Some Court Decisions Relating to Administrative Adjudication

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Part 1 “Circuit Courts shall have such power to review administrative action as provided by law.”

Illinois Const., Art. VI, § 9

> Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provided by law.

Generally, where the Administrative Review Law is applicable the circuit court's power to resolve factual and legal controversies surrounding an administrative action must be exercised through its review of an administrative agency's final decision and not in a separate proceeding. There are exceptions.

Where plaintiff is seeking judicial intervention to protect their civil rights under Section 42 USC 1983 and the Illinois Civil Rights Act 10 ILCS 5/29-17 Whitten v. Rochester Township Republican Central Committee, 2021 IL App (4th) 210018-U

Where plaintiff is challenging constitutionality of a statute on its face *Phillips v. Graham, 86 Ill. 2d 274, 289, 427 N.E.2d 550, 56 Ill. Dec. 355 (1981)*

Where administrative agency's subject matter jurisdiction is disputed *Kane County v. Carlson, 116 Ill. 2d 186, 199, 507 N.E.2d 482, 107 Ill. Dec. 569 (1987)*

Where it would be patently futile to seek relief before the appropriate agency); *Graham v. Illinois Racing Board, 76 Ill. 2d 566, 573, 394 N.E.2d 1148, 31 Ill. Dec. 771 (1979)*

Part 2 Authority of ALJ

A. Can ALJ decide the validity of a rule or ordinance or ordinance?

Where a conditional challenge is raised, consider the following response: As an administrative law judge, I do not have the authority to make a ruling as to whether a County ordinance or regulation is constitutional.[1] I will allow a party to place on the record his or her argument.”

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[1] Yellow Cab Co. v. City of Chicago, 938 F. Supp. 500 (N.D. Ill. 1996)

> “Generally, an administrative agency is "without power or expertise to pass upon the constitutionality of administrative or legislative action." Spiegel, Inc. v. Federal Trade Commission, 540 F.2d 287, 294 (7th Cir. 1976). See also Alleghany Corporation v. Haase, 896 F.2d 1046, 1051-52 (7th Cir. 1990) (noting that courts commonly hold that administrative agencies lack the power to determine the constitutionality of legislation they enforce), vacated in part as moot sub nom Dillon, Commissioner, Indiana Department of Insurance v. Alleghany

The constitutionality of an ordinance will be determined by a court of law, if a party seeks judicial review of your administrative decision. However, you should provide the party with an opportunity to raise the issue and articulate an argument supporting that position.

Board of Education v. Brown, 311 Ill. App. 3d 478, 724 N.E.2d 956 (1st Dist. 1999) involved the defendants' petition to detach their small residential real estate development from one township and annex to another township order. The plaintiffs maintained that the annexation would violate the constitution. At the conclusion of an administrative hearing the Board granted the petition.

The plaintiffs appealed to the Circuit Court. The Circuit court remanded the case to the Board. Pursuant to the trial court's remand order, the Board conducted hearings regarding the constitutional claims asserted by plaintiffs and rendered a final administrative decision and order denying the petition for detachment. Each township rendered a written decision setting forth its findings of fact and conclusions of law as to the constitutional claims. Unanimity of opinion absent, the Board denied the detachment upon consideration of plaintiffs' constitutional challenges. On March 4, 1998, the Circuit Court then entered an order stating in relevant part: "The Township Trustees should have granted the Defendants' petition and allowed the detachment and annexation.

The Appellate court reversed finding that the trial court erred in delegating to the administrative agency the court's responsibility to make constitutional determinations.

> " Further, an administrative agency must accept as constitutional, the statute over which it has jurisdiction. Wiseman v. Elward, 5 Ill. App. 3d 249, 257, 283

> Corp., 499 U.S. 933, 113 L. Ed. 2d 441, 111 S. Ct. 1383 (1991); Tillett v. Lujan, 931 F.2d 636, 640 (10th Cir. 1991) ("Nor do we generally commit to an administrative agency the power to determine the constitutionality of its regulations [or of legislation]").[footnote omitted]

Hunt v. Daley, 286 Ill.App.3d 766,677 N.E.2d 456 (1st Dist. 1997)

> "We first address the waiver issue. At the outset, we note that the parties agree that, as is the case with administrative agencies generally, the Mayor's License Commission did not have the power to invalidate a statute in the first instance because of any substantive due process violation. See generally 2 Am. Jur. 2d Administrative Law § 77, at 99 (1994) ("it is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable."). See also Yellow Cab Co. v. City of Chicago, 938 F. Supp. 500 (N.D. Ill. 1996) (administrative agencies lack power to determine the constitutionality of legislation which they must enforce); Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987) (administrative agency has no power to declare a statute void or unenforceable)."

Am Jur 2d Administrative Law § 68

> "As a general rule, administrative agencies have no jurisdiction to decide issues of constitutional law. The power delegated by the legislature to an agency generally does not include the inherent authority to decide whether a particular statute or regulation that the agency is charged with enforcing is constitutional."

N.E.2d 282 (1972); Phelan v. County Officers Electoral Board, 240 Ill. App. 3d 368, 373, 608 N.E.2d 215, 181 Ill. Dec. 142 An agency lacks the authority to invalidate a statute on constitutional grounds or even to question its validity. Texaco-Cities Serv. Pipeline Co. v. McGaw, 182 Ill. 2d 262, 278, 230 Ill. Dec. 991, 695 N.E.2d 481 (1998)"

See also: Hofrichter v. City of Chi. Heights, 2016 IL App (1st) 153106, 2016 Ill. App. LEXIS 717, 408 Ill. Dec. 695, 66 N.E.3d 487;Puffer-Hefty Sch. Dist. No. 69 v. Du Page Reg'l Bd. of Sch. Trs., 339 Ill. App. 3d 194, 789 N.E.2d 800, 2003 Ill. App. LEXIS 528, 273 Ill. Dec. 626 ("An administrative agency must accept as constitutional the statute over which it has jurisdiction"') Stykel v. City of Freeport, 318 Ill. App. 3d 839, 742 N.E.2d 906, 2001 Ill. App. LEXIS 34, 252 Ill. Dec. 368 ("an agency lacks the authority to question the validity or constitutionality of a statute.")

While a body of case law holds that an administrative agency does not have the authority to determine the constitutionality of an ordinance or statute, the courts have held that a party waives any argument as to the constitutionality or legality of a statute, ordinance or regulation, if the party fails to raise the issue at the administrative level.

Where a party challenges the validity of an ordinance as applied, the issue must be raised in the administrative hearing.[2] However, where the party challenges the ordinance or regulation on its face, the issue is not waived if the party fails to raise it at the administrative level.[3]

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[2] "It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review." Kinkos v. Village of Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 212, 886 N.E.2d 1011, 1019, 319 Ill. Dec. 887 (2008). *"It is quite established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review." Cinkus v. Village of Stickney Municipal Officers Electoral Board, 228 Ill. 2d 200, 212, 886 N.E.2d 1011, 1019, 319 Ill. Dec. 887 (2008). A party's right to challenge the validity of a statute also falls under the procedural default rule even if the administrative body lacks the power to declare a statute unconstitutional or challenge the statute's validity. Cinkus, 228 Ill. 2d at 214, 886 N.E.2d at 1020. The purpose behind the practice of requiring these challenges to be raised during the administrative hearing is to avoid "piecemeal litigation and, more importantly, allow[] opposing parties a full opportunity to refute" the arguments made. Cinkus, 228 Ill. 2d at 214, 886 N.E.2d at 1020.*

[3] "Courts have made an exception to the general procedural-default rule for challenges to the facial validity of a statute. [Citation.] Such a case 'presents an entirely legal question that does not require fact-finding by the agency or application of the agency's particular expertise.' [Citation.] In contrast, a challenge to a statute as applied to a litigant relies upon certain factual bases. Thus, when a litigant presents an as-applied challenge, 'an evidentiary record is indispensable because **administrative** review is confined to the record created before the agency.' [Citation.] In such a case, the rule of procedural default 'allows opposing parties a full opportunity to present evidence to refute the constitutional challenge.' [Citation.]" *Gruwell v. Department of Financial and Professional Regulation, 406 Ill. App. 3d*

Does an ALJ have the authority to determine that an ordinance violates a statute? In *City of Chicago v. Wendella Sightseeing, Inc.*, 2019 IL App (1st) 181428 the ALJ ruled that the Chicago's Municipal Tax violated federal law and therefor the Supremacy clause in the United States Constitution. The appellate court affirmed the decision. The panel did not discuss the ALJ's authority to find the ordinance invalid.

B. Where the agency fails to notify party of charges and hearing date in a manner required by ordinance or statute, is administrative order void or voidable?

in *Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings*, 2017 IL 117720, 88 N.E.3d 699, the Court held that the Department of Administrative Hearings was without jurisdiction to adjudicate the alleged municipal code violation because the notice provided to the Corporation did not meet the standards set out in the Chicago Municipal Code and the record was devoid of any evidence showing that the party who appeared purportedly on behalf of the Corporation had legal authorization to do so.

> *To reiterate what we have already said, there is no dispute that Stone Street received no such notice with respect to the building code violations that gave rise to this litigation. The notice issued by the City was never served on the corporation's registered agent or sent to the corporation's principal place of business as required by section 2-14-074(c) of the Chicago Municipal Code (Chicago Municipal Code § 2-14-074(c) (amended Apr. 29, 1998)). As the appellate court, correctly recognized (2014 IL App (1st) 123654, P14, 382 Ill. Dec. 412, 12 N.E.3d 691), the only possible way this fundamental lapse could be cured is if the lack of proper notice was subsequently waived by Johnson's appearance at and participation in the hearing. As we have already explained, however, no such waiver can be imputed to Stone Street. Because it is manifest from the record before us that Johnson's actions were neither authorized nor ratified by Stone Street, anything he did or failed to do at the hearing did not cure the City's failure to properly serve the corporation. Issues regarding the unauthorized practice of law are immaterial. Even if Johnson had been an attorney, his lack of actual or apparent authority to act on Stone Street's behalf and the absence of after-the-fact ratification of his conduct by Stone Street precludes any claim by the City that Johnson's conduct operated as a waiver by Stone Street of the company's objections to the City's failure to notify it of the violations or the hearing thereon as required by law.*
>
> *The notice requirements were jurisdictional prerequisites that the Department was required to follow in order for it to have authority to hear the case and adjudicate the*

283, 297-98, 943 N.E.2d 658, 671-72, 348 Ill. Dec. 50 (2010), quoting *Arvia v. Madigan, 209 Ill.2d 520, 527-28, 809 N.E.2d 88, 94, 283 Ill. Dec. 895 (2004)*.

charges against Stone Street. In re Abandonment of Wells Located in Illinois, 343 Ill. App. 3d 303, 307, 796 N.E.2d 623, 277 Ill. Dec. 537 (2003); see Newkirk v. Bigard, 109 Ill. 2d 28, 36, 485 N.E.2d 321, 92 Ill. Dec. 510 (1985). Because Stone Street was never properly served with notice and because Johnson had no authority to appear on the company's behalf, the Department failed to acquire personal jurisdiction over it. The Department's 1999 judgment imposing fines on Stone Street was therefore void ab initio and could be attacked at any time, either directly or collaterally. See In re Abandonment of Wells Located in Illinois, 343 Ill. App. 3d at 307; City of Chicago v. Fair Employment Practices Comm'n, 65 Ill. 2d 108, 112-13, 357 N.E.2d 1154, 2 Ill. Dec. 711 (1976); Siddens v. Industrial Comm'n, 304 Ill. App. 3d 506, 511, 711 N.E.2d 18, 238 Ill. Dec. 205 (1999); People v. Smith, 275 Ill. App. 3d 844, 850-51, 656 N.E.2d 797, 212 Ill. Dec. 200 (1995). Accordingly, regardless of whether the Department could itself have set aside the void judgment in the context of the 2011 administrative proceeding; the judgment could have been set aside by the circuit court as Stone Street requested. The appellate court was therefore correct when it held that Stone Street should have been permitted to pursue its claims to quiet title and obtain declaratory relief to invalidate all proceedings premised on the void 1999 judgment and that the portions of count II seeking such relief should therefore not have been dismissed by the circuit court.

C. Does the ALJ have the authority to consider a claim of a party where the claim was filed after the deadline set by statute or ordinance?

In *Austin Gardens v. City of Chicago Department of Administrative Hearings,* 2018 IL App (1st) 163120; 96 N.E.3d 367 the respondent filed a motion to vacate the default uncourt 18 months after the order was issued. The Chicago Municipal Code also provided that there was a 21-day limit on filing a motion to set aside. The respondent claimed that the delay was occasioned by its mistaken belief that the matter had been resolved in a separate action filed with the Circuit Court. The ALJ entered an order denying the motion. The appellate court ruled that the ALJ did not have jurisdiction to consider and deny the motion.

> *The 21-day limit in Chicago, Ill., Mun. Code § 2-14-108(a) constitutes a limit on the Department of Administrative Hearings' jurisdiction. Although"[a]n ordinance that dictates a procedural command to a government official is presumed directory rather than mandatory that principle is not relevant to the analysis in this case. The 21-day time limitation in section 2-14-108(a) is not a procedural directive to government officials, but it specifies when a party must act to obtain review of a default judgment. Thus, we reject Austin Gardens' argument that the provision is merely directory. Rather, consistent with the precedent discussed, it limits the DOAH's authority to act. Because Austin Gardens did not move to*

vacate the default judgment within the 21-day limit set by the Code, the DOAH lacked jurisdiction to consider that motion, and its December 19, 2014, order is void. In turn, the circuit court should not have reached the merits of Austin Gardens' complaint for administrative review, but "was limited to reviewing the [DOAH's] decision for whether the decision was void. Accordingly, the order of the DOAH denying the motion to vacate, as well as the judgment of the circuit court affirming that decision, must be vacated.

D. What are the consequences of an agency's failure to meet time frames set out in statute or ordinance?

Sloper v. City of Chicago, 2014 IL App (1st) 140712, 23 N.E.3d 1208 involved a vehicle impoundment by the City of Chicago. The municipal ordinance provides that the "hearing date must be no more than 30 days after a request for a hearing has been filed." The hearing was conducted after the 30-day deadline. The ALJ denied the respondent's motion to dismiss. The Appellate Court sustained the city's position finding that the 30-day provision was directory rather than mandatory.

> *We find that section 2-14-132(2)'s requirement that the hearing date "must be no more than 30 days" after the filing of a request for a hearing is directory rather than mandatory, and, therefore, we reject Sloper's claim that the administrative agency lost jurisdiction by failing to conduct the hearing within 30 days.*
>
> *The plain and unambiguous language of section 2-14-132(2) expressly requires the administrative agency to schedule a hearing date within 30 days after a request, but the ordinance's plain language does not compel the conclusion that the failure to commence and conclude the hearing within that period deprives the agency of jurisdiction. Important to this analysis is the fact that the ordinance fails to impose any consequences if the hearing is not scheduled within 30 days nor does it contain any negative language preventing further action if the 30-day time limit is not met.*
>
> *Moreover, the purpose of section 2-14-132(2) is to provide the owner of an impounded vehicle with the right to request a hearing "to challenge whether a violation of this Code for which seizure and impoundment applies has occurred." Chicago Municipal Code § 2-14-132(2) (amended July 28, 2011). An ALO's decision to continue a hearing date beyond 30 days does not defeat the ordinance's purpose because the owner may still challenge the violation. See In re James W., 2014 IL 114483, ¶ 35, 381 Ill. Dec. 621, 10 N.E.3d 1224 (procedural command deemed mandatory when the right the provision is designed to protect would generally be injured under a directory reading). Further, as we discuss below, because a vehicle owner is able to secure the vehicle's release by paying the penalty and fees, subject to a refund if the owner prevails at the hearing, the owner can avoid an extended period of deprivation of*

use of the vehicle. Thus, the ordinance's plain language does not defeat the presumption of a directory reading of the procedural command and a directory interpretation is most consistent with the drafters' intent.

