ETHICS TRAINING FOR ADMINISTRATIVE LAW JUDGES- OTDA/ 2010

2 HOURS C.L.E. (120 MINUTE SESSION)

AGENDA

INTRODUCTION	15 MINUTES
MAINTAINING INTEGRITY AND INDEPENDENCE OF ALJS	10 MINUTES
AVOIDANCE OF IMPROPER ACTIVITIES/ APPEARANCE OF IMPROPRIETY	10 MINUTES
LIMITATIONS ON EXTRA JUDICIAL ACTIVITIES OF ALJS	10 MINUTES
INAPPROPRIATE POLITICAL ACTIVITY	10 MINUTES
PERFORMANCE OF ALJ DUTIES IN AN IMPARTIAL AND DILIGENT MANNER	35 MINUTES

Maintaining professional competence
Demeanor at the hearing
Performance in an impartial manner
Opportunity to be heard/ ex- parte communications
Unrepresented parties
Recusal

HEARING RECORD/ DECISION AFTER HEARING	5 MINUTES
CONFIDENTIALITY OF RECORDS AND HEARING PROCEEDINGS	10 MINUTES
CONCLUSION/ QUESTIONS-ANSWERS	15 MINUTES

LEGAL SOURCES

New York State Model Code for ALJs(N. Y. S. Bar Association)

9 NYCRR 4.131 (Executive Order 131)

State Court Cases

- Lizotte v. Johnson
- Nembhard v. Turner
- Roche v. Turner

Federal Court Cases

- Goldberg v. Kelly

State Administrative Procedure Act- Part 300

18 NYCRR Part 358/ OTDA Fair Hearings

State Manual for Administrative Law Judges (N. Y. S. Dept. of Civil Service)

Section 136 of the Social Services Law- Confidentiality of welfare records

Federal and State "Hatch Acts"

ETHICS FOR ADMINISTRATIVE LAW JUDGES

Robert Tengeler, Esq.

I. INTRODUCTION

A. Ethics in the public sector-Goal is not to satisfy the needs of an employer but rather the public interest

B. ALJ- Independence and integrity

WHY IS ETHICAL CONDUCT BY ALJs IMPORTANT?

A. For the appellant it ensures their due process rights have been met

B. For the public it ensures their confidence in the adjudicatory process

C. Ethical conduct by ALJs and Judges supports the willingness of the citizenry to adhere to judicial decisions

WHAT ARE THE OBJECVTIVES OF ETHICAL BEHAVIOR

A. Credibility of the process

B. Professionalism

C. Quality of services

D. Confidence

WHAT ARE THE PRINCIPLES OF ETHICAL BEHAVIOR BY ALJs?

A. Integrity

B. Objectivity/ Impartiality

C. Professional Competence

D. Professional behavior

ISSUES REGARDING ETHICAL CONDUCT

A. Integrity and independence of the administrative judiciary (Canon 1)
B. Avoidance of conduct which is improper or gives the appearance of impropriety (Canon 2)
C. Appropriate conduct involving extra judicial activity (Canon 4)
D. Political activity (Canon 5)

continued

E. Performance of duties impartially and dutifully (Canon 3)

1-Professional competence

2-Demeanor at the hearing

3-Impartiality

4-Opportunity to be heard

5-Unrepresented appellants

6-Recusal

F. The record and the decision after hearing

G. Confidentiality requirements relating to public assistance

GOLDBERG v. KELLY (1970)

"The fundamental requisite of due process of law is the opportunity to be heard... which must be tailored to the capacities and circumstances of those who are to be heard." 397 US 254, 267-269

OUR RESOURCES

A. Model State Code of Ethics for ALJs

B. Executive Order 131 (9 NYCRR 4.131)

C. Court decisions

D. SAPA- Part 300

E. 18 NYCRR Part 358

II. INTEGRITY AND INDEPENDENCE OF THE ADMINISTRATIVE JUDICIARY

A. ALJs must establish, maintain and support high standards of conduct so that the integrity and independence of the administrative judiciary is preserved.

B. Issues regarding state agency ALJ panels as opposed to a centralized hearing authority

   1. Quotas 4-131-II.D
   2. Performance evaluations, salary- 4-131-II.C
   3. Pressure 4-131-II.E
   4. Physical separation of ALJ staff- 4-131-II.B.4

INTEGRITY AND INDEPENDENCE (continued)

C. Deference to ALJ rulings depends on public confidence in the integrity and independence of ALJs- An ALJ's integrity in turn depends on their ability to act without outside influence

INTEGRITY AND INDEPENDENCE (continued)

D. Issues: (Manual p. 32)

Fraternizing with the agency

ALJ cannot- have a personal stake in the outcome

- be related or closely associated to a party
- be prejudiced or biased to a party

INTEGRITY AND INDEPENDENCE (continued)

E. Insulation- There is a need for insulation of the agency decision makers- Manual p. 36/ Executive Order 131

-Physical separation of ALJ staff

-However, agency staff can respond to ALJ questions "to assure the quality of the decision and/or to promote consistency

III. AVOIDANCE OF IMPROPER ACTIVITIES

A. ALJ's conduct must ensure the integrity and impartiality of the administrative adjudicatory process.

B. ALJs cannot:

1. Allow relationships to influence and ALJ's conduct or judgment
2. Lend the prestige of the office to advance any private or personal interests (speeding tickets)

continued

3. Permit others to convey the impression that they are in a position to influence the ALJ

4. Be a member of any organization that practices invidious discrimination

5. Publicly comment on matters currently before the ALJ

IV. ALJs shall conduct their extra judicial activities to minimize conflicts with their judicial duties

A. Extra judicial conduct should be conducted so that it:

1. Does not cast doubt on the ALJ's capacity to act impartially
2. Does not detract from the dignity of the office
3. Does not interfere with the performance of ALJ duties
4. Is not incompatible with the standards of "judicial office."

continued

B. Issues: ALJs

1. May speak, write, lecture
2. Should not accept appointment to a government commission if it would cast doubt on their ability to be impartial
3. Can be members of organizations devoted to improving the bar (NYSBA)

continued

4. Should not be officers of organizations that will likely appear before the ALJ

5. Can engage in charitable work

6. Can only accept gifts within specified limitations (State Public Officers Law)

continued

C. Outside practice of law

1.OTDA outside employment issues

2.Can practice if:

does not affect the independent judgment of the ALJ

no conflicts (party appearing before the ALJ)

can't appear before your own agency

continued

3. Compensation- Must be reasonable for the work performed

   Cannot be excessive or give the appearance that the compensation is an attempt to influence

D. Business relationships- conflicts

V. INAPPROPRIATE POLICITAL ACTIVITY

A. ALJs must refrain from inappropriate political activity

1. Leader or committee person in a political party
2. Cannot publicly endorse a candidate as an ALJ
3. Can't make speeches or solicit funds as an ALJ

continued

4. Cannot be a candidate for non judicial office (Hatch Act)

5. Other issues- State and federal Hatch Acts

VI. AN ALJ SHALL PERFORM THEIR DUTIES IMPARTIALLY AND DILLIGENTLY

A. An ALJ shall maintain professional competence in the law- this includes CLE, legal updates

B. Demeanor at the hearing- an ALJ shall require decorum and order in proceedings
   1. ALJ MANUAL (p. 87)- The proceedings should be somewhat informal – key words: patience and courtesy

Demeanor at the hearing-Continued

2. The informality is intended to give the impression that the hearing is NOT about gaining advantage by use of technicalities

3.The hearing in fact is an inquiry into the relevant facts and law.

4. The ALJ must balance this informality with the need for decorum and the necessity to make an orderly and proper record

Impartial and unbiased manner

C. An ALJ shall perform their duties in an impartial and unbiased manner

Executive Order 131.II.A- "All proceedings shall be impartial, efficient, timely and fair."

SAPA 303- "Hearings shall be conducted in an impartial manner."

Impartial and unbiased manner (continued)

18NYCRR 358-5.6 "The hearing shall be conducted by an impartial ALJ."

The ALJ shall require all persons appearing in the hearing from refraining from conduct or words that exhibit prejudice or bias

Impartial and unbiased manner (continued)

What could constitute biased or prejudicial behavior?

- Acting overly deferential or familiar with one party
- Disrespectful conduct
- Tolerance of inappropriate conduct
- Speech or gestures perceived as prejudicial or even harassment

OPPORTUNITY TO BE HEARD/ EX-PARTE COMMUNICATIONS

D. An ALJ shall accord all persons in the hearing an opportunity to be heard

Ex-Parte Communications-4.131 II-B- An ALJ shall not communicate directly or indirectly in connection with any issue that relates to the hearing except on notice and the opportunity for all parties to participate

EX- PARTE COMM. (continued)

What is permissible?

Scheduling or administrative purposes that does not affect a substantial right of any party provided the ALJ subsequently notifies all parties

Ex- parte comm. (continued)

What is permissible?

An ALJ may communicate with a supervisor or colleague on issues

An ALJ may consult with an outside expert

Can do so on the consent of the parties

Opportunity to be heard- language barriers

An ALJ shall be attentitive to language barriers OTDA has translators

Title VI Civil Rights Act of 1964

Ensure a proper record

UNREPRESENTED PARTIES

E. An ALJ shall advance the ability of an unrepresented party to fully participate in the hearing to ensure that the record is fully developed and that all rights are fully developed.

Issue – The fine line between being a neutral arbiter and an advocate

Unrepresented parties (continued)

18 NYCRR 358-5.6 (b)

(2)- Opening statement

(3)- Elicit documents and testimony including questioning parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or an inability to question a witness; however, the ALJ will not act as a party's representative

(Unrepresented parties (continued)

(4) Require an independent medical assessment if needed

(6) Adjourn the hearing if it would be prejudicial to a party

(7) Require the attendance of witnesses or production of documents

Unrepresented parties (continued)

Roche v. Turner – Was the client entitled to a medical exemption from WEP?

Facts- Appellant requested medical exemption/ denied by HRA

Requested hearing, never received notice, defaulted/ discontinued due to default/ requests a hearing again

Appellant has 2nd conference with HRA/medical exemption granted but still discontinued due to default

Roche v. Turner (continued)

Hearing- No opening statement/or order of presentation
Parties spoke over each other (poor record)
Appellant submitted hospital records & proof medical exemption was granted (second time)

Decision- Conflicting HRA notices
ALJ failed to ensure a complete record; no opening statement; failed to address who had the burden of proof
Failed to assist the pro- se appellant- "Due process considerations require that when a claimant is un represented by counsel, the ALJ is under a heightened duty to scrupulously and conscientiously probe all relevant facts."

UNREPRESENTED PARTIES (continued)

Nembhard v. Turner- Appellant failed to attend a medical exam (workfare) claiming illness

Facts- Transcript 2 ½ pages

Previously exempted due to chronic medical issues

Appellant requested rescheduling of appointment/ told she could reschedule/ then discontinued

Hearing-Agency documents submitted regarding notice to report/ nothing regarding appellant's request to reschedule (issue-"willfulness")

Nembhard v. Turner (continued)

Decision- Improper notice (regulatory cite)

Failed to elicit info from HRA re appellant's alleged call requesting a rescheduling

No evidence regarding willfulness

(Agency has burden of proof)

"Due process…stands for the proposition that a mandated hearing provide a pro se Appellant a meaningful opportunity to understand and participate in the proceedings and to be adequately heard."

UNREPRESENTED PARTIES (continued)

Lizotte v. Johnson- Was Appellant entitled to a special foster care rate?

Facts-Child had special medical problems/ Appellant denied increased foster care rate

Lizotte v. Johnson (continued)

Decision- ALJ failed to:

Explain or delineate relevant issues

Provide appellant with an adequate opportunity to review exhibits (ALJ never identified them for the record)

Ensure Appellant received adequate translation (interpreter never translated discussion between ALJ and HRA)

Failed to fully develop the record (special needs of child, type of school, etc.)

Unrepresented parties-ALJ Manual (pp119-120)

-Needs to be a balance by the ALJ between being an advocate and assisting an unrepresented party in fully developing the record

-Without favoring the unrepresented party, the ALJ must guide the party through the hearing process

-ALJ may be required to summarize in simple language the law and regulations

Manual (continued)

ALJ may be required to ensure that all procedural issues (pre hearing and hearing) are adhered to

ALJ may be required to question the unrepresented party and agency representative and to protect the unrepresented party from unfair cross –X.

6.Recusal

A. A state ALJ shall disqualify himself/herself where the ALJ's impartiality might be in question

B. 18 NYCRR358-5.6 (c)/ Recuse when:

   1. ALJ previously dealt with the substance (could include personal knowledge)
   2. Has an interest in the matter
   3. Has displayed bias or partiality

F. RECORD/ DECISION AFTER HEARING

A. 18 NYCRR -6.1 Decision after hearing is based solely on the record
B. SAPA 307-Decision shall include all findings and conclusions of law and contain a statement of the underlying facts supporting the findings
C. ALJs cannot independently investigate the facts
D. Avoid going off the record

G.CONFIDENTIALITY

A. SSL- 136
B. HIPAA- Medicaid
C. 18 NYCRR 369/ 18 NYCRR 357.2 – restricts disclosure of protected information to administration of the program
D. 18 NYCRR 360-8.1- HIV issues- Again restricted to administration of the program

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ETHICS TRAINING FOR ADMINISTRATIVE LAW JUDGES- OTDA

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- 9 NYCRR 4.131
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- 18 NYCRR 358-5- OTDA FAIR HEARINGS

NEW YORK STATE BAR ASSOCIATION

COMMITTEE ON ATTORNEYS IN PUBLIC SERVICE
SUBCOMMITTEE ON THE ADMINISTRATIVE LAW JUDICIARY

MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

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MODEL CODE OF JUDICIAL CONDUCT FOR
STATE ADMINISTRATIVE LAW JUDGES

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PREAMBLE

New York State's administrative legal system is based on the principle that an independent, fair and competent administrative judiciary will interpret and apply the laws and regulations that govern consistently with American concepts of justice. Intrinsic to all sections of this Code are precepts that state administrative law judges, individually and collectively, must respect and honor their office as a public trust and strive to enhance and maintain confidence in our legal system. State administrative law judges decide questions of fact and law for the resolution of disputes and are a highly visible symbol of government under the rule of law.

The Model Code of Judicial Conduct for State Administrative Law Judges is intended to identify standards for ethical conduct for state administrative law judges, and to provide comprehensive and centralized guidance for judges in dealing with the ethical dilemmas that arise in the course of their duties. The Code of Professional Responsibility for Attorneys provides no such guidance, because state administrative law judges act in a quasi-judicial capacity rather than as advocates for clients. Further, not all state administrative law judges in New York State are attorneys. The New York State Code of Judicial Conduct (CJC) specifically excludes state administrative law judges from coverage. Both the American Bar Association (ABA) and the National Association for the Administrative Law Judiciary (NAALJ) have issued model codes for administrative law judges, but those codes make no reference to specific provisions in New York law that address state administrative law judges. Provisions in the State Administrative Procedure Act (SAPA), the New York Public Officers Law and Executive Order No. 131 provide some standards that cover state administrative law judges, but nothing comprehensive. In instances in which SAPA, the Public Officers Law or Executive Order No. 131 set a standard for certain conduct that the Code addresses, the Code reflects and refers to those pre-existing standards. In this way, the Code provides a single reference document for state administrative law judges in seeking ethical guidance. The Code also seeks to do more than merely impose standards of conduct. The Code seeks to provide protection for the independence of state administrative law judges and, thus, enhance confidence our legal system.

The Code consists of broad statements called Canons, specific rules set forth in Sections under each Canon, and Commentary. The Code also contains a Terminology Section and an Application Section. The text of the Canons and Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not meant as additional rules.

When the Code uses "shall or "shall not," it is intended to impose binding obligations. When the Code uses "should" or "should not," the statement is intended as hortatory and as a statement of what is or is not appropriate conduct, rather than as a binding rule. When the Code uses "may," the text denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The term state administrative law judge includes all hearing officers, administrative officers, hearing examiners, impartial hearing officers, referees or any other person whom a state agency has designated and empowered to conduct administrative adjudicatory proceedings. The

Code is intended to apply to all such quasi-judicial administrative officials, whether the persons serving that function are attorneys or not, and whether they are employed full time or part time, or retained on a contract or per diem basis while acting in their capacity as administrative adjudicators.

Except where modified, the Code follows the language of the New York State Code of Judicial Conduct. The Canons and Sections contained in this Code governing state administrative judicial conduct are rules of reason. They should be applied consistently with constitutional requirements, statutes, regulations, administrative rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of state administrative law judges in making judicial decisions.

The Code is designed to provide guidance to state administrative law judges and may provide a structure for regulating conduct if adopted by any agency. The Code is not designed or intended as a basis for civil liability or criminal prosecution.

The Code is intended to govern conduct of state administrative law judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the administrative judicial system.

The Code is not intended as an exhaustive guide for conduct. Strict adherence to this Code would not exempt a state administrative law judge from applying other ethical standards that apply to any person. However, as noted above, this Code is designed to reconcile, encompass and expand upon the aspects of professional conduct addressed by the CJC and the ABA and NAALJ Model Codes for State Administrative Law Judges, as well as, where relevant, SAPA, Public Officers Law, and Executive Order No. 131, in order to provide a single source of guidance for state administrative law judges in the subject areas addressed here.

TERMINOLOGY

The following terms used in this Code are defined as follows:

(A) A "candidate" is a person seeking selection for or retention in public office by any public election, including primary and general elections and including partisan and nonpartisan elections. A person becomes a candidate for public office as soon as he or she makes a public announcement of candidacy, or authorizes solicitation or acceptance of contributions.

(B) The "degree of relationship" is calculated according to the civil law system. That is, where the state administrative law judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the state administrative law judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins.

(C) "Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, provided that:

(1) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the state administrative law judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(2) service by a state administrative law judge as an officer, director, advisor or other active participant in an educational, religious, charitable, cultural, fraternal or civic organization, or service by a judge's spouse or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(3) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization, unless a proceeding pending or impending before the state administrative law judge could substantially affect the value of the interest;

(4) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the state administrative law judge could substantially affect the value of the securities;

(5) "de minimis" denotes an insignificant interest that could not raise reasonable questions as to a judge's impartiality.

(D) An "ex parte communication" is a communication that concerns a pending or impending proceeding before a state administrative law judge and occurs, directly or indirectly, between the judge and a party, or a representative of a party, to the proceeding without notice to and outside the presence of one or more other parties to the proceeding.

