non-lawyer from a legal services program seeking to represent a recipient or applicant for services in Division of Economic Assistance, Division of Medical Assistance and Health Services and Division of Youth and Family Services cases may make oral application to represent the recipient or applicant by complying with the requirements of (b)1 above. Forms may be obtained from the Clerk of the Office of Administrative Law or through the State of New Jersey Office of Administrative Law website www.state.nj.us/oal/.

i. For non-lawyer employees seeking to represent a State agency, the Notice shall include a certification that the non-lawyer is an employee of the State agency he or she seeks to represent; his or her position at the agency; his or her supervisor at the agency; his or her supervisor's position, business address and telephone number; and an explanation of his or her special expertise or experience in the matter in controversy. The Notice shall also contain a certification, indicating that the employee has been assigned to represent the agency in the case and that the Attorney General will not provide legal representation.

ii. For non-lawyers from legal services programs, the Notice shall include a certification that he or she is a paralegal or legal assistant; the name and address of the Legal Services Program of which he or she is a part; and the name, business address, telephone number and signed authorization of a Legal Services attorney who supervises the applicant.

iii. The non-lawyer union representative shall include in his or her Notice a certification that he or she is an authorized representative of a labor organization; that the labor organization is the duly authorized representative of the represented employee's collective bargaining unit; and the name, title, business address and telephone number of his or her supervisor.

iv. In special education hearings, the non-lawyer applicant shall include in his or her Notice an explanation certifying how he or she has knowledge or training with respect to handicapped pupils and their educational needs so as to facilitate the presentation of the claims or defenses of the parent or child. The applicant shall describe his or her relevant education, work experience or other qualifications.

v. For non-lawyer employees seeking to represent a county or local government appointing authority in a Civil Service case, the notice shall include a certification that the non-lawyer is an employee of the county or local government appointing authority; his or her position with the appointing authority; his or her supervisor's position; business address and telephone number; and an explanation of his or her special expertise or experience in the matter in controversy. The notice shall also contain a certification indicating that the employee has been assigned to represent the appointing authority in the case and that the legal representative for the county or locality does not provide representation in the matter.

vi. In cases where principal seeks to represent a close corporation, the non-lawyer applicant shall demonstrate in his or her notice how he or she qualifies as a principal of a close corporation as defined in N.J.A.C. 1:1-2.1.

vii. Any non-lawyer applicant filing a Notice of Appearance/Application shall submit a certification with the Notice stating that he or she is not a disbarred or suspended attorney and is not receiving a fee for the appearance.

viii. The Notice of Appearance/Application must be signed by the non-lawyer applicant. Notices shall be filed with the Clerk if a judge has not yet been assigned to the matter and shall be filed with the judge if a judge has been assigned and shall be served on all parties no later than 10 days prior to the scheduled hearing date. In Special Education cases, the Notice of Appearance/Application shall be filed with the Clerk and served on all parties no later than five days prior to the scheduled hearing date.

ix. The judge may require the applicant to supply additional information or explanation of the items specified above as applicable, or may require the applicant to supply evidence of the statements contained in the Notice.

Amended by R.1991 d.296, effective June 17, 1991.
See: 23 N.J.R. 1053(a), 23 N.J.R. 1919(a).
Eliminated provision that a DAG had to "sign off" on agency non-lawyer representation; delegated authority to agencies.
Amended by R.1992 d.213, effective May 18, 1992.
See: 24 N.J.R. 321(a), 24 N.J.R. 1873(b).
Revised text.
Amended by R.1997 d.158, effective April 7, 1997.
See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).
In (a)6, inserted reference to Public Employment Relations Commission; inserted (a)8; in (b)1iv, amended subsection reference; inserted new (b)2; recodified former (b)2 as (b)3; in (b)3, inserted "where a county or local government employee seeks to represent the appointing authority"; inserted (b)3v; and recodified former (b)3v through (b)3viii as (b)3vi through (b)3ix.
Amended by R.1997 d.474, effective November 3, 1997.
See: 29 N.J.R. 3758(a), 29 N.J.R. 4677(a).
In (b)1, substituted "Family Development" for "Economic Assistance", and added "and Department of Labor Vocational Rehabilitation cases".
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
In (b)3, added the second sentence in the introductory paragraph, and added an N.J.A.C reference in vi.
Amended by R.2005 d.106, effective April 4, 2005.
See: 36 N.J.R. 3956(a), 37 N.J.R. 1015(a).
In (a), added 9; in (b), substituted "(b)4i" for "(b)3i" following "set forth in" in 1iv' added new 3, recodified former 3 as 4.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In the introductory paragraph of (a), substituted "(f)" for "(e)"; in (b)1i, (b)1iii, (b)2, and (b)3, substituted "certify" for "state"; rewrote (b)1iv; in (b)4, transferred the former second sentence to the end; in (b)4i, (b)4ii, (b)4iii, and (b)4v, substituted "certification" for "statement" throughout; in (b)4iv, inserted a comma following "hearings", substituted "certifying" for the first occurrence of "of" and deleted

"related to the child's condition" from the end; in (b)4viii, inserted "if a judge has not yet been assigned to the matter and shall be filed with the judge if a judge has been assigned" and "shall be" preceding "served", and inserted the last sentence; and in (b)4ix, substituted "judge" for "Clerk", and deleted the final two sentences.

