Chapter 1. Introduction
Chapter 2. Maryland State Administrative Procedure Act (MAPA)
Chapter 3. County and Municipal Administrative Agencies
Chapter 4. Due Process and Other Fundamental Rights in Contested Cases
Chapter 5. Office of Administrative Hearings (OAH)
Chapter 6. Contested Cases.
Chapter 7. The Accardi Doctrine
Chapter 8. Standing
Chapter 9. Constitutional Issues
Chapter 10. Judicial Review
Chapter 11. Exhaustion of Administrative Remedies
Chapter 12. Special Areas of Administrative Practice
Chapter 13. Other Administrative Law Considerations
# TABLE OF CONTENTS

## Chapter 1. Introduction

A. Overview ................................................................. 1
B. What is Administrative Law? ........................................ 2
C. Agency Authority and Judicial Oversight ......................... 3
D. Administrative Procedure Acts ...................................... 4
E. Investigative Role of an Agency .................................... 5

## Chapter 2. Maryland’s State Administrative Procedure Act - MAPA

A. General Comments on the MAPA .................................. 8
B. Contested Case Provisions of the MAPA, (Subtitle 2) ......... 9
   10-201. Declaration of policy ........................................ 10
   10-202. Definitions .................................................. 10
   10-203. Scope of subtitle ............................................ 10
   10-204. Political subdivisions and instrumentalities .......... 11
   10-205. Delegation of hearing authority .......................... 11
   10-206. Procedural regulations .................................... 12
   10-206.1. Legal practice ............................................ 12
   10-207. Notice of agency action ................................... 13
   10-208. Notice of hearing .......................................... 13
   10-209. Notice mailed to address of licensee ................. 13
   10-210. Dispositions ............................................... 14
   10-211. Hearings conducted by electronic means ............. 14
   10-212. Open hearings ............................................. 14
   10-212.1. Interpreters ............................................. 14
   10-213. Evidence .................................................. 14
   10-214. Consideration of other evidence ....................... 15
   10-215. Transcription of proceedings ............................ 15
   10-216. Exceptions ............................................... 15
   10-217. Proof .................................................... 16
   10-218. Contents of record ....................................... 16
   10-219. Ex parte communications ................................ 16
   10-220. Proposed decisions and orders ......................... 17
   10-221. Final decisions and orders .............................. 17
   10-222. Judicial review .......................................... 18
   10-222.1. Administrative orders ................................ 19
   10-223. Appeals to Court of Special Appeals .................. 19
   10-224. Litigation expenses for small businesses and nonprofit organizations 19
   10-225. Suspension of provisions ............................... 20
   10-226. Licenses - Special provisions .......................... 20
C. Regulations Enacted .............................................. 21
D. Declaratory Rulings ............................................... 25
E. References .......................................................... 27
   (1). Opinions of the Attorney General ........................ 27
   (2). MICPEL Publications .......................................... 27
   (3). Law Review Articles .......................................... 28
   (4). Treatises ..................................................... 29
Chapter 3. County and Municipal Administrative Agencies
A. Baltimore County – A Charter County .................................................. 31
B. Other Rules of Procedure ........................................................................ 37

Chapter 4. Due Process and Other Fundamental Rights in Contested Cases
A. MAPA Rights Enumerated .................................................................... 40
B. Due Process of Law. What Process is Due? .......................................... 42
C. Notice and An Opportunity to be Heard ............................................... 44
D. The Right to Cross Examination ............................................................ 48
E. The Right to Subpoena Witnesses .......................................................... 50
F. Discovery ................................................................................................. 55
G. The Conduct of the Hearing .................................................................. 60
H. Liberty Interest ....................................................................................... 62

Chapter 5. Office of Administrative Hearings.
A. In General ............................................................................................... 66
B. The Judges ............................................................................................... 72
   (1) Caseload ............................................................................................. 73
   (2) Facilities ............................................................................................. 74
   (3) The Judges ......................................................................................... 74
   (4) Hearings before “specialized” administrative law judges .................. 75
C. Regulations ............................................................................................. 76
D. Representation of Persons before OAH ................................................ 78

Chapter 6. Contested Case
A. What is a Contested Case? ...................................................................... 85
   (1) Agencies to Which the MAPA is applicable ...................................... 86
   (2) The Definition of a Contested Case .................................................. 87
B. Notice of Charges ................................................................................... 90
C. Notice of a Hearing.................................................................................. 91
   (1) Generally .......................................................................................... 92
   (2) OAH ................................................................................................ 93
D. Motions and Other Prehearing Matters ............................................... 94
   (1) Prehearing Conferences .................................................................. 94
   (2) Motions Practice .............................................................................. 95
E. Discovery ................................................................................................ 96
   (1) Generally .......................................................................................... 96
   (2) Public Information Requests ........................................................... 96
F. The Hearing ............................................................................................. 99
   (1) OAH In General .............................................................................. 100
   (2) Opening ........................................................................................... 101
   (3) Evidence .......................................................................................... 99
       a. Generally ....................................................................................... 99
       b. Hearsay ......................................................................................... 101
       c. Business Records ......................................................................... 103
       d. Illegally obtained evidence ........................................................... 104
       e. Additional Evidence .................................................................. 105
f. Judicial Determination ................................................................. 106
  g. Polygraph Evidence ................................................................. 106
  h. Relevancy .............................................................................. 107
  i. Telephone Testimony and Video Conferencing ....................... 108
  j. The Requirement of an Oath ..................................................... 110

(4) The Right to Present Evidence and Cross-Examine .................. 111
(5) Privileges .............................................................................. 111
(6) Agency Expertise ..................................................................... 112
(7) Representation at the Hearing ............................................... 112
(8) The Burden of Proof ............................................................... 113
(9) Subpoenas .............................................................................. 111
(10) Postponements ....................................................................... 115
(11) Closing and Summation ......................................................... 118

G. Recusal ..................................................................................... 119
  (1) OAH .................................................................................. 119
  (2) Generally ............................................................................ 120

H. Disposition ............................................................................... 123
  (1) Failure to Participate ........................................................... 123
  (2) Proposed or Final Decision ................................................. 123
  (3) Reconsideration .................................................................. 125
  (4) The Necessity to Resolve Issues ......................................... 125

State Government (SG) ................................................................. 126
  §10-201. Declaration of policy.
  §10-203. Scope of subtitle.
  §10-204. Political subdivisions and instrumentalities.
  §10-205. Delegation of hearing authority.
  §10-206. Procedural regulations.
  §10-206.1. Legal practice.
  §10-207. Notice of agency action.
  §10-208. Notice of hearing.
  §10-209. Notice mailed to address of licensee.
  §10-210. Dispositions.
  §10-211. Hearings conducted by electronic means.
  §10-212. Open hearings.
  §10-212.1. Interpreters.
  §10-213. Evidence.
  §10-214. Consideration of other evidence.
  §10-215. Transcription of proceedings.
  §10-216. Exceptions.
  §10-217. Proof.
  §10-218. Contents of record.
  §10-219. Ex parte communications.
  §10-220. Proposed decisions and orders.
  §10-221. Final decisions and orders.
  §10-222.1. Administrative orders.
  §10-223. Appeals to Court of Special Appeals.
  §10-224. Litigation expenses for small businesses and nonprofit organizations.
  §10-225. Suspension of provisions.
§10-226. Licenses - Special provisions.

J. COMAR Regulations. The Office of Administrative Hearings Regulations. Rules of Procedure...138

SUBTITLE 02. RULES OF PROCEDURE
CHAPTER 01. RULES OF PROCEDURE

COMAR 28.02.01.01 Scope.
COMAR 28.02.01.02 Definitions.
COMAR 28.02.01.03 Initial Pleading; Commencement of Case.
COMAR 28.02.01.04 Transmittal of Request for Hearing.
COMAR 28.02.01.05 Notice of Hearing.
COMAR 28.02.01.06 Expedited Hearings.
COMAR 28.02.01.07 Venue.
COMAR 28.02.01.08 Powers and Duties of Judges.
COMAR 28.02.01.09 Appearance of Parties at Hearings; Representation.
COMAR 28.02.01.10 Discovery.
COMAR 28.02.01.11 Subpoenas.
COMAR 28.02.01.12 Intervention.
COMAR 28.02.01.13 Prehearing Conferences.
COMAR 28.02.01.14 Alternative Dispute Resolution (ADR).
COMAR 28.02.01.15 Stipulations and Affidavits.
COMAR 28.02.01.16 Motions.
COMAR 28.02.01.17 Conduct of Hearings.
COMAR 28.02.01.18 Evidence.
COMAR 28.02.01.19 Appointment of Interpreter.
COMAR 28.02.01.20 Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.
COMAR 28.02.01.21 Proceedings Open to the Public.
COMAR 28.02.01.22 Decision or Proposed Decision.
COMAR 28.02.01.23 the Record.
COMAR 28.02.01.24 Service.
COMAR 28.02.01.25 Postponements.
COMAR 28.02.01.26 Dismissal for Lack of Prosecution.
COMAR 28.02.01.27 Cases Remanded to the Office.
COMAR 28.02.01.28 Reconsideration and Revision.

Chapter 7. The Accardi Doctrine
A. When an Agency Does not Follow its Rules and Regulations ................................................................. 151
B. The Doctrine and its Exceptions – Legislative Intent.......................................................... 156

Chapter 8. Standing
A. Standing before the agency.............................................................. 161
B. Standing before the Court.............................................................. 162

Chapter 9. Constitutional Issues
## Chapter 10. Judicial Review

### A. When an Appeal (Judicial Review) May be Taken

1. Statutory Authorization ......................................................... 175
2. The Writ of Mandamus .......................................................... 179

### B. The 700 Rules ................................................................ 182

1. To Secure Review .................................................................. 182
2. The Agency Responsibility to Send Notice ............................. 184
3. Time Limitations .................................................................... 185
4. Response to Petition .............................................................. 186
5. Preliminary Motions .............................................................. 187
6. Stays ................................................................................... 187
7. The Record
   (a) What the Record Shall Include ....................................... 189
   (b) Stipulation ....................................................................... 189
8. Memorandum ......................................................................... 190
9. Hearing ................................................................................ 192
10. Additional Evidence .............................................................. 192
11. Disposition .......................................................................... 192
12. Appellate Court Review ....................................................... 193

### C. The Scope of Review ....................................................... 193

1. In General ........................................................................... 193
2. Venue .................................................................................. 197
3. Parties .................................................................................. 197
4. A cookbook methodology – a three part address .................. 197
5. Issues Not Before the Agency ............................................... 197
6. Review of the Agency Factual Determinations (the substantial evidence test) .............................................. 199
7. Review of Agency Legal Determinations ............................ 206
8. Was the agency decision arbitrary and capricious ............... 218
9. Disposition .......................................................................... 222
10. Expertise of the Agency ......................................................... 223
11. Agency Must State Basis of Decision ................................... 223
12. Complete Record ................................................................ 228

## Chapter 11. Exhaustion of Administrative Remedies

### A. The General Rule and Categories ..................................... 229

### B. Legislative Intent – Is jurisdiction exclusive, primary, or concurrent? .............................................. 231

## Chapter 12. Specific Areas of Maryland Administrative Law

### A. Employee Grievances ....................................................... 246

### B. License Suspensions .......................................................... 250

### C. Insurance Cases ............................................................... 254

### D. LEOBR ............................................................................ 256

### E. MVA ............................................................................... 257

### F. State Procurement Contracts ............................................. 259

### G. Zoning ............................................................................ 261

### H. Chesapeake Bay Critical Areas Commission .................... 271

### I. Board of Education and Education Matters ....................... 271

### J. Home Improvement Commission ....................................... 273
Chapter 13. Other Administrative Law Considerations

A. Ex Post Facto Laws ......................................................... 281
B. Sanctions .................................................................. 282
C. Waiver ..................................................................... 283
D. Immunity & Privilege ................................................. 283
E. Multiple Statutes .......................................................... 284
F. Attorney's Fees .............................................................. 286
G. Injunctions ................................................................. 288
H. Estoppel ..................................................................... 290
I. Open Meetings Act ...................................................... 292
J. Double Jeopardy ......................................................... 295
K. Retroactivity ................................................................. 295
L. Issue Preclusion (res judicata) ...................................... 296
M. Substantive Due Process Rights ................................. 297
Chapter 1.

Introduction

This Chapter 1 is broken down into the following Sections:

A. Overview ................................................................. 1
B. What is Administrative Law? ......................................... 2
C. Agency Authority and Judicial Oversight ......................... 3
D. Administrative Procedure Acts ..................................... 4
E. Investigative Role of an Agency ..................................... 5

A. Overview.
In an increasingly bureaucratic society, government, both state and federal, plays a dominant role. Traditional issues such as the right to a driver’s license, to operate a business, or to practice a profession continue to produce conflicts between citizens and government, but are now subject to greater due process scrutiny than ever before. Additional sources of dispute, such as entitlement to benefits, protection against unjust termination of governmental employment, educational and environmental issues, child abuse or neglect dispositions, workplace safety, human relations and a host of other potential conflicts have presented themselves, fairly recently, for resolution. All adjudicated resolutions (“contested cases”) must now meet due process scrutiny and utilize more of the general rules of constitutional courts.

The remarkable growth of governmental agencies, regulations, policies, statutes and case law can be daunting. When combined with the vastly increased attention to due process, both procedural and substantive, since the sixties and early seventies, procedural protection against arbitrary or mistaken governmental action has become quite complex. In turn, quasi-judicial or “trial-type” hearings have become the norm. In many states with independent administrative “courts,” such as Maryland, the process is frequently referred to, only half in jest, as the “fourth branch of government.”

The workings of State of Maryland administrative agencies in contested cases are governed, for the most part, by a State Administrative Procedure Act (MAPA), contained in SG §10-201, et. seq. of the Maryland Code and the Rules of Procedure of the Office of Administrative Hearings, as well as procedural rules of the agencies. Both State and county administrative law is treated in this book. The book is primarily concerned with the “contested case” functions of administrative agencies rather than with agency rulemaking. We are not concerned with the application of a substantial evidence rule or the business judgment rule applicable to private, as opposed to public, entities such as a physician credentialing committee in hospitals.

1 Administrative Law Judge Guy J. Avery of the Office of Administrative Hearings of the State of Maryland has been kind enough to contribute these first two paragraphs to this overview.
2 Sadler v. Dimensions Healthcare, 378 Md. 509, 836 A. 2d 655 (2003) was concerned with the proper test to be applied to a judicial review of the acts of a hospital credentialing committee when a circuit court action focused on claims of a breach of...
Through the years there has been case law discussion and some confusion as to what authority and how much authority can legally be delegated by the legislature to an administrative agency without running afoul of the separation of powers doctrine inherent in government structure. There is "this" police power that the State has to protect the health, safety and general welfare of the people of the State, and the question of how much flexibility there is or has to be in the exercise of this discretion by an administrative agency. "It is well settled that when legislative authority is delegated to administrative officials, there must be sufficient standards for the guidance of the administrative officials. The modern tendency of the courts is towards greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases." As with so much of our law, "it" (the ability to delegate and the standards to be applied to determine the permissible extent of that delegation) depends on the facts and circumstances of the particular case. "... [I]n determining whether a state administrative agency is authorized to act in a particular manner, the statutes, legislative background and policies pertinent to that agency are controlling."

B. What is Administrative Law? 6
Administrative law functions include adjudication of disputes, rule making and regulation. Following an examination of the history of administrative agencies, this book considers the law of Maryland State and County administrative law in contested cases. Many more attorneys become involved with the dispute adjudication aspect of administrative law than the regulatory aspect of administrative law.

In his Administrative Law Treatise, Richard J. Pierce, Jr. says this:

contract and tort. Judicial review of internal hospital decisions is usually limited to what is termed the "business judgment" rule, now codified in Corps. & Assoc. §2-405.1. 378 Md. at 522. This rule has been applied in situations involving internal voting rules or voluntary membership associations and corporate disputes. 378 Md. at 526. Circuit court actions alleging common law and statutory causes of action in contract and tort law may not always be disposed of by summary judgment on the basis of a business judgment or substantial evidence rule. Hospital bylaws may be regarded as contractual in nature under some circumstances. 378 Md. at 542-43. Two judges in the Sadler case concurred stating that the majority holding on the contract/tort exception to application of the business judgment rule, may not have been as clear as the majority thought it was. 378 Md. at 547.

"a legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered." 326 Md. at 624, 606 A.2d at 1075. [Emphasis by bold] It is axiomatic, therefore, that an administrative regulation must be consistent with the letter and policy of the statute under which the administrative agency acts.


4 Sullivan v. Bd. Of License Comm'rs, 293 Md. 113, 121, 442 A. 2d 558 (1982). Article 8 of the Maryland Declaration of Rights is specific: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

Maryland State Police v. Warwick Supply & Equip. Co., 330 Md. 474, 624 A.2d 1238 (1993) saw the Court explaining: The delegation doctrine prohibits a legislative body from delegating its law-making function to any other branch of government or entity and is a corollary of the separation of powers doctrine implicit in the United States Constitution and expressly provided in the Maryland Constitution. Nonetheless, we have long sanctioned delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute. As Chief Judge Murphy recently observed in Insurance Commissioner v. Bankers Independent Insurance Company [326 Md. 617, 602 A. 2d 1072 (1992)], "a legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, impairs, limits, or restricts the act being administered."

326 Md. at 624, 606 A.2d at 1075. [Emphasis by bold] It is axiomatic, therefore, that an administrative regulation must be consistent with the letter and policy of the statute under which the administrative agency acts.
Judge Friendly has provided a particularly good definition of administrative law. “Administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government’s participation is in furnishing an impartial tribunal with the power of enforcement,” Friendly, New Trends in Administrative Law, 6 Md. Bar J. No. 3, p. 9 (1974).

According to 2 Am.Jur 2d. Administrative Law §1, “administrative law” has no authoritative definition. However, Am. Jur then goes on to say: “Administrative law is concerned with the legal problems arising out of the existence of agencies which combine in a single entity legislative, executive, and judicial powers which were traditionally kept separate. It is also generally concerned with the problems of administrative regulation, rather than with those of administrative management.”

Basically what all of this means is that there came a time long, long ago that both the executive and legislative branches of government came to the conclusion that the Legislature could not long endure passing a statute for every problem that surfaced to assure that laws were properly executed. More hands on supervision by specialists in the field was needed. Therefore, it is “enabling” legislation that is passed giving general authority and instruction to an agency of the executive branch to operate within a statutory framework, and at the same time to make its own rules (regulations) in furtherance of the legislative directive given to it so as to make the system work. The executive branch administers legislative authority. Just how and when the judiciary becomes involved in this process in the protection of public and private rights remains a question defined day to day by case law decisions. It is the rule of law that agencies act within the statutory authority granted to those agencies and that individuals dealing with agencies are to be protected against an abuse of agency power.

For example, when the Maryland Health Resources Planning Commission adopts and updates a Maryland State Health Plan in accord with HG §§19-101 through 19-123 it performs a quasi-legislative function. HG §19-114(d) requires the Commission to adopt regulations “that ensure broad public input, public hearings, and consideration of local health plans in the development of the State health plan.” Applying for a certificate of need within the State Health Plan is a different process. A certificate of need is required before a person may develop, operate, expand, change, or invest capital in health care facilities or services. Application for a certificate of need is a quasi-judicial process. Therefore, it is improper to make application for a certificate of need to operate open heart surgery units at a hospital and thereby to challenge the validity and applicability of the State Health Plan. It is within the parameters of the State Health Plan (via executive function) that an application for need is denied or granted.

Separation of powers requires a recognition that agencies generally are constituted for the enforcement of the public right, as opposed to civil courts which enforce a private right. Thus, the functions of the executive, legislative, and judicial branches of government are to remain separated.

C. Agency Authority and Judicial Oversight.
Agencies derive their power from enabling statutes that govern them. They are creatures of statute and have no inherent powers. In the words of the Court of Appeals of Maryland:

10 Adventist Healthcare, 350 Md. at 107.
11 Adventist Healthcare, 350 Md. at 123.
12 Adventist Healthcare, 350 Md. at 122-23. The Court explained that alternative remedies could be seen in HG 19-114(c) to file a petition to review changes needed in the plan and also that a Declaratory Judgment Action might be appropriate under Cts. §3-406. 350 Md. at 126.
[Administrative agencies] are "established by legislative bodies, administrative agencies [and] derive their power from enabling statutes that govern them." An administrative agency is a "creature of statute, [which] has no inherent powers and its authority thus does not reach beyond the warrant provided it by statute." Generally, absent express legislative intent, the role of [a] Court is to determine whether an agency is empowered to decide the issue in controversy and whether the agency's procedures can be "performed within the confines of the traditional standards of procedural and substantive fair play." When it is doubtful that the General Assembly has vested powers in an agency to decide certain issues, the agency's ability to exercise that power will be circumscribed by the courts. [The judicial] task, therefore, is to determine whether the legislature intended, when it enacted [a statute]\textsuperscript{13}

Principles of statutory construction are applied to determine the intent of the legislature.\textsuperscript{14}

No doubt the role of the judiciary is limited. Still, personal rights are involved and constitutional guarantees to due process attend liberty and property interests. In 2006 there is a rather strong view in the private sector that agencies have too much power and that the fairness of their actions in contested cases is sometimes to be doubted.

D. Administrative Procedure Acts.
Authority is given by the Maryland Legislature or County legislative authority to a particular agency. In addition to the substantive law, there are legislatively created procedural acts to govern the process whereby agency authority is to be exercised. On the federal level, there is Chapter 5 of Title 5 of the United States Code which contains the Federal Administrative Procedure Act. Subchapter 1 contains general provisions and Subchapter II is the Administrative Procedure Act. In Maryland State Government, there is a Maryland Administrative Procedure Act in the State Government Article. (MAPA) Title 10 of that Article deals with Governmental Procedures. Subtitle 1 contains the Administrative Procedure Act dealing with regulations. Subtitle 2 contains the Administrative Procedure Act dealing with Contested Cases. There is also Subtitle 3 containing Administrative Procedure Act statutes dealing with Declaratory Rulings.\textsuperscript{15}

Administrative Procedure Acts and/or rules and regulations exist in Maryland’s subdivisions and some municipalities to govern the work of agencies when dispute resolution or quasi-judicial function.

\textsuperscript{13} Adamson \textit{v.} Correctional Medical, 359 Md. 238, 250-51, 753 A. 2d 501 (2000) (citations omitted). In this case, the task was to determine whether the legislature intended, when it enacted the Prisoner Litigation Act, "that a prisoner asserting medical malpractice against a private contractor providing medical services for the State first be required to file his alleged grievance with the [Division of Correction] and/or the [Inmate Grievance Office] before filing a common law tort complaint in state courts." The Court's holding was that going through the administrative process first was not required. 359 Md. at 272.

\textsuperscript{14} Adamson, 359 Md. at 251-52.

\textsuperscript{15} Within Title 10 are other subtitles:
Subtitle 4. Compliance with Workers' Compensation Act Required.
Subtitle 5. Meetings. "Open Meetings Act"
Subtitle 7. Reorganizations.
Subtitle 8. Written Policies for Public Communication.
Subtitle 10. Civil Penalties.
Subtitle 11. Equal Access to Public Services for Individuals with Limited English Proficiency.
Subtitle 12. Toll-Free Telephone Numbers.
E. Investigative Role of an Agency

Many, if not most agencies have the right to perform investigations to determine if statutory provisions have been violated. This authority is in addition to the quasi-legislative right of an agency to pass regulations and the quasi-judicial right of an agency to adjudicate disputes. For instance, the Board of Physicians is given authority, pursuant to HO §14-401, to perform an investigation to determine whether there are grounds for disciplinary or other action against a physician. Quite extensive is the authority of the Consumer Protection Division of the State of Maryland to investigate complaints to ascertain issues and facts toward a determination as to whether there has been a violation of Maryland law. See Com. Law §13-401, et. seq. Likewise, the Securities Commissioner of Maryland has broad authority to investigate whether there has been a violation of Maryland’s Securities Act. See Corps. & Assoc. §11-701. Investigations and subpoenas.

This 2006 book does not deal specifically with the agency investigative process. A body of law on the subject has developed through the years, and is recently growing. Throughout the book, there are references in the text and to Significant Case Decisions concerning investigations and the enforcement authority of particular agencies.

Attorneys involved in the practice of administrative law deal with a system where an agency is required to act within the statutory authority granted to it and the protection of individuals against any abuse of power by the agency.\(^{16}\)

\(^{16}\) Although not an administrative agency case, *Twigg v. Riverside*, 168 Md. App. 351, 896 A. 2d 439 (2006) talks about the importance of understanding and analyzing the authority of government. The Court said that a municipal corporation possesses only limited powers and that counties and municipalities are normally bound by their contracts to the same extent as private entities, and that governmental immunity is not generally recognized in defense of government contracts. 168 Md. App. at 362. Thus, an agreement between a property owner and the City of Frederick Maryland was void regarding a special fee levy and a waiver of other fees was void as an *ultra vires* act requiring the enactment of an ordinance to be affective. 168 Md. App. at 375. Certiorari was granted from the opinion in this case dated April 12, 2006.
Blank page
This Chapter 2 is divided into the following sections:

A. General Comments on the MAPA ................................................................................. 8
B. Contested Case Provisions of the MAPA. (Subtitle 2) .................................................. 9
   10-201. Declaration of policy ....................................................................................... 10
   10-202. Definitions ...................................................................................................... 10
   10-203. Scope of subtitle ............................................................................................ 10
   10-204. Political subdivisions and instrumentalities .................................................... 11
   10-205. Delegation of hearing authority ..................................................................... 11
   10-206. Procedural regulations .................................................................................. 12
   10-206.1. Legal practice ............................................................................................. 12
   10-207. Notice of agency action .................................................................................. 13
   10-208. Notice of hearing ........................................................................................... 13
   10-209. Notice mailed to address of licensee ............................................................... 13
   10-210. Dispositions .................................................................................................... 14
   10-211. Hearings conducted by electronic means ....................................................... 14
   10-212. Open hearings ................................................................................................ 14
   10-212.1. Interpreters ................................................................................................ 14
   10-213. Evidence ......................................................................................................... 14
   10-214. Consideration of other evidence .................................................................... 15
   10-215. Transcription of proceedings ........................................................................ 15
   10-216. Exceptions ...................................................................................................... 15
   10-217. Proof ................................................................................................................ 16
   10-218. Contents of record ......................................................................................... 16
   10-219. Ex parte communications .............................................................................. 16
   10-220. Proposed decisions and orders ...................................................................... 17
   10-221. Final decisions and orders ............................................................................. 17
   10-222. Judicial review ............................................................................................... 18
   10-222.1. Administrative orders ................................................................................. 19
   10-223. Appeals to Court of Special Appeals .............................................................. 19
   10-224. Litigation expenses for small businesses and nonprofit organizations ......... 19
   10-225. Suspension of provisions .............................................................................. 20
   10-226. Licenses - Special provisions ......................................................................... 20

1 The first law case to reach the Court of Appeals interpreting the act was Bernstein v. Real Estate Commission, 221 Md. 221, 156 A. 2d 657 (1959). Chapter 94 of the Acts of 1957 was codified as Art. 41, Sections 244-56, inclusive. Id., at 224.
Maryland has adopted a State Administrative Procedure Act (MAPA). There is a Uniform Law Commissioners' Model State Administrative Procedure Act (1961) with Maryland listed along with 27 other states as having adopted that Act. "The model administrative procedure act was developed to encourage a more uniform procedural process for administrative agencies." There is also a Uniform Law Commissioners' Model State Administrative Act (1981) with three states, of which Maryland is not one, listed as having adopted these provisions. As with any model act, care must be taken to compare the provisions of the model act with those enacted in any particular state. Annotations to the model act are only as useful as the correlation of a particular statute to the Act.

As stated above, unless excluded, the Maryland Administrative Procedure Act applies to all agencies of the State of Maryland, except those specifically excluded. There is a federal administrative procedure act. Maryland's APA was adopted in 1956 and has been revised since that time.

In 2002, the Court of Appeals gave this historical summary of the MAPA:

---

3 SG 10-102. See also: Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965). The Federal Administrative Procedure Act, 5 U.S.C. §551 provides that an agency means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." It does not include the Congress, courts of the United States, governments of territories or possessions or the government of the District of Columbia.
4 5 USCA §§551, et seq.
5 In Dept. of Health v. Chimes, 343 Md. 336, 681 A.2d 484, (1996), the late Chief Judge Robert Murphy detailed history behind the MAPA enactment and its revisions:

In 1952, the Commission on Administrative Organization of the State, appointed by Governor McKeldin, recommended adoption of the 1946 Model State Administrative Procedure Act (MSAPA) "to the end that administrative agencies may be subjected to essential controls but not unduly hampered in the performance of their functions." Seventh Report of the Commission on Administrative Organization of the State 70 (1952). That statute was designed to ensure that "certain basic principles of common sense, justice and fairness," including notice to interested parties, are applied in administrative procedures, Id., "without unduly restricting the agencies in the performance of their various tasks." Id. at 8; see also Maryland Code (1995 Repl. Vol., 1995 Supp.) §10-201 of the State Government Article (declaration of policy); Commission to Revise the Administrative Procedure Act, Initial Report on Subtitles 2 and 4 of the APA 2 (1992). The Maryland Administrative Procedure Act (APA), adopted by Ch. 94 of the Acts of 1957 and based on the MSAPA, therefore, sought to balance the State's interest in efficient administration against the individuals' interest in fairness. Cf. Bonfield, State Administrative Rule Making §1.2.2 (1986 & Supp. 1993) (discussing the 1981 MSAPA); Woodland Private Study Group v. State, 109 N.J. 62, 533 A.2d 387, 393 (1987) (in determining whether the intra-agency statements exception from the New Jersey APA applies, the court focuses upon "whether the agency's interest in streamlined procedure is outweighed by the importance of the interests that are affected."); see also Emma Ah Ho v. Cobb, 62 Haw. 546, 617 P.2d 1208, 1213 (1980) (discussing the federal APA contracts exception).

Id., at 338-39.
The State APA was enacted initially in 1957, see Chapter 94, Acts of 1957 (originally codified at Md. Code (1957), §§Art. 41, 244-256), and is currently codified at Md. Code (1984, 1999 Repl. Vol., 2001 Supp.), State Government Art., §§10-101-10-305. The purpose of the State APA is to provide a "standard framework of fair and appropriate procedures for agencies that are responsible for both administration and adjudication of their respective statutes." The APA prescribes procedures for two types of proceedings: (1) procedures for the adoption of regulations, see APA §§ 10-101-10-139, and (2) adjudicatory procedures for deciding contested cases, see APA §§ 10-201-10-227.21 It "applies to all state administrative agencies not specifically exempted." See APA § 10-203 (expressly excluding certain entities from the contested cases subtitle of the APA). Although the Executive branch state agencies excluded from the embrace of the State APA's contested cases provisions include some substantial portions of the State bureaucracy (the Worker's Compensation Commission, the State Department of Assessments & Taxation, and the Public Service Commission, to name a few), the bulk of the Executive branch agencies are included. This judicially noticeable fact gives weight and impetus to the broad sweep of the fundamental principles of State administrative law which should extend to similar proceedings beyond those conducted by administrative bodies strictly covered by the State APA.6

There is a section in the Maryland Administrative Procedure Act that allows a small business or non profit organization to recover litigation expenses incurred in a contested when an agency brings an action in bad faith or without substantial justification.7 A contested case "is a proceeding before, or dispute with, an agency that entitled a party to an agency hearing."8 "Investigation" of a possible antitrust violation prior to the filing of a complaint by the Consumer Protection Division does not constitute a contested case.9

Significant Case Decisions

- The Police Department of Baltimore City is a State agency and therefore the Administrative Procedure Act applied to a case where an individual was refused a taxicab operator's license in Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 479-80, 204 A. 2d 521 (1964). The MAPA applies to all State agencies except those expressly excluded therefrom. Id.10

B. Contested Case Provisions of the MAPA.

Subtitle 2, of Title 10 of the State Government (SG) Article is entitled: “Administrative Procedure Act – Contested Cases.” All sections should be prefixed by SG to indicate they appear in the State Government Article of the Annotated Code of Maryland. Within Subtitle 2 are the following sections:

---

8 Maryland Pharmacists, 115 Md. App. at 658.
9 Maryland Pharmacists, 115 Md. App. at 658. This case involved an allegation by the Hallmark Card Co., Inc. concerning activities of the Maryland Pharmacists Association, Inc. and mail order prescription plans. Id., at 653. Analogy to Maryland Rule 2-101(c) and the institution of a civil action was made by the Court in determining when an issue is contested. No such document to generate a contested case was ever issued by the Attorney General in this case. Id., at 659.
10 The Court discussed the fact that Taxicab companies in Maryland are common carriers. "Within constitutional limitations, local authorities may be authorized to regulate taxicabs. This includes the right to license their operators in order to protect the public health, welfare, morals, and safety." Id., at 483-84. No error was found in the decision not to issue a taxicab license to Mr. Kaufman. Id., at 484.
The text of the MAPA contested case provisions is reproduced below:

The Maryland Administrative Procedure Act
Subtitle 2. Administrative Procedure Act – Contested Cases

SG §10-201. Declaration of policy.
The purpose of this subtitle is to:
   (1) ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and
   (2) promote prompt, effective, and efficient government.

(a) In general.- In this subtitle the following words have the meanings indicated.
(b) Agency.- "Agency" means:
   (1) an officer or unit of the State government authorized by law to adjudicate contested cases; or
   (2) a unit that:
      (i) is created by general law;
      (ii) operates in at least 2 counties; and
      (iii) is authorized by law to adjudicate contested cases.
(c) Agency head.- "Agency head" means:
   (1) an individual or group of individuals in whom the ultimate legal authority of an agency is vested by any provision of law; or
   (2) the secretary of the State department that is responsible for State programs that are administered by the Montgomery County Department of Health and Human Services.
(d) Contested case.-
   (1) "Contested case" means a proceeding before an agency to determine:
      (i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or
      (ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.
   (2) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.
(e) License.- "License" means all or any part of permission that:
   (1) is required by law to be obtained from an agency;
   (2) is not required only for revenue purposes; and
   (3) is in any form, including:
      (i) an approval;
      (ii) a certificate;
      (iii) a charter;
      (iv) a permit; or
      (v) a registration.
(f) Office.- "Office" means the Office of Administrative Hearings.
(g) Presiding officer.- "Presiding officer" means the board, commission, agency head, administrative law judge, or other authorized person conducting an administrative proceeding under this subtitle.

SG §10-203. Scope of subtitle.
(a) General exclusions.- This subtitle does not apply to:
   (1) the Legislative Branch of the State government or an agency of the Legislative Branch;
   (2) the Judicial Branch of the State government or an agency of the Judicial Branch;
   (3) the following agencies of the Executive Branch of the State government:
      (i) the Governor;
      (ii) the Department of Assessments and Taxation;
(iii) the Insurance Administration except as specifically provided in the Insurance Article;
(iv) the Injured Workers' Insurance Fund;
(v) the Maryland Parole Commission of the Department of Public Safety and Correctional Services;
(vi) the Public Service Commission;
(vii) the Maryland Tax Court;
(viii) the State Workers' Compensation Commission;
(ix) the Maryland Automobile Insurance Fund; or
(x) the Patuxent Institution Board of Review, when acting on a parole request;
(4) an officer or unit not part of a principal department of State government that:
   (i) is created by or pursuant to the Maryland Constitution or general or local law;
   (ii) operates in only 1 county; and
   (iii) is subject to the control of a local government or is funded wholly or partly from local funds;
(5) unemployment insurance claim determinations, tax determinations, and appeals in the Department of Labor,
   Licensing, and Regulation except as specifically provided in Subtitle 5A of Title 8 of the Labor and Employment
   Article; or
(6) any other entity otherwise expressly exempted by statute.
(b) Applicability to property tax assessment appeals boards and correction of death certificates.- This subtitle
does apply to:
   (1) the property tax assessment appeals boards; and
   (2) as to requests for correction of certificates of death under § 5-310 (d) (2) of the Health-General Article, the
       office of the Chief Medical Examiner.
(c) Public hearings.- A public hearing required or provided for by statute or regulation before an agency takes a
particular action is not an agency hearing under § 10-202 (d) of this subtitle unless the statute or regulation:
   (1) expressly requires that the public hearing be held in accordance with this subtitle; or
   (2) expressly requires that any judicial review of the agency determination following the public hearing be
       conducted in accordance with this subtitle.
(d) Contested cases arising from State program administered by Montgomery County Department of Health and
Human Services.-
   (1) Subject to paragraphs (2) and (3) of this subsection, this subtitle does apply to a contested case that arises
from a State program administered by the Montgomery County Department of Health and Human Services in the
same manner as the subtitle applies to a county health department or local department of social services.
   (2) For purposes of this subtitle, the Office of the Attorney General, after consultation with the County Attorney
for Montgomery County, shall determine if the Montgomery County Department of Health and Human Services
administers a State program.
   (3) This subsection is not intended to extend or limit the authority of the Montgomery County Department of
Health and Human Services to administer State programs in the manner of a county health department or local
department of social services.
[An. Code 1957, art. 41, § 244; 1984, ch. 284, § 1; 1986, ch. 567; 1987, ch. 311, § 1; 1989, ch. 5, § 1; 1990, ch. 71, § 3; 1991, ch. 21, § 3; 1992,
ch. 547, 1993, ch. 59, § 1; 1994, ch. 536, § 1; 1995, ch. 120, § 19; 1996, ch. 476; 1997, ch. 16; ch. 70, § 4; 2008, ch. 660 §4. ]

SG §10-204. Political subdivisions and instrumentalities.
A political subdivision of the State or an instrumentality of a political subdivision is entitled, to the same extent as
other legal entities, to be an interested person, party, or petitioner in a matter under this subtitle, including an appeal.
[An. Code 1957, art. 41, § 256A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-205. Delegation of hearing authority.
(a) To whom delegated; limitation.-
   (1) Except as provided in paragraph (2) of this subsection, a board, commission, or agency head authorized to
conduct a contested case hearing shall:
      (i) conduct the hearing; or
      (ii) delegate the authority to conduct the contested case hearing to:
          1. the Office; or
          2. with the prior written approval of the Chief Administrative Law Judge, a person not employed by the
             Office.
   (2) A hearing held in accordance with § 4-608(f) or § 5-610(f) of the Business Occupations and Professions
Article may not be delegated to the Office.
(3) With the written approval of the Chief Administrative Law Judge, a class of contested case hearings may be
delegated as provided in paragraph (1)(ii)2 of this subsection.
(4) This subsection is not intended to restrict the right of an individual, expressly authorized by a statute in effect
on October 1, 1993, to conduct a contested case hearing.

(b) **Scope of authority delegated.** - An agency may delegate to the Office the authority to issue:
(1) proposed or final findings of fact;
(2) proposed or final conclusions of law;
(3) proposed or final findings of fact and conclusions of law;
(4) proposed or final orders or orders under Article 49B of the Code; or
(5) the final administrative decision of an agency in a contested case.

c) **Procedure upon receipt of hearing request.** - Promptly after receipt of a request for a contested case hearing, an
agency shall:
(1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing;
(2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's
delegation; or
(3) request written approval from the Chief Administrative Law Judge to appoint a person not employed by the
Office to conduct the hearing.

(d) **Delegation final; exception.** -
(1) Except as provided in paragraph (2) of this subsection, an agency's delegation and transmittal of all or part of
a contested case to the Office is final.
(2) If an agency has adopted regulations specifying the criteria and procedures for the revocation of a delegation
of a contested case, delegation of authority to hear all or part of a contested case may be revoked, by the agency
head, board, or commission, in accordance with the agency's regulations, at any time prior to the earlier of:
   (i) the issuance of a ruling on a substantive issue; or
   (ii) the taking of oral testimony from the first witness.

e) **Duties of the Office.** -
(1) The Office shall:
   (i) conduct the hearing; and
   (ii) except as provided in paragraph (2) of this subsection or as otherwise required by law, within 90 days after
   the completion of the hearing, complete the procedure authorized in the agency's delegation to the Office.
(2) The time limit specified in paragraph (1)(ii) of this subsection may be extended with the written approval of
the Chief Administrative Law Judge.


**SG §10-206. Procedural regulations.**

(a) **Adoption by Office; conflict.** -
(1) The Office shall adopt regulations to govern the procedures and practice in all contested cases delegated to
the Office and conducted under this subtitle.
(2) Unless a federal or State law requires that a federal or State procedure shall be observed, the regulations
adopted under paragraph (1) of this subsection shall take precedence in the event of a conflict.
(b) **Adoption by agencies.** - Each agency may adopt regulations to govern procedures under this subtitle and
practice before the agency in contested cases.
(c) **Expedited hearings.** - Regulations adopted under this section may include procedures and criteria for
requesting and conducting expedited hearings.
(d) **Prehearing procedures.** - Each agency and the Office may adopt regulations that:
   (1) provide for prehearing conferences in contested cases; or
   (2) set other appropriate prehearing procedures in contested cases.
(e) **Explanatory materials.** - To assist the public in understanding the procedures followed by an agency or the
Office in contested cases, an agency or the Office may develop and distribute supplemental explanatory materials,
including the related forms that the agency or Office requires and instructions for completing the forms.


**SG §10-206.1. Legal practice.**

(a) **Practice before agency.** - An agency may not:
   (1) grant the right to practice law to an individual who is not authorized to practice law;
   (2) interfere with the right of a lawyer to practice before an agency or the Office; or
(3) prohibit any party from being advised or represented at the party's own expense by an attorney or, if permitted by law, other representative.

(b) Publicly provided legal services.—Subsection (a) of this section may not be interpreted to require the State to furnish publicly provided legal services in any proceeding under this subtitle.

[1994, ch. 536, § 1.]

SG §10-207. Notice of agency action.
(a) In general.—An agency shall give reasonable notice of the agency's action.
(b) Contents of notice.—The notice shall:
(1) state concisely and simply:
   (i) the facts that are asserted; or
   (ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;
(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;
(3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;
(4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:
   (i) what, if anything, a person must do to receive a hearing; and
   (ii) all relevant time requirements; and
(5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.

tion of notices.—The notice of agency action under this section may be consolidated with the notice of hearing required under § 10-208 of this subtitle.
(d) Publication in Register.—For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.

[An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239; 1993, ch. 59, § 1.]

SG §10-208. Notice of hearing.
(a) In general.—An agency or the Office shall give all parties in a contested case reasonable written notice of the hearing.
(b) Contents of notice.—The notice shall state:
(1) the date, time, place, and nature of the hearing;
(2) the right to call witnesses and submit documents or other evidence under § 10-213 (f) of this subtitle;
(3) any applicable right to request subpoenas for witnesses and evidence and specify the costs, if any, associated with such a request;
(4) that a copy of the hearing procedure is available on request and specify the costs associated with such a request;
(5) any right or restriction pertaining to representation;
(6) that failure to appear for the scheduled hearing may result in an adverse action against the party; and
(7) that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.
(c) Consolidation of notices.—The notice of hearing may be consolidated with the notice of agency action required under § 10-207 of this subtitle.
(d) Publication in Register.—For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.

[1993, ch. 59, § 1.]

SG §10-209. Notice mailed to address of licensee.
(a) In general.—Where a licensing statute provides for service other than by regular mail, notice under this subtitle may be sent by regular mail to the address of record of a person holding a license issued by the agency if:
   (1) the person is required by law to advise the agency of the address; and
   (2) the agency has been unsuccessful in giving notice in the manner otherwise provided by the licensing statute.
(b) Hearing.—Upon a showing that the person neither knew nor had reasonable opportunity to know of the fact of service, a person served by regular mail under subsection (a) of this section shall be granted a hearing.
(c) Reasonable opportunity to know of service.—A person holding a license shall be deemed to have had a reasonable opportunity to know of the fact of service if:
   (1) the person is required by law to notify the agency of a change of address within a specified period of time;
(2) the person failed to notify the agency in accordance with the law;
(3) the agency or the Office mailed the notice to the address of record; and
(4) the agency did not have actual notice of the change of address prior to service.
[1993, ch. 59, § 1; 1994, ch. 141.]

SG §10-210. Dispositions.
Unless otherwise precluded by law, an agency or the Office may dispose of a contested case by:
(1) stipulation;
(2) settlement;
(3) consent order;
(4) default;
(5) withdrawal;
(6) summary disposition; or
(7) dismissal.
[An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-211. Hearings conducted by electronic means.
(a) Permitted.- In accordance with subsection (b) of this section, a hearing may be conducted by telephone, video conferencing, or other electronic means.
(b) Objections.-
(1) For good cause, a party may object to the holding of a hearing by telephone, video conferencing, or other electronic means.
(2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic means.
(3) If a party establishes good cause in opposition to the holding of a hearing by video conferencing or other similar audiovisual electronic means, the hearing shall be conducted in person.
[1993, ch. 59, § 1; 1996, ch. 96.]

SG. §10-212. Open hearings.
(a) In general.- Except as otherwise provided by law, a contested case hearing conducted by the Office shall be open to the public.
(b) Subtitle 5 not applicable.- Hearings conducted by the Office are not subject to Subtitle 5 of this title.
[1993, ch. 59, § 1.]

SG §10-212.1. Interpreters.
(a) In general.-
(1) In a contested case, a party or witness may apply to the agency for the appointment of a qualified interpreter to assist that party or witness, if the party or witness is deaf or, because of a hearing impediment, cannot readily understand or communicate the spoken English language.
(2) On application of the party or witness the agency shall appoint a qualified interpreter.
(3) In selecting a qualified interpreter for appointment, the agency may consult the directory of interpreters for manual communication or oral interpretation to assist deaf persons that is maintained by the courts of the State.
(b) Compensation.-
(1) An interpreter appointed under this section shall be allowed the compensation that the agency considers reasonable.
(2) Subject to paragraph (3) of this subsection, the compensation shall be paid by the agency.
(3) If the agency has the authority to tax for services and expenses as a part of the costs of a case, the agency may tax the amount paid to an interpreter as a part of these services and expenses in accordance with the federal Americans with Disabilities Act.
[An. Code 1957, art. 30, § 1; 1997, ch. 31, § 1.]

SG §10-213. Evidence.
(a) In general.-
(1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.
(2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.

(b) **Probative evidence.** The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.

(c) **Hearsay.** Evidence may not be excluded solely on the basis that it is hearsay.

(d) **Exclusions.** The presiding officer may exclude evidence that is:

(1) incompetent;
(2) irrelevant;
(3) immaterial; or
(4) unduly repetitious.

(e) **Rules of privilege.** The presiding officer shall apply a privilege that law recognizes.

(f) **Scope of evidence.** On a genuine issue in a contested case, each party is entitled to:

(1) call witnesses;
(2) offer evidence, including rebuttal evidence;
(3) cross-examine any witness that another party or the agency calls; and
(4) present summation and argument.

(g) **Documentary evidence.** The presiding officer may receive documentary evidence:

(1) in the form of copies or excerpts; or
(2) by incorporation by reference.

(h) **Official notice of facts.** The agency or the Office may take official notice of a fact that is:

(i) judicially noticeable; or
(ii) general, technical, or scientific and within the specialized knowledge of the agency.

(2) Before taking official notice of a fact, the presiding officer:

(i) before or during the hearing, by reference in a preliminary report, or otherwise, shall notify each party; and
(ii) shall give each party an opportunity to contest the fact.

(i) **Evaluation.** The agency or the Office may use its experience, technical competence, and specialized knowledge in the evaluation of evidence.


(a) **Findings based on evidence of record.** Findings of fact must be based exclusively on the evidence of record in the contested case proceeding and on matters officially noticed in that proceeding.

(b) **Regulations, rulings, etc., binding.** In a contested case, the Office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case.

SG §10-215. Transcription of proceedings.

All or part of proceedings in a contested case shall be transcribed if any party:

(1) requests the transcription; and
(2) pays any required costs.

SG §10-216. Exceptions.

(a) **Notice of proposed decision; consideration of exceptions.**

(1) In the case of a single decision maker, if the final decision maker in a contested case has not personally presided over the hearing, the final decision may not be made until each party is given notice of the proposed decision in accordance with § 10-220 of this subtitle and an opportunity to:

(i) file exceptions with the agency to the proposed decision; and
(ii) present argument to the final decision maker that the proposed decision should be affirmed, reversed, or remanded.

(2) In the case of a decision-making body, if a majority of the officials who are to make a final decision in a contested case have not personally presided over the hearing, the officials may not make the final decision until each party is given notice of the proposed decision in accordance with § 10-220 of this subtitle and an opportunity to:

(i) file exceptions to the proposed decision with the agency; and
(ii) present argument to a majority of the officials who are to make the final decision.

(3) If a party files exceptions or presents argument under paragraph (1) or (2) of this subsection, the official or officials who are to make the final decision shall:
   (i) personally consider each part of the record that a party cites in its exceptions or arguments before making a final decision; and
   (ii) except as otherwise provided by law or by agreement of the parties, make the final decision within 90 days after the exceptions are filed or the argument is presented, whichever is later.

(b) Changes to proposed decision.- The final decision shall identify any changes, modifications, or amendments to the proposed decision and the reasons for the changes, modifications, or amendments.

[1993, ch. 59, § 1; 1995, ch. 3, § 1; 2003, ch. 391.]

SG §10-217. Proof.
The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution.

[1993, ch. 59, § 1.]

SG §10-218. Contents of record.
The presiding officer hearing a contested case shall make a record that includes:

1. all motions and pleadings;
2. all documentary evidence that the agency or Office receives;
3. a statement of each fact of which the agency or Office has taken official notice;
4. any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of the agency who is not authorized to participate in the decision making process;
5. each question;
6. each offer of proof;
7. each objection and the ruling on the objection;
8. each finding of fact or conclusion of law proposed by:
   (i) a party; or
   (ii) the presiding officer;
9. each exception to a finding or conclusion proposed by a presiding officer; and
10. each intermediate proposed and final ruling by or for the agency, including each report or opinion issued in connection with the ruling.

[An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-219. Ex parte communications.

(a) Restrictions.
   (1) Except as provided in paragraph (2) of this subsection, a presiding officer may not communicate ex parte directly or indirectly regarding the merits of any issue in the case, while the case is pending, with:
   (i) any party to the case or the party's representative or attorney; or
   (ii) any person who presided at a previous stage of the case.
   (2) An agency head, board, or commission presiding over a contested case may communicate with members of an advisory staff of, or any counsel for, the agency, board, or commission who otherwise does not participate in the contested case.

(b) Communications prior to hearing.- If, before hearing a contested case, a person receives an ex parte communication of a type that would violate subsection (a) of this section if received while conducting a hearing, the person, promptly after commencing the hearing, shall disclose the communication in the manner prescribed in subsection (c) of this section.

(c) Disclosure.- An individual who is involved in the decision making process and who is personally aware of an ex parte communication shall:
   (1) give notice to all parties;
   (2) include in the record of the contested case:
      (i) each written communication received;
      (ii) a memorandum that states the substance of each oral communication received;
      (iii) each written response to a communication; and
(iv) a memorandum that states the substance of each oral response to the communication; and
(3) send to each party a copy of each communication, memorandum, and response.

(d) **Rebuttal.** A party may rebut an ex parte communication if the party requests the opportunity to rebut within 10 days after notice of the communication.

(e) **Remedial action.**
   (1) To eliminate the effect of an ex parte communication that is made in violation of this section, the presiding officer, or, if the presiding officer is a multimember body, the individual board or commission member, may:
      (i) withdraw from the proceeding; or
      (ii) terminate the proceeding without prejudice.
   (2) An order to terminate the proceeding without prejudice shall state the last date by which a party may reinstitute the proceeding.

[An. Code 1957, art. 41, § 254A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

(a) **Preparation.** If the Office conducts a hearing under this subtitle, the Office shall prepare proposed findings of fact, conclusions of law, or orders in accordance with the agency’s delegation under § 10-205 of this subtitle.
(b) **Submission.** The Office shall send its proposed findings, conclusions, or orders:
   (1) to the parties and the agency directly; or
   (2) if the agency’s delegation under § 10-205 of this subtitle requires, to the agency for distribution by the agency to the parties.
(c) **Review and issuance.**
   (1) Within 60 days after receipt of the Office’s proposed findings, conclusions, or order under subsection (b) (2) of this section, the agency shall:
      (i) review the Office’s proposed findings, conclusions, or order;
      (ii) issue the proposed decision, which may include the Office’s proposed findings, conclusions, or order with or without modification; and
      (iii) send the proposed decision and a copy of the Office’s proposed findings, conclusions, or order to the parties.
   (2) The time limit specified in paragraph (1) of this subsection may be extended by the agency head, board, or commission with written notice to the parties.
(d) **Form and contents.** A proposed decision or order, including proposed decisions or orders issued for contested case hearings subject to this subtitle but not conducted by the Office, shall:
   (1) be in writing or stated on the record;
   (2) contain separate findings of fact and conclusions of law;
   (3) include an explanation of procedures and time limits for filing exceptions; and
   (4) if the Office conducted the hearing and the agency’s proposed decision includes any changes, modifications, or amendments to the Office’s proposed findings, conclusions, or orders, contain an explanation of the reasons for each change, modification, or amendment.

[1993, ch. 59, § 1.]
(2) the party's attorney of record.


(a) Review of final decision.-

(1) Except as provided in subsection (b) of this section, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section.

(2) An agency, including an agency that has delegated a contested case to the Office, is entitled to judicial review of a decision as provided in this section if the agency was a party before the agency or the Office.

(b) Review of interlocutory order.- Where the presiding officer has final decision-making authority, a person in a contested case who is aggrieved by an interlocutory order is entitled to judicial review if:

(1) the party would qualify under this section for judicial review of any related final decision;

(2) the interlocutory order:

(i) determines rights and liabilities; and

(ii) has immediate legal consequences; and

(3) postponement of judicial review would result in irreparable harm.

(c) Jurisdiction and venue.- Unless otherwise required by statute, a petition for judicial review shall be filed with the circuit court for the county where any party resides or has a principal place of business.

(d) Parties.-

(1) The court may permit any other interested person to intervene in a proceeding under this section.

(2) If the agency has delegated to the Office the authority to issue the final administrative decision pursuant to § 10-205 (a) (3) of this subtitle, and there are 2 or more other parties with adverse interests remaining in the case, the agency may decline to participate in the judicial review. An agency that declines to participate shall inform the court in its initial response.

(e) Stay of enforcement.-

(1) The filing of a petition for judicial review does not automatically stay the enforcement of the final decision.

(2) Except as otherwise provided by law, the final decision maker may grant or the reviewing court may order a stay of the enforcement of the final decision on terms that the final decision maker or court considers proper.

(f) Additional evidence before agency.-

(1) Judicial review of disputed issues of fact shall be confined to the record for judicial review supplemented by additional evidence taken pursuant to this section.

(2) The court may order the presiding officer to take additional evidence on terms that the court considers proper if:

(i) before the hearing date in court, a party applies for leave to offer additional evidence; and

(ii) the court is satisfied that:

1. the evidence is material; and

2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer.

(3) On the basis of the additional evidence, the final decision maker may modify the findings and decision.

(4) The final decision maker shall file with the reviewing court, as part of the record:

(i) the additional evidence; and

(ii) any modifications of the findings or decision.

(g) Proceeding.-

(1) The court shall conduct a proceeding under this section without a jury.

(2) A party may offer testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record.

(3) On request, the court shall:

(i) hear oral argument; and

(ii) receive written briefs.

(h) Decision.- In a proceeding under this section, the court may:

(1) remand the case for further proceedings;

(2) affirm the final decision; or

(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the final decision maker;
(iii) results from an unlawful procedure;
(iv) is affected by any other error of law;
(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
(vi) is arbitrary or capricious.


SG §10-222.1. Administrative orders.
(a) Enforcement.- A party to a contested case may timely seek civil enforcement of an administrative order by filing a petition for civil enforcement in an appropriate circuit court.
(b) Jurisdiction and venue.- Unless otherwise required by statute, a party shall file a petition for civil enforcement of an administrative order in the circuit court for the county where any party resides or has a principal place of business.
(c) Parties - Defendants.- In an action seeking civil enforcement of an administrative order a party shall name, as a defendant, each alleged violator against whom the party seeks to obtain civil enforcement.
(d) Same - Plaintiffs.- A party may file an action for civil enforcement of an administrative order if another party is in violation of the administrative order.
(e) Remedies.- A party in an action for civil enforcement of an administrative order may request, and a court may grant, one or more of the following forms of relief:
(1) declaratory relief;
(2) temporary or permanent injunctive relief;
(3) a writ of mandamus; or
(4) any other civil remedy provided by law.
[2000, ch. 377.]

SG §10-223. Appeals to Court of Special Appeals.
(a) Scope of section.- This section does not apply to:
(1) a case that arises under Title 16 of the Transportation Article unless a right to appeal to the Court of Special Appeals is specifically provided; or
(2) a final judgment on actions of the Inmate Grievance Office.
(b) Right of appeal.-
(1) A party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases.
(2) An agency that was a party in the circuit court may appeal under paragraph (1) of this subsection.
[An. Code 1957, art. 41, § 256; 1984, ch. 284, § 1; 1993, ch. 59, § 1; 1994, ch. 536, § 1.]

SG §10-224. Litigation expenses for small businesses and nonprofit organizations.
(a) Definitions.-
(1) In this section, the following words have the meanings indicated.
(2) "Business" means a trade, professional activity, or other business that is conducted for profit.
(3) "Nonprofit organization" means an organization that is exempt or eligible for exemption from taxation under § 501 (c) (3) of the Internal Revenue Code.
(b) Scope of section.- This section applies only to:
(1) an agency operating statewide;
(2) a business that, on the date when the contested case or civil action is initiated:
(i) is independently owned and operated; and
(ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation; and
(3) a nonprofit organization.
(c) Reimbursement authorized.- Subject to the limitations in this section, an agency or court may award to a business or nonprofit organization reimbursement for expenses that the business or nonprofit organization reasonably incurs in connection with a contested case or civil action that:
(1) is initiated against the business or nonprofit organization by an agency as part of an administrative or regulatory function;
(2) is initiated without substantial justification or in bad faith; and
(3) does not result in:
(i) an adjudication, stipulation, or acceptance of liability of the business or nonprofit organization;
(ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business or nonprofit organization; or
(iii) a settlement agreement under which the business or nonprofit organization agrees to take corrective action or to pay a monetary sum.

(d) **Claim required in contested case.** -
(1) To qualify for an award under this section when the agency has initiated a contested case, the business or nonprofit organization must make a claim to the agency before taking any appeal.
(2) The agency shall act on the claim.

(e) **Amount.** -
(1) An award under this section may include:
   (i) the expenses incurred in the contested case;
   (ii) court costs;
   (iii) counsel fees; and
   (iv) the fees of necessary witnesses.
(2) An award under this section may not exceed $10,000.
(3) The court may reduce or deny an award to the extent that the conduct of the business or nonprofit organization during the proceedings unreasonably delayed the resolution of the matter in controversy.

(f) **Source of award.** - An award under this section shall be paid as provided in the State budget.

(g) **Appeals.** -
(1) If the agency denies an award under this section, the business or nonprofit organization may appeal, as provided in this subtitle.
(2) An agency may appeal an award that a court makes under this section.

[An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1; 1986, ch. 256; 1988, ch. 110, § 1; 1993, ch. 59, § 1.]

SG §10-225. Suspension of provisions.
(a) **In general.** - Upon a finding by the Governor that there is an imminent threat within a time certain of a loss or denial of federal funds to the State because of the operation of any section of this subtitle or of Title 9, Subtitle 16 of this article, the Governor by executive order may suspend the applicability of part or all of this subtitle or of Title 9, Subtitle 16 of this article to a specific class of contested cases.
(b) **Duration.** - A suspension under this section is effective only so long as, and to the extent, necessary to avoid a denial or loss of federal funds to the State.
(c) **Contents of order.** - The executive order shall explain the basis for the Governor's finding and state the period of time during which the suspension is to be effective.
(d) **Termination.** - The Governor shall declare the termination of a suspension when it is no longer necessary to prevent the loss or denial of federal funds.
(e) **Publication of order.** - An executive order issued under this section shall be:
   (1) presented to the Legislative Policy Committee; and
   (2) published in the Maryland Register pursuant to § 7-206 (a)(2) (viii) of this article.

[1993, ch. 59, § 1; 1994, ch. 141; 1996, ch. 10, § 1.]

SG §10-226. Licenses - Special provisions.
(a) **Definitions.** -
(1) In this section the following words have the meanings indicated.
(2) "License" means all or any part of permission that:
   (i) is required by law to be obtained from a unit;
   (ii) is not required only for revenue purposes; and
   (iii) is in any form, including:
      1. an approval;
      2. a certificate;
      3. a charter;
      4. a permit; or
      5. a registration.
(3) "Unit" means an officer or unit that is authorized by law to:
   (i) adopt regulations subject to Subtitle 1 of this title; or
   (ii) adjudicate contested cases under this subtitle.
Renewal and expiration.- If, at least 2 calendar weeks before a license expires, the licensee makes sufficient application for renewal of the license, the license does not expire until:
   (1) the unit takes final action on the application; and
   (2) either:
       (i) the time for seeking judicial review of the action expires; or
       (ii) any judicial stay of the unit's final action expires.

Revocation of suspension.-
   (1) Except as provided in paragraph (2) of this subsection, a unit may not revoke or suspend a license unless the unit first gives the licensee:
       (i) written notice of the facts that warrant suspension or revocation; and
       (ii) an opportunity to be heard.
   (2) A unit may order summarily the suspension of a license if the unit:
       (i) finds that the public health, safety, or welfare imperatively requires emergency action; and
       (ii) promptly gives the licensee:
           1. written notice of the suspension, the finding, and the reasons that support the finding; and
           2. an opportunity to be heard.

[1993, ch. 59, §1; 1995, ch. 538.]

Cross references. See Revision of subtitle and Editor's notes under § 10-201 of this article.

C. Regulations Enacted.
This book is concerned with "contested cases" within the meaning of MAPA. Subtitle 2 of Maryland's Administrative Procedure Act contains the statutes applicable to "contested cases." Subtitle 1 of Maryland's Act is concerned with the adoption of regulations by agencies. A comprehensive statutory scheme is set forth for the adoption of regulations. Regulation is defined by SG §10-101(g) as follows:

(g) Regulation.-
   (1) "Regulation" means a statement or an amendment or repeal of a statement that:
       (i) has general application;
       (ii) has future effect;
       (iii) is adopted by a unit to:
           1. detail or carry out a law that the unit administers;
           2. govern organization of the unit;
           3. govern the procedure of the unit; or
           4. govern practice before the unit; and
       (iv) is in any form, including:
           1. a guideline;
           2. a rule;
           3. a standard;
           4. a statement of interpretation; or
           5. a statement of policy.
   (2) "Regulation" does not include:
       (i) a statement that:
           1. concerns only internal management of the unit; and
           2. does not affect directly the rights of the public or the procedures available to the public;
       (ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or
       (iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.
   (3) "Regulation", as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation.

The definition is wordy. Case law has addressed the issue of what constitutes a regulation. The importance of the definition is seen in the fact that a "regulation" has general application to the individual and entity regulated by an agency and requires notice and comment or a requirement that emergency rule-making procedures be followed, before the regulation is operative.11 Some agency rules are not a

"regulation" in the sense contemplated by the MAPA and need not have been promulgated according to the MAPA rulemaking procedures.12

The Court of Appeals has detailed and summarized the statutory process required for the approval of proposed regulations.

The APA requires State agencies to submit proposed regulations to the Attorney General for approval as to legality, §10-107(b) of the State Government Article, and also to the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) for preliminary review 15 days prior to publication. §10-110(b). The agency must publish the proposed regulation in the Maryland Register and may adopt the regulation 45 days later. §10-111(a)(1). For 30 out of the 45 days, the agency must accept public comment on the proposed regulation. §10-111(a)(3). The AELR Committee may delay adoption of the regulation to allow more time for review. §10-111(a)(2)(i). The AELR Committee considers whether the regulation is in conformity with the statutory authority of the agency and the legislative intent of the statute under which the regulation is promulgated. §10-111.1(b). If the AELR Committee votes to oppose adoption of the regulation, the agency may withdraw or modify the regulation, or submit it to the Governor for approval. §10-111.1(c)(2). The Governor may then order the agency to withdraw, modify, or adopt the regulation. §10-111.1(c)(3). Notice of the adoption of the regulation must be printed in the Maryland Register. §10-114. This process is commonly known as "notice and comment" rulemaking.

The APA also provides for "Emergency Adoption" of regulations. If an agency deems it necessary, §10-111(b)(1) allows immediate adoption of regulations by submitting the regulation and a fiscal impact statement to the AELR Committee. A majority of the AELR Committee or the chair or co-chair may approve the regulation. §10-111(b)(2)(i). A public hearing must be held at the request of any member of the AELR Committee. §10-111(b)(2)(ii). The circuit courts must declare invalid any regulation adopted in violation of these procedures. §10-125(d).13

When agency procedures do not change existing law or formulate rules of widespread application, the process to adopt a regulation is not required for those procedures to be effective.14

Units of government in the Executive branch are included within the provisions of the subtitle. Legislative and Judicial branch activities are excluded as well as the promulgation of regulations concerning the Injured Workers' Insurance fund, a board of license commissioners or the Rural Maryland council. SG §10-102. "A regulation is not effective unless it contains a citation of the statutory authority for the regulation." SG §10-106. Provisions are made for preliminary review, SG §10-110; there are time limitations and public hearings, SG §10-111; and provisions for opposition to be filed to the adoption of regulations. SG §10-111.1. Publication of the proposed regulation must occur, SG §10-112; provisions are made for changes in a proposed regulation, SG §10-113; and proposed regulations may be withdrawn. SG §10-116.

Declaratory judgment is a procedure that may be utilized to contest the validity of a regulation:

SG §10-125. Declaratory judgment.
(a) Petition authorized.-
(1) A person may file a petition for a declaratory judgment on the validity of any regulation, whether or not the person has asked the unit to consider the validity of the regulation.
(2) A petition under this section shall be filed with the circuit court for the county where the petitioner resides or has a principal place of business.

12 Chimes, 342 Md. at 348.
13 Chimes, 343 Md. at 339-40. The Chimes decision addressed cost containment measures adopted by The Developmental Disabilities Administration (DDA), and whether regulations had to be promulgated by DDA attempting to stay within its budget. Id., at 342, 344. The growth cap did not change existing law. Id., at 346.
(b) Authority to consider.- A court may determine the validity of any regulation if it appears to the court that the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege of the petitioner.

(c) Unit as party.- The unit that adopted the regulation shall be made a party to the proceeding under this section.

(d) Finding of invalidity.- Subject to § 10-128 of this subtitle, the court shall declare a provision of a regulation invalid if the court finds that:

1. the provision violates any provision of the United States or Maryland Constitution;
2. the provision exceeds the statutory authority of the unit; or
3. the unit failed to comply with statutory requirements for adoption of the provision.

[An. Code 1957, art. 41, § 249; 1984, ch. 284, § 1.]

Separate statutes address invalid provisions, and a Regulatory Review and Evaluation Act exists. SG §§10-128, et. seq.; 10-130, et. seq.

COMAR Titles containing adopted regulations are listed below:

Title 01. Executive Department
Title 02. Office of the Attorney General
Title 03. Comptroller of the Treasury
Title 04. Department of General Services
Title 05. Department of Housing and Community Development
Title 07. Department of Human Resources
Title 08. Department of Natural Resources
Title 09. Department of Labor, Licensing, and Regulation
Title 10. Department of Health and Mental Hygiene
Title 11. Department of Transportation
Title 12. Department of Public Safety and Correctional Services
Title 13a. State Board of Education
Title 13B. Maryland Higher Education Commission
Title 14. Independent Agencies
Title 15. Department of Agriculture
Title 16. Department of Juvenile Justice
Title 17. Department of Budget and Management
Title 18. Department of Assessments and Taxation
Title 19a. State Ethics Commission
Title 20. Public Service Commission
Title 21. State Procurement Regulations
Title 22. State Retirement and Pension System
Title 23. Board of Public Works
Title 24. Department of Business and Economic Development
Title 25. Office of the State Treasurer
Title 26. Department of the Environment
Title 27. Chesapeake Bay Critical Area Commission
Title 28. Office of Administrative Hearings
Title 29. Department of State Police
Title 30. Maryland Institute for Emergency Medical Services Systems (Miemss)
Title 31. Maryland Insurance Administration
Title 32. Maryland Department of Aging
Title 33. State Board of Elections
Significant case decisions

Legislative regulations vs. administrative regulations

- **State v. Copes**, 175 Md. App. 351, 358, 927 A. 2d 426 (2007) was a case involving a claim for medical malpractice by health care providers against the State of Maryland under the Maryland Tort Claims Act and the interpretation of SG 12-106 requiring notice to the State Treasurer within a one-year period of time prior as a condition precedent to filing a claim against the State under the Maryland. The “State Insurance Program” subtitle of COMAR contained regulations relevant to the inquiry (COMAR 25.02.03.02) and a consideration of the issue caused the Court to comment on a difference between “legislative” and “interpretative” administrative regulations:

  Administrative regulations have the force of law when they are "legislative" and not merely "interpretive." A regulation is "legislative" when it "affects individual rights and obligations" and "the agency intended the rule to be legislative as 'evidenced by such circumstantial evidence as the formality that attended the making of the law, including rule making procedure and publication.'" Moreover, a "legislative" regulation is enacted under the authority of an express delegation of power from the legislature. (a legislative rule "is the product of an exercise of delegated legislative power to make the law through rules") (citation omitted).

  An "interpretive" regulation, in contrast, "simply state[s] what the administrative agency thinks the statute means, and only remind[s] affected parties of existing duties." While an interpretive regulation does not carry the force of law, it is entitled to deference because it reflects the agency's interpretation of its own statute.

  175 Md. App. at 379-80. (citations omitted)

Regulations must be consistent with the statutory authority authorizing them to be passed

- **Fields v. DCDSS**, 176 Md. App. 152, 931 A. 2d 824 (2007) decided that procedural steps set forth in a COMAR regulation were void because the regulation made more burdensome the statutory appeal process for an individual contesting a determination of “indicated” child abuse. There was a two step process for persons appealing a finding of responsible for indicated child abuse or neglect: (1) filing an appeal to the local department by notice within 60 days of the ruling, and (2) the requirement to take an additional step of sending a contested case hearing request to OAH within 60 days of the ruling. The former requirement is one of statute, but the latter requirement was passed by regulation. “To require a party who objects to the actions of an agency and who has notified it of his/her intent to appeal, to take a second step (send the contested Case Hearing Request Form to OAH) within sixty days, exceeds the scope of what FL Section 5-706(b)(1) permits and unfairly decreases the time the objecting party has to act.” 176 Md. App at 160. The ALJ had dismissed the appeal because Fields failed to submit the contested case form to OAH prior to the expiration of the sixty-day period. 176 Md. App. at 156. Regulations must be consistent with the statutory authority under which they are authorized.

---

15 What was before the court in this case was the issue of who the claimant was that had to file a written claim to the State Treasurer in a case where only one of three sisters files a wrongful death action and that brought into play the interpretation of statutes and regulations concerning whether the claim of all three sisters had been timely filed. Copes, 175 Md. App. at 357-58. Regulations by the State Treasurer interpreted the term “claimant” in the statute (SG §12-106). “We conclude that, for the wrongful death of a decedent, not all the beneficiaries under the WDA [Wrongful Death Act] are required to file separate written claims with the State Treasurer.” 175 Md. App. at 382.

16 The Court discussed case law dealing with regulations which are consistent with and not consistent with the letter and spirit of the law. DCS3, 176 Md. App. at 161.
D. Declaratory Rulings.
There is a provision in the State Government article for declaratory rulings that can be made by administrative agencies. Subtitle 3 of Title 10 contains the applicable sections.

Subtitle 3. Administrative Procedure Act - Declaratory Rulings.
10-301. "Unit" defined.
10-302. Scope of subtitle.
10-303. Political subdivisions and instrumentalities.
10-304. Petition for ruling.
10-305. Ruling.

SG §10-304. Petition for ruling.
(a) Authorized.- An interested person may submit to a unit a petition for a declaratory ruling with respect to the manner in which the unit would apply a regulation or order of the unit or a statute that the unit enforces to a person or property on the facts set forth in the petition.
(b) Regulations.- Each unit shall adopt regulations that set:
   (1) the form for a petition under this section; and
   (2) procedures for the submission, consideration, and disposition of the petition.
[An. Code 1957, art. 41, § 250; 1984, ch. 284, § 1.]

SG §10-305. Ruling.
(a) Authorized.- A unit may issue a declaratory ruling.
(b) Effect.- A declaratory ruling binds the unit and the petitioner on the facts set forth in the petition.
(c) Appeal- A declaratory ruling under this section is subject to review in a circuit court in the manner that Subtitle 2 of this title provides for the review of a contested case.
[An. Code 1957, art. 41, § 250; 1984, ch. 284, § 1.]

Significant case decisions

Standard to apply on judicial review
- Potomac Valley Orthopaedic Associates v. Maryland Board of Physicians, 417 Md. 622, 12 A. 3d. 84 (2011) discussed the standard of review when a State agency makes a Declaratory Ruling pursuant to SG § 10-304(a).
  The Declaratory Ruling of a State Administrative Agency is subject to judicial review in the same manner as provided for a "contested case" decided under the Administrative Procedure Act. SG §§ 10-305(c) and 10-223(b)(1). As the ruling at issue does not involve any disputes of fact, our role is "limited to determining . . . if the administrative decision is premised upon an erroneous conclusion of law." United Parcel Serv., Inc. v. People's Counsel for Baltimore County, 336 Md. 569, 577, 650 A.2d 226, 230 (1994). When the issue is whether an administrative agency has made an erroneous conclusion of law, the "agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts," Marzullo v. Kahl, 366 Md. 158, 172, 783 A.2d 169, 177 (2001). . . .
417 Md. 622, 635-36.17

Upon background information set forth in the opinion and statutory interpretation (reading of statute, legislative history of H.B. 1280, effect of rejection by Legislature of efforts to achieve legislatively that

17 In this case, the Court was called upon for Judicial Review of a decision by the Board of Physicians decision that the Maryland Patient Referral Law (Subtitle 3 of Title 1 of HO) prohibited an orthopaedic surgeon from furnishing patients with MRI or CT diagnostic services within his/her office or group even when the orthopaedist complies with the 'group practice' exemption or direct supervision exemption contained in the applicable statutes. 417 Md. at 626.
which the court was asked to grant, opinions of the attorney general), the Court stated that the Board of Physician declaratory holding was found to be correct. 417 Md. at 625, 639-41.

From our review of the record, we hold that the Board was correct in ruling that (1) the "group practice" exemption does not permit an orthopedic surgeon to refer his or her patient for a MRI or CT scan to be performed by another member of the orthopedic surgeon's practice group, and (2) the "direct supervision" exemption, which is limited to referrals to "outside" entities, requires that the referring physician be "personally present within the treatment area when the service is performed and either personally providing the service or directly supervising that service." As the Board and the Attorney General have pointed out, a contrary conclusion would offend several well established principles of statutory construction.

417 Md. at 639.

A declaratory ruling vs. the requirement of a regulation
- Baltimore City Board v. City Neighbors Charter School, 400 Md. 324, 929 A. 2d 113 (2006) held that the state Board of Education could establish by declaratory rulings standards for determining the amount of funding that three public charter schools were entitled to receive from their respective county boards of education and that the State Board need not engage in the rulemaking process to make these decisions.

Discussing Charter Schools as being in the nature of semi-autonomous public schools, the federal and Maryland law by which they are created and funded, the Court set forth the contentions of the three charter schools who initiated the litigation. No statewide formula or methodology exists for determining how local school systems fund their schools and the State Board concluded that a reasonable starting point for determining the commensurate amount to be given to the charter schools was “the total annual school system operating budget that includes all federal, State, and local funding with the approved appropriations for each of the major categories” as specified in the Maryland law. 400 Md. at 336-37. The State Board has broad statutory authority over the administration of the public school system in Maryland. 400 Md. at 342.

Rulemaking (SG § 10-101(g)) was discussed as well as the declaratory ruling procedure under SG § 10-305. 400 Md. at 345. The comprehensive law governing public charter schools “requires a county board of education to ‘disburse to a public charter school an amount of county, State, and federal money for elementary, middle, and secondary students that is commensurate with the amount disbursed to other public schools in the local jurisdiction.’” 400 Md. at 346. The attack by the charter schools on the State Board’s per public expenditure measure could not be upheld. The statute was held to be “patently ambiguous.” 400 Md. at 347. Statutory interpretation tools, including legislative history, meant that the requirement of ED § 9-109(a) allowed the School Board to make the decision it made by declaratory ruling. 400 Md. at 356-57.

Two judges dissented and Judge Raker writing for the dissent stated:

This court has never addressed when, if, or to what extent agencies may implement policies through declaratory rulings. Our cases addressing situations when agencies must proceed through formal rulemaking, as opposed to adjudication, are however, instructive on this point.

400 Md. at 358. [Emphasis by bold]

... It is clear that in issuing its declaratory rulings, SBE created new policies of general and widespread application where none existed before. SBE should have engaged in formal rulemaking procedures. ...

400 Md. at 361.

We have recognized that administrative agencies have discretion to establish policy either through the adoption of regulations or through ad hoc contested case adjudications and that it would be "patently unreasonable" to conclude that "every time an agency explains the standards through which it applies a statute in a contested proceeding it is promulgating rules." Declaratory rulings are thus a permissible mechanism by which SBE may exercise its statutory authority to "explain the true intent and meaning" of the public school laws and decide "controversies and disputes" under those laws. [Emphasis by bold]
The rulings at issue here were specific to three individual cases that happened to involve some common issues relating to the construction of ED § 9-109. That statute, like the charter school movement generally, was a new one, not at all free from ambiguity, and SBE was well within its discretion to proceed in the manner it did -- adjudicating the cases before it and offering "guidance" to other applicants, rather than proceeding with more formal and binding regulations.

From the dissent:
The above cases demonstrate that administrative agencies do not possess unfettered discretion to issue policies through whatever procedure they choose. We have noted repeatedly that an administrative agency's discretion should be limited where it (1) changes existing law, (2) applies new standards retroactively, or (3) creates rules of widespread application. Further, we have concluded that an agency must engage in formal rulemaking when it changes existing laws or creates new standards that have retroactive effect.

The majority states that formal rulemaking was un-necessary in this case because the "rulings at issue here were specific to three individual cases that happened to involve some common issues relating to the construction of ED § 9-109." Maj. op. at 24. I disagree. It is clear that in issuing its declaratory rulings, SBE created new policies of general and widespread application where none existed before. SBE should have engaged in formal rulemaking procedures.

As noted, prior to issuing these declaratory rulings, SBE had never interpreted § 9-109(a). With limited input from the parties involved, and none from outside parties with an interest in the interpretation of § 9-109(a), SBE adopted a general formula to determine the appropriate amount of funding to be disbursed to public charter schools, required that each "charter agreement must be completed within 30 calendar days from the date of the decision approving the charter application," and mandated that the "total average per pupil amount shall be adjusted by a 2% reduction as a reasonable cost to the charter school for these required central office functions." These are not rulings "specific to three individual cases." SBE noted as much when it stated as follows: "We have issued this Opinion as guidance and direction not only to the parties in this appeal but also to the other charter school applicants and local school systems in Maryland . . ."

Formal rulemaking was necessary to create the policies at issue. A declaratory ruling, which failed to provide even the quasi-judicial protections of an administrative adjudication, was an inappropriate mechanism for the formation of such widespread policies. . .

400 Md. at 360-62. (footnote omitted)

E. References.
There are a number of Opinions from the Attorney General of Maryland relating to the statutory scheme for the adoption of regulations. Case law has interpreted provisions of the statute over the years. References to case law decisions are included throughout these materials. There are law review articles the reader may find helpful.

(1). Opinions of the Attorney General.
(2). MICPEL Publications.
(3). Law Review Articles.
(4). Treatise Authority.

(1). Opinions of the Attorney General.
Listed below are some opinions of the Attorney General concerning the MAPA:
A policy statement issued by the Subcabinet for Children, Youth, and Families that established a strict two-year limit on services provided to an eligible child under the State's "Return/Diversion" initiative fit the definition of "regulation" in the State Administrative Procedure Act and was required to be adopted under the rulemaking provisions of the act in order to be enforceable.

Procedural regulations. - The Administrative Procedure Act, which under subsection (a) of this section applies to virtually every unit in the Executive Branch, prescribes the procedural requirements for the adoption of a regulation.

The Medical Assistance Program's document informing physicians of a new documentation requirement for prescriptions of brand-name drugs did not constitute a regulation subject to the adoption procedures of the Administrative Procedure Act as it falls within the internal management exception to the definition of regulation.

Notice where final text of proposed agency rule differs from original version. - When the final text of a proposed agency rule contains provisions which are substantially different from the text as originally proposed and published, the adequacy of notice depends on whether the affected class reasonably could have anticipated from the published notice the substance of a regulation finally proposed for adoption, and if not, the agency should treat its revised version as a newly proposed rule and give the public additional notice and an opportunity to be heard.

(2). MICPEL Publications.

   1. Administrative Law – Maryland.
   2. Delegated Legislation – Maryland.
   3. Administrative Agencies – Maryland.
o Maryland State Board of Contract Appeals Decisions (1994)
o New Administrative Procedure Act and How it Affects OAH Practice (1996)
o Update for the General Practitioner (1996)

(3). Law Review Articles.

35 Md. L. Rev. 414 (1976)
Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland, by Edward A. Tomlinson.
   The Law of Judicial Review in Maryland ................................................................. 416
   The Limits on the Judicial Role .................................................................................. 425
   The Limits on the Administrative Role ....................................................................... 440
   Conclusion .................................................................................................................. 456

56 Md. L. Rev. 196
The Maryland Administrative Procedure Act; Forty Years Old in 1997, by Edward A. Tomlinson.
Introduction.......................................................................................................................... 196
I. Rulemaking v. Adjudication in Maryland................................................................. 202
   A. Rulemaking Procedures in Maryland................................................................. 204
   B. Contested Case Procedures in Maryland......................................................... 211
   C. Application of Rulemaking vs. Adjudication Dichotomy ..................... 219
II. Rulemaking and the Maryland APA................................................................. 229
III. Adjudication and the Maryland APA............................................................. 240
   A. Relationship Between Adjudication and Contested Case.................. 240
   B. Overview of Adjudication in Maryland ....................................................... 245
   C. What Is a Contested Case?........................................................................... 255
Conclusion...................................................................................................................... 271

29 U. Balt. L. Rev. 1 (2001)
"Principles of Maryland Procurement Law"


   While Maryland is not bound by the doctrine of separation of powers that has developed under the federal Constitution, Maryland courts have articulated analogous principles. Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive and Judicial powers of Government ought to be forever separate." Thus, unlike the federal Constitution, Maryland's Constitution contains an explicit reference to the separation of powers. Any delegation of legislative or judicial power to an administrative agency appears to contradict Article 8 because, in theory, administrative agencies fall under the executive branch. Nonetheless, the Court of Appeals of Maryland has recognized the right of the General Assembly to delegate legislative powers to administrative agencies for over 125 years. As the court of appeals has construed Article 8, the separation of powers doctrine does not act as a complete bar to the transfer of power among the three branches of government.
   As with the federal courts, Maryland courts have adopted and developed their own nondelegation doctrine jurisprudence that regulates the transfer of power from the General Assembly to administrative agencies. The Court of Appeals of Maryland has aptly recognized that "the delegation doctrine . . . is a corollary of the separation of powers doctrine." Thus, Maryland's nondelegation doctrine curtails violations of Maryland's constitutional separation of powers doctrine.
   Id., at 539-40 (footnotes omitted)

Article: Bold Promises but Baby Steps: Maryland's Growth Policy to the Year 2020 by Philip J. Tierney.
   The author comments on Maryland, Pennsylvania, and Virginia formation of the Chesapeake Bay Commission to coordinate legislative planning and programs to restore the Bay and on the adoption of the Maryland Economic Growth, Resource Protection,
and Planning Act of 1992. Flexible techniques in the types of available zoning in Maryland are discussed. *Id.* 483-91.

(4). Treatises.
Not all that much is available by way of treatises on State and County Administrative Law. The author refers the reader to the following:

A. Maryland Administrative Law, Professor Arnold Rochvarg, MICPEL, 2001 with 2004 Supplement.


D. Maryland Law Encyclopedia (M.L.E.), Administrative Law and Procedure, West Group, with 2006 pocket part. (not very reliable in the opinion of the author of this Chapter 1).

County governments and municipalities have their own administrative agencies, contested hearings and procedures for adjudicating cases. Finding rules of procedure applicable to these proceedings requires inquiry at a local level. With the advent of the internet, some Maryland subdivisions have rules of procedure on-line.

This Chapter 3 is divided into the following sections:

A. Baltimore County – A Charter County ................................................................. 31
B. Other Rules of Procedure ...................................................................................... 37

Reference is made to the Annotated Code of Maryland where it is provided that a Maryland subdivision or part of a subdivision may elect a particular form of government. Among the choices are:

Art. 23A. Corporations - Municipal.
Art. 23B. Municipal Corporation Charter.
Art. 25. County Commissioners.
Art. 25A. Chartered Counties of Maryland.
Art. 25B. Home Rule for Code Counties.

This Chapter 3 is divided into the following subsections:

A. Baltimore County – A Charter County.

Article 25A of Maryland’s Annotated Code is entitled “Charted Counties of Maryland.” A Maryland county may adopt a charted form of government. Section 5 contains enumerated express powers granted to and conferred upon any county which forms a charter form of government. Baltimore County, Maryland has elected this form of government. Among those statutory powers is the following:

(U)

County Board of Appeals

To enact local laws providing (1) for the establishment of a county board of appeals whose members shall be appointed by the county council; (2) for the number, qualifications, terms, and compensation of the members; (3) for the adoption by the board of rules of practice governing its proceedings; and (4) for the
decision by the board on petition by any interested person and after notice and opportunity for hearing and on the basis of the record before the board, of such of the following matters arising (either originally or on review of the action of an administrative officer or agency) under any law, ordinance, or regulation of, or subject to amendment or repeal by, the county council, as shall be specified from time to time by such local laws enacted under this subsection: An application for a zoning variation or exception or amendment of a zoning ordinance map; the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; and the assessment of any special benefit tax: Provided, that upon any decision by a county board of appeals it shall file an opinion which shall include a statement of the facts found and the grounds for its decision. Any person aggrieved by the decision of the board and a party to the proceeding before it may appeal to the circuit court for the county which shall have power to affirm the decision of the board, or if such decision is not in accordance with law, to modify or reverse such decision, with or without remanding the case for rehearing as justice may require. Any party to the proceeding in the circuit court aggrieved by the decision of the court may appeal from the decision to the Court of Special Appeals in the same manner as provided for in civil cases.

As part of its charter, Baltimore County provides for a Board of Appeals with different sections of its charter governing appointment to the Board of Appeals (Sec. 601) and the powers and functions of the Board (Sec. 602). Among powers and functions of the Board of Appeals are to hear:

(a). Appeals from orders relating to zoning.
(b). Appeals from orders relating to licenses.
(c). Appeals from orders relating to building.
(d). Appeals from executive, administrative and adjudicatory orders.
(e). Original and exclusive jurisdiction over all petitions for reclassification.

Rules of practice and procedure have been adopted. (Sec. 603). Appeals from decisions of the Board may be made to the circuit court of Baltimore County (Sec. 604) by one “aggrieved” within thirty (30) days “after any decision of the county board of appeals.” Authority is given to the circuit court to in that court “to modify or reverse such decision, with or without remanding the case for rehearing, as justice may require.”

Whenever such appeal is taken, a copy of the notice of appeal shall be served on the board by the clerk of said court, and the board shall promptly give notice of the appeal to all parties to the proceeding before it. The board shall, within fifteen days after the filing of the appeal, file with the court the originals or certified copies of all papers and evidence presented to the board in the proceeding before it, together with a copy of its opinion which shall include a statement of the facts found and the grounds for its decision. Within thirty days after the decision of the circuit court is rendered, any party to the proceeding who is aggrieved thereby may appeal such decision to the court of appeals of this state. The review proceedings provided by this section shall be exclusive.

On the State level, various statutes, the Maryland Administrative Procedure Act and rules and regulations in the Office of Administrative Hearings contain the procedure to be followed for hearings in contested cases. In Baltimore County, the Rules adopted for practice before the Board of Appeals are the following:

Rule 1. General.
   a. The county board of appeals shall select one of its members to be the chairman of the board, and he shall serve as chairman at the pleasure of the board. The chairman shall preside at all meetings of the county board of appeals, and in his absence he shall designate another member of the board to sit in his place as acting chairman.
   b. Meetings of the county board shall be held as determined by the chairman, but never less than weekly; and the board shall meet at such other times as the board may determine.
c. Three (3) members of the board of appeals, as designated by the chairman, shall sit for the purpose of conducting the business of the board; and a majority vote of two (2) members shall be necessary to render a decision, except that, in the event of illness or death of a sitting member, upon agreement of counsel of record or parties of record, two (2) members may continue to sit for purposes of concluding any matter before the board of appeals.

d. All appeals to the board from decisions of the zoning commissioner or deputy zoning commissioner shall be in conformance with the rules of the zoning commissioner of Baltimore County with respect to the form of appeal, and the filing fees shall be as established either by said rules of the zoning commissioner or by the Zoning Regulations of Baltimore County.

Rule 2. Notice.

a. No hearing shall be conducted without at least ten (10) days' notice to all parties of record or their counsel of record, unless otherwise agreed to by all such parties or their counsel of record.

b. Postponements and continuances will be granted at the discretion of the board only upon request in writing by an attorney of record, addressed to the board and with a copy of every other attorney of record, or party of record (if not represented by counsel) entitled to receive notice, in accordance with section 500.11 of the Baltimore County Zoning Regulations, setting forth good and sufficient reasons for the requested postponement.

c. No postponement shall be granted within fifteen (15) days next prior to the hearing date except in extraordinary circumstances and for a reason satisfactory to the board, given by the party requesting such postponement indicating that the circumstances requiring the postponement are of any unusual and extraordinary nature.

d. All records and dockets of the board shall be open to the public during normal business hours.

e. In appeals from decisions of the zoning commissioner, formal notice of hearings, continuances and decisions of the board will be provided only to those persons entitled to receive same in accordance with section 500.11 of the Baltimore County Zoning Regulations.

Rule 3. Appeals.

a. No appeal shall be entertained by the board of appeals unless the notice of appeal shall state the names and addresses of the persons taking such appeal.

b. An appeal may be withdrawn or dismissed at any time prior to the conclusion of the hearing on said appeal.

c. Unless otherwise provided for by statute, all appeals to the board of appeals, subject to and limited by statutory authority to hear appeals, shall be made within thirty (30) days from the date of the final action appealed.


a. All hearings held by the county board of appeals shall be open to the public. No hearing shall be private even though all parties agree. The county board of appeals shall have the power to administer oaths, and all witnesses shall testify under oath.

b. The chairman shall regulate the course of the hearing and shall rule upon procedural matters, applications, modifications and objections made during the course of the hearing, subject to the concurrence of a majority of the board conducting the hearing.

c. A hearing may be adjourned from time to time for good cause shown and if the time and place of reconvening the hearing is announced at adjournment, no further notice of reconvening shall be required. If the time and place of reconvening is not announced at adjournment, notice of time and place of reconvening shall be given as required in rule 2a.

d. Depositions shall not be allowed unless by agreement of all parties or their counsel of record.1

1 This rule was referred to in Hammen v. Baltimore County Police Dept., 373 Md. 440, 453, 818 A. 2d 1125 (2003) where Hammen sought a surveillance tape that was going to be used by Baltimore County in a proceeding to reevaluate his disability pension benefits. The County Attorney made an offer to exchange the tape for the right to take Hammen’s deposition and this rule was mentioned with the Court stating that in the proceedings depositions could not otherwise be taken, except by agreement. Id., at 447. The Court stated that the rules of practice and procedure before the Board of Appeals are silent regarding discovery except for this rule. Id., at 453.
Rule 5. Subpoenas.
   a. The county board of appeals shall have the power to compel the attendance of witnesses and to require the production of records and documentary or other tangible evidence.
   b. The board may cause subpoenas and subpoenas duces tecum to be issued upon its own motion, or upon the application of any party to any hearing; but subpoenas will not be issued upon application unless such application is in writing and sets forth the persons, records, books, papers or other documents to be produced and a general statement as to the purpose.

Rule 6. Appearances and practice before the board of appeals.
   a. Any individual who is a party to a proceeding before the board may appear in his own behalf; and member of a partnership may appear as representing said partnership if it is a party; a duly authorized officer of a corporation, trust or an association may appear as representing said body, if it is a party to the proceedings; and a duly authorized officer or an employee of any political subdivision or body or department may represent the same before the board.
   b. Any party may be represented in any proceeding by an attorney-at-law admitted to practice before the Court of Appeals of Maryland.
   c. No person shall appear before the board in a representative capacity, engage in practice, examine witnesses or otherwise act in a representative capacity except as provided in sections a. and b. above.
   d. When an attorney wishes to appear in any proceeding in a representative capacity which involves a hearing before the county board of appeals, he shall file with the board a written notice of such appearance, which shall state his name, address, telephone number, and the names and addresses of the persons on whose behalf he has entered his appearance.

Rule 7. Evidence.
   a. Any evidence which would be admissible under the general rules of evidence applicable in judicial proceedings in the State of Maryland shall be admissible in hearings before the county board of appeals. Proceedings before the board being administrative in nature, the board will not be bound by the technical rules of evidence but will apply such rules to the end that needful and proper evidence shall be most conveniently, inexpensively and speedily produced while preserving the substantial rights of the parties. Any oral or documentary evidence may be received; but the board reserves the right as a matter of policy to provide for the exclusion of immaterial or unduly repetitious evidence, and the number of witnesses may be limited if it appears that their testimony may be merely cumulative.
   b. All evidence, including records and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made part of the record. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.
   c. Prepared statements may be read by participants in the hearing if they include factual material and do not include argument, provided copies of said statements have been delivered to the board and opposing counsel at least five (5) days prior to hearing, and their admissibility ruled upon, the same as if the factual content were presented in the usual manner. "Prepared statements" within the meaning of this section shall not include factual reports, written summations, letters, expert opinions of professional expert witnesses and other such similar documents.
   d. Except as may otherwise be provided by statute or regulations, the proponent of action to be taken by the board shall have the burden of proof.
   e. Any official record or entries therein when admissible for any purpose may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, and the appearance of the officer will not be required unless demanded by a party to the case and for good cause shown to the board. This rule does not prevent any party from summoning any proper witness to attend any hearing before the board.
   f. Records of other proceedings before the board may be offered in evidence by the production of the files containing said records of such other proceedings.
   g. In such cases as the board may determine, it may by order require that the direct testimony of all "expert" witnesses be submitted in writing, accompanied by copies of all exhibits to which reference is therein made, unless such are of a voluminous nature or within the files of, or readily available to, the board of appeals, in which case adequate reference shall be made thereto, which testimony shall be submitted by the parties required so to do and under the time and service provisions as contained in said order.
Thereafter, said "expert" witnesses shall be personally present at the hearing for affirmation of their written statement and exhibits previously submitted and for cross-examination.

**Rule 8. Special rule pertaining to persons appearing before the board as representatives of civic or improvement associations.**

a. Before any person shall testify on behalf of any civic or improvement association, it shall be shown that the person has accurate knowledge of the number of members in the association and geographical limits of the association.

b. Before any such person shall testify it shall also be shown that the person is authorized to speak for and present the views of the civic or improvement association.

c. Such authorization shall consist of presenting at the hearing or prior thereto a resolution in duplicate duly adopted by the association at its annual meeting or first meeting of each year, signed by the president and attested by the secretary, providing that the responsibility for review and action on all zoning matters be placed in its board of directors or a duly elected zoning committee.

d. Before any such authorized person shall testify, it shall be shown by written affidavit in duplicate, signed by the president of the association and attested by the secretary, that the person is currently a duly elected member of the board of directors or zoning committee of that association, or is a duly designated employee or an authorized representative of that association, or is an attorney-at-law appointed to represent the board of directors or zoning committee.

e. Before any such authorized person shall testify, a resolution stating the position of the association as adopted by the board of directors or zoning committee, signed by the president and attested by the secretary, shall also be produced in duplicate at the hearing.

**Rule 9. Special rule pertaining to original petitions for reclassification, special exception and/or variance.**

a. Application of Rule: This rule shall apply only to petitions for reclassification, special exception and/or variance filed with the board pursuant to section 2-58.1 of Article V, "Boards and Commissions," Division 4, "Board of Appeals," Title 2, "Administration," of the Baltimore County Code, as now in force and effect or as hereafter amended. It applies to the filing, processing, advertising and scheduling of hearings on such petitions and is supplemental to such other rules of the board and section 2-58.1 of the Baltimore County Code as now in force and effect or as are hereafter amended or adopted. Once filed and scheduled for hearing under the provisions of this special rule, such petitions shall be heard and decided in accordance with all other rules of the board.

**Editor's note:**

Because of the reorganization of the Code in this publication, the Code references in this section should read as follows:...

b. Definition of Petition. As used herein the term "petition" shall mean:

1. Request for reclassifications of property, including all material filed with said request.

2. Request for special exceptions and/or variances, the granting of which are dependent upon a reclassification of the property in question, including all material filed therewith.

c. Filing.

1. Petitions may be filed in the office of the board of appeals throughout the year, except during the period from April 16, 1979, through October 15, 1980, and all like periods beginning on April 16, 1983, and every fourth year thereafter.

2. Petitions accepted for filing, no later than forty-five (45) days prior to April 16 will be processed during the April–October cycle, and petitions accepted for filing no later than forty-five (45) days prior to October 16 will be processed during the October–April cycle.

3. Notwithstanding paragraphs 1. and 2. above, petitions exempted from the regular cyclical procedure due to public interest or because of emergency may be filed and processed at any time.

d. Processing and File Maintenance Procedure.

1. Upon receipt of a petition, the board shall establish a file and promptly transmit it to the zoning commissioner's office for processing and preparation of a written report. Said report shall be prepared by the zoning staff; shall reflect the comments of the zoning plans advisory committee; and shall indicate the petition's compliance, with regard to the zoning laws and regulations, and each reviewing agency's adopted standards or policies.
2. Petitions may be amended prior to the hearing only if said amendment takes place prior to the first public advertisement of the petition.

3. The zoning staff shall maintain possession of said file throughout the zoning review and report processing procedure.

4. Upon completion of the zoning review and report process, including distribution of copies of pertinent material to the planning staff, and the necessary advertising and posting, the file, complete with the zoning report and planning board recommendations, shall be returned to the board for the hearing.

5. The board shall maintain possession of the file until such time as the case has been completed with all pending appeals satisfied. Thereafter, said file shall be returned to the zoning office for microfilming and retention on behalf of the board.

e. Scheduling, Posting and Advertising for Public Hearings.

1. The zoning staff shall schedule and otherwise prepare the necessary newspaper advertisements and arrange for the posting of property in accordance with section 2-58.1 of the Baltimore County Code. However, all hearing dates and times shall be established by the board.

2. All postponed hearings shall be readvertised and the properties posted in accordance with the requirements for final advertising and posting pursuant to section 2-58.1(g) of the Baltimore County Code. The cost of such advertising and posting shall be borne by the party requesting the postponement.

Editor's note:
Because of the reorganization of the Code in this publication, section 2-58.1 referred to in this section is now Article 32, Title 3, Subtitle 5 of the Code.

f. Guide for Preparation of Reclassification Petitions. Each petition request shall be filed on forms provided by the county board of appeals. As a matter of convenience, the board will make available a guide containing information for use in the preparation of petitions for reclassification.

Rule 10. Revisory power of the board.
Within thirty (30) days after the entry of an order, the board shall have revisory power and control over the order in the event of fraud, mistake or irregularity.

These rules may be amended from time to time in accordance with section 603 of the Baltimore County Charter.

Significant case decisions

A denovo appeal to the Board of Appeals

The meaning of denovo

○ Maryland's Express Powers Art (Art. 25A §5(U)) authorizes each Maryland county to create a board of appeals. Anne Arundel County's charter (§603) created its Board of Appeals as an independent unit of county government and vested the Board with de novo authority to hear all appeals authorized by the Express Powers Act. "The Board is a statutory creature and may exercise only those powers expressly granted to it by law or those which can be fairly implied." Halle v. Crofton Civic Association, 339 Md. 131, 140-141, 661 A. 2d 282 (1975)

The nature of a de novo hearing was discussed at length. Halle, 339 Md. at 141-43, 146-49. The Court addressed a question of first impression regarding the scope of a board of appeals de novo review. At issue was whether the Board had the authority to address access to a landfill, gravel and rubble proposed site when that particular road was not part of the original application and whether conditions imposed by the Board as to the use of that access road was proper. Halle, 339 Md. at 143. De novo means an entirely new hearing and the Board exercises jurisdiction akin to original jurisdiction. The Court rejected the position of the Protestants that would preclude the Board from addressing "by condition any aspect of a zoning proposal which might affect the public welfare. The access issue was so inextricably intertwined with the administrative hearing officer's decision that it was an issue properly before the Board which could be addressed." Halle, 339 Md. at 145-46 "The power of the board to address all issues properly before it by condition goes hand-in-hand with the authority to take whatever action the administrative hearing officer could take if presented with the same evidence. After determining that permitting the proposed operations would be in the best interest of the public, therefore, the Board had the authority to address the access issue by imposing conditions as part of its de novo power." Halle, 339 Md. at 146
B. Other Rules of Procedure.
Listed below are some references to where local rules of procedure and/or administrative procedure acts may be found for some other subdivisions. Sometimes, there is going to be no substitute but to contact the individual county or municipality and obtain a copy of the rules from that entity. If you have a case wherever, rules and conduct of the proceedings are all important.

Anne Arundel County, Maryland (as of 5/28/06)
www.co.anne-arundel.md.us
Land Use and Construction
AA County Code
Article 3. Boards, Commissions, and Similar Bodies
American Legal Publishing
Contents
Appendix, Rules of Practice and Procedure Board of Appeals

Montgomery County, Maryland
www.montgomerycountymd.gov (as of 5/28/06)
Departments
Board of Appeals
Rules of Procedure (PDF Format)

Prince George’s County, Maryland
www.co.pg.md.is
Government
Charter

Anne Arundel County, Maryland
www.aacounty.org
Government
AA County Code
Boards and Commissions
County Agencies

Talbot County, Maryland
www.talbotgov.org
E-Codes – Municipal (Codes on Internet) www.generalcode.com
Maryland - Codes and Charters for Counties and Towns, including Talbot
Code puts you into Board of Appeals Rules selection which can be made.
notes
There are minimal procedures that must be followed to satisfy due process requirements in a quasi-judicial hearing before an administrative agency. This is to insure fairness. Basic due process constitutional rights include notice and the opportunity to be heard. Bullet point considerations include:

- Notice of the charges
- Notice of the hearing
- How much notice is sufficient and fair notice
- A "meaningful" opportunity to be heard
- What is "meaningful"?

Proceedings before agencies are not as formal or as strict as those required before courts. There are any number of Maryland cases stating this general principal, but not to be found is a case enumerating all the rights available in a contested case before an agency. "Both the Maryland declaration of Rights and the Constitution of the United States guarantee that a person will not be deprived of life, liberty, or property without due process of law. U.S. Const, amend. XIV: Md. Declaration of Rights art. 24." In order for a person to establish a violation of procedural due process, that person must first show that state action has resulted in his being deprived of a liberty or property interest. "A party has a valid property interest in an administrative appeal."

Due process and other constitutional issues are sometimes generated to attack the conduct of agency hearing. "When a proceeding meets the definition of a 'contested case' the agency must provide trial type procedures. The MAPA 'itself does not grant a right to a hearing. The right must come from another source such as a statute, a regulation, or due process principles.'"

In Section A, below, there is a general enumeration of rights available under MAPA. Constitutional and other issues of fairness are often an issue when it is alleged that these hearing rights or any of them are violated.

---

4 Breguiner, 111 Md. App. at 712.
A. MAPA Rights Enumerated.

Within the MAPA, the following rights are stated. They are reflective of due process requirements and then some:

1. notice of the agency proposed action is to be concisely and simply stated as to the alleged violations of law, accompanied by statutory and regulatory citations, along with the proposed sanction or penalty;\(^6\)
2. notice of the direct consequence, sanction, potential penalty, if any, or remedy if the recipient fails to exercise, in a timely manner, the opportunity for a hearing or to appear for a scheduled hearing;\(^7\)
3. notice of the right to a hearing and notice of the time, date and place of the hearing;\(^8\)
4. the right to a copy of the hearing procedures available with information specifying the costs associated with obtaining the copy;\(^9\)
5. that a hearing may be conducted by telephone, video conferencing, or other electronic means, and that good cause objections may be made to this procedure;\(^10\)
6. the right to call witnesses and submit documents or other evidence pursuant to SG §10-213(f);\(^11\) [SG §10-213 is titled, “Evidence.” Subsection (f) deals with the scope of evidence]
7. that the evidence (including rebuttal evidence) considered by the agency is to be probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs;\(^12\)
8. that evidence may not be excluded solely on the basis that it is hearsay;\(^13\)
9. that evidence may be excluded if it is incompetent, irrelevant, immaterial, or unduly repetitious;\(^14\)
10. that the agency may accept documentary evidence in the form of copies or excerpts or materials may be incorporated by reference;\(^15\)
11. that there is a right to reasonably cross examine any witnesses that another party or the agency calls;\(^16\)
12. that privileges recognized by law shall be recognized in the agency hearing;\(^17\)

---

\(^6\) SG §10-207(a)(b). See SG §10-209 as to notice mailed to address of licensee.
\(^7\) SG §10-207(b)(5) & SG §10-208(b)(6).
\(^8\) SG §10-207(b)(4) & SG §10-208.
\(^9\) SG §10-208(b)(4).
\(^10\) SG §10-211.
\(^11\) SG §10-208(b)(2) & SG §10-213(f).
\(^12\) SG §10-213(b) & SG §10-213(f)(1)(2).
\(^13\) SG §10-213(c).
\(^14\) SG §10-213(d).
\(^15\) SG §10-213(g).
\(^16\) SG §10-213(f)(3).
13. that the agency may: (a) take official notice of a fact that is judicially noticeable, or (b) general, technical, or scientific and within the specialized knowledge of the agency, but before taking official notice the agency must give notice of the intent to each party and the opportunity to contest the fact;18

14. any applicable right to request subpoenas for witnesses and evidence, along with a statement of the costs, if any, associated with such a request;19

15. the right to be represented by counsel or another representative, if applicable, and any restriction pertaining to that representation;20

16. that, unless otherwise prohibited by law, the parties may agree to evidence and waive their right to appear at the hearing;21

17. that an individual may be entitled to the services of a qualified interpreter appointed by the agency, at the cost of the agency;22

18. that hearings are to be open to the public, except as otherwise provided by law;23

19. that a party may present summation and argument;24

20. that witnesses shall be sworn or put under affirmation to tell the truth;25

21. that in its decision the agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence;26

22. that the proceeding will be recorded and may be transcribed upon request and payment of any required costs;27

23. that the burden of proof is by a preponderance of the evidence unless the standard of clear and convincing evidence is imposed by the agency by regulation, statute or the constitution;28

17 SG §10-213(e). Porter Hayden v. Bullinger, 350 Md. 452, 713 A.2d 962 (1998) states that a party may not obtain information that is privileged. With appreciation to Judge Dale R. Cathell for this summary, the decision lists various privileges that may be available and asserted:


530 Md. at 461-62. [Emphasis by bold]

As to what else is or is not privileged, Tax Returns were said not to be privileged in Ashton v. Cherne Contracting Corp., 102 Md. App. 87, 648 A.2d 1067 (1994) (claimant in Worker's Compensation case required to furnish state/federal, returns (joint with his wife) that are relevant to claim, as are post-injury wages to the issue of actual incapacity in occupational disease cases) 102 Md. App. at 94, 99. Judge Alpert writes an exhaustive review of the tax return privilege issue in this opinion.

