For the Record: Guiding the Participants in the Administrative Hearing Process

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Introduction

Across the nation, the number of self-represented litigants, in every type of trial and hearing, is increasing. However, self-representation, by both the respondent/petitioner and the agency, is the norm for many different types of administrative hearings. Often, in these situations, neither side is properly prepared for the hearing. Consequently, the hearing may take longer, it may be necessary to hold the record open for missing or forgotten evidence, and recalcitrant witnesses may be less than forthcoming about the facts. The result? The administrative adjudicator may have a record that lacks chronology, is muddled, or just doesn't contain enough evidence to address all the issues within the scope of the hearing.

There are several analogies that can be drawn regarding the role of the administrative adjudicator in the administrative hearing. The hearing official could be analogous to the traffic cop at a busy intersection, the umpire or referee at a sporting event, the director of a play, or the construction manager at a building site. However, the analogy that seems to fit best is the administrative adjudicator as the conductor of a choir or orchestra. When each person involved in the administrative hearing process fulfills their role effectively, the result is a well-ordered, complete, cohesive, harmonious composition. If they players in your orchestra, or the voices in your choir, don't have the music—perhaps have never even heard the song they're supposed to perform—the result can be disastrous.

As the conductor, we often walk into the hearing room at the moment the hearing is to begin expecting the participants to be ready to perform to their utmost. However, if any of the participants are unfamiliar with the process or if they don't understand the issues within the scope of the hearing, the result is going to be disappointing.

We often expect our hearings to be seamless and effortless if both parties are represented by counsel. However, counsel may be no more familiar with the administrative hearing process, the agency rules, or the issues than the self-represented party—unprepared attorneys and recent law school graduates are common in administrative hearings.

Agency investigators and record custodians frequently must testify in administrative hearings, but most would prefer not to do so. Why? Their understanding of the administrative hearing process is gathered from office lore, TV courtroom dramas, and their limited experience, all of which are inadequate to prepare them to fulfill their role in the hearing. If they are unfamiliar with due process or jurisdictional requirements, procedural rules (*e.g*. discovery), foundation, or the basics of evidence admissibility, their testimony can range from useless to destructive.

It's unrealistic and somewhat unfair to expect all the hearing participants to make our jobs easier, by being fully prepared for the hearing, when we make no contribution to that effort. Participants can and should be provided with information regarding jurisdiction, process, procedural rules, and evidence basics. Hopefully, this class will help you help them.

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I. Jurisdiction

Some source of law must provide jurisdiction (authority) for an administrative agency to impose a penalty (administrative sanction).

A. State or Federal Statutes and Regulations Specific to (Controlling) the Agency

The agency's statutes typically provide authority for the agency to perform certain acts, including imposition of sanctions. Statutes may also provide for a hearing for persons wanting to contest the agency's action.

B. State or Federal Administrative Procedures Acts

While statutes provide authorization for or explanation of the ability of the agency to impose sanctions for failure to follow agency statutes and regulations, the general overarching authority for the agency to act comes from an Administrative Procedures Act (APA). The APA also gives the agency the ability to make regulations.

C. Constitutions (both state and federal)

A hearing may be requested to contest the agency's action on the ground that the action conflicts with the state or federal constitution.

D. Case Law from the U.S. Supreme Court or Your State Supreme Court

It is not the function of case law to establish jurisdiction. But when there is more than one way to interpret a statute, a regulation or even the constitution, the courts have the final say about what the law means and therefore can affect the agency's jurisdiction (until the legislature provides further clarification).

Only the above have the "force of law" and provide jurisdiction for the agency to impose penalties or sanctions against the public.

II. Promulgation of Regulations (Rulemaking)

A. What Regulations ARE

Regulations are agency rules, standards, directives or statements of general applicability that *have the force of law* and which serve to:

1. Effect or interpret law or policy;
2. Describe the organization, procedure and practice requirements of the agency;
3. A written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.

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B. What Regulations ARE NOT

1. Statements concerning the internal management of an agency and not affecting private rights or procedures available to the public;
2. Declaratory rulings (they are only applicable to the litigants to whom the rulings are addressed);
3. Intra-agency memoranda;
4. Manuals of internal policies and procedures or audit procedures of an agency which is used solely to train or provide guidance to employees of the agency and which is not used as authority in a contested case to determine whether a person is in compliance with a federal or state statute or regulation;
5. Agency decisions or findings in a contested case;
6. Advisory opinions issued by an agency that are not of universal applicability;
7. Published opinions of the Agency Counsel or of the Attorney General;
8. Statements of how the agency intends to interpret a statute;
9. Letters of approval, concurrence or disapproval issued in relation to a permit for a specific project or activity;
10. Contracts or agreements into which an agency has entered; and
11. Emergency actions taken by an agency that is necessary to protect public health and safety.

C. How Regulations *Must* Be Created to Have the Force of Law

1. Both proposed regulations must be readily available to the public;
2. Proposed regulations must be worded according to the guidelines for drafting regulations that have been developed;
3. Agency must give prior notice of its intent to create or modify a regulation;
4. Agency must conduct at least one workshop to solicit comments from interested persons on topics to be addressed in the proposed regulation and provide the public with notice of time and place for the workshop;
5. Agency must provide the opportunity for a public hearing regarding new or proposed changes to regulations with notice to the public regarding same;
6. Agency must give a *second* notice of intent to create or modify a regulation following the public hearing;
7. Wording of the regulation must be approved by the Legislative Counsel's Office, by the Legislative Commission, by a Subcommittee responsible for reviewing agency regulations or by some other government entity responsible for the wording of regulations;
8. Regulations, once approved, must be readily available to the public.

If any of the above guidelines were not followed in creating the regulation, the regulation was not properly promulgated and can be declared invalid by a court.

