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# Approaching Hearsay at Administrative Hearings: Hearsay Evidence and the Residuum Rule

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Perhaps nothing is more unsettling to the uninitiated than the evidentiary aspects of administrative law. Many of the evidence rules applied in judicial proceedings simply are not applicable under the Administrative Procedure Act (APA) and Uniform Administrative Procedure Rules (UAPR).[1] Experienced litigators are wary of the idea that most hearsay which is inadmissible in court will be admitted in administrative hearings.[2] The specter of such a proceeding may conjure up visions of the often lawless Dodge City of the old wild west Such visions are unfounded. The treatment of hearsay under the limitations of the UAPR and the *"residuum* rule" does not run far afield of traditional evidence rules, if approached with understanding.

**Evidence Rules Under the UAPR**

Except where specifically provided in the UAPR parties are not bound by statutory or common law rules of evidence or court rules of procedure in administrative hearings. All relevant evidence is admissible.[3] Relevancy is a "logical relation between the evidence offered and a material fact. The evidence offered, if relevant, will render a desired inference more probable than it would be without the evidence."[4] The test of relevancy is "whether the evidence has any tendency in reason to prove any material or legally consequential fact."[5]

Aside from relevancy, the UAPR provides two other bases for a party to object to the introduction of evidence. First, a party challenging offered evidence may argue for the exclusion of even relevant evidence if its probative value is substantially outweighed by the risk that its admission will necessitate undue consumption of time, or create substantial danger of prejudice or confusion.[6] Second, all evidentiary privileges, such as self-incrimination or the lawyer-client and patient-physician privileges, are applicable in administrative hearings.[7] Privileges will be applied '"to the extent permitted by the context and similarity of the circumstances."[8]

These bases are the only exclusionary provisions considered by an administrative law judge (AIJ) when determining: (1) whether a witness is qualified to testify; (2) whether evidence is admissible; or (3) whether a privilege is validly asserted.[9]

While the UAPR borrow some provisions from the New Jersey Rules of Evidence,[10] the vast majority of the Rules of Evidence are conspicuous by their absence. For instance, the UAPR do not address evidence of character, habit, custom and conduct (N.J.R.E. 405 and 4O6(b)), or credibility (N.J.R.E. 607 and 608). No specific UAPR provision permits a respondent to impeach a petitioner's primary witness.[11] As a result, a party could seek to introduce impeachment evidence at an administrative hearing, although such evidence might be ruled inadmissible under N.J.A.C. 1:1-15.1 (c) if its probative value were adjudged to be substantially outweighed by the risk that its admission would create a substantial danger of undue prejudice or confusion.

Since many of the omitted evidence rules can be similarly approached, ALJs will have a tendency to exclude the same types of evidence, which might be excluded in a judicial forum. If fairness is the standard for admissibility, an argument based on the Rules of Evidence, which are themselves based in fairness, often will prevail. The advice to the practitioner: Don't leave your Rules of Evidence in the office.

**The Admission of Hearsay**

The major difference between the treatment of evidence in a judicial forum and in an administrative proceeding involves the admission of hearsay. The APA does not specifically declare that hearsay is admissible: It merely provides that the "parties shall not be bound by rules of evidence, whether statutory, common law, or adopted formally by a court. All relevant evidence is admissible."[12] Under the UAPR, hearsay is expressly admissible in contested cases. The ALJ is directed to focus instead on the appropriate weight to be given to such evidence.

Hearsay is accorded whatever weight the ALJ deems appropriate, considering "the nature, character and scope of the evidence, the circumstances of its creation and production, and generally, its reliability."[13]

Evidence that responsible persons are accustomed to rely upon in the course of important affairs may be given weight equal to the weight given competent evidence, even if it is technically hearsay.[14] Outrageous, wild, improbable or unsupported assertions by a party, even if admitted, are likely to be given little weight. Thus, while unreliable hearsay evidence ultimately may be admitted by an ALJ, it will likely (and hopefully) be given the weight it deserves - none.

**The Residuum Rule**

Moreover, the admission of hearsay in administrative proceedings is tempered by the *residuum* rule, which controls the *use* and *weight* of such evidence. The New Jersey Supreme Court first enunciated the *residuum* rule in *Weston v. State* as follows:

> It is common practice for administrative agencies to receive hearsay evidence at their hearings… However, in our State … fact finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence to support it.[15]

The rule, which is more easily stated than understood, requires that some legally competent evidence exist to support each ultimate finding of fact to the extent sufficient to provide assurances of reliability, and to avoid the fact or appearance of arbitrariness.[16] The *residuum* rule generally applies to evidence which would be inadmissible under the Rules of Evidence, but which is admissible in administrative proceedings. Although it has been rejected by the federal courts as well as other states, the rule is recognized in New Jersey, and applies except where specifically made inapplicable by statute.[17]

Under the rule, hearsay may be used to corroborate or add probative force to competent evidence. But a court will not sustain an administrative decision unless a *"residuum"* of competent evidence supports the ultimate findings in the case.[18]

**Application to Findings of Fact**

Some of the confusion engendered by the *residuum* rule centers on the amount of competent proof necessary to sustain an administrative determination. The rule does *not* require that each finding of fact be based upon a *residuum* of legally competent evidence. Such a narrow reading would seriously undermine the APA's mandate that all relevant evidence be admissible. Instead, the rule focuses on the ultimate findings rendered. The determination on the ultimate issue requires the support of a *residuum* of competent legal evidence, but each evidential fact upon which the ultimate decision is based need not be supported by a *residuum* of competent evidence.