18 SG §10-213(h).
19 SG §10-208(b)(3).
20 SG §10-208(b)(5).
21 SG §10-208(b)(7).
22 SG §10-212.1.
23 SG §10-212. For example, the Board of Physicians has adopted COMAR 10.32.02.08, providing that hearings before the Board are confidential.
24 SG §10-213(f)(4).
25 COMAR 28.02.01.17D(3).
26 SG §10-213(l).
27 SG §10-215.
24. that *ex parte* communications are generally prohibited, both directly or indirectly, regarding the merits of any issue in the case, and there is a requirement that any *ex parte* communications attempted or made to a hearing officer or Board be disclosed;29

25. that disposition may be made by stipulation, settlement, consent order, default, withdrawal, summary disposition, dismissal or final order;30

26. that an individual is entitled to a final decision of agency action which decision shall be specific as to findings of fact, and conclusions or law, and decision shall be communicated to the parties;31

27. judicial review of agency action may be available;32

28. that although judicial review is usually limited to the record before the agency, there are some instances where additional evidence may be taken either by remand to the agency or before the court;33 and that

29. in some cases a stay of enforcement of the administrative agency action may be sought and obtained pending judicial review.34

**B. Due Process of Law – What Process is due?**

A denial of procedural due process is sometimes alleged when the right to attend a hearing, to cross examine witnesses, to notice and an opportunity to be heard is less than what a particular individual feels it should have been.

There are many allegations of a violation of due process in litigation that do not properly fit into a category of constitutional significance.35

Maryland case law states that there are procedural safeguards attendant to contested cases before an administrative agency exercising judicial or quasi-judicial functions.36 "... [T]he requirements of procedural due process as guaranteed by the Fourteenth Amendment to the Constitution and Article 24 of the Maryland Declaration of Rights apply to an administrative agency exercising judicial or quasi-judicial functions.37 "... [I]t is well settled that the procedure followed in administrative agencies usually is not as formal and strict as that of the courts."38 "... [F]or an 'appellant to establish a violation of procedural due process, he must first show that state action has

---

28 SG §10-217. For example, HO §14-405(b)(3) provides that factual findings before the Board of physicians shall be supported by clear and convincing evidence for certain charges made against a physician.

29 SG §10-219.

30 SG §10-210.

31 SG §10-221. (Final Decision and Order) & SG §10-220 (Proposed decisions and Order)

32 SG §10-222.

33 SG §10-222(f).

34 SG §10-222(f).

35 In *Landsman v. Maryland Home Improvement Commission*, 154 Md. App. 241, 259, 839 A. 2d 743 (2003), there was an allegation that retroactive application of a statute increasing an award from the Home Improvement Fund raised serious due process issues because it would impose additional liability upon a contractor that he could not reasonably have foreseen at the time of the contract. Substantive due process was discussed.

36 *Travers v. Baltimore City Police Department*, 115 Md. App. 395, 407, 693 A. 2d 378 (1997). *Ostrezenski v. Siegel*, 177 F. 3d. 245 (1999) saw the Court stating that members of a peer review committee are entitled to absolute quasi-judicial immunity. Thus, the allowance of a suit against conduct by peer reviewers was not allowed by law. One of the reasons given for the conclusion in this case involving suit against a physician was that by giving notice of disciplinary action and an opportunity to be heard (HO §14-405(a)-(c)), an opportunity to call witnesses, the right to offer evidence, cross examine witnesses, and present argument, due process was afforded. (SG §10-215). Proof must be by clear and convincing evidence (HO §14-405(b)) and judicial review may be sought. (HO §14-408 & SG §10-220) 177 F. 3d. at 251.

It must always be remembered that the discussion here is about quasi-judicial functions. Due process application to a legal process does not require a hearing unless required by the rules and regulations of the body and statutory considerations pertaining to open meeting requirements.


38 *Travers*, 115 Md. App. at 408.
resulted in his being deprived of a property interest. A party has a valid property interest in an administrative appeal.39

"The fundamental requisites of fairness are notice and an opportunity to be heard."40 Due process in administrative proceedings is not a rigid concept. It is flexible and calls only for such procedural protections as the particular situation demands. The government balances the private and government interests affected.41 Administrative procedure acts and regulations give rights to individuals participating in administrative proceedings. Sometimes those rights are reflective of constitutional due process entitlements. The scope of the issue at a hearing is an important factor in determining what process is due.

What process is due? That will vary according to the case before the court.42 In a case involving suspension of a license before the State Racing Commission, the Court of Appeals stated: "As has often been stated ‘due process does not require adherence to any particular procedure. On the contrary, due process is flexible and calls only for such procedural protections as the particular situation demands.’"43 The "level of due process required must be decided under the facts and circumstances of each case."44

Significant Case Decisions


- **At issue in Patrick v. Dept. of Public Safety**, 156 Md. App. 423, 847 A. 2d 450 (2004) was whether a inmate had a liberty interest, “protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution in avoiding continued incarceration” at a particular Maryland facility following a charge he had attempted to escape. 156 Md. App. at 431-43. In dicta (the inmate had not properly preserved the issue for review), the Court examined the breadth of liberty interests afforded to inmates. 156 Md. App. at 434-443. Quoting Supreme Court and other authority, the Court determined that a transfer of a prisoner from one institution to another did not involve a liberty interest in the absence of a statute or regulation that created such an interest, which interest is not created by any Maryland statute or regulation. 156 Md. App. at 435-36, 440. “A protected liberty interest is implicated only if the conditions existing at the facility where the inmate is housed are so ‘atypical’ that exposure to them for a significant time impose[s] a significant hardship on the inmate in relation to the ordinary incidents of prison life” 156 Md. App. at 456 quoting Sandin v. Conner, 550 U.S. 472, 483-84 (1995). Upon a further review of case law, the Court determined: “long terms of disciplinary or administrative segregation alone, generally do not implicate a liberty interest under Sandin.” 156 Md. App. at 439.

---


First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.


41 Coleman, 369 Md. at 142-43.

42 "The level of due process required must be decided based on the circumstances of each individual case." Regan, 120 Md. App. at 511.


Travers v. Baltimore City Police Department, 115 Md. App. 395, 407, 407, 693 A. 2d 378 (1997) reminds the reader that in addition to other procedural safeguards, "... [A] police officer confronted with disciplinary proceedings is entitled to the protections afforded by the contested provisions of the Maryland Administrative Procedure Act (APA), Md. Code, state Gov't §10-201 et. seq., as well as those of the Law Enforcement Officers' Bill of Rights (LEORB), Md. Code, art. 27, §§727-734C."

There is a statutory rebuttable presumption that the test results generated by certain breath test instruments administered by trained technician are accurate. At issue in MVA v. Lytle, 374 Md. 37, 821 A. 2d 62 (2003) was whether the ALJ hearing a case was required to consider the margin of error in establishing the accurate level of Lytle's blood alcohol content breath test. 374 Md. at 49. A due process argument was made. A driver's license is a property interest protected by both the Fourteenth Amendment to the U.S. Constitution and Art. 24 of the Maryland Declaration of Rights. 374 Md. at 70. A balance must be struck between the reason for the legislation to protect the public against drunk drivers and the right of a citizen. Lytle's due process argument failed. 374 Md. at 71-72.

The County Commissioners of St. Mary's County virtually conceded that their notice of appeal to the Board of Appeals was deficient Board of County Comm. V. Southern Resources, 154 Md. App. 10, 837 A. 2d 1059 (2003). "An administrative proceeding is subject to the requirements of due process. This includes an adequate formulation and notice of the issues in the case." 154 Md. App. at 28. Based on all information presented, the Board of Appeals proceeded de novo and everyone understood that safety in the development of land was the contested issue being reviewed. 154 Md. App. at 30.

The Court in Bregunier Masonry v. Maryland Commissioner, 111 Md. App. 698, 684 A. 2d 6 (1996) said it found no infringement of due process in the interplay between the MAPA and Maryland Occupational Safety and Hazard Act [MOSH]. No infringement of the procedure was found as applied to the appellant in this case. 111 Md. App. at 713. A violation could be seen in a case where an overzealous reviewing agency, in an attempt to cure the defects in an ALJ finding, could deny a party a fair opportunity to be heard. Id.

Constitutional due process rights attended a COMAR provision giving an employee, deemed to have resigned because she did not report to work, a chance to have the resignation expunged in Dept. of Corrections v. Thomas, 158 Md. App. 540, 544, 857 A. 2d 638 (2004). COMAR 17.04.04.03 provided in part: "A resignation without notice may be expunged by the appointing authority when extenuating circumstances exist, and the employee had good cause for not notifying the appointing authority." The ALJ determination that Ms. Thomas was no longer an employee and therefore had no right to grieve was said to have been in error. The grievance procedure had a "second look" provision was an integral part of the provision applicable to one who is considered to have resigned. Due process concerns under the second look provision. "Ms. Thomas was a former employee for other purposes, the constitutional right to Due Process requires that she be permitted to invoke the grievance procedure to assert her claims under the Second Look provision." 158 Md. App. at 556. A remand was ordered because the recorded failed to reveal that the Department exercised its discretion as to whether to expunge the resignation. 158 Md. App. at 544.

C. Notice and An Opportunity to be Heard.45

The MAPA requires that reasonable notice of agency action be given, and that all parties be given notice of the fact a hearing shall be held in a contested case. It is required that notice of agency action state concisely and simply the facts asserted, the issues involved, the pertinent statutory and regulatory

45 Issues of notice meeting due process of law requirements occur throughout the judicial process. Exceptions to a foreclosure sale claiming lack of notice was the issue in Griffin v. Bierman, 403 Md. 186, 941 A. 2d 475 (2008) with the Court holding is that sending notice of foreclosure action and sale by certified and first class mail complied with procedural due process. Though this case deals with mortgage foreclosure, Judge Harrell for the Court discussed due process considerations. The reader may find the discussion of the constitutional aspects of this case helpful as the issue arises in administrative law situations.
sections under which agency action is taken, and the proposed sanction or potential penalty.\textsuperscript{46} Stating the right to entitlement to a hearing must be a part of the notice accompanied by a statement of what, if anything, a person must do receive a hearing. All relevant time requirements must be stated.\textsuperscript{47} Notice must also be given of the "direct consequences, sanction, potential penalty, if any, or remedy occasioned by the recipient’s failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing."\textsuperscript{48} Notice of agency action and a notice of a hearing may be combined.\textsuperscript{49} The purpose of notice is to provide a party with adequate knowledge of the reasons for the action being taken.\textsuperscript{50}

SG §10-207. Notice of agency action.

(a) \textit{In general.-} An agency shall give reasonable notice of the agency's action.

(b) \textit{Contents of notice.} - The notice shall:

\begin{enumerate}
\item state concisely and simply:
\begin{enumerate}
\item the facts that are asserted; or
\item if the facts cannot be stated in detail when the notice is given, the issues that are involved;
\end{enumerate}
\item state the pertinent statutory and regulatory sections under which the agency is taking its action;
\item state the sanction proposed or the potential penalty, if any, as a result of the agency's action;
\item unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:
\begin{enumerate}
\item what, if anything, a person must do to receive a hearing; and
\item all relevant time requirements; and
\end{enumerate}
\item state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.
\end{enumerate}

(c) \textit{Consolidation of notices.} - The notice of agency action under this section may be consolidated with the notice of hearing required under § 10-208 of this subtitle.

(d) \textit{Publication in Register.} - For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.

Notice of a hearing has additional requirements under the MAPA. Reasonable notice must state:

\begin{enumerate}
\item the date, time, place, and nature of the hearing;
\item the right to call witnesses and submit documents or other evidence;
\item any applicable right to request subpoenas for witnesses and evidence specifying the costs, if any, associated with such a request;
\item that a copy of the hearing procedure is available on request and specify the costs associated with such a request;
\item any right or restriction pertaining to representation;
\item that failure to appear for the scheduled hearing may result in an adverse action against the party; and
\item that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.\textsuperscript{51}
\end{enumerate}

\textsuperscript{46} SG §10-207(a)(b)(1)-(3). In Bregunier Masonry \textit{v.} Maryland Commissioner, 111 Md. App. 698, 684 A. 2d 6 (1996), the Court cited a case where an employer was unfairly deprived of an opportunity to cross-examine or to present rebuttal evidence and testimony. The employer learned the exact nature of its alleged violation only after the hearing. "Due process in matters before the Commission [Occupational Safety and Health Review Commission] requires that a party be afforded reasonable notice of the nature of the allegations against it so that the party can prepare a suitable defense." 111 Md. App. at 713. "... [F]airness dictates that a party should be given some notice as to the identity of the issues before the reviewing agency. The difficult issue is to define the extent and formality of the notice, given the competing interests involved." 111 Md. App. at 714.

\textsuperscript{47} SG §10-207(b)(4).

\textsuperscript{48} SG §10-207(b)(5).

\textsuperscript{49} SG §10-207(c) & SG §10-208(c). The notice must be actual notice. Publication in the Maryland Register does not constitute reasonable notice to a party. SG §10-207(d) & SG §10-208(d).

\textsuperscript{50} School Board \textit{v.} Davis, 96 Md. App. 401, 427, 625 A. 2d 361 (1993).

\textsuperscript{51} SG §10-208(a)(b)(1)-(7). The right to call witnesses and submit documents is referenced to SG §10-213(f).
Licensees are required to keep an agency aware of their current address. If an agency has been unsuccessful in giving notice in the manner otherwise provided by a licensing statute, that notice may then be given by regular mail. For example, there is a regulation requiring a registered pharmacist licensee to notify the Board of Pharmacy of a change of address:

**COMAR 10.34.06.03 Mailing Address.**
A. Each licensed pharmacist shall report to the Board the pharmacist's current mailing address on the pharmacist's biennial license renewal form. The mailing address may be the pharmacist's residence address.
B. Within 30 days of the date a pharmacist changes the pharmacist's mailing address, the pharmacist shall notify the Board in writing of any change in the information in Sec. A.

Due process requires notice and an opportunity to be heard. Notice has to be "reasonable" notice to the individual against whom the proceedings are instituted. The issues have to be identified in the notice. As to the quality of that notice and how it is to be evaluated against the argument that it is insufficient, the Court of Special Appeals has stated:

In an adversary proceeding, due process requires that an individual against whom proceedings are instituted be given notice and an opportunity to be heard. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." A court, in considering the reasonableness of notice, "must balance the interests of the state or the giver of notice against the individual interest sought to be protected by the fourteenth amendment." Thus, in determining whether notice was reasonable, a court must evaluate the specific circumstances of each case. In administrative proceedings, reasonable notice of the nature of the allegations must be given to the party so that it can prepare a suitable defense. Moreover, SG §10-207(a) of the APA also requires an agency to give reasonable notice of its action.

---

52 SG §10-209. The statute provides that the licensee shall be deemed to have a reasonable opportunity to know of the fact of service when that person is required to notify the agency of address changes but fails to give that notice. Thus, where the agency mails the notice to the address of record without actual notice of any change of address the notice is going to be sufficient.

53 Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 519, 707 A. 2d 891 (1998), affirmed, Regan v. Board of chiropractic Examiners, 355 Md. 397, 735 A. 2d 991 (1999). It should be noted that in disposing of the "notice" argument and affirming the Court of Special Appeals, the Court based its decision on the fact that the Board complied with SG §10-207 (Notice of Agency Action) as opposed to combining this with a due process argument. Regan, 355 Md. at 416-19.


55 Regan, 120 Md. App. at 519. (citations omitted) When the Court of Appeals considered this case in Regan v. Board of chiropractic Examiners, 355 Md. 397, 735 A. 2d 991 (1999), Judge Eldridge noted for that court that it was alleged by Dr. Regan that the State violated SG §10-205 requiring specificity in notice of agency action. Dr. Regan argued that the Board did not adequately notify him that it would seek to hold him liable for an employee's (Ms. Tillman's) unauthorized practice of "physical therapy," as opposed to the unauthorized practice of "chiropractic." 355 Md. at 417. The Court spend some pages of analysis to conclude that the content in the overall written notice to Dr. Regan left no doubt as to the deficiencies charged against him: The Board's findings and conclusions encompassed two primary areas of misconduct: improper delegation of chiropractic duties and fraudulent billing practices. Dr. Regan was given reasonable notice in the charging document of these matters. Furthermore, the Board's conclusions, forming the basis for the imposition of discipline, concerned matters specifically encompassed by the charging document. The Board and both courts below correctly held that Dr. Regan had reasonable notice of the charges against him.

355 Md. at 420.

Thus, it is instructive from both Regan opinions that the constitutional significance of adequate notice requires a detailed analysis of the charges made against the proof offered, that it is a "reasonable" notice approach, not an exact specific factual recitation in the notice given that is going to control.
It is not always necessary that the notice and opportunity to be heard come before disciplinary action is taken by an agency. A party before an agency must have the opportunity to examine and challenge reports and other evidence produced against him/her/it before the agency reaches its conclusion. Otherwise, the requisite of procedural fairness has not been met.

**Significant Case Decisions**

- It was alleged in *Regan v. Board of Chiropractic Examiners*, 355 Md. 397, 735 A. 2d 991 (1999) that the Board failed to provide Dr. Regan with adequate notice of charges against him. SG §10-207 (Notice of agency action) was cited. 355 Md. App. at 416. Dr. Regan alleged the Board did not notify him that it would seek to hold him liable for Ms. Tillman's unauthorized practice of "physical therapy" as opposed to "chiropractic." The Court stated that this argument missed the point that the "charge" was Dr. Regan was not operating within the permissible scope of his chiropractic license. 355 Md. App. at 417. Likewise, the fact that the Board questioned Karen Trotta about whether Dr. Regan billed for chiropractic services not rendered, which was beyond the scope of allegations concerning her in the charging document, did not matter because no conclusion concerning false reports and bills were based on anything concerning Ms. Trotta. 355 Md. App. at 418.

- "By granting a hearing promptly after the reciprocal actions [suspension of a horse trainer] went into effect, and considering the limited scope of the issues at the hearing, the Maryland Racing Commission gave both trainers the process that was due." *Maryland Racing Commission v. Castrenze*, 335 Md. 284, 300, 643 A. 2d 412 (1994). The case involved the automatic suspension of a trainer from racing in Maryland following his suspension in Delaware. There was much discussion as to what type of a hearing was required by due process. Reciprocal suspension did not entitle the trainer to a hearing as a contested case prior to suspension. 335 Md. App. at 300. As to the quality and quantity of due process rights afforded: "Another factor is the very limited scope of the issues to be reviewed at the hearing. Under the terms of the reciprocity regulation, the Maryland hearing would seem to be limited to determining whether the trainer was the same person who was subject to the action in the other state, whether the other state in fact suspended the trainer, and the period of the suspension." 335 Md. App. at 300.

- *Dept. of Corrections v. Thomas*, 158 Md. App. 540, 857 A. 2d 638 (2004) decided that a discharged corrections officer generated due process rights when she invoked a second look provision contained in COMAR 17.04.04.03D. She had to be given a hearing on that issue. 158 Md. App. at 556. Procedural due process was violated when the hearing body gave "little or no attention" to this provision which states that a resignation "may be expunged by the appointing authority when extenuating circumstances exist, and the employee had good cause for not notifying the appointing authority [of her absence from employment without leave]." 158 Md. App. at 551.

- Notifying a teacher that her "services" are no longer required is not adequate notice under *Maryland's Education Act*. *School Board v. Davis*, 96 Md. App. 401, 428, 625 A. 2d 361 (1993). That is not what happened in this case. "Here, the teachers were provided with written and oral comments over a two year period, culminating in the written explanations of the 1990 year-end evaluations . . . Moreover, 56

---


57 *Maryland State Police v. Zeigler*, 550 Md. 540, 625 A. 2d 914 (2004) stated this with a citation to the prior Court of Appeals case of *DalMaso v. Bd. Of Co. Commrs*, 238 Md. 333, 209 A. 2d 62 (1965) which was concerned with the propriety of considering evidence produced following the close of a hearing. 550 Md. at 560.

58 Nothing in this decision pointed to an error that caused reversal. However, it is important to read the decision as a caution to those filing charges that those charges should be situation and person specific, less the charging document run afoul of the requirement that adequate notice be given.

59 There is a specific statute in the APA requiring written notice of suspension of a license and an opportunity to be heard prior to suspension. *Castrenze*, 335 Md. at 296-97. SG §10-405(a) at the time of this case; now SG §10-226. Licenses — Special provisions. This section was held not to be applicable to the reciprocal suspension in this case. The automatic disqualification by virtue of a foreign suspension "does not itself amount to a license suspension by the Maryland Racing Commission and, therefore, does not require compliance with §10-405 of the APA." " . . . [D]ue process requirements are satisfied when the trainer is promptly given written notice of the facts deemed to warrant the reciprocal ruling and is informed of the opportunity to be heard on the matter." *Castrenze*, 335 Md. at 288.
the Statements of Charges themselves clearly told the teachers precisely the statutory basis for their
dismissal, i.e. 'for incompetency'; similar notices have been used and approved in the case. 96 Md. App. at
429. Incompetency is one of the five grounds for dismissal expressly set forth in the statute. Educ. Art. §6-

Due process constitutional concepts (Article 24, Maryland Declaration of Rights and 14th Amendment to
US Constitution) regarding notice were discussed in In Re: Katherine C., 390 Md. 554, 890 A. 2d 295
(2006) where a judgment awarding child support was reversed where there was no notice that issue would
be discussed at a permanency plan review hearing in juvenile court. Reasonable notice is a requirement of
due process, and that notice must be "reasonably calculated, under all the circumstances, to apprise
interested parties of the pendency of the action and afford them an opportunity to present their objections."
390 Md. at 574. Case law was reviewed: (1) Phillips v. Venker, 316 Md. 212, 557 A. 2d 1338 (1989) (lack
of notice to the parties that an issue would be decided when judge placed telephone conference call to the
that hearing would be on "visitation and child's possessions" meant the court could not terminate the
of a status conference to last fifteen minutes meant the court erroneously announced modification of
custody and changing custody from the mother to the father).

D. The Right to Cross-Examination.60
SG §10-213(f), as a part of the MAPA provides that on a "genuine issue in a contested case, each party is
entitled to cross-examine any witness that another party or the agency calls."

SG §10-213. Evidence.
(f) Scope of evidence.- On a genuine issue in a contested case, each party is entitled to:
(1) call witnesses;
(2) offer evidence, including rebuttal evidence;
(3) cross-examine any witness that another party or the agency calls; and
(4) present summation and argument.

"... [A] basic tenet of fairness in administrative adjudications is the requirement of an opportunity
for reasonable cross examination.61 The Court of Special Appeals has reviewed cases on the issue of when
a denial of the right of cross examination can mean a reversal of an administrative adjudication.

314, 320 (1976) . . we concluded that it was error to admit two affidavits because the affiants
were not available for cross examination. Further, in Tron v. Prince George's County, 69 Md.
App. 256, 517 A.2d 113 (1986), the County, in order to dispute a disability claim, introduced the
written reports of three physicians who had examined Tron and the testimony of a doctor who
examined those reports and concluded that the disability was not work-related. Once again, we
recognized that "a reasonable right of cross examination must be allowed," in an administrative
adjudicatory proceeding by statute and case law. Id. at 261 (quoting Hyson v. Montgomery
County Council, 242 Md. 55, 67, 217 A.2d 578, 585 (1966)). Accordingly, we concluded that
Tron's right to a fair hearing had been denied because "the opportunity to cross-examine
witnesses is a requirement of administrative adjudicatory hearings . . . [and b]ecause no live
witnesses were produced." 69 Md. App. at 263.62

60 A problem may arise when a contention is made that one has been prevented from properly cross examining a witness due to a
want of documents not being furnished in discovery. There is not a provision for all agencies to allow discovery. See: Changing
Feffer to testify without producing his files.")


62 Travers, 117 Md. App. at 417.
Under Maryland Law “the right of reasonable cross-examination attaches to adjudicatory administrative hearings.” "[W]hen an administrative board or agency is required to hold a public hearing and to decide disputed adjudicative facts based upon evidence produced and a record made, . . . a reasonable right of cross-examination must be allowed the parties."63 “[W]hen the board is functioning in an adversary proceeding, the fundamentals applicable to the decision of adjudicative facts by any tribunal must be preserved" On the other hand, “no trial-type hearing [is] required in comprehensive rezoning, which is a quasi-legislative proceeding.”64

The right to cross examination is not unlimited.65 So long as there is no abuse of discretion, an agency may limit the scope of cross-examination.66 Control over the scope of cross-examination is traditionally left to the discretion of a trial judge unless there is a showing of prejudicial abuse of discretion may properly be applied in administrative hearings.67

**Significant Case Decisions**

- Disciplinary action against a police officers for statements he allegedly made to a newspaper reporter meant that officer “has a right to cross-examine witnesses who testify against him.” *Prince George’s County v. Hartley*, 150 Md. App. 581, 597, 822 A. 2d 537 (2003). The introduction of only an affidavit or newspaper articles to prove the case would mean the officer “would be deprived of his fundamental right to cross-examine” the reporters. 150 Md. App. 581

- So: Is the nature of this hearing quasi-legislative or quasi-judicial? The “determination of whether to impose a special assessment and the mode of imposing a special assessment are legislative determinations.” When there is a special assessment hearing, adjudicatory in nature, held to determine the amount of special assessment to be levied based on the amount of benefit to a specific piece of property, there is an adjudicatory determination to which the right of cross-examination attached. *Rockville v. Woodmont C.C.*, 348 Md. 572, 583, 705 A. 2d 301 (1998). This case involved a challenge to the procedure used by the Mayor and city Council of Rockville in levying special assessments against the property of the Woodmont Country Club for the construction of a road and water transmission main. This hearing was adjudicatory in nature and the right of cross examination applied. 348 Md. at 574-75. Appraisers hired by the City were not made available for cross-examination. 348 Md. at 579. This Court affirmed the Court of Special Appeals determination that the proceedings levying the special assessments on Woodmont were invalid because of the denial of Woodmont’s request to cross-examine the city’s appraisers. 348 Md. at 580-81.

- A circuit court’s ruling that a hearing officer has erred in restricting the right of cross-examination of a police officer investigating instances of child abuse was reversed in *Department v. Bo Peep*, 317 Md. 573, 565 A. 2d 1015 (1989). The case involved the license of a day care center and the allegations of child abuse at the center. “To the extent that Bo Peep sought to use Swam [the police officer] to ‘fish’ for additional suspects, the issue is whether Clark [hearing examiner] abused his discretion in closely limiting the scope of cross-examination.” “Clark was not obliged to let Bo Peep explore through Swam whether one

---

64 *Woodmont*, 348 Md. at 582-83. The determination of when a function is legislative, quasi-legislative, or adjudicative is sometimes not all that easy to make. In this case, the Court reviewed a number of cases that had previously been decided, *Id.*, at 584-90. The act of zoning or reclassification of zoning is a function that is legislative in nature. When the legislative body makes administrative findings of fact, drawing administrative inferences, and arriving at administrative conclusions and decisions, a different type of proceeding occurs. *Id.*, at 585. This difficult area requires a review of the various appellate court decisions to determine when a hearing is adjudicative and the parties are entitled to a hearing and the right to produce evidence and cross-examine witnesses.
or more other persons had, at one time or another, been the object of police attention when the matter would be left hanging, open ended, with only half of the story told.” There was no abuse of discretion by the hearing examiner’s limitation of cross-examination. 317 Md. at 604.

○ Dr. Stillman claimed that the Comm’ on Med. Discipline improperly restricted his cross-examination of the physician head of the Peer Review Committee which investigated his medical practice and recommended that his license be revoked in Comm’n on Med. Discipline v. Stillman, 291 Md. 390, 419, 435 A.2d 747 (1981). Objection to the cross examination was that it exceeded the scope of direct examination. “We have long held that cross-examination can relate only to the facts and incidents connected with matters stated in the direct examination of the witness, and if a party desires to examine a witness as to other matters, he must do so by making the witness his own.” On judicial review Dr. Stillman said the cross-examination had to do with an inquiry as to whether there an improper ex parte communication by the witness. Dr. Stillman did not call Dr. Berman “as his own witness or advise the Commission of the purpose of his inquiry.” 291 Md. at 423.

E. The Right to Subpoena Witnesses.
Categorizing the absence of a right to subpoena witnesses as a violation of due process is problematical. Proper categorization on the right to subpoena witness focuses on the fairness of a hearing and the opportunity to be heard under all the facts and circumstances of the particular case. Throughout Maryland’s Annotated Code there are statutory provisions allowing administrative agencies to issue subpoenas in the performance of the agency’s investigatory and adjudicatory authority. Some statutes do not provide for this authority.

Sometimes, there are specific statutory provisions regulating the subpoena of records in a civil or criminal court proceeding. For instance, a subpoena for records of a financial institution may result in the disclosure or production of financial records or information only if the subpoena contains a certification that a copy or the subpoena has been served on the person whose records are sought by the party seeking the disclosure or production or a court waives that certification of service for good cause.

OAH may issue a subpoena requiring the attendance and testimony of witnesses and the production of tangible things on the written request of a party or at the direction of a judge. Requests should be filed at least ten (10) days before the hearing. A significant number of case decisions in Maryland deal with proceedings before the MVA, and disciplinary actions against policemen, both of which have separate procedures for the issuance of a subpoena. MVA regulations pertaining to Summary Suspensions for Alcohol and Drug Related Offenses has a special provision for the issuance of a subpoena which requires the request for the subpoena to be accompanied by “a proffer of the expected testimony or evidence and

68 For example: BR §11-211(e) (Horse Racing); CL §13-405 (Consumer Protection – Attorney General); FI §12-423 (Investigatory powers of Commissioner of Financial Regulation in the Department of Labor, Licensing, and Regulation).
69 For example: BOP §2-317 (Accountants); BOP §16-209 (State Commission of Real Estate Appraisers and Home Inspectors); BR §8-312 (Home Improvement); BR §3-204 (Amusement Attractions); HO §3-315 (Chiropractors); HO 8-317 (Nurses); HG §4-306 (concerning investigations under Maryland’s confidentiality of medical records law); HG §2-104 (Secretary of Health and Mental Hygiene); EN §11-313 (Environmental Sanatarians); EN §14-114 (Gas and Oil); SG §15-507 (State Ethics Commission).
70 HG §18-205(1)(i)(ii) (providing that medical laboratory reports and records are subject to subpoena or discovery in a criminal or civil proceeding only pursuant to a court order sealing the court record)
71 HG §1-304. Circuit court judges are sometimes called upon to waive this notice upon the application of the States Attorney during an investigation of possible criminal conduct.
72 COMAR 28.02.01.11.
73 COMAR 28.02.01.11 is extensive and requires specific information to identify the individual subpoenaed and what is required to be produced. Service and return of service provisions are contained within the rule. Id.
its relevance to the proceeding." Disciplinary proceedings against police officers have separate procedures whereby the agency may issue subpoenas.

Case law has held that individuals who forgo their right to subpoena known, material witnesses will usually waive any objections to denial of an opportunity to cross-examine that witness. When discussing the issuance of a subpoena, there may be an issue of the ability of the agency to subpoena records, both in the investigatory stage of a proceeding and in a contested case. The Court of Appeals "has set forth a three-part test for determining the validity of a subpoena issued by an administrative agency." To "determine a subpoena's validity, a reviewing court must ask 'whether the inquiry is authorized by statute, the information sought is relevant to the inquiry, and the demand is not too indefinite or overbroad.'"

COMAR 11.11.03.07 addresses the refusal of subpoena requests in MVA hearings. Not every request for a subpoena must be granted. Whether to grant or deny a request depends on the general evidentiary standards set out in the MAPA. Requests for subpoenas are considered along with SG §10-213 concerning what evidence is allowed and excluded in administrative proceedings. Therefore, COMAR 11.11.03.07C provides that a request for the issuance of a subpoena may be denied if the evidence to be offered is immaterial, irrelevant and/or does not pertain to a genuine issue in the case.

---

74 COMAR 11.11.03.07A(5). Title 11 of COMAR contains regulations for the Department of Transportation. Administrative procedures are contained in Subtitle 11. Complete address information must also accompany the request for a subpoena.

75 PS §4-107(d). A number of rights are afforded to police officers by the Law Enforcement Officers' Bill of Rights contained in PS §3-101. et. seq.

76 Travers v. Baltimore Police Department, 115 Md. App. 395, 693 A. 2d 378 (1997). The Court stated: . . . Ordinarily, a complaining witness who is also a "victim" cannot be viewed as neutral and detached. Such concerns are less weighty in cases when hearsay statements come into evidence through a disinterested witness because they tend to be more reliable than statements introduced through a witness who has an interest in the subject matter underlying the controversy. Thus, there is some force behind appellant's argument that in a hearing to determine whether he would be permitted to retain his livelihood, due process requires that he be accorded the opportunity to cross-examine a complaining witness.

Nonetheless, because appellant failed to exercise his right to subpoena Ms. Nelson, see Md. Ann. Code, art. 27 § 730(j), we conclude that he has effectively waived his right to complain about a denial of the opportunity to cross-examine Ms. Nelson. In 1971, the Supreme Court in Richardson v. Perales, 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), upheld the admission of hearsay evidence in a proceeding before the Social Security Board, noting that Perales' lawyer could have subpoenaed the hearsay declarant but did not do so. Id. at 404-05. Although not citing Perales, we held in American Radio [American Radio-Tel. Serv. v. Public Serv. Comm'n, 33 Md. App. 423, 434, 365 A.2d 314, 320 (1976)] that the error in admitting affidavits, without subjecting the affiant to cross-examination, was harmless because the opponents "made no request for . . . an opportunity to bring the affiant in for cross-examination." 33 Md. App. at 435, 365 A.2d 320. Finally, in Tron [Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986)], we distinguished Perales on the ground that Tron had not been furnished with subpoena power, while the claimant in Perales failed to exercise his right under the Social Security Act to subpoena adverse witnesses. We read Perales as standing for the proposition that claimants who forgo their right to subpoena known, material witnesses effectively waive any objections to denial of an opportunity to cross-examine.

91 Md. App. at 264, 517 A.2d 117. Accord Changing Point, Inc. v. Maryland Health Resources Planning Comm'n, 87 Md. App. 150, 172, 589 A.2d 502 (1991); but cf. Kade, 80 Md. App. at 726, 566 A.2d at 151 (concluding that hearsay was reliable based on the fact that hearsay proponent did not subpoena declarant). We conclude that, in light of appellant's failure to subpoena Ms. Nelson, the admission of her statements to Officer Moore and Lieutenant Henderson did not vitiate appellant's right to a fair administrative hearing.

115 Md. App. at 418-19. (Footnotes and some citations omitted). [Emphasis by bold]

77 Solomon v. Board of Medicine, 155 Md. App. 687, 700, 845 A. 2d 47 (2004) citing Banach v. State of Maryland Comm'n on Human Relations, 277 Md. 502, 356 A.2d 242 (1976). Solomon involved a disciplinary proceeding against a physician. The Court said the Board had the right to subpoena patients' records (a random sampling) to yield information regarding the quality of medical care Dr. Solomon provided, including diagnostic and treatment information. In addition, the records would reveal information concerning Dr. Solomon's coding and billing practices. 155 Md. App. at 700. The complaint against Dr. Solomon was on the basis that she had not properly informed a patient of the diagnostic procedures and methods of treatment. The Board had informed Dr. Solomon that they would be performing a peer re-review of her practice in 6 months. 155 Md. App. at 693.

Though most of this Section is concerned with the right of an individual to subpoena information, there are a number of agencies, with investigative authority, with the right to issue subpoenas in furtherance of an investigation.

**Some of the Authority Pertaining to the Issuance of Subpoenas in Certain Administrative Proceedings**

**SG §10-208. Notice of hearing.**
(a) *In general.* An agency or the Office shall give all parties in a contested case reasonable written notice of the hearing.
(b) *Contents of notice.* The notice shall state:
   (3) any applicable right to request subpoenas for witnesses and evidence and specify the costs, if any, associated with such a request;

**SG §9-1605. Administrative law judges.**
(c) *Powers generally.* In any contested case conducted by an administrative law judge, the administrative law judge may:
   (1) authorize the issuance of subpoenas for witnesses;

Title 11. Department of Transportation  
Subtitle 11. Motor Vehicle Administration – Administrative Procedures  
Subtitle 03. Summary Suspensions for Alcohol and Drug-Related Offenses  

**COMAR 11.11.03.07 Request for Subpoenas.**
A. A request for the issuance of a subpoena to require the attendance of witnesses or the production of documents shall be in writing and shall contain:
   (1) The name and complete mailing address of the licensee;
   (2) The driver's license number of the licensee;
   (3) The date of the scheduled hearing, if known;
   (4) The name, address, and telephone number of the attorney, if applicable;
   (5) A proffer of the expected testimony or evidence and its relevance to the proceeding; and
   (6) The name and address of the requested witness.
B. The decision to issue a subpoena shall be in the discretion of the Administration.
C. A request may be refused if the testimony or evidence to be offered:
   (1) Is immaterial, irrelevant, or unduly repetitious; or
   (2) Does not pertain to a genuine issue in the contested case.
D. If a subpoena request is made, the Administration may defer the decision on the request until the hearing is held. The administrative law judge may take testimony and receive evidence to determine if the request may be granted pursuant to Sec. C. The administrative law judge may entertain a proffer from the licensee or the licensee's attorney as to the nature of the witness' testimony. If the administrative law judge decides to issue a subpoena for a witness, the administrative law judge shall continue the hearing and stay the suspension. The Administration may reschedule the hearing at a location most convenient for the witness.
E. A party, other than the Administration, requesting the issuance of a subpoena, shall pay the Administration a fee of $4 for each subpoena issued.

Enforcement of administrative subpoenas for investigatory matters or for adjudicatory hearings involves application to the circuit court to use its enforcement power. Agencies have no authority to enforce their own subpoenas. Usually these subpoenas will be enforced if statutorily authorized, the information sought is relevant, and the demand is not indefinite, privileges and/or overly burdensome.
Significant Case decisions

- **Forman v. MVA**, 332 Md. 201, 630 A. 2d 753 (1993) dealt with the denial of the request for a subpoena by Forman for a police officer to appear at an administrative hearing. Important to the proceeding was whether Forman had properly been advised of the consequences of not taking an alcohol test. 332 Md. at 323-24. The Court said there is a procedure to be followed when a request for a subpoena is denied and the licensee then makes a proffer at the hearing. “We can say that when faced with a licensee's proffer and subpoena request, an ALJ has three distinct choices: (1) accept the proffer's contents as true, and indicate this acceptance; (2) reach no conclusion regarding the truth of the proffer (essentially suspending judgment), and issue the subpoena; or (3) reject the proffer and subpoena request entirely, and provide a valid explanation of the rejection. 332 Md. at 222. This third option enables the ALJ to dispose of frivolous or otherwise improper subpoena requests. We emphasize that the ALJ may only avoid issuing the subpoena when he or she explicitly accepts the proffer or rejects the proffer and provides a basis for this rejection.”

“As for the ALJ’s decision to accept or reject a subpoena request, the legislature has given the MVA subpoena power, providing that "[i]n any matter subject to its jurisdiction, the Administration may subpoena any person or documents and take the testimony of any person ..." 322 Md. at 222. “Should the ALJ decide not to accept a licensee's proffered testimony as true, then failure to grant licensee's subpoena request may be an abuse of discretion when the proffered testimony (1) does not fall within the categories of excludable evidence found in COMAR and the Code and (2) the ALJ provides no valid reasons why the proffer was rejected. 332 Md. at 223. In Forman's case, the evidence proffered met both the statutory and regulatory standards and there was no other apparent reason to reject the proffer.” 332 Md. at 224.

- **Solomon v. Board of Medicine**, 155 Md. App. 687, 705-06, 845 A. 2d 47 (2004). “As for Dr. Solomon’s patients, this Court has made clear that patients have no veto power over subpoenas issued by the Board in the course of investigating a physician.” 155 Md. App. at 705. Patients of Dr. Solomon had objected to the production of their medical records in the disciplinary proceedings against her. Neither the Confidentiality of Medical Records Act nor a physician-patient privilege precluded the production of these records. 155 Md. App. at 707.79

- In **Travers v. Baltimore Police Department**, 115 Md. App. 395, 693 A. 2d 378 (1997), the Court stated that the failure of the officer to subpoena a witness meant a police officer could not complain about a denial of the opportunity to cross-examine that witness.80 This was a disciplinary proceeding against an officer alleged to have assaulted Ms. Nelson. Hearsay evidence was introduced as to her statements concerning the assault and that evidence was deemed credible as being introduced through a disinterested witness. Officer Travers did not subpoena Ms. Nelson to testify concerning the matter. 115 Md. App. at 418.

- When a subpoena issued by the Maryland Securities Commissioner (allegations that appellant was engaging in securities transactions without first registering with the Commissioner) and the appellant did not respond, the Commissioner sought enforcement in the Circuit Court for Anne Arundel County in **Scheck v. Maryland Securities**, 101 Md. App. 390, 391, 646 A. 2d 1092 (1994).81 The Court determined that on its face, the subpoena was not unduly burdensome or oppressive as alleged by Appellant and it was correctly and legally issued pursuant to the investigatory authority of the Commissioner. 101 Md. App. at 394.

- **Securities Commissioner v. Agora**, 389 Md. 1, 882 A. 2d 833 (2005) was an unsuccessful attempt by the Securities Commissioner of the State of Maryland to subpoena information from Agora, Inc. to determine whether Agora’s activities, including the publishing a newsletter disseminating securities information,

---

79 Dr. Solomon had also generated an issue concerning the ability of the Board of Physicians to subpoena her medical records. **Solomon**, 155 Md. App. at 700-02.
80 Officer Travers had the right to subpoena witnesses under the provisions of LEORB, Md. Ann. Code, art. 27 § 730(j). **Traves**, 115 Md. App. at 418.
81 CA §1 l-701(a) gives the Commissioner the authority to request a subpoena in fulfilling his/her investigatory role. **Maryland Securities**, 101 Md. App. at 393.
violated the securities law of the State of Maryland. A motion to compel filed with a circuit court was met with an affirmative defense by Agora that the protections of the First Amendment to the United States Constitution and Article 40 of the Maryland Declaration of Rights precluded enforcement. 389 Md. at 10. At issue was whether the Securities Commissioner may compel Agora to produce subscriber lists.

"Ordinarily, administrative agency subpoenas will be enforced if the agency's investigation is statutorily authorized, the information sought by the subpoena is relevant to the investigation, and the demand is not indefinite or overbroad." 389 Md. at 15. Discussing First Amendment law and the protection it affords includes the rights of individuals to read and receive ideas. 389 Md. at 16-17. "The Supreme Court has condemned as unconstitutional the deterrent effect on speech that could arise if the government required readers to identify themselves before receiving through the mail certain reading material." 389 Md., at 18. "The Supreme Court has recognized that government inquiry into an individual's choice of associates may produce a chilling effect on exercise of the freedom of association protected by the First Amendment." 389 Md. at 19. "To the extent that the Commissioner's subpoenas require Agora, a publisher, to disclose the identities of those who subscribe to or purchase its materials, the subpoenas seek information within the protective umbrella of the First Amendment." 389 Md. at 22. "In order to compel production of the subscriber information, the Commissioner must therefore establish a substantial relation between the information sought and an overriding and compelling State interest." 389 Md. at 23. "The Commissioner has failed to show a sufficient nexus between the investigation into whether Agora acted as an unregistered investment adviser, on the one hand, and the demand for a list of those subscribers who received the Email on the other." 389 Md. at 23. In an opinion considering different aspects of the affirmative defense asserted, the Court also considered the speculative value of purchaser information sought and determined it does not outweigh the burden that compelled disclosure would place on the First Amendment interests of the individuals identified. 389 Md. at 25-26.

What the Securities Commissioner alleged in this case, what she could allege given the information it had, and what she may be able to allege in another case at another time will all involve the same analysis dealt with the Court in this opinion. It all depends. Only speculation of wrongdoing attended the request for the issuance of a subpoena in this case, and speculation does not a good basis make to furnish the nexus of proof to overcome a First Amendment right. A very interesting case; an even more interesting constitutional analysis; perhaps there is more to come.

- Within a case involving judicial review of a successful administrative protect against the renewal of a liquor license, an issue arose concerning whether a subpoena should be compelled for the attendance of witnesses. Board v. Global Express, 168 Md. App. 339, 896 A. 2d 432 (2006). The Court determined that the liquor board had no responsibility to refer the matter to the circuit court to compel testimony following an interpretation of the statute with the following comment: "The request to issue the subpoena came one day before the hearing, without an acceptable explanation as to why it had not occurred earlier... There was no proffer that the witnesses were properly served pursuant to statute. The reasonable implication from the record is that the witnesses, if served, were served by counsel for the licensees. There was no proffer of the expected testimony, but appellant assumed that the witnesses would testify that they observed no activities that would constitute a disturbance of the public peace and safety. Appellant noted there was considerable evidence to the contrary. [solicited prostitution drugs, etc. ]" 168 Md. App. at 350-51. Though Art. 2B §16-410 provided that if a witness summoned refused to attend or testify the board had the responsibility ("shall") to report the facts to the circuit court to proceed by attachment against the witness, that same section was permissive ("may") as to whether the Board had a responsibility to issue a subpoena when a request was made. 168 Md. App. at 346-47. Troublesome is the fact that the Court based its opinion primarily on its reasoning that although the statute used the word "shall" as to the responsibility of

82 In the opinion, Judge Raker sets forth provisions of the Maryland Securities Act in the Corps. & Assoc. Articles and the various allegations by the Securities Commissioner to support its investigation and request for a subpoena. Agora, 389 Md. at 3-10.
83 Interesting is the fact that the witnesses were members of the Prince George's County Police Department, who worked part-time as security personnel at the licensee's establishment. The witnesses briefly appeared at the hearing but gave no testimony as giving testimony was said by them to be in violation of the Police Department policy. Global, 168 Md. App. at 342-43.
84 Judge James Eyler spend some time talking about dictionary definitions of the word "shall" and the necessity to read the context in which the word is used. Global, 168 Md. App. at 348-50.
the Board to send the matter to the circuit court for enforcement if the witness did not appear or would not testify: "The legislature clearly intended that the various licensing boards be empowered to regulate and control the sale of alcoholic beverages, and requiring a board to report to the circuit court a failure of a witness to testify in all such instances, would hinder the board in exercising its authority under Article 2B." Too bad no subsequent appellate history.

**The right to subpoena may well become the responsibility to request a subpoena**

- In *MVA v. Aiken*, 418 Md. 11, 12 A. 3d 656 (2011), the Court stated that the statute did not require the MVA to introduce evidence at a suspension of license hearing that breadth test was administered by a "qualified person" and that the testing equipment was approved by a State toxicologist. 418 Md. at 16. As to the remedy a driver has to assure that the operator of the equipment is qualified and that the equipment is certified, the Court stated that in this case the MVA did not present to the ALJ "the Intox EC/IR strip produced during Respondent’s breadth test, which theoretically would have been useful in challenging the accuracy of the alcohol concentration test.” Respondent was entitled to request from the ALJ prior to the hearing a subpoena for production of the statement in order to rebut the presumption of reliability of the breadth test result. 418 Md. at 35.

Service of a subpoena is to be made on the custodian of a public record. If that custodian is not known and cannot be ascertained after a reasonable effort by a party in a legal proceeding, the party may request a court to issue a subpoena for the custodian of public records to be served on.85

1. a resident agent designated for service on a local utility pursuant to Article 24 §1-110 of the Code;
2. a resident agent designated for service on a State agency that is not represented by the Attorney General, that designation being under SG 6-109; or
3. the Attorney General or an individual designated by the Attorney General as provided under the Maryland rules for service on a State agency that is represented by the Attorney General.86

**F. Discovery.**

Not all administrative agencies allow discovery. What discovery is allowed differs from agency to agency.87 If, when and under what circumstances a denial of discovery can be said to deny an individual the right to a fair hearing, and thus a due process violation, is going to depend on the facts and circumstances of the case. The author of this book sees a future change in the appellate court approach to discovery. I believe that approach is already demonstrated through recent appellate court opinions noting and allowing increased access through the Maryland Public Information Act. If the constitutions of the United States and the State of Maryland assure one with a property interest due process, then there has to be a point where due process is going to mean the right to discovery. No doubt, due process is a flexible concept in administrative proceedings, but that does not mean that the issues of a particular case are going to allow an agency to deny discovery when no statutory or regulatory authorization exists. The facts and circumstances are going to sometimes demand that the right to a fair hearing, means the right to

---

85 This service is the equivalent of personal service on a custodian of public records. CJ §6-410(c).
86 CJ §6-410.
meaningful discovery on a particular issue. We will be spectators and actors in the future development of the law in this area.

When there is a hearing before OAH, a request may be made not later than 30 days before a scheduled hearing for inspection or copying of any file memorandum, correspondence, document, object or tangible thing that is relevant to the subject matter of the case, and not privileged. But, unless otherwise provided by law or by agreement of the parties, “no other discovery procedure may be required.” Costs attend a request for documents, which cost may be waived in accord with law.

COMAR 28.02.01.10 Discovery.
A. By written request filed not later than 30 days before the scheduled hearing, a party may require any other party to produce within 15 days, for inspection or copying, any file, memorandum, correspondence, document, object, or tangible thing:
   (1) Relevant to the subject matter of the case; and
   (2) Not privileged.
B. Unless provided by law or by agreement of the parties, no other discovery procedure may be required.
C. Copies.
   (1) Copies of requested documents and records shall be made at the expense of the party making the request.
   (2) The charge for copies of requested documents and records may be waived by the custodian of the documents in accordance with State Government Article, § 10-611 et seq., Annotated Code of Maryland, or other applicable law.

Statutes and regulations applicable to hearings before a particular agency must be reviewed to see if additional discovery is allowed. For example, COMAR 10.34.01.09 dealing with the discipline of pharmacists provides (in supplement to OAH provisions discovery provisions) that a party may require another party to produce (within 15 days):

1. a list of witnesses to be called and/or
2. copies of documents intended to be produced at the hearing.

There is also mandatory discovery in a pharmacy contested hearing requiring that:
3. each party provide to the other party the earlier of not later than 15 days before any prehearing conference, or 45 days before a scheduled hearing date: (a) the name and curriculum vitae of any expert witness who will testify at the hearing; and (b) a detailed written report summarizing the expert’s testimony including an opinion offered, the factual basis for the opinion and reasons underlying the opinion;
4. any report may be excluded by the Board of Pharmacy or OAH if the report is not sufficiently specific or otherwise fails to comply with the requirements;
5. the Board of Pharmacy or OAH shall consider and decide any arguments generated regarding the sufficiency of the report at any scheduled prehearing conference or immediately before a scheduled hearing;
6. that expert adoption of a sufficiently specific charging document as the expert’s report means that adoption satisfies the requirement of submission of the report; and that
7. parties have a continuing duty to supplement their disclosure of witnesses and documents.

Absent unforeseen circumstances that would otherwise impose an extraordinary hardship on a party, witnesses or documents may not be added to the list after any scheduled prehearing conference or later than 15 days before a scheduled hearing. This prohibition against adding witnesses does not apply to witnesses or documents to be used for impeach or rebuttal purposes.
COMAR 10.34.01.09 Discovery.

A. Discovery on Request. By written request served on the other party and filed with the Board or the Office of Administrative Hearings, as appropriate, a party may require another party to produce, within 15 days, the following:

1. A list of witnesses to be called;
2. Copies of documents intended to be produced at the hearing; or
3. Both § A(1) and (2) of this regulation.

B. Mandatory Discovery.

1. Each party shall provide to the other party not later than 15 days before the prehearing conference, if scheduled, or 45 days before the scheduled hearing date, whichever is earlier:
   a. The name and curriculum vitae of any expert witness who will testify at the hearing; and
   b. A detailed written report summarizing the expert's testimony, which includes the:
      i. Opinion offered;
      ii. Factual basis for the opinion; and
      iii. Reasons underlying the opinion.

2. If the Board or the Office of Administrative Hearings, as appropriate, finds that the report is not sufficiently specific, or otherwise fails to comply with the requirements of § B(1) of this regulation, the Board or the Office of Administrative Hearings, as appropriate, shall exclude from the hearing the testimony of the expert and any report of the expert.

3. The Board or the Office of Administrative Hearings, as appropriate, shall consider and decide arguments regarding the sufficiency of the report:
   a. At the prehearing conference, if scheduled; or
   b. Immediately before the scheduled hearing.

4. If an expert adopts a sufficiently specific charging document as the expert's report, that adoption satisfies the requirements set forth in § B(1) of this regulation.

C. Parties are not entitled to discovery of items other than as listed in §§ A and B of this regulation.

D. Both parties have a continuing duty to supplement their disclosure of witnesses and documents.

E. Absent unforeseen circumstances that would otherwise impose an extraordinary hardship on a party, witnesses or documents may not be added to the list:
   1. After the prehearing conference, if scheduled; or
   2. Later than 15 days before the hearing, if no prehearing conference is scheduled.

F. The prohibition against adding witnesses does not apply to witnesses or documents to be used for impeachment or rebuttal purposes.

G. Construction.

1. In hearings conducted by an administrative law judge of the Office of Administrative Hearings, this regulation shall, whenever possible, be construed as supplementing and in harmony with COMAR 28.02.01.

2. In the event of a conflict between this regulation and COMAR 28.02.01, this regulation applies.

Indicative of the most extensive discovery allowed in an administrative proceeding are the provisions of COMAR 21.10.14 pertaining to The Maryland State Board of Contract Appeals. Interrogatories, depositions and protective orders may all be part of the process. While the discovery is not as inclusive as that allowed in circuit court civil discovery, it is considerably broader than that allowed in most administrative proceedings.

Maryland has not yet addressed whether there is a due process right to discovery. In very limited and particular circumstances federal and other law has stated due process considerations may attend the right to discovery.88

88 It is noted in 2 Am. Jur. Adm. Law 217 that "due process fairness dictates that discovery be permitted in some situations so that the rights of the parties may be protected" California Teachers Ass'n v. California Com'n on Teacher Credentialing, 11 Cal. App. 4th 1004, 4 Cal. Repr. 3d 369, 180 Law Rep. 239 (3 Dist. 2003); NLRB v. Rex Disposables, 494 F. 2d 588 (5th Cir. 1974) are cited. Also noted is that an agency which has promulgated discovery rules is bound by those rules and must assure that its
**Significant Case Decisions**

**Just what discovery is allowed in Maryland administrative law cases**
- There was a contention in *Changing Point v. Maryland Health Resources*, 87 Md. App. 150; 172, 589 A. 2d 502 (1991) that certain files should have been produced during the hearing. The Court said production was not required under the facts presented. "Additionally, the Commission's rules of procedure do not provide for discovery of this type of document by the parties." 87 Md. App. at 172. A problem may arise when a contention is made that one has been prevented from properly cross examining a witness due to a want of documents not being furnished in discovery. There is not a provision for all agencies to allow discovery. *Id.*

**Discovery of the thought processes of a decision maker? (not an administrative law case, but illustrative)**
- When dealing with governmental agencies, the thought processes of the decision makers is seldom discoverable. One of the issues in *St. Mary's County v. Lacer*, 393 Md. 414, 903 A. 2d 378 (2006) was whether the Court of Special Appeals "correctly reviewed and affirmed . . . the circuit court's relevant order addressing a discovery dispute that implicated the St. Mary's County Open Meetings Act. . ." "The Circuit Court allowed Alfred A. Lacer, Respondent, to inquire in depositions into discussions held during a closed executive session of the St. Mary's Board of County Commissioners, Petitioner, as those discussions related to Lacer's employment contract with the Board and its subsequent termination of Lacer." 393 Md. at 419. The Court of Appeals concluded that the collateral order doctrine enabled appellate review of the discovery portion of the Circuit Court's order." 393 Md. 428. Discussing the collateral order doctrine and its elements (all 4 elements must be met before an appeal may proceed) in some detail, the Court disagreed that the government aspect of the discovery allowed the appeal. "While we appreciate the sensitivity of the Court of Special Appeals that a meaningful challenge to the allowed probing of the Board members' thought processes might be lost if such a contention were not resolved on appeal until following a trial, we perceive that the more limited inquiry permitted by the circuit Court's order, with respect to Lacer's requested relief under the St. Mary's County Open Meetings Act, pertains to functional aspects of the closed session discussion and not the thought processes of the decision makers." Thus, the Court distinguished its opinions in *Public Service Comm'n v. Patuxent Valley*, 300 Md. 200, 477 A. 2d 759 (1984) and *Montgomery Co. v. Stevens*, 337 Md. 471, 654 A. 2d 877 (1995), and the discovery order was not reviewable at this time. 393 Md. at 430-31.

**Pre-hearing discovery in administrative hearings**
  We find no merit in the plaintiffs' final argument that "the ALJ's determination that pre-hearing discovery was not permitted denied [plaintiffs] due process of law as required by the United States and Maryland Constitutions." (Plaintiffs' supplemental brief at 46). There is no provision in the Maryland Administrative Procedure Act which provides for discovery at the pre-hearing stage. Furthermore, under COMAR 26.01.02.21A, which governs the Department of the Environment contested case proceedings, "discovery may be taken only in accordance with the stipulation of the parties." Parties may, however, "request governmental documents under the Maryland Public Information Act, State Government Article, §10-611 et. seq," COMAR 26.01.02.21B. There was no stipulation in this case providing for discovery. Consequently, the ALJ properly determined procedures meet due process requirements citing *Pacific Gas and Elec. Co. v. F.E.R.C.*, 746 F. 2d 1383 (9th Cir. 1984) and *McClelland v. Andrus*, 606 F. 2d 1278 (D.C. Cir. 1979).

What the *California Teachers* association held was that in the "investigation" stage into allegations of misconduct (sexual abuse) against a credentialed teacher is that full discovery is not required by due process. The Court cited a prior California case to the effect that there is no due process right to prehearing discovery in administrative cases. 11 Cal. App. 4th at 1012. In the *Rex Disposables*, the Court said that it exercised broad discretion to require proceedings to be fair. Sometimes that fairness may mean that discovery be required. The case involved an allegation of layoffs against individuals promoting unionization. The Court cited Davis for his suggestion that the *California Teachers* case may well be followed by federal courts for its general noting that an agency must provide prehearing discovery even in the absence of a statutory requirement. Davis, Administrative Law Treatise 1970 Supp. §8:15. The holding in *Rex Disposables* was that even if there was error in a failure to order discovery, there was no actual prejudice. 494 F. 2d at 592.

---

58
that, absent such stipulation, she was not authorized to require the extensive discovery requested by the plaintiffs. Moreover, pursuant to COMAR 26.01.02.21B, the plaintiffs requested certain documents under the Maryland Public Information Act which they received without delay. Finally, the plaintiffs do not dispute the respondents' representations that the plaintiffs were furnished with several documents.

The plaintiffs do not argue that the ALJ or the Department relied upon any document which was not previously shown to the plaintiffs, or with regard to which there was no opportunity for rebuttal. Cf. Rogers v. Radio Shack, 271 Md. 126, 129, 314 A.2d 113, 115 (1974) ("We agree with Rogers that under the circumstances here, with no opportunity for cross-examination or rebuttal, fundamental fairness would preclude reliance upon the report by an administrative agency"). The plaintiffs have cited no case in the Supreme Court or in this Court, and we are unaware of any such case, holding that due process mandates pre-hearing discovery in an administrative proceeding. See Replacement Rent-A-Car v. Smith, 99 Md. App. 588, 593, 638 A.2d 1217, 1219 (1994) ("The Maryland Rules relating to discovery apply only to proceedings in the circuit courts and not to proceedings before administrative agencies. . . . It is equally well-established that there is no broad constitutional right to pre-hearing discovery in administrative proceedings and that any general right to such discovery must come from the statutes or rules governing those proceedings. * * * Neither the State Administrative Procedure Act nor the statute governing the [agency] provides such entitlement . . . ").

Thus, we perceive no error in the ALJ's refusal to require pre-hearing discovery.

344 Md. at 316-17.

The public information act and the Maryland Open Meetings Act

1. Attorneys fees under the MPIA

   Stromberg v. University of Maryland, 395 Md. 120, 909 A. 2d 663 (2006) focused on the enactment of Maryland's public information act, its history from 1970 and the provision allowing attorneys fees and litigation costs for one who has substantially prevailed. The Maryland act is patterned after the federal information act. 395 Md. at 127. A subcontractor sought records from public university under MPIA relating to a construction project. The Court said the trial court did not abuse its discretion by denying subcontractor's motion for costs and attorneys fees, though university conceded subcontractor was the prevailing party. Consideration of awarding attorneys fees under PIA was the focus of discussion.

2. Who is the custodian of records under the MPIA?

   When an inmate sought records from the Warden of the facility where he was incarcerated (documentary information on health care providers, the cost and availability of medical services, complaints from prisoners regarding health care, institutional operations records relating to security restrictions and violations and complaints from inmates about their confinement, and the cost of making copies by inmates within the institution), and the Warden replied that the request had to be made on each department with responsibility to main the respective files, the Court of Appeals said this was error to direct the inmate to go elsewhere in Ireland v. Shearin, 417 Md. 401, 404-405, 10 A 3d. 754 (2012). Reviewing the provisions of the MPIA, the definition of "public record," the definition of "custodian," the statute did not limit requests
upon the physical custodian. The Wardens’ directive to go to the individual departments “violated the
PIA’s overarching policy of providing access with the lease costs and delay to the requesting party.” 417
Md. at 412.

3. But is “this” a state agency subject to MPIA?
In Napata v. University of Maryland Medical System, 417 Md. 724, 717, 12 A. 3d 144 (2011), the Court of
Appeals said it was called upon to determine the limits of Maryland’s Public Information Act as it
pertained to the University of Maryland Medical System brought by an individual seeking records
concerning the award of a UMMS construction contract following the racketeering conviction of former
State Senator Thomas Bromwell regarding his role in influencing the award. “Although the General
Assembly created a separate corporate entity, it did not relinquish all control of UMMS.” 417 Md. at 730.
The intermediate appellate court held that UMMS “was exempt from the PIA because the entity’s enacting
statute expressly provided that the corporation was not subject to laws affecting only governmental or
public entities.” 417 Md. at 732. “The PIA governs access to public records.” The Court stated it had
“repeatedly announced that there is no single test for determining whether an entity is a unit or
instrumentality of the state.” “We emphasized the importance of examining all aspects of the government-
entity relationship for purposes of the PIA.” 417 Md. at 733-34. Case law was reviewed and while the
attributes of UMMS’s relationship with the State point to its being an instrumentality of the State
predominates, the statute creating UMMS (Ed. §13-303(a)(2) specifically provides that UMMS “shall not
be a State agency, political subdivision, public body, public corporation or municipal corporation and is not
subject to any provisions of law affecting only governmental or public entities.” The Court ruled that this
exemption controlled despite the Napata argument a public information act conflict because there should be
broad access to public information. 417 Md. at 737-738. 89

G. The Conduct of the Hearing.
The right to a hearing and the right to a meaningful hearing means due process rights are involved.
COMAR 28.02.01.17 governs the conduct of hearings before OAH. A party is entitled to call witnesses,
offer evidence, cross-examine witnesses, and make opening and closing statements. 90 Procedures are set
forth for telephone hearings and the right to object to proceedings by telephone. 91 Hearings may also be
held by video conferencing and objections may be made to holding proceedings in this manner. 92 Parties
may waive their right to appear at a hearing and that waiver may result in a default. 93

When an ALJ conducts a proceeding, that judge briefly explains the purpose and nature of the
hearing. The ALJ may allow the parties to present preliminary matters, and shall state the order of the
presentation of the evidence prior to the beginning of the hearing. 94

Agencies have the right to control the procedure utilized in a hearing so long as that procedure
comports with due process of law and otherwise does not violate a right afforded to an individual by the
constitution, a statute or a regulation.

The admission of additional evidence by an agency after the hearing has closed is allowed so long as
there was compliance with due process. 95 “. . . [D]ue process ordinarily requires that an opportunity for

89 There had been recent legislative history in 2007 attempting to include UMMS as subject to the provisions of the public
information act which had failed to pass. “Although a failed statutory amendment is not an infallible indicator of legislative
intent, we have indicated that ‘such action strengthens the conclusion that the Legislature did not intend to achieve the results’
that the amendment would have achieved, if adopted.” 417 Md. 739 (cases cited omitted here).
90 COMAR 28.02.01.17A.
91 COMAR 28.02.01.17B.
92 COMAR 28.02.01.17C.
93 COMAR 28.02.01.17E.
94 COMAR 28.02.01.17D.
When cross-examination, the opportunity to present additional evidence and the allowance to make additional closing argument was given in a case. The Court of Appeals stated: “The board fully complied with the due process requirements concerning subsequent evidence which are set forth in our cases.”

If an agency asks for additional evidence there may be a contention that due process was not afforded because “the board’s action [in asking for additional evidence itself] implied that the charges were not sufficiently proven prior to the reopening. . . .” No case has stated this type of action by the Board constituted a denial of due process and a review of the record will be made to determine if the argument is factually sound based on the facts and circumstances of the case. Actions by a Board in reopening proceedings asking for additional evidence is not automatically a denial of due process. An agency may exercise the same discretion afforded to trial judges in determining when to reopen proceedings.

**Significant Case Decisions**

*When the trier of fact calls for additional witnesses?*

- *Maryland State Police v. Zeigler, 350 Md. 540, 625 A. 2d 914 (2004)* involved a police disciplinary proceeding. “After the two-day hearing, the board adjourned to deliberate.” After a brief deliberation the Board reconvened and said there were additional witnesses who should be called to testify before the Board. 350 Md. at 449. Zeigler objected, but the witnesses were produced and the Board decision went against Zeigler. The circuit court held that the Board acted inappropriately, and the Court of Special Appeals agreed. 350 Md. at 550. “The intermediate appellate court refused to accord to the Board the same broad discretion to reopen that is generally given to trial courts in situations other than reopenings during jury deliberations.” 350 Md. at 556. “The Court of Specials’ holding that the Board abused its discretion in reopening the hearing was, as previously indicated, based entirely upon cases dealing with the reopening of the evidentiary portion of judicial trials.” 350 Md. at 555.

*The ability to defend at an administrative hearing*

The present ability to consult with an attorney with a reasonable degree of rational understanding

- In *Coleman v. Anne Arundel County Police Dept.*, 136 Md. App. 419, 766 A. 2d 169 (2001) there was a contention that Mr. Coleman was not competent to attend a police officer disciplinary hearing. A due process violation was alleged. While the appellant was on the Family and Medical Leave Act due to mental illness, 136 Md. App. at 428, there was nothing in the record to indicate he was not able to attend the hearing. No motions were filed on the grounds of competency, and the issue of competency and need for a further continuance had not been raised until after he had testified. 136 Md. App. at 435. The ability to defend at an administrative hearing “is akin to competency to stand trial,” which requires that a defendant must exhibit both the “present ability to consult with his lawyer with a reasonable degree of rational understanding – and. . . a rational as well as a factual understanding of the proceedings against him.” 136 Md. App. at 436. Later testimony by Mr. Coleman indicated “that he was able to comprehend fully what was going on and to respond appropriately to questions that were asked of him by both the prosecutor and his own attorney. In short, there was nothing to give the Board any indication that appellant was not competent such that his competency should have been questioned sua sponte.” 136 Md. App. at 436-37.

---

95 *Maryland State Police v. Zeigler, 550 Md. 540, 625 A. 2d 914 (2004).*
96 *Zeigler, 550 Md. at 559-60 (citations and analysis omitted)*
97 *Zeigler, 550 Md. at 560.*
98 *Zeigler, 550 Md. at 560-61.*
99 *Zeigler, 550 Md. at 560-62.* Chief Judge Bell dissented stating: “The situation is critically different when it is the agency, rather than one of the parties, that is the moving force behind the exercise of discretion [to reopen the case]” 550 Md. at 571-72. He argued to allow the agency itself to produce call for this additional evidence meant they were doing so “without fear either of meaningful review or reversal,” and that even though agencies were not bound by the common law rules of evidence, he found that “permitting [the reopening] on that basis such a result if absurd.” He was the lone dissenter but does he have a good point?
100 *Maryland State Police v. Zeigler, 550 Md. 540, 560-62, 625 A. 2d 914 (2004).*
H. Liberty Interest.

A constitutional liberty interest was at stake where an agency denied an applicant for a day care license to contest a prior finding of abuse found against a family member when there had been no final adjudication by the agency.102 The right to pursue an application to earn a living was involved. The Court said that "Fundamental liberty interests protected by the due process clause of the constitution include: "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men [and women]."103

Significant Case Decisions

The prisoner's liberty interest right
- Patrick v. Dept. of Public Safety, 156 Md. App. 423, 847 A. 2d 450 (2004) saw an appellant arguing that he had a protected liberty interest in avoiding incarceration in a certain correctional institution. 156 Md. App. at 432-31. Though he failed to preserve the issue for review, the Court commented on the extent of an inmate's protected liberty interest by reviewing cases. 156 Md. App. at 434-442. "[A] transfer of a prisoner from one institution to another . . . does not implicate a liberty interest in the absence of a state statute or regulation that creates such an interest." 156 Md. App. at 435. The protected liberty analysis examines the nature of the conditions themselves, not the statute or regulation that creates them. Transfer to an institution that has more burdensome conditions is within the normal limits or range of custody which the conviction has authorized the State to impose. 156 Md. App. at 436. Nothing in this case (no record was preserved) implicated a protected liberty interest. 156 Md. App. at 439. "Long terms of disciplinary or administrative segregation alone, generally do not implicate a liberty interest. . ." 156 Md. App. at 439.104

The right to a livelihood
- When a day care license was denied because a DSS investigation of some years prior resulted in a finding of abuse against a family member, the Court of Special Appeals said the ALJ had erred in not allowing a contest to that DSS determination. Though the DSS report indicated "abuse indicated" this determination was not made while DSS was "acting in a quasi-judicial or judicial capacity." "Nor was there a final judgment relating to the alleged child abuse."105 "The ALJ's decision to preclude consideration of appellee's challenge to the DSS finding infringed Ms. Thompson's right to a meaningful hearing" on her application for a day care license. It was unfair to preclude Ms. Thompson's right to pursue a livelihood without giving her a right to contest the underlying administrative finding. A fundamental liberty interest was at issue.106

An inmate alleges he was caused to serve more time than the law required
- In Massey v. Secretary of Public Safety, 389 Md. 496, 886 A. 2d 585 (2005), Massey, an inmate, argued107 that the finding he had violated certain institution directives (kind of conduct subjecting inmates to discipline; procedure for charging; matrix of punishments; processing of inmate complaints)108 and had to

104 Disciplinary proceedings in Maryland are reviewed in accord with standards set forth in COMAR 12.07.01.09B. A separate process for institutional administrative decisions is governed by COMAR 12.07.01.09(C). Patrick, 156 Md. App. at 441.
106 Thompson, 103 Md. App. at 197.
107 Massey's complaint that the procedure was unlawful is set forth at Massey, 504-05 of the opinion.
108 The directives are set forth at Massey, 389 Md. 501-04.
therefore serve additional prison time was illegal because directives adopted by the Safety regarding inmate behavior were actually regulations\(^\text{109}\) not enacted in accord with the State Administrative Procedure Act (SG §§10-101 - 10-117) and therefore were void. The Court concluded\(^\text{110}\) that the "directives" were "regulations," as defined in SG§ 10-101(g)(1) because they "constitute statements that have general application throughout all of the correctional institutions in DOC and apply to all inmates in those institutions; they have future effect; they were adopted by a "unit" to carry out laws that the unit administers; and they are in the form of rules, standards, statements of interpretation, and statements of policy." The Court also said that the "regulations" "were not statements concerning only internal management of the unit, that do not affect directly the rights of the public or the procedures available to the public, thus rejecting the appellee's contention in that regard, that the exception, contained in" SG §10-101 (g) (2) applied.\(^\text{111}\) Therefore, the directives were invalid and ineffective.\(^\text{112}\) Other case law and authority supports this holding regarding the requirement for regulations with regard to inmate discipline.\(^\text{113}\)

The mandate of the case was delayed because the purpose of the regulations was to ensure prisoners were afforded due process.\(^\text{114}\)

\(^{109}\) Regulation is defined by SG §10-101(g)(1). The Court summarized the process for the adoption of regulations. \textit{Massey}, 389 Md. at 500, 507.

\(^{110}\) The process of judicial review which allowed the Court to address the issue was set forth in \textit{Massey}, 389 at 507-08.

\(^{111}\) \textit{Massey}, 389 Md. at 509, 511, reviewing the Correctional Services article, CS §2-109; CS §3-205 (The Commissioner has broad authority to adopt regulations for the operation and maintenance of DOC facilities. The Court stated that both the nature and history of the directives made it clear that the directives are not merely guidelines pertaining to internal management, routine or otherwise. \textit{Massey}, 512. The Wilner traced the history of applicable due process requirements beginning from 1970 to a U.S. District Court decision regarding transfer of inmates and additional punishment meted our to inmates which were part of a consent order. \textit{Massey}, 389 Md. at 512-13. He points out that the due process underpinning of the procedures consented to regarding revocation of earned diminution credits at risk was confirmed by the Supreme Court in \textit{Wolff v. McDonnell}, 418 U.S. 539 (1974) with a finding that a due process liberty interest was triggered and therefore a state-credited right is not to be arbitrarily abrogated. \textit{Massey}, 389 Md. at 513-14. Detailing the history of the creation of the Office of Commissioner of Correction and the MAPA requirements for adopting new regulations. The regulations at issue in this case were adopted in January, 2002. \textit{Massey}, 389 Md. at 514-15.

The fact that these procedures were designed to implement basic Federal due process requirements is powerful evidence they are not merely guidelines for routine, or even non-routine, internal management. Discipline may serve to lengthen an inmate’s period of incarceration. \textit{Massey}, 389 Md. at 516.

\(^{112}\) The majority pointed to \textit{Pollock v. Patuxent}, 374 Md. 463, 823 A. 2d 626 (2003) to the effect that as a minimum, an agency’s failure to comply with its own regulations “automatically nullifies its action where the regulation is promulgated to effect fundamental rights derived from the Constitution or a federal statute” and that nullification had been required even when “less fundamental” rights were involved. \textit{Massey}, 389 Md. at 517-18.

Judge Robert M. Bell dissented in part because he did not agree with the majority view that Massey failed to raise the issue of his guilt of the infractions with which he was charged. \textit{Massey}, 389 Md. at 529. The summary of the majority opinion in this paragraph is mostly taken by Judge Bell’s summary of the majority position at the beginning of his dissent at 389 Md. p. 527-28.

\(^{113}\) \textit{Massey}, 389 Md. at 519-24.

\(^{114}\) Recognizing that sometimes there may be a thin line between substance and procedure, the Court concluded that the rights here were procedural ones. \textit{Massey}, 389 Md. at 525. The clerk was directed to withhold the mandate for 120 days to give the Secretary time to comply with the MAPA. \textit{Massey}, 389 Md. at 602.
A number of statutes and regulations are set forth in these materials in full version. Particularly mentioned here for placement reference are:

SG §10-201, et. seq. Administrative Procedure Act (MAPA) – Contested Cases.
COMAR 28.02.01.01, et. seq. OAH Rules of Procedure.

SG §9-1601, et. seq. is included in this Chapter 5. SG §10-201, et. seq. and COMAR 28.02.01, et. seq. are included in Chapter 6 dealing with the “contested hearing.”

Under the MAPA, the delegation of matters to the OAH is not a mandatory function, but it is within the discretion of the agency.1

The Office of Administrative Hearings (OAH) was established in 1989.2 It is presently codified in the State Government Article, Title 9, Subtitle 16. There is general agreement throughout Maryland that the system of using administrative law judges to conduct contested hearings has worked well. First of all, it assures an independent decision maker, with professional training; second, because property and liberty interests, as we have seen, have become more numerous and difficult to analyze, expertise in the law is crucial; third, because it gives the appearance of fairness to the public when a person is not tried by the same agency that “charged” him or her; fourth, because the de novo findings of fact which are crucial, of course, depend upon an administrative law judge’s skill in making demeanor-based credibility determinations of witnesses and evaluations of expert witnesses and, in general, to make logical and legally defensible evaluations of the record; and finally, because the administrative law judge must make a decision based only on the record.

"When [the agency] delegates the hearing responsibility to an ALJ, the ALJ becomes an extension of [the agency]. Any responsibilities not expressly given the ALJ remain with [the agency] and, unless

---

   The OAH statute must be read in tandem with the contested cases provisions of the Administrative Procedure Act (APA), formerly codified in Md.Code (1957), Art. 41. In 1984 the provisions of the APA were transferred to the new State Government article as Title 10, subtitle 2, in revised language but without substantive change. In 1989 the APA was amended to accommodate the provisions of the OAH statute. An agency may "delegate to the [OAH] the authority that the agency . . . has to hear particular contested cases," SG § 10-207(a)(1) , and "may delegate to [the OAH] the authority to issue the final administrative decision of the agency in a contested case," SG § 10-207(a)(2). . . .
   330 Md. at 191-92.
   The PPS Appeal Board delegated its authority to OAH to determine disputes for final reimbursement amounts from the Developmental Disabilities Administration (DDA) to service providers in Dept of Health v. Chimes, 343 Md. 336, 343, 681 A. 2d. 484 (1996).
statutorily proscribed, [the agency] reserves the right to review any aspect of an ALJ decision." When the ALJ files a proposed decision, the agency, the parties may file exceptions to the ALJ's proposed order. The parties may then file exceptions to the ALJ's proposed order. COMAR § 31.02.02.10. The agency then makes the final decision. When an agency delegates full hearing authority to an ALJ, the agency has limited its authority to review an ALJ decision.

Sections within this Chapter 5 are:
A. In General .......................................................... 66
B. The Judges .......................................................... 72
   (1) Caseload .......................................................... 73
   (2) Facilities .......................................................... 74
   (3) The Judges .......................................................... 74
   (4) Hearings before "specialized" administrative law judges ........................................ 75
C. Regulations .......................................................... 76
D. Representation of Persons before OAH.................................................. 78

A. In General.
   "... Under the APA, the delegation of matters to the OAH is not a mandatory function, but a function within the discretion of the administrative agency." Pursuant to APA §10-205(a)(1), an administrative agency may delegate its authority to conduct the contested case to the Office of Administrative Hearings (OAH) for assignment of the matter to an Administrative Law Judge (ALJ). Delegation to OAH may be to submit: (1) proposed or final findings of fact; (2) proposed or final conclusions of law; (3) proposed or final findings of fact and conclusions of law; (4) proposed or final orders or orders under Article 49B [Human Relations Commission] of the Code; or (5) the final administrative decision of an agency in a contested case. Volume-wise, most OAH decisions are final.

3 Berkshire Life v. Maryland Insurance Administration, 142 Md. App. 628, 645, 791 A. 2d 942 (2002). Judge Guy J. Avery, a prominent, and now retired ALJ with OAH, comments that although this is the way the statute reads, the concept of an extension of the agency can be misinterpreted. Judge Avery's position is that the OAH is not entirely an "extension of the agency." He points out that any communication with the agency by an ALJ would be ex parte. He notes that the OAH "responsibilities," whether expressly given or not, are still governed by the contested case provisions of the MAPA and generally, where applicable, the Rules of Evidence. OAH recognizes privileges, which includes Fifth Amendment claims, and a host of other evidentiary rules promulgated by the courts and the legislature. Hearsay is not precluded simply because it is hearsay, and it is up to the ALJ to determine the reliability of such evidence. If the OAH were merely an extension of the agency, it would, in effect, be ruling against itself. He points out that the MAPA also contains a provision that the OAH is bound by "[A]ny agency regulations, declaratory ruling, prior adjudication, or other settled, preexisting policy." SG §10-214(b). Judge Avery notes that OAH has refused to accept some agency policy directives that OAH believes that do not simply elucidate the regulations, but, rather, amount to regulations themselves, without having been legally adopted. Due process, good findings of fact, and good legal analysis remain the hallmark of a good decision, despite an agency's defense that the action taken was traditional, or based on policy, rather than law. Finally, Judge Avery points out that the agency must give deference to the demeanor-based findings of fact made by an ALJ. Anderson v. Dept' of Public Safety, 330 Md. 187, 213, 627 A. 2d 198 citing General Dynamics v. OSHRC, 599 F. 2d 453, 463 (1st Cir. 1979). He notes that these are some of the differences between a "hearing officer" employed by an agency, and an independent administrative law judge.

Judge Avery has been kind enough to review many of these materials for me. I have inserted his comments in these materials at various places and tried to attribute his comments to his excellent work product. These comments are the voice of experience, reflection, observation, and competence. This insight is very much appreciated.

Title 9, Subtitle 16 of the State Government Article contains the law governing the operation and authority of the Office of Administrative Proceedings. OAH applies to “each agency that employs or engages one or more hearing officers to adjudicate contested cases,” except as stated in the statute. The statute declares that OAH is “created as an independent unit in the Executive Branch of State Government.” Just how independent OAH is or should be, and how reflective its decisions should be of the purpose and expertise of individual agencies is a matter of some dispute.

There is a State Advisory Council on Administrative Hearings. The Council consists primarily of representatives of the agencies, lawyers, and others who have an interest in the OAH. It is advisory only, dealing with organizational issues and how they can be improved. Needless to say, no individual cases are considered. The Council provides valuable feedback to the OAH concerning practices and policies which are working well or need to be improved.

There is a Chief Administrative Law Judge. Duties of the Chief Judge are set forth in the statute. These duties include training, classification, continuing education, development of rules of procedure and development of a code of professional responsibility.

Administrative law judges are appointed by the Chief Judge. These judges have the authority to issue subpoenas, administer oath, examine witnesses, compel the production of documents or other things. Contempt proceedings for failure to comply with the order of an ALJ are enforced in the circuit court. Generally, “an agency may not select or reject a particular administrative law judge for a particular proceeding. Units of State government are mandated to cooperate with the Chief Judge in the discharge of his duties.” Designation of an ALJ for a contested hearing is by the Chief Judge, but if OAH is “unable to assign an administrative law judge in response to an agency request, the Chief Administrative Law Judge shall designate in writing an individual to serve as an administrative law judge in a proceeding” if the agency consents to assignment and the individual designated meets the qualifications for an ALJ established by the office.

At the present time, there are two parts to the Office of Administrative Hearings: (1) operations, and (2) quality assurance. The quality assurance program keeps the ALJs up on the law and keeps them apprised of changes in the law that affects the work they are required to do. OAH sets aside one day a month for training and it is the job for quality assurance to put on a program to keep judges up to date with law and problems that may occur. This also allows judges the opportunity to get together to talk to one another about the work they do and problems encountered.

Inserted here is the whole of Title 9, Subtitle 16 of the State Government Article pertaining to the Office of Administrative Hearings.

---

8 SG §9-1601(b).
9 SG §9-106(b) excepts the Governor; units of the Judicial Branch and Legislative Branch; the Comptroller of the treasury; the inmate adjustment hearing officers; the Public Service Commission; the Workers’ Compensation Commission; the Parole Commission; the Health Services Cost Review Commission; the Maryland Health Care Commission; unemployment insurance benefit determinations; and employer obligation determinations in the Department of Labor, Licensing, and Regulation.
10 SG §9-1602.
11 SG §9-1608.
12 SG §9-1605.
13 SG §9-1606.
14 SG §9-1607.
THE OFFICE OF ADMINISTRATIVE HEARINGS
STATUTORY

STATE GOVERNMENT ARTICLE
TITLE 9. Miscellaneous Executive Agencies.

§ 9-1601. Applicability.
§ 9-1602. Establishment.
§ 9-1603. Chief Administrative Law Judge - In general.
§ 9-1604. Same - Powers and duties.
§ 9-1605. Administrative law judges.
§ 9-1606. Cooperation of State government units; audits; selection of judges.
§ 9-1607. Designation of administrative law judges.
§ 9-1607.1. Representation by person not licensed to practice law.
§ 9-1607.2. Applicability of procedural regulations.
§ 9-1609. Same - Terms; compensation; chairman.
§ 9-1610. Same - Powers and duties; meetings.

SG §9-1601. Applicability.
(a) Exceptions.- This subtitle does not apply to:
   (1) the Governor;
   (2) any unit of the Judicial Branch;
   (3) any unit of the Legislative Branch;
   (4) the Comptroller of the Treasury;
   (5) the inmate adjustment hearing officers;
   (6) the Public Service Commission;
   (7) the State Workers' Compensation Commission;
   (8) the Parole Commission;
   (9) the Health Services Cost Review Commission;
   (10) the Maryland Health Care Commission; and
   (11) unemployment insurance benefit determinations and employer obligation determinations in the Department of Labor, Licensing, and Regulation, and appeals from those determinations.
(b) In general.- Except as provided in subsection (a) of this section, this subtitle shall apply to each agency that employs or engages one or more hearing officers to adjudicate contested cases unless the agency has been exempted by the Governor under subsection (c) of this section.
(c) Temporary exceptions.- Until July 1, 1994, the Governor may temporarily exempt an agency from this subtitle.

SG §9-1602. Establishment.
The Office of Administrative Hearings is created as an independent unit in the Executive Branch of State government.
[1989, ch. 788.]

SG §9-1603. Chief Administrative Law Judge - In general.
(a) Appointment.- The Office is headed by a Chief Administrative Law Judge appointed by the Governor with the advice and consent of the Senate.
(b) Term; other employment.- The Chief Administrative Law Judge shall:
   (1) be appointed for a term of 6 years;
(2) devote full time to the duties of the Office; and
(3) be eligible for reappointment.

(c) **Salary; qualifications; powers and duties generally.** - The Chief Administrative Law Judge shall:
   (1) receive the salary provided in the State budget;
   (2) be admitted to practice law in the State; and
   (3) have the powers and duties specified in this subtitle.

(d) **Staff.** - The Chief Administrative Law Judge may employ a staff in accordance with the State budget.


**SG §9-1604. Same - Powers and duties.**

(a) **Duties generally.** - The Chief Administrative Law Judge shall:
   (1) supervise the Office of Administrative Hearings;
   (2) establish qualifications for administrative law judges;
   (3) appoint and remove administrative law judges in accordance with § 9-1605 of this subtitle;
   (4) assign administrative law judges to conduct hearings in contested cases;
   (5) if necessary, establish classifications for case assignment on the basis of subject matter, expertise, and case complexity;
   (6) establish and implement standard and specialized training programs and provide materials for administrative law judges;
   (7) provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications, compiling and disseminating information, and advise of changes in the law relative to their duties;
   (8) develop model rules of procedure and other guidelines for administrative hearings;
   (9) develop a code of professional responsibility for administrative law judges; and
   (10) monitor the quality of State administrative hearings.

(b) **Powers generally; fees.** -
   (1) The Chief Administrative Law Judge may:
      (i) serve as an administrative law judge in a contested case;
      (ii) furnish administrative law judges on a contractual basis to other governmental entities;
      (iii) accept and expend funds, grants, and gifts and accept services from any public or private source;
      (iv) enter into agreements and contracts with any public or private agencies or educational institutions;
      (v) adopt regulations to implement this subtitle; and
      (vi) assess fees to cover administrative expenses as follows:
         1. to file an appeal, a fee not exceeding:
            A. $125 for an appeal of a driver's license suspension or revocation related to a violation of the Maryland Vehicle Law; and
            B. $50 for all other types of appeals; and
         2. to process a subpoena, a fee not exceeding $5.
   (2) Fees charged under paragraph (1) of this subsection for administrative expenses may not be charged to:
      (i) State agencies; or
      (ii) petitioners who are determined by the Office of Administrative Hearings to be unable to pay the fees.
   (3) A fee charged under paragraph (1) of this subsection for filing an appeal shall be refunded to a party who initiates the appeal if the party receives a favorable decision from the administrative law judge.

(c) **Reports.** -
   (1) The Chief Administrative Law Judge shall submit an annual report on the activities of the Office to the Governor and, subject to § 2-1246 of this article, to the General Assembly.
   (2) This report may be prepared in conjunction with the annual report required under § 9-1610 of this subtitle.

(d) **Meetings and conferences with advisory council.** - The Chief Administrative Law Judge shall meet and confer regularly with the Advisory Council on Administrative Hearings.


**SG §9-1605. Administrative law judges.**

(a) **In general.** - An administrative law judge:
   (1) shall be a special appointment in the State Personnel Management System;
   (2) may be removed, suspended, or demoted by the Chief Administrative Law Judge for cause, after notice and an opportunity to be heard;
(3) shall receive the compensation provided in the State budget; and
(4) may not perform duties inconsistent with the duties and responsibilities of an administrative law judge.

(b) Restrictions.- An administrative law judge may not be responsible to or subject to the supervision or direction of an officer, employee, or agent engaged in the performance of investigative, prosecuting, or advisory functions for an agency.

c) Powers generally.- In any contested case conducted by an administrative law judge, the administrative law judge may:

(1) authorize the issuance of subpoenas for witnesses;
(2) administer oaths;
(3) examine an individual under oath; and
(4) compel the production of documents or other tangible things.

d) Refusal to comply with order; to show cause.-

(1) Without good cause, a person may not refuse an order by any administrative law judge to:
   (i) appear for a hearing;
   (ii) testify under oath; or
   (iii) produce any relevant evidence, including documents or other tangible things.

(2) (i) An administrative law judge may apply, upon affidavit, to any judge of a circuit court for an order, returnable in not less than 2 nor more than 5 days, to show cause why a person should not be committed to jail for refusal to comply with an order issued under paragraph (1) of this subsection.

   (ii) On the return of an order issued under subparagraph (i) of this paragraph, if the judge hearing the matter determines that the person is guilty of refusal to comply with the order of the administrative law judge, the judge may commit the offender to jail as in cases of civil contempt.


SG §9-1606. Cooperation of State government units; audits; selection of judges.

(a) Cooperation of State government units.- All units of State government shall cooperate with the Chief Administrative Law Judge in the discharge of his duties.

(b) Audits.- The Office shall be subject to audit and examination by the Office of Legislative Audits of the Department of Legislative Services under § 2-1220 of this article.

(c) Selection of judges.- Except as provided in this subtitle or in regulations adopted under this subtitle, an agency may not select or reject a particular administrative law judge for a particular proceeding.


SG §9-1607. Designation of administrative law judges.

If the Office is unable to assign an administrative law judge in response to an agency request, the Chief Administrative Law Judge shall designate in writing an individual to serve as an administrative law judge in a proceeding before the agency if:

(1) the individual meets the qualifications for an administrative law judge established by the Office under § 9-1604 of this subtitle; and

(2) the agency that employs the individual consents to the assignment.

[1989, ch. 788.]

SG §9-1607.1. Representation by person not licensed to practice law.

(a) Conditions.- An individual who is not licensed to practice law in this State may represent a party in a proceeding before the Office if:

   (1) authorized by law;
   (2) the individual is representing:
      (i) a recipient of or applicant for benefits that are:
         1. based on the recipient's or applicant's income and resources; and
         2. provided by the Department of Human Resources or the Department of Health and Mental Hygiene;
      (ii) a resident of a facility at a proceeding conducted under § 19-344 (q) (4) or § 19-345.1 of the Health - General Article;
      (iii) a health care facility, as defined in § 10-101 of the Health - General Article, at a proceeding under the provisions of § 10-632 or § 10-708 of the Health - General Article or § 3-121 of the Criminal Procedure Article; or
      (iv) a grievant at a proceeding conducted pursuant to Title 10, Subtitle 2 of the Correctional Services Article concerning a grievance submitted to the Inmate Grievance Office, provided the representation is not otherwise
restricted for reasons of security or expense pursuant to regulations, rules, directives, or policies adopted by the Division of Correction or Patuxent Institution;

(3) the individual is a designee of a corporation while appearing on its behalf in an administrative proceeding held under §27-613 of the Insurance Article;

(4) the individual is an officer of a corporation, an employee designated by an officer of a corporation, a general partner in a business operated as a partnership or an employee designated by a general partner, or an employee designated by the owner of a business operated as a sole proprietorship while the officer, partner, or employee is appearing on behalf of the corporation, partnership, or business in an administrative hearing held under:

(i) § 8-312 of the Business Regulation Article (Home Improvement Commission);
(ii) Title 5 of the Labor and Employment Article (Occupational Safety and Health); or
(iii) regulations adopted pursuant to § 14-303 of the State Finance and Procurement Article, concerning the decertification of a minority business enterprise to conduct business with the Department of Transportation;

(5) in the case of an insurer, the individual is a designee of the insurer who:
(i) is employed by the insurer in claims, underwriting, or as otherwise provided by the Commissioner; and
(ii) has been given the authority by the insurer to resolve all issues involved in the proceeding; or

(6) the individual is representing a unit of State government, at the direction of the unit of State government.

(b) **Business entities**.-

(1) An employee designated by a business entity under subsection (a) (3) or (4) of this section:

(i) shall provide the Office a power of attorney sworn to by the employer that certifies that the designated employee is an authorized agent of the business entity and may bind the business entity on matters pending before the Office; and

(ii) may not be a disbarred or suspended lawyer in any state.

(2) A business entity may not contract, hire, or employ another business entity, other than an attorney, to provide appearance services under subsection (a) (3) or (4) of this section.

(3) An employee designated by a business entity under subsection (a) (4) of this section may not be assigned on a full-time basis to appear in administrative hearings before the Office on behalf of the business entity.

(c) **Right to represent self**.- This section may not be interpreted to limit the right of an individual to appear on the individual's own behalf.


SG §9-1607.2. Applicability of procedural regulations.

(a) **In general**.- Subject to subsection (b) of this section, regulations adopted in accordance with § 10-206 (a) (1) of this article shall apply to a proceeding before the office, regardless of whether the proceeding is subject to Title 10, Subtitle 2 of this article (Administrative Procedure Act - Contested Cases).

(b) **Conflict**.- Unless a federal or State law or regulation requires that a federal or State procedure shall be observed, the regulations specified in subsection (a) of this section shall take precedence in the event of a conflict.

[1993, ch. 59, § 1.]


(a) **Establishment**.- There is a State Advisory Council on Administrative Hearings.

(b) **Composition - Number**.- The Council consists of 10 members.

(c) **Same - Representation**.- Of the 10 Council members:

(1) 1 shall be a member of the Senate of Maryland, appointed by the President of the Senate;

(2) 1 shall be a member of the House of Delegates, appointed by the Speaker of the House;

(3) 1 shall be the Attorney General or the Attorney General's designee;

(4) 1 shall be a nongovernmental attorney who practices before the Office of Administrative Hearings;

(5) 2 shall be secretaries or designees from departments involved in the adjudication of contested cases;

(6) 2 shall represent the Maryland State Bar Association; and

(7) 2 shall be from the general public.

(d) **Appointment**.- The Governor shall appoint the members specified in subsection (c) (4) through (7) of this section.

(e) **Attorneys**.- Of the members appointed under subsection (c), not more than 5 shall be attorneys who practice before the Office of Administrative Hearings.

SG §9-1609. Same - Terms; compensation; chairman.
(a) Terms.-
(1) The term of a member of the Council is 4 years.
(2) The terms of the members are staggered as required by the terms provided for members of the Council on January 1, 1990.
(3) A member is eligible to serve more than 1 term.
(b) Compensation and reimbursement of expenses.- A member of the Council may not receive compensation, but is entitled to reimbursement for expenses under the Standard State Travel Regulations.
(c) Chairman.- The Council shall designate a chairman from among its members.
[1989, ch. 788; 1990, ch. 107.]

SG §9-1610. Same - Powers and duties; meetings.
(a) Powers and duties.- The Council shall:
(1) advise the Chief Administrative Law Judge in carrying out his duties;
(2) identify issues of importance to administrative law judges that should be addressed by the Chief Administrative Law Judge;
(3) review issues and problems relating to administrative hearings and the administrative process;
(4) review and comment upon policies and regulations proposed by the Chief Administrative Law Judge;
(5) advise the Governor as to those agencies for which a continuing exemption under § 9-1601 of this subtitle should be maintained as consistent with the purposes of this subtitle; and
(6) submit an annual report, which may be prepared in conjunction with the report required under § 9-1604 of this subtitle and is subject to § 2-1246 of this article, to the Legislative Policy Committee of the General Assembly, including a list of the agencies that are exempted from this subtitle under § 9-1601 (c) of this subtitle and the reasons for the exemptions.
(b) Meetings.- The Council shall meet at a regular time and place to be determined by the Council.

The reader should note that these statutory sections are listed here as enacted through the 2006 legislative session.

B. The Judges (authority, caseload, facilities)15
There were a number of reasons for the creation of the Office of Administrative Hearings. One of the primary objections to the old system was the perception of unfairness when being "tried" by the same agency which originally filed the charges and did the investigation. An old story illustrates this perception. A driver is stopped in a small town by Officer Phillips; he contests the stop in court, where the judge is also named Phillips; he notices that the prosecutor, too, is named Phillips. The driver begins to believe he has little chance to prevail in the hearing!

In other words, the negative perception of many litigants was influenced by the fact that employees of an agency were the ones adjudicating contested cases. It would be difficult indeed to believe that a hearing officer would not rule in his employer's favor, at least in close cases. Whether or not such undue influence was ever exerted, the perception was certainly real.

For the most part, the hearing officers were not highly trained individuals in due process and litigation procedure as are the ALJs. There was also a need for centralized rules of procedure, which followed the tenants of due process and the APA.16

There were a number of reasons for the creation of the Office of Administrative Hearings. There was a perception to many that fair treatment was not given when employees of an agency were the ones

15 The statistics in this section come from a seminar given by Chief Judge Thomas Dewberry at a MICPEL education conference on November 4, 2004.
16 Judge Guy J. Avery's insight in writing this introductory paragraph is very much appreciated.
adjudicating contested cases. For the most part, the hearing officers were not highly trained individuals in due process and litigation procedure as are the ALJs. There also was a need for centralized rules of procedure.

Chief Judge Dewberry is a constant advocate before the Legislature that the ALJ salary should be reflective of the enormous responsibility of the judges. He always correctly notes that the work of an ALJ is important, interesting and challenging.

(1) Caseload

In 2003, OAH had a case load of 66,000 cases. Not all these cases went to a hearing. Many of these cases were dropped or resolved prior to a hearing but approximately ¼ of the cases were heard. The bulk of the OAH case load consists of Motor Vehicle Administration cases.

Maryland is one of the largest central panel states (OAH handling the contested case function for administrative agencies) in the nation. Maryland has the broadest jurisdiction in conducting hearings for State agencies. Other states that have a central panel do not have as many agencies who utilize its services. This Maryland Central Panel Agency holds hearings for over 30 state agencies involving over 200 different programs. Maryland and New Jersey spearheaded the movement toward independent administrative law judges, and continue to be leaders in the field. Approximately 28 states utilize one form or another of the central panel concept.

A number of agencies delegate full authority to OAH. Since the time OAH was formed, there is a growing trend for agencies to delegate final decision authority to the agency. Not all agencies are comfortable with the final authority delegation. The agency decides what kind of authority to give to OAH. Insurance Administration cases now delegate final authority in all cases. WSSC grants some final decision making authority.

SG §10-205 provides for the delegation of authority to OAH.

SG §10-205. Delegation of hearing authority.
(a) To whom delegated; limitation.-
(1) Except as provided in paragraph (2) of this subsection, a board, commission, or agency head authorized to conduct a contested case hearing shall:
   (i) conduct the hearing; or
   (ii) delegate the authority to conduct the contested case hearing to:
        1. the Office; or
        2. with the prior written approval of the Chief Administrative Law Judge, a person not employed by the Office.
(2) A hearing held in accordance with § 4-608(f) or § 5-610(f) of the Business Occupations and Professions Article may not be delegated to the Office.
(3) With the written approval of the Chief Administrative Law Judge, a class of contested case hearings may be delegated as provided in paragraph (1)(ii)2 of this subsection.
(4) This subsection is not intended to restrict the right of an individual, expressly authorized by a statute in effect on October 1, 1993, to conduct a contested case hearing.
(b) Scope of authority delegated.- An agency may delegate to the Office the authority to issue:
   (1) proposed or final findings of fact;
   (2) proposed or final conclusions of law;
   (3) proposed or final findings of fact and conclusions of law;
   (4) proposed or final orders or orders under Article 49B of the Code; or
   (5) the final administrative decision of an agency in a contested case.
(c) Procedure upon receipt of hearing request.- Promptly after receipt of a request for a contested case hearing, an agency shall:
   (1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing;
(2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's delegation; or
(3) request written approval from the Chief Administrative Law Judge to appoint a person not employed by the Office to conduct the hearing.

(d) Delegation final; exception.-
(1) Except as provided in paragraph (2) of this subsection, an agency's delegation and transmittal of all or part of a contested case to the Office is final.
(2) If an agency has adopted regulations specifying the criteria and procedures for the revocation of a delegation of a contested case, delegation of authority to hear all or part of a contested case may be revoked, by the agency head, board, or commission, in accordance with the agency's regulations, at any time prior to the earlier of:
   (i) the issuance of a ruling on a substantive issue; or
   (ii) the taking of oral testimony from the first witness.

(e) Duties of the Office.-
(1) The Office shall:
   (i) conduct the hearing; and
   (ii) except as provided in paragraph (2) of this subsection or as otherwise required by law, within 90 days after the completion of the hearing, complete the procedure authorized in the agency's delegation to the Office.
(2) The time limit specified in paragraph (1) (ii) of this subsection may be extended with the written approval of the Chief Administrative Law Judge.


Most agencies do not have the time to handle most of the contested cases that come before them.

Some agencies that do not fall under OAH authority. There are substantive reasons for this as well as political reasons. Governors do not like to give up some authority they have. Some agency work is very complex demanding the agency conduct the hearings, such as exists with utility law. The average was at least a good 2 years for the Public Service Commission (PSC) to hear some of its simplest cases.

(2) Facilities
The main OAH facility is located in Hunt Valley, Baltimore County, Maryland. There are 23 different hearing rooms at the Hunt Valley location. Only 40% of cases are heard in Hunt Valley. The remainder are heard at different facilities all over the State. MVA, Inmate Grievance, Forced Medication, DSS food stamp applications, and Special Education cases are heard all over the State. Anywhere there is State of Maryland action by a State agency, the OAH may be involved. (i.e. insurance policy renewal; disciplinary action against nursing license; license suspension for failure to take a DWI test; home improvement, etc.)

(3) The Judges
In 2004, OAH had 61 judges. Judges are cross trained and OAH does not have any judge specially assigned to a particular area of adjudication.17 The Chief Administrative Law Judge in Maryland estimates it takes some 9-12 months for a new ALJ to become proficient enough to hear all cases that come before OAH. Each ALJ is required to take 40 hrs of mediation training. OAH mediates 300 cases a year, mostly in the area of specialized education contests. An ALJ is called upon sometimes to sit as a settlement judge. When an ALJ is involved as a settlement judge, OAH takes care to make sure the one conducting the settlement is not the judge assigned to hear the contested case.

17 This is a matter of some controversy. Some agencies with more involved cases (Board of Physicians, environmental, etc.) have expressed a preference for a more specialized ALJ assignment so these agencies may have the benefit of continued and concentrated expertise by an ALJ in a particular area.
The Chief Administrative Law Judge in Maryland estimates it takes some 9-12 months for a new ALJ to become proficient enough to hear all cases that come before OAH. In addition, each ALJ is required to take 40 hrs of mediation training. OAH mediates some 300 cases a year, mostly in the area of specialized education conflicts. At times, an ALJ is called upon to sit as a settlement judge, as well. The judges must rule on motions and discovery requests, and, to a certain extent, perform those functions associated with Circuit Court judges.

An ALJ is required to: (1) conduct a full, fair and impartial hearing; (2) avoid unnecessary delay in disposition; (3) maintain order in the proceeding; and (4) “modify or waive, reasonably, time periods” as permitted by law.18

The ALJ is required to regulate the course of a hearing, and the conduct of the participants in that hearing. He/She has authority to:
1. Administer oaths and affirmations;
2. Issue subpoenas for witnesses and the production of evidence;
3. Rule upon offers of proof and receive relevant and material evidence;
4. Consider and rule upon motions in accordance with this chapter;
5. Examine witnesses and call witnesses as necessary to insure a full and complete record;
6. Limit unduly repetitious testimony and reasonably limit the time for presentations;
7. Grant a continuance or postponement;
8. Request parties to submit legal memoranda, proposed findings of fact, and conclusions of law;
9. Make proposed or final decisions and take any other appropriate action authorized by law;
10. Issue orders as are necessary to secure procedural simplicity and administrative fairness, and to eliminate unjustifiable expense and delay;
11. Conduct the hearing in a manner suited to ascertain the facts and safeguard the rights of the parties to the hearing; and
12. Impose appropriate sanctions for failure to abide by this chapter or any lawful order of the judge.19

(4). Hearings before “specialized” administrative law judges.

Specialized judges, such as requested by the Board of Physicians and the Department of the Environment, would make no difference in these or any other cases, in the opinion of OAH. It is the position of OAH: (First) of all, in a proposed decision (which is the authority they designated to the OAH), the agency still has the last word, though having the last word may not be in 2006 what it was years ago. Case law has required that deference be given to the ALJ’s demeanor-based findings of fact. (Second), the ALJ’s decision is now part of the record in the case. Thus, if an agency’s decision departs significantly from that of the ALJ, the agency must furnish some justification. If it does not, then it could be attacked as arbitrary and capricious. So-called specialists in these areas would still be required to consider only the record before them. Naturally, the expertise of a Board or Department may be crucial to the decision, but that expertise must be made part of the record and not simply resorted to because an agency does not agree with the ALJ’s proposed decision.

Agencies have great expertise in the area which they cover, but little or no expertise in making findings of fact, conclusions of law and sticking to the record. It is only natural that a board member,

18 COMAR 28.02.01.08 A.
19 COMAR 28.02.01.08 B.
with years of experience in his or her field, might substitute his or her opinion, perhaps not even realizing it, instead of coming to a decision based solely on the record.\textsuperscript{20}

Boards and agencies urging the use of judges concentrating in particular areas of the law feel that specialization by ALJ’s is needed to facilitate and enhance the reliability of determinations made during the process. It is to be noted that the Maryland State Court system puts employs an assignment system so that judges specialize in family law and business and technology law.

C. Regulations.
Regulations are required to be adopted by OAH in accord with SG §10-206(a)(1). These regulations are “to govern the procedures and practice in all contested cases delegated to” OAH. OAH procedures take precedence in the event of a conflict in procedure with a particular agency, unless a federal or state law requires a specific procedure be observed.\textsuperscript{21} Administrative agencies may also “adopt regulations to govern procedures.”\textsuperscript{22} Regulations may include procedures for expedited hearings,\textsuperscript{23} and for prehearing procedures.\textsuperscript{24} Supplemental explanatory materials, including forms and instructions may be developed by OAH through regulations.\textsuperscript{25} Regulations adopted by OAH shall apply to a proceeding before OAH regardless of whether the proceeding is subject to SG §10-201, et. seq., unless federal or state law requires a specific regulatory procedure.\textsuperscript{26}

COMAR Title 28 contain the OAH regulations. “The Rules of Procedure codified at COMAR 28.02.01 govern all hearings conducted by the OAH and serve to supplement the procedures required by statute.”\textsuperscript{27} Three separate subtitles are included in Title 28. Only Subtitle 2, dealing with the Rules of Procedure for practice before OAH, are discussed in any detail in these materials. There are three separate subtitles to COMAR Title 28.

**TITLE 28. OFFICE OF ADMINISTRATIVE HEARINGS**

**SUBTITLE 01. Administration**

**SUBTITLE 02. Rules of Procedure**

**SUBTITLE 03. Fees**

Subtitle 01 contains administration provisions applicable to OAH. There are provisions for: employee grievances; family relations policy; the removal, suspension, or demotion of an ALJ; Public Information Act requests; and a provision for the correction or amendment of personal records.\textsuperscript{28}

\textsuperscript{20} There is a difference of opinion on the necessity and/or desirability for judges who specialize in different areas. This position of OAH is submitted by Administrative Law Judge Guy J. Avery and reflects the consistent position of OAH.

\textsuperscript{21} SG §10-206(a). COMAR 28.02.01.01C. & D.

\textsuperscript{22} SG §10-206(b). \textit{Mehrling v. Nationwide}, 371 Md. 40, 805 A. 2d 662 (2002) is cited for this proposition and gives as an example the Maryland Insurance Administration, which Agency has promulgated regulations in COMAR 31.02.02 governing how a contested case hearing is to be conducted by the OAH. Insurance Commissioner control over delegated cases is retained. 371 Md. at 53. Likewise, the State Retirement and Pension System of Maryland is required by controlling statute to adopt regulations governing procedures under the MAPA. \textit{State Ret. & Pension Sys. v. Thompson}, 368 Md. 53, 63-64, 792 A.2d 277 (2002).

