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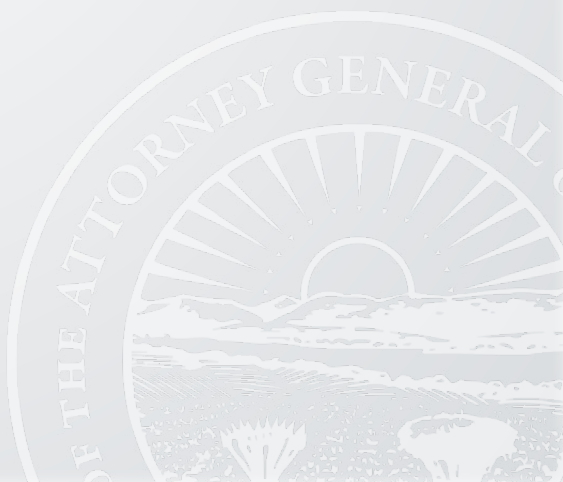
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# 2020 ADMINISTRATIVE LAW HANDBOOK

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## **I. APPLICATION OF R.C. CHAPTER 119**

### **A. Governmental Entities Subject to R.C. Chapter 119**

Pursuant to R.C. 119.01(A), there are three ways in which a state agency, board or commission may be required to follow the Ohio Administrative Procedure Act.

1. Certain agencies, boards and commissions are specifically named in R.C. Chapter 119.
2. A statute specifically subjects the agency, board or commission to R.C. Chapter 119.
3. The agency, board or commission has authority to issue, suspend, remove or cancel licenses. *Fair v. School Emp. Retirement Sys.*, 44 Ohio App.2d 115, 117 (10th Dist.1975).

### **B. Entities that Constitute an “Agency”**

1. Agencies Specifically Named in R.C. 119.01(A)
  - a. R.C. 119.01(A)(1): Any official, board, or commission that has the authority to promulgate rules or make adjudications in:
    - (1) the Civil Service Commission;
    - (2) the Division of Liquor Control;
    - (3) the Department of Taxation;
    - (4) the Industrial Commission; and/or
    - (5) the Bureau of Workers’ Compensation.
  - b. Any administrative or executive officer, department, division, bureau, board or commission of the state government specifically made subject to sections 119.01 to 119.13 of the Revised Code. R.C. 119.01(A)(1).
  - c. The licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the state government having the authority of responsibility of issuing, suspending, revoking or cancelling licenses. R.C. 119.01(A)(1).
  - d. R.C.119.01(A)(2): Any official or work unit having authority to promulgate rules or make adjudications in the Department of Job and Family Services specifically pertaining to:

- (1) Adoption, amendment or rescission of rules mandated by R.C.5101.09;
  - (2) Issuance, suspension, revocation or cancellation of licenses.  
R.C. 119.01(A)(2)(b).
- e. Exclusions from Definition of “Agency”, R.C. 119.01(A)(1):
- (1) Public Utilities Commission;
  - (2) Utility Radiological Safety Board;
  - (3) Controlling Board;
  - (4) Actions of the superintendent of financial institutions and the superintendent of insurance regarding the taking possession, rehabilitating or liquidating businesses, as well as other activities specifically mentioned in R.C. 119.01(A);
  - (5) Actions of the Industrial Commission or Bureau of Worker’s Compensation brought under R.C. 4123.01-4123.94.
2. Entity’s own law specifically makes it subject to R.C. Chapter 119.
- a. There must be a clear legislative intent to make an entity’s functions subject to R.C. Chapter 119. *McEldowney v. Ohio Expositions Comm.*, Franklin C.P. No. 95CVF06-4466 (Aug. 10, 1995).
  - b. There is a clear legislative intent to qualify a board as an agency when there is a statutory provision that subjects the board to R.C. Chapter 119 without restriction to rulemaking. *South Community, Inc. v. State Emp. Relations Bd.*, 38 Ohio St.3d 224 (1988).
3. Entity has authority for issuing, suspending, revoking or canceling licenses.
- a. The Revised Code defines “license” as: [a]ny license, permit, certificate, commission, or charter issued by any agency.... [but not] any arrangement whereby a person, institution, or entity furnishes Medicaid services under a provider agreement with the department of job and family services pursuant to Title XIX of the “Social Security Act,” 49 Stat. 620, 42 U.S.C. § 301 (1935), as amended. R.C. 119.01(B).
  - b. The courts define an agency’s licensing authority based on the involvement an entity has with the processing of licenses. Examples:

- (1) Decision to hold contractor in default of contract is not a licensing function. *Asphalt Specialist Inc. v. Ohio Dept. of Transp.*, 53 Ohio App.3d 45, 47 (10th Dist.1988).
- (2) The action of a superintendent of banks in approving branch applications was such an elaborate procedure that the action was considered a licensing function. *Genoa Banking Co. v. Mills*, 67 Ohio St.2d 106, 111 (1981). The mere approval of a savings and loan branch location application was not a licensing function. *Home S. & L. Assn. v. Boesch*, 41 Ohio St.2d 115, 119 (1975).
- (3) In *Bayside Nursing Ctr. v. Ohio Dept. of Health*, 96 Ohio App.3d 754, 759 (10th Dist.1994), the Tenth District Court of Appeals held that certification of a health care provider by the Ohio Department of Health for compliance with federal Medicaid requirements constitutes a license for purposes of Ohio Rev. Code Ann. § 119.12; it is not an arrangement whereby a person, institution, or entity furnishes Medicaid services under a provider agreement with Ohio Department of Human Services. Therefore, the act is a licensing function because it does not fall under the exemption included in R.C. 119.01(B).
- (4) The Tenth District Court of Appeals held in *Springfield Fireworks, Inc. v. Ohio Dept. of Commerce*, 10th Dist. Franklin No. 03AP-330, 2003-Ohio-6940, ¶ 24, that an act of the State Fire Marshal refusing to transfer a fireworks license was not classified as a licensing function because it did not involve the issuing, suspending, revoking, or canceling of a license. Since the act was not a licensing function, the refusal was not an agency decision and therefore, was not appealable pursuant to R.C. Chapter 119.

#### 4. Entities exercising derivative power

- a. Where an entity exercises power derived from another agency that is covered by Chapter 119, the entity is also subject to Chapter 119.
  - (1) In *Bd. of Trustees of Ohio State Univ. v. Dept. of Admin. Serv.*, 68 Ohio St.2d 149, 151-52 (1981), the Supreme Court of Ohio held that the Ohio State University was not itself an “agency” for purposes of Chapter 119. The conduct at issue was authorized by R.C. 124.14(G), which then authorized state universities to exercise the powers, duties, and functions of the Department of Administrative Services with respect to civil service employees. The court held that to the extent that the university was exercising powers derived from the Department of Administrative Services, which was an agency subject to Chapter 119, the university was also bound by Chapter 119 in the exercise of those powers.



(2) Municipal body exercising derivative power does not constitute an “agency” for purposes of Chapter 119; entity exercising derivative power must be a state agency. *Bd. of Trustees*, 68 Ohio St.2d at 152 n.3 (citing *Karrick v. Board of Edn. of Findlay School Dist.*, 174 Ohio St. 467 (1963), paragraph two of the syllabus).

### C. Chapter 119 Applies to Adjudications, Not Ministerial Acts

1. Chapter 119 provides certain rights in relation to adjudications.

- a. Right to opportunity for hearing: Chapter 119 provides that “[n]o adjudication order shall be valid unless an opportunity for hearing is afforded in accordance with sections 119.01 to 119.13.” R.C. 119.06, ¶ 2 (emphasis added).
- b. Right to an appeal: Pursuant to R.C. 119.12, “any party adversely affected by any order of an agency issued pursuant to an adjudication denying the applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license ... may appeal from the order of the agency to the court of common pleas.” R.C. 119.12, ¶ 1 (emphasis added).

2. “Adjudication” defined

- a. An “adjudication” is defined by R.C. 119.01(D) as:

“\* \* \* the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specific person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.”

- b. Thus, in order to determine whether Chapter 119 applies, one must determine whether the act of the agency constituted an adjudication, or was merely a ministerial act.

(1) The Ohio Supreme Court ruled in *Ohio Boys Town, Inc. v. Brown*, 69 Ohio St.2d 1 (1982) that, pursuant to R.C. Chapter 119, the state is under a statutory duty to provide licensees an opportunity for a hearing prior to rejection of their applications for renewal of their charitable bingo licenses. *Id.* at 12. The Supreme Court held that the rejection of the application for renewal was an adjudication by the highest or ultimate authority of an agency, therefore, the licensee was entitled to a hearing prior to being forced to cease bingo operations. *Id.*