In Cooper v. Department of Children & Family Services, 234 Ill. App. 3d 474, 599 N.E.2d 537, 174 Ill. Dec. 753 (1992) the Department of Children and Family Services (DCFS) failed to hold a hearing within 30 days, as required by statute after the agency notified the owners of a daycare center that DCFS sought to revoke their license to operate. The circuit court concluded that the failure to hold a timely hearing caused DCFS to lose jurisdiction. Id. On appeal, our court discussed whether the statutory 30-day time frame was "mandatory, thus leaving DCFS without jurisdiction" or "merely directory." Id. We concluded that the provision was only directory: The Appellate Court reversed

*"Here, by allowing a mandatory interpretation of this provision ***, the persons whom the statute was intended to protect, children, will be adversely affected. *** Moreover, there is no negative language in the statute denying performance by DCFS for failure to comply with the statute. It appears that this provision is one that merely directs a manner of conduct for the guidance of the officials and specifies the time for performance of an official duty. Thus, *** we hold this provision is directory*."

See also *Lakewood Nursing & Rehabilitation Center, LLC v. Department of Public Health*, 2019 IL 124019 Illinois Supreme Court held that statutory time limit for completion of a hearing was not mandatory.

E. May an ALJ engage in plea-bargaining?

In *Stone Street Partners, LLC v. City of Chicago*, 2017 IL App (1st) 133159, 91 N.E.3d 965, the ALJ began the hearing within admonishment, saying that those who admitted liability would receive the minimum fine permitted by the ordinance. The ALJ warned that those who proceed to a hearing, if found liable, could receive a higher fine. The respondent rejected the offer. At the conclusion of the hearing, the respondent was found liable. The ALJ imposed a fine in an amount greater than the minimum fine authorized by the ordinance. On appeal, the respondent argued that the higher fine violated due process. The appellate court rejected that argument.

In Pearce, the Supreme Court held that (1) "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and (2) the reasons for the increased sentenced "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726; see Alabama v. Smith, 490 U.S. 794, 798-99, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989) ("In order to assure the absence of such a motivation [of vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for him doing so must affirmatively appear. [Citation.] Otherwise, a presumption arises

*that a greater sentence has been imposed for a vindictive purpose—a presumption that must be rebutted by objective information *** justifying the increased sentence." (Internal quotation marks omitted.)). The Pearce presumption applies in administrative proceedings. See Waicekauskas, 336 Ill. App. 3d at 439.*

We nonetheless find Pearce inapplicable here because the ALJ's conduct in this case amounted to nothing more than constitutionally permissible plea bargaining. As the United States Supreme Court has explained, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citations.] But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

"The plea-bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but [the Supreme Court has] repeatedly held that the government 'may encourage a guilty plea by offering substantial benefits in return for the plea.'" United States v. Emanate, 513 U.S. 196, 209-10, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995) (quoting Corbitt v. New Jersey, 439 U.S. 212, 219, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978)); see United States v. Cruz, 977 F.2d 732, 733 (2d Cir. 1992) ("Courts have long recognized that trial judges are entitled to encourage guilty pleas by imposing on a defendant who pleads guilty a lesser sentence than would have been imposed] had the defendant stood trial." (citing Corbitt, 439 U.S. at 219)). "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" Bordenkircher, 434 U.S. at 364 (quoting Chaffin v. Cytochrome, 412 U.S. 17, 31, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973)). It is therefore not a violation of due process to impose a harsher punishment after a defendant declines to enter into a plea agreement. See id. at 365; People v. Walker, 84 Ill. 2d 512, 522, 419 N.E.2d 1167, 50 Ill. Dec. 718 (1981) ("Bordenkircher teaches that defendants who make knowing, voluntary, and intelligent choices to risk an increased sanction rather than plead guilty pursuant to a plea bargain will be held to that choice."); see also Smith, 490 U.S. at 802 ("[W]e have upheld the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial."). Thus, in People v. Lewis, 88 Ill. 2d 129, 430 N.E.2d 1346, 58 Ill. Dec. 895 (1981), the Illinois Supreme Court rejected the defendant's claim that the State violated his right to due process by seeking the death penalty after he rejected a plea bargain. The court explained:

*"There is no merit to the contention that the prosecutor's action in offering to recommend a 60-year sentence if defendant pleaded guilty and seeking the death penalty when defendant elected to stand trial, penalized defendant for exercising his constitutional right to a jury trial. It is entirely clear that defendant knew death was a possibility when he chose to stand trial. There is here no indication of a purpose to punish defendant for exercising his right to jury trial, *** nor allegations of prosecutorial vindictiveness ***. Unless we are willing to say that a prosecutor may never seek a penalty greater than that offered in plea discussions, defendant's argument here must fail, for his election to stand trial was made with a complete understanding of the hazards." Id. at 148-49.*

*Stone Street's complaint alleges that the ALJ stated that she had been authorized by the City to impose only the minimum fine in exchange for a plea to liability. The ALJ cautioned, however, that for parties that did not plead liable, the minimum fine was off the table and a more harsh punishment would be levied. Stone Street has not alleged that it was not "free to accept or reject the [ALJ's] offer." Bordenkircher, 434 U.S. at 363. Stone Street has also not alleged that the ALJ's statement was incomplete or ambiguous. As a result, Stone Street cannot contend that its decision to have a contested hearing was not "made with a complete understanding of the hazards." Lewis, 88 Ill. 2d at 148-49. Consequently, we find that the total of the allegations in Stone Street's complaint, and all reasonable inferences which can be drawn from those allegations, is that the ALJ conveyed the City's constitutionally permissible offer of plea bargaining. The ALJ's threat to impose higher fines on persons who requested hearings—a threat she made good upon **by** increasing Stone Street's fine by $100 over the minimum—was heavy-handed. But case law from higher courts compels us to find that her practice was constitutional, as against the specific challenges raised in Stone Street's complaint. Accordingly, the circuit court properly dismissed count II of Stone Street's complaint for failure to state a claim for a due process violation.*

F. Where the prosecuting governmental body does not participate in an administrative adjudication proceeding, may the ALJ, sua sponte, select and admits into evidence materials prepared by the governmental body?

In Stone Street Partners, LLC v. City of Chicago, 2017 IL App (1st) 133159, 91 N.E.3d 965, the county's case was prosecuted without the presence of a representative of the County. The ALJ entered the documentation filed by the City into evidence, although the City was unrepresented and did not request that the documentation be entered into evidence. On appeal, the respondent argued that the ALJ was playing the role of an adjudicator and the prosecutor. The court sided with the ci*ty.*

Stone Street contends that the ALJ served as both judge and prosecutor. This, Stone Street contends, violated its due process rights. . .... In Scott v. Department

*of Commerce & Community Affairs, 84 Ill. 2d 42, 54, 416 N.E.2d 1082, 48 Ill. Dec. 560 (1981), the Illinois Supreme Court rejected a claim virtually identical to Stone Street's. The Scott court characterized the argument as follows: "Plaintiffs' final argument is *** that they are entitled to a hearing before an impartial tribunal, and that due process requirements preclude the Department from serving as both prosecutor and judge. We do not agree." The court explained that, "[w]ithout a showing to the contrary, State administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly since its own circumstances.'" Id. at 55 (quoting United States v. Morgan, 313 U.S. 409, 421, 61 S. Ct. 999, 85 L. Ed. 1429 (1941)). Relying extensively on Martin-Trigon v. Underwood, 529 F.2d 33 (7th Cir. 1975), the Scott court explained:*

> *"'one who asserts this contention necessarily carries or assumes a difficult burden of persuasion. Initially, he must overcome a presumption of honesty and integrity in those serving as adjudicators; and second, he "must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."'" Scott, 84 Ill. 2d at 55-56 (quoting Martin-trigonal, 529 F.2d at 37, quoting Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).*

Stone Street argues that the ALJ violated its due process rights by "search[inn] for, find[in], present[inn] and accept[in] into evidence documentary evidence (in the form of photographs) into the record." But even taking those allegations as true, they do not allege that the ALJ was predisposed to rule against Stone Street. Moreover, Stone Street's complaint does not allege that "[t]he adjudicatory function" of the ALJ in this case was not "completely separate from the investigatory function" of the officer who issued the citation. Van Harken v. City of Chicago, 305 Ill. App. 3d 972, 985, 713 N.E.2d 754, 239 Ill. Dec. 223 (1999); see id. at 984 ("Illinois case law, however, rejects the notion that the combination of investigatory, prosecutorial and judicial functions offends due process."). Based on the foregoing, we find that the circuit court correctly determined that count I failed to state a claim for a due process violation.

G. Does an ALJ have the authority to impose a sanction when necessary to preserve the integrity of an authorized adjudicative proceeding?

Federal courts have upheld orders that impose litigation sanctions on parties who violate an administrative agency's procedural rules. See Roadway Exp., Inc. v. U.S. 1Dept. of Labor, 495 F.3d 477, 484 (7th Cir. 2007) ("[A]agency's rules unambiguously permit the ALJ to impose, as a discovery sanction, an order excluding evidence that a non-complying party wishes to introduce in support of its claim."); In re Bogese, 303

F.3d 1362, 1367-68 (Fed. Cir. 2002) (Patent and Trademark Office, like other administrative agencies, may impose reasonable deadlines and requirements on parties appearing before it and has broad authority to sanction undue delay by holding a patent unenforceable); Atlantic Richfield Co. v. U.S. Dep't of Energy, 769 F.2d 771, 793 (D.C. Cir. 1984) (rejecting argument that administrative agency "cannot impose evidentiary sanctions—of course, short of a fine or imprisonment—when necessary to preserve the integrity of an authorized adjudicative proceeding"). As the court of appeals in Atlantic Richfield Co. stated,

> It seems to us incongruous to grant an agency authority to adjudicate—which involves vitally the power to find the material facts—and yet deny authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative adjudicatory proceeding has no incentive to comply, and often times has every incentive to refuse to comply. 769 F.2d at 796.

Part 3 Interpretation of Statutes, Rules and Ordinances

A. What does “shall” mean”?

Openlands v. DOT, 2018 IL App (1st) 170340, 127 N.E.3d 40 centered on the following statutory provision:

> "The Board, in cooperation with local governments and transportation providers, shall develop and adopt a process for making the transportation decisions that require final MPO approval pursuant to federal law. That process shall comply with all applicable federal requirements. The adopted process shall ensure that all MPO plans, reports, and programs shall be approved by the CMAP Board prior to final approval by the MPO." Id. § 60(c).

The plaintiffs challenged a plan of the Metropolitan Planning Organization (MPO) because the plan had not been approved by the Chicago Metro Planning Agency

> *The Plaintiffs hang their hat on the language of section 60(c) requiring that the Chicago Metro Planning Agency Board approve all MPO plans, reports, and programs prior to final approval by the MPO Policy Committee. Plaintiffs argue that the language of this clause, which utilizes "shall," is clear and unambiguous. Thus, in this case, they argue the MPO Policy Committee's vote to include the Iliana Tollway in the short- and long-range regional planning was nullified by the Chicago Metro Planning Agency Board's vote to exclude it. “The Appellate Court rejected the plaintiffs’ argument explaining that . . .*
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> *The word "shall" generally indicates the legislature's intent to impose a mandatory obligation. People v. Robinson, 217 Ill. 2d 43, 50, 838 N.E.2d 930, 298 Ill. Dec. 37 (2005); Pace, 346 Ill. App. 3d at 140. The term does not have a fixed or inflexible meaning, however, and may be given a permissive or directory interpretation depending on the legislative intent. Pace, 346 Ill. App. 3d at 140. "If the provision merely directs a manner of conduct to guide officials or is designed to secure order, system, and dispatch in proceedings, it is generally directory." Id. In other words, we presume commands to government officials regarding procedure are usually directory, but this presumption is overcome when there is negative language prohibiting further action in the case or when the official's failure to follow the procedure will generally injure the right the procedure was designed to protect. People v. Delvile, 235 Ill. 2d 507, 517, 922 N.E.2d 330, 337 Ill. Dec. 207 (2009); Robinson, 217 Ill. 2d at 56. As such, when a statute expressly prescribes a consequence for failure to obey a statutory provision, that is very strong evidence the legislature intended that consequence to be mandatory. Robinson, 217 Ill. 2d at 54.*

Concerning 70 ILCS 1707/60(c) (2014), the Illinois Legislature's use of the word "shall" with regard to the Chicago Metro Planning Agency Board's approval process is directory, rather than mandatory. First, there is no negative language prohibiting further action if the Chicago Metro Planning Agency Board does not first approve of all Metropolitan Planning Organization (MPO) plans, reports, and programs. In fact, the Regional Planning Act contains numerous directives employing the word, "shall," without identifying consequences for failing to enforce the obligatory language. The use of the word "shall" throughout the statute thus directs the Chicago Metro Planning Agency and its Board in their conduct while securing order and dispatch in how they are to proceed. The statute, as written, is clearly a blue print for how government officials are to proceed. There are no specific consequences cited for the Chicago Metro Planning Agency Board's failure to first approve the MPO's plans, reports, and programs.

However, where statute provides that a private party shall take certain procedural step, "shall" has a different meaning,

Austin Gardens v. City of Chicago Department of Administrative Hearings, 2018 IL App (1st) 163120; 96 N.E.3d 367 involved a situation where a respondent filed a request to set aside a default judgment months after the entry of the judgment. The Chicago Municipal Code requires that the motion be filed within 21 days after the issuance of the default judgment. Both the city and the respondent argued that this requirement was directory, rather mandatory. The appellate court disagreed.

> ***A****ustin Gardens relies on Cooper to argue that section 2-14-108 of the Code is directory and does not impact DOAH's jurisdiction. This argument is without merit, as the distinction between "directory" and "mandatory" concerns provisions directing government officials, not limits upon parties. As explained by our supreme court:*
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> *"the law presumes that statutory language issuing a procedural command to a government official is directory rather than mandatory, meaning that the failure to comply with a particular procedural step will not have the effect of invalidating the governmental action to which the procedural requirement relates. That presumption can be overcome under either of two conditions: (1) when there is negative language prohibiting further action in the case of noncompliance or (2) when the right the provision is designed to protect would generally be injured under a directory reading." (Emphasis added.) In re James W., 2014 IL 114483, ¶ 35, 381 Ill. Dec. 621, 10 N.E.3d 1224.*
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> *This inquiry also applies to Code provisions governing acts by DOAH officials. Sloper, 2014 IL App (1st) 140712, ¶ 19 ("An ordinance including language that dictates a procedural command to a governmental official is presumed directory rather than mandatory, which means the failure to comply *** does not invalidate the governmental action to which the*

procedural requirement relates."). Thus, the DOAH's failure to act within a time period set forth by the Code will not cause the agency to lose jurisdiction, if the Code provision is merely directory. See id. ¶ 20 (DOAH's failure to conduct vehicle impoundment hearing within 30 days of party's request, as required by section 2-14-132(2) of the Code, did not deprive DOAH of jurisdiction, as the ordinance was "directory rather than mandatory").

*Although "[a]n ordinance *** that dictates a procedural command to a government official is presumed directory rather than mandatory" (id. ¶ 19), that principle is not relevant to the analysis in this case. The 21-day time limitation in section 2-14-108(a) is not a procedural directive to government officials, but it specifies when a party must act to obtain review of a default judgment. Thus, we reject Austin Gardens' argument that the provision is merely directory. Rather, consistent with the precedent discussed, it limits the DOAH's authority to act.*

*Because Austin Gardens did not move to vacate the default judgment within the 21-day limit set by the Code, the DOAH lacked jurisdiction to consider that motion, and its December 19, 2014, order is void. Modrytzkji, 2015 IL App (1st) 141874, ¶ 14. In turn, the circuit court should not have reached the merits of Austin Gardens' complaint for administrative review, but "was limited to reviewing the [DOAH's] decision for whether the decision was void." **Id. ¶ 15** (citing Kyles v. Maryville Academy, 359 Ill. App. 3d 423, 432, 834 N.E.2d 441, 295 Ill. Dec. 860 (2005)).[2] Accordingly, the order of the DOAH denying the motion to vacate, as well as the judgment of the circuit court affirming that decision, must be vacated.*

B. What degree of deference should be accorded to an agency's interpretation of its rules, ordinances or statutes?

Medponics Illinois, LLC v. Department of Agriculture, 2021 IL 12544 involved an administrative decision of the Illinois Department of Agriculture (DOA) to issue cannabis license to Currative. The license permitted Currative to operate a medical cannabis cultivation center. In the process of issuing the permit, DOA interpreted its rules and a provision in the Compassionate Use of Medical Cannabis Pilot Program Act which governs the location requirement for medical cannabis cultivation center permits.