\textsuperscript{23} SG §10-206(c).

\textsuperscript{24} SG §10-206(d).

\textsuperscript{25} SG §10-206(e).

\textsuperscript{26} SG §9-1607.2.


\textsuperscript{28} The Sections within this Subtitle are:

**SUBTITLE 01. ADMINISTRATION**

**CHAPTER 01.** Family Relations Policy

**CHAPTER 02.** Employee Grievance Procedures - Repealed

**CHAPTER 03.** Administrative Law Judge Removal, Suspension, or Demotion for Cause Charges

76
COMAR 28:01.04, dealing with Public Information Act requests, will be dealt with in Chapter 6. The Contested Case, E, where discovery is discussed. Otherwise, individuals who have an interest in any of this section material should carefully examine the COMAR regulations.

Subtitle 2 of Title 28 deals with the OAH Rules of Procedure. No attorney can effectively practice before OAH without knowledge of these rules. These Rules of Procedure will be examined in Chapter 6 (The Contested Case). A copy of the Maryland statutes dealing with OAH and the OAH Rules of Procedure are attached to Chapter 6 as an Appendix B and Appendix C.

The sections within Subtitle 2 are:

**SUBTITLE 02. RULES OF PROCEDURE**

**CHAPTER 01. RULES OF PROCEDURE**

- COMAR 28.02.01.01 Scope.
- COMAR 28.02.01.02 Definitions.
- COMAR 28.02.01.03 Initial Pleading; Commencement of Case.
- COMAR 28.02.01.04 Transmittal of Request for Hearing.
- COMAR 28.02.01.05 Notice of Hearing.
- COMAR 28.02.01.06 Expedited Hearings.
- COMAR 28.02.01.07 Venue.
- COMAR 28.02.01.08 Powers and Duties of Judges.
- COMAR 28.02.01.09 Appearance of Parties at Hearings; Representation.
- COMAR 28.02.01.10 Discovery.
- COMAR 28.02.01.11 Subpoenas.
- COMAR 28.02.01.12 Intervention.
- COMAR 28.02.01.13 Prehearing Conferences.
- COMAR 28.02.01.14 Alternative Dispute Resolution (ADR).
- COMAR 28.02.01.15 Stipulations and Affidavits.
- COMAR 28.02.01.16 Motions.
- COMAR 28.02.01.17 Conduct of Hearings.
- COMAR 28.02.01.18 Evidence.
- COMAR 28.02.01.19 Appointment of Interpreter.
- COMAR 28.02.01.20 Failure to Attend or Participate in a Hearing, Conference, or Other
Finally, there is Subtitle 03 of COMAR Title 28. That Subtitle pertains to the fees charged by OAH, the waiver of those fees, etc. Some provisions of this Subtitle will be dealt with in Chapter 6. The Contested Case.  

D. Representation of Individuals Before OAH.

Representatives of individuals who appear before the OAH are not always required to be admitted to the practice of law. There are provisions in Maryland law allowing non-attorneys to represent individuals who seek services such as those provided by the Department of Human resources, the Department of Health and Mental Hygiene, a grievant; corporate designees in some insurance article proceedings; officers or employees of corporations or partnerships before the Home Improvement Commission, MOSH, etc. Individuals who are not attorneys and who desire to represent others before the OAH must consult the provisions of SG §9-1607.1 to determine their eligibility.

A party may represent himself/herself at a hearing and may be represented by an attorney. In certain cases the party may be represented by an individual who is not an attorney.  

A person may represent himself/herself before an administrative agency. Entities such as corporations and partnerships cannot be represented by an officer, director, employee or member without specific statutory authorization allowing that representation. Attorneys may represent an individual or entity. In specified situations, individuals other than attorneys may appear in a representative capacity. Without specific statutory authorization to represent another individual, an individual, other than an attorney, is committing a crime by practicing law without being admitted to the Bar.

---

31 The provisions in this Subtitle are:
SUBTITLE 03. FEES
CHAPTER 01. FEES
Comar 28.03.01.01 Scope.
Comar 28.03.01.02 Definitions.
Comar 28.03.01.03 Payment of Filing Fee.
Comar 28.03.01.04 Payment of Subpoena Processing Fee.
Comar 28.03.01.05 Assessment of Penalty for Insufficient Checks.
Comar 28.03.01.06 Waiver of Fees.
Comar 28.03.01.07 Penalty for Failure to Pay Fees.
Comar 28.03.01.08 Refund of Filing Fee.
32 COMAR 28.02.01.09 A & B.
1. Attorneys.

As a general rule, there is no constitutional right to representation by counsel in an administrative proceeding.34 Both the Federal APA and Maryland’s APA (MAPA) permit an individual to be represented by counsel at the expense of a party.35 MAPA provides that an agency may not:

1. grant the right to practice law to an individual who is not authorized to practice law;
2. interfere with the right of a lawyer to practice before an agency or OAH; or
3. prohibit any party from being advised or represented at the party’s own expense by an attorney or, if permitted by law, other representative.36

There is a very limited legal requirement that the State of Maryland furnish publicly provided legal services in any agency or OAH proceeding.37 For instance, individuals proposed for involuntary commitment to a mental institution have the right to a Public Defender during the administrative hearing.38

Only attorneys authorized to practice law in Maryland may appear in representation of an individual or entity. Attorneys from other jurisdictions are properly referred to the provisions of rule 14,39 Special Admission of Out-of-State Attorneys, which must be satisfied before an attorney can practice before a Maryland court or an administrative body.40

2. Representation by non-Attorneys before OAH.

Under stated circumstances, there is a right of individuals, not admitted to the practice of law, to represent individuals before the OAH.41 As stated above, a party may represent himself/herself before OAH.42 An individual who is not licensed to practice law in Maryland may represent a party in an OAH hearing if that individual is authorized by law to represent:

34 2 Am Jur 2d Administrative Law §321.
35 2 Am Jur 2d Administrative Law §322 citing 5 U.S.C.A. §555(b) and the Model State Administrative Procedure Act §4-203(b).
36 SG §10-206.1(a). In federal law, an agency may discipline or disbar individuals who appear before the agency. 2 Am Jur 2d §325. No Maryland case law has yet been developed on this issue.
37 SG §10-206.1(b). To like effect see 2 Am Jur 2d Administrative Law §322. Am Jur points out that a party’s statutory right to counsel (as opposed to a constitutional right) is safeguarded when the agency advises the party of the right and gives a party a list of free and inexpensive legal services in the area, and postpones the hearing to allow time to secure representation.
38 Judge Guy J. Avery has pointed out this requirement of representation to me. The further development of these materials will allow me to give more information on this aspect of legal representation in the future.
39 Practically what this means is that an attorney licensed in another state, may practice before an administrative agency, but not until that attorney complies with the procedures which require filing in a circuit court the a motion for admission and having an order signed allowing that admission.
40 The practice of law is regulated in Maryland by the Judicial Branch of Maryland Government, and through Title 10 BOP entitled, “Lawyers.” This statutory scheme is properly referred to as the “Maryland Lawyers Act.” Within BOP Title 10 are provisions for admission to the Maryland Bar, the establishment and maintenance of the client Protection Fund, and miscellaneous provisions such as a statute on attorneys’ liens. The unauthorized practice of law is a crime. Monetary penalties and imprisonment may be imposed upon conviction. The Office of the Attorney General is authorized to investigate the alleged commission of that crime. BOP §§ 10-404; 10-601 through 10-606.

Title 16, Chapter 700 of the Maryland Rules of Procedure contain provisions for disciplining attorneys. An Appendix to the Maryland rules contains the “Rules of Professional Conduct,” binding on members of the Maryland Bar. There is also within the Maryland Rules a section governing admission before the bar.
41 SG §9-1607.1. 2 Am Jur 2d Administrative Law §323 points out that nothing in the federal APA prohibits a non-attorney or non-CPA(tax matters) from representing an individual before an agency if permitted by agency rule.
42 SG §9-1607.1(c).
1. an individual who is a recipient or applicant for benefits, based on the applicant’s income, provided by the Department of Human Resources or the Department of Health and/or Mental Hygiene;

2. an individual who is a resident of a facility (comprehensive care facility or an extended care facility) seeking compliance by or for a resident for statutory required services to be provided to a resident of the facility (under HG §19-343), who may be represented by next of kin, a guardian or the Department of aging;

3. a mental health care facility in an: (1) involuntary admissions proceeding; (2) a proceeding when an individual refuses to take medication; or (3) when there are allegations of a violation of the conditional release of an individual committed to the Department of Health and Mental Hygiene after having been found not criminal responsible. The facility itself, however, must be represented by counsel if it is a corporation.

4. one involved in a hearing where notice is given by a facility to a resident that he/she will be discharged or transferred (under HG §19-345.1), which law requires notice to the resident of the right to consult with an attorney and the availability of “the services of the Legal Aid Bureau, the Older American Act Senior Legal Assistance Programs, and other agencies that may provide assistance to individuals who need legal counsel, and also the availability of the Department of Aging and local Office on Aging Long-term Care Ombudsman to assist the resident. Because the notice of transfer or discharge must also be given to the next of kin, guardian, or any other individual known to have acted as the individual’s representative, it is a fair assumption that the individual may also be represented at a hearing by any of these individuals, to whom notice is given.

5. an individual in a hearing concerning an emergency evaluation (HG §10-622), which statute authorizes any individual to appear before a court if the person has reason to believe that the individual has a mental condition and presents a danger to himself or others. The statute authorizes a physician, psychologist, health officer or designee of a health officer or a peace officer and an individual informed of the facts leading to the filing of the petition to participate in the court hearing and presumably in a follow up administrative proceeding;

6. an individual involved in a hearing where an institution is seeking to compel the administration of medication (HG §10-708);

43 SG §9-1607.1(a)
44 HG §19-343(a).
45 Requirements by the statute include application to the facility, charges beyond medical assistance allowance, distribution from funds belonging to a resident, providing statements relating to services and charges, the resident’s participation in planning for his/her care, confidential information requirements, communication between the resident and others, visitors, personal effects of the residence, privacy issues, the right to file a grievance, etc.
46 Defined by HG §10-101(e) to mean “any public or private clinic, hospital, or other institution that provides or purports to provide treatment or other services for individuals who have mental disorders.”
47 HG §10-632.
48 HG §10-708 dealing with the rights of mentally ill individuals in mental facilities.
49 Crim. Proc. §3-121.
50 HG §19-343.1(b)(4)-(6). Note that HO §10-622 is concerned with witnesses at a hearing and it provides that when an individual is the subject of a hearing concerning an emergency evaluation, individuals may appear before a court if the person has reason to believe that the alleged disabled has a mental condition and presents a danger to himself or others. The statute authorizes a physician, psychologist, health officer or designee of a health officer or a peace officer and an individual informed of the facts leading to the filing of the petition to participate in the court hearing and presumably in a follow up in the administrative proceeding.
51 HG §§10-622 – 10-626.
7. an inmate submitting a grievance to the Inmate Grievance Office [Title 10, subtitle 2 of the Correctional Services article], “provided the representation is not otherwise restricted for reasons of security or expense pursuant to regulations, rules, directives, or policies adopted by the Division of Correction or Patuxent Institution;”

8. the designee of a corporation under Ins. §27-605 concerning cancellations, nonrenewals, premium increases or reductions in insurance coverage;

9. the individual is an officer of a corporation or the designee of an officer, a general partner in a partnership or the designee of a general partner, or an employee designed by the owner of a business operated as a sole proprietorship in an hearing: (a) before the Home Improvement Commission [BR §8-312]; (b) under the Occupational Safety and Health provisions of the Maryland Code [LE, Title 5]; or (c) pursuant to regulations adopted by the Board of Public Works [SFP §14-303] for minority business preference participation in state contracts;

10. the designee of an insurer employed in claims, underwriting, or as otherwise provided by the Commissioner who is given authority by the insurer to resolve all issues involved in the proceeding;

11. an individual representing a unit of State government at the direction of that unit;

When a business entity designated an employee representative, the designation is to be by way of a power of attorney sworn to by the employer “that certifies that the designated employs is an authorized agent of the business entity and may bind the business entity on matters pending before” OAH. The individual may not be an attorney suspended or disbarred in any state. Also a “business entity may not contract, hire, or employee another business entity, other than an attorney, to provide appearance services. No business designated employee may be assigned on a full time basis to appear in administrative hearings before” OAH.

COMAR 28.02.01.09C allows OAH to accept any properly executed power of attorney meeting the requirements of SG §9-1607.1 to represent an individual or entity. OAH has the right to provide a form power of attorney and to allow the power of attorney to be kept on file at OAH. ALJ’s are to be provided with a power of attorney allowing representation at the outset of any hearing. An appearance shall be entered by the representative and that representative “shall be copied on all notices, pleadings and other correspondence.”

---

52 Title 27 of the Ins. Code is titled “Unfair Trade Practices and Other Prohibited Practices.”
53 SG §9-1607.1(b).
54 Id.
55 Id.
blank page
“When a proceeding meets the definition of a ‘contested case’ the agency must provide trial type procedures. The MAPA ‘itself does not grant a right to a hearing. The right must come from another source such as a statute, a regulation, or due process principles.”

OAH has promulgated its own rules or procedure for the conduct of contested cases. These rules are to be found in COMAR 28.02.01, et. seq. As stated in Chapter 3 of this book, most agencies have the right to utilize the services of OAH to conduct a contested hearing, and to have an ALJ make either a proposed finding or final decision on an issue. Some agencies have promulgated their own rules of procedure. In some places, the Maryland Code mandates that contested cases be heard and decided (final decision) by OAH.

This Chapter 6 is divided into the following sections:

A. What is a Contested Case? ......................................................................................... 85
   (1) Agencies to Which the MAPA is applicable .............................................................. 86
   (2) The Definition of a Contested Case ......................................................................... 87
B. Notice of Charges ....................................................................................................... 90
C. Notice of a Hearing ..................................................................................................... 91
   (1) Generally.................................................................................................................. 92
   (2) OAH ........................................................................................................................ 93
D. Motions and Other Prehearing Matters ................................................................... 94
   (1) Prehearing Conferences ......................................................................................... 94
   (2) Motions Practice ..................................................................................................... 95
E. Discovery ..................................................................................................................... 96
   (1) Generally ................................................................................................................ 96
   (2) Public Information Requests .................................................................................. 96
F. The Hearing ............................................................................................................... 99
   (1) OAH In General .................................................................................................... 100
   (2) Opening .................................................................................................................. 101

2 SG §10-205.
3 For example:
   Cor. §10-207 (inmate grievance actions)
   Ed. §5-203 (retirement contributions to local school systems)
   Ed. §8-307 (admission to the schools for the deaf and blind)
   Ed. §8-413 (special education cases)
   FL §5-525 (foster care out-of-home placements)
   FL §5-706.1 (neglect and abuse of children)
   FL §10.119.3 (suspension of occupational licenses for child support arrearages)
   P&P §5-310 (State whistle blower cases)
   Art. 49B (Human Relations Commission hearings)
   Art. 27, §255C (Washington County Gaming Commission)
§10-222.1. Administrative orders.
§10-223. Appeals to Court of Special Appeals.
§10-224. Litigation expenses for small businesses and nonprofit organizations.
§10-225. Suspension of provisions.
§10-226. Licenses - Special provisions.

J. COMAR Regulations. The Office of Administrative Hearings Regulations. Rules of Procedure... 138

A. What is a Contested Case?
The MAPA is not applicable to all administrative hearings before all agencies of the State of Maryland. A statute (SG §10-203) delineates what is covered by the MAPA, and what is not covered. Case law has addressed disputes as to whether a particular agency proceeding is governed by the MAPA. Even if the agency is within the ambit of the statutory direction that the MAPA governs its actions, a particular issue before that agency may fall within the definition of a contested case.

There are time limits within which a contested hearing must be sought. In *Prince George's County DSS v. Knight*, 158 Md. App. 130, 854 A. 2d 907 (2004), Telania Knight had 60 days after receiving notice of an indicated abuse finding against her child to request a contested case hearing pursuant to FL §5-706.1(b). The dispute as to whether issuance of the notice or receipt of the notice triggered the 60 day
period was the subject to dictionary definition reference and statutory construction. *Knight*, 158 Md. App. at 138-39.4

(1) Agencies to Which the MAPA is applicable
It is legislative policy that statutory procedures are enacted to:

1. “ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and
2. promote prompt, effective, and efficient government.”5

Generally, all agencies of State Government are governed by Subtitle 2 (contested cases) of Title 10 (governmental procedures), unless excluded.

Throughout Subtitle 2 there are references to an “agency,” and “agency,” which is defined to mean

1. “an officer or unit of [Maryland] State government authorized by law to adjudicate contested cases,” or
2. “a unit that is created by general law; operates in at least 2 counties; and is authorized by law to adjudicate contested cases.”6

By specific statutory provision (SG §10-203), the MAPA does not apply to:

1. the Legislative or Judicial Branch of Maryland State Government, or
2. Executive Branch functions concerning:
   A. the Governor;
   B. the State Department of Assessments and Taxation;
   C. many proceedings before the Insurance Administration;7
   D. the Injured Workers’ Insurance fund;
   E. the Maryland Parole Commission;
   F. the Public Service Commission;
   G. the Maryland Tax Court;
   H. the Worker’s Compensation Commission;
   I. the Maryland Automobile Insurance fund;
   J. the Patuxent Institution Board of Review when acting on a parole request;
   K. an officer or unit not part of a principal department of State government created pursuant to the Maryland Constitution or general or local law that operates in only 1 county and is subject to the control of a local government or is funded wholly or partly from local funds;
   L. Unemployment insurance claim determinations, tax determinations, and appeals in the Department of Labor, Licensing, and Regulation except as specifically provided in Subtitle 5 of Title 8 in the Labor and Employment Article;8
   M. property tax assessment appeals boards;

---

4 In this opinion, Judge Bloom detailed the responsibility of health practitioners, police and others to report children subjected to abuse, *Knight*, 158 Md. at 133, and the provisions of FL §5-706 requiring investigation by DSS and notice to an individual before a name can be put on a central registry as an abuser. *Knight*, 158 Md. App. at 134.
5 SG §10-201.
6 SG §10-202(b).
7 SG §10-203 states that this exclusion applies to “the Insurance Administration except as specifically provided in the Insurance Article.”
8 Subtitle deals with Board of Appeals of Department of Labor, Licensing, and Regulation. Within the provisions of this Subtitle are references to ex parte communications, records, etc., whereby the provisions of the MAPA do apply.
N. requests for correction of certificates of death under HG §5-310(d)(2) pertaining to the
Office of the Chief Medical Examiner;
O. contested cases arising from the State program administered by the Montgomery County
Department of Human Services in the same manner as the Subtitle applies to a county
health department of local department of social services; and
P. any other entity otherwise expressly exempted by statute.

When a public hearing is required or provided for by statute or regulation before an agency takes a
particular action, that agency is not an agency as defined in the MAPA unless: (1) the statute or regulation
expressly requires that the public hearing be held in accordance with this Subtitle 2 of title 10 of the State
Government Article, or (2) expressly requires that any judicial review of the agency determination
following the public hearing be conducted in accordance with this Subtitle 2.

**Significant Case Decisions**

**Sometimes the grievance right to a contested hearing may be trumped by another process**

Title 12 of the State Personnel and Pensions Article (SPP) sets forth a grievance procedure for most
Executive Branch State employees, the grievance procedure was not available to employee of the Baltimore
City Department of Social Services, a unit of the State Department of Human Resources. 379 Md. at 409.
Reviewing SPP §10-102, et. seq. and the grievance procedure, Judge Wilner focused on a 1999 enactment
by the General Assembly establishing limited collective bargaining rights for State Executive Branch
employees. 379 Md. at 411. Walker and other employees were covered by a Memorandum of
Understanding (MOU) entered into by the State and Council 92 of the American Federation of State,
County, and Municipal Employees (AFSCME), and that meant this particular grievance (a complaint
against a supervisor who was alleged to have caused many problems in the working environment) was
covered by the provisions of the MOU. Analyzing the grievance, the MOU and the SPP statutes, Judge
Wilner entered into a statutory construction to resolve the dispute of who was to resolve the grievance. 379
Md. at 419-23.

The mere existence of an MOU does not, therefore, deprive an employee of the statutory
grievance procedure. Art. 30, § 1 clearly precludes parallel and alternative procedures for
resolving disputes and carefully delineates when each of the two procedures is exclusively
applicable. If the dispute falls within the ambit of the title 12 grievance procedure, the MOU
procedure is not available; the employee has only the title 12 procedure. The exclusivity of the
MOU procedure comes into play only when (1) the basis of the dispute arises solely from a
provision of an MOU, (2) the dispute concerns the interpretation or application of the MOU, and
(3) the dispute no longer falls (or perhaps never fell) within the definition of a grievance for
purposes of title 12. We affirm the judgment of the Circuit Court because that is the case here.
379 Md. at 423.

**The Definition of a Contested Case**

"When a proceeding meets the definition of a ‘contested case’ the agency must provide trial type
procedures. The MAPA ‘itself does not grant a right to a hearing. The right must come from another
source such as a statute, a regulation, or due process principles.’"9 "..."[A] 'judicial' or 'trial-type'
hearing is not a requirement of procedural due process where an administrative agency does not act in a
*quasi-judicial capacity* and the facts to be determined are 'legislative' rather than adjudicative in nature."
"It is the nature of the dispute, rather than the stage of the proceedings, that determines whether or not a

---

matter is a contested case." Under "the APA, a dispute resolved prior to a formal hearing may, nonetheless, be a contested case." The MPHA (SG §202) defines a "contested case." This statute, along with case law, tells us what a "contested case" is and what it is not.

A "contested case" is a proceeding before an agency to determine:

1. a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or

2. the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.

A "contested case" does not include:

1. a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle,

2. Any proceeding before a person, body or agency excluded from the provisions of the MAPA by SG §10-203.

"It is well settled that a party is entitled to a quasi-judicial hearing before an administrative agency only if that type of hearing is required by statute or regulation or mandated by constitutional due process concerns." The General Assembly, in providing for judicial review of actions by administrative agencies, may not confer upon the courts the ability to review quasi-legislative decisions by substitution of the court's judgment, as to the wisdom of the administrative action, for that of the agency. For example, the authority of the Maryland Insurance Administration to approve rates and forms is a quasi-legislative function, not subject to an adjudicatory process that would require a quasi-judicial hearing.

Case law determining whether a proceeding comes within the "contested case" provisions of the MAPA focuses on the nature of the dispute and whether that dispute entitles the parties to a hearing to

---


11 Modular Closet v. Comptroller, 315 Md. 438, 445, 554 A. 2d 1221 (1989). The episode that generated this statement from the Court had to do with Modular Closet's (seller of portable closet inserts) application for attorneys fees under the Small Business Litigation Expenses Act (SG §10-217). Controversy focused on the Comptroller's argument that it had not pursued its assessment of a retail sales tax, and thus, no contested case had occurred to trigger the operation of the Act. "In the present case, the levy of the assessment against modular moved the proceedings beyond the preliminary investigation stage. At that point Modular became entitled to an eventual hearing." Thus, the issue of attorneys fees could be considered. 315 Md. at 447-448.

12 SG §10-202(d).

13 SG §10-202(d).


15 Weiner, 337 Md. at 190 citing Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 334 A.2d 514 (1975).

16 Weiner, 337 Md. at 193-94.
determine their rights and duties. Decisions do not focus on the timing of the proceedings or the stage at which the dispute terminates. 17 In addition to the definition of “contested case” within the MAPA another federal or state statute may mandate administrative hearings. 18 The right to a hearing depends on the character of the proceeding and the nature of the interest of the person seeking relief. 19

**Significant Case Decisions:**

**An agency cannot do an end run around the contested hearing requirement**
- Local DSS agencies were not allowed to maintain files on individuals investigated for child abuse which resulted in findings either of “indicated” or “unsubstantiated” in *Montgomery County DSS v. L.D. et al*, 349 Md. 239, 707 A. 2d 1331 (1998) without first affording a contested case hearing to the individuals whose names DSS wanted to place in the registry. 20 State law requires that before names of individuals may be placed in a Central Registry (FL 5-714 & FL 5-715) base, the individual “can request an administrative hearing by responding to the local department’s notice in writing...” 349 Md., at 248. 21 Maintenance of Automated Master files and Client Information Systems were statewide registries and are therefore subject to the contested case hearing procedures mandated by FL §5-703. 349 Md. at 260. 22

“Central registry” included the AMF and CIS databases operated by the DHR and local departments. Accordingly, prior to the entry of their names as suspected child abusers and neglectors into these databases, accused individuals must be provided a full contested case hearing and the concomitant right to judicial review...” 349 Md. at 275. The holding: “Taking into consideration the plain meaning of the term ‘central registry’ and the legislative history and purpose of the Child Abuse and Neglect statute, we hold that the term ‘central registry’ includes the AMF and CIS databases now operated by the DHR and local departments. Accordingly, prior to the entry of their names as suspected child abusers and neglectors into these databases, accused individuals must be provided a full contested case hearing and the concomitant right to judicial review in accordance with section 5-715 and our opinion in *C.S.*” 344 Md. at 275.

**It is the nature of the dispute that determines whether a contested hearing is required**
- Litigation expenses are authorized by SG §10-224 to be reimbursable to small businesses and non profit organizations in “contested cases” before State agencies when State action is initiated without substantial justification. Whether a proceeding is a contested case does not depend on the timing of the proceedings or the state at which the dispute terminates. *Modular Closet v. Comptroller*, 315 Md. 438, 445, 554 A. 2d 1221 (1989). “Rather the Court has focused on whether the nature of the dispute entitles the parties to a hearing to determine their rights or duties.” Id.

---

18 *Modular Closet*, 315 Md. at 446 citing a case where a hearing was mandated for individuals denied emergency benefits under the aid to families with Dependent Children program.
20 Three cases were consolidated: (1) D.N. is a tenured public school teacher found responsible for indicated abuse of a student arising out of an incident where a student was burned in a shop class by a hot tool. D.N. asserted the contact was accidental. (2) T.E.P. is a private school teacher classified as an “indicated” abuser after an in-school paddling of a student by T.E.P. (3) L.D is a day care provider found responsible for “indicated” neglect.
21 The Court detailed the procedure of investigation of child abuse complaints and findings made, *L.D.*, 349 Md. at 247-249; the maintenance of records of abuse; and the 1966 enactment providing for a Central Registry, *L.D. 349 Md.* at 249-54.
22 The Court stated:

In this consolidated appeal, we must address the issue left unanswered in *C.S.*, 343 Md. at 34 n.8, 680 A.2d at 480 n.8: “Whether records stored in the AMF [and CIS] are...central registries' within the meaning of [section] 5-714.” We answer this in the affirmative and hold that because the AMF and CIS registries are statewide, comprehensive databases containing information identifying suspected child abusers, available on a statewide basis, these databases constitute central registries and therefore are subject to the contested case hearing procedures mandated by section 5-715 and C.S.

*L.D.*, 349 Md. at 260.

The decision in *C.S.*, 343 Md. was reviewed, statutory interpretation principals were applied, legislative history was set forth, case law was reviewed, and the holding announced. *L.D.*, 349 Md. at 262-275.
hearing and the contested case provisions of MAPA became applicable. In this case the dispute was resolved prior to a formal hearing by the abatement of the assessment by the Comptroller. 315 Md. at 443. The trial court erred in determining that the "contested case" provisions of the MAPA did not apply. 315 Md. at 446.23

Approval of rates by the Insurance Commissioner is a quasi-legislative function

Some legislative hearings require a hearing, but that does not necessarily mean a contested hearing

- In Weiner v. Maryland Insurance Adm., 337 Md. 181, 652 A. 2d 125 (1995), Blue Cross and Blue Shield of Maryland filed a form of contract with the Maryland Insurance Administration (MIA) to the effect that the insurer would enter into a reimbursement formula with participating pharmacies for filling prescriptions. The Commissioner's authority to approve rates is a quasi-legislative function. The proposal before the Commissioner pertained to individuals who were insured under the plan, and the policy determination was a quasi-legislative rate setting function. Therefore, the pharmacists had no right to an adjudicatory hearing. 337 Md. at 194.

- In construing a statute, the legislature is presumed aware of the words used in a statute. In Social Services v. Linda J., 161 Md. App. 402, 869 A. 2d 404 (2005), when the Legislature said that an individual found guilty of a criminal charge of abuse or neglect is not entitled to contested case hearing, that includes the receipt of a PBJ on that guilty finding. 161 Md. App. at 409. There was no right to a contested hearing when DSS "indicated child abuse" in this case before the name of Ms. J's name would be placed in the agency's central registry of suspected child abusers. The criminal charge against her for striking her eight-year-old foster daughter with a belt was disposed of with a PBJ. FL §5-706.1 setting forth the procedure for notification and appeal of a finding of "indicated child abuse or neglect" states that if the individual is found guilty there is no right to a contested hearing. A person receiving a PBJ is first determined to be guilty and no contested hearing is allowed. 161 Md. App. at 409-510.

B. Notice of Charges

MAPA states specific requirements an agency must follow to constitute notice of agency action. Whatever notice is given, the notice must be "reasonable." A basic tenant of fair play in administrative proceedings is the right of a party to be given adequate notice of the nature of the proceeding in order that he may prepare his defenses.24

In an adversary proceeding, due process requires that an individual against whom proceedings are instituted be given notice and an opportunity to be heard. The notice must be "reasonably" calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. A court, in considering the reasonableness of notice, "must balance the interests of the state or the giver of notice against the individual interest sought to be protected

23 In this 1989 decision, Judge Eldridge for the Court of Appeals listed a number of cases addressing the issue of whether a proceeding was a contested case within the meaning of the MAPA:


Modular Closet, 315 Md. at 445.

In addition to the listing, the Court specifically addressed fact situations in many of the cases cited during its analysis of the issue. Modular Closet, 315 Md. at 445-47.

by the fourteenth amendment." Thus, in determining whether notice was reasonable, a court must evaluate the specific circumstances of each case. In addition to constitutional due process requirements, SG §10-207(a) (MAPA) also requires an agency to give reasonable notice of its action:25

- The facts asserted stated concisely and simply
- The pertinent statutory and regulation sections under which State action is taken
- The sanction or proposed penalty
- The right to request a hearing and how to make that request
- All relevant time requirements
- The consequences of not appearing

SG §10-207. Notice of agency action.
(a) In general.- An agency shall give reasonable notice of the agency's action.
(b) Contents of notice.- The notice shall:
   (1) state concisely and simply:
      (i) the facts that are asserted; or
      (ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;
   (2) state the pertinent statutory and regulatory sections under which the agency is taking its action;
   (3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;
   (4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:
      (i) what, if anything, a person must do to receive a hearing; and
      (ii) all relevant time requirements; and
   (5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.
(c) Consolidation of notices.- The notice of agency action under this section may be consolidated with the notice of hearing required under § 10-208 of this subtitle.
(d) Publication in Register.- For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.
[An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239; 1993, ch. 59, § 1.]

**Significant Case Decisions**

**Adequacy of the notice depends on the totality of the circumstances**
- One of the allegations in Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 511, 707 A. 2d 891 (1998), *affirmed*, Regan v. Board of Chiropractic Examiners, 355 Md. 397, 735 A. 2d 991 (1999) was that adequate notice was not given of the charges against Dr. Regan. Due process violations were not accompanied by specifics. The record supported the fact that Dr. Regan had delegated duties to employees not authorized to perform them and that he billed patients for treatments that were not rendered, as alleged by the Board in the complaint filed against him. 120 Md. at 519-23

**C. Notice of a Hearing**
An agency is required to give reasonable notice, an opportunity to be heard, and to conduct a fair hearing as part of basic due process requirements.

---

25 *Regan v. Board of Chiropractic Examiners*, 120 Md. App. 494, 511, 719, 707 A. 2d 891 (1998), *affirmed*, Regan v. Board of Chiropractic Examiners, 355 Md. 397, 735 A. 2d 991 (1999). Separate and apart from what the notice requirements of the statute or regulations are, there is a requirement of fundamental constitutional due process that reasonable notice of the charges against an individual must be given to that individual prior to commencement of a hearing.
(1) Generally
The Maryland Administrative Procedure Act requires that all parties in a contested case shall be given “reasonable” written notice of the hearing. SG §10-208 specifically spells out what that notice is to include. The statutory requirement goes well beyond stating that a contested hearing is going to be heard at a stated time in a specific place. What is required is that the notice contain the following:

1. the date, time, place, and nature of the hearing;
2. the right to call witnesses and submit documents or other evidence under SG §10-213 (f) [scope of evidence] of the Administrative Procedure Act
3. any applicable right to request subpoenas for witnesses and evidence, and the cost, if any, to request a subpoena;
4. that a copy of the hearing procedure is available on request, and the cost, if any, to obtain that copy;
5. any right or restriction pertaining to representation;
6. that the failure to appear for the scheduled hearing may result in an adverse action against the party; and
7. that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.

COMAR 28.02.01.05 applies to OAH hearings and this regulation also sets forth requirements to be contained in the notice of the hearing. Basically, the regulation parallels the statute, but does add a notice that a party has the right to cross examine a witness produced by another party.

8. the right to cross examine witnesses any witness that another party calls26

Both the notice of hearing and the notice of agency action may be combined. SG §10-208(c).

Publication in the Maryland Register of the fact that a hearing will be held does not constitute reasonable notice to a party. SG §10-208(d).

Always, the attorney representing a client before an agency must do a complete review of all statutes and regulations pertaining to a hearing before that agency to ascertain the notice requirements. Agency hearing notice provisions are diverse as indicated by the following three examples:

BR §17-324 concerns hearings involving Real Estate Brokers. In addition to other hearing requirements, that section sets forth notice of hearing requirements:
(d) Specific notice requirements.-
(1) At least 10 days before the hearing, the hearing notice to be given to the individual shall be:
(i) served personally on the individual; or
(ii) sent by certified mail to the last known business address of the individual.
(2) If the individual is an associate real estate broker or a real estate salesperson, at least 10 days before the hearing, the Commission shall give notice of the hearing to each real estate broker with whom the associate real estate broker or the real estate salesperson is affiliated by sending notice by certified mail to the last known business address of the real estate broker.

and

HO §13-317 concerned with Physical Therapists simply provides:

26 SG §10-213(f) dealing with the scope of evidence that may be produced on a genuine issue in a contested case specifically provides for the “cross-examination of any witness that another party or the agency calls.”
(b) Application of Administrative Procedure Act.- The Board shall give notice and hold the hearing in accordance with the Administrative Procedure Act.

and

Com. Law §13-403 allows the Consumer Protection Division of the Office of the Attorney General to hold a hearing to determine if a violation of the Consumer Protection Laws has occurred. As to charges filed and notice:

(a) Hearing.-
   (1) The Division may hold a public hearing to determine if a violation of this title has occurred.
   (2) The Division shall serve:
      (i) A statement of charges on the alleged violator; and
      (ii) A notice of the time and place of hearing on each party of record.

In addition there is COMAR 02.01.02.02 dealing with the hearing procedures initiated by the Consumer Protection Division which states:

COMAR 02.01.02.02 Hearing Notice.
A. Every hearing notice shall bear an identifying number which shall be the number assigned to all hearings, orders, and communications between the parties relating to the subject matter of the hearing.
B. Every hearing notice shall include:
   (1) The names of all parties of record;
   (2) The date, time, and place designated for the hearing;
   (3) Copies of any exhibits filed with the petition;
   (4) All allegations, made by the party proponent (for definition of "party proponent" see Regulation .14, below), of violations of the Consumer Protection Laws or regulations promulgated thereunder, committed by the party respondent.

(2) OAH

"The Rules of Procedure codified at COMAR 28.02.01 govern all hearings conducted by the OAH, and serve to supplement the procedures required by statute." SG §10-206(a)(1) requires OAH to "adopt regulations to govern the procedures and practice in all contested cases delegated to the Office [of Administrative Hearings] and conducted under this [(Administrative Procedure Act - Contested Cases)] subtitle." 27 In addition, the [M]APA authorizes an agency to adopt its own regulations to govern procedures in contested case hearings." SG §10-206(b) states that "each agency may adopt regulations to govern procedures under this [(Administrative Procedure Act - Contested Cases)] subtitle and practice before the agency in contested cases." 28 These regulations "shall be construed to ensure the fair and expeditious determination of every action." 29 These regulations are lengthy. Many terms are defined. 30

The timeliness of actions commenced by an agency depends on relevant statutes or regulations, and if no time period is specified an action must be commenced "within 30 days of the date of the notice of contested action." Time is computed in accord with Article 1, §36 of the Code of Maryland. 31

To obtain a hearing, a request for a hearing must be filed. That request is considered filed "within the time period specified by relevant law" or "within 30 days of the date of the notice of contested action"

28 Mehrling 371 Md. at 53.
29 COMAR 28.02.01. A & B.
30 COMAR 28.02.01.02.
31 COMAR 28.02.01.03.
if no time period is specified. The request for a hearing is to be “filed” on the earlier of the date the request is postmarked, or is received by OAH or the agency.

OAH (and most agencies) provide forms on which a request for a hearing may be made. It is best to use these forms though it is also permissible to request a hearing “in any other manner permitted by law.” Regulations are specific in stating that the request for a hearing must contain the following:
1. the name and address of the requesting party;
2. the notice (or a copy) of agency action or the name of the person or agency against whom the hearing request is filed;
3. any documents, or other information required by law; and
4. any fees required.

Expedited hearings “may” be given upon a motion setting forth the reasons for the request. If an expedited hearing is granted and the matter is heard by an ALJ, that ALJ “shall render the proposed or final decision within 30 days after the close of the record, unless the parties agree to a longer period or a shorter period is prescribed by law.”

D. Motions and Other Prehearing Matters
SG §10-206 requires OAH to adopt regulations to govern the procedures and practice in all cases delegated to the Office and conducted under Subtitle 2 (MAPA – Contested Cases) of Title 10 (Government Procedures). Statutory authorization is given for an administrative agency and/or OAH to adopt regulations that:

1. provide for prehearing conferences in contested cases; or
2. set other appropriate prehearing procedures in contested cases.

(1) Prehearing Conferences
Pursuant to the statutory authority, OAH has passed regulations for prehearing conferences. These prehearing conferences are not required in every case ("may" hold a prehearing conference.) COMAR 28.02.01.13 governs these conferences. Many matters may be discussed at a prehearing conference. Maryland Rule 2-504.2 deals with a pretrial conference in the circuit court. There is no reason why most of the matters considered at a circuit court conference cannot be the subject matter of discussion prior to an administrative hearing. The Rule identifies areas for possible discussion.

COMAR 28.02.01.13 Prehearing Conferences.
A. When appropriate, the judge may hold a prehearing conference to resolve matters preliminary to the hearing.

---

32 COMAR 28.02.01.03 B. “Computation of Time. Time shall be computed in accordance with Article 1, § 36, Annotated Code of Maryland.” COMAR 28.02.01.03 C.
33 COMAR 28.02.01.03 D.
34 COMAR 28.02.01.04 A.
35 COMAR 28.02.01.04 B.
36 COMAR 28.02.01.06 Expedited Hearings.
A. A motion for an expedited hearing may be filed by any party.
B. The motion shall set forth the reasons for expediting the hearing.
C. All parties shall be notified promptly of the decision on the motion.
D. If the motion for expedited hearing is granted, the judge shall render the proposed or final decision within 30 days after the close of the record, unless the parties agree to a longer period or a shorter period is prescribed by law.
37 SG §10-206(d).
38 COMAR 28.02.01.13A.
B. The judge may require the parties to submit information before the prehearing conference.

C. A prehearing conference may be convened to address the following matters:
   (1) Issuance of subpoenas;
   (2) Factual and legal issues;
   (3) Stipulations;
   (4) Requests for official notice;
   (5) Identification and exchange of documentary evidence;
   (6) Admissibility of evidence;
   (7) Identification and qualification of witnesses;
   (8) Motions;
   (9) Discovery disputes;
   (10) Order of presentation;
   (11) Scheduling;
   (12) Alternate dispute resolution; and
   (13) Any other matters that will promote the orderly and prompt conduct of the hearing.

D. Conduct. Except as otherwise indicated in this chapter, at the discretion of the judge, all or part of a prehearing conference may be recorded.

E. Prehearing Orders.
   (1) Unless otherwise stated in this chapter, when a prehearing conference has been held, a prehearing order shall be issued by the judge.
   (2) The prehearing order shall set forth the actions taken or to be taken with regard to any matter addressed at the prehearing conference.
   (3) If a prehearing conference is not held, the judge may issue a prehearing order to regulate the conduct of the proceedings.
   (4) The prehearing order shall be a part of the case record.

(2) Motions Practice
OAH has also adopted COMAR 28.02.01.15 titled "Motions." The regulation deals with pre-hearing motions, motions made during a hearing, motions to dismiss, motions for a decision, and a motion for judgment. As to the pre-hearing and during the hearing motions, the applicable provisions are:

COMAR 28.02.01.16 Motions.
A. Unless otherwise provided by this chapter, this regulation pertains to all motions filed with the Office.
B. Unless otherwise provided by this chapter:
   (1) A party may move for appropriate relief before or during a hearing;
   (2) A party shall submit all motions in writing or orally at a hearing;
   (3) Written motions shall:
      (a) Be filed as far in advance of the hearing as is practicable,
      (b) State concisely the question to be determined, and
      (c) Be accompanied by any necessary supporting documentation;
   (4) An answer to a written motion shall be filed on the earlier of:
      (a) 15 days after the date the motion was filed, or
      (b) The date of the hearing;
   (5) Upon notice to all parties, the judge may schedule a conference to consider a written motion;
   (6) The judge may issue a written decision on a motion or state the decision on the record;
   (7) If a ruling on a motion is not stated on the record, the ruling shall be included in the judge's proposed or final decision;
   (8) The filing or pendency of a motion does not alter or extend any time limit otherwise established by this chapter.

* * *
E. Discovery
Not all agencies have regulations allowing any discovery to the parties participating in a hearing. OAH has adopted discovery rules, though these rules are very limited. See Chapter 4. Due Process and Other Rights in Contested Hearings. F. Discovery, (page 51) The extent to which the allowance of discovery is part of due process entitlement has not been developed to much of an extent by case law.

(1) Generally
OAH regulations allow discovery, providing it is requested in writing filed not later than 30 days before a hearing. Discovery requested is to be produced within 15 days of the request so as to allow the requesting party to copy any file, memorandum, correspondence, document, object or intangible thing relevant to the subject matter of the case, and not privileged. No other discovery is provided unless there is an agreement between the parties. Copies of material requested in discovery shall be made at the expense of the party making the request, but that cost may be waived in accord with the provisions of Maryland’s Public Information Act.39

"...[A]bsent a statute to the contrary, the rules of discovery applicable to circuit court proceedings are not, generally, applicable with respect to MPIA [Maryland Public Information Act] proceedings."41
"The Maryland rules pertaining to pre-trial discovery in circuit court cases do not, generally, apply to administrative proceedings."42

(2) Public Information Requests.
"A party to an administrative proceeding might, pursuant to a proper MPIA [Maryland Public Information Act] request, be able to access information not normally available to that party under the prevailing administrative rules or if that party were a party to a court action and making such a request subject to the discovery rules."43

The basis of Maryland’s Public Access to Information Act (SG §§10-611-628) is that except as otherwise provided by law, a custodian of government documents shall permit a person to inspect any public record at a reasonable time. The provisions of the Act "reflect the legislative intent that citizens of the State of Maryland be accorded wide-ranging access to public information concerning the operation of their government." Thus, the Act is to be construed in favor of disclosure.44 SG 10-615(1) requires a custodian to deny inspection of a public record or any part of a public record if, "by law, the public record is privileged or confidential."45 A custodian is permitted to deny inspection of "any part of an interagency or intra-agency letter or memorandum that would not be available by law to a private party in litigation with the [governmental unit]."46 MPIA specifies time limits and procedures for requesting and furnishing information.47 One denied access to records may file an action in a circuit court.48

39 COMAR 28.02.01.10 A & B.
40 SG 10-601. et. seq.
42 Hammen 373 Md. at 457.
46 Stromberg, 382 Md. at 157 citing SG §10-615(b).
47 Stromberg, 382 Md. at 159-60.
48 Stromberg, 382 Md. at 160. See §10-623 (Judicial review)
SG §10-618 is titled “permissible denials.” This section allows a custodian to deny inspection of a public record if inspection “would be contrary to the public interest.” A custodian may deny inspection of interagency or intra-agency information; licensure examination material; research projects; real estate appraisals; records of certain governmental investigations by law enforcement authority; trade secrets, etc. \(^{49}\)


In many administrative agency proceedings, discovery rules are limited or non-existent. “... [I]n court cases discovery rules are applicable and are designed to assure a balance, and thus the applicable discovery rules, might, under circumstances of a particular case, be interpreted to prohibit a document or tape from being subject to discovery.” Administrative agency proceedings in which there are no such discovery rules cannot trump or thwart the very purpose of the MPIA, which permits a person to gain board access. The MPIA contains its own exemptions. \(^{50}\)

Absent a statute to the contrary, the rules of discovery applicable to circuit court proceedings are not generally applicable in respect to MPIA proceedings. \(^{51}\) The MPIA may be used to obtain documents that may be produced as evidence in administrative proceedings. \(^{52}\)

**Significant Case Decisions**

*There is to be broad access to public records*

Bow, private information (such as personnel records) is a different thing

- **Hammen v. Baltimore County Police Dept.,** 373 Md. 440, 453, 818 A. 2d 1125 (2003) decided an issue under Maryland’s Access to Public Records Act in the public interest, even though the matter was moot. \(^{53}\)

  Hammen suffered a disability due to an injury sustained in 1993. Videotapes taken of his activities were sought by him in relation to a re-evaluation of disability benefits proceeding. 373 Md. at 442-43. \(^{54}\) The request was denied. 373 Md. at 448. The Board of Appeals of Baltimore County correctly noted it had no power to enforce subpoenas or requests for information under the Maryland Access to Public Records Act. \(^{55}\) As to a request under MPIA, the Hammen Court stated: “The affording of broad access to public records by citizens is the very purpose of the MPIA, which generally affirm citizens' rights to access government records especially when they involve the requesting citizen. Such situations are very different from civil actions between private parties. An MPIA action is an attempt to gain statutorily guaranteed access to “public records,” not private information. The MPIA permits an interested party to request and

\(^{49}\) SG §10-618(b)-(i).

\(^{50}\) **Hammen,** 373 Md. at 456. In this case the Court said access was permitted to allow Hammen to gain access to a video surveillance tape that was going to be used by Baltimore County in a proceeding to re-evaluate his entitlement to disability benefits. Code §23-58 allowed periodic re-evaluation of disability. The videotapes were part of an investigation done by the Baltimore County Office of Law. Id., at 446.


\(^{52}\) **Hammen,** 373 Md. at 458. (concurring opinion summary)

\(^{53}\) Appellant had already received the surveillance tapes. The doctrine of mootness was discussed and the circumstances under which an opinion will be given to resolve a matter of public concern or an issue capable of repetition yet evading review. The Court held that the circumstances of this case fit both categories. **Hammen,** 373 Md. at 451.

\(^{54}\) The **Hammen** Court noted in FN 4 that anonymous individuals reported that Hammen was an active member of a volunteer fire department while collecting disability.

\(^{55}\) The Board of Appeals urged Baltimore County to give up the tape stating that if the tape was released at the hearing and a request was made for a continuance, the Board “will be inclined to grant such a continuance,” to give Hammen the opportunity to present additional evidence to counter the videotape. **Hammen,** 373 Md. at 447. The County Attorney made an offer to exchange the tape for its ability to take Hammen’s deposition, but that offer was declined. The **Hammen** Court stated the obvious: "A party to an administrative proceeding, pursuant to a proper MPIA request, cannot first be required to submit to a deposition before receiving surveillance videotapes, to which he is statutorily entitled." 373 Md., at 454.
receive the surveillance videotapes from the governmental agency possessing them because he or she is a party in interest and has a right to the tapes from the custodian of record.” 373 Md., at 456-57.

Freedom of information act used for discovery
- Office of the AG v. Gallagher, 359 Md. 341, 753 A.2d 1036 (2000) addressed the issue as to whether documents otherwise subject to disclosure under Maryland’s Freedom of Information Act were privileged as containing attorney mental impressions or attorney work product. The Court stated:
  ... Such records have not heretofore been discoverable pursuant to Rules 2-402(c) and 4-263(c). As this Court made clear in Fauk v. State’s Attorney for Harford Co., 299 Md. 493, 510, 474 A.2d 880, 889 (1984), the Public Information Act "was not intended to be a device to enlarge the scope of discovery beyond that provided by the Maryland Rules ..." On the contrary, the Act explicitly provides, in § 10-615, "that effect is to be given to court rules when to allow public inspection of public records would contravene those rules." State Prosecutor v. Judicial Watch, supra, 356 Md. at 133, 737 A.2d at 600.
  359 Md. at 347-48. [Emphasis by bold]
  The Court reviewed the Act and stated that the Act makes it clear that exemptions in the Act to documents otherwise subject to disclosure means that a person in interest cannot avoid all other exemptions under the Act simply because he is seeking disclosure of an investigatory file pursuant to St.Gvt. §10-618(f). 359 Md. at 348-355.

Public records and an executive or legislative privilege against disclosure
- In Stromberg v. University of Maryland, 382 Md. 151, 854 A. 2d 1220 (2004), a subcontractor sought to inspect and copy public records pertaining to a construction project at the University of Maryland College Park campus under MPIA. Executive privilege and confidential commercial information the claim asserted in opposing disclosure. 382 Md. at 157.56 The Court: “What is really at issue here is the broader deliberative process privilege that arose from the common law, from rules of evidence, and mostly from rules governing discovery in civil judicial proceedings – a privilege that, with the advent of disclosure statutes, was incorporated into exemption provisions like SG §10-618(b) and 5 U.S.C. §552(b)(5) [The Federal Public Information Act] to protect from legislatively mandated disclosure interagency or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the unit.”57 The somewhat difficult to clinically understand concept of confidential commercial information, pertinent to information generated by the Government, was discussed. 382 Md. at 168-69.58 Affirming the trial court decision to redact certain information, the Court stated:
  We agree with the University that the limited and time-sensitive exemption for confidential commercial or financial information that has been read into FOIA, §552(b)(5), is part of SG §10-618(b) ... That kind of information may be shielded from discovery by a protective order under Maryland Rule 2-403, as it is under F.R. Civ. Proc. 26(c). That does not avail the University in this case, however, for two reasons. For one thing, the University does not assert a time-limited privilege, as was recognized in the Federal cases, but seems to assert that the number in question may never be revealed. That extends well beyond what the Federal courts have allowed under §552(b)(5). More important, for the reasons discussed with respect to the deliberative process privilege, we fail to see how the number would disclose any time-sensitive confidential commercial information. As we have indicated, it is an aggregate number that does not reveal Mr. Mitchell's, or anyone else's, views as to the validity or value of claims or the future status of the project.
  Stromberg, at 169-70.

56 The confidential commercial information claim of privilege was asserted under SG §10-618(b). The Court discussed executive privilege. 382 Md. at 161-62.
57 Stromberg, 382 Md. at 163. Judge Wilner discussed the deliberative process privilege and its application through case law. 382 Md. 164-166. A distinction is drawn between purely factual data and deliberative opinions, noting that the distinction is sometimes not all that clear. “If the deliberative aspects could be separated from the purely factual aspects, they might be subject to shielding.” There is no Maryland law on the State’s assertion of a confidential commercial information privilege. 382 Md. at 166-68.
58 One example given pertained to the immediate release of directives that would significantly harm the Government’s monetary functions or commercial interests. Stromberg; 382 Md. at 169.
COMAR 28.01.04 is concerned with public information requests as it relates to OAH. Procedures for filing requests with OAH for the inspection and copying of records under the Public information Act (SG §10-611, et. seq.) are set forth. Requests are to be in writing, and there is a procedure for notification of persons who may be affected by disclosure. A hearing procedure exists for use when a request is denied. Fees may be charged.

The MPIA provides that copies may be made of records that are subject to public disclosure. There are limitations on some disclosures and the statute must be reviewed. Generally, “reasonable” fees are charged, the reasonableness of which depends on the “costs incurred by the governmental unit.” Employee time may not be charged “for the first 2 hours that are needed to search for a public record and [to] prepare it for inspection.” Unless some other law applies, the custodian of records may charge for the making or supervising the making of a copy, printout, or photograph of a public record and for the cost of providing facilities for the reproduction of the public record if the custodian does not have the facilities.

Waiver of the fee may be made upon by the custodian “after consideration of the ability of the applicant to pay the fee and other relevant factors” if the custodian determines waiver to be in the public interest.

F. The Hearing

Basically, an administrative hearing is conducted similar to a trial. The MAPA does not give that much detail as to how a hearing is to be conducted, but with all the procedures it mandates, it is clear that a “trial type” proceeding is anticipated for a contested case. OAH has adopted rules and procedures for the conduct of hearings and it is fair to say that the OAH procedures are reflective of what occurs in an agency hearing whether OAH is involved or not. Throughout the Maryland Code, there are references to the hearing process in statutes regulating agencies. For example, HO §14-405(b)(1), concerned with hearing procedures before the Board of Physicians, states the “hearing officer shall give notice and hold the hearing in accordance with the Administrative Procedure Act. HO § 12-305(b)(c), concerned with the procedures for the disciplining of pharmacists, has reference to the MAPA and also states specific procedures as to notice requirements, the right to counsel, and the issuance of subpoenas and the administering of oaths. Individual agency and board statutes have to be consulted and compared and coordinated with OAH procedures when both OAH and the agency are involved in the process.

Hearings are open to the public, unless otherwise provided by law. SG §10-212. While, the author of this book questions the legality and wisdom of the confidentiality of some proceedings, certain Boards have provided for confidentiality. Title 4 of HG is concerned with the confidentiality of medical records. HO §1-401 is titled, “Medical Review Committees.” Section §1-401(d) makes some records in some situations confidential, not discoverable and not admissible into evidence. The Board of Physicians takes the position that hearings before that body are confidential and a regulation has been passed to make those proceedings confidential. Of course, once Judicial Review occurs, the record is open to the public. Even

59 SG 10-620.
60 SG 10-621(b).
61 SG 10-621(c).
62 SG 10-621(d).
63 SG 10-621(e).
64 While many hearings, such as those involving the suspension of a license to drive may not last that long other hearings are quite lengthy. The hearing consumed 7 days and resulted in a 92 page opinion by the Board of Chiropractic. Regan v. Board of Chiropractic, 120 Md. App. 494, 507, 707 A. 2d 891 (1998) aff’d 355 Md. 397 (1999).
with Judicial Review, every attempt is made to protect patient identity when it is necessary to discuss medical records and procedures.

One of the regulations passed by the Board of Pharmacy provides that its proceedings are confidential "and that confidentiality may not be waived by the parties." While it is easy to see that patient records can and should be protected, in the disciplining of pharmacists, is it wise to prohibit public access to the proceedings? What chance does this section have of being declared constitutional when it says that the person being disciplined may not waive the confidentiality, say to tell the press what is happening in the proceeding? Time will tell.

COMAR 10.34.01.03 Confidentiality of Proceedings.
A. Except as otherwise provided by law, the proceedings of the Board are confidential and that confidentiality may not be waived by the parties.
B. The Office of Administrative Hearings' proceedings involving the adjudication of a Board formal disciplinary action and the administrative law judge's recommended decision are confidential.
C. The respondent may not waive the confidentiality of the:
   (1) Proceedings; or
   (2) Patients whose medical records or care are reflected in the record of the proceedings.
D. To the extent possible, even after the close of a formal disciplinary action, the parties shall refrain from revealing:
   (1) Legal documents;
   (2) Oral statements; or
   (3) Information that would reveal the identity of patients involved in the matter.

Significant Case Decisions

Evidence presented must be under oath
- At issue in Heard v. Foxhire Associates, LLC., 145 Md. App. 695, 806 A. 2d 348 (2002) was whether the evidence was sufficient to sustain the decision of the Board of Appeals granting a special exception to extend the entrance to a retail shopping center. The record showed that the Board decision was based on trial counsel's narrative in argument to the Board. Was that narrative evidence? "It is imperative that evidence given before an adjudicatory body be under oath, whether from an attorney or lay person, a lay witness or an expert witness." The Board could not rely on the opening statement by counsel as "evidence." The Court held there was no evidence in support of the special exception granted by the Board. 145 Md. App. at 708-09.65

(1) OAH In General
As to "venue", hearings shall be conducted at the site designated by OAH in accordance with applicable law.66 Statutes and regulations need to be checked.

The role of the ALJ is spelled out in the OAH statute and regulations promulgated by OAH. For the most part, all agency hearings are going to follow a model. An ALJ is required to: (1) conduct a full, fair and impartial hearing; (2) avoid unnecessary delay in disposition; (3) maintain order in the proceeding; and (4) "modify or waive, reasonably, time periods" as permitted by law.67 The ALJ is required to regulate the course of a hearing, the conduct of the participants, and has the authority to:

65 The Court commented on the way the oath can be administered during a zoning hearing. There is no real substitute for a procedure whereby an individual is sworn in individually as a witness and the identity of the witness appears the record. Foxhire, 145 Md. at 709.
66 COMAR 28.02.01.07
67 COMAR 28.02.01.08 A.
1. Administer oaths and affirmations;
2. Issue subpoenas for witnesses and the production of evidence;
3. Rule upon offers of proof and receive relevant and material evidence;
4. Consider and rule upon motions;
5. Examine witnesses and call witnesses as necessary to insure a full and complete record;
6. Limit unduly repetitious testimony and reasonably limit the time for presentations;
7. Grant a continuance or postponement;
8. Request parties to submit legal memoranda, proposed findings of fact, and conclusions of law;
9. Make proposed or final decisions and take any other appropriate action authorized by law;
10. Issue orders as are necessary to secure procedural simplicity and administrative fairness, and to eliminate unjustifiable expense and delay;
11. Conduct the hearing in a manner suited to ascertain the facts and safeguard the rights of the parties to the hearing; and
12. Impose appropriate sanctions for failure to abide by this chapter or any lawful order of the judge.68

(2) Opening
COMAR 28.02.01.17A(4) specifically states that opening statements may be made when a proceeding occurs before OAH. Attorneys attest to the benefit of a concise, clear and well oriented opening statement.

(3) Evidence
Provisions of the Maryland Administrative Procedure Act, case law, and due process govern the admissibility and consideration of evidence in administrative law cases. This section of Chapter 5 is divided into the following subsections:

a. Generally
b. Hearsay
c. Business Records
d. Illegally Obtained Evidence
e. Additional Evidence
f. Issue Preclusion
g. Judicial Determination
h. Polygraph Evidence
i. Relevancy.
j. Telephone Testimony
k. Videotape Testimony
l. The Requirement of an Oath

(3) a. Generally.
SG §10-213 "specifies with particularity the evidence which may be offered and considered in a contested case, and provides generally that 'each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.'" SG §10-213(a)(1). "Findings of fact must be based exclusively on the evidence of record in the contested case proceeding and on matters officially noticed in that proceeding." SG §10-214(a).69 When a contested hearing is held before an ALJ, COMAR 28.02.01.18 dealing with "evidence" is also applicable.

68 COMAR 28.02.01.08 B.
Probative evidence “that reasonable and prudent individuals commonly accept in the conduct of their affairs to which they give probative effect ‘may’ be admitted in agency proceedings.”70 Evidence may not be excluded solely on the basis that it is hearsay.71 Case law has shown that not all hearsay evidence may be admitted.

Administrative agencies are not generally bound by the technical common law rules of evidence. Evidence inadmissible in a judicial proceeding is not per se inadmissible in an administrative proceeding. Agencies must observe the basic rules of fairness as to parties appearing before them, and admit evidence that has sufficient reliability and probative value to satisfy procedural due process.72 The Maryland Rules of Evidence do not apply to State Administrative Law Proceedings and Local Government Administrative Proceedings.73 Rules of evidence are relaxed in administrative proceedings.74 Courts of Appeal countenance “the relaxation of evidentiary rules so long as they are not applied in an arbitrary or oppressive manner that deprives a party of his or right to a fair hearing.”75 Constitutional procedural due process, as guaranteed by the Fourteenth Amendment to the Constitution and Article 24 of the Maryland Declaration of Rights apply to an administrative agency exercising judicial or quasi-judicial functions.76

Incompetent, irrelevant, immaterial or unduly repetitious evidence “may” be excluded.77 Privileges recognized by the law must be applied in administrative proceedings.78 As with judicial proceedings evidence is mainly produced through witnesses and through the introduction of documentary evidence.

Documentary evidence may be introduced in the form of excerpts or by incorporation by reference. Facts may be judicially noticed as may general, technical, or scientific knowledge within the specialized knowledge of particular evidence. Before noticing a fact, parties must be notified of what will be noticed and they must be given an opportunity to contest the fact. “The agency or the office may use its experience, technical competence, and specialized knowledge in the evaluation of evidence.”79 It should be noted that the official notice taken is a notice of existing facts. As to the evaluation of evidence through expertise, the agency may rely on all the evidence produced, both fact and opinion.

“Findings of fact must be based exclusively on the matters of record in the contested case proceeding and on matters officially noticed in that proceeding. In a contested case, the office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, pre-existing policy, to the same extent as the agency is or would have been bound if it were hearing the case.”80

70 SG §12-205(b).
71 SG §12-205(c).
75 Travers, 115 Md. App. at 412.
77 SG §12-205(d).
78 SG §12-205(e).
79 SG §12-205(g)(1).
80 SG §10-204.
Specific evidence problems that have arisen in appellate court cases are discussed throughout this Section of Chapter 6.

Failure to object to the introduction of evidence, means the issue is not preserved for appeal.81 “The initiative in excluding answers to improper questions rests upon the shoulders of the opposing party. If the opponent fails to object, he will not later be heard to complain that the evidence should not have been admitted.”82

**Significant Case Decisions**

**Evidence considerations are different in administrative hearings**

T. §16-205.2 permits police officers to administer a preliminary breath test licensees stopped on suspicion of DUI and provides that test is to be used as a guide and may not be used as evidence by the State in any court action. In this case the preliminary test result showed a blood alcohol concentration of 0.16. 390/122.83 *MVA v. Weller*, 390 Md. 115, 125, 887 A. 2d 1042 (2005) held that the preliminary test result can be introduced in an administrative proceeding. Statutory interpretation rules were utilized focusing on the fact the statute prohibited the use of these preliminary test findings in a “court” action and/or a “civil” proceeding. 390 Md. at 134. Citing Black’s Law Dictionary, prior case law and the fact that administrative hearings are distinguishable from court actions, the Court held the preliminary breadth test evidence was admissible in administrative proceedings. 390 Md. at 135-138.84

(3) b. Hearsay

Evidence may not be excluded in an administrative proceeding solely on the basis that it is hearsay,85 but case law has shown us that not all hearsay evidence may be admitted. To be admissible, hearsay must be credible and probative, and if so, that evidence “may be the sole basis for a decision of an administrative body.”86 Appellate court decisions have “developed guidelines to assure that evidence which is credited and reliable and competent” is the type of evidence that may be utilized in administrative proceedings.87 “It is improper for an agency to consider hearsay evidence without first carefully considering its reliability and probative value. One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath are ordinarily presumed to possess a greater caliber of reliability.”88

81 *Ginn v. Farley*, 43 Md. App. 229, 236, 403 A. 2d. 858 (1979). “The appellants, in the instant case, objected to two of the questions asked Mr. Coady. They did so on the basis of the evidence’s having been closed. Both times they objected their objections were sustained. What appellants did not do was to continue to object to the subsequent questions. Thus, the answers to those questions were admitted into evidence and, inferentially, considered by the Board. Id.

82 *Ginn*, 43 Md. App. at 236.

83 In great detail, the Court reviewed the advice of rights provisions of the Maryland Code and the laws concerning the use of alcohol concentration tests and the effects of a failure to take a test on the right and responsibility of the MVA to suspend a license. *Weller*, 390 Md. 123-25.

84 Case law states generally that agency hearings are different from court actions and civil actions, and they are ordinarily informal in nature. While adversary proceedings require preservation of fundamentals applicable to the decision of adjudicative facts, administrative agencies are not bound by the technical rules of evidence. *Weller*, 390 Md. at 137-35

85 SG §12-205(c).


87 *Kade*, 80 Md. App. at 727.

**Significant Case Decisions**

**Testimony from the criminal proceeding introduced into the civil proceeding?**
- Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 436 A.2d 525 (1981) approved the introduction of evidence in the administrative licensing hearing from Eichberg's earlier criminal trial. The testimony under oath in the criminal proceeding included cross-examination of the witness by Eichberg's counsel, who represented him in both the criminal and administrative matters. The witness at the criminal trial, whose testimony was used in the administrative proceeding, was not available at administrative hearing. 50 Md. App. at 192.

**What did your deceased husband tell you? Corroborated?**
- Hearsay testimony before the State Industrial Accident Commission from a widow, as to what her deceased husband told her of the circumstances that lead to his death, was said to be credible in Standard Oil Co. v. Mealey, 147 Md. 249, 252, 127 A. 850 (1925). This evidence was corroborated by other people who had been told by the decedent that he had had an accident. Id.
- In Commercial Transfer Co. v. Quasny, 245 Md. 572, 580-81, 227 A.2d 20 (1967), hearsay statements given by a wife under oath were admissible where the husband, the declarant, had died and where other witnesses corroborated the testimony.

**Hearsay evidence in the form of statements by other individuals?**
- Objection to the introduction of written reports of fellow employees and students to prove a case against a state employee charged with loud and disrespectful conduct toward a fellow employee at the Charles H. Hickey School were not reliable, credible or competent in Kade v. Hickey School, 80 Md. App. 721, 726-27, 566 A. 2d 148 (1989). The statements were relevant but not under oath and there was no information as to how they were obtained. Statements submitted by students were not sworn or dated and there was no evidence of the age of the students or any other evidence these students were competent witnesses. No information was given as to why the declarants were unavailable. Thus, the Court stated: “[The] hearing officer had no basis for evaluating the credibility of the declarants of the written statements on which she based her proposed order. Without that ability, appellant's right to a fair hearing on the allegations of appellees was compromised.”

**Statements by the victim made to police? Reliable hearsay?**
- Comment was made in Travers v. Baltimore Police, 115 Md. App. 395, 407, 693 A. 2d 378 (1997) that statements by Ms. Nelson were admissible against Officer Travers arising out of a domestic dispute. The Court stated that these statements, though not sworn, nonetheless were made to officers and falsehood could have subjected her to criminal penalties. 115 Md. App. at 413. More trustworthy (not the Court's comment, but the author's comment) was the fact the statements were made a relatively short time after the incident. "Thus, while Ms. Nelson’s statements might not constitute an ‘excited utterance,’ . . . their

---

89 Kade, 80 Md. App. at 727-28. There was a lot wrong with the hearsay evidence attempted to be introduced in this case. Does this mean that other statements in other cases, say where the statements were made under oath and presented in an affidavit will be admitted? Time will tell. It all depends.

Changing Point v. Maryland Health Resources, 87 Md. App. 150; 589 A. 2d 502 (1991) involved an argument that “a number of documents and certain testimony constituted hearsay evidence. . .” and should not be admitted. 87 Md. App. at 170. The Court analyzed the contention and determined that the right to cross-examination was not denied because: “there is no indication that the Commission relied on the Goldman letter in concluding that there was no direct relationship between Dr. Fishman and Mountain Manor.” The “Commission's decision relied on the testimony of Dr. Fishman, Charles Nabit and Mary Roby, not the Goldman letter,” and therefore “the admission of Mr. Goldman's letter was not a violation of the principles of Kade, Changing Point, 87 Md. App. at 172.

90 This was a domestic dispute and therefore this conclusion by the Court is disturbing. If anything is certain from trial attorneys involved in domestic matters, it is that testimony in domestic disputes by one party against the other are circumspect in 13 cases out of 12. Certainly, corroboration of those statements existed in this case. However, to allow this statement concerning the reliability of the hearsay to sit in the opinion unguarded is at odds with most domestic practitioner experience.

91 The Travers Court quoted Consolidated Edison v. N.L.R.B., 305 U.S. 197 (1938): “mere uncorroborated hearsay or rumor does not constitute substantial evidence.”
relative proximity in time to the allegedly heated incident is a factor that enhances the reliability of her statement.” Corroboration was also found in the police testimony noticing red marks on both sides of Ms. Nelson’s neck and that her face was puffy and red against the Travers contention that he did not assault, strike, or choke her. 115 Md. App. at 414.

In Travers, where the Officer’s employment was terminated for his off duty actions. The Court stated: “Ordinarily, a complaining witness who is also a “victim” cannot be viewed as neutral and detached. Such concerns are less weighty in cases when hearsay statements come into evidence through a disinterested witness because they tend to be more reliable than statements introduced through a witness who has an interest in the subject matter underlying the controversy.” The Officer had the right to subpoena this witness but failed to do so and thus was said to have waived his right to complain about a denial of the opportunity to cross-examine her. 115 Md. App. at 418.92

92 While one may wonder how effective it may be for the Officers to have called this adverse witness to the stand to cross-examine her, this doctrine of harmless error sometimes has credit in the law when the right to subpoena an available witness is not exercised. There may well be a difference when no authority is available to have a subpoena issued. See Judge Harrell comments and citation to other case law at Travers, 115 Md. App. at 418-19.


At issue in Motor Vehicle Administration v. Karwacki, 340 Md. 271, 666 A. 2d 511 (1995)93 was whether at a probable cause hearing for a suspension of driving privileges for a second refusal to take an alcohol concentration test, an ALJ may give greater credit to the sworn written statement of an absent police officer, who was not subpoenaed by either party, than to the testimony of the motorist which conflicts with the written statement. The driver acknowledged that the officer requested that he take a test and advised him that he could refuse the test. He said that he was told that if he did not take the test his license would be automatically taken from him for 120 days. “He stated . . . that had he been told that his license could be suspended for one year, he would have taken the test.” The motorist testified that he had no recollection of the officer’s advising him of the consequences of taking the test and getting a high reading. 340 Md. at 277-78.

“The sworn statement of the arresting officer is prima facie evidence of a test refusal.” Unless explained or contradicted, the sworn statement is sufficient to establish that the driver refused to take an alcohol concentration test. 340 Md. at 282-83. The ALJ did not find the driver’s testimony sufficient to negate the officer’s sworn statement. “. . . [T]he officer’s sworn statement provides adequate support for the ALJ’s conclusion that the respondent was fully advised. Hearsay evidence, if reliable, is admissible in an administrative proceeding and, thus, may support an administrative decision.” 340 Md. at 285. “In the instant case, by not subpoenaing the arresting officer and offering only his sworn testimony, directly conflicting the arresting officer’s sworn statement on a critical point, the respondent presented the ALJ with an all or nothing choice. Either the ALJ must accept his testimony, in which case the prima facie evidence of the officer’s sworn statement would be rebutted, or he must reject it and leave the prima facie evidence intact. The ALJ did the latter. Clearly, under this scenario, the ALJ was under no obligation to believe the respondent. Nor, in the absence of a request to do so, was he obliged even to consider whether to subpoena the arresting officer.” 340 Md. at 289.

(3) c. Business Records.

“Maryland rule 5-803(b)(6) sets out the well-established exception to the rule against hearsay for records of a regularly conducted business activities. There are times when items made part of and included within an official record may be admitted into evidence as part of a business record admitted under this exception.”94 Many government records qualify as business records. There are times when appellate courts approve the use of the Maryland Rules of Evidence for use in administrative proceedings.

Maryland Rule 5-803. Hearsay exceptions: Unavailability of declarant not required.

(6) Records of regularly conducted business activity.- A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Significant Case Decisions

Videotape of extraction of inmate from his cell

Videotape was admissible in a hearing terminating the employment of a correctional officer (alleging unnecessary force in removing inmate from a cell). It was found to be admissible on two different theories, one of which was that it was a business record in Dept. of Public Safety v. Cole, 342 Md 12, 27-28, 672 A. 2d 1115 (1996). The videotape was “properly authenticated as part of the correctional institution’s business records.” It “was the regular practice of the correction institution to make and retain videotaped cell extractions, presumably as a protection for both the inmates and the institution.” A proper chain of custody was established. 342 Md. at 29-30. Admission at the administrative proceeding was also approved by the Court under the “silent witness” method of authentication of photograph and videotape evidence, which does not require the testimony of a witness. 342 Md. at 21.

(3) d. Illegally obtained evidence.

The exclusionary rule applicable to illegally obtained evidence in a criminal proceeding is not generally applicable to administrative proceedings. The Court of Appeals has stated: “...[A]s a matter of Maryland administrative law, we are unwilling to hold that such evidence is always admissible.” Police seized narcotics and related paraphernalia illegally from city correctional officers (without probable cause and without a warrant). That evidence was sought to be introduced in an employee discharge proceeding. Such “evidence is inadmissible in civil administrative discharge proceedings where the defendant establishes that the police were improperly motivated to illegally seize evidence to benefit civil proceedings” The evidence, when properly challenged is inadmissible upon a finding of bad faith. 342 Md. at 20-30.

---

95 “We are called upon in the instant case to determine whether a videotape may be admissible in evidence in an administrative hearing even though no witness testifies that what is depicted on the videotape is a fair and accurate representation of what it purports to show. For the following reasons, we answer in the affirmative and hold that the videotape was properly admitted into evidence.” Cole, 342 Md. at 17. The introduction of videotapes as evidence was discussed by the Court in great detail. 342 Md. at 20-30.


98 Sheets, 315 Md. at 215-217. The Court remanded the case for a proper determination on the issue of bad faith. The court listed (not an exclusive list) some factors to be considered in ascertaining the motivation behind an improper search and seizure:

1. whether, at the time of the illegal search, the police were aware of the potential effect of using such evidence in devil proceedings,
2. whether the severity of the consequences of a civil proceedings roughly paralleled or exceeded that of the criminal proceedings,
(3) e. **Additional Evidence:**

Sometimes a court is able to consider additional evidence not submitted to the agency. In most instances, the reviewing court is going to be limited to the record produced before the Agency.\(^99\)

**Significant Case Decisions**

**Judicial review usually means a review of the proceedings before the agency**

**Does the statute say that other evidence may be considered?**

- **Fromberg v. Insurance Commissioner**, 87 Md. App. 236, 243-44, 589 A. 2d 544 (1991) saw the Court considering the insurance article. The insurance code (then Article 48, section 40(4)) provided that the trial court hearing the matter de novo should base its decision on the agency record "together with such additional evidence as may be offered by any party to the appeal," it was error for the trial judge not to allow the introduction of a California study regarding the future incidence of accidents based on a history of past accidents where the insurer was attempting to deny renewal to an insured of an automobile liability policy. The final decision is to be made by the Insurance Commissioner. A remand to the Commissioner is to be made if the trial court determines that the additional evidence might change the decision. The Court stated:

> Although the trial court is not permitted to substitute its judgment for that of the administrative agency, where, as here, additional evidence is to be submitted that might have an impact on the decision of the administrative agency, the trial court is constrained to "consider the evidence contained in the transcript, exhibits, and documents therein filed by the Commissioner, together with such additional evidence as may be offered by any party to the appeal." Md.Ann.Code art. 48A, §40(4) (1986). Upon considering the California Study together with the other evidence of record, the trial court must affirm the Commissioner unless it finds that "the substantial rights of the petitioned[ ] may have been prejudiced," see Md.Ann.Code art. 48A, §40(5) (1986), for any of the reasons set forth in Article 48A, section 40(5), supra. Accordingly, Fromberg is entitled to a further hearing, wherein the court will consider the California Study along with the other evidence presented in the record. Should the trial court find that the Commissioner's "findings, inferences, conclusions, or decisions," see Md.Ann.Code art. 48A, §40(5) (1986), that may have prejudiced the petitioner might have been different if the "additional evidence" had been before the Commissioner, then the trial court should remand. It must not substitute its judgment for the expertise of the Commissioner. *Muhl v. Magan*, 313 Md. at 479, 545 A.2d 1321.

87 Md. App. at 249.

**Look at that statute?**

**What is the agency to consider when making a determination?**

**What evidence is the judge to consider on judicial review?**

- The record before the Maryland Insurance Administration consisted of the ALJ's findings, exceptions, notice, documentary evidence and transcript in *Mehrling v. Nationwide*, 371 Md. 40, 55, 806 A. 2d 662 (2002). In this case, MIA reserved to itself the right to make the final decision in the case. Under MAPA §10-218(9), exceptions are a part of the record that is before the agency in making its final determination. Nothing in the statute or corresponding regulations precluded a party from offering new evidence in support of the party's exceptions. Evidence offered in exceptions may become, unless properly rejected by the agency, a part of the administrative record, subject to the final administrative decision maker's ruling on whether to admit and consider such evidence. 371 Md. at 60-62.

---

3. whether a reasonable officer would have believed the search to be a proper one,
4. whether there was an agreement between the police and another party to pursue the investigation which led to the improperly obtained evidence, and
5. whether the police had a special interest in the case.

Citations here to authority here mean much is to be read and considered in applying these factors.

(3) Judicial Determination.

Is an agency able to rely on a circuit court judge’s finding of the guilt of a State employee in a non-jury, criminal case for telephone misuse as evidence when determining whether to discipline the employee. It all depends as to whether the conviction is admissible, “...[T]he distinction between judicial and administrative proceedings is critical. ...[A] judgment of conviction, under Maryland’s law of evidence ... could not be used in a subsequent civil case to prove the underlying facts.100 “Although that ‘which is inadmissible in a judicial proceeding is not per se inadmissible in an administrative proceeding,’ that which is admitted in an administrative proceeding must have sufficient reliability and probative value to satisfy procedural due process.”101

Significant Case Decisions

o In Powell v. Maryland Aviation, 336 Md. 210, 219, 647 A. 2d 437 (1994), the Court held that guilty finding in a criminal case in which misconduct of a state employee was charged could be used as evidence of misconduct in an administrative termination proceeding. Operative on the issue of admissibility is SG §10-213. The ALJ erred in giving conclusive effect to the guilty finding. 336 Md. at 219. The distinction between judicial and administrative proceedings is critical. Id. Telephone misuse was the event at issue. Due process considerations attend the introduction of the court decision and its consideration by the ALJ.

(3) g. Polygraph Evidence:

Legislative intent directs that polygraph evidence be excluded in administrative proceedings. This evidence is deemed not trustworthy by Maryland appellate courts.

Significant Case Decisions

Inherently unreliable

o In Dept. of Public Safety v. Scruggs, 79 Md. App. 312, 321, 556 A. 2d 736 (1989), the Court addressed a case involving the termination of employment for a correctional officer, who was alleged to have sexual relations with three female inmates, it was argued that polygraph evidence should be allowed because the technical rules of evidence were not applicable to administrative proceedings. Objection was made to the use of polygraph evidence taken from inmates to the effect they were truthful in saying that the sexual relations had occurred. Id., at 316.102 The Maryland judiciary's distrust of polygraph evidence is well documented. Because of their "unreliability," Maryland courts exclude any evidence of polygraph tests, or evidence based on them, even if the parties stipulate to the admissibility of the test results. Even an unsolicited reference by a complaining witness to the fact that he or she took a polygraph test has been found to be prejudicial error, despite the judge's instruction to the jury to disregard, when the crucial issue at trial was the credibility of that witness.


Reviewing SG §10-208(c), the Court noted that “incompetent” evidence was to be excluded from introduction during an administrative proceeding. “The question which arises, then, is whether we consider polygraph evidence so unreliable as to deem it ‘incompetent.’” Id., at 322-23. A review of prior appellate court decisions concerning polygraph evidence and the decision that this evidence did not meet the ‘general

102 As to the examiner who submitted a proposed decision for consideration by the Agency: “He further stated ‘it is improbably that the three inmates could have entirely fabricated their story of Ms. Scruggs’ having one act of intercourse with each of three, then coordinated their story with Mr. Scruggs’ schedule and carried the story through so as to outwit the polygraph.” Scruggs, 79 Md. App. at 217.
acceptance standard of reliability, meant it was not to be introduced in the administrative proceeding. 79 Md. App. at 324.

(3) h. Relevancy.
If evidence is not relevant, it has no place be considered by an administrative agency. To that effect SG §10-213(d)(2) states that irrelevant evidence may be excluded. As with court proceedings, the Maryland Rules of Evidence, though not binding in administrative proceedings, give a good view of the law regarding what evidence is irrelevant and what is not.

Rule 5-401. Definition of "relevant evidence".
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 5-402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. Evidence that is not relevant is not admissible.

The Maryland rules of evidence say that evidence that is not relevant is "not admissible." SG §10-213(d)(2) is permissive in stating that irrelevant evidence "may" be excluded. Whatever play one wants to make with language it seems evident that irrelevant evidence does not form the basis of any decision that is required to be made and therefore must be excluded.

There is that "balancing" test to be done by trial courts even when evidence is relevant. Prejudice is more often addressed to a jury case than a case before a trained trier of fact.

Rule 5-403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Still, it is to be noted that SG 10-213(d)(4) allows an agency to exclude evidence that is "unduly repetitious."

Significant Case Decisions

What if the patients of the physician do not want an inquiry into their confidential matters?
- Dr. Solomon contended in Solomon v. Board of Medicine, 155 Md. App. 687, 705-06, 845 A. 2d 47 (2004) that the ALJ abused her discretion in denying Dr. Solomon's request to call a number of witnesses to testify on her behalf, namely in a physician disciplinary proceeding. She wanted to call 9 patients whose medical records the Board had subpoenaed; a retired Administrative Law Judge, John Appel; and a dentist, Michael Baylin. She proffered that the 19 patients would testify "that they do not wish their confidential medical records be turned over to the Board"; Mr. Appel would opine as an expert that the law did not require Dr. Solomon to comply with the December 2nd subpoena because it was overbroad and therefore invalid; and Dr. Baylin would testify that he had not been punished for failing to comply with a medical records subpoena, which the Board of Dental Examiners had issued during an investigation of him. The Court stated:

An ALJ is permitted to exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious. Md. Code (1984, 1999 Repl. Vol.), §10-213(d) of the State Government Article. We do not disturb such rulings absent an abuse of the ALJ's discretion. See Maryland State Police v. Zeigler, 330 Md. 540, 557, 625 A.2d 914 (1993) (stating that "as long as an administrative
agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily unreviewable by the courts").

In this case, the ALJ did not abuse her discretion in excluding the testimony of the 19 patients, Mr. Appel, and Dr. Baylin. The proffered testimony of these witnesses simply was not relevant to the issues before the ALJ—whether Dr. Solomon failed to cooperate with an investigation by the Board, and whether she exercised unprofessional conduct in the practice of medicine.

The Consumer Protection Division said we did the following things wrong

We want to admit affidavits from 80 customers which to tell you how well we treated them

Relevant? Irrelevant?

- T-Up, Inc. v. Consumer Protection Division, 145 Md. App. 27, 801 A. 2d 173 (2002) saw an allegation that it was error for the ALJ not to admit affidavits from eighty of a Company’s customers which stated these customers had favorable experiences with the Company’s products and its employees. 145 Md. at 66-67. The Division found false advertising of two products sold by the Company as cures or treatments for cancer, AIDES, and HIV. 145 Md. at 35. The ALJ said the affidavits did not meet the initial test of relevance. “The ruling was correct because the affidavits do not show support for appellants’ representations that meets the Standard. Even though it was within the discretion of the ALJ to admit the affidavits into the record, the decision to require strict relevancy was not an abuse of discretion on the facts here. The fact that eighty consumers were satisfied with the products does not necessarily mean that the products were effective.” 145 Md. at 67.

(3) Telephone Testimony and Video Conferencing

Issues of both the introduction of telephone and video evidence and the conduct of hearings before an agency via telephone or video evidence can arise. SG §10-211 addressed the subject of hearings conducted by electronic means. The main issue with this address is going to focus on the ability of the trier of fact to eye ball the witnesses and make credibility determinations. SG §10-211 addresses this issue.

SG §10-211. Hearings conducted by electronic means.

(a) Permitted. - In accordance with subsection (b) of this section, a hearing may be conducted by telephone, video conferencing, or other electronic means.

(b) Objections. -

(1) For good cause, a party may object to the holding of a hearing by telephone, video conferencing, or other electronic means.

(2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic means.

(3) If a party establishes good cause in opposition to the holding of a hearing by video conferencing or other similar audiovisual electronic means, the hearing shall be conducted in person.

[1993, ch. 59, § 1; 1996, ch. 96.]

---

103 Solomon v. Board of Medicine, 155 Md. App. 687, 705-06, 845 A. 2d 47 (2004). “As for Dr. Solomon’s patients, this Court has made clear that patients have no veto power over subpoenas issued by the Board in the course of investigating a physician.” 155 Md. App. at 705.

104 An FTC case was cited, analogy was made to Rule 5-701 and further analysis was made by the Court in support of its decision. T-Up, 145 Md. App. at 68-70.

105 There is a circuit court rule governing the taking of depositions by telephone;

Rule 2-418. Deposition - By telephone.

The parties may stipulate in writing, or the court on motion may order, that a deposition be taken by telephone. The officer before whom the deposition is taken may administer the oath by telephone. For the purpose of these rules, a deposition taken by telephone is taken at the place where the deponent answers the questions.

Although the rule does not so state, there is going to be a difficulty encountered whenever a litigant generates the ability or inability of the trier of fact to judge the credibility of a witness by anything other than a face to face confrontation. With depositions, not taken to be introduced into testimony, the issue is fact finding, not credibility.
COMAR 28.02.01.17 also addresses this issue:

**COMAR 28.02.01.17 Conduct of Hearings.**

B. Telephone Hearings.

(1) If a party does not object and establish good cause for the objection, the judge may conduct all or part of the hearing by telephone or other similar audio electronic means, if each participant in the hearing has an opportunity to participate in and hear the entire proceeding.

(2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic means.

(3) All substantive and procedural rights apply to telephone hearings, subject only to the limitations of the physical arrangement.

(4) Documentary Evidence. For a telephone hearing, documentary evidence to be offered shall be mailed by the proponent to all parties and the Office at least 5 days before the hearing.

(5) Default. For a telephone hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than 15 minutes after the scheduled time of the hearing:

(a) Failure to answer the telephone;

(b) Failure to free the telephone for a hearing; or

(c) Failure to be ready to proceed with the hearing as scheduled.

C. Video Hearings.

(1) If a party does not object and establish good cause for the objection, the judge may conduct all or part of a hearing by video or other similar audiovisual electronic means, if each participant in the hearing has an opportunity to participate in, hear, and see the entire proceeding.

(2) If a party establishes good cause in opposition to the holding of a hearing by video or other similar audiovisual electronic means, the hearing shall be held in person.

(3) All substantive and procedural rights apply to video hearings, subject only to the limitations of the physical arrangement.

(4) Default. For a video hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than 15 minutes after the scheduled time of the hearing:

(a) Failure to be present in the designated video hearing room; or

(b) Failure to be ready to proceed with the hearing as scheduled.

Circuit Court proceedings very often involve videotape testimony. This is especially so with expert testimony. See: **Rule 2-416. Deposition - Videotape and audiotape.**

**Significant Case Decisions**

**Objection to the telephone conference hearing**

- An applicant for a day care license has no right to present evidence by telephone at the hearing to determine whether that license should be awarded. *Dept. of Human Resources v. Thompson*, 103 Md. App. 175, 202-03, 652 A. 2d 1183 (1995). The Court stated:
  
  We agree that the ALJ properly excluded Morrison's telephone testimony. At the administrative hearing, Ms. Thompson sought to introduce Morrison's telephone testimony and CCA objected. According to COMAR 28.02.01.17(b)(1), which governs the use of telephonic testimony in administrative hearings, "the judge may, with consent of the parties, conduct all or part of the hearing by telephone." (Emphasis added). See also, S.G. § 10-211 (1993 Repl. Vol., 1994 Cum.Supp.). Because the agency objected to the presentation of Morrison's testimony by telephone, the ALJ was without authority to admit it. On remand, however, if Ms. Morrison appears, or if there is no objection to her testimony by telephone, her testimony would not be inadmissible merely because it pertains to the question of the occurrence of the child abuse.

103 Md. App. at 202-03.
A fair and accurate representation of... 

- Videotape was admissible even though no witness testified that what was depicted on the videotape is “a fair and accurate representation of what it purports to show” in a hearing terminating the employment of a correctional officer in Dept. of Public Safety v. Cole, 342 Md 12, 17, 672 A. 2d 1115 (1996). Chain of custody was not an issue. Departure from the requirement of an accurate representation witness, the Court said the evidence was admissible under the “silent witness” theory of admissibility: The “silent witness” theory of admissibility authenticates a photograph as a “mute” or “silent” independent photographic witness because the photograph speaks with its own probative effect.106 We do note that a foundation is adequate, at least for an administrative hearing, if there are sufficient indicia of reliability so that the trier of fact can “reasonably infer that the subject matter is what its proponent claims.”107

- . . . Galley testified at the hearing that cell extractions are ordinarily videotaped at the institution. . . routinely labeled with the date and time of the extraction and the names of the inmate and officers involved . . kept in an individual envelope and . . stored in a security vault . . , and it [was] not disputed that Officer Cole was depicted in the videotape. . . [T]his evidence is sufficient to prove in an administrative hearing that the videotape was properly made in conformity with the routine practice of the prison and thus, supports the trustworthiness, and reliability of the videotape.108

If this authentication process looks to the reader as a business record, that look is a wise one. The Court also said admission was proper under that evidence theory. 342 Md. at 27-30. The Court reviewed in detail the theory of the “silent witness” theory citing treatise authority and case law from other jurisdictions. 342 Md. at 21-26. It stated: “We decline to adopt any rigid, fixed foundational requirements necessary to authenticate photograph evidence under the ‘silent witness’ theory.” Id. In this case, the possibility of tampering was said to be remote. Id.

(3) j. The Requirement of an Oath

Hundreds of years of both English and American law dictate that to be admissible and trustworthy testimony must be presented under oath. COMAR 28.02.01.08 authorizes an ALJ to “administer oaths and affirmations.”

Significant Case Decisions

Statements under oath do not evidence make

- At issue in Heard v. Foxhire Associates, LLC., 145 Md. App. 695, 806 A. 2d 348 (2002) was whether the evidence was sufficient to sustain the decision of the Board of Appeals of Washington County. Statements by an attorney are not evidence. Sufficiency was questioned because the Board’s decision granting a special exception to extend the entrance to a retail shopping center owned by Foxshire through a subdivided residential lot, also owned by Foxshire, adjacent to the shopping center was based on trial counsel’s narrative. Evidence produced may be presented by counsel. 145 Md. App. at 704-07. As to the application of the Rules of Professional Conduct, there exists a distinction between a “trial” and a “hearing.” 145 Md. App. at 707. “It is imperative that evidence given before an adjudicatory body be under oath, whether from an attorney or lay person, a lay witness or an expert witness.” Id. Discounting the Board’s reliance on the “evidence” presented by Foxshire’s counsel in opening statement means the evidence in support of the special exception did not exist. 145 Md. App. at 708-09.109

106 Cole, 342 Md. at 21. The Court reviewed in detail the theory citing treatise authority and case law from other jurisdictions. 342 Md. at 21-26.
107 Cole, 342 Md. at 26. The Court said: “We decline to adopt any rigid, fixed foundational requirements necessary to authenticate photograph evidence under the ‘silent witness’ theory.”
108 Cole, 342 Md. at 27. The possibility of tampering was said to be remote.
109 The Court commented on the way the oath can be administered during a zoning hearing. Nothing beats individual swearing and identity of the witness on the record. Heard, 145 Md. App. at 709.
(4) The Right to Present Evidence and Cross-Examine

Fundamental to due process is the right of an individual to have a meaningful hearing. To that extent both the constitution of Maryland and the United States provide for a hearing. That hearing must be meaningful.

SG §10-213. Evidence in section (f) delineates the scope of evidence to be allowed in an administrative proceeding:

SG §10-213. Evidence.
(f) Scope of evidence.- On a genuine issue in a contested case, each party is entitled to:
(1) call witnesses;
(2) offer evidence, including rebuttal evidence;
(3) cross-examine any witness that another party or the agency calls; and
(4) present summation and argument.

(g) Documentary evidence.- The presiding officer may receive documentary evidence:
(1) in the form of copies or excerpts; or
(2) by incorporation by reference.

Hearings before an ALJ include COMAR 28.02.01.18. Evidence. That section provides that evidence is to be admitted in accord with SG §10-213.

(5) Privileges

Privileges granted by the Legislature or otherwise recognized by law must be recognized in administrative proceedings. SG §10-213(e) specifically states: “the presiding officer shall apply a privilege that law recognizes.”

As to what privileges are recognized by Maryland law, the case of Porter Hayden v. Bullinger, 350 Md. 452, 713 A.2d 962 (1998) states that a party may not obtain information that is privileged. The Court does a good job of listing various privileges that may be available and asserted:


Bullinger, 350 Md. at 461-62. [Emphasis by bold]

As to what else is or is not privileged, Tax Returns were said not to be privileged in Ashton v. Cherne Contracting Corp., 102 Md. App. 87, 648 A.2d 1067 (1994) (claimant in Worker’s Compensation
case required to furnish state/federal, returns (joint with his wife) that are relevant to claim, as are post-
injury wages to the issue of actual incapacity in occupational disease cases) *Id.*, at 94, 99. Judge Alpert
does an exhaustive review of the tax return privilege issue.

(6) Agency Expertise
Throughout Maryland case law there are references to the fact that judicial review must include the fact
that there has to be deference to agency expertise in a particular area. In addition SG §10-213 takes
special notice of expertise that may exist with an agency.

SG §10-213. Evidence.
(h) *Official notice of facts.*-
(1) The agency or the Office may take official notice of a fact that is:
   (i) judicially noticeable; or
   (ii) general, technical, or scientific and within the specialized knowledge of the agency.
(2) Before taking official notice of a fact, the presiding officer:
   (i) before or during the hearing, by reference in a preliminary report, or otherwise, shall notify each
       party; and
   (ii) shall give each party an opportunity to contest the fact.
   (i) *Evaluation.* - The agency or the Office may use its experience, technical competence, and specialized
       knowledge in the evaluation of evidence.

(7) Representation at the Hearing
In Chapter 5. D. Representation of Persons before OAH, there are provisions for who, in addition to an
attorney, may represent an individual at an agency proceeding held before OAH. Throughout the
Maryland Annotated Code, there are various references to the right of an individual to be represented by
an attorney. For example: BR §9-312(e) concerned with the licensing of Landscape architects specifically
states "the individual may be represented at the hearing by counsel;" AG §2-311 addresses the procedure
to be utilized in disciplinary proceedings against Veterinarians and specifically states in (b) that a licensee
has the right to be represented by counsel before the Board; and HO §8-317(d) provides that "the person
may be represented at the hearing by counsel" at a disciplinary proceeding before the Board of Nursing.

Even without specific statutory authority, it is difficult to imagine an agency having the right to deny
the request of an individual to be represented by counsel at an administrative proceeding. SG §10-206.1
addresses the issue:

SG §10-206.1. Legal practice.
(a) *Practice before agency.* - An agency may not:
   (1) grant the right to practice law to an individual who is not authorized to practice law;
   (2) interfere with the right of a lawyer to practice before an agency or the Office; or
   (3) prohibit any party from being advised or represented at the party's own expense by an attorney or, if
       permitted by law, other representative.
(b) *Publicly provided legal services.* - Subsection (a) of this section may not be interpreted to require the
State to furnish publicly provided legal services in any proceeding under this subtitle.
(8) The Burden of Proof

"The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution." See: SG 10-217

SG §10-217. Proof.
The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution.

As to the standard of the burden of proof to be applied in administrative proceedings, the Court of Appeals did an extensive review of the subject in 2002 settling on the holding, that in the absence of a legislative or regulatory enactment to the contrary, the standard in State and County administrative proceedings is probably going to be by a "preponderance of the evidence."

In 2001, the Court of Special Appeals thoroughly reviewed burden of proof in administrative proceedings in an LEORB case. "An administrative case is a civil case and, as such, the standard of proof is generally the preponderance of the evidence." That is, unless the constitution, a statute or a regulation makes the standard of clear and convincing evidence applicable. "... [I]n some instances, proof of a case by clear and convincing evidence may be more appropriate "because of the seriousness of the allegations." Even when charges fit within the "fraud, dishonesty, or criminal conduct" category, an administrative agency is not required to apply a clear and convincing test. Addressing due process concerns, the Court stated that it is in reality, an administrative proceeding that is being conducted by law persons. The conclusion: "We decline to require police hearing boards to apply different standards of proof in different cases depending upon the charges that are brought against an officer."

The Court of Special Appeals reviewed the concept of due process in the form of what burden of proof should be applicable in administrative proceedings alleging theft and dishonesty against a police officer in 2001. This was an LEORB case. Prior decisions "indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probative value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Bernstein v. Real Estate Commission, 221 Md. 221, 156 A. 2d 657 (1959) was the first case to interpret the MAPA which was enacted in 1957. The Court stated: "With respect to the weight of the evidence, it is true of course, that a mere surmise or conjecture that is was sufficient would not be enough. The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, i.e., a preponderance of the evidence is necessary, but proof beyond a reasonable doubt is not required. 42 Am. Jur., Public Administrative Law, Section 132." 221 Md. at 232. Coleman v. Anne Arundel Police, 369 Md. 108, 139, 797 A. 2d 770 (2002). Judge Harrell did an extensive review of the applicable standards of proof in criminal, civil and administrative proceedings. 369 Md. at 127-41. Coleman v. Anne Arundel County Police Dept., 136 Md. App. 419, 446, 766 A. 2d 169 (2001) (a police Board disciplinary case) citing cases. A clear and convincing standard is applied in civil proceedings in which fraud, dishonesty or criminal conduct is alleged, but that does not automatically extend to administrative proceedings. Case law from other states was reviewed. Coleman, 136 Md. App. at 447. Coleman, 136 Md. App. at 447-48, particularly discussing Meyers v. Montgomery County Police, 96 Md. App. 668, 626 A. 2d 1010 (1993). Coleman, 136 Md. App. at 448-49. In Meyers v. Montgomery County Police, 96 Md. App. 668, 626 A. 2d 1010 (1993) and other cases, prior appellate opinions "indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probative value, if any, of additional or substitute procedural safeguards; and finally the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Coleman, 136 Md. App. at 448. The Coleman Court addressed each of these factors in light of the theft and fraud charges brought. Coleman, 136 Md. App. at 448-51. Coleman, 136 Md. App. at 452. Coleman v. Anne Arundel County Police Dept., 136 Md. App. 419, 766 A. 2d 169 (2001).
safeguards; and finally the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 117

**Significant Case Decisions**

**There is no 100% certainty factor**
- Board of County Comm. v. Southern Resources, 154 Md. App. 10, 837 A. 2d 1059 (2003) reversed determining that it could not be 100% certain that real property to be developed was safe from explosives and thus the property was not to be developed. “The 100% certainty standard was arbitrary because it is impossible to demonstrated, based on a 100% certainty requirement, that any parcel of land is completely safe. Therefore, by applying an incorrect standard, the Board’s decision was arbitrary and capricious.” Id., at 33. 118 The Board’s determination constituted an error of law and the agency decision is owed no deference. A remand was ordered. 154 Md. App. at 34. 119

**Application of the clear and convincing standard**
- Everett v. Balt. Gas & Elec. Co., 307 Md. 286, 513 A.2d 882 (1986) held that the clear and convincing standard was applied in an administrative adjudication before the Maryland Public Service Commission. The Commission’s proceedings were expressly are exempt from the contested case provisions of the State APA. Coleman v. Anne Arundel Police, 369 Md. 108, 124, 797 A. 2d 770 (2002). This case was overruled in 2002 with the Court of Appeals stating that the contours of general state administrative law principles had evolved with the Legislative pronouncement in favor of a preponderance standard. Coleman, 369 Md. at 135. Because there was no legislative or regulatory enactment to the contrary, the preponderance test applied to LEORB proceedings. Coleman, 369 Md. App. at 139.

**Preponderance in disciplinary proceeding**
- Meyers v. Montgomery County Police Dep’t, 96 Md. App. 668, 626 A.2d 1010 (1993) held that the preponderance of the evidence standard was determined to apply in an administrative disciplinary proceeding brought by a local police department under the LEOBR, where the police officer was charged with excessive use of force in making an on duty arrest. 120

**Termination of employment by a preponderance of the evidence standard**
- Applying a standard of by a preponderance of the evidence in an administrative proceeding terminating a police officer through a finding of guilt on theft counts and the loss of more than one million dollars in actuarially calculated retirement benefits was not a violation of due process in Coleman v. Anne Arundel Police, 369 Md. 108, 142, 797 A. 2d 770 (2002). The Court discussed burdens of proof in civil litigation. “The function of a standard of proof, as that concept is embodies in the Due Process Clause . . . is to ‘instruct the factfinder concerning the degree of confidence out society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” Coleman, 369 Md. at 143 citing Addington v. Texas, 441 U.S. 418, 423 (1979). Balancing private vs. public interests, and assuming the officer properly demonstrated a liberty interest, the preponderance standard along with other procedures afforded under LEORB “adequately protect an officer against an erroneous deprivation of his or her due process rights.” 369 Md. at 149.

---

117 Coleman, 136 Md. App. at 448. The Coleman Court addressed each of these factors in light of the theft and fraud charges brought. 136 Md. App. at 448-51. “We decline to require police hearing boards to apply different standards of proof in different cases depending upon the charges that are brought against an officer.” 136 Md. App. at 452.

118 “The correct standard is whether th evidence supports a finding of unreasonable risk and, if so, whether it could be ameliorated.” Southern Resources, 154 Md. App. at 33.

119 A remand was in order in this case. “Nevertheless, when and administrative agency renders a decision based on incorrect legal standards, but there exists some evidence, ‘however minimal, that could be considered appropriately under the correct standard, the case should be remanded so the agency can reconsider the evidence using the correct standard.” Southern Resources, 154 Md. App. at 34.

What will the future bring?

Zeigler argued that the charges against him for filing a false statement were akin to charges of fraud which should require proof by clear and convincing evidence. These arguments were not made before the circuit court or the Court of Special Appeals. Ordinarily, the Court of Appeals will consider only an issue that has been raised in the petition for certiorari or any cross-petition to preserve the issue for review and that was not done in this case. *Maryland State Police v. Zeigler*, 330 Md. 540, 562-63, 626 A. 2d 914(1993)

(9) Subpoenas

Many administrative agencies provide for the issuance by the Agency of a subpoena for documents and other matters. It is important to first note that there is no absolute right, as there is with trial court proceedings, to have a subpoena issued. Constitutional due process requires the right to a hearing and an opportunity to be heard, and case law says that means the hearing must be meaningful. When and under what circumstances does the right to have one subpoenaed to testify become a part of the due process requirements of a hearing.

A. Agency and Other Authority

As an example of Agency authority to issue subpoenas, there is:

1. Authority of the Attorney General in consumer protection enforcement matters:

   **CL §13-405. Subpoena power.**
   
   (a) *Authority of Attorney General.* - In the course of any examination, investigation, or hearing conducted by him, the Attorney General may subpoena witnesses, administer oaths, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents.
   
   (b) *Information inadmissible in criminal proceeding.* - Information obtained under this section is not admissible in a later criminal proceeding against the person who provides the evidence.
   
   [An. Code 1957, art. 83, § 22; 1975, ch. 49, § 3.]

2. **HO Title 18 deals with disciplinary action against psychologists.**

   **HO §18-315. Same - Hearings.**
   
   (e) *Subpoenas; oaths.* -
   
   (1) Over the signature of an officer or the administrator of the Board, the Board may issue subpoenas and administer oaths in connection with any investigation under this title and any hearings or proceedings before the Board.
   
   (2) The Board shall issue subpoenas on behalf of the individual if the individual:
   
   (i) Requests that the Board do so; and
   
   (ii) States under oath that the testimony or evidence sought is necessary to the individual's defense.
   
   (3) If, without lawful excuse, an individual disobeys a subpoena from the Board or an order by the Board to take an oath, testify, or answer a question, on petition of the Board, a court of competent jurisdiction may compel compliance with the subpoena.
   

3. **LE §4-106 is concerned with the powers of mediation service and boards.**

   **LE §4-106. General powers of Mediation Service and boards.**
   
   (a) *In general.* - To the same extent as a court of the State in a civil case, the Mediation Service or a board may:
(1) conduct an investigation;
(2) hold hearings;
(3) administer oaths; and
(4) issue a subpoena for the attendance of a witness to testify or the production of books, papers, and other documents.

(b) **Enforcement of subpoena.**

(1) If a person fails to comply with a subpoena issued under this section, on petition of the Mediation Service or board, a circuit court may compel compliance with the subpoena.

(2) A board shall petition the circuit court for the county where the board is meeting.


**In addition,** proceedings before OAH are subject to a subpoena:

SG §9-1605(c) and COMAR 28.02.01.08 address states the authority of an ALJ to issue subpoenas:

**COMAR 28.02.01.08** **Powers and Duties of Judges.**

B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

(2) issue subpoenas for witnesses and the production of evidence;

**SG §9-1605. Administrative law judges.**

(c) **Powers generally.** In any contested case conducted by an administrative law judge, the administrative law judge may:

(1) authorize the issuance of subpoenas for witnesses.

**B. General Principles**

The Court of Appeals has set forth a three part test for determining the validity of a subpoena issued by an administrative agency. To determine the validity of a subpoena, a reviewing court asks whether:

1. the inquiry is authorized by statute;
2. the information sought is relevant to the inquiry; and
3. the information sought is relevant to the inquiry.\(^{121}\)

Agency enforcement of its subpoena authority is through the circuit court.

**Significant Case Decisions**

**The subpoena of these records would violate the privacy rights of my patients**

- In *Solomon v. Board of Medicine*, 155 Md. App. 687, 692. 845 A. 2d 47 (2004), the Board of Physicians issued a issued a *subpoena duces tecum* commanding Dr. Solomon to produce the medical records of 19 of her patients. She refused to comply the grounds that she was not under investigation by the Board for misconduct, the subpoena was overbroad, and her compliance with the subpoena would violate her patients' privacy rights. 155 Md. App. at 692. The Court cited HG 4-306(b)(2) which provides for permitted disclosures of medical records "to health professional licensing and disciplinary boards, in accordance with a subpoena for medical records for the purpose of an investigation regarding: . . . licensure, certification, or discipline of a health care provider. . ." 155 Md. App. at 698. The subpoena

was not overbroad as the Board had an interest in reviewing Dr. Solomon's patients' records for sampling to obtain information regarding the quality of medical care Dr. Solomon provided, including diagnostic and treatment information. Review of the records would also elicit information about Dr. Solomon's coding and billing practices. Limiting the Board's examination to whether an "informed consent" form was included in the patients' files, as Dr. Solomon suggests, would not provide the information necessary to assist the Board in determining if Dr. Solomon is rendering appropriate medical care. 155 Md. App. at 701.

There is no physician-patient privilege that would prohibit the subpoena of these records by the Board for investigatory purposes. 155 Md. App. at 702.122

**Does a news reporter have a privilege not to testify at an administrative hearing?**

- Quashing an administrative subpoena for the appearance of a news reporter to verify statements of a police officer at a police disciplinary hearing was error and not protected by privilege. *Prince George's County v. Hartley*, 150 Md. App. 581, 584, 822 A. 2d 537 (2003). “... Neither the First Amendment nor the Maryland Shield Law entitles [reporters] to refuse to testify at [an] administrative hearing.” *Id.*

**Alleging the ALJ improperly denied a request to issue a subpoena**

- In *Forman v. MVA*, 332 Md. 201, 630 A. 2d 753 (1993) a licensee claimed that the ALJ improperly denied her request to subpoena a police officer in a license suspension hearing. The Court said that whether the ALJ was correct depended on why the ALJ rejected the request. A remand was in order because the Court did not know why the ALJ did what he did. The Court stated:

  ... We can say that when faced with a licensee's proffer and subpoena request, an ALJ has three distinct choices: (1) accept the proffer's contents as true, and indicate this acceptance; (2) reach no conclusion regarding the truth of the proffer (essentially suspending judgment), and issue the subpoena; or (3) reject the proffer and subpoena request entirely, and provide a valid explanation of the rejection. This third option enables the ALJ to dispose of frivolous or otherwise improper subpoena requests. We emphasize that the ALJ may only avoid issuing the subpoena when he or she explicitly accepts the proffer or rejects the proffer and provides a basis for this rejection.