Case Notes

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

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

Attorney licensed in foreign jurisdiction could not represent party as a non-lawyer. Thompson and Pavlick v. Department of Community Affairs, 92 N.J.A.R.2d (OAL) 9.

Nursing home not authorized representative for patients. Bridgeton Nursing Center v. Division of Medical Assistance and Health Services, 92 N.J.A.R.2d (DMA) 1.

Allowed representation by non-lawyer representative in matters in which such appearances were permitted prior to the establishment of the OAL. Dep't of Community Affairs v. The Buckingham, 6 N.J.A.R. 81 (1982).

1:1-5.5 Conduct of non-lawyer representatives; limitations on practice

(a) The presiding judge, unless precluded by Federal law, may determine at any time during the proceeding that a specific case is not appropriate for representation by a non-lawyer representative. The judge's determination may be based either on the lack of appropriate experience or expertise of the particular non-lawyer representative, or the complexity of the legal issues or other factors which make the particular case inappropriate for a non-lawyer representative. The judge shall implement a determination to preclude non-lawyer representation by informing the parties of the decision and the reasons therefor. With respect to a county, local or State agency or a close corporation, the judge may require the party to obtain legal representation. With respect to an individual, the judge may require the individual either to obtain a new non-lawyer, to represent himself or herself or to obtain legal representation.

(b) The presiding judge may revoke any non-lawyer's right to appear in a case if and when the judge determines that a material statement is incorrect in any Notice of Appearance/ Application or in any oral application by a non-lawyer.

(c) Non-lawyer representatives shall be subject to the Uniform Administrative Procedure Rules, including the sanctions provided in N.J.A.C. 1:1-14.14 and 14.15. If the judge determines that an incorrect statement in an oral application or Notice of Appearance/Application was an intentional misstatement, or that the non-lawyer representative has unreasonably failed to comply with any order of a judge or with any requirement of this chapter, the judge may impose the sanctions provided under N.J.A.C. 1:1-14.14 and 14.15, which may include:

1. In the case of a State, county or local agency employee, reporting any inappropriate behavior to the agency for possible disciplinary action;

2. A determination by the presiding judge that the non-lawyer representative shall be excluded from a particular hearing; and,

3. A recommendation by the presiding judge to the agency head that a particular non-lawyer representative be permanently excluded from administrative hearings before that agency.

(d) A non-lawyer may not be precluded from providing representational services solely because the non-lawyer is also appearing as a witness in the matter.

(e) In general, a non-lawyer representative shall be permitted at the hearing to submit evidence, speak for the party, make oral arguments, and conduct direct examinations and cross-examinations of witnesses.

1. In the interest of a full, fair, orderly and speedy hearing, the judge may at any time condition, limit or delineate the type or extent of representation which may be rendered by a non-lawyer. Conditions or limits may include:

i. Requiring any examination and cross-examination by the non-lawyer to be conducted through the judge;

ii. Requiring questions from the non-lawyer to be presented to the judge prior to asking;

iii. Requiring the party to speak for him or herself; or

iv. Revoking the right of the non-lawyer to appear if the judge finds that the proceedings are being unreasonably disrupted or unduly delayed because of the non-lawyer's participation.

(f) In settlements, a non-lawyer may not sign a consent order or stipulation for a party, except that non-lawyer representatives of State agencies, county or municipal welfare agencies or close corporations who have been authorized to agree to the terms of a particular settlement by the represented entity may sign consent orders or stipulations.

(g) Non-lawyer representatives are expected to be guided in their behavior by appropriate standards of conduct, such as contained in the following Rules of Professional Conduct for attorneys: RPC 1.2 (Scope of Representation); RPC 1.3 (Diligence); RPC 1.4 (Communication); RPC 3.2 (Expediting Litigation); RPC 3.3 (Candor Towards the Tribunal); RPC 3.4 (Fairness to Opposing Party and Counsel); RPC 3.5 (Impartiality and Decorum of the Tribunal); and RPC 4.1 (Truthfulness in Statements to Others). Non-lawyer representatives who are state officers or employees must also comply with the requirements of the New Jersey Conflicts of Interest Law, in particular N.J.S.A. 52:13D-16. For failure to comply with

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; limitation in conference hearings

(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).

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.

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

(a) At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein.

(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. 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 date of submission. 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.

Case Notes

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

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

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

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

Validity of partial summary decision rule upheld; reversed summary decisions in sex discrimination case re: men's eating clubs on jurisdiction and liability, final hearing necessary to resolve disputed fact (cited former N.J.A.C. 1:1-13.1—13.4). Frank v. Ivy Club, 228 N.J.Super. 40, 548 A.2d 1142 (App.Div.1988).

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

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

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

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

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

1:1-12.6 Emergency relief

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

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

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

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

(e) Where circumstances require some immediate action by the agency head to preserve the subject matter of the application pending the expedited hearing, or where a party applies for emergency relief under circumstances which do not permit an opposing party to be fully heard, the agency head may issue an order granting temporary relief. Temporary relief may continue until the agency head issues a decision on the application for emergency relief.