The Appellate Division clarified the difference between ordinary factual determinations and the ultimate fact--finding to which the *residuum* rule applies in *Matter of the Tenure Hearing of Cowan.*[19] There, a public high school teacher appealed the determination of the commissioner of education who terminated him due to certain acts of unbecoming conduct.

Specifically, the commissioner had determined that, over a ten-year period, the teacher committed various acts of verbal and physical abuse against students. The teacher contended that in reaching the ultimate determination, the commissioner improperly relied upon hearsay evidence regarding an assault that took place in the earlier part of the ten-year period.

In affirming the commissioner's decision, the court agreed that the evidence of the early assault was inadmissible hearsay, but concluded nevertheless that the *residuum* rule did not require the fact-finder to ignore hearsay evidence of that particular assault even though there was no competent evidence of the act.

The court stated:

> Applying the residuum rule requires identifying the “ultimate finding of fact" that must be supported by a residuum of competent evidence. Here, the "ultimate finding of fact" was that ... the appellant engaged in one or more of eleven acts of alleged misconduct that were "unbecoming." Alternatively, one might characterize as the "ultimate finding of fact" that appellant was engaged in a course of unbecoming conduct of which the acts charged were examples. Whether each of the acts charged is viewed as unbecoming conduct, as corroborative evidence ... or only as examples of a course of unbecoming conduct, there need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as "the combined probative force of the relevant hearsay and the relevant competent evidence” sustains the Commissioner's ultimate finding of unbecoming

conduct. [20](Citation omitted)

Clearly then, the fact-finder may rely upon relevant hearsay evidence in reaching a determination as long as there is a *residuum* of other competent evidence to support the ultimate finding.

**Over-Emphasis of Hearsay**
As set forth above, an ALJ or hearing examiner may not rely upon hearsay as the sole basis for his or her ultimate determination. As a result, parties who rely primarily upon hearsay are destined to fail. A classic example of such failure is found in the Appellate Division's decision *In re the Analysis of Walsh Trucking Occupancy and Sprinkler System.*[21] There, the appellant applied to the Hackensack Meadowlands Development Commission (HMDC) for a certificate of occupancy. The HMDC challenged the adequacy of the building's sprinkler system, which became the ultimate issue at an agency hearing. The appellant produced its experts, who testified regarding the adequacy of the sprinkler system. The HMDC did not call any witnesses, and simply relied upon the written engineering report of its staff.

The Appellate Division reversed the agency decision, finding a violation of the *residuum* rule because the decision "was based almost entirely upon the [HMDC's] staff engineering report, but neither the Author of the report nor anyone else was called as a witness to be subject to cross-examination and to defend the conclusions of the report."[22] The agency had urged that the *residuum* rule was not applicable because the facts in the case were undisputed. Rejecting that contention, the court found the *residuum* rule applicable because the type of sprinkler system required was in dispute. This was the ultimate issue to be determined, and the HMDC failed to submit any competent evidence on the subject.

The Supreme Court addressed a party's substantial reliance upon hearsay in *Clowes v. Terminix Int'l.*[23] The issue before the Court was whether alcoholism is a handicap under New Jersey's Law Against Discrimination (lAD). While answering that question in the affirmative, the Court ruled, based upon the *residuum* rule, that the plaintiff had not established that he was entitled to protection under the LAD. The Court explained that to the extent that the plaintiff's hospital records contained a diagnosis of alcoholism, the evidence was hearsay, and the "hearsay medical records alone are not sufficient to sustain a finding that Clowes was an alcoholic." Without competent evidence to support such a finding, the Court reasoned, "the complainant failed to establish the first element of his *prima facie* case and ... his action for discriminatory discharge therefore must fail."[24]

**The Approach to Hearsay at Hearing**
The existence of the *residuum* rule serves as a constant reminder that, upon judicial review of administrative decisions, a "more sensitive awareness would be expected of a court weighing the combined probative force of the relevant hearsay and the relevant competent evidence."[25]

Objections to hearsay on the basis that the offering party has not satisfied one of the hearsay exceptions contained in the New Jersey Rules of Evidence Rules are bound to fail. Indeed, it might seem at first glance to be a waste of time to object or argue over the admissibility of any hearsay in an administrative proceeding. However, while an ALJ may not reject evidence solely because it is hearsay,[26] fundamental fairness requires that the parties be allowed to explain, rebut or test the trustworthiness of the evidence presented.[27]

As a strategic matter, a practitioner should consider interposing objections to hearsay.[28] Such objections remind the ALJ of the *quality* of the evidence proffered. Conversely, a party seeking to offer hearsay should seek to demonstrate the admissibility of the evidence under one of the traditional hearsay exceptions to strengthen its proffer. Many of the theories behind exceptions to the hearsay rule relate to probative value. For example, the hearsay exception for declarations against interest is based on the assumption that anyone making such a statement would be less likely to fabricate. Therefore, it would benefit a party to demonstrate that the evidence is within an exception in order to enhance its probative value.

