CASE NO. 93258067

T-2691
02-22-10-31

Part ____ of ____ Parts

In The Circuit Court for Baltimore City

CIVIL

CL 170049

In the Matter of

DISCOVERY DAYS CHILD CARE, INC.
VS.
THE NUTRITION & TRANSPORTATION SERVICES BRANCH OF
THE DIVISION OF BUSINESS SERVICES, STATE OF MD.,
DEPT. OF EDUCATION

VS.

JUL 0 5 1994

IN THE CIRCUIT COURT FOR BALTIMORE CITY *
PETITION FOR DISCOVERY DAYS CHILD CARE, INC.
*
FOR JUDICIAL REVIEW OF THE DECISION OF THE
MARYLAND STATE DEPARTMENT OF EDUCATION * Civil Action No.
93258067/CL170049
IN THE CASE OF: *
DISCOVERY DAYS CHILD CARE, INC.
* * * * * * * * * * * *

RESPONDENT'S SUPPLEMENTAL MEMORANDUM

Respondent, the Maryland State Department of Education, by and through its undersigned counsel, submits this supplemental memorandum in response to Judge Hollander's request for additional authority on certain topics at the June 22, 1994 hearing in the above-captioned matter.

Impartial Hearing Officer

The court requested that counsel provide authority on the question of whether an agency employee is per se disqualified from acting as an impartial hearing officer for the agency.

Our nation has a substantial history of federal and state agencies using their own employees to adjudicate administrative hearings. One of the foremost cases in this area of law is Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456 (1975). In Withrow, the Supreme Court held that the combination of investigative and adjudicative functions in the same agency, or even the same individual, does not create a presumption of bias in an administrative adjudication. "Without a showing to the contrary, state administrators are assumed to be men of conscience and intellectual discipline, capable of judging a controversy fairly on the basis of its own circumstances." Id.

at 55, 95 S.Ct. at 1468. The presumption of the adjudicator's honesty and integrity may be overcome by evidence that the adjudicator has a pecuniary interest in the outcome, or has been a target of abuse or criticism from the party before him. Id. at 47, 95 S.Ct. at 1464. In cases where investigative and adjudicative powers have been conferred on the same individual, the objecting party bears the burden of persuading the court that the combination poses such a risk of actual bias or prejudgment that the practice must be forbidden to protect the guarantee of due process. Id.

Citing Withrow, the U.S. district court in Maryland stated: "The mere fact that the hearing officer is an employee of the agency which investigates and brings the action does not per se disqualify him . . . . Moreover, to support a claim that the hearing officer was personally biased apart from her position within the agency, the plaintiff must make a substantial showing." Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222, 1226-27 (D. Md. 1978), affirmed, 596 F.2d 608 (4th Cir. 1979). In Caton Ridge, the court held that the mere fact that the hearing officer in a proceeding to revoke a nursing home's license was an employee of the State Department of Health and Mental Hygiene which investigated and brought the action did not disqualify the hearing officer in the absence of a substantial showing of personal bias. Because the plaintiff failed to present facts from which a reasonable man could infer that the DHMH hearing officer was not impartial, the plaintiff's claim was dismissed.

Petitioner has neither alleged nor introduced evidence on the record to show that the hearing officer in this matter was affected by actual bias as a result of a personal or pecuniary conflict of interest, or that his employment with the agency in an unrelated capacity poses such a risk of prejudgment that he must be disqualified from hearing this matter. (The hearing officer was an internal auditor for the agency who has no duties relating to administration of the Child and Adult Care Food Program or to auditing participants in the Program.) Accordingly, there is no basis for finding that this hearing officer was not impartial and that the Petitioner did not receive the fair treatment required by due process.

Estoppel or Laches

During the course of oral argument, the court questioned the parties as to whether the government should be estopped from seeking reimbursement from Petitioner because of the two-year delay in auditing Petitioner and discovering the error upon which the overclaim is based. Respondents were not prepared to respond to this question at the hearing, and would now like to offer some legal authority on the question.

It is well settled in Maryland, as elsewhere, that:

> [T]he doctrine of estoppel will not be applied against the State in the performance of its governmental, public or sovereign capacity or in the enforcement of police measures.
>
> ...
>
> 'The reason for the rule is obvious: no administrative officer is vested with the power to abrogate the statute law of the State, nor to grant to an individual an exemption from the general operation of the law.'

...

> It is equally well settled that laches on the part of the state in bringing suit is not a defense in a case which is founded on the exercise of a sovereign right or the exercise of a governmental function. As it is sometimes expressed, the mere acquiescence, laches, lapse of time or non action on the part of the public agents or officers will not be imputed to the government to work an estoppel.

Salisbury Beauty Schools v. State Board of Cosmetologists, 268 Md. 32, 63-65 (1973) (citations omitted) (holding Board not estopped from enforcing statute relating to cosmetology students even though it had not been enforced for many years). The Respondent's administration of the Child and Adult Care Food Program, including the functions of auditing participants and enforcing the federal statute and regulations with respect to eligibility for reimbursement, is a governmental function; accordingly, the State cannot be estopped from enforcing requirements of the Program even if there was a delay in doing so. See also, e.g., Comptroller v. Atlas General Industries, 234 Md. 77 (1964) (State not estopped from collecting taxes due to previous delay or inaction); Cuppett and Weeks Nursing Home v. DHMH, 49 Md. App. 199 (1981) (State not estopped from seeking reimbursement of improper payments to Medicaid provider).

In addition, the highest courts of Maryland and the United States have clearly indicated that a state cannot be estopped from enforcing a law even if an agent of the state gave erroneous advice. In C. E. Weaver Stone Company v. Comptroller, 235 Md. 15 (1964), the Maryland Court of Appeals found that the State was not estopped from collecting sales taxes from a company which

allegedly had not been paid because of misrepresentation by an agent of the comptroller. Quite recently, in Office of Personnel Management v. Richmond, 496 U.S. 414, 110 S.Ct. 2465 (1990), the Supreme Court held that erroneous advice given by a government employee to a benefits claimant could not estop the government from denying benefits which were not otherwise permitted by law. The Court relied upon the Appropriations Clause which limits payment of money from the Federal Treasury to payments authorized by statute. Thus, even if it had been proved on the record that agents of the State gave Petitioner erroneous advice regarding calculation of the eligibility ratio for proprietary institutions participating in the Program (which it was not), the Respondent could not be estopped from seeking reimbursement of the federal funds which were not authorized by statute to be paid to Petitioner in the absence of eligibility as a proprietary Title XX child care provider.

In conclusion, the Maryland State Department of Education submits that the Petitioner has not presented evidence to justify reversing the Agency's decision, either on the grounds of a biased hearing officer or estoppel of the government, and therefore requests that the Respondent's determination be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

CAROLINE E. EMERSON
Assistant Attorney General

Office of the Attorney General
Educational Affairs Division
200 Saint Paul Place, 19th Floor
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Tel: (410) 576-6465

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 1994, a copy of the foregoing Respondent's Supplemental Memorandum was sent by first-class mail, postage prepaid, to Patrick J. Massari, Esquire, Church & Houff, P.A., 117 Water Street, Suite 700, Baltimore, Maryland 21202, Attorney for Petitioner.

CAROLINE E. EMERSON

CEE03

J. JOSEPH CURRAN, JR.
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VALERIE V. CLOUTIER
Principal Counsel

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
MARYLAND STATE DEPARTMENT OF EDUCATION

July 5, 1994

HAND DELIVERED

The Honorable Ellen L. Hollander
Circuit Court for Baltimore City
Clarence M. Mitchell Courthouse
100 North Calvert Street
Baltimore, Maryland 21202

Re: Petition of Discovery Days Child Care, Inc.
Civil Action No. 93258067/CL170049

Dear Judge Hollander:

Enclosed please find the Respondent's Supplemental Memorandum offering legal authority on two issues discussed at the June 22 hearing in the above-captioned matter which had not been briefed in the Petitioner's or Respondent's pre-hearing memoranda. I trust that this information will assist you in your deliberations.

Thank you for permitting us the opportunity to provide this material, and for your close attention to this case.

Sincerely,

Caroline E. Emerson

Caroline E. Emerson
Assistant Attorney General

CEE04/tlw
Enclosure

cc: Clerk of the Circuit Court for Baltimore City
Sheila Terry
Patrick J. Massari, Esquire

File

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PATRICK J. MASSARI
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410-539-3987

July 14, 1994

HAND-DELIVER

The Honorable Ellen L. Hollander
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert Street
Room 408
Baltimore, Maryland 21202

Re: **Discovery Days Child Care, Inc., Petitioner/Appellant v. The Nutrition and Transportation Services Branch of Business Services, State of Maryland, Department of Education, Appellee**
Circuit Court for Baltimore City
Case No. 93258067/CL170049
Our File No.: 4275

Dear Judge Hollander:

I am in receipt of a letter to Your Honor dated July 12, 1994, from the Attorney General's office. If the tenor of the response correlates to the stature of the argument, then I expect I have done my client a service in raising the points contained in my submission to Your Honor, pursuant to instruction at the oral hearing. I do not understand my submission to reflect an argument made for the first time, or one that was not there already, but simply as a response to this Court's request for supplementation of argument. The Court, of course, is free to consider matters not raised by attorneys, either in brief or oral argument sua sponte.

Finally, I note that as to the applicability of §10-205 of the State Government Article of the Annotated Code of Maryland to this case, Section 4, Chapter 181, Acts 1991, provides that "this Act shall be construed **retroactively** and shall be applied to and interpreted to affect the Office of Administrative Hearings in all contested hearings beginning on or after January 1, 1990." (emphasis supplied). Accordingly, the decision of Mr. Pyzik should be overturned and returned to be heard before an administrative law judge, in comport with the Statute.

Thanking you for your patient consideration of this matter, I am

Very truly yours,

Patrick J. Massari /dvp

Patrick J. Massari

PJM/dvp
cc: Caroline E. Emerson, Esq.
Clerk, Circuit Court for Baltimore City,
Case No. 93258067/CL170049
Ms. Joan Hurt

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July 12, 1994

HAND DELIVER

The Honorable Ellen L. Hollander
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert Street
Room 408
Baltimore, Maryland 21202

RE: Petition of Discovery Days Child Care, Inc.
Case No. 93258067/CL170049

Dear Judge Hollander:

I am obligated to respond on my client's behalf to the argument made for the first time in Mr. Massari's letter to you of July 5, 1994. Discovery Days now argues that the Department failed to comply with the Maryland Administrative Procedure Act insofar as it did not delegate the hearing in this matter to an administrative law judge at the Office of Administrative Hearings.

Petitioner did not raise this argument, or even object to Mr. Pyzik serving as the impartial hearing officer, at any time in the course of the administrative proceedings and, therefore, failed to preserve the issue for judicial review.

> A party who knows or should have known that an administrative agency has committed an error and who, despite an opportunity to do so, fails to object in any way or at any time during the course of the administrative proceeding, may not raise an objection for the first time in a judicial review proceeding.

Cicala v. Disability Review Board, 288 Md. 254, 261-62 (1980) (rejecting claim that appellant was denied due process by error of Board because error was not raised during administrative proceeding). See also, e.g., Bullock v. Pelham Wood Apartments, 283 Md. 505, 518-19 (1978); Board of School Commissioners v. James, 96 Md. App. 401, 426-29 (1993); Cherkhof v. Dep't of Natural Resources, 43 Md. App. 10, 16 (1979). While counsel for Petitioner questioned the hearing officer about his appointment at the outset of the hearing (Tr. 4), counsel never objected to Mr. Pyzik serving as the hearing officer and certainly never argued that the hearing should be delegated to the Office of Administrative Hearings. If he had raised the issue at the beginning of the hearing, the Department would have had the opportunity to correct the error, if any, before proceeding with the hearing. Permitting a party to raise such a procedural error after the conclusion of the administrative proceedings and well into judicial review invites a waste of resources - judicial, agency and otherwise - if it results in granting the Petitioner a re-hearing. The court should, therefore, reject this argument as not being properly preserved for judicial review.

In the event that the court does reach the merits of Petitioner's argument, the Department states as follows. The statute upon which Discovery Days relies, St. Gov't Art. § 10-205(a), Ann. Code of Md. (1993 Supp.), was enacted during the 1993 session of the General Assembly and took effect on June 1, 1993. Prior to that time, the applicable provision of the Administrative Procedure Act permitted, but did not mandate, delegation of administrative hearings to the Office of Administrative Hearings. St. Gov't Art. § 10-207(a), Ann. Code of Md. (1993) ("An agency or an official or employee of an agency may delegate to the Office of Administrative Hearings the authority that the agency, official or employer has to hear particular contested cases.")

By letter dated May 13, 1993, Discovery Days requested a hearing on the Department's audit findings and April 26, 1993 invoice for repayment of the overclaim (Record 1). The Department promptly scheduled the hearing for June 17, 1993 and sent Petitioner notice of the scheduled hearing by letter dated May 20, 1993 (Record 2). The Respondent was not out of compliance with the requirements of the APA because the "cause of action" accrued, the appeal request was filed, and the hearing was scheduled prior to June 1, 1993, the effective date of the APA amendment mandating delegation to the Office of Administrative Hearings. In addition, being unaware of the pending changes in the APA, officials in the Nutrition and Transportation Services Branch of the Department consulted with U.S. Department of Agriculture staff and were assured that the designated hearing officer (Mr. Pyzik) satisfied the applicable federal regulation's criteria for an impartial hearing officer. See 7 C.F.R. § 226.6(k)(6).

If the Court were to find that the Department has committed an error of law in its procedure, the appropriate remedy would be to remand the matter to the agency for further proceedings designed to remedy the error. Eaton v. Rosewood Center, 86 Md. App. 366, 376 (1991); see also, O'Donnell v. Bassler, 289 Md. 501, 509 (1981). Remand in a case such as this, where the central issue is one of statutory interpretation, seems wasteful and unnecessary, particularly since there has been no showing that Petitioner was deprived of due process by a biased hearing officer. See Dep't of Health and Mental Hygiene v. Shrieves, ____ Md. App. _____, No. 1719, slip op. at 16-21 (May 31, 1994).

The only real issue in this case is whether the Department has interpreted 42 U.S.C.A. § 1766(a) correctly with respect to the calculation of a proprietary institution's eligibility to participate in the Child and Adult Care Food Program. Since there is no dispute of fact as to the underlying numbers on which the calculations are to be made, there is no information that could come out of a re-hearing that would affect the outcome. Such legal issues are ultimately for the courts to determine. Baltimore & Ohio R. Co. v. Bower, 60 Md. App. 299, 305 (1984). When considering whether an agency erred as a matter of law, such as when there is a challenge to a regulatory interpretation, the court is to apply the substituted judgment standard. Dep't of Health and Mental Hygiene v. Reeders Memorial Home, Inc., 86 Md. App. 447, 452 (1991). Accordingly, this court should exercise its power to review the agency's statutory interpretation and affirm if no error is found.

Thank you for your attention to this matter.

Respectfully submitted,

Caroline E. Emerson

Caroline E. Emerson
Assistant Attorney General

CEE35/gjt

cc: Patrick J. Massari, Esquire
Sheila G. Terry
Clerk, Circuit Court for Baltimore City

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July 5, 1994

For inclusion in court file/record

HAND-DELIVER

The Honorable Ellen L. Hollander
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert Street
Room 408
Baltimore, Maryland 21202

Re: **Discovery Days Child Care, Inc., Petitioner/Appellant v. The Nutrition and Transportation Services Branch of Business Services, State of Maryland, Department of Education, Appellee**
Circuit Court for Baltimore City
Case No. 93258067/CL170049
Our File No.: 4275

Dear Judge Hollander:

Please find enclosed the relevant case law and submissions on behalf of Discovery Days Child Care, Inc., in the above-referenced case, on the issue of the fairness and impartiality of the hearing officer below, pursuant to Your Honor's instructions at the hearing of this matter on June 22, 1994.

The most recent and relevant case on this matter is Anderson v. Department of Public Safety and Correctional Services, 330 Md. 187, 623 A.2d 198 (1993). Anderson notes in pertinent part:

> "[O]ne of the main objectives of the Legislature in establishing the OAH was to provide an impartial hearing officer in contested cases. A hearing officer employed by and under the control of the agency where the contested case or other disputed action arises, often results in the appearance of an inherent unfairness or bias against the aggrieved. See, the Final Report of the "Governors Task Force on Administrative Hearing Officers." (1988)." Id. at 211.

Part and parcel of this analysis are the provisions contained in the Office of Administrative Hearings Act, set forth at Subtitle 16, Sections 9-1601, et seq., State Government Article of the Annotated Code of Maryland, a copy of which is also enclosed. The provisions under this Subtitle provide for the designation of an Administrative Law Judge in situations exactly as that presented below.

If we examine the matter further, Section 10-205(a) of the Administrative Procedure Act--Contested Cases, provides as follows:

> (a) To whom delegated. (1) a board, commission, or agency head authorized to conduct a contested case hearing shall: (i) conduct the hearing; or (ii) delegate the authority to conduct the contested case hearing to: (1) the office; or (2) with the prior written approval of the chief administrative law judge, a person not employed by the office.

It is clear that the procedure by which Mr. Pyzik was designated did not follow the strictures contained in Section 10-205, Delegation of Hearing Authority. There is no prior written approval in the Record which indicates that the chief administrative law judge "signed off" on Mr. Pyzik's role as a hearing officer. Furthermore, it is not even clear that a "agency head authorized to conduct a contested case" was appropriately involved in the designation of a hearing officer or other action.

It is abundantly clear that the objective of Section 10-205, as well as the OAH, was to provide an unbiased, fair forum to "ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed" by the Administrative Procedure Act. Section 10-201, Administrative Procedure Act, State Government Article of the Annotated Code of Maryland. We further note that a "agency head" means an "individual or group of individuals in whom the ultimate legal authority of an agency is vested by any provision of law." Id. at Section 10-202. The Department of Education plainly failed to comply with the applicable provisions in the Administrative Procedure Act in the designation and allowance of Mr. Pyzik as the hearing officer in this case. He was plainly under the control and employed by the agency where the contested case arose, and, as such, would be per se disqualified. Furthermore, the explicit requirements of the Administrative Procedure Act in delegating hearing authority, were not followed in this case.

Additionally, any number of cases are quoted in the Anderson opinion which explain the nature of administrative review and the role of administrative law judges in the decisions of administrative agencies where contested cases are involved. I am happy to further supplement the Record toward this end, but I believe the Anderson case, as well as the applicable statutory citations, provide this Court with a basis to reverse the decision of the Department of Education below.

I am happy to answer any questions Your Honor may have in this matter.

Most respectfully, I am

Very truly yours,

Patrick J. Massari

PJM/dvp
Enclosures
cc: Caroline E. Emerson, Esq. (HAND-DELIVER) (w/Encl.)
Clerk, Circuit Court for Baltimore City,
Case No. 93258067/CL170049 (w/Encl.)
Ms. Joan Hurt (w/Encl.)

330 Md. 187

William ANDERSON

v.

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES et al.

No. 115, Sept. Term, 1992.

Court of Appeals of Maryland.

April 23, 1993.

Department of Corrections employee sought review of order seeking his removal from service for alleged use of excessive force on inmate. The administrative law judge (ALJ) recommended that employee be reinstated to state service, and penitentiary filed exceptions. On review, secretary of personnel's designee renounced ALJ's decision and ordered employee be separated from service. Employee appealed. The Circuit Court for the City of Baltimore, Robert I.H. Hammerman, J., affirmed designee's order, and employee appealed to Court of Special Appeals. The Court of Appeals issued writ of certiorari on its own motion, and held in opinion by Charles E. Orth, Jr., J., (retired, specially assigned), that: (1) the Office of Administrative Hearings (OAH) Act and Administrative Procedure Act as amended to accommodate OAH provisions did not depart from principles regarding judicial review of agency's final decision; (2) designee failed to give adequate deference to ALJ's assessment of credibility of witnesses in reviewing ALJ's decision; and (3) Division of Corrections regulations did not mandate removal of employee from service upon employee's failure to abide by Division regulations, but merely required filing of charges for removal from state service.

Vacated and remanded.

1. Administrative Law and Procedure ⇐784.1

In reviewing factual findings of administrative agencies, reviewing court's appraisal or evaluation must be of agency's fact-finding results and not independent original estimate of or decision on evidence.

2. Administrative Law and Procedure ⇐314

One of main objectives of Legislature in establishing Office of Administrative Hearings was to provide impartial hearing officer in contested cases; hearing officer employed by and under control of agency where contested case or other disputed action arises often results in appearance of inherent unfairness or bias against aggrieved. Code, State Government, § 9–1601 et seq.

3. Administrative Law and Procedure ⇐314

Legislature, in enacting Office of Administrative Hearing (OAH) statute, did not depart from principles which have been recognized in opinions governing judicial review of final agency decisions; OAH Act on its face and Administrative Procedure Act as amended to accommodate provisions of OAH Act did not address test for judicial review. Code, State Government, §§ 9–1601 et seq., 10–201 et seq.

4. Administrative Law and Procedure ⇐788, 791

Decision of agency shall be reversed or modified if any substantial right of petitioner may have been prejudiced because of finding, conclusion or decision of agency is unsupported by competent, material and substantial evidence in light of entire record as submitted. Code, State Government, § 10–215(g)(3)(i-v).

5. Administrative Law and Procedure ⇐791

On judicial review of decision of administrative agency, determination of the substantiality of the record includes examiner's report.

6. Administrative Law and Procedure ⇐462

In assessing credibility of witnesses, agency should give appropriate deference to opportunity of examiner to observe demeanor of witnesses.

7. **Administrative Law and Procedure** ⇐787

Officers and Public Employees ⇐72.31

Secretary of personnel's designee failed to adequately take into account, in considering evidence before administrative law judge (ALJ), whatever in record detracted from substantiality of that evidence; credibility of witnesses was of utmost importance in the circumstances, but there was no indication that designee gave any deference to ALJ's assessment of credibility of witnesses before ALJ, and she gave no strong reasons for rejecting ALJ's own assessments of credibility, but instead made her own findings of fact. Code, State Government, §§ 9–1601 et seq., 10–201 et seq.

8. **Prisons** ⇐7

Division of Corrections regulation, indicating that use of excessive or unnecessary force by Division employee against inmate, shall result in filing of charges for removal from state service, did not mandate dismissal, but merely required filing of charges for removal from state service.

9. **Officers and Public Employees** ⇐69.7

Department of Personnel regulations, indicating that classified employee may be permanently removed from his position only for cause and indicating options open to secretary of personnel when she resolves employment matter in a case involving removal of classified employee, did not mandate removal of classified employee when employee failed to abide by requirements of Division of Corrections regulation regarding use of excessive force on inmates.

Joel A. Smith (Christyne L. Neff, Kahn, Smith and Collins, P.A., on brief), Baltimore, for appellant.

Edward R.K. Hargadon, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., Susan L. Howe, Asst. Atty. Gen., on brief), Glen Burnie, for appellee.

Argued before ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ., and CHARLES E. ORTH, Jr. Associate Judge of the Court of Appeals (retired) Specially Assigned.

CHARLES E. ORTH, Jr., Judge, Specially Assigned.

We are asked on this appeal whether, upon judicial scrutiny, the administrative removal of William Henry Anderson, Jr. from State service was legally justified.

BACKGROUND

Anderson had been an employee of the Department of Correction (DOC) for a decade when he was fired. His entire tenure had been spent in a security environment, the last nine years as a correctional guard in the South Wing Segregation Unit of the Maryland Penitentiary which housed the most violent and uncooperative inmates. He had attained the rank of Sergeant and the classification of Correctional Officer III. He was suspended by the DOC pending charges for his removal for allegedly using excessive force on an inmate, Glen Wooden. Formal charges against him were filed by the Warden of the Maryland Penitentiary and the charges were approved by the Department of Public Safety and Correctional Services. At a preliminary hearing he was barred from the worksite, so his suspension was without pay. He was notified of the charges by the Department of Personnel (DOP).

The DOP was "created as a principal department of the State government" by Md.Code (1957, 1990 Repl.Vol.) Art. 41, § 9–101(a). The head of the Department is the Secretary of Personnel (SOP). *Id.*

> The [SOP] shall be responsible for promulgating rules and regulations for his office. He shall review and shall have the power to approve or disapprove or revise the rules and regulations of all of the boards, offices and agencies within the jurisdiction of the [DOP].

Art. 41, § 9–105(b).

The SOP is also the head of the State Merit System. Md.Code (1957, 1988 Repl. Vol.) Art. 64A.

> All employees of the Maryland Penitentiary ... shall be included in the classified service and subject to all of the provisions of [Art. 64A].

Art. 64A, § 2. "It shall be the duty of the [SOP] to carry out the provisions of [Art. 64A], and to make such rules as he deems necessary or proper to that end." Art. 64A, § 11. Art. 64A, § 33(d)(1) provides:

> The [SOP] shall, by rule, prescribe what may constitute cause for removal, but no removal shall be allowed because of the religious or political opinions or affiliations of any employee.

As required, the SOP has promulgated rules and regulations. They are published in the Code of Maryland Regulations (COMAR). COMAR 06.01.01.61A permits a classified employee against whom charges have been filed to submit a written appeal to the Office of Administrative Hearings (OAH).

The OAH was established by act of the General Assembly in 1989 and was codified in the Md.Code (1984) as Title 9, subtitle 16 of the State Government article (SG). The OAH is "an independent unit in the Executive Branch of State government," SG § 9–1602, headed by a Chief Administrative Law Judge, SG § 9–1603(a). The SOP may designate an official whose duties and responsibilities are unrelated to the hearing process to conduct a hearing in contested removal cases. Art. 64A, § 36A(c)(3).

The OAH statute must be read in tandem with the contested cases provisions of the Administrative Procedure Act (APA), formerly codified in Md.Code (1957), Art. 41. In 1984 the provisions of the APA were transferred to the new State Government article as Title 10, subtitle 2, in revised language but without substantive change. In 1989 the APA was amended to accommodate the provisions of the OAH statute. An agency may "delegate to the [OAH] the authority that the agency ... has to hear particular contested cases," SG § 10–207(a)(1), and "may delegate to [the OAH] the authority to issue the final administrative decision of the agency in a contested case," SG § 10–207(a)(2). Section 10–207(b) spells out the duties of the OAH. It shall:

> (1) conduct the hearing; and
>
> (2) submit in writing to the parties involved in the administrative action ...:
>
> (i) proposed findings of fact and proposed conclusions of law; or
>
> (ii) if the agency has delegated the authority to issue a final decision to the [OAH], final findings of fact and conclusions of law.

The Chief Administrative Law Judge may designate an Administrative Law Judge (ALJ) "to conduct hearings in contested cases." SG § 9–1604(a)(4). "In any contested case conducted by an [ALJ], the [ALJ] may"

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

SG § 9–1605(c). Inasmuch as an agency may delegate to the OAH "the authority that the agency ... has to hear particular contested cases," the ALJ is told by the APA through authority granted an agency how the hearing is to be conducted. SG §§ 10–208 and 10–209 speak with particularity of the evidence which may be offered and considered. Translating the authority of the agency to the ALJ, SG § 10–210 dictates that the ALJ shall make a record that includes:

> (1) all motions and pleadings;
>
> (2) all documentary evidence that the agency receives;
>
> (3) a statement of each fact of which the agency has taken official notice;
>
> (4) any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of the agency who is not authorized to participate in the decision making process;
>
> (5) each question;
>
> (6) each offer of proof;
>
> (7) each objection and the ruling on the objection;
>
> (8) each finding of fact or conclusion of law proposed by:

(i) a party; or

(ii) a hearing officer;

(9) each exception to a finding or conclusion proposed by a hearing officer; and

(10) each intermediate proposed and final ruling by or for the agency, including each report or opinion issued in connection with the ruling.

Unless the agency has authorized the ALJ to make a final decision, the ALJ may only propose a decision which is subject to review by the agency which then renders the final decision. "The finding and decision of the [SOP] ... shall be final, and shall be certified to the appointing authority and shall forthwith be enforced by such authority." Md.Code, Art. 64A, § 33(c). SG § 10–214(a) requires that "[a] final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record." Subsection (b) concerns the contents of the decision. In relevant part, it provides:

(1) A final decision in a contested case shall contain separate statements of:

(i) the findings of fact; and

(ii) the conclusions of law.

(2) If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.

In the case before us, the SOP as the head of the DOP delegated to the OAH only the authority to conduct the hearing on the charges and to propose a decision. The ALJ assigned to conduct the hearing proposed that Anderson be reinstated to State service. The Penitentiary filed exceptions to the proposed decision, and the SOP appointed a designee to conduct a hearing to review the proposed decision of the ALJ. The designee renounced the decision of the ALJ. She ordered that Anderson be separated from state service. Anderson appealed the order to the Circuit Court for Baltimore City as authorized by SG § 10–215. The court affirmed the order of the designee for the SOP. *See* SG § 10–215(g)(2). Anderson looked to Court of Special Appeals pursuant to § 10–216(b). *See* Md.Rule B2. We ordered the issuance of a writ of certiorari on our own motion before decision by the intermediate appellate court.

Thus it is that the case has wended its way to this Court through the maze of administrative proceedings for the contested removal of a classified employee from State service. There has been complete compliance with the procedural particularities of the gaggle of statutes, rules and regulations; there is no claim of a procedural irregularity. So what is before us is the propriety of the affirmance by the Circuit Court for Baltimore City of the final order of the SOP which cost Anderson his job.

THE CHARGES

Md.Code, Art. 64A, § 33(b)(2)(i) commands:

> No employee who has completed his probation may be permanently removed from the classified service except for cause, upon written charges and after an opportunity to be heard in his own defense.

The Division of Correction (DOC) was established by § 4–105(a) of Art. 41 of the Maryland Code as a part of the Department of Public Safety and Correctional Services. Md.Code (1957, 1992 Repl.Vol., 1992 Cum Supp.), Art. 27, § 673 creates the office of the Commissioner of Correction (COC). The COC "is in sole and active charge of the [DOC] and of its several institutions and agencies, subject only to his responsibility to the Secretary of Public Safety and Correctional Services and to the Governor." *Art. 27, § 674.* The COC is empowered to adopt and promulgate "reasonable rules and regulations" including those providing for

> the duties, discipline and conduct of officers and employees of the several institutions and agencies [in the DOC].

Art. 27, § 676. The Maryland Penitentiary is one of those institutions.

Anderson was charged with violating a rule of COMAR, four regulations of the DOC (DCRs),[1] and a Post Order of the Maryland Penitentiary, as follows:

(1) COMAR 06.01.01.47 paragraphs B, D, L and M;

(2) DCR 50–2 IV.A.4, 19a. and 25;

(3) DCR 50–6 VI.A;

(4) DCR 50–54 V. and VI.;

(5) DCR 110–23 IV.A;

(6) Post Order 12 VI.N.5.

(1) The SOP prescribed "Causes for Removal" in COMAR 06.01.01.47. It declares:

> Any employee in the classified service may be permanently removed from his position only for cause and, except in the case of rejection on probation, only upon written charges and after an opportunity to be heard in his own defense, and not because of his religious or political opinions or affiliations or for refusing to contribute to a political fund or render political services. The following shall be sufficient cause of removal, though removal may be for causes other than those enumerated:

Paragraph B provides:

> That the employee has been wantonly careless or negligent in the performance of his duty or has used unwarranted or excessive force in his treatment of public charges, fellow employees, or other persons;

Paragraph D provides:

> That the employee has violated any lawful official regulation or order or failed to obey any lawful and reasonable direction given by his superior officer when the violation or failure to obey amounts to insubordination or serious breach of discipline which may reasonably be expected to result in a lower morale in the organization or to result in loss or injury to the State or the public;

Paragraph L provides:

> That the employee has willfully made a false official statement or report;

Paragraph M provides:

> That the employee has been guilty of conduct such as to bring the classified service into public disrepute;

(2) DCR 50–2 IV is titled "Procedures." Section A warns:

> All employees of the Division must abide by the following rules of conduct established by the Commissioner. All new employees must read this regulation within 24 hours after reporting for duty. All employees will review this regulation at least annually. Violations of this regulation and the stated rules of conduct, whether through ignorance, carelessness, or willful action, will be considered grounds for disciplinary action, possible criminal action, and/or removal from State Service.

Subsection 4 ("Personal Conduct") commands:

> Every employee shall conduct him or herself at all times, both on and off duty, in such a manner as to reflect most favorably on the Division of Correction. Conduct unbecoming an employee shall include that which tends to bring the Division of Correction into disrepute, or reflects discredit upon the employee as a representative of the Division, or that which tends to impair the operation or efficiency of the agency or employee.

Subsection 19 ("Performance of Duties") provides in paragraph a:

> Employees are to perform their duties diligently and efficiently. Indifference, carelessness or negligence will constitute grounds for disciplinary action.

Subsection 25 ("Reports") cautions:

> Reports submitted by employees must be clear, concise, factual and accurate. Any report, written or oral, which contains an

1. Some of the Division of Correction's regulations currently in effect differ, at least in designation, from those on the books when the incident before us took place. For example, DCR 50–2 has since grown into a 71-page pamphlet of its own encompassing, among others, DCRs 50–6 and 50–54. Our discussion, of course, concerns the DCRs as they were on January 15, 1991.

intentional false statement, omission or misstatement of fact will be considered grounds for disciplinary action.

(3) DCR 50–6 VI is headed "Procedure." Section A reads:

> Staff having direct responsibility for custody of inmates, when found to be inattentive, careless or negligent in the performance of their duties which contributes to or results in a breach of security, escape, harm to an inmate, employee or the general public by an inmate, shall be disciplined as follows:
>
> 1. First occasion within the current reckoning period—Suspension for 15 days.
> 2. Second occasion with the current reckoning period—Discharge from State Service.

(4) DCR 50–54 V, under the title "Policy," declares:

> The use of force is to be resorted to only after reasonable non-force solutions have failed and only to the extent necessary to control the situation. Any use of force shall be applied in compliance with DCR 110–23.

Section VI is headed "Procedure." Although the charges do not specify which of the five subsections are intended, they do characterize the violation as "Use of Force," and it appears that subsection A is applicable. It states:

> Excessive or unnecessary force used against an inmate, or any other action by an employee which results in serious bodily harm, death or a serious breach of the security of the institution, its staff, inmates, or the general public, or which has the potential for such results, shall result in the filing of Charges for Removal from State service.

(5) DCR 110–23 IV does not prescribe a violation; it only gives the definitions of "Non-deadly Force," "Deadly Force," and "Chemical Agents." Section V, however, titled "Policy and Procedure," states in subsection A:

> The use of force is to be resorted to only after reasonable non-forceful solutions have failed and then only to the extent necessary to control the situation.

The violation as it appears in the statement of charges as § IV is characterized as "Use of Force."

(6) Post Order 12 is applicable to the Maryland Penitentiary Correctional Staff. Section II. Its purpose is "[t]o provide a guide to assist officers assigned to the [South Wing]." Section III. "Special Remarks" are stated in § IV:

> South Wing is a housing unit consisting of inmates assigned to segregation, protective custody, and general population. Extreme caution and strict adherence to procedures should be exercised at all times.... Proper procedures will be adhered to during the movement of inmates housed in this unit.

"Procedure" is the subject of § VI. It seems that the incident occurred when Wooden was to be removed from his cell to take a shower. After compliance with certain preliminary precautions and when an inmate is about to leave the cell to be escorted to the shower room, paragraph N.5 directs:

> The inmate will then be instructed to face the back wall, place his hands behind his back and position himself to be handcuffed when the door is opened. The door will be opened only enough to allow the assisting officer ample space to place handcuffs on the inmate. After being handcuffed, the inmate will be allowed to exit the cell, wearing his shorts and shower shoes.

Post Order 12 is not published generally; it is available only to the Maryland Penitentiary personnel.

THE HEARING BEFORE THE ADMINISTRATIVE LAW JUDGE

Eleven witnesses testified at the hearing conducted by the ALJ and 24 exhibits were presented; the transcript of the proceeding consumes 551 pages. The proposed recommendation of the ALJ listed 31 facts which he found by a preponderance of the evidence "[b]ased on the testimony of witnesses, exhibits submitted at the hearing and

documents entered into the record after the hearing." We set them out verbatim:

1. On January 15, 1991, Sgt. William Anderson was the shift Officer in Charge (OIC) on the South Wing of the Maryland Penitentiary.

2. Sgt. Anderson was required to make two security check rounds of the South Wing during his shift.

3. During the course of the morning round, Sgt. Anderson saw an inmate being handcuffed outside of his cell which he believed was a violation of Post Order 12 and a possible breach of security.

4. Sgt. Anderson approached the cell at a rapid pace and saw Correctional Officers Brenda Dorsey and Henry Brandon with inmate Glen Wooden.

5. Officers Dorsey and Brandon had been employed by the Division of Correction for two years and ten months respectively compared with Sgt. Anderson's ten years.

6. Upon reaching the cell, Sgt. Anderson noticed that Officer Dorsey was attempting to complete handcuffing the inmate in the front by placing one cuff on the wrist and the other on a crutch.

7. Sgt. Anderson ordered the inmate to return to his cell immediately in an effort to restore compliance with Post Order 12.

8. Inmate Wooden initiated an argument with Sgt. Anderson and verbally and physically resisted the order to return into his cell.

9. The inmate told Sgt. Anderson that he was a short timer and would get him when he got uptown. This statement was clearly a threat.

10. The inmate had a history of verbal and physical assaultive behavior.

11. With minor physical pressure, the inmate backed partially into his cell, faced outward and held the crutch by the lower shaft.

12. Officer Dorsey was between Sgt. Anderson and the inmate and facing the inmate.

13. Officer Dorsey was trying to correct the handcuffing of the inmate when he (the inmate) raised the crutch as if to swing it and hit her.

14. Sgt. Anderson responded to this threat by raising his forearm to divert the blow and grabbed the crutch.

15. Sgt. Anderson interposed himself between the inmate and Officer Dorsey to prevent her injury.

16. The inmate refused to respond to Sgt. Anderson's orders to cease struggling and let go of the crutch. They grappled for the crutch and with each other.

17. During the course of this struggle, Sgt. Anderson and the inmate hit the wall of the cell several times, then the bed and finally rolled onto the floor.

18. Sgt. Anderson lay on top of the inmate pinning his arms to prevent being hit; the inmate intertwined his legs with Sgt. Anderson's and both were unable to break the hold of the other.

19. When the scuffle began, Officer Dorsey took the keys from Officer Brandon, closed the cell door and went to call in a "Signal 13" indicating an officer was in confrontation with an inmate.

20. Officer Brandon remained on the scene but did not assist Sgt. Anderson in subduing and containing the inmate.

21. A response team, including Lt. Wouldridge, came to the cell pursuant to the Signal 13 call.

22. Lt. Wouldridge unlocked the cell door, entered and observed Sgt. Anderson and the inmate in the position described in Finding 19 above.

23. Lt. Wouldridge directed Sgt. Anderson to stand up who then stated he could not because of the intertwinement of his and the inmate's legs.

24. Sgt. Anderson did stand up after a response team member untangled their legs.

25. Lt. Wouldridge escorted the inmate to the inmate inhouse medical facility for treatment of his abrasions and other internal injuries.

26. The inmate's abrasions and dermal injuries could have been easily caused by the use of minimal force.

27. On January 16, 1991, Sgt. Anderson reported to work with a swollen arm, abrasions, bruises and lacerations, which caused him to seek medical treatment.... He did not report back to work until January 18, 1991.

28. All required incidents and use of force reports were properly filed by participants and observers who were on site at the time of the incident.

29. The variations in these reports resulted from the difference in recollections of the writers rather than any intent to falsify an official report.

30. Sgt. Anderson was rated overall satisfactory in his annual efficiency rating reports for 1989 and 1990 and superior in the 1988 report.

31. On January 16, 1991, Sgt. Anderson was suspended pending charges for removal.

The ALJ did not address the alleged COMAR violation but he discussed each of the DCRs charged. As to DCR 50–2 IV.A.4, he said:

> The facts educed at the hearing do not show that Sgt. Anderson acted in a manner bringing disrepute or discredit upon the Division or himself. They do show his action reduced greatly the actual and/or probable risk of a breach of security when he came upon Officers Dorsey and Brandon attempting to handcuff the inmate outside his cell while holding a dangerous instrument (crutch). Sgt. Anderson reacted instantly to [a] dangerous situation. He intended to restore conditions to those required by DCRs and Post Orders. His response reflected favorably on the Division without discredit or disrepute.

As to paragraph 19a., he observed:

> The facts show that Sgt. Anderson acted immediately to restore proper security with the least possible harm to himself, fellow officers and the inmate as warranted by the situation. Sgt. Anderson did not act in violation of Paragraph 19a.

As to paragraph 25, he stated:

> The facts in this case do not reveal any intentional falsity, omission or misstatement in the required reports. They do show that the variations in the reports arose from natural differences in the recollection of witnesses and participants involved in a traumatic incident. I conclude that Sgt. Anderson did not act in violation of Paragraph 25.

On the charge under DCR 50–6 IV.A, he said:

> In this case, Sgt. Anderson came upon a situation that was dangerous and a breach of security. The facts show he acted immediately to restore safety, security and order. Such steps cannot be characterized as negligent, careless or inattentive. Thus, I conclude he did not violate this regulation.

He discussed DCR 50–54 V and VI:

> Sgt. Anderson repeatedly ordered the inmate to return to his cell and only resorted to force after the inmate verbally and physically refused to comply with those orders. Reasonable force was also used by Sgt. Anderson when he saw the inmate raise a weapon (crutch) to strike Officer Dorsey who stood between them. Sgt. Anderson's attempt to wrest the crutch from the inmate resulted in their scuffling, hitting the wall, bed and floor. In a matter of seconds they came to rest in a position where neither party could hit the other and the inmate had Sgt. Anderson's legs entangled so that he could not stand up.
>
> Sgt. Anderson acted immediately to protect Officer Dorsey from a blow from the crutch; his swollen forearm attests to his taking the blow himself. The standoff existing when Sgt. Anderson and the inmate immobilized each other was not a display of excessive or unnecessary force. It was an example of the use of minimum force to contain/control a dangerous situation. Sgt. Anderson's actions in this situation do not constitute the use of excessive or unnecessary force.
>
> It might be argued that since the inmate was inside the cell, Sgt. Anderson could have retreated from the cell, locked the door and waited for the inmate to surrender the crutch; that was not possible here. The inmate initiated a course

of verbal and physical threats, Officer Dorsey was inside the cell and preoccupied with resolving the handcuffing of the inmate. Finally, the use of no force was precluded when the inmate raised the crutch in an apparent attempt to strike Officer Dorsey.

The ALJ correctly noted that DCR 110–23 IV.A. does not prescribe a violation; it merely defines certain terms. Therefore, the ALJ dismissed that charge. But, he said:

> If it is assumed for the sake of argument that the agency intended to refer to Section V, then the same discussion and conclusion set forth under DCR No. 50–54 above is also applicable here; i.e., Sgt. Anderson did not use excessive force.

As far as we can ascertain from the record that was submitted to us, the charge was not amended to show that a violation of § V.A was the intended charge.

Regarding Post Order 12, the ALJ declared:

> The facts in this case show that Officers Dorsey and Brandon were not following proper procedures in handcuffing the inmate for his shower. Sgt. Anderson recognized this fact and immediately attempted to restore the proper conditions of security with the minimum force necessary.

He noted: "The regulation does not speak to any accommodations for the inmate's use of a crutch." He pointed out:

> The evidence shows that medical authority to use a crutch does not alter basic security procedures if interpreted with a touch of common sense. The Acting Assistant Warden Sanders testified to the above and that if the inmate made a gesture with the crutch, it was completely proper for the Officer to take it from him.

We think that the ALJ covered the COMAR violation even though he did not expressly discuss it.

Based on his findings of fact as applied to the charges, the ALJ concluded as a matter of law that the DOC did not meet its burden of proving any of the charges by a preponderance of the evidence. The ALJ declared:

> [Anderson] did not act so as to bring disrepute/discredit upon himself, the Division or other parties. He used only that force necessary to comply with security regulations. In no sense was this excessive or unnecessary force.

The ALJ issued the following proposed order:

> The decision of the Division of Correction to suspend Sgt. Anderson pending charges for removal from State service and their action to remove him from State service is REVERSED. Sgt. Anderson is to be reinstated as of the date his suspension without pay began with all rights, benefits and pay he would have been entitled to from that date to reinstatement.