(E) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

(F) "Impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the state administrative law judge.

(G) An "impending proceeding" is one that is reasonably foreseeable but has not yet been commenced.

(H) An "independent" administrative judiciary is one free of outside influences or control.

(I) "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. Integrity also includes a firm adherence to this Code or its standard of values.

(J) To "know" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(K) "Law" includes regulations as well as statutes, constitutional provisions and decisional law.

(L) "Member of the state administrative law judge's family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

(M) "Member of the state administrative law judge's family residing in the judge's household" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

(N) "Non-judicial personnel" does not include the lawyers or representatives of parties in a proceeding before a state administrative law judge.

(O) "Nonpublic information" denotes confidential information of which a state administrative law judge become aware as a result of his or her judicial duties and which is not otherwise available to the public.

(P) A "pending proceeding" is one that has begun but not yet reached its final disposition.

(Q) "Political organization" denotes a political party, political club or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

(R) "Primarily employed by the state" means employed on a full-time basis or the equivalent or regularly scheduled to work the equivalent of 20 hours per week at one or more state agencies.

(S) "Public election" includes primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.

(T) "Require." The rules prescribing that a state administrative law judge "require" certain conduct of others, like all of the rules in this Code, are rules of reason. The use of the term "require" in that context means a state administrative law judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

(U) A "state administrative law judge" is an administrative law judge, hearing officer, administrative officer, hearing examiner, impartial hearing officer, referee or any other person whom a state agency has designated and empowered to conduct administrative adjudicatory proceedings. The term "state administrative law judge" does not include the head of an agency or the members of a state board or commission.

CANON 1

A STATE ADMINISTRATIVE LAW JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE ADMINISTRATIVE JUDICIARY.

An independent and honorable administrative judiciary is indispensable to justice in our society. A state administrative law judge should participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the administrative judiciary is preserved. The provisions of this code shall be construed and applied to further that objective.

Commentary:

[1.1] Deference to the judgments and rulings of administrative judiciaries depends upon public confidence in the integrity and independence of state administrative law judges. The integrity and independence of state administrative law judges depends in turn upon their acting without fear or favor. Although state administrative law judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the administrative judiciary is maintained by the adherence of each state administrative law judge to this responsibility. Conversely, violation of this code diminishes public confidence in the administrative judiciary and thereby does injury to the system of government under law.

[1.2] To the extent that this code conflicts with applicable statutes, regulations, or codes, including but not limited to the Public Officers Law, State Administrative Procedure Act, Executive Order No. 131 (9 NYCRR 4.131), and any codes adopted by individual agencies, the more restrictive rule will govern.

CANON 2

A STATE ADMINISTRATIVE LAW JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

(A) A state administrative law judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary.

Commentary:

[2.1][2A] Public confidence in the administrative judiciary is eroded by irresponsible or improper conduct by state administrative law judges. A state administrative law judge must avoid all impropriety and appearance of impropriety. A state administrative law judge must expect to be the subject of constant public scrutiny. Such a state administrative law judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the

ordinary citizen and should do so freely and willingly.

[2.2][2A] The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a state administrative law judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by state administrative law judges that is harmful although not specifically mentioned in the Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the state administrative law judge's ability to carry out administrative judicial responsibilities with integrity, impartiality and competence is impaired.

[2.3][2A] See also Commentary under 2C.

(B) A state administrative law judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment.

(C) A state administrative law judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a state administrative law judge convey or permit others to convey the impression that they are in a special position to influence the judge. A state administrative law judge shall not testify voluntarily as a character witness.

Commentary:

[2.4][2C] Maintaining the prestige of administrative judicial office is essential to a system of government in which the administrative judiciary must to the maximum extent possible function independently. Respect for the office facilitates the orderly conduct of legitimate administrative judicial functions. State administrative law judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a state administrative law judge to allude to his or her administrative judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, administrative judicial letterhead must not be used for conducting a state administrative law judge's personal business. A state administrative law judge who is authorized to practice law may not use or permit the use of a title or honorific such as "judge" or "honorable" in connection with his or her law practice.

[2.5][2C] A state administrative law judge must avoid lending the prestige of administrative judicial office for the advancement of the private interests of others. For example, a state administrative law judge must not use his or her administrative judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of the state administrative law judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(4)(a) and Commentary.

[2.6][2C] Although a state administrative law judge should be sensitive to possible abuse of the prestige of office, such a judge may, based upon the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

[2.7][2C] State administrative law judges may participate in the process of selection of members of the judiciary and administrative judiciary by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judicial position. See also Canon 5 regarding use of a state administrative law judge's name in political activities.

[2.8][2C] A state administrative law judge must not testify voluntarily as a character witness because to do so may lend the prestige of the administrative judicial office in support of the party for whom the judge testifies. Moreover, when a state administrative law judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A state administrative law judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a state administrative law judge should discourage a party from requiring the judge to testify as a character witness.

(D) A state administrative law judge shall not hold membership in any organization that practices invidious discrimination on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law. This provision does not prohibit a state administrative law judge from holding membership in an organization that is dedicated to the preservation of religious, ethnic, cultural or other values of legitimate common interest to its members.

Commentary:

[2.9][2D] Membership of a state administrative law judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2D refers to the current practice of the organization. Whether an organization practices invidious discrimination is often a complex question to which state administrative law judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, persons who would otherwise be admitted to membership. See New York State Club Assn. Inc. v City of New York, 487 US 1, 108 S Ct 2225, 101 L Ed 2d 1 (1988); Board of Directors of Rotary Intl. v Rotary Club of Duarte, 481 US 537, 107 S Ct 1940, 95 L Ed 2d 474 (1987); Roberts v United States Jaycess, 468 US 609, 104 S Ct 3244, 82 L Ed 2d 462 (1984).

[2.10][2D] Although Section 2D relates only to membership in organizations that invidiously discriminate on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, a state administrative law judge's membership in an organization that engages in any

discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a state administrative law judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, or any other protected status enumerated by law, in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a state administrative law judge of the judge's knowing approval of invidious discrimination on any actual or perceived basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the administrative judiciary, in violation of Section 2A.

[2.11][2D] When a person who is a state administrative law judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2D or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practice as promptly as possible (and in all events within a year of the state administrative law judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 3

A STATE ADMINISTRATIVE LAW JUDGE SHALL PERFORM THE DUTIES OF ADMINISTRATIVE JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY.

(A) Administrative judicial duties in general. The administrative judicial duties of a state administrative law judge take precedence over all the judge's other activities. The state administrative law judge's administrative judicial duties include all the duties of the judge's office prescribed by law. The standards below apply to the performance of these duties.

(B) Adjudicative responsibilities.

(1) A state administrative law judge shall be faithful to the law and maintain professional competence in it. A state administrative law judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(2) A state administrative law judge shall require order and decorum in proceedings before the judge.

(3) A state administrative law judge shall be patient, dignified and courteous to parties, witnesses, lawyers, representatives and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, representatives, staff members and others subject to the judge's direction and control.

Commentary:

[3.1][3B(3)] The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the state administrative law judge. State administrative law judges can be efficient and businesslike while being patient and deliberate.

(4) A state administrative law judge shall perform administrative judicial duties without bias or prejudice against or in favor of any person. A state administrative law judge in the performance of administrative judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, or any other protected status enumerated by law, and shall require staff and others subject to the judge's direction and control to refrain from such words or conduct.

Commentary:

[3.2][3B(4)] A state administrative law judge must perform judicial duties impartially and fairly. A state administrative law judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the

proceeding, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial. Prejudicial behavior may include (1) being overly deferential to one person, such as addressing a party, attorney, or representative by an honorific title such as "judge"; (2) being overly familiar with a person, such as referring to a party, attorney, or representative by his or her first name; or (3) being disrespectful or demeaning to a person. A state administrative law judge can also engage in prejudicial behavior by tolerating such conduct by a party, attorney, or representative, such as allowing an attorney to address a witness disrespectively as "Smith" rather than "Mr. Smith." This rule does not prohibit addressing a party, attorney or representative appearing in his or her capacity as a public official by the title of the office, addressing a party or a witness by a professional title such as "Doctor," or addressing a member of the clergy by a title such as "Reverend."

[3.3][3B(4)] A state administrative law judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment of any kind, including sexual harassment and harassment against any protected class member, among others. The judge must require the same standard of conduct of others subject to the judge's direction and control.

(5) A state administrative law judge shall require participants in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, or any other protected status enumerated by law, against parties, representatives or others. This paragraph does not preclude legitimate advocacy when age, race, sex, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, any other protected status enumerated by law, or other similar factors, are issues in the proceeding.

(6) A state administrative law judge shall accord to all persons who are legally interested in a proceeding, or their lawyers or representatives, full right to be heard according to law. Unless otherwise authorized by law and except as provided in paragraphs (a) through (e) below, a state administrative law judge shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending or impending before the judge with any person except upon notice and opportunity for all parties to participate.

(a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided:

(i) the state administrative law judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the state administrative law judge, insofar as practical and appropriate, makes provision for prompt notification of other parties, or their lawyers or representatives of the substance of the ex parte

communication and allows an opportunity to respond.

(b) A state administrative law judge may consult on questions of law with supervisors, agency attorneys or other state administrative law judges, provided that such supervisors, state administrative law judges or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.

(c) A state administrative law judge may consult with supervisors, other state administrative law judges, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing.

(d) Unless otherwise prohibited by law, a state administrative law judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.

(e) A state administrative law judge, with the consent of the parties, may confer separately with the parties and their lawyers or representatives on agreed-upon matters.

(f) A state administrative law judge may initiate or consider any ex parte communications when authorized by law to do so.

(g) Decisions of a state administrative law judge shall be based exclusively on evidence in the record of the proceeding and material that has been officially noticed.

Commentary:

[3.4][3B(6)] The ex parte communication rule contained herein is adapted from Executive Order No. 131 (<u>see</u> 9 NYCRR 4.131), which was continued by Governor David A. Paterson on June 18, 2008 (<u>see</u> Executive Order No. 9). The ex parte communication rule contained in Executive Order No. 131 is more limited than the rule contained in State Administrative Procedure Act (SAPA) § 307(2). Executive Order No. 131 applies to state administrative law judges; it does not apply to agency heads or boards acting in an adjudicatory capacity. Agency heads and boards remain subject to SAPA § 307(2). To the extent statutes or regulations applicable to a particular state administrative law judge impose limitations on ex parte communications that are more stringent than Executive Order No. 131, such statutes or regulations should be followed.

[3.5][3B(6)] The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

[3.6][3B(6)] To the extent reasonably possible, all parties or their lawyers or other representatives shall be included in communications with a state administrative law judge.

[3.7][3B(6)] Whenever presence of a party or notice to a party is required by Section 3B(6), it is the party's lawyer or other representative, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

[3.8][3B(6)] Certain ex parte communication is approved by Section 3B(6) to facilitate scheduling, other administrative purposes, or emergencies. In general, however, a state administrative law judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(6) are clearly met. A state administrative law judge must disclose to all parties all ex parte communications described in Section 3B(6)(a) regarding a proceeding pending or impending before the judge.

[3.9][3B(6)] Executive Order No. 131, as well as this Code, would allow a state administrative law judge to consult on questions of law with an agency attorney outside of the administrative tribunal or hearings office who is not otherwise involved in the matter before the judge or a factually related matter. Moreover, Executive Order No. 131 does not require a state administrative law judge to report such consultations with agency attorneys outside the administrative tribunal or hearings office, to the parties to the proceeding before the judge. Consistent with the provision concerning consultations with disinterested legal experts, the better practice is to give notice to the parties of the agency attorney consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and afford the parties a reasonable opportunity to respond.

Note that Section 3B(6)(b) does not apply when the administrative tribunal or hearings office is a separate, independent agency from the administrative agency whose actions are under review. In that context, communications with involved agency attorneys employed outside the administrative tribunal or hearings office are governed by Section 3B(6)(d).

[3.10][3B(6)] An appropriate and often desirable procedure for a state administrative law judge to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

[3.11][3B(6)] A state administrative law judge must not independently investigate facts in a case, unless authorized by law, and must consider only the evidence presented.

[3.12][3B(6)] A state administrative law judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

[3.13][3B(6)] A state administrative law judge may delegate the responsibilities of the judge under Section 3B(6) to a member of the judge's staff. A state administrative law judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(6) is not violated through law clerks or other personnel on the judge's staff. This provision does not prohibit the judge or the judge's staff from informing all parties individually of scheduling or administrative decisions.

[3.14][3B(6)] The ex parte communication rule applies primarily in adjudicatory proceedings

where the state administrative law judge is presiding as an impartial decision maker in a quasi-judicial role. The ex parte communication rule may be modified in other administrative proceedings presided over by a state administrative law judge, such as legislative or rule making proceedings, depending on the requirements and necessities of such hearings, and any applicable law and regulations.

(7) A state administrative law judge shall be attentive to language barriers that may affect parties or witnesses, and provide such qualified interpreter services as are available or otherwise required by law to provide meaningful access and participation in administrative proceedings.

Commentary:

[3.15] [3B(7)] A State agency may be under an affirmative obligation pursuant to Title VI of the Civil Rights Act of 1964 to provide language services to limited English proficient (LEP) individuals participating in administrative proceedings. In such cases, the state administrative law judge may be required to take further action to assure that interpretive services are provided. Absent such a statutory obligation, however, a state administrative law judge nonetheless should be continually attentive to the issue whether parties who may not be proficient in English are afforded a full and fair opportunity to be heard. The obligation to provide such interpretive services as are available applies whether a party or witness is represented or not.

(8) A state administrative law judge shall take appropriate steps to ensure that any party not represented by an attorney or other relevant professional has the opportunity to have his or her case fully heard on all relevant points.

(a) Where the state administrative law judge deems it necessary to advance the ability of a litigant not represented by an attorney or other relevant professional to be fully heard, the judge may, or, where required by law, the judge shall:

(i) liberally construe and allow amendment of papers that a party not represented by an attorney has prepared;

(ii) provide brief information concerning statutory procedures and substantive law, including but not limited to charges and defenses;

(iii) provide brief information about the nature of the hearing, who else is participating in the hearing and how the hearing will be conducted;

(iv) provide brief information about what types of evidence that may be presented;

(v) question witnesses to elicit general information and to obtain clarification;

(vi) modify the traditional order of taking evidence;

(vii) minimize the use of complex legal terms;

(viii) explain the basis for a ruling when made during the hearing or when made after the hearing in writing;

(ix) make referrals to resources that may be available to assist the party in the preparation of the case.

(b) A state administrative law judge shall ensure that any steps taken in fulfillment of the obligations of this paragraph are reflected in the record of the proceeding. A communication between a state administrative law judge and a litigant made in fulfillment of the obligations of this paragraph remains subject to the restrictions on ex parte communications contained in the preceding paragraph.

Commentary:

[3.16][3B(8)] In contrast to court proceedings, administrative proceedings often involve pro se litigants and non-attorney representatives. See Matter of Board of Educ. of Union-Endicott Cent. School Dist. v New York State Pub. Empl. Relations Bd., 233 AD2d 602 (3d Dept 1996). Some agency regulations impose an affirmative duty on state administrative law judges to ensure a complete record and to provide non-attorney litigants with certain basic information about the hearing process (see, e.g., 18 NYCRR 358-5.6[b]). A state administrative law judge should conduct hearings with pro se and non-attorney litigants in a manner that is fair to both parties, that assures the efficient conduct of administrative justice, that ensures the rights of the litigants, and that equalizes the field for the parties. This Section provides specific guidance to state administrative law judges in dealing with these issues.

(9) A state administrative law judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

[3.17][3B(9)] In disposing of matters promptly, efficiently and fairly, a state administrative law judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A state administrative law judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A state administrative law judge should encourage and seek to facilitate settlement, but the judge should not take any action or make any comment that might reasonably be interpreted by any party or its counsel as (a) coercion to settle, or (b) impairing the party's right to have the controversy resolved by the administrative tribunal in a fair and impartial manner in the event settlement negotiations are unsuccessful. In matters that will be tried before the state administrative law judge without a separate fact finder, a judge who seeks to facilitate settlement should exercise extreme care to

avoid prejudging or giving the appearance of prejudging the case.

[3.18][3B(9)] Prompt disposition of the state administrative law judge's business requires a judge to devote adequate time to judicial duties, to be punctual in attending hearings and expeditious in determining matters under submission, and to insist that personnel subject to the judge's direction and control, litigants and their lawyers cooperate with the judge to that end.

(10) A state administrative law judge shall not make any public comment about a pending or impending proceeding before any: (i) state administrative agency, or (ii) court within the United States or its territories, concerning a matter which originated within the agency. The state administrative law judge shall require similar abstention on the part of agency personnel subject to the judge's direction and control. This paragraph does not prohibit state administrative law judges from making public statements in the course of their official duties or from explaining for public information the procedures of the administrative judiciary. This paragraph does not apply to proceedings in which the state administrative law judge is a litigant or representative in a personal capacity.

Commentary:

[3.19][3B(10)] The requirement that state administrative law judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. A state administrative law judge should not be influenced by the potential for personal publicity when making decisions in pending cases. Release of decisions to the media or notifying the media that the decision is available before counsel or representatives for the parties have been notified may be embarrassing or prejudicial to the private rights of the litigants. This Section does not prohibit a state administrative law judge from commenting on proceedings in which the judge is a litigant in a personal capacity. "Agency personnel" does not include the lawyers in a proceeding before a state administrative law judge. The conduct of lawyers relating to trial publicity is governed by DR 7-107 of the Code of Professional Responsibility.

[3.20][3B(10)] This Section is not intended to preclude participation in an association of state administrative law judges merely because such association makes public comments about a pending or impending proceeding in the administrative process. The Section is directed primarily at public comments by a state administrative law judge concerning a proceeding before another judge.

(11) A state administrative law judge shall not:

(a) make pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office;

(b) with respect to cases, controversies or issues that are likely to come before the tribunal, make commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(12) A state administrative law judge shall not disclose or use, for any purpose unrelated to administrative judicial duties, nonpublic information acquired in an administrative judicial capacity.

(C) Administrative responsibilities.

(1) A state administrative law judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in administrative judicial administration and cooperate with other judges and non-judicial personnel in the administration of judicial business.

(2) A state administrative law judge shall require staff, hearing officials, non-judicial personnel and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias and prejudice in the performance of their official administrative duties.