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III. Standing

Standing: the right to contest the legality of an agency decision/action. Standing arises when a party is:

A. Adversely affected; or

B. Aggrieved (in many jurisdictions); or

C. Has been granted standing by a statute or by the agency.

IV. Due Process

"No person shall be…deprived of life, liberty or property without **due process** of law…"
Amendment 5, U.S. Constitution

"…nor shall any state deprive any person of life, liberty or property without **due process** of law…" *Amendment 14, U.S. Constitution*

"Due process" is the "process" that is "due" to the individual before the government can take away a government-issued benefit, license or privilege; the process necessary to insure that the individual was not deprived of the benefit, license or privilege by mistake.

due: That which is owed to someone as a natural or moral right; something to which an individual is entitled. Example: "He attracts more criticism than is his due."

process: A series of actions or steps taken in order to achieve a particular end; procedure.

In the context of a legal hearing, administrative or otherwise, "due process" consists of the procedure to which an individual is entitled to assure that his or her hearing is objective, unbiased and fair-minded.

A. "Privilege v. property-right" distinction was abandoned in *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970). *Goldberg* is currently the due process standard only for TANF & SNAP (Human Services) hearings:
   1. Right to timely and adequate notice of the basis for the action;
   2. Opportunity to defend against the reason for the action;
   3. Opportunity to confront adverse witnesses;
   4. Opportunity to present arguments and evidence orally;
   5. Opportunity to cross-examine witnesses;
   6. Right to disclosure of opposing evidence;
   7. Opportunity for representation by counsel;
   8. Right to determination based solely on evidence presented at the hearing;
   9. Right to a reasoned decision stating the evidence upon which it relied; and
   10. Right to an impartial decision maker.

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B. *Richardson v. Perales*, 402 U.S. 389 (1971): Admission of hearsay documents in a Social Security hearing, without cross-examination of the declarant of the document, did not violate due process. The opinion, delivered by Justice Blackmun and which 6 other justices joined, said *Goldberg v. Kelly* imposed "undue judicialization" on what was a only *quasi*-judicial process and would impair disbursal of government benefits to those intended as the law's beneficiaries. The Court held it was impracticable, because of the nature and volume of administrative cases, to require all the elements of due process in *Goldberg v. Kelly* holding that the system must be "fair—and it must work."

C. *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972): Roth was hired as assistant professor for a fixed term of one year. Tenure was available, but only after 4 years. Roth was not rehired, was not told why, and was not given an opportunity to challenge the decision not to hire him. He brought action in Federal District Court alleging he was entitled to a statement of reasons and a hearing. U.S. Supreme Court held that due process adheres only when life, liberty or property is at risk. Roth's need, desire or unilateral expectation of being rehired did not constitute a property right which warranted due process protection. Neither federal nor state appellate courts have varied from this position. See also *In re 'Ao Ground Water Management Area High-Level Source Water Use Permit Applications*, 128 Hawai'I 228, 287 P.3d 129 (2012); *Lewis v. Jaeger*, 818 N.W.2d 165 (Iowa, 2012); and *Wynkoop v. Town of Cedar Lake*, 970 N.E.2d 230 (Ind.App. 2012).

D. *Goss v. Lopez*, 419 U.S. 565 (1975): The level of due process required depends on the competing interests involved. *Goss* (3-day school suspension) held elaborate procedures would harm educational interests but some type of hearing must be held due to the potential loss of an opportunity for education. An informal conference between the student and the principal, held in the school office, was sufficient due process because the student received:

1. An opportunity for confrontation (but no right to call or cross-examine witnesses and no right to counsel);
2. Notice regarding the charges against them; and
3. An opportunity to present his version of events.

The level of procedural due process required for a limited school suspension remains essentially the same today.[1]

[1]In 2012, 18-year-old high school student injured younger student with his automobile on school property and received 10-day school suspension. *Heyne v. Metropolitan Nashville Board of Public Education*, 380 S.W.3d 715, 286 Ed. Law Rep. 730 (Tenn. 2012) held: Student had a claim of entitlement to public education warranting procedural due process. But written notice of charges and, if he denies them, an explanation of the evidence against him and an opportunity to present his side of the story satisfy due process.

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E. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) created an analytical technique for determining the necessary level of due process required for administrative hearings. The *Mathews* balancing test:

   a. What private interest will be affected?
   b. What is the risk of erroneous deprivation of the identified private interest?
   c. What is the cost to the agency in time, resources and money for additional procedural protection?

   State appellate courts, of course, must follow the precedent set by the U.S. Supreme Court. Consequently, the nationwide standard for the amount of "process" that is "due" is that which is provided in *Mathews v. Eldridge*, with the exception of TANF and SNAP hearings.

B. *Consiglio, M.D., v. Department of Financial and Professional Regulation*, 988 N.E.2d 1020 (Ill.App. 1 Dist. 2013): Three physicians were licensed by the state to practice medicine. Subsequent to being licensed, each of the three was convicted of battery or abuse against a patient in the course of care or treatment. Pursuant to an act passed after their convictions, their licenses were revoked without a hearing based solely on the convictions. Plaintiffs argued the act violated their procedural due process rights because it called for revocation of their licenses without a hearing. Citing the *Mathews v. Eldridge* balancing test, the court held: Due process is a flexible concept, and the procedural safeguards it requires may not be the same in all situations. It does not necessarily require a proceeding that is akin to a judicial proceeding, nor does it require a hearing in every instance a government action impairs a private interest. The risk that their medical license would be erroneously revoked under the act was low because the act operates only upon a conviction which is a matter of public record and can be established without a fact-finding hearing.