THE HEARING BEFORE THE DESIGNEE OF THE SECRETARY OF PERSONNEL

A hearing on the proposed decision of the ALJ was triggered by exceptions filed by The Maryland Penitentiary with the SOP. The Penitentiary claimed four errors of law and three errors of fact. It requested that the SOP:

A. Reject the Proposed Decision as issued;

B. Substitute [the SOP's] own Findings of Fact and Conclusions of Law;

C. Sustain the Charges and each of them....

It suggested a choice of sanctions:

D. Remove the employee From state service ...; or

E. Demote the employee to CO–II; or

F. Substitute a lengthy suspension.

The designee of the SOP (SOPD) conducted the hearing. An employee of the Department of Public Safety and Correctional Services represented the Maryland Penitentiary, and the Director of Field Services for the Maryland Correctional Unit represented Anderson. The SOPD "reviewed the entire record [including] the taped proceeding of the administrative hearing before the [ALJ]." Upon review of the record and

hearing the oral arguments, the SOP "adopt[ed] in part and reject[ed] in part the [ALJ's] proposed findings of fact and conclusions of law." The SOPD made these findings of fact:

1. On January 15, 1991, Sergeant William Anderson was the shift Officer In Charge (OIC) on the South Wing of the Maryland Penitentiary.

2. During the course of his morning security round, Sergeant Anderson saw an inmate being handcuffed outside of his cell which was a violation of Post Order 12 and a breach of security.

3. Upon reaching the cell, Sergeant Anderson noticed that Officer Dorsey was attempting to handcuff the inmate in the front by placing one cuff on his wrist and the other on a crutch.

4. Sergeant Anderson ordered that the inmate's wrists be cuffed together in front of him.

5. The inmate told Sergeant Anderson that he was a short timer and would take care of him when he "got uptown."

6. The inmate argued with Sergeant Anderson. Mr. Anderson ordered the inmate to return to his cell.

7. The inmate backed partially into his cell, facing outward and Officer Dorsey moved into the doorway of the cell to remove the inmate's handcuffs.

8. Officer Dorsey was between Sergeant Anderson and the inmate and she was facing the inmate.

9. The inmate's verbal barrage against Sergeant Anderson continued and, with cuffed hands, he swung his crutch.

10. Sergeant Anderson order Officer Dorsey to step out of the cell and he entered the cell and asked the inmate to surrender the crutch. The inmate refused to let go of the crutch.

11. Sergeant Anderson and the inmate grappled for the crutch and with each other.

12. Sergeant Anderson grabbed the face of the inmate and shoved the inmate into the wall of the cell several times. Sergeant Anderson got the inmate positioned in a headlock. The two fell onto the bed and then rolled onto the floor.

13. Sergeant Anderson laid on top of the inmate pinning his arms; the inmate intertwined his legs with Sergeant Anderson's and both were unable to break the hold of the other.

14. When the scuffle began, Officer Dorsey took the keys from Officer Brandon, and went to call in a "Signal 13" indicating an officer was in confrontation with an inmate.

15. Officer Brandon remained on the scene but did not assist Sergeant Anderson in subduing the inmate.

16. A response team reported to the cell pursuant to the Signal 13 call.

17. Lt. Wouldridge entered the cell and observed Sergeant Anderson and the inmate in the position described in Finding # 13 above.

18. Sergeant Anderson stood up after a response team member freed his legs.

19. Lt. Wouldridge escorted the inmate to the in-house medical facility for treatment of his injuries. The inmate was treated for abrasions and skin lacerations on his face and back.

20. The inmate was handcuffed in front throughout the entire incident.

21. The inmate had a history of verbal and physical assaultive behavior.

22. On January 16, 1991, Sergeant Anderson reported to work with a swollen arm, abrasions, bruises and lacerations, which caused him to seek medical treatment.... He did not report back to work until January 18, 1991.

23. All required incident and use of force reports were filed by the participants and observers who were on site at the time of the incident.

24. Sergeant Anderson was rated overall satisfactory in his efficiency reports for 1989 and 1990 and superior in the 1988 report.

25. On January 16, 1991, Sergeant Anderson was suspended pending charges for removal for his involvement in the January 15 incident.

The SOPD complained that the ALJ "apparently gave weight to only the testimony of Sergeant Anderson and Officers Dorsey

and Brandon." She observed: "It appears that he completed ignored, without explanation, the testimony of other witnesses. Even in relating the testimony of Sergeant Anderson, the [ALJ] ignored pertinent facts established in the record." She said, early on in her opinion:

> In light of relevant facts discovered in the record, I reasonably conclude that Mr. Anderson did use excessive force in dealing with the inmate....

She opined, "Consequently, the charges against him should be sustained and his termination upheld."

The SOPD noted that Anderson, Dorsey and Brandon testified at the hearing before the ALJ and each submitted two reports of the incident. "All three of the officers reported that Mr. Anderson and the inmate became involved in a physical altercation." The SOPD observed:

> According to Mr. Anderson's direct testimony, Officer Dorsey was standing in the doorway of the cell attempting to remove the inmate's handcuffs. Out of concern for Officer Dorsey's safety, Mr. Anderson stepped between Dorsey and the inmate to remove the cuffs himself. He asked the inmate to surrender a crutch he was using and then reached for it. According to Mr. Anderson, the inmate snatched the crutch and swung it at him so he (Anderson) "grabbed the inmate in the face area and slammed him against the wall of the cell several times." Mr. Anderson explained that he then got the inmate in a headlock. The inmate hit him in the body and Mr. Anderson reported that he hit the inmate in the side with his fist. The two fell against the bed and onto the floor, at which time the response team arrived to control the disturbance.

The SOPD acknowledged that Anderson, Dorsey and Brandon "maintained that Mr. Anderson confronted the inmate in order to protect himself and Officer Dorsey from personal injury." But the SOPD believed that

> [i]t was clear from Mr. Anderson's testimony that he considered the crutch a weapon and he believed that the inmate should not be allowed to retain it in his cell. However, the uncontroverted testimony that the inmate needed the crutch to navigate and that his hands were cuffed in front of him throughout the entire incident cannot be ignored. Also several of the witnesses confirmed management's contention that Mr. Anderson could have retreated from the cell and *locked the inmate inside, instead of taking* such an aggressive stance of trying to single-handedly wrest the crutch from the inmate.

"Consequently," the SOPD concluded, "there were other non-forceful solutions available to Mr. Anderson."

> [Anderson's] own testimony concerning his involvement in the physical altercation ... leads one to reasonably conclude that he used more force than necessary to resolve the situation.

The SOPD found that the Maryland Penitentiary had met its burden of proving by a preponderance of the evidence that "Anderson used excessive force in dealing with the inmate...." She concluded further that "such behavior violates COMAR .47B, D & L; DCR 50–2.IV.A.4 & 19a; DCR 50–6, DCR 50–54, DCR 110–23, and the cited Post Order." But she agreed with the ALJ that the "charges of violating COMAR .47L & DCR 50–2.IV.A.25 were not substantiated," even though she had just stated that COMAR .47L had been violated. "Consequently," she said, "I dismiss the proposal rendered by the Administrative Law Judge that Mr. Anderson be returned to duty. I believe that the employee's termination, *as mandated by DCR 50–54.IV*, should be sustained." (Emphasis added). The SOPD ordered that

> William Anderson be removed from his Correctional Officer III position at the Maryland Penitentiary, effective January 16, 1991 (the date of his suspension).

Anderson, aggrieved by this final order, sought judicial review by the Circuit Court for Baltimore City pursuant to SG § 10–215.

THE REVIEW BY THE CIRCUIT COURT FOR BALTIMORE CITY

On the judicial review by the Circuit Court for Baltimore City, the decision of the agency was affirmed by the judge after hearing from the parties. The judge found that "there was substantial evidence upon which the Secretary could make the findings which she did...." He said:

> I think there is substantial evidence to indicate both that excessive or unnecessary force was used against the inmate, as well as substantial evidence to support a finding that the force used had the potential for the results of serious bodily harm, death, or serious breach of security of the institution, its staff, inmates, or the general public.

The judge observed, "The injuries per se to the inmate, Mr. Wooden, may have been superficial but the evidence is sufficient to allow the Secretary to find that the force applied was excessive and not necessary." The judge opined that the arguments advanced by Anderson were not "in any way frivolous." He said:

> Reasoning minds can differ, as they have already as witness the positions of the Administrative Law Judge and the Secretary, and where reasoning minds can differ I cannot change the result below. And I do not find that it's an arbitrary or capricious decision.

THE STANDARD FOR JUDICIAL REVIEW

The authority of a circuit court on judicial review of a final order under the APA is spelled out in SG § 10–215(g). The subsection provides:

> In a proceeding under this section, the court may:
>
> (1) remand the case for further proceedings;
>
> (2) affirm the decision of the agency; or
>
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:
>
> (i) is unconstitutional;
>
> (ii) exceeds the statutory authority or jurisdiction of the agency;
>
> (iii) results from an unlawful procedure;
>
> (iv) is affected by any other error of law;
>
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
>
> (vi) is arbitrary or capricious.

See Maryland Rules, ch. 1100, subtitle B, Rules B1–B13, implementing SG § 10–215.

We have reviewed a goodly number of our cases addressing the matter of judicial review. They range from the first one governed by the Administrative Procedure Act after its enactment in 1957, *Bernstein v. Real Estate Comm,* 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S.Ct. 1257, 4 L.Ed.2d 1515 (1960), to the most recent, *Dashiell v. Department of Health,* 327 Md. 130, 607 A.2d 1249 (1992). The opinions discuss the import of what is now § 10–215(g), explicate it and apply it. All of them sing the same tune; the melody of each is identical. Even though the lyrics may vary at times, their substance is always in harmony. *See,* in addition to *Bernstein* 221 Md. at 224–225 and 230, 156 A.2d 657 and *Dashiell* 327 Md. at 137–138, 607 A.2d 1249, *State Board v. Ruth,* 223 Md. 428, 436–437, 165 A.2d 145 (1960); *Kaufman v. Taxicab Bureau,* 236 Md. 476, 484, 204 A.2d 521 (1964), *cert. denied,* 382 U.S. 849, 86 S.Ct. 95, 15 L.Ed.2d 88 (1965); *Nuger v. Insurance Comm'r,* 238 Md. 55, 61, 207 A.2d 619 (1965); *Melfa v. Commissioner,* 240 Md. 744, 746, 215 A.2d 755; *cert. denied,* 384 U.S. 1001, 86 S.Ct. 1922, 16 L.Ed.2d 1014 (1966); *Eger v. Stone,* 253 Md. 533, 542, 253 A.2d 372 (1969); *Grosman v. Real Estate Comm'n,* 267 Md. 259, 268, 297 A.2d 257 (1972); *Zeitschel v. Board of Education,* 274 Md. 69, 79, 332 A.2d 906 (1975); *Dep't of Nat. Res. v. Linchester,* 274 Md. 211, 224–226, 334 A.2d 514 (1975); *Bulluck v. Pelham Wood Apts.,* 283 Md. 505, 511–513, 390 A.2d 1119 (1978); *Holy Cross Hosp. v. Health Services,* 283 Md. 677, 683, 393 A.2d 181 (1978); *Annapolis v. Annap. Waterfront Co.,* 284 Md. 383, 394–

396, 396 A.2d 1080 (1979); *Courtney v. Board of Trustees*, 285 Md. 356, 361–363, 402 A.2d 885 (1979); *Md. State Dep't of Personnel v. Sealing*, 298 Md. 524, 535–536, 471 A.2d 693 (1984); *United Steelworkers v. Beth. Steel*, 298 Md. 665, 679, 472 A.2d 62 (1984); *Balto. Lutheran High Sch. v. Emp. Sec. Adm.*, 302 Md. 649, 660–661, 490 A.2d 701 (1985); *Board of Educ., Mont. Co. v. Paynter*, 303 Md. 22, 35–36, 491 A.2d 1186 (1985); *State Election Bd. v. Billhimer*, 314 Md. 46, 58–59, 548 A.2d 819 (1988), *cert. denied*, 490 U.S. 1007, 109 S.Ct. 1644, 104 L.Ed.2d 159 (1989); *Board of County Comm'rs v. Holbrook*, 314 Md. 210, 218, 550 A.2d 664 (1988); *Caucus v. Maryland Securities*, 320 Md. 313, 323–324, 577 A.2d 783 (1990). There are a host of other of our cases cited in the above cases in support of the principles they expressed.

[1] No matter how the test for reviewing factual findings of administrative agencies is phrased, the reviewing court's

> appraisal or evaluation must be of the agency's fact-finding results and not an independent original estimate of or decision on the evidence.

Hammond, C.J., speaking for a majority of the Court in *Insurance Comm'n v. Nat'l Bureau*, 248 Md. 292, 309, 236 A.2d 282 (1967). The Chief Judge recognized that

> [t]he required process is difficult to precisely articulate but it is plain that it requires restrained and disciplined judicial judgment so as not to interfere with the agency's factual conclusions under any of the tests, all of which are similar. There are differences but they are slight and under any of the standards the judicial review essentially should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment.

Id. at 309–310, 236 A.2d 282. "[T]he common denominator of the scope of judicial review with respect to all administrative agencies," we said in *Balto. Lutheran High Sch.*, 302 Md. at 661, 490 A.2d 701, is "[t]he substantiality of the evidence."

> That is to say, a reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency, but it must not itself make independent findings of fact or substitute its judgment for that of the agency.

Id. at 662, 490 A.2d 701. *Bulluck*, 283 Md. 505, 390 A.2d 1119, (Eldridge, J.) drew upon our cases as well as *Universal Camera Corp. v. National Labor Rel. Bd.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) and *Consolidated Edison Co. v. National Labor Rel. Bd.*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938) and referred to treatises and law journals in explaining the meaning of "substantial evidence." The Court said:

> "Substantial evidence" as the test for reviewing factual findings of administrative agencies, has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...." The scope of review "is limited 'to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.'"

Id. 283 Md. at 512, 390 A.2d 1119 (citations omitted). It pointed out:

> In applying the substantial evidence test, we have emphasized that a "court should [not] substitute its judgment for the *expertise* of those persons who constitute the administrative agency from which the appeal is taken."

Id. at 513, 390 A.2d 1119 (citations omitted) (emphasis in original). The Court explained, "We must also review the agency's decision in the light most favorable to the agency, since 'decisions of administrative agencies are prima facie correct,' ... and 'carry with them the presumption of validity.'" *Id.* (citations omitted). "Furthermore," Judge Eldridge continued,

> not only is it the province of the agency to resolve conflicting evidence, but where inconsistent inferences from the same ev-

idence can be drawn, it is for the agency to draw the inferences.

Id. (citations omitted).[2]

[2, 3] One of the main objectives of the Legislature in establishing the OAH was to provide an impartial hearing officer in contested cases. A hearing officer employed by and under the control of the agency where the contested case or other disputed action arises, often results in the appearance of an inherent unfairness or bias against the aggrieved. *See* the Final Report of the "Governor's Task Force on Administrative Hearing Officers." (1988). It is apparent that the Legislature, in enacting the OAH statute did not depart from the principles which have been recognized in our opinions that govern judicial review of an agency's final decision. The OAH act on its face and the APA as amended to accommodate the provisions of the OAH act did not address the test for judicial review. The standard for judicial review remained the same as we had consistently declared it to be.

The creation of an ALJ as a impartial hearing officer in administrative proceedings introduced another factor to be considered in our standard for judicial review. To determine what impact the findings of fact, conclusions and proposed order of an ALJ have on an agency's final order provoked us to look again to *Universal Camera*, 340 U.S. 474, 71 S.Ct. 456. The essential issue raised in *Universal Camera* was "the effect of the Administrative Procedure Act and the ... Taft–Hartley Act ... on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board." 340 U.S. at 476, 71 S.Ct. at 458. After carefully tracing the history of the reviewing power, *id.* at 477–486, 71 S.Ct. at 459–63, the Court held that

> the standard of proof specifically required of the Labor Board by the Taft–Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Id. at 487, 71 S.Ct. at 463. Charles H. Koch, Jr. observed in his *Administrative Law and Practice* (1985), Vol. 1, § 6.73 at 520 (hereinafter "Koch"), that *Universal Camera* "outlined the significance of the presiding officer's findings for the agency and ultimately for the court." Our Administrative Procedure Act parallels the federal Administrative Procedure Act sufficiently so that the guidelines of *Universal Camera* relate to proceedings under our Act.

The meat of *Universal Camera* on the standard of judicial review is contained in Part III of the opinion. The basic concept of the test firmly established by our opinions is left intact. *Universal Camera* is not contrarient to our test but explicates it. First we note that *Universal Camera* made perfectly clear that the responsibility for the final decision placed on the agency "is wholly inconsistent with the notion that the [agency] has power to reverse an examiner's findings only when they are 'clearly erroneous.'" 340 U.S. at 492, 71 S.Ct. at 467. This assertion was confirmed in *Federal Commun. Com'n v. Allentown Broad. Corp.*, 349 U.S. 358, 364, 75 S.Ct. 855, 859, 99 L.Ed. 1147 (1955).

[4–6] Given that there is no error of law within the contemplation of § 10–215(g)(3)(i)(ii)(iii) and (iv), the test firmly established by our opinions follows the dictate of § 10–215(g)(3)(v), that the decision of the agency shall be reversed or modified "if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency"

> is unsupported by competent, material, and substantial evidence in light of the entire record as submitted....

2. We observed in *United Steelworkers v. Beth. Steel*, 298 Md. 665, 679, 472 A.2d 62 (1984):

> Judicial review of administrative action differs from appellate review of a trial court judgment. In the latter context the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court. However, in judicial review of agency action the court may not uphold the agency order unless it is sustainable on the agency's findings and for the reasons stated by the agency.

Ordinarily, if the decision is so unsupported, it may also be "arbitrary and capricious" under § 10–215(g)(3)(vi). *See Dashiell*, 327 Md. at 137–138, 607 A.2d 1249. *Universal Camera* fleshed out what constitutes the "entire record." The Supreme Court observed:

> Surely an examiner's report is as much a part of the record as the complaint or the testimony.

Id. 340 U.S. at 493, 71 S.Ct. at 467. The determination of the substantiality of the record includes the examiner's report. *Id.* But, the Court cautioned:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve.

340 U.S. at 496, 71 S.Ct. at 469. The Court made clear that the " 'substantial evidence' standard is not modified in any way when the [agency] and its examiner disagree." *Id.* The Court explained:

> We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the [agency's] than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony.

Id. The Court emphasized:

> The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us *materially more difficult than to heed the* other factors which in sum determine whether evidence is "substantial."

Id. at 496–497, 71 S.Ct. at 469. On the matter of assessing the credibility of the witnesses the Court indicated that the agency should give appropriate deference to the opportunity of the examiner to observe the demeanor of the witnesses.

> All aspects of the witnesses demeanor—including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication—may convince the observing [hearing officer] that the witness is testifying truthfully or falsely.

Penasquitos Village, Inc. v. N.L.R.B., 565 F.2d 1074, 1078–1079 (9th Cir.1977). "Nothing in the statutes," *Universal Camera* pointed out,

> suggests that the [agency] should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the [agency] does not.

340 U.S. at 495, 71 S.Ct. at 468. "Nothing suggests," the Court continued, "that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands." *Id.* "The [agency's] findings are entitled to respect...." *Id.* at 490, 71 S.Ct. at 466.

> [B]ut they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Id. In other words, the decision of the agency must be vacated when "the standard appears to have been misapprehended or grossly misapplied." *Id.* at 491, 71 S.Ct. at 466.

Koch stated on the question of credibility:

> The presiding officer's findings as to credibility have almost conclusive force and the importance of credibility evidence to the final decision will affect the weight given the presiding officer's findings.

Koch, § 6.73 at 522 (footnote omitted). He quoted *General Dynamics v. OSHRC*, 599 F.2d 453, 463 (1st Cir.1979) for the general principle regarding the administrative review body's authority over credibility findings of the hearing officer:

> "the credibility findings of the person who sees and hears the witnesses—be he ALJ, juror or judge—is entitled to considerable deference. While the degree of

deference due the ALJ's final decision is related to the importance of credibility in a particular case, the ALJ's decision to give or deny credit to a particular witness' testimony should not be reversed absent an adequate explanation of the grounds for the reviewing body's source of disagreement with the ALJ."

Koch, § 6.73 at 522 (footnote omitted). "In sum," Koch concluded, "the review authority has the power to reject credibility assessments *only if it gives strong reasons* for doing so." *Id.* (footnote omitted).

We have surveyed a fair sampling of cases in other jurisdictions which address the matter of judicial review of the final decision of an administrative agency. *See Appendix* hereto. They all look to *Universal Camera* and are in line with our test as explicated by that opinion. The cases recognize that "[w]hile the standard set forth in *Universal Camera* is imprecise, 'it provides as much clarity as the area affords.'" *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir.1967), quoting *Bon-R Reproductions, Inc. v. NLRB*, 309 F.2d 898 (2d Cir.1962). *Universal Camera* itself recognized that a precise standard for review "cannot be imprisoned within any form of words...." 340 U.S. at 489, 71 S.Ct. at 465. It noted, "There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms." *Id.* "But," the Court observed, "a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in." *Id.* Kenneth Culp Davis, in his *Administrative Law Treatise* (1980), Vol. 3, § 17.16 at 330, observed that the principles of *Universal Camera* "are reasonably clear, but a good many problems arise in applying them...." He selected a number of cases applying the principles to show that each of the cases referred to was "unique; seldom can two or more problems about application of the principles be put together." *Id.*

THE DECISION OF THIS COURT

[7] As we see it, the SOPD gave no real significance to the ALJ's report. She did not adequately take into account in considering the evidence before the ALJ whatever in the record detracted from the substantiality of that evidence, as, for example the disagreement between the ALJ and the SOPD as to the disposition of Anderson. We do not agree with the appellees' assertion that "there is really no issue of credibility on the genuine issues of this case." We think that the credibility of the witnesses was of the utmost importance in the circumstances here; it played a dominant role; it was pivotal. But there is no indication that the SOPD gave any deference to the ALJ's assessment of the credibility of the witnesses before him. And she gave no strong reasons for rejecting the ALJ's assessments of credibility. It seems that the SOPD made her own findings of fact, as suggested by the representative of the Penitentiary, and it appears that she did not take into account in making them the factual findings of the ALJ. Therefore, we believe that the Circuit Court for Baltimore City was wrong when it found that there was substantial evidence to support the order of the SOPD, because the SOPD did not appreciate the proper relationship between her and the ALJ. The SOPD must reconsider her order in the light of what we have found to be the interrelation between her function and the function of the ALJ. We vacate the judgment of the Circuit Court for Baltimore City and remand the case to it with direction to remand the case to the DOP for further proceedings in accordance with this opinion.

We note that the SOPD found that Anderson's removal was "mandated by DCR 50–54.VI." Presumably, she saw her discretion to decide on a less drastic sanction destroyed by Paragraph A of that DOC regulation. As we have noted, the regulation declares:

> Excessive or unnecessary force used against an inmate, or any other action by an employee which results in serious bodily harm, death or a serious breach of the security of the institution, its staff, in-

mates, or the general public, or which has the potential for such results, *shall* result in the filing of Charges for Removal from State service.

(Emphasis added). This belief was probably why she did not address the issue of mitigation raised by Anderson. In any event, she read too much into the provision.

[8] DCR 50–54.VI.A does not mandate dismissal; all it does is require the filing of "Charges for Removal from State service." That much, obviously, had been accomplished and was the basis for the hearing. In fact, written charges are required to set the hearing process in motion. *See* Art. 64A, § 33(b)(2)(i); COMAR 06.01.01.48. The issue before the ALJ and the SOP was whether Anderson should, in fact, be removed from State service in light of the charges already filed. The DCR regulation in no way binds the Department of Personnel to a preordained result in a given case; for its decision, the DOP has its own regulations to guide it.

[9] The relevant DOP regulation says that a classified employee "*may* be permanently removed from his position only for cause...." COMAR 06.01.01.47 (emphasis added). The regulation then sets forth several specific transgressions that "shall be sufficient cause of removal, though removal may be for causes other than those enumerated." *Id.* COMAR 06.01.01.61, which is headed "Appeal of Charges for Removal of a Classified Employee," discusses the options open to the SOP when she resolves an employment matter such as the one at issue in this case. It says that the SOP or her designee "*may*" decide to:

(1) Restore the employee to his position without loss of pay;

(2) Suspend the employee without pay for a specified period of time;

(3) Demote the employee;

(4) Remove the employee from the position and the classified service;

(5) Require that other action be taken as indicated by the findings in the case.

COMAR 06.01.01.61H (emphasis added). The plain meaning of COMAR language applicable to the Department of Personnel is that removal is not "mandated" when an employee fails to abide by the requirements of a Division of Correction regulation. The representative of the DOP acknowledged as much at the hearing in the Circuit Court for Baltimore City. She told the court:

> I do agree with [Anderson's attorney] that if the [SOP] had thought that a lesser sanction was appropriate she didn't have to remove him because the regulation [DCR 50–54.VI.A] just says [charges] shall be filed.[3]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT WITH DIRECTION TO REMAND THE CASE TO THE DEPARTMENT OF PERSONNEL WITH DIRECTION TO VACATE ITS ORDER REMOVING WILLIAM HENRY ANDERSON, JR. FROM STATE SERVICE AND TO CONDUCT FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION;

COSTS TO BE PAID BY APPELLEES.

APPENDIX

A sampling of cases in other jurisdictions surveyed on the issue of the standard of review in administrative proceedings.

General Dynamics v. Occupational Safety and Health, 599 F.2d 453, 463 (1st Cir.1979); *N.L.R.B. v. Interboro Contractors, Inc.*, 388 F.2d 495, 499 (2d Cir.1967); *Abbott Labs., Ross Labs, Division v. N.L.R.B.*, 540 F.2d 662, 667 (4th Cir.1976); *Dryden Manufacturing Company v. N.L.R.B.*, 421 F.2d 267, 269–670 (5th Cir. 1970); *Ward v. N.L.R.B.*, 462 F.2d 8, 11–13 (5th Cir.1972); *Ala. Ass'n of Ins. A. & Bd. of Gov. of F.R. System*, 533 F.2d 224, 248–

3. An Act concerning the "Administrative Procedure Act—Contested Cases—Revision" was introduced in the 1993 session of the General Assembly as House Bill 877. It was the flowering of the Governor's Commission to Revise the Administrative Procedure Act. The Bill passed the House and the Senate without a dissenting vote, and the Governor signed it on 13 April as Acts 1993, ch. 59 to take effect 1 June 1993.

APPENDIX—Continued

249 (5th Cir.1976), *vacated in part on other grounds by*, 558 F.2d 729 (5th Cir.1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *N.L.R.B. v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir.1988) (citing to *Kopack v. N.L.R.B.*, 668 F.2d 946, 959–954 (7th Cir. 1982), *cert. denied*, 456 U.S. 994, 102 S.Ct. 2278, 73 L.Ed.2d 1290 (1982); *Roper Corp. v. N.L.R.B.*, 712 F.2d 306, 310 (7th Cir. 1983); and *Stokely-Van Camp, Inc. v. N.L.R.B.*, 722 F.2d 1324, 1328 (7th Cir. 1983)); *Amco Electric v. N.L.R.B.*, 358 F.2d 370, 373 (9th Cir.1966); *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074, 1078–1079 (9th Cir.1977); *N.L.R.B. v. Warren L. Rose Castings, Inc.*, 587 F.2d 1005, 1007–1008 (9th Cir.1978); *Loomis Courier Serv., Inc. v. N.L.R.B.*, 595 F.2d 491, 495–496 (9th Cir.1979); *Butler-Johnson Corp. v. N.L.R.B.*, 608 F.2d 1303, 1305 (9th Cir. 1979); *N.L.R.B. v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir.1982); *Pogue v. U.S. Dept. of Labor*, 940 F.2d 1287, 1290 (9th Cir.1991); *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 853 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971); *Local No. 441, Int. Bro. of Electrical Workers v. N.L.R.B.*, 510 F.2d 1274, 1276 (D.C.Cir. 1975); *Teamsters Local U. 769 v. N.L.R.B.*, 532 F.2d 1385, 1392 (D.C.Cir.1976); *Faulkner Radio, Inc. v. F.C.C.*, 557 F.2d 866, 870 (D.C.Cir.1977); *Nichols v. Cohen*, 290 F.Supp. 207, 210 (S.D.Ill.1968); *Vinal v. Contributory Retirement Appeal Bd.*, 13 Mass.App. 85, 430 N.E.2d 440, 448–450 (1982); *Morris v. Board of Reg. in Medicine*, 405 Mass. 103, 539 N.E.2d 50, 54 *cert. denied*, 493 U.S. 977, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989).

Subtitle 15. Services to Handicapped Children.

§§ 9-1501 to 9-1508. Services to handicapped children.

Transferred.

Editor's note. — Section 2, ch. 419, Acts 1990, effective July 1, 1990, transferred former §§ 9-1501 through 9-1508 of this article to be present §§ 13 through 20 of Article 49D.

Additionally, ch. 419 transferred the subtitle heading "Subtitle 15. Services to Handicapped Children" to be the subtitle heading preceding § 13 of Article 49D.

Subtitle 16. Office of Administrative Hearings.

§ 9-1601. Applicability.

(a) *Exceptions.* — This subtitle does not apply to:
(1) the Governor;
(2) any unit of the Judicial Branch;
(3) any unit of the Legislative Branch;
(4) the Comptroller of the Treasury;
(5) the inmate adjustment hearing officers;
(6) the Public Service Commission;
(7) the State Workers' Compensation Commission;
(8) the Parole Commission;
(9) the Health Services Cost Review Commission; and
(10) the Health Resources Planning Commission.

(b) *In general.* — Except as provided in subsection (a) of this section, this subtitle shall apply to each agency that employs or engages one or more hearing officers to adjudicate contested cases unless the agency has been exempted by the Governor under subsection (c) of this section.

(c) *Temporary exemptions.* — Until July 1, 1994, the Governor may temporarily exempt an agency from this subtitle. (1989, ch. 788; 1991, ch. 21, § 3; ch. 251; 1992, ch. 22, §§ 1, 13.)

Effect of amendments. — Chapter 21, Acts 1991, effective Oct. 1, 1991, in (a) (5), substituted "State Workers' Compensation Commission" for "Workmen's Compensation Commission".

Chapter 251, Acts 1991, effective July 1, 1991, deleted "the Inmate Grievance Commission and" at the beginning of (a) (3).

The 1992 amendment, approved Apr. 7, 1992, and effective from date of enactment, inserted present (a) (2) and (a) (3) and redesignated the remaining paragraphs accordingly.

Editor's note. — Section 3, ch. 788, Acts 1989, effective Jan. 1, 1990, as amended by § 1, ch. 181, Acts 1991, effective June 1, 1991, and as amended by § 1, ch. 22, Acts 1992, approved Apr. 7, 1992, and effective from date of enactment, provides that "any reference in any law, regulation, or order to a hearing examiner or officer appointed or transferred under Title 9, Subtitle 16 of the State Government Article shall be deemed a reference to an administrative law judge of the Office of Administrative Hearings, including any reference to a hearing officer employed by or appointed by any agency."

Section 7, ch. 21, Acts 1991, provides that "the provisions of § 3 of this Act are intended solely to correct technical errors in the current law and to conform to terminology in the Labor and Employment Article (as enacted by Chapter ____ (H.B. 1) of the Acts of the General Assembly of 1991) and there is no intent for § 3 of this Act to revive or otherwise affect law that is the subject of other Acts, whether those Acts were signed by the Governor before or after this signing of this Act." House Bill 1 was enacted as ch. 8, Acts 1991.

List of automatic exceptions exclusive. — Subsection (a) specifies all of the agencies automatically exempt from the legislation. 74 Op. Att'y Gen. 38 (1989).

The hearings of an agency which does not employ or engage hearing officers are not required to be conducted by administrative law judge under this subtitle. 74 Op. Att'y Gen. 38 (1989).

Cited in Motor Vehicle Admin. v. Shrader, 324 Md. 454, 597 A.2d 939 (1991).

§ 9-1602. Establishment.

The Office of Administrative Hearings is created as an independent unit in the Executive Branch of State government. (1989, ch. 788.)

§ 9-1603. Chief Administrative Law Judge — In general.

(a) *Appointment.* — The Office is headed by a Chief Administrative Law Judge appointed by the Governor with the advice and consent of the Senate.

(b) *Term; other employment.* — The Chief Administrative Law Judge shall:

(1) be appointed for a term of 6 years;

(2) devote full time to the duties of the Office; and

(3) be eligible for reappointment.

(c) *Salary; qualifications; powers and duties generally.* — The Chief Administrative Law Judge shall:

(1) receive the salary provided in the State budget;

(2) be admitted to practice law in the State; and

(3) have the powers and duties specified in this subtitle.

(d) *Staff.* — The Chief Administrative Law Judge may employ a staff in accordance with the State budget. (1989, ch. 788; 1991, ch. 181.)

Effect of amendments. — The 1991 amendment substituted "6" for "3" in (b) (1).

Editor's note. — Section 2, ch. 181, Acts 1991, provides that "except as provided in § 3 of this Act, it is the intent of the General Assembly that the amendment to § 9-1603 (b) (1) of the State Government Article under this Act shall apply to the incumbent Chief Administrative Law Judge."

Section 3 of ch. 181 provides that "the salary of the incumbent Chief Administrative Law Judge may not be increased or decreased until January 1, 1993, and, effective January 1, 1993, the salary of the incumbent Chief Administrative Law Judge may be altered in the same manner that the salaries of other public officials serving greater than 4-year terms may be altered."

Section 4 of ch. 181 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect the Office of Administrative Hearings and all contested hearings beginning on or after January 1, 1990."

§ 9-1604. Same — Powers and duties.

(a) *Duties generally.* — The Chief Administrative Law Judge shall:

(1) supervise the Office of Administrative Hearings;

(2) establish qualifications for administrative law judges;

(3) appoint and remove administrative law judges in accordance with § 9-1605 of this subtitle;

(4) assign administrative law judges to conduct hearings in contested cases;

(5) if necessary, establish classifications for case assignment on the basis of subject matter, expertise, and case complexity;

(6) establish and implement standard and specialized training programs and provide materials for administrative law judges;

(7) provide and coordinate continuing education programs and services for administrative law judges, including research, technical assistance, technical and professional publications, compiling and disseminating information, and advise of changes in the law relative to their duties;

(8) develop model rules of procedure and other guidelines for administrative hearings;

(9) develop a code of professional responsibility for administrative law judges; and

(10) monitor the quality of State administrative hearings.

(b) *Powers generally; fees.* — (1) The Chief Administrative Law Judge may:

(i) serve as an administrative law judge in a contested case;

(ii) furnish administrative law judges on a contractual basis to other governmental entities;

(iii) accept and expend funds, grants, and gifts and accept services from any public or private source;

(iv) enter into agreements and contracts with any public or private agencies or educational institutions;

(v) adopt regulations to implement this subtitle; and

(vi) assess fees to cover administrative expenses as follows:

1. to file an appeal, a fee not exceeding $15; and

2. to process a subpoena, a fee not exceeding $5.

(2) Fees charged under paragraph (1) of this subsection for administrative expenses may not be charged to:

(i) State agencies; or

(ii) petitioners who are determined by the Office of Administrative Hearings to be unable to pay the fees.

(3) A fee charged under paragraph (1) of this subsection for filing an appeal shall be refunded to a party who initiates the appeal if the party receives a favorable decision from the administrative law judge.

(c) *Reports.* — The Chief Administrative Law Judge shall submit an annual report on the activities of the Office to the Governor and, subject to § 2-1312 of the State Government Article, to the General Assembly.

(d) *Meetings and conferences with advisory council.* — The Chief Administrative Law Judge shall meet and confer regularly with the Advisory Council on Administrative Hearings. (1989, ch. 788; 1992, ch. 134.)

Effect of amendments. — The 1992 amendment, effective July 1, 1992, in (b), redesignated the former introductory language as (1), former (1) through (5) as (1) (i) through (v) and added (1) (vi), (2) and (3).

§ 9-1605. Administrative law judges.

(a) *In general.* — An administrative law judge:

(1) shall be a member of the unclassified service;

(2) may be removed, suspended, or demoted by the Chief Administrative Law Judge for cause, after notice and an opportunity to be heard;

(3) shall receive the compensation provided in the State budget; and

(4) may not perform duties inconsistent with the duties and responsibilities of an administrative law judge.

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

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

(1) authorize the issuance of subpoenas for witnesses;

(2) administer oaths;

(3) examine an individual under oath; and

(4) compel the production of documents or other tangible things.

(d) *Refusal to comply with order; to show cause.* — (1) Without good cause, a person may not refuse an order by any administrative law judge to:

(i) appear for a hearing;

(ii) testify under oath; or

(iii) produce any relevant evidence, including documents or other tangible things.

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

(ii) On the return of an order issued under subparagraph (i) of this paragraph, if the judge hearing the matter determines that the person is guilty of refusal to comply with the order of the administrative law judge, the judge may commit the offender to jail as in cases of civil contempt. (1989, ch. 788; 1991, ch. 181.)

Effect of amendments. — The 1991 amendment added (c) and (d).

Editor's note. — Section 2, ch. 181, Acts 1991, provides that "except as provided in § 3 of this Act, it is the intent of the General Assembly that the amendment to § 9-1603 (b) (1) of the State Government Article under this Act shall apply to the incumbent Chief Administrative Law Judge."

Section 3 of ch. 181 provides that "the salary of the incumbent Chief Administrative Law Judge may not be increased or decreased until January 1, 1993, and, effective January 1, 1993, the salary of the incumbent Chief Administrative Law Judge may be altered in the same manner that the salaries of other public officials serving greater than 4-year terms may be altered."

Section 4 of ch. 181 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect the Office of Administrative Hearings and all contested hearings beginning on or after January 1, 1990."

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

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

(b) *Audits.* — The Office shall be subject to audit and examination by the Division of Audits of the Department of Fiscal Services under § 2-1215 of the State Government Article.

(c) *Selection of judges.* — Except as provided in this subtitle or in regulations adopted under this subtitle, an agency may not select or reject a particular administrative law judge for a particular proceeding. (1989, ch. 788.)

§ 9-1607. Designation of administrative law judges.

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

(1) the individual meets the qualifications for an administrative law judge established by the Office under § 9-1604 (a) (2) of this subtitle; and

(2) the agency that employs the individual consents to the assignment. (1989, ch. 788.)

§ 9-1608. State Advisory Council on Administrative Hearings — Establishment; composition; appointment.

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

(b) *Composition — Number.* — The Council consists of 9 members.

(c) *Same — Representation.* — Of the 9 Council members:

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

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

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

(4) 2 shall be secretaries or designees from departments involved in the adjudication of contested cases;

(5) 2 shall represent the Maryland State Bar Association; and

(6) 2 shall be from the general public.

(d) *Appointment.* — The Governor shall appoint the members specified in subsection (c) (4) through (6) of this section. (1989, ch. 788.)

§ 9-1609. Same — Terms; compensation; Chairman.

(a) *Terms.* — (1) The term of a member of the Council is 4 years.

(2) The terms of the members are staggered as required by the terms provided for members of the Council on January 1, 1990.

(3) A member is eligible to serve more than 1 term.

(b) *Compensation and reimbursement of expenses.* — A member of the Council may not receive compensation, but is entitled to reimbursement for expenses under the Standard State Travel Regulations.

(c) *Chairman.* — The Council shall designate a chairman from among its members. (1989, ch. 788; 1990, ch. 107.)

Editor's note. — Section 2, ch. 107, Acts 1990, effective July 1, 1990, provides that "the terms of the initial members of the State Advisory Council on Administrative Hearings shall expire as follows:

(1) 3 members on December 31, 1991;
(2) 3 members on December 31, 1992; and
(3) 3 members on December 31, 1993."

§ 9-1610. Same — Powers and duties; meetings.

(a) *Powers and duties.* — The Council shall:

(1) advise the Chief Administrative Law Judge in carrying out his duties;

(2) identify issues of importance to administrative law judges that should be addressed by the Chief Administrative Law Judge;

(3) review issues and problems relating to administrative hearings and the administrative process;

(4) review and comment upon policies and regulations proposed by the Chief Administrative Law Judge; and

(5) submit an annual report, subject to § 2-1312 of this article, to the Legislative Policy Committee of the General Assembly that includes a list of the agencies that are exempted from this subtitle under § 9-1601 (c) of this subtitle and the reasons for the exemptions.

(b) *Meetings.* — The Council shall meet at a regular time and place to be determined by the Council. (1989, ch. 788; 1991, ch. 55, § 6.)

Cross references. — See Editor's note to § 9-1601 of this article.

Effect of amendments. — The 1991 amendment, approved Apr. 9, 1991, and effective from date of enactment, inserted "subject to § 2-1312 of this article" in (a) (5).

Subtitle 17. Victim Services.

§ 9-1701. Definitions.

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

(b) *Board.* — "Board" means the State Board of Victim Services.

(c) *Crime.* — (1) "Crime" means an act that is committed by any person in the State that would constitute a crime under Article 27 of the Code or at common law.

THE ANNOTATED CODE
OF THE PUBLIC GENERAL LAWS
OF MARYLAND

1993 Supplement

Prepared by the Editorial Staff of the Publishers

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1993 REPLACEMENT

Place in Pocket of Corresponding Volume of Main Set.

Effective Date of Statutes

See Md. Const., Article XVI, § 2

Annotated through 622 A.2d 517. For complete scope of annotations and legislation, see preface in supplement to Volume 1.

THE MICHIE COMPANY

Law Publishers

CHARLOTTESVILLE, VIRGINIA

1993

(f) *Expenditures.* — Expenditures from the Fund, including earnings from the Archives Endowment Account, shall be made pursuant to an appropriation approved by the General Assembly in the annual State budget or by the budget amendment procedure provided for in § 7-209 of the State Finance and Procurement Article.

(g) *Continuing, nonlapsing fund.* — The Fund is a continuing, nonlapsing fund which is not subject to § 7-302 of the State Finance and Procurement Article.

(h) *Audit.* — The Fund and the Endowment Account are subject to audit by the Legislative Auditor. (1984, ch. 286, §§ 5, 8; 1993, ch. 81.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, added (b) (3); inserted present (c); deleted former (d); redesignated former (c) as present (d) (1); added (d) (2) and (d) (3); in present (d) (1), inserted "money received by" and "for 'the Archives of Maryland'" and added (e) through (h).

Subtitle 11. Services to Individuals With Disabilities.

§ 9-1105. Duties of Office.

Privatization of Maryland Corporate Partnership Project. — The Governor's Office for Individuals with Disabilities' privatization of the Maryland Corporate Partnership Project was consistent with that agency's statutory powers. 77 Op. Att'y Gen. — (August 17, 1992).

Subtitle 16. Office of Administrative Hearings.

§ 9-1601. Applicability.

(a) *Exceptions.* — This subtitle does not apply to:

(1) the Governor;

(2) any unit of the Judicial Branch;

(3) any unit of the Legislative Branch;

(4) the Comptroller of the Treasury;

(5) the inmate adjustment hearing officers;

(6) the Public Service Commission;

(7) the State Workers' Compensation Commission;

(8) the Parole Commission;

(9) the Health Services Cost Review Commission;

(10) the Health Resources Planning Commission; and

(11) unemployment insurance benefit determinations and employer obligation determinations in the Department of Economic and Employment Development, and appeals from those determinations.

(b) *In general.* — Except as provided in subsection (a) of this section, this subtitle shall apply to each agency that employs or engages one or more hearing officers to adjudicate contested cases unless the agency has been exempted by the Governor under subsection (c) of this section.

(c) *Temporary exemptions.* — Until July 1, 1994, the Governor may temporarily exempt an agency from this subtitle. (1989, ch. 788; 1991, ch. 21, § 3; ch. 251; 1992, ch. 22, §§ 1, 13; 1993, ch. 30.)

Effect of amendments.
The 1993 amendment, effective Oct. 1, 1993, added (a) (11).

University of Baltimore Law Review. — For article, "Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change," see 21 U. Balt. L. Rev. 1 (1991).

Quoted in State Dep't of Pub. Safety & Correctional Servs. v. Bailey, 95 Md. App. 12, 619 A.2d 176 (1993).

§ 9-1602. Establishment.

University of Baltimore Law Review. — For article, "Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change," see 21 U. Balt. L. Rev. 1 (1991).

§ 9-1604. Same — Powers and duties.

Powers. — The Chief Administrative Law Judge has the discretion to adopt a regulation providing that a nonindigent party's failure to pay a filing fee will result in the dismissal of the party's appeal. 77 Op. Att'y Gen. — (May 29, 1992).

§ 9-1605. Administrative law judges.

(a) *In general.* — An administrative law judge:

(1) shall be a member of the unclassified service of the State Personnel Management System;

(1993, ch. 22, § 1.)

Effect of amendments.
The 1993 amendment, effective Oct. 1, 1993, added "of the State Personnel Management System" at the end of (a) (1).

As the rest of this section was not amended, it is not reprinted in this Supplement.