(D) Disciplinary responsibilities.

(1) A state administrative law judge who receives information indicating a substantial likelihood that another state administrative law judge has committed a substantial violation of this Code shall take appropriate action.

(2) A state administrative law judge who receives information indicating a substantial likelihood that a lawyer or other representative has engaged in unprofessional conduct shall take appropriate action.

(3) Acts of a state administrative law judge in the discharge of disciplinary responsibilities are part of the judge's administrative judicial duties.

Commentary:

[3.21][3D] Referral of a state administrative law judge or lawyer to a substance abuse treatment agency is "appropriate" action under paragraphs (1) and (2).

[3.22][3D] Appropriate action may include direct communication with the state administrative law judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body. Internal agency procedure which routes the complaint can be utilized.

(E) Disqualification.

(1) A state administrative law judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) (i) the state administrative law judge has a personal bias or prejudice concerning a party, or

(ii) the state administrative law judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the state administrative law judge knows that:

(i) the state administrative law judge served as a lawyer in the matter in controversy, or

(ii) a lawyer with whom the state administrative law judge previously practiced law served during such association as a lawyer concerning the matter, or

(iii) the state administrative law judge has been a material witness concerning it;

(c) the state administrative law judge knows that he or she, individually or as a fiduciary, or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding;

(ii) is an officer, director or trustee of a party;

(iii) has an economic interest in the subject matter in controversy;

(iv) has any other interest that could be substantially affected by the proceeding; or

(v) is likely to be a material witness in the proceeding; or

(d) the state administrative law judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(e) Notwithstanding the provisions of subparagraph (c) above, if a state administrative law judge would be disqualified because of the appearance or discovery, after the matter was assigned to the judge, that the judge individually or as a fiduciary, the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person has an economic interest in a party to the proceeding, disqualification is not required if the state administrative law judge, spouse or other relevant person, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(2) A state administrative law judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interest of the judge's spouse and minor children residing in the judge's household.

Commentary:

[3.23][3E(1)] Under this rule, a state administrative law judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply.

[3.24][3E(1)] A state administrative law judge should disclose on the record information that the judge believes the parties or their lawyers or representatives might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

[3.25][3E(1)] By decisional law, the rule of necessity may override the rule of disqualification. For example, a state administrative law judge might be required to participate in judicial review of a matter where no other forum is available to decide the matter and no provision is available for delegating the authority to hear the matter to another adjudicator. Or, a state administrative law judge might be the only judge available in a matter requiring immediate judicial action. In the latter case, the state administrative law judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

[3.26][3E(1)(b)] A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b). A state administrative law judge formerly employed as agency counsel, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association. <u>See</u> NY St Bar Assn Comm on Prof Ethics Op 617 (1991).

[3.27][3E(1)(d)] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the state administrative law judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the state administrative law judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the proceeding" under Section 3E(1)(c)(iv) may require that judge's disqualification.

(F) <u>Remittal of disqualification</u>.

(1) A state administrative law judge disqualified by the terms of subdivision (E) above may disclose on the record the basis for his or her disqualification. Thereafter, subject to paragraph (2) below, if the parties who have appeared and not defaulted and their representatives, without participation by the state administrative law judge, all agree that the judge should not be disqualified, and the judge believes that he or she will be impartial and is willing to participate, the state administrative law judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

(2) Notwithstanding paragraph (1) above, disqualification of a state administrative law judge shall not be remitted if participation in the proceeding by the judge would violate this Code or if the basis for disqualification is that:

(a) the state administrative law judge has a personal bias or prejudice concerning a party;

(b) the state administrative law judge, while in private practice, served as a lawyer in the matter in controversy;

(c) the state administrative law judge has been or will be a material witness concerning the matter in controversy; or

(d) the state administrative law judge or his or her spouse is a party to the proceeding or is an officer, director or trustee of a party to the proceeding.

Commentary:

[3.28][3F] A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification in the event a remittal is available under the Section. To assure that consideration of the question of remittal is made independently of the state administrative law judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a state administrative law judge may wish to have all parties and their lawyers or representatives sign the remittal agreement.

CANON 4

A STATE ADMINISTRATIVE LAW JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS.

(A) Extra-judicial activities in general. A state administrative law judge shall conduct all of his or her extra-judicial activities so that they:

(1) do not cast reasonable doubt on the state administrative law judge's capacity to act impartially as a state administrative law judge;

(2) do not detract from the dignity of judicial office;

(3) do not interfere with the proper performance of judicial duties; and

(4) are not incompatible with judicial office.

Commentary:

[4.1][4A] Complete separation of a state administrative law judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

[4.2][4A] Expressions of bias or prejudice by a state administrative law judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of actual or perceived age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status. See Section 2D and accompanying Commentary.

(B) Avocational activities. A state administrative law judge may speak, write, lecture, teach and participate in extra-judicial activities subject to the requirements of this Code.

Commentary:

[4.3][4B] In this and other Sections of Canon 4, lists of permissible activities are intended to be illustrative and not exclusive.

[4.4][4B] As a judicial officer and person specially learned in the law, a state administrative law judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revisions of substantive and procedural law. To the extent that time permits, a state administrative law judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization

dedicated to the improvement of the law. State administrative law judges may participate in efforts to promote the fair administration of justice, the independence of the administrative judiciary and the integrity of the legal profession.

[4.5][4B] In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a state administrative law judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

[4.6][4B] See Section 2B regarding the obligation to avoid improper influence.

(C) Governmental, civic, or charitable activities.

(1) A state administrative law judge shall not appear at a public hearing before an executive or legislative body or official if doing so would cast doubt on his or her ability to decide impartially regarding any issue or party that with reasonable foreseeability might come before him or her unless the issue or party is one with respect to which the state administrative law judge would in any event be disqualified under this Code or any other provision of law.

(2) A state administrative law judge shall not accept:

(a) appointment to a governmental committee or commission or other governmental position if his or her activity in such capacity would cast doubt on his or her ability to decide impartially regarding any issue or party that with reasonable foreseeability might come before him or her; or

(b) appointment or employment as a peace officer or police officer, as those terms are defined in Criminal Procedure Law §§ 1.20 and 2.10, unless he or she is a member of the uniformed force of the police department exercising adjudicative duties.

Commentary:

[4.7][4C(2)] The appropriateness of accepting extra-judicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the administrative judiciary from involvement in extra-judicial matters that may prove to be controversial. State administrative law judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the administrative tribunal on which the judge serves.

(3) Unless otherwise prohibited by law, a state administrative law judge may be a member or serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, cultural, fraternal or civic

organization not conducted for profit subject to the following limitations and the other requirements of this Code.

(a) A state administrative law judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that ordinarily would come before the state administrative law judge, or

(ii) will be regularly engaged in adversary proceedings before the agency in which the state administrative law judge serves.

(b) In connection with civic or charitable activities, a state administrative law judge may participate in fund-raising or solicitation for membership if:

(i) the state administrative law judge does not use or permit use of the prestige of judicial office for fund-raising or solicitation for membership;

(ii) the fund-raising or solicitation for membership is not directed at persons who have appeared, are appearing or are foreseeably likely to appear before the state administrative law judge;

(iii) the state administrative law judge's participation in the fund-raising or solicitation for membership would not detract from the dignity of judicial office or interfere with the proper performance of judicial duties or be incompatible with judicial office; and

(iv) the fund-raising or solicitation for membership is not otherwise prohibited by law.

Commentary:

[4.8][4C(3)] See Commentary to Section 4B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a state administrative law judge permitted by Section 4C(3) to serve on the board of a fraternal institution may be prohibited from such service by Section 2D or 4A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

[4.9][4C(3)] Service by a state administrative law judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Section 4C. For example, a state administrative law judge is prohibited by Section 4G from appearing on behalf of a civic or charitable organization in matters before the agency in which the judge serves.

[4.10][4C(3)(a)] The changing nature of some organizations and of their relationship to the

law makes it necessary for a state administrative law judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the relationship to that organization.

[4.11][4C(3)(b)] Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the state administrative law judge's name and office or other position in the organization and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

(4) Unless otherwise proscribed by law or agency regulation, a state administrative law judge may accept duty assignments in addition to serving as a state administrative law judge provided that (i) such duties do not conflict with the state administrative law judge's responsibilities as a state administrative law judge, and (ii) such duties do not involve functions related to prosecutions or adversarial presentations of agency positions. State administrative law judges may be assigned to conduct investigatory hearings provided that the standards of independence and objectivity specified in this Code are adhered to.

Commentary:

[4.12][4C(4)] Section 4C(4) is derived from paragraph IIIB(2)(a) of Executive Order No. 131 (see 9 NYCRR 4.131[III][B][2][a]).

(D) Financial activities.

(1) A state administrative law judge shall not engage in financial and business dealings that:

(a) may reasonably be perceived to reflect adversely on the state administrative law judge's impartiality or exploit his or her judicial position;

(b) involve the state administrative law judge with any business, organization or activity that ordinarily will come before the judge; or

(c) involve the state administrative law judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the agency in which the judge serves.

(2) A state administrative law judge, subject to the requirements of this Code, may hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A state administrative law judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon

as the state administrative law judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.

(4) Consistent with state law and agency regulation, a state administrative law judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) a gift which is customary on family and social occasions;

(d) a gift from a relative or friend, for a special occasion such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3(E) of this Code;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge, and if the gift is required by law to be reported, the judge shall do so.

Commentary:

[4.13][4D] The specific prohibition contained in the Code of Judicial Conduct against a

judge's services as an officer, director, manager, advisor or an employee of any business (which has sometimes been interpreted to bar such participation in a family business) has been deleted, because the general prohibitions in Canon 3(C)(1) and statutes or rules prohibiting such activities by state administrative law judges involving agencies wherein they serve render the specific prohibition somewhat superfluous and because generic prohibition of involvement in a family business is regarded as unnecessary and undesirable. Involvement in a business that neither affects the independent professional judgment of the state administrative law judge nor the conduct of the judge's official duties is not prohibited.

[4.14][4D] When a state administrative law judge acquires in a judicial capacity information, such as materials contained in filings with the administrative tribunal, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

[4.15][4D] A state administrative law judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's administrative tribunal. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of a state administrative law judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

[4.16][4D] Participation by a state administrative law judge in financial and business dealings is subject to the general prohibitions in Section 4A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2C against the misuse of the prestige of judicial office. In addition, a state administrative law judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 4B regarding use of the phrase "subject to the requirements of this Code."

[4.17][4D(2)] This Section provides that, subject to the requirements of this Code, a state administrative law judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

[4.18][4D(4)] Section 4D(4) does not apply to contributions to a state administrative law judge's campaign for judicial office, a matter governed by Canon 5.

[4.19][4D(4)] Because a gift, bequest, favor or loan to a member of the state administrative law judge's family residing in the judge's household might be viewed as intended to influence the

judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

[4.20][4(D)(4)(a)] Acceptance of an invitation to a law-related function is governed by Section 4D(4)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 4D(4)(h).

[4.21][4(D)(4)(a)] A state administrative law judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 4A(1) and 2B.

[4.22][4D(4)(d)] A gift to a state administrative law judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 4D(4)(e).

[4.23][4D(4)(h)] Section 4D(4)(h) prohibits state administrative law judges from accepting any gifts, favors, bequests or loans not otherwise enumerated in Section 4D(4) from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

(E) Fiduciary activities.

(1) A state administrative law judge shall not serve as an executor, administrator, trustee, guardian or other fiduciary if such service will interfere with the proper performance of judicial duties or if it is likely that as a fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in an agency in which the judge serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary, a state administrative law judge is subject to the same restrictions on financial activities that apply to the judge in the judge's personal capacity.

Commentary:

[4.24][4E(2)] The restrictions imposed by this Canon may conflict with the state administrative law judge's obligation as a fiduciary. For example, a state administrative law judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 4D(3).

(F) Service as arbitrator, mediator or hearing officer. Unless otherwise prohibited by law or

agency regulation, a state administrative law judge may act as an arbitrator or mediator or otherwise perform judicial functions independent of his or her administrative judicial duties, so long as such activity affects neither the independent professional judgment of the state administrative law judge nor the conduct of his or her official duties.

Commentary:

[4.25][4F] Service as an arbitrator or mediator as part of a state administrative law judge's official duties is not covered by this provision.

[4.26][4F] This Code does not prohibit state administrative law judges from acting as arbitrators or mediators in capacities outside their official administrative judicial duties and in circumstances where it is unlikely that their decisions as arbitrators or mediators will be submitted to their agency for administrative review. In considering whether to adopt this Code, the agency should consider whether it is appropriate to prohibit its staff from acting as arbitrators or mediators in capacities outside official agency proceedings, consistent with substantive law and the needs of the agency (<u>see</u> NY St Bar Assn Comm on Prof Ethics Op 594 [1988]).

(G) <u>Practice of law</u>.

(1) Consistent with all other provisions of this Code, and with any applicable agency regulations and with all other provisions of law, a state administrative law judge may practice law, as long as such activity affects neither the independent professional judgment of the judge nor the conduct of his or her official duties.

(2) A state administrative law judge shall not represent or appear on behalf of private interests before the agency in which he or she serves.

(3) A state administrative law judge primarily employed by the state shall not represent or appear on behalf of private interests before any state administrative tribunal or agency.

(4) A state administrative law judge shall not be associated or affiliated with any firm, company or organization that regularly represents or appears on behalf of private interests before the agency in which he or she serves.

Commentary:

[4.27][4G] This Section does not prohibit a state administrative law judge from engaging in the private practice of law. However, consistent with ethics opinions, and the general principles underlying this Code, this Section does prohibit a state administrative law judge or members of the judge's law firm from appearing in a representative capacity before the agency in which the

judge serves (<u>see</u> NY St Bar Assn Comm on Prof Ethics Op 543 [1982]; NY St Bar Assn Comm on Prof Ethics Op 365 [1974]).

[4.28][4G] This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A state administrative law judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a state administrative law judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2C.

[4.29][4G] A state administrative law judge who maintains a private legal practice should use letterhead for matters involving official administrative judicial duties that is separate and distinct from the letterhead for matters in private practice. The letterhead for private practice shall omit any reference to the person's status as a state administrative law judge.

(H) <u>Compensation and reimbursement</u>. Consistent with applicable law and regulation, a state administrative law judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a state administrative law judge would receive for the same activity.

(2) Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the state administrative law judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.

Commentary:

[4.30][4H(2)] See Section 4D(4) regarding reporting of gifts, bequests and loans.

[4.31][4H(2)] The Code does not prohibit a state administrative law judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A state administrative law judge should ensure, however, that no conflicts are created by the arrangement. A state administrative law judge must not appear to trade on the judicial position for personal advantage. Nor should a state administrative law judge spend significant time away from judicial duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the state administrative law judge's ability or willingness to be impartial.

(I) Financial disclosure. A state administrative law judge shall disclose income, debts, investments, or other assets to the extent required by law.

Commentary:

[4.32][4I] A state administrative law judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

CANON 5

A STATE ADMINISTRATIVE LAW JUDGE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY.

(A) Political activities in general.

A state administrative law judge shall not directly or indirectly engage in any political activity that detracts from, or reduces public confidence in, the fairness, impartiality or dignity of his or her office or the tribunal he or she serves. In addition, a state administrative law judge shall not permit his or her title or position to be used to promote any activity of a political organization. Prohibited political activity shall include the following:

(1) A state administrative law judge shall not act as a leader, committee member, or an officer in any political party or organization.

(2) A state administrative law judge shall not publicly endorse or publicly oppose (other than by running against) another candidate for public office in a way that allows for identification of the state administrative law judge as such.

(3) A state administrative law judge shall not make speeches on behalf of a political organization or other candidate.

(4) A state administrative law judge shall not solicit funds for or contributions to a political organization or candidate.

(B) State administrative law judge as candidate for nonjudicial office. A state administrative law judge shall resign or, if authorized by law, take a leave of absence from administrative judicial office, and withdraw his or her name from any roster for assignment or employment as a state administrative law judge upon becoming a candidate for elective nonjudicial office either in a primary or in a general election, except that the state administrative law judge may continue to hold administrative judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(C) State administrative law judge as candidate for judicial office. A state administrative law judge who is a candidate for elective judicial office shall comply with the Rules of the Chief Administrator of the Courts for the State of New York governing the conduct of such candidates, 22 NYCRR 100.5. A determination by the State Commission on Judicial Conduct, a court of the State of New York or any other authorized entity that a state administrative law judge has violated those Rules shall constitute misconduct and a violation of this Code.

Commentary:

[5.1][5A] In two opinions from the 1970s, the Committee on Professional Ethics of the New York State Bar Association has taken the position that as quasi-judicial officers, state administrative law judges are subject to the same constraints against political activity as judges

in the judicial branch (<u>see</u> NY St Bar Assn Comm on Prof Ethics Op 337 [1974]; NY St Bar Assn Comm on Prof Ethics Op 327 [1974]; <u>see also</u> Code of Judicial Conduct Commentary 6.1). The drafters of this Model Code, however, conclude that the strict application of Canon 5 of the Code of Judicial Conduct ("CJC"), in particular section 5A(1), to state administrative law judges is unduly and unnecessarily restrictive. Divergence from the strict application of CJC Canon 5 is warranted for several reasons.

First, although state administrative law judges are quasi-judicial officers responsible for unbiased and independent decision making within the agency context and, thus, function as a limited check on agency power, state administrative law judges do not serve the same separation of powers function as judges in the third branch. Specifically, while state administrative law judges have the authority to rule on as-applied constitutional challenges to agency action, they lack the authority to strike as facially invalid an act of the Legislature. Second, in contrast to most judicial offices in New York, state administrative law judges are appointed and, therefore, are not required to engage in partisan political campaigns to achieve judicial office. Given the path by which most third branch judges obtain judicial office, and the significant power they exercise once in office, the heightened restrictions against political activities imposed upon third-branch judges by CJC Canon 5 are warranted to avoid even the mere appearance of improper political influence. Such considerations are less compelling in the context of state administrative law judges.

Moreover, courts have recently concluded that proscriptions against political speech by even third-branch judicial officers are subject to First Amendment limitations (<u>see</u> <u>Republican Party of Minnesota v White</u>, 536 US 765, 122 S Ct 2528, 153 L Ed 2d 694 [2002]). Thus, the strict application of each section of CJC Canon 5 to state administrative law judges does not appear justified.

