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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Inserted designation (a); and added (b).

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

Case Notes

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

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

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

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

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

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

1:1-3.3 Return of transmitted cases

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

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

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

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

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

Case Notes

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

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

1:1-4.1 Determination of contested case

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

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

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

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

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

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

1:1-10.6 (Reserved)

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

SUBCHAPTER 11. SUBPOENAS

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

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

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

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

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

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

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

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

1:1-11.2 Service; fees

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

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

1:1-11.3 Motions to quash

The judge on motion may quash or modify any subpoena for good cause shown. If compliance with a subpoena for the production of documentary evidence would be unreasonable or oppressive, the judge may condition denial of the motion upon the advancement by the requesting party of the reasonable cost of producing the objects subpoenaed. The judge may direct that the objects designated in the subpoena be

produced before the judge at a time prior to the hearing or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys.

1:1-11.4 Failure to obey subpoena

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

1:1-11.5 Enforcement

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

SUBCHAPTER 12. MOTIONS

1:1-12.1 When and how made; generally

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

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

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

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

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

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

1:1-12.2 Motions in writing; time limits

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

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

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

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

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

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

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

1:1-12.3 Procedure when oral argument is directed

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

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

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

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

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

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

Case Notes

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

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

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

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

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

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

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

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

Amended by R.1990 d.368, effective August, 6, 1990.
See: 22 N.J.R. 3(a), 22 N.J.R. 2262(a).
In (e): added text to provide for an agency head to remand partial summary decisions to judge when deemed appropriate that decision will be reviewed at the end of contested case.
Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
Rewrote (a); in (b), added the fourth and fifth sentences; and in (c), substituted "due date of the last permitted responsive filing" for "date of submission".

Case Notes

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

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

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

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

Validity of partial summary decision rule upheld; reversed summary decisions in sex discrimination case re: men's eating clubs on jurisdiction and liability, final hearing necessary to resolve disputed fact

(cited former N.J.A.C. 1:1-13.1—13.4). Frank v. Ivy Club, 228 N.J.Super. 40, 548 A.2d 1142 (App.Div.1988).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Initial Decision (2005 N.J. AGEN LEXIS 590) adopted, which found that the Department was entitled to summary judgment in its action against respondents — a gas station and its owner — for their failure to perform a proper remedial investigation because the Department

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

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

1:1-12.6 Emergency relief

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

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

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

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

(e) Where circumstances require some immediate action by the agency head to preserve the subject matter of the

application pending the expedited hearing, or where a party applies for emergency relief under circumstances which do not permit an opposing party to be fully heard, the agency head may issue an order granting temporary relief. Temporary relief may continue until the agency head issues a decision on the application for emergency relief.

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

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

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

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

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

5. Contain a provision for serving and notifying all parties and for scheduling a hearing before the agency head or for transmitting the application to Office of Administrative Law.

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

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

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

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

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

Case Notes

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

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

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

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

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

1:1-12.7 Disposition of motions

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

SUBCHAPTER 13. PREHEARING CONFERENCES AND PROCEDURES

1:1-13.1 Prehearing conferences

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

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

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

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

1:1-13.2 Prehearing order; amendment

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

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

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

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

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

5. Stipulations as to facts and issues;

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

7. Any amendments to the pleadings contemplated or granted;

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

9. Order of proofs;

10. A list of exhibits marked for identification;

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

12. Estimated number of fact and expert witnesses;

13. Any motions contemplated, pending and granted;

14. Other special matters determined at the conference.

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

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

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

SUBCHAPTER 14. CONDUCT OF CASES

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

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

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

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

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

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

Case Notes

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

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

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

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

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

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

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

1:1-14.2 Expedition

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

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

Case Notes

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

1:1-14.3 Interpreters; payment

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

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

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

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

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

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

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

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

(c) If the judge receives an explanation:

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

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

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

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

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

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

Amended by R.1987 d.462, effective November 16, 1987.
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).
Added text in (a) "The judge may . . . the requested relief."
Amended by R.1987 d.506, effective December 21, 1987.
See: 19 N.J.R. 1591(b), 19 N.J.R. 2388(b).
Substituted may for shall in (a).
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Amended failure to appear rules; recodified provisions of original subsection (c) as new rule, N.J.A.C. 1:1-14.14.
Recodified original subsection to subsections (a) and (b), deleting original subsection (b). In (a), changed "10" to "one" day for time limit of receipt of an explanation for nonappearance. Added additional text to (a) and new (b)2. Added new subsection (c).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (a), substituted "shall, unless proceeding pursuant to (d) below" for "may, pursuant to N.J.A.C. 1:1-3.3(b) and (c)", and inserted "pursuant to N.J.A.C. 1:1-3.3(b) and (c)"; recodified (b)1 as (c); in the introductory paragraph of (c), deleted ", the judge shall reschedule the matter and may, at his or her discretion, order any of the following" from the end; added (c)1 and (c)2; deleted former (b)2; recodified former (c) as (d), and in (d), deleted "because of the failure to appear" preceding ", the party shall ask".

Case Notes

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

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

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

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

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

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

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

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

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

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

1:1-14.5 Ex parte communications

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

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

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

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

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

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Case Notes

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

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.

(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).

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

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

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

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

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

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

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

1:1-15.2 Official notice

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

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

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

Amended by R.1996 d.343, effective August 5, 1996.
See: 28 N.J.R. 2433(a), 28 N.J.R. 3779(a).
In (a) updated Rules of Evidence citation.

Case Notes

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

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

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

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

1:1-15.3 Presumptions

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

1:1-15.4 Privileges

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

Administrative Correction.
See: 23 N.J.R. 847(a).
Amended by R.1996 d.343, effective August 5, 1996.
See: 28 N.J.R. 2433(a), 28 N.J.R. 3779(a).
Updated Rules of Evidence citations.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Substituted "Cleric-Penitent Privilege" for "Priest Penitent Privilege".
Amended by R.2009 d.112, effective April 6, 2009.
See: 41 N.J.R. 5(a), 41 N.J.R. 1391(a).
Deleted "N.J.R.E 501 (Privilege of Accused)" following "similarity of circumstances:".

Case Notes

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

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

1:1-15.5 Hearsay evidence; residuum rule

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

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

Law Review and Journal Commentaries

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

Case Notes

Community-supervised-for-life offender, who, for some time, has been released into the community, must be afforded due process of law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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).

In an action to suspend or revoke an acupuncturist's license, the ALJ's credibility findings were not arbitrary, capricious, or unreasonable and were supported by sufficient competent and credible evidence in the record. Although the ALJ may have erred in allowing an expert to comment on the credibility of the acupuncturist, the ALJ had an independent basis for finding that the acupuncturist was credible and had not acted inappropriately with a patient (adopting with modification 2010 N.J. AGEN LEXIS 179). In re Lee, OAL Dkt. No. BDS 03271-09, 2010 N.J. AGEN LEXIS 686, Final Decision (July 15, 2010).

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

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

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

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

In a disciplinary action against an employee for patient abuse, an ALJ's credibility determinations were not arbitrary, capricious, or unreasonable; while a co-worker was in close proximity when the alleged incident occurred, there was not enough information to substantiate his allegations. Specifically, the testimony indicated that the medical examination did not reflect that the patient sustained any injuries, and there were no witnesses to support the co-worker's allegations (adopting 2008 N.J. AGEN LEXIS 1212). In re Ziah, OAL Dkt. No. CSV 237-08, 2008 N.J. AGEN LEXIS 1212, Civil Service Comm'n Decision (October 8, 2008).

ALJ's determination that an eyewitness was not credible was unreasonable; although there were minor discrepancies between the witness's report of abuse and his testimony at the hearing, there was not a scintilla

of evidence that demonstrated the witness fabricated the allegation of patient abuse against the cottage training technician. The technician's act of yelling profanities and throwing the patient's foot into the footrest of the wheelchair was sufficiently egregious to warrant his removal (rejecting 2008 N.J. AGEN LEXIS 363). In re Harris, OAL Dkt. No. CSV 8808-07, 2008 N.J. AGEN LEXIS 1066, Final Decision (September 24, 2008).

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

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

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

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

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

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