The MAPA subpoena power (SG §12-103(c)) is permissive (“may”). The decision whether or not to issue a subpoena is “governed by the general evidentiary standards set out in the Administrative Procedure Act.” An MVA hearing "shall be conducted in accordance with the rules of evidence in §§10-208 and 10-209 of the State Government Article [the Administrative Procedure Act]”) By SG §10-2-8 irrelevant and incompetent evidence may be excluded. *Forman*, 332 Md. at 222. In addition COMAR 11.11.03.07 dealing with MVA hearings addresses subpoena hearings by providing:

**COMAR 11.11.03.07. Request for Subpoenas.**

**C. A request may be refused if the testimony or evidence to be offered:**

(1) Is immaterial, irrelevant, or unduly repetitious; or

(2) Does not pertain to a genuine issue in the contested case."

If it is determined that a subpoena should not issue, a proffer of testimony is required for the court to determine on judicial review whether the decision was correct. 332 Md. at 223.124

---


123 Disciplinary proceedings were brought against Officer lot for a statement attributed to him in the Washington Post to the effect that he would have shot someone had he been on the scene. *Id.*, at 584. First Amendment law was reviewed and found not applicable as newspaper reporters have no better testimonial privilege than other citizens. The law was examined in depth. *Hartley*, 150 Md. App. at 587-99. “Officer Lott has a right to cross-examine witnesses who testify against him.” 150 Md. App. at 597. There is a Maryland Shield Law which changed the common law of no privilege afforded newsmen. 150 Md. App. at 600. Court ordered disclosure is a part of that law when there is a significant legal issue and the information could not be otherwise obtained. 150 Md. App. at 602. Remand was required for the trial court to make a determination of whether the witness was compellable. 150 Md. App. at 603.

124 The *Forman* Court stated:
**Postponements**

The one conducting a contested case hearing is often requested to postpone that hearing. When that hearing is conducted before an ALJ, there is a COMAR provision:

**COMAR 28.02.01.08  Powers and Duties of Judges.**

B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:

(7) Grant a continuance or postponement;

No matter who conducts the hearing, any consideration of whether to grant a postponement has to be recognized as involving due process rights to a fair hearing and the opportunity to be heard.

**Significant Case Decisions**

**Is there anything to indicate he was unable to attend the hearing?**

- In *Coleman v. Anne Arundel County Police Dept.*, 136 Md. App. 419, 766 A. 2d 169 (2001) there was a contention that Mr. Coleman was not competent to attend a police officer disciplinary hearing. A due process violation was alleged. While the appellant was on the Family and Medical Leave Act due to mental illness, 136 Md. App. at 428, there was nothing in the record to indicate he was not able to attend the hearing. No motions were filed on the grounds of competency, and the issue of competency and need for a further continuance had not been raised until after he had testified. 136 Md. App. at 435. The ability to defend at an administrative hearing “is akin to competency to stand trial,” which requires that a defendant must exhibit both the “present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as a factual understanding of the proceedings against him.” 136 Md. App. at 436. Later testimony by Mr. Coleman indicated “that he was able to comprehend fully what was going on and to respond appropriately to questions that were asked of him by both the prosecutor and his own attorney. In short, there was nothing to give the Board any indication that appellant was not competent such that his competency should have been questioned *sua sponte.*” 136 Md. App. at 436-37.

**Closing and Summation**

SG §10-206 (MAPA) enables OAH to govern procedures and practice for contested cases. Agencies may also adopt regulations to govern procedures under the MAPA. COMAR 28.02.01.17A.(4) states that in a hearing before OAH, a party is entitled to make opening and closing statements.

---

Should the ALJ decide not to accept a licensee's proffered testimony as true, then failure to grant licensee's subpoena request may be an abuse of discretion when the proffered testimony (1) does not fall within the categories of excludable evidence found in COMAR and the Code and (2) the ALJ provides no valid reasons why the proffer was rejected. In Forman's case, the evidence proffered met both the statutory and regulatory standards and there was no other apparent reason to reject the proffer. The proffered evidence directly "pertain[ed] to a genuine issue in the contested case," COMAR 11.11.03.07C(2), namely, whether Forman was properly and fully advised of the administrative sanctions to be imposed for refusing the test. Further, our earlier discussion should make clear that evidence pertaining to negation of the advice of rights or inducement to refuse the alcohol concentration test is neither incompetent, irrelevant, immaterial, nor unduly repetitious. See Md.Code (1984, 1993 Repl.Vol.), State Government Art., §10-208(c) and COMAR 11.11.03.07C(2). In fact, the officer's advice to the licensee is specifically established, by statute, as a necessary issue to be decided at the hearing. As § 16-205.1(f)(7)(i) states: "At a hearing . . . the only issues shall be . . . (3) [w]hether the police officer requested a test after the person was fully advised of the administrative sanctions that shall be imposed . . . ." (Emphasis added). Thus, if the ALJ did not accept the proffer as to the officer's advice of rights, he should have issued the subpoena to require the detaining officer to testify at the hearing.

*Forman*, 332 Md. at 223-24.
Even without a statute or a rule, it seems unlikely that one would be denied the right to give a closing argument before the trier of fact.

G. Recusal

1. OAH

Disqualification of an ALJ is required "in which personal bias or other reasons render the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may reasonably be inferred from the facts." Any party may move for disqualification. A motion for disqualification must be made "promptly" upon discovering facts that establish grounds for disqualification.

Substitution of an ALJ may be made if, for any reason, a judge "is unable to continue presiding over a pending hearing, or issue a proposed or final decision after the conclusion of the hearing" to the extent allowed by law. "The substitute may use the existing record and conduct further proceedings as are necessary and proper."

Significant Case Decisions

Personal involvement?
- Case law relating to motions for recusal in litigation other than that involving administrative agencies can give direction as to the general application of the doctrine. See South Easton v. Easton, 387 Md. 468, 876 A.2d 58 (2005) (judge need not recuse himself from case concerning the closing of a public street and conveying a roadbed to a private hospital to allow new emergency room facility to be built on the basis that ruling could adversely affect medical care to his wife, who was seriously ill – good review of the law and difference between personal and judicial conduct – judge asked for specific examples of his impermissible judicial conduct and answers given meant that conduct did not rise to the level of harassment. 387 Md. at 499-501.

Some ABC's of recusal
- Dr. Regan filed a motion to recuse two Board members because he stated he intended to call them as witnesses, that they were personally biased against him, and that they were personally involved in matters as to with there were disputed evidentiary facts. Also he alleged that two Board members would benefit economically from a decision adverse to him because their chiropractic practices were in the same geographic area as Dr. Regan's practice and this fact created at least an appearance of impropriety. That motion was denied by the Board. Regan v. Board of Chiropractic, 120 Md. App. 494, 504-06, 707 A. 2d 891 (1998) aff’d 355 Md. 397 (1999)

On appeal the Court stated that there is a presumption in Maryland that a judge is impartial and that judge normally has a wide range of discretion in determining whether to recuse himself/herself from hearings. Reference was made to the Maryland Code of Judicial Conduct (Rule 16-813) and the Court pointed out that rule 5-605 provides that a judge presiding at trial may not testify as a witness at that trial. It was also noted that OAH requires disqualification when there is an appearance of impropriety which may be reasonably inferred. COMAR 28.02.01.08. Regan v. Board of Chiropractic, 120 Md. App. 494, 511, 707 A. 2d 891 (1998) aff’d 355 Md. 397 (1999)

---

125 COMAR 28.02.01.08 C. The regulation states that "personal bias shall be presumed under circumstances set forth in Canon 3D of the Code of Conduct for Judicial Conduct for Administrative Law Judges of the Office of Administrative Hearings."

126 Id. In Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 512, 707 A. 2d 891 (1998), the Court stated:

With respect to the OAH, an administrative law judge (ALJ) must conduct a full, fair, and impartial hearing. COMAR 28.02.01.08(A)(1). An ALJ must withdraw from a proceeding when "personal bias or other reasons render the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may reasonably be inferred from the facts." COMAR 28.02.01.08(C)(1)(a). This provision is relevant by analogy to the case before us because the Administrative Procedure Act (APA) applies to ALJs and the Board with relatively equal force.

127 Id. Facts are sometimes determined on the base of demeanor based credibility.
In this case there was no evidence of bias and the generalities argued by Dr. Regan were not a sufficient basis for disqualification of a Board member. *Regan v. Board of Chiropractic*, 120 Md. App. 494, 514, 707 A. 2d 891 (1998) *aff’d* 355 Md. 397 (1999) The Court of Appeals affirmed citing the concession at oral argument by Dr. Regan that there was no showing of actual bias, and referencing both COMAR 28.02.01.08 and the Maryland Code of Judicial Conduct in discussing the appearance of impropriety standard. *Regan II*, 355 Md. at 409-410. In addition the Court cited other case law regarding the proper standard to be applied in determining whether there is an “appearance of impropriety.” One Board member did phone Dr. Regan regarding a newspaper advertisement stating that Dr. Regan should include his own name in the advertisement. The Court stated the fact this Board member sat in judgment did “not rise to the level of an appearance of impropriety.” *Regan v. State Board of Chiropractic*, 355 Md. 397, 412, 735 A. 2d 991 (1999). Case law demonstrated court rulings on the standard of the appearance of impropriety:

1. “Simply because an administrator may have some earlier knowledge of a case does not mean that he or she is precluded from rendering a fair decision after all of the evidence has been presented in an evidentiary hearing.”

2. “The mere recitation by an agency official of the underlying facts that are alleged to support the charges in question does not inherently manifest bias on the part of the agency official, so as to preclude such official from rendering a fair decision after all the evidence has been brought out through the adversarial process.”

3. “The issuance of press releases announcing charges by the agency that will ultimately decide the case does not violate due process guarantees.”

4. “An administrative agency is sometimes required to act as both prosecutor and judge, and it has never been held that such procedure denies constitutional right.”

5. “...[A] judge is not necessarily disqualified for having earlier expressed an opinion as to a case.”

The Court of Appeals stated it did not “believe that a reasonable person, knowing and understanding all the relevant facts would believe that Dr. Lewis was prejudiced because of the alleged seduction plot.” 355 Md. at 412. That plot did not involve any conduct on the part of Dr. Lewis; court are reluctant to allow litigants to utilize motions for recusal to “judge shop;” and “Parties cannot be allowed to create the basis for recusal by their own deliberate actions.” 355 Md. at 414.

2. Generally

Whether the individual(s) presiding other a hearing are members of a Board or agency or an ALJ, there sometimes arises a situation where recusal is requested or required. It is APA Legislative policy that those persons involved in contested cases shall be treated “in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings.” Judicial review includes the right to reverse or modify a decision “if any substantial right . . . may have been prejudiced because a finding, conclusion, or decision is . . . unconstitutional . . . results from an unlawful procedure . . . is affected by any other error of law . . . is unsupported by competent, material, and substantial evidence in light of the entire record as submitted . . . or is arbitrary or capricious.” That means going into a proceeding there is the right to ask the trier to recuse himself/herself if objective reasons exist to make that request.

There are no definitions in the APA for the relevant terms of fair, unbiased, unlawful procedure found in sections 10-201 and 10-222(h). The Court of Special Appeals has stated that appropriate analogies can be drawn from the Maryland Rules of Procedure and case law. Rule 16-813, Canon 3(C) states that a judge should “not participate in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . . the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the

---

128 SG §10-201.
129 SG §10-222(h).
proceeding; . . ."  

"The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

"Courts have recognized that there is a strong presumption that judges are impartial and will refrain from presiding over a matter when appropriate." It is a presumption which can be overcome if "the aggrieved party proves the existence of actual bias." Statements of generalities without specific instances of improper conduct are not sufficient. "It is essential that the judicial process not only operate fairly and but also appear to operate fairly. . . . [C]ourts have determined that recusal is mandated when a trial judge reasonably appears to hold a bias or prejudice against the moving party." The test is an objective one.

Recusal was required when: (1) two members of the Board of Pharmacy allowed personal knowledge of disputed evidentiary facts into the decision and order of the Board, (2) the Board reviewed documents prepared by its attorney prior to the introduction of evidence during the hearing, and a Board member called the attorney for Ms. Spencer a liar during the hearing. A Board member calling the attorney for Ms. Spencer a liar during the hearing. There was an "unacceptable appearance of impropriety."

Two Board members were not required to disqualify themselves from a hearing on disciplinary charges against Dr. Regan before the Board of Chiropractic. One Board member was alleged to have been "personally involved in the events resulting in the filing of advertising charges," and the other Board member was part of an alleged scheme by Dr. Regan to compromise this Board member by engineering a scheme to sexually compromise him by involvement with a woman patient.

---

131 Spencer, 150 Md. App. at 152.
133 Id., (citations omitted)
134 Regan, 120 Md. App. at 152. (citations omitted)
135 Regan, 120 Md. App. at 513-14.
136 Regan. The Court stated:

The test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts . . . Like all legal issues, judges determine appearance of impropriety - not by what a straw poll of the only partly informed man-in-the-street would show - but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge. (. . . "whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned").

Id. (citations omitted)
137 Board of Pharmacy v. Spencer, 150 Md. App. 138, 153, 819 A.2d 383 (2003). "In and of itself, the participation by a Board member in both the settlement negotiations and the following hearing, does not pose a problem. (. . . "administrative decision makers do not automatically become biased merely because they have become familiar with the facts of a proceeding through the performance of their administrative duties").
138 Spencer, 150 Md. App. at 153-54. The Court stated:

In the instant case, a reasonable member of the public knowing all the relevant facts would conclude that appellant's impartiality was questionable. The hearing started out poorly when appellee's counsel arrived and "caught" the members of the Board reviewing documents not in evidence before the hearing started. In addition, it was inappropriate for the Board to consider anything it learned during the unsuccessful settlement negotiations, when issuing its Final Opinion and Order. Of much more concern to this Court, however, is the statement by Ms. Hawkins to appellee's counsel. Once the hearing deteriorated to the point where a member of the reviewing tribunal called the attorney for appellee a "bold faced liar," the appearance of impartiality and fairness of the whole proceeding vanished.

150 Md. App. at 155.
140 Regan, 120 Md. App. at 506.
Claim of bias * preemptory challenge?

- In *Coleman v. Anne Arundel County Police Dept.*, 136 Md. App. 419, 766 A. 2d 169 (2001), a presiding Board member was asked to recuse himself because the alleged offender had the right to a peremptory challenge, and that the member was alleged to be biased against him having filed a prior complaint against Officer Coleman. 136 Md. App. at 437. Record proceedings were examined in detail. 137 Md. App. at 437-39. Maryland strongly presumes that judges are impartial. Any right to a peremptory challenge had not been timely raised. The Board member did not initially recall filing charges; he indicated his concerns in the past were unrelated to an integrity determination; and the prior investigation had been resolved to the Board member’s satisfaction. The Board member’s questioning the behavior of Officer Coleman some years earlier did not automatically disqualify him from the sitting on the Board in this case. 136 Md. App. at 439-40.

The appearance of impropriety?

- An issue in *Gigeous v. ECI*, 363 Md. 481, 769 A. 2d 912 (2001) was whether the ALJ improperly denied Petitioner’s request to review a personnel file of a prior ALJ to determine whether any impropriety existed with regard to ALJ taking a position against *Gigeous* in a prior hearing. 363 Md. at 506. It was argued that impartiality is questioned with ALJ McCloud favored positions taken by the agency where he later became employed. 363 Md. at 509. The Court said that assuming the situation could be said to have an appearance of impropriety, *Gigeous* essentially obtained the relief he sought. The question was moot. ALJ Seaton independently reviewed ALJ McCloud’s rulings, and overruled him on one point to the advantage of the Petitioner on a burden of proof shift issue. 363 Md. at 510.

Exhaustion of administrative remedies on the bias issue

- In *PSC v. Schisler*, 389 Md. 27, 882 A. 2d 849 (2005), Wilson claimed that the PSC termination of her violated her due process rights by failing to provide an impartial agency adjudicator for her post-termination administrative appeal. 389 Md. at 38 The circuit court agreed but the Court of Appeals reversed. Chairman Schisler, the individual who terminated Wilson, was the head of her principal unit and the one under the statutory scheme who would ordinarily hear her appeal. She argued he was biased against her and that the failure to supply her with an impartial trier for her appeal denied her a fundamental constitutional right citing Article 24 of the Maryland Declaration of Rights. The Court said it would not reach this question because it concluded that Wilson failed to invoke and exhaust her statutory remedies provided to a management service at-will employee of the PSC who is terminated for reasons other than misconduct. 389 Md. at 88-89.

In this case, [SPP] §11-113 provided a specific statutory administrative appeal process for certain categories of State employees, of which Wilson was one. Although Wilson apparently submitted an administrative appeal pursuant to §1-113 following her initial termination, she failed to do so with respect to her re-termination, instead opting to file an unsuccessful motion to hold the Commission in contempt in the action in the Circuit Court arising from the initial termination. We find that, before Wilson could seek a judicial forum to resolve the disputes she seeks to raise with her re-termination, she was required to file and prosecute to a final administrative decision an administrative appeal under §11-113.141

389 Md. at 90

Not having filed that appeal, the doctrine of exhaustion of administrative remedies applied and the allegation was dismissed. 389 Md. at 93-94

Unconstitutional bias was alleged by Wilson. There is a constitutional exception to the exhaustion of administrative remedies doctrine. In this case, Wilson did not attack the constitutionality of SPP §11-113, but rather as applied to her situation. Additionally, there was no record of what the specifics of Wilson’s allegations of unconstitutional bias were. 389 Md. at 91-92 "Furthermore, the Chairman’s responses were not flippant,

---

141 Simply stated, the Court did not know what the Commission and Chairman Schisler would do had judicial review been requested. Effort to file the appeal was minimal, she could have succeeded on appeal or Schisler may have concluded authority should be delegated to another individual. *Wilson*, 389 Md. at 91-92.
frivolous, or facetious on their fact." Citing Spencer, the Court said there was no factual predicate for specific personal bias or per se requirement of recusal. 389 Md. at 93

H. Disposition
Dismissal of a case "may" occur if the request for a hearing does not contain any of this information and "shall" occur if the request does not contain the address of the person requesting the hearing. An alternative to dismissal for a failure to include required information is the right of OAH to return the hearing request with a request for resubmission with all required items. However, any resubmission "does not extend the time within which the initial pleading is required to be filed."

Disposition is best discussed with a recitation of the applicable sections from the MAPA and before OAH:

(1). There can be a dismissal for a failure to attend or participate:

COMAR 28.02.01.20 Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.

A. If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other stage of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party.

B. Final Default Orders.

(1) On motion filed within 30 days after the date of a final default order, the judge may, for good cause, vacate or modify the final default order and set the case in for further proceedings as appropriate.

(2) If a motion is denied, the final default order is effective.

C. Proposed Default Orders. A proposed default order is reviewable in accordance with the delegating agency's regulations governing review of proposed decisions.

(2). The Decision made is either a proposed decision or a final decision:

"When the OAH hears a contested case, it is directed by statute to "prepare proposed findings of fact, conclusions of law, or orders in accordance with the agency's delegation under §10-205." APA § 10-220(a). The agency then takes action on the proposed decision within sixty days. APA § 10-220(c)(1). If the OAH "conducted the hearing and the agency's proposed decision includes any changes, modifications, or amendments to the [OAH's] proposed findings, conclusions, or orders, [its order shall] contain an explanation of the reasons for each change, modification, or amendment." APA § 10-220(d)(4)."

"When [the agency] delegates the hearing responsibility to an ALJ, the ALJ becomes an extension of [the agency]. Any responsibilities not expressly given the ALJ remain with [the agency] and, unless statutorily proscribed, [the agency] reserves the right to review any aspect of an ALJ decision." When the ALJ files a proposed decision, the agency, the parties may file exceptions to the ALJ's proposed order. The parties may then file exceptions to the ALJ's proposed order. COMAR § 31.02.02.10. The agency then makes the final decision."145

142 COMAR 28.02.01.04 C.
143 COMAR 28.02.01.04 D.

(a) Preparation.- If the Office conducts a hearing under this subtitle, the Office shall prepare proposed findings of fact, conclusions of law, or orders in accordance with the agency's delegation under § 10-205 of this subtitle.

(b) Submission.- The Office shall send its proposed findings, conclusions, or orders:

1. to the parties and the agency directly; or
2. if the agency's delegation under § 10-205 of this subtitle requires, to the agency for distribution by the agency to the parties.

(c) Review and issuance.-

1. Within 60 days after receipt of the Office's proposed findings, conclusions, or order under subsection (b) (2) of this section, the agency shall:
   (i) review the Office's proposed findings, conclusions, or order;
   (ii) issue the proposed decision, which may include the Office's proposed findings, conclusions, or order with or without modification; and
   (iii) send the proposed decision and a copy of the Office' proposed findings, conclusions, or order to the parties.

2. The time limit specified in paragraph (1) of this subsection may be extended by the agency head, board, or commission with written notice to the parties.

(d) Form and contents.- A proposed decision or order, including proposed decisions or orders issued for contested case hearings subject to this subtitle but not conducted by the Office, shall:

1. be in writing or stated on the record;
2. contain separate findings of fact and conclusions of law;
3. include an explanation of procedures and time limits for filing exceptions; and
4. if the Office conducted the hearing and the agency's proposed decision includes any changes, modifications, or amendments to the Office's proposed findings, conclusions, or orders, contain an explanation of the reasons for each change, modification, or amendment.

[1993, ch. 59, §1.]

SG §10-221. Final decisions and orders.

(a) Form.- A final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record.

(b) Contents.-

1. A final decision or order in a contested case, including a remand of a proposed decision, shall contain separate statements of:
   (i) the findings of fact;
   (ii) the conclusions of law; and
   (iii) the order.

2. A written statement of appeal rights shall be included with the decision.

3. If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.

4. If, in accordance with regulations, a party submitted proposed findings of fact, the final decision shall state a ruling on each proposed finding.

(c) Distribution.- The final decision maker promptly shall deliver or mail a copy of the final decision or order to:

1. each party; or
2. the party's attorney of record.


COMAR 28.02.01.22 Decision or Proposed Decision.

A. A judge shall prepare a decision or proposed decision in accordance with the agency's delegation or pertinent law.

B. Proposed Decision.

1. If the judge is not the final decision maker, the judge shall submit the proposed decision to the final decision maker with a copy to each party, unless otherwise provided by law or the agency's delegation.
(2) When permitted by law, an adversely affected party may file exceptions to the proposed decision in accordance with the delegating agency's regulations or as otherwise provided by law.

C. Final Decision. Except as otherwise provided by law, when the judge is the final decision maker, the decision is the final decision for purposes of judicial review.

(3). There is a provision for a reconsideration and revision (at least before OAH)

COMAR 28.02.01.28 Reconsideration and Revision.
A. Except as provided in § B(2) of this regulation, a decision may be revised or reconsidered only by the judge who rendered the decision for which reconsideration or revision is requested.

B. Revisory Power.
   (1) On motion of any party filed at any time, the judge may exercise revisory power and control over a final decision in the event of fraud, mistake, or irregularity in the same manner that the courts may exercise revisory power under Maryland Rule 2-535(b).
   (2) On the initiative of the judge or on the motion of any party, a judge may correct a clerical mistake in a final decision at any time in the same manner as the courts exercise revisory power under Maryland Rule 2-535(d).

C. Reconsideration. When the judge is the final decision maker, the judge who rendered the decision may revise or reconsider the decision to the same extent as permitted by law if the agency rendered the final decision.

D. A request for revision or reconsideration does not automatically stay the action or toll the time for filing an appeal.

E. Proposed decisions may not be revised or reconsidered by the judge.

(4). The Necessity to Resolve Issues
It is important and “necessary that administrative agencies resolve all significant conflicts in the evidence and then chronicle, in the record, full, complete and detailed findings of fact and conclusions of law.” “At a minimum, one must be able to discern from the record the facts found, the law applied, and the relationship between the two.” From the Court of Appeals: “We must know what a decision means before the duty becomes ours to say whether it is right or wrong.”

Significant Case Decisions

A reversal and remand because the ALJ did not reach that decision
- Forman asserted at an MVA hearing that the policeman who arrested her in connection with a DWI stop neglected to give her the warnings contained in an DR-15 MVA form and also induced her to refuse the alcohol concentration test, “thereby affecting her ability to make a knowing and voluntary decision about whether to take or refuse the test.” Forman v. MVA, 332 Md. 201, 221, 630 A. 2d 753 (1993). “... [A] detaining officer’s negation of previously and properly given advice of rights can violate a licensee’s due process rights.” Because the ALJ never decided this issue or explained his decision, the Court of Appeals reversed and remanded for further proceedings. 332 Md. at 221-22.

§10-201. Declaration of policy.
The purpose of this subtitle is to:
   (1) ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and
   (2) promote prompt, effective, and efficient government.
[1993, ch. 59, § 1.]

(a) In general.- In this subtitle the following words have the meanings indicated.
(b) Agency.- "Agency" means:
   (1) an officer or unit of the State government authorized by law to adjudicate contested cases; or
   (2) a unit that:
      (i) is created by general law;
      (ii) operates in at least 2 counties; and
      (iii) is authorized by law to adjudicate contested cases.
(c) Agency head.- "Agency head" means:
   (1) an individual or group of individuals in whom the ultimate legal authority of an agency is vested by any provision of law; or
(2) the secretary of the State department that is responsible for State programs that are administered by the Montgomery County Department of Health and Human Services.

(d) **Contested case.**

(1) "Contested case" means a proceeding before an agency to determine:

(i) a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or

(ii) the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.

(2) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

(e) **License.** "License" means all or any part of permission that:

(1) is required by law to be obtained from an agency;

(2) is not required only for revenue purposes; and

(3) is in any form, including:

(i) an approval;

(ii) a certificate;

(iii) a charter;

(iv) a permit; or

(v) a registration.

(f) **Office.** "Office" means the Office of Administrative Hearings.

(g) **Presiding officer.** "Presiding officer" means the board, commission, agency head, administrative law judge, or other authorized person conducting an administrative proceeding under this subtitle.


**SG §10-203. Scope of subtitle.**

(a) **General exclusions.** This subtitle does not apply to:

(1) the Legislative Branch of the State government or an agency of the Legislative Branch;

(2) the Judicial Branch of the State government or an agency of the Judicial Branch;

(3) the following agencies of the Executive Branch of the State government:

(i) the Governor;

(ii) the Department of Assessments and Taxation;

(iii) the Insurance Administration except as specifically provided in the Insurance Article;

(iv) the Injured Workers' Insurance Fund;

(v) the Maryland Parole Commission of the Department of Public Safety and Correctional Services;

(vi) the Public Service Commission;

(vii) the Maryland Tax Court;

(viii) the State Workers' Compensation Commission;

(ix) the Maryland Automobile Insurance Fund; or

(x) the Patuxent Institution Board of Review, when acting on a parole request;

(4) an officer or unit not part of a principal department of State government that:

(i) is created by or pursuant to the Maryland Constitution or general or local law;

(ii) operates in only 1 county; and

(iii) is subject to the control of a local government or is funded wholly or partly from local funds;

(5) unemployment insurance claim determinations, tax determinations, and appeals in the Department of Labor, Licensing, and Regulation except as specifically provided in Subtitle 5 of Title 8 of the Labor and Employment Article; or

(6) any other entity otherwise expressly exempted by statute.

(b) **Applicability to property tax assessment appeals boards and correction of death certificates.** This subtitle does apply to:

(1) the property tax assessment appeals boards; and

(2) as to requests for correction of certificates of death under § 5-310 (d) (2) of the Health-General Article, the office of the Chief Medical Examiner.

(c) **Public hearings.** A public hearing required or provided for by statute or regulation before an agency takes a particular action is not an agency hearing under § 10-202 (d) of this subtitle unless the statute or regulation:

(1) expressly requires that the public hearing be held in accordance with this subtitle; or
 expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with this subtitle.

(d) Contested cases arising from State program administered by Montgomery County Department of Health and Human Services.-

(1) Subject to paragraphs (2) and (3) of this subsection, this subtitle does apply to a contested case that arises from a State program administered by the Montgomery County Department of Health and Human Services in the same manner as the subtitle applies to a county health department or local department of social services.

(2) For purposes of this subtitle, the Office of the Attorney General, after consultation with the County Attorney for Montgomery County, shall determine if the Montgomery County Department of Health and Human Services administers a State program.

(3) This subsection is not intended to extend or limit the authority of the Montgomery County Department of Health and Human Services to administer State programs in the manner of a county health department or local department of social services.


SG §10-204. Political subdivisions and instrumentalities.
A political subdivision of the State or an instrumentality of a political subdivision is entitled, to the same extent as other legal entities, to be an interested person, party, or petitioner in a matter under this subtitle, including an appeal.

[An. Code 1957, art. 41, § 256A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-205. Delegation of hearing authority.
(a) To whom delegated; limitation.-

(1) Except as provided in paragraph (2) of this subsection, a board, commission, or agency head authorized to conduct a contested case hearing shall:

(i) conduct the hearing; or

(ii) delegate the authority to conduct the contested case hearing to:

1. the Office; or

2. with the prior written approval of the Chief Administrative Law Judge, a person not employed by the Office.

(2) A hearing held in accordance with § 4-608(f) or § 5-610(f) of the Business Occupations and Professions Article may not be delegated to the Office.

(3) With the written approval of the Chief Administrative Law Judge, a class of contested case hearings may be delegated as provided in paragraph (1)(ii)2 of this subsection.

(4) This subsection is not intended to restrict the right of an individual, expressly authorized by a statute in effect on October 1, 1993, to conduct a contested case hearing.

(b) Scope of authority delegated.- An agency may delegate to the Office the authority to issue:

(1) proposed or final findings of fact;

(2) proposed or final conclusions of law;

(3) proposed or final findings of fact and conclusions of law;

(4) proposed or final orders or orders under Article 49B of the Code; or

(5) the final administrative decision of an agency in a contested case.

(c) Procedure upon receipt of hearing request.- Promptly after receipt of a request for a contested case hearing, an agency shall:

(1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing;

(2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's delegation; or

(3) request written approval from the Chief Administrative Law Judge to appoint a person not employed by the Office to conduct the hearing.

(d) Delegation final; exception.-

(1) Except as provided in paragraph (2) of this subsection, an agency's delegation and transmittal of all or part of a contested case to the Office is final.

(2) If an agency has adopted regulations specifying the criteria and procedures for the revocation of a delegation of a contested case, delegation of authority to hear all or part of a contested case may be revoked, by the agency head, board, or commission, in accordance with the agency's regulations, at any time prior to the earlier of:

(i) the issuance of a ruling on a substantive issue; or
(ii) the taking of oral testimony from the first witness.

(e) Duties of the Office.-
   (1) The Office shall:
   (i) conduct the hearing; and
   (ii) except as provided in paragraph (2) of this subsection or as otherwise required by law, within 90 days after
       the completion of the hearing, complete the procedure authorized in the agency's delegation to the Office.
   (2) The time limit specified in paragraph (1)(ii) of this subsection may be extended with the written approval of
       the Chief Administrative Law Judge.


SG §10-206. Procedural regulations.
   (a) Adoption by Office; conflict.-
       (1) The Office shall adopt regulations to govern the procedures and practice in all contested cases delegated to
           the Office and conducted under this subtitle.
       (2) Unless a federal or State law requires that a federal or State procedure shall be observed, the regulations
           adopted under paragraph (1) of this subsection shall take precedence in the event of a conflict.
   (b) Adoption by agencies.- Each agency may adopt regulations to govern procedures under this subtitle and
       practice before the agency in contested cases.
   (c) Expedited hearings.- Regulations adopted under this section may include procedures and criteria for
       requesting and conducting expedited hearings.
   (d) Prehearing procedures.- Each agency and the Office may adopt regulations that:
       (1) provide for prehearing conferences in contested cases; or
       (2) set other appropriate prehearing procedures in contested cases.
   (e) Explanatory materials.- To assist the public in understanding the procedures followed by an agency or the
       Office in contested cases, an agency or the Office may develop and distribute supplemental explanatory materials,
       including the related forms that the agency or Office requires and instructions for completing the forms.

[An. Code 1957, art. 41, §§ 245, 251A; 1984, ch. 284, § 1; 1992, ch. 547; 1993, ch. 59, § 1; 1994, ch. 536, §§ 1, 2.]

SG §10-206.1. Legal practice.
   (a) Practice before agency.- An agency may not:
       (1) grant the right to practice law to an individual who is not authorized to practice law;
       (2) interfere with the right of a lawyer to practice before an agency or the Office; or
       (3) prohibit any party from being advised or represented at the party's own expense by an attorney or, if permitted
           by law, other representative.
   (b) Publicly provided legal services.- Subsection (a) of this section may not be interpreted to require the State to
       furnish publicly provided legal services in any proceeding under this subtitle.

[1994, ch. 536, § 1.]

SG §10-207. Notice of agency action.
   (a) In general.- An agency shall give reasonable notice of the agency's action.
   (b) Contents of notice.- The notice shall:
       (1) state concisely and simply:
           (i) the facts that are asserted; or
           (ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;
       (2) state the pertinent statutory and regulatory sections under which the agency is taking its action;
       (3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;
       (4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have
           an opportunity to request a hearing, including:
           (i) what, if anything, a person must do to receive a hearing; and
           (ii) all relevant time requirements; and
       (5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to
           exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.
   (c) Consolidation of notices.- The notice of agency action under this section may be consolidated with the notice
       of hearing required under § 10-208 of this subtitle.
(d) *Publication in Register.* - For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party.

[An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239; 1993, ch. 59, § 1.]

SG §10-208. Notice of hearing.

(a) *In general.* - An agency or the Office shall give all parties in a contested case reasonable written notice of the hearing.

(b) *Contents of notice.* - The notice shall state:
   (1) the date, time, place, and nature of the hearing;
   (2) the right to call witnesses and submit documents or other evidence under § 10-213 (f) of this subtitle;
   (3) any applicable right to request subpoenas for witnesses and evidence and specify the costs, if any, associated with such a request;
   (4) that a copy of the hearing procedure is available on request and specify the costs associated with such a request;
   (5) any right or restriction pertaining to representation;
   (6) that failure to appear for the scheduled hearing may result in an adverse action against the party; and
   (7) that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.

(c) *Consolidation of notices.* - The notice of hearing may be consolidated with the notice of agency action required under § 10-207 of this subtitle.

(d) *Publication in Register.* - For purposes of this subtitle, publication in the Maryland Register does not constitute reasonable notice to a party.

[1993, ch. 59, §1.]

SG §10-209. Notice mailed to address of licensee.

(a) *In general.* - Where a licensing statute provides for service other than by regular mail, notice under this subtitle may be sent by regular mail to the address of record of a person holding a license issued by the agency if:
   (1) the person is required by law to advise the agency of the address; and
   (2) the agency has been unsuccessful in giving notice in the manner otherwise provided by the licensing statute.

(b) *Hearing.* - Upon a showing that the person neither knew nor had reasonable opportunity to know of the fact of service, a person served by regular mail under subsection (a) of this section shall be granted a hearing.

(c) *Reasonable opportunity to know of service.* - A person holding a license shall be deemed to have had a reasonable opportunity to know of the fact of service if:
   (1) the person is required by law to notify the agency of a change of address within a specified period of time;
   (2) the person failed to notify the agency in accordance with the law;
   (3) the agency or the Office mailed the notice to the address of record; and
   (4) the agency did not have actual notice of the change of address prior to service.

[1993, ch. 59, § 1; 1994, ch. 141.]

SG §10-210. Dispositions.

Unless otherwise precluded by law, an agency or the Office may dispose of a contested case by:

   (1) stipulation;
   (2) settlement;
   (3) consent order;
   (4) default;
   (5) withdrawal;
   (6) summary disposition; or
   (7) dismissal.

[An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-211. Hearings conducted by electronic means.

(a) *Permitted.* - In accordance with subsection (b) of this section, a hearing may be conducted by telephone, video conferencing, or other electronic means.

(b) *Objections.* -
   (1) For good cause, a party may object to the holding of a hearing by telephone, video conferencing, or other electronic means.
(2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio
electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic
means.

(3) If a party establishes good cause in opposition to the holding of a hearing by video conferencing or other
similar audiovisual electronic means, the hearing shall be conducted in person.

[1993, ch. 59, § 1; 1996, ch. 96.]

SG §10-212. Open hearings.
(a) In general.- Except as otherwise provided by law, a contested case hearing conducted by the Office shall be
open to the public.
(b) Subtitle 5 not applicable.- Hearings conducted by the Office are not subject to Subtitle 5 of this title.
[1993, ch. 59, § 1.]

SG §10-212.1. Interpreters.
(a) In general.-
(1) In a contested case, a party or witness may apply to the agency for the appointment of a qualified interpreter
to assist that party or witness, if the party or witness is deaf or, because of a hearing impediment, cannot readily
understand or communicate the spoken English language.
(2) On application of the party or witness the agency shall appoint a qualified interpreter.
(3) In selecting a qualified interpreter for appointment, the agency may consult the directory of interpreters for
manual communication or oral interpretation to assist deaf persons that is maintained by the courts of the State.
(b) Compensation.-
(1) An interpreter appointed under this section shall be allowed the compensation that the agency considers
reasonable.
(2) Subject to paragraph (3) of this subsection, the compensation shall be paid by the agency.
(3) If the agency has the authority to tax for services and expenses as a part of the costs of a case, the agency may
tax the amount paid to an interpreter as a part of these services and expenses in accordance with the federal
Americans with Disabilities Act.
[An. Code 1957, art. 30, § 1; 1997, ch. 31, § 1.]

SG §10-213. Evidence.
(a) In general.-
(1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the
record.
(2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency
shall make the evidence part of the record.
(b) Probative evidence.- The presiding officer may admit probative evidence that reasonable and prudent
individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.
(c) Hearsay.- Evidence may not be excluded solely on the basis that it is hearsay.
(d) Exclusions.- The presiding officer may exclude evidence that is:
(1) incompetent;
(2) irrelevant;
(3) immaterial; or
(4) unduly repetitious.
(e) Rules of privilege.- The presiding officer shall apply a privilege that law recognizes.
(f) Scope of evidence.- On a genuine issue in a contested case, each party is entitled to:
(1) call witnesses;
(2) offer evidence, including rebuttal evidence;
(3) cross-examine any witness that another party or the agency calls; and
(4) present summation and argument.
(g) Documentary evidence.- The presiding officer may receive documentary evidence:
(1) in the form of copies or excerpts; or
(2) by incorporation by reference.
(h) Official notice of facts.-
(1) The agency or the Office may take official notice of a fact that is:
(i) judicially noticeable; or
(ii) general, technical, or scientific and within the specialized knowledge of the agency.

(2) Before taking official notice of a fact, the presiding officer:
   (i) before or during the hearing, by reference in a preliminary report, or otherwise, shall notify each party; and
   (ii) shall give each party an opportunity to contest the fact.

(i) Evaluation.- The agency or the Office may use its experience, technical competence, and specialized knowledge in the evaluation of evidence.

[An. Code 1957, art. 41, § 252; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

   (a) Findings based on evidence of record.- Findings of fact must be based exclusively on the evidence of record in
      the contested case proceeding and on matters officially noticed in that proceeding.
   (b) Regulations, rulings, etc., binding.- In a contested case, the Office is bound by any agency regulation,
      declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or
      would have been bound if it were hearing the case.

[1993, ch. 59, § 1.]

SG §10-215. Transcription of proceedings.
   All or part of proceedings in a contested case shall be transcribed if any party:
      (1) requests the transcription; and
      (2) pays any required costs.

[An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1; 1993, ch. 59]

SG §10-216. Exceptions.
   (a) Notice of proposed decision; consideration of exceptions.-
      (1) In the case of a single decision maker, if the final decision maker in a contested case has not personally
         presided over the hearing, the final decision may not be made until each party is given notice of the proposed
         decision in accordance with § 10-220 of this subtitle and an opportunity to:
            (i) file exceptions with the agency to the proposed decision; and
            (ii) present argument to the final decision maker that the proposed decision should be affirmed, reversed, or
                 remanded.
      (2) In the case of a decision-making body, if a majority of the officials who are to make a final decision in a
         contested case have not personally presided over the hearing, the officials may not make the final decision until each
         party is given notice of the proposed decision in accordance with § 10-220 of this subtitle and an opportunity to:
            (i) file exceptions to the proposed decision with the agency; and
            (ii) present argument to a majority of the officials who are to make the final decision.
      (3) If a party files exceptions or presents argument under paragraph (1) or (2) of this subsection, the official or
          officials who are to make the final decision shall:
            (i) personally consider each part of the record that a party cites in its exceptions or arguments before making a
                final decision; and
            (ii) except as otherwise provided by law or by agreement of the parties, make the final decision within 90 days
                after the exceptions are filed or the argument is presented, whichever is later.
   (b) Changes to proposed decision.- The final decision shall identify any changes, modifications, or amendments to
      the proposed decision and the reasons for the changes, modifications, or amendments.

[1993, ch. 59, § 1; 1995, ch. 3, § 1; 2003, ch. 391.]

SG §10-217. Proof.
   The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and
   convincing evidence is imposed on the agency by regulation, statute, or constitution.

[1993, ch. 59, § 1.]

SG §10-218. Contents of record.
   The presiding officer hearing a contested case shall make a record that includes:
      (1) all motions and pleadings;
      (2) all documentary evidence that the agency or Office receives;
      (3) a statement of each fact of which the agency or Office has taken official notice;
(4) any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of the agency who is not authorized to participate in the decision making process;
(5) each question;
(6) each offer of proof;
(7) each objection and the ruling on the objection;
(8) each finding of fact or conclusion of law proposed by:
   (i) a party; or
   (ii) the presiding officer;
(9) each exception to a finding or conclusion proposed by a presiding officer; and
(10) each intermediate proposed and final ruling by or for the agency, including each report or opinion issued in connection with the ruling.

[An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

SG §10-219. Ex parte communications.
(a) Restrictions.-
   (1) Except as provided in paragraph (2) of this subsection, a presiding officer may not communicate ex parte directly or indirectly regarding the merits of any issue in the case, while the case is pending, with:
      (i) any party to the case or the party's representative or attorney; or
      (ii) any person who presided at a previous stage of the case.
   (2) An agency head, board, or commission presiding over a contested case may communicate with members of an advisory staff of, or any counsel for, the agency, board, or commission who otherwise does not participate in the contested case.
(b) Communications prior to hearing.- If, before hearing a contested case, a person receives an ex parte communication of a type that would violate subsection (a) of this section if received while conducting a hearing, the person, promptly after commencing the hearing, shall disclose the communication in the manner prescribed in subsection (c) of this section.
(c) Disclosure.- An individual who is involved in the decision making process and who is personally aware of an ex parte communication shall:
   (1) give notice to all parties;
   (2) include in the record of the contested case:
      (i) each written communication received;
      (ii) a memorandum that states the substance of each oral communication received;
      (iii) each written response to a communication; and
      (iv) a memorandum that states the substance of each oral response to the communication; and
   (3) send to each party a copy of each communication, memorandum, and response.
(d) Rebuttal.- A party may rebut an ex parte communication if the party requests the opportunity to rebut within 10 days after notice of the communication.
(e) Remedial action.-
   (1) To eliminate the effect of an ex parte communication that is made in violation of this section, the presiding officer or, if the presiding officer is a multimember body, the individual board or commission member, may:
      (i) withdraw from the proceeding; or
      (ii) terminate the proceeding without prejudice.
   (2) An order to terminate the proceeding without prejudice shall state the last date by which a party may reinstitute the proceeding.

[An. Code 1957, art. 41, § 254A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.]

(a) Preparation. - If the Office conducts a hearing under this subtitle, the Office shall prepare proposed findings of fact, conclusions of law, or orders in accordance with the agency's delegation under § 10-205 of this subtitle.
(b) Submission. - The Office shall send its proposed findings, conclusions, or orders:
   (1) to the parties and the agency directly; or
   (2) if the agency's delegation under § 10-205 of this subtitle requires, to the agency for distribution by the agency to the parties.
(c) Review and issuance.-
Within 60 days after receipt of the Office's proposed findings, conclusions, or order under subsection (b) of this section, the agency shall:

(i) review the Office's proposed findings, conclusions, or order;
(ii) issue the proposed decision, which may include the Office's proposed findings, conclusions, or order with or without modification; and
(iii) send the proposed decision and a copy of the Office's proposed findings, conclusions, or order to the parties.

The time limit specified in paragraph (1) of this subsection may be extended by the agency head, board, or commission with written notice to the parties.

(d) Form and contents.- A proposed decision or order, including proposed decisions or orders issued for contested case hearings subject to this subtitle but not conducted by the Office, shall:

(1) be in writing or stated on the record;
(2) contain separate findings of fact and conclusions of law;
(3) include an explanation of procedures and time limits for filing exceptions; and
(4) if the Office conducted the hearing and the agency's proposed decision includes any changes, modifications, or amendments to the Office's proposed findings, conclusions, or orders, contain an explanation of the reasons for each change, modification, or amendment.

SG §10-221. Final decisions and orders.
(a) Form.- A final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record.
(b) Contents.-
(1) A final decision or order in a contested case, including a remand of a proposed decision, shall contain separate statements of:
   (i) the findings of fact;
   (ii) the conclusions of law; and
   (iii) the order.
(2) A written statement of appeal rights shall be included with the decision.
(3) If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.
(4) If, in accordance with regulations, a party submitted proposed findings of fact, the final decision shall state a ruling on each proposed finding.
(c) Distribution.- The final decision maker promptly shall deliver or mail a copy of the final decision or order to:
   (1) each party; or
   (2) the party's attorney of record.

(a) Review of final decision.-
(1) Except as provided in subsection (b) of this section, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section.
(2) An agency, including an agency that has delegated a contested case to the Office, is entitled to judicial review of a decision as provided in this section if the agency was a party before the agency or the Office.
(b) Review of interlocutory order.- Where the presiding officer has final decision-making authority, a person in a contested case who is aggrieved by an interlocutory order is entitled to judicial review if:
   (1) the party would qualify under this section for judicial review of any related final decision;
   (2) the interlocutory order:
      (i) determines rights and liabilities; and
      (ii) has immediate legal consequences; and
   (3) postponement of judicial review would result in irreparable harm.
(c) Jurisdiction and venue.- Unless otherwise required by statute, a petition for judicial review shall be filed with the circuit court for the county where any party resides or has a principal place of business.
(d) Parties.-
(1) The court may permit any other interested person to intervene in a proceeding under this section.
(2) If the agency has delegated to the Office the authority to issue the final administrative decision pursuant to § 10-205 (a) (3) of this subtitle, and there are 2 or more other parties with adverse interests remaining in the case, the agency may decline to participate in the judicial review. An agency that declines to participate shall inform the court in its initial response.

(e) Stay of enforcement.-
(1) The filing of a petition for judicial review does not automatically stay the enforcement of the final decision.
(2) Except as otherwise provided by law, the final decision maker may grant or the reviewing court may order a stay of the enforcement of the final decision on terms that the final decision maker or court considers proper.

(f) Additional evidence before agency.-
(1) Judicial review of disputed issues of fact shall be confined to the record for judicial review supplemented by additional evidence taken pursuant to this section.
(2) The court may order the presiding officer to take additional evidence on terms that the court considers proper if:
   (i) before the hearing date in court, a party applies for leave to offer additional evidence; and
   (ii) the court is satisfied that:
       1. the evidence is material; and
       2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer.
(3) On the basis of the additional evidence, the final decision maker may modify the findings and decision.
(4) The final decision maker shall file with the reviewing court, as part of the record:
   (i) the additional evidence; and
   (ii) any modifications of the findings or decision.

(g) Proceeding.-
(1) The court shall conduct a proceeding under this section without a jury.
(2) A party may offer testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record.
(3) On request, the court shall:
   (i) hear oral argument; and
   (ii) receive written briefs.

(h) Decision.- In a proceeding under this section, the court may:
(1) remand the case for further proceedings;
(2) affirm the final decision; or
(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
   (i) is unconstitutional;
   (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
   (iii) results from an unlawful procedure;
   (iv) is affected by any other error of law;
   (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
   (vi) is arbitrary or capricious.


SG §10-222.1. Administrative orders.
(a) Enforcement.- A party to a contested case may timely seek civil enforcement of an administrative order by filing a petition for civil enforcement in an appropriate circuit court.
(b) Jurisdiction and venue.- Unless otherwise required by statute, a party shall file a petition for civil enforcement of an administrative order in the circuit court for the county where any party resides or has a principal place of business.
(c) Parties - Defendants.- In an action seeking civil enforcement of an administrative order a party shall name, as a defendant, each alleged violator against whom the party seeks to obtain civil enforcement.
(d) Same - Plaintiffs.- A party may file an action for civil enforcement of an administrative order if another party is in violation of the administrative order.
(e) Remedies.- A party in an action for civil enforcement of an administrative order may request, and a court may grant, one or more of the following forms of relief:
   (1) declaratory relief;
   (2) temporary or permanent injunctive relief;
(3) a writ of mandamus; or
(4) any other civil remedy provided by law.

[2000, ch. 377.]

SG §10-223. Appeals to Court of Special Appeals.
(a) **Scope of section.** - This section does not apply to:
   (1) a case that arises under Title 16 of the Transportation Article unless a right to appeal to the Court of Special Appeals is specifically provided; or
   (2) a final judgment on actions of the Inmate Grievance Office.
(b) **Right of appeal.**
   (1) A party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases.
   (2) An agency that was a party in the circuit court may appeal under paragraph (1) of this subsection.

[An. Code 1957, art. 41, § 256; 1984, ch. 284, § 1; 1993, ch. 59, § 1; 1994, ch. 536, § 1.]

SG §10-224. Litigation expenses for small businesses and nonprofit organizations.
(a) **Definitions.**
   (1) In this section, the following words have the meanings indicated.
   (2) "Business" means a trade, professional activity, or other business that is conducted for profit.
   (3) "Nonprofit organization" means an organization that is exempt or eligible for exemption from taxation under § 501 (c) (3) of the Internal Revenue Code.
(b) **Scope of section.**
   (1) an agency operating statewide;
   (2) a business that, on the date when the contested case or civil action is initiated:
      (i) is independently owned and operated; and
      (ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation; and
   (3) a nonprofit organization.
(c) **Reimbursement authorized.**
   Subject to the limitations in this section, an agency or court may award to a business or nonprofit organization reimbursement for expenses that the business or nonprofit organization reasonably incurs in connection with a contested case or civil action that:
   (1) is initiated against the business or nonprofit organization by an agency as part of an administrative or regulatory function;
   (2) is initiated without substantial justification or in bad faith; and
   (3) does not result in:
      (i) an adjudication, stipulation, or acceptance of liability of the business or nonprofit organization;
      (ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business or nonprofit organization; or
      (iii) a settlement agreement under which the business or nonprofit organization agrees to take corrective action or to pay a monetary sum.
(d) **Claim required in contested case.**
   (1) To qualify for an award under this section when the agency has initiated a contested case, the business or nonprofit organization must make a claim to the agency before taking any appeal.
   (2) The agency shall act on the claim.
(e) **Amount.**
   (1) An award under this section may include:
      (i) the expenses incurred in the contested case;
      (ii) court costs;
      (iii) counsel fees; and
      (iv) the fees of necessary witnesses.
   (2) An award under this section may not exceed $10,000.
   (3) The court may reduce or deny an award to the extent that the conduct of the business or nonprofit organization during the proceedings unreasonably delayed the resolution of the matter in controversy.
(f) **Source of award.** An award under this section shall be paid as provided in the State budget.
(g) **Appeals.**
(1) If the agency denies an award under this section, the business or nonprofit organization may appeal, as provided in this subtitle.

(2) An agency may appeal an award that a court makes under this section.

[An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1; 1986, ch. 256; 1988, ch. 110, § 1; 1993, ch. 59, § 1.]

SG §10-225. Suspension of provisions.
(a) In general.- Upon a finding by the Governor that there is an imminent threat within a time certain of a loss or denial of federal funds to the State because of the operation of any section of this subtitle or of Title 9, Subtitle 16 of this article, the Governor by executive order may suspend the applicability of part or all of this subtitle or of Title 9, Subtitle 16 of this article to a specific class of contested cases.
(b) Duration.- A suspension under this section is effective only so long as, and to the extent, necessary to avoid a denial or loss of federal funds to the State.
(c) Contents of order.- The executive order shall explain the basis for the Governor's finding and state the period of time during which the suspension is to be effective.
(d) Termination.- The Governor shall declare the termination of a suspension when it is no longer necessary to prevent the loss or denial of federal funds.
(e) Publication of order.- An executive order issued under this section shall be:
(1) presented to the Legislative Policy Committee; and
(2) published in the Maryland Register pursuant to § 7-206 (a) (2) (viii) of this article.

[1993, ch. 59, § 1; 1994, ch. 141; 1996, ch. 10, § 1.]

SG §10-226. Licenses - Special provisions.
(a) Definitions.-
(1) In this section the following words have the meanings indicated.
(2) "License" means all or any part of permission that:
(i) is required by law to be obtained from a unit;
(ii) is not required only for revenue purposes; and
(iii) is in any form, including:
1. an approval;
2. a certificate;
3. a charter;
4. a permit; or
5. a registration.
(3) "Unit" means an officer or unit that is authorized by law to:
(i) adopt regulations subject to Subtitle 1 of this title; or
(ii) adjudicate contested cases under this subtitle.
(b) Renewal and expiration.- If, at least 2 calendar weeks before a license expires, the licensee makes sufficient application for renewal of the license, the license does not expire until:
(1) the unit takes final action on the application; and
(2) either:
(i) the time for seeking judicial review of the action expires; or
(ii) any judicial stay of the unit's final action expires.
(c) Revocation of suspension.-
(1) Except as provided in paragraph (2) of this subsection, a unit may not revoke or suspend a license unless the unit first gives the licensee:
(i) written notice of the facts that warrant suspension or revocation; and
(ii) an opportunity to be heard.
(2) A unit may order summarily the suspension of a license if the unit:
(i) finds that the public health, safety, or welfare imperatively requires emergency action; and
(ii) promptly gives the licensee:
1. written notice of the suspension, the finding, and the reasons that support the finding; and
2. an opportunity to be heard.

[1993, ch. 59, § 1; 1995, ch. 538.]

Cross references. See Revision of subtitle and Editor's notes under § 10-201 of this article.

Section check through supplement up to date through 12/6/06 check.

COMAR 28.02.01.01 Scope.
A. Applicability. This chapter applies to all hearings before the Office of Administrative Hearings.
B. This chapter shall be construed to ensure the fair and expeditious determination of every action.
C. Subject to § D of this regulation, this chapter supplements the procedures required by law.
D. Unless federal or State law requires that a federal or State procedure shall be observed, this chapter takes precedence in the event of conflict.

COMAR 28.02.01.02 Definitions.
A. In this chapter, the following terms have the meanings indicated.
B. Terms Defined.
   (1) "Administrative law judge" or "judge" means an individual appointed by the Chief Administrative Law Judge under State Government Article, § 9-1604, Annotated Code of Maryland, or designated by the Chief Administrative Law Judge under State Government Article, § 9-1607, Annotated Code of Maryland.
   (2) "Agency" means:
      (a) Any unit of government whose action gives rise to a contested case hearing under State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland; or
(b) Any other unit of government or private entity having a proceeding before the Office of Administrative Hearings to which the Chief Administrative Law Judge may assign a judge pursuant to State Government Article, § 9-1604(b), Annotated Code of Maryland.

(3) "Authorized representative" means an attorney or, when permitted by applicable law, a person designated by a party to represent the party.

(4) Docket Entry.
   (a) "Docket entry" means the filing of a pleading by a party, a request for a hearing date, or the scheduling of a proceeding.
   (b) "Docket entry" does not include the entry or withdrawal of appearance of counsel, case status reports, or other inquiries.

(5) "Filed" means, unless otherwise indicated in this chapter, the earlier of when the document is postmarked or received at the Office and, when required, served on the other parties to a proceeding or an administrative law judge.

(6) "Final decision maker" means the person or entity authorized by law or delegation to render the final decision in a contested case or other proceeding before the Office.

(7) "Initial pleading" means a notice of agency action, an appeal of an agency action, or any other request for a hearing by a person.

(8) "Law" means State and federal constitutions, statutes, regulations, and relevant case law.

(9) "Office" means the Office of Administrative Hearings.

(10) "Party" means a person or agency named or admitted to participate in a case before the Office.

(11) "Person" means an individual, representative, corporation, or other entity, including a public or nonprofit corporation, or an agency or instrumentality of federal, State, or local government.

(12) "Proposed decision" means the document issued by an administrative law judge in accordance with law or an agency's delegation, when final decision-making authority has not been vested in the Office, and includes recommended decisions and provisional orders.

COMAR 28.02.01.03 Initial Pleading; Commencement of Case.
A. Unless otherwise provided for by law, the Office acquires jurisdiction over a matter when an initial pleading is filed with the Office by:
   (1) An agency, pursuant to law or a delegation of authority; or
   (2) A person when directed by an agency pursuant to law or a delegation of authority.

B. Timeliness. An initial pleading is timely when it is filed:
   (1) Within the time period specified by relevant law; or
   (2) If no time period is specified, within 30 days of the date of the notice of contested action.

C. Computation of Time. Time shall be computed in accordance with Article 1, § 36, Annotated Code of Maryland.

D. A hearing request is considered filed on the earlier of the date the request, along with any fees, documents, or other information required by law, is postmarked or received by the:
   (1) Office, if required to be filed with the Office; or
   (2) Agency, if required to be filed with the agency.

COMAR 28.02.01.04 Transmittal of Request for Hearing.
A. Initiation. A hearing may be initiated:
   (1) On transmittal forms provided by the Office and accompanied by copies of all pertinent documents;
   (2) On forms provided by the agency; or
   (3) In any other manner permitted by law.

B. A hearing request shall include and be accompanied by the following:
   (1) The name of the person requesting the hearing;
   (2) The mailing address of the person requesting the hearing;
   (3) The notice of agency action or the name of the person or agency against whom the hearing request has been filed; and
   (4) Any fees, documents, or other information required by law.

C. Dismissal.
   (1) Except for the required dismissal under § C(2) of this regulation, a case may be dismissed if an initial pleading is received without an item required by § B of this regulation.
If a hearing request is received without the address of the person requesting the hearing, the case shall be dismissed.

D. Unless a case is dismissed pursuant to § C of this regulation, a hearing request received without an item required by § B of this regulation may be returned to the person requesting the hearing for resubmission with all of the required items. Return of the initial pleading under this section does not extend the time within which the initial pleading is required to be filed.

COMAR 28.02.01.05 Notice of Hearing.
A. Reasonable written notice of the hearing shall be provided to the parties.
B. A hearing notice provided by the Office shall contain:
   (1) The date, time, place, and nature of the hearing;
   (2) A statement of the right to present witnesses and documents, or other evidence, and the right to cross-examine any witness that another party calls under State Government Article, § 10-213(f), Annotated Code of Maryland, if applicable;
   (3) A statement of the right to request subpoenas for witnesses and evidence, and specifying the costs, if any, associated with the request;
   (4) A statement that a copy of the hearing procedures is available on request and specifying the costs, if any, associated with the request;
   (5) A statement of any right or restrictions pertaining to representation;
   (6) A statement that failure to appear for the scheduled hearing may result in an adverse action against that party; and
   (7) A statement that, unless otherwise prohibited by law, the parties may agree to the evidence and may waive their right to appear at the hearing.

COMAR 28.02.01.06 Expedited Hearings.
A. A motion for an expedited hearing may be filed by any party.
B. The motion shall set forth the reasons for expediting the hearing.
C. All parties shall be notified promptly of the decision on the motion.
D. If the motion for expedited hearing is granted, the judge shall render the proposed or final decision within 30 days after the close of the record, unless the parties agree to a longer period or a shorter period is prescribed by law.

COMAR 28.02.01.07 Venue.
Hearings shall be conducted at the site designated by the Office in accordance with applicable law.

COMAR 28.02.01.08 Powers and Duties of Judges.
A. A judge shall:
   (1) Conduct a full, fair, and impartial hearing;
   (2) Take action to avoid unnecessary delay in the disposition of the proceedings;
   (3) Maintain order; and
   (4) Modify or waive, reasonably, any time periods established by this chapter.
B. A judge has the power to regulate the course of the hearing and the conduct of the parties and authorized representatives, including the power to:
   (1) Administer oaths and affirmations;
   (2) Issue subpoenas for witnesses and the production of evidence;
   (3) Rule upon offers of proof and receive relevant and material evidence;
   (4) Consider and rule upon motions in accordance with this chapter;
   (5) Examine witnesses and call witnesses as necessary to insure a full and complete record;
   (6) Limit unduly repetitious testimony and reasonably limit the time for presentations;
   (7) Grant a continuance or postponement;
   (8) Request parties to submit legal memoranda, proposed findings of fact, and conclusions of law;
   (9) Make proposed or final decisions and take any other appropriate action authorized by law;
   (10) Issue orders as are necessary to secure procedural simplicity and administrative fairness, and to eliminate unjustifiable expense and delay;
   (11) Conduct the hearing in a manner suited to ascertain the facts and safeguard the rights of the parties to the hearing; and
   (12) Impose appropriate sanctions for failure to abide by this chapter or any lawful order of the judge.
C. Disqualification; Substitution of Judges.

(1) Conditions.
   (a) A judge shall withdraw from participation in any proceeding in which personal bias or other reasons render
       the judge unable to provide an impartial hearing and decision, or when an appearance of impropriety may
       reasonably be inferred from the facts.
   (b) For purposes of this section, personal bias shall be presumed under circumstances set forth in Canon 3D of

(2) Motion for Disqualification. A party shall move promptly for disqualification of a judge upon discovering
facts that establish grounds for disqualification.

(3) Substitution of Judges.
   (a) If, for any reason, a judge is unable to continue presiding over a pending hearing, or issue a proposed or final
       decision after the conclusion of the hearing, to the extent allowed by law, another judge may be assigned to conclude
       the hearing process and render a proposed or final decision.
   (b) The substitute may use the existing record and conduct further proceedings as are necessary and proper.

COMAR 28.02.01.09 Appearance of Parties at Hearings; Representation.

A. A party may represent himself or herself.
B. A party may be represented by an attorney authorized to practice law in Maryland, or, when authorized by law,
   appear through a representative who is not an attorney.
C. Power of Attorney.
   (1) An employee of a business entity who is representing that business entity in accordance with State
       Government Article, § 9-1607.1, Annotated Code of Maryland, shall provide the Office with a power of attorney.
   (2) The Office shall accept any properly executed power of attorney meeting the requirements of State
       Government Article, § 9-1607.1, Annotated Code of Maryland.
   (3) The Office may provide a form for a power of attorney.
   (4) A power of attorney required by this regulation may be:
       (a) Kept on file with the Office;
       (b) Provided to the judge at the outset of a hearing in which the power of attorney is required; or
       (c) In the discretion of the judge, provided to the judge at any time before the close of the record.
D. A party's representative shall enter the representative's appearance with the Office.
E. A party's representative of record shall be copied on all notices, pleadings, and other correspondence.

COMAR 28.02.01.10 Discovery.

A. By written request filed not later than 30 days before the scheduled hearing, a party may require any other party
   to produce within 15 days, for inspection or copying, any file, memorandum, correspondence, document, object, or
   tangible thing:
   (1) Relevant to the subject matter of the case; and
   (2) Not privileged.
B. Unless provided by law or by agreement of the parties, no other discovery procedure may be required.
C. Copies.
   (1) Copies of requested documents and records shall be made at the expense of the party making the request.
   (2) The charge for copies of requested documents and records may be waived by the custodian of the documents
       in accordance with State Government Article, § 10-611 et seq., Annotated Code of Maryland, or other applicable
       law.

COMAR 28.02.01.11 Subpoenas.

A. Issuance of Subpoenas. On request of a party, or at the direction of a judge, the Office may issue subpoenas
   requiring the attendance and testimony of witnesses and the production at the hearing of any tangible items in the
   possession or under the control of the witness.
B. Requests.
   (1) A request for a subpoena shall be made, in writing, to the Office.
   (2) To the extent practicable, subpoena requests shall be filed at least 10 days before the hearing.
   (3) A request for a subpoena shall specify the:
       (a) Name and full address of the person to be subpoenaed; and
       (b) Name, full address, and telephone number of the party requesting the subpoena.
A subpoena that requests the of tangible items, books, papers, or other documents shall describe those items with particularity.

C. Service of Subpoenas.
   (1) Subpoenas may be served by:
       (a) Personal delivery by an individual 18 years old or older who is not a party to the proceeding;
       (b) Certified mail to the person at the address specified in the subpoena request; or
       (c) If mailed by the Office, by regular mail.
   (2) Unless the subpoena request specifies otherwise, the subpoena shall be mailed by the Office as provided in § C(1) of this regulation.
   (3) The subpoena may not be enforced pursuant to State Government Article, § 9-1605(d)(2), Annotated Code of Maryland, absent proof of service by certified mail or personal delivery.
   (4) Costs of certified mailing or personal delivery of subpoenas are the responsibility of the person requesting service.
   (5) Proof of service of subpoenas by certified mail or personal delivery is the responsibility of the person requesting the subpoenas.

D. Return of service shall be made as follows:
   (1) When service is by certified mail, by the filing of the original return receipt; and
   (2) When service is by personal delivery, by the filing of an affidavit, signed by the person who made service, containing:
       (a) The name of the person served,
       (b) The date on which the person was served,
       (c) The particular place of service, and
       (d) A statement that the affiant is 18 years old or older and not a party to the proceeding.

E. Objections to Subpoenas. A person may object to a subpoena by filing a motion to quash or for other relief.

F. Enforcement of Subpoenas. If a person fails to comply with a properly served subpoena, at the request of a judge, the Office may apply to the appropriate circuit court for an order to show cause why a person should not be committed to jail for refusal to comply with a subpoena.

COMAR 28.02.01.12 Intervention.
A. Upon motion filed not later than 15 days before the earlier of the prehearing conference or the hearing date, a person may be permitted to intervene in an action when the person has standing and:
   (1) Has an unconditional right to intervene as a matter of law; or
   (2) Claims an interest relating to the subject matter of the hearing that is:
       (a) Adversely affected, and
       (b) Not adequately represented by existing parties.
B. The motion shall state the grounds for the motion, accompanied by a statement setting forth the claim or defense for which intervention is sought.
C. Order of Intervention.
   (1) The judge shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
   (2) As soon as practicable, the judge shall issue an order denying or allowing intervention.
   (3) In an order allowing intervention, the judge may place conditions upon the intervener’s participation in the proceedings.
D. Appeal.
   (1) If the judge is not the final decision maker, the denial of a motion to intervene may be appealed to the final decision maker in accordance with the agency’s regulations.
   (2) When the judge is the final decision maker, a party or other affected person may seek review of the denial of a motion to intervene in accordance with law.
   (3) In the discretion of the judge, a request for further review of the denial of a motion to intervene may stay the proceedings.

COMAR 28.02.01.13 Prehearing Conferences.
A. When appropriate, the judge may hold a prehearing conference to resolve matters preliminary to the hearing.
B. The judge may require the parties to submit information before the prehearing conference.
C. A prehearing conference may be convened to address the following matters:
   (1) Issuance of subpoenas;
(2) Factual and legal issues;
(3) Stipulations;
(4) Requests for official notice;
(5) Identification and exchange of documentary evidence;
(6) Admissibility of evidence;
(7) Identification and qualification of witnesses;
(8) Motions;
(9) Discovery disputes;
(10) Order of presentation;
(11) Scheduling;
(12) Alternate dispute resolution; and
(13) Any other matters that will promote the orderly and prompt conduct of the hearing.

D. Conduct. Except as otherwise indicated in this chapter, at the discretion of the judge, all or part of a prehearing conference may be recorded.

E. Prehearing Orders.

(1) Unless otherwise stated in this chapter, when a prehearing conference has been held, a prehearing order shall be issued by the judge.

(2) The prehearing order shall set forth the actions taken or to be taken with regard to any matter addressed at the prehearing conference.

(3) If a prehearing conference is not held, the judge may issue a prehearing order to regulate the conduct of the proceedings.

(4) The prehearing order shall be a part of the case record.

COMAR 28.02.01.14 Alternative Dispute Resolution (ADR).

A. For purposes of this regulation, "alternative dispute resolution (ADR)" means the process of resolving matters pending before the Office through a settlement conference, neutral case evaluation, neutral fact finding, other nonadversarial dispute resolution process, or combination of those processes.

B. If all parties agree, an ADR proceeding may be scheduled by the Office.

C. An individual who presides at an ADR proceeding may not be the judge at the prehearing conference, hearing on the merits, or other stage of the proceedings.

D. Confidentiality of ADR Proceedings.

(1) ADR proceedings are confidential and are closed to the public.

(2) Discussions in an ADR proceeding may not be made a part of the case record in any subsequent proceeding.

(3) ADR proceedings may not be recorded electronically or in any other manner.

(4) A judge or other individual who conducts an ADR proceeding may not be called to testify, participate in discovery, or otherwise provide information in any subsequent proceeding related to the ADR proceeding.

COMAR 28.02.01.15 Stipulations and Affidavits.

A. Stipulations.

(1) The parties may, in accordance with law, agree to any substantive or procedural matter.

(2) A stipulation may be filed in writing or entered on the record at the hearing.

(3) The judge may require additional development of stipulated matters.

B. Affidavits. A judge may admit an affidavit as evidence.

COMAR 28.02.01.16 Motions.

A. Unless otherwise provided by this chapter, this regulation pertains to all motions filed with the Office.

B. Unless otherwise provided by this chapter:

(1) A party may move for appropriate relief before or during a hearing;

(2) A party shall submit all motions in writing or orally at a hearing;

(3) Written motions shall:

(a) Be filed as far in advance of the hearing as is practicable,

(b) State concisely the question to be determined, and

(c) Be accompanied by any necessary supporting documentation;

(4) An answer to a written motion shall be filed on the earlier of:

(a) 15 days after the date the motion was filed, or

(b) The date of the hearing;
(5) Upon notice to all parties, the judge may schedule a conference to consider a written motion;
(6) The judge may issue a written decision on a motion or state the decision on the record;
(7) If a ruling on a motion is not stated on the record, the ruling shall be included in the judge's proposed or final decision;
(8) The filing or pendency of a motion does not alter or extend any time limit otherwise established by this chapter.

C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

D. Motion for Summary Decision.
(1) A party may move for summary decision on any appropriate issue in the case.
(2) A judge may grant a proposed or final summary decision if the judge finds that:
   (a) There is no genuine issue of material fact; and
   (b) A party is entitled to prevail as a matter of law.

E. Motion for Judgment.
(1) A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party. The moving party shall state with particularity all reasons that the motion should be granted. Objection to the motion for judgment is not necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.
(2) When a party moves for judgment at the close of the evidence offered by an opposing party, the judge may:
   (a) Proceed to determine the facts and to render judgment against an opposing party; or
   (b) Decline to render judgment until the close of all evidence.
(3) A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence if the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

Significant case decisions

Collateral estoppel to avoid relitigation of an issue
- “The Maryland Insurance Administration (‘MIA’) revoked Allan J. Culver’s Insurance producer’s license.” Culver v. Insurance Commissioner, 175 Md. App. 645, 647, 931 A. 2d 537 (2007). “Anyone selling insurance in Maryland must be licensed as an insurance producer by the MIA.” 175 Md. App. at 648. Culver was disbarred from the practice of law in Maryland effective May 13, 2007. When the MIA revoked Culver’s insurance producer’s license he asked for a contested hearing and the MIA moved for summary disposition of the matter. 175 Md. App. at 649. One of the grounds for revocation of a license in INS. §10-126 (a)(13) “has otherwise shown a lack of trustworthiness or incompetence to act as an insurance producer.” 175 Md. App. at 651. Collateral estoppel was discussed by the Court with a focus on offensive nonmutual collateral estoppel. 175 Md. App. at 654-55. “A summary decisions, such as the one in this case, is authorized by COMAR 28.02.01.16D. The evidence that appellant desired to put forth would have constituted nothing more than an attempt to relitigate the findings made in the disbarment actions. As stated above, principles of collateral estoppel barred appellant from relitigating those issues. Because appellant could not challenge the findings made in the disbarment actions, there were no material facts at issue. Therefore, his case was disposed of appropriately by summary decision.” 175 Md. App. at 659. The MIA did not exceed its statutory authority by revoking Culver’s license on the basis of “attorney misconduct or the sanction of disbarment.” BR §9A310 is applicable to the denial of a license in Maryland. 175 Md. App. at 659-61.

COMAR 28.02.01.17 Conduct of Hearings.
A. On a genuine issue in a contested case, each party is entitled to:
   (1) Call witnesses;
   (2) Offer evidence;
   (3) Cross-examine any witness who testifies; and
   (4) Make opening and closing statements.
B. Telephone Hearings.
(1) If a party does not object and establish good cause for the objection, the judge may conduct all or part of the hearing by telephone or other similar audio electronic means, if each participant in the hearing has an opportunity to participate in and hear the entire proceeding.

(2) If a party establishes good cause in opposition to the holding of a hearing by telephone or other similar audio electronic means, the hearing shall be held in person or by video conferencing or other similar audiovisual electronic means.

(3) All substantive and procedural rights apply to telephone hearings, subject only to the limitations of the physical arrangement.

(4) Documentary Evidence. For a telephone hearing, documentary evidence to be offered shall be mailed by the proponent to all parties and the Office at least 5 days before the hearing.

(5) Default. For a telephone hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than 15 minutes after the scheduled time of the hearing:
   (a) Failure to answer the telephone;
   (b) Failure to free the telephone for a hearing; or
   (c) Failure to be ready to proceed with the hearing as scheduled.

C. Video Hearings.

(1) If a party does not object and establish good cause for the objection, the judge may conduct all or part of a hearing by video or other similar audiovisual electronic means, if each participant in the hearing has an opportunity to participate in, hear, and see the entire proceeding.

(2) If a party establishes good cause in opposition to the holding of a hearing by video or other similar audiovisual electronic means, the hearing shall be held in person.

(3) All substantive and procedural rights apply to video hearings, subject only to the limitations of the physical arrangement.

(4) Default. For a video hearing, the following may be considered a failure to appear and grounds for default, if the conditions exist for more than 15 minutes after the scheduled time of the hearing:
   (a) Failure to be present in the designated video hearing room; or
   (b) Failure to be ready to proceed with the hearing as scheduled.

D. Order of Proceedings.

(1) A case shall be called to order by the judge.

(2) The judge shall explain briefly the purpose and nature of the hearing.

(3) The judge may allow the parties to present preliminary matters.

(4) The judge shall state the order of presentation of the evidence.

(5) Witnesses shall be sworn or put under affirmation to tell the truth.

E. Waivers.

(1) Waiver of Right to Appear at the Hearing.
   (a) A party may waive the right to appear personally at the hearing unless prohibited by law.
   (b) A waiver shall be in writing and filed with the Office.
   (c) A party may withdraw a waiver by written notice filed not later than 5 days before the scheduled hearing.
   (d) When a party has filed a waiver permitted by law, the failure of a party to appear personally or by representative may not result in a finding of default.

(2) Waiver of Hearing. A hearing before a judge is not necessary if all parties agree to the admission of the evidence and waive their right to appear.

COMAR 28.02.01.18 Evidence.

A. Evidence shall be admitted in accordance with State Government Article, § 10-213, Annotated Code of Maryland, and other pertinent law.

B. The judge may admit evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs, and give probative effect to that evidence.

C. Evidence may not be excluded solely on the basis that it is hearsay.

D. Exclusion of Witnesses.

(1) Upon request by a party, the judge shall exclude witnesses other than parties from the hearing room, except when testifying.

(2) A party, representative, witness, or spectator may not disclose to a witness excluded under this section the nature, substance, or purpose of testimony, exhibits, or other evidence introduced during that witness's absence.

(3) A party that is not an individual may designate an employee or officer as its representative to remain in the hearing room, even though the employee or officer may be a witness.
(4) An expert witness who is to render an opinion based on testimony given at the hearing may remain during the testimony.

(5) The judge may exclude the testimony of a witness who receives information in violation of this section, or take other appropriate action.

E. Prefiled Testimony.

(1) In the discretion of the judge, testimony may be received in written form.

(2) The testimony shall be filed not later than 10 days before the hearing.

F. Official Notice.

(1) The judge may take official notice of a fact that is:
   (a) Judicially noticeable; or
   (b) General, technical, or scientific and within the specialized knowledge of the agency.

(2) Before taking official notice of a fact, the judge shall:
   (a) Notify each party before or during the hearing, by reference in a preliminary report, or otherwise; and
   (b) Give each party an opportunity to contest the fact.

COMAR 28.02.01.19 Appointment of Interpreter.

A. If a party or witness cannot readily hear, speak, or understand the spoken or written English language, the judge shall arrange for a qualified interpreter to provide assistance during the hearing.

B. An interpreter shall take an oath or affirmation that the interpreter will accurately translate.

COMAR 28.02.01.20 Failure to Attend or Participate in a Hearing, Conference, or Other Proceeding; Default.

A. If, after receiving proper notice, a party fails to attend or participate in a prehearing conference, hearing, or other stage of a proceeding, the judge may proceed in that party's absence or may, in accordance with the hearing authority delegated by the agency, issue a final or proposed default order against the defaulting party.

B. Final Default Orders.

(1) On motion filed within 30 days after the date of a final default order, the judge may, for good cause, vacate or modify the final default order and set the case in for further proceedings as appropriate.

(2) If a motion is denied, the final default order is effective.

C. Proposed Default Orders. A proposed default order is reviewable in accordance with the delegating agency's regulations governing review of proposed decisions.

COMAR 28.02.01.21 Proceedings Open to the Public.

A. Unless otherwise prohibited by law, all proceedings before the Office are open to the public.

B. Unless otherwise provided by law, documents, notices, and records in the possession of the Office as a result of a contested case proceeding may be inspected and copied by any person as provided in State Government Article, § 10-611 et seq., Annotated Code of Maryland, and regulations adopted by the Office under that Act.

C. The judge may:
   (1) Remove individuals whose conduct impedes the orderly progress of the hearing; and
   (2) Restrict attendance because of the physical limitations of the hearing room.

D. Audio recording equipment, cameras, or other electronic or photographic equipment shall be excluded from the hearing room when required by law or if the judge determines that the use of this equipment may impede the orderly progress of the hearing or otherwise interfere with the hearing process.

COMAR 28.02.01.22 Decision or Proposed Decision.

A. A judge shall prepare a decision or proposed decision in accordance with the agency's delegation or pertinent law.

B. Proposed Decision.

(1) If the judge is not the final decision maker, the judge shall submit the proposed decision to the final decision maker with a copy to each party, unless otherwise provided by law or the agency's delegation.

(2) When permitted by law, an adversely affected party may file exceptions to the proposed decision in accordance with the delegating agency's regulations or as otherwise provided by law.

C. Final Decision. Except as otherwise provided by law, when the judge is the final decision maker, the decision is the final decision for purposes of judicial review.

COMAR 28.02.01.23 The Record.
A. The Office shall prepare an official case record of each hearing.  
B. The record shall include:
(1) All pleadings, motions, responses, proposed orders, memoranda, including proposed findings of fact and conclusions of law, and requests filed by the parties;
(2) All hearing notices;
(3) All documentary and other tangible evidence received or considered;
(4) A statement of each fact officially noticed;
(5) All offers of proof and objections;
(6) All rulings, orders, and decisions, proposed or final;
(7) Matters placed on the record in connection with ex parte communication;
(8) The recording of the hearing, and of any prehearing proceeding, and any transcript of the recording prepared by a court reporting service; and
(9) Any other item required by law.

COMAR 28.02.01.24 Service.
A. A copy of any pleading, motion, response, correspondence, or other paper filed in any proceeding shall be served promptly on all other parties to the proceeding.
B. Unless otherwise required by law, service of pleadings, correspondence, and all other documents shall be made by personal delivery or by regular mail.
C. Proof of Service.
(1) Every pleading, motion, response, correspondence, or other paper filed with the Office shall contain or be accompanied by a certificate of service.
(2) The certificate of service shall be signed and shall contain the:
   (a) Date of service;
   (b) Manner of service;
   (c) Name of each person served; and
   (d) Address at which each person was served.

COMAR 28.02.01.25 Postponements.
A. A request for postponement shall be considered only if the party requesting the postponement establishes good cause for the postponement.
B. Except as provided in § D of this regulation, a request for postponement shall be made in writing and filed not less than 5 days before the scheduled hearing.
C. Documentation of the reasons for the postponement may be required from the party making the request.
D. Emergency Request for Postponement.
   (1) For purposes of this section, "emergency" means a sudden, unforeseen occurrence requiring immediate attention which arises within 5 days of the hearing.
   (2) In an emergency, a request for postponement may be made by telephone.
E. When practicable, all parties to a proceeding shall be contacted before a ruling on a postponement request is made.

COMAR 28.02.01.26 Dismissal for Lack of Prosecution.
A. Unless otherwise required by law, a case pending before the Office may not be held in abeyance or placed on inactive status.
B. At the expiration of 6 months from the last docket entry, a case is subject to dismissal, on request of a party or a judge's own initiative, for lack of prosecution.
C. If dismissal is initiated by a judge or requested by a party, the judge shall send notice to all parties that a final or proposed dismissal for lack of prosecution will be entered after the expiration of 30 days from the date of the notice unless a motion is filed under § D of this regulation.
D. On motion filed within 30 days after the date of the notice, the judge, for good cause shown, may defer issuance of the final or proposed order of dismissal for the period and on the terms the judge considers proper.
E. Entry of Order.
   (1) If a motion is not filed within 30 days or if a motion is filed and denied, the judge shall issue an order or proposed order of dismissal within 30 days after the time for filing the motion has expired.
   (2) If a motion is filed and good cause is shown for deferral of the dismissal, the judge shall issue an order deferring dismissal and specifying the period and the terms of the deferral.
COMAR 28.02.01.27 Cases Remanded to the Office.
A. A case remanded to the Office by a court or an agency for further proceedings is considered filed with the Office on the earlier of:
   (1) When the court's or agency's order is received by the Office; or
   (2) When a party files with the Office a signed copy of the remand order.
B. Unless the remand order specifies otherwise, the Office shall promptly schedule further proceedings as necessary and issue a decision in accordance with State Government Article, § 10-205(e), Annotated Code of Maryland.

COMAR 28.02.01.28 Reconsideration and Revision.
A. Except as provided in § B(2) of this regulation, a decision may be revised or reconsidered only by the judge who rendered the decision for which reconsideration or revision is requested.
B. Revisory Power.
   (1) On motion of any party filed at any time, the judge may exercise revisory power and control over a final decision in the event of fraud, mistake, or irregularity in the same manner that the courts may exercise revisory power under Maryland Rule 2-535(b).
   (2) On the initiative of the judge or on the motion of any party, a judge may correct a clerical mistake in a final decision at any time in the same manner as the courts exercise revisory power under Maryland Rule 2-535(d).
C. Reconsideration. When the judge is the final decision maker, the judge who rendered the decision may revise or reconsider the decision to the same extent as permitted by law if the agency rendered the final decision.
D. A request for revision or reconsideration does not automatically stay the action or toll the time for filing an appeal.
E. Proposed decisions may not be revised or reconsidered by the judge.
When an agency does not follow its own regulations, that does not necessarily mean that an agency decision will be reversed and its decision invalidated.

- The *Accardi* doctrine
- The exceptions
- Fundamental constitutionally mandated procedures
- Burden of proof to show substantial prejudice
- Affecting individual rights, obligations, and benefits
- No per se violation
- Internal procedures

Sections to this Chapter 7 are:

A. When an Agency Does not Follow its Rules and Regulations ................................................. 151

B. The Doctrine and its Exceptions—Legislative Intent ................................................................. 156

A. When an Agency Does not Follow its Rules and Regulations

What happens when an administrative agency decision is attacked because the agency did not follow its own procedures and regulations? The "Accardi Doctrine" is applicable to administrative hearings in Maryland:1 "It is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force."2

"The 'Accardi Doctrine', . . . traces its roots to the Supreme Court decision of United States ex rel. *Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954), [and] has been recognized in federal and some state jurisdictions.3 When an agency does not follow its own rules, there is going to be an examination of the rule violated and an initial question of whether the rule implicated some

---

1 *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463, 468, 823 A. 2d 626 (2003). There are many Maryland appellate court cases addressing the issue of when and under what circumstances an administrative agency's failure to follow its own rules will invalidate its decision. *Pollock* (2003) is the most exhaustive in its treatment of the subject. This decision is *Pollock III*. There were issues of chain of custody addressed in *Pollock v. Patuxent Institution Board of Review*, 358 Md. 656, 751 A. 2d 496 (2000), *Pollock I*, and on remand there is a Court of Special Appeals opinion, *Pollock v. Patuxent Institution Board of Review*, 146 Md. App. 54, 806 A.2d 388 (2002), *Pollock II*. In *Pollock III*, Judge Cathell does an exhaustive review of federal and state appellate opinions interpreting *Accardi* and its exception.


3 *Pollock*, 374 Md. at 481. In *Accardi*, the Attorney General of the United States sent an unlawful communication to the Board of Immigration Appeals listing Accardi as an "unsavory character" to be deported, in disregard of the applicable procedures of the Board of Immigration Appeals. 374 Md. at 481-82.
fundamental constitutional mandated procedure. "...[W]hen the Accardi doctrine, with its exceptions, is applicable, a complainant must also show prejudice to have the agency action invalidated."4

The practical aspects of Accardi demonstrate the problems that administrative law judges, circuit court judges and the Court of Special Appeals grappled with, at least until Pollock settled many matters.5 Hopkins v. Maryland Inmate Grievance Commission6 addressed a rule of the Department of Corrections that a hearing on an alleged infraction against an inmate had to be held within 72 hours, except in exceptional circumstances. That time limit was not met because of the volume of cases the institution was required to hear.7 While stating that Accardi did not apply to an agency’s departure from procedural rules adopted for the orderly transaction of agency business, the Court found the Division’s rule was not intended to govern internal procedures, but instead was adopted to confer important procedural benefits on inmates. Thus: “is well established that rules and regulations promulgated by an administrative agency cannot be waived, suspended or disregarded in a particular case as long as such rules and regulations remain in force.”8 The Court held the rule was mandatory. It said that it did not base its decision on a due process violation but on the “judicially-evolved rule of administrative law and not on due process grounds.”9 The fact that the rule was mandatory made compliance a necessity. In this case, a showing of prejudice was not something that was discussed as being determinative and/or a burden on either party.

In 1980, the Court of Special Appeals determined in Board of Educ. Of A. A. County v. Barbano10 that “Guidelines for the Evaluation of Probationary Teachers” were best interpreted by the Board of Education (“a unique branch of government given peculiarly autonomous powers among which is the authority to explain the true intent and meaning of not only the rules, regulations and bylaws adopted by the Board, but the very provisions legislatively authorizing the powers and duties, etc. of the Board itself.”).11 In this case dismissal of a probationary teacher was not accomplished in conformity with the State guidelines.

While the State Board of Education policy manual was formulated to assess the competence of probational teachers (entitled “Guidelines for the Evaluation of Probationary Teachers”) did confer some procedural benefit on a teacher, its primary purpose was “to bestow upon students education by teachers of unquestionable competency.” Thus, the Board’s own opinion that the guidelines were intended to provide a degree of uniformity in guiding the divergent county boards in negotiating annually such procedures with the union-like representative of teachers controlled, and the rules were not meant to confer procedural benefits upon individual probationary teachers. The application of Accardi was reversed. The failure of the local Board of Education to adequately follow the provisions of the Guidelines did not come within the ambit of Accardi because of the principal purpose of the policy.12 The lesson of Barbano, then, was that the primary purpose of an internal policy directive determines whether Accardi applies.

---

4 Pollock, 374 Md. at 481-82, 501.
5 Most of the analysis from this Hopkins case to the King case over the next couple of pages of this book is the result of analysis by former Administrative Law Judge Guy J. Avery. Judge Avery lived through all of this and has produced an analysis that deserves reproduction here, consideration along with the analysis of the Pollock decision. The author of this book is indebted to Judge Avery for his input and expertise.
7 Hopkins, 40 Md. App. at 333. The Court was not impressed that the case load or institutional backlog was exceptional or justification for a violation of the rule. Id.
8 Hopkins, 40 Md. App. at 335 citing 2 Am. Jur. 2d Administrative Law, Sec. 350; 1 Cooper, State Administrative Law, pp. 266-67 (1965 Edition); K. Davis, Administrative Law of the 70's Section 5-03-5 (Cum. Supp. 1977). The Hopkins Court stated: "We are not convinced that the one day's delay here was a denial of due process." Id.
9 Hopkins, 40 Md. App. at 337.
11 Barbano, 45 Md. App. at 42.
12 Barbano, 45 Md. App. at 44.
In the 1986 case of *Board of Education of Baltimore County v Ballard*, the Board failed to follow its own rule (requiring further evaluations of teachers with unsatisfactory performance) in dismissing a librarian. The Court held that Board Policy 4100 spoke in unambiguous, mandatory language “which makes clear that its purpose is to confer ‘important procedural benefits and safeguards’ upon tenured teachers.” A reading of the education code lent support to the contention that the policy and procedures were to confer important procedural rights on the individual. Not aware that the State Board had adopted or construed the policy in a manner other than what was evident by its plain language, the policy was required to be followed. The written policy violated substantial rights of the librarian and her termination was invalid.

1993 saw the Court of Special Appeals turning to the “purpose” in an evaluation of policy violations. In *Board of School Comm’rs of Baltimore City v. James and Davis* (consolidated cases), the Court cited with approval the Board’s finding that a violation of dismissal procedures were inconsequential, given the primary purpose of the policy. Both teachers received year-end evaluations for 88-89 and 89-90 that they needed improvement, but there was no compliance with the rule that tenured teachers being evaluated be observed by nonschool-based staff and that the teacher be accorded preobservation and postobservation conferences. The Court adopted the Board’s statement:

"... It found the failure to have a formal evaluation by a non-school-based observer during the 1988-89 year was not a “fatal error” because the “primary purpose” of the Baltimore City evaluation procedures is to “improve instruction and to encourage growth in professional ability and responsibility on the part of the staff” and “not to confer procedural benefits.”"

While the State Board’s authority in interpretation is not unlimited, Board interpretation is given great weight. *Accardi* requires that administrative agencies generally follow their own rules, and if they do not, the resulting agency action is invalid with there being no showing of prejudice by the complaining party. The *Accardi* rule is not limitless because an agency failure to follow mere “internal administrative procedures” does not require reversal of an agency’s action unless the complaining party can show substantial prejudice. In this case, there was no past history indicating an intent not to confer procedural benefits. “The State Board specifically found that the purpose of the Procedures was to improve instruction and professional ability and not to confer procedural benefits.” The Court stated: “. . .[T]he Board’s interpretation as to the purpose of that procedure is entitled to deference.” Thus, the agency determination (State Board) was correct in finding that the procedural violation did not automatically mandate reversal of the decision to terminate the teachers.

One must wonder, then, why such protections are included in the policy at all. In *James*, for example, termination of a teacher required an evaluation by a qualified person who was not connected with the school. Such an evaluation was not done. The benefit to the teacher would have been that he or she could have been reasonably sure that the termination decision did not arise out of personal animus by

---

15 Ballard, 67 Md. App. at 244.
17 James and Davis, 96 Md. App. at 419-10.
18 James and Davis, 96 Md. App. at 413. The Court said it was well established that the State Board is “vested with the last word on matters of educational policy and administration of public education in Maryland” and that this “doctrine dates back more than 100 years.” James and Davis, 96 Md. App. at 417.
19 James and Davis, 96 Md. App. at 421.
20 James and Davis, 96 Md. App. at 421-22.
21 James and Davis, 96 Md. App. at 423.
22 James and Davis, 96 Md. App. at 425.
the principal or others in the school who were part of the process. While such a finding may be said to be unlikely, the teacher was entitled, nevertheless, to a completely objective evaluation.

However, in *Kohli v. Looc, Inc.* 103 Md.App. 694, 654 A2d 927, *cert. granted* 342 Md. 588,678 A.2d 1047 (1996) and order rev’d on other grounds, 347 Md. 258, 701 A.2d 92 (1997) the Court of Special Appeals, Harrell, J., held that the Human Relations Comm’n had limited it’s Appeal Board’s authority to reverse the administrative law judge’s decision to those situations where it finds the administrative law judge’s conclusions to be unsupported by competent, material and substantial evidence or otherwise arbitrary or capricious. In *Looc, Inc.*, the Appeals Board failed to meet this standard, and its decision, disagreeing with that of the administrative law judge, was reversed, in part and remanded on other grounds. There was no “primary purpose” analysis, the Board simply did not follow its own rules and procedures and did not meet the required review standard. The Human Relations Commission imposed that standard, which essentially is the same as a reviewing court’s standard, on the Appeal Board. It was under no obligation to do so, but once done it had to meet the standard for its decision to be upheld. The decision in *Looc* reinvigorated the principle that an agency’s failure to follow its own rules implicates *Accardi*.

Throughout this time, there were arguments that an agency’s violation of its own policy was a denial of an individual’s rights, warranting dismissal of the “charge,” whether or not the individual could show “substantial prejudice” because of the violation. (*Ballard*, for example). This was known as the *per se* view. The other interpretation of *Accardi* was that a violation of policy was irrelevant unless it affected individual rights and obligations or conferred important procedural benefits. If so, then petitioner still had to show that the violation caused substantial prejudice.

One of the problems of the latter approach was that “substantial prejudice” was undefined. Another concerned the “purpose” interpretation. In the school cases, for example, all policy, regulations and statutes are adopted, to one degree or another, primarily to benefit the educational process. Thus, any procedural benefit for the employee, especially if found in a rule meant only to assure “the orderly transaction of business,” could easily be classified as collateral. With more formidable issues, such as a teacher’s termination, violation of the procedural rights of the teacher were subsumed to the greater purpose of assuring good educational outcomes. The most important exception to *Accardi*, in fact, was that it did not apply to policy adopted for the orderly transaction of business. But the orderly transaction of business might well have an impact on people, especially in a school setting. Nevertheless, the “purpose” argument was widely accepted. The “purpose” rationale of cases like *Barbano* had to be viewed with some skepticism.

This ambiguous state of affairs concerning agency actions was remedied by two cases heard by the Court of Appeals in 2002 and 2003. The first case was *Maryland Transportation Authority v. King*, 369 Md. 274, 799 A.2d 1246 (2002). Although Judge Eldridge commented that *King* was the first *Accardi* case to come before the Court, he noted that, to some extent, “a similar doctrine is reflected in Maryland administrative law.” (*FN: King*, 369 Md. at 286, 799 A.2d at 1252) The Court also noted that the Supreme Court had held that the Interstate Commerce Commission’s failure to exercise strict compliance with its own rules “did not render void its order” because there was substantial compliance and “the absence of strict compliance did not prejudice other carriers who objected to the application.” (*FN: 374 Md. 463, 487, footnote 13, citing American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 90 S.Ct. 1288, 25 L.Ed.2d 547 (1970). The alleged procedural violation was held not to implicate Accardi, because the appellant could not show that he was prejudiced by the violation.

The following year, *Pollock v. Patuxent Institution Board of Review*, 374 Md. 463, 823 A.2d 626 (2003) extensively reviewed applicable case law, and modified the position that it felt the Court of
Consistent with our own APA in respect to the agencies to which it applies, we adopt for other administrative agencies, the Accardi doctrine as we modify it and hold that an agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland's body of administrative law, which generally holds that an agency should not violate its own rules and regulations.

In so holding we nonetheless note that not every violation of internal procedural policy adopted by an agency will invoke the Accardi doctrine. Whether the Accardi doctrine applies in a given case is a question of law that, as the Court of Special Appeals has opined, requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates Accardi because it "affects individual rights and obligations" or whether it confers "important procedural benefits" or, conversely, whether Accardi is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal "procedural rules adopted for the orderly transaction of agency business," i.e., not triggering the Accardi doctrine.

Additionally, we adopt the exception to the Accardi doctrine which provides that the doctrine does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.

To this extent we adopt the application and rationale of the Court of Special Appeals in its previous applications of the Accardi. We reject, however, the Court of Special Appeals' holdings where that court has indicated that there can be a per se violation of the doctrine in situations where it may be applicable, regardless of whether the complainant involved was prejudiced by the failure of the agency to follow its procedures or regulations.

Where the Accardi doctrine is applicable, we are in accord with the line of cases arising from the Supreme Court and other jurisdictions which have held that prejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the Accardi doctrine, i.e., even a rule or regulation that "affects individual rights and obligations" or affords "important procedural benefits upon individuals," the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to Accardi applies and where an agency fails to follow its "internal administrative procedures," if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. In either case, prejudice must be shown.

In summary, we affirm the Court of Special Appeals' holding that PID 110-18, the Patuxent directive violated in the case sub judice implicates the Accardi doctrine, but also implicates the Accardi exception for the reasons stated herein and the reasons indicated in the intermediate appellate court's opinion in the case in this appeal. PID 110-18 merely provides for the orderly transaction of Patuxent business of collecting and handling urine specimens. The provisions at issue here implicate no fundamental constitutional rights and are not imposed on the agency by statute.

Moreover, we reject petitioner's contentions that he suffered prejudice in the way the sample was handled and, by the Board's consideration of the positive urinalysis sample which was submitted by him. He signed the specimen document. He wrote the correct
inmate number on it; he affixed the evidence tape on the top of the jar. It was his urine sample. In the instant case, Patuxent staff were generally following PID 110-18, but committed purely technical infractions[.]

374 Md. 463 at 503-04, 823 A.2d 626 at 650, 651.

B. The Doctrine and its Exceptions – Legislative Intent

"... [T]here is a principal exception to the doctrine, which provides that the [Accardi] doctrine is not applicable to 'an agency's departure from procedural rules adopted for the orderly transaction of agency business.'23 Some rules are not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion. The issue is whether the violation causes substantial prejudice.24 Maryland has not adopted a per se invalidation of agency action rule even when a fundamental constitutional right is involved.25 Claimants must demonstrate prejudice resulting from the violation of a regulation or rule to have the agency action invalidated in Maryland. The Court of Appeals has adopted this rule as being "in line with Maryland public policy concerns as expressed by the Legislature in the APA for agencies that come under the APA's aegis."26 "... [N]ot every violation of internal procedural policy adopted by an agency will invoke the Accardi doctrine. Whether the Accardi doctrine applies in a given case is a question of law. ... [T]he doctrine does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business. ..."

23 Pollock, 374 Md. at 483.


Supreme Court cases subsequent to Accardi are set forth in the opinion. Pollock, 374 Md. at 489-95.

The Pollock Court pointed to numerous Court of Special Appeals opinions recognizing or applying the Accardi doctrine were cited. Pollock, 374 Md. at 487-88.

25 Pollock, 374 Md. at 495. Some are heard to say this is a mistake. Under the premise that fundamental constitutional rights should be easily recognized and too easily discarded if there is not a penalty to pay, controversy exists. Id., at 495-96.

26 Id. The Court cited federal and other cases to this effect. Pollock, 374 Md. at 496-500.

27 Pollock, 374 Md. at 503.

28 Pollock, 374 Md. at 503-04. Pollock's extensive review of case law ended with the Court's conclusion in summary form:

... [A]n agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded...

... [N]ot every violation of internal procedural policy adopted by an agency will invoke the Accardi doctrine. Whether the Accardi doctrine applies in a given case is a question of law that ... requires the courts to scrutinize the agency rule or regulation at issue to determine if it implicates Accardi because it "affects individual rights and obligations" or whether it confers "important procedural benefits" or, conversely, whether Accardi is not implicated because the rule or regulation falls within the ambit of the exception which does not require strict agency compliance with internal "procedural rules adopted for the orderly transaction of agency business," i.e., not triggering the Accardi doctrine.
"The APA governs administrative procedures and is a legislative statement of policy setting forth statutory requirements for agencies to which it applies and what prohibitions exist for such agencies in the carrying out of their business." SG §10-222 providing for judicial review of agency decisions states that "courts may reverse or modify the decision of the administrative agency if both a substantial right of the petitioner has been violated and the petitioner ‘may have been prejudiced’ by that departure from the prescribed procedure. . . ." Incorporating the legislative policy statement, the "APA basically provides that if a covered agency's departure from requirements affects fundamental rights and prejudices a petitioner, its action is subject to be reversed or modified by the courts."

Sometimes "mandamus or other traditional actions may lie to enforce administrative compliance with procedural requirements or duties."  

**Significant Case Decisions**

**Raise the issue before the agency or lose that right on appeal**

- Argument on appeal by Dr. Finucan that his due process rights were not safeguarded by the Board of Physicians because of a failure to allow him to confront a complaining witness was not addressed in *Finucan v. Board of Physicians*, 380 Md. 577, 846 A. 2d 377 (2004). This was not an issue raised before the agency and could not be brought for the first time on appeal. 380 Md. at 589.

**The board cannot summarily dispose of a case where it has no procedures in place to do that**

- Summary disposition by the Board of Contract appeals in *Engineering Mgt. v. State Highway*, 375 Md. 211, 825 A. 2d 966 (2003) was reversed. The Board violated procedures set forth in its statute because it did not adopt rules allowing a summary disposition procedure. 375 Md. at 232-32. Thus, the agency action was unlawful and required reversal. 375 Md. at 236.

**King's argument that when the Authority did not in fact immediately terminate him, it lose the right to terminate him**

- The Maryland Transportation Authority did not violate *Accardi* when it first investigated allegations of misconduct by an employee before terminating him in *MTA v. King*, 369 Md. 274, 799 A. 2d 1246

. . . [T]he doctrine does not apply to an agency's departure from purely procedural rules that do not invade fundamental constitutional rights or are not mandated by statute, but are adopted primarily for the orderly transaction of agency business.  
. . . [There is no] per se violation of the doctrine in situations where it may be applicable, regardless of whether the complainant involved was prejudiced by the failure of the agency to follow its procedures or regulations.  
. . . [P]rejudice to the complainant is necessary before the courts vacate agency action. In the instances where an agency violates a rule or regulation subject to the *Accardi* doctrine, i.e., even a rule or regulation that "affects individual rights and obligations" or affords "important procedural benefits upon individuals," the complainant nevertheless must still show that prejudice to him or her (or it) resulted from the violation in order for the agency decision to be struck down. In other instances where an exception to *Accardi* applies and where an agency fails to follow its "internal administrative procedures," if the complainant can nonetheless show prejudice to a substantial right due to the violation of the rule or regulation by the agency, then the agency decision may be invalidated pursuant to the Maryland Administrative Procedure Act. In either case, prejudice must be shown. 374 Md. at 503-04.


"According to King, allowing him to remain in his job 'spanning a period over a year' from the time of his alleged misconduct violated the 'immediate termination' language of the agency rule and was thus, an unlawful termination. 369 Md. at 287. The Court deferred to agency interpretation of the regulation. "Allegations of serious misconduct or some evidence of serious possible misconduct by an employee may come to the Authority's attention, but there may be a substantial question concerning the truth of the allegations or whether the misconduct actually occurred. While not required it may be fairer to the employee for him or her to remain on the job while the allegations of evidence are being investigated." 369 Md. at 289-90.

A mandamus action to say the Board had no authority to issue a summary determination

The agency violated its own procedure

- When the Medical Advisory Board and the Disability Review Board of the Prince George's County Police Department Pension Plan ruled that Corporal Steven Kerpelman's hypertension did not constitute a qualifying disability, he brought a mandamus action. *Kerpelman v. Disability Review*, 155 Md. App. 513, 515-16, 843 A. 2d 877 (2004) The Court examined the Police Pension Plan. The language of the plan specifically required the Medical Advisory Board to provide a written opinion to the Disability Review Board. The Disability Review board is then required to render an opinion of disability. "This finding is a prerequisite for a claimant to request a hearing." The Board's interpretation allowing it to make summary determinations of disability without written findings and without offering a right to appeal was incorrect under the language of the plan. 155 Md. App. at 522-27. The Court ruled that the Medical Advisory Board "failed to issue a written opinion concerning Kerpelman's alleged disability to the Disability Review Board. In so doing, the Agency violated "its own rules of procedure."

Deference to an agency interpretation of its own rules and regulations

Not conclusive *just some deference

- Though deference is to be given to an agency interpretation of its own rules and regulations, that agency interpretation is not conclusive. *Smith v. State*, 140 Md. App. 445,455, 780 A. 2d 1199 (2001). This case involved diminution credits due a prison inmate. The Court did not agree with the DOC that there was a conflict between an interpretation of the regulation and the statute. 140 Md. App. at 457. "The DOC is now obligated to honor and follow the regulation as it is written." The mis-calculation of credits in this case required a remand and further proceeding. 140 Md. App. at 463.

This opinion is quoted extensively in *Jordan v. Hebbville*, 369 Md. 439, 455-58, 800 A. 2d 768 (2002). This case involved the granting of a towing license in Baltimore County. Baltimore County should not have granted the permit based on the sole criterion that applicant was African-American, as this was not a criteria to be considered in determining the need for additional towing service. It was a longstanding practice to use defined criteria. There was a proper basic needs standard in operation. Granting the license meant that Mr. Freeman [The Chief of the Department of Permits and Development Management], deviated from regulations. He could not determine "need" other than based on established criteria. He could not define "need" in another contest.

The Court said that the "Board of Appeals was legally correct to conclude that the DPM, using race alone as the sole needed criterion, should not have granted appellant's towing license application and that its action was arbitrary and capricious" *Id.,* at 461. An improper departure from past consistent practice occurred with the decision to apply a "single, newly-created standard" for this license application. "Such a departure from past consistent interpretation and practice is a matter better addressed either by a legislative entity, or by the adoption of a regulation." 369 Md. at 458.

In this 2002 opinion Judge Eldridge reviewed Supreme Court opinions relying on *Accardi*, *King*, 369 Md. at 285. Court of Special Appeals opinions on the issue were cited. 369 Md. at 285-86. SG §10.222(h)(iii) allows reversal for an agency failure to follow the law. 369 Md. at 286. Judge Eldridge commented:

Moreover, numerous opinions of this Court have involved the review of agency action to determine if the agency complied with its regulations and required procedures. (An agency's violations of procedures which do not "compromise the accused's opportunity for a full and fair hearing on the charges," or which were not raised during the administrative proceedings, furnish no basis to invalidate the agency's decision); (The failure of an agency to complete an investigation within the time set forth in a regulation did "not reflect any prejudice ... that was caused by the delay," and therefore the administrative decision was affirmed); (Where the suspension of an employee was not authorized by the agency's regulation, the suspension was vacated); *Heft v. In addition, we have recognized that, under some circumstances, mandamus or other traditional actions may lie to enforce administrative compliance with procedural requirements or duties.*

369 Md. at 286-87. (citations omitted)
Claiming a violation of due process
Peer review process
When is an irregularity material
A failure to object means the right is waived

- Board of Physician Quality Assurance v. Levitsky, 353 Md. 188, 725 A. 2d 1027 (1999) saw the Court commenting that the disciplining of physicians in Maryland is governed by the Medical Practices Act (HO Title 14), COMAR 10.32.02, et. seq., and a Peer Review Handbook for Maryland adopted jointly by the Board and the Medical and Chirurgical Faculty of Maryland in 1989. Dr. Levitsky claimed a violation of due process because the peer review process that occurred prior to filing charges against him “was not conducted in strict compliance with procedural requirements.” That peer review process is to determine whether there is “reasonable cause to charge [a] physician with a failure to meet appropriate standards of care.” 353 Md. at 192. Some handbook procedures were not followed. However, there was no requirement that “each member of the medical review committee to review each and every record of each and every patient when it has selected a medical review team for that purpose.”

33 353 Md. App. at 203-04. HO §14-405(g) states “the hearing of charges may not be stayed or challenged by any procedural defects alleged to have occurred prior to the filing of charges.” Irregularities “are ordinarily immaterial and may not be challenged.” 353 Md. at 204-05. That peer review process did not determine guilt but “only whether there is a sufficient basis for the filing of charges, there was not a compromise to the right to a full hearing or a proper challenge to jurisdiction. 353 Md. at 206, 208. In any event, the failure of Dr. Levitsky to object meant the right to object was waived. 353 Md. at 206-07.

