2017 SUPPLEMENT

Arnold Rochvarg, Principles and Practice of Maryland Administrative Law

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Preface

Principles and Practice of Maryland Administrative Law was published by Carolina Academic Press in 2011. It quickly became the standard text and authority for issues involving Maryland Administrative Law. It has been relied upon by lawyers for the government at the state and county levels, lawyers in private practice, judges and their law clerks, and non-lawyers who try to navigate the administrative process on their own. Since its publication, there have been new cases decided by the courts, new statutes enacted by the legislature, and new regulations adopted by agencies. These developments are sufficiently significant to justify a Supplement to the original book, although not (in my opinion) significant enough to justify a second edition. I am extremely pleased that Bruce P. Martin, who has had a long, distinguished career in public service, agreed to work on this Supplement. Bruce took over teaching the course "Maryland Administrative Law," when I took *emeritus* status at the University of Baltimore School of Law. Bruce's expertise in Maryland Administrative Law is well known, and I am grateful for his work on this Supplement. We hope that as circumstances warrant, new updates and supplements will appear. We ask you to share any information with us that you feel will be helpful to others attempting to understand the administrative process in Maryland.

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Chapter 1 – Introduction

§ 1.1. What Is Administrative Law?

§ 1.2. Administrative Agencies

§ 1.3. Sources of Administrative Law

§ 1.4. Maryland APA

Chapter 2 - The Rulemaking Process

§ 2.1. Introduction

§ 2.2. What Is a Regulation?

Effective October 1, 2015, the APA definition of "regulation" was renumbered as § 10-101(h) of the State Government Article.

§ 2.3. Substantive Regulations

§ 2.4. Interpretive Regulations

The Court of Appeals, in *Building Materials Corp. of America v. Board of Education of Baltimore County*, 428 Md. 572, 53 A.3d 347 (2012), held that public school construction regulations adopted by the Board of Public Works "are to be treated as 'substantive' or 'legislative' regulations that are binding on the courts and have the 'force of law.'" The Court explained the difference between legislative and interpretive regulations:

> Legislative regulations result from a specific statutory grant, and are treated and enforced as binding law. This is in contrast to "interpretive" regulations, which do not arise from an explicit legislative mandate and are not afforded similar deference. "Interpretative rules simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties. In contrast, a substantive or legislative rule, pursuant to properly delegated authority, has the force of law, and creates new law or imposes new rights or duties.". . . In Maryland, all regulations, whether legislative or interpretive, are adopted under the State Administrative Procedure Act. . . .

428 Md. at 591, n. 25.

§ 2.5. Procedural Regulations

§ 2.6. Code of Maryland Regulations (COMAR)

§ 2.7. Maryland Register

§ 2.8. The APA Rulemaking Process

§ 2.9. The Proposed Rule

Effective June 1, 2012, a new § 10-112.1 was added. This section requires a unit to publish the text of a proposed regulation on the unit's website no later than 3 business days after the date that the regulation is published in the Maryland Register. The amendment also requires that a unit submitting a regulation to the AELR committee for emergency adoption publish the text of the regulation on the unit's website no later than 3 business days after the regulation is submitted to the AELR Committee.

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§ 2.18. Judicial Challenges to What Is a Regulation

In *Balfour Beatty Construction v. Maryland Department of General Services*, 220 Md. App. 334, 103 A.3d 1091 (2014), the Court of Special Appeals found that a "pilot project" requiring the inclusion of a project labor agreement (PLA)[1] specification as an evaluation factor for a public construction job did not constitute a regulation requiring rulemaking procedures under the Administrative Procedure Act. The State had issued a solicitation of Request for Proposals (RFP) for construction management at risk services relating to the construction of a juvenile detention center. Several potential bidders filed a protest challenging the inclusion of a PLA as an evaluation factor in the selection process, alleging that the State had created a new procurement policy in violation of the APA rulemaking requirements. In upholding a contested case decision of the Maryland State Board of Contract Appeals, the court held that because the requirement for a PLA evaluation factor did not have general application, change existing law, or apply retroactively, it was not a "regulation" under the APA, State Government Article, § 10–101(h)(1). While the court was unwilling to conclude that agencies must amend their regulations whenever adding a new or unusual procurement specification, it did caution that should the State decide to adopt a PLA requirement with general application and future effect, or implement "a *de facto* policy change . . . evidenced by the ubiquitous inclusion of PLAs in RFPs, then promulgation through rulemaking may be appropriate." 220 Md. App. 361–62.

Relying on *Balfour,* the Court of Special Appeals in *Medical Management and Rehabilitation Services, Inc. v. Maryland Department of Health and Mental Hygiene,* 225 Md. App. 352, 124 A.3d 1137 (2015), held that an RFP to select a single provider for the Rare and Expensive Case Management Medicaid program was not a regulation. The agency decision to seek a single provider and subsequently limit the award of a three-year contract for case management services for a limited portion of the Medicaid population applied only to the case management agencies responding to the RFP and was therefore not generally applicable.

§ 2.19. Granting an Appropriate Remedy

[1] A PLA is an agreement between a construction manager and the collective bargaining representative for all employees on a particular public project. Contractors hired to perform work on a project covered by a PLA must sign the PLA and agree that no labor strikes or disputes will disrupt the project.

Chapter 3 - Judicial Review of a Regulation

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§ 3.3. Challenges to the Constitutionality of a Regulation

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§ 3.5. Other Constitutional Challenges to Regulations

§ 3.6. In Excess of Statutory Authority

The principle that regulations must be consistent with the agency's enabling statute was reiterated in two cases where the Court of Appeals refused to enforce certain provisions of Department of Human Resources regulations pertaining to child abuse.[2]

In *McClanahan v. Washington County Department of Social Services*, 445 Md. 691, 129 A.3d 293 (2015), a mother alleged that her ex-husband had sexually abused their biological daughter. On a number of occasions, the mother reported the allegations to various medical facilities where the child underwent nine vaginal examinations over several years. The examinations showed evidence of vaginal redness, but not sexual abuse. The medical personnel examining the child could not, however, completely rule out the child's allegation that her father had "hurt her bottom." The Washington County Department of Social Services found the mother responsible for indicated child abuse mental injury due to subjecting the child to the multiple examinations. The mother appealed the finding to the Office of Administrative Hearings where, after a contested case hearing, the ALJ found that there was no medical evidence supporting the mother's repeated allegations of child abuse. The ALJ then authorized the Department to identify the mother in the Department of Human Resources computerized central registry of child abuse and neglect investigations and assessments as being responsible for child abuse mental injury. The ALJ concluded that the mother's behavior was "either an intentional attempt to manipulate and influence the outcome of an ongoing custody dispute . . . or were a result of her subconscious efforts to have [the child] remain close to her." 445 Md. at 696–97, 129 A.3d at 296. The ALJ's decision was upheld by the Circuit Court and the Court of Special Appeals on judicial review.

The Court of Appeals reversed, declining to enforce a regulation in which a parent could be deemed a child abuser for unintentionally causing mental injury, but not for unintentionally causing physical injury. The Court reasoned that the regulation created a distinction between child abusers causing physical and those causing mental injuries; however, the statute upon which the regulation was based made no such distinction. Without statutory authority, a regulation requiring scienter for physical abuse but not for mental abuse was unjustified. "Accordingly, we decline to enforce the portion of COMAR 07.02.07.12C that limits its

[2] Effective July 1, 2017, the Department of Human Resources was renamed as the Maryland Department of Human Services, and the Child Support Enforcement Administration was renamed as the Child Support Administration. Laws of Maryland 2017, Chapter 205 (House Bill 103).

exculpatory scope (for accidental injury) to alleged abusers causing physical injury. [Family Law Article] FL § 5–706 does not justify such distinction." 445 Md. at 711, 129 A.3d at 304.[3]

In *Department of Human Resources, Baltimore City Department of Social Services v. Hayward*, 426 Md. 638, 45 A.3d 224 (2012), the Court of Appeals found that a child abuse appeal regulation of the Department of Human Resources was inconsistent with the statute the regulation was intended to implement. The regulation, COMAR 07.02.26.05B, involved the administrative appeal rights of a person who wished to challenge a local department of social services finding of unsubstantiated child abuse in an attempt to have that finding modified to child abuse "ruled out." The regulation improperly limited the right of appeal to "[a]n individual found responsible for unsubstantiated child abuse" when the statute, Family Law Article, § 5–706.1, provided a right to appeal for persons challenging findings of unsubstantiated child abuse regardless of whether there were any additional findings of actual responsibility.

§ 3.7. Improper Procedure

§ 3.8. Bias Challenges to Regulations

§ 3.9. Substantial Evidence Review of Regulations

§ 3.10. Arbitrary or Capricious Review of Regulations

§ 3.11. Judicial Deference in Judicial Review of Regulations

In *McClanahan v. Washington County Department of Social Services*, 445 Md. 691, 129 A.3d 293 (2015), the Court of Appeals reiterated its prior holdings suggesting that when reviewing an agency's legal interpretation of a statute it administers or of its own regulations, the Court accords some deference to the agency interpretation. However, the Court of Appeals declined to enforce a child abuse regulation which the Court found to be inconsistent with the enabling statute. Notwithstanding some deference, a court is obligated to correct a legal conclusion that is erroneous. *See* discussion in § 3.6 (*In Excess of Statutory Authority)*.

See also Hranicka v. Chesapeake Surgical, Ltd., 443 Md. 289, 116 A.3d 507 (2015). (Electronic filing of Worker's Compensation Commission claim was untimely because although regulation required electronic "submission" statute mandated "paper filing"); and *Building Materials Corp. of America v. Board of Education of Baltimore County*, 428 Md. 572, 53 A.3d 347 (2012) ("Deference is particularly appropriate where, as here, the regulation is adopted under a specific delegation by the Legislature").

§ 3.12. Judicial Review of a Regulation as Part of Judicial Review of a Contested Case

[3] In response to the *McClanahan* decision, the General Assembly altered the definition of "mental injury" to mean the observable, identifiable, and substantial impairment of a child's mental or psychological ability to function caused by an intentional act, or series of acts, regardless of whether there was an intent to harm the child. Laws of Maryland 2017, Chapters 651 and 652 (House Bill 1263 and Senate Bill 996).

Chapter 4 - Contested Cases: Right to a Contested Case Hearing

§ 4.1. Quasi-Judicial and Quasi-Legislative Proceedings

Environmental standing legislation enacted by the General Assembly in 2009 broadened the ability of individuals and organizations to seek judicial review of determinations by the Maryland Department of the Environment (MDE) concerning the issuance, denial, renewal, or revision of specified environmental permits, and by the Board of Public Works (BPW) concerning licenses to dredge or fill on State wetlands. 2009 Laws of Maryland, Chapters 650 and 651 (Senate Bill 1065 and House Bill 1569). *See* § 14.4 *(Special Statutory Standing).* This legislation also prohibited the use of contested case administrative hearings in MDE and BPW environmental permit matters. *See* Md. Code Ann., Environment (EN), § 1-601(b) ("For permits listed under subsection (a) of this section, a contested case hearing may not occur); § 5-204(f)(2) ("For permits listed under paragraph (1) of this subsection, a contested case hearing may not occur); § 16-204(c)(1) ("A contested case hearing may not occur on a decision of the Board in accordance with § 16-202 of this subtitle"). Instead, direct review of the agency action is obtained by filing a petition for judicial review. The statute specifies what materials constitute an administrative record for purposes of that judicial review and, with certain exceptions, judicial review is limited to the administrative record and objections raised during the public comment period. Because the administrative review process does not involve contested cases, and the statute does not establish a standard for judicial review, the Court of Appeals was required to address that question in several cases.

In *Maryland Department of the Environment v. Anacostia Riverkeeper*, 447 Md. 88, 134 A.3d 892 (2016), the court held that where a statute authorizes judicial review without a contested case hearing, but does not establish a standard of review, the substantial evidence and arbitrary and capricious standards apply. The court acknowledged that it may seem "anomalous" to apply the quasi-judicial substantial evidence standard when there is no formal contested case administrative record, but concluded that because EN § 1–606 requires that specific documents be included in the record (*e.g.*, transcripts of public hearings, comments, and responses to comments), "we are essentially reviewing the same record that we would have examined, excluding the administrative law judge's decision, had the merits of this case been subject to a contested case proceeding." 447 Md. at 119–20, 134 A.3d at 910–11. Thus, the court decided that judicial review was within the substantial evidence standard of review intended by the APA.

In *Kor-Ko Ltd. v. Maryland Department of the Environment*, 451 Md. 401, 152 A.3d 841 (2017), the court reviewed a decision by MDE to issue a construction permit to build a human remains incinerator in a commercial industrial park. The court noted that the same MDE permitting statute dealt with in *Anacostia Riverkeeper* had elements of both quasi-judicial and quasi-legislative processes. For example, by engaging in a fact intensive review and issuing a permit that directly affected the rights of the applicant, but not those of crematorium operators in general, MDE seemed to some extent to be engaged in a quasi-judicial process. However, the statute expressly forbid contested case hearings. After "venting" over the less than ideal nature of the unique agency record and "nebulous" agency decisional process created by a statute "which prohibits contested hearings and fails to require more formal and comprehensive

explication of the reasoning of the agency," the court adopted the reasoning from *Anacostia Riverkeeper*, and applied the substantial evidence and arbitrary and capricious standards of review.

In *Maryland Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC,* 425 Md. 482, 42 A.3d 40 (2012) (*Hovnanian I*), the Court of Appeals discussed whether a decision by the Board of Public Works not to issue a license allowing a developer to fill and dredge on State wetlands was quasi-judicial or quasi-legislative in nature. The Court noted that the answer to that question would control the proper standard of review. The difficulty, however, is that a "precise line of demarcation" between quasi-judicial or quasi-legislative functions cannot be articulated by the courts.

The Court, citing *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 909 A.2d 235 (2006), stated that an agency acts in a quasi-judicial function when the decision is on individual grounds, scrutinizes a single property, and there is a fact-finding procedure including testimony and the weighing of evidence. According to the Court, "[n]ormally, that requires a contested case hearing, so that evidence (as opposed to informal statements of general beliefs) may be made. In this case, however, while the Board of Public Works' decision reflected elements of a quasi-judicial, fact driven process in that it involved a specific property and the potential impact of the proposed filling and dredging on specific wetlands, the entire process leading up to the decision of the Board did not require any kind of hearing at all. Moreover, because the Board of Public Works has significant discretion in deciding whether to issue a State wetlands license, the action had the hallmarks of a quasi-legislative decision. 425 Md. at 515, 42 A.3d at 59 ("the Board possesses a great deal of largely unguided discretion in determining whether to issue a license and on what terms and conditions"). The Court was able to avoid resolving the question by finding that the answer would be "largely irrelevant" because whichever label was ascribed to the Board of Public Works' action, it had "exceeded its statutory authority" if its decision was considered quasi-judicial, and was not "acting within its legal boundaries" if its decision was considered quasi-legislative. 425 Md. at 516, 42 A.3d at 59.

In *Kenwood Gardens Condominiums, Inc. v. Whalen Properties, LLC*, 449 Md. 313, 144 A.3d 647 (2016), the Court of Appeals examined county zoning regulations that created a Planned Unit Development (PUD) approval process that is in some respects quasi-legislative and in other ways quasi-judicial in nature. Kenwood Gardens Condominiums alleged that Whalen, the developer seeking the PUD, made illegal campaign contributions to the county councilman who accepted the PUD application and who had introduced the county council resolution that was required to be passed in order to permit substantive review of the application for the PUD. If the resolution passes, the PUD application undergoes an administrative review and approval process by county planning and zoning agencies. The next step is a hearing before an administrative law judge. Relying on *Maryland Overpak Corp. v. Mayor and City Council of Baltimore*, 395 Md. 16, 909 A.2d 235 (2006), the Court found that that the introduction of the resolution was a legislative act because even though the PUD involved a specific property, it was evaluated by the county council on broad policy grounds based on legislative facts regarding the community-wide impact rather than the particular characteristics of the property. Unlike the Baltimore City Council in *Overpak,* the county council did not engage in a deliberative fact-finding process with factual testimony or

the consideration of documentary evidence, and it did not make fact intensive findings. The resolution was merely a preliminary step in a process that involved a more detailed review by the county zoning and planning agencies. Because the county council acted in a legislative or quasi-legislative capacity, the Court limited its review to deciding whether it had acted within its legal boundaries. Accordingly, the motivations of the councilman in accepting the disputed campaign contributions and introducing the resolution were beyond the scope of any extended judicial review.