Editor's note.
Section 3, ch. 22, Acts 1993, provides that "this Act is not intended to change the status as of October 1, 1993 of any employee, official, or position from the State Personnel Management System or any other personnel system to a different personnel system, from the unclassified service to the classified service, from the classified service to the unclassified service, or otherwise from one employment status to a different employment status."

Section 4 of ch. 22 provides that "except as expressly provided to the contrary in this Act, any transaction or employment status affected by or flowing from any change of nomenclature or any statute amended, repealed, or transferred by this Act and validly entered into or existing before October 1, 1993 and every right, duty, or interest flowing from the statute, remains valid after October 1, 1993 and may be terminated, completed, consummated, or enforced as required or allowed by any statute amended, repealed, or transferred by this Act as though the repeal, amendment, or transfer had not occurred. If the change in nomenclature involves a change in name or designation of any State unit, the successor unit shall be considered in all respects as having the powers and obligations granted the former unit."

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

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

(1) authorized by law;

(2) the individual is representing:

(i) a recipient of or applicant for benefits that are:

1. based on the recipient's or applicant's income and resources; and

2. provided by the Department of Human Resources or the Department of Health and Mental Hygiene;

(ii) a resident of a facility at a proceeding conducted under § 19-344 (q) (4) or § 19-345 (b) of the Health-General Article;

(iii) a health care facility, as defined in § 10-101 of the Health-General Article, at a proceeding under the provisions of § 10-632, § 10-708, § 12-114, or § 12-120 of the Health-General Article; or

(iv) a grievant at a proceeding conducted pursuant to Article 41, § 4-102.1 of the Code concerning a grievance submitted to the Inmate Grievance Office, provided the representation is not otherwise restricted for reasons of security or expense pursuant to regulations, rules, directives, or policies adopted by the Division of Correction or Patuxent Institution;

(3) the individual is a designee of a corporation while appearing on its behalf in an administrative proceeding held under Article 48A, § 240AA of the Code (automobile insurance); or

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

(i) Article 56, § 260 of the Code (Home Improvement Commission);

(ii) Title 5 of the Labor and Employment Article (Occupational Safety and Health); or

(iii) regulations adopted pursuant to § 14-303 of the State Finance and Procurement Article, concerning the decertification of a minority business enterprise to conduct business with the Department of Transportation.

(b) *Business entities.* — (1) An employee designated by a business entity under subsection (a) (3) or (4) of this section:

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

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

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

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

(c) *Right to represent self.* — This section may not be interpreted to limit the right of an individual to appear on the individual's own behalf. (1993, ch. 59, § 1.)

Editor's note. — Section 5, ch. 59, Acts 1993, provides:

"(1) Except as provided in subsection (2) of this section, the provisions of § 1 of this Act shall apply to all administrative proceedings commencing on or after June 1, 1993.

(2) The provisions of the following sections of the State Government Article, as enacted by this Act, shall apply as follows:

(i) Section 10-222 shall apply to all actions for judicial review filed on or after June 1, 1993;

(ii) Section 10-223 shall apply to all appeals filed on or after June 1, 1993; and

(iii) Section 9-1607.1 shall apply, insofar as practicable, to all administrative proceedings pending on June 1, 1993.

(3) This § 5 is intended to preclude application of this Act to any administrative proceeding that commenced before June 1, 1993, even if the matter is subsequently remanded for further administrative proceedings after judicial review (e.g., Sugarloaf Citizens Association, et al v. Northeast Waste Disposal Authority, et al, 323 Md. 641, 594 A. 2d 1115)."

Section 6 of ch. 59 provides that the act shall take effect June 1, 1993.

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§ 9-1607.2. Applicability of procedural regulations.

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

(b) *Conflict.* — Unless a federal or State law or regulation requires that a federal or State procedure shall be observed, the regulations specified in subsection (a) of this section shall take precedence in the event of a conflict. (1993, ch. 59, § 1.)

Editor's note. — Section 6, ch. 59, Acts 1993, provides that the act shall take effect June 1, 1993.

§ 9-1610. Same — Powers and duties; meetings.

(a) *Powers and duties.* — The Council shall:

(1) advise the Chief Administrative Law Judge in carrying out his duties;

(2) identify issues of importance to administrative law judges that should be addressed by the Chief Administrative Law Judge;

(3) review issues and problems relating to administrative hearings and the administrative process;

(4) review and comment upon policies and regulations proposed by the Chief Administrative Law Judge;

(5) advise the Governor as to those agencies for which a continuing exemption under § 9-1601 of this subtitle should be maintained as consistent with the purposes of this subtitle; and

(6) submit an annual report, subject to § 2-1312 of this article, to the Legislative Policy Committee of the General Assembly that includes a list of the agencies that are exempted from this subtitle under § 9-1601 (c) of this subtitle and the reasons for the exemptions.

(b) *Meetings.* — The Council shall meet at a regular time and place to be determined by the Council. (1989, ch. 788; 1991, ch. 55, § 6; 1993, ch. 30.)

Effect of amendments.
The 1993 amendment, effective Oct. 1, 1993, inserted (a) (5) and redesignated the following subdivision accordingly.

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§ 10-138. Proposed amendments or repeal of regulations.

(a) *Proposed amendments or repeal.* — Within 60 days after an evaluation report is approved pursuant to § 10-135 (d) (3), § 10-136 (a) (2) (i), or § 10-137 of this subtitle, the unit shall propose for adoption any amendments to or repeal of its regulations that were proposed in the unit's evaluation report as approved.

(b) *Manner of proposing amendments or repeal.* — The amendments or repeal shall be proposed in the manner provided under Part III of this subtitle. (1985, ch. 727; 1986, ch. 5, § 1.)

§ 10-139. Citation of part.

This Part VI of this subtitle may be cited as the "Regulatory Review and Evaluation Act". (1985, ch. 727.)

Cross references. — See Editor's note to § 10-101 of this article.

Subtitle 2. Administrative Procedure Act — Contested Cases.

§ 10-201. Definitions.

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

(b) *Agency.* — "Agency" means:

(1) an officer or unit of the State government authorized by law to adjudicate contested cases; or

(2) a unit that:

(i) is created by general law;

(ii) operates in at least 2 counties; and

(iii) is authorized by law to adjudicate contested cases.

(c) *Contested case.* — "Contested case" means a proceeding before an agency to determine:

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

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

(d) *License.* — "License" means all or any part of permission that:

(1) is required by law to be obtained from an agency;

(2) is not required only for revenue purposes; and

(3) is in any form, including:

(i) an approval;

(ii) a certificate;

(iii) a charter;

(iv) a permit; or

(v) a registration. (An. Code 1957, art. 41, §§ 244, 250A; 1984, ch. 284, § 1.)

Maryland Law Review. — For article, "Survey of Developments in Maryland Law, 1984-85," see 45 Md. L. Rev. 473 (1986).

For survey, "Developments in Maryland Law, 1989-90," see 50 Md. L. Rev. 1027 (1991).

Administrative Procedure Act shall apply to all State agencies except those expressly excluded. Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Board of Pharmacy is "agency." Maryland Bd. of Pharmacy v. Peco, Inc., 234 Md. 200, 198 A.2d 273 (1964).

Police department of Baltimore City is State "agency." Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Inmate Grievance Commission is within definition of State "agency." Bryant v. Department of Pub. Safety & Correctional Servs., 33 Md. App. 357, 365 A.2d 764 (1976).

Washington Suburban Sanitary Commission is "agency" under Administrative Procedure Act. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Washington Suburban Sanitary Commission is State agency; thus its retirement plan establishes an administrative procedure. Quesenberry v. Washington Sub. San. Comm'n, 311 Md. 417, 535 A.2d 481 (1988).

County agencies are not included within the provisions of the Administrative Procedure Act. Urbana Civic Ass'n v. Urbana Mobile Village, Inc., 260 Md. 458, 272 A.2d 628 (1971).

Board of license commissioners of Anne Arundel County is not "agency." Valentine v. Board of License Comm'rs, 291 Md. 523, 435 A.2d 459 (1981).

County boards of education are not State agencies authorized to make rules or adjudicate cases. Bernstein v. Board of Educ., 245 Md. 464, 226 A.2d 243 (1967).

Determination of whether dispute is contested case. — It is the nature of the dispute, rather than the stage of the proceedings, that determines whether or not a matter is a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

Proceeding not a "contested case." — Proceeding in which inmates were denied reinstatement in a work release program was not a "contested case." Holmes v. Robinson, 84 Md. App. 144, 578 A.2d 294 (1990), cert. denied, 321 Md. 501, 583 A.2d 275 (1991).

Statute providing for hearing doesn't itself make "contested case." — The mere fact that a statute calls for a hearing is not in and of itself sufficient to make the subject of that hearing a "contested case." Washington Sub. San. Comm'n v. Donacam Assocs., 57 Md. App. 719, 471 A.2d 1097 (1984), rev'd on other grounds, 302 Md. 501, 489 A.2d 26 (1985).

Challenging assessment for water and sewer charges as "contested case." — Statutory proceedings before the Washington Suburban Sanitary Commission whereby property owner challenged the correctness of assessment for water and sewer front-foot benefit charges was an appealable "contested case" under the Administrative Procedure Act. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Discrimination proceedings not "contested case." — Investigation of claim of race and age discrimination, and resulting no probable cause finding, was not a contested case and was not appealable under the administrative procedure provisions in § 10-215 of this article. Parlato v. State Comm'n on Human Relations, 76 Md. App. 695, 548 A.2d 144 (1988), cert. denied, 314 Md. 497, 551 A.2d 867 (1989).

Withdrawal of firm's certification as minority business enterprise "contested case." — Withdrawal by an agency of a firm's certification as a minority business enterprise may give rise to a "contested case" under subsection (c) of this section, hence permitting judicial review under § 10-215. Warwick Corp. v. DOT, 61 Md. App. 239, 486 A.2d 224 (1985).

Dispute resolved prior to hearing. — A dispute resolved prior to a formal hearing may, nonetheless, be a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

Baltimore City health department is not State "agency." American Ambulance & Oxygen Serv. v. Mayor of Baltimore, 31 Md. App. 432, 356 A.2d 580 (1976).

Hearing on AFDC emergency as "contested case." — A hearing held relative to a claim for emergency assistance under the Aid to Families with Dependent Children program is a "contested case." Murray v. State Dep't of Social Servs., 260 Md. 323, 272 A.2d 16 (1971).

Video-conferencing. — Video-conferencing does not conflict with the Administrative Procedure Act's hearing procedures. 74 Op. Att'y Gen. 187 (1989).

Applied in Baltimore County v. Penn, 66 Md. App. 199, 503 A.2d 257, cert. denied, 306 Md. 118, 507 A.2d 631 (1986); Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987).

Quoted in Silverman v. Maryland Deposit Ins. Fund Corp., 317 Md. 306, 563 A.2d 402 (1989); Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

Cited in Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984); Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986); Board of Educ. v. Secretary of Personnel, 317 Md. 34, 562 A.2d 700 (1989); CBS, Inc. v. Comptroller of Treas., 319 Md. 687, 575 A.2d 324 (1990); Maryland Real Estate Comm'n v. Johnson, 320 Md. 91, 576 A.2d 760 (1990); Maryland State Police v. Zeigler, 85 Md. App. 272, 583 A.2d 1085 (1991).

§ 10-202. Scope of subtitle.

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

(1) an agency of the Legislative Branch of the State government;

(2) an agency of the Judicial Branch of the State government; or

(3) the following agencies of the Executive Branch of the State government:

(i) the Governor;

(ii) the Department of Assessments and Taxation;

(iii) the Board of Appeals of the Department of Economic and Employment Development;

(iv) the Insurance Division of the Department of Licensing and Regulation;

(v) the Injured Workers' Insurance Fund;

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

(vii) the Public Service Commission;

(viii) the Maryland Tax Court; or

(ix) 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.

(c) *Applicability to property tax assessment appeals boards and correction of death certificates.* — This subtitle does apply to:

(1) the property tax assessment appeals boards; and

(2) as to requests for correction of certificates of death under § 5-310 (d) (2) of the Health-General Article, the Office of the Chief Medical Examiner. (An. Code 1957, art. 41, § 244; 1984, ch. 284, § 1; 1986, ch. 567; 1987, ch. 311, § 1; 1989, ch. 5, § 1; 1990, ch. 71, § 3; 1991, ch. 21, § 3; 1992, ch. 547.)

Effect of amendments. — The 1991 amendment, effective Oct. 1, 1991, in (a) (3) (ix), substituted "State Workers' Compensation Commission" for "Workmen's Compensation Commission."

The 1992 amendment, effective Jan. 1, 1993, added (c) (2) and made related stylistic and punctuation changes.

Editor's note. — Section 2, ch. 547, Acts 1992, provides that "the Chief Medical Examiner, in consultation with the Office of Administrative Hearings, shall adopt final regulations for the purpose of implementing this Act, to be effective January 1, 1993."

Section 3 of ch. 547 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect all certificates of death for individuals who died on or after May 1, 1987. Notwithstanding the restrictions of § 5-310 (d) (2) (i) of the Health-General Article as enacted by § 1 of this Act, persons in interest may request corrections to certificates of death for individuals who died on or after May 1, 1987, by filing a request with

the Office of the Chief Medical Examiner no later than June 30, 1993."

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

Administrative Procedure Act shall apply to all State agencies except those expressly excluded. Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Stated in Everett v. Baltimore Gas & Elec. Co., 307 Md. 286, 513 A.2d 882 (1986).

Cited in Miller v. Insurance Comm'r, 70 Md. App. 355, 521 A.2d 761, cert. denied, 310 Md. 130, 527 A.2d 51 (1987).

§ 10-203. Political subdivisions and instrumentalities.

A political subdivision of the State or an instrumentality of a political subdivision is entitled, to the same extent as other legal entities, to be an interested person, party, or petitioner in a matter under this subtitle, including an appeal. (An. Code 1957, art. 41, § 256A; 1984, ch. 284, § 1.)

County as participant in administrative proceedings. — A county, its agencies, and its instrumentalities may participate in proceedings under the Administrative Procedure Act to the same extent as any other legal entity. Montgomery County v. One Park N. Assocs., 275 Md. 193, 338 A.2d 892 (1975).

§ 10-204. Procedural regulations.

(a) *Required.* — (1) Each agency shall adopt regulations to govern procedures under this subtitle and practice before the agency, including the related forms that the agency requires and the instructions for completing the forms.

(2) A regulation under this subsection may not:

(i) grant the right to practice law to an individual who is not authorized to practice law; or

(ii) interfere with the right of a lawyer to practice before the agency.

(b) *Prehearing procedures.* — The agency may adopt regulations that:

(1) provide for prehearing conferences in contested cases; or

(2) set other appropriate prehearing procedures in contested cases.

(c) *Descriptive statement.* — To help persons deal with the agency, the agency shall supplement, so far as practicable, the regulations under this section with a description of the procedures of the agency. (An. Code 1957, art. 41, §§ 245, 251A; 1984, ch. 284, § 1; 1992, ch. 547.)

Effect of amendments. — The 1992 amendment, effective Jan. 1, 1993, reenacted the section without change.

Editor's note. — Section 2, ch. 547, Acts 1992, provides that "the Chief Medical Examiner, in consultation with the Office of Administrative Hearings, shall adopt final regulations for the purpose of implementing this Act, to be effective January 1, 1993."

Section 3 of ch. 547 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect all certificates of death for individuals who died on or after May 1, 1987. Notwithstanding the restrictions of § 5-310 (d) (2) (i) of the Health-General Article as enacted by § 1 of this Act, persons in interest may request corrections to certificates of death for individuals who died on or after May 1, 1987, by filing a request with the Office of the Chief Medical Examiner no later than June 30, 1993."

§ 10-205. Notice and hearing.

(a) *In general.* — An agency shall give all parties in a contested case an opportunity for a hearing after reasonable notice.

(b) *Contents of notice.* — The notice shall:

(1) state the time, place, and nature of the hearing;

(2) state the authority of the agency to hold the hearing;

(3) cite the specific section of each statute and regulation, including a procedural regulation, that is pertinent; and

(4) state concisely and simply:

(i) the facts that are asserted; or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved.

(c) *Additional statement.* — The agency shall provide a more detailed statement of the facts asserted if:

(1) when notice was given, the facts were not stated in detail; and

(2) a party requests the statement.

(d) *Notice mailed to business address of licensee — When allowed.* — Where a licensing statute provides for service other than by regular mail, notice by an agency may be sent by regular mail to the business address of record of a person holding a license issued by the agency if:

(1) the person is required by law or regulation to advise the agency of the business address; and

(2) the agency has been unsuccessful in giving notice in the manner otherwise provided by the licensing statute.

(e) *Same — Rehearings.* — Upon a showing that the person neither knew nor had reasonable opportunity to know of the fact of service, an agency shall grant a rehearing to a person served by regular mail under subsection (d) of this section.

(f) *Limitation.* — For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party. (An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239.)

Different procedures for legislative and judicial matters. — The Administrative Procedure Act sets up different procedures to be followed in the promulgation of rules and regulations on the one hand and the hearing of contested cases on the other. Board of Liquor License Comm'rs v. Leone, 249 Md. 263, 239 A.2d 82 (1968).

This section requires hearing only in "contested case." Eliason v. State Rds. Comm'n, 231 Md. 257, 189 A.2d 649, cert. denied, 375 U.S. 914, 84 S. Ct. 211, 11 L. Ed. 2d 152 (1963).

Adequate notice essential to fair play. — Basic tenet of fair play in administrative proceedings is the right of a party to be given adequate notice of the nature of the proceeding in order that he may prepare his defense. Ferguson v. UPS, 270 Md. 202, 311 A.2d 220 (1973), cert. denied, 415 U.S. 1000, 94 S. Ct. 1602, 39 L. Ed. 2d 895 (1974).

Cited in Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

§ 10-206. Disposition before hearing.

Unless otherwise precluded by law, an agency may dispose of a contested case by:

(1) stipulation;

(2) settlement;

(3) consent order; or

(4) default. (An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1.)

Contested case. — A dispute resolved prior to a formal hearing may, nonetheless, be a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

§ 10-207. Delegation of hearing authority.

(a) *Authorized.* — (1) An agency or an official or employee of an agency may delegate to the Office of Administrative Hearings the authority that the agency, official, or employee has to hear particular contested cases.

(2) An agency, by regulation, may delegate to the Office of Administrative Hearings the authority to issue the final administrative decision of the agency in a contested case.

(b) *Duties of the Office of Administrative Hearings.* — The Office of Administrative Hearings shall:

(1) conduct the hearing; and

(2) submit in writing to the parties involved in the administrative action, including the agency, official, or employee who delegated the authority:

(i) proposed findings of fact and proposed conclusions of law; or

(ii) if the agency has delegated the authority to issue a final decision to the Office of Administrative Hearings, final findings of fact and conclusions of law. (An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1; 1991, ch. 181.)

Effect of amendments. — The 1991 amendment rewrote the section.

Editor's note. — Section 4, ch. 181, Acts 1991, provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect the Office of Administrative Hearings and all contested hearings beginning on or after January 1, 1990."

Authority to adjudicate all issues. — The hearing officer (now Office of Administrative Hearings) has the authority to fully adjudicate all of the issues, both procedural and substantive, that surround the commitment of patients to mental institutions. 64 Op. Att'y Gen. 229 (1979).

Substitution of examiners without a de novo proceeding is allowable only where the original examiner is unavailable and either: (1) The case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses, or (2) if it is a case in which credibility is involved, the parties agree to proceed without a de novo administrative proceeding. Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493, cert. denied, 307 Md. 260, 513 A.2d 314 (1986) (decision prior to 1991 amendment).

Applied in Fort Washington Community Hosp. v. Southern Md. Hosp. Ctr., 66 Md. App. 480, 505 A.2d 117 (1986), aff'd, 308 Md. 323, 519 A.2d 727 (1987).

§ 10-208. Evidence.

(a) *In general.* — (1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.

(2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.

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

(c) *Exclusions.* — The agency may exclude evidence that is:

(1) incompetent;

(2) irrelevant;

(3) immaterial; or

(4) unduly repetitious.

(d) *Rules of privilege.* — The agency shall apply a privilege that law recognizes.

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

(1) call witnesses;

(2) offer evidence, including rebuttal evidence;

(3) cross-examine any witness that another party or the agency calls; and

(4) present summation and argument.

(f) *Documentary evidence.* — The agency may receive documentary evidence:

(1) in the form of copies or excerpts; or

(2) by incorporation by reference.

(g) *Official notice of facts.* — (1) The agency may take official notice of a fact that is:

(i) judicially noticeable; or

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

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

(i) before or during the hearing, by reference in a preliminary report, or otherwise, shall notify each party; and

(ii) shall give each party an opportunity to contest the fact.

(h) *Evaluation.* — The agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence. (An. Code 1957, art. 41, § 252; 1984, ch. 284, § 1.)

Administrative agencies are not bound by technical common-law rules of evidence. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

But they must observe basic rules of fairness as to parties appearing before them. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

Exclusion of "incompetent" evidence. — The legislature clearly has indicated its intent that evidence which would be considered "incompetent," and for that reason inadmissible for substantive purposes in judicial proceedings, should also be excluded in proceedings before administrative agencies. Department of

Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989).

Hearsay evidence is admissible before 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. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Kade v. Charles H. Hickey Sch., 80 Md. App. 721, 566 A.2d 148 (1989).

Limitations on use of hearsay. — Even though hearsay is admissible, there are limits on its use; it must be competent and have probative force. Kade v. Charles H. Hickey Sch., 80 Md. App. 721, 566 A.2d 148 (1989).

Polygraph evidence does not meet the standard, under the Maryland Administrative Procedure Act, of "competent" evidence. Department of Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989).

Transcribed testimony of police informant at previous criminal trial was admissible in hearing before Board of Pharmacy where it was taken under oath, the informant was unavailable to testify in person at the trial, and the opposing party, as the defendant in the criminal trial and the respondent in the action before the Board, was afforded an opportunity to cross-examine the informant at the criminal trial and extensively availed himself of that opportunity. Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 436 A.2d 525 (1981), cert. denied, 292 Md. 596 (1982).

Failure to object to admission of evidence. — If the opponent fails to object, he will not later be heard to complain that the evidence should not have been admitted. Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

Burden of proof. — The comparative degree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, i.e., a preponderance of the evidence is necessary. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960).

Video-conferencing. — A hearing conducted by video-conferencing enables a party to call and examine witnesses, offer evidence, cross-examine adverse witnesses, and present summation and argument, just as if the presiding official were physically present. 74 Op. Att'y Gen. 187 (1989).

When a suppression hearing is held each party ordinarily should be afforded a reasonable opportunity to present argument. The trial judge, of necessity, must have great latitude in controlling the duration and limiting the scope of these arguments; the trial judge may limit counsel to a reasonable time, ensure that the argument does not stray unduly from the mark, and terminate argument when continuation would be repetitive or redundant. State v. Brown, 324 Md. 532, 597 A.2d 978 (1991).

"Contested case" hearing not required. — The Air Management Administration is not required to hold a "contested case" hearing upon request, before ruling on an application for a Prevention of Significant Deterioration (PSD) permit approval. The construction permit approval stage is the point at which a hearing is required by law, thus meeting the definition of a contested case. Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

Quoted in Doctors' Hosp. v. Maryland Health Resources Planning Comm'n, 65 Md. App. 656, 501 A.2d 1324 (1986).

Cited in Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986).

§ 10-209. Consideration of other evidence.

In the determination of a contested case, the agency may consider only evidence that is in the record. (An. Code 1957, art. 41, § 252; 1984, ch. 284, § 1.)

§ 10-210. Contents of record.

Unless law provides for a de novo review, the agency adjudicating a contested case shall make a record that includes:

(1) all motions and pleadings;

(2) all documentary evidence that the agency receives;

(3) a statement of each fact of which the agency has taken official notice;

(4) any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of

the agency who is not authorized to participate in the decision making process;

(5) each question;

(6) each offer of proof;

(7) each objection and the ruling on the objection;

(8) each finding of fact or conclusion of law proposed by:

(i) a party; or

(ii) a hearing officer;

(9) each exception to a finding or conclusion proposed by a hearing officer; and

(10) each intermediate proposed and final ruling by or for the agency, including each report or opinion issued in connection with the ruling. (An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1.)

§ 10-211. Transcription of proceedings.

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

(1) requests the transcription; and

(2) pays any required costs. (An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1.)

§ 10-212. Examination of evidence.

If a majority of the officials who are to make the final decision in a contested case have not heard the evidence and the proposed decision is adverse to a party other than the agency, the officials may not make the final decision until:

(1) the agency:

(i) serves on each party the proposed decision, including findings of fact and conclusions of law; and

(ii) gives each party whom the proposed decision affects adversely an opportunity to:

1. file exceptions; and

2. present argument to a majority of the officials who are to make the final decision; and

(2) a majority of the officials who are to make the final decision consider personally each part of the record that the party cites. (An. Code 1957, art. 41, § 253; 1984, ch. 284, § 1.)

Evidence need not be heard by all those who will render final decision in a "contested case." Younkin v. Boltz, 241 Md. 339, 216 A.2d 714 (1966).

When service of decision required. — The General Assembly requires service of the proposed decision, including findings of fact and conclusions of law, and argument, whenever a majority of the decision makers was not actually present at the taking of testimony. Bethesda Mgt. Servs., Inc. v. Department of Licensing & Regulation, 276 Md. 619, 350 A.2d 390 (1976).

Substitution of examiners without a de novo proceeding is allowable only where the original examiner is unavailable and either: (1) The case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses, or (2) if it is a case in which credibility is in-

volved, the parties agree to proceed without a de novo administrative proceeding. Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493, cert. denied, 307 Md. 260, 513 A.2d 314 (1986).

Cited in Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984).

§ 10-213. Ex parte communications.

(a) *Generally prohibited.* — (1) Except as provided in paragraph (2) of this subsection, an individual who is not authorized to participate in the decision making process of a contested case may not communicate ex parte with an individual who is involved in the process with regard to any issue of law or fact in the contested case.

(2) An individual who is involved in the decision making process may communicate with members of an advisory staff of the agency or any counsel for the agency who otherwise does not participate in the contested case.

(b) *Disclosure.* — An individual who is involved in the decision making process and who is personally aware of an ex parte communication that is made in violation of subsection (a) of this section shall:

(1) include in the record of the contested case:

(i) each written communication received;

(ii) a memorandum that states the substance of each oral communication received;

(iii) each written response to a communication; and

(iv) a memorandum that states the substance of each oral response to the communication; and

(2) send to each party a copy of each communication, memorandum, and response.

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

(d) *Remedial action.* — (1) To eliminate the effect of an ex parte communication that is made in violation of subsection (a) of this section, the hearing officer may:

(i) withdraw from the proceeding; or

(ii) terminate the proceeding without prejudice.

(2) An order to terminate the proceeding without prejudice shall state the last date by which a party may reinstitute the proceeding. (An. Code 1957, art. 41, § 254A; 1984, ch. 284, § 1.)

Cited in Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

§ 10-214. Final decisions and orders.

(a) *Form.* — A final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record.

(b) *Contents.* — (1) A final decision in a contested case shall contain separate statements of:

(i) the findings of fact; and

(ii) the conclusions of law.

(2) If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.

(3) If, in accordance with regulations, a party submitted proposed findings of fact, the final decision shall state a ruling on each proposed finding.

(c) *Distribution.* — The agency promptly shall deliver or mail a copy of the final decision or order to:

(1) each party; or

(2) the party's attorney of record. (An. Code 1957, art. 41, § 254; 1984, ch. 284, § 1.)

Contents of order. — Failure to comply with the requirements of this section as to the contents of an order requires the reviewing court to remand the case for the appropriate findings of fact; this is no more than a recognition of the fundamental right of a party to be apprised of the facts relied upon by the agency and is frequently required by a court as an aid to judicial review. Crumlish v. Insurance Comm'r, 70 Md. App. 182, 520 A.2d 738 (1987).

For agencies subject to the Administrative Procedure Act, the requirement that the agency make and disclose specific findings of fact and conclusions of law is statutory. But even agencies, such as the Workers' Compensation Commission, that are not under that act are subject to that requirement. Institute of Mission Helpers v. Beasley, 82 Md. App. 155, 570 A.2d 382 (1990).

Applied in Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990).

§ 10-215. Judicial review.

(a) *Filing authorized.* — 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.

(b) *Jurisdiction and venue.* — 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.

(c) *Parties.* — The court may permit any other interested person to intervene in a proceeding under this section.

(d) *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 agency may grant or the reviewing court may order a stay of the enforcement of the final decision on terms that the agency or court considers proper.

(e) *Additional evidence before agency.* — (1) The court may order the agency 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 agency.

(2) On the basis of the additional evidence, the agency may modify the findings and decision.

(3) The agency shall file with the reviewing court, as part of the record:

(i) the additional evidence; and

(ii) any modifications of the findings or decision.

(f) *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 agency that do not appear on the record.

(3) On request, the court shall:

(i) hear oral argument; and

(ii) receive written briefs.

(g) *Decision.* — In a proceeding under this section, the court may:

(1) remand the case for further proceedings;

(2) affirm the decision of the agency; or

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

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the agency;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

(vi) is arbitrary or capricious. (An. Code 1957, art. 41, § 255; 1984, ch. 284, § 1.)

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

For article, "Survey of Developments in Maryland Law, 1984-85," see 45 Md. L. Rev. 473 (1986).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

For survey, "Developments in Maryland Law, 1989-90," see 50 Md. L. Rev. 1027 (1991).

University of Baltimore Law Review. — For article, "Health Claims Arbitration in Maryland: The Experiment Has Failed," see 14 U. Balt. L. Rev. 481 (1985).

For article, "Fair Treatment for Contractors Doing Business with the State of Maryland," see 15 U. Balt. L. Rev. 215 (1986).

Section to be followed by party seeking initial judicial review. — Aggrieved party seeking initial judicial review of a decision of an administrative agency does so in accordance with the provisions of this section. Maryland State Bd. of Motion Picture Censors v. Marhenke, 18 Md. App. 175, 305 A.2d 501, cert. denied, 269 Md. 762 (1973).

Limitations on scope of review. — A reviewing court is restricted to the record made before the administrative agency, and is confined to whether, based upon the record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency. Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989).

Standing. — Where organization did not allege any property interest distinct from its members that the issuance of two permits would affect, the organization was without standing to challenge the issuance of the permits under the Maryland Administrative Procedure Act. Maryland Waste Coalition, Inc. v. Maryland Dep't of Env't, 84 Md. App. 544, 581 A.2d 60 (1990), rev'd on other grounds, 327 Md. 596, 612 A.2d 241 (1992).

In order to have standing to appeal to the circuit court from an administrative decision, a person must (1) have been a party to the proceeding before the agency; and (2) be aggrieved by the agency decision. Maryland Waste Coalition, Inc. v. Maryland Dep't of Env't, 84 Md. App. 544, 581 A.2d 60 (1990), rev'd on other grounds, 327 Md. 596, 612 A.2d 241 (1992).

So long as the agency's decision is not predicated solely on an error of law, the Court of Appeals will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the agency. Caucus Distribs., Inc. v. Maryland Sec. Comm'r, 320 Md. 313, 577 A.2d 783 (1990); Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991).

Substantial evidence test applies when the only question is whether the agency, using the correct legal standard, properly applied the law to the facts; however, where the agency's decision is based on an erroneous conclusion of law, this deferential test does not apply. Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991).

Discretion of trial court. — A decision to remand, affirm, reverse, or modify a decision of an administrative agency is one that is committed to the sound discretion of the trial court. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Deviation from prior agency decisions. — An unexplained deviation from prior agency decisions may constitute an arbitrary and capricious act under this section. Montgomery County v. Anastasi, 77 Md. App. 126, 549 A.2d 753 (1988).

Substantial evidence test. — When deciding whether any factual finding is in violation of subsection (g) of this section, Maryland courts have used the substantial evidence test. Doctors' Hosp. v. Maryland Health Resources Planning Comm'n, 65 Md. App. 656, 501 A.2d 1324 (1986).

"Substantial evidence," as the test for reviewing factual findings of administrative agencies, has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Maryland Shipbuilding & Drydock Co. v. Maryland Comm'n on Human Relations, 70 Md. App. 538, 521 A.2d 1263, cert. denied, 310 Md. 130, 527 A.2d 51 (1987).

Finality of administrative agency action. — The action of an administrative agency, like the order of a court, is final if it determines or concludes the rights of the parties, or if it denies the parties the means of further prosecuting or defending their rights and interests in the subject matter in proceedings before the agency, thus leaving nothing further for the agency to do. Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 459 A.2d 205 (1983).

Review of factual finding. — When determining whether an agency's factual finding violates this section, the appropriate standard of review is the substantial evidence test. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Review of finding of law. — When considering whether the agency erred as a matter of law, for example, when there is a challenge to a regulatory interpretation, the substituted judgment standard is to be used. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Failure to await final agency decision is not excused by a party's argument that an agency will be exceeding its authority if it ultimately interprets the statute and decides the case contrary to that party's position. Maryland Comm'n on Human Relations v. Mass Transit Admin., 294 Md. 225, 449 A.2d 385 (1982).

Time limitations. — An appeal to judicially review an administrative agency determination under this section is governed by the time limitations set forth in Maryland Rules, Rule B4. Clinton Community Hosp. Corp. v. Maryland Comprehensive Health Planning Agency, 31 Md. App. 265, 355 A.2d 775 (1976).

Where county not "party aggrieved." — Notwithstanding a county's interest in an agency head's order and in a review board's order, not being a party to either of these proceedings, a county was not a "party aggrieved" and, hence, was not entitled to judicial review. Montgomery County v. One Park N. Assocs., 275 Md. 193, 338 A.2d 892 (1975).

Court's statutory role upon review of a decision of an agency goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative action. Harford Mem. Hosp. v. Health Servs. Cost Review Comm'n, 44 Md. App. 489, 410 A.2d 22 (1980).

A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact. Commissioner, Baltimore City Police Dep't v. Cason, 34 Md. App. 487, 368 A.2d 1067, cert. denied, 280 Md. 728 (1977); Toland v. State Bd. of Educ., 35 Md. App. 389, 371 A.2d 161 (1977).

A reviewing court may, and should, examine any conclusion reached by an agency, to see

whether reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by permissible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion. Commissioner, Baltimore City Police Dep't v. Cason, 34 Md. App. 487, 368 A.2d 1067, cert. denied, 280 Md. 728 (1977); Toland v. State Bd. of Educ., 35 Md. App. 389, 371 A.2d 161 (1977).

Drawing of inferences. — Not only is it the province of an agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences. Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

No provision for new trial. — Proceedings under the Administrative Procedure Act do not include provision for a new trial; instead, the reviewing court is given broad discretion to order the taking of new evidence in open court or before the agency, or, where justice requires, to remand the case for further proceedings. Lucke v. Commissioner of Personnel, 245 Md. 706, 228 A.2d 313 (1967), cert. denied, 392 U.S. 926, 88 S. Ct. 2270, 20 L. Ed. 2d 1384 (1968).

De novo hearing. — Under certain circumstances a de novo hearing is appropriate. These circumstances are: (1) The original trier of fact becomes unavailable and is consequently replaced by a second trier of fact; and (2) the material issues of the case turn on conflicting evidence in which the demeanor and credibility of lay witnesses is a crucial factor. Prince George's County v. Zayre Corp., 70 Md. App. 392, 521 A.2d 779 (1987).

Presumption of validity of agency's decision. — An agency's decision must be reviewed in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity. Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

Administrative exercise of judgment not controllable by mandamus. — The application of somewhat complex regulatory standards to the facts of a particular situation is an administrative exercise of judgment which is not controllable by mandamus. Heft v. Maryland Racing Comm'n, 323 Md. 257, 592 A.2d 1110 (1991).

Appeal of discrimination proceeding finding. — Investigation of claim of race and age discrimination, and resulting no probable cause finding, was not a contested case and was not appealable under the administrative procedure provisions in this section. Parlato v. State Comm'n on Human Relations, 76 Md. App. 695, 548 A.2d 144 (1988), cert. denied, 314 Md. 497, 551 A.2d 867 (1989).

Effect of immediate appeal of order not terminating case. — Where an injunction or similar order is immediately appealed because of the irreparable injury which may flow from the order, but where the case is not terminated in the trial court or administrative agency, the trial court or administrative agency properly may proceed with any other issue or matter in the case. Holiday Spas v. Montgomery County Human Relations Comm'n, 315 Md. 390, 554 A.2d 1197 (1989).

Secretary and Department of Personnel lack standing to appeal judgment of circuit court vacating and remanding Secretary's decision to remove a State employee; the agency was exercising its quasi-judicial function in rendering the decision and does not have the right to appeal to protect its own decision, but the Comptroller of the Treasury had standing to appeal the court's decision where it initiated charges against the proceedings and was thus a party. Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984).

Hearing decision of appointee not final until approved by Secretary. — Although the Secretary of Personnel may delegate to an appointee his authority to hear, investigate, and determine charges brought against a classified employee, the decision of that appointee is not final and reviewable by a court until approved by the Secretary. Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984).

When court should reverse or modify order. — If the court should find that substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified, because of an administrative finding, inference, conclusion or decision, then it is the function of the court to reverse or modify the order. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960).

Materiality, for purpose of court accepting additional evidence, includes any evidence which is reasonably capable of influencing a tribunal's decision, but it does not require that the evidence will necessarily do so. Breedon v. Maryland State Dep't of Educ., 45 Md. App. 73, 411 A.2d 1073 (1980).

Court order remanding case to administrative agency does not constitute a final order. — Order of the circuit court under subsection (e) remanding to administrative agency for taking of additional evidence when the circuit court has not yet heard or decided the appeal from administrative agency is not a final order, and therefore, is not appealable. Hickory

Hills Ltd. Partnership v. Secretary of State, 84 Md. App. 677, 581 A.2d 834 (1990).

Remand to administrative agency. — Remand for additional evidence is permitted under subsection (e) prior to a final decision by the reviewing court where the court has reviewed the record for substantial evidence and found it insufficient. Hickory Hills Ltd. Partnership v. Secretary of State, 84 Md. App. 677, 581 A.2d 834 (1990).

Court not to substitute its judgment for that of agency. — While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, it is clear that the court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960); State Bd. of Registration v. Ruth, 223 Md. 428, 165 A.2d 145 (1960); Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965); Nuger v. State Ins. Comm'r, 238 Md. 55, 207 A.2d 619 (1965); Grosman v. Real Estate Comm'n, 267 Md. 259, 297 A.2d 257 (1972); Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Holy Cross Hosp. v. Health Servs. Cost Review Comm'n, 283 Md. 677, 393 A.2d 181 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

In reviewing decisions of administrative agencies, the court's appraisal or evaluation must be of the agency's fact finding results, and not an independent, original estimate of, or decision on, the evidence. Zeitschel v. Board of Educ., 274 Md. 69, 332 A.2d 906 (1975); Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989).

In appeal of cease and desist order of Consumer Protection Division regarding a company's sale of diet pills through the mail, the circuit court exceeded its authority and usurped administrative functions by substituting its own remedy for the Division's order. Consumer Protection Div. v. Consumer Publishing Co., 304 Md. 731, 501 A.2d 48 (1985).

Under the Administrative Procedure Act, a circuit court reviewing an agency order is permitted to modify the order, but the circuit court exceeded its statutory authority by substituting its own order for the Department's final order where there was substantial evidence presented before the Department to support the agency's finding that the permit should be issued and the agency's conclusion was not arbitrary. Howard County v. Davidsonville Civic & Potomac River Ass'ns, 72 Md. App. 19, 527 A.2d 772 (1987).

Erroneous conclusion of law. — The reviewing court is not constrained to affirm the agency where its order is premised upon an erroneous conclusion of law; the court may not, however, substitute its judgment for the expertise of the agency. Maryland Comm'n on Human Relations v. Mayor of Baltimore, 86 Md. App. 167, 586 A.2d 37, cert. denied, 323 Md. 309, 593 A.2d 668 (1991).

Recognizing an agency's superior ability to understand its own rules and regulations, upon appellate review a court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Consideration of additional evidence. — Where it was clear from the court's order that no findings were made as to whether the new evidence submitted by appellees was material and whether good cause existed for its omission at the time of the hearing, the court erred in remanding to the agency to consider this evidence under subsection (e). Howard County v. Davidsonville Civic & Potomac River Ass'ns, 72 Md. App. 19, 527 A.2d 772 (1987).

Complete remand of case to administrative agency is not required but rather a referral for the receipt of additional evidence with an opportunity for the agency to modify its findings or decision is anticipated. Breedon v. Maryland State Dep't of Educ., 45 Md. App. 73, 411 A.2d 1073 (1980).

Court order remanding case to administrative agency constitutes final order. — A trial court's order remanding a case to an administrative agency constitutes a final order for the purpose of further judicial review. Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 459 A.2d 205 (1983).

County master plan amendment not contested case. — The adoption of an amendment to the master plan is not a contested case within the meaning of the Administrative Procedure Act and hence the appeal from such action was properly dismissed. Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987).

Circuit court erred in reversing planning board's approval of developer's project plans under subsection (g) (iv) where the developer had complied with all legal requirements for issuance of the project and preliminary plan approvals, and the restrictions in the development guidelines that the circuit court ruled to be ineffective did not apply to the area

in question. Montgomery County v. Singer, 321 Md. 503, 583 A.2d 704 (1991).

Remand for error of law. — When the agency has committed an error of law, i.e., by considering improperly an ex parte communication, the court should remand the case to the agency for further proceedings designed to remedy the error. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Remand appropriate. — Trial court's decision to remand case for purpose of conducting a hearing regarding the impact of an ex parte communication, to ensure that final order of secretary was based only on matters contained in the record, was not an abuse of the court's discretion. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Washington Suburban Sanitary Commission actions were subject to judicial review pursuant to this section. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Washington Suburban Sanitary Commission charges were "arbitrary and capricious." Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Applied in Juiliano v. Lion's Manor Nursing Home, 62 Md. App. 145, 488 A.2d 538 (1985); Perini Servs., Inc. v. Maryland Health Resources Planning Comm'n, 67 Md. App. 189, 506 A.2d 1207 (1986); Board of Educ. v. Ballard, 67 Md. App. 235, 507 A.2d 192 (1986); Desser v. Department of Health & Mental Hygiene, 77 Md. App. 1, 549 A.2d 18 (1988); Prince George's County Health Dep't v. Briscoe, 79 Md. App. 325, 556 A.2d 742 (1989); Fort Wash. Care Ctr. v. Department of Health & Mental Hygiene, 80 Md. App. 205, 560 A.2d 613 (1989); Landover Books, Inc. v. Prince George's County, 81 Md. App. 54, 566 A.2d 792 (1989); Board of Educ. v. Secretary of Personnel, 317 Md. 34, 562 A.2d 700 (1989); Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990); Maryland State Police v. Lindsey, 318 Md. 325, 568 A.2d 29 (1990); Holmes v. Robinson, 84 Md. App. 144, 578 A.2d 294 (1990); Liberty Nursing Ctr., Inc. v. Department of Health & Mental Hygiene, 91 Md. App. 210, 603 A.2d 1344 (1992).

Quoted in 318 N. Mkt. St., Inc. v. Comptroller of Treas., 78 Md. App. 589, 554 A.2d 453 (1989); GMC v. Bark, 79 Md. App. 68, 555 A.2d 542 (1989); Department of Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989); Lofland v. Montgomery County, 319 Md. 265, 572 A.2d 163 (1990); Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

Stated in Browning-Ferris, Inc. v. Baltimore County, 774 F.2d 77 (4th Cir. 1985); Insurance Serv. Mgt., Inc. v. Muhl, 65 Md. App. 217, 500 A.2d 297 (1985); Carter v. Maryland Comm'n on Medical Discipline, 639 F. Supp. 542 (D. Md. 1986); State Dep't of Assmts. & Taxation v. Loyola Fed. Sav. & Loan Ass'n, 79 Md. App. 481, 558 A.2d 428, cert. denied, 317 Md. 511, 564 A.2d 1182 (1989).

Cited in Lohrmann v. Arundel Corp., 65 Md. App. 309, 500 A.2d 344 (1985); Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493 (1986); Miller v. Insurance Comm'r, 70 Md. App. 355, 521 A.2d 761 (1987); Motor Vehicle Admin. v. Lindsay, 309 Md. 557, 525 A.2d 1051 (1987); Stark v. Comptroller of Treas., 78 Md. App. 599, 554 A.2d 458 (1989); State Dep't of Env't v. Showell, 316 Md. 259, 558 A.2d 391 (1989); People's Counsel v. Mangione, 85 Md. App. 738, 584 A.2d 1318 (1991).

§ 10-216. Appeals to Court of Special Appeals.

(a) *Scope of section.* — This section does not apply to:

(1) a case that arises under the Maryland Vehicle Law unless a right to appeal to the Court of Special Appeals is specifically provided; or

(2) a final judgment on actions of the Inmate Grievance Commission.