C. *Bussoletti v. Department of Public Welfare*, 59 A.3d 682 (Pa. 2012): Mentally retarded adult male living with his parents received county benefit of daily door-to-door transportation to an adult training facility despite the fact that he lived three miles from the nearest paved road. The transportation service, Pathways, had difficulty picking him up during inclement weather and the commute caused significant wear and tear on its vehicles. Pathways said it was too costly to continue door-to-door transportation services and proposed to modify his transportation providing three options: (1) meet Pathways at the paved road nearest to his home; (2) use an alternate transportation provider, Green Arc; or (3) have his parents drive him for which they would be reimbursed 51 cents per mile. Recipient objected to the change. At hearing, ALJ determined regulation allowed Recipient to select any "willing and qualified provider," Pathways was no longer willing, and Pathways acted in accordance with regulations when it proposed modifications. On appeal, Recipient contended his procedural due process rights were violated because his parents were pressured to agree to the modification, he was discouraged from filing an appeal, he was given false statements about his rights to hearing

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and appeal, and the ALJ refused to address the issue of the illegality of Pathways' modification proposal. The Court held Recipient was entitled to notice and an opportunity for hearing and had received both. The notice contained all the pertinent information regarding hearing and appeal and provided the appeal deadline. Recipient was heard by the ALJ, his father testified, presented evidence and cross-examined opposing witnesses and ALJ properly addressed all issues.

D. *Pishny v. Board of County Commissioners*, 47 Kan.App.2d 547, 277 P.3d 1170 (2012): Coalition of landowners sought reversal of resolution by County Board of Commissioners to allow city to annex additional land. Landowners claimed they did not receive due process at public board meeting. Court held their due process rights were not violated because they received adequate notice of the city's intentions and notice of the public hearing and received the opportunity to be heard.

E. *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, 967 N.E.2d 950, 359 Ill.Dec. 920 (2012): Vehicle owner fined $100 as the owner of a car that ran a red light at an intersection monitored by an automated camera brought action against the village, seeking declaratory judgment and administrative review. Held: "Procedural due process" does not protect persons from the loss of life, liberty or property; it is the process that protects them from the mistaken or unjustified deprivation of life, liberty or property. It includes a right to present evidence and argument, a right to cross-examine witnesses and impartiality in rulings upon the evidence which is offered.

V. Defining the "Process" That Is "Due" in Your State

Statutorily Guaranteed Due Process Rights Include, At Minimum

A. All parties must be afforded an **opportunity** for a hearing.
B. The hearing cannot be held until after reasonable **notice** which must include:
   1. A statement of the time, place and nature of the hearing.
   2. A statement of the legal authority and jurisdiction under which the hearing is to be held (APA).
   3. A reference to the particular sections of the statutes and regulations involved (statute supplying basis for the action the agency seeks to impose).
   4. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. A later more definite and detailed statement must be furnished upon request.
C. Any party is entitled to be **represented** by counsel.
D. Opportunity must be afforded all parties to **respond** and **present evidence and argument** on all issues involved.

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VI. Statutes & Cases Illustrating Elements of Procedural Due Process

A. Adequate Notice

1. *Nevada Board of Osteopathic Medicine v. Graham,* 643 P.2d 1222, 98 Nev. 174 (1982): Physician whose license was revoked for gross malpractice was deprived of his fundamental rights of due process of law where the Board failed to provide **notice** of his right to a hearing, to be represented by counsel and to call and examine witnesses.

2. *Matthew M. v. Department of Children and Families,* 71 A.3d 603, 143 Conn.App. 813 (Conn.App. 2013): For purposes of due process, notice of an administrative hearing is not required to contain an accurate forecast of the precise action which will be taken on the subject matter referred to in the notice; it is adequate if it fairly and sufficiently apprises those who may be affected of the nature and character of the action proposed, so as to make possible intelligent preparation for participation in the hearing.

3. *Hansen v. Board of Registered Nursing*, 208 Cal.App.4th 664, 145 Cal.Rptr.3d 739 (2012): The period for a nurse to challenge the default revocation of her license had expired. She failed to receive the original hearing notice in time to contest the board's action because she failed to keep the Board informed of her current address as required by law. The Board sent the notice via certified mail which is not forwarded. Denial of nurse's petition to challenge the revocation of her nursing license was affirmed. There was no due process violation for lack of notice where the inability to receive the notice was the fault of the appellant.

B. Opportunity to be Heard

1. It is not the hearing itself, that due process requires, but the **<u>opportunity</u> to be heard**: *Traverso v. People ex rel Dept. of Transp*., 384 P.2d 488 (Cal. 1992) (due process requires opportunity to be heard rather than actual hearing); *Reno v. Flores*, 113 S.Ct. 1439 (1993) (INS proceeding); *Tur v. FAA*, 4 F.3d 766 (9th Cir. 1993) (emergency revocation of pilot's license); *Banks v. Secretary of the Indiana Family and Social Services Administration*, 997 F.2d 231 (7th Cir. 1993) (denial of Health care providers' reimbursement claims); *Skydiving Center v. St. Mary's Airport Commission*, 823 F.Supp. 1273 (D.Md. 1993) (revocation of school's permit to conduct parachute drops); *Odum v. University of Alaska*, 845 P.2d 432 (Alaska 1993) (employment termination of professor); *United States v. McCalla*, 821 F.Supp. 363 (E.D. Pa. 1993) (INS telephone hearing).

2. When an emergency exists, the immediate protection of the public has precedence over the right to be heard; an agency may take action immediately but must provide opportunity for hearing within a reasonable time. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723 (1977) (driver's

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license taken based on driving record showing repeated convictions for traffic violations).

C. May Be Represented by Counsel (At Their Own Expense)

1. *Kearse v. State Health & Human Services Finance Commission*, 456 S.E.2d 892 (S.C. 1995). There is no constitutional right to counsel at the state's expense in an administrative proceeding unless the action could result in incarceration (no liberty interest at stake).

2. *Father & Sons Lumber & Building Supplies, Inc. v. NLRB*, 931 F.2d 1093 (6th Cir. 1991). The administrative procedures act guaranteed the right to counsel, not the right to the *effective assistance* of counsel. See also *Loe v. Sex Offender Registry Board*, 73 Mass.App.Ct. 673, 901 N.E.2d 140 (Mass.App.Ct.2009).

3. *Watson v. Fiala*, 101 A.D.3d 1649, 957 N.Y.S.2d 523 (2012): Aside from certain narrow exceptions, the right to counsel that is paid at the government's expense does not extend to civil actions or administrative proceedings. Due process considerations in such cases require that a party to an administrative hearing be afforded the opportunity to be represented by counsel.