§ 4.2. Right to Contested Case Hearing Under the APA

§ 4.3. No Contested Case Hearing Required

§ 4.4. Contested Case Hearing Required

The question of whether a contested case hearing under the Maryland Administrative Procedure Act was required prior to the termination of Section 8 housing assistance benefits was addressed in *Walker v. Department of Housing and Community Development*, 422 Md. 80, 29 A.3d 293 (2011). The Section 8 program is administered by the U.S. Department of Housing and Urban Development (HUD) pursuant to federal statutes and regulations. *See* 42 U.S.C. § 1437f; 24 C.F.R. Part 982. Under the program, HUD provides funding to state public housing agencies in order to provide rental subsidies to eligible persons. The Department of Housing and Community Development (DHCD) is the agency implementing the Section 8 program in Maryland. DHCD notified Walker that it was terminating her from the program for failure to satisfy the family obligations required by the program. 24 C.F.R. § 982.551. The allegations were that Walker did not make her home available for inspection and did not enter into a repayment plan to compensate DHCD for alleged overpayments. DHCD provided Walker with an "informal hearing" that complied with the HUD regulation's procedural requirements, including: (a) providing all relevant documents; (b) permitting legal representation; (c) ensuring that the hearing officer is not the person who made or approved the decision under review or a subordinate; (d) allowing the presentation of evidence and the questioning of witnesses; (e) requiring factual determinations to be made by a preponderance of the evidence; and (f) requiring the hearing officer to issue a written decision briefly stating the basis for the decision. 422 Md. at 85, 29 A.3d at 296, *citing* 24 C.F.R. § 982.555(e). After hearing testimony and argument from both parties, the hearing officer concluded that the decision of DHCD should be upheld. Although the decision was in writing, the hearing officer made no formal findings of fact. Walker filed a petition in circuit court under the APA procedures providing for judicial review of contested cases. DHCD moved to dismiss the petition, arguing that the informal hearing under 24 C.F.R. § 982.555 was not a "contested case," because no statute or provision of the Constitution required a contested case hearing prior to termination of Section 8 benefits. Instead, DHCD argued, since the only right to a hearing was in the HUD regulations, the informal hearing did not meet the definition of contested case in State Government Article, § 10-222(d). Walker argued that the source of the right to a hearing was not only the HUD regulation but also the Due Process Clause of the U.S. Constitution.

The Court of Appeals concluded that housing is a basic need and that Due Process requires an evidentiary hearing prior to termination of such benefits, citing *Goldberg v. Kelley*, 397 U.S. 254 (1970) (Due Process hearing required prior to termination of welfare benefits). Thus, the Court found that it is the Due Process Clause and not merely the HUD regulations that require a hearing prior to termination of Section 8 benefits. Even though the HUD regulation requires a hearing and that hearing may be sufficient to satisfy *Goldberg* Due Process requirements, because a hearing is also constitutionally required, it does not fall within the exception to the definition of a contested case in SG § 10-202(d)(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."). The Court held that since Section 8 benefits termination hearings are contested cases under the APA, the informal hearing was insufficient under the APA and remanded the case to DHCD for compliance with the APA.

§ 4.5. Special Statutory Provisions Limiting a Contested Case Hearing

§ 4.6. Due Process Right to a Hearing

§ 4.7. Flexible Due Process

§ 4.8. Summary Suspension

Chapter 5 - Contested Cases: General Procedural Matters

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§ 5.2. Notice of Hearing

§ 5.3. Representation: Maryland Attorneys

§ 5.4. Representation: Out-of-State Attorneys

§ 5.5. Non-Attorney Representation

§ 5.6. Pro Se Representation

§ 5.7. Agency Subpoenas

In a judicial action to enforce an Office of the Attorney General's Consumer Protection Division (CPD) investigative subpoena, the business that was the target of the investigation claimed that CPD had no legal authority to investigate (1) the firm's access and use of consumer credit reports, an issue under the authority of the Commissioner of Financial Regulation; and (2) the licensing status of the firm's sales people since that was under the authority of the Home Improvement Commission. *Washington Home Remodelers, Inc. v. Office of Attorney General Consumer Protection Division*, 426 Md. 613, 45 A.3d 208 (2012). The Court of Appeals noted that the three part test for determining the validity of a subpoena involves an analysis of whether the inquiry is authorized by statute, the information sought is relevant to the inquiry, and whether the demand is too indefinite or overbroad. 426 Md. at 623, 45 A.3d at 214-15, c*iting* Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law,* § 5.7 at 62 (2011). The Court concluded that only the first prong of the test was implicated, and that the CPD was vested with broad and extensive investigatory authority under the Consumer Protection Act (CPA). Although the Court agreed that the CPD may only enforce violations of the CPA, it found that under the subpoena authority of the CPA, Commercial Law Article, § 13-405, CPD is not required to make a preliminary showing that the party under investigation has, in fact, violated the CPA before issuing an investigative subpoena.[4] The CPD may initiate an investigation to determine whether the activities under investigation violate the CPA or are not covered by the CPA.

§ 5.8. Refusal to Issue a Subpoena

§ 5.9. Enforcement of Subpoenas

§ 5.10. Discovery

The constitutional protections of *Brady v. Maryland*, 373 U.S. 83 (1963), requiring the State to disclose exculpatory evidence in criminal cases, do not extend to the quasi-judicial

[4] Commercial Law Article, § 13-404(a) provides: "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."

administrative hearing procedures of the Law Enforcement Officers' Bill of Rights (LEOBR). *Ellsworth v. Baltimore Police Department*, 438 Md. 69, 89 A.3d 1183 (2014).

§ 5.11. Statute of Limitations

§ 5.12. Intervention

§ 5.13. Open Hearings

§ 5.14. Ashbacker Doctrine/Comparative Hearings

§ 5.15. Mental Competency

§ 5.16. Right to Jury Trial

§ 5.17. Interpreters

While SG §10–212.1(a)(1) provides that a party or witness in a contested case may request an interpreter "if the party or witness is deaf or, because of a hearing impediment, cannot readily understand or communicate the spoken English language," the APA does not appear to extend that entitlement more generally to those with limited English proficiency. The OAH procedural regulations avoid that inequity by omitting the hearing impairment limitation. COMAR 28.02.01.09A ("Upon request of a party or witness who cannot hear, speak, or understand the spoken or written English language, the Office shall provide a qualified interpreter during the hearing."). *See* Chapter 10, § 10.32 (*Interpreters*).

Maryland State agencies are nevertheless generally required to provide individuals with limited English proficiency with equal access to government services. There is a specific State statute requiring agencies to take reasonable steps to provide equal access to public services for individuals with limited English proficiency. *See* SG § 10-1101 *et seq*. Reasonable steps include providing oral language services and translating vital documents in any language spoken by any limited English proficient population that constitutes at least 3% of the overall population within the State. SG § 10-1103(b). There is also a strong argument that an interpreter for someone with limited English proficiency is necessary to comply with the requirements of Due Process, Equal Protection, and with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. *See Lau v. Nichols*, 414 U.S. 564 (1974). Executive Order 13166, 65 Fed. Reg. 50,121 (August 11, 2000), mandates that Federal agencies implement requirements for recipients of Federal financial assistance to ensure that programs and activities normally provided in English are also accessible to individuals with limited English proficiency.

§ 5.18. Electronic Hearings

§ 5.19. Substitution of Presiding Officer and the Institutional Decision

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§ 6.6. Probativity

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§ 6.8. Expunged Records

§ 6.9. Illegally Seized Evidence

§ 6.10. Prior Criminal Cases

§ 6.11. Hearsay

In addition to an express provision in the State Administrative Procedure Act, State Government Article, § 10-213(c), it has long been the case that the common law in Maryland has permitted the admission of hearsay in administrative hearings. *Neuman v. City of Baltimore*, 251 Md. 92, 246 A.2d 583 (1968) ("Hearsay evidence is not only admissible, it may serve as the sole basis for decision if it is credible and has sufficient probative force."); *Redding v. Board of County Commissioners*, 263 Md. 94, 110–11, 282 A.2d 136, 145 (1971) ("Redding complains that some of the evidence admitted was hearsay; but we have held that such evidence is admissible before an administrative body in contested cases and, indeed, if credible and of sufficient probative force, may be the sole basis for the decision of the administrative body"). *See also, Eger v. Stone*, 253 Md. 533, 253 A.2d 372 (1969)("We have recently decided, however, that not only is hearsay evidence admissible in administrative hearings in contested cases but that such evidence, if credible and of sufficient probative force, may indeed be the sole basis for the decision of the administrative body."), *citing Neuman.*

In *Para v. 1691 Ltd. Partnership*, 211 Md. App. 335, 65 A.3d 221, *cert. denied,* 434 Md. 314 (2013), the Court of Special Appeals conducted a review of the law concerning the admission of hearsay in an APA administrative proceeding conducted on behalf of the Maryland Department of the Environment, *citing* Arnold Rochvarg, *Principles and Practice of Md. Administrative Law* 75 (2011). The Court pointed out that the admission of hearsay must be premised on providing the litigants with fundamental procedural fairness, including the opportunity for reasonable cross examination. In this case, however, the complaining parties had no basis to effectively object to the admission of the hearsay as they were only deprived of the opportunity to cross-examine witnesses "by their own failure to subpoena witnesses or further

documentation." 211 Md. App. 385-86, 65 A.3d at 250, *citing Travers v. Baltimore Police Dep't*, 115 Md.App. 395, 693 A.2d 378 (1997).

§ 6.12. Missing Witness Rule

§ 6.13. Official or Administrative Notice

§ 6.14. Reopening the Hearing for Additional Evidence

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§ 7.3. Findings Requirement and the Sanction

Chapter 8 - Contested Cases: Res Judicata, Collateral Estoppel and Double Jeopardy

§ 8.1. Res Judicata and Collateral Estoppel

§ 8.2. Two Administrative Proceedings

In a case involving the administrative decisions of two different agencies, the Court of Appeals formally embraced, for the first time, the doctrine of offensive nonmutual collateral estoppel. *Garrity v. Maryland State Board of Plumbing*, 447 Md. 359, 135 A.3d 452 (2016), was an appeal from a decision by the Maryland State Board of Plumbing that Garrity had violated the Maryland Plumbing Act "by providing incompetent or negligent plumbing services; failing to obtain permits required by local jurisdictions; engaging in unfair trade practices; knowingly permitting employees to work outside the scope of their licenses; and employing unlicensed persons to participate in the provision of plumbing services." 447 Md. at 366, 135 A.3d at 457; *See* Md. Code Ann., Bus. Occ. & Prof. (BOP) §§ 12–312(a)(1) and 12–602(a). The BOP had based its charges on the outcome of an earlier enforcement action by the Consumer Protection Division (CPD) of the Maryland Office of the Attorney General, which had brought multiple charges alleging unfair and deceptive trade practices in violation of the Maryland Consumer Protection Act by Garrity and his two plumbing companies. *See* Md. Code Ann., Com. Law (CL) § 13–303.

Garrity had disputed the CPD charges during a two-day contested case hearing. In that proceeding, the CPD submitted 84 exhibits and called 24 witnesses, while Garrity only submitted one exhibit, called no witnesses, and, refused to testify when called as a witness by the CPD, invoking his Fifth Amendment right against self-incrimination. Neither party contested the proposed findings of fact and conclusions of law issued by the ALJ, and the final order issued by the CPD found that Garrity had committed at least 7,079 violations of the Consumer Protection Act, including the employment of unlicensed plumbers and the billing of customers for services that were not performed. The CPD ordered Garrity to cease and desist the unfair and deceptive trade practices, as well as pay $250,000 in restitution, $707,900 in civil penalties, and $65,129 in costs. Neither party sought judicial review of the final administrative order.

The BOP brought the complaint against the petitioner after CPD had issued its decision. The Charge Letter incorporated by reference the CPD's Final Order. At the BOP contested case hearing, counsel for the BOP moved to admit the CPD's Final Order as evidence in its case in chief. The BOP admitted eight exhibits and called two witnesses, one of whom was Garrity. However, as in the CPD proceeding, Garrity refused to testify, invoking his Fifth Amendment privilege. In any event, the BOP's decision was based almost entirely on the CPD's findings and conclusions.

At the BOP hearing, Garrity objected to the introduction of the CPD's Final Order, arguing that the BOP must conduct its own evidentiary hearing and independently prove the alleged violations. The BOP denied the objection and admitted the CPD's Final Order, applying the doctrine of collateral estoppel to adopt the findings of fact made by the CPD. Based upon the CPD's findings in the prior contested case, the BOP concluded that Garrity had committed "pervasive, numerous and egregious" violations of the Maryland Plumbing Act as alleged in the Charge Letter. As a result of those findings, the BOP revoked Garrity's master plumber's license

and levied a $75,000 civil penalty. Garrity sought judicial review, but the circuit court ruled that the BOP had properly invoked collateral estoppel in adopting the CPD's findings of fact. On appeal, the Court of Special Appeals affirmed.

The Court of Appeals analyzed the doctrine of offensive nonmutual collateral estoppel in which one party seeks to establish as undisputed a fact that was previously litigated adversely against the other party by a third party not directly involved in the litigation. 447 Md. at 369-70, 135 A.3d at 459-60, *citing Shader v. Hampton Improvement Ass'n*, 443 Md. 148, 115 A.3d 185 (2015). If either party in the second proceeding was not a party to the first proceeding, then the collateral estoppel is considered "nonmutual." Estoppel is considered "defensive" if applied by a respondent or defendant, and "offensive" if invoked by a petitioner or plaintiff. The Court noted that offensive nonmutual collateral estoppel had never been "embraced and applied" by the Court of Appeals.

The Court of Appeals, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), discussed the policies and considerations underlying use of offensive nonmutual collateral estoppel. In *Parklane*, shareholders of a corporation sought to grant preclusive effect to facts found in an earlier civil suit brought by the Securities and Exchange Commission (SEC) against the same defendants. The Supreme Court found that offensive nonmutual collateral estoppel may be applied only if it promotes the policies of fairness and judicial economy. The *Parklane* court recognized that defensive collateral estoppel promotes judicial economy because the plaintiff has an incentive to join all potential defendants in a single action, whereas in offensive collateral estoppel, a second plaintiff may adopt a wait-and-see approach and bring a lawsuit if the first plaintiff is successful in the first action. The Court of Appeals analyzed the unfairness of applying collateral estoppel to cases in which the party against whom it is sought would not have had the incentive to vigorously defend the allegations, or where the stakes of the initial case may have been "small and nominal" and a future suit was not reasonably foreseeable.

In *Garrity*, the procedures involved in the two administrative proceedings were virtually identical. Both of the administrative proceedings were concerned with "applying statutes designed to protect consumers in highly-regulated industries." As in *Parklane,* where the shareholders could not have joined the SEC proceeding, BOP could not have joined the CPD proceeding. "Both are administrative agencies, and both are constrained to charge violations of their own statutes." Requiring the BOP to replicate the evidence produced at the CPD contested case hearing would have been a waste of resources, especially where Garrity had failed to submit any evidence or call witnesses at the CPD hearing. *Id*. Moreover, the Court concluded that Garrity had every incentive to vigorously defend against the charges in the CPD matter, given that he was a small business owner facing a penalty of more than $700,000. Further, just as in *Parklane*, where a subsequent shareholder suit was foreseeable after a successful SEC judgment, Garrity was aware that a BOP proceeding to revoke his license was a foreseeable consequence of an adverse ruling before the CPD.