(b) *In general.* — A party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases. (An. Code 1957, art. 41, § 256; 1984, ch. 284, § 1.)

Method of appeal is as from law courts in civil cases. — Method of appeal under the Administrative Procedure Act is limited to the manner provided by law for appeals from law courts in other civil cases. Maryland State Bd. of Motion Picture Censors v. Marhenke, 18 Md. App. 175, 305 A.2d 501, cert. denied, 269 Md. 762 (1973).

Standard of appellate review of refusal of circuit court to allow presentation of additional evidence is whether the trial judge abused his discretion. Resetar v. State Bd. of

Educ., 284 Md. 537, 399 A.2d 225, cert. denied, 444 U.S. 838, 100 S. Ct. 74, 62 L. Ed. 2d 49 (1979).

Applied in Motor Vehicle Admin. v. Lindsay, 309 Md. 557, 525 A.2d 1051 (1987).

Cited in Prince George's County v. Zayre Corp., 70 Md. App. 392, 521 A.2d 779 (1987); 318 N. Mkt. St., Inc. v. Comptroller of Treas., 78 Md. App. 589, 554 A.2d 453 (1989); Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991).

§ 10-217. Litigation expenses for small businesses and nonprofit organizations.

(a) *Definitions.* — (1) In this section, the following words have the meanings indicated.

(2) "Business" means a trade, professional activity, or other business that is conducted for profit.

(3) "Nonprofit organization" means an organization that is exempt or eligible for exemption from taxation under § 501 (c) (3) of the Internal Revenue Code.

(b) *Scope of section.* — This section applies only to:

(1) an agency operating statewide;

(2) a business that, on the date when the contested case or civil action is initiated:

(i) is independently owned and operated; and

(ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation; and

(3) a nonprofit organization.

(c) *Reimbursement authorized.* — Subject to the limitations in this section, an agency or court may award to a business or nonprofit organization reimbursement for expenses that the business or nonprofit organization reasonably incurs in connection with a contested case or civil action that:

(1) is initiated against the business or nonprofit organization by an agency as part of an administrative or regulatory function;

(2) is initiated without substantial justification or in bad faith; and

(3) does not result in:

(i) an adjudication, stipulation, or acceptance of liability of the business or nonprofit organization;

(ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business or nonprofit organization; or

(iii) a settlement agreement under which the business or nonprofit organization agrees to take corrective action or to pay a monetary sum.

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

(2) The agency shall act on the claim.

(e) *Amount.* — (1) An award under this section may include:

(i) the expenses incurred in the contested case;

(ii) court costs;

(iii) counsel fees; and

(iv) the fees of necessary witnesses.

(2) An award under this section may not exceed $10,000.

(3) The court may reduce or deny an award to the extent that the conduct of the business or nonprofit organization during the proceedings unreasonably delayed the resolution of the matter in controversy.

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

(g) *Appeals.* — (1) If the agency denies an award under this section, the business or nonprofit organization may appeal, as provided in this subtitle.

(2) An agency may appeal an award that a court makes under this section. (An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1; 1986, ch. 256; 1988, ch. 110, § 1.)

Term "small business" does not include nonprofit entities. 68 Op. Att'y Gen. 24 (1983).

Retail sales tax assessment challenge. — A small business's challenge to a retail sales tax assessment by the comptroller of the treasury, which was resolved in favor of the business prior to a formal hearing, was a "contested case" for which reimbursement of legal expenses could be sought under this section. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

Subtitle 3. Administrative Procedure Act — Declaratory Rulings.

§ 10-301. "Unit" defined.

In this subtitle, "unit" means an officer or unit that is authorized by law to:

(1) adopt regulations subject to Subtitle 1 of this title; or

(2) adjudicate contested cases subject to Subtitle 2 of this title. (An. Code 1957, art. 41, § 244; 1984, ch. 284, § 1.)

Cited in Board of Educ. v. Secretary of Personnel, 317 Md. 34, 562 A.2d 700 (1989).

§ 10-302. Scope of subtitle.

(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 Economic and Employment Development;

(4) the Insurance Division of the Department of Licensing and Regulation;

(5) the Injured Workers' Insurance Fund;

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

(7) the Public Service Commission;

(8) the Maryland Tax Court; or

(9) 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 Automo-

THE ANNOTATED CODE
OF THE PUBLIC GENERAL LAWS
OF MARYLAND

1993 Supplement

Prepared by the Editorial Staff of the Publishers

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1993 REPLACEMENT

Place in Pocket of Corresponding Volume of Main Set.

Effective Date of Statutes

See Md. Const., Article XVI, § 2

Annotated through 622 A.2d 517. For complete scope of annotations and legislation, see preface in supplement to Volume 1.

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
1993

Effect of amendments.
The 1993 amendment, effective Oct. 1, 1993, inserted "Presiding" in the introductory language of (a) (2).

Subtitle 2. Administrative Procedure Act — Contested Cases.

§ 10-201. Declaration of policy.

The purpose of this subtitle is to:

(1) ensure the right of all persons to be treated in a fair and unbiased manner in their efforts to resolve disputes in administrative proceedings governed by this subtitle; and

(2) promote prompt, effective, and efficient government. (1993, ch. 59, § 1.)

Revision of subtitle. — Section 1, ch. 59, Acts 1993, repealed former §§ 10-209 and 10-212; renumbered former §§ 10-201 through 10-208 as present §§ 10-202 through 10-204, 10-206, 10-207, 10-210, 10-205, and 10-213, respectively; renumbered former §§ 10-210 and 10-211 as present §§ 10-218 and 10-251, respectively; renumbered former §§ 10-213 through 10-217 as present §§ 10-219, 10-221 through 10-224, respectively; and enacted the remaining provisions in this subtitle.

Section 5, ch. 59, Acts 1993, provides:

"(1) Except as provided in subsection (2) of this section, the provisions of § 1 of this Act shall apply to all administrative proceedings commencing on or after June 1, 1993.

(2) The provisions of the following sections of the State Government Article, as enacted by this Act, shall apply as follows:

(i) Section 10-222 shall apply to all actions for judicial review filed on or after June 1, 1993;

(ii) Section 10-223 shall apply to all appeals filed on or after June 1, 1993; and

(iii) Section 9-1607.1 shall apply, insofar as practicable, to all administrative proceedings pending on June 1, 1993.

(3) This § 5 is intended to preclude application of this Act to any administrative proceeding that commenced before June 1, 1993, even if the matter is subsequently remanded for further administrative proceedings after judicial review (e.g., Sugarloaf Citizens Association, et al v. Northeast Waste Disposal Authority, et al, 323 Md. 641, 594 A. 2d 1115)."

Section 6 of ch. 59 provides that the act shall take effect June 1, 1993.

Maryland Law Review. — For article, "Survey of Developments in Maryland Law, 1984-85," see 45 Md. L. Rev. 473 (1986).

For survey, "Developments in Maryland Law, 1989-90," see 50 Md. L. Rev. 1027 (1991).

§ 10-202. Definitions.

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

(b) *Agency.* — "Agency" means:

(1) an officer or unit of the State government authorized by law to adjudicate contested cases; or

(2) a unit that:

(i) is created by general law;

(ii) operates in at least 2 counties; and

(iii) is authorized by law to adjudicate contested cases.

(c) *Agency head.* — "Agency head" means an individual or group of individuals in whom the ultimate legal authority of an agency is vested by any provision of law.

(d) *Contested case.* — (1) "Contested case" means a proceeding before an agency to determine:

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

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

(2) "Contested case" does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.

(e) *Office.* — "Office" means the Office of Administrative Hearings.

(f) *License.* — "License" means all or any part of permission that:

(1) is required by law to be obtained from an agency;

(2) is not required only for revenue purposes; and

(3) is in any form, including:

(i) an approval;

(ii) a certificate;

(iii) a charter;

(iv) a permit; or

(v) a registration.

(g) *Presiding officer.* — "Presiding officer" means the board, commission, agency head, administrative law judge, or other authorized person conducting an administrative proceeding under this subtitle. (An. Code 1957, art. 41, §§ 244, 250A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, inserted (c) and redesignated former (c) as present (d) and rewrote that subsection; added (e) and redesignated former (d) as (f); and added (g).

Administrative Procedure Act shall apply to all State agencies except those expressly excluded. Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Board of Pharmacy is "agency." Maryland Bd. of Pharmacy v. Peco, Inc., 234 Md. 200, 198 A.2d 273 (1964).

State Police Hearing Board is "agency." — The Maryland State Police Hearing Board is an agency whose decisions are subject to review under § 10-215 (g) (3) of the Maryland Administrative Procedure Act. Prince George's County v. Younkers, 94 Md. App. 48, 615 A.2d 1197 (1992).

Police department of Baltimore City is State "agency." Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Inmate Grievance Commission is within definition of State "agency." Bryant v. Department of Pub. Safety & Correctional Servs., 33 Md. App. 357, 365 A.2d 764 (1976).

Washington Suburban Sanitary Commission is "agency" under Administrative Procedure Act. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Washington Suburban Sanitary Commission is State agency; thus its retirement plan establishes an administrative procedure. Quesenberry v. Washington Sub. San. Comm'n, 311 Md. 417, 535 A.2d 481 (1988).

County agencies are not included within the provisions of the Administrative Procedure Act. Urbana Civic Ass'n v. Urbana Mobile Village, Inc., 260 Md. 458, 272 A.2d 628 (1971).

Board of license commissioners of Anne Arundel County is not "agency." Valentine v. Board of License Comm'rs, 291 Md. 523, 435 A.2d 459 (1981).

County boards of education are not State agencies authorized to make rules or adjudicate cases. Bernstein v. Board of Educ., 245 Md. 464, 226 A.2d 243 (1967).

County as participant in administrative proceedings. — A county, its agencies, and its instrumentalities may participate in proceedings under the Administrative Procedure Act to the same extent as any other legal entity.

Montgomery County v. One Park N. Assocs., 275 Md. 193, 338 A.2d 892 (1975).

Determination of whether dispute is contested case. — It is the nature of the dispute, rather than the stage of the proceedings, that determines whether or not a matter is a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

Proceeding not a "contested case." — Proceeding in which inmates were denied reinstatement in a work release program was not a "contested case." Holmes v. Robinson, 84 Md. App. 144, 578 A.2d 294 (1990), cert. denied, 321 Md. 501, 583 A.2d 275 (1991).

An eligibility review proceeding to determine whether prisoner would remain in or be transferred from a special treatment facility is not a contested case under the Maryland Administrative Procedures Act; therefore, assistance of counsel was not required. Angell v. Henneberry, 92 Md. App. 279, 607 A.2d 590 (1992).

Statute providing for hearing doesn't itself make "contested case." — The mere fact that a statute calls for a hearing is not in and of itself sufficient to make the subject of that hearing a "contested case." Washington Sub. San. Comm'n v. Donacam Assocs., 57 Md. App. 719, 471 A.2d 1097 (1984), rev'd on other grounds, 302 Md. 501, 489 A.2d 26 (1985).

Challenging assessment for water and sewer charges as "contested case." — Statutory proceedings before the Washington Suburban Sanitary Commission whereby property owner challenged the correctness of assessment for water and sewer front-foot benefit charges was an appealable "contested case" under the Administrative Procedure Act. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Discrimination proceedings not "contested case." — Investigation of claim of race and age discrimination, and resulting no probable cause finding, was not a contested case and was not appealable under the administrative procedure provisions in § 10-215 of this article. Parlato v. State Comm'n on Human Relations, 76 Md. App. 695, 548 A.2d 144 (1988), cert. denied, 314 Md. 497, 551 A.2d 867 (1989).

Withdrawal of firm's certification as minority business enterprise "contested case." — Withdrawal by an agency of a firm's certification as a minority business enterprise may give rise to a "contested case" under subsection (c) of this section, hence permitting judicial review under § 10-215. Warwick Corp. v. DOT, 61 Md. App. 239, 486 A.2d 224 (1985).

Dispute resolved prior to hearing. — A dispute resolved prior to a formal hearing may, nonetheless, be a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

Baltimore City health department is not State "agency." American Ambulance & Oxygen Serv. v. Mayor of Baltimore, 31 Md. App. 432, 356 A.2d 580 (1976).

Hearing on AFDC emergency as "contested case." — A hearing held relative to a claim for emergency assistance under the Aid to Families with Dependent Children program is a "contested case." Murray v. State Dep't of Social Servs., 260 Md. 323, 272 A.2d 16 (1971).

Video-conferencing. — Video-conferencing does not conflict with the Administrative Procedure Act's hearing procedures. 74 Op. Att'y Gen. 187 (1989).

Applied in Baltimore County v. Penn, 66 Md. App. 199, 503 A.2d 257, cert. denied, 306 Md. 118, 507 A.2d 631 (1986); Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987).

Quoted in Silverman v. Maryland Deposit Ins. Fund Corp., 317 Md. 306, 563 A.2d 402 (1989); Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

Cited in Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984); Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986); Board of Educ. v. Secretary of Personnel, 317 Md. 34, 562 A.2d 700 (1989); CBS, Inc. v. Comptroller of Treas., 319 Md. 687, 575 A.2d 324 (1990); Maryland Real Estate Comm'n v. Johnson, 320 Md. 91, 576 A.2d 760 (1990); Maryland State Police v. Zeigler, 85 Md. App. 272, 583 A.2d 1085 (1991); Medical Waste Assocs. v. Maryland Waste Coalition, Inc., 327 Md. 596, 612 A.2d 241 (1992); State Dep't of Pub. Safety & Correctional Servs. v. Bailey, 95 Md. App. 12, 619 A.2d 176 (1993).

§ 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 Division of the Department of Licensing and Regulation except as specifically provided in Article 48A of the Code;

(iv) the Injured Workers' Insurance Fund;

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

(vi) the Public Service Commission;

(vii) the Maryland Tax Court;

(viii) the State Workers' Compensation Commission; or

(ix) The Maryland Automobile Insurance Fund;

(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 Economic and Employment Development except as specifically provided in Subtitle 5 of Title 8 of the Labor and Employment Article; or

(6) any other entity otherwise expressly exempted by statute.

(b) *Applicability to property tax assessment appeals boards and correction of death certificates.* — This subtitle does apply to:

(1) the property tax assessment appeals boards; and

(2) as to requests for correction of certificates of death under § 5-310 (d) (2) of the Health-General Article, the office of the Chief Medical Examiner.

(c) *Public hearings.* — A public hearing required or provided for by statute or regulation before an agency takes a particular action is not an agency hearing under § 10-202 (d) of this subtitle unless the statute or regulation:

(1) expressly requires that the public hearing be held in accordance with this subtitle; or

(2) expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with this subtitle. (An. Code 1957, art. 41, § 244; 1984, ch. 284, § 1; 1986, ch. 567; 1987, ch. 311, § 1; 1989, ch. 5, § 1; 1990, ch. 71, § 3; 1991, ch. 21, § 3; 1992, ch. 547; 1993, ch. 59, § 1.)

Effect of amendments. — The 1991 amendment, effective Oct. 1, 1991, in (a) (3) (ix), substituted "State Workers' Compensation Commission" for "Workmen's Compensation Commission."

The 1992 amendment, effective Jan. 1, 1993, added (c) (2) and made related stylistic and punctuation changes.

The 1993 amendment, effective June 1, 1993, rewrote the section.

Editor's note. — Section 2, ch. 547, Acts 1992, provides that "the Chief Medical Examiner, in consultation with the Office of Administrative Hearings, shall adopt final regulations for the purpose of implementing this Act, to be effective January 1, 1993."

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Section 3 of ch. 547 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect all certificates of death for individuals who died on or after May 1, 1987. Notwithstanding the restrictions of § 5-310 (d) (2) (i) of the Health-General Article as enacted by § 1 of this Act, persons in interest may request corrections to certificates of death for individuals who died on or after May 1, 1987, by filing a request with the Office of the Chief Medical Examiner no later than June 30, 1993."

Section 3, ch. 59, Acts 1993, provides that "the provisions of § 10-203 (a) (4) of the State Government Article, as enacted by this Act, may not be interpreted to affect the rights of any local government employee who is subject to the State Merit System law."

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

Administrative Procedure Act shall apply to all State agencies except those expressly excluded. Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965).

Stated in Everett v. Baltimore Gas & Elec. Co., 307 Md. 286, 513 A.2d 882 (1986).

Cited in Miller v. Insurance Comm'r, 70 Md. App. 355, 521 A.2d 761, cert. denied, 310 Md. 130, 527 A.2d 51 (1987).

§ 10-204. Political subdivisions and instrumentalities.

A political subdivision of the State or an instrumentality of a political subdivision is entitled, to the same extent as other legal entities, to be an interested person, party, or petitioner in a matter under this subtitle, including an appeal. (An. Code 1957, art. 41, § 256A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

County as participant in administrative proceedings. — A county, its agencies, and its instrumentalities may participate in proceedings under the Administrative Procedure Act to the same extent as any other legal entity. Montgomery County v. One Park N. Assocs., 275 Md. 193, 338 A.2d 892 (1975).

§ 10-205. Delegation of hearing authority.

(a) *To whom delegated.* — (1) A board, commission, or agency head authorized to conduct a contested case hearing shall:

(i) conduct the hearing; or

(ii) delegate the authority to conduct the contested case hearing to:

1. the Office; or

2. with the prior written approval of the chief administrative law judge, a person not employed by the Office.

(2) With the written approval of the chief administrative law judge, a class of contested case hearings may be delegated as provided in paragraph (1) (ii) 2 of this subsection.

(3) This subsection is not intended to restrict the right of an individual, expressly authorized by a statute in effect on October 1, 1993, to conduct a contested case hearing.

(b) *Scope of authority delegated.* — An agency may delegate to the Office the authority to issue:

(1) proposed or final findings of fact;

(2) proposed or final conclusions of law;

(3) proposed or final findings of fact and conclusions of law;

(4) proposed or final orders or orders under Article 49B of the Code; or

(5) the final administrative decision of an agency in a contested case.

(c) *Procedure upon receipt of hearing request.* — Promptly after receipt of a request for a contested case hearing, an agency shall:

(1) notify the parties that the authorized agency head, board, or commission shall conduct the hearing;

(2) transmit the request to the Office so that the Office shall conduct the hearing in accordance with the agency's delegation; or

(3) request written approval from the chief administrative law judge to appoint a person not employed by the Office to conduct the hearing.

(d) *Delegation final; exception.* — (1) Except as provided in paragraph (2) of this subsection, an agency's delegation and transmittal of all or part of a contested case to the Office is final.

(2) If an agency has adopted regulations specifying the criteria and procedures for the revocation of a delegation of a contested case, delegation of authority to hear all or part of a contested case may be revoked, by the agency head, board, or commission, in accordance with the agency's regulations, at any time prior to the earlier of:

(i) the issuance of a ruling on a substantive issue; or

(ii) the taking of oral testimony from the first witness.

(e) *Duties of the Office.* — (1) The Office shall:

(i) conduct the hearing; and

(ii) except as provided in paragraph (2) of this subsection or as otherwise required by law, within 90 days after the completion of the hearing, complete the procedure authorized in the agency's delegation to the Office.

(2) The time limit specified in paragraph (1) (ii) of this subsection may be extended with the written approval of the chief administrative law judge. (An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1; 1991, ch. 181; 1993, ch. 59, § 1.)

Effect of amendments. — The 1991 amendment rewrote the section.

The 1993 amendment, effective June 1, 1993, rewrote the section.

Editor's note. — Section 4, ch. 181, Acts 1991, provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect the Office of Administrative Hearings and all contested hearings beginning on or after January 1, 1990."

Authority to adjudicate all issues. — The hearing officer (now Office of Administrative Hearings) has the authority to fully adjudicate all of the issues, both procedural and substantive, that surround the commitment of patients to mental institutions. 64 Op. Att'y Gen. 229 (1979).

Substitution of examiners without a de novo proceeding is allowable only where the original examiner is unavailable and either: (1) The case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses, or (2) if it is a case in which credibility is involved, the parties agree to proceed without a de novo administrative proceeding. Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493, cert. denied, 307 Md. 260, 513 A.2d 314 (1986) (decision prior to 1991 amendment).

Applied in Fort Washington Community Hosp. v. Southern Md. Hosp. Ctr., 66 Md. App. 480, 505 A.2d 117 (1986), aff'd, 308 Md. 323, 519 A.2d 727 (1987).

§ 10-206. Procedural regulations.

(a) *Adoption by Office; conflict.* — (1) The Office shall adopt regulations to govern the procedures and practice in all contested cases delegated to the Office and conducted under this subtitle.

(2) Unless a federal or State law requires that a federal or State procedure shall be observed, the regulations adopted under paragraph (1) of this subsection shall take precedence in the event of a conflict.

(b) *Adoption by agencies.* — Each agency may adopt regulations to govern procedures under this subtitle and practice before the agency in contested cases.

(c) *Expedited hearings.* — Regulations adopted under this section may include procedures and criteria for requesting and conducting expedited hearings.

(d) *Restrictions.* — (1) A regulation under this section may not:

(i) grant the right to practice law to an individual who is not authorized to practice law;

(ii) interfere with the right of a lawyer to practice before an agency or the Office; or

(iii) prohibit any party from being advised or represented at the party's own expense by an attorney or, if permitted by law, other representative.

(2) Paragraph (1) of this subsection may not be interpreted to require the State to furnish publicly provided legal services in any proceeding under this subtitle.

(e) *Prehearing procedures.* — Each agency and the Office may adopt regulations that:

(1) provide for prehearing conferences in contested cases; or

(2) set other appropriate prehearing procedures in contested cases.

(f) *Explanatory materials.* — To assist the public in understanding the procedures followed by an agency or the Office in contested cases, an agency or the Office may develop and distribute supplemental explanatory materials, including the related forms that the agency or Office requires and instructions for completing the forms. (An. Code 1957, art. 41, §§ 245, 251A; 1984, ch. 284, § 1; 1992, ch. 547; 1993, ch. 59, § 1.)

Effect of amendments. — The 1992 amendment, effective Jan. 1, 1993, reenacted the section without change.

The 1993 amendment, effective June 1, 1993, rewrote the section.

Editor's note. — Section 2, ch. 547, Acts 1992, provides that "the Chief Medical Examiner, in consultation with the Office of Administrative Hearings, shall adopt final regulations for the purpose of implementing this Act, to be effective January 1, 1993."

Section 3 of ch. 547 provides that "this Act shall be construed retroactively and shall be applied to and interpreted to affect all certificates of death for individuals who died on or after May 1, 1987. Notwithstanding the restrictions of § 5-310 (d) (2) (i) of the Health-General Article as enacted by § 1 of this Act, persons in interest may request corrections to certificates of death for individuals who died on or after May 1, 1987, by filing a request with the Office of the Chief Medical Examiner no later than June 30, 1993."

§ 10-207. Notice of agency action.

(a) *In general.* — An agency shall give reasonable notice of the agency's action.

(b) *Contents of notice.* — The notice shall:

(1) state concisely and simply:

(i) the facts that are asserted; or

(ii) if the facts cannot be stated in detail when the notice is given, the issues that are involved;

(2) state the pertinent statutory and regulatory sections under which the agency is taking its action;

(3) state the sanction proposed or the potential penalty, if any, as a result of the agency's action;

(4) unless a hearing is automatically scheduled, state that the recipient of notice of an agency's action may have an opportunity to request a hearing, including:

(i) what, if anything, a person must do to receive a hearing; and

(ii) all relevant time requirements; and

(5) state the direct consequences, sanction, potential penalty, if any, or remedy of the recipient's failure to exercise in a timely manner the opportunity for a hearing or to appear for a scheduled hearing.

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

(d) *Publication in Register.* — For purposes of this section, publication in the Maryland Register does not constitute reasonable notice to a party. (An. Code 1957, art. 41, § 251; 1984, ch. 284, § 1; 1989, ch. 239; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, rewrote the section.

Cited in Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

§ 10-208. Notice of hearing.

(a) *In general.* — An agency or the Office shall give all parties in a contested case reasonable written notice of the hearing.

(b) *Contents of notice.* — The notice shall state:

(1) the date, time, place, and nature of the hearing;

(2) the right to call witnesses and submit documents or other evidence under § 10-213 (f) of this subtitle;

(3) any applicable right to request subpoenas for witnesses and evidence and specify the costs, if any, associated with such a request;

(4) that a copy of the hearing procedure is available on request and specify the costs associated with such a request;

(5) any right or restriction pertaining to representation;

(6) that failure to appear for the scheduled hearing may result in an adverse action against the party; and

(7) that, unless otherwise prohibited by law, the parties may agree to the evidence and waive their right to appear at the hearing.

(c) *Consolidation of notices.* — The notice of hearing may be consolidated with the notice of agency action required under § 10-207 of this subtitle.

(d) *Publication in Register.* — For purposes of this subtitle, publication in the Maryland Register does not constitute reasonable notice to a party. (1993, ch. 59, § 1.)

Different procedures for legislative and judicial matters. — The Administrative Procedure Act sets up different procedures to be followed in the promulgation of rules and regulations on the one hand and the hearing of contested cases on the other. Board of Liquor License Comm'rs v. Leone, 249 Md. 263, 239 A.2d 82 (1968).

Former section required hearing only in "contested case." Eliason v. State Rds. Comm'n, 231 Md. 257, 189 A.2d 649, cert. denied, 375 U.S. 914, 84 S. Ct. 211, 11 L. Ed. 2d 152 (1963).

Adequate notice essential to fair play. — Basic tenet of fair play in administrative proceedings is the right of a party to be given adequate notice of the nature of the proceeding in order that he may prepare his defense. Ferguson v. UPS, 270 Md. 202, 311 A.2d 220 (1973), cert. denied, 415 U.S. 1000, 94 S. Ct. 1602, 39 L. Ed. 2d 895 (1974).

§ 10-209. Notice mailed to address of licensee.

(a) *In general.* — Where a licensing statute provides for service other than by regular mail, notice under this subtitle may be sent by regular mail to the address of record of a person holding a license issued by the agency if:

(1) the person is required by law or regulation to advise the agency of the address; and

(2) the agency has been unsuccessful in giving notice in the manner otherwise provided by the licensing statute.

(b) *Hearing.* — Upon a showing that the person neither knew nor had reasonable opportunity to know of the fact of service, a person served by regular mail under subsection (a) of this section shall be granted a hearing.

(c) *Reasonable opportunity to know of service.* — A person holding a license shall be deemed to have had a reasonable opportunity to know of the fact of service if:

(1) the person is required by statute to notify the agency of a change of address within a specified period of time;

(2) the person failed to notify the agency in accordance with the statute;

(3) the agency or the Office mailed the notice to the address of record; and

(4) the agency did not have actual notice of the change of address prior to service. (1993, ch. 59, § 1.)

Editor's note. — Chapter 59, Acts 1993, effective June 1, 1993, repealed former § 10-209 and enacted a new section in lieu thereof.

§ 10-210. Dispositions.

Unless otherwise precluded by law, an agency or the Office may dispose of a contested case by:

(1) stipulation;

(2) settlement;

(3) consent order;

(4) default;
(5) withdrawal;
(6) summary disposition; or
(7) dismissal. (An. Code 1957, art. 41, § 251A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, inserted "or the Office" in the introductory clause; and added (5)-(7).

Contested case. — A dispute resolved prior to a formal hearing may, nonetheless, be a contested case. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

§ 10-211. Telephonic hearings.

If a party does not object, a hearing may be conducted by telephone or other electronic means. (1993, ch. 59, § 1.)

§ 10-212. Open hearings.

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

Editor's note. — Chapter 5, Acts 1993, effective June 1, 1993, repealed former § 10-212 and enacted a new section in lieu thereof.

§ 10-213. Evidence.

(a) *In general.* — (1) Each party in a contested case shall offer all of the evidence that the party wishes to have made part of the record.
(2) If the agency has any evidence that the agency wishes to use in adjudicating the contested case, the agency shall make the evidence part of the record.
(b) *Probative evidence.* — The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.
(c) *Hearsay.* — Evidence may not be excluded solely on the basis that it is hearsay.
(d) *Exclusions.* — The presiding officer may exclude evidence that is:
(1) incompetent;
(2) irrelevant;
(3) immaterial; or
(4) unduly repetitious.
(e) *Rules of privilege.* — The presiding officer shall apply a privilege that law recognizes.
(f) *Scope of evidence.* — On a genuine issue in a contested case, each party is entitled to:
(1) call witnesses;

(2) offer evidence, including rebuttal evidence;

(3) cross-examine any witness that another party or the agency calls; and

(4) present summation and argument.

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

(1) in the form of copies or excerpts; or

(2) by incorporation by reference.

(h) *Official notice of facts.* — (1) The agency or the Office may take official notice of a fact that is:

(i) judicially noticeable; or

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

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

(i) before or during the hearing, by reference in a preliminary report, or otherwise, shall notify each party; and

(ii) shall give each party an opportunity to contest the fact.

(i) *Evaluation.* — The agency or the Office may use its experience, technical competence, and specialized knowledge in the evaluation of evidence. (An. Code 1957, art. 41, § 252; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, substituted "presiding officer" for "agency" throughout the section; added (c) and redesignated former (c)-(h) as (d)-(i); and inserted "or the Office" in (h)(1) and (i).

University of Baltimore Law Review. — For article, "Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change," see 21 U. Balt. L. Rev. 1 (1991).

Administrative agencies are not bound by technical common-law rules of evidence. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

But they must observe basic rules of fairness as to parties appearing before them. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

Exclusion of "incompetent" evidence. — The legislature clearly has indicated its intent that evidence which would be considered "incompetent," and for that reason inadmissible for substantive purposes in judicial proceedings, should also be excluded in proceedings before administrative agencies. Department of Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989).

Hearsay evidence is admissible before 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. Fairchild Hiller Corp. v. Supervisor of Assmts., 267 Md. 519, 298 A.2d 148 (1973); Kade v. Charles H. Hickey Sch., 80 Md. App. 721, 566 A.2d 148 (1989).

Limitations on use of hearsay. — Even though hearsay is admissible, there are limits on its use; it must be competent and have probative force. Kade v. Charles H. Hickey Sch., 80 Md. App. 721, 566 A.2d 148 (1989).

Polygraph evidence does not meet the standard, under the Maryland Administrative Procedure Act, of "competent" evidence. Department of Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989).

Transcribed testimony of police informant at previous criminal trial was admissible in hearing before Board of Pharmacy where it was taken under oath, the informant was unavailable to testify in person at the trial, and the opposing party, as the defendant in the criminal trial and the respondent in the action before the Board, was afforded an opportunity to cross-examine the informant at the criminal trial and extensively availed himself of that opportunity. Eichberg v. Maryland Bd. of Pharmacy, 50 Md. App. 189, 436 A.2d 525 (1981), cert. denied, 292 Md. 596 (1982).

Failure to object to admission of evidence. — If the opponent fails to object, he will not later be heard to complain that the evidence should not have been admitted. Ginn v. Farley, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979).

Burden of proof. — The comparative de-

gree of proof by which a case must be established is the same in an administrative as in a civil judicial proceeding, i.e., a preponderance of the evidence is necessary. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960).

Video-conferencing. — A hearing conducted by video-conferencing enables a party to call and examine witnesses, offer evidence, cross-examine adverse witnesses, and present summation and argument, just as if the presiding official were physically present. 74 Op. Att'y Gen. 187 (1989).

When a suppression hearing is held each party ordinarily should be afforded a reasonable opportunity to present argument. The trial judge, of necessity, must have great latitude in controlling the duration and limiting the scope of these arguments; the trial judge may limit counsel to a reasonable time, ensure that the argument does not stray unduly from the mark, and terminate argument when continuation would be repetitive or redundant. State v. Brown, 324 Md. 532, 597 A.2d 978 (1991).

"Contested case" hearing not required. — The Air Management Administration is not required to hold a "contested case" hearing upon request, before ruling on an application for a Prevention of Significant Deterioration (PSD) permit approval. The construction permit approval stage is the point at which a hearing is required by law, thus meeting the definition of a contested case. Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991).

Quoted in Doctors' Hosp. v. Maryland Health Resources Planning Comm'n, 65 Md. App. 656, 501 A.2d 1324 (1986).

Cited in Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986); Angell v. Henneberry, 92 Md. App. 279, 607 A.2d 590 (1992).

§ 10-214. Consideration of other evidence.

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

(b) *Regulations, rulings, etc., binding.* — In a contested case, the Office is bound by any agency regulation, declaratory ruling, prior adjudication, or other settled, preexisting policy, to the same extent as the agency is or would have been bound if it were hearing the case. (1993, ch. 59, § 1.)

§ 10-215. Transcription of proceedings.

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

(1) requests the transcription; and

(2) pays any required costs. (An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

§ 10-216. Exceptions.

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

(i) file exceptions with the agency to the proposed decision; and

(ii) present argument to the final decision maker.

(2) In the case of a decision-making body, if a majority of the officials who are to make a final decision in a contested case have not personally presided over the hearing, the officials may not make the final decision until each

party is given notice of the proposed decision in accordance with § 10-220 of this subtitle and an opportunity to:

(i) file exceptions to the proposed decision with the agency; and

(ii) present argument to a majority of the officials who are to make the final decision.

(3) If a party files exceptions or presents argument under paragraph (1) or (2) of this subsection, the official or officials who are to make the final decision shall personally consider each part of the record that a party cites in its exceptions or arguments before making a final decision.

(b) *Changes to proposed decision.* — The final decision shall identify any changes, modifications, or amendments to the proposed decision and the reasons for the changes, modifications, or amendments. (1993, ch. 59, § 1.)

Evidence need not be heard by all those who will render final decision in a "contested case." Younkin v. Boltz, 241 Md. 339, 216 A.2d 714 (1966).

When service of decision required. — The General Assembly requires service of the proposed decision, including findings of fact and conclusions of law, and argument, whenever a majority of the decision makers was not actually present at the taking of testimony. Bethesda Mgt. Servs., Inc. v. Department of Licensing & Regulation, 276 Md. 619, 350 A.2d 390 (1976).

Substitution of examiners without a de novo proceeding is allowable only where the original examiner is unavailable and either: (1) The case is not one in which the resolution of conflicting testimony requires a determination of the credibility of the witnesses, or (2) if it is a case in which credibility is involved, the parties agree to proceed without a de novo administrative proceeding. Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493, cert. denied, 307 Md. 260, 513 A.2d 314 (1986).

§ 10-217. Proof.

The standard of proof in a contested case shall be the preponderance of evidence unless the standard of clear and convincing evidence is imposed on the agency by regulation, statute, or constitution. (1993, ch. 59, § 1.)

§ 10-218. Contents of record.

The presiding officer hearing a contested case shall make a record that includes:

(1) all motions and pleadings;

(2) all documentary evidence that the agency or Office receives;

(3) a statement of each fact of which the agency or Office has taken official notice;

(4) any staff memorandum submitted to an individual who is involved in the decision making process of the contested case by an official or employee of the agency who is not authorized to participate in the decision making process;

(5) each question;

(6) each offer of proof;

(7) each objection and the ruling on the objection;

(8) each finding of fact or conclusion of law proposed by:

(i) a party; or

(ii) the presiding officer;

(9) each exception to a finding or conclusion proposed by a presiding officer; and

(10) each intermediate proposed and final ruling by or for the agency, including each report or opinion issued in connection with the ruling. (An. Code 1957, art. 41, § 252A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, substituted "the presiding officer hearing" for "Unless law provides for a de novo review, the agency adjudicating" in the introductory clause; inserted "or Office" in (2) and (3); substituted "the presiding" for "a hearing" in (8) (ii); and substituted "presiding" for "hearing" in (9).

Quoted in State Dep't of Pub. Safety & Correctional Servs. v. Bailey, 95 Md. App. 12, 619 A.2d 176 (1993).

§ 10-219. Ex parte communications.

(a) *Restrictions.* — (1) Except as provided in paragraph (2) of this subsection, a presiding officer may not communicate ex parte directly or indirectly regarding the merits of any issue in the case, while the case is pending, with:

(i) any party to the case or the party's representative or attorney; or

(ii) any person who presided at a previous stage of the case.

(2) An agency head, board, or commission presiding over a contested case may communicate with members of an advisory staff of, or any counsel for, the agency, board, or commission who otherwise does not participate in the contested case.

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

(c) *Disclosure.* — An individual who is involved in the decision making process and who is personally aware of an ex parte communication shall:

(1) give notice to all parties;

(2) include in the record of the contested case:

(i) each written communication received;

(ii) a memorandum that states the substance of each oral communication received;

(iii) each written response to a communication; and

(iv) a memorandum that states the substance of each oral response to the communication; and

(3) send to each party a copy of each communication, memorandum, and response.

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

(e) *Remedial action.* — (1) To eliminate the effect of an ex parte communication that is made in violation of this section, the presiding officer or, if the presiding officer is a multimember body, the individual board or commission member, may:

(i) withdraw from the proceeding; or

(ii) terminate the proceeding without prejudice.

(2) An order to terminate the proceeding without prejudice shall state the last date by which a party may reinstitute the proceeding. (An. Code 1957, art. 41, § 254A; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, rewrote (a); added (b) and redesignated former (b) through (d) as (c) through (e); in (c), deleted "that is made in violation of subsection (a) of this section" preceding "shall" in the introductory clause and added (c) (1); and in (e) (1), rewrote the introductory clause.

Cited in Eaton v. Rosewood Ctr., *86 Md.* App. 366, 586 A.2d 804 (1991).

§ 10-220. Proposed decisions and orders.

(a) *Preparation.* — If the Office conducts a hearing under this subtitle, the Office shall prepare proposed findings of fact, conclusions of law, or orders in accordance with the agency's delegation under § 10-205 of this subtitle.

(b) *Submission.* — The Office shall send its proposed findings, conclusions, or orders:

(1) to the parties and the agency directly; or

(2) if the agency's delegation under § 10-205 of this subtitle requires, to the agency for distribution by the agency to the parties.

(c) *Review and issuance.* — (1) Within 60 days after receipt of the Office's proposed findings, conclusions, or order under subsection (b) (2) of this section, the agency shall:

(i) review the Office's proposed findings, conclusions, or order;

(ii) issue the proposed decision, which may include the Office's proposed findings, conclusions, or order with or without modification; and

(iii) send the proposed decision and a copy of the Office's proposed findings, conclusions, or order to the parties.

(2) The time limit specified in paragraph (1) of this subsection may be extended by the agency head, board, or commission with written notice to the parties.

(d) *Form and contents.* — A proposed decision or order, including proposed decisions or orders issued for contested case hearings subject to this subtitle but not conducted by the Office, shall:

(1) be in writing or stated on the record;

(2) contain separate findings of fact and conclusions of law;

(3) include an explanation of procedures and time limits for filing exceptions; and

(4) if the Office conducted the hearing and the agency's proposed decision includes any changes, modifications, or amendments to the Office's proposed findings, conclusions, or orders, contain an explanation of the reasons for each change, modification, or amendment. (1993, ch. 59, § 1.)

§ 10-221. Final decisions and orders.

(a) *Form.* — A final decision or order in a contested case that is adverse to a party shall be in writing or stated on the record.

(b) *Contents.* — (1) A final decision in a contested case shall contain separate statements of:

(i) the findings of fact;

(ii) the conclusions of law; and

(iii) the order.

(2) A written statement of appeal rights shall be included with the decision.

(3) If the findings of fact are stated in statutory language, the final decision shall state concisely and explicitly the facts that support the findings.

(4) If, in accordance with regulations, a party submitted proposed findings of fact, the final decision shall state a ruling on each proposed finding.

(c) *Distribution.* — The final decision maker promptly shall deliver or mail a copy of the final decision or order to:

(1) each party; or

(2) the party's attorney of record. (An. Code 1957, art. 41, § 254; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, added (b) (1) (iii) and (b) (2); redesignated former (b) (2) and (3) as (b) (3) and (4); and in (c), substituted "final decision maker" for "agency."

Contents of order. — Failure to comply with the requirements of this section as to the contents of an order requires the reviewing court to remand the case for the appropriate findings of fact; this is no more than a recognition of the fundamental right of a party to be apprised of the facts relied upon by the agency and is frequently required by a court as an aid to judicial review. Crumlish v. Insurance Comm'r, 70 Md. App. 182, 520 A.2d 738 (1987).

For agencies subject to the Administrative Procedure Act, the requirement that the agency make and disclose specific findings of fact and conclusions of law is statutory. But even agencies, such as the Workers' Compensation Commission, that are not under that act are subject to that requirement. Institute of Mission Helpers v. Beasley, 82 Md. App. 155, 570 A.2d 382 (1990).

Applied in Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990).

Cited in Medical Waste Assocs. v. Maryland Waste Coalition, Inc., 327 Md. 596, 612 A.2d 241 (1992).

§ 10-222. Judicial review.

(a) *Review of final decision.* — (1) 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:

(i) is aggrieved by the final decision; and

(ii) was a party before the agency or the Office.

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

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

(2) the interlocutory order:

(i) determines rights and liabilities; and

(ii) has immediate legal consequences; and

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

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

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

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

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

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

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

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

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

(ii) the court is satisfied that:

1. the evidence is material; and

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

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

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

(i) the additional evidence; and

(ii) any modifications of the findings or decision.

(g) *Proceeding.* — (1) The court shall conduct a proceeding under this section without a jury.

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

(3) On request, the court shall:

(i) hear oral argument; and

(ii) receive written briefs.

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

(1) remand the case for further proceedings;

(2) affirm the final decision; or

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

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the final decision maker;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

(vi) is arbitrary or capricious. (An. Code 1957, art. 41, § 255; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, rewrote (a); added (b); redesignated former (b) through (d) as (c) through (e); in (c), inserted "Unless otherwise required by statute"; added (d) (2); in (e) (2), substituted "final decision maker" for "agency"; added (f) (1); redesignated former (e) as (f) (2) through (4) and former (f) and (g) as (g) and (h); in (f) (2) and (g) (2), substituted "presiding officer" for "agency"; in (f) (3) and (4) and (h) (3) (ii), substituted "final decision maker" for "agency"; in (h) (2), inserted "final" and deleted "of the agency" following "decision"; and, in (h) (3), deleted "of the agency" at the end.

Editor's note. — Section 5, ch. 59, Acts 1993, provides:

"(1) Except as provided in subsection (2) of this section, the provisions of § 1 of this Act shall apply to all administrative proceedings commencing on or after June 1, 1993.

(2) The provisions of the following sections of the State Government Article, as enacted by this Act, shall apply as follows:

(i) Section 10-222 shall apply to all actions for judicial review filed on or after June 1, 1993;

(ii) Section 10-223 shall apply to all appeals filed on or after June 1, 1993; and

(iii) Section 9-1607.1 shall apply, insofar as practicable, to all administrative proceedings pending on June 1, 1993.

(3) This § 5 is intended to preclude application of this Act to any administrative proceeding that commenced before June 1, 1993, even if the matter is subsequently remanded for further administrative proceedings after judicial review (e.g., Sugarloaf Citizens Association, et al v. Northeast Waste Disposal Authority, et al, 323 Md. 641, 594 A. 2d 1115)."

Maryland Law Review. — For article, "Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland," see 35 Md. L. Rev. 414 (1976).

For article, "Survey of Developments in Maryland Law, 1984-85," see 45 Md. L. Rev. 473 (1986).

For article, "Survey of Developments in Maryland Law, 1987-88," see 48 Md. L. Rev. 551 (1989).

For survey, "Developments in Maryland Law, 1989-90," see 50 Md. L. Rev. 1027 (1991).

University of Baltimore Law Review. — For article, "Hearsay in State Administrative Hearings: The Maryland Experience and Suggestions for Change," see 21 U. Balt. L. Rev. 1 (1991).

For article, "Health Claims Arbitration in Maryland: The Experiment Has Failed," see 14 U. Balt. L. Rev. 481 (1985).

For article, "Fair Treatment for Contractors Doing Business with the State of Maryland," see 15 U. Balt. L. Rev. 215 (1986).

Section to be followed by party seeking initial judicial review. — Aggrieved party seeking initial judicial review of a decision of an administrative agency does so in accordance with the provisions of this section. Maryland State Bd. of Motion Picture Censors v. Marhenke, 18 Md. App. 175, 305 A.2d 501, cert. denied, 269 Md. 762 (1973).

Limitations on scope of review. — A reviewing court is restricted to the record made before the administrative agency, and is confined to whether, based upon the record, a reasoning mind reasonably could have reached the factual conclusion reached by the agency. Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989).

Where the error made is one of law, the reviewing court, under the provisions of this section, may reverse or modify the decision of an agency for that reason alone. Shanty Town Assocs. Ltd. Partnership v. Department of Env't, 92 Md. App. 103, 607 A.2d 66 (1992).