D. Opportunity to Present Evidence and Argument

1. Appellate courts have reversed where judges have limited each to party to a certain number of hours to present their cases, including time used for cross-examination. *Goelner v. Goelner*, 770 P.3d 1387 (Colo. 1989), *Rosa v. Bowen*, 677 F.Supp. 782 (1988).

2. Presentation of evidence can be accomplished by means other oral hearing without violating due process. *Mathews v. Eldridge*, *supra*; *FDIC v. Mallen*, *supra*; and *Landesman v. Bd. of Regents of New York State*, *supra*.

3. Refusing a final oral argument isn't error if a written argument is allowed. *Union State Bank v. Galecki*, 417 N.W.2d 60 (Wis.Ct.App. 1987).

4. *Hicks v. Kentucky Unemployment Insurance Commission*, 390 S.W.3d 167 (Kent.App. 2013): Claimant was denied subpoena duces tecum on the ground that the documents he requested were "primarily documentation the claimant should have had in his possession." However, certain information relating to the Commission's investigation and his employment file would not have been in his possession. Court held his due process rights were violated when he was not granted the administrative subpoena he requested.

5. *Hertelendy v. Great Lakes Architectural Service Systems*, 976 N.E.2d 950 (Ohio App. 8th Dist. 2012): Unemployment claimant disputed that he was

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hired as a fabricator rather than a driver. He wished to call two witnesses to testify regarding for which position he was hired. They were standing by to testify by telephone when the hearing officer said he did not believe he needed to take their testimony. Thus, they did not testify. Appellate court held their testimony was relevant and material and it was a due process violation not to take their testimony.

E. Opportunity for Cross-Examination

1. *State, Department of Motor Vehicles v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986): Appellant whose driver's license was suspended following an administrative hearing for DUI argued due process rights were violated when affidavit of person who withdrew blood sample was admitted over objection at administrative hearing. Appellant asserted he had due process right to cross-examine the person who withdrew his blood. Court held only defendants in criminal proceedings may object to the use of such affidavits and that admission of affidavits over objection did not violate due process.

2. Agency did not deny petitioner the right to confront and cross-examine witnesses where affidavits were given under oath to agency investigators with statutory authority to take those statements, which were required by regulation. The petitioner failed to make any request to question any affiant, thereby forfeiting his right to cross-examine the affiants. *Valkering U.S.A. Inc. v. U.S. Dept. of Agriculture*, 48 F.3d 305 (1995).

3. *Bennett v. NTSB and FAA*, 55 F.3d 495 (1995.) Petitioner argued he was denied ability to cross-examine primary complainants against him. 10th Circuit, held his "invocation of the 6th Amendment is misplaced for the Confrontation Clause speaks only of 'all criminal prosecutions.' That constitutional right does not apply to civil administrative manners generally (*Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502 (1960)." The court further held that the petitioner

   > "had been notified during the week preceding the Hearing that the O'Malleys would not be able to attend due to their vacation plans and that FAA would seek to have the O'Malleys' 'testimony, at least in the form of a declaration' available at the hearing…Bennett failed to subpoena the O'Malleys as was his right under Board's Rules of Practice. Nor did he seek to depose the O'Malleys or request a continuance either before the Hearing or afterwards. Thus having forgone the available opportunities for cross-examination, he cannot ascribe error on that ground."

F. Right to a Reasoned Decision Based Solely on the Record

1. The **record** in a contested case must include (at minimum):
   a. All notices, pleadings, motions and intermediate rulings.
   b. All evidence received or considered.
   c. A statement of matters officially noticed.

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d. Questions, offers of proof and objections, and rulings thereon.
e. Any proposed findings and exceptions.
f. Any decision, opinion or report by the presiding hearing officer.
g. A transcription or an audio recording of oral proceedings (audio recordings must be transcribed on request of any party but that party may be responsible for the cost of transcription).

2. An administrative adjudicator's Findings of fact must be based exclusively on the evidence that is in the record.

3. An administrative adjudicator is prohibited from impermissible *ex parte* (off the record) communication:

> Members or employees of an agency that are assigned to render a decision or to make findings of fact and conclusions of law in a contested case *shall not* communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or the party's representative, except upon notice and opportunity to all parties to participate.

4. *In re Fine*, 116 Nev. 1001, 13 P.3d 400 (2000): Any *ex parte* communications between a judge and a witness should be limited to procedural or administrative matters. Matters involving the merits or substance of a case must not be discussed outside the presence of the parties. It is improper for a judge to make a decision and/or issue a ruling on a disputed matter based on judge's *ex parte* meeting with a witness.

5. *State v. Dussault*, 245 P.3d 436 (Alaska App. 2011): Defendant requested conditional release from Alaska Psychiatric Institute which resulted in several hearings. State filed motion to disqualify judge alleging that he engaged in improper ex parte communication with Commissioner of Department of Health and Social Service during the conditional release hearings. Court reversed judge holding communications were not authorized by law and created appearance of partiality.

G. Right to be Heard by an Impartial Hearing Officer

1. *State, Department of Motor Vehicles v. Thompson*, 102 Nev. 176, 717 P.2d 580 (1986): Hearing officer's actions in producing, marking, and offering Department exhibits, and in questioning Department witnesses to obtain narrative responses, did not suggest hearing officer's taking a prosecutorial role so as to require her to disqualify herself.

2. *Cinderella Career and Finishing Schools, Inc., v. Federal Trade*

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Commission, 425 F.2d 583, 138 U.S.App.D.C. 152 (1970). FTC Chairman should have recused himself from participating in review of the Hearing Examiner's initial decision because he'd made public statements indicating prejudgment.

3. During the course of an administrative proceeding, an ALJ had lunch with Counsel for one of the two parties and a witness for that same party. This created such an appearance of partiality that it tainted the entire proceedings. The ALJ's order in the case was vacated and a new hearing was ordered. *Wells v. Del Norte School Dist. C-7*, 735 P.2d 770 (Colo. Ct. App. 1987).