Nevertheless, because of their role as quasi-judicial officers, some of the specific restrictions on political activities contained in CJC Canon 5 are applicable to state administrative law judges. Under Section 2B, a state administrative law judge should not allow political considerations to influence the judge's judicial conduct or judgment. The public political activities prohibited by section 5A of this Code are justified to eliminate suspicion that a judge's judgment is affected by such political influences.

Any State agencies considering the adoption of this Code should consider whether the limitations imposed herein, or those applied by CJC Canon 5, are appropriate and apply those limitations on political activity most consistent with the characteristics of the particular agency and state administrative law judges employed by such agency.

[5.2][5A] A state administrative law judge retains the right to participate in the political process as a voter, to be enrolled as a member of a political party, to make private and voluntary contributions to political campaigns and candidates, and to participate in non-fund raising activities on behalf of candidates. The activities prohibited by Section 5A are those public displays of political endorsement that raise the suspicion that a state administrative law judge's judgment is affected by political influences, or that the prestige of judicial office is being used to advance political interests.

The specific prohibitions set forth in Section 5A are to be interpreted in light of the general language of that section which prohibits the state administrative law judge from lending his or her status as a judge to political activities. The goal is to permit the state administrative law judge to exercise as much political freedom as possible as a private citizen within this constraint, while recognizing that few political activities are truly private. In complying with this section, state administrative law judges must exercise discretion so that their role in political activities is relatively anonymous, "low-profile," and divorced from their professional status. Thus, for example, it might be appropriate for a state administrative law judge to make non-fund raising phone calls or to circulate petitions on behalf of a candidate for office if the judge is identified only by a first name. Similarly, a state administrative law judge might appropriately attend a political gathering where the judge is not otherwise well-known and does not wear a name tag, or does not wear a name tag identifying the judicial office. In contrast, it would not be appropriate to sit at a head table or to be publicly recognized and welcomed by a master of ceremonies. Application in particular circumstances will depend upon such factors as the size of the community, the notoriety of a particular state administrative law judge, the size of the event or scope of the particular activity, and the publicity likely to attend a given event or activity, among other considerations.

[5.3][5A(1)] The restrictions in this Code concerning political activity do not prohibit a state administrative law judge from membership in a union or other non-political organization, merely because the organization has an associated political action committee ("PAC") that endorses political candidates. With respect to PAC-related activities, however, the provisions of Section 5A apply.

Other provisions of this Code, however, might bar membership in some non-political organizations. For example, Section 2D bars a state administrative law judge outright from membership in an organization that practices invidious discrimination. Otherwise, a state administrative law judge must remain and appear impartial at all times. Under the provisions in Section 4A, a state administrative law judge must be sensitive to whether any extra-judicial activities, including political activity, raise questions about the judge's capacity to act impartially.

[5.4][5A(2)] Section 5A(2) does not prohibit a state administrative law judge from privately expressing his or her views on judicial candidates or other candidates for public office.

[5.5][5A(4)] Section 5A(4) does not prohibit a state administrative law judge from making contributions to a political campaign. However, such contributions must be private and voluntary. A state administrative law judge may make contributions to political campaigns as a private citizen only and, unless otherwise required by law, should not reference the judge's judicial office when making such contributions. A state administrative law judge should make reasonable efforts to prevent the recipient of a political contribution from using the prestige of the judge's office or otherwise publicizing the judge's contribution. A state administrative law judge should not be compelled to make political contributions, including the purchase of tickets for politically sponsored dinners or other functions, including any such function for a non-political purpose.

[5.6][5B]   Section 5B requires a state administrative law judge to resign from office or take a leave of absence, if allowed by law and subject to the appointing authority's approval, when the judge become a candidate for non-judicial office. Section 5B does not require a state administrative law judge to resign from office or take a leave of absence when the judge becomes a candidate for judicial office.

APPLICATION OF THE CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES

(A)   Effective date of compliance. A person to whom this Code becomes applicable should arrange his or her affairs as soon as reasonably possible to comply with it.

(B)   Application to Agency Heads, to Members of a State Board or Commission, or to Other Officers or Tribunals Serving an Administrative Appellate Function. The provisions of this Code are not applicable to the head of an agency, to members of a State board or commission, or to other State officers or tribunals serving an administrative appellate function, unless adopted by the rules of the employing agency.

Commentary:

[6.1][6B]   If an agency chooses to apply the provisions of the Model Code of Judicial Conduct for State Administrative Law Judges to an agency head, members of a State board or commission, or other officers or tribunals serving an administrative appellate function, it should do so with due regard to the different role and function performed by such officers as compared to the role and function performed by state administrative law judges. Due to their role as the initial finders of fact in the administrative adjudicatory process, state administrative law judges are subject to stricter limitations than agency heads, members of a State board or commission, or other State officers or tribunals serving an administrative appellate function (see, e.g., Executive Order No. 131 [9 NYCRR 4.131]). In general, however, the provisions addressing partiality, conflicts of interest and disqualification may be applicable to persons performing quasi-judicial administrative appellate functions.

9 NYCRR 4.131 EXECUTIVE ORDER ESTABLISHING ADMINISTRATIVE ADJUDICATION PLANS

4. The Strike Force shall conduct audits to specifically identify and confirm the value of proceeds generated by criminal activity and to reveal the persons or entities involved in producing and laundering those criminal proceeds.

5. The Strike Force shall use State assets forfeiture powers to impound, seize, or attach identified criminal proceeds and as the claiming agent, acting through the Attorney General as the claiming authority, institute forfeiture proceedings.

6. The Strike Force shall, where deemed appropriate and necessary, study, develop, and recommend to the Governor, legislative, regulatory, or policy changes which would enhance the State's effectiveness in disrupting money laundering or associated activities.

7. The Strike Force shall report monthly to the Director of Criminal Justice, except as otherwise prohibited by law, regarding its activities, specifically including information regarding ongoing investigations, civil or criminal prosecutions, and forfeiture proceedings.

IV. *Assistance of State Agencies*

The Strike Force on Criminal Proceeds may request and shall receive the full cooperation and assistance of any agency represented by its membership and, in addition thereto, of any State criminal justice agency.

Signed: Mario M. Cuomo
Dated: December 4, 1989

Historical Note

Order dated Dec. 4, 1989, filed Dec. 5, 1989.

§ 4.131 Executive Order No. 131: Establishing administrative adjudication plans.

WHEREAS, administrative adjudication was developed to provide expert, efficient, timely and fair resolution of claims, rights and disputes before state agencies;

WHEREAS, administrative adjudication often addresses complex scientific, technical, financial, medical, legal and related issues under the jurisdiction of state agencies with specialized knowledge;

WHEREAS, administrative adjudication should be a more flexible alternative to, rather than a duplication of, the civil and criminal court system;

WHEREAS, administrative adjudication must meet due process standards and should resolve disputes in a manner that is fair and appears fair to the public;

WHEREAS, the fairness of administrative adjudication and the appearance of fairness are particularly important when a state agency is a party to the administrative proceeding; and

WHEREAS, to assure expert, efficient, timely and fair adjudications, hearing officers who preside at administrative hearings should be knowledgeable, competent, impartial, objective and free from inappropriate influence;

NOW, THEREFORE, I, Mario M. Cuomo, Governor of the State of New York, by virtue of the authority vested in me by the Constitution and Laws of the State of New York, do hereby order as follows:

I. *Definitions*

A. The term "agency" shall mean any department, board, bureau, commission, division, office, council, committee or officer of the state authorized by law to make final decisions in adjudicatory proceedings but shall not include the governor, agencies created by interstate compact or international agreement, the Division of Military and Naval Affairs to the extent it exercises its responsibility for military and naval affairs, the Division of State Police, the identification and intelligence unit of the

Division of Criminal Justice Services, the Division for Youth, the State Insurance Fund, the Workers' Compensation Board, the State Division of Parole, the Department of Correctional Services, the State Ethics Commission, the State Education Department and the Division of Tax Appeals.

B. The term "hearing officer" shall mean a person designated and empowered by an agency to conduct adjudicatory proceedings as defined in this Order, including but not limited to hearing officers, hearing examiners and administrative law judges; provided, however, that such term shall not apply to the head of an agency or to members of a state board or commission.

C. The term "adjudicatory proceedings" shall mean any activity before an agency in which a determination of legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a formal adversarial hearing; provided, however, that such term shall not apply to (1) a rule making proceeding, (2) an employee disciplinary action or other personnel action pursuant to article five of the civil service law or (3) representation proceedings conducted by the State Labor Relations Board and the Public Employment Relations Board.

II. *General Principles*

A. Every agency that conducts adjudicatory proceedings shall insure that such proceedings are impartial, efficient, timely, expert and fair.

B. 1. Unless otherwise authorized by law and except as provided in paragraph two of this subdivision, a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate.

2. A hearing officer may consult on questions of law with supervisors, agency attorneys or other hearing officers, provided that such supervisors, hearing officers or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding. Hearing officers may also consult with supervisors, other hearing officers, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. The head of each agency shall strictly enforce the prohibition set forth in this paragraph B.

3. Subdivision one of this paragraph shall not apply (a) in determining applications for initial licenses for public utilities or carriers or (b) to proceedings involving the validity or application of rates, facilities, or practices to public utilities or carriers.

C. No agency shall consider whether a hearing officer's rulings, decisions or other actions favor or disfavor the agency or the State in establishing the hearing officer's salary, promotion, benefits, working conditions, case assignments or opportunities for employment or promotion. The work of hearing officers shall only be evaluated on the following general areas of performance: competence, objectivity, fairness, productivity, diligence and temperament.

D. No agency shall establish quotas or similar expectations for any hearing officer that relate in any way to whether the hearing officer's rulings, decisions or other actions favor or disfavor the agency or the State.

E. In any pending adjudicatory proceeding, the agency may not order or otherwise direct a hearing officer to make any finding of fact, to reach any conclusion of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal, or other decision on the record of the proceeding; provided, however, that such provision shall not preclude a supervisor from giving legal advice or guidance to a hearing officer where the supervisor determines that such advice or guidance is appropriate to assure the quality standards of the agency or to assure consistent or legally sound decisions.

F. If the head of an agency, or a designee, issues a decision that includes findings of fact or conclusions of law that conflict with the findings, conclusions or recommended decision of the hearing officer, the head of the agency, or the designee, shall set forth in writing the reasons why the head of the agency reached a conflicting decision.

III. *Administrative Adjudication Plans*

A. Every agency responsible for administrative adjudication shall develop an administrative adjudication plan. No later than February 1, 1990, each agency shall make its proposed plan available to the public for comment and shall publish a notice of the availability of such plan in the State Register at the first available date. No later than March 30, 1990, each agency shall conduct at least one public hearing to solicit comments on the plan. Each agency shall give full consideration to the comments received from the public and shall issue a final administrative adjudication plan no later than April 30, 1990. Notice of the availability of such final plan shall be published in the *State Register* and shall address the comments received from the public. All such plans shall be fully implemented no later than July 1, 1990 except to the extent appropriations necessary to implement the plan are not available. An agency may amend such plan as necessary following notice of a proposed amendment and an opportunity for public comment.

B. The administrative adjudication plan shall, at a minimum, include the following:

1. An attestation by the head of the agency that the plan adheres to the principles of administrative adjudication set forth in section two of this Order.

2.a. An organization of administrative adjudication that ensures that hearing officers do not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel. Wherever practical, hearing officers shall be assigned to an administrative unit made up exclusively of hearing officers, supervisors and support staff. The unit may be part of the agency counsel's office but may not be part of any agency bureau, office or division with programmatic functions unless such functions are not the subject of adjudicatory proceedings within the agency nor may it include attorneys responsible for prosecutions or other adversarial presentation of agency position. Unless otherwise proscribed by law, hearing officers may be assigned duties in addition to serving as a hearing officer provided that (1) such duties do not conflict with the hearing officer's responsibilities as a hearing officer and (2) such duties do not involve functions related to prosecutions or adversarial presentations of agency positions. Hearing officers may be assigned to conduct investigatory hearings provided that the standards of independence and objectivity specified in this Order are adhered to.

b. An agency may establish an organization of administrative adjudication for less complex cases that does not satisfy the requirements of paragraph a of this subdivision provided that any such organization and its justification is set forth in the agency's administrative adjudication plan.

c. In order to comply with the requirement that a hearing officer not report with regard to functions that relate to the merits of adjudicatory proceedings to any agency official other than the head of the agency, a supervisor of hearing officers or the general counsel as set forth in paragraph a of this subdivision, an agency may request the services of a hearing officer from a different agency. No later than January 15, 1990, the Division of the Budget, in consultation with the Office of Business Permits and Regulatory Assistance ("OBPRA"), shall develop a plan under which agencies may share the services of hearing officers where necessary. The Office of Business Permits and Regulatory Assistance shall develop and maintain a register of hearing officers that may be available to conduct adjudicatory proceedings in agencies other than the agency that employs them.

3. Provisions for the hiring of hearing officers that allow, to the extent practical and consistent with the Civil Service Law, opportunities for non- agency personnel to compete for open hearing officer positions.

4. Location of hearing officers that separates, to the extent practical, hearing officers, supervisors and support staff from other agency staff.

5. Duly promulgated procedural regulations governing adjudicatory hearings that include, without limitation, requirements for clear and detailed notices of hearing and statements of charges; permission for answers and responsive pleadings, where appropriate; provisions for discovery to the extent permitted by the agency; and a procedure for any party to request recusal of a hearing officer.

6. A description of continuing education and training programs for hearing officers. Training programs shall include an explanation of the need for objectivity and fairness and the avoidance of a pro-agency bias. The Governor's Office of Employee Relations shall develop training programs to assist agencies in providing continuing education and training to hearing officers.

NEW YORK STATE COURT CASES

ROCHE V. TURNER
NEMBHARD V. TURNER
LIZOTTE V. JOHNSON

[719 NYS2d 436]

In the Matter of ROBERT ROCHE, Petitioner, v JASON TURNER, as Commissioner of the New York City Human Resources Administration, et al., Respondents.

Supreme Court, New York County, May 30, 2000

HEADNOTES

Courts — Justiciable Questions — Retroactive Public Assistance Benefits

1. An otherwise timely CPLR article 78 proceeding challenging respondent's determination after a fair hearing that petitioner's public assistance benefits were properly discontinued because of his failure to submit sufficient documentation to support a medical exemption for a Work Experience Program assignment should not be dismissed as "academic" on the ground that petitioner failed to reapply for benefits when the sanction period ended. Social Services Law § 106-b, which prohibits retroactive public assistance payments to persons who are not recipients of public assistance, would not bar petitioner's recovery. Petitioner is not working and remains financially eligible for assistance. Furthermore, once petitioner reapplies, his case history on welfare is resurrected such that the agency is responsible for the payment of any past underpayment just as petitioner would be liable for any past overpayment (*see*, 18 NYCRR 352.31 [d], [f]). Moreover, the length of time that a recipient of public assistance will be sanctioned for a work rule violation is a function of the number of sanctions to which the individual has been subject (12 NYCRR 1300.12 [d] [2]). Petitioner has already been sanctioned once, and if he receives benefits again, it is imperative that a wrongful sanction be deleted from his records, since it will raise the level of any future sanction.

Social Services — Public Assistance — Termination of Benefits for Work Rule Violation — Compliance with Due Process Standards

2. Respondent's determination after a fair hearing that petitioner's public assistance benefits were properly discontinued because of his failure to submit sufficient documentation to support a medical exemption for a Work Experience Program assignment must be annulled and a de novo hearing ordered due to the lack of adherence to minimal due process standards. The Administrative Law Judge (ALJ) failed to ensure a complete record as required by respondent's regulations (18 NYCRR 358-5.6 [b]). Moreover, since petitioner was not represented by counsel, procedural due process required a heightened duty on the part of the ALJ to develop the record. The ALJ failed to make an opening statement explaining the nature of the proceeding, the issues to be heard or the manner in which the hearing would be conducted. In addition, the ALJ failed to elicit documents and testimony, and failed to consider an independent medical assessment. Furthermore, the record also indicates the ALJ's failure to adequately address petitioner's claim that he was unemployable because of hand surgeries.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Courts, §§ 54, 113; Welfare Laws, §§ 107, 110.

CARMODY-WAIT 2d, Courts and Their Jurisdiction § 2:50; Pretrial Motions to Dismiss § 38:3.

McKINNEY'S, Social Services Law § 106–b.

12 NYCRR 1300.12 (d) (2); 18 NYCRR 352.31 (d), (f); 358–5.6 (b).

NY JUR 2d, Courts and Judges, §§ 568, 569; Public Welfare and Old Age Assistance, §§ 383–394, 397, 400.

ANNOTATION REFERENCE

See ALR Index under Moot and Abstract Matters; Poor Persons.

APPEARANCES OF COUNSEL

Robert Roche, petitioner *pro se. Michael D. Hess, Corporation Counsel* of New York City (*Jack G. McKay* and *Richard Kahn* of counsel), for Jason Turner, respondent. *Eliot Spitzer, Attorney General* (*Domenic Turziano* of counsel), for Brian Wing, as Commissioner of New York State Office of Temporary and Disability Assistance, and others, respondents.

OPINION OF THE COURT

JOAN A. MADDEN, J.

Petitioner, Robert Roche, who is *pro se* in this proceeding as he was in the administrative proceeding, was a recipient of public assistance benefits when he was directed to appear for a Work Experience Program (WEP) assignment as a maintenance worker. Petitioner failed to appear and the City issued a notice of intent, dated January 15, 1999, to discontinue his public assistance benefits effective January 25, 1999 (First Notice). The First Notice further advised petitioner that this sanction affected only his eligibility to receive public assistance, and explicitly stated that his food stamps and medical assistance benefits were to remain unchanged.

On January 25, 1999, at a conference with the City agency, petitioner's request for a medical exemption from WEP because he was disabled was denied on the ground that he failed to submit sufficient documentation. On the same day, January 25, 1999, he requested a fair hearing from the State agency to challenge the City agency's denial. Petitioner states he never received notice and thus did not appear at a March 30, 1999 fair hearing, and a default was entered against him. Based on that default, petitioner's public assistance grant was discontinued on April 7, 1999. Petitioner's food stamps and Medicaid benefits were also discontinued, notwithstanding the state-

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ment to the contrary in the First Notice. Shortly thereafter, petitioner requested another fair hearing from the State agency, which is the subject of this proceeding.