Medponics, a competitor of Currative, filed an action seeking judicial review of DOA's decision awarding the license to Curative. The circuit court found that DOA misinterpreted its rule and reversed DOA's decision awarding the license.

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[2] We note that the voidness of the DOAH's decision on the motion to vacate does not deprive our court of jurisdiction although "we are limited on review to considering whether the [DOAH] had authority to act." Modrytzkji, 2015 IL App (1st) 141874, ¶ 16.

The appellate court reversed the circuit court's ruling and ordered the permit reinstated to Curative. The Illinois Supreme Court affirmed the appellate court' decision and in doing so the court explained:

> *The applicable standard of review will determine the level of deference given to the **administrative** agency's decision and is contingent on whether the question is one of fact, one of law, or a mixed question of law and fact. AFM Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 390, 763 N.E.2d 272, 261 Ill. Dec. 302 (2001). If the question presented is one of fact, the **administrative** agency's factual findings are considered prima facie correct and will only be reversed by the reviewing court if they are against the manifest weight of the evidence. Marconi v. Chicago Heights Police Pension Board, 225 Ill. 2d 497, 540, 870 N.E.2d 273, 312 Ill. Dec. 208 (2006). Questions of law are subject to de novo review. AFM Messenger Service, 198 Ill. 2d at 390. Mixed questions of law and fact are reviewed **under** the clearly erroneous standard. Id. at 391. A mixed question is one where the facts are admitted, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard or whether the rule of law is violated when applied to the established facts. Id.*
>
> *The facts here are undisputed, as the parties agree that the proposed location of Curative's cultivation center is closer than 2500 feet to the R-1 and R-5 districts in Aurora. However, the rule of law is contested, as the parties disagree on the propriety of the DOA's interpretation of the location requirement in the Administrative Rules (see 8 Ill. Adm. Code 1000.10 (2014)) and the application of that interpretation to the zoning of the R-1 and R-5 districts in Aurora. Accordingly, the question is one of law, which we review de novo. AFM Messenger Service, 198 Ill. 2d at 390; see also Roselle Police Pension Board, 232 Ill. 2d at 552 (**HN8**[] issues of statutory construction are questions of law which are reviewed de novo).*
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> *Notwithstanding our de novo standard of review, regulations adopted by an **administrative** agency are presumptively valid. Hartney Fuel Co. v. Hamer, 2013 IL 115130, ¶ 38, 998 N.E.2d 1227, 376 Ill. Dec. 294. Moreover, even applying a de novo review, an agency's interpretation of its own regulations is entitled to substantial deference and weight, as the agency makes informed judgments based on its **[**17]** expertise and experience and provides a knowledgeable source in ascertaining the intent of the legislature. Id. Additionally, an agency's interpretation of a statute is given deference on de novo review unless it is erroneous, unreasonable, or conflicts with the statute. Hadley v. Illinois Department of Corrections, 224 Ill. 2d 365, 371, 864 N.E.2d 162, 309 Ill. Dec. 296 (2007).*
>
> *To resolve the issue on appeal, we apply principles of statutory construction to the question of the DOA's interpretation of the location requirement in the Administrative Rules in conjunction with the relevant provisions of the Zoning Ordinance regarding the zoning of the R-1 and R-5 districts, as applied to the location of Curative's cultivation center. See People ex rel. Madigan v. Illinois Commerce Comm'n, 231 Ill. 2d 370, 380, 899 N.E.2d 227, 326 Ill. Dec. 10 (2008) (**HN10**[] administrative rules have force and effect of law and are construed under*

> *the standards governing construction of statutes); City of Chicago v. Morales, 177 Ill. 2d 440, 447, 687 N.E.2d 53, 227 Ill. Dec. 130 (1997) (same rules governing statutory construction*

Peterson Plaza Preservation, L.P. v. City of Chicago Department of Finance, 2019 IL App (1st) 181502 involved an interpretation of the City's transfer tax ordinance. The ordinance exempted from the tax imposed on the transfer of title of “real property used primarily for *commercial or industrial* purposes located in an enterprise zone." The ordinance did not provide a definition of “commercial.”

The plaintiffs challenged the denial of their waiver request. They were provided with an administrative hearing. At the hearing, they contended that they used the properties inside the enterprise zones exclusively for the commercial purpose of generating profits from rents received in exchange for the right of occupancy and for providing various other (free) services to the tenants, such as GED classes, literacy programs, health screenings, and job training.

Relying on tax rulings, the ALJ concluded that the plaintiff's use of the property did not constitute a commercial use and therefore, the transfers did not qualify for a waiver of the tax.

The Appellate Court affirmed. The court found that the ordinance is ambiguous and therefore, deference should be given to the agency's interpretation of the ordinance.

> *The Department's interpretation of a municipal ordinance is a question of law that we review de novo. Metro Developers, LLC, 377 Ill. App. 3d at 397. Although our review is de novo, our supreme court instructs that "a court will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute. Such an interpretation expresses an informed source for ascertaining the legislative intent. A significant reason for this deference is that an agency can make informed judgments upon the issues, based on its experience and expertise." Bonaguro v. County Officers Electoral Board, 158 Ill. 2d 391, 398, 634 N.E.2d 712, 199 Ill. Dec. 659 (1994) . . .*
>
> *However, defendants interpret the term commercial purposes" differently than plaintiffs, contending that there is a "clear distinction" between commercial and residential properties, such that plaintiffs' use of the properties to provide residential housing does not fall within the exemption. Given that the term "commercial purposes" is not defined in section 3-33-060(L) and is subject to multiple interpretations, we find an ambiguity. Accordingly, although our review here is de novo, we give substantial deference to Tax Ruling No. 2, as it is an interpretation of the ambiguous ordinance by the agency charged with its administration and enforcement.*

C. Where there is a conflict between two provisions does the more recent general provision trump the older specific provision?

People ex rel. Madigan v. Burge, 2014 IL 115635, 18 N.E.3d 14 involved an attempt by the Attorney General to revoke a pension awarded to a former police officer. The Retirement Board of the Policemen's Annuity and Benefit Fund of Chicago (the Board) awarded a pension the infamous Jon Burge, a former Chicago police supervisor, The Illinois Attorney General. filed an action to terminate that pension. The court was confronted with two conflicting statutory provisions. One, provided that adjudications related to the Fund were within the Board's exclusive, original jurisdiction. A more recently enacted statutory provision stated that which stated that "any violation of a Pension Code provision could be challenged in circuit court."

The appellate court found that that the more recently enacted provision trumped the provision which was enacted earlier. The appellate court concluded that the courts and the Board share concurrent jurisdiction and therefore, an action could be filed to terminate a pension issued by the Board.

The Illinois Supreme Court reversed, finding the provision which gave the Board exclusive jurisdiction to make decisions was more specific than the general provision which stated that any violation of the Pension Code could be challenged in circuit court. The court held that more specific provision granting authority to the Board trumped the general provision which authorized violations of the Pension Code to be challenged in circuit court for any violation of the Pension Code.

The decision provides an outline of the rules of statutory construction where there is a conflict between two provisions.

> *As the Attorney General notes, section 1-115 is a broadly worded provision, covering "any" act or practice which violates "any" provision of the **Pension** Code. Section 5-189, in contrast, does not possess the same breadth. Section 5-189 confers original jurisdiction on the Board only for ordinary adjudications related to or affecting the Fund. Other original actions, such as those alleging that the trustees of the Board have breached a fiduciary duty set forth in the **Pension** Code by, for example, making fraudulent investments, may be brought in the circuit court under section 1-115, but not before the Board under section 5-189. Moreover, the Board's original jurisdiction is limited to matters "relating to or affecting the fund." Any violation of a **Pension** Code provision which is not related to the fund may be challenged in an original action in the circuit court under section 1-115, but not before the Board under section 5-189. In short then, section 5-189 is the more specific provision than section 1-115.*
>
> *"[I]t is a commonplace of statutory construction" that* https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5CK3-XK91-F04G-4001-00000-00&context=&link=clscc7 *when two conflicting statutes cover the same subject, "the specific governs the general." Morales v. Trans World Airlines,*

Inc., 504 U.S. 374, 384-85, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S. Ct. 2494, 96 L. Ed. 2d 385 (1987)). "[T]he law is settled that [h]owever inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." (Internal quotation marks omitted.) Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 228, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. , , 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012). Here the broad language of section 1-115, which states that "any" violation of a ***Pension*** *Code provision may be challenged in circuit court, is in conflict with section 5-189, which provides that ordinary adjudications related to or affecting the Fund are within the "exclusive," original jurisdiction of the Board. Accordingly, to eliminate this contradiction, the specific provision, section 5-189, must be construed as an exception to the general provision, section 1-115.*

Citing the canon which holds that when two statutes are in conflict the one which was enacted later should prevail (see, e.g., Village of Chatham, Illinois v. County of Sangamon, Illinois, 216 Ill. 2d 402, 431, 837 N.E.2d 29, 297 Ill. Dec. 249 (2005)), the Attorney General maintains that section 1-115, as the more recently enacted provision, should be given precedence over section 5-189. Justice Freeman, in dissent, adopts a similar position. Infra ¶ 88 (Freeman, J., dissenting). However, the canon that the specific governs the general holds true "'regardless of the priority of enactment.'" Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976) (quoting Morton v. Mancari, 417 U.S. 535, 550-51, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)); 82 C.J.S. Statutes § 482 (2010) ("The more specific of two statutes dealing with a common subject matter generally will prevail whether it has been passed before or after the more general statute."). Indeed, because repeals by implication are disfavored, the canon that the specific governs the general applies with special force where, as here, the earlier provision is specific and the later, general provision makes no mention of the earlier provision. As this court has stated, "a later statute general in its terms and not expressly repealing the prior special statute will ordinarily not affect the special provisions of the earlier statute." People ex rel. Atwell Printing & Binding Co. v. Board of Commissioners, 345 Ill. 172, 178, 177 N.E. 705 (1931); Morton, 417 U.S. at 549-51. Section 1-115 does not expressly repeal section 5-189 or, indeed, even mention the provision. We decline to hold that the exclusive, original jurisdiction of the Board to hear ordinary adjudications related to or affecting the Fund has been repealed by implication.

And it is apparent why the General Assembly would exclude ordinary adjudications related to the Fund from the broad reach of section 1-115 as the Attorney General proposes. Section 1-115 does not limit the right to bring a cause of action solely to the Attorney General. Rather, it permits any "participant, beneficiary or fiduciary" to file a civil action to enjoin a violation of the ***Pension*** *Code. Under the Attorney*

General's reasoning, a participant in the Fund who loses a benefits decision before the Board could file an administrative appeal in the circuit court, while at the same time, another participant who disagreed with the Board's determination could file a separate, original action under section 1-115. According to the Attorney General, the court in the latter action would not be required to give the Board's determination any deference, thus creating two simultaneous, potentially conflicting actions in the circuit court. Further, section 1-115 contains no specific time limit on the filing of such an action. If each of the groups listed in section 1-115 were allowed to adjudicate or re-adjudicate every grant, denial or adjustment of ***pension*** *benefits made by the Board at any time, as the Attorney General contends, tremendous instability would be injected into the Fund. As the circuit court below aptly noted, "[a]dministering a* ***pension*** *fund with so much instability and uncertainty is not just inconvenient, it is unworkable."*

D. Retroactive application of a statutory amendment

People ex rel. Madigan v. J.T. Einoder, Inc., 2015 IL 117193, 28 N.E.3d 758 provides guidance to determine whether an amendment operates retroactively. The court explained:

*When called upon to determine whether an amended statute may be applied retroactively, Illinois courts are to follow the approach set forth by the United States Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). See Allegis Realty Investors, 223 Ill. 2d at 330 ("In assessing whether a statute applies retroactively, this court has adopted the approach set forth *** in Landgraf [citation]."); Caveney v. Bower, 207 Ill. 2d 82, 91, 797 N.E.2d 596, 278 Ill. Dec. 1 (2003) ("In Commonwealth Edison, this court for the first time adopted the United States Supreme Court's retroactivity analysis, as set forth in Landgraf [citation]."); Commonwealth Edison Co. v. Will County Collector, 196 Ill. 2d 27, 37-39, 749 N.E.2d 964, 255 Ill. Dec. 482 (2001). Under the Landgraf approach, if the legislature has clearly indicated the temporal reach of the amended statute, that expression of legislative intent must be given effect, absent a constitutional prohibition. If, however, the amended statute contains no express provision regarding its temporal reach, the court must go on to determine whether applying the statute would have a retroactive impact, "keeping in mind the general principle that prospectivity is the appropriate default rule." Allegis Realty Investors, 223 Ill. 2d at 330-31.*

An amended statute will be deemed to have retroactive impact if application of the new statute would impair rights ***[*** *a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. Allegis Realty Investors, 223 Ill. 2d at 331; Caveney, 207 Ill. 2d at 91; Commonwealth Edison Co., 196 Ill. 2d at 38. If the court finds that retrospective application of the new law would have a retroactive impact or result in inequitable consequences, "the court must presume that the legislature did not intend that it be so applied." Caveney, 207 Ill. 2d at 91 (citing Commonwealth Edison Co., 196 Ill. 2d at 38); see also Landgraf, 511 U.S. at*

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Part 4 Estoppel

A. Can government be estopped because of conduct of a government official?

adjudication is used to determine whether an ordinance has been violated by the respondent and to rule on claims that defenses set out in that ordinance are applicable. The role of determining the equities of enforcement of laws is the courts' prerogative. However, the ALJ might include in his/her ruling factual determinations which would assist the court...

Bata Shakira v. Illinois Department of Financial & Professional Regulation, 2018 IL App (1st) 170285, 97 N.E.3d 199 involves a claim that a governmental body was estopped from denying a license renewal application. In 1975, Mr. Shakira was convicted of attempted murder. He was 21 years of age. In 1982, he obtained his licensure to be a nurse. His license was renewed over the years, even though the state agency which renewed his license knew of his criminal conviction. In 2011, the General Assembly passed a bill, which provides that "[w]hen a licensed health care worker has been convicted of a forcible felony the license of the health care worker shall by operation of law be permanently revoked without a hearing."

In 2012, the agency renewed his license. A few years later, the agency sent him a notice stating that his license was revoked because of the statute. He administratively appealed the decision arguing that having granted him a license after the passage of law the state agency was estopped from revoking that license. The state agency affirmed its decision to revoke his license. He filed an action the circuit court and lost. The appellate court affirmed the agency's decision.

> *doctrine of equitable estoppel, rather than collateral estoppel, we may reverse the Department's revocation order under either doctrine.*
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> *We first address the Department's contention that Mr. Shakari forfeited any estoppel-based argument by raising it for the first time in his reply brief in the*
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> *[N]either collateral nor equitable estoppel can be based on the unauthorized act of an administrative agency. HN9[] Section 2105-165 unambiguously revokes the licenses of certain health care workers "by operation of law." As such, it is really the State of Illinois, as principal, that Mr. Shakira argues was estopped from revoking his license, based on the actions of its agent, the Department. But this contradicts the longstanding rule that a government body "cannot be estopped by an act of its agent beyond the authority conferred upon him." Rippinger v. Niederst, 317 Ill. 264, 275, 148 N.E. 7 (1925) (holding that a city was not estopped by the actions of its building commissioner who, acting*

in his official capacity as a representative of the city, issued a building permit he was not authorized to issue under the applicable zoning ordinance).

