4. All parties and the agency shall be notified of any action taken under this section.

(b) Cases may not be placed on the inactive list to await an appellate court decision involving other parties unless the appellate decision is so imminent and directly relevant to the matter under dispute so that some reasonable delay would be justified.

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 "demonstrates good cause" for "is mentally or physically incapable of proceeding or is with other just excuse unable to proceed without substantial inconvenience or inordinate expense"; in (a)4, substituted "All parties and the agency shall be notified" for "The Clerk shall notify all parties and the agency"; and in (b), inserted "so" preceding "that".

Cross References

Placement on inactive list pending disposition of charges. See, N.J.A.C. 1:19-9.1.

SUBCHAPTER 10. DISCOVERY

1:1-10.1 Purpose and function; policy considerations; public documents not discoverable

(a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.

(b) It is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) In considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.

(d) Discovery shall generally not be available against a State agency that is neither a party to the proceeding nor asserting a position in respect of the outcome but is solely providing the forum for the dispute's resolution.

Amended by R.2004 d.287, effective August 2, 2004.
See: 36 N.J.R. 1857(a), 36 N.J.R. 3523(a).
Deleted former (d) and recodified former (e) as new (d).

Case Notes

Parents of mentally retarded individual were entitled to discovery of all information from Division of Developmental Disabilities concerning placement of individual. Mr. and Mrs. J.E. on Behalf of G.E. v. State Dept. of Human Services, Div. of Development Disabilities, 253 N.J.Super. 459, 602 A.2d 279 (A.D.1992), certification granted 130 N.J. 12, 611 A.2d 651, reversed 131 N.J. 552, 622 A.2d 227.

Disclosure of identity of purported "confidential source" who provided certain information which led to the filing of a complaint against respondent ordered by OAL judge. Div. of Gaming Enforcement v. Boardwalk Regency, 9 N.J.A.R. 274 (1986).

Parties are obliged to exhaust all less-formal opportunities to obtain discoverable material before invoking provisions for discovery practice (citing former N.J.A.C. 1:1-11.4). Div. of Consumer Affairs v. Acme Markets, 3 N.J.A.R. 210 (1981).

1:1-10.2 Discovery by notice or motion; depositions; physical and mental examinations

(a) Any party may notify another party to provide discovery by one or more of the following methods:

1. Written interrogatories;

2. Production of documents or things, including electronically stored information provided that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party from whom discovery is sought shall demonstrate that the electronically stored information is not reasonably accessible because of undue burden or cost;

3. Permission to enter upon land or other property for inspection or other purposes; and

4. Requests for admissions.

(b) Any party may request an informal, nontranscribed meeting with witnesses for another party in order to facilitate the purposes of discovery as described in N.J.A.C. 1:1-10.1. The other party and his or her representative must be given notice and the opportunity to be present. Such meetings are voluntary and cannot be compelled. Failure to agree to such meetings will not be considered good cause for permitting depositions pursuant to (c) below.

(c) Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, the judge shall consider the policy governing discovery as stated in N.J.A.C. 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness. An order granting a deposition or an examination shall specify a reasonable time during which the deposition or examination shall be concluded. The parties may agree to conduct depositions without the necessity of filing a motion; however, the taking of any depositions shall not interfere with the scheduled hearing date.

(d) A party taking a deposition or having an examination conducted who orders a transcript or a report shall promptly, without charge, furnish a copy of the transcript or report to the witness deposed or examined, if an adverse party, and, if not, to any adverse party. The copy so furnished shall be

made available to all other parties for their inspection and copying.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (a)2; and in (c), inserted the final sentence.

Case Notes

Under N.J.A.C. 1:1-10.2(c), there was good cause for compelling the deposition of a witness who had made allegations against a school principal and caused an Order to Show Cause to be issued by the Board of Examiners against the principal. Because the witness was not a party to the proceeding and the witness was unable to comply with the principal's counsel's request for an informal meeting, the deposition of the witness was warranted. In re Certificates of Kandell, OAL Dkt. No. EDE 09266-2005N; SBE No. 09266-05; SB No. 9-06, 2006 N.J. AGEN LEXIS 637, State Board of Education Decision (May 3, 2006).