However, in the interim, petitioner received a second notice of intent to discontinue his public assistance grant for noncompliance with employment-related requirements dated March 5, 1999 (Second Notice). At a conference with the City agency on April 2, 1999, petitioner's request for a medical exemption was granted (the bottom of the Second Notice is stamped "Settled in Conference in Favor of Client [01]"), and the form is marked with a circled hand notation "HSS exam," apparently a notation that petitioner is to be referred to an agency medical examination to determine his employability. According to petitioner, he was subsequently told by a worker for the City agency that the HSS exam was never scheduled because his public assistance case was closed due to his failure to appear for a fair hearing on the First Notice.

Fair Hearing

As to the First Notice, a fair hearing was held on June 4, 1999. The transcript comprises 17 pages of testimony, seven pages of which discuss whether petitioner's request for a fair hearing was timely, and whether the default of March 30, 1999 could be vacated. That issue was ultimately resolved in petitioner's favor. The balance of the transcript is largely incomprehensible, partially due to a poorly transcribed record (many of the words and paragraphs are transcribed as either indecipherable or missing). The problem of the incomplete transcript is exacerbated by the Administrative Law Judge's (ALJ) failure to make an opening statement and to establish an order in the presentation of testimony and exhibits. The ALJ, petitioner, and the City representative spoke one after the other, cutting each other off, while addressing different facets of the case, without clearly addressing the remaining issue: whether petitioner had a medical excuse in refusing to cooperate with the WEP program.

Regarding the documentary evidence, petitioner offered, and the ALJ accepted, records from Kings County Hospital establishing petitioner was admitted into the hospital on August 29, 1998, operated on on August 30, 1998, and discharged on September 4, 1998 for an infection due to a bite on his left hand. Also accepted into evidence was a copy of the Second Notice of Intent dated March 5, 1999, which established that the subsequent work sanction was settled in petitioner's

favor by the City agency. Petitioner further offered Kings County Hospital records regarding a 1987 hospitalization and surgery on his right hand, but the ALJ refused to accept it stating "I am not going to need that." The rejected medical records were neither marked nor identified.

By determination dated June 11, 1999, the decision after fair hearing (Decision) held that the petitioner's default at the March 1999 fair hearing should be vacated and that the Statute of Limitations did not expire. The Decision further held that petitioner's August 30, 1998 hospitalization, without more recent medical documentation regarding petitioner's medical condition, did not constitute a valid reason for petitioner's failure to report to the December 29, 1998 WEP assignment. On these grounds, the State affirmed the City's determination in all respects. Petitioner thereupon commenced this CPLR article 78 proceeding challenging the Decision.

In this proceeding, petitioner alleges he accepted the WEP assignment under "extreme pressure," even though he "submitted all my medical file from Kings County Hospital and my doctor statement that I was medically unfit to work at that time." He further alleges that, since 1987, his right hand has been permanently partially disabled following major surgeries. Although the hospital records for the 1987 surgeries and an undated letter on Kings County Hospital Center stationery are attached to the petition as an exhibit, they were not part of the record below. The doctor's letter states: "Please be advised that above patient suffered a severe hand infection from human bite that required surgery September 1998 with extended recovery time of 6 months. During this period patient was unable to lift heavy objects or work as a laborer." In opposition to the petition, the State and the City contend that the determination is supported by substantial evidence. The City also contends that this proceeding is barred by the applicable Statute of Limitations and that this proceeding is moot or, in the alternative, that the proceeding must be transferred to the Appellate Division for determination of the substantial evidence issue.

Statute of Limitations

A challenge to an administrative determination must be commenced within four months after the determination becomes final and binding upon the petitioner (*Matter of Todd v New York City Hous. Auth.*, 262 AD2d 202 [1st Dept 1999]; CPLR 217). For a determination to be considered binding, unequivo-

cal actual notice must be received by the petitioner (*Matter of Lubin v Board of Educ.*, 60 NY2d 974 [1983], *cert denied* 469 US 823 [1984]). Here, although petitioner has not advised the court of the date on which he received the State's determination, the record demonstrates that the State issued its decision on June 11, 1999. Therefore, the earliest possible date the limitations period could have expired is October 11, 1999. The County Clerk's Office date stamp on the petition demonstrates that the petition was filed with the court on October 8, 1999, three days prior to expiration of the limitations period. Therefore, this proceeding is timely.

Mootness

[1] The City argues that this petition should be dismissed as "academic" as even if petitioner were to prevail on his claims, he would have no remedy at law because he failed to reapply for benefits when the sanction period ended on September 7, 1999, and Social Services Law § 106-b prohibits retroactive public assistance to persons who are not current recipients of assistance, relying upon *Patrick v New York City Dept. of Social Servs.* (257 AD2d 512 [1st Dept 1999]) and *Matter of Ortiz v Hammons* (171 Misc 2d 699 [Sup Ct, NY County 1997]).

However, unlike the petitioners in *Patrick* and *Ortiz* (*supra*), who were working and thus financially ineligible for benefits at the time of the hearing and when the article 78 proceeding was commenced, there is no evidence that this petitioner was working during the relevant time periods. In fact, petitioner alleges that he is "dependant [*sic*] upon soup kitchens and the good will of friends for lodging and hygiene." Therefore, it appears he remains financially eligible for assistance.

As to the City's argument that retroactive public assistance is prohibited, once petitioner reapplies, his case history on welfare is resurrected such that the agency is responsible for the payment of any past underpayment (18 NYCRR 352.31 [f]), just as the petitioner would be liable for any past overpayment (18 NYCRR 352.31 [d]).

Moreover, the length of time that a recipient of public assistance will be sanctioned for a work rule violation is a function of the number of sanctions to which the individual has been subject. For the first offense, the sanction lasts 90 days; the second offense carries a 150-day sanction; and a third violation carries a 180-day sanction (12 NYCRR 1300.12 [d] [2]). Petitioner has already been sanctioned once; this appeal concerns a second sanction. Thus, if petitioner receives benefits

again, it is imperative that this wrongful sanction be deleted from his records, as it will raise the level of any future sanction.

Merits

[2] A review of the administrative record reveals a lack of adherence to minimal due process standards. This is evident in the conflicting notices and determinations, a lack of clear and coordinated action by the City and State agencies, and the lack of clear and concise instructions to petitioner, all of which culminated in the failure to establish a proper administrative record below. Where subsistence benefits are at stake, it is of the utmost importance that there be strict adherence to due process safeguards and that conflicting actions by agencies be scrupulously examined.

Respondents ignored conflicting determinations at the hearing, in the Decision, and in this proceeding. Such conflict is evident in the opposite conclusions reached by the respondents regarding petitioner's employability (petitioner is not sanctioned and is granted a medical evaluation on the Second Notice but is found employable and sanctioned on the First Notice). Such conflict is also evident in the termination of petitioner's food stamp and Medicaid benefits despite the clear and unambiguous statement in the notices that only his cash grant was in issue.

Furthermore, this court finds the State's arguments regarding the competency and import of the doctor's letter are without merit or foundation. The State objects to the competency of the doctor's letter as petitioner failed to submit it at the hearing. However, it is unclear whether petitioner offered the letter together with the 1987 medical records which were rejected by the ALJ. Conversely, if petitioner did not attempt to submit the letter at the hearing, had petitioner been informed of the nature of the proceedings and issues involved, he could have requested an adjournment to submit it. As to its significance, the State argues the letter "fails to support his claim that he was unemployable on December 29, 1998," despite the fact that the letter clearly states that petitioner could not work for six months after hand surgery in September 1998.

Due Process

The State agency's regulations (18 NYCRR 358-5.6 [b]) clearly state the ALJ must ensure a complete record by, *inter alia*, doing the following:

"(2) make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which the fair hearing will be conducted;

"(3) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness * * *

"(4) where the hearing officer considers independent medical assessment necessary, require that an independent medical assessment be made part of the record when the fair hearing involves medical issues * * *

"(6) adjourn the fair hearing when in the judgment of the hearing officer it would be prejudicial to the due process rights of the parties to go forward with the hearing * * *

"(8) * * * where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records."

As evidenced from this fair hearing transcript, the ALJ failed to make a complete record. Although it appears that passages are missing, what is transcribed demonstrates a departure from the agency's own regulations. Petitioner was never advised as to the nature of the proceeding, the issues to be heard or the manner in which the hearing would be conducted. In addition, the ALJ failed to elicit documents and testimony, and failed to consider an independent medical assessment. This last failure is salient in light of the fact that the City agency was planning to schedule petitioner for an HSS exam regarding the Second Notice, and this evidence was before the ALJ.

Hence, the fair hearing held here was in violation of the State agency's own regulation (18 NYCRR 358-5.6 [b]), and was a denial of due process such that a remand for a de novo hearing is required (*Matter of Blackman v Perales*, 188 AD2d 339, 340 [1st Dept 1992] [the Administrative Law Judge "(did not) delineate the issues so that (*pro se*) petitioner would know the conditions under which she would be entitled to a grant of assistance and be in a position properly to present her case"]; *Matter of Schnurr v Perales*, 115 AD2d 740, 741 [2d Dept 1985] [ALJ's failure to "delineate the issues upon which the hearing was to focus or to develop the testimony presented * * * effectively deprived (*pro se* claimant) of her right to a fair hearing"]; *Matter of Dreher v Smith*, 65 AD2d 572, 573 [2d Dept 1978] [*pro se* claimant was not given proper assistance nor "was there sufficient development by the hearing officer of the

testimony presented by her"]; *Matter of Rezoagli v Toia*, 62 AD2d 1020 [2d Dept 1978] [*pro se* claimant "not accorded the opportunity to make a clear presentation of her evidence * * * and was not advised of her right to procure an adjournment of the hearing to enable her to produce witnesses essential to her case"]; *Feliz v Wing*, NYLJ, Feb. 1, 2000, at 27, cols 1, 3 [Sup Ct, NY County, Schlesinger, J.] [hearing transcript consists of four pages; ALJ utterly failed to elicit a complete record: "Due process, as guaranteed by the Constitutions of New York and the United States, stands for the proposition that a statutorily mandated hearing provide a (*pro se* petitioner a) meaningful opportunity to understand the proceedings, to participate in the proceeding, and to be adequately heard"]; *Matter of Nembhard v Turner*, 183 Misc 2d 73, 77 [Sup Ct, NY County 1999, Moskowitz, J.] ["In reviewing (*pro se* claimant's) fair hearing transcript and decision, the court finds that NYCHRA and the State agency failed to follow many of the procedural requirements to ensure fundamental fairness"]; *Matter of Santana v Hammons*, 177 Misc 2d 223, 232 [Sup Ct, NY County 1998, Goodman, J.] ["The agency ALJs also appear to be violating the agency's own directives which require assistance to *pro se* claimants"], *revd and mod on other grounds sub nom. Mitchell v Barrios-Paoli*, 253 AD2d 281 [1st Dept 1999]; *Matter of Acevedo v Wing*, NYLJ, Apr. 18, 1997, at 27, cols 2, 3 [Sup Ct, Bronx County, Green, J.] ["Despite the fact that (*pro se*) petitioner was clearly a person in need of assistance in presenting evidence and questioning witnesses, no effort was made to obtain the information about the nature and extent of her medical treatment or to assist her in cross-examining witnesses in order to ensure a complete record"]).

Furthermore, due process considerations require that when the "claimant is unrepresented by counsel, the ALJ is under a heightened duty 'to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.'" (*Echevarria v Secretary of Health & Human Servs.*, 685 F2d 751, 755 [2d Cir 1982], citing *Hankerson v Harris*, 636 F2d 893, 896 [2d Cir 1980], and *Gold v Secretary of Health, Educ. & Welfare*, 463 F2d 38, 43 [2d Cir 1972].) These seminal Federal cases delineate the due process requirements in disability cases under the Social Security Act and regulations (42 USC § 402 *et seq.*; 20 CFR 404.1 *et seq.*). Similarly, under New York State's Social Services Law and regulations (18 NYCRR 358-5.6 [b]), procedural due process requires such a heightened duty on the part of State ALJs to develop the record.

Specifically, the ALJ here not only failed to make an opening statement as required by 18 NYCRR 358-5.6 (b) (2), but fundamentally, the record fails to address: (1) as to the burden of proof, the standard to be applied, and the party who has the burden; (2) petitioner's rights regarding the presentment of evidence; (3) identification of the documents which the ALJ rejected; (4) whether petitioner should be referred for a medical exam, and if not, why not; (5) if there was a need for petitioner to submit recent medical evidence, and his right to adjourn the hearing in order to obtain the evidence. (*See, e.g., Echevarria v Secretary of Health & Human Servs.*, 685 F2d, *supra*, at 755 [2d Cir 1982]; *Hankerson v Harris*, 636 F2d, *supra*, at 896 [2d Cir 1980]; *Gold v Secretary of Health, Educ. & Welfare*, 463 F2d, *supra*, at 43 [2d Cir 1972].)

In addition, at the hearing, petitioner testified that he was unemployable because of hand surgeries on both hands, and that he has "metal in this hand, and I cannot take the cold." Under these circumstances, the record indicates a failure to address: (1) whether the work assignment petitioner refused was indoors or outside, as petitioner was assigned a job in the middle of winter; (2) whether petitioner is left or right handed; and (3) any restriction in the use of each of his hands. (*See, e.g., Echevarria v Secretary of Health & Human Servs., supra; Hankerson v Harris, supra; Gold v Secretary of Health, Educ. & Welfare, supra.*)

Finally, respondents maintain that this proceeding raises a substantial evidence question and therefore this court must transfer the proceeding to the Appellate Division (CPLR 7804 [g]). However, where, as here, a petition raises issues regarding respondents' interpretation of statutes and regulations, and their application to the facts, this court must decide the case (*Matter of Westmount Health Facility v Bane*, 195 AD2d 129, 131 [3d Dept 1994]; *Matter of Rosenkrantz v McMickens*, 131 AD2d 389 [1st Dept 1987]).

Accordingly, it is hereby ordered and adjudged that the decision after fair hearing dated June 4, 1999 is annulled and the matter is remanded to respondents to conduct a new fair hearing in accordance with this decision and which shall meet the minimum due process requirements outlined above.

[Portions of opinion omitted for purposes of publication.]

[703 NYS2d 673]

In the Matter of MAVIS NEMBHARD, Petitioner, v JASON A. TURNER, as Commissioner of the New York City Human Resources Administration, et al., Respondents.

Supreme Court, New York County, December 6, 1999

HEADNOTES

Social Services — Public Assistance — Employment Program Requirements — Termination of "Safety Net" Benefits — Agency's Failure to Comply with Due Process Requirements

1. The determination after a fair hearing to discontinue petitioner's "Safety Net" public assistance benefits because of her "willful" failure to appear for a medical examination necessary to maintain her exemption from workfare requirements (*see,* 18 NYCRR 351.21 [a], [f]; 12 NYCRR 1300.2 [d]; 1300.12 [a]) must be annulled and a new fair hearing ordered, where the respondent agencies failed to follow the requisite procedural guidelines to ensure fundamental fairness. The Hearing Officer failed to make the required assessment, on the record, as to whether the "Notice of Intent to Discontinue Public Assistance and Medicaid Benefits" sent to petitioner complied with regulatory and due process requirements. The "Notice of Intent" was, in fact, defective because of the failure to cite the regulations upon which the agency based its determination (18 NYCRR 358-2.2 [a] [4]) and the failure to contain the specific reasons for the action (18 NYCRR 358-2.2 [a] [3]). The "Notice of Intent" did not specify what appointment petitioner failed to keep, on what date or with whom. Furthermore, the Hearing Officer failed to elicit necessary documents and testimony (*see,* 18 NYCRR 358-5.6) after petitioner testified that she had called the agency on the day of the appointment seeking to reschedule. The fair hearing was also defective because the Hearing Officer failed to require the agency to submit evidence about petitioner's alleged "willful" failure to appear for the appointment. By failing to require any evidence on the issue of willfulness, the Hearing Officer improperly shifted the burden to the *pro se* petitioner to prove that her failure to appear was not "willful" and without good cause. At a fair hearing it is the agency that has the burden of proof of establishing that its actions were correct (*see,* 18 NYCRR 358-5.9 [a]).

Social Services — Public Assistance — Termination of "Safety Net" Benefits — Agency's Failure to Comply with Due Process Requirements — Conciliation Notice

2. The determination after a fair hearing to discontinue petitioner's "Safety Net" public assistance benefits because of her "willful" failure to appear for a medical examination necessary to maintain her exemption from workfare requirements (*see,* 18 NYCRR 351.21 [a], [f]; 12 NYCRR 1300.2 [d]; 1300.12 [a]) must be annulled and a new fair hearing ordered where respondent agency failed to follow the requisite procedural guidelines to ensure fundamental fairness. Respondent failed to supply necessary documents demonstrating that petitioner was an exempt recipient of public assistance for whom a conciliation notice (12 NYCRR 1300.11) was not required. There is no indication in the record whether petitioner was still an exempt participant at the time the agency sent her the "Notice of Intent to Discontinue Public Assistance and Medicaid Benefits." Without this information, it is

impossible to determine whether the agency was required to send a conciliation notice.

Social Services — Public Assistance — Termination of "Safety Net" Benefits — Agency's Failure to Comply with Due Process Requirements — Pro Se Petitioner's Failure to Preserve Objections

3. The determination after a fair hearing to discontinue petitioner's "Safety Net" public assistance benefits because of her "willful" failure to appear for a medical examination necessary to maintain her exemption from workfare requirements (*see,* 18 NYCRR 351.21 [a], [f]; 12 NYCRR 1300.2 [d]; 1300.12 [a]) must be annulled and a new fair hearing ordered where respondent agency failed to follow the requisite procedural guidelines to ensure fundamental fairness. The *pro se* petitioner's failure to preserve objections at the fair hearing does not result in a waiver of objections, especially where many of the agency's lapses concern its burden of proof that it had to meet in order to have its determination affirmed.

Proceeding against Body or Officer — Transfer to Appellate Division

4. A CPLR article 78 proceeding seeking to annul respondent's determination after a fair hearing to discontinue petitioner's "Safety Net" public assistance benefits because of her "willful" failure to appear for a medical examination does not raise a substantial evidence question, and thus need not be transferred to the Appellate Division (*see,* CPLR 7804 [g]). Where a petitioner raises issues that can terminate the proceeding without reference to substantial evidence, Supreme Court must decide the case. Since petitioner's claims of errors are sufficient to terminate the proceeding without considering substantial evidence questions, the court will not transfer the matter.