Garrity's procedural opportunities at each agency contested case proceeding were the same, including the right of judicial review, so it could not be argued that the BOP somehow benefited from a lower standard of proof in the CPD case. The Court of Appeals concluded:

> Petitioner was charged by and participated in a hearing with two administrative agencies that were governed by the same rules of procedure, bore the same burden of proof, and required the same facts to be established to support violations of their respective statutes. It is against this backdrop that we conclude that non-mutual collateral estoppel can be applied offensively in this case in a manner that is fair to the party against whom the doctrine is asserted.

447 Md. at 382, 135 A.3d at 467. The Court noted that the question of whether the doctrine of nonmutual collateral estoppel could appropriately be invoked in another case involving different tribunals would depend of the specific facts.

§ 8.3. Administrative Contested Case Followed by Judicial Proceeding

§ 8.4. Judicial Proceeding Followed by Contested Case

In *Cosby v. Allegany Co. DSS*, 425 Md. 629, 42 A.3d 596 (2012), the Court of Appeals clarified the *dicta* in its *Tamara A*. decision concerning FL § 5-706. In *Cosby*, an adoptive mother refused to allow her 17 year-old adoptive son, who was paralyzed from the waist down, to return home after he got into a verbal and physical altercation with her "live-in paramour." The mother also refused to allow the Allegany County Department of Social Services (DSS) to attempt to arrange a voluntary out-of-home placement for her son and, instead, insisted that he be placed in foster care "as a punishment." The DSS filed a Child in Need of Assistance (CINA) petition in the Circuit Court for Allegany County. The DSS also notified the mother it had found her responsible for "indicated child neglect," which would result in her name being placed into a central registry of child neglectors. On December 1, 2008, prior to a Circuit Court's decision on the CINA petition, the mother filed a contested case administrative challenge to the DSS determination that she was responsible for "indicated child neglect." On December 15, 2008, based on a finding of the mother's neglect, the Circuit Court adjudicated the son to be a CINA, and placed him in the care of the DSS for transfer into foster care.

The DSS then moved to dismiss the contested case on grounds of collateral estoppel, arguing that the Circuit Court finding of neglect precluded the mother from challenging the DSS "indicated child neglect" determination that was based upon the same facts as the CINA case. The ALJ, relying on the Court of Special Appeals decision in *Montgomery County Department of Health and Human Services v. Tamara A*., 178 Md.App. 686, 943 A.2d 653 (2008), granted the motion and dismissed the mother's administrative appeal. The ALJ noted that in *Tamara A.,* the Court of Special Appeals had found that the definition of child neglect in the CINA case was identical to the definition of child neglect applicable in making an "indicated child neglect" determination. Because the mother had the opportunity to fully litigate the same issues of law and fact at the CINA hearing, the ALJ concluded that collateral estoppel barred the contested case hearing.

The mother sought reconsideration because, prior to the ALJ's decision, the Court of Appeals had reversed the Court of Special Appeals. *Tamara A. v. Montgomery County Department of Health and Human Services,* 407 Md. 180, 963 A.2d 773 (2009). Nevertheless, the

ALJ reaffirmed the decision to dismiss the contested case because the Court of Appeals in *Tamara A*. had not reached the merits of the collateral estoppel issue, instead ruling that the matter was an improper interlocutory appeal.

The Court of Appeals in *Cosby* found that, unlike the situation in *Tamara A*., the ALJ's decision on the motion to dismiss constituted a final disposition of the contested case and was thus immediately appealable. The Court of Appeals went on to find that there was no indication in the legislative history of FL § 5-706 that suggested an intent to abrogate the application of common law collateral estoppel in cases where the doctrine would otherwise be satisfied. The Court of Appeals concluded that "while a CINA finding does not act as a *per se* bar to an administrative appeal, it can be preclusive where the elements of collateral estoppel are met." 425 Md. at 652, 42 A.3d at 610. The Court then quoted *Tamara A.* for the proposition that § 5–706.1 "does not necessarily preclude a collateral estoppel defense in a proper case." Applying the four-part test for the application of collateral estoppel set out in *Colandrea v. Wilde Lake Cmty. Ass'n*, 361 Md. 371, 391, 761 A.2d 899, 909 (2000), the Court of Appeals held that the elements of collateral estoppel had properly been met in this case.

§ 8.5. Intra-Agency Decisions

§ 8.6. Law of the Case

§ 8.7. Double Jeopardy

In *Garrity v. Maryland State Bd. of Plumbing*, 447 Md. 359, 135 A.3d 452 (2016), the Court of Appeals for the first time expressly adopted the analysis of the Supreme Court's ruling in *Hudson v United States*, 522 U.S. 93 (1997). The *Hudson* court had overruled *United States v. Halper*, 490 U.S. 435 (1989), and adoption of the *Hudson* Double Jeopardy test rejected the *Halper* test that had previously been endorsed by the Court of Appeals in *Spencer v. Maryland State Board of Pharmacy,* 380 Md. 515, 846 A.2d 341 (2004) and *Ward v. Department of Public Safety and Correctional Services,* 339 Md. 343, 663 A.2d 66 (1995).

Garrity argued that the State, in violation of the Double Jeopardy Clause of the Fifth Amendment, had punished him twice for the same offense by fining him $707,900 for violating the Consumer Protection Act and $75,000 for violating the Maryland Plumbing Act. 447 Md. at 383, 135 A.3d at 467. (*See* a more detailed discussion of the facts in *Garrity* at § 8.2). The Court rejected Garrity's argument, ruling that the Double Jeopardy Clause did not apply because the agencies had imposed civil fines, not criminal punishments. *See Hudson v. U.S.*, 522 U.S. 93, 99 (1997) (Double Jeopardy Clause only protects "against the imposition of multiple *criminal* punishments for the same offense") (emphasis in original). The Court noted that in prior cases it had "held that penalties imposed on licensed individuals for violating provisions attendant to that license are outside of the reach of the Double Jeopardy Clause because those penalties are directed toward protecting the public, and are therefore remedial, rather than punitive." The Court then examined the statutory schemes establishing the Consumer Protection Division and the Board of Plumbing, and found that it was the General Assembly's intent to provide for only civil, nonpunitive sanctions. The Court held that the civil penalties assessed under the Consumer

Protection Act and the Maryland Plumbing Act were not so punitive in form as to be criminal in practice. While the total amount of the fines imposed by the Consumer Protection Division was quite high, CPD had found that Garrity had committed at least 7,079 violations and engaged in a pattern of deceit against hundreds of Maryland homeowners over the course of several years. The amount of the fine itself does not convert a civil penalty into a criminal punishment. "That Petitioner committed an extensive number of violations, and the summation of each violation resulted in a large monetary penalty, cannot be used in his favor to transform what is unquestionably a civil remedial sanction into a criminal punishment." Although not necessary for resolution of the case, the Court also found that the subsequent civil penalty imposed by the Board of Plumbers was not "criminal punishment" for purposes of Double Jeopardy since, like the Consumer Protection Act, the Maryland Plumbing Act is a remedial scheme designed to protect the public and the monetary penalty imposed was reasonable.

Chapter 9 - Contested Cases: Office of Administrative Hearings

§ 9.1. History

§ 9.2. Organization of OAH

§ 9.3. OAH Rules of Procedure

Pursuant to the Regulatory Review and Evaluation Act, State Government Article, §§ 10-130 - 10-139, Annotated Code of Maryland, the OAH is required to review all its regulations in 2018. As part of that process, the OAH will review its regulations to determine, among other things, if they are still necessary and supported by statutory and judicial authority, or are obsolete or otherwise appropriate for amendment or repeal.

State Government Article, § 9-1607.2(b), provides that the Office of Administrative Hearings procedural regulations "shall take precedence in the event of a conflict" with agency regulations, "[u]nless a federal or State law or regulation requires that a federal or State procedure shall be observed." Utilizing that authority, some agencies have adopted procedural regulations specifically mandating that, in the event of a conflict, the agency's rules control over the OAH regulations. One such agency is the Board of Dental Examiners, which has adopted procedural regulations that provide:

> (1) In hearings conducted by an administrative law judge of the Office of Administrative Hearings, this regulation shall be construed, whenever possible, as supplementing and in harmony with COMAR 28.02.01.
>
> (2) In a conflict between this regulation and COMAR 28.02.01, this regulation applies.

COMAR 10.44.07.08(G), renumbered in 2012 as COMAR 10.44.07.11(G).

In *Maryland State Board of Dental Examiners v. Tabb*, 199 Md. App. 352, 22 A.3d 921 (2011), the Court of Special Appeals acknowledged that the regulations of the Board of Dental Examiners provided that they were controlling in the event of a conflict with the procedural rules of the OAH, but found that the procedural regulations could be read in harmony. The case involved an Administrative Law Judge's finding that he was bound by the agency's regulations to reject a request to extend the deadline to allow the submission of supplemental expert witness reports. The Court found that the ALJ had committed an error of law in his interpretation of the interaction of the agency and OAH procedural regulations because COMAR 10.44.07.08(G)(1) expressly provided that the agency regulations supplemented the OAH regulations, COMAR 28.02.01. Since COMAR 28.02.01.11(B)(8) included the deadlines for filing expert witness reports established by the agency regulations, if the ALJ found sufficient grounds for allowing more time, the ALJ had the authority under COMAR 28.02.01.11(B)(8) to modify or waive any time periods or "[g]rant a continuance or postponement" under COMAR 28.02.01.11(B)(7). These provisions may be read "in harmony" with the mandatory discovery provisions of COMAR 10.44.07.08(B). Accordingly, it was an error of law for the ALJ not to recognize that he had discretion to exercise

the power to extend deadlines and make other such rulings necessary to ensure fairness to the parties.

§ 9.4. OAH Power to Hold Contested Case Hearings

Effective July 1, 2016, the Maryland Insurance Commissioner was given expanded authority to delegate the responsibility for holding hearings under the Insurance Article. Laws of Maryland 2016, Chapter 56 (Senate Bill 240). In addition to the Deputy Commissioner, associate deputy commissioners, and associate commissioners who were already authorized by statute to hold hearings, the Commissioner may now designate one other Maryland Insurance Administration employee to hold the hearings, if that employee is admitted to practice law in Maryland.

According to the OAH, the Board of Pharmacy has begun delegating hearing authority to the OAH in some cases, while the Maryland Commission on Civil Rights has delegated authority to the OAH to make proposed findings of fact and conclusions of law, but not the authority to propose sanctions.

§ 9.5. Statutory Delegation to OAH

§ 9.6. Workload of OAH

The total number of cases handled by the OAH has decreased from approximately 50,000 per year in 2011 to about 41,000 cases in 2016. According to the OAH, the decrease is largely attributable to fewer cases from the Department of Health and Mental Hygiene, now called the Maryland Department of Health (MDH),[5] and the MVA. The MDH caseload drop is because the federal Affordable Care Act's expansion of Medicaid eligibility has resulted in fewer eligibility denials. The decline in MVA cases is due to the mandatory use of ignition interlock devices for certain drivers convicted of driving under the influence. Drivers required to participate in the Ignition Interlock System Program keep their licenses in lieu of OAH hearings. *See* Laws of Maryland 2016, Chapter 512 (Senate Bill 945).

In 2015, the General Assembly made significant changes to the Public Information Act (PIA). Laws of Maryland 2015, Chapters 135 and 136 (House Bill 755 and Senate Bill 695). The changes to the PIA included the creation of a State Public Information Act Compliance Board and an Office of Public Access Ombudsmen to resolve disputes concerning fees and the production of documents. The right to an APA contested case review at the OAH was repealed, and replaced by the Board and Ombudsman review process.

During the 2017 Session of the General Assembly, legislation was enacted that appears to require OAH to take on policy-making responsibilities in matters involving health occupation boards. The legislation, Laws of Maryland 2017, Chapters 613 and 614 (House Bill 628 and Senate Bill 517), was enacted in response to the United States Supreme Court's decision in *North*

[5] Effective July 1, 2017, the Department of Health and Mental Hygiene was renamed the Maryland Department of Health, and the Secretary of Health and Mental Hygiene is the Secretary of Health. Laws of Maryland 2017, Chapter 214 (Senate Bill 82).

Carolina State Board of Dental Examiners v. F.T.C., 135 S. Ct. 1101 (2015). In *North Carolina State Board of Dental Examiners v. F.T.C.*, the Supreme Court addressed the doctrine of state action immunity from antitrust liability. That doctrine was established in *Parker v. Brown*, 317 U.S. 341, 351 (1943), where the Supreme Court held that the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*., was not intended to restrict state action or official action directed by a state. Under the doctrine, state action immunity applies if a state is acting as a sovereign (*i.e*., in a regulatory or governmental capacity), even when the state is acting in conjunction with private parties. However, a state acting as a market participant, rather than a regulator, may not be immune from antitrust liability. Nor may a state authorize a private party to violate the Sherman Act by attempting to delegate regulatory authority over a market.

The North Carolina dental board, which was controlled by licensed dentists, issued cease-and-desist letters to non-dentists who were performing teeth whitening services. The dental board had found that teeth whitening by non-dentists constituted the unauthorized practice of dentistry. The Federal Trade Commission filed a complaint alleging that the dental board's action to exclude non-dentists from the market for teeth whitening services was anticompetitive and a violation of the Sherman Act. The Supreme Court observed that "while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor." 135 S. Ct. at 1110. When active market participants have a controlling number of members on a state regulatory board, it may enjoy state-action immunity only if it acts pursuant to a clearly articulated and affirmatively expressed state policy which is actively supervised by the State. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980). Thus, in *North Carolina State Board of Dental Examiners,* the Supreme Court held that "[i]f a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked." 135 S. Ct. at 1117.

To prevent unreasonable anticompetitive actions in the regulation of occupations and professions, Chapters 613 and 614 require the Secretary of each State department to supervise each unit within the Secretary's jurisdiction that is composed, in whole or in part, of individuals participating in the regulated occupation or profession. The secretaries are charged with determining whether the decisions and actions of the regulatory unit reasonably further a clearly articulated State policy to displace competition in the regulated market. If a Secretary finds that a proposed decision or action is unreasonably anticompetitive or does not further a clearly articulated State policy to displace competition in the regulated marketplace, the Secretary must issue a written decision disapproving or modifying the proposed decision or action, or remanding it back to the unit for further review before it becomes final or is implemented.

The process is somewhat different for boards or commissions within the Department of Health. Chapters 613 and 614 require that the Secretary of Health and OAH adopt regulations for the review of decisions and actions of boards or commissions within MDH that are controlled, in whole or in part, by persons participating in the occupation or profession being regulated. This review is designed to prevent unreasonable anticompetitive actions, and to determine whether the decision and action of the board or commission furthers a clearly articulated State policy to displace competition in the regulated market. However, for boards and commissions within

MDH, it is OAH that must review a decision or action to determine whether it furthers the specified State policy. OAH must then issue a written decision approving, disapproving, or modifying the proposed decision or action, or remanding it back to the board or commission for further review. A final board or commission decision or action must comply with OAH's written decision.

The supervision of the secretaries, and review by the OAH in the case of MDH, should permit the State to successfully assert State-action immunity as a defense in cases involving occupational and professional regulatory boards and commissions. The additional responsibility will undoubtedly increase the OAH workload, but the precise extent is uncertain.

Chapter 10 - Contested Cases: The OAH Hearing Process

§ 10.1. Initial OAH Involvement

§ 10.2. Notice of Hearing

§ 10.3. Assignment of ALJs

§ 10.4. Entry of Appearance

§ 10.5. Service

§ 10.6. Computing Time

§ 10.7. Pre-Hearing Motions

§ 10.8. Expedited Hearings

§ 10.9. Postponements

§ 10.10. Disqualification of ALJ

§ 10.11. Substitution of ALJ

§ 10.12. Intervention

§ 10.13. Pre-Hearing Conferences

§ 10.14. Discovery

§ 10.15. Subpoenas

§ 10.16. Stipulations

§ 10.17. Prefiled Testimony

§ 10.18. Official Notice

§ 10.19. Waiver of Hearing

§ 10.20. Waiver of Right to Appear at Hearing

§ 10.21. Dismissal for Lack of Prosecution

§ 10.22. Default Order for Failure to Attend or Participate

§ 10.23. Venue

§ 10.24. Flexible Due Process and Formality of the Hearing

§ 10.25. The Hearing

§ 10.26. Open Hearings

§ 10.27. Telephone Hearings

§ 10.28. Video Hearings

§ 10.29. ADA Compliance

§ 10.30. Evidence

§ 10.31. Exclusion of Witnesses

The OAH rule, COMAR 28.02.01.21D, is similar to Maryland Rule 5-615 and Federal Rule of Evidence 615. Even in cases not conducted under OAH rules of procedure, an administrative law judge or other quasi-judicial hearing official has the authority to sequester witnesses in an administrative proceeding. *See Jacocks v. Montgomery County*, 58 Md. App. 95, 472 A.2d 485 (1984) (In LEOBR case, witness who was not excluded was a representative of the County and called as the first witness).