Administrative agency discovery practice limits available methods of discovery on notice to written interrogatories, production of documents or things, property inspection, physical and mental examinations and requests for admissions (citing former N.J.A.C. 1:1-11.2). Depositions upon oral examination are available on motion for good cause shown (citing former N.J.A.C. 1:1-11.3). Div. of Consumer Affairs v. Acme Markets, Inc., 3 N.J.A.R. 210 (1981).

1:1-10.3 Costs of discovery

(a) The party seeking discovery shall pay for all reasonable expenses caused by the discovery request.

(b) Where a proponent of any notice or motion for discovery or a party taking a deposition is a State agency, and the party or person from whom such discovery or deposition is sought is entitled by law to recover in connection with such case the costs thereof from others, such State agency shall not be required to pay the cost of such discovery or deposition.

1:1-10.4 Time for discovery; relief from discovery; motions to compel

(a) The parties in any contested case shall commence immediately to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material.

(b) Parties shall immediately serve discovery requests.

(c) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice; or, in the case of a notice requesting admissions, each matter therein shall be admitted unless within the 15 days the receiving party answers, admits or denies the request or objects to it pursuant to N.J.A.C. 1:1-10.4(d).

(d) A party who wishes to object to a discovery request or to compel discovery shall, prior to the filing of any motion regarding discovery, place a telephone conference call to the judge and to all other parties no later than 10 days of receipt of the discovery request or the response to a discovery request. If a party fails without good reason to place a timely telephone call, the judge may deny that party's objection or decline to compel the discovery.

(e) The parties shall complete all discovery no later than 10 days before the first scheduled evidentiary hearing or by such date ordered by the judge.

Amended by R.1989 d.190, effective April 3, 1989.
See: 20 N.J.R. 2845(b), 21 N.J.R. 889(a).
In (c), clear specifications added on the result of a failure to respond to a request for admissions.
Petition for Rulemaking.
See: 35 N.J.R. 3965(a), 4331(a).
Amended by R.2004 d.95, effective March 15, 2004 (operative April 15, 2004).
See: 35 N.J.R. 4349(a), 36 N.J.R. 1355(a).
In (e), substituted "10 days" for "five days" following "no later than".
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (b), deleted "and notices and make discovery motions" from the end; rewrote (d); and in (e), deleted "at the prehearing conference" from the end.

Case Notes

Petitioners' claim seeking a home-based program for their child was dismissed due to petitioners' delays and failures to respond which deprived the school district with an opportunity to address the substantive issues, properly prepare and present a defense, and otherwise present a meaningful evidentiary hearing. J.G. ex rel. J.G. and J.G. v. Paramus Bd. of Educ., OAL DKT. EDS 7551-06 and 7553-06, 2006 N.J. AGEN LEXIS 1001, Final Decision (November 28, 2006), aff'd, 2008 U.S. Dist. LEXIS 30030 (D.N.J. April 11, 2008).

1:1-10.5 Sanctions

By motion of a party or on his or her own motion, a judge may impose sanctions pursuant to N.J.A.C. 1:1-14.14 and 14.15 for failure to comply with the requirements of this subchapter. Before imposing sanctions, the judge shall provide an opportunity to be heard.

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).
Revised N.J.A.C. citation in rule text.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Inserted "and 14.15".

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys as representatives of parties. In re Timofai Sanitation 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).

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).

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

(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

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 nonappearance 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).

(c) Any party may, by motion, apply to a judge for his or her disqualification. Such motion must be accompanied by a statement of the reasons for such application and shall be filed as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. In no event shall the judge enter any order, resolve any procedural matters or render any other determination until the motion for disqualification has been decided.

(d) Any request for interlocutory review of an administrative law judge's order under this section shall be made pursuant to N.J.A.C. 1:1-14.10(k) and (*l*).

Case Notes

Blind Administrative Law Judge was not required to recuse himself due to his inability to visually inspect a videotape. Division of Motor Vehicles v. Hall, 94 N.J.A.R.2d (OAL) 14.

Administrative law judge was not required to recuse himself. Ridings v. Maxim Sewerage Corp., 92 N.J.A.R.2d (OAL) 10.