State — Equal Access to Justice Act — Counsel Fees

5. Petitioner is entitled to an award of attorney's fees pursuant to 42 USC § 1988 and CPLR 8601 (b) for having succeeded in having respondent's determination to discontinue her "Safety Net" public assistance benefits annulled because of respondent's failure to follow the requisite procedural guidelines to ensure fundamental fairness. Petitioner raised both State and Federal due process claims and is the prevailing party as to those claims.

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By the Publisher's Editorial Staff

Am Jur 2d, Costs, §§ 63, 64; Welfare Laws, §§ 53, 72, 105–110.

Carmody-Wait 2d, Actions By or Against the State § 126:117; Actions By or Against Public Officers §§ 145:352–145:361.

McKinney's, CPLR 7804 (g); 8601 (b).

12 NYCRR 1300.11; 18 NYCRR 351.21, 358–2.2.

42 USCA § 1988.

NY Jur 2d, Article 78 and Related Proceedings, §§ 59, 332, 333, 336, 341–347, 368; Costs in Civil Actions, § 16; Public Welfare and Old Age Assistance, §§ 389, 390.

ANNOTATION REFERENCE

See ALR Index under Administrative Law; Attorneys' Fees; Costs of Actions; Poor Persons.

APPEARANCES OF COUNSEL

Legal Aid Society, Brooklyn (*Warren B. Scharf* and *Susan R. Sternberg* of counsel), for petitioner. *Jack G. MacKay,* New York City (*Robert Kraft* and *Erica Michals* of counsel), for Jason A. Turner, respondent. *Eliot Spitzer, Attorney General,* New York City (*Domenic Turziano* of counsel), for Brian J. Wing, as Commissioner of New York State Office of Temporary and Disability Assistance, and another, respondents.

OPINION OF THE COURT

KARLA MOSKOWITZ, J.

Petitioner Mavis Nembhard (Nembhard) brings this proceeding pursuant to CPLR article 78 to vacate and annul the decision after fair hearing dated March 25, 1999, issued by State respondent Department of Labor (DOL) after a hearing conducted on its behalf by the Office of Temporary and Disability Assistance (OTADA). That hearing affirmed a New York City Human Resources Administration (NYCHRA or agency) determination to discontinue Nembhard's "Safety Net" Assistance benefits. In an interim order dated August 12, 1999, this court ordered respondents to provide petitioner with certain emergency relief.

Nembhard is a recipient of Safety Net Assistance benefits who lives with her disabled adult daughter, for whom she is representative payee for Supplemental Security Income disability benefits. Petitioner has depended on public assistance since losing her employment as a home attendant after sustaining an injury on the job. Respondent NYCHRA exempted Nembhard from workfare requirements because of chronic medical problems. A notice dated January 12, 1999 required her to attend a medical examination at NYCHRA's medical contractor, HS Systems, Inc. The notice advised Nembhard that the appointment was on January 27, 1999, at 1:00 P.M., and that failure to keep the appointment could result in the discontinuance or reduction of Nembhard's public assistance and food stamps benefits. Nembhard contends that she was too ill to travel from her home in East Flatbush, Brooklyn, to Manhattan on the day in question. She called the telephone number on the notice to ask to reschedule the appointment. She was told that she could not reschedule.

Nembhard received a "Notice of Intent to Discontinue Public Assistance and Medicaid Benefits" (Notice of Intent). The reason given was: "[o]ur information as of 2/01/99 is that you failed to keep an appointment with the Office of Employment Services for the purpose of evaluating your current employability status. We have determined that your action was willful and without good cause. See 18 NYCRR 351.21." The Notice of Intent provided information on how to request a fair hearing and advised Nembhard of her rights with regard to the fair hearing.

Nembhard appeared *pro se* at the fair hearing on March 22, 1999. The entire transcript of the hearing is contained in two and a half pages. The agency representative informed the Hearing Officer that the agency sent a notice for a medical appointment on January 12, 1999; that the date of the appointment was January 27, 1999; that Nembhard failed to report; and that, on February 5, 1999, the agency sent a Notice of Intent, effective February 15, 1999. The agency representative then gave the Hearing Officer Nembhard's address. The Hearing Officer then marked and received into evidence the case record. As the State respondents concede, the medical appointment notice, the activity record indicating the action taken in Nembhard's case, the Notice of Intent, the fair hearing information sheet, Nembhard's address history sheet and the current case composition sheet were the only documents in evidence. None of these contain any information as to whether Nembhard attempted to contact the agency, what steps the agency took, if any, to verify the willfulness of Nembhard's noncompliance or any information regarding her prior exemption for medical reasons.

Nembhard told the Hearing Officer that on the day of the appointment she had called and tried to make a new appointment because her leg was swollen, but was told that she could not reschedule. The Hearing Officer asked if she had documentation concerning the reason she did not go. Nembhard said no, and started saying she called, when the Hearing Officer interrupted, and asked again whether she had documentation. She again said she had none. Nembhard then told the Hearing Officer that she did not go because her legs were swollen, that she has problems with her legs and had pain. After asking Nembhard her age, the Hearing Officer concluded the hearing.

The decision after fair hearing recites the requirements of 18 NYCRR 351.21 (a) and (f), as well as the provisions of 12 NYCRR 1300.2 (d) and 1300.12 (a). The Hearing Officer found

that Nembhard's testimony that she was too ill to report to her appointment on January 27, 1999 was "not credible because the Appellant did not have supporting medical documentation and she was vague." Consequently, the decision concluded that Nembhard failed to establish good cause for not keeping the appointment and confirmed that portion of the agency's determination that discontinued Nembhard's public assistance.

[1] There are a number of troubling aspects to the manner in which the agencies carried out their statutory mandates. The agency is required to follow certain enumerated procedures in notifying a participant about its intentions to discontinue benefits and in ensuring that any action it takes is proper. In addition to the statutory mandates of the Social Services Law, the agency is bound by both the NYCRR and its own policy guidelines to implement public assistance in a fundamentally fair manner. In reviewing Nembhard's fair hearing transcript and decision, the court finds that NYCHRA and the State agency failed to follow many of the procedural requirements to ensure fundamental fairness.

The Hearing Officer is required to review the sufficiency of the Notice of Intent to assess whether it complies with regulatory requirements and whether there are any deficiencies that impinge on the appellant's due process rights. The Hearing Officer should conduct this assessment on the record. (Policy guidelines, Dec. 11, 1996.) The transcript of the hearing contains no assessment of the Notice of Intent.

Among other things, the Notice of Intent is required to include the specific laws and/or regulations upon which the action is based. (18 NYCRR 358-2.2 [a] [4].) The only regulation cited in Nembhard's Notice of Intent is 18 NYCRR 351.21, that lists the required contacts and investigation the agency must conduct with a participant. The Notice of Intent does not address the participant's obligations to cooperate with requirements of the agency or the consequences of failing to comply with any requirements. The determination of the agency, as confirmed by the decision after fair hearing, was based upon the regulations governing failure to comply with the requirements of 12 NYCRR part 1300. Thus, the Notice of Intent was defective in failing to cite the regulations upon which the agency based its determination. (*Matter of Bryant v Perales*, 161 AD2d 1186 [4th Dept], *lv denied* 76 NY2d 710 [1990].)

In addressing the sufficiency of the Notice of Intent, the Hearing Officer was also required to determine whether the Notice contained the specific reasons for the action. (18 NYCRR

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358-2.2 [a] [3].) The Notice of Intent did not specify what appointment Nembhard failed to keep, on what date or with whom. Therefore, the Notice was deficient here too.

A Hearing Officer has an obligation to ensure there is a complete record and to elicit documents and testimony. (18 NYCRR 358-5.6.) Nembhard told the Hearing Officer that she had called the agency on the day of the appointment seeking to reschedule. Nonetheless, the Hearing Officer did not seek to elicit any information from the agency whether it had information about a call and whether the agency had any documentation of receipt of a call. The agency's failure to provide any records of calls received is in violation of the agency's obligation to provide a complete case record, as it agreed to in the consent judgment in *Rodriguez v Blum* (US Dist Ct, SD NY, Feb. 25, 1983, 79 Civ 4518). The Hearing Officer's omission constitutes a failure to comply with lawful procedure and is another basis for which a new fair hearing is required.

The Hearing Officer also failed to elicit testimony or documentation regarding Nembhard's prior medical condition. Even though the Hearing Officer had information that Nembhard had previously been found to be medically incapacitated, the Hearing Officer made no effort to ascertain what the disability was and whether the incapacity was consistent with the reason Nembhard gave for not attending the appointment. This failure may have significantly affected the Hearing Officer's determination of credibility upon which the decision after fair hearing rested.

The fair hearing was also flawed because the Hearing Officer failed to require the agency to submit evidence about Nembhard's alleged "willful" failure to appear for the appointment. The agency merely stated that Nembhard had not attended the appointment. This fact was not disputed. By failing to require any evidence on the issue of willfulness, the Hearing Officer "improperly shifted the burden to the pro se claimant[ ] to prove that [her] failure * * * was not willful and without good cause." (*Mitchell v Barrios-Paoli*, 253 AD2d 281, 289.) Further, willfulness is an element of ineligibility that the agency was required to verify prior to notifying the recipient of the proposed change. (*Allen v Blum*, 58 NY2d 954.) There is no evidence in the record that the agency ever attempted or achieved this required verification. Because, as respondents concede, at a fair hearing the agency has the burden of proof of establishing that its actions were correct (18 NYCRR 358-5.9 [a]), the agency's failure to produce any evidence on this issue also requires an annulment of the determination after fair hearing.

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[2] Nembhard maintains that she was also deprived of due process because of the agency's failure to issue a conciliation notice, as set forth in 12 NYCRR 1300.11. Respondents contend that no conciliation notice was required because Nembhard was an exempt recipient of public assistance and these notices are required only for nonexempt applicants and recipients.

While it is true that the agency need not send a conciliation notice to an exempt participant, in order to rely on this exception, the agency must demonstrate that Nembhard was an exempt participant. The agency claims to have done so by referring to the medical appointment notice that states that the last time Nembhard was contacted, she was too ill to participate in the New York City WAY Program. Although someone who is too ill to engage in work activities is exempt under part 1300, that determination exists for a maximum of three months. (12 NYCRR 1300.2 [b] [1].) There is no indication in the record of when the agency made the initial determination. Therefore, there is no way to establish whether Nembhard was still an exempt participant at the time that the agency sent the Notice of Intent. Without this information, it is impossible to determine whether the agency was required to send a conciliation notice. Thus, here too, the agency failed to supply necessary documents, violating the consent judgment in *Rodriguez v Blum* (*supra*).

Nembhard's claims as to food stamps and emergency rent arrears were not subjects of the fair hearing and are apparently under separate review. Accordingly, they cannot be addressed in this proceeding.

[3] Respondents contend that Nembhard failed to preserve any objection at the fair hearing and has thereby waived any objection. The cases cited in support of this position, however, involve petitioners who were represented by counsel at the fair hearing, not *pro se* litigants. Moreover, many of the agency's lapses concern its burden of proof that the agency had to meet in order to have its determination affirmed. To conclude that petitioner waived her right to have the agency sustain its burden is to make a mockery of the fair hearing and would itself violate due process and the purpose of the Social Services Law, as well as the agency's own guidelines. (*See, Matter of Raitport v New York City Dept. of Social Servs.*, 260 AD2d 223; *Matter of Schnurr v Perales*, 115 AD2d 740; *Allen v Blum*, 58 NY2d 954, *supra*; Policy guidelines, Dec. 11, 1996.) Thus, respondents' argument is rejected.

[4] Respondents maintain that this proceeding raises a substantial evidence question and, therefore, the court must

transfer the proceeding to the Appellate Division. (*See*, CPLR 7804 [g].) However, where a petition raises issues that can terminate the proceeding without reference to substantial evidence, the Supreme Court must decide the case. (*See, Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405; *Matter of Duso v Kralik*, 216 AD2d 297.) Because petitioner's claims of errors are sufficient to terminate the proceeding without considering substantial evidence questions, the court will not transfer the matter.

[5] Nembhard seeks attorneys' fees pursuant to 42 USC § 1988 and CPLR 8601 (b) and 8602 (c). Respondents object, saying that no Federal question has been presented and that petitioner must first be found to be the prevailing party. Here, Nembhard raised both State and Federal claims, based upon respondents' failure to abide by due process requirements. Because petitioner is the prevailing party as to these claims, she is entitled to an award of attorneys' fees. (*Matter of Thomasel v Perales*, 78 NY2d 561; *Matter of Daniels v Hammons*, 228 AD2d 341.)

Accordingly, it is hereby ordered and adjudged that the decision after fair hearing dated March 25, 1999 is annulled and the matter is remanded to respondents to conduct a new fair hearing as to the discontinuation of petitioner's public assistance. The Clerk is directed to enter judgment accordingly; and it is ordered that pending this hearing and a final agency determination, respondents are directed to restore petitioner's public assistance benefits to the amount provided to petitioner immediately prior to termination; and it is further ordered that the portion of the proceeding that seeks the recovery of attorneys' fees is severed and an assessment thereof is directed; and it is further ordered that the assessment is referred to a Special Referee to recommend or, on consent of the parties, to determine; and it is further ordered that a copy of this order with notice of entry shall be served on the legal support office (room 311) to arrange a date for the reference to a Special Referee.

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Justice Court of Town

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[777 NYS2d 580]

In the Matter of IRMA LIZOTTE, Petitioner, v JOHN A. JOHNSON, as Commissioner of the New York State Office of Children and Family Services, et al., Respondents.

Supreme Court, New York County, January 8, 2004

HEADNOTE

Social Services — Foster Care — Improper Denial of Special Rate Foster Care Payments — Due Process — Inadequate Translation Services

The determination of respondents after a fair hearing denying petitioner foster parent eligibility for foster care benefits at the special rate on behalf of her developmentally impaired great-grandson (*see* Social Services Law § 398-a) was arbitrary and capricious where petitioner appeared pro se and required the assistance of a translator, but the hearing officer failed to develop the record and ensure that the hearing was conducted in compliance with the minimum requirements of due process. The hearing officer failed to explain or delineate the relevant issues for petitioner, especially petitioner's need to establish that the foster child required a high degree of supervision (*see* 18 NYCRR 427.6 [c]), and failed to provide petitioner with an opportunity to review any of the documents submitted by respondents. In addition, the failure to provide adequate translation services for all of the testimony, as well as the relevant documents, deprived petitioner of fundamental due process.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

By the Publisher's Editorial Staff

AM JUR 2d, Welfare Laws § 19.
6 LAW AND THE FAMILY NEW YORK (2d ed) § 6:71.
MCKINNEY'S, Social Services Law § 398–a.
18 NYCRR 427.6 (c).
NY JUR 2d, Public Welfare and Old Age Assistance § 207.

ANNOTATION REFERENCE

See ALR Index under Foster Children.

FIND SIMILAR CASES ON WESTLAW®

Database: NY-ORCS
Query: foster /2 care child /s special /s benefit

APPEARANCES OF COUNSEL

Legal Aid Society, New York City (*David W. Weschler* and *Palvi D. Mohammed* of counsel), for petitioner. *Michael A. Cardozo, Corporation Counsel*, New York City (*Joseph Cardieri* and *Debra E. Brown* of counsel), for William C. Bell, as Commissioner of the New York City Administration for Children's Ser-

vices, respondent. *Eliot Spitzer, Attorney General*, New York City (*John P. Gasior* of counsel), for John A. Johnson and another, respondents.

OPINION OF THE COURT

DORIS LING-COHAN, J.

" 'The fundamental requisite of due process of law is the opportunity to be heard' . . . [which] must be tailored to the capacities and circumstances of those who are to be heard." (*Goldberg v Kelly*, 397 US 254, 267-269 [1970].)

Pursuant to CPLR article 78, Irma Lizotte seeks, inter alia, an order reversing, annulling and vacating the decision after fair hearing dated April 29, 2003, which affirmed the New York City Administration for Children's Services' (ACS) determination not to provide petitioner foster care payments at the special rate. Petitioner contends that the decision was arbitrary and capricious, without a rational basis in law, and that it is not supported by substantial evidence in the record. Petitioner also seeks a judgment reinstating the special rate foster care payments.

Respondents, in opposition, argue that the decision is neither irrational, arbitrary, capricious or in violation of the petitioner's right to due process of law. Moreover, respondents argue that the decision is supported by substantial evidence.[1] For the reasons stated below, the petition is granted to the extent provided below.

History

The ACS placed minor child C.L.[2] in the foster care of petitioner, his stepgreat-grandmother, on December 15, 2000. Initially, the petitioner received foster care benefits at the regular rate. Psychiatric evaluations performed in 2001 and 2002 diagnosed C.L. with various disorders including Dysthymic Disorder-Early Onset and H/O Attention Deficit Hyperactivity Disorder.

1. State respondent Wing asserts that he is not a proper party inasmuch as the decision under review was based on a hearing conducted by an agent of respondent Johnson and that the decision was issued by a designee of respondent Johnson. Petitioner, in her reply papers, does not dispute this assertion and, therefore, respondent Wing's application to dismiss is granted.

2. The full name of the minor child has been redacted to protect his anonymity.

On December 11, 2002, after ACS refused to provide petitioner with foster care benefits at the special rate on behalf of C.L., petitioner requested a fair hearing to review that determination. At the January 13, 2003 fair hearing, ACS offered to provide petitioner with the special rate foster care payments for the period December 15, 2000 to December 15, 2001; ACS also offered to evaluate petitioner's eligibility at the special rate for the period from December 16, 2001 forward and, if eligible, would provide such benefits to the petitioner. The petitioner accepted both offers.

On February 24, 2003, ACS determined that petitioner was not eligible for the special rate of foster care benefits because "the submitted documentation does not indicate any significant atypical behaviors or conditions severe enough as to require an unusual level of care or supervision within the meaning of Special Rate Regulations" (notice of disapproval). Petitioner requested another fair hearing.

At the April 16, 2003 fair hearing, petitioner appeared pro se and required the assistance of a translator, who translated part of the proceedings. Petitioner testified, inter alia, that C.L. needs a lot of attention and that she must watch him constantly because, if left alone, he would become violent with his sister or other siblings. She also testified that C.L. attends a special school, where he sees a counselor weekly and continues to take medication for his behavioral disorder.

In a decision dated April 29, 2003, the hearing officer upheld ACS' determination not to provide petitioner with foster care benefits at the special rate from December 16, 2001 to the present. Petitioner has now initiated the present proceeding challenging that decision.