§ 10.32. Interpreters

See § 5.17 *(Interpreters)*

§ 10.33. Motion for Judgment

§ 10.34. The Record

§ 10.35. ALJ Decisions

§ 10.36. Revision

§ 10.37. Stays

§ 10.38. Cases Remanded to OAH

§ 10.39. Alternative Dispute Resolution (ADR) at OAH

§ 10.40. Foreclosure Mediation

Foreclosure mediations are now held at the OAH offices in Hunt Valley, Cumberland, Salisbury, and Kensington, as well as in various circuit courts.

The foreclosure mediation statute requires the OAH to conduct a mediation within sixty days after transmittal of a request. For good cause shown, the OAH may grant a thirty day extension of the time for completing mediation. The statute was amended in 2011 to also allow a continuance for a longer period of time, with the agreement of all parties. In addition, the time within which the OAH must file a report with the court regarding the outcome of the mediation was changed from five to seven days. *See* 2011 Laws of Maryland, Chapter 355 (House Bill 728).

Chapter 11 - Contested Cases: OAH Proposed Decisions and the Exceptions Process

§ 11.1. Exceptions Regulations

§ 11.2. Scope of Exceptions Process

§ 11.3. Standard of Review in the Exceptions Process

§ 11.4. Expert Witnesses and the Anderson-Shrieves Doctrine

§ 11.5. Approaches in Federal and Other State Cases

§ 11.6. Modification of the Exceptions Process by Regulation or Statute

Chapter 12 - Contested Cases: MVA Hearings at OAH

§ 12.1. Flexible Due Process

§ 12.2. The Hearing

In *Motor Vehicle Administration v. Lipella*, 427 Md. 455, 48 A.3d 803 (2012), the Court of Appeals reiterated that the evidentiary standards in MVA hearings are liberal, and that an ALJ may admit evidence not admissible in court, including unsworn documents. The Court noted that under the MVA regulations, evidence that is probative and commonly accepted by reasonable persons is admissible. COMAR 11.11.02.10C provides that the ALJ "is not bound by the technical rules of evidence.". The Court rejected Lipella's argument that an Alcohol Influence Report[6] should not have been admitted into evidence by the ALJ because it was not a sworn statement, holding that the ALJ properly admitted the Alcohol Influence Report as corroborating evidence.

§ 12.3. Implied Consent Cases

In *Motor Vehicle Administration v. Gonce,* 446 Md. 100, 130 A.3d 436 (2016), a driver was stopped by the State Police and appeared impaired. Gonce agreed to take the breath alcohol concentration test, which he passed. The Trooper then referred Gonce to a drug recognition expert, who concluded that there were reasonable grounds to believe that Gone had been driving under the influence of drugs. Gonce, however, declined to take blood drug test. Gonce's driver's license was then confiscated, and he was served with an automatic order of suspension. Gonce exercised his right to a contested case hearing at the Office of Administrative Hearings, arguing that Transportation Article, § 16-205.1 only subjected a driver to automatic license suspension for refusal to take *either* an alcohol *or* a drug test. Thus, he contended, his refusal to take the drug test did not subject him to automatic suspension of his driver's license because he had taken and passed the alcohol test. After examining the language of the statute and its legislative history, the Court of Appeals held that a law enforcement officer with probable cause may request both an alcohol and a drug test, and that a driver's refusal to take both tests may result in an automatic license suspension. The Court found that as used in § 16-205.1 the word "test" included the plural ("tests") and included both the alcohol and the drug tests. Further, the Court looked to the applicable statutory interpretation rule, General Provisions Article, § 1-202, which provides: "The singular includes the plural and the plural includes the singular." As to the legislative history, the General Assembly had made clear that the purpose of the statutory provision was to protect the public by deterring both drunk and drugged driving.

A due process challenge to the implied consent law was raised in *Motor Vehicle Administration v. Seenath*, 448 Md. 145, 136 A.3d 885 (2016), where the holder of a commercial driver's license (CDL) was stopped by the police while driving a non-commercial vehicle. After Seenath failed the field sobriety test and the preliminary breath alcohol test, he was arrested and given an Advice of Rights form which explained both the consequences of refusing to take an

[6] An Alcohol Influence Report "is the police officer's narrative of the entire incident—the underlying traffic violation, the officer's suspicions of intoxication, the results of the standard field sobriety tests, and the events at the police station." 427 Md. at 460, n. 3, 48 A.3d at 805, n.3.

alcohol concentration test, and the consequences for taking and failing the test. Seenath agreed to take the alcohol test, which he failed. At his administrative hearing, Seenath alleged that the Advice of Rights form did not detail the consequences of a failed alcohol test for someone with a CDL. The Court of Appeals reviewed the constitutional challenge to the Advice of Rights form both as applied and on its face. The Court concluded that the form did not violate Due Process as applied because Seenath did not testify at the MVA hearing that he had been misled and might have refused to take the alcohol test had he fully understood the consequences. Moreover, the Court found that Seenath did not suffer negative consequences as a result of his decision to take the test. His mandatory suspension was shorter than if he had refused, he avoided being disqualified from driving commercial motor vehicles for one year, and he was ineligible for a restricted CDL whether he failed or refused to take the test. With regard to the facial challenge to the Advice of Rights form, the Court concluded that the form was not misleading as to holders of CDLs in that it did not affirmatively suggest that a restricted license would be available to them.

The due process right of a suspected drunk driver to consult legal counsel before deciding whether to take a breath test under the implied consent, administrative per se law was addressed in *Motor Vehicle Administration v. Deering*, 438 Md. 611, 92 A.3d 495 (2014). Using the flexible due process analysis of *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court concluded that the risk of an erroneous administrative sanction due to an inability to consult counsel is minimal or non-existent. "Advice of counsel before the test may aid the driver in deciding whether to take the sure suspension related to a refusal or risk a different suspension by taking the test, but it would not affect whether the basis for the sanction was erroneous." 438 Md. at 623–24, 92 A.3d at 502–03. Accordingly, in a purely administrative context, the Court said it "would likely conclude that due process does not require such a consultation." *Id.*

The Court of Appeals in *Motor Vehicle Administration v. Sanner*, 434 Md. 20, 73 A.3d 214 (2013), upheld an Administrative Law Judge's decision that an arresting officer had reasonable grounds to request a blood alcohol concentration test where the officer detected a strong odor of alcohol on a driver involved in a multi-vehicle accident. The ALJ's decision was supported by substantial evidence based on documentary evidence alone even though the officer was subpoenaed to testify at continuation of the hearing, but had failed to appear and testify. The Court noted that "reasonable grounds" to believe a person was driving while under the influence of alcohol or drugs or both means "reasonable articulable suspicion," a lesser standard than preponderance of the evidence or probable cause to arrest. This standard is met when an officer detects a strong odor of alcohol combined with other signs of impairment. In this case, the other sign was involvement in an accident.

Although the ALJ continued the hearing so that the officer could be subpoenaed to testify, she did not suggest that the failure of the officer to testify would necessarily result in a finding for Sanner. Moreover, Sanner chose not to testify at the hearing, and did not proffer any argument or evidence to undermine the MVA's documentary evidence. The Court thus concluded that the ALJ's decision to make findings based on the documentary evidence alone, notwithstanding the officer's failure to testify, was not arbitrary or capricious.

Chapter 13 - Judicial Review: Procedural Matters

§ 13.1. Non-Reviewability and Inherent Power of Review

§ 13.2. Non-Reviewability and Committed to Agency Discretion by Law

§ 13.3. Non-Reviewability and Intra-Government Disputes

The Court of Appeals has emphasized that these intragovernmental cases are not about the lack of standing of government entities: "The primary holdings of these cases ... was that there was ... *no cause of action* in the first instance no matter whether the complaining party is a Board of Education, its constituent individuals, or county taxpayers." *Puddester v. Felton*, 359 Md. 336, 753 A.2d 1034 (2000) (emphasis in original). *See also Board of Education of Prince George's County v. Secretary of Personnel,* 317 Md. 34, 562 A.2d 700 (1989).

§ 13.4. Original Jurisdiction in the Circuit Court

See Bert v. Comptroller of the Treasury, 215 Md. App. 244, 81 A.3d 460 (2013) ("The Maryland Tax Court is an administrative agency and its decisions are subject to the same standards of judicial review that are reserved for any appellate tribunals."), *citing* Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law*, § 13.4 at 159–60 (2011).

See also Department of Human Resources, Baltimore City Department of Social Services v. Hayward, 426 Md. 638, 45 A.3d 224 (2012) ("This Court has made clear that the 'judicial review' process is not an appellate process,") *citing Shell Oil Co. v. Supervisor,* 276 Md. 36, 343 A.2d 521 (1975).

§ 13.5. Forms of Review

§ 13.6. The Petition for Judicial Review

§ 13.7. Filing

§ 13.8. Time Limits

§ 13.9. Other Petitions for Review

§ 13.10. Response to Petition

§ 13.11. Preliminary Motions

§ 13.12. Stays

§ 13.13. Transmittal of Agency Record

In *McReady v. University System of Maryland*, 203 Md.App. 225, 37 A.3d 1018 (2012), a professor at the University of Maryland, University College filed complaints under the Maryland Whistleblower Law alleging that the University had failed to renew his contract and terminated him in illegal retaliation for his exercise of free speech under the First Amendment. At the Office

of Administrative Hearings, the University moved to dismiss McReady's complaints as untimely. The ALJ held non-evidentiary hearings on the motions to dismiss the complaints. These hearings involved only arguments of counsel. The ALJ dismissed the complaints as untimely. McReady filed petitions for judicial review in the circuit court. Maryland Rule 7–206(a) requires that "[t]he record shall include the *transcript of testimony* and all exhibits and other papers filed in the agency proceeding," except items allowed to be excluded by agreement or court order. (Emphasis added). Rule 7-206 further provides that where "testimony has been recorded but not transcribed before the filing of the petition for judicial review," the petitioner must normally pay the expense of transcription. However, McReady refused to pay for the OAH hearing transcripts, arguing that under Maryland Rule 7–206 those transcripts were not part of the record required to be transmitted to the circuit court because no "testimony" had been taken. The circuit court dismissed the actions for judicial review on the ground that the OAH transcripts were required to be included in the record, and that therefore McReady had failed to properly provide for the preparation of the entire record as required by Maryland Rule 7–206(a).

The Court of Special Appeals agreed with McReady and held that in Rule 7–206(a) the word "testimony" means oral evidence given by witnesses and not arguments of counsel. The Court reached this conclusion notwithstanding an OAH regulation which specified that the "record" shall include "[t]he recording of the hearing, and any prehearing proceeding, and any transcript of the recording prepared by a court reporting service." COMAR 28.02.01.22(B)(9). The Court concluded that the OAH definition of "record" could not control over Maryland Rule 7–206(a).

§ 13.14. Memoranda

§ 13.15. Mandamus

In *Matthews v. Housing Authority of Baltimore City*, 216 Md. App. 572, 88 A.3d 852, *cert. denied,* 439 Md. 330, 96 A.3d 145 (2014), the Court of Special Appeals held that it had jurisdiction to consider a challenge by way of mandamus to the decision of the Housing Authority of Baltimore City (HABC) to terminate a tenant's participation in the Section 8 housing voucher program. The Court noted that administrative and traditional common law mandamus actions arise in the absence of a statutorily-granted right to judicial review, citing Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law* § 13.15 (2011). The Court went on to explain:

> Administrative mandamus, which is set forth in Md. Rule 7–401, *et seq.,* "is the proper mandamus action when the agency decision being challenged is ... from a contested case." *Id.* (internal footnote omitted). By contrast, a traditional mandamus action "is used to review an agency action that is not the product of a contested case." *Id.* Both types, however, have specific rules of procedure which govern in circuit court, and both are subject to review by this Court. *See id.* at § 13.15–13.17.

216 Md. App. at 581–82, 88 A.3d at 857.

In *Hughes v. Moyer*, 452 Md. 77, 156 A.3d 770 (2017), the Court of Appeals again explained the difference between traditional and administrative mandamus, noting the difference in the nature of the pleadings required to be filed:

> A common law mandamus proceeding seeks to compel a public official to perform a clear legal duty that is not discretionary and that does not depend on personal judgment. *Falls Road Community Ass'n v. Baltimore County*, 437 Md. 115, 85 A.3d 185 (2014). It is initiated by a pleading entitled a "complaint." *See* Maryland Rule 15–701. By contrast, a proceeding for administrative mandamus seeks judicial review of administrative action that is not otherwise subject to judicial review. Maryland Rule 7–401. It is initiated by filing a "petition" in accordance with the rules governing review of administrative agency action. *See* Maryland Rule 7–402 (incorporating procedures set forth in Maryland Rules 7–202 and 7–203).

Even though it was unclear from the pleadings which type of mandamus the petitioner/complainant wished to pursue, the court concluded that the case should be treated as a traditional common law mandamus matter because "neither of the issues identified for decision concerns the merits of Ms. Hughes' termination—which depended on an exercise of judgment—but rather whether Ms. Hughes has a "clear legal right" to continue her administrative appeal seeking review of that decision." Further, despite the fact that the petition for a writ of mandamus did not raise the key issue of inadequate notice, because the issue was raised in the circuit court and the petition for *certiorari,* the court decided to exercise its discretion to address the issue, citing Maryland Rule 8-131.

§ 13.16. Administrative Mandamus

In *Town of LaPlata v. Faison–Rosewick LLC*, 434 Md. 496, 76 A.3d 1001 (2013), the Court of Appeals found that administrative mandamus was not available to review a town manager's decision to issue procedures regarding the process of validating and verifying referendum petition signatures because the town manager was not acting in a quasi-judicial capacity.

See also Matthews v. Housing Authority of Baltimore City, 216 Md. App. 572, 88 A.3d 852, cert. *denied,* 439 Md. 330, 96 A.3d 145 (2014)

§ 13.17. Traditional Mandamus

In a case involving the question of whether a court may compel County officials to take land use and zoning enforcement actions by means of a writ of mandamus, the Court of Appeals said that "in rare cases" the discretionary acts of a public official may be reviewed by a court if there is a lack of any procedure for otherwise obtaining judicial review, and there is an allegation that the agency action was illegal, arbitrary, capricious or unreasonable. *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115, 85 A.3d 185 (2014). In those cases, the judicial review "must be circumspect" to avoid separation of powers issues. In this case, a leaseholder operating a restaurant on County property had paved a parking lot with asphalt in apparent violation of an agreement with a local community organization that had been incorporated into multiple County zoning orders. The zoning orders required that the surface of the parking lot

consist of crushed stone or a similar material, "unless otherwise required by law." The Court concluded that even assuming a violation, mandamus was not available to compel County officials to exercise the discretion to utilize limited prosecutorial resources to bring an enforcement action against every arguable violation.

Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 443 Md. 199, 115 A.3d 634 (2015) (*Hovnanian II*), involved a long-running dispute between a developer and the Board of Public Works over the issuance of a State wetlands permit. *See Maryland Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC,* 425 Md. 482, 42 A.3d 40 (2012) (*Hovnanian I*). Hovnanian filed a complaint for a writ of mandamus against the Board of Public Works in an effort to compel the Board to immediately vote on Hovnanian's application for a State wetlands permit, arguing that the Board had been slow walking the permit process for years in an effort to deny a permit despite lacking a legitimate basis to do so. The Court of Appeals suggested that it had the inherent power of judicial review to address agency inaction, and that mandamus might be available where an agency unduly delays processing an application. In this case, there was no evidence in the record that the Board had acted improperly.