Decision in criminal case involving substantive aspects of judicial disqualification provided no basis for collateral attack on issue of recusal of administrative law judge. N.J.S.A. 18A:6-27. In the Matter of the Tenure Hearing of John Fargo, 92 N.J.A.R.2d (EDU) 172.

1:1-14.13 Proceedings in the event of death, disability, departure from State employment, disqualification or other incapacity of judge

(a) If, by reason of death, disability, departure from State employment, disqualification or other incapacity, a judge is unable to continue presiding over a pending hearing or issue an initial decision after the conclusion of the hearing, a conference will be scheduled to determine if the parties can settle the matter or, if not, can reach agreement upon as many matters as possible.

(b) In the event settlement is not reached, another judge shall be assigned to complete the hearing or issue the initial decision as if he or she had presided over the hearing from its commencement, provided:

1. The judge is able to familiarize himself or herself with the proceedings and all testimony taken by reviewing the transcript, exhibits marked in evidence and any other materials which are contained in the record; and

2. The judge determines that the hearing can be completed with or without recalling witnesses without prejudice to the parties.

(c) In the event the hearing cannot be continued for any of the reasons enumerated in (b) above, a new hearing shall be ordered by the judge.

(d) An order or ruling issued pursuant to (b) and (c) above may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case.

Amended by R.2008 d.151, effective June 16, 2008.
See: 40 N.J.R. 915(a), 40 N.J.R. 3617(a).
Added (d).

1:1-14.14 Sanctions; failure to comply with orders or requirements of this chapter

(a) For unreasonable failure to comply with any order of a judge or with any requirements of this chapter, the judge may:

1. Dismiss or grant the motion or application;

2. Suppress a defense or claim;

3. Exclude evidence;

4. Order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved representative or party; or

5. Take other appropriate case-related action.

New Rule, R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
Amended by R.1996 d.133, effective March 18, 1996.
See: 27 N.J.R. 609(a), 28 N.J.R. 1503(a).
Added (b) through (d).
Recodified in part to N.J.A.C. 1:1-14.15 by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Recodified (b) through (d) as N.J.A.C. 1:1-14.15.

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Before administrative law judge (ALJ) could impose sanctions on attorneys, court was required to conduct evidentiary hearing. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Dismissal was the proper sanction where parent's counsel failed to provide the ALJ the complete and final witness and his full and complete exhibit packet in advance of the hearing, as ordered by the ALJ; failure on the part of counsel to comply with the court order was egregious, was uncalled for, and there was no excuse for his failure to comply. A.D. ex rel. A.J. v. Camden City Bd. of Educ., OAL Dkt. No. EDS 8733-09, 2009 N.J. AGEN LEXIS 772, Final Decision (October 28, 2009).

All evidence regarding a school district's proposed placement for a three-year-old autistic child was excluded as a sanction for the school district's failure to comply with an order requiring it to provide the parents' expert access to the proposed placement to conduct an observation; failure to comply with the order effectively denied the parents the opportunity to present a case regarding whether the proposed placement would have provided their child with a free appropriate public education. S.B. ex rel. P.B. v. Park Ridge Bd. of Educ., OAL Dkt. No. EDS 13813-08, 2009 N.J. AGEN LEXIS 318, Final Decision (April 21, 2009).

Initial Decision (2008 N.J. AGEN LEXIS 1031) adopted, which dismissed, for lack of prosecution, a school district employee's claim for reimbursement of full salary without loss of sick time for an injury allegedly sustained in the course of her employment; although the case was placed on inactive status awaiting a determination by the Division of Workers' Compensation as to whether the employee sustained a qualifying injury, the employee's compensation claim had been dismissed for lack of prosecution and the employee failed to offer any explanation or justification as why the education claim should not also have been dismissed, especially in light of the fact that more than eight years had elapsed since the filing of the education appeal. Green v. School Dist. of Jersey City, OAL Dkt. No. EDU 7401-00, 2009 N.J. AGEN LEXIS 639, Final Decision (January 29, 2009).