There were promotional procedures in place
LEORB

The right to respond to allegations against you

- In an action by a police officer grieving the failure to promote him, the Court reviewed the validity of the Montgomery County Police Department’s promotional procedures in Anastasi v. Montgomery County, 123 Md. App. 472, 484-88, 719 A. 2d 980 (1998). LEORB was invoked. The Officer alleged that his rights under Montgomery County Administrative Procedure were violated because he was not allowed to respond to memos in his employment file expressing reservations about his candidacy for promotion. 123 Md. App. at 490. Reviewing the procedure, the Court determined that it affected “individual rights and obligations, and confers important procedural benefits upon employees of Montgomery County.” 123 Md. App. at 493. Accardi was triggered. Not having been given the opportunity to see or respond to memos in the file meant officer Anastasi’s rights were violated. Remand was ordered to allow the Officer to respond to the memos in the file. 123 Md. App. at 497.34 The positive urinalysis drug test result introduced in a petitioner’s parole revocation hearing was not required to be excluded because Patuxent Institution did not strictly comply with its own directive setting forth technical collection and documentation procedures for urinalysis samples. “What occurred constituted a technical mistake which did not substantially prejudice petitioner.” Pollock v. Patuxent Institution Board of Review, 374 Md. 463, 468, 823 A. 2d 626 (2003). A guard wrote the wrong inmate number on the specimen paperwork, but petitioner signed it and wrote his correct number on the paper. Anastasi, 123 Md. App. at 501. Evidence supported the chain of custody finding, and that the specimen was petitioners. 123 Md. App. at 503.

Sexual harassment charged
The at-will employee
A statutory responsibility to investigate * that responsibility violated?

- Danaher v. Dept. of Labor, 148 Md. App. 139, 155, 811 A. 2d 359 (2002) saw the Court reversing and remanding a case involving termination of a Maryland State employee under a sexual harassment policy. Even though the employee was an “at-will" employee, the State did not comply with its statutory responsibility to investigate alleged misconduct, meet with the employee, consider any mitigating

33 The circuit court relied on a prior Maryland Court of Special Appeals decision in Young v. Board of Physicians, 111 Md. App. 721, 684 A. 2d 17 (1996) stating that the Handbook was not merely an internal document and that the sanctions for non compliance in not doing an individual review of all files at issue. Levitsky, 353 Md. at 202.

34 Officer Anastasi had asked the Court to order his promotion to Lieutenant. The Court stated this was not its function, and that decision was best left to the Department with the Court to review the decision made if judicial review was requested. Anastasi, 123 Md. App. at 497.
circumstances, and then to “determine appropriate disciplinary action, if any, to be imposed.” SPP §11-106. 148 Md. App. at 166, 176. SPP §11-106 “does not detail how the Employer was to conduct the required investigation.” Nevertheless, using a dictionary definition, the inquiry had to be careful or systematic and adhere to basic principles of fairness. 148 Md. App. at 169. Termination of a State employee with prejudice means that the employee may not be employed with the State in any capacity for three years. 148 Md. App. at 176.

---

35 Evidently, the appellant did not mention Accardi when appealing the termination. The Court of Special Appeals said the doctrine was relevant to the disposition of the case where the State did not follow either the statutory directive or COMAR regulations in properly investigating the matter prior to termination of the employee. Danahar, 148 Md. App. at 174-175.

36 In this case there was no meeting with the employee giving him a meaningful opportunity to respond. Nor was the veracity of the allegations checked. Danahar, 148 Md. App. at 170 A number of disciplinary options are available to the employer, 148 Md. App. at 171, but before determining which of those options to exercise, the Department of Labor had to satisfy the statutory requirements “by conducting an investigation and considering mitigating circumstances.” 148 Md. App. at 176.
Standing before an administrative agency is different than standing before a circuit court on judicial review of an administrative agency decision. The benchmark for analyzing a standing dispute is the case of Sugarloaf v. Department of Environment, 344 Md. 271, 292, 686 A.2d 605, 616 (1996), must reading for etiology and analysis by anyone involved in a standing dispute.

Sections within this Chapter 8 are:
A. Standing before the agency
B. Standing before the Court

A. Standing before the agency
There is a liberal standard under Maryland law for a party to have status in an administrative hearing.1 “The requirements for administrative standing under Maryland law are not very strict. Absent a statute or a reasonable regulation specifying criteria for administrative standing, one may become a party to an administrative proceeding rather easily.” As least this is so with administrative proceedings where community and individual interest is high, such as is seen with zoning, development and certificate of need proceedings. One present at a hearing before a Board of Appeals, who testifies as a witness and makes statements or arguments as to why amendments to zoning regulations should not be approved, has standing.2 “... [T]he format for proceedings before administrative agencies is intentionally designed to be informal so as to encourage citizen participation.”3

“... [T]he threshold for establishing oneself as a party before an administrative agency is indeed low.” Presence “at the hearing and testimony in favor of an asserted position is sufficient” Appearance and testimony at the hearing are not required. It has been held to be sufficient that the hearing examiner


"He was present at the hearing before the Board, testified as a witness and made statements or arguments as to why the amendments to the zoning regulations should not be approved. This is far greater participation than that previously determined sufficient to establish one as a party before an administrative agency. See, e.g., Baxter v. Montgomery County, 248 Md. 111, 113, 235 A.2d 536 (1967) (per curiam) (submitting name in writing as a protestant); Bryniarski v. Montgomery Co., 247 Md. 137, 143, 230 A.2d 289, 293-94 (1967) (testifying before agency); Hertelendy v. Montgomery Cty., 245 Md. 554, 567, 226 A.2d 672, 680 (1967) (submitting into evidence letter of protest); DuBay v. Crane, 240 Md. 180, 184, 213 A.2d 487, 489 (1965) (identifying self on agency record as a party to proceedings); Brashears v. Lindenbaum, 189 Md. 619, 628, 56 A.2d 844, 849 (1948) (same) . . . .

3 Sugarloaf, 344 Md. at 286-86. “[A]bsent a reasonable agency or other regulation providing for a more formal method of becoming a party, anyone clearly identifying himself to the agency for the record as having an interest in the outcome of the matter being considered by that agency, thereby becomes a party to the proceedings." Id.
considered one to be a party, or that the appellant’s name was submitted to the agency as one who would be aggrieved by an adverse decision.4 “[M]ere presence at an administrative proceeding, without active participation, is sufficient to establish oneself as a party to the proceeding.”5

B. Standing before the Court

“For a person or entity to maintain an action under the Administrative Procedure Act for judicial review of an administrative decision, the person or entity "must both be a 'party' to the administrative proceedings and be 'aggrieved' by the final decision of the agency."6 While the term "aggrieved" is not defined in the Administrative Procedure Act, [the Court of Appeals has held] that the statutory requirement that a party be "aggrieved" mirrors general common law standing principles applicable to judicial review of administrative decisions."7 Accordingly, in order to be "aggrieved" for purposes of judicial review, a person ordinarily must have an interest "such that he is personally and specifically affected in a way different from . . . the public generally."8 This means that "the [administrative] decision must not only affect a matter in which the protestant has a specific interest or property right but his interest therein must be such that he is personally and specially affected in a way different from . . . the public generally".9

A judicial standing issue should be adjudicated by the circuit court by filing a motion or other pleading to dismiss the petition. Testimony may be needed to determine the dispute. When the issue of standing of an appellant to seek judicial review is raised in the court in which review of an administrative action is asked, the Court of Appeals has approved the practice of trial judges in permitting testimony on the point to be taken before them. Additional testimony is not taken on the merits of the substantive issue, but of “determining whether the appellants have the requisite standing to have those issues resolved.”10 It is the trial court’s function to determine whether a person is aggrieved.

Whether there has been an invasion of one’s legal interest goes to the merits of a dispute. “The question of standing is different. It concerns . . . the question whether the interest sought to be protected by the complainant is arguably within some zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” Thus, when considering whether one has standing, the focus is on the party seeking to get his complaint before a court and not on the issues he wishes to have adjudicated.11 “In cases involving challenges to administrative land use decisions, there is a distinction between standing in court to obtain review of the governmental action and the merits of the challenger’s position.”12 Evidence there would be an increase in traffic in an area may be sufficient to give contiguous landowners

---

6 Sugarloaf, 344 Md. at 287-88 citing Medical Waste v. Maryland Waste, supra, 327 Md. at 611, 612 A.2d at 248. See § 10-222(a)(1) of the State Government Article; Bailey v. Dep’t of Public Safety, 333 Md. 397, 405, 635 A.2d 432, 436 (1994);
Maryland-Nat’l v. Smith, supra, 333 Md. at 11, 633 A.2d at 859 ("Establishing the [plaintiff’s] status as a party to the proceedings before the Board of Appeals completes only half of the required analysis; the [plaintiff] must also be aggrieved by the Board’s decision in order to have standing").
7 Sugarloaf, 344 Md. at 288 citing Medical Waste v. Maryland Waste, supra, 327 Md. at 611 n.9, 612 A.2d at 248-249 n.9;
8 Sugarloaf, 344 Md. at 288 citing Medical Waste v. Maryland Waste, supra, 327 Md. at 611 n.9, 612 A.2d at 248-249 n.9,
9 Sugarloaf, 344 Md. at 288.
11 Sugarloaf, 344 Md. at 292.
12 Sugarloaf, 344 Md. at 295 citing Data Processing Service Org. v. Camp, 397 U.S. 150 (1970) and other cases.
13 Sugarloaf, 344 Md. at 294.
standing to challenge the grant of a special exception to build an apartment hotel. Evidence that a facility discharging toxins into the air that may subject a nearby property owner to greater emissions than the general public means that property owner has the requisite standing to contest issuance of a permit to construct the facility. These determinations are independent of outcome of the administrative proceeding on the underlying issues of traffic conditions and the acceptable limits of emissions. "In actions for judicial review of administrative land use decisions 'an adjoining, confronting or nearby property owner is deemed prima facie . . . a person aggrieved. The person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for [judicial review] and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved."

The Legislature "may enact legislation affecting a person's standing to bring a type of action in court or prescribing criteria for standing to bring such an action." With "respect to the allocation of functions between administrative agencies and the judiciary, the determination of whether a person has standing to maintain an action in court is exclusively a judicial function." Where there exists a party having standing to bring an action, the court "shall not ordinarily inquire as to whether another party on the same side also has standing."

"In actions for judicial review of administrative land use decisions, 'an adjoining, confronting or nearby property owner is deemed, prima facie . . . a person aggrieved. The person challenging the fact of aggrievement has the burden of denying such damage in his answer to the petition for [judicial review] and of coming forward with evidence to establish that the petitioner is not, in fact, aggrieved."

"In cases involving government-issued permits allowing activity which causes the emission of toxic substances into the air, the concept of 'nearby' property owners who are presumptively aggrieved may well include persons in a greater geographical range than in a typical zoning matter."

**Significant Case Decisions**

What the Legislature said; what the Legislature should have said; What the Legislature meant by what it said when it said what it said

- Another standing issue was before the Court in Gosain v. County Council of Prince George's County, 420 Md. 197, 22 A. 3d 825 (2011) where two individuals who operated service stations sought to maintain an action for judicial review of a final administrative decision by the Prince George's County Council, acting as the District Council, to challenge the approval of a detailed site plan for a parcel of commercial property in Prince George's County. The individuals were not aggrieved. They were also stockholders and employees of corporate entities which owned businesses and therefore separate from those corporate entities. It was the corporate entity which paid taxes in Prince George's County – not the individual

---

14 Sugarloaf, 344 Md. at 294.
15 Sugarloaf, 344 Md. at 295. The Court said standing cannot be based on a decision that one would not suffer legally cognizable harm. This would put an unreasonable burden on complainant. 344 Md. at 296. That is putting the cart before the horse.
16 Sugarloaf, 344 Md. at 297-98 citing cases stating that one who owns any property located within sight or sound of the subject property, within the same subdivision, in close proximity to the reclassified land, etc. have been said to have standing. Id., at 298.
17 Sugarloaf, 344 Md. at 290. (citations omitted) The Court reviewed prior decisions. 344 Md. at 290-292.
18 Sugarloaf, 344 Md. at 297. In this case, one party had standing so it was unnecessary to determine whether any of the other plaintiffs also had standing. 344 Md. at 297.
19 Sugarloaf, 344 Md. At 297. The Court reviewed cases. 344 Md. at 297-98 discussing concepts of property within sight or sound of the subject property; proximity of homes within the same subdivision; close proximity, etc.
20 Sugarloaf, 344 Md. at 299.
petitioners. Therefore, the individuals had no right to standing to contest the agency proceeding. 420 Md. at 210-211.

The standing issue depended upon the correct interpretation of Article 28, § 8-106(e) which statutory section controlled the judicial review process from a Prince George's County District Council decision. 420 Md. at 204-05. Legislative history dictated the result that statutory authority granting the right to judicial review to "any person or taxpayer in Prince George's County," which could literally be construed to mean any transient or individual passing through the County, would produce an absurd, illogical or incompatible with common sense. Prior to 1965 the statute, in pertinent part, gave the right to judicial review to a person "aggrieved." 420 Md. at 205.

"The term "aggrieved" as a basis for standing to bring an action is used in numerous statutes, is also a Maryland common law standard, and has been defined and applied in many opinions by this Court." 420 Md. at 206. The Court traced the wording of the statute granting authority to contest agency action and the changes in the statutory wording over the years (set out in the opinion). "...[T]he statutory wording and legislative history that the General Assembly contemplated a broad category of persons or entities having standing. The Amendment to § 8-106(c) over the years had the effect of expanding the class of persons or entities having standing. On the other hand, as previously discussed, it would be unreasonable to give the phrase its broadest literal meaning." "Traditionally, standing to challenge in court governmental decisions regarding the use of land has been based on the challenger's having some type of interest in real property in the area. Under § 8-106(e), of course, the pertinent area is all of Prince George's County. Moreover, the 1994 amendment to § 8-106(e) granted standing to associations "representing property owners affected by a final district council decision," indicating that an interest in property was the basis for standing." 420 Md. at 209.

Consequently, in our view, a reasonable interpretation of "any person ... in Prince George's County" means a person or entity having some type of interest in real property in Prince George's County. This would include a person residing in Prince George's County or owning a residence in the County, regardless of whether it is the person's domicile. It would include businesses or other entities owning or leasing real estate in Prince George's County.

Similarly, it is reasonable to conclude that "any...taxpayer in Prince George's County" means any person or entity which pays property taxes to Prince George's County. See Superior Outdoor Signs v. Eller Media Company, 150 Md. App. 479, 505, 822 A.2d 478, 493 (2003), where the Court of Special Appeals pointed out that a statute granting standing to "any taxpayer" in a particular jurisdiction would literally include "payers not only of property taxes, but of any kind of tax - sales, income," etc., but that the statute "must be interpreted in its context" which was land use regulation. The court held, therefore, that the statute meant property taxes paid to the particular jurisdiction.

Both petitioner Gosain and petitioner Chaudhry lacked standing under our interpretation of Article 28, § 8-106(e), to maintain this judicial review action. They neither resided or had a property interest in a residence in Prince George's County, nor owned or leased any real property in the County, nor paid property taxes to the County. The two corporations, Sona Auto Care, Inc., and MNA, LLC, owned the two service station properties and the businesses. The corporations, not the petitioners, paid property taxes to Prince George's County. Neither corporation, however, was a party to this litigation. 420 Md. at 210.

**An appellate court may raise the standing issue on its own initiative**

**Look at the statutory authority for some direction as to who has standing**

- Parties in the circuit court aggrieved by a final judgment of a circuit court were entitled to appeal to the Court of Special Appeals in Dorsey v. Bethel, A.M.E., 375 Md. 59, 68, 825 A. 2d 388 (2003). The Court cited Art. 25A §5(U) gives that authority following appeal to a circuit court from a decision of a county Board of Appeals. 375 Md. at 68. “When . . . aggrieved parties in the trial court are entitled to appeal and prosecute a timely, proper appeal to the Court of Special appeals, their alleged lack of standing to have instituted the action in the trial court furnishes no ground for dismissal of the appeal.” 375 Md. at 69. “Under some circumstances, an appellate court may consider a standing issue even though it was not raised in the trial court. Sometimes an issue described as a ‘standing’ issue may relate to the jurisdiction of the appellate court, such as whether the ‘case-or-controversy requirement’ is met, and such an issue may always be noticed by the appellate court.” 375 Md. at 70. The Court said the intermediate court should not have raised the issue of standing in this case where the only issue litigated in the circuit court was the
The judiciary determines standing disputes relating to the right to be in court

- The "question of standing to maintain a judicial review action [is] a matter to be resolved exclusively by the courts." An administrative agency has no authority to determine whether standing exists on judicial review. Sugarloaf v. Department of Environment, 344 Md. 271, 291-92, 686 A.2d 605, 616 (1996). This case was concerned with the Maryland Department of the Environment's decision to issue two permits which authorized the construction of a solid waste incinerator near Sugarloaf Mountain in Dickerson, Maryland. The agency delegated authority to OAH to conduct a hearing on whether a permit to construct should be issued and whether a refuse disposal permit should be issued. 344 Md. at 280-81. The ALJ concluded that the plaintiffs lacked standing under NR 1-508, et. seq. or common law principles or under SG 10-222(a) to challenge the Department's decision to issue permits. 344 Md. at 281. The merits of the controversy are not to be blurred with the issue of whether standing exists. 344 Md. at 293.
- When government issued permits allow the emission of toxic substances into the air, the concept of "nearby" properties owners who are presumptively aggrieved "may well include persons in a greater geographical range than in a typical zoning matter." 344 Md. at 298. In this case an adjacent farmer only 2,000 feet away from the incinerator had standing. 344 Md. at 298-99.

- Sugarloaf v. Montgomery Co., supra, 247 Md. 137, 145, 230 A.2d 289 held that when "[a] person whose property is far removed from the subject property" faces a challenge in court to his standing, and therefore attempts to establish in court that he is aggrieved by an administrative zoning decision, he may rely on "evidence" before the agency, as well as evidence before the court, to show "that his personal or property rights are specially and adversely affected by the [administrative] action." The issue of standing is "determined by the courts on a case by case basis." This case was concerned with the administrative grant of a special exception permitting the construction and operation of an apartment hotel. Evidence "indicating that there would be an increase in traffic in the area because of the apartment hotel was sufficient to give landowners, who were 'continuous or close in proximity' to the proposed hotel, standing to challenge in court the grant of a special exception. Such persons would have standing even if it were ultimately determined that the increase in traffic was not so great as to require denial of the special exception."27

Adjacent property owners had standing to argue the case in the circuit court. 344 Md. at 298-99. Evidence at the administrative hearing demonstrated that much higher levels of toxic substances would fall

---

21 "In light of these circumstances the individual plaintiffs had prima facie standing to seek judicial review, and any dispute concerning their standing should have been raised and litigated in the Circuit Court, not the Court of Special Appeals. Bethel, 375 Md. at 70-71.
22 "The Court of Special Appeals, therefore, erred in holding that any deference could be given to the administrative decision concerning plaintiffs' standing to maintain an action for judicial review." Sugarloaf, 344 Md. at 293. The Court stated: "The decisions below appear to reflect some confusion between standing to be a party at the administrative level and standing to maintain a judicial review action in the circuit court, as well as confusion over the appropriate roles of an administrative agency and a reviewing court with regard to each type of standing." 344 Md. at 285.
23 "The ALJ, however, did in fact render findings and conclusions with respect to the plaintiffs' standing, holding that the plaintiffs would not be "aggrieved" by the issuance of the permits and that, therefore, they did not "have standing to challenge the administrative decisions." The ALJ purported to apply the case law dealing with standing in court to maintain a judicial review action. If the ALJ's findings and conclusions concerning the plaintiffs' standing were intended to relate to administrative standing, the ALJ clearly applied an erroneous standard. Moreover, as pointed out previously, the plaintiffs were in fact properly accorded administrative standing. The plaintiffs' status at the administrative hearing was simply a non-issue." Sugarloaf, 344 Md. at 289.
24 The Court said it rejected the "argument that the plaintiffs lack standing because, in the respondents' view, the likely fallout of toxic substances upon their properties will be acceptable under government air quality standards." Id., at 297. "In cases involving challenges to administrative land use decisions, there is a distinction between standing in court to obtain review of the governmental action and the merits of the challengers position." Sugarloaf, 344 Md. at 294.
25 Evidence at the administrative hearing demonstrated that much higher levels of toxic substances would fall on the adjacent farm than on other nearby property owners. Even if it turned out that the level of pollutants falling on nearby property may be "acceptable" and thus the issuance of the permits would be justified, this did not mean that standing did not exist. Sugarloaf, 344 Md. at 300-01.
27 Sugarloaf, 344 Md. at 295.
on the Buchanans’ farm and on other nearby property owners than would fall on properties further away from the site. 344 Md. at 300.

**ho is an “aggrieved” individual?**

**Initiation of a dispute by the appellate court**

- **Ginn v. Farley,** 43 Md. App. 229, 236, 403 A. 2d. 858 (1979) saw the Court stating that though not raised by the trial judge, the Court said it had no hesitancy in holding that Ms. Gin was not an aggrieved party within the meaning of Maryland Law. “. . . [S]he was not properly before the circuit court; and she should not have been heard.” 43 Md. App. at 232. Transcription of the proceeding showed Ms. Gin stating she was not an aggrieved party and was just representing the neighborhood and the property is within the neighborhood complex.” 43 Md. App. at 231.

**Look at the statute to see if there is any indication was to who aggrieved individuals are going to be**

- The Cambridge City Code provided that “persons jointly or severally aggrieved by any decision of the board of Appeals, or any taxpayer . . . of the municipality” have standing to seek judicial review of a zoning decision in **Handley v. Ocean Downs,** 151 Md. App. 615, 628-29, 827 A. 2d 961 (2003). The Court noted that Article 66B, section 4.08 governs zoning appeals. The Court of Appeals has interpreted the language to evidence a legislative intent to give a taxpayer standing to appeal notwithstanding lack of aggrievement. 151 Md. App. at 629. Rule 7-202(c) requires a petitioner to state where he or she was a party to the agency proceeding when filing for judicial review. “If the petitioner was not a party, the petitioner shall state the basis of the petitioner’s standing to seek judicial review.” 151 Md. App. at 629.

**School board decisions**

- In **Patterson Park v. Teachers Union,** 399 Md. 174, 923 A. 2d 60 (2007), the Court discussed standing prerequisites where waivers sought from State law and regulations were sought so as to allow Charter Schools to hire without the restriction of a collective bargaining agreement. That meant “the potential for a competing labor pool within those public charter schools” “[B]ecause the waivers had the potential of limiting the scope of the Unions’ bargaining unit” that meant that the Unions “possessed a sufficient interest in the proceedings to satisfy standing requirements and the State Board erred by not giving proper notice or opportunity to be heard in the waiver proceedings.” 399 Md. at 208.

  The Court also stated:

  We had the opportunity to explore standing prerequisites specifically with regard to decisions issued by the State Board of Education in **Baltimore Teachers Union. [Baltimore Teachers Union v. Maryland State Board of Education,** 379 Md. at 192, 840 A.2d at 728.] In that case, the State Board of Education enacted regulations for the reconstitution of schools that consistently fail to meet the prescribed student performance standards. Part of the reconstitution plan enabled the State Board to delegate control and management over public schools to third parties. Pursuant to these new regulations, the State Board and the Baltimore City Board of School Commissioners entered into a five-year contract with a company, Edison Schools, Inc., under which Edison was to assume operation and management of three Baltimore City public schools, serving as “the employer of all employees hired for the . . . schools” with “the power to hire, assign, discipline, and dismiss all personnel hired at the schools.” Id. at 197, 840 A.2d at 731. The Baltimore Teachers Union, American Federation of Teachers, Local 340, and the AFL-CIO filed a complaint challenging the reconstitution regulations and the Edison contract to which the State Board and the City Board responded by filing a motion to dismiss for lack of standing. The circuit court ruled that the Unions had standing, and we affirmed, underscoring that the Unions, as the exclusive collective bargaining agent for the employees of the Baltimore City Public School System, possessed “statutory rights and fiduciary duties to negotiate for, and to act in the best interests of, the public school employees.” Id. at 199, 840 A.2d at 732. We further explicated that, by removing three public schools from the Unions’ charge, the Edison contract not only interjected a competing labor pool with the Unions’ bargaining unit, but also reduced the size and scope of the Union’s bargaining unit. Id. Thus, we held that the Unions had standing to challenge the reconstitution.

  399 Md. at 207-208.
Maryland State and County Administrative Law

Chapter 9.

Constitutional Issues

"... [A]n administrative agency or official is not empowered to render a declaratory judgment with respect to the constitutionality of a statute." The MAPA requires an agency to make findings of law and contains no exception for constitutional issues. Therefore, most claims during the course of an administrative hearing that a statute is either unconstitutional as applied or unconstitutional on its face, are going to be resolved in the agency action.

A court will not decide a constitutional issue when a case can properly be disposed of on a non-constitutional ground. The same is true as to administrative agency decisions.

An agency lack of authority “to issue a declaratory judgment or ruling on the constitutionality of a statute does not mean that an administrative agency or official, in the course of rendering a decision in a matter falling within the agency's jurisdiction, must ignore applicable law simply because the source of that law is the state or federal constitution.” Agencies, “like judges, the Governor, members of the General Assembly, and others elected or appointed to "any office of profit or trust," must take an oath to "support the Constitution" of Maryland and to "execute [his or her] office ... according to the Constitution ... of this State ..." Article I, Section 9, of the Constitution of Maryland.” Moreover, over the past fifty years, when many statutes have provided for quasi-judicial administrative proceedings to resolve the innumerable controversies and problems associated with our modern age, [the Court of Appeals] has consistently taken the position that constitutional issues, including the constitutionality of applying particular statutes, can and often must be raised and initially decided in the statutorily prescribed administrative proceedings.

1 Insurance Commissioner v. Equitable Life, 339 Md. 596, 615-16, 664 A. 2d 862 (1995), referencing Maryland’s Declaratory Judgment Act, C.J. §3-404. This 1995 decision written by Judge John C. Eldridge of the Court of Appeals of Maryland is “the” definitive case of the when, where, how and what of agency consideration of constitutional issues.
2 Equitable Life, 339 Md. at 616 referencing former Art. 48A §40(4) of the Insurance law and S.G. § 10-222(h). Case law is cited and analyzed in the opinion. 339 Md. at 617-23. “The issue arose when the Insurance Commissioner stated that he was not authorized to declare” a statute constitutional.” 339 Md. at 615. The circuit court disagreed with the Insurance Commissioner’s conclusion that he had the authority to rule on the constitutionality of a statute. 338 Md. at 611.
3 Piscatelli v. Liquor Commissioners, 378 Md. 623, 630 837A. 2d 931 (2003). FN No. 4 on page 630 cites cases to this effect.
4 Equitable Life, 339 Md. at 616.
5 Equitable Life, 339 Md. at 617 citing “Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 180, 2 L. Ed. 60, 74 (1803) (public official's taking a prescribed oath to discharge his duties "agreeably to the constitution" requires that the official apply the Constitution, and not a statute, when the two are in conflict). The Insurance Commissioner in the present case was obligated to apply the relevant law, and the relevant law does not exclude Article 46 of the Maryland Declaration of Rights.”
6 Equitable Life, 339 Md. at 617. The Court cited and gave examples considering prior Maryland case law. 339 Md. at 617-621.
The Maryland Court of Appeals has recognized a "constitutional exception" to the normal rule requiring exhaustion of administrative remedies even as to constitutional issues. Where the constitutionality of a statute on its face is challenged, and where there exists a recognized declaratory judgment or equitable remedy, we have held that the challenger ordinarily need not invoke and exhaust his administrative remedy.7 "The 'constitutional exception' . . . alluded permits a judicial determination without administrative exhaustion when there is a direct attack upon the power or authority (including whether it was validly enacted) of the legislative body to adopt the legislation from which relief is sought."8 "The 'constitutional exception' recognized in these cases does not mean that the constitutionality of a statute as a whole cannot be raised and initially decided in the statutorily prescribed administrative proceedings. Instead, under the language in the above-cited opinions, by-passing an initial administrative resolution of the constitutional issue is an option which the challenger may or may not choose. The modern cases make it clear that the constitutionality of a statute as a whole can be initially decided in the administrative proceedings."9

"The modern cases make it clear that the constitutionality of a statute as a whole can be initially decided in the administrative proceedings."10 "Moreover, under circumstances where there exists no declaratory judgment or equitable remedy, and where the only avenue for relief is the statutorily prescribed administrative and judicial review proceedings, a constitutional challenge to a statute, whether on its face or as applied, must be initially litigated in the administrative proceeding."11

The Court of Appeals of Maryland has stated that "[U]nder circumstances where there exists no declaratory judgment or equitable remedy, and where the only avenue for relief is the statutorily prescribed administrative and judicial proceedings, a constitutional challenge to a statute, whether on its face or as applied, must be initially litigated in the administrative proceeding."12 " . . . [W]here a constitutional challenge to a statute, regardless of its nature, is intertwined with the need to consider evidence and render findings of fact, and where the legislature has created an administrative proceeding for such purpose, [The Court of Appeals] has regularly taken the position that the matter should be initially resolved in the administrative proceeding."13

Significant Case Decisions

A constitutional issue not labeled or considered as such?

MVA reciprocity considerations took the front seat to a constitutional attack in a 2 Judge dissent interpretation of T. §16-103.1 which states that the Maryland MVA "may not issue a driver's license to an individual . . . (d)uring any period for which the individual's license to drive is revoked, suspended, refused, or canceled in this or any other state, unless the individual is eligible for a restricted license under § 16-111(e) of this subtitle. . ." in Alvez v. MVA, 402 Md. 727, 729, 939 A. 2d 139 (2008). Alvez is a citizen of Mexico and not in the USA legally. The problem in the view of the dissent was: " . . . Alvez, now a resident of Maryland, will always be ineligible to obtain a driver's license in Maryland because of New Jersey's policy of refusing a driver's license to a person whose 'continued presence in the united States is [un]authorized under Federal Law.'" The 2 Judge dissent said that the New Jersey policy was contrary to Maryland Public Policy, 402 Md. at 739 was a violation of Maryland's constitution (equal protection

---

7 Equitable Life, 339 Md. at 621.
8 Equitable Life, 339 Md. at 622.
9 Equitable Life, 339 Md. at 622.
10 Equitable Life, 339 Md. at 622.
11 Equitable Life, 339 Md. at 623.
13 Equitable Life, 339 Md. at 623 citing cases.
provisions of Article 24 of the Maryland Declaration of Rights): “Making a Maryland resident’s eligibility for a Maryland driver’s license depend upon which state or province was the person’s previous residence certainly appears to lack any rational basis. Moreover, the grounds of refusal in the other state or province could be utterly arbitrary or discriminatory.” 402 Md. at 744. Prior case law and the plain wording of the statute was dispositive of the decision by the majority. 402 Md. at 729.

**Substantive due process rights denied?**

- In *Thomas v. Dept. of Labor*, 170 Md. App. 650, 908 A. 2d 99 (2006) two school bus drivers, who were employees of the Baltimore County Department of Education claimed that L.E. §8-909(c) violated the Due Process Clause of the fourteenth Amendment and the Maryland Declaration of Rights in denying them unemployment benefits during academic school years “because it discriminates between those school bus drivers employed by county boards of education and those employed by private contractors.” 170 Md. App. at 668. L.E. 8-909 was enacted to exclude those individuals employed by educational institutions and with a reasonable assurance of continued employment from eligibility for unemployment benefits during regularly scheduled periods of unemployment. Congress had concluded that, because those employed by educational institutions know of scheduled breaks in employment they should be prepared for the breaks that regularly occur in their chosen employment and should prepare for them. The statute is rationally related to achieving its objective.” 170 Md. app. at 669-70. “Although privately employed bus drivers may not be subject to exclusion provisions of L.E. §8-909, any perceived inequitable treatment of privately employed and publicly employed school bus drivers is a matter for the legislature to address. 170 Md. App. at 671.

**Ask: What authority is granted to the agency under the constitution and laws of Maryland?**

- As a home rule subdivision, Baltimore City had the authority, by the Maryland Constitution, Article XI-A, and Art. 25A, to enact local zoning laws and laws for the sale and disposition of food of every kind. Article 66B (Land Use) §2.01, et. Seq. expressly grants zoning authority to the Mayor and City of Baltimore. *Piscatelli v. Liquor Commissioners*, 378 Md. 623, 635-36, 837 A. 2d 931 (2003). The regulation of alcoholic beverages is not within the express powers granted to Article XI-A home rule jurisdictions. The Maryland Legislature has preempted this area which is regulated by Art. 2B of the Maryland Code. 378 Md. at 636. *Piscatelli* argued that the Board of Liquor Commissioners of Baltimore City could not prohibit him from serving alcoholic beverages between 2 a.m. and 6 a.m. because Article 2B §11-365(d) had a specific provision that establishments providing any form of entertainment between 2 a.m. and 6 p.m. on any day where alcoholic beverages are consumed shall register with the fire department and the Department of Housing and Community Development and comply with all laws. 378 Md. at 631. The Court said this section does not contain an authorization for a licensee to operate or provide entertainment between those hours. 378 Md. at 632. Also, this enactment was not violative of the constitutional provision prohibiting a liquor board authority from enacting general laws reserved to a home rule subdivision under Article 25A of the Maryland Code. 378 Md. at 640.

---

14 Judge Kenney wrote for the Court describing equal protection arguments and the application of suspect classifications and strict scrutiny, etc. *Thomas*, 170 Md. App. at 668. No “sensitive classification” was found in this case and therefore a rational basis standard was applied. Constitutional attacks have occurred against state unemployment law classifications:

("Where a state's unemployment insurance compensation statute neither involves a discernable fundamental interest nor affects any protected class with particularity, the relatively relaxed 'rational basis' standard should be applied in determining whether the statute violates the Equal Protection Clause.")

170 Md. App. at 669 (citations omitted)

15 Courts in other jurisdictions had reached the same or similar conclusions. *Thomas*, 170 Md. App. at 670-71.

16 “Rather than providing broad general guidelines, the General Assembly has chosen to closely control by statute even the more detailed aspects of the alcoholic beverages industry.” *Equitable Life*, 339 Md. at 623.

17 The Court then discussed *Piscatelli*’s argument that the liquor board’s enactment violated The First Amendment and the Equal Protection Clause of the U.S. Constitution by improperly singling out liquor license establishments that provided life entertainment and/or dancing by requiring those establishments to close when alcohol cannot be sold but allowing certain restaurants, pharmacies and hotels to remain open. Live entertainment did not appear to be protected by the First Amendment. Time, place and manner restrictions, as discussed in *Pack Shack v. Howard County*, 377 Md. 55, 832 A. 2d 170 (2003), were not an issue as Article 2B did not relate to the number of establishments, but only concerned the hours of operation. *Piscatelli*, 378
No authorization for an agency to declare a statute unconstitutional

But:

- The Insurance Commissioner was not authorized "to declare" a statute unconstitutional in Insurance Commissioner v. Equitable Life, 339 Md. 596, 615, 664 A. 2d 862 (1995). That did not mean that the Commissioner, in the course of rendering a decision in a matter falling within the agency's jurisdiction, must ignore applicable law simply because the source of that law is the state or federal constitution. 339 Md. at 616. Jurisdiction in the Maryland Insurance Commissioner to enforce the insurance laws through administrative action and the MAPA requirement that agencies render conclusions of law in contested cases contain no exception for constitutional issues. Therefore, the circuit court erred in determining that the Insurance Commissioner lacked authority to decide whether portions of the Insurance Code were unconstitutional. 339 Md. at 624. The Insurance Commissioner held that portions of the insurance code authorizing differentials in certain insurance rates and underwriting based on gender if actuarially justified, are unenforceable in light of Article 46 of the Maryland Declaration of Rights (ERA). The circuit court had reversed that decision. 339 Md. at 600-01.

This 1995 Equitable Life Court of Appeals decision is encompassing. From that decision is taken the following significant case decisions pointing up, in a clinical setting, the application of the principles:

- In Hoffman v. City of Baltimore, 197 Md. 294, 305-306, 79 A.2d 367, 372 (1951), a property owner contended that the application of a zoning statute to his property was unconstitutional and that, for this reason, he was entitled to an exception. This Court noted the view expressed in some earlier cases that an administrative agency cannot pass upon the constitutionality of a statute and then held that the zoning board could grant an exception "by holding the ordinance pro tanto invalid," and its ruling on the constitutional issue would be fully subject to judicial review.

- In Baltimore v. Seabolt, 210 Md. 199, 123 A.2d 207 (1956), property owners again contended that the application of a zoning statute to their property would be unconstitutional. Instead of invoking and exhausting the statutorily prescribed administrative and judicial review remedy, the property owners brought a declaratory judgment action. The trial court rendered a declaratory judgment that "the Zoning Ordinance resulted in a taking of the appellees' property without compensation" and that it was not necessary for the property owners to invoke and exhaust the administrative procedure "where a constitutional question was involved." This Court, however, reversed, ordered that the declaratory judgment action be dismissed, and held that the property owners were required to have the constitutional issue resolved in the statutorily prescribed administrative and judicial review proceedings. The Court repeated the statement from the Hoffman case that the administrative agency, if it agreed with the property owners' constitutional argument, was authorized to grant "exceptions by holding the ordinance pro tanto invalid."

- A similar case was Poe v. Baltimore City, 241 Md. 303, 216 A.2d 707 (1966), where the property owners, contending that the application of a zoning statute to their property was unconstitutional, brought a declaratory judgment action without having exhausted their administrative remedy. They argued "that they had no effective remedy before the Board [of Municipal and Zoning Appeals], because the Board is an administrative agency, not a court, and only a court can decide a question of constitutional law." This Court, in affirming the trial court's order sustaining a demurrer to the bill of complaint, flatly rejected the argument that the Board could not initially decide the constitutional issue. In an opinion by Judge Oppenheimer, the Court stated:

"It is particularly within the expertise of an administrative body such as the Board to marshal and sift the evidence presented in a hearing . . . and to make an administrative finding as to whether, on the evidence, the application of the ordinance to the property involved deprives the owner of any reasonable use of it. Such a finding is subject to court review on the question of constitutionality, as a matter of law."

Md. at 641-43. Social or economic legislation means the states have wide latitude under the Equal Protection Clause. No unreasonable basis was seen through the Art. 2B limitation that was enacted. 378 Md. at 643-45.
Sapero v. M. & C. C., 235 Md. 1, 3, 200 A.2d 74, 76 (1964) saw the Court stating: "we think the Board . . . [was] justified in concluding that a denial of the variance would not amount to a taking in the constitutional sense".

Frankel v. City of Baltimore, 223 Md. 97, 101, 103-104, 162 A.2d 447, 449, 451 (1960) was a case where the Court stated that the administrative agency erred by not holding ordinance unconstitutional as applied.

There was a constitutional challenge to a tax statute on its face in Potomac Elec. Power v. P. G. County, 298 Md. 185, 468 A.2d 325 (1983). The Court stated that because the tax had been paid, the exclusive remedy was the statutorily mandated administrative refund proceeding.
Blank page
Judicial review of quasi-legislative functions (adoption of regulations) is different from judicial review of quasi-judicial functions1 (dispute resolution through contested case). Maryland Court Rules, Title 7, Chapter 200 deals with Judicial Review of Administrative Agency Decisions. CJ §12-301, et. seq. contains the statutory grants of a right to appeal from circuit court judicial review and exceptions. “A reviewing court may reverse the decision of [an agency] if such decision results from unlawful procedure or some other error or law.”2 “. . . [T]he procedure followed in administrative agencies usually is not as formal and strict as that of the courts.”3 A court review of an agency decision means the application of separate standards for questions of fact (the substantial evidence test) and questions of law (a de novo review).4

Within this Chapter 10 are the following sections:
A. When an Appeal (Judicial Review) May be Taken .................................................................................................................. 175
   (1). Statutory Authorization .................................................................................................................................................. 175
   (2). The Writ of Mandamus .................................................................................................................................................. 179
B. The 700 Rules .............................................................................................................................................................................. 182
   (1). To Secure Review .......................................................................................................................................................... 182
   (2). The Agency Responsibility to Send Notice ...................................................................................................................... 184
   (3). Time Limitations ............................................................................................................................................................... 185
   (4). Response to Petition ......................................................................................................................................................... 186
   (5). Preliminary Motions ........................................................................................................................................................... 187
   (6). Stays ........................................................................................................................................................................................................ 187
   (7). The Record ............................................................................................................................................................................. 188
       (a). What the Record Shall Include .................................................................................................................................. 189
       (b). Stipulation ......................................................................................................................................................................... 189
   (8). Memorandum ........................................................................................................................................................................ 190
   (9). Hearing .................................................................................................................................................................................. 192
   (10). Additional Evidence ....................................................................................................................................................... 192
   (11). Disposition .......................................................................................................................................................................... 192
   (12). Appellate Court Review ................................................................................................................................................... 193

1 These materials primarily focus on agency review by a circuit court. If the circuit court decision is appealed to 361 Rowe Boulevard, the same review is performed as occurs at the circuit court level. Dept. of Public Safety v. PHP, 151 Md.App. 182, 824 A.2d 986 (2003). (“Thus, whether the circuit court applied the wrong standard of review is of no consequence if our own review satisfies us that the [Board’s] decision was proper.”) 151 Md. App. at 194.
3 Travers, 115 Md. App. at 408.
C. The Scope of Review

(1) In General

(2) Venue

(3) Parties

(4) A cookbook methodology – a three part address

(5) Issues Not Before the Agency

(6) Review of the Agency Factual Determinations (the substantial evidence test)

(7) Review of Agency Legal Determinations

(8) Was the agency decision arbitrary and capricious

(9) Disposition

(10) Expertise of the Agency

(11) Agency Must State Basis of Decision

(12) Complete Record

Under the separation of powers requirement, it is not the proper function of an administrative official to decide whether a plaintiff has standing to maintain an action in court. That is the prerogative of the court.5

“...[W]hen a court remands a proceeding to an administrative agency, the matter reverts to the process of the agency, and there is nothing further for the court to do. Such an order is an appealable final order because it terminates the judicial proceeding and denies the parties means of further prosecuting or defending their rights in the judicial proceeding.”6

Whenever a circuit court “directly reviews the action, or inaction, of any administrative agency, governmental body, or official in the executive or legislative branches of government, including local government, the court is exercising original jurisdiction and not appellate jurisdiction.” To constitute the exercise of appellate jurisdiction there must be a prior judicial final order. In a “technical, constitutional meaning of the term, a circuit court never exercises ‘appellate jurisdiction’ when it directly reviews the decision of an administrative agency or local government body.” Thus, there is Judicial Review of an administrative decision when permitted by law.7

1000 Friends of Maryland v. Ehrlich, 170 Md. App. 538, 907 A. 2d 865 (2006) challenged the approval by the Board of Public Works of funding for an expansion of Maryland Route 32 in Howard County (via declaratory judgment, request for injunctive relief and request for mandamus). The circuit court granted the State’s motion to dismiss the complaint and the Court affirmed. Detailing the “Smart Growth” (State may not provide funding for a growth-related project if the project is not located within a priority funding area) legislation enacted in 1997 and the approval process under the “extraordinary circumstances” exception under the statute. (SFP §5-7B-05(a)) The circuit court determined that the Comptroller had properly delegated his authority to vote for the project and that it “found no additional requirement in the statute for the Board of Public Works to make any [factual] findings prior to voting on an exception.” 170 Md. App. at 545. SFP §5-7B-10(a) specifically states the “Smart Growth” legislation does not create a private cause of action and that precluded the declaratory judgment and injunctive relief claims. 170 Md. App. at 548. When the Board acts to approve funding based on the “extraordinary circumstances” exception, “[the Board shall approve by a majority vote that] the project satisfies the statutory requirements. There is no express requirement that formal findings of fact supporting its determination be made and presented.” 170 Md. App. at 549. When approving funding, the Board is performing a “quasi-legislative” function, such as promulgation of a regulation or approving a budget and

6 Board of Physician Quality assurance v. Levitsky, 353 Md. 188, 200-201, 725 A. 2d 1027 (1999) citing prior Maryland cases.
is not performing a “quasi-judicial” function requiring reasons to be stated. 170 Md. App. at 550. The claim for Mandamus falls as the Board met, heard statements, determined the “extraordinary circumstances” requirement had been met and thus the statute was satisfied. 170 Md. App. at 549-550.

A. When an Appeal (Judicial Review) May be Taken.

(1). Statutory authorization
Title 12 of the Courts and Judicial Proceedings Article deals with appeals, certiorari and certification of questions of law. There is a definitions section (Subtitle 1), a section pertaining to review of cases docketed in the Court of Special Appeals (Subtitle 2) and a section pertaining to a review of decisions of trial courts and general jurisdiction (Subtitle 3).8

CJ §12-301. Right of appeal from final judgments - Generally.
Except as provided in §12-302 of this subtitle, a party may appeal from a final judgment entered in a civil or criminal case by a circuit court. The right of appeal exists from a final judgment entered by a court in the exercise of original, special, limited, statutory jurisdiction, unless in a particular case the right of appeal is expressly denied by law. In a criminal case, the defendant may appeal even though imposition or execution of sentence has been suspended. In a civil case, a plaintiff who has accepted a remittitur may cross-appeal from the final judgment.


CJ §12-302. Same - Exceptions.
(a) District Court, administrative agency, or local legislative body.- Unless a right to appeal is expressly granted by law, §12-301 does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local legislative body.


In Board v. McKinney, 174 Md. 551, 199 A. 540 (1938), the Court of Appeals stated “. . . [A]bsent specific statutory authority, an administrative agency exercising a quasi-judicial function usually is not entitled to appeal from a circuit court judgment reversing the agency's decision.”10 The years following that decision saw the Court making it “clear that the McKinney doctrine does not apply to all agencies or to all adjudicative administrative proceedings.”11 “. . . [U]nder the general statutory authorizations for appeal, agencies are entitled to appeal from adverse circuit court judgments where the functions of the agencies "are so identified with the execution of some definite public policy as the representative of the

---

8 There is also contained in Title 12 the following subtitles:
Subtitle 4. Review of Decisions of District Court.
Subtitle 6. Certification of Questions of Law.
Subtitle 7. Practice on Appeal.

Maryland Rule 7-201 lists a number of Code provisions which authorize appeals to, and reviews by, a circuit court from administrative agencies.

9 The remainder of this statute deals with appeals from contempt findings, criminal cases, in banc review, a plea of guilty, sentencing review panels, and a revocation of probation.

11 Maryland Racing, 335 Md. at 294. (Citations omitted)
State, that their participation in litigation affecting their decisions is regarded by the Legislature as essential to the adequate protection of the State’s interests.12

There are any number of Maryland code provisions which authorize judicial review of administrative proceedings, some of which are set forth in annotations to Rule 7-201. What Rule 7-201 states is that the Maryland Rules apply to review an agency order where it is authorized by statute. In stating the procedures to be followed when appealing an administrative decision to the circuit court, the Rules do not create a right of appeal.13 Maryland law holds that without specific statutory authorization to a circuit court and/or an appellate court, no appeal will generally lie.14 “Although at an early period the common law recognized the availability of writ of error under some circumstances, questions of appealability have today become entirely governed by statutes.”15 In a typical statutory judicial review action, CJ §13-302(a) precludes an appeal where there is no specific statutory authorization for that appeal.

Statutory provisions governing the right to appeal are sometimes extensive. For example the Maryland Insurance Administration appeal rights are governed by Ins. §2-215. What may be appealed (a), who may appeal (b), venue for the appellate case (c), a time limit for filing the appeal (d), the caption for appeal papers (e), the right of the circuit court to grant a stay (f), the contents of the record on appeal (g), and the authority of the court to affirm, remand, or reverse and for what reasons (h) are all included within this statutory provision. Costs may be assessed (i) and a further appeal may be had to the Court of Special Appeals (j). Some provisions for judicial review are fairly simple such as BO §2-210 allowing an appeal from the State Board of Accountants which provides: “Any person aggrieved by a final decision of the Board in a contested case, as defined in § 10-202 of the State Government Article, may take an appeal as allowed in §§ 10-222 and 10-223 of the State Government Article.” For others, there is an intermediate step as with AG §2-405 allowing an appeal from a decision by the Secretary of Agriculture to a Board of Review and thereafter providing for judicial review.

Significant Case Decisions

The right to have Judicial Review

- Always essential to know is the statutory authority for the decision of an agency and therefore the envelope within which the agency has the authority to act and one feeling aggrieved has the right to file for judicial review. In City Council of Prince George’s County v. Billings, 420 Md. 84, 21 A.3d 1065 (2011), the Court stated the legislative procedure in Prince George’s County, Maryland where the right to challenge agency zoning decisions is governed by the Maryland Regional District Act (Art. 28, §7-101, et. seq.).

---


Given that the Racing Commission formulates policy in addition to its adjudicatory function (it has broad authority to promulgate regulations governing horse racing and betting), it had standing to maintain an appeal despite the fact no statutory authority specifically conferred that right. Maryland Racing, 335 Md. at 294-95. A circuit court judge had determined that the Commission failed to give proper notice and an opportunity to be heard prior to suspension, 335 Md. at 291. The Court of Appeals disagreed. 335 Md. at 300.


14 Urbana Civic, 260 Md. at 460-61. The Court noted that Frederick County was neither a charter nor a code county provided with home rule. With home rule, it could have created a county board of appeals capable of reviewing the planning commission’s disapproval of the subdivision plat in question here.” 260 Md. at 462.

15 Prince George’s County v. Baretta, 358 Md. 166, 173, 747 A. 2d 647 (2002). The Court pointed to Gisriel v. Ocean City Elections Board, 345 Md. at 485, 693 A.2d at 761 for its summarization of Maryland law concerning the appealability of judgments. Unless there is a right to appeal from the circuit court to the Court of Special Appeals by state statute of local law, the Court of Special Appeals has no jurisdiction to entertain an appeal. 358 Md. at 174. This Court also reviewed the general right to appeal statutes and exceptions. 358 Md. at 177-81. There is some discussion, not applicable to this case, as to whether the ability to pursue a declaratory judgment action or mandamus action, would give an avenue to appeal to the Court of Special Appeals. 358 Md. at 182-83.
zoning power is mostly delegated to the Prince George’s County District Council which Council by ordinance may adopt and amend the text of a zoning ordinance, adopt and amend maps to regulate the size of lots, yards, courts and other open places (Art. 28 §8-101, et. seq.). The Prince George’s County Board of Zoning Appeals may extend or continue nonconforming uses and grant special exceptions and variances. (Art. 28 §8-110, et. seq.)

In *Billings*, the Court was called upon to determine whether the District Council may, on its own initiative “elect to review” certain local land use decisions when an administrative appeals board withdraws an election to review, the result of which is an agency decision not to decide. 420 Md. at 88. The Court held that Citizens are eligible to seek review of Council decisions and that the District Council may not withdraw its election to review a local zoning decision. 420 Md. at 90.

361 Rowe Boulevard to litigant: “We do not see a statute giving you the right to be here”

- In *PSC v. Schisler*, 389 Md. 27, 882 A. 2d 849 (2005) the Court noted in FN 39 at page 89 that neither the Public Utilities Companies Article nor the State Personnel and Pensions Article authorized a petition for judicial review of the Public Service Commission’s final decision to terminate an at-will employee of the PSC. The Court said that Wilson, undoubtedly aware of this, filed a circuit court complaint and sought judicial scrutiny of the Commission’s actions through alternative legal vehicles when she pled for a declaratory judgment, a writ of mandamus, common law certiorari, and injunctive relief. That Court said: “... [H]owever, skillful pleading may not avoid application of the doctrine of exhaustion of administrative remedies,” which precluded relief to Wilson in this case. *Wilson*, 389 Md. at 89.

Look at the statute/ordinance and see what it says, if anything, about an appeal

- *Kant v. Montgomery County*, 365 Md. 269, 778 A. 2d 384 (2001) held that the decision by the Montgomery County Commission on Landlord-Tenant Affairs was able to be appealed to both the Circuit Court for Montgomery County and the Court of Special Appeals. 365 Md. at 278-79. At issue was whether the Court of Special Appeals had jurisdiction to hear the case. CJ § 12-301 generally provides for an appeal from a circuit court determination. “The right of appeal exists from a final judgment entered by a court n the exercise of original, special, limited, statutory jurisdiction, unless in a particular case, the right of appeal is expressly denied by law.” The Montgomery County Charter, section 2A-2 discusses appealability of administrative decisions. 365 Md. at 275-76. A Commission decision is subject to the County’s Administrative Procedure Act.” 365 Md. at 276. Section 2A-11 of the Code provided for an appeal from a circuit court determination: “Any party to the proceeding in the circuit court may appeal from such decision to the appellate courts of Maryland pursuant to applicable provisions of the Maryland Rules of Procedure.” 365 Md. at 277.

What this case teaches in holding that an appeal to the Court of Special Appeals was allowed is that there is no substitute for a detailed examination of Maryland Law beginning with CJ and following through to an examination of local government authority and to the Charter of the local government. 365 Md. at 277-78.

Local government adjudicatory decisions

Ascertain the extent of a right to appeal

- *Murrell v. Mayor & City Council*, 376 Md. 170, 190, 829 A. 2d 548 (2003) stated:

    Because the impact of [CJ] §12-302(a) is chiefly upon actions for judicial review of local government adjudicatory administrative decisions, the right to appeal a circuit court's decision in these judicial review actions is primarily dependent upon local laws. Some subdivisions, such as Montgomery County, broadly authorize appeals to the Court of Special Appeals from circuit court judgments reviewing local administrative adjudicatory decisions. Other subdivisions, such as Prince George's County, do not broadly authorize such appeals. Thus, the right to an appeal in a large group of cases is dependent upon a person's geographical situation.

16 The Commission ordered a refund to Ms. Wetherell of her entire security deposit, plus interest; ordered the Landlord to pay her $4,502 for a 15% refund of the reduced value for her leasehold during the defective tenancy, $1,000 in attorney's fees, and $982 in relocation costs. *Kant*, 358 Md., at 271. When the circuit court affirmed the Commission finding, an appeal was entered to the Court of Special Appeals. 358 Md. at 272.
Where do you see the provision allowing this appeal?

- The Court of Appeals reviewed the right under a charter county to enact a statute which provides that a county administrative agency, upon a finding of employment discrimination, may in addition to other relief, award money damages “for humiliation and embarrassment” up to $100,000" in Prince George’s County v. Baretta, 358 Md. 166, 167, 747 A. 2d 647 (2002). The review was precluded because the circuit court judgment was not appealable. Section 2-197(c) of the Prince George’s County Code authorized an “appeal” (i.e. judicial review) from the Human Relations Commission to the Circuit Court for Prince George’s County. “There is no provision of Prince George’s County law, however, authorizing in this type of case an appeal from the Circuit Court to the Court of Special Appeals.” 358 Md. at 174.

Whether an appeal is allowed

The extent of the appeal allowed (circuit court; appellate court?)

A decision on the law is for the court

- Disability benefits were the focus of attention in Marsheck v. Board of Trustees, 358 Md. 393, 749 A. 2d 774 (2000). The hearing examiner dismissed the request for special disability benefits because the Petitioner failed to file her application timely. Discussion as to when an injury occurs was before the Court. Remedial legislation which governs retirement benefits “must be construed liberally in favor of injured employees in order to effectuate the legislation’s remedial purpose.” 358 Md. at 403. The doctrine of substantial compliance was inapplicable to this case. 358 Md. at 416. “. . . [S]he was required to file her application with Respondent on 13 February 1997. It is clear that she did not. Respondent received Petitioner’s application on 18 February 1997, five days after it was due. Petitioner has no cited us to, nor have been discovered, any part of Article 22 as it applies to the fire and police retirement system that grants an exception to the five year statute of limitations . . . We may not craft one for her judicially.” 358 Md. at 416. While the agency decision is presumed to be correct, and review is limited to determining if substantial evidence supported the decision, and ordinarily deference is accorded to the decision of the agency, this case presented a legal issue, namely the meaning of the term “injury” as used in the code and whether “injury” meant the point at which a police officer becomes permanently disabled. That legal decision was for the Court. 358 Md. at 402.

It is not for the circuit court to determine whether an appellate court has jurisdiction

- In Carroll County v. Love Craft, 384 Md. 23, 862 A. 2d 404 (2004), a circuit court erroneously struck a notice to appeal to the Court of Special Appeals. The circuit court has some authority under the appellate rules to strike an appeal but those reasons are entirely collateral to the merits of the appeal, such as an untimely filing, failure to provide the record, etc. A circuit court may not dismiss an appeal because it believes the appellate court has no jurisdiction. Carroll County, 384 Md. at 42. Compounding the error was the fact that Carroll County failed to appeal the erroneous dismissal. Carroll County, 384 Md. at 42. Examining the appellate rules that were applicable and the term “jurisdiction, Though the circuit court erred, it had fundamental jurisdiction. “If the county desired to challenge the Circuit Court’s order . . . it was required to note an appeal. When it failed to do so within the 30 days allowed, the order became final; the appeal was dismissed. Thus, when we issued a writ of certiorari on May 14, 2004 in Appeal No. 1376, that appeal was no longer pending in the Court of Special Appeals. There is nothing for us to review.” Carroll County, 384 Md. at 45-46.

The Anne Arundel Code gave no right to appeal

- A class action lawsuit alleged that between 1988 and 1996 Anne Arundel County mishandled and unlawfully used the developmental impact fees it collected and Dvorak (Chief Administrative Officer of the County from 1994 to 1997) and Scheibe (a former County Attorney) participated in the lawsuit on behalf of the Plaintiffs. Dvorak, et. al. v. AA County Ethics Commission, 400 Md. 446, 929 A. 2d 185 (2007) involved the appeal of an administrative agency finding subsequently filed against Dvorak and Scheibe alleging they had violated Article 9 §5-105 of the Anne Arundel Code, “a provision of the Public Ethics Law prohibiting ‘former County employees from representing or assisting a party in a matter, if the former employee had information not generally available to the public.” The Ethics Commission found that the allegations were well founded. When the Circuit court affirmed the Commission and the Court of Appeals determined there was no right for judicial review beyond the circuit court.

17 One judge dissented on a statutory interpretation basis saying that the result was too harsh and the majority’s construction posed an illogical or unreasonable result. Marsheck, 358 Md. at 417.
18 Compounding the error was the fact that Carroll County failed to appeal the erroneous dismissal. Carroll County, 384 Md. at 42. Examining the appellate rules that were applicable and the term “jurisdiction, Though the circuit court erred, it had fundamental jurisdiction. “If the county desired to challenge the Circuit Court’s order . . . it was required to note an appeal. When it failed to do so within the 30 days allowed, the order became final; the appeal was dismissed. Thus, when we issued a writ of certiorari on May 14, 2004 in Appeal No. 1376, that appeal was no longer pending in the Court of Special Appeals. There is nothing for us to review.” Carroll County, 384 Md. at 45-46.
19 The primary focus on judicial review was that the Commission lacked jurisdiction over them. Dvorak, 400 Md. at 449.
“Appellate jurisdiction, except as constitutionally authorized, is determined entirely by statute, and therefore a right of appeal must be legislatively granted. In other words, an examination of the relevant Maryland Code provisions and the legislative enactments of the subject local governmental body is necessary to determine whether, in a given case, there is a right of appeal or judicial review form the final decision of an administrative agency. The right to appellate review prescribed by the Maryland Code, is delineated in Maryland code is delineated in §§12-301 and 12-302 of the Courts and Judicial Proceedings Article.

400 Md. at. 450-51. (citations omitted)

A broad right to generally appeal stated by §12-301 is limited significantly by §12-302 which provides that “unless a right of appeal is expressly granted by law, §12-301 does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of the District Court, an administrative agency, or a local governmental body.” 400 Md. at 451. The ethics law gave the circuit court the right to review the administrative holding. At issue was whether there was any right to ask the appellate courts of Maryland to further review the matter. The holding: “There being no provision of Anne Arundel County law that confers a right of appeal to the Court of Special Appeals in this kind of acase and the appellants having failed to raise any question concerning the circuit court’s jurisdiction to "sit in reviw of such a judgment, the Commission’s motion to dismiss the appeal is granted. 400 Md. at 457.

(2). The Writ of Mandamus

A writ of mandamus may be issued under limited circumstances. Legislatures cannot divest courts of the inherent power they possess to review and correct actions by an administrative agency.20 Because State agencies and political subdivision are creatures of the State, they have no fundamental rights and no right to question the constitutionality of the acts of their superior and creator. " . . . [T]he purpose of a traditional common law mandamus action is ‘to compel . . . public officials or administrative agencies to perform their function, or perform some particular [non-discretionary] duty imposed upon them.”21

Mandamus will not lie to control the exercise of discretion by an agency. There are cases recognizing an exception to this principle where public officials or agencies engage in “arbitrary abuses of discretion.”22 These cases all involve claims of personal rights or property rights of private individuals or entities. It is doubtful that these cases, and the principle they set forth, have any application to an action for mandamus by one state government agency against another state government official or agency.”23

Sometimes “mandamus or other traditional actions may lie to enforce administrative compliance with procedural requirements or duties.24

"In the absence of a statutory provision for an appeal from a determination of an administrative agency, judicial review may be obtained through an action for a writ of mandamus." Courts issue a writ of mandamus "to prevent disorder, from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one.”25 " . . . [T]he Court of Appeals [has] explained that the common law writ of mandamus is an original action and not an appeal. . . . It is a summary remedy, for the want of a specific one, where there would otherwise be a failure of justice. It is based upon reasons of justice and public policy, to preserve peace, order and good

23 Board v. Secretary of Personnel, 317 Md. at 47.
government." The "Maryland Constitution is silent regarding appellate court power to issue a writ of mandamus, but [a court] "may utilize the writs of mandamus . . . as an aid to appellate jurisdiction[.]" "If the use of a writ is 'necessary to enable . . . [the Court] to exercise appellate jurisdiction it is in aid of that jurisdiction.'" The exercise of a court's authority to issue an extraordinary writ may be justified by the potential irreparable harm to the moving party and by the need to maintain the integrity of the legal system."26

The Court of Special Appeals set forth a two-pronged test in 2004 for determining if judicial review through a writ of mandamus is proper. "Judicial review is properly sought through a writ of mandamus "where there [is] no statutory provision for hearing or review and where public officials [are] alleged to have abused the discretionary powers reposed in them." Thus, prior to granting a writ of mandamus to review discretionary acts, there must be both a lack of an available procedure for obtaining review and an allegation that the action complained of is illegal, arbitrary, capricious, or unreasonable."27

... [A] writ of mandamus . . . may issue "'to prevent disorder, from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one.'" "The plaintiff seeking a writ of mandamus must demonstrate that a public official has a plain duty to perform certain acts, that the plaintiff has a plain right to have those acts performed, and that no other adequate remedy exists by which plaintiff's rights can be vindicated."


Significant Case Decisions

Appeal vs. judicial review

- Murrell v. Mayor & City Council, 376 Md. 170, 829 A. 2d 548 (2003) addressed the issue of whether a circuit court judgment upholding an administrative decision to raze certain buildings was appealable to the Court of Special Appeals. The Court of Special Appeals said no and the Court of Appeals said yes. CJ §12-302(a) was the focus of discussion. Though that section limited appeals from a circuit court review of agency action, it did not preclude appeals that were essentially common law mandamus actions.28 Section §12-302(a) "creates an exception to the general appeals statutory actions in the circuit courts seeking judicial review of adjudicatory administrative decisions."29 Actually, what comes to a circuit court from a final decision by an agency is not an appeal but rather a request for judicial review. Section 12-301 does not authorize an appeal from a circuit court judgment and any right to appeal "in such a case must be found in some other statute." Otherwise, the right to appeal does not exist. 376 Md. at 184-85. Section 123.7 of the Building Code limited appeal rights to the circuit court for Baltimore City. 376 Md. at 185-86.

Historically, the rule limiting appeals evolved from the Court's holding that there should be no right of appeal where it did not exist at common law. Mandamus actions are common law actions. 376 Md. at 192. The majority of the Court determined that the failure of the Department of Housing to perform several non-discretionary mandatory duties by failing to give required notices, failure to render findings of fact and

---

28 The Court reviewed the Building Code sections applicable. Murrell, 376 Md. at 172-75. The underlying facts were set forth. 376 Md. at 175-182.
29 CJ §12-301 is the general appeals statute. The Court reviewed the history of the statute. Murrell, 376 Md. at 186-190. "Because the impact of §12-302(a) is chiefly upon actions for judicial review of local government adjudicatory administrative decisions, the right to appeal a circuit court's decision in these judicial review actions is primarily dependent upon local laws." 376 Md. at 190.
...[T]he purpose of a traditional common law mandamus action is 'to compel ... public officials or administrative agencies to perform their function, or perform some particular [non-discretionary] duty imposed upon them.' Murrell v. Mayor & City Council, 376 Md. 170, 193, 829 A. 2d 548 (2003). In Gisriel v. Ocean City Elections Board, 345 Md. 477, 693 A. 2d 757, no appeal was provided by the Ocean City Charter authorizing appeals to the Court of Special Appeals from a circuit court's judicial review of an administrative decision. Nonetheless, the appellate court had jurisdiction over an action, whatever it was called, in the nature of mandamus. In this case, the Court determined that the Board had a “non-discretionary duty to delete from the Ocean City registered voter list the names of unqualified voters before determining the percentage of voters who had signed” a petition to place a recent zoning ordinance on the ballot for the next election, and whether the 20% voter requirements was met. 376 Md. at 192-193.31

Non-ministerial acts
Could the dispute be addressed elsewhere
timeliness

The Board of Education of Prince George's County in Board v. Secretary of Personnel, 317 Md. 34, 562 A. 2d 700 (1989) sought a writ of mandamus alleging that state agencies acted arbitrarily, capriciously, and unreasonably in not granting the Board's request for a contested case hearing regarding an audit of social security payments made on behalf of government employees. While agreeing that mandamus ordinarily will not lie to control the exercise of discretion, the Board relied on cases recognizing an exception to this principle where public officials or agencies engage in "arbitrary abuses of discretion pointing to language in State Dep't of A. & Tax. v. Clark, 281 Md. 385, 398, 380 A.2d 28, 36 (1977); Criminal Inf. Comp. Bd. v. Gould, supra, 275 Md. at 500-501, 331 A.2d at 65; and State Health Dep't v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965) ("While as a general rule mandamus is not proper to review non-ministerial acts of public officials or agencies, this Court has recognized that such will lie to remedy arbitrary abuses of discretion"). The Board asserts that the Secretary of Personnel's refusal to issue a declaratory ruling in this case was an arbitrary abuse of discretion, and thus mandamus will lie. 317 Md. at 47. While the Court said it was doubtful that mandamus relief would lie between one government agency and another, it said there was no abuse of discretion. The request for a declaratory ruling was not timely, and a pending action existed before the Department of budget and Fiscal Planning where the issue could have been raised. 317 Md. at 48.

An employment dispute
What authority did the ALJ have?

Wilson v. Simms, 380 Md. 206, 844 A. 2d 412 (2004) was a mandamus action arising out of an employment dispute between Gail Wilson and the Department of Public Safety and Correctional Services. Wilson brought a mandamus action to enforce an administrative order for her reinstatement and to provide her with back pay, accrued leave, and retirement benefits although the administrative order omitted reference to these benefits. The Court concluded that a mandamus action was not proper in this situation. Id., at 209.

30 Two judges dissented. “The use of a mandamus action to review administrative decisions was always intended to be limited, especially when statutory judicial review exists.” Murrell, 376 Md. at 201. “Local legislative bodies have provided for appeal from the circuit Court in some instances, but not in others. If there is some perceived deficiency, it is easily correctable by legislation. It should not be corrected by this Court’s creative, but unwarranted, stretching of the common law mandamus action. Perhaps this is a hard case, in the sense that the circuit Court made a mistake, but we should not allow that to make bad law, which is precisely what the Court is doing.” 376 Md. at 202.

31 The Murrell Court continued:

The Court discussed the history and nature of the Writ of Mandamus. 380 Md. at 217-224. Mandamus should issue only in those cases where another adequate remedy does not exist and where "clear and undisputable" rights are at stake. A Writ will not lie if the petitioner's right is unclear or issues only at the discretion of a decision maker." 380 Md. at 223. While the ALJ order conferred the right to reinstatement, nothing was said about back pay, etc. 380 Md. at 224. No legal authority provided that reinstatement necessarily includes back pay, accrued leave, and/or retirement benefits. The Court reviewed the applicable law. 380 Md. at 224-228. Mandamus failed because Wilson had no clear right to the remedies she sought. 380 Md., at 229.

Catch 22 in administrative law

The Court of Appeals concluded that Corporal Steven Kerpelman's appeal to the circuit court through a motion for writ of mandamus was procedurally correct in Kerpelman v. Disability Review, 155 Md. app. 513, 528, 843 A. 2d 877 (2004). The Medical Advisory Board of the Prince George's Police Department had not communicated a finding that Kerpelman did not have a qualifying disability by a written opinion as required by the statute, which written opinion generated the right to appeal. "Kerpelman found himself in "the ultimate 'Catch-22.'" He could not advance his application due to the MAB's determination, nor could he appeal that determination. Thus, the two prongs of the test for judicial action through writ of mandamus were met." 155 Md. App. at 529.

B. The 700 Rules.

Chapter 200 of Title 7 of the Maryland Rules of Procedure deals with Judicial Review of Administrative Agency Decisions. These rules are applicable to agency decisions:32 (1) "where review is authorized by statute;" and (2) where there is a "final determination of the trustees if the Client Protection Fund of the Bar of Maryland." Appeals from agencies of the State and its political subdivisions are governed by these rules.33

There is a question of whether, when, and under what circumstances an appeal may be taken from an administrative agency where no appeal is provided by the statute or ordinance or where the statute or ordinance states that no appeal is allowed. See Section A (2) Mandamus, supra.

7-201. General provisions.
7-203. Time for filing action.
7-204. Response to petition.
7-205. Stays.
7-206. Record.
7-207. Memoranda.
7-208. Hearing.
7-209. Disposition.
7-210. Return of agency record.

Once review is sought of an agency decision, there are requirements on the part of the petitioner, the clerk of the circuit court and the agency whose decision is sought to be reviewed.

(1). To secure review

Rule 7-202 addresses the method of securing review. A person seeking judicial review shall file a petition for judicial review within 30 days after the latest of: (1) "the date of the order or action of which review is

32 Administrative agency is defined by Rule 7-201(b) to mean "any agency, board, department, district, commission, authority, commissioner, official, the Maryland Tax Court, or other unit of the State of of a political subdivision of the State and the Client Protection Fund of the Bar of Maryland."

33 Rule 7-201.
sought”; or (2) “the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner”; (3) or “the date the petitioner received notice of the agency’s order or action, if notice was required by law to be received by the petitioner.”

“If one party files a timely petition, any other person may file a petition within ten days after the date the agency mailed notice of the filing of the first petition,” or within the period within which the first party filed, whichever is later.

A form petition for judicial review is contained within the rule. “The petition shall:
1. request judicial review,
2. identify the order or action of which review is sought,
3. state whether the petitioner was a party to the agency proceeding, and
4. shall state the basis of the petitioner’s standing to seek judicial review if petitioner was not a party to the agency proceeding.

No other allegations are necessary.” If the appeal is from a decision by the Workers’ Compensation Commission, “the petitioner shall attach to the petition a certificate that copies of the petition were served . . . by first class mail on the Commission and each other party of record in the proceeding before the Commission.”

Part of the requirement of what is needed to secure review is for the petitioner to “deliver to the clerk a copy of the petition for the agency whose decision is sought to be reviewed.” It is then the responsibility of the “clerk [to] promptly mail a copy of the petition to the agency, informing the agency of the date the petition was filed and the civil action number assigned to the action for judicial review.”

Rule 7-201. General provisions.
(a) Applicability.- The rules in this Chapter govern actions for judicial review of (1) an order or action of an administrative agency, where judicial review is authorized by statute, and (2) a final determination of the trustees of the Client Protection Fund of the Bar of Maryland.
(b) Definition.- As used in this Chapter, "administrative agency" means any agency, board, department, district, commission, authority, commissioner, official, the Maryland Tax Court, or other unit of the State or of a political subdivision of the State and the Client Protection Fund of the Bar of Maryland.

(a) By petition.- A person seeking judicial review under this chapter shall file a petition for judicial review in a circuit court authorized to provide the review.
(b) Caption.- The Petition shall be captioned as follows:
(c) Contents of petition.- The petition shall request judicial review, identify the order or action of which review is sought, and state whether the petitioner was a party to the agency proceeding. If the petitioner was not a party, the petition shall state the basis of the petitioner's standing to seek judicial review. No other allegations are necessary. If judicial review of a decision of the Workers' Compensation Commission is sought, the petitioner shall attach to the petition a certificate that copies of the petition were served pursuant to subsection (d) (2) of this Rule.

Committee Note. The petition is in the nature of a notice of appeal. The grounds for judicial review, required by former Rule B2 e to be stated in the petition, are now to be set forth in the memorandum filed pursuant to Rule 7-207.

(d) Copies; filing; mailing.-

(1) Notice to agency.- Upon filing the petition, the petitioner shall deliver to the clerk a copy of the petition for the agency whose decision is sought to be reviewed. The clerk shall promptly mail a copy of the petition to the agency, informing the agency of the date the petition was filed and the civil action number assigned to the action for judicial review.

(2) Service by petitioner in workers' compensation cases.- Upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner shall serve a copy of the petition by first class mail on the Commission and each other party of record in the proceeding before the Commission. Committee Note. This subsection is required by Code, Labor and Employment Article, § 9-737. It does not relieve the clerk from the obligation under subsection (d) (1) of this Rule to mail a copy of the petition to the agency or the agency from the obligation under subsection (d) (3) of this Rule to give written notice to all parties to the agency proceeding.

(3) By agency to parties.- Unless otherwise ordered by the court, the agency, upon receiving the copy of the petition from the clerk, shall give written notice promptly by ordinary mail to all parties to the agency proceeding that:

(A) a petition for judicial review has been filed, the date of the filing, the name of the court, and the civil action number; and

(B) a party wishing to oppose the petition must file a response within 30 days after the date the agency's notice was mailed unless the court shortens or extends the time.

(e) Certificate of compliance.- Within five days after mailing, the agency shall file with the clerk a certificate of compliance with section (d) of this Rule, showing the date the agency's notice was mailed and the names and addresses of the persons to whom it was mailed. Failure to file the certificate of compliance does not affect the validity of the agency's notice.

Upon receiving notice has the responsibility to “give written notice promptly” by ordinary mail to all parties to the agency proceeding that the petition for judicial review has been filed, the date of filing, the name of the court and the civil action number. Any opposition to the petition must be by way of response filed within 30 days after the date of the agency’s notice. A “certificate of compliance” as to the performance of the agency’s responsibility shall be filed by the agency.40

(3). Time Limitations
Rule 7-203 governs the time within which a petition for judicial review must be filed. For the most part, a petition “shall” be filed within 30 days of the latest of the date of the order or action of which review is sought or the date the administrative agency sent notice of the order or action to the petitioner, if notice was required to be sent to the petitioner.41 This general rule controls unless another Rule of court or a statute provides for another date or time limitation within which a petition must be filed.42

“If one party files a timely petition, any other person may file a petition within ten days after the date the agency mailed notice of the filing of the first petition or within the period” set by Rule 7-203, whichever is later.43

Note that Maryland Rule 1-204 governs the filing of a motion to shorten or extend time requirements.

There is a time limitation for transmitting the agency record to the clerk of the circuit court.
Rule 7-206(c)&(d) governs this procedure. The failure to adhere to time limits and the responsibility to have time limits extended can and will result in dismissal of the action pertaining to the transmission of the agency record: It is to be noted:
- The agency “shall” transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review.
- Either the agency or a party may file a motion to shorten or extend this time.
- It is the responsibility of the petitioner to keep abreast of this time limitation.
- “The action shall be dismissed if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party.”

Rule 7-203. Time for filing action.
(a) Generally.- Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:
1. the date of the order or action of which review is sought;
2. the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
Cross References. See Code, Labor and Employment Article, § 9-726 governing judicial review of a decision of the Workers’ Compensation Commission in a case in which a rehearing request has been filed.
3. the date the petitioner received notice of the agency’s order or action, if notice was required by law to be received by the petitioner.
(b) Petition by other party.- If one party files a timely petition, any other person may file a petition within ten days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.
Committee note. The provisions of former Rule B4 concerning the shortening and extending of time are not carried forward. The time for initiating an action for judicial review is in the nature of a statute of limitations, which must be

---

40 Rule 7-202(3).
41 Rule 7-203(a).
42 Rule 7-203(a).
43 Rule 7-203(b).
specifically raised either by preliminary motion under Rule 7-204 or in the answering memorandum filed pursuant to Rule 7-207.

**Significant case decisions**

**When read with the insurance code**
- Timeliness of a filing for petition for judicial review was the issue before the Court in Centre v. J.T.W., 397 Md. 71, 916 A. 2d 235 (2007). Rule 7-203 provides that the time for filing a petition for judicial review is within 30 days after the latest of “the date of the order or action,” “the date the ... agency sent notice of the order or action,” or “the date the petitioner received notice of the agency’s order or action.” All of this is “except as otherwise provided in this Rule or by statute.” Judicial review of an MIA (Maryland Insurance Administration) decision in this case was from an ALJ decision relating to compensation due an insured under a homeowner’s policy for damage to personal property destroyed by a tornado. The holding: “We hold that the plain language of the pertinent statutes provides that, in the context of the relevant sections of the Insurance Article, the 30-day filing period for a petition for judicial review of an administrative decision under §§ 2-204(c) [Orders and Notices, Service] and 2-215(d)(i) [Judicial Review, Filing petition for Judicial Review] begins when the order resulting from a relevant administrative hearing is mailed.” 397 Md. at 73. While Judge Cathell for the Court said this decision was a construction of the plain language of the statutes. The position of J.T. W., that he had until he actually received the notice, had some basis. Considering what it means to “serve” a notice or order as defined by Black’s Law dictionary, prior case law construction, and practicality dictated the Court’s holding. Considering the fact that §2-215(d)(i) does not provide for personal service or service by certified mail and that §2-204(c) defines “service” as mere mailing meant: “If the Legislature had wanted “service” in the context of Title 2 of the Insurance Article to require actual receipt of an order by an affected party it would have so provided.” 397 Md. at 88.

**An extension of time in the administrative proceeding?**
- Procedure is important in all administrative law appeals and nowhere more important than in liquor license contests where Article 2B §16-101 (e)(3) provides that a decision by the Board of Liquor License Commissioners “shall be affirmed, modified, or reversed by the court within 90 days after the record has been filed in the court by the local licensing board.” A contest over whether an extension of this time had been granted by the circuit court beyond the 90 day period, and the effect of an extension not having requested and granted was discussed in Woodfield v. West River Improvement, 395 Md. 377, 384-84, 910 A. 2d 452 (2006). Discussing the impracticability of sometimes setting a hearing, the Court determined that the extension had been properly granted in this case. Woodfield, 395 Md. 385, 391.

(4). Response to petition
A response may be filed by anyone person entitled by law to be a party who wishes to participate as a party. Rule 7-204 governs this procedure. No allegations are necessary other than the response shall

---

44 Actually, there were two petitions for judicial review, the first by the insured against the insurer for the manner in which it handled his claims and secondly, an allegation that the insurer had failed to comply with a settlement agreement between the parties. J.T.W., 397 Md. at 74.
45 “Additionally, holding that service required the receipt of the order could lead to unreasonable or illogical results, i.e., service might never be able to be accomplished. For example, if the individual to whom an order was mailed happened to be out of the country for several months or hears he or she would not be deemed to have been served because they had not actually received the order. . . . [W]e avoid such unreasonable and illogical construction of statutes.” J.T.W., 397 Md. at 86.
46 Thus, the Circuit Court order dismissing the petition for judicial review as untimely filed was upheld. J.T.W., 397 Md. at 88. The Court said that when the COSA reversed the Circuit Court that Court did not determine the effect of §2-204(c) defining “service” on the interpretation of §2-215(d)(1) and the intermediate appellate court determination that it was implicit in §2-215(d)(1) that receipt by the petitioner was required was not a legally correct position. J.T.W., 397 Md. at 76-77.
47 Discussing Art. 2B §16-1201(e) and its statutory duty for a judicial decision be made within 90 days and whether that requirement was a directory or mandatory (and the statutory history of the section), the Court said that it was clear that the Legislature “did not intend for non-compliance with the now-90-day period to produce any automatic result.” Woodfield, 395 Md. at 390-91.
state the intent to participate in the action for judicial review." 48 A response shall be filed within 30 days after the date the agency mails notice of the filing of the petition unless the court shortens or extends the time. The response need be served only on the petitioner, and shall be served in the manner prescribed by Rule 1-321. 49

Rule 7-204. Response to petition.
(a) Who may file; contents.- Any person, including the agency, who is entitled by law to be a party and who wishes to participate as a party shall file a response to the petition. The response shall state the intent to participate in the action for judicial review. No other allegations are necessary.
(b) Preliminary motion.- A person may file with the response a preliminary motion addressed to standing, venue, timeliness of filing, or any other matter that would defeat a petitioner's right to judicial review. Except for venue, failure to file a preliminary motion does not constitute waiver of an issue. A preliminary motion shall be served upon the petitioner and the agency. Committee Note. The filing of a preliminary motion does not result in an automatic extension of the time to transmit the record. The agency or party seeking the extension must file a motion under Rule 7-206(d).
(c) Time for filing response; service.- A response shall be filed within 30 days after the date the agency mails notice of the filing of the petition unless the court shortens or extends the time. The response need be served only on the petitioner, and shall be served in the manner prescribed by Rule 1-321. [Service of pleadings and papers other than original pleadings]

Significant case decisions

Opposition as a late filed response?
- One of the issues in Dep't Public Safety v. Neal, 160 Md. App. 496, 864 A. 2d 287 (2004), cert denied, 386 Md. 181 (2005) had to do with a claim by the State that Neal had not filed a response to the petition for judicial review filed by the State to contest an ALJ decision and therefore she was not a property party to the case on appeal. 160 Md. App. at 508. Looking at Maryland rule 7-204 "Response to Petition," the Court said that when the circuit court treated Neal's opposition to the Department's motion to stay as a late-filed response to the petition by a person entitled to be a party, 160 Md. App. at 509, the circuit court exercised its discretion to extend the deadline for Neal to file a response to the petition retroactively. Neal also could present oral argument to the circuit court even though she did not file an opposing memoranda as Rule 7-707(d) permits the court to allow that argument. 160 Md. App. at 510.

(5). Preliminary motions
"A person may file with the response a preliminary motion addressed to standing, venue, timeliness of filing, or any other matter that would defeat a petitioner's right to judicial review. Except for venue, failure to file a preliminary motion does not constitute waiver of an issue. A preliminary motion shall be served upon the petitioner and the agency." 50 Parties seeking an extension of a specified time limit must file a motion under rule 7-206(d)

(6). Stays
"The filing of a petition does not stay the order or action of the administrative agency. Upon motion and after hearing, the court may grant a stay, unless prohibited by law, upon the conditions as to bond or otherwise that the court considers proper." 51 There is no automatic stay of the enforcement of a final decision by an agency. "Except as otherwise provided by law, the final decision maker may grant or the

48 Rule 7-204(a).
49 Rule 7-204(c).
50 Rule 7-204(b).
51 Rule 7-205.
reviewing court may order a stay of the enforcement of the final decision on terms that the final decision maker or court considers proper."\(^{52}\)

An example of a situation where a stay may not be granted is the statutory provision found in LE §9-741 where it is provided that an appeal from a decision of the Worker’s Compensation Commission is not a stay of its order.\(^{53}\)

**Rule 7-205. Stays.**

The filing of a petition does not stay the order or action of the administrative agency. Upon motion and after hearing, the court may grant a stay, unless prohibited by law, upon the conditions as to bond or otherwise that the court considers proper.

**Cross references.** Title 1, Chapter 400; Code, Labor and Employment Article, § 9-741.

**Committee note.** This Rule does not affect any power an agency may have to stay its own order pending judicial review.

---

**Significant Case Decisions**

**A stay is not an injunction**

**A supersedes bond?**

- Berkshire Life v. Maryland Insurance Administration, 142 Md. App. 628, 791 A. 2d 942 (2002) involved the denial of coverage on a disability policy despite proof that medical problems existed that the individual was totally disabled. A stay and/or the denial of a stay is not an injunction. The trial judge denied a motion to stay the payment of benefits ordered by the Administration. On appeal it was argued that it was a denial of due process and an abuse of discretion for the trial court not to grant a stay. The issue was moot because under Rule 8-422(a) Berkshire filed a supersedes bond ("an appellant may stay the enforcement of a civil judgment, other than for injunctive relief from which an appeal is taken by filing a supersedes bond"). The court stated: "An order by the Insurance Commissioner is not automatically stayed by operation of law when a petition for judicial review is filed." Ins. §2-215(f) provides the circuit court is to determine whether the filing operates as a stay. 142 Md. App. at 641.

(7). **The Record**

The agency shall transmit the original or a certified copy of the agency record to the circuit court.\(^{54}\) Rule 7-206 governs this procedure. Generally, this must be done within 60 days after the agency receives the first petition for judicial review. The circuit court may "shorten or extend" this time. It is then the responsibility of the clerk to notify the parties of the date that the record was filed.\(^{55}\) "Upon the filing of the record, the clerk [of the circuit court] shall notify the parties of the date that the record was filed."\(^{56}\)

The administrative record closes for the receipt of evidence in a contested case under where the agency reserves final decision-making authority from exceptions before an ALJ only upon receipt of all transcripts, documents, information, and materials that were before the final decision maker at the time of

---

\(^{52}\) SG §10-222(e).

\(^{53}\) Gleneagles v. Hanks, 156 Md. App. 543, 847 A. 2d 520 (2004) refers to this provision as a "no stay" provision which has been interpreted by the Court of Appeals. 156 Md. App. at 552. This Court held that the "no stay" provision could not be circumvented by application to the circuit court for injunctive relief from which an appeal is taken by filing a supersedes bond. 156 Md. App. at 556.

\(^{54}\) Hahn v. Gabeler, 156 Md. App. 213, 846 A. 2d 462 (2004). "The procedures on appeal from a decision of the Worker’s Compensation Commission are governed by LE §9-700 et. seq." 156 Md. at 218. Referring to Rule 7-206, the initial transfer of the record on appeal is the obligation of the agency. That should also apply to supplemental orders tdhat are the subject of review pending an appeal. 156 Md. at 221.

\(^{55}\) Rule 7-206(c)(d)(e).

\(^{56}\) Rule 7-206(e).
his or her decision. In this case the "entire" administrative record consists of all materials and information the agency had before it at the time it reached its final decision and an "administrative agency has broad discretion to consider evidence submitted after the close of an evidentiary hearing as long as there is compliance with procedural due process."

(a). What the record shall include:

1. The transcript of testimony of the proceedings before the agency. “If the testimony has been recorded but not transcribed before the filing of the petition for judicial review, the first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs and may be apportioned as provided in Rule 2-603."

   A petitioner who pays the cost of transcription shall file with the agency a certification of costs, and the agency shall include the certification in the record.

2. All exhibits and other papers (including the agency opinion) filed in the agency proceeding. The parties may agree or the court may order portions of the agency record to be omitted.

The first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs and may be apportioned as provided by Rule 2-603.

(2). Stipulation:

“If the parties agree that the questions presented by the action for judicial review can be determined without an examination of the entire record, they may sign and, upon approval by the agency, file a statement showing how the questions arose and were decided and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such a statement. The statement, any exhibits to it, the agency's order of which review is sought, and any opinion of the agency shall constitute the record in the action for judicial review.”

Rule 7-206. Record.

(a) Contents; expense of transcript.- The record shall include the transcript of testimony and all exhibits and other papers filed in the agency proceeding, except those papers the parties agree or the court directs may be omitted by written stipulation or order included in the record. If the testimony has been recorded but not transcribed before the filing of the petition for judicial review, the first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs and may be apportioned as provided in Rule 2-603. A petitioner who pays the cost of transcription shall file with the agency a certification of costs, and the agency shall include the certification in the record.

(b) Statement in lieu of record.- If the parties agree that the questions presented by the action for judicial review can be determined without an examination of the entire record, they may sign and, upon approval by the agency, file a statement showing how the questions arose and were decided and setting forth only those facts or allegations that are essential to a decision of the questions. The parties are strongly encouraged to agree to such a statement. The statement, any exhibits to it, the agency's order of which review is sought, and any opinion of the agency shall constitute the record in the action for judicial review.

59 Maryland Rule 2-603 pertains to civil litigation in a circuit court. It contains the procedure for the allowance and allocation of costs, and assessment of costs by the clerk and/or the court.
60 Rule 7-206(a).
61 Rule 7-206(a).
62 Rule 7-206(b).
agree to such a statement. The statement, any exhibits to it, the agency's order of which review is sought, and any opinion of the agency shall constitute the record in the action for judicial review.

(c) Time for transmitting.- Except as otherwise provided by this Rule, the agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review.

(d) Shortening or extending the time.- Upon motion by the agency or any party, the court may shorten or extend the time for transmittal of the record. The court may extend the time for no more than an additional 60 days. The action shall be dismissed if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party.

(e) Duty of clerk.- Upon the filing of the record, the clerk shall notify the parties of the date that the record was filed.


Committee note. Code, Article 2B, § 175 (e) (3) provides that the decision of a local liquor board shall be affirmed, modified, or reversed by the court within 90 days after the record has been filed, unless the time is "extended by the court for good cause."

Significant case decisions

The record is the record

- The Court of Appeals in Woodfield v. West River Improvement, 395 Md. 377, 910 A. 2d 452 (2006) reviewed the decision of the Board of License Commissioner of Anne Arundel County that Charles Bassford did not have an interest in the liquor license. "Additional documentary evidence, casting further suspicion that Bassford was involved in the formation of companies that operated both existing restaurants operating with a liquor license and in Appolis Produce, was offered in the Circuit Court but rejected. Those documents could have been offered to the Board but were not. They are not, therefore, in evidence and may not be relied upon in determining the validity of the Board's decision. The Court must deal with the record as it is, not as it could have been, and on the record we have, we cannot conclude that the Board was clearly erroneous in its finding regarding Bassford." Woodfield, 395 Md. at 392

(8). Memoranda.
The rule provides for a memorandum to be filed by the petitioner, an answering memorandum to be filed, and a reply to the answering memorandum may also be filed.

There is a time limit within which a memorandum must be filed.

- It "shall" be filed by the petitioner within 30 days after the clerk sends notice of the filing of the record, except for judicial review of a decision of the Workers' Compensation Commission where the review is de novo.63

- This time limit may be shortened or extended by stipulation of the parties providing the "first memorandum and any answering memorandum are filed at least 30 days, and any reply memorandum is filed at least ten days, before the scheduled hearing" or as otherwise ordered by the trial court pursuant to Rule 1-204.64

While there is no specific chronology or form stated within the rule, it only makes sense that the petitioner set forth what the Rule requires the memorandum to contain in the order provided by the rule. Judge focus on the issues earmarked for consideration. Memoranda which contain a fact recitation before the question is earmarked constitute a nuisance and are not in accord with how most appellate court

63 A Committee Note states: "Memoranda are required in an action for judicial review of the amount of an attorney's fee in a Worker's Compensation case, because the review is on the record of the Worker's Compensation Commission." Mitchell v. Goodyear Service Store, 306 Md. 27 (1986) is cited.

64 Rule 7-207(c).
opinions address issues. It is no coincidence that most appellate court opinions earmark the issue for the reader. Memoranda should do the same. In fact, most judges will agree that if the first paragraph of the memorandum does not concisely capsulate and identify the essentials of the dispute, legally and factually, it is not written the way it should have been written.

By Rule 7-707, the memorandum shall set forth:
- Questions presented
- Statement of facts
- Argument
- Citations of authority
- References to pages of the record
- Exhibits relied upon
- "[S]etting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on."65

Dismissal may be ordered by the court if a petitioner fails to file a memorandum within the time prescribed if the court "dings that a failure to file or the last filing caused prejudice to the moving party." A person who has filed a response to the petition for judicial review, but "who fails to file an answering memorandum within the time prescribed . . . may not present argument except with permission of the court."66

Rule 7-207. Memoranda.
(a) Generally.- Within 30 days after the clerk sends notice of the filing of the record, a petitioner shall file a memorandum setting forth a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to pages of the record and exhibits relied on. Within 30 days after service of the memorandum, any person who has filed a response, including the agency when entitled by law to be a party to the action, may file an answering memorandum in similar form. The petitioner may file a reply memorandum within 15 days after service of an answering memorandum. Except with the permission of the court, a memorandum shall not exceed 35 pages. In an action involving more than one petitioner or responding party, any petitioner or responding party may adopt by reference any part of the memorandum of another.
(b) When not required.- Memoranda are not required in an action for judicial review of a decision of the Workers' Compensation Commission where the review is de novo.
Committee Note. Memoranda are required in an action for judicial review of the amount of an attorney's fee in a Worker's Compensation case, because the review is on the record of the Worker's Compensation Commission. See Mitchell v. Goodyear Service Store, 306 Md. 27 (1986).
(c) Modification of time requirements.- The time for filing a memorandum may be shortened or extended by (1) stipulation of the parties filed with the clerk so long as the first memorandum and any answering memorandum are filed at least 30 days, and any reply memorandum is filed at least ten days, before the scheduled hearing, or (2) order of the court entered pursuant to Rule 1-204.
(d) Sanctions for late filing of memoranda.- If a petitioner fails to file a memorandum within the time prescribed by this Rule, the court may dismiss the action if it finds that the failure to file or the late filing caused prejudice to the moving party. A person who has filed a response but who fails to file an answering memorandum within the time prescribed by this Rule may not present argument except with the permission of the court.

[Amended Dec. 10, 1996, effective July 1, 1997.]
Committee note. The Committee intends that all issues and allegations of error be raised in the memoranda, and that ordinarily an issue not raised in a memorandum should not be entertained at argument. The Committee does not intend

65 Rule 7-207(a).
66 Rule 7-207(d).
to preclude a person who has filed a preliminary motion, but not an answering memorandum, from arguing the issues raised in the preliminary motion.

**Significant Case Decisions**

*Be specific in argument*

It is not the responsibility of the appellate court to construct the argument

It is the appellant's responsibility to . . .

- In *Changing Point v. Maryland Health Resources*, 87 Md. App. 150; 589 A. 2d 502 (1991), Changing Point argued that a number of documents and testimony constituted hearsay evidence admitted by the Commission in violation of *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 566 A.2d 148 (1989). The Court said: “*Changing Point has been less than helpful, however, in identifying the evidence it finds objectionable and in explaining how that evidence violates Kade.* In its brief, Changing Point discusses only two pieces of evidence. One was a cover letter by Herbert Goldman, Esq., which was attached to a number of documents that the Commission ordered Mountain Manor to produce. The other was the testimony of Dr. Fishman's counsel in North Carolina who testified without producing his files. Changing Point also points to its "Supplemental Memorandum in Support of Renewed Motion Concerning the Admissibility of Hearsay Evidence" as further examples of hearsay admitted in violation of *Kade*. This memorandum refers to certain pages of the testimony of Charles Nabit, several exhibits, and the "hearsay testimony of Mary Roby and Charles Nabit on January 25, 1990." 87 Md. App. at 169-170. "It is neither our responsibility nor inclination to investigate and construct an argument on behalf of an appellant. Therefore, we will confine our analysis to that evidence specifically discussed in Changing Point's brief." 87 Md. App. at 170.

(9). **Hearing.**

A hearing shall be held unless it is waived in writing by the parties. Though the rules say the hearing “shall be no later than 90 days from the date the record was filed” this is not possible in most cases, considering the court's docket.67

**Rule 7-208. Hearing.**

(a) Generally.- Unless a hearing is waived in writing by the parties, the court shall hold a hearing.

(b) Scheduling.- Upon the filing of the record pursuant to Rule 7-206, a date shall be set for the hearing on the merits. Unless otherwise ordered by the court or required by law, the hearing shall be no earlier than 90 days from the date the record was filed.

(c) Additional evidence.- Additional evidence in support of or against the agency's decision is not allowed unless permitted by law.

[Amended Nov. 8, 2005, effective Jan. 1, 2006.]

**Cross references.** Where a right to a jury trial exists, see Rule 2-325 (d). See *Montgomery County v. Stevens*, 337 Md. 471 (1995) concerning the availability of prehearing discovery.

(10). **Additional Evidence.**

"Additional evidence in support of or against the agency’s decision is not allowed unless permitted by law."68

(11). **Disposition.**

"Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency’s order or action, remand the action to the agency for further proceedings,

---

67 Rule 7-207(a)(b).
68 Rule 7-208(c).
or an appropriate combination of the above. Whatever action is taken, it is contemplated that the circuit court judge should give reasons for whatever action is taken. Rule 2-522 pertains to a contested court trial and states that a judge shall prepare and file or dictate into the record a brief statement of the reasons for the decision and the basis of determining any damages. Judicial review of an agency decision is not a court trial, and this rule does not apply. Trial judges and attorneys are well aware that review of a circuit court decision by an appellate court means a review of the same issues on the same record and that too often means a circuit court judge will not file an opinion or give reasons for a decision made.

"After the time for seeking appellate review has expired, if no appellate review has been sought, the clerk shall return the record of the agency proceeding to the agency. If appellate review has been sought, the clerk, unless otherwise ordered by the appellate court, shall return the record of the agency proceedings to the agency upon conclusion of the appellate review."

Rule 7-209. Disposition.
Unless otherwise provided by law, the court may dismiss the action for judicial review or may affirm, reverse, or modify the agency's order or action, remand the action to the agency for further proceedings, or an appropriate combination of the above.

Rule 7-210. Return of agency record.
After the time for seeking appellate review has expired, if no appellate review has been sought, the clerk shall return the record of the agency proceeding to the agency. If appellate review has been sought, the clerk, unless otherwise ordered by the appellate court, shall return the record of the agency proceedings to the agency upon the conclusion of the appellate review.

Significant Case Decision

No remand authorized in liquor board cases
- Does a court have authority to remand a case to an agency for further proceedings. Most of the statutory schemes providing authority for judicial review to courts give that authority. However, with liquor boards, the result is different as there is no statutory authority in Article 2B allowing a remand. It is an up or down decision on judicial review. Thanner Enterprises v. Baltimore County, Maryland, 414 Md. 265, 282, 995 A. 2d 257 (2010).

(12). Appellate Court Review.
Where provided by rule, an appeal from a circuit court decision may be appealed to the Court of Special Appeals of Maryland. The clerk "shall return the record of the agency proceedings to the agency upon the conclusion of the appellate review" when no appeal is taken or upon the conclusion of appellate review.

C. The Scope of Review.
(1). In General.
The first decision to reach the Court of Appeals interpreting the MAPA caused that Court to comment: "While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, it is clear that the statute did not intend that the court should substitute its judgment for the expertise of those

69 Rule 7-209.
70 Rule 7-210.
71 Rule 7-210.
persons who constitute the administrative agency from which the appeal is taken.”

The scope of judicial review from county administrative proceedings is sometimes not that well defined. For example, “no statute expressly establishes the scope of judicial review of an administrative proceeding initiated by a county police department pursuant to the LEOBR.” Generally, the scope is the same as that applicable to administrative appeals. That means judicial review is narrow and limited to determining whether there is substantial evidence in the administrative record to support agency findings and conclusions. In reviewing the agency decision, a court “presumes that the decision made by an administrative body is prima facie correct.”

Review of administrative agencies generally fits into three categories:
1. Judicial Review of the fact finding by the agency;
2. the agency interpretation of the law; and,
3. whether the agency decision is arbitrary and capricious.

When there is appellate court review, an appellate court reviews the “agency’s decision applying the same statutory standards as used by the precluding reviewing court [i.e. trial court to COSA or CA; COSA to CA].” For a State agency, SG 10-222 governs judicial review. The appellate court reevaluates the decision of the agency, not the decision of the circuit court.

(a) Review of final decision.-
(1) Except as provided in subsection (b) of this section, a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision as provided in this section.
(2) An agency, including an agency that has delegated a contested case to the Office, is entitled to judicial review of a decision as provided in this section if the agency was a party before the agency or the Office.
(b) Review of interlocutory order.- Where the presiding officer has final decision-making authority, a person in a contested case who is aggrieved by an interlocutory order is entitled to judicial review if:
(1) the party would qualify under this section for judicial review of any related final decision;
(2) the interlocutory order:
   (i) determines rights and liabilities; and
   (ii) has immediate legal consequences; and
(3) postponement of judicial review would result in irreparable harm.
(c) Jurisdiction and venue.- Unless otherwise required by statute, a petition for judicial review shall be filed with the circuit court for the county where any party resides or has a principal place of business.
(d) Parties.-

74 Coleman, 369 Md. at 121.
75 Marshack v. Board of Trustees, 358 Md. 393, 402, 749 A. 2d 774 (2000).
76 Thus, in Solomon v. Board of Medicine, 155 Md. App. 687, 705-06, 845 A. 2d 47 (2004), the Court said it made no difference whether the trial court applied the correct standard for review. “We, therefore, do not evaluate the findings of fact and conclusions of law made by the circuit court; instead ‘we review the administrative decision itself.’” 155 Md. App. at 697.
77 Gigeous v. ECI, 363 Md. 481, 495-95, 769 A.2d 912 (2001). The Court of Appeals stated in Spencer v. Board of Pharmacy, 380 Md. 515, 524, 846 A. 2d 341 (2004): “When this court sits in review of an administrative agency decision, we reevaluate the decision of the agency under the same statutory standards as would the circuit court; we do not employ those standards to reevaluate the decision of the circuit or intermediate appellate court.” Thus, it makes no difference whether or not the trial judge applied the correct standard of review.”
(1) The court may permit any other interested person to intervene in a proceeding under this section.
(2) If the agency has delegated to the Office the authority to issue the final administrative decision pursuant to § 10-205 (a) (3) of this subtitle, and there are 2 or more other parties with adverse interests remaining in the case, the agency may decline to participate in the judicial review. An agency that declines to participate shall inform the court in its initial response.

(e) Stay of enforcement.-
(1) The filing of a petition for judicial review does not automatically stay the enforcement of the final decision.
(2) Except as otherwise provided by law, the final decision maker may grant or the reviewing court may order a stay of the enforcement of the final decision on terms that the final decision maker or court considers proper.

(f) Additional evidence before agency.-
(1) Judicial review of disputed issues of fact shall be confined to the record for judicial review supplemented by additional evidence taken pursuant to this section.
(2) The court may order the presiding officer to take additional evidence on terms that the court considers proper if:
(i) before the hearing date in court, a party applies for leave to offer additional evidence; and
(ii) the court is satisfied that:
1. the evidence is material; and
2. there were good reasons for the failure to offer the evidence in the proceeding before the presiding officer.
(3) On the basis of the additional evidence, the final decision maker may modify the findings and decision.
(4) The final decision maker shall file with the reviewing court, as part of the record:
(i) the additional evidence; and
(ii) any modifications of the findings or decision.

(g) Proceeding.-
(1) The court shall conduct a proceeding under this section without a jury.
(2) A party may offer testimony on alleged irregularities in procedure before the presiding officer that do not appear on the record.
(3) On request, the court shall:
(i) hear oral argument; and
(ii) receive written briefs.

(h) Decision.- In a proceeding under this section, the court may:
(1) remand the case for further proceedings;
(2) affirm the final decision; or
(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
(i) is unconstitutional;
(ii) exceeds the statutory authority or jurisdiction of the final decision maker;
(iii) results from an unlawful procedure;
(iv) is affected by any other error of law;
(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
(vi) is arbitrary or capricious.

In the State system, the review must be of a “final” decision. Interlocutory judicial appeals may be taken by a party subject to a final decision if the interlocutory order: (1) determines rights and liabilities; (2) has immediate legal consequences; and (3) postponement of judicial review would result in irreparable harm.78

---

78 SG §10-222(a)(b).
Significant Case Decisions

In *Christopher v. Dept. of Health*, 381 Md. 188, 849 A. 2d 46 (2004), appellant contended that the Department "erred as a matter of law" because "its interpretation of COMAR 07.03.17.431(3) and COMAR 07.03.17.02B(6) was arbitrary and capricious" as it penalized her "for exercising her legal right to appeal her disability determination." Statutory standards allowing reviewing courts to reverse or modify agency decisions are different depending upon the agency's action. If "the Department "erred as a matter of law," the question is not whether the Department abused its discretion by acting "arbitrarily and capriciously," but whether the agency interpreted and applied the law correctly." 381 Md. at 197. There is a cookbook methodology approach of sorts to be followed on appeal.79

1. When the agency makes a fact determination, the issue on appeal is whether the decision is supported by substantial evidence. 381 Md. at 198.80

2. "Determining whether an agency's 'conclusions of law' are correct is always, on judicial review, the court's prerogative, although [the court is to] ordinarily respect the agency's expertise and give weight to its interpretation of a statute that it administers. Of course, even though an agency's interpretation of a statute is often persuasive, "the reviewing court must apply the law as it understands it to be.' Nevertheless, 'an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.'" 381 Md. at 199.81

3. "... [The] court applies the arbitrary and capricious standard when it reviews an agency's discretionary functions. ... [W]hen an agency acts in its discretionary capacity, it is taking actions that are specific to its mandate and expertise and, unlike conclusions of law or findings of fact, have a non-judicial nature. For this reason, [a court owes] 'a higher level of deference to functions specifically committed to the agency's discretion. 'As long as an administrative agency's exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily reviewable by the courts.' Courts thus generally only intervene when an agency exercises its discretion 'arbitrarily' or 'capriciously.' 381 Md. at 199.82

The liquor board has its own rules

* Art. 2B, § 16-101(e)(1) sets forth the standard to be applied in judicial review actions from liquor board decisions. Though articulated differently, the statutory standard is consistent with the more general law regarding the review of administrative agency decisions:

"[T]he action of the local licensing board shall be presumed by the court to be proper and to best serve the public interest. The burden of proof shall be upon the petitioner to show that the decision complained of was against the public interest and that the local licensing board's discretion in rendering its decision was not honestly and fairly exercised, or that such decision was arbitrary, or procured by fraud, or unsupported by any substantial evidence, or was unreasonable, or that such decision was beyond the powers of the local licensing board, and was illegal."

79 The six standards of review provided in SG 10-222(h)(3) of the MAPA may be grouped into three categories: (1) findings of fact; (2) conclusions of law; or (3) discretionary action. *Christopher*, 381 Md. at 198.


(h) *Decision.*—In a proceeding under this section, the court may:

1. remand the case for further proceedings;
2. affirm the final decision; or
3. reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
   (i) is unconstitutional;
   (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
   (iii) results from an unlawful procedure;
   (iv) is affected by any other error of law;
   (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
   (vi) is arbitrary or capricious.

80 SG §10-222(h)(v)
81 SG §10-222(h)(i)-(iv).
82 SG §10-222(h)(vi).
Compare Maryland Code, § 10-222(h) of the State Government Article, setting forth the standard for judicial review under the State Administrative Procedures Act, and see United Parcel v. People's Counsel, 336 Md. 569, 577, 650 A.2d 226, 230 (1994) (court's role in judicial review of administrative agency decision "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.").

Woodfield, 395 Md. at 392-93.

(2). Venue
"Unless otherwise required by statute, a petition for judicial review shall be filed with the circuit court for the county where any party resides or has a principal place of business."83

(3). Parties
The appeal may be taken by a party who is "aggrieved," and in order for an agency to take an appeal, that agency must have been a party to the proceeding. The Court may permit any "other interested person to intervene in a proceeding." An agency may decline to participate in judicial review.84

While proper parties must be properly noted on the appeal, the designation of parties on the papers to initiate the appeal is not conclusive.85

(4). A cookbook methodology - a three part test
A 2001 decision by the Court of Special Appeals stated that a reviewing court analysis of final agency action should be considered in three parts:

1. Determining whether the agency recognized and applied the correct principles of law governing the case,

2. If so, then examine the agency’s factual findings recognize “it is the agency’s province to resolve conflicting evidence, and, where inconsistent inferences can be drawn from the same evidence, it is for the agency to draw the inference,” and

3. Finally, to examine whether the agency properly applied the law to the facts, realizing: (a) this is a judgment process involving a mixed question of law and fact with great deference to be accorded to the agency; and (b) the test on appeal is “whether . . . a reasoning mind could reasonably have reached the conclusion reached by the [agency], consistent with a proper application of the [controlling legal principles].86

(5). Issues Not Before the Agency.