Standing. — Where organization did not allege any property interest distinct from its members that the issuance of two permits would affect, the organization was without standing to challenge the issuance of the permits under the Maryland Administrative Pro-

cedure Act. Maryland Waste Coalition, Inc. v. Maryland Dep't of Env't, 84 Md. App. 544, 581 A.2d 60 (1990), rev'd on other grounds, 327 Md. 596, 612 A.2d 241 (1992).

In order to have standing to appeal to the circuit court from an administrative decision, a person must (1) have been a party to the proceeding before the agency; and (2) be aggrieved by the agency decision. Maryland Waste Coalition, Inc. v. Maryland Dep't of Env't, 84 Md. App. 544, 581 A.2d 60 (1990), rev'd on other grounds, 327 Md. 596, 612 A.2d 241 (1992).

So long as the agency's decision is not predicated solely on an error of law, the Court of Appeals will not overturn it if a reasoning mind could reasonably have reached the conclusion reached by the agency. Caucus Distribs., Inc. v. Maryland Sec. Comm'r, 320 Md. 313, 577 A.2d 783 (1990); Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991).

Substantial evidence test applies when the only question is whether the agency, using the correct legal standard, properly applied the law to the facts; however, where the agency's decision is based on an erroneous conclusion of law, this deferential test does not apply. Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991).

Impact of an administrative law judge's ruling on an individual who is not a grievant, is insufficient to confer standing under this act. State Dep't of Pub. Safety & Correctional Servs. v. Bailey, 95 Md. App. 12, 619 A.2d 176 (1993).

Discretion of trial court. — A decision to remand, affirm, reverse, or modify a decision of an administrative agency is one that is committed to the sound discretion of the trial court. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Deviation from prior agency decisions. — An unexplained deviation from prior agency decisions may constitute an arbitrary and capricious act under this section. Montgomery County v. Anastasi, 77 Md. App. 126, 549 A.2d 753 (1988).

Substantial evidence test. — When deciding whether any factual finding is in violation of subsection (g) (now (h)) of this section, Maryland courts have used the substantial evidence test. Doctors' Hosp. v. Maryland Health Resources Planning Comm'n, 65 Md. App. 656, 501 A.2d 1324 (1986).

"Substantial evidence," as the test for reviewing factual findings of administrative agencies, has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Maryland Shipbuilding & Drydock Co. v. Maryland Comm'n on Human Relations, 70 Md. App. 538, 521 A.2d 1263, cert. denied, 310 Md. 130, 527 A.2d 51 (1987).

Finality of administrative agency action. — The action of an administrative agency, like the order of a court, is final if it determines or concludes the rights of the parties, or if it denies the parties the means of further prosecuting or defending their rights and interests in the subject matter in proceedings before the agency, thus leaving nothing further for the agency to do. Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 459 A.2d 205 (1983).

Review of factual finding. — When determining whether an agency's factual finding violates this section, the appropriate standard of review is the substantial evidence test. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Review of finding of law. — When considering whether the agency erred as a matter of law, for example, when there is a challenge to a regulatory interpretation, the substituted judgment standard is to be used. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Failure to await final agency decision is not excused by a party's argument that an agency will be exceeding its authority if it ultimately interprets the statute and decides the case contrary to that party's position. Maryland Comm'n on Human Relations v. Mass Transit Admin., 294 Md. 225, 449 A.2d 385 (1982).

Time limitations. — An appeal to judicially review an administrative agency determination under this section is governed by the time limitations set forth in Maryland Rules, Rule B4. Clinton Community Hosp. Corp. v. Maryland Comprehensive Health Planning Agency, 31 Md. App. 265, 355 A.2d 775 (1976).

Where county not "party aggrieved." — Notwithstanding a county's interest in an agency head's order and in a review board's order, not being a party to either of these proceedings, a county was not a "party aggrieved" and, hence, was not entitled to judicial review. Montgomery County v. One Park N. Assocs., 275 Md. 193, 338 A.2d 892 (1975).

Court's statutory role upon review of a decision of an agency goes very little beyond its inherent power of review to prevent illegal, unreasonable, arbitrary or capricious administrative action. Harford Mem. Hosp. v. Health Servs. Cost Review Comm'n, 44 Md. App. 489, 410 A.2d 22 (1980).

A reviewing court may, and should, examine facts found by an agency, to see if there was evidence to support each fact found. If there was evidence of the fact in the record before the

agency, no matter how conflicting, or how questionable the credibility of the source of the evidence, the court has no power to substitute its assessment of credibility for that made by the agency, and by doing so, reject the fact. Commissioner, Baltimore City Police Dep't v. Cason, 34 Md. App. 487, 368 A.2d 1067, cert. denied, 280 Md. 728 (1977); Toland v. State Bd. of Educ., 35 Md. App. 389, 371 A.2d 161 (1977).

A reviewing court may, and should, examine any conclusion reached by an agency, to see whether reasoning minds could reasonably reach that conclusion from facts in the record before the agency, by direct proof, or by permissible inference. If the conclusion could be so reached, then it is based upon substantial evidence, and the court has no power to reject that conclusion. Commissioner, Baltimore City Police Dep't v. Cason, 34 Md. App. 487, 368 A.2d 1067, cert. denied, 280 Md. 728 (1977); Toland v. State Bd. of Educ., 35 Md. App. 389, 371 A.2d 161 (1977).

Drawing of inferences. — Not only is it the province of an agency to resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences. Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

No provision for new trial. — Proceedings under the Administrative Procedure Act do not include provision for a new trial; instead, the reviewing court is given broad discretion to order the taking of new evidence in open court or before the agency, or, where justice requires, to remand the case for further proceedings. Lucke v. Commissioner of Personnel, 245 Md. 706, 228 A.2d 313 (1967), cert. denied, 392 U.S. 926, 88 S. Ct. 2270, 20 L. Ed. 2d 1384 (1968).

De novo hearing. — Under certain circumstances a de novo hearing is appropriate. These circumstances are: (1) The original trier of fact becomes unavailable and is consequently replaced by a second trier of fact; and (2) the material issues of the case turn on conflicting evidence in which the demeanor and credibility of lay witnesses is a crucial factor. Prince George's County v. Zayre Corp., 70 Md. App. 392, 521 A.2d 779 (1987).

Presumption of validity of agency's decision. — An agency's decision must be reviewed in the light most favorable to the agency, since decisions of administrative agencies are prima facie correct and carry with them the presumption of validity. Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

Administrative exercise of judgment not controllable by mandamus. — The application of somewhat complex regulatory standards to the facts of a particular situation is an administrative exercise of judgment which is not controllable by mandamus. Heft v. Maryland Racing Comm'n, 323 Md. 257, 592 A.2d 1110 (1991).

Appeal of discrimination proceeding finding. — Investigation of claim of race and age discrimination, and resulting no probable cause finding, was not a contested case and was not appealable under the administrative procedure provisions in this section. Parlato v. State Comm'n on Human Relations, 76 Md. App. 695, 548 A.2d 144 (1988), cert. denied, 314 Md. 497, 551 A.2d 867 (1989).

Effect of immediate appeal of order not terminating case. — Where an injunction or similar order is immediately appealed because of the irreparable injury which may flow from the order, but where the case is not terminated in the trial court or administrative agency, the trial court or administrative agency properly may proceed with any other issue or matter in the case. Holiday Spas v. Montgomery County Human Relations Comm'n, 315 Md. 390, 554 A.2d 1197 (1989).

Secretary and Department of Personnel lack standing to appeal judgment of circuit court vacating and remanding Secretary's decision to remove a State employee; the agency was exercising its quasi-judicial function in rendering the decision and does not have the right to appeal to protect its own decision, but the Comptroller of the Treasury had standing to appeal the court's decision where it initiated charges against the proceedings and was thus a party. Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984).

Hearing decision of appointee not final until approved by Secretary. — Although the Secretary of Personnel may delegate to an appointee his authority to hear, investigate, and determine charges brought against a classified employee, the decision of that appointee is not final and reviewable by a court until approved by the Secretary. Comptroller of Treas. v. Myers, 59 Md. App. 118, 474 A.2d 941 (1984).

When court should reverse or modify order. — If the court should find that substantial rights of a petitioner for review have been prejudiced, by one or more of the causes specified, because of an administrative finding, inference, conclusion or decision, then it is the function of the court to reverse or modify the order. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960).

Materiality, for purpose of court accepting additional evidence, includes any evidence which is reasonably capable of influencing a tribunal's decision, but it does not require

that the evidence will necessarily do so. Breedon v. Maryland State Dep't of Educ., 45 Md. App. 73, 411 A.2d 1073 (1980).

Court order remanding case to administrative agency does not constitute a final order. — Order of the circuit court under subsection (e) remanding to administrative agency for taking of additional evidence when the circuit court has not yet heard or decided the appeal from administrative agency is not a final order, and therefore, is not appealable. Hickory Hills Ltd. Partnership v. Secretary of State, 84 Md. App. 677, 581 A.2d 834 (1990).

Remand to administrative agency. — Remand for additional evidence is permitted under subsection (e) prior to a final decision by the reviewing court where the court has reviewed the record for substantial evidence and found it insufficient. Hickory Hills Ltd. Partnership v. Secretary of State, 84 Md. App. 677, 581 A.2d 834 (1990).

Court not to substitute its judgment for that of agency. — While it appears that the scope of judicial review by a trial court of the findings, inferences, conclusions and decisions of administrative agencies under the statute has been broadened to some extent, it is clear that the court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. Bernstein v. Real Estate Comm'n, 221 Md. 221, 156 A.2d 657 (1959), appeal dismissed, 363 U.S. 419, 80 S. Ct. 1257, 4 L. Ed. 2d 1515 (1960); State Bd. of Registration v. Ruth, 223 Md. 428, 165 A.2d 145 (1960); Kaufman v. Taxicab Bureau, Baltimore City Police Dep't, 236 Md. 476, 204 A.2d 521 (1964), cert. denied, 382 U.S. 849, 86 S. Ct. 95, 15 L. Ed. 2d 88 (1965); Nuger v. State Ins. Comm'r, 238 Md. 55, 207 A.2d 619 (1965); Grosman v. Real Estate Comm'n, 267 Md. 259, 297 A.2d 257 (1972); Bulluck v. Pelham Wood Apts., 283 Md. 505, 390 A.2d 1119 (1978); Holy Cross Hosp. v. Health Servs. Cost Review Comm'n, 283 Md. 677, 393 A.2d 181 (1978); Courtney v. Board of Trustees, 285 Md. 356, 402 A.2d 885 (1979).

In reviewing decisions of administrative agencies, the court's appraisal or evaluation must be of the agency's fact finding results, and not an independent, original estimate of, or decision on, the evidence. Zeitschel v. Board of Educ., 274 Md. 69, 332 A.2d 906 (1975); Warner v. Town of Ocean City, 81 Md. App. 176, 567 A.2d 160 (1989).

In appeal of cease and desist order of Consumer Protection Division regarding a company's sale of diet pills through the mail, the circuit court exceeded its authority and usurped administrative functions by substituting its own remedy for the Division's order. Consumer Protection Div. v. Consumer Publishing Co., 304 Md. 731, 501 A.2d 48 (1985).

Under the Administrative Procedure Act, a circuit court reviewing an agency order is permitted to modify the order, but the circuit court exceeded its statutory authority by substituting its own order for the Department's final order where there was substantial evidence presented before the Department to support the agency's finding that the permit should be issued and the agency's conclusion was not arbitrary. Howard County v. Davidsonville Civic & Potomac River Ass'ns, 72 Md. App. 19, 527 A.2d 772 (1987).

Erroneous conclusion of law. — The reviewing court is not constrained to affirm the agency where its order is premised upon an erroneous conclusion of law; the court may not, however, substitute its judgment for the expertise of the agency. Maryland Comm'n on Human Relations v. Mayor of Baltimore, 86 Md. App. 167, 586 A.2d 37, cert. denied, 323 Md. 309, 593 A.2d 668 (1991).

Recognizing an agency's superior ability to understand its own rules and regulations, upon appellate review a court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. Department of Health & Mental Hygiene v. Reeders Mem. Home, Inc., 86 Md. App. 447, 586 A.2d 1295 (1991).

Consideration of additional evidence. — Where it was clear from the court's order that no findings were made as to whether the new evidence submitted by appellees was material and whether good cause existed for its omission at the time of the hearing, the court erred in remanding to the agency to consider this evidence under subsection (e). Howard County v. Davidsonville Civic & Potomac River Ass'ns, 72 Md. App. 19, 527 A.2d 772 (1987).

Complete remand of case to administrative agency is not required but rather a referral for the receipt of additional evidence with an opportunity for the agency to modify its findings or decision is anticipated. Breedon v. Maryland State Dep't of Educ., 45 Md. App. 73, 411 A.2d 1073 (1980).

Where a taxpayer's appeal of the supervisor's assessment to the Tax Court was heard "de novo" with testimony and documentary evidence introduced, the circuit court erred by remanding the cases to the Tax Court to remand to the supervisor for revaluation of the assessments. Atlantic Venture, Inc. v. Supervisor of Assmts., 94 Md. App. 73, 615 A.2d 1210 (1992).

Court order remanding case to administrative agency constitutes final order. — A trial court's order remanding a case to an administrative agency constitutes a final order

for the purpose of further judicial review. Maryland Comm'n on Human Relations v. Baltimore Gas & Elec. Co., 296 Md. 46, 459 A.2d 205 (1983).

County master plan amendment not contested case. — The adoption of an amendment to the master plan is not a contested case within the meaning of the Administrative Procedure Act and hence the appeal from such action was properly dismissed. Boyds Civic Ass'n v. Montgomery County Council, 309 Md. 683, 526 A.2d 598 (1987).

Circuit court erred in reversing planning board's approval of developer's project plans under subsection (g) (3) (iv) (now (h) (3) (iv)) where the developer had complied with all legal requirements for issuance of the project and preliminary plan approvals, and the restrictions in the development guidelines that the circuit court ruled to be ineffective did not apply to the area in question. Montgomery County v. Singer, 321 Md. 503, 583 A.2d 704 (1991).

Remand for error of law. — When the agency has committed an error of law, i.e., by considering improperly an ex parte communication, the court should remand the case to the agency for further proceedings designed to remedy the error. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Remand appropriate. — Trial court's decision to remand case for purpose of conducting a hearing regarding the impact of an ex parte communication, to ensure that final order of secretary was based only on matters contained in the record, was not an abuse of the court's discretion. Eaton v. Rosewood Ctr., 86 Md. App. 366, 586 A.2d 804 (1991).

Washington Suburban Sanitary Commission actions were subject to judicial review pursuant to this section. Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Washington Suburban Sanitary Commission charges were "arbitrary and capricious." Donocam Assocs. v. Washington Sub. San. Comm'n, 302 Md. 501, 489 A.2d 26 (1985).

Applied in Juiliano v. Lion's Manor Nursing Home, 62 Md. App. 145, 488 A.2d 538 (1985); Perini Servs., Inc. v. Maryland Health Resources Planning Comm'n, 67 Md. App. 189, 506 A.2d 1207 (1986); Board of Educ. v. Ballard, 67 Md. App. 235, 507 A.2d 192 (1986); Desser v. Department of Health & Mental Hygiene, 77 Md. App. 1, 549 A.2d 18 (1988); Prince George's County Health Dep't v. Briscoe, 79 Md. App. 325, 556 A.2d 742 (1989); Fort Wash. Care Ctr. v. Department of Health & Mental Hygiene, 80 Md. App. 205, 560 A.2d 613 (1989); Landover Books, Inc. v. Prince George's County, 81 Md. App. 54, 566 A.2d 792 (1989); Board of Educ. v. Secretary of Personnel, 317 Md. 34, 562 A.2d 700 (1989); Motor Vehicle Admin. v. Mohler, 318 Md. 219, 567 A.2d 929 (1990); Maryland State Police v. Lindsey, 318 Md. 325, 568 A.2d 29 (1990); Holmes v. Robinson, 84 Md. App. 144, 578 A.2d 294 (1990); Liberty Nursing Ctr., Inc. v. Department of Health & Mental Hygiene, 91 Md. App. 210, 603 A.2d 1344 (1992); Dashiell v. Maryland State Dep't of Health & Mental Hygiene, 327 Md. 130, 607 A.2d 1249 (1992); Prince George's County v. Younkers, 94 Md. App. 48, 615 A.2d 1197 (1992).

Quoted in 318 N. Mkt. St., Inc. v. Comptroller of Treas., 78 Md. App. 589, 554 A.2d 453 (1989); GMC v. Bark, 79 Md. App. 68, 555 A.2d 542 (1989); Department of Pub. Safety & Correctional Servs. v. Scruggs, 79 Md. App. 312, 556 A.2d 736 (1989); Lofland v. Montgomery County, 319 Md. 265, 572 A.2d 163 (1990); Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 323 Md. 641, 594 A.2d 1115 (1991); Alston v. Robinson, 791 F. Supp. 569 (D. Md. 1992); Medical Waste Assocs. v. Maryland Waste Coalition, Inc., 327 Md. 596, 612 A.2d 241 (1992); Patuxent Inst. Bd. of Review v. Hancock, 329 Md. 556, 620 A.2d 917 (1993).

Stated in Browning-Ferris, Inc. v. Baltimore County, 774 F.2d 77 (4th Cir. 1985); Insurance Serv. Mgt., Inc. v. Muhl, 65 Md. App. 217, 500 A.2d 297 (1985); Carter v. Maryland Comm'n on Medical Discipline, 639 F. Supp. 542 (D. Md. 1986); State Dep't of Assmts. & Taxation v. Loyola Fed. Sav. & Loan Ass'n, 79 Md. App. 481, 558 A.2d 428, cert. denied, 317 Md. 511, 564 A.2d 1182 (1989).

Cited in Lohrmann v. Arundel Corp., 65 Md. App. 309, 500 A.2d 344 (1985); Citizens for Rewastico Creek v. Commissioners of Hebron, 67 Md. App. 466, 508 A.2d 493 (1986); Miller v. Insurance Comm'r, 70 Md. App. 355, 521 A.2d 761 (1987); Motor Vehicle Admin. v. Lindsay, 309 Md. 557, 525 A.2d 1051 (1987); Stark v. Comptroller of Treas., 78 Md. App. 599, 554 A.2d 458 (1989); State Dep't of Env't v. Showell, 316 Md. 259, 558 A.2d 391 (1989); People's Counsel v. Mangione, 85 Md. App. 738, 584 A.2d 1318 (1991); Marquardt v. Papenfuse, 92 Md. App. 683, 610 A.2d 325 (1992).

§ 10-223. Appe

(a) *Scope of sect*

(1) a case that
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(2) An agency
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Editor's note. — Se
1993, provides:

"(1) Except as provide
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(2) The provisions of
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(i) Section 10-222 sha
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§ 10-223. Appeals to Court of Special Appeals.

(a) *Scope of section.* — This section does not apply to:

(1) a case that arises under Title 16 of the Transportation Article unless a right to appeal to the Court of Special Appeals is specifically provided; or

(2) a final judgment on actions of the Inmate Grievance Office.

(b) *Right of appeal.* — (1) A party who is aggrieved by a final judgment of a circuit court under this subtitle may appeal to the Court of Special Appeals in the manner that law provides for appeal of civil cases.

(2) An agency that is aggrieved by a final judgment of the circuit court may appeal under paragraph (1) of this subsection. (An. Code 1957, art. 41, § 256; 1984, ch. 284, § 1; 1993, ch. 59, § 1.)

Effect of amendments. — The 1993 amendment, effective June 1, 1993, in (a) (1), substituted "Title 16 of the Transportation Article" for "the Maryland Vehicle Law"; in (a) (2), substituted "Office" for "Commission"; and added (b) (2).

Editor's note. — Section 5, ch. 59, Acts 1993, provides:

"(1) Except as provided in subsection (2) of this section, the provisions of § 1 of this Act shall apply to all administrative proceedings commencing on or after June 1, 1993.

(2) The provisions of the following sections of the State Government Article, as enacted by this Act, shall apply as follows:

(i) Section 10-222 shall apply to all actions for judicial review filed on or after June 1, 1993;

(ii) Section 10-223 shall apply to all appeals filed on or after June 1, 1993; and

(iii) Section 9-1607.1 shall apply, insofar as practicable, to all administrative proceedings pending on June 1, 1993.

(3) This § 5 is intended to preclude application of this Act to any administrative proceeding that commenced before June 1, 1993, even if the matter is subsequently remanded for further administrative proceedings after judicial review (e.g., Sugarloaf Citizens Association, et al v. Northeast Waste Disposal Authority, et al, 323 Md. 641, 594 A. 2d 1115)."

Method of appeal is as from law courts in civil cases. — Method of appeal under the Administrative Procedure Act is limited to the manner provided by law for appeals from law courts in other civil cases. Maryland State Bd. of Motion Picture Censors v. Marhenke, 18 Md. App. 175, 305 A.2d 501, cert. denied, 269 Md. 762 (1973).

Standard of appellate review of refusal of circuit court to allow presentation of additional evidence is whether the trial judge abused his discretion. Resetar v. State Bd. of Educ., 284 Md. 537, 399 A.2d 225, cert. denied, 444 U.S. 838, 100 S. Ct. 74, 62 L. Ed. 2d 49 (1979).

Applied in Motor Vehicle Admin. v. Lindsay, 309 Md. 557, 525 A.2d 1051 (1987).

Cited in Prince George's County v. Zayre Corp., 70 Md. App. 392, 521 A.2d 779 (1987); 318 N. Mkt. St., Inc. v. Comptroller of Treas., 78 Md. App. 589, 554 A.2d 453 (1989); Mayor of Ocean City v. Purnell-Jarvis, 86 Md. App. 390, 586 A.2d 816 (1991); Atlantic Venture, Inc. v. Supervisor of Assmts., 94 Md. App. 73, 615 A.2d 1210 (1992).

§ 10-224. Litigation expenses for small businesses and nonprofit organizations.

(a) *Definitions.* — (1) In this section, the following words have the meanings indicated.

(2) "Business" means a trade, professional activity, or other business that is conducted for profit.

(3) "Nonprofit organization" means an organization that is exempt or eligible for exemption from taxation under § 501 (c) (3) of the Internal Revenue Code.

(b) *Scope of section.* — This section applies only to:

(1) an agency operating statewide;

(2) a business that, on the date when the contested case or civil action is initiated:

(i) is independently owned and operated; and

(ii) has less than 50 employees, including, if a corporation owns 50% or more of the stock of the business, each employee of the corporation; and

(3) a nonprofit organization.

(c) *Reimbursement authorized.* — Subject to the limitations in this section, an agency or court may award to a business or nonprofit organization reimbursement for expenses that the business or nonprofit organization reasonably incurs in connection with a contested case or civil action that:

(1) is initiated against the business or nonprofit organization by an agency as part of an administrative or regulatory function;

(2) is initiated without substantial justification or in bad faith; and

(3) does not result in:

(i) an adjudication, stipulation, or acceptance of liability of the business or nonprofit organization;

(ii) a determination of noncompliance, violation, infringement, deficiency, or breach on the part of the business or nonprofit organization; or

(iii) a settlement agreement under which the business or nonprofit organization agrees to take corrective action or to pay a monetary sum.

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

(2) The agency shall act on the claim.

(e) *Amount.* — (1) An award under this section may include:

(i) the expenses incurred in the contested case;

(ii) court costs;

(iii) counsel fees; and

(iv) the fees of necessary witnesses.

(2) An award under this section may not exceed $10,000.

(3) The court may reduce or deny an award to the extent that the conduct of the business or nonprofit organization during the proceedings unreasonably delayed the resolution of the matter in controversy.

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

(g) *Appeals.* — (1) If the agency denies an award under this section, the business or nonprofit organization may appeal, as provided in this subtitle.

(2) An agency may appeal an award that a court makes under this section. (An. Code 1957, art. 41, §§ 244, 255A; 1984, ch. 284, § 1; 1986, ch. 256; 1988, ch. 110, § 1; 1993, ch. 59, § 1.)

Term "small business" does not include nonprofit entities. 68 Op. Att'y Gen. 24 (1983).

Retail sales tax assessment challenge. — A small business's challenge to a retail sales tax assessment by the comptroller of the treasury, which was resolved in favor of the business prior to a formal hearing, was a "contested case" for which reimbursement of legal expenses could be sought under this section. Modular Closet Sys. v. Comptroller of Treas., 315 Md. 438, 554 A.2d 1221 (1989).

§ 10-225. Suspension of provisions.

(a) *In general.* — Upon a finding by the Governor that there is an imminent threat within a time certain of a loss or denial of federal funds to the State because of the operation of any section of this subtitle, the Governor by executive order may suspend the applicability of part or all of this subtitle to a specific class of contested cases.

(b) *Duration.* — A suspension under this section is effective only so long as, and to the extent, necessary to avoid a denial or loss of federal funds to the State.

(c) *Contents of order.* — The executive order shall explain the basis for the Governor's finding and state the period of time during which the suspension is to be effective.

(d) *Termination.* — The Governor shall declare the termination of a suspension when it is no longer necessary to prevent the loss or denial of federal funds.

(e) *Publication of order.* — An executive order issued under this section shall be:

(1) presented to the Legislative Policy Committee; and

(2) published in the Maryland Register pursuant to § 7-206 (a) (viii) of the State Government Article. (1993, ch. 59, § 1.)

§ 10-226. Licenses — Special provisions.

(a) *Definitions.* — (1) In this section the following words have the meanings indicated.

(2) "License" means all or any part of permission that:

(i) is required by law to be obtained from a unit;

(ii) is not required only for revenue purposes; and

(iii) is in any form, including:

1. an approval;
2. a certificate;
3. a charter;
4. a permit; or
5. a registration.

(3) "Unit" means an officer or unit that is authorized by law to:

(i) adopt regulations subject to Subtitle 1 of this title; or

(ii) adjudicate contested cases under this subtitle.

(b) *Renewal and expiration.* — If, at least 2 calendar weeks before a license expires, the licensee makes sufficient application for renewal of the license, the license does not expire until:

(1) the unit takes final action on the application; and

(2) either:

(i) the time for seeking judicial review of the action expires; or

(ii) any judicial stay of the unit's final action expires.

(c) *Revocation of suspension.* — (1) Except as provided in paragraph (2) of this subsection, a unit may not revoke or suspend a license unless the unit first gives the licensee:

(i) written notice of the facts that warrant suspension or revocation; and

(ii) an opportunity to be heard.

(2) A unit may order summarily the suspension of a license if the unit:

(i) finds that the public health, safety, or welfare imperatively requires emergency action; and

(ii) promptly gives the licensee:

1. written notice of the suspension, the finding, and the reasons that support the finding; and

2. an opportunity to be heard. (1993, ch. 59, § 1.)

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

Subtitle 4. Administrative Procedure Act — Licensing.

§§ 10-401 to 10-405. Administrative Procedure Act — Licensing.

Repealed by Acts 1993, ch. 59, § 1, effective June 1, 1993.

Subtitle 5. Meetings.

§ 10-502. Definitions [Amendment subject to abrogation].

(h) *Public body.*

(3) "Public body" does not include:

(x) a self-insurance pool that is established in accordance with Article 48A, § 482B or § 9-404 of the Labor and Employment Article by:

1. a public entity, as defined in Article 48A, § 482B of the Code; or

2. a county or municipal corporation, as defined in § 9-404 of the Labor and Employment Article.

(1993, ch. 5, § 1.)

Effect of amendments.

The 1993 amendment, approved Mar. 16, 1993, and effective from date of enactment, substituted "§ 9-404 of the Labor and Employment Article" for "Article 101, § 16A of the Code" in the introductory language of (h) (3) (x) and in (h) (3) (x) 2; and substituted "municipal corporation" for "municipality" in (h) (3) (x) 2.

As the rest of this section was not amended, it is not reprinted in this Supplement.

DISCOVERY DAYS CHILD CARE, INC.	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
MD. STATE DEP'T OF EDUCATION; NUTRITION & TRANSPORTATION SERVICES BRANCH OF THE DIV. OF BUSINESS SERVICES	*	BALTIMORE CITY
	*	CASE NO. 93258067/CL170049

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FILED

AUG 29 1994

CIRCUIT COURT FOR BALTIMORE CITY

MEMORANDUM OPINION AND ORDER

Hollander, J.

Background

Discovery Days Child Care, Inc. ("Petitioner" or "Discovery Days") has filed a Petition for Judicial Review (the "Petition") of a decision of the Maryland State Department of Education (alternatively, "Respondent," the "Department," or "MSDE"). In its decision, the Department found that Discovery Days had received overpayment under the Child and Adult Care Food Program (the "CACFP" or the "Program"), a federally funded, State administered program created under the National School Lunch Act ("NSLA"), 42 U.S.C. § 1766 (1988), and implemented through federal regulations, 7 C.F.R. § 226 (1992). The following summary of relevant facts has been gleaned from the record.

Discovery Days is a private, "for-profit" child-care center participating in the CACFP. The Program is designed to reimburse child-care centers which provide food to children receiving social service benefits under Title XX of the Social Services Act. 42 U.S.C. 1397, *et seq.* (1988) ("Title XX"). The CACFP does not limit eligibility of non-profit child-care centers. However, a proprietary center may qualify for CACFP benefits

only if it demonstrates that at least 25% of its enrolled children are receiving Title XX benefits.[1] Applications for reimbursement may be made for any month in which the percentage is equal to or greater than 25%. It is the method of calculation of percentages which is at the heart of this controversy.

At the relevant time, Discovery Days owned and operated two buildings. One was used for preschool-age children (the "Center") and the other for school-age children (the "School"). T.23-4. The Center and the School served three categories of children: "full-time" children; "part-time" children who spent mornings, afternoons, or fewer than five full days each week at the facilities; and "drop-in" children who spent evenings or intermittent hours at the Center or the School.[2] T.24, 30-1. Only full-time and part-time children at the Center were fed. Petitioner's Hearing Exhibit 1, at 1; T.32-41. In contrast, neither drop-ins nor children at the School were fed by Discovery Days. Petitioner's Hearing Exhibit 1, at 2; T.24.

Discovery Days first applied for participation in CACFP in March, 1990. Petitioner's Hearing Exhibit 2.[3] At the time, the Department provided an orientation session for prospective participants to help them comply with federal regulations. The session was

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[1]Specifically, such centers must show that "not less than 25 percent of enrolled participants were . . . Title XX beneficiaries." 7 C.F.R. §§ 226.6(b)(8), 226.10(c), 226.11(b, c), and 226.15(b)(6). See also, Id., §§ 226.6(c)(11), 226.17(b)(4).

[2]This court is certainly aware that quality child-care services, available at night or on a drop-in basis, are hard to find. While of small comfort, Petitioner deserves credit for offering these services.

[3]The administrative record has not been completely sequentially page numbered. Accordingly, documents in the record will be described herein by name, so as to permit their identification. References to the transcript are abbreviated by "T", along with the particular page number of the transcript.

run by Patricia Freeman ("Freeman"), the Program Administrator and Staff Specialist at the Department who reviews applications for approval. T.43, 49.

Discovery Days had a single license to provide care for up to 140 children; the license applied to both the Center and the School. T.23-24. For the purposes of the Program, one application must be submitted for each license, regardless of the number of buildings or programs offered by the sponsor. T.46. But when Discovery Days submitted its application, it included only the children at the Center to calculate the total of children enrolled. Petitioner's Hearing Exhibit 1, at 2; T.14-15, 28. Upon the submission of the completed application, the Department approved Discovery Days' participation, effective May 1, 1990. Petitioner's Hearing Exhibit 2, T.32. With routine reviews of Discovery Days' paperwork on June 22, 1990, and January 17, 1992, the Department also accepted Discovery Days' annual renewal in October of 1990, 1991, and 1992. Petitioner's Hearing Exhibits 3-5.

In 1991, Freeman noticed a discrepancy between the list of children receiving Title XX benefits and the list of enrolled children. Specifically, she found that some children appearing on the former list were not on the latter list. T.43-45, 68-69. She had not previously noticed the discrepancy because she did not know Discovery Days operated two separate buildings. Consequently, she did not realize that Discovery Days was providing child-care services to children in the School, who were not counted on the total enrollment list because they were not furnished any food. T.5-7, 43-45, 47-48, 67-69. Further, she had relied on Petitioner to meet its obligation to provide accurate enrollment data to MSDE. Petitioner's Exhibit 2, ¶¶ 9, 14, 18, 20-22; Respondent's Hearing Exhibit 1, Attachment A,

at 17-18; T.40-43.

In November, 1992, MSDE conducted an audit of Discovery Days for fiscal year 1991, and concluded that Discovery Days did not meet the eligibility requirements for any of the months. Petitioner's Hearing Exhibit 1; Respondent's Hearing Exhibit 3; T.7, 32-41. The auditors found that in calculating the eligibility percentage, Discovery Days did not include any unfed part-time or unfed drop-in children in the total enrollment denominator, but did include in the numerator those part-time Title XX children who were fed. Recalculating the eligibility percentage--using both the ratio of total Title XX children to total children[4] and the ratio of fed Title XX children to total fed children--the auditors found that Discovery Days did not exceed the required 25%, and so could not be considered qualified for any month during fiscal year 1991. T.33-34.

Expanding the audit to include the applicable portions of fiscal years 1990, 1992, and 1993, the MSDE auditors concluded that Discovery Days also failed to meet the 25% requirement for 11 of the additional 18 months. Petitioner's Hearing Exhibit 1; Respondent's Hearing Exhibit 3; T.5-6. Consequently, MSDE invoiced Discovery Days for $30,090.42 in overpayments disbursed during a total of 23 months in which Discovery Days did not meet the eligibility requirements of CACFP.[5] Exhibit 1.a to Discovery Days' Letter

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[4]The auditors did not include non-Title-XX drop-in children in the total enrollment denominator. T.38-39.

[5]MSDE now stipulates that this amount was incorrect. A later audit--using the same *method* of computing the percentage--concluded that Discovery Days was overpaid by some $25,000. Nevertheless, MSDE correctly notes that the Hearing Examiner only considered the propriety of the calculation *method*, not the accuracy of the arithmetic. It is the *method* of calculation, not the arithmetic itself, which is in issue. Moreover, because the mathematical error was not raised before the Hearing Examiner, this court cannot consider

of Appeal dated May 13, 1993.

When Discovery Days contested the Department's action, Dr. Bonnie Copeland ("Copeland"), the Deputy State Superintendent of MSDE, appointed Joseph Pyzik ("Pyzik" or "Hearing Examiner"), an internal auditor for MSDE, as Hearing Examiner. T.3. Although Copeland is Pyzik's immediate supervisor, Pyzik is not supervised by any of the officials responsible for managing the Program, and he did not participate in the audit of Discovery Days in any way. T.3-4, 9-10.

A hearing was held on June 17, 1993. At the administrative hearing, Joan Hurt ("Hurt"), the president of Discovery Days, claimed that she asked Freeman, at the orientation run by MSDE, how to calculate the necessary percentage. Hurt alleged that Freeman advised her that the percentage numerator is the total number of children receiving Title XX benefits, while the denominator is the number of children being fed. T.24-25. In contrast, Freeman did not recall seeing Hurt at the orientation, and denied giving Hurt erroneous advice. T.45. Freeman testified that the percentage must be calculated based on the total number of children eligible for Title XX benefits divided by the total number of children receiving child-care services.[6] T.44-45, 48-49, 67-69.

In an opinion issued August 16, 1993 (the "Opinion"), Pyzik affirmed the decision of the auditors. In particular, Pyzik found that an audit was conducted on November 20, 1992,

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the arithmetical error in deciding whether the Hearing Examiner's decision was supported by substantial evidence in the record. See also, infra, note 8.

[6]This would necessarily include the children at both the Center and the School, whether they were there on a full-time basis, a part-time basis, or even on an irregular drop-in basis.

which indicated that Discovery Days was not eligible for reimbursements totalling $30,090.42 but also indicated that Discovery Days had been in compliance with eligibility from May, 1990 to April, 1992. From this, Pyzik concluded that Discovery Days had received $30,090.42 in overpayment claimed by MSDE. Opinion, at 3. However, he made no express finding as to what Freeman may have told Hurt as to the proper method of calculation.

In its Petition, Discovery Days raises three arguments. First, Petitioner claims that the enabling federal statutes and regulations violate the Equal Protection Clause of the 14th Amendment to the United States Constitution and Article 24 of the Maryland Declaration of Rights, in that they irrationally distinguish between proprietary and nonprofit child-care centers. Second, Discovery Days argues that this court should substitute its judgment for that of the Hearing Examiner as to the interpretation of the statutory provisions defining the percentage, and find either that Discovery Days' interpretation is correct, or that Discovery Days was entitled to rely on the instructions and approval given by Freeman as to the application. Third, Petitioner contends that MSDE denied Discovery Days an impartial hearing by appointing Pyzik, a subordinate employee of the Department, to review the actions of his co-workers.

Scope of Review

The scope of review of a decision by the Department is statutorily governed by the amended and recodified Administrative Procedure Act (the "APA"), Md. State Gov. Code Ann., § 10-222(h) (1993 & Supp. 1993) (formerly Md. Ann. Code of 1957, Art. 41, § 255

(1989)), which provides in pertinent part:

> In a proceeding under this section, the court may:
> (1) remand the case for further proceedings;
> (2) affirm the final decision; or
> (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
> (i) is unconstitutional;
> (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
> (iii) results from an unlawful procedure;
> (iv) is affected by any other error of law;
> (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
> (vi) is arbitrary or capricious.

See also, Warner v. Ocean City, 81 Md. App. 176 (1989); Harford Mem'l Hosp. v. Health Svces Cost Rev. Comm'n, 44 Md. App. 489 (1980). Cf., Bd. of Educ. v. Paynter, 303 Md. 22 (1985); MEMCO v. Md. Empl. Sec. Admin., 280 Md. 536 (1977); Bethlehem Steel Co. v. Bd. of Appeals, 219 Md. 146 (1959); Bd. of Appeals v. Baltimore, 72 Md. App. 427, 431-2 (1987); Adams v. Cambridge Wire Cloth Co., 68 Md. App. 666, 673 (1986).

Section 10-222(h), and case law interpreting its predecessor, make clear that "findings of fact made by the [agency] are binding upon the reviewing court, if supported by substantial evidence in the record." Baltimore, 72 Md. App. at 431. See also, Allen v. Core Target City Youth Program, 275 Md. 69 (1975). The resolution of conflicting evidence is the province of the agency, and "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." Bulluck v. Pelham Wood Apts., 283 Md. 505, 513 (1978) (citing Lab. Bd. v. Nevada Consol. Copper Corp., 316 U.S. 105, 106-07 (1942)). See also, Courtney v. Bd. of Trustees, 285 Md. 356, 362

(1979); Bd. v. Levitt & Sons, 235 Md. 151, 159-60 (1964); Snowden v. Baltimore, 224 Md. 443, 448 (1961); cf., Balto. Lutheran High Sch. Ass'n, Inc. v. Md. Empl. Security Admin., 302 Md. 649, 663 (1985). This court's review of MSDE's decision "is limited 'to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached." Dickinson-Tidewater, Inc. v. Supervisor, 273 Md. 245, 256 (1974) (quoting Ins. Comm'r v. Nat'l Bureau, 248 Md. 292, 309-10 (1967)).

Decisions of administrative agencies are prima facie correct and, on appeal, the agency's decision must be viewed in the light most favorable to the agency. Bulluck, 283 Md. at 512-13 (citing cases). Thus, "the reviewing court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken." Bernstein v. Real Estate Comm'n, 221 Md. 221, 230 (1959) (emphasis in original), appeal dismissed, 363 U.S. 419 (1960). Accordingly, modification or reversal of the agency's decision is only appropriate when the petitioner has demonstrated that substantial rights of the petitioner have been prejudiced by one or more of the causes specified in § 10-222(h). Id.

Discussion

I. Fair and Impartial Hearing

As a threshold matter, this court must consider Petitioner's claim that the hearing was defective because Pyzik was not impartial. The procedures for hearing contested cases

arising under the jurisdiction of administrative agencies[7] are set forth in APA, §§ 10-201 through 10-226. Most relevant to the present case is § 10-205(a), as amended by Ch. 59, 1993 Laws (the "Amendment"), which states, in pertinent part as follows:

> (a) *To whom delegated.*--
> (1) A board, commission, or agency head authorized to conduct a contested case hearing shall:
> (i) conduct the hearing; or
> (ii) delegate the authority to conduct the contested case hearing to:
> 1. the Office [of Administrative Hearings]; or
> 2. with the prior written approval of the chief administrative law judge, a person not employed by the Office [of Administrative Hearings].
>
> * * *
>
> (3) This subsection is not intended to restrict the right of an individual, expressly authorized by a statute in effect on October 1, 1993, to conduct a contested case hearing.

There can be little doubt but that the hearing held by Pyzik on June 17, 1993 did not conform to the mandatory requirements of this subsection. Pyzik himself is not a "board, commission, or agency head," and the Department has not provided evidence of the chief administrative law judge's prior written approval of Pyzik to serve as hearing examiner. In addition, MSDE has not provided any authority to demonstrate Pyzik's statutory authority to conduct a contested case hearing. The only issue, then, is whether the procedural infirmities can be excused.

The Department contends that the Amendment does not apply to the present case. Correctly, the Department notes that § 5 of the Amendment limits the application of the

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[7]MSDE is not among those agencies specifically exempted from the APA by § 10-203(a).

Amendment "to all administrative proceedings commencing on or after June 1, 1993." MSDE claims that, because Discovery Days filed its request for a hearing on May 13, 1993, the proceedings commenced before June 1, 1993, and therefore the Amendment would not apply.

The APA does not define the terms "proceeding" or "commence," and it is not clear whether "proceeding" refers to in-court proceedings, such as an actual hearing, or the mere initiation of legal action. Nevertheless, the Court of Appeals has clearly held that amendments changing only procedural matters apply to all cases pending, from the date of effect forward, unless otherwise specified. Roth v. Dimensions Health Corp., 332 Md. 627, 637 (1993) (answering question certified by the Fourth Circuit). Previously, the Court has stated:

> Ordinarily, there is no vested right in procedures utilized to enforce substantive rights. Consequently, a change in the law that does not impair existing substantive rights but only alters the procedures involved in the enforcement of those rights ordinarily applies to all actions whether accrued, pending, or future unless a contrary intention is expressed.

Mraz v. County Comm'rs of Cecil Co., 291 Md. 81, 90 (1981) (citations omitted).

MSDE has not shown that the Amendment alters any substantive rights, or that the Legislature did not intend the Amendment to apply to those cases pending on June 1, 1993. Moreover, the manner in which an administrative hearing is conducted smacks of procedure, rather than substance. If so, the hearing on June 17, 1993 should have complied with the requirements of the Amendment.

MSDE also argues that because Discovery Days has not established any proof of

actual bias on the part of Pyzik, a presumption of impartiality applies. See generally, 73A C.J.S. Pub. L. & Proc., § 138(b), at 85-86 (1976); 2 Am. Jur. 2d Admin. L., § 316, at 327 (1994). In support of its contention that actual bias must be demonstrated, MSDE cites Withrow v. Larkin, 421 U.S. 35 (1975), and Caton Ridge Nursing Home, Inc. v. Califano, 447 F.Supp. 1222 (D.Md. 1978), aff'd, 596 F.2d 608 (4th Cir. 1979). Respondent's Supplemental Memorandum, at 1-2. In Withrow, the Supreme Court held that the combination of investigative and adjudicative functions in the same agency, or even the same individual, does not create a presumption of bias in an administrative adjudication. 421 U.S. at 55. Moreover, the Court required the objecting party to carry the burden of persuading the court that the combination itself creates a risk of actual bias sufficient to threaten due process. Id. at 47. In Caton Ridge, relying on Withrow, the Federal Court held that the mere fact that the hearing examiner was an employee of the agency which investigated and brought the action did not per se disqualify the hearing examiner from presiding over a case involving parties working in an independent office within the agency, absent a substantial showing of personal bias. 447 F.Supp. at 1226. That Court observed that the contrary conclusion "would place an immense strain on the complex structure of the government." Id.

To the extent MSDE states generally applicable law, its argument is sound. In Maryland, however, the Legislature enacted the APA for the purpose of providing an impartial forum for cases such as this one. Contrary to the dicta in Caton Ridge, no strain, immense or otherwise, would have resulted had MSDE referred the hearing to an Administrative Law Judge. Moreover, the Court of Appeals, recently interpreting the APA

in another context, restated the principle that judicial and quasi-judicial officers must avoid even the appearance of bias or impropriety.

> One of the main objectives of the Legislature in establishing the [Office of Administrative Hearings] was to provide an impartial hearing officer in contested cases. A hearing officer employed by and under the control of the agency where the contested case or other disputed action arises, often results in the appearance of an inherent unfairness or bias against the aggrieved.