H. Appealing the Action By the Agency on Due Process Grounds

For a Claimant or Petitioner to prevail on appeal, there must be a showing of **prejudice**. The Claimant or the Petitioner must demonstrate that the alleged error that occurred substantially affected his or her legal rights. Examples:

On appeal, Claimant may allege he/she didn't receive proper notice of charges or of the hearing. However, if Claimant appears for the hearing and through statements and actions demonstrates he/she was fully apprised of charges, he/she cannot claim prejudice based on omission or inaccuracy in the notice.

On appeal, demoted employee claimed right to cross-examine witnesses was violated because of personnel board's enforcement of time limits. Employee failed to object to the time limit or request additional time at the hearing. He couldn't demonstrate how he was prejudiced by time limit by supplying the questions he would have asked had he had more time.

VII. Potential Bars to Agency Action

A. Estoppel: A doctrine barring a party from litigating an issue determined against that party.

Southern California Edison v. First Judicial Dist. Court of State of Nevada, 255 P.3d 231 (2011), rehearing denied. The proper means of seeking review of Tax Commission's decision denying taxpayer's claims for refunds of use taxes was by means of a petition for judicial review. But Nevada Supreme Court held Department of Taxation was judicially estopped from asserting that a petition for judicial review was the sole remedy where Department had specifically told taxpayer that trial *de novo* in District Court would be available if taxpayer was unhappy with Tax Commission's decision. Court held taxpayer's refund claims could proceed as a trial de novo because nothing suggested that the Department's original position was due to ignorance, fraud, or mistake. Court held it would have been highly inequitable to allow the Department to change its position with respect to taxpayer.

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B. Americans With Disabilities Act (ADA) of 1990

Congress declared that the purpose of the ADA is:

1. To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. To provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. To ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities;
4. To invoke the sweep of congressional authority, including the power to enforce the 14th amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Thus, the goal of the ADA is twofold. It is intended not only to remedy discrimination against disabled individuals but to prevent it.

Aurelio v. Rhode Island Department of Administration, Division of Motor Vehicles, 985 F.Supp. 48 (R.I. 1997): For a plaintiff to prevail on a claim under public services title of the ADA, plaintiff must prove that: (1) he or she is "qualified individual," (2) he or she has a disability, and (3) his or her disability was basis for discrimination action by public entity.

C. Servicemembers Civil Relief Act

The SCRA provides a wide range of protections for individuals entering the military, called to active duty in the military, or deployed servicemembers. It is intended to postpone or suspend certain civil obligations to enable service members to devote full attention to duty and relieve stress on the family members of those deployed servicemembers. Among the obligations the SCRA protects against are pending civil trials. The act requires that civil actions and proceedings be stayed while a servicemember is deployed and/or on active duty and prevents imposition of default judgments.

VIII. Sanctioning and Relief

A. What is a Sanction?

1. Prohibition, requirement, limitation or other condition affecting the freedom of a person, organization, corporation, company, etc;
2. Withholding relief;
3. Imposition of an administrative fine;
4. Destruction, taking, seizure or withholding of property;
5. Assessing damage, reimbursement, restitution, compensations, costs, charges, fee;
6. The requirement, revocation, or suspension of a license; or
7. Taking other compulsory or restrictive action.

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B. What is Relief?

1. Granting money, assistance, license, authority, exemption, exception, privilege or remedy;
2. Recognition of a claim, right, immunity, privilege, exemption or exception;
3. Taking of other action on the application or petition of and beneficial to a person, organization, corporation, etc.

C. When Does Imposing a Civil Sanction in Addition to Criminal Punishment Violate Double Jeopardy?

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three abuses:
(1) A second prosecution for the same offense after acquittal;
(2) A second prosecution for the same offense after conviction; and
(3) Multiple *punishments* for the same offense.

There are many actions which can result in a criminal prosecution (with the potential for punishment) in addition to the imposition of a civil sanction. It is often argued in administrative hearings that the government is violating the Double Jeopardy Clause of the Fifth Amendment in instances where it seeks to punish for a criminal conviction and impose an additional penalty as the result of a civil, administrative hearing.

The U.S. Supreme Court, in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L.Ed.2d 450 (1997), explained the circumstances under which an imposition of a civil penalty by an administrative agency constituted a violation of the Double Jeopardy Clause of the Fifth Amendment because it followed a punishment for a criminal conviction which originated from the same event on which the civil penalty was based.

The *Hudson* test:
(1) Is the statutory scheme that would impose the civil, administrative sanction so punitive either in purpose of effect as to transform what was intended as a civil remedy into a criminal penalty?
(2) Is there clear proof that the administrative sanction to be imposed is so punitive in form and effect as to render it criminal despite the legislature's (or in the case of a federal agency the Congress's) contrary intent?
(3) Does the imposition of the civil sanction involve a finding of scienter (*i.e.*, Is the intent of the person who was alleged to have violated the agency's statute or rule an element that is involved in the agency's decision to impose the sanction?

The imposition of a civil sanction is virtually never a violation of the Double Jeopardy Clause of the Fifth Amendment because:
(1) The statutory scheme is not punitive in either form or effect;
(2) The administrative sanction to be imposed is not punitive because
    a. It furthers the goal of public safety;
    b. It is a civil deterrent to others who might commit a similar act; and

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c. It is remedial—it seeks to educate or correct the actions of the individual who committed the act;

(3) The intent of the individual is not an element that is determinative (i.e. a finding of scienter is not an issue).

IX. Writing Investigative Reports for an Administrative Hearing

A. Essential Elements of an Investigative Report

1. **Case-Identifying Information**: Begin the report with case-specific information that identifies the case to which the report is related. Include information such as the name of the party being investigated, the case number, the date the investigation was opened, the date it was assigned to the investigator and the name of the investigator.

2. **Referral Source**: How did the investigation come to be assigned? The name, work phone number, email address, employee number, office location, department and job title of the person who lodged the complaint or provided the information that initiated the investigation.