Applicable Statutes and Regulations

Section 398-a of the Social Services Law requires the Office of Children and Family Services (CFS) to promulgate regulations establishing standards for payment for foster care services. Pursuant to that delegation, CFS provides that, if approved by the state agency, social services districts are eligible to receive state reimbursement payments for special foster care services at the special rate made on behalf of children who suffer from pronounced physical conditions as a result of which a physician certifies that they require a high degree of physical care, or have been diagnosed by a qualified psychiatrist or psychologist as being moderately developmentally disabled, emotionally

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disturbed or having a behavioral disorder to the extent that they require a high degree of supervision. (18 NYCRR 427.6 [c].)

Foster care payments are reimbursed, in part, by the federal government pursuant to title IV-E of the Social Security Act (42 USC § 670 *et seq.*). In order to be eligible for reimbursement for foster care maintenance payments under the Social Security Act Foster Care and Adoption Assistance (42 USC § 670 *et seq.*), a state receiving title IV-E assistance must "provide . . . an opportunity for a fair hearing . . . to any individual whose claim for benefits available pursuant to [title IV-E] is denied or not acted upon with reasonable promptness." (42 USC § 671 [a] [12].) The procedures and requirements of 45 CFR 205.10 governing administrative fair hearings generally apply to all programs funded under title IV-E. (45 CFR 1355.30 [k].)

18 NYCRR part 358, which governs administrative hearings concerning foster care benefits sets forth the rights and responsibilities of participants in administrative fair hearings and defines the obligations of the hearing officer. The regulation provides that administrative fair hearings must be conducted by an "impartial hearing officer" who has an obligation to "ensure a complete record." (18 NYCRR 358-5.6 [a], [b].) As such, the hearing officer must, inter alia, make an opening statement, explaining the nature of the proceedings, the issues to be heard and the manner in which the hearing will be conducted. (18 NYCRR 358-5.6 [b] [2].) The officer is duty bound to elicit documents and testimony, including questioning the parties and witnesses, particularly where the appellant demonstrates difficulty or inability to question a witness. (18 NYCRR 358-5.6 [b] [3].) The hearing officer is empowered with the discretion to issue subpoenas and/or require the attendance of witnesses and the production of books and records where necessary to develop a complete evidentiary record. (18 NYCRR 358-5.6 [b] [8].)

Discussion

Petitioner raises, in essence, two claims. First, she contends that the hearing officer's conduct at the fair hearing was arbitrary and capricious and a violation of her right to due process of law. Second, she argues that the decision is not supported by substantial evidence. While this court may agree that the decision was not so supported, if that were the only question, this proceeding would need to be transferred to the Appellate Division pursuant to CPLR 7804 (g).

However, this court finds that the hearing officer's failure to develop the record and to ensure that the hearing was conducted in compliance with the minimum requirements of due process deprived petitioner of her right to a "fair" hearing and due process of law and, therefore, the decision was arbitrary and capricious. Petitioner has established her entitlement to an order, pursuant to CPLR 7803, vacating and annulling the decision and remanding this matter for a new hearing consistent with this decision.

At the outset, it is without question that a foster parent is entitled to a full due process hearing to challenge the failure to receive foster care maintenance payments at the rate sought. (*Matter of Claudio v Dowling*, 89 NY2d 567 [1997].)

It is well established that, at such hearing, the hearing officer must assist the unrepresented appellant to present evidence and the failure of the hearing officer to develop the testimony presented by a pro se appellant effectively deprives that appellant of a fair hearing. (18 NYCRR 358-5.6 [a], [b]; *Matter of Feliz v Wing*, 285 AD2d 426, 427 [1st Dept 2001] ["the brevity of the hearing and the ALJ's complete failure to develop the testimony presented by the *pro se* petitioner effectively deprived her of her right to a fair hearing"]; *Matter of Schnurr v Perales*, 115 AD2d 740, 741 [2d Dept 1985] ["The brevity of the hearing and the Administrative Law Judge's abrupt termination of the proceedings without any attempt to delineate the issues upon which the hearing was to focus or to develop the testimony presented by the *pro se* petitioner effectively deprived her of her right to a fair hearing"]; *Matter of Hendry v D'Elia*, 91 AD2d 663, 663 [2d Dept 1982] ["the administrative law judge should have assisted petitioner by directing her to testify about her work during the month of August"]; *Matter of Dreher v Smith*, 65 AD2d 572, 573 [2d Dept 1978] ["Petitioner was appearing *pro se* and was not given proper notice and assistance with respect to the nature of the issues. Nor was there sufficient development by the hearing officer of the testimony presented by her"]; *Matter of Rezoagli v Toia*, 62 AD2d 1020, 1020 [2d Dept 1978] ["Ms. Battaglia was not accorded the opportunity to make a clear presentation of her evidence on the issue of the agency's prior approval and was not advised of her right to procure an adjournment of the hearing to enable her to produce witnesses essential to her case"]; *Zsedel v Toia*, 60 AD2d 883, 883-884 [2d Dept 1978] ["the hearing officer failed to uphold his duty to protect the rights of the parties [in that although

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Here, the hearing officer failed to: (1) explain the nature of the hearing and the showing that the petitioner needed to make in order to prevail; (2) show any of the documents offered by ACS to petitioner; (3) ensure that petitioner received adequate translation; and (4) ensure a complete record by developing testimony that would go to the question of whether the petitioner's great-grandson required a high degree of supervision.

(1) Failure to explain or delineate the relevant issues

First, in order for petitioner, a pro se appellant, to have had any hope of prevailing at the hearing, she would have needed to establish that her great-grandson required a high degree of supervision. (18 NYCRR 427.6 [c].) Yet, the hearing officer's explanation of the purpose of the hearing and the burden of proof was limited solely to asking the petitioner if the reason she was at the hearing was because "the Agency failed to provide her with the special rate of foster care benefits . . . from January 2002 to present." (Hearing transcript at 2-3.) There was no reason for the hearing officer to assume that the petitioner knew what she needed to establish and, therefore, the hearing officer utterly failed to "delineate the issues so that [pro se] petitioner would know the conditions under which she would be entitled to a grant of assistance and be in a position properly to present her case." (*Matter of Blackman v Perales*, 188 AD2d 339, 340 [1st Dept 1992]; *see also Matter of Roche v Turner*, 186 Misc 2d 581 [Sup Ct, NY County 2000].)

(2) Failure to provide an opportunity to review the exhibits

Second, the hearing officer simply did not show any of the exhibits submitted by ACS to the appellant or offer the appellant an opportunity to review those documents. As the Supreme Court observed in *Greene v McElroy* (360 US 474, 496 [1959]):

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the in-

> dividual so that he has an opportunity to show that it is untrue . . . [T]his is important in the case of documentary evidence . . . ."

The record shows that the hearing officer accepted all of the documents that ACS sought to have considered without even identifying them for the record:

> "MR. WATSON: And subsequent to that decision, Judge, the Agency made a determination that C.L. was not eligible for the special board rate (inaudible three to four words).
>
> "JUDGE KUKU: I'll mark the special rate denial Agency 2. (Whereupon, the above-described document was marked for identification and received into evidence as Agency's Exhibit Number 2, this date.)
>
> "MR. WATSON: And (inaudible for words) packet that was submitted on behalf of C.L.
>
> "JUDGE KUKU: Okay. I'll mark the packet Agency 3. (Whereupon, the above-described document was marked for identification and received into evidence as Agency's Exhibit Number 3, this date.)
>
> "MR. WATSON: I'm going to hand you what the Agency plans to continue to submit, and you can mark it (inaudible one word).
>
> "JUDGE KUKU: That Agency what?
>
> "MR. WATSON: I said I'm going to hand you what the Agency intends to continue to submit—
>
> "JUDGE KUKU: Okay.
>
> "MR. WATSON:—and you can mark them (inaudible two words).
>
> "JUDGE KUKU: Okay, this is part of the psychiatric evaluation.
>
> "MR. WATSON: Yes, sir.
>
> "JUDGE KUKU: I'll mark the psychiatric evaluation Agency 4. (Whereupon, the above-described document was marked for identification and received into evidence as Agency's Exhibit Number 4, this date.)
>
> "MR. WATSON: That's a different one, Judge . . .
>
> "MR. WATSON: The entire—in addition to what was already sent to ACS, the ACS had actually gone to the Agency to submit all the evaluations th[ey] had on behalf of C.L. (inaudible three words). That was

> the original packet, and what you're going to continue to mark is the rest of his psychiatric and psychological evaluation.
>
> "JUDGE KUKU: I'll mark this Agency 4. Agency 5, 5-A. Agency 6. (Whereupon, the above-described document was marked for identification and received into evidence as Agency's Exhibit Numbers 5, 5-A and 5-B, this date.)" (Transcript at 4-7.)

In fact, seven exhibits are presented by ACS and entered into evidence. The documents are not even shown to the petitioner, let alone explained as to their contents. Appearing pro se, it is unreasonable to expect the petitioner to know the procedure for objecting to the submission of evidence without a full and fair opportunity to review that evidence, especially when the hearing officer fails to assist by explaining to the petitioner the nature of the documents being submitted and why those documents are relevant to the hearing. Moreover, at a bare minimum, due process demands that the petitioner be afforded an opportunity to review the evidence submitted. (*Greene,* 360 US at 496-497.)

Had the petitioner had a realistic opportunity to review the documents that ACS submitted and had she been assisted to understand her burden of proof, she might have chosen to point out to the hearing officer the numerous places in the various reports of psychologists and psychiatrists where the foster child is described as suffering from "rages," exhibits "aggressive" tendencies, presents "parent-child relational problems," and "in general . . . can be very oppositional or defiant."

(3) Failure to provide adequate translation services

Moreover, while the transcript indicates, in certain places, when the interpreter translated for the petitioner, there is no indication in the transcript that the interpreter translated any of the discussion between the hearing officer and the ACS representative concerning the seven documents submitted into evidence or that the actual exhibits were translated in whole or in relevant part. As a consequence, petitioner was left completely in the dark as to the nature of the proceeding transpiring before her.

The failure of the hearing officer to require that all of the testimony of the ACS representative and the discussions between the hearing officer and that representative be translated, as well as the relevant documents, deprived petitioner of fundamental due process. For all intents and purposes, peti-

tioner might as well have not been in the room for the period of time during which the hearing officer accepted from the ACS representative the documents that would ultimately form the basis for the adverse decision.

While there is no specific state or federal constitutional provi- sion governing the right to have interpretive services furnished in a court, our courts and legislative bodies have long recogniz the need for such services to ensure meaningful participation. In the criminal context, it is well established that failure to provide interpreters is a deprivation of due process. (*See Unit States ex rel. Negron v New York,* 434 F2d 386 [2d Cir 197 [interpreter required for non-English-speaking defendants]; *People v Ramos*, 26 NY2d 272 [1970] [criminal defendant who cannot understand English is entitled to appointment of interpreter who speaks language that the defendant understan so that he may meaningfully assist in his own defense]; *Unit States v Mosquera*, 816 F Supp 168, 178 [ED NY 1993] [trans tion of indictment, relevant statutes, plea agreements and oth documents required for non-English-speaking criminal def dants]; *see also* 28 USC §§ 1827, 1828 [Judiciary and Judic Procedure Act; allows the assignment of interpreters in fede trials and proceedings].) The state courts have also recogni that interpreters are necessary to ensure meaningful partici tion in the context of civil cases. (*See Yellen v Baez*, 177 Misc 332, 336 [Civ Ct, Richmond County 1997] ["To require the te ant to proceed when it is obvious that an interpreter is need would violate due process of law"].) New York statutes prov for the hiring of court interpreters and the appointment interpreters for deaf parties or witnesses. (Judiciary Law §§ 38 390.)

As language is the principal basis of communication in a tr or hearing, a litigant's ability to understand and communic that language is critical to the proceeding's fairness. The failu to provide adequate translation services here deprived petition of fundamental due process. The due process requirement of "opportunity to be heard" which must be "tailored to t capacities and circumstances of those who are to be hear demands no less. (*See Goldberg v Kelly,* 397 US 254, 268- [1970].) It is readily apparent from the subject decision that hearing officer used the exhibits submitted by ACS, which w never shown, explained, translated (in whole or in relev part), nor fully identified to petitioner, as the entire basis her adverse decision; the hearing officer makes clear that

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discounted petitioner's unrebutted testimony and relied on the rest of the "record," a "record" consisting of documents which petitioner was in the dark about: "In this case, notwithstanding the Appellant's testimony, the record fails to support the Appellant's contention that C.L. was eligible for special foster care benefits for the period from December 16, 2001, to present." (Decision at 6.)

(4) Failure to develop the record

Finally, the transcript clearly demonstrates that the hearing officer did virtually nothing to develop the record. For example, despite the fact that eligibility for the special rate hinges, in large part, on the need for supervision, the hearing officer asks no relevant follow-up questions when the petitioner testified that the foster child tends to hit other children and, therefore, the school principal required her to seek professional intervention (transcript at 12-14). Instead, the hearing officer asks only whether the principal is "a medical practitioner." (Transcript at 13.) Similarly, the hearing officer does not ask any follow-up questions when petitioner testifies that the foster child is "uncontrollable" on the school bus. (*Id.*)

Petitioner's testimony that her foster child is "a child who need[s] a lot of attention or more attention" (transcript at 14) provides an opportunity for the hearing officer to elicit further details. However, the hearing officer utterly failed to ask any questions on this subject.

The hearing officer also did nothing to develop the record when the petitioner testified that "[h]e would hit P.L., his sister, all the time. When I go outside, he has to be careful. At no moment or at no time can I leave him alone because at any time he will throw or push P.L. Also in school they have told me when he's annoyed, he's aggressive." (Transcript at 16.) The hearing officer does not elicit any details, but asks only whether the petitioner has "house rules." (Transcript at 16-17.)

In addition, when the pro se petitioner testifies that C.L. is enrolled in a special school and is counseled by a psychiatrist, the hearing officer fails to inquire into the nature of the school and the type and frequency of the counseling, or even why he must attend a special school rather than an ordinary public school. Instead, the hearing officer impatiently focuses on whether C.L. sees a doctor apart from his psychiatrist:

> "INTERPRETER: He needs a lot of attention. I have to keep taking him to a psychiatrist. Also medication that are going to be prescribed to him every 30 days,

and right now in a school, in a special school. He has counseling and also a psychiatrist.

"JUDGE KUKU: You said that (indecipherable word). You said that already (indecipherable word). How often does C.L. see a doctor apart from the psychiatrist? (The interpreter translates for the appellant.)

"INTERPRETER: For checkups.

"JUDGE KUKU: Routine checkups.

"INTERPRETER: When we get a (indecipherable one word), but it's not the psychiatrist. It's a different doctor.

"JUDGE KUKU: Is he a healthy boy? (The interpreter translates for the appellant.)

"MS. LIZOTTE: Yes, m-m h-m-m." (Transcript at 14-15.)

As a matter of fundamental fairness and equity the hearing officer should have inquired into the relevant facts to provide a more complete record, especially considering the petitioner's pro se appearance and her inability to speak English. This court has the power to remit a matter to the agency where "further agency action is necessary to cure deficiencies in the record." (*Matter of Police Benevolent Assn. of N.Y. State Troopers v Vacco*, 253 AD2d 920, 921 [3d Dept 1998], *lv denied* 92 NY2d 818 [1998]; *see*, *Matter of Montauk Improvement v Proccacino*, 41 NY2d 913 [1977].) Here, a new hearing is necessary to afford petitioner an informed opportunity to explain whether her foster child meets the definition of a special needs child.

Conclusion

The failure of the hearing officer to fully develop the record and to ensure that the hearing was conducted in compliance with the minimum requirements of due process deprived petitioner of her right to a fair hearing and due process of law.

As to the petitioner's contention that the City agency is required to show a basis for the change in rate after previously offering such rate pursuant to *Matter of Adania C. v Hammons* (236 AD2d 315 [1st Dept 1997]), such contention is misplaced as the January 13, 2001 fair hearing was settled by the offer by ACS to: (1) provide petitioner with the special rate foster care payments for only the period December 15, 2000 to December 15, 2001; and (2) evaluate petitioner's *eligibility* for the special rate for the subsequent period (December 16, 2001 forward), and *if found eligible*, to provide such benefits.

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Accordingly, it is hereby ordered and adjudged that the petition is dismissed as to respondent Brian J. Wing as he is not a proper party; and adjudged that the petition is granted to the extent of remanding this matter to respondents for proceedings in accordance with this decision.

NEW YORK STATE ADMINISTRATIVE PROCEDURE ACT

PART 300 ADJUDICATORY PROCEEDINGS

ARTICLE 3

ADJUDICATORY PROCEEDINGS

Section 301. Hearings.
302. Record.
303. Presiding officers.
304. Powers of presiding officers.
305. Disclosure.
306. Evidence.
307. Decisions, determinations and orders.

§ 301. Hearings. 1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.

2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for violation of the laws, rules or orders enforced by the agency.

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.

5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

§ 302. Record. 1. The record in an adjudicatory proceeding shall include: (a) all notices, pleadings, motions, intermediate rulings; (b) evidence presented; (c) a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; (d) questions and offers of proof, objections thereto, and rulings thereon; (e) proposed findings and exceptions, if any; (f) any findings of fact, conclusions of law or other recommendations made by a presiding officer; and (g) any decision, determination, opinion, order or report rendered.

2. The agency shall make a complete record of all adjudicatory proceedings conducted before it. For this purpose, unless otherwise required by statute, the agency may use whatever means it deems appropriate, including but not limited to the use of stenographic transcriptions or electronic recording devices. Upon request made by any party upon the agency within a reasonable time, but prior to the time for commencement of judicial review, of its giving notice of its decision, determination, opinion or order, the agency shall prepare the record together with any transcript of proceedings within a reasonable time and shall furnish a copy of the record and transcript or any part thereof to any party as he may request. Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor.

3. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 303. Presiding officers. Except as otherwise provided by statute, the agency, one or more members of the agency, or one or more hearing officers designated and empowered by the agency to conduct hearings shall be presiding officers. Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as part of the record in the case, and its determination shall be a matter subject to judicial review at the conclusion of the adjudicatory proceeding. Whenever a presiding officer is disqualified or it becomes impractical for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

§ 304. Powers of presiding officers. Except as otherwise provided by statute, presiding officers are authorized to:

1. Administer oaths and affirmations.

2. Sign and issue subpoenas in the name of the agency, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence and said subpoenas shall be regulated by the civil practice law and rules. Nothing herein contained shall affect the authority of an attorney for a party to issue such subpoenas under the provisions of the civil practice law and rules.