§ 13.18. Discovery

§ 13.19. Attempts to Question the Agency Decision-Maker

§ 13.20. Circuit Court Judicial Review Hearing

§ 13.21. De Novo Trial

§ 13.22. Presentation of New Evidence at Circuit Court Hearing

§ 13.23. Remand for New Evidence at the Agency

§ 13.24. Scope of Circuit Court Review

While new issues, including constitutional questions, may not ordinarily be raised for the first time in an action for judicial review, the Court of Appeals held that it has discretion to address unpreserved issues. *Allmond v. Department of Health and Mental Hygiene,* 448 Md. 592, 141 A.3d 57 (2016). The Court exercised its discretion to resolve an on its face substantive due process challenge that did not require a factual record. The Court, however, declined to address a First Amendment free speech issue.

§ 13.25. Circuit Court Order

It is generally the rule that when an administrative agency applies an incorrect standard, the appropriate remedy is to remand the case back to the agency so that it may apply the correct standard. *See, Maryland Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC*, 425 Md. 482, 42 A.3d 40 (2012) (*Hovnanian I*) ("The error committed by the Board was one of law -- applying the wrong standard in formulating its decision. The appropriate remedy in such a situation is to vacate the decision and remand for further proceedings designed to correct the error."). In a zoning case, *County Council of Prince George's County v. Zimmer Development Co*.,

444 Md. 490, 120 A.3d 677 (2015), however, the Court of Appeals held that the general rule does not apply where no administrative function remains to be performed, making a remand "futile." While decisions of the Planning Board are subject to review by the District Council, the District Council could only reverse the Planning Board's decision if it was illegal, lacked substantial evidence, or was arbitrary or capricious. Since the reviewing courts had determined that none of those infirmities were present in this case, a remand was unnecessary because the only action the District Council could legally take would be to approve the Planning Board's decision.

§ 13.26. Petition for Civil Enforcement

§ 13.27. Reimbursement for Litigation Expenses

§ 13.28. Judicial Review in Court of Special Appeals

In *Matthews v. Housing Authority of Baltimore City*, 216 Md. App. 572, 88 A.3d 852, *cert. denied,* 439 Md. 330, 96 A.3d 145 (2014), the Court of Special Appeals determined that it had jurisdiction where circuit court review had been invoked through a petition for administrative mandamus. The appeal was from a circuit court order affirming a decision of the Housing Authority of Baltimore City (HABC) terminating a tenant's participation in a Section 8 housing voucher program for violation of the visitor policy. Attempting to distinguish common law mandamus cases, which HABC conceded were subject to review by the Court of Special Appeals, from administrative mandamus cases, HABC argued that Courts and Judicial Proceedings § 12–302(a) had divested the Court of Special Appeals of jurisdiction to hear an appeal of a final judgment of the circuit court exercising its jurisdiction under the administrative mandamus rules. The Court of Special Appeals held that mandamus actions are not subject to the limitations of CJP § 12–302(a) because they are an exercise of original jurisdiction by the circuit courts. *See Madison Park North Apartments, Ltd. Partnership v. Commissioner of Housing and Community Development*, 211 Md.App. 676, 66 A.3d 93 (2013), *cert. granted*, 434 Md. 311, *appeal dismissed*, 439 Md. 327 (2014) (Court of Special Appeals may review an administrative hearing officer's decision in both cases initiated through the common law writ of mandamus and those based on administrative mandamus under Md. Rule 7–401(a), since neither is a statutory judicial review action).

§ 13.29. No Court of Special Appeals Review

§ 13.30. Judicial Review in the Court of Appeals

While issues may not ordinarily be raised for the first time in an appellate court, the Court of Appeals does have discretion to address unpreserved issues. *Allmond v. Department of Health and Mental Hygiene,* 448 Md. 592, 141 A.3d 57 (2016). In *Allmond*, the Court cited Maryland Rule 8-131(a), which provides, in part, "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal." If a party wishes to have an issue addressed by the Court of Appeals, the issue should normally be raised in the petition for certiorari. *See, Sturdivant v. Maryland Department of Health & Mental Hygiene*, 436 Md. 584, 84 A.3d 83 (2014) *citing*

Maryland Rule 8–131(b) ("Arguably, the agency did raise the issue unsuccessfully before the administrative law judge. However, the issue was not included in the questions presented by the grievants' petition for certiorari and the agency did not file a cross-petition for certiorari. We decline to address it in this case."); *Fisher v. Eastern Correctional Institution*, 425 Md. 699, 43 A.3d 338 (2012) ("We decline to resolve the parties' dispute because Petitioner's *Accardi* argument was neither presented in her petition for a writ of certiorari, nor fairly embraced in the question presented in that petition.").

Chapter 14- Judicial Review: Proper Parties and Timing

§ 14.1. Standing

The Court of Appeals has noted that while the requirements for administrative standing under Maryland law "are not very strict," that leniency only exists in the absence of a statute or regulation addressing the prerequisites for standing. *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island, LLC*, 439 Md. 588, 97 A.3d 135 (2014), *quoting Sugarloaf Citizens' Association v. Department of Environment,* 344 Md. 271, 686 A.2d 605 (1996).

§ 14.2. Being a Party

§ 14.3. Aggrieved

In *Chesapeake Bay Foundation, Inc. v. DCW Dutchship Island*, LLC, 439 Md. 588, 97 A.3d 135 (2014), the Chesapeake Bay Foundation (CBF) sought standing to participate in a zoning variance proceeding on the grounds that the Magothy River Association, which advocated the same position as the CBF, had standing. The Court denied the CBF's request for standing and called into question the application of such "piggyback" standing in zoning cases, suggesting that it was a "rule of appellate procedure, designed to streamline appellate cases by avoiding unnecessary questions of standing," and should not be extended to administrative hearings "where a primary concern is to facilitate presentation of evidence in a fair and efficient manner." 439 Md. at 598, 97 A.3d at 141.

In a zoning matter, a nearby property owner is deemed to be *prima facie* aggrieved for purposes of standing, but those who are not sufficiently proximate to the property at issue must demonstrate specific injury. *A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado, LLC*, 447 Md. 425, 135 A.3d 492 (2016); *State Center, LLC v. Lexington Charles Ltd. Partnership*, 438 Md. 451, 92 A.3d 400 (2014).[7] Harm from economic competition alone is not sufficient for a far removed property owner to be specially aggrieved for purposes of property owner standing. *State Center*, 438 Md. at 537, 92 A.3d at 451.

Property owner standing based on zoning laws can give "aggrieved persons" the right to challenge administrative land use actions, whether quasi-judicial or executive, (*e.g*., piecemeal rezonings, special exceptions, variances, and nonconforming uses). *Anne Arundel County v. Bell*, 442 Md. 539, 113 A.3d 639 (2015). This right to property owner standing is based on the recognition that certain property owners may be affected by a zoning action differently from the general public. Unless a complainant alleges a sufficient "special aggrievement," or is presumed to be aggrieved specially because of the subject property's location, there is no standing to challenge the act because that person is "'merely 'generally aggrieved,' in a similar manner as the rest of the public."

[7] The *State Center* case provides an exhaustive review of the law concerning standing in the context of land use.

Property owner standing is applicable to judicial review of quasi-judicial and other administrative land use decisions, but does not apply to challenges of legislative, comprehensive zoning actions. *Anne Arundel County v. Bell*, 442 Md. at 551, 113 A.3d at 646.

§ 14.4. Special Statutory Standing

Environmental standing legislation enacted by the General Assembly in 2009 broadened the ability of individuals and organizations to seek judicial review of determinations by the Maryland Department of the Environment (MDE) concerning the issuance, denial, renewal, or revision of specified environmental permits, and by the Board of Public Works (BPW) concerning licenses to dredge or fill on State wetlands, by adopting the more liberal approach to standing used in federal courts. 2009 Laws of Maryland, Chapters 650 and 651 (Senate Bill 1065 and House Bill 1569). The legislative trade off was to "streamline" the MDE and BPW environmental permit process by prohibiting the use of contested case administrative hearings. *See* Md. Code Ann., Environment, § 1-601(b) ("For permits listed under subsection (a) of this section, a contested case hearing may not occur); § 5-204(f)(2) ("For permits listed under paragraph (1) of this subsection, a contested case hearing may not occur); § 16-204(c)(1) ("A contested case hearing may not occur on a decision of the Board in accordance with § 16-202 of this subtitle"). Under this 2009 legislation, review is obtained by filing a petition for judicial review. The statute specifies what materials constitute an administrative record for purposes of judicial review, and, with certain exceptions, judicial review is limited to the administrative record and objections raised during the public comment period.

In *Patuxent Riverkeeper v. Maryland Department of Environment*, 422 Md. 294, 29 A.3d 584 (2011), the Court of Appeals interpreted § 5–204(f) of the Environment Article, which enables a person to seek judicial review of an administrative determination by MDE regarding certain environmental permits "if the person satisfies the federal rubric for standing." 422 Md. at 297, 29 A.3d at 586. Prior to January 1, 2010, the effective date of this statute, standing to challenge MDE permitting decisions was limited to persons who were "aggrieved" by the agency's action by having personal or property rights adversely affected. The Court of Appeals reviewed U.S. Supreme Court standing jurisprudence, and determined that the Patuxent Riverkeeper did have standing because a representative member, who was an avid kayaker and mapmaker, had demonstrated an adequate aesthetic, recreational, and economic interest in the affected area of the Patuxent River.

§ 14.5. Standing of the Agency to Obtain Judicial Review

§ 14.6. Sua Sponte Rulings on Standing

§ 14.7. Finality

§ 14.8. Review of Interlocutory Orders

§ 14.9. Exhaustion

A leaseholder operating a restaurant on County property had paved a parking lot with asphalt in apparent violation of an agreement with a local community organization that had been

incorporated into two County zoning orders. The zoning orders required that the surface of the parking lot consist of crushed stone or a similar material, "unless otherwise required by law." When the community organization sought to enforce the final administrative orders, the County and the leaseholder argued that since neither of them had sought judicial review, the orders were only enforceable through another administrative proceeding. In *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115, 85 A.3d 185 (2014), the Court of Appeals noted that under that theory a new administrative proceeding would simply result in another final order, and that if the County or the tenant failed to seek judicial review or comply with the order, another administrative proceeding would have to be initiated, resulting "in an endless loop of administrative proceedings." The Court found that scenario "[e]xhausting perhaps," but not consistent with the principles underlying the exhaustion of administrative remedies doctrine. Accordingly, the community association was not required to commence yet another administrative proceeding to seek enforcement of the previous final administrative orders.

§ 14.10. The No Agency Jurisdiction Claim

§ 14.11. Statutory Interpretation

§ 14.12. Constitutional Challenges

§ 14.13. Inadequate or Unauthorized Procedures

Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 443 Md. 199, 115 A.3d 634 (2015) (*Hovnanian II*), involved a long-running dispute between a developer and the Board of Public Works over the issuance of a State wetlands permit. Hovnanian had filed a complaint for declaratory and injunctive relief and a writ of mandamus against the Board of Public Works in an effort to compel the Board to immediately vote on Hovnanian's application for a State wetlands permit. Hovnanian claimed that the Board had unreasonably delayed consideration of the permit in part because of a conflict of interest involving a Board employee. Hovnanian argued that it was entitled to seek immediate relief in court because of the "unauthorized procedure" exception to the requirement of administrative exhaustion.

The Court of Appeals expressly rejected the "unauthorized procedure" exception to the exhaustion of administrative remedies doctrine, stating that it was based on dicta, and had lost any remaining "vitality" after the adoption of the Administrative Procedure Act which provides for judicial review of final administrative decisions that are the result of "unlawful procedure." To Hovnanian's argument that the "unauthorized procedure" exception applied because the licensing process being challenged was not a contested case hearing governed by the Administrative Procedure Act, the Court held that "in this context, whether a matter is a 'contested case' and subject to the APA for purposes of judicial review is a distinction without a difference." The Court refused to treat non-APA judicial review cases differently from APA cases for the purposes of exceptions to the exhaustion and finality requirements.

§ 14.14. Inadequate Remedy

§ 14.15. The Constitutional Exception

§ 14.16. Integral Component Exception

§ 14.17. Exhaustion Doctrine Applied Against the State

§ 14.18. Federal Case Law

§ 14.19. Primary Jurisdiction

United Insurance Company of America v. Maryland Insurance Administration, 450 Md. 1, 144 A.3d 1230 (2016), involved two insurance companies that offer life insurance policies to low income persons. The issued policies, still in force, provided that the obligation to provide the insurance company with proof of death rested on the beneficiaries. The General Assembly, however, had thereafter enacted legislation that imposed a duty on insurance companies to check the death master file against their in-force policies. Insurance Article, § 16-118. Prior to this statute's enactment, insurance companies had no obligation to check whether a policyholder had died. The new statute did not have language providing whether its provisions applied retroactively. Prior to the effective date of the new statute, the Insurance Commissioner met with representatives of the two companies, and suggested that the statute applied to policies in effect prior to the statute's effective date. The companies then filed in circuit court a declaratory judgment action against the Maryland Insurance Administration alleging that the new law conflicted with the presumption against retroactive application of new laws and impaired their contract rights under various State and federal constitutional provisions. The circuit court and the Court of Special Appeals both held that the companies were required to exhaust their administrative remedies prior to seeking review in court, and dismissed their declaratory judgment actions.

The Court of Appeals stated that "long-standing Maryland precedent . . . expressly provides that an administrative remedy is intended to be primary, unless the presumption is rebutted, or an aggrieved party's claim is exempt from administrative exhaustion." *Citing Zappone v. Liberty Life Ins. Co*., 349 Md. 45, 706 A.2d 1060 (1998) and *Prince George's County v. Blumberg*, 288 Md. 275, 418 A.2d 1155 (1980). The Court then evaluated the presumption based on the four factors outlined in *Zappone.* The Court concluded that the Insurance Article provided a comprehensive remedial scheme, and that the administrative remedy was primary. Moreover, the claim of the insurance companies was not within the constitutional exception to the exhaustion requirement because the challenge was to the statute as applied and not to the constitutionality of the statute as a whole.

A restaurant parking lot was paved with asphalt despite two county zoning orders that prohibited such paving "unless otherwise required by law." *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115, 85 A.3d 185 (2014). Thus, a decision as to whether the paving was a violation of the zoning orders turned on whether the paving was otherwise required by law. The Court of Appeals held that because the "other law" cited by the parties was the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*., this was "not a statute within the peculiar expertise of County zoning officials." Therefore, the court's exercise of jurisdiction would not interfere with an efficient administrative process within the expertise of the agency.

See also Carter v. Huntington Title & Escrow, LLC, 420 Md. 605, 24 A.3d 722 (2011), which held that the MIA had primary jurisdiction over a common law action for money had and received to cover title insurance premiums that were in excess of the premium rates approved by the MIA because the claim was actually alleging a violation of the Insurance Article.

§ 14.20. Ripeness

Chapter 15 - Judicial Review: Grounds for Reversal and Deference

§ 15.1. APA and Non-APA Grounds for Reversal

§ 15.2. Deference

Chapter 16 - Judicial Review: Unconstitutional

§ 16.1. Deference

§ 16.2. Separation of Powers

In *Merchant v. State*, 448 Md. 75, 136 A.3d 843 (2016), the statutory scheme set forth in Criminal Procedure Article (CP), §§ 3–114 *et seq*., involving the granting or revocation of the conditional release of a person who had been found not criminally responsible and committed to the Department of Health and Mental Hygiene was challenged on separation of powers grounds. The statute provided for an administrative hearing before an Administrative Law Judge, a determination based on preponderance of the evidence that the committed person was eligible for conditional release, and a report and recommendation filed with the circuit court. The circuit court had held that this statutory procedure was unconstitutional, and instead of reviewing the ALJ's recommendations under a substantial evidence standard, the circuit court had held a *de novo* evidentiary hearing, giving no deference or even consideration to the ALJ's recommendations.