The rule is frequently applied in cases where an administrative agency, whether due to the error of a ministerial employee or otherwise, has acted beyond the scope of its authority to issue or renew a license or permit. See, e.g., Hersch v. Illinois Dep't of Profile Regulation, 308 Ill. App. 3d 649 (1999) (holding that the unauthorized issuance of the plaintiff's social worker's license by a governmental employee did not prevent the later revocation of the license when it was discovered that the plaintiff did not meet the necessary educational requirements for such a license); Armond v. Sawyer, 205 Ill. App. 3d 936, 939, 563 N.E.2d 900, 150 Ill. Dec. 773 (1990) (holding a municipality was not estopped from revoking the plaintiff's liquor license simply because the local liquor commission had renewed the license in violation of a referendum limiting the sale of unpackaged alcohol); Lake Shore Riding Academy, Inc. v. Daley, 38 Ill. App. 3d 1000, 1003, 350 N.E.2d 17 (1976) (holding that a zoning department's renewal of a license to operate a riding stable in violation of a zoning ordinance was an unauthorized act that did not prevent the municipality from revoking the license); People ex rel. Satas v. City of Chicago, 5 Ill. App. 3d 109, 113, 282 N.E.2d 739 (1972) (holding that the approval of an application for a laundromat license that violated a local zoning ordinance was "clearly beyond the scope" of the issuing employee's authority and could not form the basis for a defense of equitable estoppel).

[Although the rule is typically applied where a party has argued equitable estoppel, the result is the same under a theory of collateral estoppel. As our supreme court has explained, administrative agencies "have no general or common law powers" but are "statutory creature[s]," and "must find within the statute the authority which [they] claim[ ]." City of Chicago v. Fair Employment Practices Comm'n, 65 Ill. 2d 108, 112-13, 357 N.E.2d 1154, 2 Ill. Dec. 711 (1976). When the order of an agency exceeds the agency's jurisdiction, that order is void. Id. And when an agency mistakenly believes that it has the authority to take certain actions, that misapprehension of the law cannot form the basis for a defense of collateral estoppel. See Superior Coal Co. v. Department of Revenue, 4 Ill. 2d 459, 468, 123 N.E.2d 713 (1954) (finding no collateral estoppel where an agency made and followed erroneous rules and regulations based on its misinterpretation of a statute).

Here, the Department's renewal of Mr. Shakari's license in 2012 is of no consequence because, prior to the effective date of section 2105-165, the Department still had the discretion to renew his license. And the Department's unauthorized renewal of Mr. Shakari's license in 2014 had no effect on the enforceability of the law in Mr. Shakari's case or on the Department's obligation to comply with it.

In *Keeling v. Board of Trustees of the Forest Park Police Pension Fund,* 2017 IL App (1st) 170804, 96 N.E.3d 492, the plaintiff, a police officer, wished to apply for disability benefits. Under the pension plan, certain forms had to be submitted prior to the officer's termination of employment. The plaintiff submitted the wrong form and then resigned. His application was denied. He filed an action seeking judicial review of the administrative decision, arguing that he was following the advice of the union president who was also a trustee of the plan. The Court of Appeals rejected his argument.:

> *"Equitable estoppel may only be applied to a municipality in compelling or extraordinary circumstances. Patrick Engineering, Inc. v. City of Naperville, 2012 IL 113148, ¶ 35, 976 N.E.2d 318, 364 Ill. Dec. 40. The aggrieved party must show that (1) the municipality affirmatively acted; (2) its act induced the aggrieved party's substantial reliance; and (3) the aggrieved party substantially altered its position due to justifiable reliance. Morgan Place of Chicago v. City of Chicago, 2012 IL App (1st) 091240, ¶ 33, 975 N.E.2d 187, 363 Ill. Dec. 385. In cases involving a public body, the elements of estoppel are supplemented with another restriction: a public body will be estopped only where required to prevent fraud or injustice, particularly when public revenues are at stake. Vaughn v. City of Carbondale, 2016 IL 119181, ¶ 48, 401 Ill. Dec. 501, 50 N.E.3d 643. Whether estoppel should be applied against a municipality depends on the circumstances of a particular case. Morgan Place of Chicago, 2012 IL App (1st) 091240, ¶ 33. "If under all of the circumstances, the affirmative acts of the public body have created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done, the doctrine of estoppel may be applied against it." Sahelian v. Board of Education School District No. 4, 87 Ill. App. 2d 28, 39, 230 N.E.2d 465 (1967)"*
>
> *"Keeling has not met his burden of identifying an affirmative act of the municipality. Keeling specifically testified that he met with Bryant in his capacity as the Union's president, rather than his capacity as a trustee. Additionally, the acts of a ministerial officer are not necessarily the acts of the public body itself. Morgan Place of Chicago, 2012 IL App (1st) 091240, ¶ 33. If unauthorized acts of a public body's employees were permitted to bind it, the public body would be helpless to correct errors or escape the financial repercussions of actions by unscrupulous public servants. Patrick Engineering, Inc., 2012 IL 113148, ¶ 36. Thus, Bryant's alleged act of tendering the information request form was not attributable to the Board. The only act attributable to the Board was Reimer's letter, which Keeling acknowledged did not indicate the information request form was sufficient to preserve his disability pension claim."*

In *Beverly Bank v. County of Cook*, 157 Ill. App. 3d 601, 510 N.E.2d 941 (1st Dist. 1987), the plaintiff sought to use its property as a landfill. The use would have violated the county's zoning ordinance. The plaintiff maintained that the County was estopped

because it failed to object when the plaintiff sought and obtained a permit to operate the property as a landfill. The appellate court rejecting that argument explained:

> *Plaintiffs next contend that Cook County is estopped from asserting its zoning ordinance against them because the county failed to object to the issuance of Carlson's mining permit, or to the filed reclamation plans. A public body will be estopped only when it is necessary to prevent fraud or injustice. (Hickey v. Illinois Central R.R. Co. (1966), 35 Ill. 2d 427, 220 N.E.2d 415, cert. denied (1967), 386 U.S. 934, 17 L. Ed. 2d 806, 87 S. Ct. 1302.) Estoppel is found against public bodies only in rare and unusual circumstances. (Dean Foods Co. v. Pollution Control Board (1986), 143 Ill. App. 3d 322, 492 N.E.2d 1344.) Mere inaction is not sufficient to invoke estoppel. (Haeflinger v. City of Wood Dale (1984), 129 Ill. App. 3d 674, 472 N.E.2d 1228.) Here, the county's conduct in not objecting to the issuance of the mining permit or filed reclamation plans constituted mere inaction. The county never indicated in any type of affirmative manner that zoning for the landfill site was approved. The county's failure to object was only nonaction and not a positive act. See County of Cook v. Patoka (1980), 85 Ill. App. 3d 5, 405 N.E.2d 1376.*
>
> *In addition, estoppel may not be invoked where it would operate to defeat the effectiveness of a policy adopted to protect. (Dean Foods Co. v. Pollution Control Board (1986), 143 Ill. App. 3d 322, 338, 492 N.E.2d 1344, citing Tri-County Landfill Co. v. Pollution Control Board (1976), 41 Ill. App. 3d 249, 353 N.E.2d 316.) Here, the sanitary landfill site clearly affects environmental standards and thus the health, safety and welfare of the public. And the trial court upheld the county's decision that the subject property is not a suitable location for the landfill.*

However, in *Central Transport, Inc. v. Hillside,* 210 Ill. App. 3d 499, 568 N.E.2d 1359 (1st Dist. 1991), the court found that estoppel was justified where the municipality claimed that the zoning ordinance which the plaintiff relied upon had not been validly enacted by the municipality.

> *In the instant case, we find that the trial court properly ruled that defendant was estopped from asserting that its zoning ordinance was not validly enacted. We must affirm the trial court's ruling as it was not against the manifest weight of the evidence. See Lawrence v. Board of Education (1987), 152 Ill. App. 3d 187, 201.*
>
> *Plaintiff in this case had the burden of proving the requisite elements of estoppel by "clear, precise, and unequivocal" evidence. (In re Estate of Muhammad (1984), 123 Ill. App. 3d 756, 763, rev'd in part, vacated & dismissed in part (1987), 165 Ill. App. 3d 890, appeal denied (1988), 119 Ill. 2d 557; see Stenson v. Stenson (1977), 45 Ill. App. 3d 249, 254.) The record shows, and the trial court*

*properly found, that plaintiff met its burden of proof by establishing the elements of estoppel clearly, precisely, and unequivocally. Defendants are now attempting to disclaim a portion of an ordinance which was validly enacted by the Village Board. Defendants' ordinance was enacted more than 10 years ago on January 21, 1980. Subsequently, the ordinance was amended on November 23, 1987. The special use designation of the subject*https://advance.lexis.com/document/crb/?pdmfid=1000516&crid=02d6bf4b-a4e6-4b65-a7ce-2f4a2b77a9c8&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A3RX4-4580-003D-H4Y9-00000-00&pdcomponentid=6658&ecomp=6p9fk&earg=sr0.crb0&prid=0592e318-7e72-4b8a-b3ff-83fd04d304f9 *property has been in existence since 1980 when an asterisk was placed on the zoning map to indicate this classification. Plaintiff relied upon the motor freight terminal special use designation in contracting to purchase and in closing the sale of the subject property. The ordinance was printed under the authority of the Village Board when defendants placed an asterisk on the zoning map on behalf of Bellemead. This court must view the zoning map as evidence of the passage of the ordinance. We find that plaintiff had a right to rely upon the ordinance which defendants now seek to treat as invalid. Under the circumstances, defendant cannot deny the validity of its ordinance. People ex rel. Village of Colfax v. Maxon (1891), 139 Ill. 306, 310; People ex rel. Joseph Lumber Co. v. City of Chicago (1949), 402 Ill. 321, 331*

The principle of estoppel does not apply where an election official misinformed candidate as to the number of signatures required on the nominating petition.

Corbin v. Schroeder, 2021 IL 127052 involved a situation where an election official misinformed individuals seeking the office of Village of Glendale Heights president. The election official informed the candidates that they needed 24 signatures to be on the ballot. In reality, the number was much higher. The confusion was the consequence of the pandemic. Each candidate submitted nominating petitions containing more than 24 signatures but less than the number required under law.

Their candidacies were challenged. The election commission rejected the challenge. ruling that it was estopped from rejecting the nominating petitions because its agent had misinformed the candidates. The circuit court affirmed the administrative decision – as did the Appellate Court. The majority of the Supreme Court panel ruled that the estoppel would not apply in election proceedings.

B. Can a party be collaterally estopped from asserting a claim because of an earlier administrative decision involving the same issue?

In KT Winneburg, Ltd. liability Co. v. Roth, 2020 IL App (4th) 190274, the plaintiff attempted to enforce an oral settlement agreement between the plaintiff and the County The agreement provided that that the total assessment for plaintiff's property would be $20,000.00; then beginning in tax year 2014, the property would be assessed as farmland or timber, whichever was the current use, until the use of the lots changed.

The plaintiff was a party in an administrative proceeding before the Property Tax Appeal Board. The ALJ who conducted the hearing found that the oral agreement was invalid and unenforceable. Assistant State's Attorney was not authorized to enter the agreement and therefor the agreement was invalid and unenforceable. The Property Tax Appeal Board adopted and incorporated in its decision administrative law judge's findings The Board also ruled the assessment for that tax year would be $20,000 and denied plaintiff's motion to enforce the settlement agreement. The Plaintiff did not appeal the Board's decision because he was pleased with the assessment of $20,000.

Subsequently, he filed an action to enforce the oral agreement. The court found that he was stopped from litigating the issue so because he failed to appeal the administrative decision which included a finding that the agreement was invalid and unenforceable. The court explained:

> *In a nutshell, then, the rule of administrative collateral estoppel is this: if in a quasi-judicial proceeding an administrative agency issues a final decision, the legal and factual findings in the decision will, in future civil litigation, bind the parties and their privies, provided that the findings were necessary to resolve the issues before the administrative agency (Terry v. Watts Copy Systems, Inc., 329 Ill. App. 3d 382, 389, 768 N.E.2d 789, 263 Ill. Dec. 708 (2002)) and provided that issue-preclusion would work no injustice (see Restatement (Second) of Judgments § 28 (1982)).*
>
> *Plaintiff does not dispute that the Property Tax Appeal Board acted in a quasi-judicial or adjudicatory capacity; that its decision of May 20, 2016, was final; and that plaintiff was a party to the administrative litigation. Even so, for three reasons, plaintiff disputes that it is collaterally estopped from asserting the enforceability of the settlement agreement.*
>
> *Assuming, for the sake of argument, that the elements are essentially different depending on whether a party moves to enforce a settlement agreement or sues to enforce one, collateral estoppel does not require an identity of elements. Collateral estoppel does not require that the claim in the first litigation have the same elements as the claim in the subsequent litigation. Instead, a party is collaterally estopped when an "issue decided in the prior adjudication is identical with the one presented in the suit in question." Gumma v. White, 216 Ill. 2d 23, 38, 833 N.E.2d 834, 295 Ill. Dec. 628 (2005).*

The issue in count II, plaintiff informs us, was whether plaintiff and the county had a settlement contract. A contract is "a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." 1 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 1:1, at 2-3 (4th ed. 1990). If, as the Property Tax Appeal Board decided, plaintiff had no enforceable settlement agreement with the county, plaintiff now is collaterally estopped from asserting the existence of a contract—because a contract is, by definition, a promise or set of promises that the law will enforce (id.). Whether a settlement contract existed was an issue the Property Tax Appeal Board resolved against plaintiff. That issue cannot be relitigated. "Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have previously been litigated and decided in an action involving the same parties or their privies." In re Huron Consulting Group, Inc., 2012 IL App (1st) 103519, ¶ 22, 971 N.E.2d 1067, 361 Ill. Dec. 545.

The second reason why plaintiff contests the applicability of collateral estoppel is that, according to plaintiff, "there was no final judgment on the issue of the settlement agreement in the 2010 case [before the Property Tax Appeal Board]." Plaintiff admits that "there was ultimately a final judgment in the [Property Tax Appeal Board] case." Nevertheless, that "final judgment," plaintiff argues, "did not concern the settlement agreement, but merely concerned the 2010 tax assessments." We disagree. The text of the Property Tax Appeal Board's decision addresses both questions: first, whether the settlement agreement was enforceable against the county, and, second, what the amounts of the assessments for 2010 should be.

According to defendants, there were two reasons for the collateral estoppel. First, on May 6, 2015, an administrative law judge with the Property Tax Appeal Board denied plaintiff's motion to enforce the settlement agreement. The administrative law judge ruled, on the authority of Meade v. City of Rockford, 2015 IL App (2d) 140645, 396 Ill. Dec. 488, 40 N.E.3d 141, that because the county board had voted to reject the oral settlement agreement, the Property Tax Appeal Board "[could not] mandate enforcement of the settlement against the [county board]." Second, in its final unappealed decision of May 20, 2016, the Property Tax Appeal Board "adopted" the administrative law judge's ruling on plaintiff's motion to enforce the settlement agreement, and "incorporated [the ruling] in full as if set forth in [its] decision First, plaintiff argues that the circuit court erred by granting defendants' motion to dismiss count II of the amended complaint. In count II, plaintiff sought to enforce an alleged settlement agreement with the county—as plaintiff previously tried to do, without success, in litigation before the Property Tax Appeal Board. Because of the unappealed final decision in that administrative litigation, we find plaintiff to be collaterally estopped from asserting the enforceability of the settlement agreement. Thus, we affirm the dismissal of count II.

The rule of administrative collateral estoppel is this: if in a quasi-judicial proceeding an administrative agency issues a final decision, the legal and factual findings in the decision will, in future civil litigation, bind the parties and their privies, provided

that the findings were necessary to resolve the issues before the administrative agency and provided that issue-preclusion would work no injustice.