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

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

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

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

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

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

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

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

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

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

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

Case Notes

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

1:1-12.7 Disposition of motions

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

SUBCHAPTER 13. PREHEARING CONFERENCES AND PROCEDURES

1:1-13.1 Prehearing conferences

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

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

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

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

Case Notes

Striking answer and suppressing defenses was proper sanction for employer's failure to respond to discovery in employment discrimination complaint. Ospina v. Jay Screen Printing, Inc. and Jay Sign Co., 97 N.J.A.R.2d (CRT) 1.

1:1-14.8 Conduct of proceedings on the papers and telephone hearings

(a) Upon transmittal of a case that may be conducted as a proceeding on the papers, the Clerk shall schedule a hearing and send a notice of hearing on the papers to the parties. The notice shall permit the party requesting the hearing to select a telephone hearing or a proceeding on the papers in lieu of the scheduled in-person hearing. Along with the notice, the Clerk shall transmit a certification to be completed if the party requesting the hearing chooses to have a proceeding on the papers.

(b) A completed certification must be returned to the Clerk and served on the other party no later than 10 days before the scheduled hearing date. Statements, records and other documents which supplement the certification may also be submitted. Upon request and for good cause shown, the Clerk may grant additional time for submission of supplemental documents.

(c) Upon timely receipt of a completed certification, the Clerk will assign the record for review and determination by a judge. The record consists of the certification and supplemental documents, as well as documents transmitted with the file by the transmitting agency. In a proceeding on the papers, the record is closed when the Clerk assigns the record to a judge.

(d) If the party requesting the hearing does not appear at the scheduled in-person or telephone hearing and no certificate is timely received, the matter shall be handled as a failure to appear pursuant to N.J.A.C. 1:1-14.4.

Amended by R.1988 d.517, effective November 7, 1988.
See: 20 N.J.R. 1979(c), 20 N.J.R. 2749(a).
Deleted text from (e) and substituted new. The new text changes the timing of exchange to receipt of the notice of filing of the case, rather than the notice of hearing.
Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (c): revised N.J.A.C. citation.
Amended by R.2002 d.198, effective July 1, 2002.
See: 34 N.J.R. 983(a), 34 N.J.R. 2309(a).
Rewrote the section.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Section was "Conduct of proceedings on the papers". Rewrote (a); in (b), inserted "and served on the other party" and substituted "10 days before the scheduled hearing date" for "30 days from receipt of the notice of hearing and certification"; in (c), substituted "record is closed" for "hearing is concluded"; deleted former (d); recodified former (e) as (d); and rewrote (d).

1:1-14.9 Orders; preparation of orders

(a) Any resolution which does not completely conclude the case shall be by order. Orders may be rendered in writing or orally on the record by the judge.

(b) Unless such review is precluded by law, all judges' orders are reviewable by an agency head in accordance with N.J.A.C. 1:1-14.10 or when rendering a final decision under N.J.A.C. 1:1-18.6.

(c) Orders may be prepared by a party at the direction of a judge. When prepared by a party, the order shall be filed with the judge and served on all parties who may within five days after service object to the form of the order by writing to the judge with a copy to all parties. Upon objection to the form of the order, the judge, without oral argument or any further proceedings, may settle the form of the order either by preparing a new order or by modifying the proposed order. After signing the order, the judge shall cause the order to be served upon the parties.

1:1-14.10 Interlocutory review

(a) Except for the special review procedures provided in N.J.A.C. 1:1-12.6 (emergency relief), and 1:1-12.5(e) (partial summary decision), an order or ruling may be reviewed interlocutorily by an agency head at the request of a party.

(b) Any request for interlocutory review shall be made to the agency head and copies served on all parties no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. An opposing party may, within three days of receipt of the request, submit an objection to the agency head. A copy must be served on the party who requested review. Any request for interlocutory review or objection to a request shall be in writing by memorandum, letter or motion and shall include a copy of any written order or ruling or a summary of any oral order or ruling sought to be reviewed. Copies of all documents submitted shall be filed with the judge and Clerk.

(c) Within 10 days of the request for interlocutory review, the agency head shall notify the parties and the Clerk whether the order or ruling will be reviewed. If the agency head does not so act within 10 days, the request for review shall be considered denied. Informal communication by telephone or in person to the parties or their representatives and to the Clerk within the 10 day period will satisfy this notice requirement, provided that a written communication or order promptly follows.

(d) A party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head in writing arguments in favor of the order or ruling being reviewed. A copy shall be served on the party who requested review.

(e) Where the agency head determines to conduct an interlocutory review, the agency head shall issue a decision, order or other disposition of the review at the earliest opportunity but no later than 20 days from receiving the request for review. Where the interests of justice require, the agency head shall conduct an interlocutory review on an expedited basis. Where the agency head does not issue an order within 20 days, the judge's ruling shall be considered conditionally affirmed. The time period for disposition may be extended for good cause for an additional 20 days if both the agency head and the Director of the Office of Administrative Law concur.

(f) Where the proceeding generating the request for interlocutory review has been sound recorded and the agency head requests the verbatim record, the Clerk shall furnish the original sound recording or a certified copy within one day of the request. The party requesting the interlocutory review shall provide the agency head with all other papers, materials, transcripts or parts of the record which pertain to the request for interlocutory review.