Anderson v. Dep't of Public Safety, 330 Md. 187, 213-14 (1993). Given the fact that the Office of Administrative Hearings provides a ready source of impartial judges, and in light of the specific, limiting language of § 10-205(a), MSDE should have referred the instant case to the Office of Administrative Hearings to avoid the appearance of bias.

But the analysis does not end there. MSDE argues that Discovery Days has waived its right to raise error as to the conduct of the hearing. As already discussed, the hearing on June 17, 1993, was governed by the mandatory language of the Amendment only if the matter affected by the Amendment is procedural, not substantive. But in establishing a procedural defect, Petitioner has been "hoist with its own petard." The law in Maryland is well settled that to the extent a procedural error is not promptly raised before the adjudicatory officer at the administrative hearing, a complaining party may not later raise an objection on that ground in a judicial review proceeding. Bullock v. Pelham Wood Apts., 283 Md. 505, 518 (1978). Indeed, the Court of Appeals has observed that Art. 41, § 255(f) (verbatim predecessor to APA § 10-222(g)(2)), which allows the circuit court to hear testimony regarding alleged errors not appearing in the record from the agency hearing,

> does not excuse the failure to raise a timely procedural issue before the agency.

> Rather, it [provides] a means for relief in the reviewing court *where there was in fact an objection to a procedural irregularity at the administrative level* but where the administrative record failed to adequately disclose the irregularity or the objection.

Bullock, 283 Md. at 519-20 n.3 (emphasis added). See also, Cicala v. Disability Rev. Bd., 288 Md. 254, 261-62 (1980) (alleged procedural error depriving a party of due process waived when party's attorney knew or should have known of error, did not raise objection before, during, or after the hearing, but only raised it for the first time on appeal).

In the instant case, the record shows that Discovery Days learned of the potential for bias at the beginning of the hearing, questioned Pyzik about his relationship with the parties, but did not object to his presiding as the hearing examiner. T.3-5. As Discovery Days had ample opportunity to object then and there, its failure to object constitutes waiver. Accordingly, the claim of partiality affords no relief to Discovery Days.

II. The Hearing Examiner's Opinion

A. Findings of Fact

Pyzik made five specific findings, which are really not at issue here. Although his discussion in the Opinion was brief, his findings are nevertheless supported by substantial evidence in the record. Indeed, nothing in Discovery Days' pleadings challenges any findings made by Pyzik.[8] Thus, the only way this court could substitute its judgment for that

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[8]To be precise, Discovery Days does contest the *amount* of the overpayment, which MSDE now concedes should be $25,909.08, and not $30,090.42 as found by Pyzik. This fact is not necessary to support Pyzik's conclusions of law regarding the *method* of calculation and any discrepancies in the arithmetic are not germaine to any issue before this court. Moreover, as the dollar amount was not disputed at the hearing, the issue has not been preserved on appeal. See supra, note 4.

of the Hearing Examiner is if either the facts found lead inexorably to but one conclusion, cf., Ramsay, Scarlett & Co., Inc. v. Comptroller of the Treasury, 302 Md. 825, 838-39 (1985) (substitution of judgment by the circuit court of an accounting issue decided by the tax court under Code, Art. 81, § 229(o)), or the Hearing Examiner incorrectly applied the law. Adams v. Cambridge Wire Cloth Co., 68 Md. App. 666, 673 (1986).

B. Conclusions of Law

Pyzik concluded that the auditors' method of calculating Petitioner's eligibility for CACFP benefits was correct. Discovery Days' contends that the auditors and Pyzik erred as a matter of law. Petitioner's claim is *not* based on legal dialectic or settled methods of statutory construction. Rather, Discovery Days' argument has several components. Petitioner contends that Hurt either misunderstood the method of percentage calculation based on Freeman's instructions, or was misinformed as to the method of calculation. Moreover, observing that the documents Freeman considered during the approval process were not the same as those on which the auditors relied to determine Discovery Days' ultimate eligibility, Petitioner argues that the fact that different documents were considered at various stages shows that the statute is ambiguous. See, e.g., T.8-12, 14-22, 58-62, 70-71; Petitioner's Memorandum in support of the Petition, at 8-9, 20-22. Discovery Days' position is not supported by the record.

No one contends that Hurt deliberately miscalculated the number of "enrolled children" or intentionally inflated the percentage so as to become eligible for reimbursement. Nor does anyone argue that Freeman deliberately mislead Hurt. Nevertheless, Hurt's failure

to interpret correctly the Program's eligibility requirements does not, in itself, render the statute ambiguious. On the contrary, Hurt has been the only applicant who failed to apply the regulations properly. T.11, 33, 43, 69. Moreover, the testimony of Freeman and the auditors does not establish that they intepreted the rules of eligibility differently. Indeed, they calculated eligibility using identical formulas (T. 32-34, 37-40, 48-49); they merely used different sources of information. T.7-9, 11, 34-36, 41, 43-45, 67-69. As a result, this argument does not help Discovery Days meet its burden of showing that the facts inexorably lead to a conclusion other than Pyzik's.

Nor does reference to the statute or regulations help Discovery Days establish an ambiguity. The statutory language in effect during the relevant times in this case limited eligibility of private institutions to those for which at least 25% of the children received Title XX benefits, and for which the organization provides nonresidential child-care services. 42 U.S.C. § 1766(a) (1988). The regulations promulgated to effectuate the CACFC require the administering state agencies (here, MSDE) to establish application approval procedures which include requiring a prospective participant to provide "certification that not less than 25 percent of enrolled participants in each such center during the most recent calendar month were . . . Title XX beneficiaries." 7 C.F.R. §§ 226.6(b)(8), 226.15(b)(6). An "enrolled participant" and an "enrolled child" are both defined as "a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care." 7 C.F.R. § 226.2. Nowhere in the eligibility limitation is either the numerator or denominator of the percentage modified with respect to children who are "fed" or "unfed." Consequently, Petitioner has not established any grounds for finding that Pyzik

erred as a matter of law in his interpretation of the relevant statutes.

Discovery Days also argues that even if the Hearing Examiner's interpretation of the percentage is correct, Discovery Days' reasonable reliance on MSDE's erroneous representations concerning the qualification percentage, coupled with sufficient delay to cause substantial harm, support application of the doctrine of equitable estoppel. Initially, this argument must fail because the Hearing Examiner implicitly found that Freeman did not make any such erroneous representation to Hurt. Yet even if the Hearing Examiner had found that Freeman erroneously represented the method of calculation to Hurt, MSDE would not be estopped from enforcing the proper eligibility percentage.

In Maryland, the case law makes clear that the doctrine of equitable estoppel "may operate against the state by acts done in its proprietary capacity, [but] . . . will not be applied against the state in the performance of its governmental, public or sovereign capacity or in the enforcement of policy measures." Salisbury Beauty Sch. v. State Bd. of Cosmetologists, 268 Md. 32, 63-64 (1973) (citing 28 Am. Jur. 2d, Estoppel & Waiver, §§ 123-24 (1966) and 31 C.J.S., Estoppel, § 140(b) (1976)). See also, C.E. Weaver Stone Co. v. Comptroller, 235 Md. 15, 22-23 (1963) (misrepresentation by agent of Comptroller of the Treasury did not estop State from enforcing tax code); Comptroller v. Atlas General Industries, 234 Md. 77, 84-87 (1963) (same); Cuppett & Weeks Nursing Home, Inc. v. Dep't of Health & Mental Hygiene, 49 Md. App. 199, 209 (1981) (delay in enforcing Medicaid regulations does not estop the State).

This court is not unmindful of the difficulties nonlawyers--and, indeed, many lawyers--face when trying to conform conduct to the often complicated, cumbersome, and

confusing requirments imposed by Congress in order to receive public funds. In addition, this court is sympathetic to Petitioner's unfortunate situation. In a laudable attempt to provide much needed child-care services to an underserved niche, Discovery Days attempted in good faith to comply with the requirements of the Program. Hurt sought advice from Freeman, the representative of MSDE most likely to know how to comply, who--taking the evidence in the light most favorable to Petitioner--answered Hurt's questions erroneously. Moreover, the State took no action for nearly two years, despite the fact that it had all the necessary information from the outset and conducted biannual reviews.

Nevertheless, this court is obliged to follow and apply the law of Maryland--not to create new law. Under the pertinent case law, this State does not provide relief for Petitioner, no matter how harsh the result may be.[9] Even if Hurt's version of what Freeman said regarding calculation of the eligibility percentage were true, the enforcement of the eligibility requirements imposed by Congress is clearly a governmental function. Thus, MSDE cannot be estopped from enforcing the correct qualifying percentage.

C. Denial of Equal Protection

Petitioner argues that NSLA § 1766 violates the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration

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[9]In the related area of municipal estoppel, the courts have repeatedly refused to impose estoppel on the city government even though the "innocent" party stood to lose hundreds of thousands of dollars, land, businesses, and more. See, e.g., Inlet Associates v. Assateague House, 313 Md. 413 (1988); City of Hagerstown v. Long Meadow Shopping Center, 264 Md. 481 (1972); Berwyn Heights v. Rogers, 228 Md. 271, 279 (1961); Lipsitz v. Parr, 164 Md. 222 (1932); Mayor & City Council of Hagerstown v. Hagerstown Ry. Co., 123 Md. 183, 195 (1914).

of Rights on a disparate treatment theory: in order to qualify for benefits, proprietary institutions must receive compensation under Title XX of the Social Security Act for at least 25% of the children for which it provides child-care services, but no such requirement is imposed on nonprofit institutions. As discussed below, the Equal Protection argument is without merit.[10]

Discovery Days concedes that it is not in a suspect or quasi-suspect class, and the case does not concern a fundamental right. Memorandum in Support of the Petition, at 15-19. It is well established that where no suspect class and no fundamental right or interest is involved or impaired, the state agent needs to show merely that the distinction drawn by Congress--in this case, between proprietary and nonprofit child-care providers--is rationally related to a legitimate government purpose, particularly with respect to statutory classifications in the area of social welfare and economic legislation. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 768-85 (1975); Richardson v. Belcher, 404 U.S. 78, 81-84 (1971). In a case analogous to the instant matter, involving a challenge to the restriction of benefits by Congress through the Omnibus Budget Reconciliation Act of 1981, the Supreme Court noted:

> [O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend

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[10]Article 24 of the Maryland Declaration of Rights has been held to have the same meaning and effect as the Equal Protection clause of the Fourteenth Amendment to the U.S. Constitution. Bd. of Supervisors of Elections v. Goodsell, 284 Md. 279 (1979); Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143 (1974). Decisions of the Supreme Court may be considered direct authorities for interpretation of Article 24. Bureau of Mines, supra. Consequently, to the extent the discussion hereafter mentions the Fourteenth Amendment, it shall be understood to include Article 24.

money to improve the general welfare is lodged in Congress rather than in the courts.

Lyng v. International Union, U.A.W., 485 U.S. 360, 373 (1988) (citation omitted) (upholding differential treatment of striking workers as to eligibility for food stamps).

When examined under this deferential standard of review, NSLA § 1766 withstands constitutional attack because the 25% eligibility requirement for proprietary child-care providers is rationally related to the Congressional goal of allocating money to child-care centers with the greater need for public funds for food services. The Program was established to create a permanent program to help children in nonresidential child-care institutions. S. Rep. No. 94-259, 94th Cong., 1st Sess. 13, reprinted in 1975 U.S. Code Cong. & Ad. News 1004. Originally, the only programs that could participate in CACFP were federally funded programs requiring nonprofit status, and those institutions moving toward, or already in compliance with, the requirements for tax-exempt status under § 501(c)(3) of the Internal Revenue Code. Eligibility was not extended to for-profit programs until 1980. P.L. No. 96-499, § 207, 94 Stat. 2602 (1980).

In 1981, as a part of the Omnibus Budget Reconciliation Act, Congress restricted the eligibility of proprietary organizations with a threshold enrollment percentage, by adding the following language: "(but only if such organization receives compensation under [Title XX] for at least 25 percent of the children for which the organization provides such nonresidential day care services.)" P.L. No. 97-35, § 810(a)(1), 95 Stat. 528 (1981). The provision was included to limit the amount of public funds distributed, as well as to make the program more consistent with other child nutrition programs in which only nonprofit institutions could participate. S.Rep. No. 97-139, 97th Cong., 1st Sess. 2, 86, reprinted in 1981 U.S. Code

Cong. & Ad. News 475; H. Conf. Rep. No. 97-208, 97th Cong., 2d Sess. 778, reprinted in 1981 U.S. Code Cong. & Ad. News 1140.

Congress had two goals in imposing the 25% eligibility requirment upon proprietary centers: to reduce spending, and to help the greatest number of the neediest children. With an eye toward these ends, it is logical to conclude that proprietary and nonprofit child-care institutions are not similarly situated entities. Proprietary institutions, particularly profitable ones, may have greater resources for funding food service for its enrolled children, and may also have the option of raising tuition rates or reducing the profit margin. This court cannot say that the distinction drawn by Congress was irrational.

Conclusion

Based on the foregoing, it is, this 19th day of August, 1994, by the Circuit Court for Baltimore City, ORDERED that the decision of MSDE be, and the same hereby is, AFFIRMED.

Ellen L. Hollander
Judge Ellen L. Hollander

cc: Patrick Massari, Esq.
Caroline Emerson, Assistant Attorney General

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 06/09/94

PRESIDING JUDGE Ellen L. Hollander

COURTROOM CLERK Louise C. Baylor

STENOGRAPHER John Trowbridge

ASSIGNMENT FOR WEDNESDAY JUNE 22, 1994

CASE NUMBER - 93258067
CASE TITLE - DISC. DAYS CHILD CARE V NUTRITION & TRANS CL170049 CL
CATEGORY - APPEAL FROM ADMINISTRATIVE AGENCY
PROCEEDING - COURT TRIAL - FAST TRACK

CLOUTIER, VALERIE	DEFENSE ATTORNEY	576-6465
EMERSON, CAROLINE E	DEFENSE ATTORNEY	576-6450
MASSARI, PATRICK J	PLAINTIFF ATTORNEY	

TYPE OF PROCEEDING: (____ JURY) (✓ NON-JURY) (____ OTHER)

DISPOSITION (CHECK ONE)

(____ SETTLED)	(____ CANNOT SETTLE)	(____ NEXT COURT DATE)
(____ VERDICT)	(____ REMANDED)	(____ NON PROS/DISMISSED)
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(____ JUDGEMENT ABSOLUTE)	(____ ORDER/DECREE TO BE SIGNED)	
(____ POSTPONED)	(____ MOTION GRANTED)	
(____ SUB CURIA)	(____ MOTION DENIED)	

JUDGE SIGNATURE Ellen Hollander DATE 8/19/94

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 06/09/94

PRESIDING JUDGE Ellen L. Hollander

COURTROOM CLERK Louise C. Baylor

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CLOUTIER, VALERIE DEFENSE ATTORNEY 576-6465
EMERSON, LINE E DEFENSE ATTORNEY
MASSARI, ICK J PLAINTIFF ATTORNEY

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APPEAL FROM ADMINISTRATIVE AGENCY
- COURT TRIAL - FAST TRACK

CLOUTIER, VALERI[illegible] DEFENSE ATTORNEY 576-646[illegible]
[illegible], CAROLINE E DEFENSE ATTORNEY 576-645[illegible]
[illegible], PATRICK J PLAINTIFF ATTORNEY

[illegible]PE OF PROCEEDING: (____ JURY) (_✓_ NON-JURY) (____ OTHER)

DISPOSITI[illegible])

(____ SETTLED) (____ CANNOT SETTLE) (____ NEXT COURT DATE)

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(____ JUDGEM[illegible]) (_✓_ ORDER/DEC[illegible] (____ OTHER)
PLEASE EXPLAIN:

(____ JUDGEM[illegible]ABSOLUTE) (____ ORDER/DECREE TO BE SIGNED)

(____ [illegible]) (____ MOTION GRANTED)

(____ SUB CURIA) (____ MOTION DENIED)

JUDGE SIGNATUR[illegible] 8/19/94

IN THE CIRCUIT COURT FOR BALTIMORE CITY *
PETITION OF DISCOVERY DAYS CHILD CARE, INC.

FOR JUDICIAL REVIEW OF THE DECISION OF THE *
MARYLAND STATE DEPARTMENT OF EDUCATION

IN THE CASE OF: * Civil Action No.
DISCOVERY DAYS CHILD CARE, INC. * 93258067/CL170049

* *

RESPONDENT'S ANSWERING MEMORANDUM

Respondent, the Maryland State Department of Education, by and through Joseph J. Curran, Jr., Attorney General of Maryland, and Caroline E. Emerson, Assistant Attorney General, files its answering memorandum pursuant to Maryland Rule 7-207(a).

Introduction

Discovery Days Child Care, Inc. (hereinafter "Discovery Days" or "Petitioner") is a private, for profit child care center participating in the Child and Adult Care Food Program (hereinafter "CACFP" or "Program"). The CACFP is a federally funded program which reimburses participating day care institutions for food service provided to enrolled children. In order to participate in the Program, private, for profit institutions providing nonresidential child care services must receive compensation under Title XX of the Social Security Act for not less than 25 percent of the children for which the institution provides day care services. In Maryland, the Program is administered by the Maryland State Department of Education (hereinafter the "Department" or "Agency") pursuant to section 17 of the National School Lunch Act, 42 U.S.C.A. § 1766, and implementing regulations, 7 C.F.R. Part 226.

This appeal arises out of a decision by the Department finding that Discovery Days was not eligible for reimbursement under the Program for 23 months for which it had claimed reimbursement because less than 25 percent of the children enrolled at Discovery Days during those months received benefits under Title XX of the Social Security Act. The Department therefore demanded that the overclaims, amounting to $30,090.42, be repaid to the Department; Discovery Days appealed the decision. At the center of this dispute is the proper method for calculating compliance with the 25 percent requirement. Discovery Days contends that the percentage may be calculated by dividing the number of children receiving Title XX benefits by the number of children at the institution who are fed meals. The Department contends that the divisor must be the number of all children enrolled in the institution for child care services, whether fed or not fed.

I. QUESTIONS PRESENTED

1. Whether the Maryland State Department of Education's decision, applying the Child and Adult Care Food Program eligibility criteria for proprietary Title XX centers to Discovery Days Child Care, Inc., was legally correct and supported by substantial evidence?

2. Whether section 17 of the National School Lunch Act discriminates illegally against for profit child care centers by requiring that 25 percent of enrolled children be paid for under Title XX of the Social Security Act in order to be eligible for

reimbursement under the Child and Adult Care Food Program?

3. Whether Petitioner received a fair and impartial hearing before an independent official as required by 7 C.F.R. § 226.6(k)(6)?

II. STATEMENT OF FACTS

Discovery Days Child Care, Inc. applied to the Maryland State Department of Education to participate in the Child and Adult Care Food Program as a proprietary Title XX center in March, 1990 (Record 4.b(2)).[1/] Discovery Days' application was approved by the Department effective May 1, 1990 (Tr. 32; Record 4.b(2)),[2/] and renewed annually in October 1990, 1991 and 1992 (4.b(3), (4), and (5)).

Patricia Freeman, the MSDE staff specialist who reviews applications for participation in the CACFP and recommends approval (Tr. 43, 49), based her finding that Discovery Days met the eligibility criteria for proprietary centers on the lists of enrolled children and of children receiving Title XX benefits which were submitted by Discovery Days (Tr. 43; Record 4.b(2)). Ms. Freeman assumed that the list of enrolled children did, in fact, reflect total enrollment as defined by the Act, and therefore simply counted the number of children on each list to verify that at least 25 percent of enrolled children were

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[1/] "Record #" refers to the designation given to exhibits admitted into the administrative record in the Agency's Amended Certification of Record.

[2/] "Tr. #" refers to the applicable page numbers of the June 17, 1993 hearing transcript submitted as Record 3.

receiving Title XX benefits (Tr. 44-45, 67-69).

During the period at issue in this appeal, Discovery Days had a single child care license and was considered a single site for purposes of the CACFP (Tr. 46-47). Each proprietary site must meet the 25 percent Title XX enrollment ratio in order to be eligible for reimbursement under the Program. (Tr. 45-46). At the time Ms. Freeman approved Petitioner for the program, she was not aware that Discovery Days had two buildings and she had not visited the site (Tr. 47-48).

In November 1992, MSDE staff performed an audit of the Child and Adult Care Food Program sponsored by Discovery Days for the period October 1, 1990 through September 30, 1991 (Fiscal Year 1991). The auditors concluded that Petitioner did not meet the minimum criteria for participation in the CACFP by a proprietary Title XX sponsor for any month during the audit period because less than 25% of the sponsor's enrolled children were Title XX participants. Therefore, the scope of the audit was expanded to include fiscal years 1990, 1992 and 1993. The expanded review revealed that Discovery Days failed to meet the Title XX 25% requirement for 11 of the additional 18 months. Accordingly, the auditors found a total overclaim of $30,090.42 for fiscal years 1990, 1991 and 1992, and recommended that MSDE collect the disallowed reimbursement from Petitioner (Tr. 5; Record 4.c(2)).

The auditors, Ms. Anita Shook Finn and Mr. Steven Ayers, discovered Discovery Days' failure to meet the 25% ratio because of a discrepency in the lists of children relied upon to support Petitioner's monthly claims for reimbursement. Specifically, the

auditors found that the names of some of the children on the Department of Social Services (DSS) invoice (DSS children are Title XX beneficiaries) did not appear on the Discovery Days enrollment list, but had been counted to develop the percentage to make Petitioner eligible for CACFP. Pursuing the matter with Discovery Days management, the auditors found that the Petitioner did not include children who were not fed at the center - such as drop-ins, and before and after school care children who were not present during meal or snack times - in the total enrollment list, but did include DSS children who were not fed on the DSS list (Tr. 7, 32-41; Record 4.c(3)). The auditors tested Program eligibility using: (1) fed DSS children divided by all fed children; and (2) all DSS children divided by all enrolled children, fed and not fed. Discovery Days did not meet the minimum eligibility requirement for proprietary Title XX centers by either method for any of the disallowed months (Tr. 33-34).

When Ms. Freeman was informed of the auditors' findings, she re-examined the two lists of children submitted with Petitioner's initial application; she found that Petitioner had not included children who were not fed in total enrollment and, therefore, that Discovery Days had not met the 25% eligibility criteria at the time it was approved to participate (Tr. 43-45). Ms. Freeman did not cross check the names on the two lists at the time of application because she had no reason, based on prior experience, to suspect that Discovery Days had not reported all children enrolled for child care services (Tr. 43-45, 67-69).

Ms. Freeman does the orientation and training for sponsors

participating in the CACFP (Tr. 27, 45). There is no ambiguity in Ms. Freeman's mind with respect to the meaning of total enrollment, i.e. total children enrolled in a child care center, whether fed or not fed, including drop-ins or part-time children (Tr. 48). No other proprietary center has ever made the same mistake made by Discovery Days with respect to reporting total enrollment (Tr. 43, 69).

It is the proprietary sponsor's responsibility to ensure that each site has met the 25% Title XX eligibility criteria for each month for which a reimbursement claim is submitted to the Department (Tr. 40-43). The reimbursement claim forms and an Addendum to the Child Care Food Program Agreement which are signed by the Petitioner both require the sponsor to submit claims for reimbursement only for those months in which the 25% requirement has been met (Record 4.c(1),(3)).

Based on the audit findings, an invoice was issued by the Department on April 26, 1993 for reimbursement of the $30,090.42 overclaim (Record 1.a). Joan Hurt, Director of Discovery Days, requested a hearing on the invoice (Record 1). The hearing took place on June 17, 1993 and was conducted by Joseph Pyzik, who was appointed by Dr. Bonnie Copeland to act as the hearing officer (Record 3).

Mr. Pyzik is an internal auditor for the State Department of Education and reports directly to the Deputy State Superintendent, who at that time was Dr. Bonnie Copeland (Tr. 3). Mr. Pyzik is not supervised by any of the officials responsible for managing the food program (namely, Shelly Terry,

Chief of the Nutrition and Transportation Branch, or her supervisor Raymond H. Brown, Assistant State Superintendent for the Division of Business Services), or by officials responsible for auditing grantees of the Department (namely, John Johnson, Chief of the Audit Office) (Tr. 3-4, 9-10). Mr. Pyzik was not involved in the audit of Discovery Days (Tr. 4). He is responsible for auditing the Department's internal procedures (Tr. 9-10).

Mr. Pyzik issued a report of his findings and conclusions in the matter of Discovery Days Child Care, Inc. on August 16, 1993, affirming the Audit Office's findings that: (1) compliance with the proprietary Title XX center 25% requirement is calculated by dividing the number of DSS children by the total number of all enrolled children, and (2) Discovery Days owes the Department $30,090.42 for the overclaims (Record 4, 4.a). Mr. Pyzik's August 16, 1993 report was the Agency's final action from which Petitioner noted an appeal to this Court on September 15, 1993.

Petitioner alleges that Mr. Pyzik's decision was factually incorrect "on its face" because the Department subsequently reduced the amount of the overclaim owed by Discovery Days to $25,909.08. Petitioner's Memorandum at pages 10, 20-21. Petitioner is relying on facts that are not in the record in this matter and, therefore, are not subject to judicial review. State Government Article § 10-222(f)(1), Annotated Code of Maryland. While the Department is willing to concede that the amount in dispute is now $25,909.08, the Department contends that the central issue presented to this Court - i.e. the correct method

for determining Discovery Days' compliance with the 25 percent requirement for proprietary centers - is unchanged.

III. ARGUMENT

A. Child and Adult Care Food Program.

This appeal arises out of the Maryland State Department of Education's administration of the Child and Adult Care Food Program. The Program was created by the U.S. Congress in 1975 as part of the National School Lunch Act, P.L. No. 94-105, § 16, § 89 Stat. 522 (1975) (codified at 42 U.S.C. § 1766), to establish a permanent child care food program for children in nonresidential child care institutions.[3/] At that time, only institutions moving toward, or already in compliance with, the requirements for tax-exempt status under section 501(c)(3) of the tax code, or federally funded programs requiring nonprofit status, were eligible to participate in the Program.

Section 17 of the National School Lunch Act was substantially amended in 1978, but eligibility was not extended to for profit institutions until 1980. In 1980, the Program was amended to permit "any ... private organization providing nonresidential day care services for which it receives compensation from amounts granted to the States under Title XX of the Social Security Act". P.L. No. 96-499, § 207, 94 Stat. 2602 (1980). The

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[3/] The Program grew out of a pilot food service program designed to provide assistance for meal service to nonresidential child care institutions serving low-income areas and areas with working mothers. S. Rep. No. 94-259, 94th Cong., 1st Sess. 13, reprinted in 1975 U.S. Code Cong. & Ad. News 1004-5.

following year, Congress restricted eligibility of for profit organizations by adding: "(but only if such organization receives compensation under such title for at least 25 percent of the children for which the organization provides such nonresidential day care services)." P.L. No. 97-35, § 810(a), 95 Stat. 528 (1981). This modification was added through the Omnibus Budget Reconciliation Act of 1981 in order to reduce federal spending and to make the child care food program more consistent with other child nutrition programs, in which only nonprofit institutions were eligible to participate. See S. Rep. No. 97-139, 97th Cong., 1st Sess. 2, 86, reprinted in 1981 U.S. Code Cong. & Ad. News 397, 475; H. Conf. Rep. No. 97-208, 97th Cong., 2d Sess. 778, reprinted in 1981 U.S. Code Cong. & Ad. News 1140.

Accordingly, the statutory language in effect during the time pertinent to this appeal[4/] limited eligibility for private child organizations to institutions receiving compensation under Title XX of the Social Security Act for at least 25 percent of the children for which the organization provides nonresidential day care services. 42 U.S.C.A. § 1766(a) (prior to 1992 amendments).

The U.S. Department of Agriculture has promulgated regulations implementing this requirement. See 46 Fed. Reg. 58006-10 (November 27, 1981). Under the regulations, the

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[4/] While Petitioner is correct in noting that this eligibility requirement for proprietary child care centers was modified by P.L. No. 102-342, the subsequent change is immaterial to this appeal. Public Law 102-342 was enacted on August 14, 1992 and the Petitioner's reimbursement claims for the months of August and September 1992 were not disallowed by the Department's auditors. See Record 4.c(2) at Exhibit A, Schedule 3.

administering state agency (which, in Maryland, is the Maryland State Department of Education) is responsible for establishing an application approval process which includes:

> For proprietary Title XIX or Title XX centers, submission of documentation that they are currently providing nonresidential day care services for which they receive compensation under Title XIX or Title XX of the Social Security Act, and certification that not less than 25 percent of enrolled participants in each such center during the most recent calendar month were Title XIX or Title XX beneficiaries.

7 C.F.R. §§ 226.6(b)(8), 226.15(b)(6). (See also 7 C.F.R. § 226.2 for the definitions of "enrolled child", "enrolled participant," and "proprietary Title XX center".)

Institutions eligible for participation in the CACFP may submit monthly claims to the administering State educational agency for reimbursement of the cost of meals and supplements served to eligible children. The rate of reimbursement is set by statute and regulation and varies with the child's household income level. See 42 U.S.C.A. § 1766; 7 C.F.R. Part 226. The U.S.D.A. regulations require proprietary Title XX centers to indicate the percentage of enrolled participants receiving Title XX benefits for the claim month, and prohibits Title XX centers from claiming reimbursement for any month in which less than 25 percent of enrolled participants were Title XX beneficiaries. 7 C.F.R. §§ 226.10(c), 226.17(b)(4). The State agency may not make Program payments to proprietary Title XX centers for calendar months during which less than 25 percent of enrolled participants were Title XX beneficiaries. 7 C.F.R. § 226.11(b), (c). The State agency is required to "disallow any portion of a claim for reimbursement and recover any payment to an institution not

properly payable under this part." 7 C.F.R. § 226.14(a).

In addition, the State agency is responsible for ensuring that participating institutions correct serious deficiencies, including:

> The claiming of Program payment for meals served by a proprietary title XIX or title XX center during a calendar month in which less than 25 percent of enrolled participants were title XIX or title XX beneficiaries.

7 C.F.R. § 226.6(c)(11). If the deficiency is not corrected, the institution must be terminated from participating in the Program. 7 C.F.R. § 226.6(c).

B. The Department's Decision Finding that Discovery Days Failed to Meet the Eligibility Criteria for Reimbursement to Proprietary Title XX Centers was Legally Correct and Supported by Substantial Evidence.

This court may reverse or modify the Department of Education's decision only "if any substantial right of the Petitioner may have been prejudiced because a finding, conclusion or decision of the agency: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the final decision maker; (iii) results from an unlawful procedure; (iv) is affected by any other error of law; (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious." State Government Article § 10-222(h)(3), Annotated Code of Maryland. Petitioner's argument that the Department's decision was unconstitutional is addressed below at Part C, and Petitioner's claim that the decision resulted from an unlawful procedure is addressed below at Part D. This Part addresses the Petitioner's

arguments that the Department's decision was arbitrary and capricious because the Department changed its interpretation of the regulatory requirements midstream, and its argument that the Department's decision contained errors of the fact.

1. The Department's interpretation of the proprietary Title XX centers requirement was not arbitrary and capricious as applied to Discovery Days.

Discovery Days is arguing that the Department's application of the statutory 25% requirement for proprietary title XX centers was applied arbitrarily and capriciously to Petitioner because different officials of the Department interpreted the requirement differently. It is the Department's position that the record as a whole does not substantiate Discovery Days' claim that program officials misrepresented the method for calculating compliance with the 25 percent ratio; that Discovery Days' method for making that calculation was inherently illogical; and that the Department's method for calculating that percentage is unambiguously required by the applicable federal statute and implementing regulations.

Ms. Hurt, President of Discovery Days, claims that she was told by Department staff who had administered the food program that the percentage calculation was performed by dividing the number of children who were Title XX beneficiaries (fed and not fed) by the total number of children who were fed at the center. Ms. Hurt claims that later the Department auditors calculated the percentage by dividing the number of children who were Title XX beneficiaries (fed and not fed) by the total number

of children enrolled at the center (fed and not fed).

Ms. Hurt's testimony that Patricia Freeman, the staff specialist who approved Discovery Days' application to participate in the Program, instructed her in the wrong way to calculate the 25 percent ratio for proprietary Title XX centers is directly contradicted in the record. Ms. Freeman testified that she provided the orientation and training for sponsors participating in the Program and there was no ambiguity in her mind that total enrollment means all children enrolled in the center whether fed or not fed (Tr. 48). Moreover, she testified that no other proprietary center in Maryland has made the same mistake as Discovery Days with the respect to reporting total enrollment (Tr. 43, 69). At the time she approved Discovery Days' application, Ms. Freeman had no reason to suspect that Discovery Days had not included all children enrolled at the center in its "total enrollment" list because she had not visited the site, was not aware that Discovery Days had two buildings which it viewed as two separate programs, and no other proprietary center has made a similar error (Tr. 43, 47-48). Discovery Days' license was for a single site (Tr. 46-47). Accordingly, Ms. Hurt's testimony is simply not credible.

The method used by Discovery Days for calculating compliance with the 25 percent requirement was inherently illogical because "the sponsor was not comparing nor calculating the 25 percent requirement on like sets of information." (Record 4.c(3)). Discovery Days obtained an inflated percentage of children who were Title XX beneficiaries by dividing the number of all

children participating in Title XX (whether fed or not fed) by the number of children fed at the center. Discovery Days improperly used this inflated figure to claim reimbursement from the Child and Adult Care Food Program for many months for which it did not qualify.

The Federal statute, implementing regulations, and written materials provided by the Department to proprietary sponsors in Maryland are unambiguous in requiring that eligibility be established as a percentage of all children enrolled in and receiving day care services from the proprietary institution. Discovery Days' management merely needed to read the authorizing legislation, implementing regulations, or materials provided by the state agency in order to understand the conditions under which it was eligible for reimbursement from the CACFP.

Prior to the August 14, 1992 amendment, the statute itself stated that an eligible institution included:

> any other private organization providing nonresidential day care services for which it receives compensation from amounts granted to the States under Title XX of the Social Security Act (but only if such organization receives compensation under such title for at least 25 percent of the children for which the organization provides such nonresidential day care services).

42 U.S.C.A. § 1766(a). It is clear on the face of the statute that eligibility for proprietary institutions is determined by comparing the number of children receiving Title XX benefits to the number of children for which the institution provides <u>day care services</u>, not the number of children provided <u>food</u> services, as argued by Discovery Days. The implementing regulations also clearly require a proprietary institution to document and certify

that "not less than 25 percent of enrolled participants were Title XX beneficiaries" when applying to participate in the Program and when submitting a monthly claim for reimbursement. 7 C.F.R. §§ 226.6(b)(8) and (c)(11), 226.10(c), 226.11(b) and (c), 226.15(b)(6), and 226.17(b)(4). "Enrolled participant" means an "enrolled child" which is further defined as "a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care." 7 C.F.R. § 226.2. (emphasis added).

The Department's form documents -- Child and Adult Care Food Program Agreement, Addendum to Agreement for Proprietary Sponsors, and CACFP Claim for Reimbursement -- directly reiterate the language of the federal statute and regulations with respect to the requirement that proprietary institutions "receive compensation under Title XX of the Social Security Act for at least 25 percent of the children for which nonresidential child care services are provided for each month being claimed." (Record 4.c(1)). These forms were signed by Ms. Hurt on behalf of Discovery Days. (Record 4.b(3), (4), (5), and (6)).

Accordingly, Discovery Days had all the information it needed to understand the method for calculating the eligibility requirement for proprietary centers, but nevertheless had repeatedly certified that it was eligible to participate in the Program and eligible for monthly reimbursements for which it did not qualify. Contrary to Petitioner's assertions, there is no ambiguity in the statute and no reason to believe that Department officials misled Discovery Days by erroneously explaining the

method for calculating the percentage ratio.

2. The Department did not err as a matter of fact in its application of the percentage calculation to Discovery Days for fiscal years 1990, 1991 and 1992.

Petitioner alleges that the Department erred in calculating the amount of overclaim that Discovery Days had received, and as evidence of that refers to the "fact" that the Department subsequently revised the disallowed reimbursement to $25,909.08. Petitioner's Memorandum at 20. However, the "fact" relied upon by Petitioner is not in the record in this matter and, therefore, is not subject to judicial review. State Government Article § 10-222(f)(1), Annotated Code of Maryland.

The Department nevertheless proffers that remand for the taking of additional evidence would result in the following evidence being put into the record: Ms. Anita Shook Finn re-reviewed Discovery Days' 1990 and 1992 records at the request of Joan Hurt on September 29 and 30, 1993; the auditor made adjustments to the number of children who were DSS beneficiaries and who were enrolled in accordance with new explanations provided by Ms. Hurt; the explanations were given and adjustments made well after the record in this matter was closed and the appeal filed to this Court. The Department concedes that this review resulted in a downward adjustment of Discovery Days' overclaim to $25,909.08, but notes that Discovery Days has not appealed the Department's revised audit. Because the Department did not change its method of calculating the institution's compliance with the 25 percent requirement as a result of its re-

review, the exact same issue would still be presented to this Court. Because the Department will stipulate that the reimbursement demanded from Discovery Days has been reduced to $25,909.08, the Department believes that it would not be material, necessary or helpful to remand this matter for the taking of additional evidence.

C. The Eligibility Requirement for Proprietary Title XX Centers to Participate in the Child and Adult Care Food Program Does Not Discriminate Illegally Against For Profit Child Care Centers.

Petitioner argues that Section 17 of the National School Lunch Act violates the equal protection and due process clauses of the 14th Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights because it requires private, for profit institutions to receive compensation under Title XX of the Social Security Act for at least 25 percent of the children for which it provides day care services, but does not impose such a requirement on nonprofit institutions. Petitioner's Memorandum at 12-20.

It is well established that where no suspect class, fundamental right or interest is involved or impaired, as in this case, the Department merely needs to show that the distinction between for profit and nonprofit child care institutions made by the statute is rationally related to a legitimate government purpose, particularly with respect to statutory classifications in the area of social welfare and economic legislation. See, e.g., Weinberger v. Salfi, 422 U.S. 749 (1975); Richardson v. Belcher, 404 U.S. 78 (1971).[5/] In another case challenging

Congress's restriction of benefits through the Omnibus Budget Reconciliation Act of 1981, the Supreme Court noted:

> [O]ur review of distinctions that Congress draws in order to make allocations from a finite pool of resources must be deferential, for the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than in the courts.

Lyng v. International Union, UAW, 485 U.S. 360 (1988) (upholding differential treatment of striking workers with respect to eligibility for food stamps). When examined under this deferential standard of review, section 17 of the National School Lunch Act must be upheld because the 25 percent eligibility requirement for proprietary child care centers is rationally related to Congress's goal of allocating money to children and child care centers with greater need for publicly funded food services.

As noted above in Part A, the Child Care Food Program was initiated as a means to assist nonresidential child care institutions serving low-income areas and areas with working mothers with food services. At the outset, only nonprofit institutions, or institutions moving toward compliance with the requirements for tax exempt status under section 501(c)(3) of the tax code, were eligible to participate in the Program. P.L. No. 94-105, § 16, 89 Stat. 522 (1975). For profit child care

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5/ Article 24 of the Maryland Declaration of Rights has the same meaning and effect as the equal protection clause of the 14th Amendment and 5th Amendment due process clause. Board of Supervisors of Elections v. Goodsell, 284 Md. 279 (1979); Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143 (1974). Decisions of the Supreme Court may be considered direct authorities for interpretation of Article 24. Bureau of Mines, supra.

institutions were excluded entirely. In 1980, eligibility was extended to any private organization providing day care services for which it received compensation under Title XX of the Social Security Act. P.L. No. 96-499, § 207, 94 Stat. 2606 (1980). Within one year, however, Congress restricted eligibility of for profit institutions to organizations receiving compensation under Title XX for at least 25 percent of the children for which the organization provides day care services. Omnibus Reconciliation Act of 1981, P.L. No. 97-35, § 810(a), 95 Stat. 528 (1981). This restriction was added to reduce federal spending and to make the Child Care Food Program more consistent with other child nutrition programs, which at that time did not permit for profit organizations to participate at all.

No doubt Congress recognized that for profit and nonprofit child care institutions are not, contrary to Petitioner's assertion, similarly-situated entities; a proprietary institution may have greater resources for funding food service for its enrolled children, including the option to raise tuition rates or reduce its profit margin.[6/] Requiring for profit child care institutions to serve at least a minimum number of children receiving publicly funded Social Security benefits in order to participate in the publicly funded food program is certainly rationally related to the dual congressional goals of assisting

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[6/] Petitioner confuses the matter somewhat in its argument by referring to the meal reimbursement rates, which vary by type of institution and household income. Petitioner's Memorandum at 17 to 19. The reimbursement rate for meals are not at issue in this appeal and should be disregarded.

needy children through food service while reducing federal spending.

D. Discovery Days Received a Fair and Impartial Hearing Before an Independent Official.

Petitioner argues that he was deprived of a fair and impartial hearing because the individual selected to serve as the hearing officer was not sufficiently independent. Petitioner's Memorandum at 23-24. The record establishes that the hearing officer was independent of the relevant Agency decisionmakers.

Section 17 of the National School Lunch Act requires the administering State agency to provide a fair hearing and prompt determination to any institution aggrieved by an action of the State as it affects the institution's claim for reimbursement under the Child and Adult Care Food Program. 42 U.S.C.A. § 1766(e)(1). The U.S. Department of Agriculture has promulgated detailed regulations regarding the procedures to be followed when an institution appeals the State agency's denial of reimbursement or demand for remittance of an overpayment, as is the case here. 7 C.F.R. § 226.6(k). The only procedural item challenged by the Petitioner is the hearing officer appointed by the Department. The regulations require that:

> The review official shall be an independent and impartial official other than, and not accountable to, any person authorized to make decisions that are subject to appeal under the provisions of this section.

7 C.F.R. § 226.6(k)(6).

Mr. Joseph Pyzik, an internal auditor for the Department, was appointed to act as hearing officer in this matter. Mr. Pyzik

himself testified at the commencement of the hearing that he was independent from, and not accountable to, Ms. Sheila Terry, the Chief of the Nutrition and Transportation Services Branch, and Mr. John Johnson, Chief of the Audit Office. (Tr. 3-4, 9-10). Petitioner's complaint appears to be that Mr. Pyzik, Ms. Terry, and Mr. Johnson all report directly or indirectly to Dr. Bonnie Copeland, who was the Deputy State Superintendent at the time of the hearing. It is, however, clear from the record that each of the three individuals, not Dr. Copeland, independently made the decisions that are under appeal. See, for example, Record 4.b(2), (3), (4), (5), and (6) (CACFP applications are approved by Sheila Terry), Record 4.c(2) and 1.a (audit and invoice signed by John Johnson), and Record 4 and 4.a (hearing decision made by Joseph Pyzik). Mr. Pyzik was an independent and impartial official within the meaning of 7 C.F.R. § 226.6(k)(6).

The fact that Ms. Terry referred to Mr. Pyzik "several times by his first name and in a familiar fashion," Petitioner's Memorandum at 23, is certainly not evidence of bias by Mr. Pyzik.[7/] If the Court accepts Petitioner's argument that Mr. Pyzik could not be impartial with respect to co-workers in the Department of Education, the logical extention of his argument is that no Department official could serve as hearing officer. In the following paragraph, however, Petitioner argues that Mr. Pyzik did not have the necessary expertise to review this matter

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[7/] In fact, Ms. Terry also referred to Ms. Hurt, president of Discovery Days, and Mr. Massari, counsel for Discovery Days, by their first names (Tr. 42, 65).

because he was not familiar with the CACFP and its implementing regulations; the logical extention of this argument is that a Department official within the food and nutrition branch would have to serve as hearing officer. These arguments are totally inconsistent with each other.

While Petitioner alleges violation of the Due Process clause of the 5th and 14th Amendments to the United States Constitution in its heading, no legal argument is offered on this point. Respondent therefore finds it unnecessary to respond to this argument, except to state that Petitioner has not made a showing that Mr. Pyzik was affected by a disqualifying personal or pecuniary conflict of interest, see Gibson v. Berryhill, 411 U.S. 564 (1973); Tumey v. Ohio, 273 U.S. 510 (1927), or that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 493 (1976); see also Withrow v. Larkin, 421 U.S. 35 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941). Accordingly, there is no ground for finding that the hearing officer did not meet the constitutional requirement of fair process.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, the Maryland State Department of Education respectfully requests that this Court affirm the decision of the Department.

Respectfully submitted,
J. JOSEPH CURRAN, JR.

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Counsel for Respondent

CEE41/bac

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April, 1994, a copy of the foregoing Respondent's Answering Memorandum was sent by first-class mail, postage prepaid, to Patrick J. Massari, Esquire, Church & Houff, P.A., 117 Water Street, Suite 700, Baltimore, Maryland, 21202, Attorney for Petitioner.