3. **Information Regarding the Subject of the Report**: Include the accused person's name, address, date of birth, email address, work phone number, place and location of employment, department and job title.

4. **Details of Allegations**: What type of allegation is being investigated? Who is the alleged perpetrator? What happened? Where did it happen? When did it happened? Were there witnesses? Who were the witnesses? Why is this person the one who was alleged to have done the deed?

5. **Purpose of the Investigation**: Include a statement that describes the objectives of the investigation which answers the question "What is this investigation trying to prove?"

6. **List of Evidence**: List the evidence collected during the investigation including such information as the type of evidence collected (interview, video, photo, audio tape, email, etc.), the name of the person who provided the evidence, that person's role in the investigation and the location, date and time the evidence was collected.

7. **Interview Summaries**: List the investigative interviews that took place making sure that the list is in chronological order. Provide a concise summary of each interview which begins with the name of the interviewer, the names of any witnesses to the interview, the name of the person interviewed, why they were interviewed (what was their role related to the case?), the location, date and time of the interview. Then succinctly summarize the statements of the person interviewed that are relevant to the allegations made in the case.

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8. **Conclusions Drawn from Investigation**: In this section, the investigator states what he/she believes happened and explains how it happened, based on the entirety of the investigation (all the evidence and all the interviews). For each event that the investigator believes occurred, the investigator must be able to point to a specific piece of evidence or the specific statement of a witness that supports the investigator's conclusion.

9. **Recommendations**: If the allegations are true, is there a range of administrative sanctions that the law says may be administered? If so, the investigator needs to make a recommendation regarding which sanction should be imposed and why this sanction is preferable to all others.

10. **Index of Documents and Documents to be Admitted as Evidence**: Attached to the investigative report should be a copy of any document on which the witness relied in drawing conclusions regarding what happened and how it happened. The page immediately preceding the documents should list each document by its title.

B. Tips for the Witness Who Writes an Investigative Report

1. Do not use agency jargon on letter abbreviations. Assume that the person that will read the report has no knowledge of the agency or the acronyms it uses. Write out the full designation for each item mentioned and, if necessary, explain what it is or what it means.

2. Write in short, straightforward sentences using simple words. Don't use legalese or try to sound intellectual. Write in complete sentences rather than sentence fragments.

3. Avoid statements of scorn or disapproval. By the same token, avoid statements of praise or approval. It's not the investigator's job to pass judgment, but merely to conduct an impartial investigation and report the findings in a neutral manner. Remember that the person who is the subject of the investigation is legally entitled to a copy of your report.

4. Proofread the investigative report carefully, especially if you're utilizing a "plug-in-the-words" template for your report. There are few things more embarrassing than finding you forgot to enter the correct name, date or location for the current case and instead left the information from your previous investigation on the current report.

5. Avoid the temptation to discuss every bit of testimony and every piece of evidence in detail. Summaries are sufficient. If more detail is needed, if can be provided verbally at the hearing.

6. Unless you're an instructor at the FBI academy who teaches FBI agents the behavioral abnormalities that indicate deceit, keep your conjectures regarding

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witness credibility to yourself. Just report what the witness said and the manner exhibited by the witness when he/she made the statement. Let the judge make the tough decisions regarding witness credibility.

7. Evaluate your conclusions carefully. If you can't point to a specific piece of evidence for each conclusion that you drew, your conclusions may be speculative. Your speculative statements will not persuade any judge. Your conclusions will only be accepted if they are supported by the evidence which you found in your investigation and which you included in your report. Your conclusions should be logical and should flow from the evidence and interviews contained in your report.

X. What it Means to Meet the Burden of Proof in a Hearing

A. "Burden of Proof" Defined:
   1. Duty placed upon a party to a civil or criminal action to prove or disprove a disputed fact.
   2. "Burden of Proof" is also used as a synonym for "Burden of Persuasion" which is the quantum of proof by which the party with the burden of proof must establish or refute a disputed fact.

B. Preponderance of the Evidence Defined:
   1. Evidence, as a whole, shows fact to be proved is more probable than not.
   2. The existence of the fact at issue is more likely than not.
   3. The greater weight of the credible evidence.
   4. More evidence or more credible evidence than evidence offered in opposition to it.
   5. Evidence preponderates when it concurs with reason and probability.

C. When does evidence preponderate? (*i.e.*, When has the burden of "preponderance of the evidence" been met?)

   1. Under the preponderance of the evidence standard, it is not necessary to eliminate every possible alternate explanation of the facts. It is only necessary to find what is more probable than not from various scenarios.

   2. In order for a piece of evidence to support an inference, it isn't necessary that that inference be the only inference that could be drawn. It is only necessary that the inference be plausible or believable.

   3. A reasonable inference is one that, in light of all the other evidence, a reasonable person would draw. (*e.g.* It would be reasonable to infer that a person standing outside a vehicle drove the vehicle to that location if there is no one else present that could have driven the vehicle and no other explanation as to how the vehicle arrived at that location.)

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4. Evidence preponderates when it's more likely than not that a particular fact is true.

   NOTE: If, at the conclusion of a hearing, neither party has persuaded the ALJ of the correctness of his/her version of events, the party who has the burden of proof has not met his/her burden and must lose.

D. Clear and Convincing Evidence

The existence of a particular fact is highly probable or reasonably certain. This standard is occasionally used when the issue is whether a person was guilty of deceit or fraud -- a matter that normally had to be proved at common law by clear and convincing evidence, rather than by a mere preponderance.

XI. The Foundation for Your Testimony or Other Evidence

Certain basic, preliminary requirements must be met before evidence can be admitted. Those preliminary requirements are grouped under the heading of "Foundation." "Foundation" is simply the way in which an administrative adjudicator decides whether the evidence offered is connected with some issue in the hearing. Obviously, the kind of foundation that must be laid for particular evidence will depend on the way in which the evidence is offered.