83 SG §10-222(c).
84 SG §10-222 (b)(d). “An agency that declines to participate shall inform the court in its initial response.”
85 Prince George's County v. Sunrise Development, 330 Md. 297, 315, 623 A. 2d 1296 (1993). Sunrise Development moved to dismiss the appeal which caused the court to state: “Sunrise's argument is void of merit, although not of chutzpah.” What happened is that when Sunrise petitioned for circuit court judicial review of the decision by the Board of Appeals, it captioned the papers to note the board as its adversary. It was on this basis that a dismissal was sought by Sunrise though the true adverse party, Prince George's County, did appear. 330 Md. at 315.
“Judicial review of administrative decisions is limited to the issues or grounds dealt with by the administrative agency.” Under Maryland law, a party is bound by the theory the party pursues before the administrative body, and the failure to present an argument precludes it from being heard by the reviewing court. “Moreover, a reviewing court is restricted to the record made before the administrative agency, and is confined to [deciding] whether, based upon the record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency.”

**Significant Case Decisions**

**Generally judicial review is confined to issues raised at the administrative hearing**

**Exception: when the preservation of the issue becomes an integral and unavoidable component on appeal**

- No objection to the admissibility of a preliminary breadth test was made in a license suspension hearing before an ALJ in *MVA v. Weller*, 390 Md. 115, 125, 887 A. 2d 1042 (2005) and with admissibility of the test raised on appeal, an question was whether the issue had been preserved. T. §16-205.2 permits police officers to administer a preliminary breath test licensees stopped on suspicion of DUI and provides that test is to be used as a guide and may not be used as evidence by the State in any court action. In this case the test result showed a blood alcohol concentration of 0.16. 390 Md. at 122. Generally, issues not raised during an administrative proceeding may not be raised during judicial review.

- There is an exception to this general rule and that occurs when the preservation of the issue becomes an integral and unavoidable component of a properly raised issue on appeal. That exception was applicable in this case because the trial judge, in reversing the ALJ, specifically stated that this preliminary test evidence should not have been admitted into evidence. 390 Md. at 131.

**Not allowed to argue contention on appeal that was not made by the Board**

- The determination of setbacks for parking and the rights of the holder of a ground lease was an issue in *Capital Commercial v. Montgomery County*, 158 Md. App. 88, 102, 854 A. 2d 283 (2004). The appellant could not argue on appeal a contention not made before the Board, namely that by approving a Plan, the Board would be violating a code section which provided: “This chapter shall not be deemed to interfere with or abrogate or annul or otherwise affect in any manner whatsoever any ordinances, rules, regulations or easements, covenants or other agreements between parties[.]” 158 Md. App. at 102.

**That issue was not raised before the PSC**

- “. . . [T]he question of whether the PSC has any authority to validate and enforce provisions in an agreement that are prohibited under Maryland contract law by an anti-assignment clause was never presented to or decided by either the PSC or the Circuit Court. It was never raised in the Court of Special

---

88 *Patrick v. Dept. of Public Safety*, 156 Md. App. 423, 433, 847 A. 2d 450 (2004). (inmate could not argue protected liberty interest on appeal when argument before agency was based on due process argument of his classification for transfer purposes) 156 Md. App. at 433-34.
89 In great detail, the Court reviewed the advice of rights provisions of the Maryland Code and the laws concerning the use of alcohol concentration tests and the effects of a failure to take a test on the right and responsibility of the MVA to suspend a license. *Weller*, 390 Md. 123-25.
91 The *Weller* Court cited *Engineering Management Services v. SHA*, 375 Md. 211, 235, 825 A. 2d 966 (2003) (the grand of summary disposition by the Contract Board of Appeals depended in part on whether the Board passed regulations to effectuate that procedure, an issue not raised before the administrative agency) *Weller*, 390 Md. at 130-131.
92 The Court then stated: “We additionally note that addressing this issue does not work to the disadvantage of the party raising the issue before us, as the decision of the Circuit Court will be reversed and the determination by the agency upheld. Nor does it prejudice the Respondent in that he was not entitled to raise the issue in the first instance before the Circuit Court.” *Weller*, 390 Md. at 131-32.
93 The Court went on to cite a prior case and hold that, even if preserved, the issue would fail. *Capital Commercial*, 158 Md. App. at 102-03.
Appeals and should not have been determined gratuitously by that court.” *PSC v. Panda*, 375 Md. 185, 205, 825 A. 2d 462 (2003).

**The record must show the issue was plainly raised**

Ordinarily appellate courts will not decide an issue unless the record plainly shows it to have been raised in or decided by the trial court. Rule 8-131(a). *KcKay v. Dept. of Public Safety*, 150 Md. App. 182, 819 A. 2d 1088 (2003). Following an agreement between employer and employee on a disciplinary matter, the employer unilaterally rescinded the agreement and terminated the State employee. The Court of Appeals reversed. As to the proper generation of the issue on appeal:

To be sure, the wording of appellant's contention differs on appeal from that presented below. Before this Court, appellant argues that the ALJ’s failure to determine the legal effect of the Agreement in light of §11-108(a)(2), discussed *infra*, warrants a remand to the ALJ for such a determination. In the circuit court, appellant argued that the ALJ erred as a matter of law in finding that §11-108(a)(2) does not bar the Department from rescinding the Agreement. In both fora, appellant argues, in effect, that §11-108(a)(2) controls this case and precluded the Department from rescinding the Agreement it had reached with appellant. We conclude that the claims are the same; thus, the issue is preserved for our consideration.

150 Md. App. at 192.

**May not pass on issues presented for the first time on judicial review**

SG §10-222 provides that "a party who is aggrieved by the final decision in a contested case is entitled to judicial review of the decision." “Thus, it is the final decision of the final decision maker at the administrative level, not that of the reviewing court, that is subject to judicial review. Accordingly, the reviewing court, restricted to the record made before the administrative agency, may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency. Stated differently, an appellate court will review an adjudicatory agency decision solely on the grounds relied upon by the agency. **Because the issue of the attorneys' fees were been presented to the Circuit Court for the first time and never raised in, or decided by the Administrative Law Judges, that court erred in awarding them. Dep't of Health v. Campbell*, 364 Md. 108, 122-24, 771 A. 2d 1051 (2001).

**Do not pass upon the constitutionality of statutory provisions not necessary to decide the issue**

Sections of the Insurance Code were considered by the Insurance Commissioner toward a determination of whether differentials in certain insurance rates and underwriting based on gender, if actuarially justified, were unconstitutional in light of Maryland’s enactment of the “E.R.A.” in *Insurance Commissioner v. Equitable Life*, 339 Md. 596, 664 A. 2d 862 (1995). The Court held that the three sections were inapplicable to the controversy because they did not involved rate setting or life insurance, the Commissioner’s order was vacated. “Neither an administrative agency nor a court should pass upon the constitutionality of statutory provisions which are inapplicable to the controversy before the agency or the court.” 339 Md. at 635.

(6). Review of the Agency Factual Determinations. *(the substantial evidence test)*

A court's role in reviewing an administrative agency adjudicatory decision is narrow. “It is well-settled in [Maryland] that it is the function of an administrative agency to make factual findings and to draw inferences from the facts found.”94 A reviewing court evaluates the administrative agency’s fact finding results. It does not make an independent, *de novo* assessment of the evidence.95

---

95 *Karwacki*, 340 Md. at 280.
In reviewing a finding of fact made by an administrative agency, as opposed to an agency interpretation of the law, the Court of Appeals has applied a "substantial evidence" review.96 “Substantial evidence review of agency factual findings is embodied in [SG] §10-222(h)(3)(v). That provision grants a court authority to overrule an agency's factual finding only when the finding is "unsupported by competent, material, and substantial evidence in light of the entire record as submitted." According to this more deferential standard of review, judicial review of agency factual findings is limited to ascertaining whether a reasoning mind could have reached the same factual conclusions reached by the agency on the record before it."97

“A reviewing court shall apply the substantial evidence test to the final decisions of an administrative agency, but it must not itself make independent findings of fact or substitute its judgment for that of the agency.” Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The scope of review is limited to whether a reasoning mind could have reached the factual conclusion the agency reached. In applying the substantial evidence test, the reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. Agency decisions must be reviewed in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity. It is the province of the agency to resolve conflicting evidence. Where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences."98

“When a reviewing court examines the manner in which an agency applied law to facts, which is a judgmental process involving a mixed question of law and fact, great deference must be accorded to the agency.” The court review “entails only an appraisal and evaluation of the agency's fact-finding and is not an independent decision on the evidence.” The reviewing court may not substitute its judgment for that of the agency concerning the appropriate inferences to be drawn from the evidence. “On the other hand, a reviewing court may substitute its judgment on law for that of the agency if the factual findings supported by substantial evidence are susceptible of but one legal conclusion, and the agency does not so conclude.”99

There are agency decisions that fall within categories that are neither legal conclusions nor factual findings. These are mixed questions of law and fact or applications of law to facts. “The agency has correctly stated the law and its fact finding is supported by the record, but the question is whether it has applied the law to the facts correctly. When the agency decision being judicially reviewed is a mixed question of law and fact, the reviewing court applies the substantial evidence test, that is, the same

96 Spencer v. Board of Pharmacy, 380 Md. 515, 529, 846 A. 2d 341 (2004). Bernstein v. Real Estate Commission, 221 Md. 221, 156 A. 2d 657 (1959), the first case to interpret the MAPA enacted by the Acts of 1957, stated:

Generally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency and such de novo evidence, if any, as may be taken by the court, and such findings and conclusions are not against the weight of such evidence it is the function of the court to affirm the order of the agency or remand the case for further proceedings if that be necessary. On the other hand, if the court should find that the substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified in §255(g)(1)-(8) of Art. 41, because of an administrative finding, inference, conclusion or decision, then it is the function of the court to reverse or modify the order.

134 Md. at 230.
98 Gigenous v. ECI, 363 Md. 481, 497, 503, 769 A. 2d 912 (2001). Where an administrative agency’s conclusions are not supported by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence, such decisions are due no deference. Board of County Comm. V. Southern Resources, 154 Md. App. 10, 25, 837 A. 2d 1059 (2003).
On a State level, SG §10-222(h)(3)(v) [MAPA] states that a “reviewing court may reverse or modify an agency decision if a substantial right has been prejudiced because a finding is unsupported by competent, material, and substantial evidence in light of the entire record as submitted. . . .” Under the substantial evidence standard, a reviewing court must uphold an agency’s determination if it is rationally supported by the evidence in the record, even if the reviewing court, left to its own judgment, might have reached a different result.102

It may be helpful to the reader to consider a cookbook methodology to this process:103

1. presumption of agency correctness:
   Decisions of administrative agencies are *prima facie* correct and carry with them a presumption of validity.

2. inferences
   “A reviewing court may, and should, examine any conclusion reached by an agency, to see whether reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by possible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion.”

3. fact finding
   “A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact.”

4. Conclusions
   “A reviewing court may, and should, examine any conclusion reached by an agency, to see whether reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by possible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion.”

   “. . . [Agency] may rely on ‘its experience, technical competence, and specialized knowledge in the evaluation of evidence.’”104

---


101 Vann, 382 Md. at 291, 300.


103 Travers, 115 Md. App. at 420-21 citing Commissioner, Balto. City Police Dep’t v. Cason, 34 Md. App. 487, 368 A. 2d 1067, cert. denied, 280 Md. 728 (1977). See also: Dept. of Public Safety v. PHP, 151 Md.App. 182, 824 A. 2d 986 (2003). (“To conduct a proper inquiry of an administrative agency’s decision, we ‘must be able to discern from the record the facts found, the law applied, and the relationship between the two.’”) 151 Md. App. at 194.

104 This last sentence comes from Travers, 115 Md. App. 421 citing *Bulluck v. Pelham Wood Apts.*, 283 Md. 505, 390 A. 2d 1119 (1978) FN No. 6 making reference to SG §10-213(i). “Despite some unfortunate language that has crept into a few . . . opinions, a ’court’s task on review is not to’ ‘substitute its judgment for the expertise of those persons who constitute the
Significant Case Decisions

So many cases setting forth the substantial evidence test and what it means

- One fairly recent case discussing the substantial evidence test is MVA v. Weller, 390 Md. 115, 887 A. 2d 1042 (2005):

  "Our review of the agency's factual finding entails only an appraisal and evaluation of the agency's factfinding and not an independent decision on the evidence." When the agency is acting in a factfinding or quasi-judicial capacity, courts are to review its decision to determine "whether the contested decision was rendered in an illegal, arbitrary, capricious, oppressive or fraudulent manner." "A reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency . . . ."

In Board of Physician Quality Assurance v. Banks, 354 Md. 59, {67-69] 729 A.2d 376 (1999), we closely examined an appellate court's role in reviewing an administrative agency's decision, in particular, the substantial evidence test. Judge Eldridge, writing for the Court, stated that:

"A court's role in reviewing an administrative agency adjudicatory decision is narrow; it is limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.'

"In applying the substantial evidence test, a reviewing court decides "whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court "must review the agency's decision in the light most favorable to it; . . . the agency's decision is prima facie correct and presumed valid, and . . . it is the agency's province to resolve conflicting evidence" and to draw inferences from that evidence.' (final agency decisions 'are prima facie correct and carry with them the presumption of validity').

"Despite some unfortunate language that has crept into a few of our opinions, a 'court's task on review is not to "substitute its judgment for the expertise of those persons who constitute the administrative agency,"' Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. (The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight'). Furthermore, the expertise of the agency in its own field should be respected, (legislative delegations of authority to administrative agencies will often include the authority to make 'significant discretionary policy determinations'); (application of the State Board of Education's expertise would clearly be desirable before a court attempts to resolve the legal issues)."

administrative agency,' 'Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected. (legislative delegations of authority to administrative agencies will often include the authority to make 'significant discretionary policy determinations'). On the other hand, when a statutory provision is entirely clear, with no ambiguity whatsoever, "administrative constructions, no matter how well entrenched, are not given weight." Banks, 354 Md. at 68-69 (footnote 1 and citations omitted) The last sentence is from FN 2.

All that is required by courts in reviewing a board's determination is that the board's decision be based on fairly debatable evidence. Ginn v. Farley, 43 Md. App. 229, 403 A. 2d 858 (1979). A variance was requested in order to construct an office building "because the structure located on the property violated the existing front and side yard setback requirements." 43 Md. App. at 233. Testimony by an engineer that the granting of the variance would not be detrimental to the health, safety and general welfare of the locality was sufficient to trigger the "fairly debatable" standard. "It is not the function of the courts to retry or second guess the Board." 43 Md. App. at 235-36. What about this? Expertise? What qualifications did this engineer have to express an opinion? Was the opinion concerning the structural nature of a building? Was it concerning aesthetics? If concerning aesthetics, why would there be any expertise better than those who live in the neighborhood? Is the benchmark is "the health, safety and general welfare of the locality" then someone has to make a decision on this point. Does someone acquire expertise to express this opinion?
We know how the statute reads
Now: how do the facts of this case match up

- Two decisions from the Court of Appeals were fact driven on the issue of whether DNR made a correct decision that taxpayers were required to pay state excise upon the purchase of a boat. Schwartz v. DNR, 385 Md. 534, 870 A.2d 168 (2005) and Kushell v. DNR, 385 Md. 563 (2005)

“The issue of whether a vessel can be "used principally in this State" if kept here fewer than six months in a given year is solely a question of law.” Schwartz, 385 Md. at 559. The Court did the math.

If a vessel happens to be used in only two states throughout a calendar year, then it is true that the vessel will not be "principally used" in Maryland unless it spends at least 183 days (approximately six months) here. But that is not the only situation in which a vessel could be "used most" in Maryland. A vessel used five months in Maryland, four months in Delaware, and three months in Virginia would still be "used most" in this State. A vessel acquired by its owners midway through the year - thus not "used" by them in any state prior to purchase - and then used in Maryland fewer than six months but longer than in any other state would still be "used most" in this State.

This latter possibility describes precisely the facts sub judice. The vessel was not used by appellants prior to June 9, 2000. After adjusting for time spent "held for maintenance or repair," it was used for 110 days in Maryland, fifty-seven days in Georgia, and ten days total in other states.

The Secretary did not err in finding that the vessel was "used principally" in Maryland in the year 2000. Schwartz, 385 Md. 560. (Thus, the circuit court was reversed and DNR was affirmed, the decision for holding there was liability for the tax being different than that decided by the circuit court)

Kushell, 385 Md. was also fact driven where the Court concluded: “The parties agree that at the time Kushell purchased the Genesis he had no intention of principally using it in Maryland. Accordingly, he has no tax liability under § 8- 716(c)(1)(iv) of the Natural Resources Article.” 385 Md. at 581, thereby reversing the circuit court.

Factual determination: this constitutes conduct “in the practice of medicine”

- Conduct by a physician in sexually harassing co-employees while on duty at a hospital and in working areas of the hospital is conduct “in the practice of medicine.” Board of Physician v. Banks, 354 Md. 59, 77, 729 A.2d 376, 381 (1999). The Board of Physician Quality Assurance consists of 15 members, 11 of whom must be "practicing licensed physicians." See, §14-202(a) of the Health Occupations Article. Certainly the Board has a high degree of expertise in determining what constitutes unprofessional conduct "in the practice of medicine." The Board is particularly well-qualified to decide, in a hospital setting, whether specified misconduct by a hospital physician is sufficiently intertwined with patient care to constitute misconduct in the practice of medicine. Deference is to be given by a reviewing court to the Board's interpretation and application of the statute which the Board administers. The Board’s decision in this case was warranted. When a hospital physician, while on duty, in the working areas of the hospital, sexually harasses other hospital employees who are attempting to perform their jobs, the Board can justifiably conclude that the physician is guilty of immoral or unprofessional conduct in the practice of medicine. 354 Md. at 76-77.

Judicial review substitution of opinion for ALJ not allowed

- Judicial review did not permit a substitution of judicial opinion for that of the ALJ that Weller's license should be suspended for 1 year for a second refusal to submit to a chemical breath test, a penalty permitted by T. §16-205.1 in MVA v. Weller, 390 Md. 115, 887 A. 2d 1042 (2005) The MVA delegated 105 The Banks Court stated that "sexual harassment in any context is patently unacceptable" citing Attorney Grievance Comm’n v. Goldsborough, 330 Md. 342, 364, 624 A.2d 503, 514 (1993). 354 Md. at 76. The Court has previously examined what was embraced in the phrase “in the practice of medicine” in McDonnell v. Comm’n on Medical Discipline, 301 Md. 426, 429-430, 483 A.2d 76, 77-78 (1984) where it determined that a physician's attempt to intimidate adverse expert witnesses scheduled to testify against him in a medical malpractice case was "immoral conduct of a physician in his practice as a physician." The conduct was held to be "improper and not to be condoned" but "not censurable. Banks, 354 Md. at 69-70. 203
The circuit court determined that the ALJ had not taken into consideration the fact that a prior refusal was 8 years old and that Weller had to travel in his work as an insurance adjuster. In fact, the ALJ's opinion specifically considered these facts and determined the license should be suspended for a full year. 390 Md. at 125-28. Applying the "substantial evidence" test to the judicial review of the administrative proceeding, the Court could not substitute its opinion for that of the ALJ who used her discretion "and decided that suspension was the appropriate sanction in this case." "There is substantial evidence in the record to support this decision. This was respondent's second refusal, he had admitted to drinking six beers before driving, his PBT indicated a high alcohol level at the time of his arrest, and the alcohol treatment report he submitted to the ALJ failed to mention his prior drinking an driving incident. It is clear that a 'reasoning mind reasonably could have reached the factual conclusion the agency reached.'" 390 Md. at 143-45.

Agency: "this" conduct constitutes child abuse  
Circuit Court: you are wrong, I know child abuse when I see it  
Q: why would agency have more expertise than circuit court  
A: it does not  
But: for purposes of interpreting the statute and furthering the purpose of the statute and as to what the classification means under the statute? Does the agency not have more expertise in this area?  
- Fact dependent inquiries needed to be made by DSS, "using its expertise and scrutinizing the evidence before it, to determine whether the risk created by" a parent administering corporal punishment to a child "satisfied the child abuse statute" in Charles County DSS v. Vann, 382 Md. 286, 299, 855 A. 2d 313 (2004). At issue was judicial review of an administrative determination that the parent's conduct "indicated child abuse." The Court disagreed with the Court of Special Appeals determination that the parent could not be responsible for indicated child abuse when, in the course of administering corporal punishment, the parent inadvertently injured his son. A mixed question of law and fact was presented for review. "Deferential review over mixed questions of law and fact is appropriate in order for the agency to fulfill its mandate and exercise its expertise. Administering a child abuse statute is the sort of action for which the expertise of agencies is well suited." To discover whether corporal punishment was lawfully executed, the agency assesses the reasonableness of the punishment not only in light of the child's misbehavior and whether it warranted physical punishment, but also in view of the surrounding circumstances in which the punishment took place, including the child's age, size, ability to understand the punishment, as well as in the instant case, the minor's capacity to obey the parent's order to stand still while being struck by the belt." The Court of Special Appeals did not apply the proper test and the record facts substantiated the finding by DSS so that its decision had to be upheld. 382 Md. at 299.

In great detail, the Court reviewed the advice of rights provisions of the Maryland Code and the laws concerning the use of alcohol concentration tests and the effects of a failure to take a test on the right and responsibility of the MVA to suspend a license. Weller, 390 Md. 123-25.

There could certainly be disagreement among parents as to whether the DSS conclusion that child abuse occurred was correct. A six year old boy had brutally punched and kicked a teacher in the stomach at a day care center. The child had been in multiple bouts of fighting with other students. Time outs and corner sittings had resulted only in more clashes. Corporal punishment administered by the parents with a belt resulted in the child being struck in the lower back with the buckle causing a "reddish, moon-shaped bruise about an inch in height." The child had attempted to avoid punishment by running away and the injury occurred in the course of the tussle. Vann, 382 Md. at 289.

There are a number of circuit court and appellate court decisions addressing the issue of an agency determination that abuse has been found. Terrible cases! The finding of abuse follows a man or woman forever and a number of circuit court judges have seen the finding of fact much differently than the agency. This difference of opinion between circuit court judges and the agency fact finder is not something that is going to go away anytime soon.

The statute (FL §4-501(b)(2) stated: "Nothing in this subtitle shall be construed to prohibited reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child." (emphasis in original). Vann, 282 Md. at 298.

There was discussion concerning an allegation of there being two definitions of child abuse in FL §5-701(b) and FL §4-501(b), which the Court analyzed in detail, Vann, 382 Md. at 300-06, and found not applicable to preclude the DSS decision. "In sum, there is only one definition of child abuse in the Family Law Article, absent any statutory or legislative indication that two were intended." 382 Md. at 306-07.
Is “this” a matter of fact?
Or . . . Is “this” a legal determination?
Or . . . Is it both?

General statements of the law concerning the standard of review of a non-state agency determination

- Substantial evidence supported the Baltimore County Board of Appeal’s finding of fact and conclusions of law that the Baltimore County Charter §602 (and Code §26-132) did not grant authority to appeal an administrative order (in the form of a letter) that a proposed development plan constituted a refinement to a previously approved County Review Group plan. *Meadows of Greenspring v. Foxleigh Enterprises*, 133 Md. App. 510, 519, 758 A. 2d 611 (2000). “. . . [T]he question [of] whether a judgment, order or decree is final and appealable is not determined by the name or description which the court below gives it, but is to be decided by the appellate court on a consideration of the essence of what is done thereby.” The decision did not issue or modify any license, permit, or approval. It only informed that the proposed plan is a material change from the previously approved plan and that, in order to be approved, new plans must be submitted for consideration.” 133 Md. App. at 518-19. According to the specific terms of the Baltimore County Charter and Code §26-132, the decision made was not a decision or order of the zoning commissioner or the director of zoning administration and development. No right to appeal that decision to the Board of Appeals therefore exists. 133 Md. at 518.111

This Court reviewed a circuit court determination by the Board of Appeals of Baltimore County. Not governed by MAPA, the Court stated: “Judicial review of an administrative agency’s action is narrow. The circuit court’s standard of review is limited to whether or not it is ‘in accordance with law.’ Art. 25 §5(U). A reviewing court is confined to determining if there is substantial evidence in the record to support the agency’s findings and conclusions, and to determine whether the agency’s decision is premised on an erroneous conclusion of law. As such, a reviewing court is limited to the findings of fact and conclusions of law actually made by the agency. An appellate court must essentially repeat the circuit court’s review of an agency decision.” 133 Md. at 514.

Now: ethics is an area that requires expertise

In Government, what does expertise say about this man’s conduct

Where does the public interest lie?

Don’t you know who I am?

- In *Ethics Commission v. Antonetti*, 365 Md. 428, 780 A. 2d 1154 (2001), the Court held that the Administrator for the Prince George’s County Board of supervisors of Elections violated SG §§ 15-501, 15-506 and 15-607 of the Public Ethics Law through participation in recruiting, hiring, promoting and supervising his family members as employees of the Board, and by failing to file properly completed financial disclosure statements, as required by law, from 1988 through 1994. (authorizing supplemental pay authorizations for family) (financial statement improperly filled out)
  1. “The Public Ethics Law prohibits public officials from participating in matters where either the public official or the public official’s qualifying relatives have an interest in the matter.” See SG §15-501. 365 Md. at 450, 451-52.
  2. The Public Ethics Law . . . prohibits State employees . . . from ‘intentionally using the prestige of office or public position for that public official’s or employee’s private gain or that of another.” 365 Md. at 450. See SG §15-506
  3. Antonetti was required to disclose on his annual financial statement, the place of salaries employment of the individual or a member of his immediate family. See SG §10-507. 365 Md. at 457.

The *Antonetti* Court stated that it had the responsibility to determine whether there was substantial evidence to for the Ethics Commission’s decision to sanction Antonetti for violating the Public Ethics Law. To do that, the Court had to consider “the factual basis for each of Antonetti’s alleged violations of the statute and the application of the statutory language to these instances of misconduct.” 365 Md. at 451. Each statutory section was analyzed and the Court concluded through participation in recruiting, hiring, promoting and supervising his family members as employees of the Board, and by failing to file properly...

111 What does the reader think? Does this case belong in a section talking about the substantial evidence test applicable to facts?
completed financial disclosure statements, as required by law, from 1988 through 1994. (authorizing supplemental pay authorizations for family) (financial statement improperly filled out and not designating employment of family)

The credibility decision subject to the substantial evidence test?
- A correctional guard was suspended without pay, pending charges for removal, and ultimately dismissed from his job on 7/15/93 after being charged with criminal offense of possession of CDS in Gigeous v. ECI, 363 Md. 481, 769 A. 2d 912 (2001). "We determine that ALJ Seaton did not abuse her discretion when she concluded that the officers testified from their independent recollection and that such conclusion was supported by substantial evidence on the record." 363 Md. at 495. Argument by Gigeous was that testimony of police officers should not have been allowed as they testified from expunged records. 363 Md. at 498. The ALJ concluded that testimony given by an Officer was based on his independent recollection and not from expunged records. 363 Md. at 501. A credibility decision was made by the ALJ. 363 Md. at 503. That constituted substantial evidence to support her decision. 363 Md. at 506. 113

What do these statutes say?
Does the Division have a right to look beyond the language of the statutes in applying these facts?
Factual conclusion subject to substantial evidence test
- It was proper for the Consumer Protection Division to look beneath the form of an alleged leaseback transaction, to determine that appellants “engaged in small loan transactions in the form of sales-leaseback transactions” in B & S Marketing v. Consumer Protection Division, 153 Md. App. 130, 162, 835 A. 2d 215 (2003). Rental payments were deemed interest payments and usurious loans were made in violation of Maryland’s Consumer Loan Law. Anyone needing emergency cash was told all they had to do was put up a household appliance as collateral. Alleging an error of law, the appellants contended the Division applied the wrong law and the wrong legal standard in concluding the transactions were loans. It was argued that the UCC, rather than the “pretended purchase” provisions of the Consumer Loan Law should be applied. 153 Md. App. at 152. Testimony as to how consumers viewed the transaction and treated it was part of the record and held to be proper. 153 Md. App. at 152-162.

What do these statutes say?

(7). Review of the Agency Legal Determinations

“In contrast to findings of fact . . . an agency's interpretation of law is not entitled to deference.” When the question before the agency involves interpretation of an ordinance or statute,” appellate review is more expansive and the court is not bound by the agency's interpretation. Thus, 'a reviewing court is under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law.' 115

Generally, a court defers to the interpretation given a statute by the agency charged with administering it. “ . . . [T]he Court of Appeals [has] explained that "the consistent and long-standing construction given a statute by the agency charged with administering it is entitled to great deference, as the agency is likely to have expertise and practical experience with the statute's subject matter." Nevertheless, "an administrative agency's construction of the statute is not entitled to deference . . . when it conflicts with the unambiguous statutory language." Further, "when statutory language is clear and unambiguous, administrative constructions, no matter how well entrenched, are not given weight." An

112 The Court said it did not address important issues regarding the expungement statute. ECI, 363 Md. at 488-89.
113 “It is clear that ALJ Seaton did not abuse her discretion in finding Officer Teare's testimony to be credible or err by determining any facts traceable for testimonial purposes directly to the officer's review of his personal investigative file were merely collateral to the issue at hand and did not form in any meaningful way the foundation of ALJ McCloud's or her decision in this case." ECI, 363 Md. at 506.
114 The COSA opinion detailed the transactions B & S Marketing, 153 Md. App. at 139-144. There was no mention that property could be returned, 153 Md. App. at 143.
agency's erroneous interpretation of its regulations must yield to the plain language of the statute. "No custom, however long and generally it has been followed by officials, can nullify the plain meaning and purpose of a statute."116 "Furthermore, the expertise of the agency in its own field should be respected."117

The general rule as to deference has recently been recited in City Council of Prince George's County v. Billings, 420 Md. 84, 21 A.3d 1065 (2011) where it was not applicable to the issue before the court. The Petitioners have also invoked the doctrine that courts give deference to the Council's interpretation of the County Code. No doubt, we give "considerable weight" to an agency's "interpretation and application" of the statute. See, e.g., Board of Physician Quality Assurance v. Banks, 354 Md. 59, 69, 729 A.2d 376, 381 (1999). We have also stated, however, that "when a statutory provision is entirely clear, with no ambiguity whatsoever, 'administrative constructions, no matter how well entrenched, are not given weight.'" Id. at 69 n. 2, 759 A.2d at 381 n.2 (quoting Macke Co. v. Comptroller, 302 Md. 18, 22-23, 485 A.2d 254, 257 (1984)). On close examination, the Council's belief that it may withdraw its election to review does not derive from an interpretation of a statutory passage, but merely the Council's blanket assertion that it is "free, after its review . . . to withdraw[] [its] election to review[]." This claim defies the statutory procedure and is entitled to no weight.

420 Md. 107-108.

"A challenge as to a regulatory interpretation is, of course, a legal issue."118 The reviewing court may always determine whether an administrative agency made an error of law.119 " . . . [W]here the facts before the administrative agency [are] undisputed, the legal conclusion based on those facts has been treated as an issue of law."120 " . . . [O]rdinarily the court reviewing a final decision of an administrative agency shall determine (1) the legality of the decision and (2) whether there was substantial evidence from the record as a whole to support the decision."121

**Significant Case Decisions**

**What constitutes child abuse?**

**Forseeability of the injury or intent to injure?**

- Taylor v. Harford County DSS, 384 Md. 213, 862 A.2d 1026 (2004) was a case where DSS found Taylor responsible for "indicated" child physical abuse as a result of his kicking a footstool that struck his 12-year-old daughter in the face, injuring her. An ALJ decision upheld DSS as did the circuit court. The ALJ did not consider intent but based the decision under a forseeability analysis from the act of kicking the

---

116 Kerelman, 151 Md. App. at 521.
119 Ethics Commission v. Antonetti, 365 Md. 428, 780 A. 2d 1154 (2001) saw that Court stating: " . . . [R]eviewing courts should give some degree of deference to the legal conclusions of the administrative agency: 'an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Nevertheless, we owe no deference to agency conclusions based upon errors of law.' 365 Md. at 447.
120 Comptroller v. SYL, 375 Md. 78, 107, 825 A. 2d 399 (2003). At least that was so in this case where there was not a situation where factors pointed to one conclusion and other factors pointed to a contrary conclusion. The Court said a reviewing court should accord a degree of deference to the balance struck by the administrative agency as trier of facts. 375 Md. at 105. "These cases concern the liability for Maryland income taxes of two corporations that do no business in Maryland, and own no tangible property in Maryland, but are subsidiaries of parents that do business in Maryland. The dispositive issue is whether there is a sufficient nexus between the State of Maryland and each subsidiary corporation so that the imposition of Maryland income tax does not violate either the Commerce Clause of the United States Constitution, Art. 1, Section 8, cl. 3 , or principles of due process." 375 Md. at 80.

207
footstool. The Court "We hold that where an act by a parent or caregiver is injurious to that person's child, and the injury was unintentional, under Title 5 of the Family Law Article and COMAR 07.02.07.12, the injurious act should not constitute "indicated" child physical abuse unless it can be shown to have been reckless conduct. Accordingly, we vacate and remand to the ALJ for further consideration consistent with this opinion." 384 Md. at 216. Taylor was entitled to a contested case hearing. 384 Md. at 221-22.

The present appeal, as briefed before this Court, is predicated solely upon whether the ALJ, in his determination as to whether appellant was responsible for indicated child physical abuse, applied the correct legal standard in reaching his conclusion that appellant was responsible for the abuse under the applicable statutes and regulations. It is therefore neither a review of the agency's factual determinations nor can it be said to be a review of a "mixed question of law and fact." It is purely a legal question. The facts that led to "L" being injured are undisputed. Therefore, we shall proceed to review the agency's determination de novo.

384 Md. 223.

FL 5-701 defines abuse, and COMAR regulations detail the circumstances under which abuse is indicated, unsubstantiated, or ruled out as regards inclusion of a name in a central registry. 384 Md. at 223-27. Considering actions which constitute "gross negligence," a "reckless" disregard to human life, and case law considering those concepts, the Court stated that the ALJ is to consider all facts and circumstances of the case. 384 Md. at 227-31

Part of the blame may lie with the unfortunate wording of COMAR 07.02.07.12(2)(a)(i) in that most acts, whether or not they have unintended consequences, are intentional. For instance, if someone pushes a door open without realizing someone is just on the other side, and then the door slams that other person in the face, the act of opening the door cannot be said to have been either accidental or unintentional, although the injurious consequences of that act may have been just that. Under the ALJ's use of "foreseeability," if an act occurs that results in injury to a child that injury would be foreseeable because the injury occurred. Another example would be those instances where drivers have run over other persons as they operated vehicles in reverse. The foreseeability of the driver's actions would be very relevant in a negligence tort context even though there was no intent to injure. However, under the ALJ's analysis, if the driver was a parent and the person injured his or her child, the foreseeability standard of negligence would be transmogrified into intent to injure the child and the parent would forever be branded a child abuser. We do not believe that was the intent of the Legislature.

We hold that, under the circumstances here present, the intentional act must be shown to have been either reckless in its nature or deliberately intended to harm the child in order for a finding of "indicated child abuse" to be made.

384 Md. at 232.

... Because the ALJ improperly applied a foreseeability standard to infer intent instead of examining appellant's conduct under the correct "reckless" conduct standard, we shall vacate the ALJ's decision and remand the case to the ALJ for further proceedings consistent with this opinion.

384 Md. at 233.

When the agency interpretation of the law is incorrect

The Court of Appeals concluded that Corporal Steven Kerpelman's appeal to the circuit court through a motion for writ of mandamus was procedurally correct in Kerpelman v. Disability Review, 155 Md. app. 513, 528, 843 A. 2d 877 (2004). The Medical Advisory Board (MAB) of the Prince George's Police Department had not communicated a finding that Kerpelman did not have a qualifying disability by a written opinion as required by the statute, which written opinion generated the right to appeal. "Kerpelman found himself in "the ultimate 'Catch-22.'" He could not advance his application due to the MAB's determination, nor could he appeal that determination. Thus, the two prongs of the test for judicial action through writ of mandamus were met." 155 Md. App. at 529. The agency interpretation that the Plan requires MAB to render an opinion only in cases in which it finds that a qualifying disability exists is in direct conflict with the words of the plan ("[t]he [MAB] shall examine all evidence concerning the case . . . and provide a written opinion to the [DRB]."") 155 Md. App. at 526. The Agency interpretation of the law was incorrect. 155 Md. App. at 527.

A reasonable interpretation of the plain language of . . .
The projected political (money) consequences of the interpretation will have to await another day

- *Dept. Public Safety* v. *Palmer*, 389 Md. 443, 886 A. 2d 554 (2005) is another case addressing the issue of judicial review of an interpretation of law by an agency. Eastern Correctional Management non-uniformed positions claimed that a requirement to use personal leave time to undergo searches and related delays while entering and exiting the Institution was illegal. The Court agreed.¹²² "The Grievants made plain that they do not contest the requirement that they clear security. They seek to punch in before, and out after, they have cleared security so that they will not be charged personal leave time if they do not arrive at their work stations by the start of a shift or if they leave their work stations before the end of a shift. In other words, the issue raised whether the time spent in clearing security is part of the Grievants' work time." 389 Md. at 447-48. Upon a consideration of COMAR regulations as to what constitutes "work time," an examination of what constitutes "work related" time, the Federal Portal to Pay Act (part of the Fair Labor Standards Act. – 29 USC §234), case law in both the Court of Special Appeals and the Court of Appeals, the Court concluded that the agency (i.e. the ALJ decision) was not premised upon an erroneous conclusion of law. 389 Md. at 453. This was a grievance decision in which the ALJ makes and made the final decision. The Department filed for judicial review.

The ALJ decision was a reasonable interpretation of the plain language of COMAR 17.04.11.02B(1)(g) that the activity need only be job-related and the ALJ gave explanations that are reasonable and hardly arbitrary for concluding that the security clearance activity in the instant matter was job-related. 389 Md. At 454.¹²³ "The ALJ's conclusion as to the scope of [the regulation] was based on management's requiring the security checks, which could not be accomplished offsite and which were a prerequisite to commencement and completion of the day's work." 389 Md. at 455. Interesting is the State's argument that if the ALJ decision is required to stand, this reasoning would mean the State would have to compensate employees who work in State office buildings from the moment the employees enter the building and begin to walk to their officer, climb the stairs, or wait for an elevator as these are job related activities. Interesting is the Court's comment that that is an error for another day. 389 Md. at 455-46.

Interpretation of an agency rule is governed by the same principles that govern interpretation of a statute.¹²⁴ There are many, many appellate court decisions dealing with the issue of statutory interpretation in general, and the issue of agency interpretation in particular.¹²⁵

"Determining whether an agency's 'conclusions of law' are correct is always, on judicial review, the court's prerogative." The court ordinarily respects the agency's expertise and "gives weight to its

¹²² The ALJ ruled in favor of the Grievants and the Circuit Court for Somerset County affirmed. *Palmer*, 389 Md. at 444-45.

¹²³ The Court cited *Maryland Aviation* v. *Noland*, 386 Md. 556,571-72, 873 A. 2d 1145 (2005) to the effect: "Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency Thus, an administrative agency's interpretation and application of a statute which the agency administers should ordinarily be given considerable weight by reviewing courts." *Palmer*, 389 Md. at 451-52, 54.


There are many rules of construction that have been enunciated by the appellate courts of Maryland in interpretation of statutes. One is the doctrine of "*ejusdem generis.*" That doctrine was discussed in *Boyle v. Park & Planning*, 385 Md. 142, 867 A. 2d 1050 (2005) where there was an issue of whether the LEOBR was applicable to action against park police officers who had resigned their positions. The Court noted:

"The doctrine of *ejusdem generis* applies when the following conditions exist: (1) the statute contains an enumeration by specific words; (2) the members of the enumeration suggest a class; (3) the class is not exhausted by the enumeration; (4) a general reference supplementing the enumeration, usually following it; and (5) there is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires."

385 Md. at 156.

Statutory interpretation is never easy. Sometimes it is extremely difficult as it was in the case of *Becker v. Anne Arundel County*, 174 Md. App. 114, 920 A. 2d 1118 (2007) involving variances sought as necessary to construct a home on property in Pasadena, Maryland where the statutes and regulations of the Chesapeake Bay Critical Area Program and local zoning and development laws and regulations. Discussing variances and what constitutes an "unwarranted hardship," the Court explained two separate amendments of the Chesapeake Bay statutes to overturn Court of Appeals case law interpretations and to restore the definition of unwarranted hardship to mean that "without a variance, an applicant would be denied reasonable and significant use of the entire parcel or lot for which the variance is requested." 174 Md. App. at 132-33. Painstakingly, Judge James Eyler explained the framework and the effect of Anne Arundel County Code provisions. 174 Md. App. at 133-34.
interpretation of a statute it administers.” . . .[E]ven though an agency’s interpretation of a statute is
often persuasive, ‘the reviewing court must apply the law as it understands it to be.’” “Nevertheless, ‘an
administrative agency’s interpretation and application of the statute which the agency administers should
ordinarily be given considerable weight in reviewing courts.”126 “When an agency makes "conclusions of
law" in a contested case, the court, on judicial review, decides the correctness of the agency's conclusions
and may substitute the court's judgment for that of the agency's.” “This established principle of
administrative law is exemplified in [SG] §10-222(h)(3)(i)-(iv), which permits judicial modification or
reversal of agency action that (i) is unconstitutional; (ii) exceeds the agency's jurisdiction; (iii) results
from unlawful procedure; or (iv) is affected by "any other" error of law.”127 Section 10-222(h)(3)(iv), by
authorizing correction of "any other error of law," implicitly indicates (a) that courts retain authority to
correct all ("any") errors of law and (b) an understanding that agency errors based upon the previous three
provisions are also considered to be legal errors ("any other error of law").128 “Even in the case of an
agency interpreting law, our jurisprudence has shown a level of deference to an agency's interpretation of
law, provided the agency is interpreting its own regulations, or is interpreting the statute it administers.
Nevertheless, erroneous interpretations of law are never binding upon the courts.”129

One principal of statutory construction is that in construing a statute, the legislature is aware of the
when the Legislature said that an individual found guilty of a criminal charge of abuse or neglect is not
entitled to contested case hearing that includes the receipt of a PBJ. 161 Md. App. at 409.

The Court of Appeals has stated six principal tenets of statutory interpretation:

[1] The cardinal rule of construction of a statute is to ascertain and carry out the real intention of the
Legislature. [2] The primary source from which we glean this intention is the language of the
statute itself. [3] In construing a statute, we accord the words their ordinary and natural
signification. [4] If reasonably possible, a statute is to be read so that no word, phrase, clause, or
sentence is rendered surplusage or meaningless. [5] Similarly, wherever possible an interpretation
should be given to statutory language which will not lead to absurd consequences. [6] Moreover,
if the statute is part of a general statutory scheme or system, the sections must be read together to
ascertain the true intention of the Legislature. (Citations omitted).130

126 Christophner v. Montgomery County Department of Public Health, 381 Md. 188, 198, 849 A. 2d 46 (2004). See also:
Maryland Health Resources, 87 Md. app. 150; 589 A. 2d 502 (1991), the Court stated:
Moreover, an agency is best able to discern its intent in promulgating a regulation. Thus, an agency’s interpretation of
the meaning and intent of its own regulation is entitled to deference. . .
87 Md. App. at 160.

See also: Spencer v. Board of Pharmacy, 380 Md. 515, 528, 846 A. 2d 341 (2004) referencing Tomlinson, The Maryland
Administrative Procedure Act, 56 Md. L. Rev. 196, 215 n. 131 (1997) (”Questions of law encompass the first four grounds listed
in the judicial review provision of the APA”).
127 Spencer, 380 Md. at 528 referencing Tomlinson, The Maryland Administrative Procedure Act, 56 Md. L. Rev. 196, 215 n. 131
(1997) (”Questions of law encompass the first four grounds listed in the judicial review provision of the APA”).
128 Spencer, 380 Md. at 528-29.
130 Engineering Management v. Maryland State Highway Adm., 375 Md. 211, 224-25, 825 A. 2d 966 (2003) quoting Mayor and
Correction, 279 Md. 355, 360-61, 369 A.2d 82, 86-87 (1977). The Court made this statement in a case which involved the
interpretation of statutes and regulations. 365 Md. at 224.
Other appellate court statements regarding interpretation of statutes and rules are:

- "Statutes are to be interpreted in light of the goal, aim, or purpose for which they were enacted."
- When called upon to interpret two statutes that involve the same subject matter, have a common purpose, and form part of the same system, a court should read them in pari materia and construe them harmoniously.\(^{131}\)
- "When a word susceptible of more than one meaning is repeated in the same statute or sections of a statute, it is presumed that it is used in the same sense."\(^{132}\)
- "...[W]hen a part of a statutory scheme, the meaning of a particular statute must be sought within the context of that entire scheme; it should not be construed in isolation."
- "Statutory scheme[s] [are not interpreted] so as to render any part of it meaningless or nugatory." The statute should be construed "so as to harmonize all its parts with each other and render them consistent with its general object and scope."
- "Where a statutory provision is ambiguous and the general purpose for which the statute was enacted militates in favor of one among the several possible interpretations, the statute must be given that interpretation which accords with its general purpose."\(^{133}\)
- In statutory construction, the Court may "consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense."\(^{134}\)
- It is a natural presumption that the Legislature "does not intend to use words in vain or to leave a part of its enactment without sense or meaning, but intends that every part of it shall be operative."\(^{135}\)
- The plain meaning of the words rule is not absolute, but there is an elastic approach, which means that when persuasive evidence exists outside the plain text of the statute, the Court will not turn a blind eye to it.\(^{136}\)
- Interpretation of statutory language should be from a 'commonsensical,' rather than a technical perspective.\(^{137}\)
- The effect on judicial interpretation of the fact that the Maryland Legislature may or may not have acted by passing an enactment or an amendment to a statute may or not constitute evidence of legislative intent. It all depends.\(^{138}\)

**Significant Case Decisions**

**Conflicting language in two different statutes – the legislative intent ascertained**

- Sometimes legislation enacted and then amended contains conflicting language that requires statutory interpretation. That is what was the subject of the opinion in *David v. St. Mary's County DSS*, 198 Md. App. 173, 16 A. 3d. 991 (2011) where the court determined that a local DSS can investigate a report of suspected child abuse or neglect when the abuse or neglect is alleged to have happened in Maryland but the

\(^{131}\) *Annapolis Market Place L.L.C. v. Parker*, 369 Md. 689, 711-12, 802 A.2d 1029 (2002) citing cases.


\(^{133}\) *FOP No. 35 v. Mehrling*, 343 Md. 155, 680 A. 2d 1052 (1996). The Court gave as an example the Worker's Compensation Statute which should be interpreted "liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes. Any ambiguity in the law should be resolved in favor of the claimant."


\(^{138}\) For a collection of cases see *Potomac Valley Orthopaedic Associates v. Maryland Board of Physicians*, 417 Md. 622, 640-41, 12 A. 3d. 84 (2011).
child victim lives out of state. This was held to be so despite the provisions of FL § 5-706 which has specific language authorizing an investigation requires an investigation “after receiving a report of suspected abuse or neglect of a child who lives in this State that is alleged to have occurred in this state.” 198 Md. App. at 180. The statutory framework, reporting obligations of incidences of abuse, investigation reports provided for by statute, the 2003 statutory amendments, fiscal and policy notes from the legislative files, and the overall intent of the Legislature for the protection of children and investigation of child abuse dictated the result.139 FL §5-703(b) also applies and pertains “to 'suspected abuse or neglect that is alleged to have occurred in this State,'” without any qualification as to where the victim lives.” 198 Md. App. at 190, 201.

Don’t read any more requirements into the proof the statute requires.

o Statutory interpretation was the focus of attention in MVA v. Loane, 420 Md. 211, 22 A. 22 A. 3d. 833 (2011) with the Court stating: “We hold that the Statute does not require the MVA to prove at the show cause administrative hearing that the officer stopped Respondent on a highway or private property used by the public in general” in support of a proceeding to suspend a license for failure to take a breath test pursuant to Maryland’s implied consent law – DWI arrest. 420 Md. at 231. Citing the statute, noting the absence of any statutory requirement that proof be submitted that the attempt to drive was “on a highway or on any private property,” 420 Md. at 219, citing past case law interpreting the implied consent provision, the Court noted in aid of interpretation that the Statute establishes an administrative process that is “informal and summary in nature.” 420 Md. at 229 “Respondent has not articulated a principled reason for reading into the Statute a location limitation, nor can we fashion one.” 420 Md. at 230.

The statute says what the statute says – nothing more required


“When stopping or detaining an individual an officer has reasonable grounds to believe is driving under the influence, the officer is not required to arrest or formally charge that person prior to offering him or her a chemical breath test or advising that person of his or her rights pursuant to the DR-15 Advice of Rights Form140. Furthermore, an officer does not impermissibly confuse a driver into refusing a chemical breath test by simply failing to administer a previously agreed-upon preliminary breath test.141 Finally, where the sworn statements of an officer do not conflict internally, an ALJ is not required to accept the testimony of the driver over that of the officer.142

Interpretation of agency regulations can sometimes be the subject of appellate disagreement

o The political process probably began to finally decide whether a Maryland State employee is entitled to be paid as “work time” for the entire time spent driving from home directly to an out-of regular work place site, or whether the employee’s normal commute time to the regular workplace is to be deducted from the time spent driving to the out-of-workplace site after the decision in Miller v. Comptroller, 398 Md. 272, 920 A. 2d 467 (2007)143. A majority of 5 against a minority of 2 saw different results in interpreting a

139 See Court commentary at 198 Md. App. 196-97.
140 The Court stated: “Our interpretation is guided by the legislative intent to enhance public safety with prompt removal of drunk drivers from the road.” 418 Md. at 284. The statute does not say that an individual has to be apprehended or arrested prior to the officer requesting the driver submit to a chemical test. 418 Md. at 296.
141 The fact that the right to take the preliminary test was later withdrawn showed no confusion in this case upon which the licensee could rely in attacking the advice of rights given as being misleading. 418 Md. at 298.
142 Following the holding in MVA v. Karwacki, 340 Md. 271, 283, 289, 666 A. 2d 511 (1995), the Court stated that when Thomas did not issue a subpoena for the presence of the police officer at the agency hearing, it left the ALJ with an “all or nothing choice” to either accept the driver’s account or accept the officer’s sworn statement. In this case the ALJ chose the statement. 418 Md. at 299.
143 Miller’s job in the Comptroller’s office required her to conduct audits at field locations going directly to remote locations from her home. Miller, 398 Md. App. at 276.
myriad of regulations addressing the issue. Employee compensation case law discussion of statutes and regulations was reviewed in considerable detail by the Court. The Court majority held that COMAR 17.04.11.02B(1)(j) "does not entitle employees to compensation for all the time spent traveling between home and a work site other than their assigned office and that [SPP §12-203(b)] requires a remedy to be limited to compensation for claims existing within 20 days prior to the initiation of a grievance."

Interpreting the same group of regulations, the minority saw the issue differently. No benefit can be seen to the reader in going into great detail as to the interpretation issue in this case. Suffice it to say that what is or what is not consistent with the statutory scheme creating an agency and the regulations that come forth from the agency can be seen differently by judges of the same court.

When the true intent cannot be ascertained form the statutory language alone
Other indicia of legislative intent
The structure of the statute
How it relates to other laws
Legislative history
General purpose of the statute

- Gwin v. MVA, 385 Md. 440, 869 A. 2d 822 (2005) denied a driver's license to an individual who had been revoked both in Illinois and in Florida, the revocation in Florida being a mandatory lifetime revocation. Trans. §16-103.1 required that MVA not issue a driver's license to an individual revoked in another state. Gwin claimed this conflicted with Trans. §16-703, a provision of the Driver's compact to which Maryland is a signatory, that section allowing application to be made a year after the imposition of a revocation. 385 Md. at 465.

While at first blush, this may have seemed to be no more than application of the stricter statute to control, the Court extensively engaged in rules of statutory construction. Toler v. Motor Vehicle Admin, 373 Md. 214, 817 A. 2d 229 (2003) was quoted: "if the true legislative intent cannot readily be determined from the statutory language alone,' we may look to other indicia of that intent, including the structure of the statute, how it relates to other laws, its legislative history, its general purpose, and the ‘relative rationality and legal effect of various competing constructions.'" 385 Md. at 463. The Court stated "it is illogical to presume that the Legislature intended with its entry as a Compact state to make Maryland a safe harbor for extraterritorial drivers who have incurred harsh penalties in thei home state for motor vehicle violations." 385 Md. at 464. Maryland's law did not undermine the provisions of the Compact. 385 Md. at 465.

Legislative history
Harmonize statutes
General purpose behind the statute
Rationality and legal effect of various competing constructions

- The Court in Kidney v. Dept. of Public Safety, 150 Md. App. 182, 819 A. 2d 1088 (2003) stated that in determining the meaning of a statute, the Court is permitted to consider the statute’s structure, including its title and how the statute relates to other laws. It may consider the context in which a statute appears, including related statutes. The Court is bound to read statutes on the same subject together, and will harmonize them to the extent possible. The General Assembly is presumed to have intended that all its enactments operate together as a consistent and harmonious body of law. A Court may consider legislative history, the general purpose behind the statute, and the relative rationality and legal effect of various competing constructions. The Court may consider the particular problem or problems the
legislature was addressing, and the objectives it sought to obtain. "This enables us to put the statute in controversy in its proper context and thereby avoid unreasonable or illogical results that defy common sense." 150 Md. App. at 194. The McKay Court considered two provisions of a statute in determining that a State employer could not reach a disciplinary agreement with an employee and later rescind that agreement to terminate him on the basis of information subsequently obtained. 150 Md. App. at 198.

The statute needs to be interpreted
Not everybody sees the same result

Sometimes statutory interpretation is not very simple as demonstrated by Toler v. MVA, 373 Md. 214, 817 A. 2d 229 (2003) where the majority of 4 saw things different from a minority of 3. An interpretation of transportation statutes resulted in a determination that Toler was entitled to accumulate a minimum of 16 points before his driver's license could be suspended.146 373 Md. at 216. "With this background and viewing the relevant parts of the statute as a whole, we hold that § 16-405(b) is not limited to professional drivers for whom driving constitutes their employment but includes as well those licensees who must drive in order to perform other significant duties of their employment. As MVA does not contest that Toler falls within that category, we shall reverse the judgment of the Circuit Court and remand with directions that it vacate the order of suspension entered by MVA." 373 Md. at 228. This case emphasizes the sometimes seen difficulty in interpreting statutes found in Maryland's motor vehicle laws which have been enacted and reenacted over many years.

The general rules of statutory construction
To fulfill the objectives of the legislature
What problems was the legislature addressing
Unreasonable * illogical * common sense


The principles of statutory construction are not novel. "Every quest to discover and give effect to the objectives of the legislature begins with the text of the statute." If the legislature's intentions are evident from the text of the statute, our inquiry normally will cease and the plain meaning of the statute will govern. We bear in mind, however, that the plain-meaning rule is elastic, rather than cast in stone. If persuasive evidence exists outside the plain text of the statute, we do not turn a blind eye to it. We often look to the legislative history, an agency's interpretation of the statute, and other sources for a more complete understanding of what the General Assembly intended when it enacted particular legislation. In so doing, "we may also consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain." This enables us to put the statute in controversy in its proper context and thereby avoid unreasonable or illogical results that defy common sense.

Declaratory judgment action
A surgical examination of the statute

Declaratory Judgment may sometimes be the vehicle of choice when an agency denies rights to which one is entitled. In PSC v. Wilson, 389 Md. 27, 882 A. 2d 849 (2005) a request for Declaratory Judgment was filed when Wilson was terminated from her employment with the PSC. She had filed an administrative appeal contesting her termination pursuant to SPP §11-113. The Commission Chairman concluded that she was an at-will employee fired "for cause" and therefore not entitled to a statutory pre-termination hearing. Thereafter, Wilson filed a 10 count complaint seeking declaratory and injunctive relief including reinstatement as an employee. 389 Md. at 37. Wilson claimed her termination was illegal because it was by Chairman Schisler alone, without the approval, acquiescence, or delegation of authority by at least a

146 "Maryland Code, §16-401 of the Transportation Article, requires the Motor Vehicle Administration (MVA) to maintain a point system for the suspension and revocation of drivers' licenses. Petitioner, Christopher Lee Toler, accumulated eight points within a two-year period. After a hearing, an administrative law judge for MVA suspended his license for 30 days but authorized the issuance of a restricted license that allowed him to drive for work purposes during the period of suspension. Toler contends that the MVA and, on judicial review, the Circuit Court for Prince George's County, misread the law and that he is entitled to accumulate a minimum of 16 points before his license can be suspended. He is correct." Toler, 373 Md. at 216.
majority of the full Commission of 5. Statutory interpretation principles were applied and this required an elaborate and extensive examination of the statutory scheme found the State Personnel and Pensions Article. 389 Md. at 47-52, 53-57. The Court concluded that the Commission as a whole was the "appointing authority" and that Chairman Schisler could not, as an individual, fire Wilson. This provision, Wilson argues, indicates that it is the five member Commission, rather than the Chairman alone, that is the "individual or . . . unit of government that has the power to make appointments and terminate employment." § 1-101(b). We agree. Language appears throughout the statute authorizing the Commission to "hire" or "appoint" all types of employees of the PSC. In contrast, there is no mention in this statute, nor any other statute we could find, of language that outlines the Chairman's authority, independent of the Commission's, to "hire" or "appoint" employees of the PSC. Although PUC § 2-108(d) does not discuss specifically the authority of the Commission to terminate employees, PUC § 2-108(d) states that "all personnel of the Commission are subject to the provisions of the State Personnel and Pensions Article." That Article governs the termination of PSC employees, specifically those employees in the executive and management services, and those who are special appointments, all of which "serve[] at the pleasure of the employee's appointing authority" and "may be terminated from employment for any reason, solely in the discretion of the appointing authority." § 11-305. Because PUC § 2-108(d) constructs a statutory scheme outlining both the Commission's explicit authority to hire and implicit authority to terminate employees of the PSC, we conclude that the Commission as a whole is the "appointing authority."

389 Md. at 52.

**Due process is always there**

**Statutory construction of the notice requirements**

- The County Commissioners of St. Mary's County virtually conceded their notice of appeal to the Board of Appeals was deficient Board of County Comm. V. Southern Resources, 154 Md. App. 10, 837 A. 2d 1059 (2003). "An administrative proceeding is subject to the requirements of due process. This includes an adequate formulation and notice of the issues in the case." 154 Md. App. at 28. Based on all information presented, the Board of Appeals proceeded de novo and everyone understood that safety in the development of land was the contested issue being reviewed. 154 Md. App. at 30. The Court reversed determining that it could not be 100% certain that real property to be developed was safe from explosives and thus the property was not to be developed. "The 100% certainty standard was arbitrary because it is impossible to demonstrated, based on a 100% certainty requirement, that any parcel of land is completely safe. Therefore, by applying an incorrect standard, the Board's decision was arbitrary and capricious." 154 Md. App. at 33. The Board's determination constituted an error of law and the agency decision is owed no deference. A remand was ordered. 154 Md. App., at 34.

**Just what does this "or" mean**

**Legislative history**

What does a change in the language of the statute mean? What are the consequences of interpreting it this way? How about this way? Well, what about that way? A presumption that the Legislature does not intend to use words in vain

---

147 The Wilson Court discussed some of the history of the PSC. 389 Md. at 46-47.
148 "Title 11, subtitle 3 of the State Personnel and Pensions article . . . covers all aspects of termination and separation of employment for all non-temporary employees in the State Personnel Management System." SPPP §11-305 sets forth the termination procedures and protections that apply. "The statute states clearly that the termination of a management service employee may be effectuated only by the 'appointing authority' of an agency." Wilson, 389 Md. at 47-48.
149 "The correct standard is whether th e evidence supports a finding of unreasonable risk and, if so, whether it could be ameliorated." Southern Resources, 154 Md. App. at 33.
150 A remand was in order in this case. "Nevertheless, when and administrative agency renders a decision based on incorrect legal standards, but there exists some evidence, 'however minimal, that could be considered appropriately under the correct standard, the case should be remanded so the agency can reconsider the evidence using the correct standard." Southern Resources, 154 Md. App. at 34.
In Division of Labor v. Triangle, 366 Md. 407, 784 A. 2d 534 (2001), restitution was ordered against a contractor to 3 employees for a failure to pay wages in accord with Maryland’s Prevailing Wage Act.151 Under the statute, if a contractor pays its employees less than the prevailing wage, then the contractor or subcontractor is liable for restitution. At issue was whether the Legislature intended, by use of the disjunctive “or” in the statute to shield a contractor from liability for restitution to its subcontractor’s employees? 366 Md. at 421. Statutory interpretation included a look at legislative history (a 1988 report), and recognition that the law is that codification is presumed to be for the purpose of clarity rather than changing the meaning of a statute. 366 Md. at 422-23. “...[E]ven a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so radical and material that the intention of the Legislature to modify the law appears un mistakably from the language of the Code.” Id.152 Clearly the Legislature intended that the failure of a subcontractor to conform to the law meant liability is on the subcontractor, not the contractor.” 366 Md. at 425. In statutory construction, the Court may “consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.” 366 Md. at 425. It is a natural presumption that the Legislature “does not intend to use words in vain or to leave a part of its enactment without sense or meaning, but intends that every part of it shall be operative.” 366 Md. at 425-26.

This statute says what it means and means what it says

The Court in KcKay v. Dept. of Public Safety, 150 Md. App. 182, 819 A. 2d 1088 (2003) reversed the decision of the ALJ and circuit court on a matter of law interpreting a statute. In a matter of statutory interpretation, the Court stated that SPP §11-108(a)(2) allows an appointing authority and an employee to agree to the “imposition of a lesser disciplinary action as a final and binding action, not subject to further review.” 150 Md. App. at 195. Allowance of that bargaining mechanism meant the bargain made in this case disciplining a corrections employee could not be rescinded despite the fact the Warden stated he came upon other evidence following the time the bargain was made. 155 Md. App. at 198.

The standard of proof applicable to an administrative proceeding

Determining the standard of proof applicable to an administrative proceeding is a matter of law. In a proceeding under LEORB, the standard is by a preponderance of the evidence. Coleman v. Anne Arundel Police, 369 Md. 108, 122, 797 A. 2d 770 (2002).

A certificate of need

It was proper for the Maryland Health Resources Planning commission to summarily deny a certificate of need to establish and operate open-heart surgery units because approval would be inconsistent with the existing State Health Plan. Adventist Healthcare v. Suburban Hospital, 350 Md. 104, 711 A. 2d 158 (1998). A certificate of need is required before a person may develop, operate, expand, change, or invest capital in health care facilities or services in Maryland. 350 Md. at 107. COMAR §10.24.01.10C(1) permitted Staff to move for summary decision to deny a docketed certificate of need application “if the proposed project is inconsistent with one or more standards of the State health Plan that make the project unapprovable.” All decisions of the commission on certificate of need applications “shall be consistent with the State health plan and the standards for review established by the Commission.” 350 Md. at 121. The Court commented that the case presented issues that underlie other issues and did not “fall nearly and exclusively into either the area of fact-finding or the area of law determination.” What the Commission did in making its decision was to determine and apply principles of procedural and substantive law, “but mostly it exercised its expertise and judgment in applying the law to the facts.” Id.

What the applicants wanted to do was to challenge the validity and applicability of the State plan. The plan is required to be updated every five years. The certificate of need process is a quasi judicial process and making application for a certificate of need is not the appropriate way to correct, amend, or update the

151 The Act is codified at SPP §17-201, et. seq. Some history of the recodification of the Act is set forth at Triangle, 366 Md. at 418-26.

152 The Court cited Hoffman v. Key Fed. Sav. & Loan Ass’n, 286 Md. 28, 37, 416 A. 2d 1265 (1979) and other cases. Triangle, 366 Md. at 422-23. Case law discussing this principle was discussed. 366 Md. at 423-24.

153 The Court detailed the Maryland process enacted in response to the National Health Planning and Development Act of 1974 and the implementation of a comprehensive State Health Plan for Maryland. Suburban Hospital, 350 Md. at 105-120.
State Health Plan. 350 Md. at 123-24. Other remedies were available because HG §19-114(c) provided that annually or upon petition the Commission shall review the State Plan. Also a Declaratory Judgment Action could be filed pursuant to Cts. §3-406.

The extent to which the court goes to ascertain statutory intent
The old “it means what it says and it says what it means

- Denied zoning classification of property, the Petitioner in Annapolis Market Place L.L.C. v. Parker, 369 Md. 689, 715, 802 A.2d 1029, 1044 (2002) found no relief in the Court of Appeals. First of all the case is a good example of the extent courts have to go to in order to ascertain statutory intent. Analysis here was extensive with the Court holding that an Anne Arundel Code requirement that Petitioner make “an affirmative finding” regarding the adequacy of facilities and schools meant the evidence was not sufficient for the Board of Appeals to have granted the zoning classification. General evidence was not sufficient to satisfy the burden on the Petitioner. The case is lengthy. Its holding is that when a statute requires that re-zonings not be granted except on the basis of an “affirmative finding that . . . „transportation facilities, water and sewage systems, storm drainage system, schools, and fire suppression facilities [are] adequate to serve the uses allowed by the new zoning classification. . . „” 369 Md. at 693, 720-23, means what it says and says what it means.

What does the Maryland law say?
What does the federal law say?

- Dep’t of Health v. Campbell, 364 Md. 108, 771 A. 2d 1051 (2001) saw the Court interpreting law and concluding that guardianship commissions and attorneys’ fees of an attorney appointed guardian of the property of a mentally incompetent individual may not be paid from available income under the Medicaid Assistance Program as these payments do not qualify as a personal needs allowance. 364 Md. at 111-12. The Court reviewed the law pertaining to the Maryland Medical Assistance Program. 364 Md. at 113-117, 119-22. The review by the Court was from a decision by the Department of Health and Mental Hygiene (SG §10-222). The issue was whether the administrative agency committed an error of law or whether its decision was supported by substantial evidence, or is “arbitrary or capricious.” 364 Md. at 118. The Court agreed with the ALJ that “the personal needs that are contemplated by the statutory personal needs allowance are incidental items used for clothing or for grooming one’s body” and did not include legal fees or the commissions of a guardian. 364 Md. at 122.

Surgically look at what the legislature had to say

- In MVA v. Jones, 380 Md. 164, 844 A. 2d 388 (2004) a driver contested a suspension for failure to take a breadth test. Final decision making authority had been delegated by MVA to an ALJ. “The Statement of Probable Cause indicated that respondent’s refusal of the test occurred shortly after he was placed in an officer’s patrol car, but it did not indicate the exact time of the refusal.” 380 Md. at 169. The Respondent did not testify or offer any evidence during the hearing. He argued that he had not been properly advised and that two hours had passed before he was advised. 380 Md. at 169-70. The Court examined the procedure set forth in Trans. §16-205.1. Statutory construction principles were considered. The Legislature specifically set forth the six issues to be considered at a suspension hearing, and one of those issues was not whether the officer requested the test within two hours of the suspect’s apprehension. 380 Md. at 178. The Respondent should have generated this issue.

154 The Parker Court stated:

. . . In this case, it appears that the Board simply adopted, as positive fact, the negative declaration of a County employee, Mr. Kevin Dooley, that “there were no issues related to the adequacy of public facilities except for transportation systems.” Therefore, although the Board found “persuasive” the testimony of Petitioner's expert engineer that “the water, sewerage and storm drainage systems" would "be adequate to serve the uses permitted within the C3 zone," the Board erred in rendering no affirmative findings regarding the question (or in failing to explain the irrelevancy of such an inquiry on the facts before it) whether adequate off-site water, sewerage, and storm drainage systems were either in existence or programmed for construction in the County's capital improvements plan. Parker, 369 Md. at 318-19.

155 This decision reversed a circuit court determination that the Medicaid fees could be used to pay commissions and attorneys fees to the guardian. Campbell, 364 Md. at 122, 125.
Two statutes pertaining to the same situation

Statutory construction is sometimes required when statutes are alleged to be conflicting. A good brief summary of construction is set forth in Dixon v. Dep't Public Safety, 175 Md. App. 384, 927 A. 2d 445 (2007):

We conclude that the exclusive remedy provision of C.S. § 10-308 applies here. Thus, Dixon [a prison inmate filing a claim for negligence when he was severely injured while on a work detail] was required to file a claim with the Sundry Board, rather than the IGO. If "two statutes, one general and one specific, are found to conflict, the specific statute will be regarded as an exception to the general statute." Anderson, 395 Md. at 194 (citation omitted). As the Court explained in State v. Ghajari, 346 Md. 101, 115, 695 A.2d 143 (1997), "when two statutes appear to apply to the same situation, the Court will attempt to give effect to both statutes to the extent that they are reconcilable." To the extent of an irreconcilable conflict, "the specific statute is controlling..." Id. at 116. See also Anderson, 395 Md. at 183, 194; Mayor of Oakland v. Mayor of Mountain Lake Park, 392 Md. 301, 316-17, 896 A.2d 1036 (2006). But, even assuming that appellant's claim related to a "condition of confinement," the result is the same -- Dixon failed to exhaust administrative remedies.

175 Md. App. at 421-22.

(8). Was the agency decision arbitrary and capricious?

Separate and apart from the provisions of the MAPA and whether one is entitled to rights under a "contested case," is the law which states "because the circuit court nonetheless retains the power to review agency decisions to prevent illegal, unreasonable, arbitrary or capricious administrative action and [an appellate court has] authority on direct appeal to review the circuit court’s exercise of that power."156

The Court of Appeals has stated that "there are circumstances when an agency acts neither as a finder of fact nor as an interpreter of law but rather in a "discretionary" capacity."157 "...[C]ourts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusions or factual findings. Therefore, the discretionary functions of the agency must be reviewed under a standard more deferential than either the de novo review afforded an agency's legal conclusions or the substantial evidence review afforded an agency's factual findings. In this regard, the standard set forth in [SG] §10-222(h)(3)(vi), review of 'arbitrary or capricious' agency actions, provides guidance for the courts as they seek to apply the correct standard of review to discretionary functions of the agency."158

In 2004, when the Court of Appeals earmarked the "arbitrary or capricious" standard as being different from a review of a finding of fact or a conclusion of law, it referred to a 1993 case where a Board charged to review the conduct of a police officer decided to reopen the hearing to receive additional evidence. This was held to be within the discretion of the Board.159 The same court stated

156 Hurl v. Board of Education of Howard County, 107 Md. App. 286, 305, 667 A. 2d 970 (1995). As issue in this case was whether a teacher who was involuntarily transferred had a right to a contested case hearing under the MAPA. 107 Md. App. at 304.
158 Spencer, 380 Md. at 529-30.
“Although a few of our cases appear to confl ate substantial evidence review with arbitrary or capricious review, it does not follow that they are one and the same.”

In a case where the Court of Special Appeals remanded a case disciplining a pharmacist to the Board of Pharmacy with directions to that Board to send the case to OAH to conduct a hearing, the Court of Appeals said that was error. While what the Board of Pharmacy did in conducting the hearing was improper (due process violation of fairness in the conduct of the hearing), that did not mean that a court has the right to say the Board, on remand, will not act properly. “The proper course, in view of the Board’s discretion to refer, was to remand the case to the Board with instructions to cure the defects the reviewing court found at the original hearing, but without a mandate requiring referral of the case to the OAH.”

“. . . [I]n order to determine whether the board’s decision was arbitrary and capricious, the reviewing court must have an understanding of the findings of fact on all material issues.” The arbitrary or capricious standard of review is most deferential to an agency. When . . “an agency exercises its discretion in an arbitrary and capricious manner,” a court will intervene and reverse the agency action. So long as the agency’s exercise of discretion does not violate regulations, statutes, common law principles, due process and other constitutional requirements, it is ordinarily not reviewable by the courts.

**Significant Case Decisions:**

**A sanction cannot be imposed that is not authorized by statute.**

The statute creating any administrative agency is an envelope within which the agency is able legally to act, including the right or not of the agency, to pass regulations in furtherance of its purpose. That was the holding in *Thanner Enterprises v. Baltimore County, Maryland*, 414 Md. 265, 995 A. 2d 257 (2010). The Baltimore County Liquor Board had no authority to prohibit Thanner “from playing outdoor music as a sanction for violating [statutes and rules pertaining to disturbance of the neighborhood through the playing of loud noise]” . . because although the Board had the authority

“Them lawfulness of the Board’s prohibition of outside music at Appellant’s establishment turns on whether the General Assembly has granted the Board the authority to impose such a sanction.” 414 Md. at 273. Statutory interpretation of the Board’s authority under Article 2B was the focus. “An agency’s authority extends only as far as the General Assembly prescribes.” 414 Md. at 276. Admittedly, the liquor board had authority to establish rules and regulations governing the “playing of music and the use of sound-making devices” pursuant to Article 2B §9-201.414 Md. at 277-278. However: “An agency’s authority to promulgate regulations restricting certain conduct does not necessarily grant that agency the authority to

---


We do not encounter, or decide, this issue of whether the arbitrary and capricious standard in § 10-222(h)(3)(vi) will govern every type of agency action not encompassed by §10-222(h)(3)(i)-(v). It is notable, however, that in contrast to the first five grounds for judicial review in §10-222(h)(3)(i)-(v), §10-222(h)(3)(vi) does not delineate the type of agency decision to which it applies, cf. §10-222(h)(3)(i)-(iv) (implicitly and necessarily involving legal determinations by the agency); §10-222(h)(3)(vi) explicitly applying to evidentiary, factual findings), and could conceivably be a "catch-all" standard of review for any other agency action. And even in the absence of an applicable statutory scheme providing for judicial review, we have held an implied limitation upon an administrative agency's authority is that its decisions "be not arbitrary or capricious." see also our line of cases explaining mandamus actions as they apply to ministerial or non-discretionary functions of administrative agencies, discussed in *Criminal Inj. Comp. Bd. v. Gould*, 273 Md. 486, 500-504, 331 A.2d 55, 65-66 (1975).

380 Md. at 550, n.4. (citations omitted)


citing *Mehrling* 371 Md. at 62-63.

impose any conceivable sanction for violations of those regulations.164 414 Md. at 278. "When considering the implied powers of local liquor boards, this Court has consistently held, based on a survey of the Article 2B statutory scheme, that the General Assembly intended to grant the boards specific delegated powers, rather than broad delegated authority." 414 Md. at 279. Article 2B §16-507(e) "sets forth the sanctions that the Board may impose when a licensee violates [its] regulations" That statute lists three sanctions that may be imposed - imposition of fine, suspension or revocation of license). 414 Md. at 277, 279.

The agency decision is presumed correct

As to a discretionary sanction, the agency need not justify the sanction so long as it is within sanctions allowed by the statute to be imposed

- Termination of employment was the issue in Aviation Administration v. Noland, 386 Md. 556, 873 A. 2d 1145 (2005). Maryland State Retirement Agency v. Delambo, 109 Md. app. 683, 675 A. 2d 1018 (1996) was overruled. Noland's employment was terminated based upon his striking a patient twice and failing to report the incident. An exhaustive review of the facts and applicable rule was made by the Court. The circuit court reversed the agency decision determining that the agency did not give sufficient weight to the mitigating factors that Noland "was acting in self defense and the defense of others," which are "recognized defenses in Maryland which may excuse even criminal offenses." The circuit court found the agency decision arbitrary. Noland, 386 Md. at 568. The Court reversed the circuit court determination.

At issue was whether there was substantial evidence to support the agency decision.165 Spencer v. State Board of Pharmacy, 380 Md. 515, 529-31, 846 A. 2d 341 (2004) stated that judicial review of a lawful and authorized administrative disciplinary decision or sanction, ordinarily within the discretion of the administrative agency, is more limited than judicial review of either factual findings or legal conclusions . . . Noland, 386 Md. at 575. Delambo had imposed upon the Executive Branch administrative agencies numerous non-statutory requirements in employee disciplinary cases. These enumerated factors showing that alternate sanctions were considered, and explaining why the punishment fits the misconduct have no support in MAPA. Noland, 386 Md. at 579. "In sum, when the discretionary sanction imposed upon an employee by an adjudicatory administrative agency is lawful and authorized, the agency need not justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon the particular discipline." Reviewing courts are not allowed to overturn a lawful and authorized sanction on the basis that the sanction is disproportionate. The agency decision is presumed correct. Noland, 386 Md. at 581.

Failure to interview the police officer before charging

- It was not arbitrary and capricious for a police disciplinary board not to interview the alleged police officer offender in proceedings governed by the LEOBR as "there is no requirement in the statute for a mandatory interview of the officer by independent investigators." Coleman v. Anne Arundel County Police Dept., 136 Md. App. 419, 430-31, 766 A. 2d 169 (2001).

They said this was an emergency action but it took them forever to bring the charges

- Dr. Mullan’s license to practice medicine was summarily suspended for practicing medicine under the influence of alcohol in Board of Physician Quality Assurance v. Mullan, 381 Md. 157, 848 A. 2d 642 (2004). There was a delay in the investigation of the danger prior to a summary suspension order being entered. Discussing case law concerning the passage of time from complaint to summary suspension procedures, the Court stated that the delay is to be considered as evidence and could be relevant “in determining whether the agency acted arbitrarily or capriciously when it ordered the summary suspension in the first place.” "The length of the investigatory period leading up to summary suspension does not play a role in the consideration of whether there is substantial evidence to support the agency’s factual finding that the situation ‘imperatively requires emergency action.’” 385 Md. at 171.

164 (“[R]egardless of any rule making authority that the Liquor Board may enjoy, it may not impose a sanction that exceeds the confines of its expressly or impliedly delegated powers.”) 414 Md. at 276 quoting Board of Liquor License Commissioners v. Hollywood Productions, Inc., 344 Md. 2, 10, 684 A.2d 837 (1996).
Nothing is 100% certainty

- Board of County Comm. V. Southern Resources, 154 Md. App. 10, 837 A. 2d 1059 (2003) reversed determining that it could not be 100% certain that real property to be developed was safe from explosives and thus the property was not to be developed. “The 100% certainty standard was arbitrary because it is impossible to demonstrated, based on a 100% certainty requirement, that any parcel of land is completely safe. Therefore, by applying an incorrect standard, the Board’s decision was arbitrary and capricious.” 154 Md. App. at 33.166 The Board’s determination constituted an error of law and the agency decision is owed no deference. A remand was ordered. 154 Md. App. at 34.167

Discretion means there is no disproportional test

- In MTA v. King, 369 Md. 274, 799 A. 2d 1246 (2002), the Court noted that the COSA stated that termination of King’s employment “was disproportionate to the offense” and that King’s misconduct was not “so serious as to warrant dismissal.” 369 Md. at 290. The Court discussed judicial authority under SG 10-222(h). “The grounds set forth in § 10-222(h) for reversing or modifying an adjudicatory administrative decision do not include disproportionality or abuse of discretion. As long as an administrative sanction or decision does not exceed the agency's authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless, under the facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be 'arbitrary or capricious.' In the case at bar, the Court of Special Appeals rejected King's argument that the administrative decision was arbitrary or capricious, and King did not seek certiorari review of that holding. In addition, even assuming arguendo that termination was disproportionate to King's misconduct, it was clearly not so disproportionate as to be "arbitrary or capricious" within the meaning of § 10-222(h)[3](vi). 369 Md. at 291.

He should have the license because he is African-American

Where is this in the criteria?

That is arbitrary and capricious

- Jordan v. Hebbville, 369 Md. 439, 455-58, 800 A. 2d 768 (2002) involved the granting of a towing license in Baltimore County. Baltimore County should not have granted the permit based on sole criterion that applicant was African-American as this was not a criteria to be considered in determining the need for additional towing service. It was a longstanding practice to use defined criteria. There was a proper basic needs standard in operation. Granting the license meant that Mr. Freeman [The Chief of the Department of Permits and Development Management], deviated from regulations. He could not determine “need” other than based on established criteria. He could not define “need” in another contest.

. . . The Board of Appeals was legally correct to conclude that the DPM, using race alone as the sole needed criterion, should not have granted appellant’s towing license application and that its action was arbitrary and capricious. . . .

369 Md. at 461.

Mr. Freeman knew of the past, consistent interpretation of need and, albeit perhaps well-intentioned, improperly departed from the past consistent practice of the DPM to apply this single, newly-created standard when faced with the new license application. Such a departure from past consistent interpretation and practice is a matter better addressed either by a legislative entity, or by the adoption of a regulation.

369 Md. at 458.

Your refusal to reopen the record was arbitrary and capricious!

- In B & S Marketing v. Consumer Protection Division, 153 Md. App. 130, 162, 835 A. 2d 215 (2003), appellants argued unsuccessively that the Division abused its discretion in denying their motion to reopen.

---

166 “The correct standard is whether the evidence supports a finding of unreasonable risk and, if so, whether it could be ameliorated.” Southern Resources, 154 Md. App. at 33.

167 A remand was in order in this case. “Nevertheless, when and administrative agency renders a decision based on incorrect legal standards, but there exists some evidence, ‘however minimal, that could be considered appropriately under the correct standard, the case should be remanded so the agency can reconsider the evidence using the correct standard.” Southern Resources, 154 Md. App. at 34.
the record to show that property returns did not increase significantly after they included an option to return property in their options sheet. 153 Md. App. at 165. The Division had alleged that a sales-leaseback transaction was actually a usurious loan and emphasis had been placed by the Division on the fact that few returns of merchandise were made. The Division’s refusal to reopen the record “was neither arbitrary nor capricious,” as the Division’s decision was not premised solely on the small number of returns. All circumstances were considered. 153 Md. App. at 166.

**That discipline imposed was/was not disproportionate to the misconduct**

- The court in *Solomon v. Board of Medicine*, 155 Md. App. 687, 705-06, 845 A. 2d 47 (2004) dismissed the argument that the Board of Physicians exceeded its authority in revoking a license. Assuming *arguendo* that the revocation was disproportionate to her misconduct, it was not so disproportionate as to be arbitrary and capricious. Dr. Solomon’s license was revoked because she failed to comply with a lawful investigation. 155 Md. App. at 708-09.

**Great discretion as to the sanction imposed**

- It was the State’s argument in *Dep’t Public Safety v. Neal*, 160 Md. App. 496, 864 A. 2d 287 (2004), *cert denied*, 386 Md. 181 (2005) that an ALJ acted “arbitrarily and capriciously by imposing a one-month suspension without pay, instead of imposing the greater sanction of termination.” The ALJ decision reversed the decision made by the Warden to terminate employment. “If there is some evidence pointing in each direction, the issue is, by definition, ‘fairly debatable,’ and the decision of the [ALJ], whichever way it goes, may not be reversed on judicial review as having been arbitrary or capricious.” 160 Md. Apo. At 518.

- Dr. Cornfeld complained that a sanction (suspension and long term probation) imposed upon him was disproportionate to his alleged offense (patient not harmed and asked him to deliver her next child for conduct in leaving the operating room and misrepresenting his instructions to hospital personnel) so as to constitute an abuse of discretion and arbitrary and capricious agency action considering the facts of the case in *Cornfeld v. Board of Physicians*, 174 Md. App. 456, 921 A. 2d 893 (2007). Agencies have broad latitude in fashioning sanctions within the legislatively designed limits and in this case the Court said it did not see the sanction imposed as “extreme and egregious” as to warrant judicial intervention. 174 Md. App. at 487.

**Disposition.**

When the Court of Special Appeals remanded a case “directing [the Board of Pharmacy] to delegate the authority to conduct the contested case hearing and to issue the final administrative decision in this case to the OAH,” that was error.168 SG 1-0222(h) sets forth the scope of judicial review of the final administrative agency decisions in contested cases. The Court of Appeals stated: “The proper course, in view of the Board’s discretion to refer, was to remand the case to the Board with instructions to cure the defects the reviewing court found at the original hearing, but without a mandate requiring referral of the case to the OAH.”

A reviewing court may remand the case for further proceedings, affirm the final decision, or reverse or modify an administrative agency’s decision if "any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision" is, *inter alia*, erroneous, "unsupported by competent, material, and substantial evidence in light of the entire record as submitted," or "arbitrary or capricious" by the provisions of SG §10-222(h).169

---

169 *Spencer*, 380 Md. at 534.
(10). Expertise of the Agency.
What expertise does a particular agency have? To what extent is a court to defer to that agency expertise in interpretation of statutes and regulations? "The expertise of the agency in its own field should be respected." Therefore, "an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts." When reviewing the ALJ's legal conclusions, however, "the court must determine whether the agency interpreted and applied the correct principles of law governing the case and no deference is given to a decision based solely on an error of law." 171

Significant Case Decisions

A business qualifying as commercial agriculture

- There was error when the Court of Special Appeals did not properly defer to the presumed expertise of the Board of Appeals of Baltimore County in interpreting the Baltimore County Zoning regulations in Marzullo v. Kahl, 366 Md. 158, 783 A. 2d 169 (2002). As issue was whether Kahl's business in raising snakes qualified as commercial agriculture under the definition of farm in a R.C. 4 zone. The Board of Appeals conclusion that Kahl "was not using the land for the raising of animals" had been overturned by the intermediate appellate court. 366 Md. at 174. Application of statutory construction principals, 172 lead to the conclusion "there is substantial evidence in the record to support the Board of Appeals' decision to find that the breeding, raising, and selling of snakes is not a permissible use in an R.C. 4 zone." 173 Because proper deference was not given to the decision of the Board of Appeals, the decision was reversed. 174

Police board expertise in determining what conduct undermines the Department's interest in good order

- Substantial evidence was found in Travers v. Baltimore Police Department, 115 Md. App. 395, 693 A. 2d 378 (1997) in terminating a police officer from employment for insubordination or disrespect to an officer due to direct testimony from superiors that he "showed absolutely no cooperation whatsoever," his attitude was "very antagonistic . . . no professionalism whatsoever," and that he was "abrupt" and "verbally uncooperative" during the investigation, despite the fact that Lieutenant Henderson was dressed in full uniform." The Court said: "Mindful of the board's expertise in determining what conduct undermines the Department's interest in 'good order, efficiency, or discipline' we shall not disturb the board's conclusions concerning Charge 1 and Charge 4, Specification 1 (insubordination toward Lieutenant Henderson.)" 115 Md. App. at 43.

(11). Agency Must State Basis of Decision


172 To ascertain the intent of the legislative body, the Court recited the rules of statutory interpretation, the actions and discussions of the Baltimore county Planning Board as legislative history, the testimony of experts in land zoning. Solomon, 155 Md. App. at 175-189.

173 Kahl, 366 Md. at 189. Although Judge Cathell applied the cardinal rule of statutory interpretation, he threw in a bit of home spun Worcester County logic to reach the same result, a concept to which many of us can relate:

... A snake is no more the equivalent of chickens, pigs, cows, goats, and sheep, than are lions, tigers, and elephants. In arriving at this assumption, we do not rely on treatises, scientific documentation, or published works; we rely on common sense. A snake, however loveable it may be to some, is not a farm animal unless legislatively declared to be such. A boa constrictor can be an animal on a farm, but that not make it a "farm animal," any more than a fox on the way to raiding the hen house is a "farm animal."

366 Md. at 191.

Judge Cathell: Lovelable? A snake?

174 Kahl, 366 Md. at 191.
In order for judicial review to occur, an agency must be fairly specific as to its findings, and the reason for the decision made. Meaningful findings are required to facilitate judicial review. It is a necessity that "administrative agencies resolve all significant conflicts in the evidence and then [chronicle, in the record, full, complete and detailed findings of fact and conclusions of law]." "[F]indings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions." This is compelled by the nature of judicial review of an administrative agency's final decision. . . 

The reviewing court must know how and why the agency reached its decision. "It must know what it is reviewing." "Without findings of fact on all material issues, and without a clear statement of the rationale behind the [final decision maker's] action, a reviewing court cannot properly perform its function." "At a minimum, one must be able to discern from the record the facts found, the law applied, and the relationship between the two." 

Statutory authority requires meaningful findings be made. "Even in the absence of statutory authority, meaningful findings are required to facilitate judicial review." The objective of these statutory requirements is two-fold in that it seeks to apprise the parties of the basis for the agency's decision and to facilitate judicial review." Judicial review cannot occur unless the court understands the basis for the agency decision and the facts relied upon by the agency in making its decision. A party has a fundamental right to a proceeding "before an administrative agency to be apprised of the facts relied upon by the agency in reaching its decision and to permit meaningful judicial review of those findings." A court must know what a decision means before it becomes the duty of the court to say whether it was right or wrong.

"The term "findings requirement" refers to the obligation of an agency (or OAH if it has been delegated the authority to make the final decision) to "provide findings of fact on all material issues, and present a clear statement of the rationale for its decision by explaining how it applied the relevant facts to the applicable law." 

"The purpose of the findings requirement is threefold:

175 Mehrling v. Nationwide, 371 Md. 40, 64, 806 A. 2d 662 (2002). This Court made reference to Turner v. Hammond, 270 Md. 41, 55-56, 310 A.2d 543, 551 (1973) where a preprinted form was filled out by the local board of zoning appeals to deny an application for a special use exception. That Court noted that there were "no findings of fact worthy of the name and we think citizens are entitled to something more than a boiler-plate resolution" 371 Md. at 64.


177 Case law on point was cited by the Court: Forman v. Motor Vehicle Admin., 332 Md. 201, 220, 630 A.2d 753, 763 (1993) (concluding the findings requirement of the Transportation Article and the APA were not satisfied); Harford County v. Preston, 322 Md. 493, 505, 588 A.2d 772, 778 (1991) (concluding the agency violated the findings requirement of the Harford County Zoning Code); Blackburn v. Bd. of Liquor License Comm'rs, 130 Md. App. 614, 624, 747 A.2d 725, 730 (2000) (requiring the Board of Liquor License Commissioners to set forth specific findings of fact and conclusions of law, even in the absence of an express requirement to do so); Baker v. Bd. of Trustees, 269 Md. 740, 747, 309 A.2d 768, 772 (1973) (stating in dictum that "even in the absence of a statutory provision," the right of a party to be apprised of the facts relied upon by an agency in making its decision "is frequently required by a court as an aid to judicial review") (citing 2 DAVIS, ADMINISTRATIVE LAW TREATISE, § 16.05 444-49 (1958)). Mehrling, 371 Md. at 62-63.

178 Mehrling, 371 Md. at 64-65.


1. requiring an articulation of the reasoning process makes the decision-maker accountable to the public;
2. it allows the injured party to understand the reasons behind the agency’s decision; and
3. most important, the findings requirement assists in facilitating judicial review of the agency’s decision.\(^{181}\)

"Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency. "The courts may not accept appellate counsel's post hoc rationalizations for agency action. . . ."\(^{182}\)

** Significant Case Decisions **

**no requirement for a court to search the record for evidence to support a finding**  
- In *United Steelworkers v. Bethlehem Steel Corp.*, 298 Md. 665, 79-80, 472 A.2d 62, 69 (1984), the Court stated: "were we to search the subject record for evidence sufficient to support any one or more of the theories advanced by Steelworkers or by MOSH, and then to decide if that theory constitutes a violation of the general duty clause, we would be performing the administrative function that MOSHA commits to the Commissioner, and not our proper function of judicial review."

**Exceptions to ALJ decision**

**The responsibility of the agency to resolve conflicts**  
- Full and complete findings of fact
  - *Mehrling v. Nationwide*, 371 Md. 40, 806 A. 2d 662 (2002) was a case where the Insurance Commissioner was required to consider the exceptions filed to the ALJ decision. APA §10-216(a)(3). The ALJ had dismissed Ms. Mehrling's opposition to the Insurance Commissioner's attempt to terminate her as an agent for Nationwide. The dismissal was due to the ALJ determination that only the Bankruptcy Trustee had standing to bring the case. Exceptions filed contained new evidence to the effect that her bankruptcy had been dismissed. "As a threshold matter in the present case, it is unclear whether the [Commissioner] indeed considered the new evidence in Petitioner's exceptions." 371 Md. at 65. That new evidence created a material dispute "that merited a clearer resolution by the [Commissioner]. "As previously explained, the ALJ was not informed that Petitioner's bankruptcy case had been dismissed prior to issuance of his proposed decision. Accordingly, the ALJ's "detailed" findings of fact and "well-thought out" discussion concerning the rationale for his proposed decision arguably was contrary to evidence that was subsequently provided to the [Commissioner] in Petitioner's Exceptions. . . ." 371 Md. at 66. Thus, no adequate factual findings were made and no meaningful judicial review was had. 371 Md. at 66. The Associate Deputy Commissioner failed to "resolve all significant conflicts" or make "full, complete and detailed findings of fact and conclusions of law" from which we may perform properly our function. Petitioner presented the MIA with a second opportunity to elaborate on the basis for its decision in her Motion for Reconsideration. Unfortunately, the Associate Deputy Commissioner was not up to the task in his response. Accordingly, the appropriate disposition of this case is to remand to the MIA to prepare legally adequate findings of fact and conclusions of law based on the administrative record as a whole, with a cautioning note that if evidence of the termination of Petitioner's bankruptcy is admitted into evidence, it may be appropriate for the MIA to remand this matter to the ALJ for his consideration.

371 Md. at 66-67.

You say he failed to cooperate?
Just where is that in the record

Substantial evidence was found in *Travers v. Baltimore Police Department*, 115 Md. App. 395, 693 A. 2d 378 (1997) in terminating a police officer from employment for insubordination or disrespect to an officer due to direct testimony from superiors that he “...showed absolutely no cooperation whatsoever,” his attitude was ‘very antagonistic . . . no professionalism what-so-ever,’ and that he was ‘abrupt’ and ‘verbally uncooperative’ during the investigation, despite the fact that Lieutenant Henderson was dressed in full uniform.” The Court said: “Mindful of the board’s expertise in determining what conduct undermines the Department’s interest in ‘good order, efficiency, or discipline’ we shall not disturb the board’s conclusions concerning Charge 1 and Charge 4, Specification 1 (insubordination toward Lieutenant Henderson.” 115 Md. App. at 43. However, when it came to a finding that the police officer disobeyed a lawful order of comment, the decision was different: “In the case at bar, out review of the record failed to uncover evidence that Lieutenant Henderson ordered appellant to leave the apartment. . . . Accordingly, we conclude the record is bereft of substantial evidence such that reasonable minds could conclude that appellant failed to obey a command or order of a superior officer. (Charge 2, Specification 1 and Charge 4, Specification 2). 115 Md. App. at 426-27.

Adult entertainment in Baltimore City
The opinion does not show us why the nonconforming use permit was not granted
Before we can say an error was committed, we must know what happened and why

*Mobee v. Baltimore*, 165 Md. App. 42, 884 A. 2d 748 (2005) involved an application to obtain a nonconforming use permit for adult entertainment in Baltimore City (The “Club Buns”). Three out of five members of the Board of Municipal and Zoning Appeals of Baltimore City voted to allow appellant to continue presenting adult entertainment. A supermajority of 4/5 was required to approve the application so it was denied. In this case, the Court said that the minority was required to issue findings of fact and conclusions of law in support of its decision so that judicial review may occur. 165 Md. App. at 44-45. Citing and quoting case law, the Court gives a good summary of the respective responsibilities of the Board and a court reviewing the decision of the Board:
1. On judicial review, the Court must determine if substantial evidence existed for the Board’s decision;
2. To make that determination, the Court must be able to discern from the records the facts found, the law applied, and the relationship between the two;
3. The Board is required to resolve all significant conflicts in the evidence and then chronicle, in the record, full, complete and detailed findings of fact and conclusions of law;
4. Findings of fact must be meaningful and the agency cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions;
5. The absence of such findings not only violates the fundamental right of a party to a proceeding before an administrative agency to be apprised of facts relied upon by the agency in reaching its decision; but precludes meaningful judicial review of the agency decision; and
6. In the absence of adequate findings of fact, an error of law occurs which renders the Board’s decision arbitrary and capricious.

165 Md. App. at 54-55.

“...[N]o principled legal distinction can be drawn between what is required of a prevailing majority in rendering its decision and that which is required of a prevailing minority in imposing its will.” At issue in this case was whether the use should be continue because it was legally established prior to September 10, 1993. “Yet, despite the evidence, the prevailing minority made no findings as to whom or what it believed, how it interpreted the records presented or the controlling statutes involved. In other words, we do not know whether the minority found the evidence of the establishment of a nonconforming use insufficient because of gaps in the supporting evidence or because it interpreted that evidence differently than the majority did or because it found that evidence either too ambiguous or too incredible to be worthy of belief. Nor do we even know what definition of adult entertainment the minority applied. Without this information, we have no way to ascertain whether the prevailing minority’s decision is the produce of error or not.” 165 Md. App. at 59.

When it is proper to remand to the agency
Remand was the appellate court determination in *Board of County Comm. V. Southern Resources*, 154 Md. App. 10, 837 A. 2d 1059 (2003). The Board of Appeals committed an error of law and was arbitrary and capricious in applying a 100% certainty standard that a parcel of land is completely safe for development. Therefore, by applying an incorrect standard, the Board’s decision was arbitrary and capricious.” 154 Md. App at 33. A remand was in order in this case. “Nevertheless, when and administrative agency renders a decision based on incorrect legal standards, but there exists some evidence, ‘however minimal, that could be considered appropriately under the correct standard, the case should be remanded so the agency can reconsider the evidence using the correct standard.” 154 Md. App. at 34.

A failure to specify which facts supported the conclusion that the state employee possessed drugs at work

In *Bond v. DPSCS*, 161 Md. App. 112, 867 A. 2d 346 (2005), the Court reviewed the decision of the agency even though the decision was deficient in not specifying the portion of a statute appellant violated. The decision failed to acknowledge the significance of the distinction between an employee’s possession of marijuana on-the-job and off-the job in disciplining the state worker. There was a failure to specify what facts supported the conclusion that the employee used or possessed drugs at work, and the decision never clearly drew the inference of fact that it was more likely than not that appellant used or possessed marijuana at work. *Bond*, 116 Md. App. at 124. The Court said it took this action of review because: We do so because we can discern that the ALJ either concluded, (1) as a pure matter of fact, that one can reasonably infer, based on appellant's positive drug test, that appellant actually smoked or possessed marijuana at work, or (2) as a mixed question of fact and law, one can reasonably conclude that the presence of detectable traces of marijuana use in appellant's body constitutes use or possession of drugs at work under S.P.P. § 11-105(3).


We know what you did but why did you do what you did?

Stating that applicants had not sustained the burden of proof is not enough

A remand was made to the Board of Appeals of Anne Arundel County in *Becker v. Anne Arundel County*, 174 Md. App. 114, 920 A. 2d 1118 (2007) involving the placement of a septic system and the effort to obtain variances from set back and buffer requirements in order to build a home. The Court said it knew what the Board did but did not know why it did what it did. Repeatedly, the Board of Appeals said in its written opinion that the applicants had not proven their case when the Board found the applicants had not proved their request was a minimum, not simply less than would be permitted on lots not impacted by environmental factors. 174 Md. App. at 126. “A meaningful Board explanation is especially important when, as here, a house can be legally built on the property in question, but not without variances, and a potential constitutional taking is a serious concern.” 174 Md. App. at 141. Statements by the Board that that the applicants had not proven their case was not sufficient to satisfy the explanation requirement by the Board. “Specifically, we did not see evidence of an adverse impact on water quality, or that the use would impair the use or development of the adjacent property.” “There was no finding by the Board as to appellants’ reasonable needs, or reference to evidence, and why the proposed structure was not the minimum necessary to meet those needs.” No credibility findings adverse to the position of the applicants were made by the Board of Appeals. 174 Md. App. at 143-44.

Well, sometimes there is “implied”

Sometimes implication as to an agency is allowed as it was where it was in *Woodfield v. West River Improvement*, 395 Md. 377,910 A. 2d 452 (2006) where it was alleged that the Board of Liquor Commissioners of Anne Arundel County did not address directly the issue of Bassford’s status as owning an interest in more than one liquor license in the county. Implied in the statement by the Board that there had been no credible evidence that Bassford was a silent partner meant to the Court that the finding of no

183 “The correct standard is whether the evidence supports a finding of unreasonable risk and, if so, whether it could be ameliorated.” *Southern Resources*, 154 Md. App. at 33.

184 S.P.P. §11-110(b)(1) requires the Department of Corrections to delegate final decision-making authority to OAH for employee discipline cases. *Bond v. DPSCS*, 161 Md. App. 112, 122, 867 A. 2d 346 (2005)
evidence found constituted a finding by the Board that Bassford had no interest in the liquor license submitted by Woodfield, 395 Md. at 383.

(12). Complete record:
An agency decision must be made on a complete record. When an ALJ expressly refused to consider evidence presented by an applicant for a day care license that charges against her family member having been declared by DSS to be founded, that was error.185

But what is at issue here is the extent of the "complete record" that was subject to the ALJ's consideration. We hold that the ALJ's decision was not based on the "complete record," as required by COMAR, because the ALJ expressly refused to consider any evidence Ms. Thompson sought to present relevant to the merits of the child abuse allegation. In effect, the ALJ heard only one side of the contested case; she only considered the DSS record that CCA had reviewed when it determined to deny the registration. Ms. Thompson was not permitted to develop the record. Consequently, the ALJ's decision contravened COMAR 07.04.03.07, which specifically permits both CCA and Ms. Thompson to present evidence. The ALJ's comment, supra, that she was only required to determine whether CCA correctly applied its regulations irrefutably establishes that she limited her review to an examination of the agency's basis for its action. As Judge Smith observed, the ALJ failed to recognize her responsibility to consider both sides of the case before her and to base her decision on the complete record. The ALJ's failure to consider Ms. Thompson's evidence was erroneous, arbitrary, and capricious.186

186 Thompson, 103 Md. App. at 202.
A. The General Rule and Categories.
Case law has developed to tell us that the doctrine of a failure to (or necessity to) exhaust administrative remedies categorizes available administrative remedies into three types: (1) exclusive, (2) primary, and (concurrent)

A brief overview of treatment of these categories in this Chapter 11 focuses on the following:

**Exclusive administrative remedy**

- Petitioning police officers filing of a declaratory judgment action, upon receipt of a letter from the Administrator of the Retirement System that Qualified Domestic Relations Orders included payment under a direct retirement option program was in error because of a failure to exhaust administrative remedies. Whether those benefits were separate from or integral to ordinary benison benefits was within the purview of the agency to determine. *Brown*, 375 Md. 661.
- Whether obesity is covered within the meaning of a Maryland discrimination statute had to be determined before the Maryland Commission of Human Relations as agency construction of the statute which it administers is entitled to weight. An action under the Declaratory Judgment Act could not be maintained. *Mass Transit*, 294 Md. 225.
- A failure to exhaust administrative remedies by allowing the County Board of Appeals to determine whether an error occurred in the adoption of an ordinance, meant a trial judge properly dismissed a Complaint for Declaratory Judgment, Mandamus and Other Relief. *Josephson*, 353 Md. 667

**Primary administrative remedy**

- While the homeowner has the concurrent right to file an action against a contractor for damages in court or before the Home Improvement Commission, the right and responsibility to determine whether the contractor had to be licensed with the Commission was for the Commission (Agency) to determine, not a court. *Fosler v. Panoramic Design*, 376 Md. 118
- Consistent with the doctrine of primary jurisdiction, SureDeposit’s request for a Declaratory Judgment to determine that its surety bond program did not violate the Consumer Protection Act could not be maintained. The reviewing court will be in a better position to render global and appropriate relief in this dispute if it has the benefit of the Division’s final view on the canopy of claims. *SureDeposit*, 383 Md. 462.
Concurrent administrative remedy

- Statute states the right of a homeowner to file law action against a contractor or to proceed with an administrative action before the Home Improvement Commission are concurrent remedies with the option to the homeowner. *Fosler v. Panoramic Design*, 376 Md. 118

- Legislative history under Maryland’s Prisoner Litigation Act showed there was no intent to require an exhaustion of administrative remedies before an inmate can file suit for a failure to provide adequate medical services against a private corporation. *Adamson v. Correctional Medical*, 339 Md. 238.

- Actions for fraud and neglect common law actions for money damages against insurers and their agents are not required by the insurance code, on either an exclusive or primary jurisdiction basis, to first be submitted to the Insurance Commissioner of Maryland for a final agency decision. Expertise by the Commissioner is not relevant and the insurance law does not require there be an exhaustion of remedies. *Zappone*, 349 Md. 45.

The relationship between administrative and judicial remedies that ordinarily falls into one of three categories depends on legislative intent.¹ There is no presumption that the administrative remedy was intended to be exclusive. There is a presumption that the administrative remedy is intended to be primary, and that “a claimant cannot maintain the alternative judicial action without first invoking and exhausting an administrative remedy that is available.”² Considering the doctrine of exhaustion of administrative remedies as it relates to State common law and State constitutional law, the Court of Appeals has stated: “Neither the enactments by the General Assembly nor the decisions of this Court dispense with the requirement that administrative remedies be exhausted in actions to enforce rights under the Maryland Constitution or rights under state statutes.”³ “Where a legislature has provided an administrative remedy for a particular matter, even without specifying that the administrative remedy is primary or exclusive”, [the Court of Appeals] has "ordinarily construed the pertinent [legislative] enactments to require that the administrative remedy be first invoked and followed" before resort to the courts.”⁴ "When the legislative body expressly states that the administrative remedy is primary or exclusive or must be exhausted, the mandatory nature of the exhaustion requirement is underscored. Such express language ‘is totally inconsistent with the notion that the [administrative agency's] jurisdiction over [the matter] can be circumvented.’”⁵

"The exhaustion of administrative remedies doctrine requires that a party must ordinarily exhaust statutorily prescribed administrative remedies, generally evidenced by a "final decision" by the administrative agency, before the resolution of separate and independent judicial relief in the courts."⁶ "The statutory frameworks from which . . . administrative remedies arise . . . do not always act as a complete bar to the pursuit of alternative judicial relief.”⁷ The nature of administrative remedies, where an aggrieved party has an alternative judicial remedy under another statute or under common law or equitable principles, has been categorized by the Court of Appeals:

---


² *Josephson*, 350 Md. at 675. The Court cited *Maryland Reclamation Associates, Inc. v. Harford County*, 342 Md. 476, 493, 677 A.2d 567 (1996) for the statement that the Court of appeals “has ‘ordinarily construed the pertinent [legislative] enactments to require that the administrative remedy be first invoked and followed’ before resort to the Courts”).

³ *Clinton v. Board of Education*, 315 Md. 666, 678, 556 A.2d 273, 279 (1989) stated: “Ordinarily, when there are two forums available, one judicial and the other administrative, . . . and no statutory directive indicating which should be pursued first, a party is often first required to run the administrative remedial course before seeking a judicial solution.”


⁵ *Josephson*, 353 Md. at 677-68.


"First, the administrative remedy may be exclusive, thus precluding any resort to an alternative remedy. Under this scenario, there simply is no alternative cause of action for matters covered by the statutory administrative remedy.7

"Second, the administrative remedy may be primary but not exclusive. In this situation, a claimant must invoke and exhaust the administrative remedy, and seek judicial review of an adverse administrative decision, before a court can properly adjudicate the merits of the alternative judicial remedy.8

"Third, the administrative remedy and the alternative judicial remedy may be fully concurrent, with neither remedy being primary, and the plaintiff at his or her option may pursue the judicial remedy without the necessity of invoking and exhausting the administrative remedy.9

One purpose of the exhaustion doctrine "is to prevent the possibility ‘that frequent and deliberate clouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedure.’"10 The exhaustion doctrine is grounded, in part, in the prudential concern that a court must allow the executive’s jurisdiction in the first instance over a controversy within the executive’s expertise.11

B. Legislative Intent—Is jurisdiction exclusive, primary, or concurrent?
Whether the administrative remedy is exclusive, primary, or concurrent, is ordinarily a question of legislative intent. "Occasionally, the General Assembly will expressly set forth its intent in this regard."12 "...[M]ost often statutes fail to specify the category into which an administrative remedy falls."13

There are principles of statutory construction to consider.