Felder v. City of Chicago, No. 07 C 6501, 2009 U.S. Dist. LEXIS 22107 (N.D. Ill. Mar. 19, 2009) involved an impoundment hearing. Felder was found by an ALJ to have solicited sex from a person he believed to be a prostitute. As a result, he was required to pay administrative penalty in order to obtain custody of his impounded vehicle. He subsequently filed a federal lawsuit claiming that he did not solicit sex from the disguised police officer. The court found that the ALJ's finding collaterally estopped the plaintiff from asserting that he did not solicit the officer for sects.

Hasbbin Sughayyer v. City of Chicago, No. 09 C 4350, 2011 U.S. Dist. LEXIS 48334 (N.D. Ill. May 5, 2011) also involved an impoundment hearing. The police officer testified that he found controlled substance in the vehicle. The ALJ found that the evidence supported the impoundment. The vehicle owner filed an action in Federal Court for false arrests and malicious prosecution. The federal court declined to apply collateral estoppel principles because the police officer significantly recanted the testimony, he provided at the impoundment hearing. The city conceded that the testimony the officer provided at the impoundment hearing was not accurate. The court concluded that it would be inequitable to apply the estoppel principles in this case.

Part 5 Evidence

A. What hearsay evidence is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Ordinance and statutory provisions authorize consideration of hearsay evidence in our hearings?

55 ILCS 5/5-43030 provides:

> Rules of evidence shall not govern. The formal and technical rules of evidence do not apply in an adjudicatory hearing permitted under this Division. Evidence, including hearsay, may be admitted only if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Numerous statutes, ordinance and regulations authorize the use of hearsay evidence in an administrative hearing, "if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." In the following decisions, hearsay evidence relied on by the ALJ was found to meet this standard.

Shachter v. City of Chicago, 991 N.E.2d 830 (1st Dist. 2013) (photos attached to verified citation of tall weeds)

Discovery South Group, Ltd v. Illinois Pollution Board, 275 Ill. App. 3d 547; 656 N.E.2d 51(1st Dist. 1995) (compilations of telephone complaints received by the Matteson police department)

Metro Utility v. The Illinois Commerce Commission, 193 Ill. App. 3d 178; 549 N.E.2d 1327 (2d Dist. 1990) (letter from staff member of Illinois Environmental Control Agency estimating costs of a sewer connection)

Kendor v. Illinois Department of Corrections, 126 Ill. App. 3d 648; 467 N.E.2d 1107 (1st. Dist. 1984) (transcript of witness' testimony in criminal trial, where witness ignored subpoena issued in administrative hearing proceeding)

Fagiano v. Police Board of the City of Chicago, 123 Ill. App. 3d 963; 463 N.E.2d 845 (1st Dist. 1984) (in proceeding to determine residency, investigator's notes on comments made by neighbors)

Is there an example of hearsay evidence which was found not to meet the reasonably reliable standard?

Julie Q. v. Department of Children and Family Services, 963 N.E.2d 401 (2d Dist. 2011) (notes of a former DCFS employee regarding the statements of a nine-year-old child with a history of untruthfulness)

How have courts dealt with the argument that reliance of hearsay evidence violates a party's due process right to cross-examine the party?

Several decisions cite the principle that a fair hearing before an administrative agency includes the right to cross-examine adverse witnesses, while rejecting the argument that ALJ's reliance on hearsay evidence violated that principal. These decisions were based on the party/s ability to request the ALJ to subpoena a witness. See *Aich v. City of Chicago,* 2013 IL App (1st) 120987, 991 N.E.2d 830.

B. Is exclusionary rule applicable to administrative adjudication proceedings?

A significant body of law supports the proposition that the exclusionary rule is not applicable in all civil proceedings. It is questionable that an ALJ has the authority to decide the constitutionality of a governmental body's seizure of property. The best approach would be to permit the respondent to make the motion on the record and explain that: (i) constitutional decisions are best left to the judiciary and (ii) the respondent may obtain a ruling on this issue by seeking judicial review of the administrative decision. To assist the court, the ALJ could make findings of fact relating to the circumstances under which the property was seized.

United States v. Hamad, 6 F. Supp. 3d 852 (N.D. Ill. 2013) affirmed 2016 U.S. App. LEXIS 9, involved a warrantless search of a store by investigators of the Cook County Department of Revenue. They were searching for unstamped cigarettes. In the course of their search, they found not only unstamped cigarettes but also a firearm and pills containing controlled substances. A criminal prosecution was initiated based on the firearm. The defendant moved to suppress arguing that the search was illegal. The court first addressed the legality of the search for the unstamped cigarettes and found that the search did not violate the defendant's constitutional rights. The court then denied the motion to surpass as the gun was found as an incident to a lawful search.

> *Hamad argues that for the government to rely on the sale of cigarettes without an affixed Cook County tax stamp as authority to search a place of business is "blatantly sophomoric — and rather bizarre." (R. 66, Reply at 3.) As a small grocery store that engaged in the retail sale of cigarettes, however, the Ordinance applied to H & Y. Pursuant to the Burger standard, the Department of Revenue's search of H & Y under the Ordinance was reasonable.*
>
> *First, the County has a substantial interest in regulating the tobacco industry. See Austin v. Tennessee, 179 U.S. 343, 348-49, 21 S. Ct. 132, 45 L.Ed. 224 (1900) (finding that the state had a legitimate interest in regulating the sale of tobacco); Townsend v. Yeomans, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937) (upholding a state statute regulating fees charged by tobacco warehousemen for selling and handling farmers' tobacco and finding "such regulation goes back to an early day"). Given that there is a federal Bureau of Alcohol, Tobacco, Firearms and*

Explosives whose stated mission includes as a goal to "reduce alcohol smuggling and contraband cigarette trafficking activity ... and significantly reduce tax revenue losses to the States," there is no doubt that the County has a substantial interest in regulating the tobacco industry. http://www.atf.gov/content/alcohol-and-tobacco (last visited December 17, 2013). Second, warrantless inspections pursuant to § 74-440 are necessary to further the regulatory scheme. United Taxidermists, 436 Fed. Appx. at 695 ("abundant case law extols the necessity of surprise in these searches") (citing Burger, 482 U.S. at 710; United States v. Gonsalves 435 F. 3d 64, 68 (1st Cir. 2006); Lesser v. Espy, 34 F.3d 1301, 1308 (7th Cir. 1994)). Third, the inspection program provides a constitutionally adequate substitute for a warrant. The statute informs a retail seller of tobacco products that it shall permit representatives of the Department of Revenue to inspect or audit cigarette inventory on its premises. § 74-440. Thus, Hamad knew that the Department of Revenue's inspection of his store did not constitute discretionary acts by a government official but were conducted pursuant to a statute. See Burger, 482 U.S. at 711. In addition, the statute limits the "time, place, and scope" of the inspection to "regular ***business*** *hours" at "any place where cigarette inventory is possessed, stored, or sold" and the inspectors may examine only* ***]*** *the books, records, and cigarette inventory of the retail merchant. §§ 74-435, 74-440.*

Here, the Department of Revenue agents searched H & Y with the purpose of inspecting the store's cigarette inventory pursuant to § 74-435 of the Ordinance. Further, the inspection occurred not only pursuant to the Ordinance, but after the Department of Revenue agents learned that H & Y was selling cigarettes that lacked the required county tax stamp — a violation of the Ordinance. See § 74-435(c) ("the sale, resale or possession by a ... retail tobacco dealer of ... unstamped cigarettes ... shall give rise to the prima facie presumption that the ... retail tobacco dealer ... is in violation of the provisions of this article"). Thus, the Court finds that Agent Srain and Agent Glasper did not need a search warrant to conduct the search of H & Y on October 15, 2010

In *McCullough* v. *Knight* 293 Ill. App. 3d 591, 688 N.E.2d 1186, 228 Ill. Dec. 209 (1st Dist. 1998), the court refused to reverse an administrative vehicle impoundment order. In the administrative proceeding, the Administrative Law Officer relied on evidence of an illegally seized handgun. In a related criminal proceeding, a court had suppressed the evidence of the illegally seized handgun. The *McCullough* court examined the costs of applying the exclusionary rule to a vehicle impoundment proceeding and determined that "*the department of revenue would be unable to consider valuable and relevant evidence that would impede the truth-finding function of the hearing officer*," thus interfering with the public policy of the administrative proceeding: eliminating "unlawful weapons from the streets of the city." The court held that "*police officers were sufficiently 'punished' by exclusion of evidence in criminal prosecutions because the exclusion frustrates the criminal enforcement process, which was the duty and concern of police officers to ensure."*

U.S. Residential Management v. Head, 397 Ill. App. 3d 156; 922 N.E.2d 1(1st Dist. 2009) involved an eviction action. CHA sought to evict Mr. Head for illegal drug activities

in his CHA apartment and attempted to support its case with evidence seized by the Chicago Police Dept. The trial court held that the evidence of defendant's crime was seized by the arresting officers in violation of the fourth amendment's prohibition against unreasonable searches and seizures. Next, the circuit court found that the exclusionary rule barred the admission of the illegally seized evidence. In reversing the trial court, the Appellate Court ruled:

> *The Supreme Court has explained that "[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." Instead, application of the exclusionary rule has been restricted to those areas where the remedial objectives of deterring unlawful police conduct are "most efficaciously served."*
>
> *Accordingly, the Supreme Court developed a balancing test to measure the appropriate use of the exclusionary rule. Under this test, we must balance the likely benefits of excluding unlawfully seized evidence against the likely costs. On the benefit side of the analysis is the deterrence of possible future unlawful police conduct. "On the cost side there is the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs.". . ..*
>
> *Balancing the factors, the court concluded that "the exclusionary rule should not be extended to encompass the present situation. The cost to CHA and the truth-finding process outweigh the benefit which would result from the application of the exclusionary rule in forcible entry and detainer actions. By applying the exclusionary rule in the present case, CHA would be unable to consider valuable and relevant evidence of potential criminal activity that would impede the truth-finding function of the circuit court. To extend the rule and suppress evidence of criminal activity would hinder CHA's ability to enforce lease agreements designed to promote safety and deter illegal conduct in public housing communities. . ."*

C. Does the best evidence rule apply to administrative adjudication hearings?

In Village Discount Outlet v. Department of Employment Security, 384 Ill. App. 3d 522, 893 N.E.2d 943 (1st Dist. 2008), the employer asserted that the Department's decision was against the manifest weight of the evidence because it improperly found that a witness's testimony about a videotape was hearsay. Alternatively, the employer asserted that due process required remand the matter for introduction of the tape into evidence. The employer's representative had testified that the videotape showed misconduct that would justify a denial of benefits. On review, the court held that although the Board incorrectly ruled that the representative's testimony constituted hearsay, no proper foundation was laid for the introduction of the testimony. In addition, the description of a videotape that was never introduced into evidence ran afoul of the best evidence rule. The evidentiary flaws concerning the representative's testimony

affected the weight to be accorded that testimony, and the Board's findings were not against the manifest weight of the evidence.

> *In considering the natural probative value of Foley's testimony, we believe it is appropriate to note that, although not technically hearsay, it does suffer from numerous other evidentiary problems that affect the weight it should be given. The Tharpe-Williams court observed that although information obtained through a video camera was not hearsay, a proper foundation must be laid for introduction of such evidence. Tharpe-Williams, 286 Ill. App. 3d at 609. In the case before us, no foundation was ever laid for the introduction of Foley's testimony regarding his observations of the videotape. Foley never identified the date or time the videotape was made and never described where or how the video camera was set up. In fact, we have carefully reviewed Foley's testimony and note that it is difficult to determine whether Foley's description of the "one case in particular" referred to [***8] things he had seen on a videotape, information related to him by third parties, or a combination of both.*
>
> *Moreover, as the Department correctly points out, Foley's description of a videotape that was never introduced into evidence runs afoul of the best evidence rule. See Tharpe-Williams, 286 Ill. App. 3d at 610. The best evidence rule expresses a preference for the original of documentary evidence when the contents of the documentary evidence are sought to be proved. Tharpe-Williams, 286 Ill. App. 3d at 610. However, as there was no objection on this basis at the hearing, we believe that the proper result is, as with hearsay evidence, to consider the evidence, but consider the evidentiary flaws as affecting its weight. See Jackson, 105 Ill. 2d at 508.*
>
> *In sum, we find that the evidence presented by Village Discount was rife with evidentiary flaws, which although perhaps not properly classified as hearsay, nevertheless affected the weight to be accorded Foley's testimony. However, it is not our role to engage in an independent weighing of that evidence. We cannot reverse simply because we disagree with the conclusions the Board drew from the evidence. Rather, we will reverse only if, [***9] after viewing the evidence in the light most favorable to the Board, no rational fact finder could agree with the decision. Lester, 354 Ill. App. 3d at 55. Although another fact finder might have accorded greater weight to Foley's testimony, we cannot conclude that no trier of fact would have adopted the position of the Board. Therefore, we find no reason to disturb the findings of the Board, as they were not against the manifest weight of the evidence.*

In Advanced Critical Transport, Inc. v. Illinois Department of Employment Security, 2016 IL App (1st) 143401-U, the employer's witness testified that he viewed a video which showed that the claimant had driven an ambulance improperly. The video was not introduced into evidence. The Department of Employment Security found that the driver was eligible for unemployment compensation as he had not been terminated for good

cause. The employer appealed. The appellate court affirming the Department's decision explained:

> *On appeal, ACT first challenges the Board's determination that it violated the best evidence rule by having Purmann testify as to the video's contents without introducing the video into evidence. Purmann testified the video depicted Zwartz backing up without a spotter on August 10 and driving though the alley in the wrong direction on September 1 at 4:30 a.m. We may review de novo the legal question of whether the best evidence rule was violated. Village Discount Outlet, 384 Ill. App. 3d at 525, citing City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 204-05, 692 N.E.2d 295, 229 Ill. Dec. 522 (1998)..*
>
> *The best evidence rule expresses a preference for the original version of documentary evidence when the contents of the documentary evidence is sought to be proved. Village Discount Outlet, 384 Ill. App. 3d at 526. In support of its argument that the best evidence rule was not violated by Purmann's testimony, ACT asserts by example that an individual who hears a criminal defendant's confession may testify to its contents even though the confession may have been recorded, citing People v. Spencer, 264 Ill. 124, 137-38, 106 N.E. 219 (1914). However, ACT's analogy is misplaced because Purmann did not claim to have witnessed the alleged backing and driving violations by Zwartz purportedly captured on the video. Rather, Purmann testified as to what the video depicted without asserting he had personally seen the alleged*

D. Does a party to an administrative adjudication proceeding have an absolute right to subpoena witnesses?

In *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, 962 N.E.2d 586, the ALJ found the respondent liable for violating the city's ordinance which requires that property owners prevent tall weeds from growing on their properties. The city's evidence consisted of a report and photographs taken by an inspector. The respondent requested the ALJ to issue a subpoena so that he might question he inspector. The ALJ denied that request. On appeal, the respondent argued that the ALJ's administrative decision should be reversed because of the that the denial of the subpoena. In rejecting this argument, the appellate court explained:

> *Next, we address plaintiff's argument that the officer's testimony was necessary for plaintiff to defend against the city's assertion that he violated the weed ordinance. Specifically, plaintiff contends he:*
>
> > *"was given a notice of violation that Plaintiff had 'weeds' on his property, but Plaintiff did not know which plants were the alleged 'weeds', and which were not; and Plaintiff needed to know this, in order to be able to mount a defense.*

Thus, if the issuing officer were to say, 'these plants are weeds, and those plants are not weeds', then Plaintiff could present an appropriate defense ('these plants are not weeds', or, 'these plants are not ten inches tall', or 'these plants are not on my property')." (Emphasis in original.)

We reject plaintiff's argument on this point. Here, plaintiff was issued a notice of violation indicating that he was in violation of the weed ordinance because of "WEEDS — GRASS OVER 10" TALL FRONT — AND BACK YARD." At the hearing on this notice of violation, the city also presented photographic evidence of these allegations. We fail to see how plaintiff was unable to present a defense without the officer's testimony about which specific plants on plaintiff's property were or were not weeds. Plaintiff was free to present testimony and any other evidence of his own — to rebut the city's allegations and evidence, including evidence supporting his assertion that none of the plants on his property were weeds.[2] Indeed, plaintiff did so in part by specifically testifying at the hearing that some of the plants on his property were not weeds but rather were mulberry or elm saplings.