A. Witnesses.
Two kinds of witnesses: **lay witnesses** and **expert witnesses**. Before evidence can be offered through the testimony of either kind of witness, certain questions must be answered concerning the competence or qualifications of that witness to provide that testimony:

1. **Lay witnesses**.
   Lay witnesses are persons who have personal knowledge of facts relating to one or more issues in the case. Lay witnesses must be qualified to give their testimony in the following ways:
   a. Be able to testify from personal knowledge
   b. Be able to perceive events through one or more of their senses
   c. Be able to recall what they perceived
   d. Be able to report what they recall, whether by speech or other means
   e. Be able to subscribe to an obligation to tell the truth, and take an oath or the equivalent to do so

2. **Expert witnesses**.
   Expert witnesses are persons who, although they usually do not have personal knowledge of facts relating to one or more issues in a case, nonetheless have a level of education, training, experience, and expertise that makes it possible for them to formulate and offer opinions respecting the answers to those issues. Foundation questions concerning qualifications of expert witnesses involve an inquiry into educations, expertise, skill, etc.,

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but that inquiry may be shortened or eliminated if the proffered expert witness has been qualified by another court to testify as an expert on the same subject.

B. Documents.
Documents (either on paper or an electronic record) are kept somewhere, under someone's custody and control. Generally speaking, a document offered as evidence must be authenticated, either by a live witness who has seen the document previously or by the custodian of the document, if it is a record that is kept in the ordinary course of business. If it's a government document, it usually may be authenticated (*i.e.*, its validity as a government document shown) by a certificate or stamp of certification from the document's custodian.

C. Objects.
If an object is identified by a live witness as "the" object referred to in the witness' testimony, this is a sufficient foundation. If the object is one of many that are all the same or similar, or is one that easily could be altered, it may be necessary to establish the object's history (chain of custody) in order to establish its authenticity. A party may object that an object is not "the" object involved in the case, but merely one that is similar. In such a case, the hearing officer may admit the object if he/she is satisfied the object has sufficient illustrative value.

XII. Testimony

A. When issuing subpoenas to witnesses for the agency, the administrative adjudicator should always send subpoenas to the Person or Persons Most Knowledgeable. If you don't know who would be most knowledgeable by name, it is permissible to issue the subpoena using those terms; however, it's better if you know who the most knowledgeable person is and can subpoena them by name.

B. Witnesses should be prepared—read, re-read and review investigative reports and other pertinent documents prior to the hearing. The more familiar they are with the reports and other documents, the better witness they will be.

D. At the hearing, agency witnesses should be pleasant and cordial to the alleged perpetrator of the event and to his counsel. If agency witnesses are anything other than polite to everyone involved in the hearing process, it damages their credibility by making them look biased rather than objective. Their testimony will be more persuasive if they're perceived to have nothing against the petitioner or petitioner's attorney.

E. Witnesses appearing to testify who will rely on a document to "refresh their recollection" before or during testimony should bring 3 copies of any reports or related documents that were read in preparation for testimony or that will be referred to in testimony: one copy for the testifying witness, one for the court, and one for the opposing party.

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F. Witnesses should never make an unequivocal (yes or no) statement under oath of which they are not 100% sure. Saying phrases like "I'm not sure" OR "I don't recall" OR "I can't remember" doesn't damage witness credibility—it enhances it. It is much better to candidly make such an admission than it is to be caught testifying to something that later turns out to be false.

F. When testifying regarding an investigation the witness conducted, the witness should not simply read their report into the record. The only circumstance under which it is permissible to read a report into the record is if the investigator has absolutely no independent recollection of the investigation. If the witness can't recall certain details, it's permissible to "refresh recollection" by reading portions of the report prior to testifying about them. It is permissible to read short excerpts from a report into the record if they are trying to quote someone's statement exactly, if the testimony involves series of numbers that would be difficult to remember, etc. If a witness is asked a question about an investigation and is uncertain of the correct answer, it is permissible to "refresh recollection" with the report before answering the question.

G. Witnesses should speak in a clear, calm, audible voice, should not talk too fast, should listen to each question carefully, and consider the answer rather than blurting it out.

H. Witnesses should act naturally and "be themselves" while testifying, as if they're having A conversation with the people involved in the hearing. They shouldn't testify looking down, but with heads up, making eye contact with persons asking you questions.

I. Witnesses should not act irritated by questions even if the question was intended to irritate. They should remain calm regardless of "hot button" questions or pauses designed to make them nervous.

J. Dressing nicely for any court appearance, whether it's a trial court or an administrative tribunal, shows respect for the law and the hearing process.

XIII. Hearsay Admissibility in Hearings

A. Hearsay described:

1. Testimony concerning what a person said other than while testifying in the proceeding at hand;
2. Offered as proof of the truth of the matter asserted (proof of what is alleged);
3. Hearsay is generally admissible in administrative hearings if the statement is the type that reasonable and prudent people would rely on in the conduct of their affairs.

B. Evidence which cannot, by definition, be hearsay:

1. Statements that are offered to prove something other than the truth of the matter asserted (*i.e.*, not offered for the purpose of proving the allegations).

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2. Statements that may imply but do not directly assert the truth of the matter.

C. Admissibility of Testimonial Documents

1. Documents with statutory authority for admission in agency's organic statutes and commonly referred to as "self-authenticating" documents because they are to be admitted without "foundation."

2. Documents admissible under the "Public Records and Reports" Exception to the Hearsay Rule:

   Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth
   (a) the activities of the office or agency, or
   (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report (typically excluding matters observed by police officers in criminal cases)
   (c) in civil actions and proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information indicate lack of trustworthiness.

XIV. Judicial Notice

"Judicial notice" is a rule that allows a fact to be established without the introduction of evidence to support the fact because the truth of the fact is so well known that it cannot reasonably be doubted. Notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the specialized knowledge of the agency.

Parties must be notified either before or during the hearing, of the material the adjudicator intends to notice and must be given an opportunity to contest the material. Judicially noticed experience, technical competence and specialized knowledge of the agency may be utilized in the evaluation of the evidence.