Caroline E. Emerson
CAROLINE E. EMERSON

CEE44/bac

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CIVIL POSTPONEMENT FORM

DATE: 2/7/94

7A

Plaintiff(s) /Appellant
Discovery Days Child Care, Inc.

v.

Defendant(s) /Appellee
MD. State Dept. of Education

FEB 15 1994

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Computer #: _____

File #: 93258067/CL170049 ✓

Jury _____ CT. ~~X~~ CTF. ✓ MOT. GEN ☐ 2-507 ☐

DOMESTIC JUDGE: _____ DOMESTIC MASTER: _____

PLEASE PRINT

To be postponed from: DATE: February 10, 1994 ✓ PRIOR POSTPONEMENTS: Y☐ N☒

Postponement requested by: Appellant + Appellee

Postponement reason: (please specify):
Time needed for Appellant / Appellee to file briefs. This is a joint request.

Plaintiff(s) Attorneys:	Defendant(s) Attorneys:
PATRICK J. MASSARI, Esq.	Caroline F. Emerson, Asst. A.G.
117 WATER St. S. 700	200 St. Paul Place
Baltimore, MD 21202	Baltimore, MD 21202-2021

New Trial Date: 6-22-94 CTF ✓

Approved: X Denied: _____ : _____ (JUDGE'S SIGNATURE)

WHITE—Court File • YELLOW—CAO

CC-55

DISCOVERY DAYS CHILD CARE, INC.,	*	
Appellant/Petitioner	*	IN THE
V.	*	CIRCUIT COURT
THE NUTRITION AND TRANSPORTATION *SERVICES BRANCH OF THE DIVISION* OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION,	*	FOR BALTIMORE CITY
Appellee	*	Case No. 93258067/CL170049

* * * * * * * * * * * * * * *

M E M O R A N D U M

NOW COMES Petitioner/Appellant Discovery Days Child Care, Inc., by and through Patrick J. Massari and Church & Houff, P.A., and pursuant to Maryland Rule 7-207(a) and Title 10, §10-101, et seq. of the State Government Article of the Annotated Code of Maryland, a/k/a The Administrative Procedure Act, hereby files this Memorandum as follows:

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the eligibility requirement for Title XX Proprietary Day Care Centers participating in the Child and Adult Care Food Program under Title XVII of the National School Lunch Act violates the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution, and Article 24 of the Maryland Declaration of Rights.

2. Whether the Maryland State Department of Education erred as a matter of fact and as a matter of law in its application of the Child and Adult Care Food Program under Title 17 of the National School Lunch Act as applied to Petitioner/Appellant, Discovery Days Child Care, Inc.

3. Whether Petitioner/Appellant Discovery Days Child Care, Inc. was denied its right to a fair and impartial hearing, before an independent official pursuant to §226.6(k) of the Child and Adult Care Food Program, in conformity with the Due Process clause of the 5th and 14th Amendments to the United States Constitution.

II. STATEMENT OF MATERIAL FACTS

This dispute centers around the interpretation of the eligibility provision for Proprietary Title XX Day Care Center Participation in the Child and Adult Care Food Program (hereafter referred to as "Program" or the "Food Program"). The Title XX provision of the National School Lunch Act (NSLA) was enacted to provide nutritional meals for low-income children at public schools and day care centers. In essence, the eligibility provision requires that in order for a proprietary licensed day care center, such as the Petitioner/Appellant Discovery Days Child Care, Inc. (hereafter "Discovery Days"), to receive benefits under the Program, 25% of its enrolled participants must receive Title XX Department of Social Services benefits.

Public Law 102-342, the Child Nutrition Improvement Act of 1992, enacted on August 14, 1992, amended the Title XX provision of the NSLA to allow the participation of a proprietary child care center if it receives compensation under Title XX "for at least 25% of its enrolled children or 25% of its licensed capacity, whichever is less." It is noteworthy that this change occurred during the audit period of Discovery Days by the Maryland State Department of Education (hereafter the "Department"). The change as reflected by

Public Law 102-342 essentially allowed for the complex, all-encompassing, and insidious problems inherent in application of the arbitrary and capricious eligibility provision contained in the statute. The change reflected by Public Law 102-342 allowed centers with an enrollment larger than the licensed capacity to use licensed capacity as their threshold, thus qualifying for Program participation based on the number of Title XX children in attendance each day, rather than total enrollment.

Discovery Days commenced participation in the Program in May of 1990. As is evident from the Child Care Food Program Agreement entered into between Discovery Days and the Department, subpart A, paragraph 9 provides that the Sponsoring Agency, that is, Discovery Days, would "maintain documentation on the "enrolled status" of **all participants in the Program**." See, Hearing Exhibit No. 2, pg. 2 (emphasis supplied). This means that Discovery Days was to maintain certain information, as contained in paragraph 18 of the aforereferenced Agreement, as to that individual's household income and other information. There is no mention of maintaining such information on all enrolled children at Discovery Days, regardless of status.

In November of 1990, Discovery Days and the Department executed an Addendum to the Agreement for proprietary sponsors which provided that private for-profit day care centers may participate in the Program as a proprietary Title XX center if not less than 25% of their enrolled eligible participants are Title XIX or Title XX beneficiaries. Under this scheme, the Sponsoring Agency could not claim reimbursement for meals served in any for-

profit center for any preceding month during which the center receives Title XX reimbursement for less than 25% of its enrolled participants. See, Addendum to Agreement for Proprietary Sponsors, dated November 13, 1990, Hearing Exhibit No. 3.

As of June 17, 1993, the site on which Discovery Days was located had two (2) buildings, with a total licensed child capacity of 140 children. One building is a center building licensed for children ages 18 months to 5 years of age (now school-age kindergarten), and is called "The Center." The other building on this site (which was approved for school-age child care in November of 1988) is licensed for school-age children before and after school, and all day when schools are closed. Children in first grade through sixth grade are in this building, which is called "The House." In the fall of 1989, this building was approved by the Department as the building for a non-public private school, which operates from 8:45 a.m. to 3:15 p.m. The other name for this building is "The School." In the summer of 1992, the Department approved a name change of "The School" from Discovery Days Child Care, Inc. to "The Nottingham School."

Discovery Days is close to Essex Community College, Franklin Square Hospital and Golden Ring Mall. Discovery Days has received many calls from parents requesting evening care for their children due to those parents going to college or working. In the summer of 1989, Discovery Days was granted permission to have its hours of operation changed from 6:30 a.m. to 12:00 midnight. This was so children could be taken in on a drop-in basis for parents needing care for an hour or more in the afternoon, while one parent

went to work and the other parent got off work and came to get the child. Drop-in children were also accepted by Discovery Days when parents needed an hour or so of care, but not on a regular basis. Other children were also accepted on a one-day basis when the area Catholic schools were closed, and parents needed only one day of care.

The other day care centers in the area did not stay open in the evening and did not take children on a drop-in basis. Many of the drop-in children, as well as the evening children, were not fed any meals or snacks while at Discovery Days. The drop-in and part-time children who were fed were counted in Discovery Days' total enrollment, and on the Food Program.

The children enrolled in Discovery Days are not from an affluent area; Fontana Village and Kings Court townhouses are in the local surrounding area. Discovery Days had many young children in the Center who, when bringing their lunches, did not have a balanced lunch; many complained that they were still hungry after eating the lunch they had brought with them. To help the children get a more balanced lunch and to learn good eating habits, Discovery Days contracted with Meals-on-Wheels in the fall of 1989 to provide lunch to children whose parents paid an additional fee per week for these lunches.

Joan Hurt, the President of Discovery Days, found out about the Program in the fall of 1989. She received information, and then attended an orientation meeting for the Program at the Howard County Board of Education. This orientation session was conducted by Ms. Patricia Freeman of the Department. At that

meeting, Ms. Freeman explained how Discovery Days was to fill out the application for enrollment in the Program. It was explained by Ms. Freeman that Discovery Days did not count children that were not fed as part of the total enrollment for the Program. Joan Hurt specifically asked Ms. Freeman about school-age children since they were not fed at Discovery Days. Again, Ms. Hurt was told that Discovery Days should not count children who are not fed in the total enrollment figure. Ms. Hurt then asked if children could be counted who were not fed, but who were children who received Department of Social Services (hereafter "DSS") benefits in the 25% total, in order to qualify for the 25% eligibility provision for the Program. Ms. Hurt was told by Ms. Freeman that she could do this.

Discovery Days completed the application for the Program in April of 1990, when it had 25% of its total enrollment receiving DSS benefits. During the pre-approval visit, Discovery Days' application was reviewed, and assistance was given with corrections to the application. Again at this time, questions were asked of Ms. Freeman as to whether Discovery Days was performing the calculations correctly, i.e., only counting children in the Center Building for total Center enrollment and counting all of the DSS children to qualify for the 25% eligibility provision. Discovery Days was told that this was the way to calculate the count for the application, and the application was then approved. See Hearing Exhibit No. 1, with attachments.

Discovery Days began the Program on May 1, 1990, and every application for the ensuing years that are the subject of the audit at issue here, have been done and approved in this fashion.

In June of 1990, and again in January of 1992, Ms. Susan Gebhardt, Field Representative for the Department, came to The Center to inspect Discovery Days' applications, records for the Program, the room food sheets, how children were counted at the time (whether served lunch or snacks), the menus and all other requirements for the Program. When Ms. Gebhardt came to Discovery Days in June of 1990, she was again asked questions by Joan Hurt and others about documentation for records, as well as counting children for total enrollment, because Discovery Days wanted to ensure that they were in total compliance with the Statute. Ms. Gebhardt told Patricia A. Waddell, the secretary at Discovery Days, not to count any children who were not fed, including the drop-ins on the total enrollment, and also that Discovery Days was in complete compliance with all applicable regulations and policies. See Hearing Exhibit No. 1, letter dated June 13, 1993 from Patricia A. Waddell.

Ms. Waddell and Ms. Hurt attended a Program meeting in August of 1990, which meeting was a review of meal planning, portions, foods to be served and information on how the various forms dealing with the Program were to be completed. Both Ms. Waddell and Ms. Hurt attended this meeting so that they would both have the same information for completing applications and monthly forms. Ms. Hurt attended the annual Program meetings in August of 1991 and August of 1992 alone.

It is self-evident that under the Program as administered by proprietary day care centers such as Discovery Days, the children are the beneficiaries of the benefits received from the Department. These children have balanced, nutritious meals, which for some of them is the only meal that they receive that day.

In November of 1992, a representative of The Nutrition and Transportation Audit Department for the State of Maryland, Mr. Stephen Ayers, came to Discovery Days to audit all of the Program records on file from October 1, 1990 to September 30, 1991. The Audit Department decided, apparently based upon this review, that Discovery Days did not meet the eligibility requirement for 25% of total enrollment as previously set forth. The Department representatives also reviewed records from May of 1990 to October of 1992. Further, the representatives decided to expand the audit scope to include fiscal years 1990, 1992 and 1993. At that time, as set forth in a subsequent report dated November 20, 1992, representatives of the Audit Department decided that Discovery Days had only met DSS requirements for seven of the 18 months contained in the audit. As a result, there was an alleged overclaim of $30,090.42 as follows: $6,583.41 for fiscal year 1990, $17,395.79 for fiscal year 1991, and $6,111.22 for fiscal year 1992.

The information provided by the Audit Department representatives to Discovery Days in November of 1992 differed radically from that provided by Ms. Freeman and Ms. Gebhardt prior to that time. Discovery Days, in fact, relied upon the information provided by Ms. Freeman and Ms. Gebhardt in calculating the 25% eligibility requirement for inclusion of Discovery Days' children

in the Food Program. In contrast to what Discovery Days had been told by Ms. Freeman and Ms. Gebhardt, Mr. Stephen Ayers, the Department audit representative, told Ms. Hurt that Discovery Days had to count every child who was enrolled in the Program, irrespective of their status as full-time, part-time, school-age or drop-in, and irrespective of whether or not these children were fed. Mr. Ayers related that total enrollment meant all children in the day care at any time for any reason. Again, this directly contradicted what Discovery Days had been told by State representatives/employees Freeman and Gebhardt prior to November of 1992.

Based upon Mr. Ayers' findings, a report was issued by John W. Johnson, Chief of the Audit Office for the Maryland State Department of Education, alleging an overclaim of $30,090.42. Discovery Days duly noted an Appeal of the Department's finding, and a hearing was held on June 17, 1993.

The hearing officer for the Appeal was Joseph Pyzik, an Internal Auditor for the State Department of Education. Mr. Pyzik related at the hearing that he was requested by Dr. Bonnie Copeland to serve as the hearing officer. Mr. Pyzik reports directly to Dr. Bonnie Copeland, as does Mr. John W. Johnson, who was the audit officer who wrote the report with respect to Discovery Days.

Discovery Days made arrangements and paid for the transcription of the proceedings before Mr. Pyzik. Present at that hearing for Discovery Days were Ms. Hurt; the undersigned, attorney for Discovery Days; and, Mr. Josh Carey, Consultant for Discovery Days. Also present on behalf of Discovery Days were Ms. Shirley

Duncan, a representative from the Maryland Child Care Association; Ms. Christyne Ivey, President of the Baltimore Child Care Association; and a Court Reporter, Esther Wood.

Present for the Department were Ms. Sheila Terry, Ms. Betty Ledbetter, and Ms. Patricia Freeman from The Nutrition and Transportation Services Branch. Ms. Anita Shook and Mr. Stephen Ayers from the Audit Office were also present.

After hearing a discussion on the issues, as well as reviewing the Exhibits made a part of the hearing Record, and which are before this Court on Appeal, Mr. Pyzik concluded that the Department's Auditor acted correctly in recommending that the Department of Education collect $30,090.42 from Discovery Days, as a result of failing to meet Title XX requirements. Mr. Pyzik concluded that Discovery Days should have used the total number of DSS children divided by the total number of all enrolled children.

Discovery Days duly noted an Appeal to this Court from the August 16, 1993 decision of Mr. Pyzik.

It should be noted that since the time of the Hearing, and the noting of this Appeal, in several revisions of errors made by auditors from the Department of Education, the figure which has now been set forth by the Department as due and owing by Discovery Days for excess reimbursements, is $25,909.08. Therefore, the decision of Mr. Pyzik is on its face factually incorrect. In fact, Anita Fein, an Auditor with the Department of Education, has now concluded that the actual amount in dispute is $25,909.08, as opposed to the $30,090.42 figure approved by Mr. Pyzik, due to miscalculations and errors by the Department's Audit Office.

III. ARGUMENT:

Standard of Review:

This Court can reverse or modify the decision of the Department when a substantial right of the Petitioner has been prejudiced by an unconstitutional ruling of the agency, an unlawful procedure, an error of law, or an arbitrary or capricious decision or action by the agency. Furthermore, an agency's enforcement of its rules and policies must not be so fluid as to become arbitrary and capricious. "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedence without discussion it may cross the line from tolerably terse to intolerably mute." Montgomery County v. Anastasi, 77 Md. App. 126, 137, 549 A.2d 753 (1988), cited in Department v. Reeders Memorial Home, 86 Md. App. 447, 586 A.2d 1295 (1991).

Petitioner/Appellant Discovery Days urges this Court to utilize the substituted judgment standard, inasmuch as the decision of the Maryland State Department of Education below prejudiced the substantial rights of Discovery Days in that it was unconstitutional, was in effect an error of law, and was arbitrary and capricious.

The standard of review of the Department's decision is set forth in the Maryland Administrative Procedure Act as contained in the State Government Article of the Annotated Code of Maryland, §10-215(g). That provision, in pertinent part, states that the Circuit Court may (1) remand the case for further proceedings; (2)

affirm the decision of the agency; or (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion or decision of the agency: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the agency; (iii) results from an unlawful procedure; (iv) is effected by another error of law; (v) is unsupported by competent material and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious.

"There is more than one possible standard of review for an administrative decision. When determining whether an agency's factual finding violates §10-215, the appropriate standard of review is, of course, the substantial evidence test. However, when we consider whether the agency erred as a matter of law, for example, when there is a challenge to a regulatory interpretation, the substituted judgment standard is to be used. Perini Services, Inc. v. Maryland Health Resources Planning Commission, 67 Md. App. 189, 201, 506 A.2d 1207 (1986)." Department v. Reeders Memorial Home, Inc., 86 Md. App. 447, 586 A.2d 1295, 1297 (1991).

QUESTIONS PRESENTED FOR REVIEW

1. **WHETHER THE ELIGIBILITY REQUIREMENT FOR TITLE XX PROPRIETARY DAY CARE CENTERS PARTICIPATING IN THE CHILD AND ADULT CARE FOOD PROGRAM UNDER TITLE XVII OF THE NATIONAL SCHOOL LUNCH ACT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS.**

DISCUSSION

Title 17 of the National School Lunch Act (NSLA), as amended, authorizes assistance to states through grants and aid and other means to initiate, maintain, and expand non-profit food service programs for children or adult participants in non-residential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Under the Program, an "enrolled participant" or "enrolled child" means a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care.

There are three (3) reimbursement categories: free, reduce-priced, or paid. A "claiming percentage" means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduce-priced, or paid) to the total of enrolled participants in the institution.

Petitioner/Appellant Discovery Days is a proprietary Title XX center, which is a private, for-profit center, which provides non-residential child care day care services for which it receives compensation from amounts granted to the states under Title XX of the Social Security Act, and in which Title XX beneficiaries are to be not less than 25% of enrolled eligible participants during the calendar month preceding the initial application or annual re-application for Program participation. Paragraph 9 of the Child Care Food Program Agreement between Discovery Days and the Maryland State Department of Education

required that Discovery Days, as the Sponsoring Agency, "maintain documentation on the "enrolled status" of all participants in the Program."

Under §226.6(d) of the regulations which implement the Program, non-profit day care centers and day care homes do not need to meet the 25% approval criteria set forth above in order to receive benefits under the Program. Similarly situated proprietary Title XX day care centers such as Discovery Days, however, must meet the 25% eligibility provision in order to receive benefits.

"If all persons who are in like circumstances are affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstance are in the same class as invalid." Salisbury Beauty Schools v. State Board, 268 Md. 32, 60, 300 A.2d 367, 383 (1973). Accord, Wheeler v. State, 281 Md. 593, 603-04, 606, 380 A.2d 1052, 1058, 1060 (1977), cert. denied, 435 U.S. 997, 98 S.Ct. 1650, 56 L.Ed. 2d 86 (1978)." Attorney General of Maryland v. Waldron, 289 Md. 683, 426 A.2d 929, 952 (1981). "It is well recognized that the constitutional guarantee of equal protection of the law is afforded to all persons under like circumstances in the enjoyment or their civil and personal rights. Leonardo v. County Commission, 214 Md. 287, 304, 134 A.2d 284 (1957), cert. denied, 355 U.S. 906, 78 S.Ct. 332, 2 L.Ed. 260; Tattlebaum v. Pantex Manufacturing Corporation, 204 Md. 360, 369, 104 A.2d 813 (1954)." Hornbeck v. Somerset County Board of Education, 295 Md. 597, 458 A.2d 758, 781 (Md 1983). The appellant

courts in Maryland "have frequently considered the standard of review to be applied in determining whether the equal protection or equal treatment guarantees of the 14th Amendment or Article 24 have been violated by a challenged enactment. (citations omitted)" Id. Inasmuch as neither a suspect class nor a fundamental right or interest is involved or impaired in the instant case, the "deferential" review of legislative classifications, "variously referred to as a "reasonable" or "rational" basis test, upholds the statute when any state of facts reasonably may be conceived to sustain it. (citations omitted)" Id. at 782. However, the Supreme Court has in recent years enunciated a standard which cannot be classified as either "rational basis" or "heightened scrutiny" or "strict scrutiny." This is a "rational basis" test, "with teeth." See, Atty. General v. Waldron, 289 Md. 683, 426 A.2d 939, 942-47 (1981). Discovery Days asserts that the 25% eligibility provision in the Program, as applied in the claiming percentage, is not rationally related in any sense to the goal of providing nutritious meals to children in Title XX proprietary day care centers, and in fact specifically thwarts this objective. The application of this provision is a disincentive for Title XX centers to provide nutritious meals to low-income children and in fact causes a rise in the cost of day care for low-income parents, which in turn results in these children being placed in sub-standard day care with no nutritious meals. Toward this end, "[s]everal recent Supreme Court Opinions have utilized the rational basis test to invalidate legislative classifications, and, in the view of some, the Court in these case applied a less deferential

standard of review than had previously been applied under the traditional rational basis test." Murphy v. Edmonds, 325 Md. 342, 601 A.2d, 102, 110; see also, Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed. 2d 487 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2565, 86 L.Ed. 2nd 11 (1985); Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed. 2nd 751 (1985); Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed. 2d 672 (1982). "Some commentators have characterized the Court's review in these and similar cases as "rational basis with teeth" or "rational teeth with bite." Id.; See also, G. Gunther, In Search of Evolving Doctor On a Changing Court: A Model for a Newer Equal Protection, 86 Harvard L.Rev. 1, 18-19 (1972) ("these cases found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard").

Discovery Days urges this Court to adopt the standard expressed as "rational basis with teeth" in striking down the 25% eligibility provision for Title XX proprietary day care centers contained in the regulations implementing the Food Program. The 25% eligibility provision bears no rational relation to the stated goal of feeding low-income children, or children generally, nutritious meals, because the calculation used in the claiming percentage under the Program is based upon "total enrollment," which means all children in the day care center for any purpose or any classification, whether they are fed or not. This would include drop-ins or children who are only at the day care center

for a short time. It also disregards whether or not they are fed by the proprietary Title XX day care center, which should be the determining factor. The eligibility provision, in reality, provides a disincentive for proprietary Title XX day care centers to be included in the Program because of the near impossible burden of keeping 25% of total enrollment on SS benefits. The practical effect of the scheme promulgated by the State Department of Education in this instance is that proprietary Title XX day care centers such as Discovery Days are forced to charge higher prices for their services, and to cut down on the number of nutritious meals served, because they cannot afford to provide these meals.

Furthermore, the statute under consideration, which is the Child and Adult Care Food Program, 7 CFR Chapter II (1/1/93 Ed.), §§226.1 et seq., facially and in its application, treats similarly-situated entities, namely, home day care centers and proprietary Title XX day care centers, differently. This varying treatment can be upheld only if it is rationally related to a legitimate state interest, under the analysis set forth above. The arbitrary classification created by the statute, namely between home day care centers and proprietary Title XX day care centers, must be rationally related to a legitimate governmental interest. Since it fails to do so, the statute is violates the equal protection clause. The same disparate treatment exists as between non-profit day care centers and proprietary Title XX centers.

The impact of the 25% eligibility provision for proprietary Title XX centers is directly at odds with the purpose of the statute. The practical effect for Discovery Days in this

case has been to cut down on the number of children it can take in on a daily basis, completely cut out drop-in children, and otherwise limit services so that low-income children, and their parents, can no longer afford the services of Discovery Days. On a more drastic level, the widespread effect of the application of the 25% eligibility provision has been to deny low-income children nutritious meals at proprietary Title XX day care centers, because such day care centers are no longer able to afford to include such children on their total enrollment. These children are forced to seek sub-standard day care elsewhere and are denied the benefit of the Program.

Application by the State, then, of the 25% eligibility provision to proprietary Title XX day care centers is directly at odds with the purpose of the statute which is to feed children, particularly low-income children, nutritious meals. There is also no legitimate State interest in treating home and non-profit day care centers differently than proprietary Title XX day care centers. In many cases, the reimbursement per meal to home day care centers is more substantial than for proprietary Title XX centers.

The language of the statute is vague, and again is not rationally related to the legitimate State interest of providing nutritious meals to children. Application of the statute mandates that a proprietary Title XX center use its "total enrollment" figure as the basis on which to calculate the claiming percentage, that is, the ratio of the number of enrolled participants in an institution in each reimbursement category

(free, reduce-priced, or paid) to the total of enrolled participants in the institution. This makes absolutely no sense when children who are not fed are included in the total enrollment in a proprietary center. Discovery Days was forced, by the Audit Office of the Department of Education, to count all "enrolled participants" in its facility, regardless of their status as drop-ins (many of whom only spent an hour or so at Discovery Days); or other children who were not fed at all while they were at Discovery Days. To the extent the State and the Federal government is interested in providing nutritious meals to children in proprietary Title XX day care centers, the calculation of SS children should be made with respect to those children who are actually fed, not to the total number of enrolled children in the institution for any purpose at any time.

In fact, the language of the statute is vague and confusing with respect to whether the calculation involves all children enrolled in a proprietary Title XX day care center for any purpose, or those on the Food Program only.

This is a prime example of varying treatment of similarly situated groups, a scheme so unrelated to the achievement of any combination of legitimate legislative purposes, that this Court can only conclude that the statute, the actions of the Department of Education, as well as the impact of the statute, are unconstitutional, irrational, arbitrary and capricious. Gregory v. Ashcroft, U.S. 111 S.Ct 2395, 2406, 115 L.Ed. 2d 410, 430 (1991), cited in Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102, 108 (1992).

Brown v. Ashton, 93 Md. App. 25, 611 A.2d 599, cert. granted 328 Md. 462, 615 A.2d 262 (1992).

2. **WHETHER THE MARYLAND STATE DEPARTMENT OF EDUCATION ERRED AS A MATTER OF FACT AND AS A MATTER OF LAW IN ITS APPLICATION OF THE CHILD AND ADULT CARE FOOD PROGRAM UNDER TITLE 17 OF THE NATIONAL SCHOOL LUNCH ACT AS APPLIED TO PETITIONER/APPELLANT, DISCOVERY DAYS CHILD CARE, INC.**

DISCUSSION

The Department erred as a matter of fact in its application of the claiming percentage calculation in that the figure of $30,090.42, approved by the Department Audit Official at the hearing below, has subsequently been amended and revised to reflect a disallowed reimbursement of $25,909.08. The Department then, erred when it calculated the amount of overclaim that Discovery Days had received as a result of application of the Program.

Furthermore, the Maryland State Department of Education representatives and officials who explained the calculations of the claimed percentage to Joan Hurt erred on several different occasions. These officials told Ms. Hurt that the claimed percentage calculation was performed by taking the number of children who were Title XX beneficiaries and applying that to the number of children who were fed. Ms. Hurt was also told that she could take the number of Title XX beneficiaries who were not fed as a basis for calculating the 25% eligibility provision.

Ms. Hurt relied on the representations of the Department of Education officials in calculating the 25% "total

enrollment" figures for purposes of the Program. It is clearly inequitable and unfair to hold Ms. Hurt responsible for the erroneous statements of Department employees in the calculation of the claiming percentage ratio. The Department should be estopped from demanding an overclaim based on their own errors and misrepresentations to Discovery Days.

More importantly, as a matter of law, the Department erred in the interpretation of the claiming percentage ratio by virtue of the aforementioned acts of its representatives and employees. While a "Court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken," Bulluck v. Pelham Wood Apartments, 283 Md. 505, 513, 390 A.2d 1119 (1978), a Court may substitute its judgment when there is a challenge to a regulatory interpretation such as is the case here. Discovery Days relied on the expertise of the State employees when it was told that the claiming percentage ratio was performed by using the number of children who were fed in the number for total enrollment. This was clearly not the standard that the Audit Office used in November of 1992 when it performed the audit which is the subject of this Appeal. This is a prime example of an agency changing its course and deviating from prior policies and standards which Discovery Days relied on to its detriment. This Court may substitute its judgment for that of the persons who constitute the administrative agency, which in this case was Ms. Patricia Freeman and Ms. Susan Gebhardt, among others.

In essence, the deviation of the Department from its prior communications to Discovery Days constituted an arbitrary and capricious act under §10-215 of the Maryland Administrative Procedure Act. The apparent reasoned analysis for doing so was that the State representatives had made errors in explaining the process of calculating the claiming percentage ratio to the representatives of Discovery Days.

While the process and method of calculating the claiming percentage ratio under the statute seemed to be evident from the face of the statute itself, there was apparently enough ambiguity therein to justify differing explanations of how the claiming percentage was calculated by representatives of the State. The Department's original decision to explain the method of calculating the claiming percentage ratio to Discovery Days was based on an error of law, at least according to the calculations and representations of the Audit Office which occurred later.

It is the position of Discovery Days that the correct and sensible way to calculate the claiming percentage ratio is to include only those children who are fed and/or other children on SS (whether fed or not fed) in the total enrollment figure for purposes of calculating the 25% eligibility provision for Title XX proprietary day care centers. The ambiguity inherent in the calculation of the claiming percentage ratio stems from the fact that the Program is designed to provide nutritious meals to low-income children at Title XX proprietary day care centers.

3. **WHETHER PETITIONER/APPELLANT DISCOVERY DAYS CHILD CARE, INC. WAS DENIED ITS RIGHT TO A FAIR AND IMPARTIAL HEARING, BEFORE AN INDEPENDENT OFFICIAL PURSUANT TO §226.6(K) OF THE CHILD AND ADULT CARE FOOD PROGRAM, IN CONFORMITY WITH THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE MARYLAND ADMINISTRATIVE PROCEDURE ACT.**

DISCUSSION

Discovery Days was entitled to a fair and impartial hearing, before an impartial Hearing Officer, pursuant to §226.6(k) of the Program, as well as the provisions of the Maryland Administrative Procedure Act. The individual selected for this task was Mr. Joseph Pyzik, who by his own admission at the hearing of this matter below, reported to the same person as did the Chief Audit Officer on whose report the contested case was filed. While Mr. Pyzik maintained that he was an independent Audit Officer from within the Department, he was obviously familiar with all of the parties involved. Ms. Sheila Terry, who is the Chief of the Nutrition and Transportation Services Office, and who is ultimately responsible for the actions of all the State employees in this case, referred to Mr. Pyzik several times by his first name and in a familiar fashion. At one point, Ms. Terry even presumed to state to Mr. Pyzik what should be discussed at the hearing. See, Transcript of June 17, 1993 Hearing, p. 57, 47, 41. In this case, there is clearly a question as to impartiality of the Hearing Officer which should be decided against the Department. Furthermore, despite the requirements of the Administrative Procedure Act, the Department made no effort to secure a court reporter or otherwise admit evidence in a formal manner. The

apparent thinking was that the matter would be addressed on an informal basis, off-the-record, and the Hearing Officer would then issue his report 60 days later.

All of the above factors contributed to the denial of procedural due process in that a fair and impartial hearing was not held below. Mr. Pyzik could not be impartial with respect to evaluating audit officers within his own department, and co-workers in the Department of Education, despite his claims to the contrary. In essence, while claiming to be "independent," Mr. Pyzik was reviewing the actions of his co-workers and the legality of a statutory scheme of which he had no knowledge. This is evidenced by the fact that he approved a final amount for audit overclaim which has found to have been erroneous by the Department of Education's own auditors.

Furthermore, Mr. Pyzik did not have the expertise with which to deal with the Program and its implementing regulations. Clearly an Audit Officer within the Department of Education is not familiar with the calculation of claiming percentage ratios, total enrollment or other matters necessary to perform an adequate, impartial review. A decision by Mr. Pyzik to find in favor of Discovery Days would have, for all practical purposes, invalidated the report of his co-workers and Ms. Sheila Terry, with whom Mr. Pyzik is certainly acquainted. Ms. Terry, in turn, was responsible for all of the acts of Ms. Freeman and Ms. Gebhardt and their interpretation of the claiming percentage ratio, as explained to Ms. Hurt of Discovery Days.

For all of these reasons, Discovery Days' right to a fair hearing before an impartial tribunal was denied in this instance.

IV. CONCLUSION

For all of the foregoing reasons, and those to be advanced at the Hearing thereon, Discovery Days Child Care, Inc. respectfully requests this Court to reverse and vacate the decision of the Department of Education below.

Respectfully submitted,

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(410) 539-3900

Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1994, a copy of the foregoing **Memorandum** was mailed, first class, postage prepaid, to Caroline A. Emerson, Esq., Assistant Attorney General, Office of the Attorney General, Educational Affairs Division, 200 Saint Paul Place, Baltimore, Maryland 21202-2019, Attorney for Appellee.

Patrick J. Massari

DISCOVERY DAYS CHILD CARE, INC.,	*	
Appellant/Petitioner	*	IN THE
V.	*	CIRCUIT COURT
THE NUTRITION AND TRANSPORTATION SERVICES BRANCH OF THE DIVISION OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION,	*	FOR BALTIMORE CITY
Appellee	*	Case No. 93258067/CL170049

* * * * * * * * * * * * * * *

M E M O R A N D U M

NOW COMES Petitioner/Appellant Discovery Days Child Care, Inc., by and through Patrick J. Massari and Church & Houff, P.A., and pursuant to Maryland Rule 7-207(a) and Title 10, §10-101, et seq. of the State Government Article of the Annotated Code of Maryland, a/k/a The Administrative Procedure Act, hereby files this Memorandum as follows:

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the eligibility requirement for Title XX Proprietary Day Care Centers participating in the Child and Adult Care Food Program under Title XVII of the National School Lunch Act violates the Equal Protection and Due Process Clauses of the 14th Amendment to the United States Constitution, and Article 24 of the Maryland Declaration of Rights.

2. Whether the Maryland State Department of Education erred as a matter of fact and as a matter of law in its application of the Child and Adult Care Food Program under Title 17 of the National School Lunch Act as applied to Petitioner/Appellant, Discovery Days Child Care, Inc.

3. Whether Petitioner/Appellant Discovery Days Child Care, Inc. was denied its right to a fair and impartial hearing, before an independent official pursuant to §226.6(k) of the Child and Adult Care Food Program, in conformity with the Due Process clause of the 5th and 14th Amendments to the United States Constitution.

II. STATEMENT OF MATERIAL FACTS

This dispute centers around the interpretation of the eligibility provision for Proprietary Title XX Day Care Center Participation in the Child and Adult Care Food Program (hereafter referred to as "Program" or the "Food Program"). The Title XX provision of the National School Lunch Act (NSLA) was enacted to provide nutritional meals for low-income children at public schools and day care centers. In essence, the eligibility provision requires that in order for a proprietary licensed day care center, such as the Petitioner/Appellant Discovery Days Child Care, Inc. (hereafter "Discovery Days"), to receive benefits under the Program, 25% of its enrolled participants must receive Title XX Department of Social Services benefits.

Public Law 102-342, the Child Nutrition Improvement Act of 1992, enacted on August 14, 1992, amended the Title XX provision of the NSLA to allow the participation of a proprietary child care center if it receives compensation under Title XX "for at least 25% of its enrolled children or 25% of its licensed capacity, whichever is less." It is noteworthy that this change occurred during the audit period of Discovery Days by the Maryland State Department of Education (hereafter the "Department"). The change as reflected by

Public Law 102-342 essentially allowed for the complex, all-encompassing, and insidious problems inherent in application of the arbitrary and capricious eligibility provision contained in the statute. The change reflected by Public Law 102-342 allowed centers with an enrollment larger than the licensed capacity to use licensed capacity as their threshold, thus qualifying for Program participation based on the number of Title XX children in attendance each day, rather than total enrollment.

Discovery Days commenced participation in the Program in May of 1990. As is evident from the Child Care Food Program Agreement entered into between Discovery Days and the Department, subpart A, paragraph 9 provides that the Sponsoring Agency, that is, Discovery Days, would "maintain documentation on the "enrolled status" of **all participants in the Program**." See, Hearing Exhibit No. 2, pg. 2 (emphasis supplied). This means that Discovery Days was to maintain certain information, as contained in paragraph 18 of the aforereferenced Agreement, as to that individual's household income and other information. There is no mention of maintaining such information on all enrolled children at Discovery Days, regardless of status.

In November of 1990, Discovery Days and the Department executed an Addendum to the Agreement for proprietary sponsors which provided that private for-profit day care centers may participate in the Program as a proprietary Title XX center if not less than 25% of their enrolled eligible participants are Title XIX or Title XX beneficiaries. Under this scheme, the Sponsoring Agency could not claim reimbursement for meals served in any for-

profit center for any preceding month during which the center receives Title XX reimbursement for less than 25% of its enrolled participants. See, Addendum to Agreement for Proprietary Sponsors, dated November 13, 1990, Hearing Exhibit No. 3.

As of June 17, 1993, the site on which Discovery Days was located had two (2) buildings, with a total licensed child capacity of 140 children. One building is a center building licensed for children ages 18 months to 5 years of age (now school-age kindergarten), and is called "The Center." The other building on this site (which was approved for school-age child care in November of 1988) is licensed for school-age children before and after school, and all day when schools are closed. Children in first grade through sixth grade are in this building, which is called "The House." In the fall of 1989, this building was approved by the Department as the building for a non-public private school, which operates from 8:45 a.m. to 3:15 p.m. The other name for this building is "The School." In the summer of 1992, the Department approved a name change of "The School" from Discovery Days Child Care, Inc. to "The Nottingham School."

Discovery Days is close to Essex Community College, Franklin Square Hospital and Golden Ring Mall. Discovery Days has received many calls from parents requesting evening care for their children due to those parents going to college or working. In the summer of 1989, Discovery Days was granted permission to have its hours of operation changed from 6:30 a.m. to 12:00 midnight. This was so children could be taken in on a drop-in basis for parents needing care for an hour or more in the afternoon, while one parent

went to work and the other parent got off work and came to get the child. Drop-in children were also accepted by Discovery Days when parents needed an hour or so of care, but not on a regular basis. Other children were also accepted on a one-day basis when the area Catholic schools were closed, and parents needed only one day of care.

The other day care centers in the area did not stay open in the evening and did not take children on a drop-in basis. Many of the drop-in children, as well as the evening children, were not fed any meals or snacks while at Discovery Days. The drop-in and part-time children who were fed were counted in Discovery Days' total enrollment, and on the Food Program.

The children enrolled in Discovery Days are not from an affluent area; Fontana Village and Kings Court townhouses are in the local surrounding area. Discovery Days had many young children in the Center who, when bringing their lunches, did not have a balanced lunch; many complained that they were still hungry after eating the lunch they had brought with them. To help the children get a more balanced lunch and to learn good eating habits, Discovery Days contracted with Meals-on-Wheels in the fall of 1989 to provide lunch to children whose parents paid an additional fee per week for these lunches.

Joan Hurt, the President of Discovery Days, found out about the Program in the fall of 1989. She received information, and then attended an orientation meeting for the Program at the Howard County Board of Education. This orientation session was conducted by Ms. Patricia Freeman of the Department. At that

meeting, Ms. Freeman explained how Discovery Days was to fill out the application for enrollment in the Program. It was explained by Ms. Freeman that Discovery Days did not count children that were not fed as part of the total enrollment for the Program. Joan Hurt specifically asked Ms. Freeman about school-age children since they were not fed at Discovery Days. Again, Ms. Hurt was told that Discovery Days should not count children who are not fed in the total enrollment figure. Ms. Hurt then asked if children could be counted who were not fed, but who were children who received Department of Social Services (hereafter "DSS") benefits in the 25% total, in order to qualify for the 25% eligibility provision for the Program. Ms. Hurt was told by Ms. Freeman that she could do this.

Discovery Days completed the application for the Program in April of 1990, when it had 25% of its total enrollment receiving DSS benefits. During the pre-approval visit, Discovery Days' application was reviewed, and assistance was given with corrections to the application. Again at this time, questions were asked of Ms. Freeman as to whether Discovery Days was performing the calculations correctly, i.e., only counting children in the Center Building for total Center enrollment and counting all of the DSS children to qualify for the 25% eligibility provision. Discovery Days was told that this was the way to calculate the count for the application, and the application was then approved. See Hearing Exhibit No. 1, with attachments.

Discovery Days began the Program on May 1, 1990, and every application for the ensuing years that are the subject of the audit at issue here, have been done and approved in this fashion.

In June of 1990, and again in January of 1992, Ms. Susan Gebhardt, Field Representative for the Department, came to The Center to inspect Discovery Days' applications, records for the Program, the room food sheets, how children were counted at the time (whether served lunch or snacks), the menus and all other requirements for the Program. When Ms. Gebhardt came to Discovery Days in June of 1990, she was again asked questions by Joan Hurt and others about documentation for records, as well as counting children for total enrollment, because Discovery Days wanted to ensure that they were in total compliance with the Statute. Ms. Gebhardt told Patricia A. Waddell, the secretary at Discovery Days, not to count any children who were not fed, including the drop-ins on the total enrollment, and also that Discovery Days was in complete compliance with all applicable regulations and policies. See Hearing Exhibit No. 1, letter dated June 13, 1993 from Patricia A. Waddell.

Ms. Waddell and Ms. Hurt attended a Program meeting in August of 1990, which meeting was a review of meal planning, portions, foods to be served and information on how the various forms dealing with the Program were to be completed. Both Ms. Waddell and Ms. Hurt attended this meeting so that they would both have the same information for completing applications and monthly forms. Ms. Hurt attended the annual Program meetings in August of 1991 and August of 1992 alone.

It is self-evident that under the Program as administered by proprietary day care centers such as Discovery Days, the children are the beneficiaries of the benefits received from the Department. These children have balanced, nutritious meals, which for some of them is the only meal that they receive that day.

In November of 1992, a representative of The Nutrition and Transportation Audit Department for the State of Maryland, Mr. Stephen Ayers, came to Discovery Days to audit all of the Program records on file from October 1, 1990 to September 30, 1991. The Audit Department decided, apparently based upon this review, that Discovery Days did not meet the eligibility requirement for 25% of total enrollment as previously set forth. The Department representatives also reviewed records from May of 1990 to October of 1992. Further, the representatives decided to expand the audit scope to include fiscal years 1990, 1992 and 1993. At that time, as set forth in a subsequent report dated November 20, 1992, representatives of the Audit Department decided that Discovery Days had only met DSS requirements for seven of the 18 months contained in the audit. As a result, there was an alleged overclaim of $30,090.42 as follows: $6,583.41 for fiscal year 1990, $17,395.79 for fiscal year 1991, and $6,111.22 for fiscal year 1992.

The information provided by the Audit Department representatives to Discovery Days in November of 1992 differed radically from that provided by Ms. Freeman and Ms. Gebhardt prior to that time. Discovery Days, in fact, relied upon the information provided by Ms. Freeman and Ms. Gebhardt in calculating the 25% eligibility requirement for inclusion of Discovery Days' children

in the Food Program. In contrast to what Discovery Days had been told by Ms. Freeman and Ms. Gebhardt, Mr. Stephen Ayers, the Department audit representative, told Ms. Hurt that Discovery Days had to count every child who was enrolled in the Program, irrespective of their status as full-time, part-time, school-age or drop-in, and irrespective of whether or not these children were fed. Mr. Ayers related that total enrollment meant all children in the day care at any time for any reason. Again, this directly contradicted what Discovery Days had been told by State representatives/employees Freeman and Gebhardt prior to November of 1992.

Based upon Mr. Ayers' findings, a report was issued by John W. Johnson, Chief of the Audit Office for the Maryland State Department of Education, alleging an overclaim of $30,090.42. Discovery Days duly noted an Appeal of the Department's finding, and a hearing was held on June 17, 1993.

The hearing officer for the Appeal was Joseph Pyzik, an Internal Auditor for the State Department of Education. Mr. Pyzik related at the hearing that he was requested by Dr. Bonnie Copeland to serve as the hearing officer. Mr. Pyzik reports directly to Dr. Bonnie Copeland, as does Mr. John W. Johnson, who was the audit officer who wrote the report with respect to Discovery Days.

Discovery Days made arrangements and paid for the transcription of the proceedings before Mr. Pyzik. Present at that hearing for Discovery Days were Ms. Hurt; the undersigned, attorney for Discovery Days; and, Mr. Josh Carey, Consultant for Discovery Days. Also present on behalf of Discovery Days were Ms. Shirley

Duncan, a representative from the Maryland Child Care Association; Ms. Christyne Ivey, President of the Baltimore Child Care Association; and a Court Reporter, Esther Wood.

Present for the Department were Ms. Sheila Terry, Ms. Betty Ledbetter, and Ms. Patricia Freeman from The Nutrition and Transportation Services Branch. Ms. Anita Shook and Mr. Stephen Ayers from the Audit Office were also present.

After hearing a discussion on the issues, as well as reviewing the Exhibits made a part of the hearing Record, and which are before this Court on Appeal, Mr. Pyzik concluded that the Department's Auditor acted correctly in recommending that the Department of Education collect $30,090.42 from Discovery Days, as a result of failing to meet Title XX requirements. Mr. Pyzik concluded that Discovery Days should have used the total number of DSS children divided by the total number of all enrolled children.

Discovery Days duly noted an Appeal to this Court from the August 16, 1993 decision of Mr. Pyzik.