### 3. Ministerial Act

- a. The issuance of a license in response to an application with respect to which no question is raised and other acts of a ministerial nature are specifically excluded from the definition of “adjudication” and thus are not subject to review pursuant to R.C. Chapter 119. R.C. 119.01(D).
- b. A ministerial act has been defined as an act that, given a certain state of facts, a person performs in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of that person’s own judgment upon the propriety of the act being done. *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 618 (1902), cited in *Ohio Boys Town v. Brown*, 69 Ohio St.2d 1 (1982); *Koch v. Ohio Dept. of Natural Res.*, 70 Ohio App.3d 612, 614 (6th Dist.1990); *Bayside Nursing Ctr. v. Ohio Dept. of Health*, 96 Ohio App.3d 754, 762 (10th Dist.1994); *Raceway Park, Inc. v. Ohio State Racing Comm.*, 150 Ohio App.3d 702, 2002-Ohio-6838, ¶ 16 (10th Dist.); *New London Hosp. of Ohio Non-Profit Corp. v. Creasy*, 10th Dist. Franklin No. 80AP-208, 1980 Ohio App. LEXIS 12569, \*8 (July 22, 1980); *In re Seltzer*, 67 Ohio St.3d 220, 224 (1993); *Odita v. State Dept. of Human Servs.*, 88 Ohio App.3d 82, 88 (10th Dist.1993).
- c. Ministerial acts involve no discretion.
  - (1) In *Koch v. Ohio Dept. of Natural Resources*, 70 Ohio App.3d 612, 616 (6<sup>th</sup> Dist. 1990), the Sixth District Court of Appeals held that because the Division of Wildlife has no discretionary authority in reviewing Koch's request to transfer his commercial fishing license, the act of denying his transfer application was a ministerial act to which no right to appeal attached.
  - (2) Citing *Koch*, the Tenth District Court of Appeals in *Bayside Nursing Ctr. v. Ohio Dept. of Health*, 96 Ohio App.3d 754, 762-63 (10th Dist.1994), held in part that where the termination of a provider agreement in a given situation is mandated by the Revised Code, such termination amounts to a ministerial act to which no appeal right attaches. *See, also, New London Hosp. of Ohio Non-Profit Corp. v. Creasy*, 10th Dist. Franklin No. 80AP-208, 1980 Ohio App. LEXIS 12569, \*9 (July 22, 1980).
  - (3) Statute required the Bureau of Motor Vehicles to suspend respondent’s driver’s license and vehicle registration upon respondent’s failure to provide proof of insurance. This suspension was thus a ministerial act and no administrative appeal rights attach. *Brown v. Ohio Bur. of Motor Vehicles*, Franklin C.P. No. 07CV-9225 (Sept. 21, 2007).

- d. Mandamus may be used to compel performance of purely ministerial acts.

In *Odita v. State Dept. of Human Servs.*, 88 Ohio App.3d 82 (citing *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160 (1935)), the Tenth District Court of Appeals held that “mandamus will lie to compel the performance of duties that are ministerial in nature and do not require the exercise of official judgment and discretion.”

See Chapter XI

#### **D. Issues Concerning Specific Charge**

1. Access to court record sealed or expunged under R.C. 2953.52(A)(1).

The Supreme Court of Ohio in *State v. Niesen-Pennycuff*, 132 Ohio St.3d 416, 2012-Ohio-2730, held that when a criminal defendant who has successfully completed a program of intervention in lieu of conviction moves for an order sealing his or her record under R.C. 2951.041(E), the trial court has discretion either to grant the motion immediately under R.C. 2953.52(A)(1), or to impose a waiting period before the record is sealed pursuant to R.C. 2953.32(A)(1). A pending administrative proceeding involving a conviction or intervention in lieu of conviction may be affected.

2. A criminal prosecutor cannot bind an agency, which is not affiliated with the criminal prosecution of a licensee, to an agreement forcing the agency to refrain from investigating and prosecuting violations of its statutes. *Nalluri v. State Med. Bd.*, 10th Dist. Franklin No. 14AP-530, 2014-Ohio-5530.
3. When considering an application for a concealed carry permit under R.C. 2923.125, a precluding conviction must be an offense that would merit that preclusion in Ohio (i.e., not a minor misdemeanor). Here, the offense of possession of less than 100g of marijuana is a minor misdemeanor in Ohio, so, despite its being a misdemeanor punishable with up to 12 months in jail in Georgia, it is not a disqualifying offense for a concealed carry permit in Ohio. *Fenton v. Fischer*, 2017-Ohio-7746, 97 N.E.3d 1132 (2d Dist.).
4. An agency may not charge a licensee with a violation of a standard neither promulgated by the rule nor adopted pursuant to a procedure authorized by statute. *Farina v. Ohio State Racing Comm.*, Franklin C.P. 17CV-4343 (Dec. 26, 2017).
5. In order to prove an administrative charge of malfeasance, misfeasance or nonfeasance, the agency need not prove actual harm or injury. *Hand & Hand MRDD Residential Servs., Inc. v. Ohio Dept. of Dev. Disabilities*, 2017-Ohio-9287, 102 N.E.3d 1128 (10th Dist.).

6. City's enactment of an ordinance changing a zoning designation constitutes a legislative, not an administrative, act, and therefore the trial court has no jurisdiction to review the act. *Thies v. Dayton*, 2nd Dist. Montgomery No. 28029, 2019-Ohio-402.
7. Without evidence that complaint-driven inspection process had been manipulated by private parties for purely private purposes, such process is not selectively enforced, and thus does not violate the Fourteenth Amendment. *City of Cincinnati v. Fourth Natl. Realty, LLC*, 2017-Ohio-1523, 88 N.E.3d 1278 (1st Dist.).