(g) The time limits established in this section, with the exception of (e) above, may be extended by the agency head where the need for a delay is caused by honest mistake, accident, or any cause compatible with due diligence.

(h) An agency head's determination to review interlocutorily an order or ruling shall not delay the scheduling or conduct of hearings, unless a postponement is necessary due to special requirements of the case, because of probable prejudice, or for other good cause. Either the presiding judge or the agency head may order a stay of the proceedings, either on their own or upon application. Applications for stays should be made in the first instance to the presiding judge. If denied, the application may be resubmitted to the agency head. Pending review by the agency head, a judge may conditionally proceed on an order or ruling in order to complete the evidential record in a case or to avoid disruption or delay in any ongoing or scheduled hearing.

(i) Except as limited by (*l*) below and N.J.A.C. 1:1-18.4(a), any order or ruling reviewable interlocutorily is subject to review by the agency head after the judge renders the initial decision in the contested case, even if an application for interlocutory review:

1. Was not made;

2. Was made but the agency head declined to review the order or ruling; or

3. Was made and not considered by the agency head within the established time frame.

(j) In the following matters as they relate to proceedings before the Office of Administrative Law, the Director is the agency head for purposes of interlocutory review:

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

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

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

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

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

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

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

(k) Any request for interlocutory review of those matters specified in (j) above should be addressed to the Director of the Office of Administrative Law with a copy to the agency head who transmitted the case to the Office of Administrative Law. Review shall proceed in accordance with (b) through (g) above.

(*l*) Orders or rulings issued under (j)1, 2, 3, 5, 6 and 7 above may only be appealed interlocutorily; a party may not seek review of such orders or rulings after the judge renders the initial decision in the contested case.

Amended by R.1987 d.462, effective November 16, 1987.
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).
Added (m).
Amended by R.1990 d.219, effective May 7, 1990.
See: 22 N.J.R. 590(a), 22 N.J.R. 1353(a).
In (i): added language to clarify who may order a stay in an administrative hearing.
Amended by R.1991 d.34, effective January 22, 1991.
See: 22 N.J.R. 3278(a), 23 N.J.R. 194(a).
Added (k)6.
Amended by R.1996 d.133, effective March 18, 1996.
See: 27 N.J.R. 609(a), 28 N.J.R. 1503(a).
In (k)4 added fines.
Amended by R.2001 d.180, effective June 4, 2001.
See: 33 N.J.R. 1040(a), 33 N.J.R. 1926(a).
In (k)4, inserted "or 14.14" following "1:1-14.4"; added (k)7.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Deleted former (g); recodified former (h) through (m) as (g) through (*l*); in (i), substituted "(*l*)" for "(m)"; in (j)4, inserted "and 14.15"; in (k), substituted "(j)" for "(k)" and "(g)" for "(h)"; and in (*l*), substituted "(j)1" for "(k)1".

Case Notes

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

Order of the Administrative Law Judge may be reviewed by the Commissioner of the Department of Education and by the Commissioner of the Department of Human Services whether upon the interlocutory review or at the end of special education case (citing former N.J.A.C. 1:1-9.7). A.N. v. Clark Bd. of Educ., 6 N.J.A.R. 360 (1983).

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.

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

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

1. Dismiss or grant the motion or application;

2. Suppress a defense or claim;

3. Exclude evidence;

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

5. Take other appropriate case-related action.

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

Case Notes

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

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

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

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

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

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

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

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

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

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

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

Case Notes

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

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

SUBCHAPTER 15. EVIDENCE RULES

1:1-15.1 General rules

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

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

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

1. Necessitate undue consumption of time; or

2. Create substantial danger of undue prejudice or confusion.

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

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

Case Notes

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

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

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

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

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

1:1-15.2 Official notice

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

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

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

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

Case Notes

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

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

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

1:1-15.3 Presumptions

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

1:1-15.4 Privileges

The rules of privilege recognized by law or contained in the following New Jersey Rules of Evidence shall apply in contested cases to the extent permitted by the context and similarity of circumstances: N.J.R.E 501 (Privilege of Accused); N.J.R.E. 502 (Definition of Incrimination); N.J.R.E. 503 (Self-incrimination); N.J.R.E. 504 (Lawyer-Client Privilege); N.J.S.A. 45:14B-28 (Psychologist's Privilege); N.J.S.A. 2A:84-22.1 et seq. (Patient and Physician Privilege); N.J.S.A. 2A:84A-22.8 and N.J.S.A. 2A:84A-22.9 (Information and Data of Utilization Review Committees of Hospitals and Extended Care Facilities); N.J.S.A. 2A:84A-22.13 et seq.

(Victim Counselor Privilege); N.J.R.E. 508 (Newsperson's Privilege); N.J.R.E. 509 (Marital Privilege-Confidential Communications); N.J.S.A. 45:8B-29 (Marriage Counselor Privilege); N.J.R.E. 511 (Cleric-Penitent Privilege); N.J.R.E. 512 and 610 (Religious Belief); N.J.R.E. 513 (Political Vote); N.J.R.E. 514 (Trade Secret); N.J.R.E. 515 (Official Information); N.J.R.E. 516 (Identity of Informer); N.J.R.E. 530 (Waiver of Privilege by Contract or Previous Disclosure; Limitations); N.J.R.E. 531 (Admissibility of Disclosure Wrongfully Compelled); N.J.R.E. 532 (Reference to Exercise of Privileges); and N.J.R.E. 533 (Effect of Error in Overruling Claim of Privilege).