It should be noted that since the time of the Hearing, and the noting of this Appeal, in several revisions of errors made by auditors from the Department of Education, the figure which has now been set forth by the Department as due and owing by Discovery Days for excess reimbursements, is $25,909.08. Therefore, the decision of Mr. Pyzik is on its face factually incorrect. In fact, Anita Fein, an Auditor with the Department of Education, has now concluded that the actual amount in dispute is $25,909.08, as opposed to the $30,090.42 figure approved by Mr. Pyzik, due to miscalculations and errors by the Department's Audit Office.

III. ARGUMENT:

Standard of Review:

This Court can reverse or modify the decision of the Department when a substantial right of the Petitioner has been prejudiced by an unconstitutional ruling of the agency, an unlawful procedure, an error of law, or an arbitrary or capricious decision or action by the agency. Furthermore, an agency's enforcement of its rules and policies must not be so fluid as to become arbitrary and capricious. "An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedence without discussion it may cross the line from tolerably terse to intolerably mute." Montgomery County v. Anastasi, 77 Md. App. 126, 137, 549 A.2d 753 (1988), cited in Department v. Reeders Memorial Home, 86 Md. App. 447, 586 A.2d 1295 (1991).

Petitioner/Appellant Discovery Days urges this Court to utilize the substituted judgment standard, inasmuch as the decision of the Maryland State Department of Education below prejudiced the substantial rights of Discovery Days in that it was unconstitutional, was in effect an error of law, and was arbitrary and capricious.

The standard of review of the Department's decision is set forth in the Maryland Administrative Procedure Act as contained in the State Government Article of the Annotated Code of Maryland, §10-215(g). That provision, in pertinent part, states that the Circuit Court may (1) remand the case for further proceedings; (2)

affirm the decision of the agency; or (3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion or decision of the agency: (i) is unconstitutional; (ii) exceeds the statutory authority or jurisdiction of the agency; (iii) results from an unlawful procedure; (iv) is effected by another error of law; (v) is unsupported by competent material and substantial evidence in light of the entire record as submitted; or (vi) is arbitrary or capricious.

"There is more than one possible standard of review for an administrative decision. When determining whether an agency's factual finding violates §10-215, the appropriate standard of review is, of course, the substantial evidence test. However, when we consider whether the agency erred as a matter of law, for example, when there is a challenge to a regulatory interpretation, the substituted judgment standard is to be used. Perini Services, Inc. v. Maryland Health Resources Planning Commission, 67 Md. App. 189, 201, 506 A.2d 1207 (1986)." Department v. Reeders Memorial Home, Inc., 86 Md. App. 447, 586 A.2d 1295, 1297 (1991).

QUESTIONS PRESENTED FOR REVIEW

1. **WHETHER THE ELIGIBILITY REQUIREMENT FOR TITLE XX PROPRIETARY DAY CARE CENTERS PARTICIPATING IN THE CHILD AND ADULT CARE FOOD PROGRAM UNDER TITLE XVII OF THE NATIONAL SCHOOL LUNCH ACT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS.**

DISCUSSION

Title 17 of the National School Lunch Act (NSLA), as amended, authorizes assistance to states through grants and aid and other means to initiate, maintain, and expand non-profit food service programs for children or adult participants in non-residential institutions which provide care. The Program is intended to enable such institutions to integrate a nutritious food service with organized care services for enrolled participants. Under the Program, an "enrolled participant" or "enrolled child" means a child whose parent or guardian has submitted to an institution a signed document which indicates that the child is enrolled for child care.

There are three (3) reimbursement categories: free, reduce-priced, or paid. A "claiming percentage" means the ratio of the number of enrolled participants in an institution in each reimbursement category (free, reduce-priced, or paid) to the total of enrolled participants in the institution.

Petitioner/Appellant Discovery Days is a proprietary Title XX center, which is a private, for-profit center, which provides non-residential child care day care services for which it receives compensation from amounts granted to the states under Title XX of the Social Security Act, and in which Title XX beneficiaries are to be not less than 25% of enrolled eligible participants during the calendar month preceding the initial application or annual re-application for Program participation. Paragraph 9 of the Child Care Food Program Agreement between Discovery Days and the Maryland State Department of Education

required that Discovery Days, as the Sponsoring Agency, "maintain documentation on the "enrolled status" of all participants in the Program."

Under §226.6(d) of the regulations which implement the Program, non-profit day care centers and day care homes do not need to meet the 25% approval criteria set forth above in order to receive benefits under the Program. Similarly situated proprietary Title XX day care centers such as Discovery Days, however, must meet the 25% eligibility provision in order to receive benefits.

"If all persons who are in like circumstances are affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstance are in the same class as invalid." Salisbury Beauty Schools v. State Board, 268 Md. 32, 60, 300 A.2d 367, 383 (1973). Accord, Wheeler v. State, 281 Md. 593, 603-04, 606, 380 A.2d 1052, 1058, 1060 (1977), cert. denied, 435 U.S. 997, 98 S.Ct. 1650, 56 L.Ed. 2d 86 (1978)." Attorney General of Maryland v. Waldron, 289 Md. 683, 426 A.2d 929, 952 (1981). "It is well recognized that the constitutional guarantee of equal protection of the law is afforded to all persons under like circumstances in the enjoyment or their civil and personal rights. Leonardo v. County Commission, 214 Md. 287, 304, 134 A.2d 284 (1957), cert. denied, 355 U.S. 906, 78 S.Ct. 332, 2 L.Ed. 260; Tattlebaum v. Pantex Manufacturing Corporation, 204 Md. 360, 369, 104 A.2d 813 (1954)." Hornbeck v. Somerset County Board of Education, 295 Md. 597, 458 A.2d 758, 781 (Md 1983). The appellant

courts in Maryland "have frequently considered the standard of review to be applied in determining whether the equal protection or equal treatment guarantees of the 14th Amendment or Article 24 have been violated by a challenged enactment. (citations omitted)" Id. Inasmuch as neither a suspect class nor a fundamental right or interest is involved or impaired in the instant case, the "deferential" review of legislative classifications, "variously referred to as a "reasonable" or "rational" basis test, upholds the statute when any state of facts reasonably may be conceived to sustain it. (citations omitted)" Id. at 782. However, the Supreme Court has in recent years enunciated a standard which cannot be classified as either "rational basis" or "heightened scrutiny" or "strict scrutiny." This is a "rational basis" test, "with teeth." See, Atty. General v. Waldron, 289 Md. 683, 426 A.2d 939, 942-47 (1981). Discovery Days asserts that the 25% eligibility provision in the Program, as applied in the claiming percentage, is not rationally related in any sense to the goal of providing nutritious meals to children in Title XX proprietary day care centers, and in fact specifically thwarts this objective. The application of this provision is a disincentive for Title XX centers to provide nutritious meals to low-income children and in fact causes a rise in the cost of day care for low-income parents, which in turn results in these children being placed in sub-standard day care with no nutritious meals. Toward this end, "[s]everal recent Supreme Court Opinions have utilized the rational basis test to invalidate legislative classifications, and, in the view of some, the Court in these case applied a less deferential

standard of review than had previously been applied under the traditional rational basis test." Murphy v. Edmonds, 325 Md. 342, 601 A.2d, 102, 110; see also, Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed. 2d 313 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed. 2d 487 (1985); Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2565, 86 L.Ed. 2nd 11 (1985); Metropolitan Life Insurance Company v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed. 2nd 751 (1985); Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed. 2d 672 (1982). "Some commentators have characterized the Court's review in these and similar cases as "rational basis with teeth" or "rational teeth with bite." Id.; See also, G. Gunther, In Search of Evolving Doctor On a Changing Court: A Model for a Newer Equal Protection, 86 Harvard L.Rev. 1, 18-19 (1972) ("these cases found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard").

Discovery Days urges this Court to adopt the standard expressed as "rational basis with teeth" in striking down the 25% eligibility provision for Title XX proprietary day care centers contained in the regulations implementing the Food Program. The 25% eligibility provision bears no rational relation to the stated goal of feeding low-income children, or children generally, nutritious meals, because the calculation used in the claiming percentage under the Program is based upon "total enrollment," which means all children in the day care center for any purpose or any classification, whether they are fed or not. This would include drop-ins or children who are only at the day care center

for a short time. It also disregards whether or not they are fed by the proprietary Title XX day care center, which should be the determining factor. The eligibility provision, in reality, provides a disincentive for proprietary Title XX day care centers to be included in the Program because of the near impossible burden of keeping 25% of total enrollment on SS benefits. The practical effect of the scheme promulgated by the State Department of Education in this instance is that proprietary Title XX day care centers such as Discovery Days are forced to charge higher prices for their services, and to cut down on the number of nutritious meals served, because they cannot afford to provide these meals.

Furthermore, the statute under consideration, which is the Child and Adult Care Food Program, 7 CFR Chapter II (1/1/93 Ed.), §§226.1 et seq., facially and in its application, treats similarly-situated entities, namely, home day care centers and proprietary Title XX day care centers, differently. This varying treatment can be upheld only if it is rationally related to a legitimate state interest, under the analysis set forth above. The arbitrary classification created by the statute, namely between home day care centers and proprietary Title XX day care centers, must be rationally related to a legitimate governmental interest. Since it fails to do so, the statute is violates the equal protection clause. The same disparate treatment exists as between non-profit day care centers and proprietary Title XX centers.

The impact of the 25% eligibility provision for proprietary Title XX centers is directly at odds with the purpose of the statute. The practical effect for Discovery Days in this

case has been to cut down on the number of children it can take in on a daily basis, completely cut out drop-in children, and otherwise limit services so that low-income children, and their parents, can no longer afford the services of Discovery Days. On a more drastic level, the widespread effect of the application of the 25% eligibility provision has been to deny low-income children nutritious meals at proprietary Title XX day care centers, because such day care centers are no longer able to afford to include such children on their total enrollment. These children are forced to seek sub-standard day care elsewhere and are denied the benefit of the Program.

Application by the State, then, of the 25% eligibility provision to proprietary Title XX day care centers is directly at odds with the purpose of the statute which is to feed children, particularly low-income children, nutritious meals. There is also no legitimate State interest in treating home and non-profit day care centers differently than proprietary Title XX day care centers. In many cases, the reimbursement per meal to home day care centers is more substantial than for proprietary Title XX centers.

The language of the statute is vague, and again is not rationally related to the legitimate State interest of providing nutritious meals to children. Application of the statute mandates that a proprietary Title XX center use its "total enrollment" figure as the basis on which to calculate the claiming percentage, that is, the ratio of the number of enrolled participants in an institution in each reimbursement category

(free, reduce-priced, or paid) to the total of enrolled participants in the institution. This makes absolutely no sense when children who are not fed are included in the total enrollment in a proprietary center. Discovery Days was forced, by the Audit Office of the Department of Education, to count all "enrolled participants" in its facility, regardless of their status as drop-ins (many of whom only spent an hour or so at Discovery Days); or other children who were not fed at all while they were at Discovery Days. To the extent the State and the Federal government is interested in providing nutritious meals to children in proprietary Title XX day care centers, the calculation of SS children should be made with respect to those children who are actually fed, not to the total number of enrolled children in the institution for any purpose at any time.

In fact, the language of the statute is vague and confusing with respect to whether the calculation involves all children enrolled in a proprietary Title XX day care center for any purpose, or those on the Food Program only.

This is a prime example of varying treatment of similarly situated groups, a scheme so unrelated to the achievement of any combination of legitimate legislative purposes, that this Court can only conclude that the statute, the actions of the Department of Education, as well as the impact of the statute, are unconstitutional, irrational, arbitrary and capricious. Gregory v. Ashcroft, U.S. 111 S.Ct 2395, 2406, 115 L.Ed. 2d 410, 430 (1991), cited in Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102, 108 (1992).

Brown v. Ashton, 93 Md. App. 25, 611 A.2d 599, cert. granted 328 Md. 462, 615 A.2d 262 (1992).

2. **WHETHER THE MARYLAND STATE DEPARTMENT OF EDUCATION ERRED AS A MATTER OF FACT AND AS A MATTER OF LAW IN ITS APPLICATION OF THE CHILD AND ADULT CARE FOOD PROGRAM UNDER TITLE 17 OF THE NATIONAL SCHOOL LUNCH ACT AS APPLIED TO PETITIONER/APPELLANT, DISCOVERY DAYS CHILD CARE, INC.**

DISCUSSION

The Department erred as a matter of fact in its application of the claiming percentage calculation in that the figure of $30,090.42, approved by the Department Audit Official at the hearing below, has subsequently been amended and revised to reflect a disallowed reimbursement of $25,909.08. The Department then, erred when it calculated the amount of overclaim that Discovery Days had received as a result of application of the Program.

Furthermore, the Maryland State Department of Education representatives and officials who explained the calculations of the claimed percentage to Joan Hurt erred on several different occasions. These officials told Ms. Hurt that the claimed percentage calculation was performed by taking the number of children who were Title XX beneficiaries and applying that to the number of children who were fed. Ms. Hurt was also told that she could take the number of Title XX beneficiaries who were not fed as a basis for calculating the 25% eligibility provision.

Ms. Hurt relied on the representations of the Department of Education officials in calculating the 25% "total

enrollment" figures for purposes of the Program. It is clearly inequitable and unfair to hold Ms. Hurt responsible for the erroneous statements of Department employees in the calculation of the claiming percentage ratio. The Department should be estopped from demanding an overclaim based on their own errors and misrepresentations to Discovery Days.

More importantly, as a matter of law, the Department erred in the interpretation of the claiming percentage ratio by virtue of the aforementioned acts of its representatives and employees. While a "Court should not substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken," Bulluck v. Pelham Wood Apartments, 283 Md. 505, 513, 390 A.2d 1119 (1978), a Court may substitute its judgment when there is a challenge to a regulatory interpretation such as is the case here. Discovery Days relied on the expertise of the State employees when it was told that the claiming percentage ratio was performed by using the number of children who were fed in the number for total enrollment. This was clearly not the standard that the Audit Office used in November of 1992 when it performed the audit which is the subject of this Appeal. This is a prime example of an agency changing its course and deviating from prior policies and standards which Discovery Days relied on to its detriment. This Court may substitute its judgment for that of the persons who constitute the administrative agency, which in this case was Ms. Patricia Freeman and Ms. Susan Gebhardt, among others.

In essence, the deviation of the Department from its prior communications to Discovery Days constituted an arbitrary and capricious act under §10-215 of the Maryland Administrative Procedure Act. The apparent reasoned analysis for doing so was that the State representatives had made errors in explaining the process of calculating the claiming percentage ratio to the representatives of Discovery Days.

While the process and method of calculating the claiming percentage ratio under the statute seemed to be evident from the face of the statute itself, there was apparently enough ambiguity therein to justify differing explanations of how the claiming percentage was calculated by representatives of the State. The Department's original decision to explain the method of calculating the claiming percentage ratio to Discovery Days was based on an error of law, at least according to the calculations and representations of the Audit Office which occurred later.

It is the position of Discovery Days that the correct and sensible way to calculate the claiming percentage ratio is to include only those children who are fed and/or other children on SS (whether fed or not fed) in the total enrollment figure for purposes of calculating the 25% eligibility provision for Title XX proprietary day care centers. The ambiguity inherent in the calculation of the claiming percentage ratio stems from the fact that the Program is designed to provide nutritious meals to low-income children at Title XX proprietary day care centers.

3. **WHETHER PETITIONER/APPELLANT DISCOVERY DAYS CHILD CARE, INC. WAS DENIED ITS RIGHT TO A FAIR AND IMPARTIAL HEARING, BEFORE AN INDEPENDENT OFFICIAL PURSUANT TO §226.6(K) OF THE CHILD AND ADULT CARE FOOD PROGRAM, IN CONFORMITY WITH THE DUE PROCESS CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE MARYLAND ADMINISTRATIVE PROCEDURE ACT.**

DISCUSSION

Discovery Days was entitled to a fair and impartial hearing, before an impartial Hearing Officer, pursuant to §226.6(k) of the Program, as well as the provisions of the Maryland Administrative Procedure Act. The individual selected for this task was Mr. Joseph Pyzik, who by his own admission at the hearing of this matter below, reported to the same person as did the Chief Audit Officer on whose report the contested case was filed. While Mr. Pyzik maintained that he was an independent Audit Officer from within the Department, he was obviously familiar with all of the parties involved. Ms. Sheila Terry, who is the Chief of the Nutrition and Transportation Services Office, and who is ultimately responsible for the actions of all the State employees in this case, referred to Mr. Pyzik several times by his first name and in a familiar fashion. At one point, Ms. Terry even presumed to state to Mr. Pyzik what should be discussed at the hearing. See, Transcript of June 17, 1993 Hearing, p. 57, 47, 41. In this case, there is clearly a question as to impartiality of the Hearing Officer which should be decided against the Department. Furthermore, despite the requirements of the Administrative Procedure Act, the Department made no effort to secure a court reporter or otherwise admit evidence in a formal manner. The

apparent thinking was that the matter would be addressed on an informal basis, off-the-record, and the Hearing Officer would then issue his report 60 days later.

All of the above factors contributed to the denial of procedural due process in that a fair and impartial hearing was not held below. Mr. Pyzik could not be impartial with respect to evaluating audit officers within his own department, and co-workers in the Department of Education, despite his claims to the contrary. In essence, while claiming to be "independent," Mr. Pyzik was reviewing the actions of his co-workers and the legality of a statutory scheme of which he had no knowledge. This is evidenced by the fact that he approved a final amount for audit overclaim which has found to have been erroneous by the Department of Education's own auditors.

Furthermore, Mr. Pyzik did not have the expertise with which to deal with the Program and its implementing regulations. Clearly an Audit Officer within the Department of Education is not familiar with the calculation of claiming percentage ratios, total enrollment or other matters necessary to perform an adequate, impartial review. A decision by Mr. Pyzik to find in favor of Discovery Days would have, for all practical purposes, invalidated the report of his co-workers and Ms. Sheila Terry, with whom Mr. Pyzik is certainly acquainted. Ms. Terry, in turn, was responsible for all of the acts of Ms. Freeman and Ms. Gebhardt and their interpretation of the claiming percentage ratio, as explained to Ms. Hurt of Discovery Days.

For all of these reasons, Discovery Days' right to a fair hearing before an impartial tribunal was denied in this instance.

IV. CONCLUSION

For all of the foregoing reasons, and those to be advanced at the Hearing thereon, Discovery Days Child Care, Inc. respectfully requests this Court to reverse and vacate the decision of the Department of Education below.

Respectfully submitted,

Patrick J. Massari
CHURCH & HOUFF, P.A.
117 Water Street
Suite 700
Baltimore, MD 21202
(410) 539-3900

Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of February, 1994, a copy of the foregoing **Memorandum** was mailed, first class, postage prepaid, to Caroline A. Emerson, Esq., Assistant Attorney General, Office of the Attorney General, Educational Affairs Division, 200 Saint Paul Place, Baltimore, Maryland 21202-2019, Attorney for Appellee.

Patrick J. Massari

CIRCUIT COURT FOR BALTIMORE CITY DATE PRINTED 01/28/94

PRESIDING JUDGE W. N. Thomas Ward

COURTROOM CLERK J. Lawson

STENOGRAPHER L. Brown

ASSIGNMENT FOR THURSDAY FEBRUARY 10, 1994

CASE NUMBER - 93258067
CASE TITLE - DISC. DAYS CHILD CARE V NUTRITION & TRANS CL170049 CL
CATEGORY - APPEAL FROM ADMINISTRATIVE AGENCY
PROCEEDING - COURT TRIAL - FAST TRACK

CLOUTIER, VALERIE	DEFENSE ATTORNEY	576-6300
EMERSON, CAROLINE E	DEFENSE ATTORNEY	576-6450
MASSARI, PATRICK J	PLAINTIFF ATTORNEY	

Continued per COA

TYPE OF PROCEEDING: (____ JURY) (____ NON-JURY) (____ OTHER)

DISPOSITION (CHECK ONE)

(____ SETTLED)	(____ CANNOT SETTLE)	(____ NEXT COURT DATE)
(____ VERDICT)	(____ REMANDED)	(____ NON PROS/DISMISSED)
(____ JUDGEMENT NISI)	(____ ORDER/DECREE SIGNED)	(____ OTHER) PLEASE EXPLAIN:
(____ JUDGEMENT ABSOLUTE)	(____ ORDER/DECREE TO BE SIGNED)	
(____ POSTPONED)	(____ MOTION GRANTED)	
(____ SUB CURIA)	(____ MOTION DENIED)	

JUDGE SIGNATURE _____ DATE _____

(7)
A.S

DISCOVERY DAYS CHILD CARE, INC. *

Appellant *

V. *

THE NUTRITION AND TRANSPORTATION SERVICES BRANCH OF THE DIVISION OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION, *

Appellee *

IN THE
CIRCUIT COURT
FOR
BALTIMORE CITY

Case No. 93258067/CL170049

* * * * * * * * * * * * * *

MOTION FOR CONTINUANCE

NOW COME Appellant, Discovery Days Child Care, Inc., and Appellee, The Nutrition & Transportation Services Branch of the Division of Business Services, State of Maryland, Department of Education, and hereby jointly request that a continuance be granted in the above-captioned case, and as grounds therefor, state as follows:

1. A hearing is currently scheduled on this matter on February 10, 1994, at 9:30 a.m.

2. Counsel for Appellant and Appellee have jointly agreed to a continuance of this date to allow for filing of Memoranda and other matters.

WHEREFORE, it is respectfully requested that a continuance be granted in the above-captioned matter.

Respectfully submitted,

Patrick J. Massari
CHURCH & HOUFF, P.A.
117 Water Street - Suite 700
Baltimore, Maryland 21202
(301) 539-3900

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 1994, copies of the foregoing **(1) Motion for Continuance; (2) Memorandum of Points and Authorities; and (2) (proposed) Order** were mailed, first class, postage prepaid, to Caroline A. Emerson, Esq., **Assistant Attorney General, Office of the Attorney General, Educational Affairs Division, 200 Saint Paul Place, Baltimore, Maryland 21202-2019, Attorney for Appellee.**

Patrick J. Massari

DISCOVERY DAYS CHILD CARE, INC.,	*	
Appellant	*	IN THE
V.	*	CIRCUIT COURT
THE NUTRITION AND TRANSPORTATION SERVICES BRANCH OF THE DIVISION OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION,	*	FOR
	*	BALTIMORE CITY
Appellee	*	Case No. 93258067/CL170049

* * * * * * * * * * * * * *

MEMORANDUM OF POINTS AND AUTHORITIES

I. **POINTS**

1. The record herein.

2. The Motion herein.

II. **AUTHORITIES**

1. Maryland Rule 2-508.

Respectfully submitted,

Patrick J. Massari
CHURCH & HOUFF, P.A.
117 Water Street - Suite 700
Baltimore, Maryland 21202
(301) 539-3900

Attorney for Appellant

DISCOVERY DAYS CHILD CARE, INC.,	*	
Appellant	*	IN THE
V.	*	CIRCUIT COURT
THE NUTRITION AND TRANSPORTATION SERVICES BRANCH OF THE DIVISION OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION,	*	FOR
	*	BALTIMORE CITY
Appellee	*	Case No. 93258067/CL170049

* * * * * * * * * * * * * * *

O R D E R

Upon consideration of the Motion for Continuance jointly filed by Appellant and Appellee in the above-captioned matter, it appearing to the Court that good cause exists for said Motion, it is by the Court this ____ day of _____, 1994

ORDERED, that Appellant and Appellee's joint Motion for Continuance be and the same is hereby granted, and it is further

ORDERED, that the trial of this matter be and it hereby is continued to _____, 1994, at _____ a.m./p.m.

_____
JUDGE
CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND
(CIVIL DIVISION)

cc: Patrick J. Massari, Esq.
Church & Houff, P.A.
117 Water Street - Suite 700
Baltimore, Maryland 21202

Caroline A. Emerson, Esq.
Assistant Attorney General
Office of the Attorney General
Educational Affairs Division
200 Saint Paul Place
Baltimore, Maryland 21202-2019

DISCOVERY DAYS
CHILD CARE INC.,

Appellant

v.

THE NUTRITION AND TRANSPORTATION SERVICES BRANCH OF THE DIVISION OF BUSINESS SERVICES, STATE OF MARYLAND, DEPARTMENT OF EDUCATION,

Appellee

IN THE

CIRCUIT COURT

FOR

BALTIMORE CITY

CIVIL 93-258067

CL 170049

AMENDED CERTIFICATION OF RECORD

I HEREBY CERTIFY that, to the best of my knowledge, the following is the full and complete record of the proceedings before the Division of Business Services' hearing official in the above-named case:

1. Letter of Appeal dated May 13, 1993, from Joan Hurt, Director of Discovery Days Child Care, Inc., to Sheila G. Terry, Chief of the Nutrition and Transportation Services Branch of the Division of Business Services with enclosed:

   a. Invoice number E 4367, dated April 26, 1993

2. Letter of May 20, 1993, from Raymond H. Brown, Assistant State Superintendent, Division of Business Services, responding to the request for a hearing and giving notice of hearing date and time.

3. Transcript of June 17, 1993, hearing.

4. Memorandum of August 18, 1993, from Joe Pyzik to Raymond Brown with attachments:

   a. Statement of Case, Issue, Proposed Findings of Facts, Discussion and Conclusion;

   b. Exhibits from hearing on June 17, 1993-Discovery Days Child Care, Inc.;

      1) Exhibit 1-Letter of June 16, 1993, from Joan Hurt to Joe Pyzik with attachments;

      2) Exhibit 2-Initial Application, for participating in the Child and Adult Care Food Program, April 1990;

3) Exhibit 3-Initial Child and Adult Care Food Program Application Approved, October 1990;

4) Exhibit 4-Renewal Child and Adult Care Food Program Application Approved, October 1991;

5) Exhibit 5-Renewal Child and Adult Care Food Program Application Approved, October 1992;

6) Exhibit 6-Child and Adult Care Food Program Agreement

7) Exhibit 7-Letter of July 7, 1993, from Christyne Ivey, President, Baltimore City Child Care Association.

c. Exhibits from hearing on June 17, 1993-Maryland State Department of Education:

1) Exhibit 1-Letter of July 2, 1993, from Sheila G. Terry with attachments

2) Exhibit 2-Maryland State Department of Education's Audit Report for Fiscal Year 1991, dated November 20, 1992;

3) Exhibit 3-Letter of July 23, from Anita J. Finn, Section Chief of the Audit Office.

5. Exhibits submitted by Discovery Days Child Care, Inc., after the hearing:

a) Exhibit 1-Letter of June 24, 1993, from Patrick Massari.

b) Exhibit 2-Letter of June 29, 1993, from Patrick Massari and enclosure.

I, Chief of the Nutrition and Transportation Services Branch of the Maryland State Department of Education, do certify this record as of this 16th day of December 1993.

Sheila G. Terry, Chief
Nutrition and Transportation Services Branch
Maryland State Department of Education

Sworn before me the 16th day of December, 1993

My Commission expires:
December 14, 1997

f:\pat\corresp\acorecord

LAW OFFICES
CHURCH & HOUFF, P. A.
SUITE 700
117 WATER STREET
BALTIMORE, MARYLAND 21202-1044
410-539-3900

PATRICK J. MASSARI
DIRECT NUMBER
410-539-3989

FACSIMILE
410-539-3987

June 29, 1993

Mr. Joseph Pyzik
Internal Auditor
Maryland State Department of Education
200 W. Baltimore Street
Baltimore, Maryland 21201

Re: Discovery Days Child Care, Inc. /
CACFP Food Program
Hearing -- June 17, 1993
Our File No.: 4275

Dear Mr. Pyzik:

Enclosed please find a copy of a letter dated June 25, 1993, to Delegate E. Farrell Maddox from Joan Hurt, the Director/ President of Discovery Days Child Care, Inc.

If you have any questions, please do not hesitate to contact me. Thanking you again, I am

Very truly yours,

Patrick J. Massari

PJM/dvd
Enclosure

DISCOVERY DAYS
CHILD CARE
INC.
9715 Philadelphia Road
Baltimore, Maryland 21237
391-2200

June 25, 1993

Delegate E. Farrell Maddox
418 Eastern Boulevard
Baltimore, MD 21221

Dear Delegate Maddox:

On June 21, 1993 I sent to your office information on a Food Program hearing held on June 17, 1993. In that letter I referenced names of attendees from MSDE - Nutrition and Transportation Department. I forgot to include Christyne Ivey, Ivey League Learning Center, President of Baltimore Child Care Association and Shirley Duncan, Park Heights Child Care Center who represented the State Maryland Child Care Association. Both of these women attended the hearing to voice their concerns about the administration of the regulations of the CACFP Food Program and support for Discovery Days Child Care, Inc..

Very truly yours,

Joan Hurt

Joan Hurt
Director/President

cc: Senator Michael Collins
Mr. Patrick Massari, Esquire

JJH:jmw

LAW OFFICES

CHURCH & HOUFF, P. A.

SUITE 700

117 WATER STREET

BALTIMORE, MARYLAND 21202-1044

410-539-3900

PATRICK J. MASSARI

DIRECT NUMBER

410-539-3989

FACSIMILE

410-539-3987

June 24, 1993

Mr. Joseph Pyzik
Internal Auditor
Maryland State Department of Education
200 W. Baltimore Street
Baltimore, Maryland 21201

Re: Discovery Days Child Care, Inc. /
CACFP Food Program
Hearing -- June 17, 1993
Our File No.: 4275

Dear Mr. Pyzik:

Enclosed please find a copy of a letter dated June 21, 1993, to Delegate E. Farrell Maddox from Joan Hurt, the Director/ President of Discovery Days Child Care, Inc.

If you have any questions, please do not hesitate to contact me. Thanking you again, I am

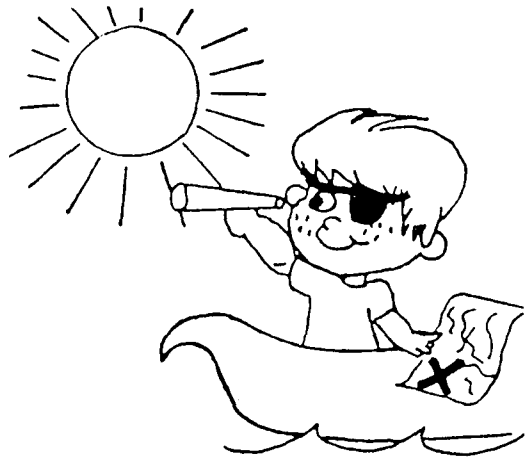
Very truly yours,

Patrick J. Massari

PJM/dvd
Enclosure

DISCOVERY DAYS
CHILD CARE
INC.

9715 Philadelphia Road
Baltimore, Maryland 21237
391-2200



June 21, 1993

Delegate E. Farrell Maddox
418 Eastern Boulevard
Baltimore, MD 21221

Dear Delegate Maddox

Per our conversation, I am sending you all the information that I took to the hearing held on June 17, 1993 in reference to the CACFP Food Program. Among those attending this hearing was Sheila G. Terry, Chief (MSDE) of the Nutrition and Transportation Services Office, the auditors who audited the the food program records for this business in November 1992 and other members of the MSDE Nutrition and Transportation Office. The hearing official was Mr. Joseph Pyzik of Internal Audit Dept. of MSDE.

The information I gave Mr. Pyzik is self explanatory. I am not enclosing the four years of application packets for May 1990, September 1990, October 1991 and October 1992; if you would like to see these, I would be glad to bring them to your office.

Discovery Days Child Care, Inc. and I appreciate your consideration of and help with this matter.

Very Truly Yours,

Joan J. Hurt

Joan Hurt
Director/President

RECEIVED
JUN 25 1993
MD. STATE DEPT. OF EDUCATION
INTERNAL AUDITOR

RECEIVED
JUN 23 1993
CHURCH & HOUFF, P.A.

cc: Senator Michael Collins
Mr. Patrick Massari, Esquire

JJH:jmw

Maryland State Department of
EDUCATION

Schools for Success

Nancy S. Grasmick
State Superintendent of Schools

200 West Baltimore Street
Baltimore, Maryland 21201
Phone (410) 333-2000
TTY/TDD (410) 333-6442

December 16, 1993

Ms. Saundra E. Banks
Clerk
Circuit Court for Baltimore City
Court House East
111 North Calvert Street
Baltimore, Maryland 21202

Re: Discovery Days Child Care, Inc. v. The Nutrition and Transportation Services Branch of the Division of Business Services, State of Maryland, Department of Education,
Civil No. 93-258067

Dear Ms. Banks:

It has come to my attention that two (2) exhibits were omitted from the original submission of a certified copy of the record of the proceeding in the matter referenced above. An amended Certification of Record and the two exhibits are enclosed.

Sincerely

Sheila G. Terry
Chief
Nutrition and Transportation
Services Branch, Maryland State
Department of Education

SGT/VVC44/pba

cc: Caroline Emerson, Esquire
Patrick J. Massari, Esquire

Circuit Court for Balto. City
111 N. Calvert St. Rm. 462
21202

Patrick J. Massari
117 Water Street, Suite 700
Baltimore, Maryland 21202

Circuit Court for Balto. City
111 N. Calvert St. Rm. 462
21202

Caroline E. Merson
Assistant Attorney Gen.
Office of the Atty. Gen.
Education Affairs Division
200 Saint Paul Place, 17th Fl
Baltimore, Maryland 21202

NOTICE SENT IN ACCORDANCE WITH MARYLAND [redacted]207.

Discovery Days Child Care, Inc. Docket: .....

vs. Folio: .....

The Nutrition & Transportation Services Branch of the Div. of Business Services, St. of MD. File: 93258067/CL170049

Date of Notice: 12-7-93

STATE OF MARYLAND, ss:

I HEREBY CERTIFY, That on the 9th **day of** November, **Nineteen Hundred and** ninety-three **I received from the Administrative Agency, the record, in the above captioned case.**

SAUNDRA E. BANKS, Clerk
Circuit Court for Baltimore City

CC-39

NOTICE SENT IN ACCORDANCE WITH MARYLAND [redacted]207.

Discovery Days Child Care, Inc. Docket: .....

vs. Folio: .....

The Nutrition & Transportation Services Branch of the Div. of Business Services, St. of MD. File: 93258067/CL170049

Date of Notice: 12-7-93

STATE OF MARYLAND, ss:

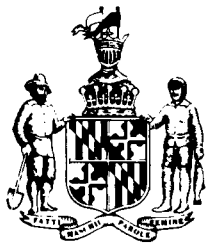
I HEREBY CERTIFY, That on the 9th **day of** November, **Nineteen Hundred and** ninety-three, **I received from the Administrative Agency, the record, in the above captioned case.**

SAUNDRA E. BANKS, Clerk
Circuit Court for Baltimore City

CC-39

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

RALPH S. TYLER
DEPUTY ATTORNEY GENERAL



JOHN K. ANDERSON
CHIEF COUNSEL FOR
EDUCATIONAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL

EDUCATIONAL AFFAIRS DIVISION

200 SAINT PAUL PLACE
BALTIMORE, MARYLAND 21202-2019

(410) 576-6450

WRITER'S DIRECT DIAL NO.
(410) 576-6450

D.C. Metro 470-7534

TTY for Deaf *Balto. Area 576-6372* *D.C. Metro 565-0451*

Telecopier No. (410) 576-6437

September 30, 1993

The Honorable Saundra E. Banks
Clerk, Circuit Court for Baltimore City
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert Street
Baltimore, MD 21202

Re: Discovery Days Child Care, Inc. v.
Maryland State Department of Education
Civil Action No. 93258067/CL1700049

11-4-93
TRANS.

Dear Ms. Banks:

Enclosed is the original copy of Response to Petition to be filed among the proceedings the above-captioned case. As you can see by the stamp from the Clerk's Office the same was to be entered in the proceedings yesterday, but was inadvertently returned to our office.

Thank you for your attention in this matter.

Very truly yours,

Bernadette M. Grabowski

Bernadette M. Grabowski
Secretary to
Caroline E. Emerson

DELTA:BMG201

3VB

IN THE CIRCUIT COURT FOR BALTIMORE CITY *
PETITION OF DISCOVERY DAY CHILD CARE, INC.

FOR JUDICIAL REVIEW OF THE DECISION OF THE *
MARYLAND STATE DEPARTMENT OF EDUCATION

IN THE CASE OF: * Civil Action No.

DISCOVERY DAYS CHILD CARE, INC. * 93258067/CL170049
(Appellant)

v. *

MARYLAND STATE DEPARTMENT OF EDUCATION *
(Appellee)

RESPONSE TO PETITION

The Maryland State Department of Education, by and through its undersigned counsel, does intend to participate as a party in the above-captioned action for judicial review.

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

Valerie V. Cloutier
VALERIE V. CLOUTIER
Assistant Attorney General

Caroline E. Emerson
CAROLINE E. EMERSON
Assistant Attorney General

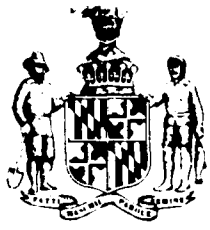
Office of the Attorney General
Educational Affairs Division
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202
Tel: (410) 576-6450

Counsel for Maryland
State Department of Education

DELTA:BMG:CEE102

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

RALPH S. TYLER
DEPUTY ATTORNEY GENERAL



JOHN K. ANDERSON
CHIEF COUNSEL FOR
EDUCATIONAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL

EDUCATIONAL AFFAIRS DIVISION

200 SAINT PAUL PLACE
BALTIMORE, MARYLAND 21202-2019

(410) 576-6450

D.C. Metro 470-7534

TTY for Deaf Balto. Area 576-6372 D.C. Metro 565-0451

Telecopier No. (410) 576-6437

WRITER'S DIRECT DIAL NO.
(410) 576-6456

September 29, 1993

Patrick Massari, Esquire
CHURCH & HOUFF, P.A.
117 Water Street, Suite 700
Baltimore, MD 21202

Re: Discovery Days' Child Care, Inc. v.
Maryland State Department of Education

Dear Mr. Massari:

Enclosed please find the Maryland State Department of Education's Response to Discovery Days' Petition for Judicial Review required by Maryland Rule 7-204.

Sincerely,

Caroline E. Emerson

Caroline E. Emerson
Assistant Attorney General

DELTA:BMG:CEE101
Enclosure
cc:The Honorable Saundra Banks (w/encl.)
Clerk, Circuit Court for Baltimore City

J. JOSEPH CURRAN, JR.
ATTORNEY GENERAL

RALPH S. TYLER
DEPUTY ATTORNEY GENERAL

JOHN K. ANDERSON
CHIEF COUNSEL FOR
EDUCATIONAL AFFAIRS

OFFICE OF THE ATTORNEY GENERAL

EDUCATIONAL AFFAIRS DIVISION

200 SAINT PAUL PLACE
BALTIMORE, MARYLAND 21202-2019

(410) 576-6450

WRITER'S DIRECT DIAL NO.
(410) 576-6456

D.C. Metro 470-7534

TTY for Deaf Balto. Area 576-6372 D.C. Metro 565-0451

Telecopier No. (410) 576-6437

September 24, 1993

The Honorable Saundra E. Banks
Clerk, Circuit Court for Baltimore City
Clarence M. Mitchell, Jr. Courthouse
100 N. Calvert Street
Baltimore, MD 21202

Re: Discovery Days Child Care, Inc. v.
Maryland State Department of Education
Civil No. 93258067 / CL170049

Dear Ms. Banks:

Enclosed is the Maryland Rule 7-202(e) Certificate of Compliance for the above-captioned case.

Yours truly,

Caroline E. Emerson

Caroline E. Emerson
Assistant Attorney General

DELTA:BMG:CEE93
Enclosure
cc: Patrick Massari, Esquire
Ms. Sheila G Terry

IN THE CIRCUIT COURT FOR BALTIMORE CITY
PETITION OF DISCOVERY DAY CHILD CARE, INC.

FOR JUDICIAL REVIEW OF THE DECISION OF THE MARYLAND STATE DEPARTMENT OF EDUCATION

IN THE CASE OF:

DISCOVERY DAYS CHILD CARE, INC.
(Appellant)

v.

MARYLAND STATE DEPARTMENT OF EDUCATION
(Appellee)

* Civil Action No.
93258067/CL170049
*
*
*

CERTIFICATE OF COMPLIANCE

I hereby certify this 24th day of September, 1993, in accordance with Maryland Rule 7-202(e), that written notice of the filing of the Petition referenced above was served by first class mail on every party to the proceeding before the Maryland State Board of Education including Joan Hurt, Director, Discovery Days Child Care, Inc., 9715 Philadelphia Road, Baltimore, MD 21237, and Sheila G. Terry, Chief, Nuitrition and Transportation Services, Maryland State Department of Education, 200 West Baltimore Street, Baltimore, MD 21201.

Caroline E. Emerson

CAROLINE E. EMERSON
Assistant Attorney General

Office of the Attorney General
Educational Affairs Division
200 Saint Paul Place, 17th Floor
Baltimore, Maryland 21202
Tel: (410) 576-6450

Counsel for Maryland
State Department of Education

DELTA:BMG:CEE94

913026

IN THE CIRCUIT COURT FOR BALTIMORE CITY *
PETITION OF DISCOVERY DAYS CHILD
CARE, INC., MRS. JOAN HURT, DIRECTOR *
9715 PHILADELPHIA ROAD
BALTIMORE, MARYLAND 21237 *

FOR JUDICIAL REVIEW OF THE DECISION *
OF THE MARYLAND STATE DEPARTMENT
OF EDUCATION, JOSEPH PYZIK, *
INTERNAL AUDITOR
200 WEST BALTIMORE STREET *
BALTIMORE, MARYLAND 21201

IN THE CASE OF: *

DISCOVERY DAYS CHILD CARE, INC. *
MRS. JOAN HURT, DIRECTOR
(Appellant/Sponsor) *

v. *

THE NUTRITION AND TRANSPORTATION *
SERVICES BRANCH OF THE DIVISION OF
BUSINESS SERVICES, STATE OF MARYLAND, *
DEPARTMENT OF EDUCATION
(Appellee) *

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
93 SEP 15 AM 11:56
CIVIL DIVISION

CIVIL ACTION
NO.:
93258067
CL170049

12:23PM09/15/93 002#7003 B ****
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#0000067
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LIBRA $10.00
**TTL $90.00
CHECK $90.00
CHNG $0.00

* * * * * * * * * * * * * * *

PETITION FOR JUDICIAL REVIEW

Discovery Days Child Care, Inc., Appellant/Sponsor, pursuant to Rule 7-202 requests judicial review of the order of the Maryland State Department of Education issued on August 16, 1993. Discovery Days Child Care, Inc. was a party to the above-referenced agency proceeding.

Respectfully submitted,

Patrick J. Massari
Church & Houff, P.A.
117 Water Street, Suite 700
Baltimore, Maryland 21202

Attorney for Appellant

Copy sent

LAW OFFICES
CHURCH & HOUFF, P. A.
SUITE 700
117 WATER STREET
BALTIMORE, MARYLAND 21202-1044
410-539-3900

PATRICK J. MASSARI
DIRECT NUMBER
410-539-3989

FACSIMILE
410-539-3987

September 15, 1993

VIA CARL MESSENGER

Clerk of the Court
Circuit Court of Maryland
for Baltimore City
111 N. Calvert Street
Room 462
Baltimore, Maryland 21202
ATTN: Civil Division

Re: Petition of Discovery Days Child Care, Inc. for Judicial Review of the Decision of Maryland State Department of Education **In Case Of:**

Discovery Days Child Care, Inc., Appellant/Sponsor
v. The Nutrition and Transportation Services
Branch of Business Services, State of Maryland,
Department of Education, Appellee
Civil Action No.: NOT ASSIGNED YET
Our File No. : 4275

To the Clerk:

Enclosed for filing, on behalf of the Appellant/Sponsor, Discovery Days Child Care, Inc., please find an original and two (2) copies of the following document:

Petition for Judicial Review

Please file the original and one copy in the captioned proceeding and stamp in the extra copy and return same to this office via our messenger.

Also enclosed is this firm's check in the amount of **$90.00,** which covers the cost of the filing fee.

Thanking you for your anticipated cooperation, I am

Very truly yours,

Patrick J. Massari

PJM/dvd
Enclosures
cc: Ms. Joan Hurt

1993

F.L.
2-4-10
212 Images

DISC. DAYS CHILD CARE V NUTRITION & TRANS Box 481 Case No. 93258067 [MSA T2691-5556, OR/22/10/31]

YATES VS MD INSURANCE COMMISSIONER, ET Box 499 Case No. 93270059 [MSA T2691-5574, OR/22/11/1]

BOARMAN VS LITTON SYSTEM INC Box 551 Case No. 93308008 [MSA T2691-5627, OR/22/12/6]

KINZIE VS.MD DEPT OF ECON.& EMP. DEV. Box 599 Case No. 93337061 [MSA T2691-5675, OR/22/13/7]

KIM VS. ZONING BOARD Box 614 Case No. 93350027 [MSA T2691-5690, OR/22/13/22]