E. What is the necessary foundation for the introduction of computer printouts into evidence?

Evidence showing that the printouts were: (1) made in the regular course of business and (2) made at or near the time of the transaction, event, or occurrence is sufficient.

Mulry v. Berrios, 2017 IL App (1st) 152563, 72 N.E.3d 1260 provides guidance. For more than 30 years, Barbara Mulry and her husband, Timothy, lived at 9139 S. Springfield Ave. in Evergreen Park. In 2001, when her uncle died, Barbara inherited the house he lived in at 9135 S. Springfield. The Mulrys rented the property once they acquired it. Barbara never resided in the house.

Her uncle had claimed a general homestead exemption for the property, and Mulrys kept the exemption intact. They continued to pay the taxes on the home based on the homestead exemption - while claiming their own residence at 9139 S. Springfield as a homestead exemption as well.

In 2013, the General Assembly adopted the "Erroneous homestead exemptions" section of the Property Tax Code. The statute permitted the Assessor to utilize the administrative adjudication process, once it has discovered that a property owner has been erroneously granted a homestead exemption, to recoup unpaid taxes and 10% annual interest and impose 50% penalties and liens.

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[2] *We also note that plaintiff was aware of the type of evidence that would be presented by the city, as the five-page written memorandum he presented at the hearing in support of his request for a subpoena included the assertion that "[o]n information and belief, the inspector bases his case upon certain photographs."*

The assessor charged Barbara with violation of the statute. At the administrative hearing, the County introduced into evidence a computer printout to show that Barbara had applied for homestead exemptions on two properties during the years 2010, 2011 2012. The County's witness had no personal knowledge of the number of exemptions she was granted during years. Barbara objected, arguing that a proper foundation had not been laid to justify treating the printouts as records kept in the ordinary course of business. The ALJ overruled the objection; and at the conclusion of the hearing found Barbara liable for the tax years 2010, 2011 and 2012.

On appeal, Barbara again challenged the introduction of the printouts into evidence. The court in rejecting the argument explained:

> *The foundation necessary to admit a record into evidence is only that the proponent establish that the record was (1) made in the regular course of business and (2) made at or near the time of the transaction, event, or occurrence...*
>
> *Here, Accardi's testimony clearly satisfied the two foundational requirements. Aicardi said he investigated Mulry's tax exemptions for 2010, 2011, and 2012, in part by "pull[ing] documents" from the "records that *** [were] kept in the normal course of business at the Assessor's office." Accardi elaborated, stating that he was "familiar with the [Mulry] case" and that he printed out the proferred documents himself from the Assessor's AS400 system. Accardi also more specifically identified the printouts and their contents:*
>
> *"Q: And, how do you obtain these records?*
>
> > *A. Just accessing our computer system. We have to log in individually and just based on the PIN numbers, it produces the information.*
> >
> > *Q. So, when you log into your system, you would type in the PINs that are currently in front of you, that are People's Exhibits D1 and D2, what does it show for the homeowner's exemptions?*
> >
> > *[L]et me ask that question again ***. Can you tell us what the documents in front of you show you as far as homeowner's exemptions for the tax years 2010, '11, and '12?*
> >
> > *A. They show that, that the homeowner's homestead exemption was taken for those years.*
> >
> > *Q. On both properties?*
> >
> > *A. That's correct."*

> *Thus, the testimony established that the printout was from records that were made in the regular course of the Assessor's business, at or near the time that Mulry's tax liability was calculated in 2010, 2011, and 2012.*

In Northbrook Bank & Trust Co. v. Abbas, 2018 IL App (1st) 162972, 102 N.E.3d 861, the defendant objected to the introduction into evidence a printout related to a loan agreement because the bank's witness was not familiar with the records before litigation arose and did not personally make the entries into the computer system. The appellate Court rejecting the defendant's argument:

> *In the context of computer-generated records, it must be established that the equipment used is the industry standard, the entries were made in the regular course of business, at or near the time of the transaction, and the sources of information, method and time of preparation indicate their trustworthiness and justify their admission. Riley v. Jones Brothers Construction Co., 198 Ill. App. 3d 822, 829, 556 N.E.2d 602, 144 Ill. Dec. 924 (1990).*
>
> *In this case, defendant mainly challenges Galus' personal knowledge of the documents specifically those generated prior to his management of the loan (i.e. the purchase and assumption agreement, the schedule of loans, and the loan agreement). Galus' testimony established that he personally managed the loan on behalf of plaintiff. Galus further testified that the loan records at issue were kept in the ordinary course of business by the plaintiff and, as the manager of the loan, he had access to and was familiar with those records. See Weiland, 338 Ill. App. 3d at 600 ("A sufficient foundation for admitting records may be established through testimony of the custodian of records or another person familiar with the business and its mode of operation."). Lastly, Galus testified the loan records were true and accurate copies, although he did indicate that portions of the purchase and assumption agreement were redacted for reasons of confidentiality. While defendant maintains that Galus was not party to the negotiations with the FDIC or present when certain of the loan records were initially created, there is no foundational requirement that he be familiar with the records before litigation arose or have personally made the entries into the computer system. US Bank, Nat. Assn's v. Andic, 2014 IL App (1st) 121759, ¶ 29, 381 Ill. Dec. 254, 10 N.E.3d 339. Indeed the lack of personal knowledge by the maker affects the weight afforded the evidence, but not its admissibility. Weiland, 338 Ill. App. 3d at 601. According to Rule 236, it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible. Champaign Nat. Bank v. Babcock, 273 Ill. App. 3d 292, 298, 652 N.E.2d 848, 210 Ill. Dec. 46 (1995)*

F. Can an ALJ make an adverse inference where a party refuses to testify?

X, a nonparty, prepared a document which has been introduced into evidence. However, X declines to testify. Can you draw Is a negative inference as to the accuracy of the statements contained in the document based on X's disinclination to testify?

Muldrow v. Barron, 2021 IL App (1st) 210248 involved Mr. Muldrow's attempt to be the Mayor of Markham. He filed nomination papers to be included on the ballot as an independent candidate for election to the office of Mayor. An objection was filed. against Muldrow's nomination papers, raising signature and circulator-based objections. The election board scheduled a hearing and subpoenaed Walker, Muldrow's nephew, who circulated Muldrow's petition papers and certified the validity of those papers.

Walker appeared at the hearing. However, at the suggestion of a Muldrow's associate, he sprang from the hearing room - without testifying. At the conclusion of the hearing, the Board entered a decision striking Muldrow's name from the ballot. In doing so, the Board drew a negative inference as to the Walker's honesty and the accuracy of his affidavits. This inference was based on his premature departure from the hearing.

The Appellate court agreed that that the negative inference was warranted.

> "As to whether the allegations of fraud and false swearing were proved by clear and convincing evidence, the Board found Muldrow's "testimony to be incredible" and that finding was "bolstered" by Walker's "unusual and overt act to avoid having to testify about the petition circulation process." Despite having actual knowledge that the Board had issued a subpoena for him to appear and testify, Walker abruptly left the hearing room. When directed by the security officer to return to testify, he departed the premises at the behest of a Muldrow ally. See *Canter v. Cook County Officers Electoral Board, 170 Ill. App. 3d 364, 370, 523 N.E.2d 1299, 120 Ill. Dec. 388 (1988)* (negative inference from subpoenaed circulator's refusal to testify upheld). Based on these events, the Board permissibly drew a negative inference against Muldrow."

Canter v. Cook County Officers Electoral Board also involved a situation where the circulator declined to testify. In this case the circulator asserted his rights under the Fifth Amendment. Once again, the administrative body treated the circulator's refusal to testify as a negative inference as to the accuracy of the affidavits he signed. The court had no problem with supporting the Board's position.

> Finally, petitioner, relying on *Baxter v. Palmigiano (1976), 425 U.S. 308, 47 L. Ed. 2d 810, 96 S. Ct. 1551*, and *Mayer v. Angelica (7th Cir. 1986), 790 F.2d 1315*, contends that the board erred in drawing a negative inference against petitioner from Hamilton's refusal to testify. Initially, we point out that the adverse inference drawn from Hamilton's invocation of his fifth amendment privilege goes only to the issue of Hamilton's credibility, not to that of petitioner. And neither *Baxter* nor *Mayer* establishes that a negative inference may not be drawn against a nonparty from his silence in an administrative proceeding. Rather, in *Baxter*, the court held that a prison inmate's silence at a disciplinary proceeding *may* be used against him, while in *Mayer*, the court held that a codefendant's silence could not be used, other evidence, as a foundation for the admission of

documents he had written.

Moreover, as noted in *Giampa v. Illinois Civil Service Comm'n* ***[*370]*** *(1980), 89 Ill. App. 3d 606, 613, 411 N.E.2d 1110, 1116*, cited by the board in its decision, "[the] constitutional guarantee against self-incrimination protects a witness from being forced to give testimony leading to the imposition of criminal penalties, but it does not insulate a witness from every possible detriment resulting from his testimony." Although it was a party that **refused** to testify in *Giampa*, it is apparent that the trier of fact in a civil case, unlike a criminal case, is not barred from considering a witness' refusal to testify.

G. Do Corporations have any self-incrimination protections under the Fifth Amendment?

Universal Metro Asian Services Ass'n v. Mahmood, 2021 IL App (1st) 2021involved discovery of a corporation's documents and the assertion by the corporation's that release of the documents would incriminate him.

Mr. Mahmood is the owner, CEO, and sole employee of Accurate Consulting Inc. He is also the defendant in a criminal case, in which he is charged with tax evasion. Universal filed a civil action against Accurate and Mr. Mahmood. In the course of their litigation, Universal filed discovery requests for certain documents in the possession of Accurate.

Mr. Mahmood requested the trial court in the civil matter to stay discovery until a final disposition was entered in the criminal case. Asserting his rights under the Fifth Amendment, he argued that the documentation could incriminate.

The trial court denied the motion. The appellate court affirmed, ruling that: (a) the documents were those of the Corporation - not those of Mr. Mahmood, and (b) corporations do not have any self-incrimination protections under the Fifth Amendment.

> We note, as do plaintiffs, that there is one critical difference between **[**20]** Mahmood and the Accurate companies. Defendant Mahmood is an individual. ***HN12***[⬆] Defendants the Accurate companies are **corporations**, and **corporations** are not protected by the ***fifth*** *amendment*. See *In re Zisook, 88 Ill. 2d 321, 336, 430 N.E.2d 1037, 58 Ill. Dec. 786 (1981)*; see also *Braswell v. United States, 487 U.S. 99, 102, 108 S. Ct. 2284, 101 L. Ed. 2d 98 (1988)* (**corporations** are not protected by the ***fifth*** *amendment*); *cf. United States v. All Meat & Poultry Products, No. 02 C 5145, 2003 U.S. Dist. LEXIS 17677, 2003 WL 22284318, at *4 (N.D. Ill. Oct. 3, 2003)* (holding that where the defendants included indicted individuals and indicted corporate entities, and "the indicted individual defendants appear to be the central figures in both the civil and criminal proceedings, courts have determined that the better course is to enter a stay as to all defendants"). The motion for a stay of proceedings was denied as to defendant Mahmood. Other than the relationship between defendant Mahmood and the Accurate companies, defendants do not and cannot offer anything in either federal

or state jurisprudence that would place the Accurate companies on equal footing with defendant Mahmood for *fifth amendment* purposes. The court did not abuse its discretion in denying the motion to stay the proceedings as it relates to the Accurate companies.

We acknowledge that Mahmood's response to discovery on behalf of the Accurate companies could potentially give rise to self-incrimination concerns. Even so, that potential does not relieve him of the obligation to respond either in his individual or representative capacity. *In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 57 (2d Cir. 1985)*, is consistent with our supreme court's holding in *In re Zisook* and thus, is persuasive. There, the Court of Appeals for the Second Circuit held that the *fifth amendment* protects a person only from incriminating himself by his own compelled testimonial communications as opposed to being incriminated by the testimonial act of a third person, such as a corporation that produces requested information. *Id.* In rare situations where a corporation's custodian of records would incriminate himself by producing the company's records, the corporation must appoint some other employee or agent to produce the documents. *Id.* Simply put, no situation could exist that would prevent a corporation from producing corporate records, as the **corporation** itself possesses no ***fifth*** *amendment* privilege.

We note that in this case, at the hearing on defendants' motion to stay, the circuit court suggested that the self-incrimination concerns could perhaps be addressed by appointing an agent to respond to discovery. Thus, **defendants** are not without some protective mechanism.

H. Where party asserts Fifth Amendment protection in civil case and the court fails to draw an adverse inference, must the court set forth a valid reason for declining to do so.

People v. Gibson, 2018 IL App (1st) 162177, 105 N.E.3d 47 involved a postconviction proceeding which is treated as a civil proceeding. Mr. Gibson maintained that he was convicted based on a coerced confession. He asserted that Detective Paladino beat him. At the postconviction hearing, the detective asserted his Fifth Amendment rights and declined to testify. The trial court rejected Mr. Gibson's request that the court draw an adverse inference from the police officer's refusal to testify. The trial court did not adopt a negative inference. The appellate court reversed and in dong explained:

> *In a civil action, the Fifth Amendment does not forbid an adverse inference against a party who refuses to testify in response to probative evidence of alleged misconduct. Whirl, 2015 IL App (1st) 111483, ¶ 106; People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van, 177 Ill. 2d 314, 332, 685 N.E.2d 1370, 226 Ill. Dec. 627 (1997); Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976). As long as there is "some" evidence to support the complainant's allegations, a court may consider a party's refusal to testify as further evidence of the alleged misconduct. People v. Houar, 365 Ill. App. 3d 682, 690, 850 N.E.2d 327, 302 Ill. Dec. 890 (2006).*

While the circuit court may draw an adverse inference from a party's refusal to testify, it is not automatically required to do so. Id. at 689; Whirl, 2015 IL App (1st) 111483, ¶ 107. That said, the circuit court does not have unfettered—or unreviewable—discretion to decline a draw an adverse inference. To the contrary, as we held in Whirl, a failure to draw an adverse inference may be error, even though the inference is permissive, if there is no good reason why the inference should not have been drawn. See Whirl, 2015 IL App (1st) 111483, ¶ 107.

Part 6 Adequacy of Notice

A. Where agency provides service which meets statutory requirements, and respondent does not receive the notice, is default judgment entered against respondent void?

The issue is whether the agency provided respondent with proper service of process – not whether the respondent received the notice. Several cases hold that where an agency mails notice of a hearing in a manner which complies with statute, the adjudicating body has jurisdiction - even though the addressee did not receive the notice.
In *People ex rel. Devine v. $30,700.00 United States Currency,* 199 Ill. 2d 142, 766 N.E.2d 1084, 262 Ill. Dec. 781 (2002), the State mailed notice of a forfeiture hearing to the defendant's home address. The defendant did not receive the notice, because he was in prison in Vandalia on an unrelated charge. The court held that the notice was sufficient under the circumstances. The court distinguished cases where notice was found insufficient, because, in those cases, the arrest and seizure.:

Under the Drug Forfeiture Act, where the claimant's name and address were known to the State, the State was required to give notice of pending forfeiture proceedings "'by either personal service or mailing a copy of the notice, *** return receipt requested, to that address.' The Drug Forfeiture Act further provides: “Notice served under this Act is effective upon personal service, the last date of publication, or the mailing of written notice, whichever is earlier.'" The State sent notice to the claimants via certified mail, return receipt requested, but it did not actually receive a return receipt. The claimants did not appear at the forfeiture proceedings, and the trial court entered a default order. The appellate court reversed on the basis that the trial court lacked personal jurisdiction over the claimants because they were not properly served, in that under the Drug Forfeiture Act service was accomplished when the State received a signed return receipt. Id.