Even if the Merit System Board had jurisdiction to review the City's request that appellant pay the costs of the City's experts based on the appellant's attorney's late arrival to the hearing before the ALJ, the facts would not support such a penalty, given the reasonable explanation of the late arrival; moreover, the Board would generally not penalize an appellant for the actions of his or her representative unless those actions were shown to be intentionally and flagrantly in violation of OAL rules and authorized by that appellant. In re Harris, OAL Dkt. No. CSV 11388-03, 2007 N.J. AGEN LEXIS 1075, Merit System Board Decision (September 26, 2007).

Initial Decision (2007 N.J. AGEN LEXIS 414) adopted, finding that when discovery requests encompassed all aspects of the petition, the proper remedy under N.J.A.C. 1:1-14.14 for failure to provide discovery was suppression of the petitioner's claim. L.A. and C.A. ex rel. P.M.A. v. Bd. of Educ. of Port Republic, OAL Dkt. No. EDU 12031-06, 2007 N.J. AGEN LEXIS 521, Commissioner's Decision (July 18, 2007).

Parent's duplicative discovery requests did not warrant sanctions (adopting 2006 N.J. AGEN LEXIS 263 as supplemented) (decided under former N.J.A.C. 1:1-14.14(a) and (b), now N.J.A.C. 1:1-14.14 and 1:1-14.15). R.O. ex rel. R.O. v. Bd. of Educ. of W. Windsor-Plainsboro School Dist., OAL Dkt. No. EDU 8827-05, 2006 N.J. AGEN LEXIS 575, Commissioner's Decision (June 28, 2006).

Respondent's answer and cross-petition dismissed for persistent discovery failures. Absolut Spirits Co., Inc. v. Monsieur Touton Selection, Ltd., OAL Dkt. No. ABC 4217-04, 2006 N.J. AGEN LEXIS 508, Final Decision (May 10, 2006), aff'd in part, and rev'd in part on other grounds, A-5453-05 (App.Div. Oct. 22, 2007) (unpublished opinion) (affirming dismissal of respondent's answer and cross-petition, but reversing the granting of affirmative relief to petitioner as an evidentiary hearing was necessary).

Initial Decision (2005 N.J. AGEN LEXIS 397) adopted, which ordered insurance producer's defenses stricken where, for almost seven months, the producer failed to respond to requests for discovery, failed to comply with the ALJ's order to comply with the discovery requests, and demonstrated a flagrant disregard for the rules and the OAL's orders. Bryan v. Bellissima, OAL Dkt. No. BKI 10040-2004S, 2005 N.J. AGEN LEXIS 1154, Final Decision (August 30, 2005).

1:1-14.15 Conduct obstructing or tending to obstruct the conduct of a contested case

(a) If any party, attorney, or other representative of a party, engages in any misconduct which, in the opinion of the judge, obstructs or tends to obstruct the conduct of a contested case, the party, attorney, or other representative may be fined in an amount which shall not exceed $1,000 for each instance.

(b) Where the conduct deemed to obstruct or tending to obstruct the conduct of a contested case occurs under circumstances which the judge personally observes and which he or she determines unmistakably demonstrates willfulness and requires immediate adjudication to permit the proceedings to continue in an orderly and proper manner:

1. The judge shall inform the party, attorney or other representative of the nature of the actions deemed obstructive and shall afford the party, attorney or other representative an immediate opportunity to explain the conduct; and

2. Where the judge determines, after providing the party, attorney or other representative, an opportunity to explain, that the conduct does constitute misconduct and that the conduct unmistakably demonstrates willfulness, the judge shall issue an order imposing sanctions.

i. The order imposing sanctions shall recite the facts and contain a certification by the judge that he or she personally observed the conduct in question and explain the conclusion that the party, attorney or other representative engaged in misconduct.

(c) Where the conduct deemed to obstruct or tending to obstruct a contested case did not occur in the presence of the judge or where the conduct does not require immediate adjudication to permit the proceedings to continue in an orderly and proper manner, the matter shall proceed by order to show cause specifying the acts or omissions alleged to be misconduct. The proceedings shall be captioned "In the Matter of _____, Charged with Misconduct."