Under the statute, judicial review of the ALJ's recommendations was mandatory, and no action on the granting or revocation of a conditional release may be taken until approved by the circuit court after a hearing on the administrative record. CP §§ 3-116 and 3-117. The Court of Appeals found that "given the unique judiciary-executive branch hybrid at play, [the mandatory judicial review process] avoids the separation of powers problem that would otherwise arise." 448 Md. at 102, 136 A.3d at 859. Because the circuit court is the body that commits the person to MDH, only the court may release that commitment. If the statute allowed an ALJ's recommendations to go into effect without court approval, the statute would be constitutionally suspect by making the judiciary subordinate to the executive branch. The Court concluded that the substantial evidence standard of review was the appropriate standard, and that the statute did not impermissibly delegate judicial authority to the executive branch. *Citing Department of Natural Resources v. Linchester Sand & Gravel Corp*., 274 Md. 211, 334 A.2d 514 (1975) and Article 8 of the Maryland Declaration of Rights, the Court further held that to allow a circuit court authority to make its own decision on the merits or hold its own *de novo* hearing would violate the separation of powers doctrine "because it would allow a circuit court, exercising judicial authority, to essentially 'assume or discharge the duties of' an ALJ's exercise of executive power." 448 Md. at 103, 136 A.3d at 860. The Court of Appeals reversed the rulings of the Circuit Court and remanded for further proceedings consistent with its opinion.

Reliable Contracting Co. v. Maryland Underground Facilities Damage Prevention Authority, 446 Md. 707, 133 A.3d 1112 (2016) involved the Maryland Underground Facilities Damage Prevention Authority which was established to enforce a State law that requires notification to a one-call system (commonly known as "Miss Utility") prior to engaging in underground excavation. Title 12 of the Public Utilities Article ("PU") gives the Authority various enforcement powers, including the ability to assess monetary penalties for noncompliance. A construction contractor caused damage to a local utility's facilities when it began an excavation project without permission in violation of PU § 12-101. The Authority assessed a civil penalty of

$2,000 for excavating without calling Miss Utility, and a $1,000 penalty that could be waived if Reliable completed damage prevention training offered by the Maryland Damage Prevention Committee.

Reliable Contracting challenged the Authority's enabling statute insofar as it permitted the Authority to adjudicate violations and assess penalties, arguing that it was in violation of the separation of powers clause of the Declaration of Rights[8] and the judicial vesting clause of the Maryland Constitution[9] because it gave judicial power to a non-judicial body. The Court of Appeals acknowledged that administrative bodies may not be given judicial authority, but noted that "administrative bodies may exercise quasi-judicial authority, which essentially consists of deciding questions of fact and law subject to judicial review." The Court examined the case of *County Council for Montgomery County v. Investors Funding Corp*., 270 Md. 403, 312 A.2d 225 (1973) as a useful comparison. The Court concluded that the "core rule" was that "an administrative agency, as part of its administrative functions, may decide cases within the area delegated to it by the legislature as long as its decisions are subject to judicial review," and that the Authority's "power is not judicial, but quasi-judicial, and delegation of quasi-judicial power to an agency does not violate Article IV, § 1 of the Maryland Constitution or Article 8 of the Maryland Declaration of Rights."

In response to Reliable Contracting's argument that the Authority's power was wholly judicial because its sole responsibility is to decide cases, the Court found that even if that were the case, which it is not, "[t]he essence of quasi-judicial power is not that it is accompanied by other powers; it is that it is limited and initial, rather than plenary and ultimate in its sphere."

§ 16.3. Due Process—Bias

§ 16.4. OAH ALJ Bias

§ 16.5. Financial Bias

§ 16.6. Personal Bias

§ 16.7. Prejudgment Bias

A premium finance company claimed that a hearing held by the Maryland Insurance Administration concerning the Insurance Commissioner's Cease-and-Desist Order against the company was improper because the Assistant Deputy Insurance Commissioner (ADIC) who heard the case was subject to "command influence" because she was appointed by the Commissioner. *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 33 A.3d 949 (2011).

[8] Article 8 of the Maryland Declaration of Rights provides: "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."

[9] Md. Const. Art. IV, § 1, provides, in part: "The Judicial power of this State is vested in a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans' Courts, and a District Court."

The Court of Appeals held that there is a presumption of "honesty and integrity, absent evidence to the contrary," and that there was no tangible evidence in the record to indicate that there was undue influence. The Court said that simply having the Commissioner's legal advisor sitting next to her at the hearing was insufficient. "Simply because the ADIC was delegated by the Commissioner to conduct the hearing does not make her *a fortiori* a slavish lapdog subject to the Commissioner's will." Moreover, the Court found, even if there were an appearance of command influence, "the reviewing court's non-deferential standard of review of the issues of law decided by the ADIC would ensure that any errors of law would be considered fairly."

§ 16.8. Rule of Necessity

§ 16.9. Due Process—Combination of Functions

Maryland Insurance Commissioner v. Central Acceptance Corp., 424 Md. 1, 33 A.3d 949 (2011), involved a premium finance company that was subject to a Cease-and-Desist Order issued by the Insurance Commissioner. When the company requested a contested case hearing, the Commissioner chose to delegate the hearing and decision-making authority to the Assistant Deputy Insurance Commissioner (ADIC) who was an appointee of the Commissioner. The Court held that this combination of adjudicative and investigative functions was permissible. The Commissioner was expressly authorized by the Insurance Article to delegate the hearing to the ADIC or the OAH, the ADIC was charged solely with deciding questions of law, and there was no evidence of fraud or egregious behavior that would suggest that the Commissioner, the ADIC, or the MIA acted arbitrarily or capriciously.

§ 16.10. Equal Protection—Selective Enforcement

§ 16.11. Due Process—Void for Vagueness

§ 16.12. Avoidance of Constitutional Issues

Chapter 17 - Judicial Review: Substantial Evidence Review

§ 17.1. Findings of Fact

§ 17.2. Successful Substantial Evidence Challenges

§ 17.3. Inferences from the Facts

Where an individual was present at the scene of an accident involving a truck that he owned, and admitted to traveling from Delaware to Elkton, Maryland, after drinking two beers, the evidence supported a police officer's reasonable inference that the individual had been driving the truck. The Court stated that most facts, including ultimate facts, may be established by reasonable inference. *Motor Vehicle Administration v. Carpenter*, 424 Md. 401, 36 A.3d 439 (2012).

§ 17.4. Mixed Questions of Law and Fact

In *Kim v. Maryland State Board of Physicians*, 423 Md. 523, 32 A.3d 30 (2011), the Court of Appeals upheld the discipline of a doctor for "unprofessional conduct in the practice of medicine" due to false statements he made on his application for license renewal. The Court gave "considerable weight" to the Board's interpretation and application of the statute it administers, and found that it was not an erroneous conclusion of law to conclude that false statements on the renewal application was within the meaning of "practice of medicine."

§ 17.5. The Banks Case

Chapter 18 - Judicial Review: Exceeds Statutory Authority or Jurisdiction

Chapter 19 - Judicial Review: Errors of Law

§ 19.1. Deference

§ 19.2. The No-Deference Cases

§ 19.3. The "Some Deference" Approach

§ 19.4. Chevron Deference

§ 19.5. Agency Interpretation of Its Regulations

In *Cathey v. Board of Review, Department of Health and Mental Hygiene*, 422 Md. 597, 31 A.3d 94 (2011), the Court of Appeals reiterated its previous holdings that while an agency's construction of its own regulation is entitled to deference, the Court is not bound by an agency interpretation based upon erroneous conclusions of law. The case involved a developmentally disabled child who lived half of the year with her father in Maryland and the other half with her mother in New Jersey. The Court was faced with interpreting the term "resident" in a regulation that limited eligibility for Developmental Disability Administration (DDA) funding to "a resident of Maryland," COMAR 10.22.12.05A. The agency had concluded that the child was not a "resident" of Maryland and therefore must be denied eligibility for DDA services. To reach that determination, the agency treated the term "residence" as legally the same as the legal concept of "domicile."

The Court rejected the agency's legal interpretation, and held that the definition of "resident" in the DDA regulations was not as strict as the concept of "domicile" under Maryland law in large part because of the enabling statute's remedial purpose of protecting individuals with developmental disabilities. The Court emphasized that it has "repeatedly held that remedial statutes are to be construed 'liberally' in favor of claimant, to suppress the evil and advance the remedy." The Court then held that if a remedial statute authorizes regulations, those regulations must also be interpreted liberally in favor of remedying the adverse condition in question.

See also, Maryland Board of Public Works v. K. Hovnanian's Four Seasons at Kent Island, LLC, 425 Md. 482, 42 A.3d 40 (2012) (*Hovnanian I*) ("Although a reviewing court is required to give considerable deference to an agency's interpretation of its own regulation, the interpretation of a regulation is akin to the interpretation of a statute. It is an issue of law which, ultimately, the court must decide.").

In *Kor-Ko Ltd. v. Maryland Department of the Environment*, 451 Md. 401, 152 A.3d 841 (2017), the court reviewed a decision by MDE to issue a construction permit to build a human remains incinerator in a commercial industrial park. As discussed in *§ 4.1,* although the court was not reviewing a contested case decision, it applied the substantial evidence standard typically applicable for quasi-judicial matters. At issue was MDE's interpretation of the term "premises" in its regulations. Under the MDE's regulations, MDE has a duty to ensure that "total allowable emissions from the premises of each toxic air pollutant discharged by the new installation or source will not unreasonably endanger human health." COMAR 26.11.15.06A(1). MDE

interpreted the term "premises" to mean the entire industrial park where the crematorium would be located, as opposed to the specific building within the park where the incinerator would operate. Accordingly, MDE conducted air quality toxic emissions testing at ground level of the industrial park boundary. That decision was challenged by Kor-Ko Ltd., a business in the same building with the proposed crematorium. Kor-Ko argued that toxic emissions should be measured on the roof of that building where air handlers were located rather than at the boundary line of the industrial park.

The court explained that in its review of MDE's decision it must be "highly deferential" regarding administrative fact finding, and respectful of MDE's expertise in its field. This was also true when reviewing MDE's legal conclusions in interpreting its own regulations and statute. The court concluded: "Put another way, the courts do not play the role of an über administrative agency in reviewing the actions of state or local administrative bodies, but, rather we exercise discipline in our review so as not to cross the separation of powers boundary." The court concluded that MDE properly interpreted the term "premises," for three reasons. First, MDE's interpretation was consistent with the dictionary definition of "premises. Second, in MDE's regulations the term "premises" appears to be used interchangeably with the term "property line." Third, and most importantly, MDE established conservative enough screening levels for determining safe exposure levels of toxins so as to protect the health of people within the industrial park. The court found that MDE's interpretation and application of the term "premises" was not arbitrary or capricious.

§ 19.6. Deference and Auer

§ 19.7. Noland Footnote 3

Chapter 20 - Judicial Review: Arbitrary or Capricious

§ 20.1. A Case-by-Case Reasonableness Review

§ 20.2. MTA v. King

§ 20.3. Agency Refusal to Act

Chapter 21 - Judicial Review: Abuse of Discretion

§ 21.1. Reasonableness

§ 21.2. MTA v. King

§ 21.3. Cases Reviewing Agency's Discretion

The Court of Appeals has held numerous times that the appropriate standard of review in cases involving matters within an agency's discretion is the arbitrary and capricious standard. However, in an apparent attempt to exhort the lower courts to exercise the utmost restraint in applying the arbitrary and capricious standard when reviewing agency discretionary functions, the court has also said that such decisions are "ordinarily unreviewable." Of course, it is not the case that agency actions are "unreviewable." They are to be reviewed under the arbitrary and capricious standard. Thus, use of the term "unreviewable" in the following cases should not be taken literally.

In *Communications Workers of America v. Public Service Commission*, 424 Md. 418, 36 A.3d 449 (2012), the court discussed the standard of review "[w]here the order under review arises from a function committed to the agency's discretion," quoting *Christopher v. Montgomery County Department of Health & Human Services*, 381 Md. 188, 849 A.2d 46 (2004):

> "Finally, the court applies the arbitrary and capricious standard when it reviews an agency's discretionary functions. As we observed in *Spencer* [*v. Maryland State Bd. of Pharm.,* 380 Md. 515, 846 A.2d 341 (2004)], when 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, we 'owe a higher level of deference to functions specifically committed to the agency's discretion.' *Spencer,* 380 Md. 515, 529–31, 846 A.2d 341, 349–50.... '[A]s 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.' *Maryland State Police v. Zeigler,* 330 Md. 540, 625 A.2d 914 (1993). Courts thus generally only intervene when an agency exercises its discretion 'arbitrarily' or 'capriciously.'"

See also Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Commission, 227 Md. App. 265, 133 A.3d 1228, *affirmed*, 451 Md. 1, 150 A.3d 856 (2016), *citing Communications Workers of America v. Public Service Commission*, 424 Md. 418, 36 A.3d 449 (2012). ("When the agency exercises discretion on a matter specific to its mandate and expertise, court review is generally limited to whether the agency exercised its discretion arbitrarily or capriciously or whether the action violated regulations, statutes, common-law principles, due process, and other constitutional requirements."). The Court of Appeals, in affirming the Court of Special Appeals, again stated that an administrative agency's exercise of discretion that does not violate regulations, statutes, or constitutional requirements

is "ordinarily unreviewable" and deferred to the expertise of the PSC. 451 Md. at 12, 150 A.3d at 862.

Mesbahi v. Maryland State Board of Physicians, 201 Md. App. 315, 29 A.3d 679 (2011) ("[W]here the agency exercises its discretionary authority, as when imposing sanctions, its decision will be disturbed only if arbitrary or capricious.")

§ 21.4. Agency Decision to Proceed by a Contested Case Instead of Rulemaking

The Court of Appeals addressed the circumstances under which an agency's decision to utilize contested case adjudication rather than rulemaking is appropriate in *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 33 A.3d 949 (2011). This case involved a change in the Maryland Insurance Administration's (MIA) view of the legality of a long-standing approach used by premium finance companies to calculate the amount of interest due with each installment under a premium finance agreement for automobile insurance policies. The MIA had concluded that premium finance companies had been charging excessive interest on the premium loans to consumers in violation of the maximum interest permitted by the controlling statute, Insurance Article, § 23–304. In explaining the legal principles underlying the analysis of whether rulemaking was required, the Court wrote:

> A recent treatise on Maryland Administrative Law comments that rulemaking is preferable to, or viewed as fairer than, adjudication because the resultant rules are binding on an entire industry, rather than only on the parties to the contested case. Arnold Rochvarg, *Principles and Practice of Maryland Administrative Law* 266–67 (2011). Also, rulemaking, it is claimed, provides greater notice and public participation and applies only to future conduct, rather than operating retrospectively. *Id.* Professor Rochvarg opines further, however, that an agency's decision to proceed by adjudication, rather than rulemaking, should not be the grounds for overturning a discrete adjudication, despite this Court's reasoning in *CBS.* Rochvarg, *supra,* at 268. He bases this notion on the fact that parties to a contested case hearing receive more procedural rights than they would have during the rulemaking process, including the right to cross-examine witnesses and the requirement that the agency's decision must be based entirely on the hearing record. Rochvarg, *supra,* at 268–69.

Finding that the MIA's interpretation of the governing statute was correct, the Court concluded that the case before it fell under the authority articulated in the *Consumer Publishing* case rather than the *CBS* exception to the rule. Similar to *Consumer Publishing,* there was an application of existing law to the facts rather than a change in the law. The Court went on to explain that even if the Maryland Insurance Administration's approach "was arguably at odds with an inference drawn from its past disinclination to adopt rules" dealing with the proper method of calculating interest, the agency is not prevented from using adjudicative proceedings to announce new legal principles. *Citing* SEC *v. Chenery Corp*., 332 U.S. 194 (1947), and *Baltimore Gas & Electric Company v. Public Service Commission*, 305 Md. 145, 501 A.2d 1307 (1986), the Court noted that the nine largest premium finance companies in the industry were parties to the

contested case, and other companies and interested parties were provided with notice. Importantly, the Court saw no "benefit in a public rulemaking process for the agency to receive comments on the interpretation of a statute that is, in our view, clear on its face."