A. Adjudicatory Facts

1. A judicially noticed (adjudicatory) fact must be one
   (1) **not subject to reasonable dispute**;
   (2) **generally known within the territorial jurisdiction of the court**;
   (3) **capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned**.

2. *Wooden v. Missouri Pacific R. Co.*, 862 F.2d 560 at 563 (5th Cir. 1989): "Judicial notice applies to **self-evident truths that no reasonable person could question**, truisms that approach platitudes or banalities…."

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CAUTION: Just because the adjudicator may be aware of or have some knowledge of a particular fact does not make it a fact which can be judicially noticed:

"[F]acts which are not judicially cognizable must be proved, even though known to the judge or to the court as an individual. In other words, the individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record." *Darnell v. Barker*, 179 Va. 86, 18 S.E.2d 271 (1942).

"The judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer" outside of the trial or proceeding. *Government of Virgin Islands v. Geveau*, 523 F.2d 140, 147-148 (3rd Cir. 1975).

3. Examples of Adjudicatory Facts:

   a. **almanac information** (it is colder in winter and warmer in summer)
   b. **calendar facts** (that a date falls on a certain day of the week)
   c. **geographic facts** (distances and locations within your jurisdiction)
   d. **common knowledge** (alcohol is intoxicating, human gestation period is nine months, *USA Today* is distributed nationwide, electricity can "shock"
   e. **public records** (recorded deeds or tax liens, minutes of public meetings)

B. Scientific or Technical Information

   1. Judicial **notice of scientific or technical facts requires a two-point test**:

      a. **Validity of the underlying principle**: Does the principle really work? Does the test procedure measure what it is supposed to measure? Is it an accurate measurement?

      b. **Reliability of the principle**: Are the same results are obtained in each instance in which the test is performed? Is it a consistent measure?

   2. Examples of Accepted Scientific or Technical Principles

      a. the unique nature fingerprints

      b. that a radar measures speed

C. Legislative Facts: It is appropriate for an ALJ to take judicial notice of:

   1. State and Federal Statutes within your jurisdiction

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2. State and Federal Regulations within your jurisdiction

3. the legislative history of statutes or regulations

D. Agency Expertise: "An agency may take notice of general, technical, or scientific facts within its knowledge…" Agency expertise:

1. **Must be on subject matter specific to the agency's normal business**
2. **All parties must be informed of judge's intent to take notice**
3. **Parties must be allowed opportunity to contest notice**
4. **Notice must be supported in the record**, not "facts gathered here and there….after the close of the record." *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 282 (U.S. Supreme Ct. 1937).

   "The general rule is that the court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put in evidence. The reason for the rule is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him." *Bernau v. Nealon*, 219 Va. 1039, 1043, 254 S.E.2d 82, 85 (1979).

5. **Cannot be used to meet agency burden of proof**: "not permitted to rely on 'administrative notice' to establish that a claimant cannot perform certain work and that such work exists. That would enable the [agency] to avoid the burden of proof placed on [it]. To allow the [agency] to prove its case by administrative notice of key particulars is to rubber-stamp the agency determination". *Lightfoot v. Matthews*, 430 F. Supp. 620 (N.D. Cal. 1977).

E. Information Which May NOT Be Judicially Noticed

The evidence in a different administrative proceeding before the same tribunal:
The truth of the evidence in the other proceeding is not generally known or subject to ready determination from other sources. It is not an agency record that you can use, nor can you use your expertise because it is not obvious to an expert in the field. Unless the parties agree by stipulation, the record cannot be expanded to include facts for which there is no evidence.

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XV. Appellate Judicial Review of Administrative Agency Decisions

A. Judicial review of a final decision of an agency must be:
   1. Conducted by the court without a jury; and
   2. Confined to the record of the hearing.

B. In cases concerning alleged irregularities in procedure before an agency that are not shown in the record, the court may receive evidence concerning the irregularities.

C. The court may remand or affirm the final decision or set it aside in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is:
   1. In violation of constitutional or statutory provisions;
   2. In excess of the statutory authority of the agency;
   3. Made upon unlawful procedure;
   4. Affected by other error of law;
   5. Clearly erroneous in view of the reliable, probative, evidence in the record;
   6. Arbitrary, capricious or characterized by abuse of discretion.

D. Errors respecting Findings of Fact are evaluated using the *Substantial Evidence* standard of review which requires that:
   1. The review is based on record in its entirety and only on the record;
   2. "Substantial Evidence" is defined as "evidence which a reasonable mind might accept as adequate to support a conclusion."

E. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the agency or a lower reviewing court.

F. The reviewing court may reverse a decision of an administrative agency if the substantial rights of the appellant have: been prejudiced by:

   1. Been prejudiced by a legal error; or

   2. The action taken by the agency was an abuse of its discretion.

      a. Was the agency vested with discretion by the statutes? (*e.g.* The word "may" in a statute was addressed to the party but agency misconstrues statute believing "may" applies to the agency).
      b. The agency had discretion but failed to exercise it (*e.g.* Agency states "We had no choice but to respond in this way" when, in fact, it had discretionary authority to act otherwise.)
      c. Agency had discretion, but exercised it outside the legally permissible range of choices. (*e.g.* Agency imposed a $25,000 administrative fine when the maximum fine authorized by statute was a lesser amount.)

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XVI. From the ABA Model Code of Conduct for Administrative Law Judges

Canon 3, Section A, Subsection (6):

"A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their representatives, full right to be heard according to law and, except as authorized by law, neither initiate nor consider *ex parte* or other communications as to substantive matters concerning a pending or impending proceeding. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, by *amicus curiae* or as otherwise authorized by law, if the judge affords the parties reasonable opportunity to respond. With the consent of the parties, a judge may confer separately with the parties and their lawyers in an effort to medicate or settle matters pending before the judge. *Ex Parte* communications are prohibited, except where authorized by law."

Canon 3, Section C, Subsection (1)(a):

"A state administrative law judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning the proceeding."

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