The Supreme Court reversed. And held that the express language in the Drug Forfeiture Act clearly and unambiguously provided that notice was effective upon the mailing of written notice. The court stated, "The Act does not condition the effectiveness of notice upon receipt of the return receipt signed by the addressee, and this court will not rewrite the Act to create this requirement." Id. It rejected the claimants' argument that the "return receipt" language in the statute indicated the legislature's intent that notice would be perfected only when the State received the return receipt; the court stated that the legislature could have expressly conditioned notice upon the receipt of the return receipt, as it had in other acts.

In *Dusenbery v. United States,* 534 U.S. 161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002), the agency seeking to commence forfeiture proceedings sent notice of forfeiture to the prison where it knew the defendant to be incarcerated. The defendant, however,

claimed that he never actually received that notice and argued that the government bore the burden of actually securing delivery of notice. As an example, defendant contended that due process required a prison official to watch him open the notice and to cosign the receipt. Rejecting this argument, the United States Supreme Court wrote: "the Due Process Clause does not require such heroic efforts by the Government; it requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action"

In *Maggio v. Pollution Control Board*, 2014 IL App (2d) 130260, 9 N.E.3d 80, the court ruled that the Court ruled that the county board had jurisdiction to rule on conditional approval on the expansion of an existing solid waste landfill even though the nearby landowners did not receive notice of the hearing, as the County sent the notice in the manner required by statute, notice was valid.15 ILCS 5/39.2(b) (2012) did not require that landowners actually receive preapplication notices at least 14 days before the siting application was filed; Section 39.2(b) did not require that the sender obtain returned receipts in order for service to be effective, and Section 39.2(b) mandated only that a return receipt be "requested," and did not require proof that the recipient actually received the notice.

B. Where a notice is mailed to a party's address with proper postage, is there a presumption that the party received the notice?

There is a rebuttable presumption of receipt of mailing where agency's records show that notice was mailed to an address which meets the standards set out in Section 2-910(c), the office has a custom of mailing notices and the agency offers evidence that the custom is followed in the particular instance.

(i). Cases which found sufficient evidence to support finding that notice was mailed.

In *Carroll v. Department of Employment Security*, 389 Ill. App. 3d 404, 407, 907 N.E.2d 16, 329 Ill. Dec. 697 (2009) the court summarized the law relating to the presumption of mailing. In that case, the plaintiff was denied unemployment compensation. He filed an action seeking judicial review of the administrative decision. The suit was filed outside of the 35-day deadline. He argued the Board failed to meet its burden to prove the decision was actually mailed on April 11, 2007, contending the affidavit of Board Secretary Zaper did not establish that he had any personal knowledge or recollection concerning service of the decision. In its ruling the court set out the following guiding principals

> a) An administrative agency bears the burden of establishing that a petition *for judicial review under the Administrative Review Law was filed more than 35 days after the notice of its decision was served. Russell v. Board of Education of the City of Chicago, 379 Ill. App. 3d 38, 44, 883 N.E.2d 9, 318 Ill. Dec. 175 (2008).*

b) A mailing may be proved by evidence of office custom plus some corroborating circumstances relevant to show the custom was followed in the particular instance. Kocourek v. Bowling, 96 Ill. App. 3d 310, 312-13, 421 N.E.2d 397, 51 Ill. Dec. 889 (1981); Commonwealth Edison Co. v. Property Tax Appeal Board, 86 Ill. App. 3d 414, 417, 407 N.E.2d 1088, 41 Ill. Dec. 590 (1980).

c) Corroborating evidence includes an affidavit from people responsible for mailing the decisions that shows they had personal knowledge of the decision in issue. Saunders v. Department of Public Aid, 198 Ill. App. 3d 1076, 1082, 556 N.E.2d 736, 145 Ill. Dec. 118 (1990). However, direct testimony from the person who actually performed the mailing is not necessary if corroborating circumstances are otherwise sufficient. First National Bank of Antioch v. Guerra Construction Co., 153 Ill. App. 3d 662, 668, 505 N.E.2d 1373, 106 Ill. Dec. 582 (1987); Commonwealth Edison Company, 86 Ill. App. 3d at 417.

d) The agency does bear the burden of proving a mailing date beyond a reasonable doubt, but rather must show that it is more probable than not that the mailing occurred on a specific date. Saunders, 198 Ill. App. 3d at 1082. The circuit court examines the affidavits concerning the mailing, and if a material and genuinely disputed question of fact remains, then evidentiary testimony must be taken. Commonwealth Edison Co. v. Property Tax Appeal Board, 67 Ill. App. 3d 428, 431, 384 N.E.2d 504, 23 Ill. Dec. 710 (1978).

The court concluded that the agency provided sufficient evidence to support a finding that a copy of the administrative decision was mailed to his address.

Zaper's affidavit established both the IDES's custom of mailing the Board's final decisions and Zaper's personal knowledge that the custom was followed when the decision was mailed to plaintiff. Specifically, Zaper referenced office records over which he had control and stated that he personally checked the Board's case file, where dates of mailings are stamped, and the Board's computer docket system to confirm that the decision was mailed to plaintiff on April 11, 2007. Although Zaper did not personally remember the decision or remember preparing it to be mailed, he relied on business records for evidence of the mailing. Furthermore, although plaintiff's failure to locate the envelope in which his decision was mailed is not dispositive of this issue, the absence of such evidence may be considered in a court's determination that a defendant satisfied its evidentiary burden. Saunders, 198 Ill. App. 3d at 1082-83.

Defendants established the mailing custom of the Board and presented evidence of corroborating circumstances to show that the custom was followed when the Board mailed the decision to plaintiff. Thus, the circuit court's finding that defendants satisfied their burden to prove that the decision at issue was mailed on April 11, 2007, was not against the manifest weight of the evidence.

Other cases which found sufficient evidence of mailing sufficient to support finding of mailing.

Tabor & Co. v. Gorenz, 43 Ill. App. 3d 124, 130, 356 N.E.2d 1150, 1 Ill. Dec. 868 (1976).

> *In the case before us, the plaintiff not only adduced proof of the office custom with regard to the preparation, addressing, stamping, and mailing of confirmations, but also showed that correctly addressed confirmation forms designed so that the address would show through a window envelope imprinted with the company's return address] had been prepared in accordance with the custom. In addition, there was proof of a strong set of circumstances leading to the conclusion that Tabor & Co. did mail and Gorenz did, in fact, receive the confirmations. He admitted receiving mailings made pursuant to the same business practice close in time to the transaction in question. The disputed letters, addressed and mailed in accordance with the same practice, were not returned. (See Gallaway v. Schied, 73 Ill. App. 2d 116, 125 (1966); Wakenight v. West, 217 Ill. App. 199, 202 (1920).) Gorenz failed to complain about the load of soybeans delivered in March being credited at the low contract price for a considerable time and made no complaint until after his denial of the existence of the contract. Copies of the confirmations were received by mail at the Tabor offices at La Salle. In addition, defendant failed to keep complete and accurate records of his business transactions, and his personal denials of receipt were substantially impeached by contradictions in his testimony. These facts and circumstances may well have suggested to the jury that the unprecedented rise in soybean prices subsequent to the entry of the contract formed the real basis for the denial of the receipt of the confirmations.*

First National Bank of Antioch v. Guerra Construction Co., Inc., 153 Ill. App. 3d 662, 667, 505 N.E.2d 1373, 106 Ill. Dec. 582 (1987)

> *In the present case, plaintiff initially established its usual office practice. In addition, Goetz specifically recalled preparing the notices of assignment in question because they were the only ones she had ever done. She testified as to typing them, having them signed, stuffing them in envelopes, and taking them to the mailroom. Although the mail clerk did not testify that the notices were actually deposited in a mailbox, direct testimony from the person who actually performed the mailing is not necessary if corroborating circumstances are otherwise sufficient. (Tabor & Co. v. Gorenz (1976), 43 Ill. App. 3d 124, 131, 356 N.E.2d 1150.) In addition, Korom testified that he dialed the number he obtained from information for Hill-Behan Lumber Company and spoke to someone named Sue, who told him the notice had been received. Although Schiller testified that no one by that name worked for Hill-Behan, he also testified that he could not remember the name of every Hill-Behan employee. The conflict in the evidence was for the trial court, sitting as the trier of fact, to resolve. Jaffe*

Commercial Finance Co. v. Harris (1983), 119 Ill. App. 3d 136, 142, 456 N.E.2d 224.

***(ii) Cases where court found insufficient corroborating* evidence to support evidence of mailing**

In *M. S. Kaplan Co. v. Cullerton,* 49 Ill. App. 3d 374, 364 N.E.2d 381 (1st Dist. 1977), an attempt was made to prove mailing of notice of a hearing regarding increased valuation of plaintiff's property through evidence of records indicating the notice was prepared for mailing. The taxpayer testified that he received a notice of a proposed increased assessment from the county assessor on April 14, 1972, informing him that a hearing was to have been held on April 3, 1972. Through his attorney the plaintiff requested a hearing but was refused. The Court ruled that the tax based upon the increased assessment was void in the absence of evidence from the assessor timely mailed the notice of hearing. Below is an excerpt of the decision.

> *The issue now arises whether the presumption of receipt of a properly mailed letter applies in the case at bar. Defendants argue that the [presumption applies and that the trial court's findings were contrary to the manifest weight of the evidence. The employee of the assessor's office who testified at trial described the customary procedure for the preparation and mailing of increase notices. When an increase notice was ready to be sent out, a notation was made in a record book in the assessor's office. There is a notation in the book for the plaintiff's increase notice, dated March 27, 1972. After the notation was made, in the usual case, the notice was placed in an envelope and stamped. The employee further testified:*
>
> *"Q: Then where does it go?*
>
> *A: Then the girl takes the envelope and mails it or sends it to the mail department for mailing.*
>
> *Q: And it is placed in?*
>
> *A: For the mail department.*
>
> *Q: And the mail department places it in the U.S. mail?*
>
> *A: Yes."*
>
> *He also testified that he did not personally mail the letters.*

The court explained:

> *The mere proof of usual or customary business practice in the mailing of correspondence is not sufficient proof of mailing of a specific item. There must be proof that the practice was followed in the mailing of the particular item in question. Even in the event the presumption could become applicable, however, it only raises an issue of fact.* [Citations omitted]

Other cases which found insufficient corroborating evidence to support a finding mailing are summarized below.

a) *Lynn v. Village of West City (*1976), 36 Ill. App. 3d 561, 345 N.E.2d 172 (an insurance agent testified as to his usual practice in making a notice of claim to the insurance company, but could not testify as to the particular transactions because he did not personally mail it and he did not even have a copy of the correspondence)

b) *Goetz v. Country Mutual Insurance Co*. (1975), 28 Ill. App. 3d 154, 328 N.E.2d 109, (The insurer's proof consisted solely of demonstrating its usual office practice.)

c) *Buckingham Corp. v. Ewing Liquors Co.* (1973), 15 Ill. App. 3d 839, 305 N.E.2d 278 (Witness stated that his employer used a mailing service for mass mailings, and he had no personal knowledge of the practices of the service.)

d) *Cullen v. North American Co. for Life & Health Insurance*, 176 Ill. App. 3d 643, 531 N.E.2d 390 (2nd Dist. 1988) (*"The evidence offered to show that the notice was mailed and had the necessary postage affixed was based solely on what was asserted to be defendant's usual business custom and routine. In sum, none of the company's employees could swear from direct knowledge that a proper notice had actually been prepared or mailed to Jacqueline Cullen. Finally, the insurance company's own records reflected that the insured's street name was spelled incorrectly, a circumstance which could have resulted in the misdirection of any notice which may have been sent.")*

e) *Willett Motor Coach Co. v. Board of Education,* 103 Ill. App. 3d 760, 431 N.E.2d 1190 (1st Dist. 1981) ("*In contrast here, no evidence was presented by the Board that its mailing procedures were actually followed in the instance of the first amendment to bidding procedures under consideration. There was nothing to show that the amendment was mailed to any bidder on the list, whether to Willett or some other entity")*

Where ordinance requires notice by first-class or express mail, is notice by certified mail valid? One would assume that certified mail is even better than first class mail. Deutsche Bank Nat'l Trust Co. v. Roongseang, 2019 IL App (1st) 180948 2019 Ill. App. LEXIS 929 (1st Dist. 2019) suggests otherwise. The case involved a foreclosure action. The mortgage agreement included a provision which required that the mortgagor be provided with notice of default and given an opportunity to remedy the situation prior to filing foreclosure action. Both the agreement and the relevant state law provided that the notice is to be sent by first-class mail.

Deutsche bank sent the notice by certified mail. The mortgagor did not respond. The bank filed a foreclosure action. The mortgagor maintained that he did not receive a copy of the notice. The bank provided evidence showing that the notice was mailed and argued that under the "mailbox presumption", service on the mortgagor should be presumed.

The trial court entered a foreclosure order. The appellate court reversed finding that the presumption would not apply because the bank failed to send the notice by first-class mail. Below is an excerpt of the decision.

> *Given the restrictions on delivery of certified* mail*, many courts have declined to extend the "*mail*box" presumption of delivery to certified* mail*. In In re Marriage of Betts, 159 Ill. App. 3d 327, 511 N.E.2d 732, 110 Ill. Dec. 555 (1987), the court examined the service requirements of Illinois Supreme Court Rule 11. Generally, a party complies with the requirements of Rule 11 when it deposits a properly addressed letter with postage prepaid at a United States post office or in a post office box. In Betts, the petitioner* mail*ed notice of a hearing via certified* mail *as opposed to "regular* mail*" as required by the rule. Id. at 332. The Betts court found that where a party serves notice of a hearing via certified* mail*, that party could not rely on the presumption of delivery associated with ordinary* mail*. Id. By undertaking more than the rule required in sending the notice via certified* mail*, the petitioner triggered an obligation "to follow through on that method by submitting the return receipt as proof of service." Id. Thus, proof of service for a document sent via certified* mail *could not be shown without the certified* mail *return receipt.*
>
> *Similarly, the Seventh Circuit has held that there is no presumption of delivery "as to a piece of certified* mail *when no receipt notice is returned." McPartlin v. Commissioner, 653 F.2d 1185, 1191 (7th Cir. 1981). In McPartlin , the Commissioner of the Internal Revenue Service sent a notice of deficiency to petitioners' address via certified* mail*. The Commissioner's file did not contain a return receipt. Id. The court found that the lack of a return receipt could mean that delivery of the notice was never attempted. Id. at 1191. The Commissioner claimed that the notice started the period during which the taxpayer could petition for a redetermination. The court found that, without the return receipt, the Commissioner could not establish that the notice of deficiency was received by the petitioner, and thus could not establish that the petition for redetermination was untimely. Id. at 1192.*

C. Where government's citation does not meet all the technical requirements set out in the relevant ordinance or statute should charges be dismissed?

Technical errors in the citation do not justify dismissal of a citation unless the deficiencies materially affect the rights of the respondent or result in substantial injustice.

A party t would have to show that he/she was prejudiced by omission of material or information required under the ordinance. In *Shachter v. City of Chicago*, 2011 IL App (1st) 103582, 962 N.E.2d 586, the respondent requested that the citation be dismissed

because, the ordinance required that it contain the name of the issuer or and his/her department. The notice contained a scribble signature and the officer's unit and badge number. The Appellate court rejected that argument.