Administrative Correction.
See: 23 N.J.R. 847(a).
Amended by R.1996 d.343, effective August 5, 1996.
See: 28 N.J.R. 2433(a), 28 N.J.R. 3779(a).
Updated Rules of Evidence citations.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Substituted "Cleric-Penitent Privilege" for "Priest Penitent Privilege".

Case Notes

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

1:1-15.5 Hearsay evidence; residuum rule

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

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

Case Notes

While the writings of an administrative analyst with the New Jersey Division of Pensions and Benefits were hearsay, as they appeared highly reliable, they were admissible in an administrative hearing under the residuum rule, N.J.A.C. 1:1-15.5(b), to corroborate a retiree's 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).

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

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

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

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

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

Hearsay medical reports not sufficient to show police officer permanently and totally disabled for accidental disability retirement purposes. Mercier v. Board of Trustees, Police and Firemen's Retirement System, 92 N.J.A.R.2d (TYP) 94.

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

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

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

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

Law Review and Journal Commentaries

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

1:1-15.6 Authentication and content of writings

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

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

1:1-15.7 Exhibits

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

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

(c) The standard marking for exhibits shall be:

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

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (b), substituted "shall" for "should, whenever practicable,".

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

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

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

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

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

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

(e) Testimony of a witness may be presented by telephone if, before the hearing begins, all parties agree and the judge finds there is good cause for permitting the witness to testify by telephone.

(f) Testimony of a witness may be given in narrative fashion rather than by question and answer format if the judge permits.

Case Notes

Construction code official authorized to determine particular fire code prevention requirements of building where building use deviates in any significant respect from building uses "specifically covered" by fire prevention subcode; hearing held by construction board of appeals was procedurally deficient. In the Matter of the "Analysis of Walsh Trucking Occupancy and Sprinkler System", 215 N.J.Super. 222, 521 A.2d 883 (App.Div.1987).

Except as otherwise provided by N.J.A.C. 1:1-15, by statute or by rule establishing a privilege, every person is qualified to be a witness (citing former N.J.A.C. 15.2(e)). 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).

1:1-15.9 Expert and other opinion testimony

(a) If a witness is not testifying as an expert, testimony of that witness in the form of opinions or inferences is limited to such opinions or inferences as the judge finds:

1. May be rationally based on the perception of the witness; and

2. Are helpful to a clear understanding of the witness' testimony or to the fact in issue.

(b) If a witness is testifying as an expert, testimony of that witness in the form of opinions or inferences is admissible if such testimony will assist the judge to understand the evidence or determine a fact in issue and the judge finds the opinions or inferences are:

1. Based on facts and data perceived by or made known to the witness at or before the hearing; and

2. Within the scope of the special knowledge, skill, experience or training possessed by the witness.

(c) Testimony in the form of opinion or inferences which is otherwise admissible is not objectionable because it embraces the ultimate issue or issues to be decided by the judge.

(d) A witness may be required, before testifying in terms of opinions or inference, to be first examined concerning the data upon which the opinion or inference is based.

(e) Questions calling for the opinion of an expert witness need not be hypothetical in form unless, in the discretion of the judge, such form is required.

(f) If facts and data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, those facts and data upon which an expert witness bases opinion testimony need not be admissible in evidence.

1:1-15.10 Offers of settlement inadmissible

Offers of settlement, proposals of adjustment and proposed stipulations shall not constitute an admission and shall not be admissible.

1:1-15.11 Stipulations

The parties may by stipulation agree upon the facts or any portion thereof involved in any controversy. Such a stipulation shall be regarded as evidence and shall preclude the parties from thereafter challenging the facts agreed upon.

1:1-15.12 Prior transcribed testimony

(a) If there was a previous hearing in the same or a related matter which was electronically or stenographically recorded, a party may, unless the judge determines that it is necessary to evaluate credibility, offer the transcript of a witness in lieu of producing the witness at the hearing provided that the witness' testimony was taken under oath, all parties were present at the proceeding and were afforded a full opportunity to cross-examine the witness.

(b) A party who intends to offer a witness' transcribed testimony at the hearing must give all other parties and the judge at least 10 days notice prior to the commencement of the hearing of that intention and provide each with a copy of the transcript being offered.

(c) Opposing parties may subpoena the witness to appear personally. Any party may produce additional witnesses and other relevant evidence at the hearing.

(d) Provided the requirements in (a) above are satisfied, the entire controversy may be presented solely upon such transcribed testimony if all parties agree and the judge approves.

(e) Prior transcribed testimony that would be admissible as an exception to the hearsay rule under Evidence Rule 63(3) is not subject to the requirements of this section.

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 "or a related"; in (b), substituted "10" for "five" and inserted "prior to the commencement of the hearing".

SUBCHAPTER 16. INTERVENTION AND PARTICIPATION

1:1-16.1 Who may apply to intervene; status of intervenor

(a) Any person or entity not initially a party, who has a statutory right to intervene or who will be substantially, specifically and directly affected by the outcome of a contested case, may on motion, seek leave to intervene.