Chapter 22 - Judicial Review: Improper Procedure

§ 22.1. APA Agencies

When challenging an agency's departure from its procedures, it is necessary to establish that a substantial right was violated and that there was prejudice arising from the procedural irregularities. *Maryland Insurance Commissioner v. Central Acceptance Corp.*, 424 Md. 1, 33 A.3d 949 (2011), *citing Pollock v. Patuxent Inst. Bd. of Rev.*, 374 Md. 463, 823 A.2d 626 (2003).

The Court of Appeals in *Hughes v. Moyer*, 452 Md. 77, 156 A.3d 770 (2017), was faced with the question to what extent a statute providing State employees with administrative appeal rights in disciplinary matters requires that they be advised about the details of those appeal rights. The court noted that a government employee who may only be dismissed for cause has a Due Process property interest in employment that may be deprived only after notice and the opportunity for a hearing, *citing Maryland Classified Employees Ass'n, Inc. v. State*, 346 Md. 1, 694 A.2d 937 (1997), and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The statute providing State employees subject to discipline with notice and an opportunity to be heard was intended to comport with these Due Process principles. The court examined the statute's "deemed denial" provision that allows employees who had filed an appeal to treat a failure by the agency to render a decision within certain time limits as a denial from which they could proceed to the next level of appeal. However, the statutory notice provisions did not expressly require that an employee be specifically advised that the failure of the agency to respond to the first level appeal within the time limits would constitute a deemed denial, thus starting the time limits for an employee to appeal to the next level. An employee unaware of the deemed denial provision and, perhaps, unrepresented by a union or an attorney, might easily fail to recognize that simply waiting too long for the agency decision would result in preventing an appeal to the next level. The court pointed out that "the right to be heard 'has little reality or worth unless one is informed ... and can choose for himself whether to appeal or default, acquiesce or contest.'" Acknowledging the common law principle that a person is presumed to know the law, the court noted that there were various instances where the legislature had overridden that common law principle by requiring notice of specific legal rights in matters involving administrative adjudication, especially those likely to involve lay persons. 452 Md. at 98, 156 A.3d at 782. Accordingly, the court held that to properly effectuate the legislative purpose in creating the State employee administrative appeals process, an agency must provide notice that advises an employee of the two levels of appeal, and that the failure of the agency to respond to a first level appeal in a timely manner will trigger the timeline for the employee to file a second level appeal.

§ 22.2. Non-APA Agencies

§ 22.3. Agency Failure to Adopt Procedural Regulations

In *Ehrlich v. Maryland State Employees Union*, 382 Md. 597, 856 A.2d 669 (2004), a State employee union challenged the failure of the Secretary of Budget and Management to adopt regulations to define unfair labor practices involving State employees. The union argued that

regulations were necessary in order to provide a procedural process for resolution of such disputes. The Court of Appeals construed the word "may" in the statute then in effect as authorizing, but not requiring, the Secretary to adopt those regulations. Thus, the Secretary had the discretion to not promulgate the regulations.

The union also tried to rely on the assertion that it had petitioned the Secretary to adopt the regulations under the Administrative Procedure Act, State Government, § 10-123. The Court rejected that argument because the union had "not come close to complying" with the department's regulations governing the filing of petitions for the adoption of regulations which set forth who may file a petition, the form of a petition, and the manner of submission. Rather, the union had merely written a letter to the Secretary asking about the timetable for adoption of the regulations and the unfair labor practice procedures that would be followed prior to adoption of the regulations.

Chapter 23 - Judicial Review of the Sanction

§ 23.1. Grounds to Challenge the Sanction

§ 23.2. Delambo

§ 23.3. Noland

§ 23.4. Why Noland Should Be Abandoned

The Maryland General Assembly enacted legislation in 2016 that appears intended to override part of the Court of Appeals' decision in *Maryland Aviation Administration v. Noland*, 386 Md. 556, 873 A.2d 1145 (2005), for cases decided under the State Administrative Procedure Act. Senate Bill 942 (Chapter 704, Laws of Maryland 2016) amended the Administrative Procedure Act, State Government Article, § 10-222(h)(3), by authorizing a court on judicial review to reverse or modify the final contested case decision of an agency if the decision fails to reasonably state the basis for the nature and extent of the penalty or sanction imposed. It is notable that this provision is specifically limited to matters involving employee termination and discipline.

§ 23.5. MTA v. King and Disproportionality

§ 23.6. Federal Cases and Disproportionality

§ 23.7. Other State Cases and Disproportionality

§ 23.8. Maryland Cases and Review of the Sanction

Pautsch v. Maryland Real Estate Commission, 423 Md. 229, 31 A.3d 489 (2011), reviewed a sanction imposed against a real estate broker. Pautsch was a real estate broker who had been convicted of felonies involving the sexual abuse of minors. A hearing was held before an ALJ who determined that the Commission had proven the necessary facts to support a sanction against the broker under a section of the Business Occupations and Professions Article. This statute authorized the Commission to "suspend or revoke" the real estate broker's license of an individual convicted of a felony. After taking into account the broker's rehabilitation and other mitigating factors, the ALJ recommended that Pautsch's license be suspended for six months. The Commission adopted the ALJ's proposed findings of fact, but disagreed with the proposed sanction, and revoked Pautsch's license. The Court of Appeals upheld the more severe sanction, stating that because real estate brokers have access to private homes and owe a duty of trust to their clients and the public, there was a nexus between the felonies and the license. The Court of Appeals concluded that because the Commission found that Pautsch had engaged in sexual abuse towards minor children throughout a fifteen-year period and "showed a lack of responsibility, maturity, and trustworthiness . . . as a real estate professional," the Commission's sanction was not arbitrary or capricious.

§ 23.9. Proper Analysis

Chapter 24 - Judicial Review: Prejudicial Error

Chapter 25 - Declaratory Rulings

§ 25.1. APA Provisions

§ 25.2. When Is a Declaratory Ruling Appropriate?

The Court of Special Appeals held that the Board of Physicians had properly concluded that it was bound by its prior Declaratory Ruling that laser hair removal is a surgical act constituting the practice of medicine, and that the Board had acted properly in a subsequent contested case involving another party when the Board treated the Declaratory Ruling "akin to a precedential adjudicatory ruling." *Mesbahi v. Maryland State Board of Physicians*, 201 Md. App. 315, 29 A.3d 679 (2011). The Court recognized that if warranted by the specific facts of a case or changes in medical science or technology, the Board could reconsider its declaratory ruling, but "the Board was not free to ignore its prior policy statements."

§ 25.3. Declaratory Ruling or Rulemaking?

§ 25.4. Declaratory Ruling Regulations

Appendix I • Administrative Procedure Act—Regulations

A number of provisions in Title 10, Subtitle 1, have been amended since 2011. Some changes were relatively minor, but necessary to update references to the Code or to address new or altered agency names. Among the more substantive changes was the addition of a new § 10-112.1, effective June 1, 2012. That section was added to require a unit to publish the text of a proposed regulation on the unit's website no later than 3 business days after the date that the regulation is published in the Maryland Register. The amendment also requires that a unit submitting a regulation to the AELR committee for emergency adoption publish the text of the regulation on the unit's website no later than 3 business days after the regulation is submitted to the AELR Committee.

The reader is cautioned to always check the Code to verify that any text or citations are current.

§ 10-101. Definitions

(a) *In general.* In this subtitle the following words have the meanings indicated.

(b) *Administrator.* "Administrator" means the Administrator of the Division of State Documents.

(c) *Advisory Council.* "Advisory Council" means the Advisory Council on the Impact of Regulations on Small Businesses established under § 3-502 of the Economic Development Article.

(d) *Committee.* "Committee" means the Joint Committee on Administrative, Executive, and Legislative Review.

(e) *Local government unit.* "Local government unit" means:

(1) a county;

(2) a municipal corporation;

(3) a special district that is established by State law and that operates within a single county;

(4) a special district that is established by a county pursuant to public general law; or

(5) an office, board, or department that is established in each county under State law and that is funded, pursuant to State law, at least in part by the county governing body.

(f) *Mandate.* "Mandate" means a directive in a regulation that requires a local government unit to perform a task or assume a responsibility that has a discernible fiscal impact on the local government unit.

(g) *Register.* "Register" means the Maryland Register.

(h)(1) *Regulation.* "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 of this subtitle, means all or any portion of a regulation.

(i)(1) *Significant small business impact.* "Significant small business impact" means a determination by the Advisory Council that a proposed regulation is likely to have a meaningful effect on the revenues or profits of a significant number of small businesses or a significant percentage of small businesses within a single industry in the State.

(2) "Significant small business impact" does not include an impact resulting from a proposed regulation that is necessary to comply with federal law, unless the Advisory Council determines that the regulation is more stringent than federal law, in accordance with § 3-505 of the Economic Development Article.

(j) *Small business.* "Small business" has the meaning stated in § 2-1505.2 of this article.

(k) *Substantively.* "Substantively" means in a manner substantially affecting the rights, duties, or obligations of:
(1) a member of a regulated group or profession; or
(2) a member of the public.

(l) *Unit.* "Unit" means an officer or unit authorized by law to adopt regulations.

§ 10-102. Scope of subtitle

(a) *In general.* Except as otherwise expressly provided by law, this subtitle applies to:
(1) each unit in the Executive Branch of the State government; and
(2) each unit that:
(i) is created by public general law; and
(ii) operates in at least 2 counties.

(b) *Exclusions.* This subtitle does not apply to:
(1) a unit in the Legislative Branch of the State government;
(2) a unit in the Judicial Branch of the State government;
(3) a board of license commissioners;
(4) the Rural Maryland Council; or
(5) the Military Department.

§ 10-107. Submission of proposed regulation

(a) *"Unit counsel" defined.* "Unit counsel" means the unit counsel for the Commission on Civil Rights, the Public Service Commission, and the State Ethics Commission.

(b) *Submission to Attorney General or unit counsel.* Unless a proposed regulation is submitted to the Attorney General or to the unit counsel for approval as to legality, the regulation:
(1) may not be adopted under any statutory authority; and
(2) if adopted, is not effective.

§ 10-110. Submission before publication

(a) *Scope of section.* Except for subsection (d) of this section, this section does not apply to a regulation adopted under § 10-111(b) of this subtitle.

(b) *Submission of regulations which impact environmental hazards to children.* At least 15 days before the date a proposed regulation is submitted to the Maryland Register for publication under § 10-112 of this subtitle, the promulgating unit shall submit to the State Children's Environmental Health and Protection Advisory Council established under § 13-1503 of the Health--General Article for review any proposed regulations identified by the promulgating unit as having an impact on environmental hazards affecting the health of children.

(c) *Submission to Advisory Council on the Impact of Regulations on Small Businesses.* At least 15 days before the date a proposed regulation is submitted to the Maryland Register for publication under § 10-112 of this subtitle, the promulgating unit shall submit to the Advisory Council on the Impact of Regulations on Small Businesses established under § 3-502 of the Economic Development Article for review each proposed regulation and the estimated impact of the proposed regulation on small businesses identified by the promulgating unit.

(d) *Submission to Committee and Department of Legislative Services.*

(1) At least 15 days before the date a proposed regulation is submitted to the Maryland Register for publication under § 10-112 of this subtitle, the promulgating unit shall submit the proposed regulation to the Committee and the Department of Legislative Services.

(2) (i) If the proposed regulation, either in whole or in part, submitted to the Committee and the Department of Legislative Services in accordance with paragraph (1) of this subsection includes an increase or decrease in a fee for a license to practice any business activity, business or health occupation, or business or health profession licensed or otherwise regulated under State law, the promulgating unit shall include clearly written explanatory reasons that justify the increase or decrease in the fee.

(ii) If a regulation submitted under subparagraph (i) of this paragraph proposes an increase in a fee for a license, the written justification also shall include information about:

1. the amount of money needed by the promulgating unit to operate effectively or to eliminate an imbalance between the revenues and expenditures of the unit;
2. the most recent year in which the promulgating unit had last increased its fees;
3. the structure of the promulgating unit as to whether it is one that retains the license fees it receives or passes them through to a national organization or association that creates and administers a uniform licensing examination that is taken by anyone in the United States who is seeking a license to practice a particular occupation or profession or business activity issued by the promulgating unit;
4. measures taken by the promulgating unit to avoid or mitigate the necessity of a fee increase and the results of those measures;
5. special circumstances about the activities and responsibilities of the promulgating unit, including investigations of individuals licensed by the unit, that have had an adverse impact on the unit's operating expenses;
6. consideration given by the promulgating unit to the hardship a license fee increase may have on individuals and trainees licensed or regulated by the unit; and
7. actions taken by the promulgating unit to elicit the opinions of the individuals who are licensed by the promulgating unit and the members of the public as to the effectiveness and performance of the promulgating unit.

(3) If the promulgating unit estimates that the proposed regulation will have a significant small business impact, the unit shall:

(i) identify each provision in the proposed regulation that will have a significant small business impact;

(ii) quantify or describe the range of potential costs of the proposed regulation on small businesses in the State;

(iii) identify how many small businesses may be impacted by the proposed regulation;

(iv) identify any alternative provisions the unit considered that may have a less significant impact on small businesses in the State and the reason the alternative was not proposed;

(v) identify the beneficial impacts of the regulation, including to public health, safety, and welfare, or to the environment; and

(vi) coordinate with the Advisory Council not later than the date the proposed regulation is submitted to the Committee, the Department of Legislative Services, and the Advisory Council in accordance with this section.

(e) *Action by Committee*
(1) The Committee is not required to take any action with respect to a proposed regulation submitted to it pursuant to subsection (d) of this section.
(2) Failure by the Committee to approve or disapprove the proposed regulation during the period of preliminary review provided by subsection (d) of this section may not be construed to mean that the Committee approves or disapproves the proposed regulation.
(3) During the preliminary review period, the Committee may take any action relating to the proposed regulation that the Committee is authorized to take under §§ 10-111.1 and 10-112 of this subtitle.
(4) (i) If the Advisory Council submits to the Committee and the Department of Legislative Services a written statement of its findings that a proposed regulation will have a significant small business impact as required by § 3-505 of the Economic Development Article, the Committee and the Department of Legislative Services shall review the findings.
(ii) After notification that a proposed regulation will have a significant small business impact, any member of the Committee may request a hearing on the proposed regulation.
(iii) If a member requests a hearing, the Committee:
1. shall hold a hearing; and
2. may request that the promulgating unit delay adoption of the regulation.

(f) *Consultation with Committee.* Prior to the date specified in subsection (d) of this section, the promulgating unit is encouraged to:
(1) submit the proposed regulation to the Committee and to consult with the Committee concerning the form and content of that regulation; and
(2) submit the proposed regulation to the Advisory Council and to consult with the Advisory Council concerning the estimated small business impact of the regulation and ways to reduce the small business impact.

§ 10-111.2. Notice of emergency regulations

(a) *Website.*
(1) The Web site of the General Assembly shall include a list of all emergency regulations the Committee has received but has not approved.
(2) For each regulation, the list shall include:
(i) the date the Committee received the regulation;
(ii) whether a member of the Committee has requested a public hearing;
(iii) the date of any public hearing scheduled;
(iv) the date and a summary of any action the Committee has taken; and

(v) the name and telephone number of a member of the Committee's staff who can provide further information.

(3) A regulation shall be added to the list within 3 business days after receipt of the regulation by the Committee and the Department of Legislative Services.

(b) *Mail; electronic mail.*

(1) The Department of Legislative Services shall maintain a list of members of the public who have requested to receive notice when the Department of Legislative Services receives proposed regulations for which the promulgating unit has requested emergency adoption.

(2) A member of the public who requests notice under this subsection shall specify:

(i) whether the individual wants to receive notice by United States mail or electronic mail; and

(ii) which agencies' regulations the individual wants to receive notice of receipt.

(3) Within 2 business days of receipt of a proposed regulation, the Department of Legislative Services shall provide notice to members of the public who have requested notice, as specified in paragraph (2) of this subsection.

(4) The Department of Legislative Services:

(i) may impose a reasonable fee for sending notice under this subsection by United States mail; and

(ii) may not impose a fee for sending notice under this subsection by electronic mail.