> Plaintiff's argument focuses on that portion of section 2-14-074(b) of the city's *municipal code that requires that "the issuer of a notice of violation or notice of hearing shall specify on the notice his or her name and department." Plaintiff complains that the notice of violation he received contained only the issuer's illegible signature, the notice therefore violated the requirements of section 2-14-074(b), and the notice he received thus failed to confer proper jurisdiction upon the city's department of administrative hearings.*
>
> *We disagree; Even if we were to find that the notice plaintiff received contained a technical violation of section 2-14-074(b), the Administrative Review Law provides: "[t]echnical errors in the proceedings before the administrative agency or its failure to observe the technical rules of evidence shall not constitute grounds for the reversal of the administrative decision unless it appears to the court that such error or failure materially affected the rights of any party and resulted in substantial injustice to him or her." 735 ILCS 5/3-111(b) (West 2008); see also McCleary v. Board of Fire & Police Comm'n of the City of Woodstock, 251 Ill. App. 3d 988, 993, 622 N.E.2d 1257, 190 Ill. Dec. 940 (1993) ("the appellate court may reverse an administrative ruling only if there is error which prejudiced a party in the proceeding"). Here, plaintiff does not even attempt to allege any prejudice resulting from this purported violation, relying solely on his assertion that the requirements of section 2-14-074(b) are mandatory and may not be disregarded.*
>
> *Nor do we perceive how plaintiff could allege any prejudice. The record reflects that, in addition to the issuing officer's signature, the notice served upon plaintiff also included the officer's unit and badge number. The notice therefore contained all of the information needed for plaintiff or the ALO to determine the issuing officer's identity, and plaintiff cannot establish that any possible deficiency in the notice of violation materially affected his rights or resulted in any substantial*

Part 7 Corporations and other business entities represented by non-attorneys.

Grafner v. Department of Employment Security, 393 Ill. App. 3d 791, 914 N.E.2d 520 (1st Dist. 2009; Sudzus v. Department of Employment Security, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist. 2009) and Sudzus v. Department of Employment Security, 393 Ill. App. 3d 814, 914 N.E.2d 208 (1st Dist. 2009) involved employers who contested unemployment compensation claims filed by their former employees. In each case, the employer was represented by a non-attorney at the administrative hearing. In each case, at the conclusion of the gearing the Department found that employee was ineligible for benefits. The employees sought judicial review, claiming that the non-attorney representation of the employer at the administrative hearing constituted an unlawful practice of law. Those claims were rejected by the Court of Appeals.

Sudzus decision

The Sudzus court, citing People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937) explained:

> *Goodman, as in the case sub judice, the court's focus was upon representation of participants in administrative proceedings. Although respondent was not an attorney, he extensively engaged in the business of handling workmen's compensation claims. Respondent's activities routinely involved the solicitation of clients, providing advice concerning potential recoveries, negotiating settlements with insurance carriers, maintaining actions before the Industrial Commission and securing orders approving settlements. Goodman, 366 Ill. at 351-52, 8 N.E.2d at 944-45. Based upon these activities, our supreme court determined that respondent was indeed engaged in the practice of law. Goodman, 366 Ill. at 357, 8 N.E.2d at 944-45*:
>
> "*It is immaterial whether [***14] the acts which constitute the practice of law are done in an office, before a court or before an administrative body. The character of the act done, and not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law."*
>
> *The Goodman court's rationale was rooted in the recognition that the legal ramifications of workmen's compensation practice were pervasive. As the court noted, practitioners should be able to weigh evidence and coordinate the testimony and its application to the statute. Moreover, the practice required a trained legal mind to intelligently grasp "the substantive provisions of (1) the Workmen's Compensation act, (2) the Federal Employer's Liability act and (3) the common law, as related to liability for damages for traumatic injuries." [**216] [****9] Goodman, 366 Ill. at 356, 8 N.E.2d at 946.*
>
> *Conversely, in Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E.2d 771 (1966), our supreme court held that an individual who merely provides simple fact-based answers, which do not require legal skill or*

*knowledge, has not engaged in the unauthorized practice of law. The Quinlan court determined that real estate brokers could fill [***15] in blanks on customary contract-of-sale forms or offers to purchase without engaging in the practice of law because these [*822] documents "require no more than ordinary business intelligence and do not require the skill peculiar to one trained and experienced in the law." Quinlan, 34 Ill. 2d at 121, 214 N.E.2d at 774. However, the line was drawn by the court's understanding that upon execution of such contracts the broker has fully performed his obligation and could not fill in the blanks on deeds or mortgages and other legal instruments because those documents require the peculiar skill of a lawyer and constitute the practice of law. Quinlan, 34 Ill. 2d at 122, 214 N.E.2d at 774.*

*In Perto v. Board of Review, 274 Ill. App. 3d 485, 654 N.E.2d 232, 210 Ill. Dec. 933 (1995), as in the case sub judice, we were called upon to determine whether representation by a non-attorney before the Department of Employment Security constituted the practice of law. In Perto, the employer allowed its authorized agent to complete a protest form, which included a statement of facts detailing the claimant's discharge, and send a letter requesting a hearing before the Department. Perto, 274 Ill. App. 3d at 493-94, 654 N.E.2d at 238-39. [***16] No legal advice was provided. Because the mere submission of information did not require legal knowledge or skill, we concluded the acts of the non-attorney did not constitute the practice of law. Perto, 274 Ill. App. 3d at 494-495, 654 N.E.2d at 239.*

In Perto, as distinguished from the case at bar, the employer's representative did not appear or participate in the administrative hearing. Significantly, however, the court relied in part on a decision of the Ohio Supreme Court in Henize v. Giles, 22 Ohio St. 3d 213, 218, 22 Ohio B. 364, 490 N.E.2d 585, 589 (1986), holding that the representation of an employer by an actuarial firm, through a nonattorney at a benefits hearing, did not constitute the unauthorized practice of law. While the nonattorney in Henize presented evidence for the employer, questioned witnesses, and performed the closing statement, the Ohio Supreme Court emphasized the relative simplicity and informality of the proceedings and the absence of any necessity for formal presentation of legal arguments. Perto, 274 Ill. App. 3d at 495, 654 N.E.2d at 240, citing Henize, 22 Ohio St. 3d at 216-17, 490 N.E.2d . . .

From our review of the record, we discern that Austin was simply acting on behalf of Butterfield in a manner that would benefit the corporation; the character of the actions did not require legal knowledge or skill; and he supplied simple, fact-based answers. Johnson v. Pistakee Highlands, 72 Ill. App. 3d 402, 404, 390 N.E.2d 640, 642, 28 Ill. Dec. 473 (1979); Goodman, 366 Ill. at 357, 8 N.E.2d at 947; Perto, 274 Ill. App. 3d at 495, 654 N.E.2d at 239. Austin's participation in the hearing benefitted Butterfield because he was able to provide insight into the duties of electricians on the Industrial Kinetics jobsite, the effects of dismantling and removing parts from an HVAC unit, and the approximate resulting damage. He

also asked clarifying questions at the request of the referee. Johnson, 72 Ill. App. 3d at 404, 390 N.E.2d at 642 (holding a nonprofit did not perform acts which constituted the unauthorized practice of law when an employee prepared and filed legal documents which were solely for the benefit of the association). Moreover, Austin's actions are in stark contrast to those of the nonattorney in Goodman because Austin did not provide legal opinions or advice nor did his answers or questions within the hearing require any legal knowledge or skill. Goodman, 366 Ill. at 357, 8 N.E.2d at 947. From the totality of the circumstances, we are unable to discern that Austin's limited representation of Butterfield constituted the unauthorized practice of law.

Gafner decision

The Gafner panel provided the following analysis:

> Activities performed by an individual considered to be the "**practice of law**" include:
>
> > *"appearing in court or before tribunals representing one of the parties, counseling, advising such parties and preparing evidence, documents and pleadings to be presented. It has been defined as preparing documents the legal effect of which must be carefully determined according to law. It has been defined as referral to attorneys for service; advising or filling out of forms; negotiations with third parties and, in short, engaging in any activities which require the skill, knowledge, training and responsibility of an attorney." ISBA Op. No. 93-15, at 2 (March 1994), citing Barasch, 406 Ill. at 256, 94 N.E.2d at 150.*
>
> *The Illinois Supreme Court has indicated that in deciding whether acts amount to the unauthorized practice of law, "it is the character of the acts themselves that determines the issue." Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 120, 214 N.E.2d 771, 774 (1966). The Illinois Supreme Court has also indicated that "whether a defendant charges a fee for the act is not decisive **of** whether it is unauthorized practice." King v. First Capital Financial Services Corp., 343 Ill. App. 3d 404, 407, 798 N.E.2d 118, 121, 278 Ill. Dec. 271 (2003), aff'd, 215 Ill. 2d 1, 828 N.E.2d 1155, 293 Ill. Dec. 657 (2005), citing Quinlan & Tyson, Inc., 34 Ill. 2d at 120, 214 N.E.2d at 773.*
>
> *Here, St. Bartholomew hired Johnson, the nonattorney representative, to represent it during the informal Department telephone hearing. During the hearing, Johnson's participation was limited to the following dialogue:*
>
> > *"REFEREE: Okay, Mr. Johnson is there anything you'd like to ask Miss Grafner or would you rather go to your witness as this time sir?*
> >
> > *ER REP: We can go to my witness.*
> >
> > * * *
> >
> > *REFEREE: Thank you Father. At this time Mr. Johnson do you have*

anything you want to ask the Father?

ER REP: Not at this time, thank you Judge.

REFEREE: Okay, any redirect Mr. Johnson, quickly.

ER REP: Father Malave?

MALAVE: Yes?

ER REP: Was there ever any written agreement between you and Miss Grafner that she . . . strike that. When you hired Miss Grafner on November . . .. did you two sign any type of written agreement that the employment would last only until January 7, 2007?

MALAVE: Absolutely not. That would've been completely outside of my hope for the Parish, the Choir's hope for the Parish.

* * *

REFEREE: I agree, I understand Counselor. It's not a battle. We just have an oral agreement, and the question is what the duration of time was, what was understood of the parties and what took place during the course of that association if you will. But just a yes or no would be helpful Father. Go ahead and restate the question Mr. Johnson.

ER REP: Father Malave?

MALAVE: Yes?

ER REP: When you hired Miss Grafner did you have any type of written agreement that her employment would only last until January of 2007?

MALAVE: No.

ER REP: Okay and when she left on January 7, 2007; did work remain available?

MALAVE: Absolutely.

ER REP: Nothing further, thank you.

* * *

REFEREE: Alright, any re-cross Mr. Johnson or can we move to close please?

ER REP: Quickly very quickly.

REFEREE: Ugh!!!

ER REP: Miss Grafner?

CL[AIMANT GRAFNER]: Yes?

ER REP: Did you ever tell the Father that you wanted to leave because you weren't getting along with the choir?

CL[AIMANT GRAFNER]: No, the original agreement was the 7th.

ER REP: That was all that I wanted to ask the witness, was that one question.

REFEREE: Alright, anything further Mr. Johnson?

ER REP: No thank you.

** * **

***]** REFEREE: Okay. Thank you. Mr. Johnson anything by way of closing sir?*

ER REP: We'll rest on the record, thank you."

Grafner does not claim that Johnson drafted pleadings on St. Bartholomew's behalf or initiated any proceedings on the Parish's behalf. See Edwards v. City of Henry, 385 Ill. App. 3d 1026 (2008). There are also no claims that Johnson entered into negotiations with Grafner on St. Bartholomew's behalf nor has Grafner specified what evidence Johnson presented during the hearing. Grafner contends that Johnson questioned witnesses and made tactical decisions during the hearing reflecting the type of decisions attorneys make during legal proceedings. The nonattorney representative, however, did not have preformulated questions that he asked the parties nor did his participation during the hearing rise to the level of involving tactical, strategy based decisions. The nonattorney representative merely asked fact clarifying follow-up questions. Also, based on the dialogue above, the nonattorney representative did not provide advice to Father Malave during the telephone hearing nor did the service rendered to St. Bartholomew during the hearing require use of legal knowledge or skill.

*Both parties cite to Perto v. Board of Review, 274 Ill. App. 3d 485, 493, 654 N.E.2d 232, 238, 210 Ill. Dec. 933 (1995), which addresses what actions performed by a nonattorney representative constitutes the unauthorized **practice of law** in a matter involving a request for **unemployment** benefits. This court in Perto adopted the principle articulated in People ex rel. Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 357, 8 N.E.2d 941, 944 (1937), that it was "the character of the act done, and not the place it was done, that was the decisive factor in determining whether it constituted the **practice of law**." Perto, 274 Ill. App. 3d at 494, 654 N.E.2d at 239. The Perto court concluded that an employer's nonattorney representative who responded to a Department form letter, sent the Department a letter requesting a rehearing and detailed the employer's position in a letter with facts did not engage in the unauthorized **practice of law**. Perto, 274 Ill. App. 3d at 493, 654 N.E.2d at 238. The Perto court concluded that the employer's nonattorney representative's "acts were*

*simple, fact-based responses to determinations that plaintiff was eligible for **unemployment** benefits by the Department." Perto, 274 Ill. App. 3d at 494, 654 N.E.2d at 239. **]** The nonattorney representative in Perto did not participate in the hearing before the Referee. Perto, 274 Ill. App. 3d at 494, 654 N.E.2d at 239. This fact does not distinguish Perto from the instant case because the acts performed by the nonattorney representative in both cases required no legal knowledge or skill and were instead simple, fact-based inquiries or responses. In Perto, the nonattorney representative disagreed with the Department's determinations and presented a factual basis for the disagreement. Perto, 274 Ill. App. 3d at 495, 654 N.E.2d at 239. In the instant case, the nonattorney representative asked three fact clarifying questions, but did not independently offer any factual or legal information.*

*Simplicity and informality are the intended features of **unemployment** compensation hearings. Here, all of the parties in the hearing participated via telephone. The nonattorney representative did not present case or statutory support for the employer's position and did not offer closing remarks. The representative's fact clarifying questions were not of the nature requiring complex legal analysis but the type of questions that would have been asked by someone with experience **representing** employers. Moreover, the rules of evidence governing trial procedures are inapplicable to the hearing. Evaluating the character of the acts performed here by the nonattorney representative Johnson, a lawyer's training for their proper performance was not required and the nature of the hearing was not akin to the formality of proceedings occurring in a court of law. . .*

We are not concluding that a nonattorney representative's actions during an unemployment compensation hearing may never be considered the unauthorized practice of law, but given the circumstances of the instant case, no unauthorized practice of law occurred during the hearing. [1] St. Bartholomew's nonattorney representative limited his participation during the hearing to asking simple, fact clarifying questions, which did not require legal analysis. Additionally, Father Malave had direct knowledge of the facts concerning Grafner's employment and voluntary termination of that employment. As such, Father Malave testified as a witness on behalf of St. Bartholomew and provided information supporting the Parish's position by offering closing remarks. Father Malave's actions are consistent with actions undertaken by a witness during unemployment proceedings on behalf of its employer and do not amount to the unauthorized practice of law. Thus, based on the entirety of the record, this court is not left with a definite and firm conviction that the Board erred in concluding that the nonattorney representatives did not engage in the unauthorized practice of law.

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[1] On July 24, 2009, the fifth division in *Sudzus v. Department of Employment Security, No. 1-08-2255 (July 24, 2009), 393 Ill. App. 3d 814, 914 N.E.2d 208, 333 Ill. Dec. 1*, decided an issue similar to the issue in this case. The holding in that case is consistent with our holding here.

In Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings, 2014 IL App (1st) 123654, 12 N.E.3d 691, the appellate court rejected the Grafner and Sudzus reasoning and ruled that a corporation, when charged with an ordinance violation, could only be represented by an attorney in a hearing conducted by the Chicago Department of Administrative Hearings. That decision was vacated by the Supreme Court Stone Street Partners, LLC v. City of Chicago Department of Administrative Hearings, 2017 IL 117720, 88 N.E.3d 699.

The majority of the Supreme Court panel declined to resolve the issue of whether corporations and other business entities must be represented by attorneys in administrative hearings. The dissenters argued that the standard used for administrative hearings should be identical to the standards used in small claims cases. Supreme Court Rule 282 (b) provides:

> ***(b) Representation of Corporations.*** *No corporation may appear as claimant, assignee, subrogee or counterclaimant in a small claims proceeding, unless represented by counsel. When the amount claimed does not exceed the jurisdictional limit for small claims, a corporation may defend as defendant any small claims proceeding in any court of this State through any officer, director, manager, department manager or supervisor of the corporation, as though such corporation were appearing in its proper person. For the purposes of this rule, the term "officer" means the president, vice-president, registered agent or other person vested with the responsibility of managing the affairs of the corporation.*