3. Provide for the taking of testimony by deposition.

4. Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

5. Direct the parties to appear and confer to consider the simplification of the issues by consent of the parties.

6. Recommend to the agency that a stay be granted in accordance with section three hundred four, three hundred six or three hundred seven of the military law.

§ 305. Disclosure. Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

§ 306. Evidence. 1. Irrelevant or unduly repetitious evidence or cross-examination may be excluded. Except as otherwise provided by statute, the burden of proof shall be on the party who initiated the proceeding. No decision, determination or order shall be made except upon consideration of the record as a whole or such portion thereof as may be cited by any party to the proceeding and as supported by and in accordance with substantial evidence. Unless otherwise provided by any statute, agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, an agency may, for the purpose of expediting hearings, and when the interests of parties will not be substantially prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

2. All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.

3. A party shall have the right of cross-examination.

4. Official notice may be taken of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the agency. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to decision to dispute the fact or its materiality.

§ 307. Decisions, determinations and orders. 1. A final decision, determination or order adverse to a party in an adjudicatory proceeding shall be in writing or stated in the record and shall include findings of fact and conclusions of law or reasons for the decision, determination or order. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision, determination or order shall include a ruling upon each proposed finding. A copy of the decision, determination or order shall be delivered or mailed forthwith to each party and to his attorney of record.

2. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case.

This subdivision does not apply (a) in determining applications for initial licenses for public utilities or carriers; or (b) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

3. (a) Each agency shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the agency in adjudicatory proceedings. For purposes of this subdivision, such index shall also include by name and subject all written final decisions, determinations and orders rendered by the agency pursuant to a statute providing any party an opportunity to be heard, other than a rule making. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying. Each decision, determination and order shall be indexed within sixty days after having been rendered.

(b) An agency may delete from any such index, decision, determination or order any information that, if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of the public officers law and may also delete at the request of any person all references to trade secrets that, if disclosed, would cause substantial injury to the competitive position of such person. Information which would reveal confidential material protected by federal or state statute, shall be deleted from any such index, decision, determination or order.

NEW YORK STATE REGULATIONS - 18 NYCRR 358-5

OTDA FAIR HEARINGS

:ffective Date:
:itle: Section 358-5.1 - Notice of fair hearing.

58-5.1 Notice of fair hearing. (a) Except for hearings which are given priority in scheduling in accordance with section 58-5.2 of this Subpart, at least 10 calendar days prior to the date of the fair hearing, a written notice of the fair hearing vill be sent by the department to the appellant, appellant's authorized representative and to the social services agency.

b) The fair hearing notice will state the following:

1) the date, time and place of the fair hearing and an explanation of how and when a change in the date and place of the air hearing may be requested, and under what circumstances a hearing will be rescheduled if neither the appellant nor he appellant's representative appears at the hearing;

2) whether public assistance, medical assistance, food stamp benefits or services must be continued unchanged;

3) the appellant's right upon request to necessary transportation or to transportation expenses to and from the fair ιearing for the appellant and the appellant's authorized representatives and witnesses and for payment of the appellant's ιecessary child care costs and for any other necessary costs and expenditures related to the fair hearing;

4) the appellant's right to be represented at the fair hearing by legal counsel, a relative, friend or other person or to epresent oneself, and the right to bring witnesses to the fair hearing and to question witnesses at the hearing;

5) the right to present written and oral evidence at the hearing;

6) that the appellant should bring the notice of fair hearing to the hearing as well as all evidence that has a bearing on he case such as books, records and other forms of written evidence, and witnesses, if any;

7) the appellant's right to review appellant's case record prior to and at the fair hearing;

8) the appellant's right upon request to obtain copies of documents which the social services agency will present at the air hearing and copies of other additional documents for the purpose of preparing for the fair hearing; and

9) the right of a deaf or non-English speaking appellant to interpreter services at the fair hearing at no charge; and

10) the issues which are to be the subject of the hearing.

Volume: A

'fective Date:
tle: Section 358-5.2 - Scheduling.

·8-5.2 Scheduling. (a) The fair hearing will be held at a time and place convenient to the appellant as far as acticable. In scheduling the hearing, the department will consider such things as the physical inability of the appellant travel to the regular hearing location.

) Priority scheduling. (1) Except as set forth in paragraph (4) of this subdivision, a fair hearing which is subject to iority processing pursuant to section 358-3.2 of this Part must be scheduled as soon as practicable after the request erefor is made. In determining the date for which the hearing will be scheduled, consideration must be given to the ıture and urgency of the appellant's situation, including any date before which the decision must be issued to allow for eaningful resolution of the issue under review.

) When a hearing is requested concerning food stamp benefits and the food stamp household intends to move from the cal social services district before the decision normally would be issued, priority will be given to the scheduling of the ɜaring, taking into account any date before which the hearing must be scheduled to allow for the appellant to receive e decision while still in the district.

·) Except as set forth in paragraph (4) of this subdivision, after a hearing which was scheduled on a priority basis as set ırth above, the decision must be issued as soon as practicable. In determining the date by which the decision will be sued, consideration must be given to the nature and urgency of the appellant's situation, including any date before hich the decision must be issued to allow for meaningful resolution of the issue under review. If, at the conclusion of a ɜaring which was scheduled on a priority basis the hearing officer determines that the issues do not warrant continued riority processing, the hearing officer will inform the parties that the issuance of the decision will not receive priority rocessing.

ł) When a fair hearing is requested concerning the involuntary discharge of a resident of a tier II facility after such ɜsident requests and participates in a hearing, held by the facility or the social services district in which the facility is ɔcated, such fair hearing must be scheduled within seven working days of the request. The decision after the fair earing must be issued within seven working days of the date of the fair hearing.

ː) When a hearing is requested pursuant to section 358-3.1(g) of this Part or has been given priority in accordance with ɜction 358-3.2(d) of this Part, the hearing will be held within 30 days of the request, unless delayed by, or adjourned at ıe request of, the appellant.

'olume: A

:ffective Date:
'itle: Section 358-5.3 - Adjourning the fair hearing.

58-5.3 Adjourning the fair hearing. (a) Upon request of either the appellant or a social services agency, the fair hearing ıay be rescheduled, upon a showing of good cause for requesting the delay.

b) When in the judgment of the department or the hearing officer the parties' due process rights would best be served y adjourning the fair hearing, or if there are special circumstances which make proceeding with the case fundamentally nfair, the department or the hearing officer may reschedule the fair hearing.

c) Requests to adjourn a fair hearing must be made in accordance with the instructions in the notice of fair hearing.

d) If a fair hearing is adjourned based upon a request by the appellant, the time limit set forth in section 358-6.4 of this 'art will be extended by the number of days the fair hearing has been postponed.

e) If public assistance, medical assistance, food stamp benefits or services are continued in accordance with section 58-3.6 of this Part and the fair hearing is rescheduled for the reasons set forth in subdivision (a) or (b) of this section, n appellant has the right to have public assistance, medical assistance, food stamp benefits or services continued until he fair hearing decision is issued.

/olume: A

ffective Date:
itle: Section 358-5.4 - Withdrawal of a request for a fair hearing.

i8-5.4 Withdrawal of a request for a fair hearing. (a) The department will consider a hearing request to be withdrawn ıder the following circumstances:

) the department has received a written statement from the appellant or appellant's authorized representative stating at the request for a fair hearing is withdrawn; or

) the appellant or appellant's authorized representative has made a statement withdrawing the request to the hearing ficer on the record at the hearing.

) An oral statement by telephone or in person to a social services agency employee that an appellant is withdrawing a quest for a fair hearing is insufficient to withdraw a fair hearing request.

olume: A

Effective Date:
Title: Section 358-5.5 - Abandonment of a request for a fair hearing.

358-5.5 Abandonment of a request for a fair hearing. (a) The department will consider a fair hearing request abandoned if neither the appellant nor appellant's authorized representative appears at the fair hearing unless either the appellant or appellant's authorized representative has:

(1) contacted the department within 15 days of the scheduled date of the fair hearing to request that the fair hearing be rescheduled; and

(2) provide the department with a good cause reason for failing to appear at the fair hearing on the scheduled date; or

(3) contacted the department within 45 days of the scheduled date of the hearing and establishes that the appellant did not receive the notice of fair hearing prior to the scheduled hearing date.

(b) The department will restore a case to the calendar if the appellant or appellant's authorized representative has met the requirements of subdivision (a) of this section.

Volume: A

ffective Date:
itle: Section 358-5.6 - Hearing officer.

58-5.6 Hearing officer. (a) The hearing shall be conducted by an impartial hearing officer employed by the department, ho has not been involved in any way with the action in question.

) To ensure a complete record at the hearing, the hearing officer must:

) preside over the fair hearing and regulate the conduct and course of the fair hearing, including at the hearing officer's scretion, requiring sworn testimony, and administering the necessary oaths;

) make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which e fair hearing will be conducted;

) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the pellant demonstrates difficulty or inability to question a witness; however, the hearing officer will not act as a party's presentative;

) where the hearing officer considers independent medical assessment necessary, require that an independent medical sessment be made part of the record when the fair hearing involves medical issues such as a diagnosis, an examining hysician's report, or a medical review team's decision;

) adjourn the fair hearing to another time on the hearing officer's own motion or on the request of either party, to the xtent allowable by section 358-5.3 of this Subpart;

) adjourn the fair hearing when in the judgment of the hearing officer it would be prejudicial to the due process rights f the parties to go forward with the hearing on the scheduled hearing date;

7) review and evaluate the evidence, rule on the admissibility of evidence, determine the credibility of witnesses, make ndings of fact relevant to the issues of the hearing which will be binding upon the commissioner unless such person as read a complete transcript of the hearing or has listened to the electronic recording of the fair hearing;

3) at the hearing officer's discretion, where necessary to develop a complete evidentiary record, issue subpoenas, and/or equire the attendance of witnesses and the production of books and records; and

9) prepare an official report containing the substance of what transpired at the fair hearing and including a ecommended decision to the commissioner.

c) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from residing at the hearing.

i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity f hearing officer; or

ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of he hearing officer; or

iii) displayed bias or partiality to any party to the hearing.

2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

3) The request for removal made by a party must:

) be made in good faith; and

i) be made at the hearing in writing or orally on the record; and

ii) describe in detail the grounds for requesting that the hearing officer be removed.

4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself r herself from the hearing.

5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer nust advise the party requesting removal that the hearing will continue but the request for removal will automatically be eviewed by the general counsel or the general counsel's designee.

6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel or he general counsel's designee. Such review will include review of written documents submitted by the parties and the anscript of the hearing.

7) The general counsel or the general counsel's designee must issue a written determination of whether the hearing fficer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

Volume: A

ffective Date:**
'itle:** Section 358-5.7 - Who may be present at the fair hearing.

58-5.7 Who may be present at the fair hearing. The following persons may be present at a fair hearing:

ı) the appellant who has requested the fair hearing;

ɔ) the appellant's representative;

:) counsel or other representatives of the social services agency;

l) witnesses of either party and any who may be called by the hearing officer;

:) an interpreter; and

:) any other person admitted at the hearing officer's discretion, with the consent of the appellant.

'olume: A

Effective Date:
Title: Section 358-5.8 - Media admission to fair hearing.

358-5.8 Media admission to fair hearing. (a) The media may be admitted to a fair hearing where the appellant has made a specific waiver of appellant's right to confidentiality both in writing and on the record and has clearly and unequivocally confirmed on the record that the appellant desires and consents to the presence of the media. The waiver must be unqualified, complete, and made with full knowledge of the ramifications of the waiver, including that the waiver is irrevocable.

(b) Where a waiver has been secured in accordance with subdivision (a) of this section, the extent of any access to be granted to the media is to be determined at the discretion of the hearing officer. In determining the extent of such access, the hearing officer will consider the following:

(1) maintenance of proper hearing decorum;

(2) potential disruption to the proceedings;

(3) adverse effect on witnesses;

(4) impediments to the making of a proper and accurate record;

(5) the physical space and conditions of the hearing room;

(6) potential disruption to the hearing officer, including impediments to the hearing officer's ability to discharge responsibilities; and

(7) any other factor which, in the discretion of the hearing officer, is necessary to ensure the orderly and proper conduct of the hearing and the creation of a complete and accurate hearing record or which is necessary in order to protect confidential information where, confidentiality cannot be waived by the appellant.

Volume: A

ffective Date:
itle: Section 358-5.9 - Fair hearing procedures.

58-5.9 Fair hearing procedures. (a) At a fair hearing concerning the denial of an application for or the adequacy of ublic assistance, medical assistance, HEAP, food Stamp benefits or services, the appellant must establish that the gency's denial of assistance or benefits was not correct or that the appellant is eligible for a greater amount of ssistance or benefits. Except, where otherwise established by law or regulation, in fair hearings concerning the scontinuance, reduction or suspension of public assistance, medical assistance, food stamp benefits or services, the ocial services agency must establish that its actions were correct.

) The fair hearing decision must be supported by and in accordance with substantial evidence.

:) Technical rules of evidence followed by a court of law need not be applied. Irrelevant or unduly repetitious evidence nd/or cross-examination may be excluded at the discretion of the hearing officer. Privileges recognized by law will be iven effect.

l) Any written record or document or part thereof to be offered as evidence may be offered in the form of a eproduction or copy where such reproduction or copy is identified satisfactorily as a complete and accurate eproduction or copy of the original material.

olume: A

ﾃffective Date:**
Title: Section 358-5.10 - Consolidated fair hearings.

358-5.10 Consolidated fair hearings. (a) The department may consolidate fair hearings where two or more persons request fair hearings in which the individual issues of fact are not disputed and the sole issue in each request is an objection to:

1) Federal or State law or regulation, or local policy; or

2) a change in Federal or State law.

b) Each person whose case has been consolidated with another person's case has the right to:

1) present one's own case or have one's case presented by a representative; and

2) withdraw from the consolidated fair hearing and have an individual fair hearing.

Volume: A

ffective Date:
itle: Section 358-5.11 - The hearing record.

58-5.11 The hearing record. (a) Fair hearing record. A written transcript or recording of the fair hearing testimony and chibits, or the hearing officer's official report together with the recommended decision of the hearing officer, all papers id requests filed in the proceeding prior to the close of the fair hearing and the fair hearing decision, constitute the omplete and exclusive record of the fair hearing. Where a decision without hearing is issued in accordance with section 58-6.2 of this Part, the documents submitted by the appellant and the social services agency constitute the complete id exclusive record of the fair hearing.

) Review of record. The exclusive record of the fair hearing is confidential; however, the exclusive record may be camined by either party or their authorized representative at the Office of Administrative Hearings, or upon request at ome other location subject to the approval of the Office of Administrative Hearings.

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§ 136. Protection of public welfare records. 1. The names or addresses of persons applying for or receiving public assistance and care shall not be included in any published report or printed in any newspaper or reported at any public meeting except meetings of the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town; nor shall such names and addresses and the amount received by or expended for such persons be disclosed except to the commissioner of social services or his authorized representative, such county, city or town board or body or its authorized representative, any other body or official required to have such information properly to discharge its or his duties, or, by authority of such county, city or town appropriating board or body or of the social services official of the county, city or town, to a person or agency considered entitled to such information. However, if a bona fide news disseminating firm or organization makes a written request to the social services official or the appropriating board or body of a county, city or town to allow inspection by an authorized representative of such firm or organization of the books and records of the disbursements made by such county, city or town for public assistance and care, such requests shall be granted within five days and such firm or organization shall be considered entitled to the information contained in such books and records, provided such firm or organization shall give assurances in writing that it will not publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for and recipients of public assistance and care except as expressly permitted by subdivision four. If such firm or organization shall, after giving such assurance, publicly disclose, or participate or acquiesce in the public disclosure of, the names and addresses of applicants for or recipients of public assistance and care except as expressly permitted by subdivision four, then such firm or organization shall be deemed to have violated this section and such violation shall constitute a misdemeanor. As used herein a news disseminating firm or organization shall mean and include: a newspaper; a newspaper service association or agency; a magazine; a radio or television station or system; a motion picture news agency.

2. All communications and information relating to a person receiving public assistance or care obtained by any social services official, service officer, or employee in the course of his or her work shall be considered confidential and, except as otherwise provided in this section, shall be disclosed only to the commissioner, or his or her authorized representative, the commissioner of labor, or his or her authorized representative, the commissioner of health, or his or her authorized representative, the welfare inspector general, or his or her authorized representative, the county board of supervisors, city council, town board or other board or body authorized and required to appropriate funds for public assistance and care in and for such county, city or town or its authorized representative or, by authority of the county, city or town social services official, to a person or agency considered entitled to such information. Nothing herein shall preclude a social services official from reporting to an appropriate agency or official, including law enforcement agencies or officials, known or suspected instances of physical or mental injury, sexual abuse or exploitation, sexual contact with a minor or negligent treatment or maltreatment of a child of which the official becomes aware in the administration of public assistance and care nor shall it preclude communication with the federal immigration and naturalization service regarding the immigration status of any individual.

3. Nothing in this section shall be construed to prevent registration in a central index or social service exchange for the purpose of preventing duplication and of coordinating the work of public and private agencies.

4. No person or agency shall solicit, disclose, receive, make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of, any information relating to any applicant for or recipient of public assistance or care for commercial or political purposes. Nothing in this or the other subdivisions of this section shall be deemed to prohibit bona fide news media from disseminating news, in the ordinary course of their lawful business, relating to the identity of persons charged with the commission of crimes or offenses involving their application for or receipt of public assistance and care, including the names and addresses of such applicants or recipients who are charged with the commission of such crimes or offenses.

5. A social services official shall disclose to a federal, state or local law enforcement officer, upon request of the officer, the current address of any recipient of family assistance, or safety net assistance if the duties of the officer include the location or apprehension of the recipient and the officer furnishes the social services official with the name of the recipient and notifies the agency that such recipient is fleeing to avoid prosecution, custody or confinement after conviction, under the laws of the place from which the recipient is fleeing, for a crime or an attempt to commit a crime which is a felony under the laws of the place from which the recipient is fleeing, or which, in the case of the state of New Jersey, is a high misdemeanor under the laws of that state, or is violating a condition of probation or parole imposed under a federal or state law or has information that is necessary for the officer to conduct his or her official duties. In a request for disclosure pursuant to this subdivision, such law enforcement officer shall endeavor to include identifying information to help ensure that the social services official discloses only the address of the person sought and not the address of a person with the same or similar name.