(5) Upon request, a promulgating unit shall provide copies of emergency regulations to members of the public.

§ 10-112. Publication of proposed regulations in Register

(a) *In general.*

(1) This subsection does not apply to the emergency adoption of a regulation.

(2) To have a proposed regulation published in the Register, a unit shall submit to the Administrator:

(i) the proposed regulation; and

(ii) a notice of the proposed adoption.

(3) The notice under this subsection shall:

(i) state the estimated economic impact of the proposed regulation on:

1. the revenues and expenditures of units of the State government and of local government units; and

2. groups such as consumer, industry, taxpayer, or trade groups;

(ii) include a statement of purpose;

(iii) satisfy the requirements of § 2-1505.2 of this article;

(iv) comply with § 7-113(c) of the Human Services Article; and

(v) give persons an opportunity to comment before adoption of the proposed regulation, by:

1. setting a date, time, and place for a public hearing at which oral or written views and information may be submitted; or

2. giving a telephone number that a person may call to comment and an address to which a person may send comments.

(4)(i) The estimated economic impact statement required under paragraph (3)(i) of this subsection shall state whether the proposed regulation imposes a mandate on a local government unit.

(ii) If the proposed regulation imposes a mandate, the fiscal impact statement shall:

1. indicate whether the regulation is required to comply with a federal statutory or regulatory mandate; and

2. include, in addition to the estimate under paragraph (3)(i)1 of this subsection, the estimated effect on local property tax rates, if applicable, and if the required data is available.

(b) *Emergency adoption.* As soon as the Committee approves emergency adoption of a regulation, the Committee shall submit the regulation to the Administrator.

(c) *Symbols showing changes.* If a regulation under this section amends or repeals an adopted regulation, the text of the regulation under this section shall show the changes with the symbols that the Administrator requires.

§ 10-112.1. Publication of proposed regulation on unit's Web site

(a) *In general.* Whenever a unit publishes a proposed regulation in the Register in accordance with § 10-112 of this subtitle, the unit shall publish the text of the proposed regulation on the unit's Web site not later than 3 business days after the date that the proposed regulation is published in the Register.

(b) *Emergency adoption.* Whenever a unit submits a regulation to the Committee for approval as an emergency adoption in accordance with § 10-111(b) of this subtitle, the unit shall publish the text of the regulation on the unit's Web site not later than 3 business days after the date that the regulation is submitted to the Committee for approval of emergency adoption.

(c) *Inclusion of text or link to text of regulation.* To comply with the publication requirement of this section, a unit shall:

(1) publish the text of the regulation on the unit's home page on its Web site; or

(2) provide a link on the unit's home page to the text of the regulation if the text of the regulation is available elsewhere on the unit's Web site.

(d) *Failure to publish text of regulation.* The failure of a unit to publish the text of a regulation in a timely manner under this section may not invalidate or otherwise affect the adoption of the regulation.

§ 10-113. Changes in proposed regulations

(a) *Unit counsel.* In this section, "unit counsel" has the meaning stated in § 10-107 of this subtitle.

(b) *Requirements relating to proposing and adopting regulations.* If a unit wishes to change the text of a proposed regulation so that any part of the text differs substantively from the text previously published in the Register, the unit may not adopt the proposed regulation unless it is proposed anew and adopted in accordance with the requirements of §§ 10-111 and 10-112 of this subtitle.

(c) *Symbols showing changes.* If the regulation is proposed anew, the changes in the text shall be shown with the symbols that the Administrator requires.

(d) *Certificate of Attorney General*
(1) The Administrator shall refuse to publish the notice of adoption of a regulation that differs from the text previously published unless the notice is accompanied by a certification from the Attorney General or the unit counsel that the provisions of subsections (b) and (c) of this section are not applicable.
(2) The certification shall:
(i) be prepared in the form and according to guidelines specified by the Administrator;
(ii) contain a description of the nature of each change and the basis for the conclusion; and
(iii) be published in the Register as part of the notice of adoption.

§ 10-117. Effective date of regulations

(a) *In general.*
(1) Except as otherwise provided in subsection (b) of this section or in other law, the effective date of a regulation is:
(i) the 10th calendar day after notice of adoption is published in the Register; or
(ii) a later date that the notice sets.
(2) For calculation of the effective date under this subsection:
(i) § 1-302 of the General Provisions Article does not apply;
(ii) the issue date of the Register in which the notice is published is not counted; and
(iii) each other calendar day, including Saturdays, Sundays, and legal holidays, is counted.

(b) *Emergency adoption.* The effective date of a regulation after its emergency adoption is the date that the Committee sets.

§ 10-120. Scope of part

(a) *General exclusions.* This Part IV of this subtitle does not apply to:
(1) the Governor;
(2) the State Department of Assessments and Taxation;
(3) the Board of Appeals of the Department of Labor, Licensing, and Regulation;
(4) the Insurance Administration;

(5) the Maryland Parole Commission of the Department of Public Safety and Correctional Services;
(6) the Public Service Commission;
(7) the Maryland Tax Court; or
(8) the State Workers' Compensation Commission.

(b) *Maryland Automobile Insurance Fund.* If the Insurance Commissioner states in writing that, as to a particular matter, the Maryland Automobile Insurance Fund need not comply with this Part IV of this subtitle, this Part IV does not apply to the Fund with respect to that matter.

(c) *Property tax assessment appeals boards.* This subtitle does apply to the property tax assessment appeals boards.

Effective October 1, 2016, § 10–222(h), was amended to authorize a court on judicial review to reverse or modify the final contested case decision of an agency if the decision fails to reasonably state the basis for the nature and extent of the penalty or sanction imposed. This provision is specifically limited to matters involving employee termination and discipline. Subsection (h) of § 10-222 now provides:

(h) 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;

(vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or

(vii) is arbitrary or capricious.

Effective January 1, 2018, § 10-215 was amended to add a subsection (b) providing that if a petition for judicial review is filed by a Medicaid recipient, applicant, or authorized representative, the petitioner may not be charged a fee for the costs of transcription or the preparation or delivery of the record.

Effective January 1, 2018, § 10-222 was amended to add a subsection (i) providing that a court may not charge a fee to an individual petitioning for judicial review of a decision in a Medicaid fair hearing contested case.

The reader is cautioned to always check the Code to verify that any text or citations are current.

The following sections have been amended since 2011.

§ 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 Maryland Parole Commission of the Department of Public Safety and Correctional Services;

(v) the Public Service Commission;

(vi) the Maryland Tax Court;

(vii) the State Workers' Compensation Commission;

(viii) the Maryland Automobile Insurance Fund; or

(ix) 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.

Property tax assessment appeals boards; Chief Medical Examiner

(b) 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.

Public hearings before action

(c) 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) *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.

§ 10-222. Judicial review

(a) *Right to judicial review.*

(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) *Interlocutory orders.* 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) *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) *Effect of filing.*

(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.*

(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;

(vi) in a case involving termination of employment or employee discipline, fails to reasonably state the basis for the termination or the nature and extent of the penalty or sanction imposed by the agency; or

(vii) is arbitrary or capricious.

§ 10-225. Suspension of provisions

(a) *Suspension by Governor.* 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) *Length of suspension.* 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 executive 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 of suspension.* 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) *Presentation and publication of executive 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)(iii) of this article.

Appendix III • Administrative Procedure Act—Declaratory Rulings

Effective October 1, 2013, the following section was amended.

§ 10-302. Scope of subtitle; minutes

(a) *General exclusions.* This subtitle does not apply to:

(1) the Governor;

(2) the Department of Assessments and Taxation;

(3) the Board of Appeals of the Department of Labor, Licensing, and Regulation;

(4) the Insurance Administration;

(5) the Maryland Parole Commission of the Department of Public Safety and Correctional Services;

(6) the Public Service Commission;

(7) the Maryland Tax Court; or

(8) the State Workers' Compensation Commission.

(b) *Maryland Automobile Insurance Fund.* If the Insurance Commissioner states in writing that, as to a particular matter, the Maryland Automobile Insurance Fund need not comply with this subtitle, this subtitle does not apply to the Fund with respect to that matter.

Appendix IV • Office of Administrative Hearings—Maryland Code

Effective June 1, 2012, § 9-1604(b)(1)(vi) was amended to increase the amount of the fee required for an appeal of a driver's license suspension or revocation related to a violation of the Maryland Vehicle Law.

Appendix V • Office of Administrative Hearings—Rules of Procedure

Since 2011, there have been no amendments to Code of Maryland Regulations, Title 28, Subtitle 02, Chapter 01, as adopted effective March 22, 2010. As part of the Regulatory Review and Evaluation Act process, in 2018 the OAH will review its regulations to determine if any are appropriate for amendment or repeal.

Appendix VI • Judicial Review of Administrative Agency Decisions— Maryland Rules

The following Maryland Rules have been amended since 2011.

Rule 7-202. Method of Securing Review

The following changes to Md. Rule 7-202 went into effect on July 1, 2015:

1. *Md. Rule 7-202(c) now provides that if a petitioner was not a party to the agency proceeding, the petition must state the basis of the petitioner's standing to seek judicial review.*
2. *Md. Rule 7-202(d)(2), now provides that upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner shall serve a copy of the petition, with all attachments, by first-class mail on the Commission and all parties of record. If the petitioner is requesting judicial review of a Commission decision regarding attorneys' fees, the petitioner must serve a copy of the petition on the Attorney General.*
3. *Md. Rule 7-202(d)(3), now provides that the Worker's Compensation Commission may give written notice to a party under Md. Rule 7-202(d)(3)(A) electronically if the party has subscribed to receive electronic notices from the Commission.*
4. *Md. Rule 7-202(e), now provides that within five days after mailing or electronic transmission, the agency shall file with the clerk a certificate of compliance with Md. Rule 7-202(d). Failure to file the certificate of compliance does not affect the validity of the agency notice.*

Effective April 1, 2017, Md. Rule 7-202 was amended to permit an administrative agency to electronically provide certain notices to a party if the party has consented to such notice.

Subsections (a) and (b) unchanged.

(c) Contents of Petition; Attachments.

(1) *Contents.* The petition shall:

(A) request judicial review;

(B) identify the order or action of which review is sought;

(C) state whether the petitioner was a party to the agency proceeding, and if the petitioner was not a party to the agency proceeding, state the basis of the petitioner's standing to seek judicial review; and

(D) if the review sought is of a decision of the Workers' Compensation Commission, state whether any issue is to be reviewed on the record before the Commission and, if it is, identify the issue.

No other allegations are necessary.

(2) *Attachments--Review of Workers' Compensation Commission Decision.* If review of a decision of the Workers' Compensation Commission is sought, the petitioner shall attach to the petition:

(A) a certificate that copies of the petition and attachments were served pursuant to subsection (d)(2) of this Rule, and

(B) if no issue is to be reviewed on the record before the Commission, copies of (i) the employee claim form and (ii) all of the Commission's orders in the petitioner's case.

(d) Copies; Filing; Notices.

(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, together with all attachments, by first-class mail on the Commission and each other party of record in the proceeding before the Commission. If the petitioner is requesting judicial review of the Commission's decision regarding attorneys' fees, the petitioner also shall serve a copy of the petition and attachments by first-class mail on the Attorney General.

(3) *Notice From Agency to Parties.*

(A) Duty. Unless otherwise ordered by the court, the agency, upon receiving the copy of the petition from the clerk, shall give written notice promptly to all parties to the agency proceeding that:

(i) a petition for judicial review has been filed, the date of the filing, the name of the court, and the civil action number; and

(ii) a party who wishes to oppose the petition must file a response within 30 days after the date the agency's notice was sent unless the court shortens or extends the time.

(B) Method. The agency may give the notice by first class mail or, if the party has consented to receive notices from the agency electronically, by electronic means.

(e) Certificate of Compliance. Within five days after mailing or electronic transmission, 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 or electronically transmitted and the names and addresses of the persons to whom it was sent. Failure to file the certificate of compliance does not affect the validity of the agency's notice.

Rule 7-204. Response to Petition

The Rule has not changed, except to conform a cross-reference in a Rules Committee note.

Rule 7-206. Record —Generally

Effective July 1, 2015, new language was added as Md. Rule 7-206(a) to provide that Md. Rule 7-206 does not apply to judicial review of a decision of the Workers' Compensation Commission, except as otherwise provided by Md. Rule 7-206.1. Former Md. Rule 7-206(a) through (e) were renumbered as (b) through (f).

(a) Applicability. This Rule does not apply to judicial review of a decision of the Workers' Compensation Commission, except as otherwise provided by Rule 7-206.1.

(b) 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.

(c) 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.

(d) 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.

(e) 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.

(f) Duty of Clerk. Upon the filing of the record, the clerk shall notify the parties of the date that the record was filed.

Rule 7–206.1. Record—Judicial Review of Decision of the Workers' Compensation Commission

Effective July 1, 2015, a new Md. Rule 7-206.1, was added to provide rules for the preparation and filing of the record in a judicial review involving the Workers' Compensation Commission.

Effective August 1, 2017, Md. Rule 7-206.1 was amended to revise an internal reference and to change the word "shall" to "may" in section (d).

(a) Applicability. This Rule applies only in an action for judicial review of a decision of the Workers' Compensation Commission.

(b) If Review Is on the Record. Subject to section (d) of this Rule, Rule 7-206 governs the preparation and filing of the record if judicial review of an issue is on the record of the Commission.

(c) If No Issue Is to Be Reviewed on the Record. If no issue is to be reviewed on the record of the Commission:

(1) a transcript of the proceedings before the Commission shall be prepared in accordance with Rule 7-206(b), included in the Commission's record of the proceeding, and made available to all parties electronically in the same manner as other Commission documents;

(2) the transcript and all other portions of the record of the proceedings before the Commission shall not be transmitted to the circuit court unless the court, on motion of a party or on the court's own initiative, enters an order requiring the preparation and filing of all or part of the record in accordance with the provisions of Rule 7-206 and section (d) of this Rule; and

(3) regardless of whether the record or any part of the record is filed with the court, payment for and the timing of the preparation of the transcript shall be in accordance with Rule 7-206(b), (d), and (e).

(d) Electronic Transmission. If the Commission is required by section (b) of this Rule or by order of court to transmit all or part of the record to the court, the Commission may file electronically if the court to which the record is transmitted is the circuit court for an "MDEC county" as defined in Rule 20-101(o).

Rule 7-208. Hearing

Effective January 1, 2012, former Md. Rule 7-208(c) was redesignated as subsection (d), and new Md. Rule 7-208(c), was added providing that the court, on motion or on its own initiative, may allow one or more parties or attorneys to participate in a hearing by video conferencing or other electronic means.

(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) Hearing Conducted by Video Conferencing or Other Electronic Means.

(1) *Generally.* Except as provided in subsection (c)(2) of this Rule, the court, on motion or on its own initiative, may allow one or more parties or attorneys to participate in a hearing by video conferencing or other electronic means. In determining whether to proceed under this section, the court shall consider:

> (A) the availability of equipment at the court facility and at the relevant remote location necessary to permit the parties to participate meaningfully and to make an accurate and complete record of the proceeding;
>
> (B) whether, in light of the issues before the court, the physical presence of a party or counsel is particularly important;
>
> (C) whether the physical presence of a party is not possible or may be accomplished only at significant cost or inconvenience;
>
> (D) whether the physical presence of fewer than all parties or counsel would make the proceeding unfair; and
>
> (E) any other factors the court finds relevant.

(2) *Exceptions and Conditions.*

(A) The court may not allow participation in the hearing by video conferencing or other electronic means if (i) additional evidence will be taken at the hearing and the parties do not agree to video conferencing or other electronic means, or (ii) such a procedure is prohibited by law.

(B) The court may not allow participation in the hearing by video conferencing or other electronic means on its own initiative unless it has given notice to the parties of its intention to do so and has afforded them a reasonable opportunity to object. An objection shall state specific grounds, and the court may rule on the objection without a hearing.

(d) Additional Evidence. Additional evidence in support of or against the agency's decision is not allowed unless permitted by law.

Appendix VII • Administrative Mandamus—Maryland Rules

No changes since 2011.