**Exclusive remedy**14

---

7 Zappone, 349 Md. at 60.
8 Zappone, 349 Md. at 60-61 citing 3 separate case decisions stating that under these circumstances (primary, but not exclusive), it is appropriate for the trial court to retain jurisdiction, for a reasonable period of time, over the independent judicial action, pending invocation and exhaustion of the administrative procedures. Id.
12 Zappone, 349 Md. at 61 giving examples of (1) Art. 25A §5U [Chartered Counties of Maryland] providing that the administrative and judicial review proceedings shall be exclusive; (2) Art. 41§4-102(k) specifying that the remedy is primary by stating "no court shall entertain an inmate’s grievance or complaint within the jurisdiction of the Inmate Grievance Office or the Office of Administrative Hearings unless and until the complainant has exhausted the remedies provided in this section.;" and (3) Art. 48A §230A(f) providing "Nothing contained in this section is intended to . . . deprive any private right or cause of action to, or on behalf of any claimant or other person. . . It is the specific intent of this section to provide an additional administrative remedy . . This section may not be construed to impair the right of any person to seek redress in law or equity for any conduct which is otherwise actionable."
13 Zappone, 349 Md. at 61.
14 What does “primary” vs. “exclusive” mean? How does “concurrent” jurisdiction fit into the picture? There is a difference between the doctrine of exhaustion and the doctrine of primary jurisdiction. Both doctrines are concerned “with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties” Arroyo v. Board of Education of Howard County, 381 Md. 646, 662, 851 A. 2d 576 (2004) citing United States v. Western Pacific Railroad Company, 352 U.S. 59 (1956). "Exhaustion applies where a claim is cognizable in the first instance by an administrative agency alone – judicial interference is withheld until the administrative process has run its course” Arroyo, 381 Md. at 658. “Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body – in such a case the judicial process is suspended pending referral of such issues to the
“Ordinarily a statutory administrative and judicial review remedy will be treated as exclusive only when the Legislature has indicated that the administrative remedy is exclusive, or when there exists no other recognized alternative statutory, common law, or equitable cause of action.”15 “. . . [W]here neither the statutory language nor the legislative history disclose an intent that the administrative remedy is to be exclusive, and where there is an alternative judicial remedy under another statute or under common law or equitable principles, there is no presumption that the administrative remedy was intended to be exclusive.”16

**Primary remedy**

Where neither the statutory language nor the legislative history disclose an intent that the administrative remedy is to be exclusive, and where there is an alternative judicial remedy under another statute or under common law or equitable principles, there “is in this situation, however, a presumption that the administrative remedy is intended to be primary, and that a claimant cannot maintain the alternative judicial action without first invoking and exhausting the administrative remedy.”17

This presumption is rebuttable “and other factors are pertinent.” Legislative intent may be ascertained from the statutory language, the statutory framework, or the legislative history.18

“The comprehensiveness of the administrative remedy is a factor to be considered. A very comprehensive administrative remedial scheme is some indication that the Legislature intended the administrative remedy to be primary, whereas a noncomprehensive administrative scheme suggests the contrary.”19

“Another factor is the administrative agency’s view of its own jurisdiction. Consistent with the principle that an agency’s interpretation of the statute which it administers is entitled to weight, [the Court of Appeals has] relied on the agency’s interpretation that the remedy before the agency was not intended to be primary.”20

“An extremely significant consideration under our cases is the nature of the alternative judicial cause of action pursued by the plaintiff. Where that judicial cause of action is wholly or partially dependent upon the statutory scheme which also contains the administrative remedy, or upon the expertise of the administrative agency, the Court has usually held that the administrative body for its views.”14 381 Md. at 662. There is “no prohibition against filing an independent judicial action while primary administrative proceedings are under way, but . . . there is a prohibition against deciding, i.e., adjudicating, the issue in the independent judicial case until a final administrative determination is made.” 381 Md. at 660.


16 Zappone, 349 Md. at 63. The Court stated in a footnote that sometimes opinions in the area use the word “exclusive” when the Court actually means “primary.”


19 Zappone, 349 Md. at 64 to be compared Luskin's v. Consumer Protection, supra, 338 Md. at 196-197, 657 A.2d at 792; and Bd. of Ed. for Dorchester Co. v. Hubbard, supra, 305 Md. at 787-792, 506 A.2d at 631-634; with Md.-Nat'l Cap. P. & P. Comm'n v. Crawford, supra, 307 Md. at 25-26, 511 A.2d at 1091-1092. 349 Md. at 64-65.

20 Zappone, 349 Md. at 65 citing National Asphalt v. Prince Geo's Co., supra, 292 Md. at 80, 437 A.2d at 653-654.
remedy was intended to be primary and must first be invoked and exhausted before resort to the courts.21

Concurrent remedy

"... [W]here the alternative judicial remedy is entirely independent of the statutory scheme containing the administrative remedy, and the expertise of the administrative agency is not particularly relevant to the judicial cause of action, the Court has held that the administrative remedy was not intended to be primary and that the plaintiff could maintain the independent judicial cause of action without first invoking and exhausting the administrative procedures.22

"When an administrative agency has either primary or exclusive jurisdiction over a controversy, the parties to the controversy must ordinarily exhaust their administrative remedies before seeking a judicial resolution. That is so because, although the court may well have subject matter jurisdiction over the action before it, the exhaustion doctrine bars the court from exercising that jurisdiction, thereby gratifying the paramount legislative intent that the matter be dealt with first by the Executive Branch.23 There is a reason for this exhaustion rule. "The decisions of an administrative agency are often of a discretionary nature, and frequently require an expertise which the agency can bring to bear in sifting the information presented to it. The agency should be afforded the initial opportunity to exercise that discretion and to apply its expertise. Furthermore, to permit interruption for purposes of judicial intervention at various stages of the administrative process might well undermine the very efficiency which the Legislature intended to achieve in the first instance. Lastly, the courts might be called upon to decide issues which perhaps would never arise if the prescribed administrative remedies were followed.24

There is an interplay of exhaustion principles and primary jurisdiction. When discussing primary jurisdiction we are discussing a judicially created rule designed to coordinate the allocation of functions between courts and administrative bodies. Both an agency and a court have concurrent jurisdiction over the same subject matter and there is no statutory provision to coordinate the work of the court with that of the agency.25 "The exhaustion of administrative remedies doctrine requires that a party must exhaust statutorily prescribed administrative remedies, generally evidenced by a 'final decision' by the administrative agency.26

With primary jurisdiction cases, there is the subsequent question of whether a circuit court exercises only appellate jurisdiction or tries the case de novo. With primary and concurrent jurisdiction cases, there is the subsequent question of when and under what circumstances an agency decision is res judicata to an issue before a court.

---

21 Zappone, 349 Md. at 65 citing Quesenberry v. WSSC, supra, 311 Md. 417, 535 A.2d 481 (plaintiff sought damages for breach of contractual rights under a statutory pension plan – Court determined that the plaintiff was first required to invoke and exhaust the administrative remedies provided by the pension plan) See also, e.g., Clinton v Board of Education, supra, 315 Md. at 678-679, 556 A.2d at 279; Bd. of Ed. for Dorchester Co. v. Hubbard, supra, 305 Md. at 790-792, 506 A.2d at 633-634; Md. Comm'n on Human Rel. v. Beth. Steel, 295 Md. 586, 592-594, 457 A.2d 1146, 1149-1150 (1983); Comm'n on Human Rel. v. Mass Transit, 294 Md. 225, 233, 449 A.2d 385, 389 (1982).
23 State Retirement v. Thompson, 368 Md. 53, 65-66, 792 A. 2d 277 (2002). In Arroyo v. Board of Education of Howard County, 381 Md. 646, 658, 851 A. 2d 576 (2004), the Court put it this way: "The exhaustion of administrative remedies doctrine requires that a party must exhaust statutorily prescribed administrative remedies, generally evidenced by a 'final decision' by the administrative agency, before the resolution of separate and independent judicial relief in the courts." Id., at 661.
26 Arroyo, 381 Md. at 611.
Significant Case Decisions

**Injunction entered in error**

*Must follow statutory mandate to reduce compensation benefits*

- Granting an injunction against the State Retirement and Pension System of Maryland from complying with a statutory mandate to reduce disability retirement benefits by amounts equivalent to workers' compensation benefits received by reason of the same work-related disability was held to be error by the Court of Appeals. An administrative remedy was provided and resort to the circuit court was improper.27

*State Retirement v. Thompson,* 368 Md. 53, 55, 792 A. 2d 277 (2002).28

**Limitations when primary exhaustion doctrine evident**

- Robert Arroyo's employment as a guidance counselor was terminated. *Arroyo v. Board of Education of Howard County,* 381 Md. 646, 661, 851 A. 2d 576 (2004).29 The appellate court needed to determine when exhaustion of the administrative remedy was final and complete so it could determine when limitations began to run (under the discovery doctrine) on Arroyo's wrongful termination cause of action filed in circuit court. 381 Md. at 658. Independent litigation may be filed while the administrative agency activities are in process where the agency has primary jurisdictions. 381 Md. at 659-60. There is a prohibition against deciding the judicial case until the agency matter has been determined. 381 Md. at 660.

**No right to bring a direct suit for overtime wages**

*Statute created grievance procedure*

- *Maryland Military v. Cherry,* 382 Md. 117, 854 A. 2d 1200 (2004) held that Military Department airport firefighters could not bring a direct suit in circuit court for overtime wages30 for attending National Guard drills, annual training and other federally mandated military training because they had failed to exhaust their administrative remedies. As a condition of employment, the respondents were required to maintain membership in the Maryland/United States Air National Guard. The employees had a right to bring a grievance under SPP §12-103(b) for overtime claims. SPP §14-103 establishes that sovereign immunity is not a defense which a State may raise "in any administrative, arbitration, or judicial proceeding involving an employee grievance or hearing. . ." Even though Maryland law provides that employees are entitled to benefits provided by FLSA if those benefits are "greater" than benefits provided under Maryland law, that does not mean that direct judicial action may be maintained in Maryland. *Cherry,* 282 Md. at 124. The Supreme Court has held that the FLSA did not constitutionally authorize actions such as suits for overtime pay against the state in state courts. A failure to exhaust administrative remedies meant that the case had to be dismissed. *Cherry,* 382 Md. at 128-29.31

---

27 Maryland law requires that deduction to be made. SPP §29-118(b)(1). Thompson's injury occurred while he was working as a maintenance employee. Thereafter, he retired on disability benefits. He then received an award of workers' compensation benefits. *Thompson,* 368 Md. at 56-57. The circuit court enjoined the State Retirement and Pension system from exercising the setoff, an action the Court characterized as being based on no more than sympathy so Thompson would be able to support his family. *Thompson,* 368 Md. at 58. SPP is subject to the provisions of the MAPA. *Thompson,* 368 Md. at 33-64.

28 The granting of the injunction was reversed and the Court directed on remand that the complaint be dismissed. The Court commented that "there is not even a pretense here of any valid attempt by Thompson to pursue the administrative remedy that was available to him." *Thompson,* 368 Md. at 66, 71. In what the Court referred to as a rare circumstance it reviewed the merits of the case though it was dismissed. Judge Wilner reviewed the evolvement of the law that required the deduction from the pension received by Thompson. *Thompson,* 368 Md. at 67-70.

29 Mr. Arroyo had been involved in a physical altercation with another teacher. There was a transfer and termination proceedings were instituted because of Arroyo's failure to return to work. *Arroyo,* 381 Md. at 652. The circuit court holding was that limitations had run on Arroyo's right to file a wrongful termination action. *Arroyo,* 381 Md. at 672.

30 The action was brought pursuant to pursuant to LE §3-401, et. seq., SPP §8-301, et. seq., COMAR 17.04.02.05 and the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201, et. seq. *Cherry,* 382 Md. at 119.

31 The Court said it had previously decided the same point in *Robinson v. Bunch,* 367 Md. 432, 788 A. 2d 636 (2002). The claims for overtime compensation are based on a provision in Title 8 of SPP. The employees are not entitled to bring a direct action in court. *Cherry,* 382 Md. at 124. The Eleventh Amendment to the United States Constitution provides a state with immunity to claims arising under federal law and asserted by a citizen of that state in federal court. The Eleventh Amendment is applicable to actions in state court and Congress lacks the authority under the Commerce Clause to abrogate a state's sovereign immunity to suits in its own courts. The FLSA cannot constitutionally authorize private suits for damages against a state in state court. *Cherry,* 382 Md. at 122.
Statutory construction

The employee was required to follow the statutory process for appeal

- PSC v. Schisler, 389 Md. 27, 882 A. 2d 849 (2005) was a case where Wilson also claimed that her termination from PSC violated her due process rights by failing to provide an impartial agency adjudicator for her post-termination administrative appeal. 389 Md. at 38. The circuit court agreed but the Court of Appeals reversed. Chairman Schisler, the individual who terminated Wilson, was the head of her “principal unit” and the one under the statutory scheme who would ordinarily hear her appeal. She argued Schisler was biased against her and that the failure to supply her with an impartial trier for her appeal denied her a fundamental constitutional right citing Article 24 of the Maryland Declaration of Rights. The Court said it would not reach this question because it concluded that Wilson failed to invoke and exhaust her statutory remedies provided to a management service at-will employee of the PSC who is terminated for reasons other than misconduct. 389 Md. at 88-89.

In this case, [SPP] §11-113 provided a specific statutory administrative appeal process for certain categories of State employees, of which Wilson was one. Although Wilson apparently submitted an administrative appeal pursuant to §1-113 following her initial termination, she failed to do so with respect to her re-termination, instead opting to file an unsuccessful motion to hold the Commission in contempt in the action in the Circuit Court arising from the initial termination. We find that, before Wilson could seek a judicial forum to resolve the disputes she seeks to raise with her re-termination, she was required to file and prosecute to a final administrative decision an administrative appeal under §11-113.32

389 Md. at 90.

Not having filed that appeal, the doctrine of exhaustion of administrative remedies applied and the case was dismissed. 389 Md. at 93-94.

Unconstitutional bias was alleged by Wilson. There is a constitutional exception to the exhaustion of administrative remedies doctrine. In this case, Wilson did not attack the constitutionality of SPP §11-113, but rather as applied to her situation. Additionally, there was no record of what the specifics of Wilson’s allegations of unconstitutional bias were. 389 Md. at 91-92. “Furthermore, the Chairman’s responses were not flippant, frivolous, or facetious on their face.” Citing Spencer, the Court said there was no factual predicate for specific personal bias or per se requirement of recusal. 389 Md. at 93.

Home improvement commission

Alternative remedy for direct suit

- Homeowners were not required to exhaust administrative remedies in court prior to resorting to a suit for damages in the circuit court in Fosler v. Panoramic Design, 376 Md. 118, 131-32, 829 A. 2d 271 (2003). The Home Improvement statute specifically stated that administrative remedies did not have to be exhausted prior to litigation. 376 Md. at 131-32. However, the situation is different when the Declaratory Judgment action sought a ruling that the contractor was unlicensed. No statutory provision specifically excluded the responsibility to proceed administratively. To determine whether a contractor is licensed, the Commission’s jurisdiction is primary as that determination rests with the Commission which is responsible for its administration. 376 Md. at 134. This was not a case where it was clear that a “person or entity was engaging in the home improvement business” [and] “needed a license from the Commission.” 376 Md. at 135. Administrative interpretation of the statute is to be given considerable weight. Id., at 136. Licensure determinations were for the agency. 376 Md. at 137.33

32 Simply stated, the Court did not know what the Commission and Chairman Schisler would do had judicial review been requested. Effort to file the appeal was minimal, she could have succeeded on appeal or Schisler may have concluded authority should be delegated to another individual. Wilson, 389 Md. at 91-92.

33 There was a bit of a practical problem here as the Commission had stayed the administrative proceeding pending exhaustion of the administrative remedy. The Court presumed that with its decision, the administrative proceeding would go forward, and if not “mandamus” may be available to enforce administrative compliance.” Fosler, 376 Md. at 138.

235
There is a Prisoner Litigation Act
But that act does not cover suits for failure to provide medical coverage
- In Adamson v. Correctional Medical, 339 Md. 238, 753 A. 2d 501 (2000), the Court held that an inmate is not required to exhaust remedies under the Prisoner Litigation Act of Maryland [CJ §5-1001, et. seq.] before entering suit in a Maryland court for failure to provide adequate medical services against a private corporation that is contracted to provide medical care to prisoners in the custody of the Division of Correction. 339 Md. at 244. Statutory construction principles were used to examine the statute. 339 Md. at 251-56. The entire regulatory scheme was examined to ascertain legislative intent. 339 Md. at 261-64. The agency interpretation of its role in conjunction with the statute was discussed. 339 Md. at 265-66. No mention was made in the “legislative history of curtailing prisoner malpractice lawsuits against private contractors or private entities. The statute was designed to prevent or inhibit the influx of prisoner claims against State officials and employees in Maryland’s state courts and to lessen the burden on the Attorney General in defending such prisoner claims.” 339 Md. at 260. The Court stated: “We conclude that the General Assembly, while it was free to do so, did not craft the PLA or the CSA in a manner that envisioned the relevant administrative remedy as encompassing prisoner malpractice complaints against private medical service providers under contract with the State.” 339 Md. at 272.

The Maryland insurance code
Not an exclusive or primary remedy for alleged acts of fraud and negligent misrepresentation
- Provisions of Maryland’s Insurance Code pertaining to unfair trade practices by insurers and their agents do not provide a exclusive or primary remedy for alleged acts of fraud and negligent misrepresentation. Zappone v. Liberty Life Insurance Co., 349 Md. 45, 67, 706 A. 2d 1060 (1998). “Although there is a legal presumption that a statutory administrative and judicial review remedy is intended to be primary, that presumption is rebutted under the circumstances here. The plaintiffs' asserted causes of action in deceit and negligence are wholly independent of the Insurance Code's Unfair Trade Practices subtitle. No interpretations or applications of the Insurance Code or of any regulations by the Insurance Commissioner are involved. Instead, under the plaintiff's allegations and theory of the case, their right to recover money damages is totally dependent upon the common law tort principles applicable to deceit and negligence actions. Moreover, the expertise of the Insurance Commissioner would appear to be irrelevant to these common law causes of action.” 349 Md. at 67-68.

Declaratory judgment action
“These pension benefits are not marital property”
Failure to exhaust administrative remedies
The agency got the right to determine the validity of the claim
- Brown v. Retirement System, 375 Md. 661, 826 A. 2d 525 (2003) was an action where retired police officers sought declaratory judgment that their benefits under deferred retirement option plan were not marital property and were to be distributed entirely to them. “The Retirement system is a governmental pension plan offered by Baltimore City and is codified in [the] Baltimore City Code. . .” 375 Md. at 665. No separate account is established and no funds are segregated. 375 Md. at 666. A panel of hearing examiners conduct hearings on all matters relating to claims for disability and special death benefits and the Board of Trustees of the Retirement System “has the authority to determine the validity of claims for benefits other than those claims subject to resolution by the Panel of Hearing Examiners.” The Court examined provisions of the Code. 375 Md. at 672.34 “We conclude that actions for declaratory judgment were not appropriate in this case because petitioners failed to exhaust their statutory administrative remedies.” 375 Md. at 663. The issue was whether a “Deferred retirement option plan” compensation

34 In this case, the petitioners went to court rather than make a request of the Board of Trustees to hear their case after the Administrator of the Retirement System informed them that the QDROs did not exclude certain retirement benefits and those benefits would be paid out as marital property. Brown, 375 Md. at 673. The circuit court had dismissed the case and had also had ordered that the benefits in question be treated as ordinary benefits for purposes of payments pursuant to the parties’ Judgments of Divorce. The Court said that dismissal meant that the petitioners had nothing more to be decided and were out of court. Brown, 375 Md. at 674.
retirement benefit is marital property pursuant to the Baltimore City Code. It was the agency right to
determine the validity of claims.\textsuperscript{35} 375 Md. at 674-75.

\textbf{Declaratory judgment action to determine whether obesity is covered within the meaning of discrimination Act}

\textbf{No: Go to Human Relations Commission for that Determination and exhaust your administrative remedies}

\begin{itemize}
  \item In \textit{Commission on Human Relations v. Mass Transit}, 294 Md. 225, 449 A.2d 385 (1982), the Court held
  that the principle of exhaustion of administrative remedies barred an employer's [MTA] declaratory
  judgment action seeking a statutory interpretation as to "whether obesity is covered within the meaning
  of the discrimination statute." Three women had been denied employment on the basis of obesity. The
  Maryland Commission on Human Relations found a violation. Administrative remedies had to be
  exhausted. This was because agency construction of a statute which it administers is entitled to weight.\textsuperscript{36}
\end{itemize}

\textbf{The agency was required to give the employee the rights to which he was entitled}

\begin{itemize}
  \item The Court reversed an agency decision to discharge John Richard Danaher from State employment in
  \textit{Danaher v. Dept. of Labor}, 148 Md. App. 139, 811 A.2d 359 (2002). The agency did not investigate the
  matter, meet with the employee or consider mitigating circumstances as required by SPP \textsuperscript{\textperiodcentered}§11-106. As to
  the allegation of a failure to exhaust administrative remedies, the Court said Danaher sent a letter to the
  Secretary asking for a hearing, and information was not given to the employee so as to allow him to
  particularize his allegations. 148 Md. App. at 162. He was not given the hearing to which he was entitled
  so as to allow him to particularize. No waiver of rights was seen. 148 Md. App. at 162-63.
\end{itemize}

\textbf{Declaratory judgment action to contest rezoning}

\textbf{Wrong: you should have appealed the zoning decision through the administrative process}

\begin{itemize}
  \item A "Complaint for Declaratory Judgment, Mandamus and Other Relief" contesting the rezoning of property
  previously annexed by Annapolis was dismissed in \textit{Josephson v. City of Annapolis}, 353 Md. 667, 728 A.2d 690 (1998) for a failure to exhaust administrative remedies. Instead of appealing the rezoning decision
  pursuant to section 21.88.020 of the Annapolis City Code and thereafter seeking judicial review, the
  Complaint was filed. 353 Md. at 670. The Code gave a right to appeal a zoning action by a local legislative
  body. 353 Md. at 672. Section 21.08.060 of the Annapolis City Code provided a method for establishing
  zoning designations of newly annexed land within the city when the zoning designation is not created
  during the annexation process. The County Board of Appeals is authorized to hear appeals when an error
  in the adoption of an ordinance is alleged. 353 Md. at 680. A failure to exhaust the administrative remedies
  meant the trial judge properly dismissed the Complaint filed. 353 Md. at 680-81.\textsuperscript{37}
\end{itemize}

\textsuperscript{35} From the Court decision:

In the instant case, petitioners did not exhaust their specific administrative remedies. Each petitioner received a letter from the Administrator of the Retirement System. The letter noted that the Retirement System recently reviewed the Members' QDROS and determined that because the orders did not exclude DROP benefits, those benefits would be paid out as marital property along with the Members' other retirement benefits. Petitioners, however, did not seek a hearing before the Board, from whose determination they could have petitioned for judicial review. Instead, dissatisfied with the substance of the letter regarding their DROP benefits, petitioners filed an action for declaratory and injunctive (826 A.2d 533) relief against the Retirement System. In the Circuit Court complaint, petitioners sought a declaration that DROP benefits "be excluded from marital property" to be paid out under the divorce decrees and QDROS and that the entire amount of the DROP benefits be disbursed to them. Petitioners also sought and obtained an injunction to enjoin the Retirement System from disbursement DROP monies until the court declared the parties' rights. The basis for the declaratory action, petitioners argue to this Court, was to determine whether the Retirement System was correct in its interpretation of the relationship between DROP and other Retirement System benefits and whether the Retirement System properly was distributing DROP benefits. Petitioners desired a determination of DROP's role in the Retirement System—whether DROP is separate from or integral to ordinary pension benefits. As such, petitioners first should have sought a hearing before the Board for a determination of this issue, one within the Board's purview. We hold that petitioners failed to exhaust their statutory administrative remedies.

\textit{Brown}, 375 Md. at 674-75.


\textsuperscript{37} The Court distinguished the case of \textit{Northeast Plaza Associates v. President and Commissioners of North East}, 310 Md. 20, 526 A.2d 963 (1987), saying that \textit{Northeast} was a limited case because to the extent there is an exception to the requirement of exhaustion it "applied only to simultaneous, combined annexation/rezoning resolutions or procedures." \textit{Josephson}, 353 Md. at 680.
These parties entered into a settlement agreement 
Therefore: no need to exhaust administrative process through zoning
Go directly to whether the settlement agreement was violated 

- Chestnut Real Estate v. Huber, 148 Md. App. 190, 811 A. 2d 389 (2002) involved the owners and developers of the Blakehurst Life Care Community in Baltimore County, Maryland and a neighborhood association quarreling over the manner in which Blakehurst intended to improve its property. Interpretation of a restrictive covenant was at issue and injunctive relief was sought. One issue was whether the parties were required to exhaust administrative remedies. 148 Md. App. at 198. The Court stated: “But the remedy sought here by the Advisory Board [the neighborhood association], a mandatory injunction, is purely equitable in nature, and a preeminently judicial function that is not within the expertise of zoning administrators or the Board of Appeals. Appellees have invoked the equity power of the courts to return the Blakehurst property to its status quo ante, to wit: the removal of structures that exist in direct contravention of the restrictive covenants. Although administrative bodies may exercise certain quasi-judicial functions, for example, rendering findings of fact and making conclusions of law to decide disputes between parties, see, e.g., Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 219-21, 334 A.2d 514, 520-21 (1975), the remedy effected sub judice - a mandatory injunction - is purely a judicial prerogative. Because the construction of the offending structures was a fait accompli, the Advisory Board's sole recourse to effect their removal would be to enlist the aid of the chancellor.” 148 Md. App. at 199.

Employee action against county board of education for age discrimination
No private right of action but must go through administrative process

- Former employee action against county board of education for age discrimination in employment, violations of Fair Employment Practices Act and common law wrongful discharge. The Board is an arm of state for purposes of eleventh amendment immunity. Norville v. Board of Education, 160 Md. App. 12, 862 A. 2d 477 (2004). Board could not assert sovereign immunity as a defense to claim under $100,000 asserted by former employee for alleged age discrimination. The employee did not have private right of action against board under FEPA, and availability of administrative remedy by way of FEPA preempted employee’s common law claim for wrongful discharge. 160 Md. App. at 75-76.

A concurrent remedy

The insurance code...

- In Mardirossian v. Paul Revere Life Insurance Co., 376 Md. 640, 831 A. 2d 60 (2003), the Court stated, in response to a request from Maryland’s District Court for certification of a question of law, that the right to sue an insurer on an oral contract for the insurer to provide an insurance policy is a concurrent remedy to

---
38 From the Court opinion: Here, the Board is within the purview of the Act. And, appellant was provided with an administrative remedy by way of Article 49B. Because appellant had a statutory remedy available to him, he cannot pursue a common law wrongful discharge claim. Compare Molesworth, supra, 341 Md. at 637 (recognizing common law claim for wrongful discharge based on sex discrimination because, due to size of employer, Art. 49B did not apply). Accordingly, we shall affirm the circuit court's dismissal of appellant's common law wrongful discharge claim.

Norville, 160 Md. App. at 76.

Primary jurisdiction
Declaratory judgment actions
When the Consumer Protection Division files charges
There was an administrative remedy available to resolve . . .

No Doubt: a court would have been in a better position to . . . had it the benefit of the administrative process

SureDeposit v. Curran, 383 Md. 462, 483, 860 A. 2d 871 (2004) is a case where SureDeposit filed a
Declaratory Judgment Action to resolve its contention with the Consumer Protection Division and asked
the court to determine that "its surety bond program" does not violate the Consumer Protection Act. The
product was sold to tenants as an alternative to paying a security deposit to landlords. 383 Md. at 467-68,
471. The Division filed an administrative statement of charges against SureDeposit, alleging multiple
violations of the CPA. 383 Md. at 873. RP §8-203 defines security deposits. Among the Division's
charges were that SureDeposit claimed its product to be a security deposit; claimed to be a fee other than a
security deposit. The CPA "specifies no exclusive administrative remedy committed to the Division for
resolution of a dispute involving the SDL." 383 Md. at 482.

"It is clear that an administrative remedy was available to resolve the alleged violations of the CPA and
even the related claims based on the SDL." A declaration as to the SDL "would not terminate the entire
controversy, which includes numerous independent allegations of violations of the CPA." It was not
"entirely clear on the record of this case . . . at this juncture, that the declaratory judgment sought could
adjudicate the Division's charges against SureDeposit's officers. By the same token, as SureDeposit's
complaint includes a request for a declaration as to the viability of the Division's CPA claims, as it facially
does, it would be inappropriate for a court to accept that invitation in advance of the Division being allowed
to bring to bear, through the designated regulatory scheme, its particular expertise to render a final
administrative decision regarding the CPA matters. There is little doubt that a reviewing court would be in
a better position to render global and appropriate relief in this dispute were it to have the benefit of the
Division's final view on the panoply of claims." 383 Md. at 484-85. When a court believes that more
effective relief can and should be obtained by another procedure, that court is justified in refusing a
declaration because of the availability of another remedy." 383 Md. at 485.

"It is obvious in this case that Division review and action will be effective and efficient because it will
address the allegations concerning both the CPA and the SDL. Thus, it is impossible to conclude, as a
matter of law, that the Circuit Court's decision to reject SureDeposit's complaint is well removed from this
Court's declaratory judgment jurisprudence decided over the last sixty years. Lastly, it is no coincidence
that this result is consistent with the doctrine of primary jurisdiction that "a party is often first required to
run the administrative remedial course before seeking a judicial solution."" 383 Md. at 484.

Montgomery county, what are you doing?

Owners of pets not required by county code to repay the cost of care, post a bond, or arrange adequate care
as a condition of appealing to county hearing board from decision by animal service director concerning
confiscated animals. There was no failure to exhaust administrative remedies in Coroneos v. Montgomery

Not everything goes the administrative remedy route when a state employee is involved

Towson University v. Conte, 384 Md. 68, 862 A.2d 941 (2004) discussed termination of a professor on an
allegation of "incompetence" and "willful neglect of duty." The Court of Appeals reversed a jury verdict
and remanded, finding that a jury could not review whether the factual bases for termination actually
occurred or whether they were proved by a preponderance of the evidence. The proper role of the jury was
to review the objective motivation, i.e., whether the employer acted in objective good faith and in
accordance with a reasonable employer under similar circumstances when it decided there was just cause to
fire an employee. Judge Eldridge dissented saying that the majority had missed the point that the jury
should not have heard the case in the first instance because there was a failure to exhaust administrative
remedies, an issue the majority did not address. 384 Md. at 91, 95.
Are you trying to circumvent the administrative process?

- *Heery International v. Montgomery County*, 384 Md. 129, 862 A.2d 976 (2004) involved a dispute arising from the contractors' alleged mismanagement of other trade contractors during the construction of a detention center. The County filed for administrative dispute resolution against the contractors; the contractors filed a court action claiming that the county's administrative dispute resolution process did not have jurisdiction over the county's claims but instead only contemplated claims initiated by a contractor against the county. Characterizing the case as an initiative by the contractors to circumvent the county's administrative dispute resolution process, The Court said that the contractors failed to show that the county's administrative process was palpably without jurisdiction by not producing any legislative history to support such a claim and by failing to show that the administrative dispute resolution process would result in any irreparable injury. 384 Md. at 150-151.

A circuit court claim for overtime pay

But: they are government employees and there is a process...

- In *Maryland Military v. Cherry*, 382 Md. 117, 854 A. 2d 1200 (2004), Military Department airport firefighters were told by the Court that they could not bring a direct suit in circuit court for overtime wages\(^{39}\) for attending National Guard drills, annual training and other federally mandated military training because they had failed to exhaust their administrative remedies. As a condition of employment, the respondents were required to maintain membership in the Maryland/United States Air National Guard.

  The employees had a right to bring a grievance under SPP §12-103(b) for overtime claims. SPP §14-103 establishes that sovereign immunity is not a defense which a State may raise "in any administrative, arbitration, or judicial proceeding involving an employee grievance or hearing...” Even though Maryland law provides that employees are entitled to benefits provided by FLSA if those benefits are “greater” than benefits provided under Maryland law, that does not mean that direct judicial action may be maintained 382 Md. at 124. The Supreme Court has held that the FLSA did not constitutionally authorize actions such as suits for overtime pay against the state in state courts. A failure to exhaust administrative remedies meant that the case had to be dismissed. 382 Md., at 128-29.\(^{40}\)

Exclusive remedy for inmate injured on the job

- Things get complicated when more than one statute may cover an dispute and then statutory construction steps in as was the case with *Dixon v. Dep’t Public Safety*, 175 Md. App. 384, 927 A. 2d 445 (2007). Dixon, an inmate at the Maryland House of Correction in Jessup, was seriously injured when he fell into a ventilation shaft while on a prison work detail and he filed a tort suit against the Department. The circuit court granted a motion for summary judgment to the Department on the basis that Dixon was only entitled to pursue his claim for compensation against the Sundry Claims Board. That decision was affirmed. 175 Md. App. at 388. The Court discussed Title 10, Subtitle 3 of the Correctional Services Article governing the procedure for filing of a claim by a DOC inmate to recover for work-related injuries sustained while incarcerated. 175 Md. App. at 388.\(^{41}\) There was the Prisoner Litigation Act\(^{42}\) (PLA – CJ §5-1001, et. sec.) to be considered with its statutory requirement that there be an exhaustion of administrative remedies. CJ §

---

\(^{39}\) The action was brought pursuant to pursuant to LE §3-401, et. seq., SPP §8-301, et. seq., COMAR 17.04.02.05 and the Federal Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §201, et. seq. Cherry, 382 Md. at 119.

\(^{40}\) The Court said it had previously decided the same point in *Robinson v. Bunch*, 367 Md. 432, 788 A. 2d 636 (2002). The claims for overtime compensation are based on a provision in Title 8 of SPP. The employees are not entitled to bring a direct action in court. *Cherry*, 382 Md. at 124. The Eleventh Amendment to the United States Constitution provides a state with immunity to claims arising under federal law and asserted by a citizen of that state in federal court. The Eleventh Amendment is applicable to actions in state court and Congress lacks the authority under the Commerce Clause to abrogate a state’s sovereign immunity to suits in its own courts. The FLSA cannot constitutionally authorize private suits for damages against a state in state court. *Cherry*, 382 Md. at 122.

\(^{41}\) Judicial review is provided for by CS §10-308 both in the Circuit Court and the Court of Special Appeals. *Dixon*, 175 Md. App. at 391.

\(^{42}\) Prior litigation discussing the interplay between the Inmate Grievance Office and the Prisoner Litigation Act was reviewed as *Massey v. Galley*, 392 Md. 634, 643, 898 A. 2d 951 (2006) summarized the legislative history of the PLA. *Dixon*, 175 Md. App. at 418-422.
5-1003. 175 Md. App. at 392. Section § 10-210 of C.S. governing hearings in inmate grievance matters by OAH has a specific requirement that administrative remedies be exhausted before there may be judicial review. 175 Md. App. at 394.

Dixon argued that the procedure did not apply to his negligence claims, 175 Md. App. at 401, but statutory construction (legislative history, fiscal notes, regulations passed) showed otherwise: "We agree with the circuit court that the administrative remedy set forth in C.S. § 10-308(c) constituted appellant's exclusive remedy." 175 Md. App. at 408. Dixon's Claim for Compensation alleged he was injured by an accident "arising out of and in the course of [his] employment." 175 Md. App. at 414. Case law considering the doctrine of exhaustion of administrative remedies was reviewed by the Court which found a clear legislative intent that the statutory remedy was exclusive. 175 Md. App. at 417. Dixon was required to file a claim with the Sundry Board, rather than the IGO. Statutory construction of two conflicting statutes, one general and one specific means that the specific statute will be regarded as an exception to the specific statute to the extent they are irreconcilable. An attempt would be made to give effect to both statutes if they were reconcilable. 175 Md. App. at 422.

The Public Service Commission authority

- *Sprenger v. PSC*, 400 Md. 1, 926 A. 2d 238 (2007) was a contest to the Public Service Commission's approval of a plan of Clipper Windpower to construct a facility in Garrett County, Maryland. The suit challenged the process by which the Facility was approved. There had been an adjudicatory administrative hearing and the Circuit Court had dismissed the case on the basis that the petitions for judicial review had not been timely filed. 400 Md. at 11. The appellants had requested a Declaratory Judgment and that process was discussed by the Court, 400 Md. at 20, along with the doctrine of the exhaustion of administrative remedies. 400 Md. at 24-25. The Circuit Court was correct in dismissing the petition for declaratory relief because administrative remedies provided by the Legislature had not been followed. 400 Md. at 33.

Zoning

- Respondent use car dealers were required to invoke and exhaust administrative remedies prior to obtaining judicial review of the constitutionality of a zoning ordinance establishing a minimum lot size of 25,000 sq. ft. for used motor vehicle, mobile home, or camping trailer lots in *Prince George's County v. Ray's*, 398 Md. 652, 922 A. 2d 495 (2007). Discussing the delegation by the State of zoning power for most of Prince George's County to the Prince George's County District Council, 398 Md. at 635-36, both the Circuit Court and the Court of Special Appeals had found that the ordinance setting the lot size violated so-called "substantive due process" principles. 398 Md. at 640. The case did not fall within the "constitutional exception" to the exhaustion rule. 398 Md. at 644. Discussing *Zappone v. Liberty Life*, and the exhaustion doctrine, the Court stated that it had not yet decided whether adjudicatory remedies under the Act were exclusive or simply primary, 398 Md. at 647, but the Court said that its prior opinions had made it clear that the adjudicatory remedies provided by the Regional District Act for the resolution of zoning issues like those presented must be pursued and exhausted before resort to the courts. 398 Md. at 647-48. Discussing the "constitutional exception" to the exhaustion requirement, the Court stated that "administrative agencies are fully competent to resolve issues of constitutionality and the validity of statutes or ordinances in adjudicatory administrative proceedings which are subject to judicial review." 398 Md. at 650-51 (case law discussed). The Court stated: *first*, the attack upon the ordinance had not been to the ordinance "as a whole," including all of its parts and applications; *second*, the plaintiffs "substantive due process" and "equal protection attacks upon the ordinance were factually based and the Circuit Court declaratory judgment rested upon the court's findings of fact, and *third*, "the pursuit and exhaustion of the appropriate administrative proceedings might well result in the plaintiffs' obtaining relief without the necessity of reaching the constitutional issues at the administrative level or upon judicial review." 398 Md. at 655-56.

---

43 The Court reviewed that rules for statutory interpretation and as applicable to this case. *Dixon*, 175 Md. App. at 408-414.
An inmate injured by another inmate

- An inmate brought battery and intentional infliction causes of action in a circuit court against a fellow prisoner and the State of Maryland for violations of Maryland Declaration of Rights, for injuries occurring when he was attacked by fellow prisoner, while working in kitchen of prison laundry facility. The Court in Jennifer v. State, 176 Md. App. 211, 932 A. 2d 1213 (2007) held that Jennifer's exclusive remedy "lies with the Sundry Claims Board" and affirmed the circuit court grant of summary judgment. There is a Sundry Claims Board Act in Maryland which provides that the act is the "exclusive remedy against the State for a Claim," Corr. Serv. §10-308(c) made by 'an individual' who was engaged in work for wages while an inmate in a correctional facility in the Division of Correction." Jennifer maintained that the Act did not apply because the injury did not arise out of his work and was not accidental. 176 Md. App. 216. Another exercise in statutory interpretation saw Judge Krauser for the Court tracing the history of the Act with the Court stating: "Certainly, [Jennifer] would not have suffered the injury he did 'but for the fact that the conditions and obligations of the employment placed [him] in the position where he was injured." 176 Md. App. at 223. "[W]e conclude that 'not accidental' is a catch-all phrase and, in that capacity, refers to injuries which, while not technically 'self-inflicted,' are ones which the claimant played some role in bringing about." 176 Md. App. at 229.

C. Summary and Cookbook Methodology

Anyone faced with the problem of determining when and under what circumstances a statutory remedy is primary, exclusive or concurrent has a wide choice of case law to consult for direction. SureDeposit v. Curran, 383 Md. 462, 860 A. 2d 871 (2004) stated and summarized the rules. Because this is a fairly recent case and Judge Harrell gives a very good summary of the principles of law and cookbook methodology a court may use to determine the issue, it is reproduced here in large part. If you read all of this and conclude that there are not all that many bright line rules here, and that some inconsistency may sometimes be seen, you are correct. It is not you; it is the law.

. . . [D]eclaratory judgment is an inappropriate remedy where the primary jurisdiction doctrine properly is implicated. Luskin's Inc. v. Consumer Prot. Div., 338 Md. 188, 657 A.2d 788 (1995) Primary jurisdiction

is a judicially created rule designed to coordinate the allocation of functions between courts and administrative bodies. The doctrine is not concerned with subject matter jurisdiction or the competence of a court to adjudicate, but rather is predicated upon policies of judicial restraint: 'which portion of the dispute-settling apparatus--the courts or the agencies--should, in the interests of judicial administration, first take the jurisdiction that both the agency and the court have.' It comes into play when a court and agency have concurrent jurisdiction over the same matter, and there is no statutory provision to coordinate the work of the court with that of the agency.44

* * *

Primary jurisdiction is relevant only ... where the claim is initially cognizable in the courts but raises issues or relates to subject matter falling within the special expertise of an administrative agency. Washington Nat'l Arena, 282 Md. at 601-602, 386 A.2d at 1225-26 (citations and footnote omitted). We have recognized that an additional concern of the primary jurisdiction doctrine is the preservation of the "uniformity and integrity of the regulatory scheme...." Id. at 603, 386 A.2d at 1227 (citing Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 440, 27 S. Ct. 350, 355, 51 L. Ed. 553, 558-59 (1907)). An administrative agency decision, particularly in its area of special expertise, helps a court because the court usually relies on the "special expertise and technical knowledge normally employed in administrative fact-finding and rule-making." Id. For example, in Fosler v. Panoramic Design, Ltd., we stated that an "administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable

44 SureDeposit, 383 Md. at 478-79.

As a result, a trial court, faced with a request for a judicial remedy such as declaratory judgment in a situation where a related administrative agency action is pending, is usually confronted with three possible courses of action. First, the court may defer wholly to the administrative regulatory scheme and terminate the petition or complaint, leaving the matter to disposition by the administrative agency, without prior judicial intervention. In that situation, judicial review of the final agency decision usually will be available to an aggrieved party.45

Secondly, the court may stay its consideration of the invoked judicial remedy and await the result of the administrative proceedings before addressing the appropriateness of the relief sought in the litigation. Maryland Reclamation Assocs. v. Harford County, 382 Md. 348, 367, 855 A.2d 351, 362 (2004) (directing stay of judicial proceeding until administrative remedies exhausted); Arroyo v. Bd. of Educ., 381 Md. 646, 660, 851 A.2d 576, 584-85 (2004) (observing that a party may file an independent judicial action during pendency of primary administrative proceedings and the trial court may stay the judicial action but, should not decide it until the "final administrative determination is made"); Md.-Nat'l Capital Park & Planning Comm'n v. Crawford, 307 Md. 1, 18, 511 A.2d 1079, 1087-88 (1986) (explaining that a stay by the trial court may be appropriate when an administrative remedy and an independent judicial remedy beside judicial review of the administrative decision arises). Once the administrative process runs its course, the court may then entertain the pending judicial action (with or without any subsequently filed action for judicial review), giving due weight and deference to the administrative agency's decision in its area of particular expertise. Crawford, 307 Md. at 18, 511 A.2d at 1088.

Third, the court may exercise its discretion, if appropriate to do so, and provide a judicial remedy in advance of final action in the administrative proceeding. This option is best used when the court is faced with a purely legal question that is independent of or merely overlaps an administrative agency's area of expertise. See Washington Nat'l Arena, 282 Md. at 603-604, 386 A.2d at 1226-27 (holding that evaluating the validity of a contract clause that waived a party's right to challenge whether real estate improvements were subject to real estate taxes was a purely legal question that the Property Tax Assessment Appeal Board had no expertise to resolve because its primary expertise lay in reviewing the assessment and valuation of real property for tax purposes). n1346

n13 The trial court should be alert to situations where exercising such discretion may be contrary to the wisdom of the general rule requiring a party to "run the administrative remedial course before seeking a judicial solution." Clinton v. Bd. of Educ., 315 Md. 666, 678, 556 A.2d 273, 279 (1989); but, compare the majority and dissenting opinions in Attorney Grievance Comm'n v. Davis, 379 Md. 361, 842 A.2d 26 (2004), and Attorney Grievance Comm'n v. Lichtenberg, 379 Md. 335, 842 A.2d 11 (2004).

SureDeposit here first questions whether the Division has primary jurisdiction concerning the allegations of violations of the SDL. n14 We summarized the three general and relevant types of potentially overlapping administrative and judicial jurisdictional considerations in Zappone v. Liberty Life Insurance Company. 349 Md. 45, 706 A.2d 1060 (1998). n15 The first category

45 SureDeposit, 383 Md. at 479-80.
46 SureDeposit, 383 Md. at 480-81.
addresses situations where the administrative remedy is intended by the Legislature to be exclusive and must be exhausted before recourse may be appropriate to the courts. *Id.* at 60, 706 A.2d at 1067. When a statute explicitly directs an administrative process and remedy, our policy is set clearly by the General Assembly to maintain the uniformity of the regulatory scheme. *Id.* n16 One "special form" of statutory remedy is where a party is required to submit its complaints to the exclusive remedy of an administrative agency. See *Id.* at 62, 706 A.2d at 1068-69 (listing exclusive remedy provisions). As a result, a preemptively or prematurely filed petition for declaratory judgment, where there is provided an exclusive administrative remedy for the subject matter, should not then be entertained, if at all, until the administrative remedy is exhausted.47

n14 Section 13-101, et seq., of the Commercial Law Article specifically creates the Division and enables it to enforce and administer the CPA. While the CPA grants the Division no explicit power to administer the SDL, the CPA does prohibit unfair practices under 13-301 in the sale, or offer for sale, of "any consumer goods, consumer realty, or consumer services...." §13-303. We could find no parallel provisions in the Real Property Article of the Code committing enforcement or administrative powers to any particular executive branch agency with regard to the SDL.

n15 We recognized a fourth category, not relevant in the present case, where the administrative agency's enabling statute expressly requires the judicial remedy to be exhausted first. *Fosler*, 376 Md. at 130-33, 829 A.2d at 278-80 (holding that §8-408 of the Home Improvement Law (Md. Code, Business Regulation Art.) explicitly requires stay of the administrative action and exhaustion of the judicial remedy).

n16 Analysis under the Declaratory Judgment Act reaches the same result. Section 3-409(b) states that if "a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed in lieu of a proceeding under this subtitle." Md. Code (1973, 2002 Repl. Vol.) of the Courts and Judicial Proceedings Article.

---

47 *SureDeposit*, 383 Md. at 481-82.
This Chapter 12 considers a number of specific areas of Maryland Administrative Law that have been the subject of a number of appellate court opinions. While the treatment is not that extensive for any section of this Chapter, perhaps the reader will find some needed insight into the workings of these particular agency decisions. A few significant case decisions are included in this Chapter 12. Case law in these individual areas is enormous and the few decisions here are merely to be illustrative of some of the kinds of issues that arise with in specific areas of agency law.

A. Employee Grievances ................................................................. 246
B. License Suspensions .............................................................. 250
C. Insurance Cases ................................................................. 254
D. LEOBR ........................................................................ 256
E. MVA ........................................................................ 257
F. State Procurement Contracts ................................................. 259
G. Zoning ........................................................................ 261
H. Chesapeake Bay Critical Areas Commission ............................. 271
I. Board of Education and Education Matters .............................. 271
J. Home Improvement Commission .............................................. 273
K. Consumer Protection Division ................................................ 274
L. Liquor Boards ................................................................... 275
M. Election Laws .................................................................... 277
M. Medicaid ........................................................................... 278
O. Tax Court and Taxes ............................................................. 279
A. Employee Grievances.

"The Legislature has enacted a uniform grievance procedure for employees to invoke to resolve certain disputes. A grievance means a dispute between an employee and the employee's employer about the interpretation of and application to the employee of (i) a personnel policy or regulation adopted by the Secretary; or (ii) any other policy or regulation over which management has control." Six subject areas are excluded by the general definition of what may be grieved:

1. a pay grade or range for a class;
2. the amount or the effective date of a statewide pay increase;
3. the establishment of a class;
4. the assignment of a class to a service category;
5. the establishment of classification standards; and
6. an oral reprimand or counseling.  

The Court of Special Appeals in 2002 described Maryland State Merit System:

... Following a study undertaken by a Task Force appointed by the Governor, the so called State Merit System was revised by the State Personnel Management System Reform Act of 1996 (the "Act"). The General Assembly created the State Personnel Management System ("SPMS") to govern the employment of persons in the Executive branch of State government. See S.P.P. §6-202 et seq. SPMS falls "under the authority of the Secretary of Budget and Management." S.P.P. §6-101.

Pursuant to S.P.P. §6-102, the "basic purpose" of the SPMS "is to provide a system of employment for employees under the authority of the Secretary." To that end, the SPMS "establishes categories of service for employees based on the general nature of the employee's duties or method of appointment." S.P.P. §6-102(1)(i). In particular, it "groups employees into classes based on specific duties...," S.P.P. §6-102(2)(i), and "provides for a system of merit employment in the skilled service and professional service," based on a "standard" of "business efficiency." S.P.P. §6-102(3). Further, SPMS "provides procedures for the appointment, discipline, and termination of employees in each service." S.P.P. §6-102(1)(ii). Additionally, it provides "a process for the...prompt removal of employees." S.P.P. §-102(4)(ii).

Specifically, within SPMS, there are six employment categories: skilled service; professional service; management service; executive service; special appointees; and temporary employees. See S.P.P. §§6-401 to 6-406. Under S.P.P. §6-401(a), "all positions in the Executive Branch of State government that are included in the State Personnel Management System are in the skilled service," unless otherwise provided.

Collectively, the various provisions of the Act combine to refute the perception that a person employed by the State is virtually guaranteed continued employment, without regard to the quality of performance. Instead, the legislative scheme provides for a system in which a skilled employee's continued employment depends upon satisfactory job performance. That view is reflected in S.P.P. §2-301(a), which states: "In keeping with State efforts to reinvent government, restructuring of the State's personnel system should enhance the delivery of services to citizens in an effective and timely manner."  

S.P.P. §6-403(a) defines the circumstances under which a position is in the "management service" and §6-4029(a) provides the circumstances under which a position is in the "Professional service." Employee performance appraisals are provided for. S.P.P. §7-501, et. seq. Disciplinary actions, layoffs

---

2 Danaher v. Dept. of Labor, 148 Md. App. 139, 155, 811 A. 2d 359 (2002). (citations omitted)
3 Danaher, 148 Md. App. at 156.
and terminations are governed by S.P.P. §11-102, et. Kseq. Regulations are required to be implemented to establish policies and procedure with regard to disciplinary actions related to employee performance. S.P.P. §11-111. Thresholds exist for termination depending on the categorization of an employee as being in skilled, professional, or management service. S.P.P. §§ 11-109, 11-113. Provision is made for automatic termination. S.P.P. §§ 11-105, 11-106. 11-305. 4

S.P.P. §11-106 requires the appointing authority to do an investigation of employee misconduct, to meet with the employee, consider any mitigation circumstances and thereafter to determine appropriate disciplinary action prior to termination. 5

Significant Case Decisions

“Classification standard” not a defined term
What can be grieved and what need not be grieved or cannot be grieved

- At issue in Kram v. Maryland Military Department, 374 Md. 651, 824 A. 2d 99 (2002) was whether military airport firefighters could grieve under SPP §12-101(b)(2), the requirement that they maintain their membership in the Maryland Air National Guard. The Court said this requirement was a “classification standard” which could not be the subject of a grievance. 374 at 660. “Classification standard” is not a defined term within SPP. Section §4-202 of SPP directs the Secretary to “establish standards and general procedures to be used to classify positions.” 374 at 659. The Secretary created standards for the guidance of individual agencies. The language of the statute and legislative history indicated that classification was to include duties and responsibilities; knowledge, skills and abilities; education and experience requirements; and special requirements for one or more positions to which the selection standards and rates of pay can be applied. 374 at 661. 6

The grievance procedure
This “second look” provision
Look at the whole statute

- Whether a correctional employee had resigned due to the fact she was absent without notice was an issue in Dept. of Corrections v. Thomas, 158 Md. App. 540, 544, 857 A. 2d 638 (2004). COMAR 17.04.04.03D stated that an employee may separate from employment by resigning and being absent without leave is the equivalent of a resignation. 158 Md. App. at 545. The COMAR regulation had a “second look” provision and the Court held that the employee sufficiently invoked this provision. 158 Md. App. at 552. That provision provided that the resignation “may be expunged by the appointing authority when extenuating circumstances exist, and the employee had good cause for not notifying the appointing authority.” 158 Md.

---

4 Danaher, 148 Md. App. at 159-60.
5 Dept. of Public Safety v. Thomas, 158 Md. App. 540, 553, 857 A.2d 638 (2004). This case also gives some background stating that the State Personnel Management System Reform Act of 1996 causes the merger of the former Department of Personnel into the Department of Budget and Management. Id., at 554.
6 Interesting is the fact that the Cram Court included a suggestion to the firefighters as to how their dispute may otherwise be addressed:

"Although a grievance may in some ways be an exclusive administrative remedy, this does not mean that the Employees are deprived of any and all remedies to resolve what they contend is Management's unconstitutionally inequitable treatment of military firefighters in terms of retirement benefits, overtime pay, or the use of paid State leave. For example, as the employees did in McKamey v. State, 268 Mont. 137, 885 P. 2d 515 (Mont. 1994) could file a declaratory judgment action in circuit court. As to overtime issues, the Employees could also pursue an action in federal court under the FLSA. With respect to retirement benefits, when and if one of the Employees is discharged upon reaching the Guard retirement age, he could then appeal his termination on constitutional grounds. I offer these potential alternatives in response to the Employees' contention that this proceeding is their only recourse, without offering any opinion or conclusion as to whether or to what extent the Employees might be successful in pursuing their claims in another forum."

Kram, 374 Md. at 662.

The employees had argued that under the State Personnel System Reform Act of 1996 the grievance process was designed to be an "exclusive remedy" for an employee in the State Personnel Management System. Id.
Thomas had the burden to prove this discretionary provision should inure to her benefit. There was some question as to whether Thomas tendered medical certificates to excuse his absence. A hearing had to be held on this issue. 158 Md. App. at 552-53.

**Even this “at-will” State employ has some rights to grieve**

- *Danaher v. Dept. of Labor*, 148 Md. App. 139, 155, 811 A. 2d 359 (2002) saw the Court reversing and remanding a case involving termination of a Maryland State employee for violation of a sexual harassment policy. Even though the employee was an “at-will” employee, the State did not comply with its statutory responsibility to investigate alleged misconduct, meet with the employee, consider any mitigating circumstances, and *then* to “determine appropriate disciplinary action, if any, to be imposed.” SPP §11-106. 148 Md. App. at 166, 176. SPP §11-106 “does not detail how the Employer was to conduct the required investigation.” Nevertheless, using a dictionary definition, the inquiry had to be careful or systematic and adhere to basic principles of fairness. 148 Md. at 169. Termination of a State employee with prejudice means that the employee may not be employed with the State in any capacity for three years. 148 Md. App. at 176.

**There is a binding agreement provision resolution alternative in this case**

- The Court of Special Appeals held that when the Department of Corrections entered into a binding agreement with a corrections officer as punishment for negligence of that officer resulting in the death of an inmate, the agreement precluded the Department from rescinding it and imposing the more severe sanction of termination at a later date. *McKay v. Dept. of Public Safety*, 150 Md. App. 182, 186, 819 A. 2d 1088 (2003). In a matter of statutory interpretation, the Court stated that SPP §11-108(a)(2) allows an appointing authority and an employee to agree to the “imposition of a lesser disciplinary action as a final and binding action, not subject to further review.” 150 Md. App. at 195. Allowance of that bargaining mechanism meant the bargain made could not be rescinded despite the fact the Warden stated he came upon other evidence following the time the bargain was made. 150 Md. App. at 198.

**The overall picture of the grievance procedure**

**Imposition of sanctions**

**Rights of probationary employees**

- *PSC v. Wilson*, 389 Md. 27, 882 A. 2d 849 (2005) discussed the 1996 enactment of the State Personnel Management System Reform Act and the procedure for the imposition of sanctions to classified and other employees of the State. 389 Md. at 68-69 Those rights do not apply to probationary employees. 389 Md. at 71-72. There is a distinction in the process between an employee’s performance and misconduct of an employee. 389 Md. at 72-73.

**ALJ final administrative authority over grievance procedures**

- *Dept. Public Safety v. Myers*, 392 Md. 589, 898 A. 2d 464 (2006) held that an ALJ, as the final administrative authority under Maryland’s statutory grievance procedure for most State Executive Branch employees had the authority, if he or she concludes that the employee is performing duties that entitle the employee to be in a different classification, to direct that the employee be placed into the proper classification. 392 Md. at 590. Discussing some history of the State personnel law (§§ 6-401 through 6-406 of the State Personnel and Pension Article (SPP)), the inclusion of employees into categories and the workings of government units, the Court discussed the term “grievance” as used in the statute. 392 Md. at 591-92. This case involved seven employees working at various correctional institutions, the work history of these employees and their reclassification. Concluding that an employee had sustained her burden of proof that she did the kind of work set forth in the specifications for a position designated as APS II, the ALJ ordered she be reclassified to that position. 392 Md. at 593-96. Other employees were found not to have sustained their burden of proof. 392 Md. at 596. The circuit court affirmed as did the Court of Special Appeals.

> “As we have observed, ‘grievance’ is defined very broadly.” It includes any dispute concerning the

---

7 In *McKay*, there was no meeting with the employee giving him a meaningful opportunity to respond. Nor was the veracity of the allegations checked. *McKay*, 150 Md. App. at 170. A number of disciplinary options are available to the employer, 150 Md. App. at 171, but before determining which of those options to exercise, the Department of Labor had to satisfy the statutory requirements “by conducting an investigation and considering mitigating circumstances.” *McKay*, 150 Md. App. at 176.
interpretation and application of a personnel policy or regulation, with some exceptions. 392 Md. at 597.

"There is nothing in the definition remotely suggesting that a dispute over whether an employee is performing duties that have been assigned to a different position and, for that reason, is entitled to be reclassified to the position to which those duties have been assigned, is excluded from the grievance procedure, and, indeed, both the statute and the regulations promulgated by DBM expressly recognize that kind of reclassification grievance." 392 Md. at 598. "Unquestionably, an employee may use the grievance procedure to complain that the employee's duties and responsibilities are those assigned to a different classification. Indeed, as we observed, SPP §12-103(b) provides that, unless another procedure is provided by SPP, the grievance procedure "is the exclusive remedy through which a nontemporary employee in the [SPMS] may seek an administrative remedy for violations of the provisions of this article."" 392 Md. at 598-99. "We do not share DPSCS's view that allowing the ALJ, as the final decision maker in a grievance proceeding, to direct an appropriate reclassification will significantly impinge upon the jurisdiction and responsibility of either the principal unit or DBM in devising or implementing the classification system; nor will it jeopardize the integrity of the SPMS. The ALJ is not changing the definition or description of classes or positions but is simply determining, based on the facts presented, that a particular employee is executing duties and responsibilities that those agencies have assigned to a different position and that the employee is therefore entitled to be in that position." 392 Md. at 600.

**Interpretation of agency regulations can sometimes be the subject of appellate disagreement**

**Employee compensation time.**

- The political process probably began to finally decide whether a Maryland State employee is entitled to be paid as "work time" for the entire time spent driving from home directly to an out-of regular work place site, or whether the employee's normal commute time to the regular workplace is to be deducted from the time spent driving to the out-of-workplace site after the decision in *Miller v. Comptroller*, 398 Md. 272, 920 A. 2d 467 (2007). A majority of 5 against a minority of 2 saw different results in interpreting a myriad of regulations addressing the issue. Employee compensation case law discussion of statutes and regulations was reviewed in considerable detail by the Court. The Court majority held that COMAR 17.04.11.02B(1)(j) "does not entitle employees to compensation for all the time spent traveling between home and a work site other than their assigned office and that [SPP § 12-203 (b)] requires a remedy to be limited to compensation for claims existing within 20 days prior to the initiation of a grievance." 398 Md. at 286. Interpreting the same group of regulations, the minority saw the issue differently. No benefit can be seen to the reader in going into great detail as to the interpretation issue in this case. Suffice it to say that what is or what is not consistent with the statutory scheme creating an agency and the regulations that come forth from the agency can be seen differently by judges of the same court.

**The ALJ as finder of fact?**

**Can the ALJ enter a lesser penalty?**

*Be careful: Look at the statute. Who has to make what finding, when, where, how and what.*

- Termination of a State of Maryland employee following an incident in which Neal placed her hands around the throat of an inmate was reversed in *Dep't Public Safety v. Neal*, 160 Md. App. 496, 864 A. 2d 287

---

8 Miller's job in the Comptroller's office required her to conduct audits at field locations going directly to remote locations from her home. *Miller*, 398 Md. App. at 276.
9 "[T]he interpretation of an agency rule is governed by the same principles that govern the interpretation of a statute." *Miller*, 398 Md. at 282-83. The minority said that the majority failed to apply the appropriate standard of review and that it confused appellate court jurisprudence. 398 Md. at 289. They said that regulatory language had to be interpreted according to its "natural and ordinary meaning" and that the majority did not accordingly interpret the law, 398 Md. at 292, and that "The majority's conclusion directly contradicts the ordinary and plain language of COMAR 17.04.11.02B(1)(j)." 398 Md. at 294.
10 SPP §12-203(b) does state that a grievance procedure must be initiated by the employee within a 20 day period following the occurrence or the employee's first knowledge of the occurrence, *Miller*, 398 Md. at 297, but the minority said that the ALJ or final decision maker's authority under §12-303 to "grant 'any appropriate remedy' available under Section 12-402(a)" and that meant that the General Assembly could not have intended remedies under Section 12-402 to be restricted by Section 12-303's filing requirements." 398 Md. at 297.
11 The Court detailed the facts of the incident where the inmate had been bumping the Correctional Officer. *Neal*, 160 Md. app. at 499-501.
 Neal was terminated\textsuperscript{12} and upon appeal, an ALJ determined she should be reinstated and a 30 day suspension without pay imposed. The ALJ was convinced that the incident was more in the nature of horseplay that was not all that bad. 160 Md. App. at 499. Within the opinion is detailed the State disciplinary procedure for correctional officers consisting of a mitigation conference, COMAR regulations pertaining to discipline (with different categories of infractions) and the facts applicable to the case being considered. 160 Md. App. at 504, 511-16. As to the contention that the ALJ erred in not making a determination that the discipline imposed by Warden Maloof was a clear abuse of discretion: “The ALJ’s decision that the evidence did not support any of the factual bases underlying automatic termination of Neal from employment amounted to a decision that the sanction of automatic termination was unreasonable.” A reviewing court is required to defer to the ALJ fact-finding. 160 Md. App. at 515-16. Under the circumstances of this case, considering the charges against Neal, the ALJ “was authorized to impose a modified sanction from the termination that was imposed by the warden. The sanction of a one-month suspension without pay is a lesser sanction than the termination sanction imposed by the warden. Accordingly, it is a modification of the termination, which the ALJ was authorized to impose.” 160 Md. App. at 518.

Conditions on imposing administrative discipline – unavailability of the employee

- In a continuing saga of judicial review of administrative decisions pertaining to the termination of a State of Corrections employee\textsuperscript{13}, the Court of Appeals in Dep’t Public Safety v. Donahue, 400 Md. 510, 929 A. 2d 512 (2007) held that Donohue was properly discharged. SPP §11-106 imposes conditions on the taking of disciplinary action against a State employee which includes a requirement that the appointing authority must take action against the employee “no later than 30 days after the appointing authority acquires knowledge of the misconduct for which the disciplinary action is imposed.” 400 Md. at 527.

  “... SPP §11-106(a) requires the appointing authority to meet with the employee and consider any mitigating circumstances before taking any disciplinary action.” 400 Md. at 531. “Under State Personnel and Pensions Article §11-106(a)(2) and COMAR 17.04.05.04D3, in a disciplinary action, a State employee may be deemed unavailable to meet with the appointing authority when, after the appointing authority has made a reasonable, good faith effort to notify the employee of the meeting and the employee has been given a reasonable amount of time to receive and respond to the notice, the employee fails to respond to the notice or appear at the meeting.” Discussing the meaning of the word “unavailable” and whether Donohue was unavailable for meeting with the Warden to discuss the charges against him, he had no valid complaint when the letters and telephone calls to him never reached him. “In the absence of any information indicating where Donahue might be or, if he was not, in fact at home and was simply ignoring the communications when he might be returning, the Warden was not required to keep postponing the meeting from day to day or week to week, waiting to see if Donohue might call, write or appear. Wardens have other things to do. We hold that the warden made a reasonable, good faith effort to notify Donohue, that Donohue was given a reasonable amount of time to receive and respond to the notice, and that he failed to do so. That equates to his unavailability.” 400 Md. at 536-37.

B. License Suspensions.

There is a specific provision in the MAPA (SG §10-226) dealing with the suspension of licenses. License is broadly defined by that section to mean any permission required by law that is not required only for

\textsuperscript{12} Termination procedures under COMAR and categories of disciplinary procedures were set forth in the opinion in great detail. Neal, 160 Md. App. at 504, 511-16.

\textsuperscript{13} The court detailed the 10 year path of the proceedings. Donohue, 400 Md. at 515-526.
A license may not be revoked or suspended until the licensee is first given written notice of the facts that warrant suspension or revocation, and an opportunity to be heard.15

There is a provision for summary suspension if the licensing authority finds that “the public health, safety, or welfare imperatively requires emergency action,” and the licensee is promptly given “written notice of the suspension, the finding, and the reasons that support the finding,” and an “opportunity to be heard.”16 “The discretion to issue a summary suspension order if the agency so chooses necessarily includes the discretion to issue the order when the agency chooses.”17

The statute reads:

SG §10-226. Licenses - Special provisions.

(a) Definitions.-
(1) In this section the following words have the meanings indicated.
(2) "License" means all or any part of permission that:
(i) is required by law to be obtained from a unit;
(ii) is not required only for revenue purposes; and
(iii) is in any form, including:
1. an approval;
2. a certificate;
3. a charter;
4. a permit; or
5. a registration.
(3) "Unit" means an officer or unit that is authorized by law to:
(i) adopt regulations subject to Subtitle 1 of this title; or
(ii) adjudicate contested cases under this subtitle.

(b) Renewal and expiration.- If, at least 2 calendar weeks before a license expires, the licensee makes sufficient application for renewal of the license, the license does not expire until:
(1) the unit takes final action on the application; and
(2) either:
(i) the time for seeking judicial review of the action expires; or
(ii) any judicial stay of the unit's final action expires.

(c) Revocation of suspension.-
(1) Except as provided in paragraph (2) of this subsection, a unit may not revoke or suspend a license unless the unit first gives the licensee:
(i) written notice of the facts that warrant suspension or revocation; and
(ii) an opportunity to be heard.
(2) A unit may order summarily the suspension of a license if the unit:
(i) finds that the public health, safety, or welfare imperatively requires emergency action; and
(ii) promptly gives the licensee:
1. written notice of the suspension, the finding, and the reasons that support the finding; and
2. an opportunity to be heard.

14 That “permission” from the State may be in the form of a Unit which is defined to mean an officer or unit authorized to adopt regulations or adjudicate contested cases.
15 SG §10-226(c)(1). Thus, this is notice and opportunity to be heard prior to the effective date of any revocation or suspension. Board of Physician Quality Assurance v. Mullan, 381 Md. 157, 165, 848 A. 2d 642 (2004).
16 Mullan, 381 Md. at 165-66. COMAR 10.32.02.05(F)(2), passed by the Board of Physicians sets standards for summary disposition. Id. SG 10-226(c)(2) states the Board "may" issue a summary suspension means the Board is not compelled to issue such a suspension even when it makes a finding that the public health, safety, or welfare imperatively requires emergency action. 381 Md. at 166-67.
17 Mullan, 381 Md. at 168.
Significant Case Decisions

**The Investigative subpoena and the burden on the health care provider or the patient to file for a protective order**

Instructive for the dire consequences that can result by not properly utilizing the proper legal procedures to contest a subpoena issued by an agency, the result of the opinion in *Maryland Board of Physicians v. Eist*, 417 Md. 545, 11 A. 3d. 786 (2011). Any experienced family law attorney will wonder aloud how the complaint to the Board of Physicians by an estranged husband/father in a very contentious domestic that a psychiatrist had overly medicated his wife and sons managed to receive so much attention by the Board.18 Psychiatric records from Dr. Eist were the subject of a subpoena issued by the Board; Dr. Eist made inquiry of his patients who said the records should not be disclosed; the court appointed attorney for the children determined that their psychiatric “privilege” should not be waived; Dr. Eist refused to release the records and the Board reprimanded and fined him for the failure to cooperate with a lawful investigation. 417 Md. at 548, 550-551.

The ALJ considering the case determined that “Dr. Eist had acted in good faith because he relied upon the advice of counsel” and therefore he had not violated any tenet of his professional responsibility under § 14-404(a)(33) HO. The Board did not agree and reprimanded Dr. Eist him and fined him $5,000. The circuit court reversed, 417 Md. at 559, and the Court of Special Appeals at 176 Md. App. at 135 concluded “...[T]he Board’s interest in obtaining the patients’ psychiatric records to investigate the standard of care allegation ... did not outweigh the patients’ privacy interest in those highly personal records...” 417 Md. at 560.

On certiorari, the Court pointed to HO §14-404(a)(33) which allows the Board to “reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee ... (33) fails to cooperate with a lawful investigation conducted by the Board.” HO §14-206(a) gives the Board authority to issue subpoenas, and HG § 4-306 requires a health care provider to disclose medical records “without the authorization of a person in interest” to a licensing and disciplinary board.

The Court of Appeals stated: “We shall hold that because Dr. Eist nor the patients took any appropriate action to challenge the subpoena, such as filing in the Circuit Court a motion to quash or a motion for a protective order, as required by the applicable statutes, and because Dr. Eist clearly failed to comply with the subpoena in a timely manner, the Board’s decision was legally correct.” 417 Md. at 549.19

Title 14 of HO authorizes the Board of Physicians to take disciplinary action against health providers and to investigate allegations of conduct warranting disciplinary action. The Board has the statutory authority to issue subpoenas. 417 Md. at 562. The Maryland Confidentiality of Medical Records (HG Subtitle 3 provides that a health care provider shall disclose a medical record *without authorization of a person in interest* in response to a subpoena for investigation involving the improper practice of a health care professional. 417 Md. at 563. HG §4-307 “concerning mental health medical records, reiterates that, in connection with a Board investigation, records must be provided to the Board regardless of a patient’s authorization, and that the appropriate procedure for weighing a patient's privacy interests against the Board’s need for the records is for the patient or the health care provider to file a court action to quash the subpoena or for a protective order” under HG §4-307(k)(1)(v)(1). 417 Md. at 563-64.

If the patient and/or the health care provider believe that there are grounds for not producing the records, the patient or the health care provider must file a motion to quash the subpoena or a motion for a protective order pursuant to Maryland Rules 2-403 or 2-510. This is the route chosen by the General Assembly for the resolution of constitutional or other objections to the subpoena. The General Assembly did not provide for an action by the Board to enforce the subpoena.11 Furthermore, the General Assembly did not provide that the health care provider could refuse to comply with the

---

18 It is interesting to note the very large number of amicus briefs filed on behalf of various psychiatric associations asking the Court of Appeals to keep its nose out of the privilege that exists between a patient and his/her psychiatrist or psychologist.

19 After charges were brought against Dr. Eist the records were turned over to the Board and upon Peer Review, it was determined that: “no breach in any applicable standard of care in his treatment or conduct with the patients.” 417 Md. at 553-54.
subpoena, fail to file a motion to quash or a motion for a protective order, and later, in a disciplinary action, defend on the ground that the patient's privacy rights were infringed by the subpoena.

417 Md. at 564-56

**What does the statute say? May the license be revoked because of . . . ?**

- Revocation of the license of a physician by the Board of Physicians was reversed by the Court of Appeals upon the entry of an Alford plea of the crime of second degree assault (4th degree sexual offense had also been charged) and the physician was granted PBJ in *Rudman v. Maryland State Board of Physicians*, 414 Md. 243, 994 A.2d 985 (2010). The Board interpreted the court decision as one where the physician had pled guilty to a crime of moral turpitude and ruled that it was required to revoke. 414 Md. at 246.

  When the physician entered his plea he did not withdraw his plea of not guilty to the sexual offense charge, he denied he had committed either an assault or a sexual offense, and the circuit court had no opportunity to evaluate the strength of the proffered evidence. Thus, there was no basis for the conclusion that a conviction had occurred. 414 Md. at 260-61. “Because Petitioner has not been found guilty of a crime of moral turpitude, and has never admitted that he has committed any criminal offense, the Board does not have the authority to revoke Petitioner’s license without giving him the opportunity for a hearing pursuant to the hearing provisions of H.O. 14-405.” 414 Md. at 262.

**License suspension for violation of agency probation conditions**

- *Cohen v. Board of Physicians*, 160 Md. App. 277, 863 A.2d 358 (2004) was the case where a physician’s license was revoked when that physician had had a number of difficulties with the licensing agency over the years. “Appellant argues that the Board exceeded its statutory authority when it revoked his license because the ground of revocation, i.e., violation of probation, is not found in [HO § 14-404]. 160 Md. at 282. Among the authority provisions given to the Board upon a finding of a statutory violation is the authority to revoke a license. The Board’s findings in 1995 that this psychiatrist committed “boundary violations” and was “guilty of immoral and unprofessional conduct in the practice of medicine” in violation of HO §14-404(a)(3). Dr. Cohen’s license could have been revoked at that time but he was placed on five years probation subject to conditions. Dr. Cohen entered into a consent order where he agreed that “if he failed to meet the terms of the Consent Order, the Board would be able to impose any appropriate sanction.” 198 Md. at 283. Nothing produced by Dr. Cohen gave evidence to the fact that the determination of revocation of license was arbitrary and unreasonably severe. 198 Md. at 284.

**The passage of time and its impact on the right to summarily suspend**

- Dr. Mullan’s license to practice medicine was summarily suspended because he was practicing under the influence of alcohol in *Board of Physician Quality Assurance v. Mullan*, 381 Md. 157, 848 A. 2d 642 (2004). There was a delay in the investigation of the danger prior to a summary suspension order being issued. Discussing case law concerning the passage of time from complaint to summary suspension procedures, the Court stated that the delay was to be considered as evidence and could be relevant “in determining whether the agency acted arbitrarily or capriciously when it ordered the summary suspension in the first place.” “The length of the investigatory period leading up to summary suspension does not play a role in the consideration of whether there is substantial evidence to support the agency’s factual finding that the situation ‘imperatively requires emergency action.’” 381 Md. at 171.

**Discipline of a dentist**

- *Rosov v. Dental Examiners*, 163 Md. App. 98, 877 A. 2d 1111 (2005) affirmed the Board determination of a violation of the dental act by: (1) the failure of a dentist to properly attend and notify the patient relative to her injection with Lidocaine with a needle that had previously punctured the skin of his dental assistant; (2) his misrepresentation to the Board of attempts to contact the patient; (3) his failure to comply with CDE guidelines; and his failure to properly document the file. Nothing indicated that Dr. Rosov should be given one more opportunity. *Rosov*, 163 Md. App. at 122-25. The Complaint in this case was filed by his
dental assistant, not the patient. The Court said that fact did not matter given the substantial evidence on inappropriate conduct. 163 Md. App. at 126.20

**Representation of improper settings on surgical instrument**
- The Court of Special Appeals did a bit of a stretch in *Cornfeld v. Board of Physicians*, 174 Md. App. 456, 921 A. 2d 893 (2007) when it determined that a physician engaged in unprofessional conduct in the practice of medicine by misrepresenting to both a hospital peer review investigator and the Board that improper settings on a surgical instrument he used were not made to his specifications. At issue was what is included in the phrase within the physician's disciplinary statute of “professional misconduct in the practice of medicine”21 as “practice medicine” is defined by HO §14-404. Dr. Cornfeld was cited for a number of violations. Before *Cornfeld*, appellate courts of Maryland had occasion to consider the issue: *McDonald* (physician’s effort to influence a witness scheduled to testify against him in a malpractice case); *Banks* (sexual harassment of hospital employees); and *Finbucan* (consensual sexual relationship with patients). Fundamental principles of medical ethics require that “[a] physician shall deal honestly with patients and colleagues.” 174 Md. App. at 479. With peer review being a standard practice (citing cases and other commentary), “to exclude dishonesty in hospital peer review proceedings as sanctionable misconduct in the practice of medicine would mean that lying directly to a patient about what occurred during her surgery would qualify as unprofessional conduct in the practice of medicine, but lying to a hospital about the same surgery during peer review proceedings concerning that same patient would not qualify as unprofessional misconduct in the practice of medicine.” 174 Md. App. at 481-82. Cornfeld’s lie concerning his conduct at a treating physician before peer review and the Board constituted unprofessional conduct “in the practice of medicine.” 174 Md. App. at 482.22
- Delay in the Board investigation was addressed by the Court, stating its concern by the delay, but also stating that the failure of the Legislature to provide a penalty for this delay and the lack of prejudice to Dr. Cornfeld meant there was no reversible error. 174 Md. App. at 483-84.
- Dr. Cornfeld complained that a sanction (suspension and long term probation) imposed upon him was disproportionate to his alleged offense (patient not harmed and asked him to deliver her next child for conduct in leaving the operating room and misrepresenting his instructions to hospital personnel) so as to constitute an abuse of discretion and arbitrary and capricious agency action considering the facts of the case in 174 Md. App. 456, 921 A. 2d 893 (2007). Agencies have broad latitude in fashioning sanctions within the legislatively designed limits and in this case the Court said it did not see the sanction imposed as “extreme and egregious” as to warrant judicial intervention. 174 Md. App. at 487.

**C. Insurance Cases.**
No industry is regulated more than the insurance industry. “Under Insurance Art., §2-210(a)(2), any person claiming to be aggrieved by a decision of the Commissioner is entitled to a hearing on the matter. A hearing held pursuant to Insurance Art., §2-210 is conducted in accordance with the contested case provisions of the APA §§10-201-10-227. . . . [T]he Rules of Procedure promulgated by the OAH in COMAR 28.02.01, and the regulations promulgated by the MIA (Maryland Insurance Administration) in COMAR 31.02.02, complement the contested case provisions of the APA.” Sometimes the regulations are duplicative of each other and the statute.23 SG §10-206(a)(1) requires OAH to “adopt regulations to govern the procedures and practice in all contested cases delegated to the Office [of Administrative Hearings] and conducted under this [(Administrative Procedure Act - Contested Cases)] subtitle.”24

---

20 *Rosov* involved a six-day contested evidentiary hearing. *Rosov*, 163 Md. App. at 107. This is another Court that noted that judicial review of administrative agency decisions is narrow and reciting the substantial evidence case.
21 The ALJ had determined this conduct did not fall within “the practice of medicine.” The Board of Physicians determined it did. *Cornfeld*, 174 Md. App. at 468.
22 Cornfeld also complained that a delay in Board investigation prejudiced him but the Court found no prejudice. *Cornfeld*, 174 Md. App. at 484. The Board finding that Cornfeld violated the standard of care was supported by evidence presented. 174 Md. App. at 485-86.
24 *Mehrling*, 371 Md. at 52-53.
addition, the [M]APA authorizes an agency to adopt its own regulations to govern procedures in contested case hearings." SG §10-206(b) states that "each agency may adopt regulations to govern procedures under this [(Administrative Procedure Act - Contested Cases)] subtitle and practice before the agency in contested cases."25

The [Maryland Insurance Administration (MIA)] "has promulgated regulations in COMAR 31.02.02 governing how a contested case hearing is to be conducted by the OAH, and the Commissioner 'retains authority over delegated cases to the extent provided in that chapter.' See COMAR 31.02.02.01B.26

"Section 10-213 of the APA specifies with particularity the evidence which may be offered and considered in a contested case, and provides generally that "each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record." APA §10-213(a)(1). "Findings of fact must be based exclusively on the evidence of record in the contested case proceeding and on matters officially noticed in that proceeding." APA §10-214(a)."27 "If the MIA has not delegated to the OAH the authority to make the final decision in a contested case or category of contested cases . . . the ALJ prepares a proposed decision containing "proposed findings of fact, conclusions of law, or orders in accordance with the agency's delegation under §10-205 of this [(Administrative Procedure Act - Contested Cases)] subtitle." APA §10-220(a). The proposed decision is submitted by the OAH to the Commissioner for his or her consideration and a final decision in the matter. See APA §10-220(a). Upon motion of a party, the ALJ also may issue a proposed or final decision (depending upon the delegation of authority by the MIA) "dismissing a complaint or other agency action, or any request for hearing which fails to state a claim for which agency relief may be granted." COMAR 28.02.01.16B. A proposed decision dismissing a complaint is reviewed by the Commissioner in the same manner as any proposed decision."28

Parties may file exceptions with MIA to an ALJ proposed decision. COMAR 31.02.02.10C provides: "exceptions to the proposed decision shall be in writing unless specified otherwise by the final decision maker." In considering a party's exceptions, the final administrative decision maker, in this case the Associate Deputy Commissioner, "shall personally consider each part of the record that a party cites in its exceptions or arguments before making a final decision." APA § 10-216(a)(3).29 The regulation details what the record before the Commissioner shall contain. The Commissioner then issues a final order. While the Commissioner is bound by the ALJ’s findings of facts that are supported by competent, material, and substantial evidence, he/she is not bound by any legal analysis, proposed conclusions of law or proposed order.30 The Commissioner may affirm, reverse, or modify the proposed decision or remand the case to AOH for further proceedings. When a remand is ordered, it is incumbent upon the Commissioner to set forth, with particularity, the basis for the reversal, modification or proposed decision. The MAPA requires specific findings of fact and conclusions of law.31

Significant Case Decisions

The Commissioner's review of the ALJ decision
- The Insurance Commissioner was required to consider exceptions filed to an ALJ decision in Mehrling v. Nationwide, 371 Md. 40, 64, 806 A. 2d 662 (2002). When the Commissioner reviewed the ALJ decision,

25 Mehrling, 371 Md. at 53.
26 Mehrling, 371 Md. at 53.
27 Mehrling, 371 Md. at 53.
28 Mehrling, 371 Md. at 53-54.
29 Mehrling, 371 Md. at 54.
30 Mehrling, 371 Md. at 55.
31 Mehrling, 371 Md. at 55-56.
Mehrling offered additional information that the status of her bankruptcy case did not preclude her action to prevent Nationwide from terminating her as an agent. That new evidence, offered as part of the exceptions to the ALJ decision, was part of the record and had to be considered by the Commissioner. It was not clear whether the Commissioner considered this new evidence. 371 Md. at 65. The Commissioner's final order did not provide "adequate factual findings and a clear statement of the rationale for the agency's conclusions so as to permit 'meaningful' judicial review." 371 Md. at 66. Filing exceptions "is the only appropriate method for a party to present post-hearing evidence for an agency's possible consideration."32 Because of the authority of the Commissioner, a review is not confined to the record compiled before the ALJ. It is the function of a court to reviewed a "final decision." 371 Md. at 60.

D. LEORB.
The Law Enforcement Officers' Bill of Rights [former Art. 27, §§ 727-734D] was enacted in 1974. The primary purpose of the LEOBR is "to guarantee certain procedural safeguards to law enforcement officers during any investigation or interrogation that could lead to disciplinary action, demotion, or dismissal."33 "It is the officer's exclusive remedy in matters of departmental discipline." The Legislature has recognized that the nature of the duties of police officers are different from that of other employees. The LEOBR grants "extensive rights to law enforcement officers that are not available to the general public." The LEOBR [former Art. 27, §730] "provides a detailed recitation governing the conduct of the hearing and the introduction of evidence."34 "A state police officer confronted with disciplinary proceedings is entitled to protections afforded by the contested cases provisions of the APA [§ 10-202], as well as those provided under the LEOBR. [former Art. 27, §727(b)(1)] "County police agencies. ..are not included within the purview of the State APA."35 The LEOBR affords protection during any inquiry into his conduct which could lead to the imposition of a disciplinary sanction. It provides a police officer due process protection when the officer is investigated and/or interrogated as a result of a disciplinary-type complaint.36 **LEORB is presently found in the Public Safety Article, §3-101, et. seq.**

Section 729A of the LEOBR prohibits a law enforcement agency from prohibiting secondary employment by a police officer but the agency "may promulgate reasonable regulations as to a law enforcement officer's secondary employment." When Montgomery County passed regulations and a police officer was determined to have violated those regulations, an issue arose as to whether a Chief's power to discipline an officer who violated the secondary employment directives could include prohibiting that officer from engaging in secondary employment for a three month period of time.37 The Court concluded that enactment of the LEOBR was not to define the substantive authority of a Chief of police. "While it describes the authority of the hearing board to recommend, and confirms the power of the chief to impose, certain disciplinary sanctions, it does not define the scope of the Chief's authority to discipline."38

---

34 *Coleman*, 369 Md. at 122-23.
35 *Coleman*, 363 Md. at 137-38.
36 *FOP No. 35 v. Mehrling*, 343 Md. 155, 181-82, 680 A. 2d 1052 (1996). This Court said that the enactment was not for the purpose of defining the scope of the substantive authority of the Chief of Police. *FOP No. 35*, 343 Md. at 181.
37 *FOP No. 35*, 343 Md. at 173-74. In writing this opinion, Judge Robert Bell detailed the enactment of regulations by Montgomery County which prohibited public employees from engaging in any other employment unless that employment was approved by the Montgomery County Ethics Commission. *Id.*, at 161-73. The Officer did not question the authority of the Chief to issue a letter of reprimand. *Id.*
38 *FOP No. 35*, 343 Md. at 184. "Its primary function being to provide a procedural framework for the protection of law enforcement officers subject to disciplinary action, the LEOBR is not an effective vehicle for defining the types of disciplinary sanctions available to the Chief." 343 Md. at 183.
Probationary status and LEOBR

- Mohan v. Norris, 158 Md. App. 45,854 A. 2d 259 (2004) held that a police officer, who is certified for permanent appointment by the Maryland Police Training Commission, but is a probationary police officer employee of the Department of State Police is “not covered by the LEOBR” 158 Md. App. at 62. Some State Police employees are “police employees,” who are assigned law enforcement powers authorized by statute. 158 Md. App. at 263. Article 41 of the Maryland Code discusses appointment as a police officer. Statutory interpretation rules were stated. An officer “who does not have a permanent appointment is at most in a probationary status under the LEOBR.” 158 Md. App. at 266. “The General Assembly necessarily was aware, when it enacted the 1975 law excluding officers "in a probationary status" from LEOBR coverage (except in brutality cases), that police officer employees of the State Police, otherwise covered by the LEOBR, were by statute "in a probationary status" for 24 months after their dates of appointment. We glean, from the General Assembly's use of precisely the same language to create the LEOBR probationary status exclusion as was used to establish the probationary period for police officers of the State Police, that it meant for the exclusion to apply to probationary police employees of the State Police -- an outcome consonant with the autonomy the Secretary of the State Police has in employment decisions over probationers within that law enforcement agency.” 158 Md. App. at 62.

This decision was affirmed by the Court of Appeals in Mohan v. Norris, 386 Md. 63, 871 A. 2d 575 (2005). The answer was No! Norris, 386 Md. at 64. Reviewing the statutory scheme, legislative history, treatise and case law history, the Court determined, that even though Mohan was permanently certified, he was in his “initial entry” into the employment of the State Police. Although his permanent status prevented him from being placed “in probationary status” for the purpose of the MPTCA, that certification status was no barrierto being placed “in probationary status,” for purposes of the LEOBR, by his new police employer. Norris, 386 Md. at 78. Thus the protections of the LEOBR were unavailable to Mohan, Norris, 386 Md. at 81.

Debarment and LEOBR

- Boyle v. Park & Planning, 385 Md. 142, 867 A. 2d 1050 (2005) concerned an investigation as to whether park police officers were using their official positions and state property to further conflicting private interests. 385 Md. at 144. The Court stated that debarment proceedings did not constitute punitive action within the meaning of LEOBR and therefore LEOBR procedures were inapplicable to a procedure to debar individuals (order that renders a person ineligible to bid on or be awarded a public contract). 385 Md. at 146. LEOBR procedural protections “apply only when there is a prospect of disciplinary action or punitive measure that is within the substantive authority of the Chief of Police to impose.” “If there is no possible disciplinary action that the Chief can impose, even upon a sustaining of every charge made against the officer, the hearing board procedure serves no function; it leads nowhere.” 385 Md. at 155. Boyle and Pauley resigned their positions and were not seeking reinstatement as police officers. Thus, no sanction could be imposed by the Chief of Police and the LEOBR had no applicability.” 385 Md. at 156-57.

E. MVA.

More MVA hearing are conducted by OAH than any other type of hearings. A number of decisions case have arisen, many of which are found elsewhere in this book.

That sworn statement as prima facie proof of . . .

- Najafi v. MVA, 418 Md. 164, 12 A. 3d 1265 (2011) saw the Court stating once again that the sworn statement of an arresting officer is prima facie evidence of the refusal to take a chemical breadth test.
"Najafi alleges that he did not refuse because the officer failed to ask him to make an election, after Najafi unsuccessfully attempted to contact his attorney." 418 Md. at 185. The sworn statement prima facie case was sufficient to address the Najafi argument in this case because the ALJ determined that testimony by Najafi at the administrative hearing did not rebut the presumption attendant to the sworn statement. 418 Md. at 188.41

**Refusal to take a blood test because of a fear of needles as a defense? – no way**

- At issue in *MVA v. Dove*, 413 Md. 70, 991 A.2d 65 (2010) and *Dove v. State*, 415 Md. 727, 4 A.3d 976 (2011) was whether the ALJ correctly determined that Dove should have his driver's license suspended for refusing a blood test while a hospital emergency room patient “at a time when Dove asserted that his refusal was justified because of his fear of needles, his preference for a breath test, and the later administration of an alcohol content test by the hospital staff.” Substantial evidence was of record to sustain the ALJ decision that the test was refused. 413 Md. at 75. SG §10-222(h) was the statutory authority for judicial review and in this case the substantial evidence finding of a fact determination was the focus of review. 413 Md. at 79-80. After reviewing the statutory authority upon which a test may be ordered by a police officer under Maryland’s “implied consent statute” and the consequences of license suspension for a failure to take or submit to the test, the Court stated that there was substantial evidence that the circumstances warranted a blood test for alcohol concentration pursuant to CJ §10-305(a)(l)(ii). 413 Md. at 86. “Dove’s fear of needles does not excuse his knowing, voluntary refusal of the alcohol concentration test offered to him.” 413 Md. at 91. Before the ALJ was medical record evidence that Dove had received pain medication b an intravenous drip. 413 Md. at 92. The breath test “administered by Calvert Memorial Hospital staff did not nullify Dove’s refusal of the alcohol concentration test.” That test was for the purpose of giving medical care, not at the request of the police officer. 413 Md. at 92, 94.42

41 While I realize that there are a significant number of agency cases involving the suspension of a driver’s license for the failure to take a chemical test and/or because of a high alcohol level content, and also that one appearing before an agency has the right to have a subpoena issued for the attendance of the police officer upon the assertion of specific facts to demonstrate that the officer will testify in favor of the license, this whole idea of confrontation by paper is very worrisome. To me, allowing this procedure is a diminution of the right to confrontation of witnesses and the right of cross examination which for hundreds of years has been a mainstay of English/American law and fundamental due process and fairness. In this case as in the prior case of *MVA v. Karwacki*, 340 Md. 271, 666 A. 2d 511 (1995), expediency has won the day. The troublesome difficulties encountered with this process cause me to write that in the hope that there be no future erosion of individual rights in favor of the State in this or any other regard. John F. Fader II

42 The Court stated:

The fact that the preliminary breath test performed at Calvert Memorial Hospital showed a reading of 0.00 is irrelevant to the analysis of whether Dove refused the required blood test. The purpose of the sanction for refusal is not to punish driving under the influence directly, but rather "to provide an incentive for drivers detained under suspicion of drunk driving to take, rather than refuse, a test for alcohol concentration." . . . Dove argues that the preliminary breath test result, 0.00, should have been applied to a "probable cause" analysis. Dove, however, ignores the fact that a probable cause analysis has no place in this case. Section 16-205.1(a)(2) of the Transportation Article does not require probable cause when an officer requests an alcohol concentration test, but rather permits a test "if the person should be detained on suspicion of driving or attempting to drive while under the influence of alcohol." Suspicion based on reasonable grounds is a lower standard than a preponderance of the evidence or probable cause. In this case, the record provided the ALJ with substantial evidence that Officer Traas had reasonable suspicion that Dove was driving his
Refusal to submit to blood alcohol test

- MVA v. Atterbeary, 368 Md. 480, 796 A. 2d 75 (2002) addressed the issue of whether there was a refusal to submit to a blood alcohol concentration test in light of the two hour time limitation for tests (CJ §10-303) where an individual “suspected of driving while intoxicated has expressed a desire to consult with an attorney prior to making a test decision.” 368 Md. at 484.43 Trans. §16-205.1 sets forth the general testing policy applicable to individuals suspected of driving or attempting to drive while intoxicated. 368 Md. at 491. This law was enacted for the protection of the public and not primarily for the protection of the accused. 368 Md. at 492. Due process considerations were discussed. 368 Md. at 494-95. “In order to protect the licensee’s due process right, the right to consult with counsel prior to deciding whether to submit to a breathalyzer test must be meaningful and comport with traditional notions of essential fairness” There is no bright line rule which will effectively ensure that the due process right to communicate with counsel prior to submitting to a breathalyzer test ... is heeded in all circumstances without risking being overbroad or under-inclusive.” 368 Md. at 495-96. Case law has given some guidance “as to what types of communication would be considered an exercise of the ... due process right to communicate with counsel.” 368 Md. at 496-97. The burden to prove a refusal is on the MVA. 368 Md. at 497. In this case any refusal appeared due to the officer’s hast in concluding that Atterbeary refused to take the test. Only 20 minutes had passed from the time Atterbeary said he would submit to the test to the time the Officer determined he had refused because he wanted to speak to an attorney “... [O]n the facts and circumstances of this case, there was insufficient evidence to conclude that Atterbeary refused to submit to the breathalyzer test.” 368 Md. at 499-500.

F. State Procurement Contracts.

“State procurement contracts are subject to an exclusive, statutorily-prescribed procedure for resolving disputes. The procedure consists of four parts.44 First, the dispute must be submitted to the agency procurement officer for attempted resolution.45 Second, the agency head may approve, disapprove, or modify the procurement officer’s decision.46 Third, the decision of the agency head may be appealed to the Maryland State Board of Contract Appeals (“MSBCA”).47 Fourth, the MSBCA’s decision is subject to judicial review under the contested case provisions of the Maryland Administrative Procedure Act.”48


The Maryland State Board of Contract Appeals is an "agency" within the ambit of the Maryland Administrative Procedure Act..50

---

vehicle while under the influence of alcohol, based on the odor of alcohol detected on Dove's person at the scene, his watery eyes, and his involvement in a motor vehicle collision.

Dove, 413 Md. at 94-95 (citations and some quotes from prior court cases omitted).

43 The Court cited SG 10-222 “Standard of Review.”
45 SFP § 15-217.
46 SFP § 15-218(d) & §15-219(c) & (d).
47 SFP § 15-219(g).
48 SFP §15-223.
Significant Case Decisions

Summary disposition?

Where do you see that procedure authorized

- Summary disposition by the Board of Contract appeals in Engineering Mgt. v. State Highway, 375 Md. 211, 825 A. 2d 966 (2003) was reversed. The Board violated procedures set forth in its statute because it did not adopt rules allowing a summary disposition procedure. Id., at 232-32. Thus, the agency action was unlawful and required reversal. Id., at 236.

Oh! the tangled webs we weave

When you deal with the State of Maryland...

- Dept. of Public Safety v. PHP, 151 Md. App. 182, 824 A. 2d 986 (2003) is an appeal from a decision by the Maryland State Board of Contract Appeals. The Department’s statement concerning the number of inmates in billable population count was not an erroneous misrepresentation of a material matter and could not reasonably be relied upon by contractor when preparing proposal to provide health-care to inmates on a per inmate basis. Contractor’s overestimation of number of inmates thus did not entitle it to equitable adjustment. 51 Contention that misrepresentation existed and overhead costs were therefore too much for profit. Accuracy of information presented was discussed. The Court reviewed the verbal and written representations made by the Department to all offerors and concluded the Department has not assumed any responsibility for estimating or guaranteeing the number of inmates.” 151 Md. App. at 204. 52

Summary disposition procedures?

Where do you see that allowed in the law?

- Summary Disposition procedures by the Maryland State Highway Administration in denying a claim were declared by the Court of Appeals to be illegal because the Maryland State Board of Contract appeals MSBCA “violated the procedures set forth in its enabling statute when it proceeded to grant a summary disposition . . . in the absence of adopted rules of procedure.” 53 SG §10-206(b) states that “each agency may adopt regulations to govern procedures under this subtitle and practice before the agency in contested cases.” MSBCA’s enabling statute is more direct. SFP §15-201 states: “In accordance with Title 10, Subtitle 1 of the State Government Article [the APA], the Appeals Board shall adopt regulations that provide for informal, expeditious, and inexpensive resolution of appeals before the Appeals Board.” 54 Without the adoption of regulations providing for summary disposition the MSBCA, it may not apply summary disposition to the cases before it. Engineering Management v. Maryland State Highway Adm., 375 Md. 211, 235, 825 A. 2d 966 (2003). Additional funds were requested by Engineering Management

51 PHP’s position was that because it was being paid on a “per inmate” basis, it faced substantially higher monthly costs of operation than it had planned. It blamed its predicament upon which it claimed were misrepresentations by the Department as to the total number of inmates. PHP, 151 Md. App. at 186.

52 The Court discussed the cases of Trionfo & Sons, Inc. v. Board of Education, 41 Md. App. 103, 395 A. 2d 1207 (1979) and Raymond International, Inc. v. Baltimore County, 45 Md. App. 247, 412 A. 2d 1296 (1980). Issues of whether a contractor is required to verify information independently, when and under what circumstances a contractor is not reasonably able to discover the true facts, when compensation may be due for inaccurate and misleading representations made by government, etc. were examined. PHP, 151 Md. App. at 201-03. “A contractor may pursue the Government for damages under a contract for a misrepresentation in contract documents.” 151 Md. App. at 196. The Court said that Trionfo “does not stand for the proposition that, absent a provision releasing an owner from responsibility for the accuracy of information furnished to a bidder, a bidder is entitled to rely on such information.” 151 Md. App. at 204.

53 Engineering Management, 375 Md. at 235. Additional funds were requested by Engineering Management for repainting bridges to comply with OSHA changes relating to lead paint exposure. 375 Md. at 217. SG §10-210 allows summary disposition. There are various forms of judicial review of administrative decisions under the APA. 375 Md. at 227. Procedural vehicles are not used to determine factual disputes. They are to determine whether there is a dispute over a material fact or facts that should be tried. “. . . [T]here is no significant conflict between the deference given to factual determinations made by an agency and the principles of summary judgment [provided by Rule 2-501]” Id., at 228-29. Summary judgment “is inappropriate where matters—such as knowledge, intent or motive—that ordinarily reserved for resolution by the fact-finder are essential elements of the plaintiff’s case or defense.” 375 Md. at 230. SG 10-210 “does not describe the modality of action as summary judgment. . . .” 375 Md. at 231. “The question thus becomes whether the MSBCA properly implemented the ability to grant summary disposition, and, if so, whether it properly granted it in this case.” 375 Md. at 231. “Here, the MSBCA was directed by statute that it ‘shall adopt regulations,’ yet it failed to do so with regard to summary disposition.” 375 Md. at 234.

54 Engineering Management 375 Md. at 231.
for repainting bridges to comply with OSHA changes relating to lead paint exposure. 375 Md. at 217. SG § 10-210 allows summary disposition. There are various forms of judicial review of administrative decisions under the APA. Id., at 227. Procedural vehicles are not used to determine factual disputes. They are to determine whether there is a dispute over a material fact or facts that should be tried. 375 Md. at "... . [T]here is no significant conflict between the deference given to factual determinations made by an agency and the principles of summary judgment [provided by Rule 2-501]" 375 Md. at 228-29. Summary judgment "is inappropriate where matters – such as knowledge, intent or motive – that ordinarily reserved for resolution by the fact-finder are essential elements of the plaintiff’s case or defense." 375 Md. at 230. SG 10-210 "does not describe the modality of action as summary judgment..." 375 Md. at 231. "The question thus becomes whether the MSBCA properly implemented the ability to grant summary disposition, and, if so, whether it properly granted it in this case." 375 Md. at 231. "Here, the MSBCA was directed by statute that it 'shall adopt regulations,' yet it failed to do so with regard to summary disposition." 375 Md. at 234.

G. Zoning.

There are so many appellate court decisions on zoning, that the author of these materials thought the topic deserved special consideration to treat some reoccurring issues.55 One issue that arises from time to time is whether a vested right has been obtained so as to preclude a political subdivision from or opposing individual from 56

Not all zoning authority comes from the Express Powers Act, art. 25A. Unlike most other home rule chartered counties in Maryland which receive their basic zoning authority from Article XI-A of the Maryland Constitution, the Express Powers Act, Code (1957, 1994 Repl. Vol.), Art. 25A, § 5(x), and their county charters, the exclusive source of Montgomery County’s zoning authority is the Regional District Act, Code (1957, 1993 Repl. Vol., 1995 Supp.), Art. 28, § 8-101 et seq.57 Each county determines how a case is to move through the zoning process.58


We have very recently set out the standard of review for this Court’s review of zoning board decisions in Stansbury v. Jones, 372 Md. 172, 182-85, 812 A.2d 312, 318-20 (2002), where we said:

"Almost a half-century ago, in a case involving a denial of a use permit, we stated: 'It is a clearly established rule in the law of zoning that a court may not substitute its judgment for that of the Zoning Board.' Dorsey Enterprises, Inc. v. Shpak, 219 Md. 16, 23, 147 A.2d 853, 857 (1959) . Chief Judge Hammond wrote for the Court in State Ins. Comm’r v. National Bureau of Casualty Underwriters, 248 Md. 292, 309, 236 A.2d 282, 292 (1967) , that 'under . . . [either] of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. (alteration added).'

"Whether reasoning minds could reasonably reach a conclusion from facts in the record is the essential test. If such a conclusion is sufficiently supported by the evidence, then it is based upon substantial evidence. Forty years ago in Snowden v. Mayor and City Council of Baltimore, 224 Md. 443, 447-48, 168 A.2d 390, 392 (1961), we noted that:

377 Md. 405-06.

'The substantial evidence test "means that the reviewing court’s inquiry is whether on the record the agency could reasonably make the finding." . . . Substantial evidence is "such relevant

55 Bryan v. Makosky, 380 Md. 603, 846 A. 2d 392 (2004) is a case discussing the complaint of a member of the county planning and zoning commission concerning the appointment of a replacement. Though not generating an issue focusing on judicial review, it does give some insight into the appointment to office process.


58 In Anne Arundel County, zoning decisions are first made by the County’s Administrative Hearing Officer and from there an appeal may be taken to the County Board of Appeals. Becker v. Anne Arundel County, 174 Md. App. 114, 119, 920 A. 2d 1118 (2007).
evidence as a reasonable mind might accept as adequate to support a conclusion." The heart of the fact finding process often is the drawing of inferences from the facts. The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence. "The Court may not substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not tightness."[Citation omitted.]


"In White v. North, 356 Md. 31, 44, 736 A.2d 1072, 1079 (1999), we much more recently restated the general standard of review that:

In judicial review of zoning matters, including special exceptions and variances, "the correct test to be applied is whether the issue before the administrative body is 'fairly debatable,' that is, whether its determination is based upon evidence from which reasonable persons could come to different conclusions." Sembly v. County Bd. of Appeals, 269 Md. 177, 182, 304 A.2d 814, 818 (1973). See also Board of County Comm'r's v. Holbrook, 314 Md. 210, 216-17, 550 A.2d 664, 668 (1988); Prince George's County v. Meininger, 264 Md. 148, 151, 285 A.2d 649, 651 (1972); Zengerle v. Board of County Comm'r's, 262 Md. 1, 17, 276 A.2d 646, 654 (1971); Gerachis v. Montgomery County Bd. of Appeals, 261 Md. 153, 156, 274 A.2d 379, 381 (1971). For its conclusion to be fairly debatable, the administrative agency overseeing the variance decision must have "substantial evidence" on the record supporting its decision. See Mayor of Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 395, 396 A.2d 1080, 1087 (1979); Montgomery County v. Woodward & Lothrop, Inc., 280 Md. 686, 706, 376 A.2d 483, 495 (1977), cert. denied sub nom. Funger v. Montgomery County, 434 U.S. 1067, 98 S. Ct. 1245, 55 L. Ed. 2d 769 (1978); Agneslane, Inc. v. Lucas, 247 Md. 612, 619, 233 A.2d 757, 761 (1967)."

377 Md. at 306-07


"Nonetheless, we have also indicated in our cases that where an administrative agency's conclusions are not supported by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence, such decisions are due no deference. In Belvoir Farms Homeowners Association, Inc. v. North, 355 Md. 259, 267-68, 734 A.2d 227, 232 (1999), we stated:

'Generally, a decision of an administrative agency, including a local zoning board, is owed no deference when its conclusions are based upon an error of law. Catonsville Nursing Home, Inc. v. Loveman, 349 Md. 560, 569, {377 Md. 408} 709 A.2d 749, 753 (1998) ("We may reverse an administrative decision premised on erroneous legal conclusions." (citing People's Counsel v. Maryland Marine Mfg., 316 Md 491, 497, 560 A.2d 32, 34-35 (1989)))."

377 Md. at 407-08.

"In Maryland Marine Mfg., supra, 316 Md. at 496-97, 560 A.2d at 34-35, we said:

'As we have frequently indicated, the order of an administrative agency must be upheld on judicial review if it is not based on an error of law, and if the agency's conclusions reasonably may be based upon the facts proven. But a reviewing court is under no constraints in reversing an administrative decision which is premised solely upon an erroneous conclusion of law.' [Citation omitted.] [Emphasis added.]

We said in Elliott v. Joyce, 233 Md. 76, 81-

We hold that "on the record" before us, the Board could not "reasonably make" the reclassification and grant the special exception. Therefore, its action in so doing was arbitrary and capricious in a legal sense. To permit a gasoline station in the residential surroundings of the subject property would not promote the safety, health or general welfare of the community, but would constitute, we think, invalid "spot zoning." Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 [1959]; Hewitt v. County Comm'rs, 220 Md. 48, 151 A.2d 144 [1959]. [Alterations added.]

"The standard in respect to judicial review is, generally, the same whether the agency grants or denies relief." [Some emphasis added.]

We also note that "Such [zoning] ordinances are in derogation of the common law right to so use private property as to realize it highest utility." White, 356 Md. at 48, 736 A.2d at 1082 (quoting Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 313-14, 289 A.2d 303, 308 (1972) (quoting Landay v. Board of Zoning Appeals, 173 Md. 460, 466, 196 A. 293 (1938)).

377 Md. at 408-09.59

Significant Case Decisions

An error of law

Reversing a Montgomery County Board of Appeals decision, the Court of Appeals in Remes v. Montgomery County, 387 Md. 52, 874 A. 2d 470 (2005) held that two lots had merged for zoning purposes and therefore, the issuance of a permit to build on one of the lots was error.

Lot 11 and Lot 12 were under common ownership, and at the time of that common ownership, they were used in service to one another. The permit should not have issued, absent further zoning action. In order for Lot 11 to be utilized separate and apart from Lot 12, there would have to be a resubdivision of the combined lot, creating two lots both of which meet the requirements of both the zoning ordinance and the subdivision regulations. In that process it may well be necessary to seek zoning variances as to setbacks, or to remove the setback encroachments in the structure on Lot 12. . . .

Remes, 337 Md. at 87.60

This deference to the Board . . .