(b) Persons or entities permitted to intervene shall have all the rights and obligations of a party to the proceeding.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Administrative law judge was without jurisdiction to compel joinder of third party in school district's placement dispute with parents. B.R. v. Woodbridge Board, 95 N.J.A.R.2d (EDS) 159.

1:1-16.2 Time of motion

(a) A motion for leave to intervene may be filed at any time after a case is initiated.

(b) If made before a case has been filed with the Office of Administrative Law, a motion for leave to intervene shall be filed with the head of the agency having jurisdiction over the case. The agency head may rule upon the motion to intervene or may reserve decision for action by a judge after the case has been filed with the Office of Administrative Law.

(c) If made after a case has been filed with the Office of Administrative Law, a motion for leave to intervene shall be filed with the judge or, if the case has not yet been assigned to a judge, with the Clerk of the Office of Administrative Law.

Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (c), inserted "the judge or, if the case has not yet been assigned to a judge, with".

1:1-16.3 Standards for intervention

(a) In ruling upon a motion to intervene, the judge shall take into consideration the nature and extent of the movant's interest in the outcome of the case, whether or not the movant's interest is sufficiently different from that of any party so as to add measurably and constructively to the scope of the case, the prospect of confusion or undue delay arising from the movant's inclusion, and other appropriate matters.

(b) In cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

(c) Notwithstanding (a) above, persons statutorily permitted to intervene shall be granted intervention.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Large volume customers of a gas company were allowed to intervene in matter where Rate Counsel moved to dismiss petition to defer certain carrying costs. In the Matter of the Petition of South Jersey Gas Company for Authorization to Defer Carrying Costs, 94 N.J.A.R.2d (BRC) 139.

Telephone company's motion to intervene in proposed modification of a lease agreement between cable television operator and alternative competitive access provider granted. In the Matter of the Petition of Suburban Cablevision to Lease Excess Capacity, 94 N.J.A.R.2d (BRC) 125.

1:1-16.4 Notice of opportunity to intervene or participate

Where it appears to the judge that a full determination of a case may substantially, specifically and directly affect a person or entity who is not a party to the case, the judge, on motion of any party or on his or her own initiative, may order that the Clerk or any party notify the person or entity of the proceeding and of the opportunity to apply for intervention or participation pursuant to these rules.

Case Notes

Interested parties were entitled to relevant information on consideration of automobile insurance rates of Market Transition Facility. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

Policyholders were "interested parties" with respect to access to information to be used by Department of Insurance on setting rates. Matter of Market Transition Facility of New Jersey, 252 N.J.Super. 260, 599 A.2d 906 (A.D.1991), certification denied 127 N.J. 565, 606 A.2d 376.

1:1-16.5 Alternative treatment of motions to intervene

Every motion for leave to intervene shall be treated, in the alternative, as a motion for permission to participate.

1:1-16.6 Participation; standards for participation

(a) Any person or entity with a significant interest in the outcome of a case may move for permission to participate.

(b) A motion to participate may be made at such time and in such manner as is appropriate for a motion for leave to intervene pursuant to N.J.A.C. 1:1-16.2. In deciding whether to permit participation, the judge shall consider whether the participant's interest is likely to add constructively to the case without causing undue delay or confusion.

(c) The judge shall determine the nature and extent of participation in the individual case. Participation shall be limited to:

1. The right to argue orally; or
2. The right to file a statement or brief; or
3. The right to file exceptions to the initial decision with the agency head; or
4. All of the above.

Case Notes

The administrative law judge may determine the extent of participation once it is found a participant has a significant stake in the outcome. The Division of ABC granted participant status and allowed to file a brief (citing former N.J.A.C. 1:1-12.6(c)). Canal St. Pub v. City of Paterson, 6 N.J.A.R. 221 (1982).

SUBCHAPTER 17. CONSOLIDATION OF TWO OR MORE CASES; MULTIPLE AGENCY JURISDICTION CLAIMS; DETERMINATIONS OF PREDOMINANT INTEREST

1:1-17.1 Motion to consolidate; when decided

(a) As soon as circumstances meriting such action are discovered, an agency head, any party or the judge may move to consolidate a case which has been transmitted to the Office of Administrative Law with any other contested case involving common questions of fact or law between identical parties or between any party to the filed case and any other person, entity or agency.

(b) This rule shall apply to cases:

1. Already filed with the Office of Administrative Law;
2. Commenced in an agency but not yet filed with the Office of Administrative Law; and
3. Commenced in an agency and not required to be filed with the Office of Administrative Law under N.J.S.A. 52:14F-8.

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

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

1:1-18.1 Initial decision in contested cases

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

1. The testimony, documents and arguments accepted by the judge for consideration in rendering a decision;

2. Stipulations; and

3. Matters officially noticed.

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

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

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

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

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

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

Amended by R.1987 d.462, effective November 16, 1987.
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).
Added text to (h) "except for matters ..."
Amended by R.1992 d.46, effective February 3, 1992.
See: 23 N.J.R. 3406(a), 24 N.J.R. 404(a).
Revised (d); deleted (e); redesignated existing (f)-(h) as (e)-(g).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (d), deleted the last sentence.