**Arguing the Residuum Rule**
An additional and equally important reason to argue the admissibility of hearsay in administrative proceedings relates to the application of the *residuum* rule by a reviewing court. "[T]here is a fundamental distinction between the admission of incompetent evidence and reliance upon it in reaching a decision."[29] Thus, the *residuum* rule should be approached as the standard for judicial review of administrative decisions.

Until an ALJ renders a decision, technically there are no findings upon which a *residuum* rule objection can be

made. Nevertheless, an objection would underscore the existence of hearsay in the record to assist the ALJ in making the ultimate findings of fact. (Of course, repetitive objections may be routinely denied, and practitioners should consider a continuing objection in those situations for the purposes of the record.) Thereafter, *residuum* rule arguments may be made during closing statements or post-hearing briefs. This approach will highlight any evidence problems which may have existed in the hearing at a time when the ALJ can view all of the evidence in context. Thereafter, the ALJ can properly assess the weight that the evidence should be given in supporting the ultimate conclusion.

**Conclusion**

Although most traditional evidence rules are not applied in administrative proceedings, administrative law practitioners should remember the relationship evidence has to the ultimate findings in the action. Objections ordinarily made in judicial proceedings may be interposed in administrative proceedings to remind the fact-finder of the quality of the evidence offered, as it may relate to the ultimate findings as well as preserve the objection for judicial review.

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**Endnotes**

1. N.J.S.A 52:14B-10(a); N.J.A.C. 1:1-15.1(c).
2. *City of Newark v. Essex County Bd. of Taxation,* 138 N.J. Super. 217 (App. Div.1975).
3. N.J.A.C.1:1-15.1(c).
4. *Id.*
5. Lefelt, 37 New Jersey Practice § 203 (1995).
6. N.J.A.C.1:1-15.1.
7. N.J.S.A. 2A:84-22.1 *et* seq.
8. N.J.S.A. 52:14B-10(a); N.J.A.C. 1:1-15.4.
9. N.J.A.C.1:1-15.1(e).
10. *Compare* N.J.A.C. 1:1-15.1(c) with N.J.R.E. 403; N.J.A.C. 1:1-15.1 (e) with N.J.R.E. 104.
11. *State v. Mondrosch,* 108 N.J. Super. 1 (App. Div. 1969), *cert. denied,* 55 N.J. 600 (1970).
12. N.J.S.A 52:14B-10(a).
13. N.J.A.C.1:1-15.5(a).
14. *Weston v. State,* 60 N.J. 36,51 (1972).
15. *Id.* at 50-51.
16. N.J.A.C.1:1-15.5(b).
17. Lefelt, *supra,* note 5, at §209. For example, the *residuum* rule does not apply in hearings before the Casino Control Commission. *See* N.J.S.A. 5:12-107(a)(6). *See, also, Division of Gaming Enforcement v. Merlino, 8* N.J.A.R. 126 (1985), *aff'd.* 216 N.J. Super. 579 (App. Div. 1987), *aff'd,* 109 N.J. 134 (1988).
18. *Weston, supra,* note 14, at 51. *See also Dolan v. City of East Orange.* 287 N.J. Super. 136 (App. Div. 1996). *But* see. *Negron v. New Jersey Dep't* of *Corrections,* 220 N.J. Super. 425 (App. Div. 1987).
19. 224 N.J. Super. 737 (App. Div. 1988).
20. *Id.* at 750-51, *citing, Weston, supra.* note 14, at 52.
21. 215 N.J. Super. 222 (App. Div. 1987).
22. *Id.* at 232.
23. 109 N.J. 575 (1988).
24. *Id.* at 599.
25. *Weston, supra,* note 14, at 50-52.
26. N.J.A.C.1:1-15.5.
27. *Sander v. Planning Bd.* o( *Warren Township,* 140 N.J. Super. 386 (App. Div. 1976).
28. The issue of a failure to object to hearsay has been raised by some practitioners. Nevertheless, unobjected hearsay is deemed to be less fatal since the "weigher of evidence has a subject matter experience with which to cogently appraise the probative value of a given item of evidence." Lefelt, *supra,* note 5, at § 211 *quoting* 13 Rutgers L. Rev. 254. 267 (1958). For a more detailed discussion on unobjected hearsay, see Sleven L. Lefett, N.J.L.J. (July 4,1985).
29. B. Schwartz, Administrative Law, § 117(1976).