The Court in Lewis v. Dept. of Natural Resources, 377 Md. 382, 833 A. 2d 563 (2003) reversed a Zoning Board decision denying his request for a zoning variance to construct a hunting camp on his property located within a Critical Area Buffer. The majority of 4 ruled that it would not defer to the agency because errors of law were committed. 377 Md. at 437. The minority of 3 said there was substantial evidence to uphold the Board's determination because Lewis should not be able to do what he wished on environmentally sensitive property without regard to legal constraints on public policy. 377 Md. at 456. This is a lengthy opinion. Lewis sought reversal of a zoning appeals board denial of a zoning variance to construct a hunting camp on his property located within a Critical Area Buffer. In a very intense disagreement (4/3), the Court held the zoning appeals board committed a number of errors of law and remanded for a new look at the request for a variance. 377 Md. at 390. "We hold that while the Board purported to use the standards set forth in Belvoir Farms, White, and Mastandrea, in determining the fate of petitioner's variance, the statements by Board members and the Board's final written decision illustrate...

59 In zoning cases, the standard of review on judicial review requires the court to "consider all of the evidence before the zoning authority [and that] the decision is 'fairly debatable' if it is supported by substantial evidence on the record taken as a whole." Becker v. Anne Arundel County, 174 Md. App. 114, 137-38,920 A. 2d 1118 (2007). "[A] reviewing court may not uphold an agency's decision if a record of the facts on which the agency acted or a statement of reasons for its action is lacking." 174 Md. App. at 138-39.

60 Examining various ordinances, the Court explained that Zoning differs from planning; the doctrine of zoning merger was not a change in common law that was contrary to public policy; changes in the common law are generally applied prospectively; and that the Court of Appeals will hesitate to apply a change to the common law where such a change would be contrary to public policy set forth by the General Assembly.
that several impermissible legal standards were utilized. In addition, the record contains little or no empirical data to support the Board's conclusions or to refute the studies and reports of petitioner's experts. The Board's decision is thus arbitrary and capricious. We therefore vacate the Court of Appeals' and the Circuit Court's affirming of the Board's decision and direct the Circuit Court to remand this case to the Board for a reassessment of petitioner's variance request in light of our holding. 377 Md. at 409. The focus of attention was on the Wicomico County Code and the Critical Area Commission guidelines. As to variances, the Board was required to use criteria to "determine the ultimate question of whether strict enforcement of § 125 would deny petitioner a reasonable and significant use of his land. In doing so, it is clear that the Board should apply a standard that does not look to whether petitioner would be denied all reasonable uses of his entire property, but rather a standard that should determine if petitioner's proposed use is a reasonable and significant one in consideration of all of the § 125-36 factors. As we shall discuss, although the Board purported to act otherwise, it essentially applied the incorrect "unconstitutional takings" standard." 377 Md. at 417. Examining the "Specific Findings of Fact," the majority determined that the agency used incorrect standards of law in denying the variance request and that meant its decision are arbitrary and capricious." 377 Md. at 435. Courts cannot ordinarily either grant or deny variances, but the court reviews the agency finding on judicial review. 377 Md. at 436. This is a very lengthy case with the majority disputing the hardship finding on Lewis' property as a whole, which it said ignored the language of the ordinance. 377 Md. at 453. This whole decision has to be carefully read and considered with the issue of hardship comes to the forefront Also to be read is the decision on the motion for reconsideration filed. It remains to be seen how this decision will affect the future of zoning variance determinations.

**Snakes, snakes and more snakes**

- In *Marzullo v. Kahl*, 366 Md. 158, 783 A. 2d 169 (2002), the Court stated there was no vested right to raise, breed, and keep reptiles or snakes on a property zoned for other uses because a lawful permit had not been obtained. "In the case sub judice, respondent obtained a permit and completed substantial construction; however, he is not entitled to have a vested right because there has been no change, applicable to his case, in the zoning law itself and the permit was improperly issued." 366 Md. at 193-94. Equitable estoppel was discussed and found not applicable to the facts presented. 366 Md. at 194-99.

**The right to impose conditions when granting a variance**

- The Anne Arundel County Board of Appeals had the authority to impose a condition (designating Conway Road as access to the site) upon the grant of a special exception to allow the establishment of a sand, gravel and rubble landfill when that condition was not sought during earlier proceedings before the county administrative hearing officer. 61 Protests during the hearing process caused *Halle* to suggest an alternate access to the proposed site avoid both wetlands and traffic problems. 62 The application was granted upon a determination that the landfill would advance the public welfare of the County. 63 Conditions placed by the Board of Appeals addressed the access issue designating Conway Road as the entrance to the operations, requiring the construction of a right turn land, designating the size of the access road and how the access road was to be obtained. *Halle v. Crofton Civic Association*, 339 Md. 131, 136-37, 661 A. 2d 282 (1975) Protestants objected to the grant of the application saying this change meant that notice of the extent of matters to be considered at a public hearing had not been properly given and that a new application needed to be filed. *Halle*, 339 Md. at 139. The holding: "The board here imposed a true condition, not an illusory

---

61 The Board of Appeals allowed the change in the proposed access road but the Circuit Court reversed finding that the change substantially changed the *Halle* application. The Court said that the Board of Appeals had the right to consider new issues but that it could not indiscriminately entertain matters which in effect changed the nature of the original controversy or application and that the change in road access impermissibly enlarged the substance of Halle's application. Certiorari was taken by the Court of Appeals upon Halle's appeal to the Court of Special Appeals. *Halle*, 339 Md. at 139-39.

62 Halle filed an application for sand and gravel and rubble landfill operation in Anne Arundel County in Odenton which was denied by the AA County's administrative hearing officer resulting in an appeal to the AA County Board of Appeals. Expert testimony addressed the impact of the operation upon vicinal properties. Protestants claimed harsh environmental impact, floodplain problems and the potential threat of Patuxent road access to residential communities. *Halle*, 339 Md. at 136.

63 Evidence presented at the lengthy hearings consisted of: (1) photographs of the property, (2) a site-inspection, and (3) expert testimony on subjects including traffic impact and road improvements, environmental protection and wetland preservation, hydrology and ground water contamination, land use planning and development, civil and environmental engineering related to landfill development and acoustical engineering. *Halle*, 339 Md. at135-36
one. Contrary to the circuit court’s conclusion, the condition imposed does in fact restrict Halle’s use of the property. We shall uphold that condition, as it is justifiable in terms relating to the public health, safety and welfare.” *Halle*, 339 Md. at 148-49

The power to impose conditions upon the grant of a variance or special exception is one which is implicit in the power to grant a variance or special exception. ‘This is so because the whole basis for the exception is the peculiar hardship to the applicant, and the Board is justified in limiting the exception in such a way as to mitigate the effect upon neighboring property and the community at large.’ Both a variance and a special exception authorize uses which otherwise would not be permitted. Having been given the power to authorize such unusual uses, the Board must also have the power to limit those uses to protect the health, safety, and welfare of the community.” *Halle*, 339 Md. at 141.

**The variance vs. the exception**

Mueller v. People’s Counsel for Baltimore County, 177 Md. App. 43, 934 A. 2d 974 (2007) discussed two adjoining undersized waterfront lots, on one of which there was a home built in 1960. In 2004, a variance was sought as to the undeveloped lot in order to construct a dwelling on it. Reviewing the applicable zoning regulations and the effect of the Chesapeake Bay Critical Area Buffer requirements, 177 Md. App. at 71-75. The Board of Appeals discussed several variance criteria such as the uniqueness of the property and in its order relief on BCZR §304, a “grandfather provision that protects a landowner from a change in the zoning law, ‘if inter alia, the lot was recorded by deed prior to 1955, or the lot was recorded as part of a validly approved subdivision prior to 1955.’” 177 Md. App. at 84-85. Statutory interpretation, undertaken by the Court as it discussed the grandfather clause and prior case decisions. The Circuit Court concluded that the properties had merged for zoning purposes because they were under common ownership. The circuit court was not correct in this and no merger occurred and the Board of Appeals was not clearly erroneous in finding no merger and that there was entitlement to the variance as the criteria for a variance were satisfied and there was no self-inflicted hardship. 177 Md. App. at 101.

“The very essence of zoning is territorial division [of land within a jurisdiction] according to the character of the land and the buildings, their peculiar suitability for particular uses, and uniformity of use within the zone. The authority stems from the State’s police power to regulate in the interest of the general welfare.” “At least one function of zoning is ‘to preserve various types of neighborhoods, be they residential, industrial, commercial or historical. Planning is a broader concept, encompassing the development of a community and the creation of ‘goals for orderly growth and development including the establishment of viable neighborhoods for which it delineates appropriate boundaries,’ and ‘suggest[ing] methods for implementation and achievement of those goals, including proposals for future land use and zoning classifications.’”

“A variance is an authorization for [that] . . . which is prohibited by a zoning ordinance. The burden is on the applicant to show facts that warrant a variance. In general, ‘the specific need for the variance ‘must be substantial and urgent and not merely for the convenience of the applicant[,]’ Ordinarily, a variance is warranted if the ’applicable zoning restriction . . . is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership,’ or otherwise results in ‘unwarranted hardship.’” 177 Md. App. at 70. A variance is sometimes confused with a special exception but they are different. “[T]he variance and exception are designed to meet two entirely different needs. The variance contemplates a departure from the terms of the ordinance in order to preclude confiscation of property, while the exception contemplates a permitted use . . . [once] the prescribed conditions therefor are met.” “The general rules is that the authority to grant a variance should be exercised sparingly and only under exceptional circumstances.” 177 Md. App. at 71.

**Judicial review of legislative action?**

Art. 66B §2.09(a)(ii) provides that an “appeal” [actually Judicial Review] maybe taken to the Circuit Court for Baltimore City by any person aggrieved by “[a] zoning action by the city Council.” At issue in Armstrong v. Baltimore City, 390 Md. 469, 889 A. 2d 399 (2006) was whether residents opposing the

establishment of a parking lot were entitled to judicial review when the Mayor and City Council of Baltimore passed an ordinance, as required pursuant to then existing §10-504 of the Baltimore City Zoning Code which required such an ordinance before a parking lot could be established pursuant to §10-503 of the Baltimore City Zoning Code. Was the passage of that Ordinance a zoning decision from which a petition for judicial review could be filed. CJ §12-301 "does not permit an appeal from a final judgment of a court entered or made in the exercise of appellate jurisdiction in reviewing the decision of . . . a local legislative body.” 390 Md. at 402.

Zoning and retrospective application

- One of the peculiarities of zoning law surfaces with the case of Layton v. Howard County, 399 Md. 36, 922 A. 2d 576 (2006), where the Court of Appeals held in a land use or zoning context there may be retrospective application of a related statutory law which is amended during the course of litigation. The Petitioners were unsuccessful in obtaining a special exception to operate a charitable and philanthropic institution in Howard County. While the case was on judicial review a pertinent portion of the Howard County Code was amended, changing the “definition upon which the Board had relief in making its initial zoning decision to deny Frisky’s permission to operate a primate sanctuary.” 399 Md. At 38. Discussing the standard of review of administrative agency decisions in the context of special exceptions, 399 Md. At 48-49, the Court noted that as a general rule, statutes are presumed to operate prospectively and are to be construed accordingly. 399 Md. At 62. Discussing prior case law in the zoning context and distinguishing other non-zoning decisions, the Court reaffirmed its prior decision of retrospective application in the zoning context. 399 Md. At 71.

Homeowner seeking front yard zoning variance

- Homeowners sought review of Board of Appeals decision denying a front yard zoning variance for construction of a garage in Chesley v. Annapolis, 176 Md. App. 413, 933 A. 2d 475 (2007). The holding was that there was substantial evidence to support the Board’s decision that denial of the variance did not impose a hardship on the homeowners. Judge James Eyler for the Court discussed the Annapolis Code setting minimum setbacks, the allowance of variances from the setback variances provided that certain conditions (conditions which are enumerated in the opinion and discussed) are satisfied, and the Chesley’s development of the property. Additional discussion by the Court focused on the definition of a hardship, the Critical Areas Law as it applied to the request for the variance, discussion of a self-created variance (which the Court stated was a fact in this case), neighborhood impact testimony and the position of the protestants.

A variance authorizes the property owner “to use his property in a manner forbidden” by applicable zoning. Although “the purpose of a variance is to protect the landowner’s rights from the unconstitutional application of zoning law[,]” variances are frequently permitted in circumstances when application of the setback requirement would not constitute a ‘taking’.

There are different types of variances, including the “ordinary” front yard setback variance at issue here and the variances from the setbacks established by statute for critical areas in an effort to regulate development of waterfront properties. Not surprisingly then, “there are different criteria that must be met for ‘ordinary’ or ‘general’ zoning variances and critical area variances.


The Court discussed the findings of the Board relative to the conditions upon which a petition for a variations is based and the application to this case. 176 Md. App. at 424-26.

“The burden of showing facts to justify . . . [a] variance rests upon the applicant[.] In cases involving critical area variances, it has been made clear by statute that applicants “have the burden of meeting all of the requirements” enumerated in the law governing such variances. 176 Md. App. at 427-28.
Much analysis of the conditions of granting a variance and the applicability to the facts of this case is set forth in the opinion. It is must reading for those involved in the “variance” process.

A court may not substitute its judgment for that of the zoning Board.65 Judicial review is essentially limited to determining whether a “reasoning mind reasonably could have reached the factual conclusion the agency reached.”66 This is the essential test. “If such a conclusion is sufficiently supported by the evidence, then it is based upon substantial evidence.”67 Substantial evidence is relevant evidence which a reasonable mind might accept to support a conclusion. “The administrative agency is the one to whom is committed the drawing of whatever inferences reasonably are to be drawn from the factual evidence.” It is not the right of a court to substitute its judgment on the question whether the inference drawn is the right one or whether a different inference would be better supported. The test is reasonableness, not rightness.68 Previously, the test was whether the evidence makes the issue of harm fairly debatable. If so, the decision is for the Board to determine.69

The test in zoning matters applies to determinations of special exceptions and variances. For something to be fairly debatable there must be substantial evidence on the record supporting the decision.70 Where the agency’s conclusions are not supported by competent and substantial evidence, or where the agency draws impermissible or unreasonable inferences and conclusions from undisputed evidence, such decisions are due no deference.71 As with the decisions of other agencies, no deference is owed to a Zoning Board when its conclusions are based on an error of law.72 The standard of review is the same whether the agency grants or denies relief.73

**Variances**

We hold, therefore, that the unnecessary or unwarranted hardship standard, or similar standards, are less restrictive than the unconstitutional taking standard. The unwarranted hardship standard, and its similar manifestations, are equivalent to the denial of reasonable and significant use of the property. Whether a property owner has been denied reasonable and significant use of his property is a question of fact best addressed by the expertise of the Board of Appeals, not the courts. Thus, we leave the application of this standard to petitioner's variance application to the Board on remand." Belvoir Farms, 355 Md. at 282, 734 A.2d at 240 (emphasis added).

**Special exceptions**

"By classifying a given use as a special exception use, the legislature, in essence, established a presumption that the use is consistent with the general welfare. A special exception use 'in a zoning ordinance recognizes that the legislative body of a representative government has made a policy decision for all of the inhabitants of the particular governmental jurisdiction, and that the . . . use is desirable and necessary in its zoning planning provided certain standards are met.'"74 When an agency reviews an

---


67 Lewis, 377 Md. at 405-06.

68 Lewis, 377 Md. at 406.

69 Lewis, 377 Md. at 406.

70 Lewis, 377 Md. at 407.

71 Lewis, 377 Md. at 407.

72 Lewis, 377 Md. at 407-08.

73 Lewis, 377 Md. at 408.

application for a special exception, with the presumption of validity, the agency's duty is "to judge
whether the neighboring properties in the general neighborhood would be adversely affected and whether
the use in the particular case is in harmony with the general purpose and intent of the plan." This
means that the reviewing agency or board must decide "whether there are facts and circumstances that
show that the particular use proposed at the particular location proposed would have any adverse effects
above and beyond those inherently associated with such a special exception use irrespective of its location
within the zone." "Only when a proposed special exception use will have "an adverse effect above and
beyond that ordinarily associated with such uses," must the administrative board deny the use. When the
proposed use would create a substantially similar effect if it were located elsewhere within the same zone,
the adverse impact is not sufficiently unique to justify denial of the application. "Thus, the applicant in
a special exception situation has only a limited evidentiary burden."

"Whereas, the applicant has the burden of adducing testimony which will show that his use meets the
prescribed standards and requirements, he does not have the burden of establishing affirmatively that his
proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that the
proposed use would be conducted without real detriment to the neighborhood and would not actually
adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the
neighboring area and uses is, of course, material. . . . If a requested special exception use is properly
determined to have an adverse effect upon neighboring properties in the general area, it must be denied."

A zoning board may be required to consider whether conditions or safeguards should be imposed
upon the granting of a special use permit before its approval. "The whole purpose of such conditions or
safeguards is "to protect the comprehensive plan and to conserve and protect property and property values
in the neighborhood.["]"

Significant Case Decisions

Board of zoning appeals action

- In Handley v. Ocean Downs, 151 Md. App. 615, 827 A. 2d 961 (2003) there was objection to the location
  of an Off Track Betting facility anywhere in the county. "As such, the opposition failed to negate the
  presumption, generated by the legislature's inclusion of 'satellite simulcast facilities' as approved special
  exception uses in the City Code, that the OTB facility would be in the 'interest of the general welfare.'"
  "Appellants failed to negate the presumption that "the [proposed OTB facility] would have any adverse
effects above and beyond those inherently associated with such a special exception use irrespective of its
location within the zone." Approval by the Board of Zoning Appeals was proper. Id., at 644.

Vested rights to avoid downsizing?

76 Hadley, 151 Md. App. at 642-43.
funeral home in residential zone could not be denied because opponents presented neither facts nor reasons that it would "affect
adjoining and surrounding properties in any way other than [those that] result from the location of any funeral home in any
residential zone").
78 Id.
79 Hadley, 151 Md. App. at 643. One argument made in this case is by the Appellants was that there was a failure to identify the
neighborhood under consideration. The Court stated that evidence of the impact of a special exception use on the neighboring
properties is relevant to determine whether the use causes an extraordinary impact on them. However, in this case there was no
authority for the proposition asserted that the Board must explicitly define the neighborhood. Research by the court uncovered
the fact that cases reversing zoning boards for a failure to define the neighborhood have all involved the "change in conditions"
portion of the "change or mistake" rule that is applied in piecemeal zoning cases. Abrams, Guide to Maryland Zoning Decisions
§1.4 (3rd ed 1992,2000) was cited along with case law. Hadley, 151 Md. App. at 645. In any event, the record showed the Board
did consider the neighborhood in its findings. 151 Md. App. at 645-46.
80 Hadley, 151 Md. App. at 646. The Court said there was no evidence before the Board that the proposed use would have an
unique impact on the comprehensive plan or neighboring properties in this case. Therefore, there was no need to consider the
imposition of conditions. Id.
There was no vested right in a particular zoning so as to avoid downzoning in *Prince George's County v. Sunrise Development*, 330 Md. 297, 299, 623 A. 2d 1296 (1993). The County Council of Prince George's County downzoned property belonging to Sunrise Development and thereafter an immediate stop work order was given on a 467 dwelling unit development. 330 Md. at 303. A grading permit had been issued to Sunrise which claimed that a single column footing, though not visible from the main road on which it was located, was sufficient to vest rights in a prior zoning classification. 330 Md. at 306. The Court discussed the standard for determining commencement of construction particularly focused on two cases, *Rupp v. Earl H. Cline & Sons*, 230 Md. 573, 188 A. 2d 146 (1963) and *O'Donnell v. Bassler*, 289 Md. 501, 425 A. 2d 1003 (1981). "The only building permit relied upon for work done at the site in advance of the downzoning was for the column footing." *Id.*, at 308. Upon reviewing case law, the Court stated: "It is clear from all of the foregoing that a theoretical, reasonably diligent building inspector is not the test of the beholder. That test is far too narrow to satisfy the concept of the 'public.'" 330 Md. at 314.

Here, the pouring of a single 2' X 2' footing in the center of a nearly ten acre wooded site is the only construction to which Sunrise can point for its vested rights argument. The evidence is that building inspectors, who knew that the footing had been poured and who were on the property looking for the footing, could not see where it was. They were able to locate it only by use of the site plan. A member of the public is not required to be equipped with the column footing version of the site plan to observe if this construction had started. From the standpoint of a member of the general public who is either viewing the property from its boundaries or is consensually on the property, the footing is not so clearly the commencement of construction as to render the Board's finding to the contrary arbitrary, capricious or without substantial evidence on the entire record. 330 Md. at 314.

**Fact finding:**

**Credibility as to whether one has an interest in more than one liquor license**

This statute has its own administrative review process to be followed

- A question in *Woodfield v. West River Improvement Ass'n*, 395 Md. 377, 910 A. 2d 452 (2006) was whether one Bassford had a direct or indirect interest in an application for a liquor license. Art. 2B §9-301 states that in Anne Arundel and certain other counties an individual may not own more than one interests in a liquor license. 395 Md. at 386. Characterizing the position of the protestants' assertions of his multiple interests as "very, very thin." Citing the statutory judicial review standard for liquor board decisions the Court found there was substantial evidence for the Board determination that Bassford did not have a financial interest in the Woodfield license. 395 Md. at 393.

Sometimes the statutory structure contains its own judicial review test as it does for local licensing liquor boards:

... The Court must deal with the record as it is, not as it could have been, and on the record we have, we cannot conclude that the Board was clearly erroneous in its finding regarding Bassford. Art. 2B §16-101(e)(1) sets forth the standard to be applied in judicial review actions from liquor board decisions. Though articulated differently, the statutory standard is consistent with the more general law regarding the review of administrative agency decisions:

"[T]he action of the local licensing board shall be presumed by the court to be proper and to best serve the public interest. The burden of proof shall be upon the petitioner to show that the decision complained of was against the public interest and that the local licensing board's discretion in rendering its decision was not honestly and fairly exercised, or that such decision was arbitrary, or procured by fraud, or unsupported by any substantial evidence, or was unreasonable, or that such decision was beyond the powers of the local licensing board, and was illegal."

Compare Maryland Code, §10-222(h) of the State Government Article, setting forth the standard for judicial review under the State Administrative Procedures Act, and see *United Parcel v. People's Counsel*, 336 Md. 569, 577, 650 A.2d 226, 230 (1994) (court's role in judicial review of administrative agency decision "limited to determining if there is substantial evidence in the

---

81 An evidentiary hearing was conducted pursuant to §10-202(a)(2)(ii) of Article 2B. Most of the evidence presented whether granting the Class B license was in the public interest or would be detrimental to public safety. *Woodfield*, 395 Md. at 37-38.
record as a whole to support the agency's findings and conclusions, and to determine if the
administrative decision is premised upon an erroneous conclusion of law.

Woodfield, 395 Md. at 393.

Zoning regulations as a valid exercise of government police power

Historic preservation

- "It is well-settled that zoning regulations are a valid exercise of a government's police power so long as the
limitations imposed are in the public interest and related substantially to the health, safety, or general
welfare of the community." This Court has repeatedly stated that the preservation of architecturally or
historically significant areas is a valid exercise of the governmental power.

This case invites examination of a decision of Respondent, the Mayor and council of Rockville, Maryland to designate as
historically/architecturally significant and, as a result, place within Rockville's historical district a certain
piece of improved real property ("Spates Bungalow").

Casey v. Rockville, 400 Md. 259, 306, 307, 264, 929 A. 2d 74 (2007). The case deals in detail with a number of important issues: (1) the historic designation
action by Rockville, Maryland; (2) statutory interpretation; (3) environmental guidelines; (4) economic
feasibility studies; (5) the taking of property through the regulatory process; (6) ripeness of judicial
review to an allegation of taking of a property interests; and (7) due process considerations.

Not many people practice zoning law in Maryland without being thoroughly familiar with Guide to
Maryland Zoning Decisions by Stanley D. Abrams, Esq. Chapters from this book are:

Chapter 1. Change or Mistake Rule in Maryland.
Chapter 2. Floating Zones.
Chapter 3. Decisions of the Zoning Authority and Judicial Review Thereof
Chapter 4. Standing to Appeal; Aggrievement and Appeals.
Chapter 5. Rezoning and Subdivision on the Basis of Master Plans,
Recommendations of Local Planning Commission.
Chapter 6. Due Process and Evidentiary Matters.
Chapter 7. Consideration of the Impact of Rezoning on Public Facilities.
Chapter 9. Unconstitutional Taking of Property by Failure to Rezone; Confiscation.
Chapter 11. Related areas.
Chapter 12. Recent U.S. Supreme Court Decisions.
Chapter 13. Recent Fourth Circuit U.S. Court of Appeals Decision.

---

82 The Court discussed the involved facts, the designation process, the Rockville Code provisions, economic feasibility questions, and the trigger for review of historical significance at Rockville, 400 Md. at 265-278, 281-285.

83 "[W]hen the statutory language is plain and unambiguous, a court may neither add nor delete language so as to 'reflect an
intent not evidenced in that language.'" Rockville, 400 Md. at 290.

84 "The purposes of the environmental guidelines, as adopted by Resolution 11-99, are to 'establish a comprehensive and
cohesive method to protect the city’s existing natural resources during and after the development process”, as well as to
'provid[e] for the identification of existing natural resources and preserving various environmental management strategies and
criteria to govern development within the City of Rockville.” Rockville, 400 Md. at 292. The Court discusses environmental
guidelines at 400 Md. at 293-305.

85 Discussing regulatory takings and consideration of the economic feasibility associated with identifying and preserving
historically designated property is discussed by the Court at Rockville, 400 Md. at 279-285, 285-88 (external features guidelines).

86 "The Mayor and Council's Refusal to Consider Economic Infeasibility at this Juncture [placing the property in Rockville’s
Historic District Zon] did Not Work a Taking of the Property Without Just Compensation." Rockville, 400 Md. at 305-06
(discussing financial hardship, prohibited uses of property, final decisions, Maryland Reclamation Associates).

87 Art. 66B § 8-101, et. seq is discussed throughout the opinion. “... [E]mpowered political subdivisions may adopt
zoning procedures for designating as historic an area of a particular piece of property.” 400 Md. at 280.

88 It was the Court decision that a failure to consider economic feasibility at the juncture of the case of historical designation was
not a deprivation of property without due process of law. Rockville, 400 Md. at 318-321. Some due process contentions were not
properly preserved for appeal. 400 Md. at 321-24.
When it comes to enforcement of zoning regulations, it is the District Court of Maryland that has exclusive original jurisdiction to enforce a zoning code for which equitable relief is provided. *Carroll County v. Love Craft*, 384 Md. 23, 40, 862 A. 2d 404 (2004) citing CJ §4-408(8). 89

H. Chesapeake Bay Critical Area Protection Program.
The Chesapeake Bay Critical Area Protection Program is one where State imposed regulations are locally enforced. 90 Among other regulations, a “buffer” is required to be created by local jurisdictions. These buffers act as a “setback” for development protecting the Chesapeake Bay’s water quality. 91

Who is to decide what and when with the often integration of a number of ordinances in the development and zoning process is a question of law for the court to determine. 92

The Court of Appeals held in *Montgomery County v. Revere National Corp.*, 341 Md. 366, 671 A. 2d 1 (1996) 93 that Montgomery County was bound by the provisions of a settlement agreement incorporated in a circuit court judgment. The agreement ended sixteen years of litigation between the County and the owner of a billboard company and granted to the owner the right to maintain its billboards within the County for a period of ten years, despite a County zoning regulation prohibiting all billboards. There was no impermissible interference with undermined legislative and executive discretion in the enactment and enforcement of the County’s zoning regulations. “Under some circumstances courts have ordered that local governments specifically perform their contracts.” Id., at 385. The agreement in this case did not obligate Montgomery County to rezone or amend zoning regulations. Id., at 387. As a general matter, “executive discretion in the enforcement and execution of the laws can be limited by contract.” Id., at 388. “A requirement that the government adhere to that exercise of discretion, and be held to its contract, ordinarily does not constitute an unlawful interference with future executive discretion.” Id., at 390. The compromise in this case was a reasonable settlement of a dispute. Id., at 392. Montgomery County was required to perform its obligations under the agreement. Id., at 394.

Vested rights in a particular zoning classification may be obtained by a party to avoid downzoning provided there is a substantial beginning of construction readily visible for the public to see and recognize. 94

I. Board of Education and Education Matters.
A number of appellate court decisions over the years have addressed appeals from the Maryland State Board of Education. “. . . [A]s a result of a combination of legislation and long-standing case law, the State Board has the "last word" on controversies or disputes involving the proper administration of the public school system, thereby leaving the courts of this State with limited power to interfere. This broad and comprehensive power, referred to as the State Board's "visitorial power," arises out of the Education

89 Judge Wilner’s opinion refers to this case as a procedure nightmare, one problem being an evident failure to recognize that the Circuit Court exercised appellate jurisdiction over the District Court decision, and therefore, further appeal could only be by a Writ of Certiorari to the Court of Appeals. *Carroll County*, 384 Md. at 40.
91 *Lewis*, 377 Md. at 394. Another case discussing the Chesapeake Bay Critical Area Program and its interaction with local zoning and development regulations (on the issue of "undue hardship" and variances) is *Becker v. Anne Arundel County*, 174 Md. App. 114, 130-134, 920 A. 2d 1118 (2007).
92 *Capital Commercial v. Montgomery County*, 158 Md. App. 88, 854 A. 2d 283 (2004). Parking space compliance for an expansion project and setback compliance saw the Court determining that where the Department of Permitting Services (DPS) makes a decision on a parking facilities plan, the County Council determined that DPS "be the agency exercising the power to determine parking setbacks, rather than the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission. 158 Md. App. at 101.
Article of the Annotated Code of Maryland. Section §2-205(e) of the Education Article . . .”

It is the State Board’s right to explain the true intent and meaning of the Education Article and the bylaws, rules and regulations adopted by the Board. The State Board decides all controversies and dispute under the law. A county superintendent’s decision may be appealed to the county board, and then may be further appealed to the State Board. “Thus, appeals concerning the intent and meaning of a provision of the education Article or of a State Board bylaw are taken from county boards to the State Board.”

There are exceptions to the State Board’s right to make a final decision beyond judicial interference:
1. the matter involves a purely legal question;
2. the State Board has contravened a state statute;
3. the State Board exercised its power in bad faith, fraudulently, or in breach of trust; or
4. the State Board exercised its power arbitrarily or capriciously.

Significant Case Decisions

The teacher who does not want to be transferred

- In Hurl v. Board of Education of Howard County, 107 Md. App. 286, 667 A. 2d 970 (1995), the Court of Special Appeals held that a teacher objecting to an involuntary transfer from one school to another was not entitled to an evidentiary hearing because she failed to allege sufficient facts to indicate that the superintendent acted arbitrarily, capriciously, or with discriminatory reasons. Ed. §6-201(b) allows the transfer of teachers “as the needs of the schools require.” 107 Md. App. at 295.

- The issue was whether a teacher, who was involuntarily transferred, had a right to a “contested case” hearing under the MAPA. The circuit court had dismissed the case because sufficient facts had not been alleged by the teacher to support the contention that the transfer decision was arbitrary and capricious. The Court stated: “Decisions contrary to law or unsupported by substantial evidence are not within the exercise of sound administrative discretion, but are arbitrary and illegal acts.” The Court also referred to Black’s Law Dictionary (6th ed. 1990) defining the term “arbitrary” as including something done “without adequate determining principle,” “unnatural,” and “willful and unreasoning action, without consideration and regard for facts and circumstances presented;” and the term “arbitrary and capricious” as “willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.” Finally, the State Board regulations define decisions of a county board as being ‘arbitrary’ where ‘contrary to sound educational policy’ and/or where a ‘reasoning mind could not have reasonably reached the conclusion the county board reached.’ COMAR 13A.01.03E(b). 107 Md. App. at 306.

- The Court examined every reason stated by the teacher and concluded that none of her allegations (she had been successful and experienced; she was never forewarned; she was not properly consulted and notified; her work record was crystalline) contained specific facts from which it could be determined that the transfer decision was arbitrary or capricious. 107 Md. App. at 307-310. “Although the reasons were not to her liking, this does not make the decision itself arbitrary. 107 Md. App. at 310.

Is “this” particular question within the jurisdiction of administrative remedies offered?

- It was proper for an ALJ to dismiss the complaint of parents under the Individual with Disabilities Education Act (IDEA) for a lack of jurisdiction because the disputed question was a medical or ethical question, not a special education issue in John A. v. Board of Education, 400 Md. 363, 929 A. 2d 136

---

96 Hurl, 107 Md. App. at 299.
97 Hurl, 107 Md. App. at 299.
98 An issue in the case had to do with whether the State Board’s decision fit within the MAPA definition of “contested case.” “We need not decide whether the APA applies to this case, because the circuit court nonetheless retains the power to review agency decisions to prevent illegal, unreasonable, arbitrary or capricious administrative action and [an appellate court has] authority on direct appeal to review the circuit court’s exercise of that power.” Hurl, 107 Md. App. at 305.
99 The Court discussed the history of this federal act to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and to prepare them for further education and its current provisions contained in 20 U.S.C. §1400, et. seq., and its Maryland Counterpart contained in Education §8-401, et. seq. John A., 400 Md. at 371-75. Discussion focused on the legislative purpose of the federal act and its Maryland counterpart. 400 Md. at 387-88.
(2007). John A suffered from Bi-Polar disorder, ADHD, and Sensory Integration Disorder and qualified for special education under the Act. At issue was the effect medication was having on the child and the request of the school authorities to consult with the child’s physicians concerning the administration of medication during school time, which permission the parents would not allow. 400 Md. at 377-78. It was the determination by the ALJ that the issue involved “the rights of the Parents to control the release of medical information about their child against the right of nurse to speak to the treating physician when administering medication the physician prescribed,” which was not a provision affecting free appropriate education and that the dispute therefore fell outside the provisions of the Act. 400 Md. at. 380.

What the subject matter jurisdiction was under the Act for a contest to care from which an administrative or judicial remedy could be sought was discussed by the Court in detail. The Board was concerned with potential liability if it administered blindly drugs “to students without the ability to contact physicians regarding withholding the drugs if circumstances suggest it prudent do so. 400 Md. at 391. As to the parents’ claim of a right to privacy and the right to a patient-physician privilege, the Court stated: “Congress never intended that these issues would be resolved under the auspices of the IDEA.” The conclusion: “. . .[T]his dispute falls outside the scope of the IDEA as a medical treatment issue, and not a special education issue.” 400 Md. at 393-94.

Applications for waiver – charter schools

- Only the State Board of Education has original jurisdiction over waiver applications (request for a waiver for having to follow Education Rules and Regulations) submitted pursuant to Ed. §9-106(b) for Charter Schools. Referring to statutory authority and prior case decisions, the Court in Patterson Park v. Teachers Union, 399 Md. 174, 923 A. 2d 60 (2007) stated the paramount role of the State Board of Education in interpreting the public education law of the State of Maryland. The Board of Education has the last word in most cases and its broad authority has been characterized by the Court of appeals as a “visitorial power of the most comprehensive character.” 399 Md. at 196. The powers of the State Board are not without limit but “decision of the State Board of Education are entitled to greater deference than those of most other administrative agencies. 399 Md. at 196-97.

In Patterson Park it was the position of the Baltimore City School Board that applications for waiver first had to be brought before that body, as opposed to the State Board. At issue were hiring practices without collective bargaining restraints. The State Board of Education has primary review over all education provisions. 399 Md. at 202. The provisions of Title 9 of the Education Article, dealing with Charter Schools, are not subject to waiver. Charter Schools are defined as being non sectarian, tuition-free, and are open to all students. 399 Md. at 200. When Ed. § 9-106(b) spoke of an “appeal” made to the State Board for a waiver, that did not mean the process should involve a local subdivision. The use of the word “appeal” here is a misnomer as legislative history, including an opinion by the Attorney General showed. 399 Md. at 206.

J. Home Improvement Commission.

“In 1962, the General Assembly enacted the Maryland Home Improvement Law, now codified at Md. Code (1992, 1998 Repl. Vol., 2003 Supp.), §§8-101 et seq. of the Business Regulation Article. This law, which had its genesis in a 1961 report of the Governor's Commission to Study the Home Improvement Industry in Maryland, is a regulatory scheme designed for the protection of the public. As the title of the original statute explained, the law was enacted, in part, 'with the intention of providing generally for the
regulation of the home improvement business for all persons in the State,' and 'establishing a system of licensing certain contractors and salesmen under a new administrative agency to be known as the Maryland Home Improvement Commission.' 'The Commission's primary functions are to investigate complaints about home improvement contractors, and to administer the licensing of those contractors in this state.'

In 1981, the General Assembly enacted Subtitle 4 of the Home Improvement Law, establishing the Fund. The Fund was created to provide a remedy for homeowners who suffer an 'actual loss that results from [inter alia,] an act or omission by a licensed contractor.'" See BR §8-405(a).

"Subtitle 4 [of the Act] sets forth an administrative remedy before the Commission for claims against the Fund, and provides for a contested case hearing before the Commission and payments by the Commission to claimants... Prior to 2000, the maximum amount that a homeowner could recover from the Fund for actual loss due to the unsatisfactory work of a home improvement contractor was $10,000.00. By Chapter 144 of the Acts of 2000, the General Assembly increased that amount to $15,000.00. As amended, §8-405(e)(1) reads: 'The Commission may not award from the Fund [] more than $15,000 to 1 claimant for acts or omissions of 1 contractor.'"

K. Consumer Protection Division.
The reach of the Consumer Protection Agency of Maryland State Government is enormous.

Significant Case Decisions

**Very broad powers by statute**

  
  The Consumer Protection Division is entrusted with broad powers to enforce and interpret the Consumer Protection Act, Md. Code (1975, 2000 Repl. Vol), §13-101 et seq. of the Commercial Law II Article. *Consumer Protection Division v. Consumer Pub'l Co.*, 304 Md. 731, 745, 501 A.2d 48, 55 (1985). In adopting the Act, the General Assembly concluded that "it should take strong protective and preventive steps to investigate unlawful consumer practices, to assist the public in obtaining relief from these practices, and to prevent these practices from occurring in Maryland. It is the purpose of this title to accomplish these ends and thereby maintain the health and welfare of the citizens of the State." CL §13-102(b)(3). The General Assembly further provided that the Act should be "construed and applied liberally to promote its purpose." CL §13-105.

  
  We summarized the statutory powers of the Division in *Consumer Publishing*:

  383 Md. at 513
  
  The Consumer Protection Division and the Attorney General of Maryland, like the Federal Trade Commission, clearly have a mandate "to protect the consumer" from "deceptive practices." See CL §13-102; *Consumer Publishing*, 304 Md. at 765, 501 A.2d at 66. Not unlike the FTC which has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practice disclosed," *(Ruberoid*, 343 U.S. at 473, 72 S. Ct. at 803, 96 L. Ed. at 1087 (internal citation omitted)), the Maryland Consumer Protection Division also has "broad powers to enforce and interpret the Consumer Protection Act." *Consumer Publishing*, 304 Md. at 745, 501 A.2d at 55. Those broad powers, however, must fit within the statutory scheme established by the General Assembly.

  383 Md. at 522-23.

---


105 Landsman, 154 Md. App. at 249.

106 Landsman, 154 Md. App. at 249-50 (footnote omitted)
The opinion of the expert

- **T-Up, Inc. v. Consumer Protection Division**, 145 Md. App. 27, 801 A. 2d 173 (2002) saw the Court affirming the Consumer Protection Division determination that there was a violation of the Consumer Protection Act by falsely advertising two products sold as cures or treatments for cancer, AIDS, and HIV. 145 Md. App. 35, 50. The case is a good example of the intense fact finding which sometimes involves the Consumer Protection Division of the Office of the Attorney General, the application of Federal Trade Commission law, and an evaluation of the scientific process upon which claims for medication and products can be made. There was no error in excluding the testimony of an expert that would testify to the fact that “representations in the audio tape and in the brochure with respect to the efficacy and safety of cesium chloride and the treatment of many forms of cancer are accurate.” 145 Md. App. at 50-51. “The theory of the violations of the Act charged against the appellants in this case is that they lacked reasonable substantiation for their product claims.” 145 Md. App. at 39. Rule 5-702 concerning an expert’s opinion was discussed. The ALJ determination that the testimony of the witnesses’ experience was not scientific as a formal study is required to be was not erroneous. 145 Md. App. at 53. “Applying the FTC cases, we hold that the Agency did not err in concluding that a reasonable basis for such product claims requires at least two adequate, well-controlled, double-blinded clinical studies.” 145 Md. App. at 50.

L. Liquor Boards.

Liquor Boards and the regulation of alcohol are the prerogative of subdivisions throughout Maryland through Article 2B of the Maryland Code. How does all of this authority locally result in enactments governing the subdivision. Pursuant to Article XI-A of Maryland’s Constitution enables Baltimore City and counties to adopt a home rule charter, “to achieve a significant degree of political self determination.” The purpose of this constitutional provision “was to transfer the General Assembly’s power to enact many types of . . . public laws to the Art. XI-A home rule” jurisdictions. Pursuant to the directive of that constitutional provision, the Legislature has granted express powers to home rule counties which are contained in Article 25A of the Maryland Code. Once a charter has been adopted, “no public local law shall be enacted by the General Assembly for said City or County on any subject covered by the express powers granted” by the General Assembly. See Constitution, Article XI-A, §4. “The Legislature has the power to describe the field within which the local authorities may legislate, but having once done this, it cannot restrict or limit this field of legislation without changing its boundaries” Among the express powers granted to a Charter is the authority to enact local zoning laws.

---

107 “The standard which the Agency required the appellants to meet in order to substantiate their product claims is set forth most clearly in the Agency’s final order. It directs the appellants to cease and desist from making any representations concerning the "efficacy, performance, safety or benefits" of the Company’s products "unless, at the time the representation is made, [appellants] possess and rely upon competent and reliable scientific evidence that substantiates the representation." The order further defines "competent and reliable scientific evidence" . . .”

108 Within the opinion there is analysis addressing the ALJ ruling that individuals were not qualified to express an opinion on subjects.


110 Piscatelli, 378 Md. at 634. The Piscatelli Court discussed Park v. Board of Liquor License Commissioners, 338 Md. 366, 658 A. 2d 687 (1995). That case involved the enactment of a new liquor license classification for Baltimore City providing for on-premises consumption. Some of the facilities were operating under non-conforming use zoning permits and obtaining the new A-2 license would violate the non-conforming use permits and requirements. Article 2B §18A(h) was added to provide that for purposes of zoning in Baltimore city, the operation conducted by a Class A-2 permit holder which provided that no rezoning would be required in changing a license from a B-D-7 to an A-2 license. Holding that zoning was within the express powers granted to Baltimore City, the enactment under Art. 2B §18A(h) was unconstitutional. Id., at 637-39.

111 Piscatelli, 378 Md. 635-36.
Significant case decisions

The right to make a decision may be lost

- One issue in *Woodfield v. West River Improvement Ass'n*, 395 Md. 377, 910 A. 2d 452 (2006) was whether the circuit court lost its authority to make a decision in judicial review once 90 days elapsed from the filing of the administrative record with the court. Section 16-101(e) of Art. 2B deals “generally with the procedures governing an action for judicial review of a liquor board's decision.” The law provides that unless the licensing board decision is to be affirmed unless the “affirmed, modified, or reversed by the court within 90 days after the record has been filed in the court by the local licensing board.” The 90 day period may be extended. 395 Md. at 384. Even when determining whether a statutory command is mandatory or directory, the courts “have essentially looked to the context of the enactment and ultimately to the legislative intent in determining what, if any, sanction to impose for noncompliance.” 395 Md. at 389. Statutory interpretation at work saw the Court determining that a 1991 legislative amendment deleted an automatic affirmance requirement and that the trial judge had extended the period in this case. 395 Md. at 390-91.

Evidentiary hearings – accommodation of the public – evidence issues

- Liquor licenses are controlled in Maryland by Article 2B which provides for an evidentiary hearing when an application is made for a license. An application for a license is to be “refused” if the granting of a license is not necessary for the accommodation of the public, the applicant has made a material false statement in the application or the granting of the license will disturb the peace of the residents in the neighborhood.112 *Woodfield v. West River Improvement*, 395 Md. 377, 380, 910 A. 2d 452 (2006). Liquor licenses have different classifications depending of what may be sold and when. A Class H (Beer, Wind Liquor) Music and Sunday license, restricting consumption to on the premises, was issued by the Board of License commissioners in Anne Arundel County though Woodfield had requested a Class B (Beer, Wine, Liquor) Music and Sunday license, which would have allowed a sale for consumption “on the business or elsewhere.” *Woodfield*, 395 Md. at 383 FN3.

  Contestants were the West River Improvement Association and members of the Galesville Community. Article 2B § 9-101(a) provides that an individual may not have an interest in more than one a liquor license and one of the issues in the case was whether Charles Bassford had an interest in another liquor license in Anne Arundel County that precluded the issuance of a liquor license to Woodfield. The case presents a good view of the application of the standard of judicial review. At issue was whether the Court of Special Appeals had substituted their judgment for that of the Board of License Commissioners. The Board found Bassford did not have an interest in another liquor license (“notwithstanding the allegation of a silent partner [] there hasn’t been any credible evidence that has been produce[d] in rising to the level that this applicant has made any false . . . material statements or committed fraud in the application”). Both the Circuit Court (by “any reasonable interpretation of the evidence presented, a trier of fact would conclude that Mr. Bassford has a direct or indirect interest in this applicant”) and the Court of Special Appeals (relying on the Dun and Bradstreet report not admitted into evidence and considering Bassford’s capacity of Annapolis Produce “we assume” *Woodfield*, 395 Md. at 388) found he had. The Court of Appeals determined both courts had substituted their opinion for that of the Board and reversed with instructions to the circuit court to reinstate the Board of License Commissioners’ decision.

  The West River Improvement Association alleged that Bassford already owned two restaurants with liquor licenses and was a silent partner in the Woodfield establishment, *Woodfield*, 395 Md. at 381.

  Evidence at the hearing included Woodfield’s testimony that Bassford owned no interest, the application, submitted under oath, which did not show Bassford as an owner, statements of Counsel that Bassford had no ownership,113 the proffer of a Dun & Bradstreet report showing an ownership interest by Bassford, and

---

112 Among the considerations when a Board considers whether a liquor license should be issued are the public need, the desire for the license, the number fina location of existing licenses, the impact that the license would have on the general health, safety, and welfare of the community, including issues relating to crime, traffic conditions, parking or convenience. *Woodfield*, 395 Md. at 380.

113 One troubling aspect of the decision was the absence of appellate court comment on various representations made by Counsel for Woodfield that Bassford had no interest in the license. I would have expected the Court of Appeals to have cautioned triers of fact hearing administrative matters that statements by attorneys are not evidence in the case. *Woodfield*, 395 Md. at 382.
some hearsay statements by protestants that Bassford owned or had an interest in two other restaurants. *Woofield*, 395 Md. at 383

With the court's role on judicial review being to determine whether fact determinations made by the agency were clearly erroneous, i.e. whether there was substantial evidence in the record as a whole to support the agency's findings and conclusions, the Court reviewed the credible evidence before the Board of License Commissioners.

The Board had before it Woodfield's application, in which, under oath, he averred that no one, other than he, was "in any way pecuniarily interest[ed] in the license applied for or in the business to be conducted thereunder during the continuance of the license, if issued." Woodfield confirmed that statement, under oath, at the hearing when, in direct response to the Board chairman's question, he stated that Bassford had no interest in the applied-for license. That constituted evidence - substantial evidence, as it came under oath from the applicant - that Bassford would have no interest in the license. The Board was entitled to credit that evidence. Aside from unsupported statements by protestants that Bassford had an interest in two other restaurants, all that stood in opposition to Woodfield's assertion regarding the license at issue were (1) Rogers's unsuccessful attempt to show that a Dun & Bradstreet report indicated that Bassford was president of Annapolis Produce, and (2) the statement by Woodfield's counsel that, while he believed that Bassford was a principal of some kind in Annapolis Produce, he did not know what interest Bassford actually had in the company. *Woodfield*, 395 Md. at 393.

**M. Election Laws**

Teaching this court following the Election of 2006 means a note to the election laws of Maryland and how, if, and when the administrative process is applicable.

**Significant Case Decisions**

**The arrangement of the ballot and candidate eligibility**

- The election law statute allowing judicial review of the content and "arrangement" of a ballot refers solely to the appearance and order of information contained on the ballot and does not embrace a candidate's eligibility. *Ross v. Board of Elections*, 387 Md. 649, 876 A. 2d 692 (2005). The Petition of contest was "untimely, and thus, as a matter of law, barred by laches." At issue was whether the circuit court properly interpreted Section 9-209 of the Election Law Article. Legislative intent was discussed and statutory interpretation tools were applied. 387 Md. at 661-667. The Petition for redress was not governed by Section 9-209, but by Section 12-202 of the "Election Code providing for a ten-day "window" for seeking judicial redress for an action or omission that violates the Election Law and has or would change the outcome of the election once the registered voter knows of it." 387 Md. at 668.114

**Declaratory relief requested**

**What constitutes the practice of law in Maryland and therefore eligibility for this office**

- *Abrams v. Lamone*, 398 Md. 146, 919 A. 2d 1223 (2007) was the challenge to the right of Thomas E. Perez to be a candidate for the Democratic nomination for Attorney General in Maryland in the 2006 primary. Based on an opinion by the Attorney General of the State of Maryland, Perez filed for the office with the state Board of elections, which accepted him as a candidate. That certification was challenged seeking declaratory and injunctive relief to test the State Board's right to certify the candidacy as meeting qualifications pertaining to the time the candidate practiced law in Maryland. 398 Md. at 157. The Circuit Court's grant of a summary judgment in Perez's favor was reversed by the Court of Appeals following a review of legislative and constitutional history finding that Mr. Perez was not eligible to run for the Office

---

114 A dissent of 2 judges considered the fact that appeals from grants of summary judgment, as a general rule, will consider only the grounds upon which the trial court relied in granting summary judgment. That dissent was addressed to what was termed a "shortcut" where none was permitted and which constituted an exception to the general rule. "The exceptions will eventually swallow the rule." *Ross*, 387 Md. at 680-81. Quarrel with the majority focused on what the minority said was no demonstration of the interrelatedness of §§ 9-909 and 12-202. 387 Md. at 680.
primarily because his federal practice was not sufficient to meet the requirements of the law. 398 Md. at 208.

**Invalidation of signatures**

- An petition for an expedited judicial review\(^{115}\) was filed by the Nader for President group on August 27, 2004 pursuant to EL §§6-209 and 6-210(e) of the Board of Elections decision to invalidate signatures on a petition to have Mr. Nader placed on the ballot in the 2004 Presidential Election. “The sole issue presented . . . is whether, when the signatories are otherwise eligible to vote in this State, the State Board’s invalidation of . . . 542 “wrong county” signatures were proper.” The Court in *Nader v. Board of Elections*, 399 Md. 681, 684, 926 A. 2d 199 (2007) held that the signatures were invalid because the signers were registered in a county other than the one specified on the sheets they signed. Discussing Maryland constitutional law, portions of the election code (EL), and case law, the Court reversed the Circuit Court decision, upon testimony taken in the circuit court, that the requirement that the signatures presented in support of a petition had to reflect the correct county where the signer was registered to vote. 399 Md. at 708.\(^{116}\) A minority of 3 judges dissented and stated they would affirm the judgment of the Circuit Court because EL 6-203 and COMAR 33.06.05.01.A do not violate state constitutional provisions or otherwise violate plaintiffs’ civil rights. 399 Md. at 708.

**N. Medicaid.**

Talk about the complexities of federal and state regulations and you have health care reimbursement as the focus of attention and headaches.

**Ah! These reimbursement issues**

- Medicaid reimbursement disallowance (HG §15-101, et. Seq.)\(^{117}\) was at issue in *Community Clinic v. DHMD*, 174 Md. App. 526, 922 A. 2d 607 (2007). Maryland adopted regulations which included a cap on administrative expenses. The validity of the cap *per se*, and whether the cap conflicted with federal law, was not at issue.\(^{118}\) The Court: “Consistent with both of the bases touched in the federal directive, we hold that the federal requirement for state reimbursement of 100% of an FQHC’s [federally-qualified health center, i.e. Community in this case] reasonable cost is satisfied by a state system that affords the FQHS the opportunity to demonstrate that its costs, albeit in excess of a cap, are reasonable.” *Community*, 174 Md. App. at 546. Thus, the legal issue was whether the Secretary’s decision was supported by substantial evidence. It was because the Secretary’s finding that appellants’ administrative costs, in excess of 33-1/3 of the total costs (the cap was at this 1/3 figure) were unreasonable “is supported by the presumption of unreasonableness created by the validity adopted Cap regulation, by the approval of that presumption by federal authorities, and by the recognition of the unreasonableness of excess costs implicit in other states’ adoptions of comparable caps on administrative expenses. Phrased another way, the Secretary did not act arbitrarily or capriciously in declining to draw the inference (which likewise may have been supported by substantial evidence) that appellants’ costs were reasonable. Nor did the Secretary act arbitrarily in concluding that appellants’ primary evidence, due to the absence of specific comparisons to administrative

---

\(^{115}\) Though the opinion by the court refers to “judicial review,” the review here was one where testimony was taken and evidence was produced before the circuit court. *Nader*, 399 Md. at 692-94.

\(^{116}\) This is one of those election year cases where an expedited hearing was granted by the Court of Appeals and a decision handed down on September 20, 2004 with the opinion following some time later. *Nader*, 399 Md. at 696.

\(^{117}\) A brief sketch of the federal/state system of reimbursement is set forth in the opinion at *Community Clinic v. DHMD*, 174 Md. App. 526, 530-33, 922 A. 2d 607 (2007).

\(^{118}\) The cap was adopted in accord with the MAPA and approved by HCFA (Health Care Financing Administration) as complying with federal law and thus is presumed to be valid with the burden being upon one attacking the cap or any other regulation being to prove that it not valid. *Community*, 174 Md. App. at 544.

278
costs of other FQHCs, did not persuade him that appellants’ administrative costs, in excess of the Cap, were reasonable.”

O. Tax Court and Taxes.


“This case involves a sales and use tax imposed by Maryland on charges made by out-of-state vendors to Maryland consumers of telecommunications information services beginning with the area code ‘900’. We are asked whether AT&T Communications of Maryland (AT&T), over whose long-distance lines the communications from out-of-state vendors were transmitted to Maryland consumers, was obligated to collect the tax from Maryland consumers and, failing to have done that, to be responsible for payment of the tax to the Comptroller.”

405 Md. at 87.

“The uncontested factual findings in this case establish only that AT&T acted as a common carrier with regard to the 900 number transactions at issue. Thus . . . AT&T may not be held responsible for the 900 number sales and use tax on transactions between Maryland consumers and the information services vendors without violating the Commerce Clause of the U.S. Constitution. The Comptroller’s assessment against AT&T in this case is not permissible.”

405 Md. at 105.


Taxpayer obtained favorable judgment and asked Comptroller of the Treasury for a tax refund. “We hold that the Tax Court has jurisdiction to hear a claim for interest on a refund and, on the merits, because the Tax Court committed no errors of law and its conclusions were supported by substantial evidence, we shall affirm.” 405 Md. at 189.

“The Tax Court’s inference constitutes substantial evidence upon which its finding that the Comptroller owed SAC interest on the refund was based.” “The Tax Court inferred from the Comptroller’s letter and subsequent denial of SAIC’s appeal that the State’s laws and policies at the time SAIC filed the original return required that SAIC pay tax on the sale of NSI shares.” 405 Md. at 205-206.


This was an appeal from the Maryland tax Court determination and this was affirmed by the Court of Appeals that the transfer of property from partnership of co-owning individuals to LLC composed of the same individuals was exempt from recordation and transfer taxes. 405 Md. at 503.

---

119 The ALJ found “It is the intent of the program that providers will be reimbursed the actual costs of providing high quality care, regardless of how widely they may vary from provider to provider except where a particular institution’s costs are found to be substantially out of line with other institutions in the same area which are similar in size, scope of services, utilization and other relevant factors.” She found that Community’s costs were reasonable and there was no evidence presented that its costs were out of line. Community, 174 Md. App. at 539 (Emphasis in original). The Secretary of DHMH rejected the ALJ’s conclusion finding the Cap was reasonable, the Board of Review affirmed, as did the circuit court. 174 Md. App. at 541-42.

120 The Court discussed the Commerce Clause of the United States and the validity of a state tax imposed on a transaction where an out-of-state entity is one of the essential parties at pp. 93-97. Carriers are ordinarily classified as either private or common carriers. 405 Md. at 97-98.

121 Discussion in this opinion focusing on The Maryland Tax Court as an administrative agency is found at pp. 92-93 of the opinion.
Blank page
A. Ex Post Facto Laws
The prohibition of the U.S. Constitution against the enactment of *ex post facto* laws may apply to administrative regulations.

*Significant Case Decisions*

*Guidelines for security classification of inmates and transfer of inmates*
- *Watkins v. Division of Pub. Safety,* 377 Md. 34, 831 A. 2d 1079 (2003) discussed Division of Correction directives, promulgated as "guidelines" for the exercise of discretionary administrative authority. These guidelines concerned the security classification of inmates, the assignment and transfer of prisoners among the State prison institutions, and were formulated to establish policy regarding an inmate’s eligibility for work release and family leave. The Court stated these were not *ex post facto* laws and are not violative of Article I of the United States Constitution and Article 17 of the Maryland Declaration of Rights.¹ When the Maryland General Assembly enacted a statute that changed an inmate’s eligibility for parole during his incarceration, the *ex post facto* clause may be violated.² Numerous cases held the *ex post facto* prohibition to be “inapplicable to changes by the United States Parole Commission in the Commissioner’s own

¹ Prisoners made their allegations first to the Inmate Grievance Office, and then to circuit court for judicial review. The APA was applicable through S.G. §10-222 and Corr. Serv. §10-202. *Watkins,* 377 Md. at 45.
discretionary guidelines for granting parole.” 377 Md. at 48-49. While the prohibition applies only to a law, the concept of a law is broader than a statute enacted by a legislative body, “and may include some administrative regulations. It does not encompass ‘guidelines assisting [a government agency] in the exercise of its discretion.’” 377 Md. at 49.3

Had we gotten to the ex post facto issue

o Interesting is the case of Delmarva Power & Light v. Public Service Commission, 371 Md. 356, 809 A. 2d 640 (2002). The PSC passed an Order (Order No. 76292) that placed certain requirements on the electric and gas utilities and imposed limitations on the relationship that those utilities had with their non-regulated affiliates. 371 at 359. The Court of Appeals voided that order because the PSC was subject to requirements of the MAPA and failed to comply with the requirements to pass that order as a regulation. 371 at 161. The Legislature met and passed legislation that would have overturned the appellate decision. 371, at 364. Reviewing Article II, §29 of the Maryland Constitution requiring that a law may not embrace more than one subject and the one subject it is permitted to embrace must be described in its title. 371 at 367-68.4 The question presented by the attempted corrective legislation was a substantial one. The single subject rule was violated. 371 at 378. Though the Court did not consider the ex post facto issue, it could have proved to be interesting in this case.

B. Sanctions:

Normally, a court cannot interfere with sanctions imposed upon a licensee. Unless those sanctions are arbitrary and capricious, not what is allowed by the statute, or illegal, a court must defer to the exercise of the discretionary authority by the agency. No disproportionality argument may be entertained through judicial review. Recent decisions by the Court of Appeals have made this highest level of deference to administrative determinations very clear. See Chapter 10. Judicial Review (8). Was the agency decision arbitrary and capricious, p 202

Significant Case Decisions

Review of sanctions on appeal

o In a case involving disciplinary action imposed by the Board of Chiropractic Examiners, the Court of Special Appeals vacated the Board’s decision with respect to sanctions imposed against Dr. Regan in Regan v. Board of Chiropractic Examiners, 120 Md. App. 494, 524, 707 A. 2d 891 (1998). This was because during oral argument counsel informed the COSA that an agreement had been reached by the parties which the Court found to have constituted a probationary period and status almost equal to what the Board had ordered. A remand was made to the Board for clarification in view of the agreement reached.

So long as it is within what is allowed by law

o Maryland Aviation v. Noland, 386 Md. 556, 873 A. 2d 1145 (2005) saw the Court of Appeals holding: “...[W]hen the discretionary sanction imposed upon an employee by an adjudicatory administrative agency is lawful and authorized [i.e. within what is allowed by the statute], the agency need not justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon the particular discipline. A reviewing court is not authorized to overturn a lawful and authorized sanction unless the “disproportionality [of the sanction] or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be arbitrary or capricious.” 386 Md. at 581. The terminated paramedic hit the patient twice in the face because the patient was a combative psychiatric prisoner, who

3 The Watkins Court said that when the rules are "merely guides" that "may be discarded where circumstances require" they are not subject to the ex post facto prohibitions. The Commissioner of Correction had discretion to (1) "establish policy guidelines for security classifications without legislative ratification, (2) hold, assign and transfer prisoners among the State prison institutions as it deems necessary, and (3) to establish policy regarding an inmate's eligibility for work release and family leave. Watkins, 377 Md. at 52-53 (citing statutory and case law authority). There was no violation of "Federal and State constitutional prohibitions against ex post facto laws." 377 Md. at 53.

4 The Court discussed the reasons behind the constitutional enactment. Delmarva, 371 Md. at 367-78.
was spitting and screaming expletives and removing a face shield. The blows were to prevent the patient from spitting and to protect the police officers and the paramedic team from possible exposure to a communicable disease. 386 Md. at 560-61.

Both the circuit court and the Court of Appeals had determined the agency decision was arbitrary and reversed. *Maryland State Retirement Agency v. Delambo*, 109 Md. App. 683, 675 A. 2d 1018 (1996), and its application in this case, was reversed. *Delambo* had held that before an agency can terminate an employee from his or her employment, that agency must take into consideration the employee’s (1) overall employment history in State service, (2) attendance record during that period of time, (3) disciplinary record at the present agency and at other State agencies as well, (4) work habits, and (5) relations with fellow employees and supervisors. 386 Md. At 569. Both the circuit court and the Court of Special Appeals were of the opinion that, while hitting the patient was unwarranted, the act did not automatically constitute excessive force. 386 Md. at 570. *MTA v. King*, 269 Md. 274, 799 A. 2d 1246 (2002) was a case where the Court of Special Appeals reversed an agency determination because the termination of employment was disproportionate to the offense, and because King’s conduct was not “so serious as to warrant dismissal.” The Court of Appeals reversed stating: “As long as an administrative sanction or decision does not exceed the agency’s authority, is not unlawful, and is supported by competent, material and substantial evidence, there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion unless, under the facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be ‘arbitrary or capricious’” 386 Md. at 574. And, in *Spencer v. Board of Pharmacy*, 380 Md. 515, 529-531, 846 A. 2d 341 (2004), the Court of Appeals explained that “judicial review of a lawful and authorized administrative disciplinary decision or sanction, ordinarily within the discretion of the administrative agency, is more limited than judicial review of either factual findings or legal conclusions.” *Spencer* said that a higher level of deference is owed to discretionary functions of the agency than to legal conclusions or factual findings. 386 Md. at 575.

C. Waiver:

As in other areas of law, the concept of waiver is applicable in administrative law, and an administrative agency may waive its right to bring disciplinary proceedings and other actions. Waiver involves a determination of fact.

**Significant Case Decisions**

*Waiver is a question of fact*

- The Board of Pharmacy did not waive its right, as a matter of law, to bring disciplinary proceedings against a Pharmacist for failure to timely renew her license to practice by renewing her license during the pendency of its investigation of possible wrongdoing concerning the timeliness of her application for renewal of her license. *Spencer v. Board of Pharmacy*, 380 Md. 515, 522, 846 A. 2d 341 (2004)

D. Immunity & Privilege.

Immunity from civil suit ordinarily attends those performing peer review responsibilities. Other immunity and privilege issues are discussed in administrative law cases, including the fact that those making a complaint and presenting information to an administrative agency have an absolute immunity that precludes court action against them. The application of other privileges depend upon the facts of a particular case.

---

5 In *Ostrezenski v. Siegel*, 177 F. 3d. 245 (1999), the Court affirmed dismissal of District Court dismissal of a 42 U.S.C.A. §1983 action against a physician who conducted a peer review of Ostrezenski at the behest of the Maryland Board of physician Quality. 177 F. 3d. at 247. Members of a state medical disciplinary board are entitled to absolute quasi-judicial immunity for performing judicial or prosecutorial functions. Though Siegel was not a Board member, he was one step removed from “judicial” functions because “he nevertheless may be entitled to absolute quasi-judicial immunity if he is engaged in a protected prosecutorial function.” 177 F. 3d. at 249. Peer review was analogous to the duties of a prosecutor reviewing evidence to determining whether charges should be brought. 177 F. 3d. at 250-51.
**Significant Case Decisions**

*Just what is protected by a privilege? What privilege?*

- Quashing an administrative subpoena for the appearance of a news reporter to verify statements of a police officer at a police disciplinary hearing was error and not protected by privilege. *Prince George's County v. Hartley*, 150 Md. App. 581, 584, 822 A. 2d 537 (2003). "... Neither the First Amendment nor the Maryland Shield Law entitles [reporters] to refuse to testify at [an] administrative hearing." *Id.*

**Defamation in administrative proceedings**

- A defamation action by a Montgomery County school teacher arising out of statements made during an administrative proceeding, was barred by the same absolute privilege that attends statements of witnesses in a judicial proceeding. The statements were made during an administrative proceeding. *Reichardt v. Flynn*, 374 Md. 361, 377, 823 A. 2d 566 (2003). The statements against the teacher was that he made inappropriate sexual comments during the time he coached a cross-country track team. 374 Md. at 362.

  "The administrative proceedings and appeals that were available to Flynn were much more extensive than most administrative proceedings in a non-public education matter. He was entitled to hearings, two levels of administrative appeals, and judicial review. ... The Circuit Court correctly held that Flynn's defamation action was barred by absolute privilege." 374 Md. at 377.

**E. Multiple Statutes.**

Litigating administrative law cases means that it must always be kept in mind that a number of statutes may control the procedural process. Disciplinary matters involving state police officers always will involve both the MAPA and the Law Enforcement Officers' Bill of Rights. Many other statutes, such as the insurance code, contain a substantial amount of procedural requirements, in addition to the substantive law applicable. Therefore, the litigant must often be aware of the procedural requirements of MAPA, OAH and the particular agency involved.

---

6 Disciplinary proceedings were brought against Officer Lot for a statement attributed to him in the Washington Post to the effect that he would have shot someone had he been on the scene. *Hartley*, 150 Md. App. at 584. Lot wanted the Post reporter to testify in the administrative proceeding. First Amendment law was reviewed and found not applicable as newspaper reporters have no better testimonial privilege than other citizens. The law was examined in depth. 150 Md. App. at 587-99. "Officer Lott has a right to cross-examine witnesses who testify against him." 150 Md. App. at 597. There is a Maryland Shield Law which changed the common law of no privilege afforded newsmen. 150 Md. App. at 600. Court ordered disclosure is a part of that law when there is a significant legal issue and the information could not be otherwise obtained. *Id.*, at 602. Remand was required for the trial court to make a determination of whether the witness was compellable. 150 Md. App. at 603.

7 Writing for the majority in *Reichardt*, Judge Eldridge commented on the privilege attendant to judicial and administrative hearings. *Reichardt*, 374 Md. at 367-76.

8 The Court of Special Appeals in *Reichardt* had held that the statements were not absolutely privileged. *Reichardt*, 374 at 365. The Court of Appeals discussed Educ. Art. §4-205 affording the teacher a hearing and appeal process. The absolute privilege applicable in judicial proceedings had been held applicable to administrative proceedings in *Gersh v. Ambrose*, 291 Md. 188, 434 A. 2d 547 (1981). The *Gersh* Court held the privilege applied to some administrative proceedings. Because the proceeding in *Gersh* was substantially an ordinary open public meeting and did not resemble an adjudicatory administrative proceeding or a contested case administrative proceeding under the Administrative Procedure Act, the doctrine was not applicable. 374 Md. at 369-70.

9 One judge dissented in *Reichardt* stating the Court had no power "to modify the common law to create new absolute privileges (absolute immunity). ..." *Reichardt*, 374 Md. at 378. The dissent contained an extensive examination of the absolute immunity privilege, and concluded: "To continue on the path this Court has taken in recent years is, in my view, a totally unwarranted extension of the principles of immunity, and, more important, is an affront to the constitutional provisions found in Article 40 of the Maryland Declaration of Rights." *Reichardt*, 374 Md. at 402.
Significant Case Decisions

LEOBR and MAPA


- Maryland State Police v. Zeigler, 350 Md. 540, 625 A. 2d 914 (2004) is a case considering this same issue where the Court stated:

  The MSP is a state administrative agency subject to the requirements of the Administrative Procedure Act (APA), Code (1984, 1992 Cum.Supp.), §§ 10-101 through 10-405 of the State Government Article. As a law enforcement officer, Zeigler is entitled to the protections of the Law Enforcement Officer's Bill of Rights (LEOBOR), Code (1957, 1992 Repl. Vol.), Article 27, §§ 727 through 734D. The LEOBOR requires that a law enforcement agency provide an officer with notice and a hearing before taking punitive action against the officer. As the entitlement to a hearing brings this case within the definition of a "contested case" under the APA, Zeigler is also entitled to the protections afforded by the contested case provisions of the APA.

  Travers, 115 Md. App. at 353. (footnotes and citation omitted)

Insurance code and MAPA

- In Fromberg v. Insurance Commissioner, 87 Md. App. 236, 589 A. 2d 544 (1991), the Court stated:

  Judicial review of an insurance commissioner determination had to be read with the insurance code, then Article 48A §40(4) which allowed the court to consider the agency record "together with such additional evidence as may be offered by any party to the appeal." 87 Md. App. at 243-44. Thus, the circuit court should have allowed a California Study into evidence in Fromberg's effort to discredit Allstate's contention that Fromberg's past accident history demonstrated an enhanced chance of future accident involvement so as to allow Allstate to cancel insurance coverage. 87 Md. App. at 238-40.

MOSH and MAPA


10 In Moman v. Norris, 158 Md. App. 45, 854 A. 2d 259 (2004), the Court determined that a police officer who is certified for permanent appointment by the Maryland Police Training Commission, but is a probationary police officer employee was not a "law enforcement officer," under LEOBR and not entitled to the administrative law rights granted under that statute. 158 Md. App. at 48, 62.
F. Attorneys Fees.
There is a section in the Maryland Administrative Procedure Act that allows a small business or nonprofit organization to recover litigation expenses incurred in a contested when an agency brings an action in bad faith or without substantial justification. A contested case "is a proceeding before, or dispute with, an agency that entitled a party to an agency hearing." Investigation of a possible antitrust violation prior to the filing of a complaint by the Consumer Protection Division does not constitute a contested case.

S.G. §10-224. Litigation expenses for small businesses and nonprofit organizations.
(a) Definitions.-
(1) In this section, the following words have the meanings indicated.
(2) "Business" means a trade, professional activity, or other business that is conducted for profit.
(3) "Nonprofit organization" means an organization that is exempt or eligible for exemption from taxation under § 501 (c) (3) of the Internal Revenue Code.
(b) Scope of section.- This section applies only to:
(1) an agency operating statewide;
(2) a business that, on the date when the contested case or civil action is initiated:
   (i) is independently owned and operated; and
   (ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation; and
(3) a nonprofit organization.
(c) Reimbursement authorized.- Subject to the limitations in this section, an agency or court may award to a business or nonprofit organization reimbursement for expenses that the business or nonprofit organization reasonably incurs in connection with a contested case or civil action that:
   (1) is initiated against the business or nonprofit organization by an agency as part of an administrative or regulatory function;
   (2) is initiated without substantial justification or in bad faith; and
   (3) does not result in:
      (i) an adjudication, stipulation, or acceptance of liability of the business or nonprofit organization;
      (ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business or nonprofit organization; or
      (iii) a settlement agreement under which the business or nonprofit organization agrees to take corrective action or to pay a monetary sum.
(d) Claim required in contested case.-
(1) To qualify for an award under this section when the agency has initiated a contested case, the business or nonprofit organization must make a claim to the agency before taking any appeal.
(2) The agency shall act on the claim.
(e) Amount.-
(1) An award under this section may include:
   (i) the expenses incurred in the contested case;
   (ii) court costs;
   (iii) counsel fees; and
   (iv) the fees of necessary witnesses.
(2) An award under this section may not exceed $10,000.

12 Maryland Pharmacists, 115 Md. App. at 658.
13 Maryland Pharmacists, 115 Md. App. at 158. This case involved an allegation by the Hallmark Card Co., Inc. concerning activities of the Maryland Pharmacists Association, Inc. concerning mail order prescription plans. 115 Md. App. at 653. Analogy to Maryland Rule 2-101(c) and the institution of a civil action was made by the Court. No such document was ever issued by the Attorney General in this case. 115 Md. App. at 659.
(3) The court may reduce or deny an award to the extent that the conduct of the business or nonprofit organization during the proceedings unreasonably delayed the resolution of the matter in controversy.

(f) Source of award.- An award under this section shall be paid as provided in the State budget.

(g) Appeals.-

(1) If the agency denies an award under this section, the business or nonprofit organization may appeal, as provided in this subtitle.

(2) An agency may appeal an award that a court makes under this section.

[An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1; 1986, ch. 256; 1988, ch. 110, § 1; 1993, ch. 59, § 1.]

Other statutes allow the award of attorneys fees to a party and the wording of those statutes and ordinances need to be consulted for the details of when and under what circumstances fees may be awarded.

**Significant Case Decisions**

**County code provisions for attorneys fees**

- Firefighters filed grievances that lawn cutting and other maintenance actions were not within their duties in *Montgomery County v. JAMSA*, 153 Md. App. 346, 836 A. 2d 745 (2003) The COSA had earlier determined the claims were grievable. 153 Md. App. at 350. On remand, the Montgomery County Merit system Protection Board had legislative authority to award attorney’s fees for services rendered on judicial review of the Board decisions. The Montgomery County Code authorized the Board to order the County to pay “all or part” of the employee’s reasonable attorney’s fees.14 153 Md. App. at 355.

**Montgomery Code and the lodestar approach**

- *Manor Country Club v. Flaa*, 387 Md. 297, 874 A. 2d 1020 (2005) discussed the correct approach to be applied in calculating attorney’s fees where the award of such fees is permitted in accord with the provisions of the Montgomery County Code. The Code stated criteria to be applied to a determination of the discretionary award of attorney’s fees to a prevailing party in a discrimination suit (time and labor, novelty, skill, etc.). *Flaa*, 387 Md. at 397. Flaa prevailed before the Montgomery County Human Relations Commission in a substantial way when asserting her claims of discrimination against Manor Country Club.

  The Court discussed the lodestar approach to determine attorney’s fees, and said that approach was unnecessary considering the statutory criteria that was required to be considered. *Flaa*, 387 Md. at 312-16. What prior opinions by the Court indicated was that in the absence of other statutory criteria for calculating an attorney’s fees award, one must begin with a lodestar figure. i.e. a result obtained by multiplying a number of hours by an hourly rate. *Flaa*, 387 Md. at 319. Thus, the Panel’s attorney’s fees calculation made pursuant to an analysis of each of the criteria contained in the former §27-7(k)(1) of the Montgomery County Code resulted in a properly determined award of attorneys fees in the amount of $22,440.

**Just to whom does this provision allowing fees pertain?**

- In Montgomery County, there is a code provision allowing county employees to recover fees in certain appeals in personnel actions. *Kensington Fire v. Montgomery County*, 163 Md. App. 278, 281, 878 A. 2d 662 (2004). Golden, a volunteer firefighter, appealed the decision of the Fire Administrator’s imposition of additional punishment, which decision was overturned administratively and on judicial review by the circuit court. Interpreting the Montgomery County Code, the Court held that “the language, context, and purpose of the relevant statutory provisions entitle volunteer firefighters to attorney’s fees when the County seeks judicial review of an unfavorable Board decision.” This entitlement to fees pertained to volunteers as well as county employees. *Kensington*, 163 Md. App. at 289.

---

14 The Board was of the opinion that the Code did not allow an award of attorney’s fees for services rendered in connection with judicial review of Board decisions. Id., at 351. The Montgomery County Charter stated that the County Council shall prescribe by law a merit system for County Employees. The Board was given authority to accomplish the remedial objectives of the Code including ordering the county to pay all or part of an employee’s reasonable attorney’s fees.” Id., at 353.
The fact that the fee petition was filed after the circuit court affirmed the Board decision was not fatal because such requests are generally viewed as collateral matters. *Kensington*, 163 Md. App. at 288. "If the trial court retains jurisdiction over collateral matters even after the entry of a final judgment, it follows that an appeal filed in the underlying case does not encompass the court's subsequent resolution of any collateral matters." In this case, there was no appeal of the Board's decision not to award fees within 30 days, and thus the issue was not able to be appealed. *Kensington*, 163 Md. App. at 290.

G. Injunctions.
Various statutes give administrative agencies the authority to seek injunctive action. Most of these injunctions are sought in a circuit court. When the right to an injunction is addressed to the general equity power of a court, as opposed to any applicable statutory criteria, the Maryland Rules of Procedure set forth the procedure that must be followed:

Title 15, Chapter 500. Injunctions
15-503. Bond - Temporary restraining order and preliminary injunction.
15-504. Temporary restraining order.
15-505. Preliminary injunction.

"The very function of an injunction is to furnish preventative relief against irreparable mischief or injury, and the remedy will not be awarded where it appears to the satisfaction of the court that the injury complained of is not of such a character. Suitors may not resort to a court of equity to restrain acts, actual or threatened, merely because they are illegal or transcend constitutional powers, unless it is apparent that irreparable injury will result. The mere assertion that apprehended acts will inflict irreparable injury is not enough. The complaining party must allege and prove facts from which the court can reasonably infer that such would be the result."15

"Irreparable harm is a pliant term adaptable to the unique circumstances which an individual case might present." An injury is irreparable "where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice – in other words, where, from the nature of the act, or from the circumstances surrounding the person injured, or from the financial condition of the person committing it, it cannot be readily, adequately, and completely compensated for with money."16

"The function of a court in deciding whether to issue an injunction authorized by a statute . . . to enforce and implement congressional policy is a different one from that of the court when weighing claims of two private litigants."17 No every violation will automatically require a court to issue an injunction. Equity allows a remedy to be fashioned depending on the necessities of the particular case.18 When a statute provides for an injunction a circuit court’s freedom to make an independent assessment of the equities and the public interest is circumscribed to the extent that the legislation involved has already made such assessments.19

16 *Human Relations*, 370 Md. at 140.
17 *Human Relations*, 370 Md. at 137.
18 *Human Relations*, 370 Md. at 137.
19 *Human Relations*, 370 Md. at 138.
Significant Case Decisions

Injunction following ethics commission ruling

Ethics commission issued order requiring former senior level employees of Anne Arundel County from instituting class action litigation against County pertaining to development impact fees. The circuit court denied a motion to disqualify counsel. Commission then filed in circuit court a Petition for Permanent Injunction. Ethics Commission v. Dvorak, 189 Md. App. 46, 51, 983 A. 2d 557 (2009). Reviewing the Public Ethics Law and case law and injunctive practice, and court stated: “In an injunctive action of this type, when the legislation at issue is one that affects or pertains to the public interest, courts need not necessarily adhere to a traditional balancing of the equities.” 189 Md. at 80. The case was remanded for further proceedings. 189 Md. at 85. Res Judicata was also discussed and the Court reviewed that doctrine. 189 Md. at 87-88. A trial judge affirmed the Ethics Commission finding of facts and the case was dismissed on appeal for a lack of appellate jurisdiction. Thus, the administrative conclusion of an ethics violation is a final judgment, conclusive and binding. The Petition in this case for an Injunction was an action based on that prior administrative proceeding finding that appellees violated the ethics order. “Therefore, issues decided by the circuit court, or essential to the judgment, such as the timeliness of the ethics Complaint or retroactivity, cannot be re-litigated.” 189 Md. at 89.

A state agency asking for an injunction

A circuit court was asked to issue an injunction in State Comm on Human Relations v. Talbot County Detention Center, 370 Md. 115, 803 A. 2d 527 (2002). The request was not to enjoin actions which violate the law but was a request to enjoin actions which arguably impede the Comm on Human Relations from performing the lawful task of conducting an uninhibited investigation of race and gender discrimination in the workplace and sexual harassment in the same workplace. The Commission sought an injunction to prohibit agents from the Detention Center from appearing at confidential witness interviews and from insisting that the interviews be recorded and transcribed. 370 Md. at 141. Art. 49B §4 grants the Commission the power “to bring a civil action for injunctive relief, outlines when and where such action can be brought, and further establishes the criteria under which an injunction may be sought or granted, i.e. ‘to preserve the status of the parties or to prevent irreparable harm.’” 370 Md. at 129. As opposed to a situation where the request for injunctive relief is addressed to the equity jurisdiction of the court, the statute a statute may narrow the circuit court discretionary authority by replacing considerations in equity with statutory criteria. 370 Md. at 129-30. It was not required that the commission file a complaint against the Detention Center. 370 Md. at 132. “While the investigative process may, in part, protect an employer from frivolous claims, it was never intended to provide an impenetrable shield through which no investigation could be conducted in confidence and without undue influence or intimidation by the employer accused of violating the statute. The Legislature did not mandate that the preliminary investigation must be conducted through formal transcribed interviews where both the witness and the accused are privy to the questioning process. . .” 370 Md. at 135. Here the Legislature provided “if the Commission believes that appropriate civil action is necessary to . . . prevent irreparable harm . . . the Commission may bring action to obtain a temporary injunction.” Art. 49B §4. It is this standard that courts are to utilize when considering a request for injunctive relief in this case. The issue becomes whether the Commission has satisfied the court that a reasonable necessity exists to preserve the status of the parties or prevent irreparable harm. If so, the injunction should be issued. 370 Md. at 138-39.

The Court stated that the Commission request for an injunction was temperate and reasonable. “The public has an interest in ensuring unfettered investigations of illegal company practices, particularly when civil rights are at issue.” 370 Md. at 141-42. “The Commission’s pursuit of an unfettered, uninterrupted, and comprehensive preliminary investigation, if hindered or disrupted by the Detention Center’s actions, would constitute a denial of justice, particularly because the comprehensive and ubiquitous nature of our State’s anti-discrimination legislation suggests both the Legislature’s goals and the indispensable nature of tools of enforcement it afforded the Commission, such as the injunctive relief provided in Section 4.” 370 Md. at 144. The Court ordered the circuit court to grant the injunction. Id.

---

20 The Court said the case presented a novel question as to the degree of discretionary authority a circuit court maintains when considering injunctions sought pursuant to, and authorized by a specific statute. Supreme Court and other federal cases were examined. Human Relations, 370 Md. at 128-30.

21 Appellate court authority to review the circuit court decision was pursuant to Cts. §12-301. Human Relations, 370 Md. at 132.
Stay

- Maryland rule 7-205 states that the “filing of a petition [for judicial review] does not stay the order or action of the administrative agency. Upon motion and after hearing, the court may grant a stay, unless prohibited by law, upon the conditions as to bond or otherwise that the court considers proper.” There is a “no stay” provision in LE 9-741 relating to appeals from a decision by the Worker’s Compensation Commission ordering that compensation be paid. *Gleneagles, Inc. v. Hanks*, 156 Md. App. 543, 847 A. 2d 520 (2004). Therefore, a Commission order may not be enjoined by a circuit court under the circuit court’s plenary equity power, to circumvent the “no stay” provision. 156 Md. App. at 556.22

Enjoining the use of property

- In *Joy v. Anne Arundel County*, 52 Md. App. 653, 451 A. 2d 1237 (1982), the Court considered the scope of an injunction issued by a circuit court. Anne Arundel County complained that Joy’s use of the property as a junkyard, resource reclamation facility and a hazardous waste facility was in violation of applicable zoning regulations. The Court said that last two paragraphs of the injunction were said to be unexceptional. “They merely require Joy to comply with the County Code. Nor does there seem to be any substantial basis for objecting to the first paragraph, which in effect does the same thing, by ordering Joy not to bring materials on the property, by implication, while he lacks a certificate of use. The Circuit Court had before it ample evidence of Joy’s continuing activities on the property, and of his disposition to defy the county authorities.” There was another paragraph directing Joy “to remove materials from the property,” which the Court also found to be appropriate as Joy “brought materials onto the property in connection with activities that were unlawful because he had failed to obtain the necessary certificate of use. It was not unreasonable for the chancellor to order him to remove them.” 52 Md. App. at 662-63. But the third paragraph: “ordering Joy to return the property to its original topography, presents more difficulty. The record appears to contain no evidence of what the "original" topography of the property was (whatever date "original" may refer to) or how Joy changed it. Thus, it is not clear just how Joy is to comply with this paragraph, or how he might defend himself against a charge of contempt for its violation.” 52 Md. App. at 663.

The BB rules then in effect for injunction actions required the terms of an injunction to be described in reasonable detail. Terms such as requiring a defendant to “to take such actions as shall be necessary to prevent any future flooding of the Plaintiff’s property. . . .” are not sufficient to satisfy the rule of specificity. The Court said that the requirement that Joy "restore the property to its original topography" was too vague and overbroad to comply with Maryland rules. Because of the lack of specificity, the order was vacated as to that third paragraph.

H. Estoppel.

There is a doctrine of equitable estoppel in equity law and it has some application against a municipality.23 It is sometimes alleged that the actions of government are such that it ought to be precluded, both at law and in equity, “from asserting rights which might have otherwise existed, either of property, or contract or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.”24

“Of course, no principle is better settled than that persons dealing with a municipality are bound to take notice of limitations upon its charter powers. Consequently, ‘everyone dealing with officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.’ Therefore, the doctrine of equitable estoppel ‘cannot be . . .

---

22 Though it would seem evident to some that the clear legislative “no stay” statement trumps jurisdiction by a circuit court, the *Gleneagles* court detailed the history of LE §9-741, applied the rules of statutory interpretation and reached its decision. *Hanks*, 156 Md. App. at 552-57.


24 *Kahl*, 366 Md. at 194.
invoked to defeat the municipality in the enforcement of its ordinances, because of an error or mistake
committed by one of its officers or agents which has been relied on by the third party to his detriment.” 25

Estoppel against a municipality is “bottomed on the need for the interpretation or clarification of an
ambiguous statute or ordinance . . .” 26

Maryland recognizes a “vested rights” principle common and constitutional law. The doctrine focuses
on “whether the owner acquired real property rights which cannot be taken away by government
regulation.” In construction and development cases, the focus is ordinarily on whether a permit has been
obtained and construction has begun as a condition precedent to escape the right of government to
downzone property. 27

**Significant Case Decisions**

**But the county issued a permit**
- Equitable estoppel was not applicable against Baltimore County, Maryland in *Marzullo v. Kahl*, 366 Md.
  158, 194, 783 A. 2d 169 (2002) to allow the breeding of snakes under an expanded definition of “farm”
  under a particular zoning classification where the County had issued a permit to allow the activity. 366 Md.
  at 199. Sympathy for the plight of Kahl who obtained the permit and had undertaken construction on the
  property did not mean he could legally succeed. “We have held, generally, that permits that have been
  issued that are in violation of the zoning ordinances are unlawful and cannot be grounds for estopping a
  municipality from the enforcement of the ordinance.” 366 Md. at 199.

- *Sycamore Realty v. People’s Counsel*, 344 Md. 57, 684 A. 2d 1331 (1996) held that the Court had not yet
  adopted a theory of zoning estoppel in Maryland. 344 Md. at 69. The doctrine was examined in detail and
  a Court of Special Appeals opinion recognizing a limited theory of zoning estoppel was reversed. 28

**A reservation period**
- Petitioner’s desire to erect a 220 unit townhouse complex was put on hold when the Baltimore County
  Council reserved the 24.37 acre parcel for potential future acquisition for an 18 month period. During the
  reservation period, the parcel was subject to downsized and only a 132 unit could thereafter be built.
  Appellate Courts are generally loath to “impose estoppel against the government when it is acting in a
general capacity.” 344 Md. at 66. Maryland has recognized a “vested rights” derived from principles of
  common and constitutional law. The doctrine focuses on “whether the owner acquired real property rights
  which cannot be taken away by government regulation.” 344 Md. at 67. 29 Because the Petitioner had not
  obtained a permit and had not proceeded to construction prior to the downzoning, no rights vested and the
  Petitioner was not protected. However, a Baltimore County Code provision authorized the Petitioner to
  recover “actual damages sustained” by reason of the County reservation, and that was the only remedy
  available. 344 Md. at 70.

---

25 *Kahl*, 366 Md. at 195 quoting *Inlet Associates v. Assateague House Condominium Association*, 313 Md. 413, 545 A. 2d 1296
  (1988).
26 *Inlet Associates v. Assateague House Condominium*, 313 Md. 413, 545 A. 2d 1296 (1998) reviewed the application of the
document of equitable estoppel against a government entity. The doctrine was not applicable in the *Inlet* case where there was an
error in Ocean City Maryland’s attempt to convey land through a resolution where the Charter clearly stated the conveyance had
to be by the passage of an ordinance. 313 Md. at 436. The Court stated: “Consequently, ‘[e]veryone dealing with officers and
agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such
a provision cannot be construed to have been deceived or misled by their acts when done without legal authority.’” 313 Md. at 437.
It is your legal responsibility to make sure the government has the right to do what the government agents claim it has the
right to do.
28 The *Sycamore Realty* Court discussed equitable estoppel, and the doctrine of zoning estoppel as it has been adopted in some
stated. *Sycamore*, 344 Md. at 63-66.
29 The *Sycamore Realty* Court reviewed some Maryland case decisions. *Id.*, at 67-69.
Development and downsizing

Where Petitioner's attempt to develop property was subject to downsizing in *County Council v. Offen*, 334 Md. 499, 639 A. 2d 1070 (1994), the Court of Special Appeals raised the issue of the applicability of zoning estoppel on its own volition. That *sua sponte* action was said to have exceeded the authority of the Court when that issue had neither been argued nor briefed. 334 Md. at 505.30

I. Open Meetings Act.
Subtitle 5 “Meetings” of Title 10 “Governmental Proceedings” in the State Government Article contains Maryland’s “Open Meetings Act.”31 Legislative policy is stated to be that public business should be performed in an open and public manner for citizens to observe. Included in the open meetings requirement is that the public be provided with adequate notice of the time and location of meetings of public bodies.32 Specific definitions are set forth for judicial, legislative and executive functions as well as the definition of a public body. “Public body” includes any “multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State. “Quasi-judicial” function is specifically defined to include contested cases under the MAPA.33

The Sections within Subtitle 5 are:

**Subtitle 5. Meetings.**
10-501. Legislative policy.
10-502.1. State Open Meetings Law Compliance Board.
10-502.3. Quorum; meetings; compensation.
10-502.4. Duties.
10-502.5. Complaint.
10-502.6. Same - Prospective violation.
10-503. Scope of subtitle.
10-504. Conflict of laws.
10-505. Open sessions generally required.
10-506. Notice of open session.
10-507. Attendance at open session.
10-507.1. Interpreters.
10-508. Closed sessions permitted.
10-509. Minutes; tape recordings.
10-510. Enforcement.
10-511. Penalty.
10-512. Short title.

“A public body . . . must meet in open session, which the general public is entitled to attend, except as otherwise provided for in the Open Meetings Act . . . The Open Meetings Act further specifies that the public body must provide adequate notice of the meeting.”34 “The Open Meetings act provides for sanctions in cases of non-compliance. In particular, it provides that if a court ‘finds that a public body willfully failed to comply §10-505, §10-506, §10-507, or §10-509(c) of [the Open Meetings act] and that no other remedy is adequate, [the court may] declare void the final action of the public body.” §10-

---

30 The *Offen* case is discussed along with the doctrines of zoning estoppel and vested rights in *Sycamore Realty v. People’s Counsel*, 344 Md. 57, 684 A. 2d 1331 (1996).
31 SG §10-512.
32 SG §10-501.
33 SG §10-502. There is a State Open Meetings law Compliance Board. See SG §§ 10-502.1 through 10-502.6.
The first Maryland comprehensive legislation about open meetings came into effect in 1977, with the enactment of the new sections 7 through 15 of Article 76A of the Maryland Code. The current Open Meetings Act was the result of a recodification of the provisions of Article 76A by Ch. 284 of the Acts of 1984, without substantial change. Thus, the policy of the Open Meetings Act has remained unchanged, that 'citizens be allowed to observe . . . the deliberations and decisions that the making of public policy involves.' [SG] §10-501 (a).38 "While the Act does not afford the public any right to participate in the meetings, it does assure the public right to observe the deliberative process and the making of decisions by the public body at open meetings. In this regard, it is clear that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well to all deliberations which precede the actual legislative act or decision, unless authorized by [§10-508] to be closed to the public. * * * It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business."39

"The clear policy of the Open Meetings Act is to allow the general public to view the entire deliberative process." "Observation by citizens is possible only when they have notice that such deliberations are planned by their elected representatives."40

If a circuit court concludes that there were Open Meetings Act violations, and they were grievous enough, it has the authority to remedy those violations with an action as severe as voiding the agency decision. Before that can happen, the court must determine that the Board "willfully failed to comply" with the Act, and that no other remedy is adequate. SG §10-510(d)(4).41

**Significant Case Decisions**

The appropriate remedy for a violation is to declare the action void

- **Community and Labor United v. Baltimore City Board of Elections**, 377 Md. 183, 196-97, 832 A. 2d 804 (2003) voided action by the Baltimore City Council for failure to comply with provisions of the Open Meetings Act.42 When the Council met to discuss a proposal to restructure itself this constituted deliberations that citizens had to be allowed to observe. "The record does not provide any significant information about the deliberations that preceded the passage of this bill. On the contrary, the record shows that the City Council wished to conduct these deliberations away from the scrutiny of citizens and the media. In pursuit of this goal, the council first omitted to provide notice of the August 8 meeting, and when this failed, successfully excluded citizens and the media from the meeting, where, presumably, the bill was discussed. Assuming that the bill in question was not discussed at the luncheon meeting on August 12, the only open meeting on record with any discussion of Bill 02-0654 is the evening meeting on August 12, where the Council voted on the bill. The Council effectively prevented members of the public from

35 Board of Elections, 377 Md. at 188.
36 SG §10-505.
37 SG §10-508.
40 Community and Labor United, 377 Md. at 194.
42 The Court reviewed the definitions of public body and public business, the requirement that the body must meet in open session and must provide adequate notice of the meeting. Community and Labor, 377 Md. at 187-88. The history of the Open Meetings Act was set forth. Community and Labor, 377 Md. at 193.
observing most of the deliberations on the issue, in direct contravention to the expressly stated policy of the Open Meetings Act. We hold that the Council willfully failed to comply with §§10-505 and 10-506 of the Open Meetings Act, and that the appropriate remedy was to declare the action of the Baltimore City Council void. 377 Md. at 196-97."

The philosophy of the Act

Enforcement alternatives


"The Act embodies the philosophy that public business should be performed in a public manner, accessible to interested citizens, and that this type of open government is 'essential to the maintenance of a democratic society.' Such open government 'ensures the accountability of government to the citizens of the State[,] . . . increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.'" SG §10-501. Id.

Ocean Downs involved an appeal from a decision by the Board of zoning Appeals of the City of Cambridge approving a special use permit authorizing an off-track betting facility in Cambridge. Id., at 620.43 One argument on appeal was that the Board violated the Open Meetings Act. 151 Md. App. at 627. It was claimed that the Commission hearing notice was not posted in City Hall until the day of the hearing in violation of SG §10-506(a). It was also alleged that the Board violated SG §10-508 by conferring off-the-record without voting first whether to close a session. 151 Md. App. at 634. The trial court did not rule on these alleged violations. There are enforcement provisions to the Open Meetings Act. SG §10-510 states that a Petition is to be filed for enforcement within 45 days of a violation but does not say that is the only method of enforcement. 151 Md. App. at 635-36. Other available remedies language in the Act means the Legislature did not intend the petition route to be an exclusive remedy for enforcement. 151 Md. App. at 636-37. "This interpretation is consistent with the broad legislative policy to 'ensure the accountability of government [that] undergirds and pervades the Act.'" The Act effectively delegates enforcement of the Act to the public. 151 Md. App. at 638. Appellant's claim in its Petition for Judicial Review was sufficient. 151 Md. App. at 639-40.44

Open meetings act and the public information act


We find no merit in the plaintiffs' final argument that "the ALJ's determination that pre-hearing discovery was not permitted denied [plaintiffs] due process of law as required by the United States and Maryland Constitutions." (Plaintiffs' supplemental brief at 46). There is no provision in the Maryland Administrative Procedure Act which provides for discovery at the pre-hearing stage. Furthermore, under COMAR 26.01.02.21A, which governs the Department of the Environment contested case proceedings, "discovery may be taken only in accordance with the stipulation of the parties." Parties may, however, "request governmental documents under the Maryland Public Information Act, State Government Article, §10-611 et. seq." COMAR 26.01.02.21B. There was no stipulation in this case providing for discovery. Consequently, the ALJ properly determined that, absent such stipulation, she was not authorized to require the extensive discovery requested by the plaintiffs. Moreover, pursuant to COMAR 26.01.02.21B, the plaintiffs requested certain documents under the Maryland Public Information Act which they received without delay. Finally, the plaintiffs do not dispute the respondents' representations that the plaintiffs were furnished with several documents.

The plaintiffs do not argue that the ALJ or the Department relied upon any document which was not previously shown to the plaintiffs, or with regard to which there was no opportunity for rebuttal. Cf. Rogers v. Radio Shack, 271 Md. 126, 129, 314 A.2d 113, 115 (1974) ("We agree

43 Community involvement in this litigation was intense. The Court set out all the facts dealing with the planned project. Ocean Downs, 151 Md. App. at 622-27.
44 The Court stated: "If it had intended that the 45 day limit to apply to all Open Meetings Act claims, the legislature 91) would have used broader language (i.e., a party "shall file a claim based on a violation of the act within 45 days of such violation") and (2) would have set forth this limitation in a context independent of section 10-510(b)." Ocean Downs, 151 Md. App. at 639-40.
with Rogers that under the circumstances here, with no opportunity for cross-examination or
rebuttal, fundamental fairness would preclude reliance upon the report by an administrative
agency"). The plaintiffs have cited no case in the Supreme Court or in this Court, and we are
unaware of any such case, holding that due process mandates pre-hearing discovery in an
A.2d 1217, 1219 (1994) ("The Maryland Rules relating to discovery apply only to proceedings in
the circuit courts and not to proceedings before administrative agencies. . . . It is equally well-
established that there is no broad constitutional right to pre-hearing discovery in administrative
proceedings and that any general right to such discovery must come from the statutes or rules
governing those proceedings. * * * Neither the State Administrative Procedure Act nor the statute
governing the [agency] provides such entitlement . . ."), and cases there cited.

Thus, we perceive no error in the ALJ's refusal to require pre-hearing discovery.

344 Md. at 316-17.

J. Double Jeopardy.
Sometimes an argument is generated in administrative law that state action constitutes double jeopardy
against an individual or an entity. Most cases addressing this issue discuss the principal as not often
applicable to the administrative process.

Significant Case Decisions

Administrative remedies and criminal remedies

the administrative suspension of a driver's license under Trans. §16-205.1 did not constitute "punishment"
within the ambit of the U.S.Constitution or Maryland common law so as to be double jeopardy precluding
the State from bringing a subsequent prosecution for the crime of driving while intoxicated. 340 Md. at
240, 266. The Court reviewed application of the double jeopardy doctrine. 340 Md. at 242-252; 255-63.
License suspensions generally serve remedial purposes. 340 Md. at 251. Disciplinary proceedings for
professional licenses have been viewed in the same way. 340 Md. at 253. See: 26 U. Balt. L. Rev. 80,

K. Retroactivity.45
When and under what circumstances is a statute or regulation concerning administrative law retroactive?
That is a question, the answer to which has consumed many, many case decisions. The same issues are
generated in administrative law cases.

Significant Case Decisions

A vested right

o Landsman contracted with Somerville for home improvement in Landsman v. Maryland Home
Landsman made claim against the Home Improvement guaranty Fund. At issue was whether there could be
a recovery of $15,000 against the fund, the maximum recovery by Ch. 144 of the Laws of 2000, or
$10,000, the maximum recovery at the time of the contract. 154 Md. App. at 246. "At the hearing of this
appeal is whether Landsman, having established an actual loss resulting from Somerville's abandonment of
the job in December, 1997, is entitled to benefit from the increased maximum amount provided under the

45 Dua v. Comcast Cable, 370 Md. 604, 805 A. 2d 1061 (2002) addressed the issue of late fees in consumer contracts and
subrogation in contracts between health maintenance organizations. Retroactivity was at issue. The Court held the retrospective
portions of two Acts of 2000 were unconstitutional. Id, at 618. Vested rights and the takings clause of the Maryland constitution
were discussed. The Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. Id., at 623 The
Court did not reach the federal constitutional issues.
2000 amendment. The answer to this question is dictated by whether the amendment is to be applied retrospectively or prospectively.46 Landsman had no vested right in property. 154 Md. App. at 254. The award is a monetary debt to the contractor for which the Commission may suspend the contractors license. 154 Md. App. at 256-57. The potential for a license suspension does not create a penalty for contractors. 154 Md. App. at 258.

A professional license is not an absolute vested right. It is, at most, only a conditional right which is subordinate to the police power of the State to protect and preserve the public health and welfare.48 Somerville had no vested right in being shielded from the additional $5,000 owing to the Fund upon payment of Landsman's claim. 154 Md. App. at 260. “We fail to see how a contractor is entitled to a license where there has been a determination by the Commission that the contractor’s acts or omissions have caused actual loss to a claimant. A license is essentially a privilege, not a ‘vested right.” We therefore conclude that suspension of a contractor’s license pursuant to §8-411 does not infringe upon a property right protected by the Maryland Constitution.” 154 Md. App. at 261.

L. Issue Preclusion

Res judicata? Issue Preclusion? Collateral estoppel? Are those doctrines applicable to administrative law cases? There can be no issue preclusion in either a judicial or administrative law case unless there was a final judgment in the case said to be the benchmark of preclusion. A board’s enforcement of its licensing and disciplinary requirements serves to protect the public, and is remedial, rather than punitive. Therefore, the principals of double jeopardy and res judicata do not apply.

**Significant Case Decisions**

**An explanation of res judicata**

- **Lizzi v. WMATA**, 384 Md. 199, 206-07, 862 A. 2d 1017 (2004) gives a good explanation of the doctrine of res judicata. Faced with this defense, a court and an administrative agency must examine the extent of the prior ruling claimed to have disposed of the issue. 384 Md. at 207-08.49

**There must be a final judgment**

- **In Spencer v. Md. State Bd. of Pharm.**, 380 Md. 515, 846 A.2d 341 (2004), the Court of Appeals determined that a licensee had been denied the right to a fair hearing before the Board of Pharmacy. The Court of Special Appeals had made the same ruling but ordered a remand to the Board of Pharmacy. On certiorari, it was alleged that a remand would create issues of res judicata or double jeopardy. The Court said that argument was without merit and frivolous. “The Board's enforcement of its licensing and disciplinary requirements serve purposes essential to the protection of the public, which are deemed remedial, rather than punitive, and therefore are not subject to double jeopardy principles. (holding that

---

46 “The Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. The **Landsman** case is a primer on retroactivity prohibited, when and under what circumstances. No matter how ‘rational’ under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one’s property and giving it to some one else.” Retrospective statutes abrogating vested property rights (including contractual rights) violate the Maryland Constitution. “The particular provisions of the Constitution which are violated by such acts are Article 24 of the Declaration of Rights and Article III, §40, of the Constitution. A statute having the effect of abrogating a vested property right, and not providing for compensation, does ‘authorize private property, to be taken . . . , without compensation.’ (Article III, §40). Concomitantly, such a statute results in a person or entity being ’deprived of his . . . property’ contrary to the ‘law of the land.’ (Article 24).” **Landsman**, 154 Md. App. at 259-60.

47 The question is one of statutory construction. The Court reviewed the law regarding the retrospective or prospective application of a law, which is a question of legislative intent. **Landsman**, 154 Md. App. at 251-254. **Landsman v. Maryland Home Improvement Commission**, 154 Md. App. 241, 259, 839 A. 2d 743 (2003).

48 In this case, a former employee of the Washington Metropolitan Area Transit Authority sued for unlawful termination of employment. A federal appellate court dismissed the employee’s related federal court action. “We hold that petitioner’s present claim concerning the ability of the personal-leave provisions of the FMLA to overcome the sovereign immunity of this State is barred due to the res judicata effect of the Fourth Circuit’s opinion in **Lizzi v. Alexander**, et. al, 255 F. 3d. 128 (2001).” **Lizzi**, 384 Md. at 213.
where the purpose of the penalty is remedial, it is not punishment for double jeopardy purposes); (noting that the "purpose of disciplinary proceedings against licensed professionals is not to punish the offender but rather as a catharsis for the profession and a prophylactic for the public"). Even if double jeopardy were applicable, which it is not, the rehearing would not be precluded, as a new trial (or rehearing) ordinarily is not precluded by double jeopardy principles when a conviction is reversed on grounds other than sufficiency of the evidence. The remand was not based on insufficiency of evidence but on defects in procedure."

"Neither is res judicata applicable in this case because there is no final judgment--the case is still on appellate review--and because issue and claim preclusion require a subsequent cause of action in which those doctrines may take effect; this appeal is not a subsequent cause of action but all part of the same case. (noting that res judicata principles preserve the conclusive effect of judgments, "except on appeal or other direct review,") and quoting Restatement (Second) of Judgments § 27 (1982) that "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim"). 380 Md. at 534-35.

**A finding of guilt followed by PBJ**

- In *Powell v. Md. Aviation Admin.*, 336 Md. 210, 647 A.2d 437 (1994), the Court of Appeals confronted an issue of preclusion that is instructive here. The Court considered whether a guilty finding, followed by probation before judgment, could be given preclusive effect in a subsequent administrative disciplinary proceeding. Mr. Powell, a Maryland Aviation Administration employee, was charged and found guilty in the circuit court of telephone misuse. At sentencing, the conviction was set aside and he received probation before judgment. Administrative disciplinary charges were also filed. The Court stated: "... [T]he ALJ erred in giving conclusive effect to the guilty finding. That adjudicator could "second guess" the circuit court judge in the telephone misuse case. Powell is correct in contending that the ALJ should have resolved the credibility dispute on all of the evidence and that, in that process, the ALJ was free to substitute her judgment for that of the circuit court on whether Powell had engaged in the conduct alleged. A remand is required." 336 Md. at 218. The PBJ should not have been given conclusive effect.

**N. Substantive Due Process Rights.**

*Significant Case Decisions*

- In *Thomas v. Dept. of Labor*, 170 Md. App. 650, 908 A. 2d 99 (2006) two school bus drivers, who were employees of the Baltimore County Department of Education claimed that L.E. §8-909(c) violated the Due Process Clause of the fourteenth Amendment and the Maryland Declaration of Rights in denying them unemployment benefits during academic school years "because it discriminates between those school bus drivers employed by county boards of education and those employed by private contractors." 170 Md. App. at 668. L.E. 8-909 was enacted to exclude those individuals employed by educational institutions and with a reasonable assurance of continued employment from eligibility for unemployment benefits during regularly scheduled periods of unemployment. Congress had concluded that, because those employed by educational institutions know of scheduled breaks in employment they should be prepared for the breaks that regularly occur in their chosen employment and should prepare for them. The statute is

---


51 Judge Kenney wrote for the Court describing equal protection arguments and the application of suspect classifications and strict scrutiny, etc. *Thomas*, 170 Md. App. at 668. No "sensitive classification" was found in this case and therefore a rational basis standard was applied. Constitutional attacks have occurred against state unemployment law classifications:

("Where a state's unemployment insurance compensation statute neither involves a discernable fundamental interest nor affects any protected class with particularity, the relatively relaxed 'rational basis' standard should be applied in determining whether the statute violates the Equal Protection Clause.")

170 Md. App. at 669 (citations omitted)
rationally related to achieving its objective.” 170 Md. app. at 669-70.\textsuperscript{52} “Although privately employed bus drivers may not be subject to exclusion provisions of L.E. §8-909, any perceived inequitable treatment of privately employed and publicly employed school bus drivers is a matter for the legislature to address. 170 Md. App. at 671.

\textsuperscript{52} Courts in other jurisdictions had reached the same or similar conclusions. \textit{Thomas}, 170 Md. App. at 670-71.