1:1-18.2 Oral initial decision

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

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

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

Amended by R.1996 d.57, effective February 5, 1996.
See: 27 N.J.R. 4039(a), 28 N.J.R. 813(a).
In (a) deleted "on the record before the parties" following "orally", and in (b) substituted "the conclusion of the hearing" for "rendering an oral decision".
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Rewrote (b).

1:1-18.3 Written initial decision

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

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

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

1. An appropriate caption;

2. The appearances of the parties and their representatives, if any;

3. A statement of the case;

4. A procedural history;

5. A statement of the issue(s);

6. A factual discussion;

7. Factual findings;

8. A legal discussion;

9. Conclusions of law;

10. A disposition;

11. A list of exhibits admitted into evidence; and

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

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

Case Notes

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

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

1:1-18.4 Exceptions; replies

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

(b) The exceptions shall:

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

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

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

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

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

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

Amended by R.1987 d.462, effective November 16, 1987.
See: 19 N.J.R. 1592(a), 19 N.J.R. 2131(b).
(a) substantially amended.
Amended by R.1990 d.483, effective September 17, 1990.
See: 22 N.J.R. 2067(a), 22 N.J.R. 3003(b).
Change at (a) from ten to thirteen days.
Amended by R.1991 d.44, effective February 4, 1991.
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).
In (a) and (d): deleted filing of documents with the Clerk and added text indicating which documents shall be filed with the judge.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (d), substituted "may address the issues raised in the exceptions filed by the other party or may include" for "may include cross-exceptions or".

Case Notes

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

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

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

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

1:1-18.5 Motions to reconsider and reopen

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

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

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

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).

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.

SUBCHAPTER 19. SETTLEMENTS AND WITHDRAWALS

1:1-19.1 Settlements

(a) Where the parties to a case wish to settle the matter, and the transmitting agency is not a party, the judge shall require the parties to disclose the full settlement terms:

1. In writing, by consent order or stipulation signed by all parties or their attorneys; or

2. Orally, by the parties or their representatives.

(b) Under (a) above, if the judge determines from the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues in controversy, the judge shall issue an initial decision incorporating the full terms and approving the settlement.

(c) Where the parties to a case wish to settle the matter and the transmitting agency is a party to the case, if the agency head has approved the terms of the settlement, either personally or through an authorized representative, the parties shall:

1. File with the Clerk and the assigned judge, if known, a stipulation of dismissal, signed by the parties, their attorneys, or their non-lawyer representatives when authorized pursuant to N.J.A.C. 1:1-5.5(f); or

2. If the parties prefer to have the settlement terms incorporated in the record of the case, then the full terms of the settlement shall be disclosed in a consent order signed by the parties, their attorneys, or their non-attorney representatives when authorized pursuant to N.J.A.C. 1:1-5.5(f). The consent order shall be filed with the Clerk and the assigned judge, if known.

(d) The stipulation of dismissal or consent order under (c) above shall be deemed the final decision.

Amended by R.1987 d.461, effective November 16, 1987.
See: 19 N.J.R. 1593(a), 19 N.J.R. 2131(c).
(b)1.-2. added to clarify that in those cases where the agency head, either in person or through counsel, has consented to the settlement terms.
Amended by R.1995 d.300, effective June 19, 1995.
See: 27 N.J.R. 1343(a), 27 N.J.R. 2383(a).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In the introductory paragraph of (a), substituted "transmitting agency is not a party" for "agency head has not consented to the settlement terms"; and rewrote (c).

Case Notes

Emotionally disturbed child and his parent were "prevailing parties". E.P. by P.Q. v. Union County Regional High School Dist. No. 1, D.N.J.1989, 741 F.Supp. 1144.

1:1-19.2 Withdrawals

(a) A party may withdraw a request for a hearing or a defense raised by notifying the judge and all parties. Upon receipt of such notification, the judge shall discontinue all proceedings and return the case file to the Clerk. If the judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition.

(b) When a party withdraws, the Clerk shall return the matter to the agency which transmitted the case to the Office of Administrative Law for appropriate disposition.

(c) After the Clerk has returned the matter, a party shall address to the transmitting agency head any motion to reopen a withdrawn case.

Amended by R.1990 d.71, effective February 5, 1990.
See: 21 N.J.R. 3589(a), 22 N.J.R. 334(b).
In (a): deleted language specifying the entering of an initial decision for withdrawals and added, "discontinue ... for appropriate disposition".
In (b): specified that Clerk shall return matter to agency which had transmitted the case to OAL.
In (c): deleted language referring to decision granting withdrawal.
Amended by R.1991 d.44, effective February 4, 1991.
See: 22 N.J.R. 3278(b), 23 N.J.R. 293(a).
In (a): deleted "in writing" from withdrawal procedure request.

Law Review and Journal Commentaries

Law Against Discrimination. Judith Nallin, 138 N.J.L.J. No. 15, 23 (1994).

Case Notes

Discharged employee's election to file national origin discrimination charge with the Equal Employment Opportunity Commission pursuant to federal law precluded employee from bringing state court national origin discrimination claim after the EEOC determined that employee failed to demonstrate probable cause for administrative determination of discrimination. Hernandez v. Region Nine Housing Corp., 286 N.J.Super. 676, 670 A.2d 95 (A.D.1996).