(d) In any proceeding held pursuant to (c) above, the matter may be presented by a staff attorney of the Office of Administrative Law, or by the Attorney General. The designation shall be made by the Director of the Office of Administrative Law. The matter shall not be heard by the judge who instituted the proceeding if the appearance of objectivity requires a hearing by another judge.

Recodified in part from N.J.A.C. 1:1-14.14 and amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Recodified former introductory paragraph of (b) as (a); in (a), substituted a period for "provided:"; recodified former (b)1 as introductory paragraph of (b); in introductory paragraph of (b), substituted a colon for ", the"; inserted designation (b)1; in (b)1, inserted "The" at the beginning and "and" at the end; in (b)2, inserted "and that the conduct unmistakably demonstrates willfulness" and substituted a period for "which" at the end; inserted designation (b)2i; and rewrote (b)2i and (c).

Case Notes

Administrative law judge has power to impose reasonable monetary sanctions on attorneys. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

Before administrative law judge (ALJ) could impose sanctions on attorneys, court was required to conduct evidentiary hearing. In re Timofai Sanitation Co., Inc., Discovery Dispute, 252 N.J.Super. 495, 600 A.2d 158 (A.D.1991).

SUBCHAPTER 15. EVIDENCE RULES

1:1-15.1 General rules

(a) Only evidence which is admitted by the judge and included in the record shall be considered.

(b) Evidence rulings shall be made to promote fundamental principles of fairness and justice and to aid in the ascertainment of truth.

(c) Parties in contested cases shall not be bound by statutory or common law rules of evidence or any formally adopted in the New Jersey Rules of Evidence except as specifically provided in these rules. All relevant evidence is admissible except as otherwise provided herein. A judge may, in his or her discretion, exclude any evidence if its probative

value is substantially outweighed by the risk that its admission will either:

1. Necessitate undue consumption of time; or

2. Create substantial danger of undue prejudice or confusion.

(d) If the judge finds at the hearing that there is no bona fide dispute between the parties as to any unstipulated material fact, such fact may be proved by any relevant evidence, and exclusionary rules shall not apply, except for (c) above or a valid claim of privilege.

(e) When the rules in this subchapter state that the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, the judge shall hold a preliminary inquiry to determine the issue. The judge shall indicate which party has the burden of producing evidence and the burden of proof on such issue as implied by the rule under which the question arises. No evidence may be excluded in determining such issue except pursuant to the judge's discretion under (c) above or a valid claim of privilege. This provision shall not be construed to restrict or limit the right of a party to introduce evidence subsequently which is relevant to weight or credibility.

Case Notes

Rules of Evidence application in arbitration proceedings. Fox v. Morris County Policemen's Ass'n, 266 N.J.Super. 501, 630 A.2d 318 (A.D.1993), certification denied 137 N.J. 311, 645 A.2d 140.

M.D. license revocation's request that all 70 patients present be permitted to testify held unreasonable (citing former N.J.A.C. 1:1-15.2(a)). In the Matter of Cole, 194 N.J.Super 237, 476 A.2d 836 (App.Div.1986).

In an administrative hearing, all relevant evidence is admissible (citing former N.J.A.C. 1:1-15.2(a)). Delguidice v. New Jersey Racing Commission, 100 N.J. 79, 494 A.2d 1007 (1985).

Evidence at public hearings under former rulemaking regulations. In re: Matter of Public Hearings, 142 N.J.Super. 136, 361 A.2d 30 (App.Div.1976), certification denied 72 N.J. 457, 371 A.2d 62 (1976).

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 of which it is aware unless the respondent can show surprise. Division of Motor Vehicles v. Festa, 6 N.J.A.R. 173 (1982).

1:1-15.2 Official notice

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

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

(c) Parties must be notified of any material of which the judge intends to take official notice, including preliminary reports, staff memoranda or other noticeable data. The judge

shall disclose the basis for taking official notice and give the parties a reasonable opportunity to contest the material so noticed.

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

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1:1-18.5 Motions to reconsider and reopen

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

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

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

Case Notes

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

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

1:1-18.6 Final decision; stay of implementation

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

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

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

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

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

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

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

Case Notes

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

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

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

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

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

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

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

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

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

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

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

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

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

ALJ's findings — 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 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).