Law Against Discrimination did not jurisdictionally prevent plaintiff from filing complaint in superior court after withdrawing her administrative complaint. Aldrich v. Manpower Temporary Services, 277 N.J.Super. 500, 650 A.2d 4 (A.D.1994), certification denied 139 N.J. 442, 655 A.2d 445.

SUBCHAPTER 20. MEDIATION BY THE OFFICE OF ADMINISTRATIVE LAW

1:1-20.1 Scheduling of mediation

(a) Mediation may be scheduled, at the discretion of the Director, when requested by the transmitting agency, or by all parties to a hearing or when requested by an agency with regard to a matter which has not been transmitted as a contested case. Mediation shall not be scheduled in any matter where the transmitting agency has a mediation program available to the parties to the case.

(b) When a request for mediation is granted, the Office of Administrative Law shall supply the parties with a list containing not less than six administrative law judges as suggested mediators. Each party may strike two judges from

the list and the Office of Administrative Law will not assign any judge who has been stricken from the list to conduct the mediation. The Office of Administrative Law shall notify the parties of the assigned mediator.

New Rule, R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
Former N.J.A.C. 1:1-20.1, Conduct of mediation, recodified to N.J.A.C. 1:1-20.2.
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 "or when requested by an agency with regard to a matter which has not been transmitted as a contested case".

1:1-20.2 Conduct of mediation

(a) Mediation shall be conducted in accordance with the following procedures:

1. Discovery to prepare for mediation shall be permitted at the discretion of the judge.

2. All parties to the mediation shall make available for the mediation a person who has authority to bind the party to a mediated settlement.

3. All parties must agree in writing to the following:

i. Not to use any information gained solely from the mediation in any subsequent proceeding;

ii. Not to subpoena the mediator for any subsequent proceeding;

iii. Not to disclose to any subsequently assigned judge the content of the mediation discussion;

iv. To mediate in good faith; and

v. That any agreement of the parties derived from the mediation shall be binding on the parties and will have the effect of a contract in subsequent proceedings.

4. The mediator shall, within 10 days of assignment, schedule a mediation at a convenient time and location.

5. If any party fails to appear at the mediation, without explanation being provided for the nonappearance, the mediator shall return the matter to the Clerk for scheduling a hearing or for return of the matter to the agency and, where appropriate, the mediator may consider sanctions under N.J.A.C. 1:1-14.14.

6. The mediator may at any time return the matter to the Clerk and request that a hearing be scheduled before another judge or that the matter be returned to the agency.

7. No particular form of mediation is required. The structure of the mediation shall be tailored to the needs of the particular dispute. Where helpful, parties may be permitted to present any documents, exhibits, testimony or other evidence which would aid in the attainment of a mediated settlement.

(b) In no event shall mediation efforts continue beyond 30 days from the date of the first scheduled mediation unless this time limit is extended by agreement of all the parties.

Amended by R.1991 d.279, effective June 3, 1991 (operative July 1, 1991).
See: 23 N.J.R. 639(a), 23 N.J.R. 1786(a).
In (a)5, revised N.J.A.C. citation.
Recodified from N.J.A.C. 1:1-20.1 and amended by R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
In (a), deleted a former 2, and recodified former 3 through 7 as 2 through 6. Former N.J.A.C. 1:1-20.2, Conclusion of mediation, recodified to N.J.A.C. 1:1-20.3.
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
Added new (a)1; recodified former (a)1 through (a)6 as (a)2 through (a)7; in (a)5, inserted "or for return of the matter to the agency" and "the mediator"; and in (a)6, inserted "or that the matter be returned to the agency".

1:1-20.3 Conclusion of mediation

(a) If the transmitting agency is a party to the mediation, successful mediation shall be concluded by a mediation agreement.

(b) If the transmitting agency is not a party, successful mediation shall be concluded by initial decision. The initial decision shall be issued and received by the agency head as soon as practicable after the mediation, but in no event later than 45 days thereafter.

(c) If mediation does not result in agreement, the matter shall be returned to the Clerk for scheduling appropriate proceeding or for return to the transmitting agency.

Amended by R.1997 d.158, effective April 7, 1997.
See: 29 N.J.R. 282(a), 29 N.J.R. 1295(a).
In (c), inserted "or for return to the transmitting agency".
Recodified from N.J.A.C. 1:1-20.2 by R.1999 d.413, effective December 6, 1999.
See: 31 N.J.R. 2290(a), 31 N.J.R. 2717(a), 31 N.J.R. 3999(a).
Amended by R.2007 d.393, effective December 17, 2007.
See: 39 N.J.R. 2393(a), 39 N.J.R. 5201(a).
In (b), inserted the last sentence.

SUBCHAPTER 21. UNCONTESTED CASES IN THE OFFICE OF ADMINISTRATIVE LAW

1:1-21.1 Transmission to the Office of Administrative Law

(a) Any agency head may request under N.J.S.A. 52:14F-5(o) the assignment of an administrative law judge to conduct an uncontested case, including rule making and investigatory hearings. Public or investigatory hearings conducted pursuant to a rulemaking shall proceed in accordance with N.J.S.A. 52:14B-4(g). The agency head may make such a request by letter and by completing the applicable portions of an N.J.A.C. 1:1-8.2 transmittal form.