## II. RIGHT TO HEARING

### A. No adjudication order is valid without specific statutory authority, and without an opportunity for a hearing.

1. Pursuant to R.C. 119.06, "no adjudication order of an agency shall be valid unless the agency is specifically authorized by law to make such order." *See, e.g., State ex rel. Fisher v. Nacelle Land & Mgt. Corp.*, 90 Ohio App.3d 93, 97-98 (11<sup>th</sup> Dist.1993) (Statue gives Dept. of Natural Resources authority to issue permits, to impose conditions on those permits, and to issue an order denying permit applications); *In re Jonti*, 10<sup>th</sup> Dist. Franklin Nos. 92AP-1361, 92AP-1386 (Aug. 3, 1993) ( Division of Banks is authorized by statue to impose a civil penalty against a bank or person participating in the conduct of the affairs of a bank.).
2. No adjudication order is valid unless an opportunity for a hearing has been afforded to the respondent. R.C. 119.06. *See, e.g., Koutsounadis v. Newton Falls Joint Fire Dist.*, 11<sup>th</sup> Dist. Trumbull No. 2009-T-0031, 2009-Ohio-6517 (Joint fire district's designation of a fire lane was invalid as no hearing was afforded to the respondent.).

### B. R.C. 119.06 specifically enumerates certain cases when a hearing must be afforded upon request.

1. When a statute permits suspension of a license without a prior hearing.
2. When an agency asserts that an individual must obtain a license and the individual claims the law does not impose such a requirement.
3. When an individual is refused admittance to an examination, which is a pre-requisite to the issuance of a license.
4. When an agency refuses to issue new license.
  - a. Exceptions

- (1) If a hearing was held prior to such refusal.
- (2) No hearing is required for the following boards if the applicant failed a licensing examination:
  - (a) Medical board;
  - (b) Chiropractic board;
  - (c) Board of examiners of architects;
  - (d) Board of landscape architect examiners;
  - (e) Ohio occupational therapy, physical therapy, and athletic trainers board.

5. When an agency denies a renewal or registration, R.C. 119.06, ¶ 9, provides:

- a. The agency must provide a hearing unless a hearing was held prior to the denial.
- b. If a licensee timely files for renewal or registration, the licensee shall not be required to discontinue the licensed business or profession merely because the agency fails to act on the application.
- c. The Action of the agency rejecting the application shall not be effective prior to 15 days after the notice of rejection was mailed to the licensee.

#### **C. Orders Effective Without a Hearing**

1. Orders revoking a license when an agency is required by statute to revoke a license pursuant to a judgment of a court. R.C. 119.06(A).
2. Orders suspending a license when a statute specifically permits the suspension of a license without a hearing. R.C. 119.06(B).
3. Decisions of an authority within an agency if the statute or rules of the agency specifically give a right to appeal to a higher authority within the agency, another agency, or to the board of tax appeals, and give the appellant a right to hearing on appeal. R.C. 119.06(C).
4. Certain orders canceling or suspending a driver's license, R.C. 119.062.

#### **D. Suspensions Without A Prior Hearing (“Summary Suspensions”)**

1. General rule: Agency must provide an opportunity for a hearing BEFORE issuing an adjudication order.
2. Exception: When a statute permits the suspension of a license without a prior hearing. R.C. 119.06. This is often called a “summary suspension.”

- a. A hearing must be held following suspension.
  - (1) Failure to provide an opportunity for a hearing following the suspension violates due process. *Doriott v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 05AP-1079, 2006-Ohio-2171, ¶ 14.
  - (2) A Medical Board statute permitting the board to suspend a license without a hearing when a licensee fails to submit to a medical examination must be read together with R.C. 119.07 to require the board to provide notice of opportunity for hearing subsequent to the suspension. *Doriott v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 05AP-1079, 2006-Ohio-2171, ¶ 12.
3. Notice requirements for pre-hearing suspensions pursuant to R.C. 119.07.
  - a. Notice of suspension must state:
    - (1) Reasons for the agency's action;
    - (2) Law or rule directly involved; and
    - (3) Opportunity for hearing if requested within thirty days of the mailing of the notice.
  - b. Service of the Notice
    - (1) Notice must be sent to the party by registered mail, return receipt requested, not later than the business day next succeeding such order.
    - (2) Copy of the notice must be mailed to the attorney or other representative of record.
4. Due process concerns
  - a. The U.S. Supreme Court has ruled that summary suspensions are generally constitutionally permitted to protect the public. *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. /2612 (1979), (Massachusetts DUI case).
  - b. Three-Step Analysis (Mackey)
    - (1) Nature and importance of the private interest affected by the official state action.
    - (2) Risk of erroneous deprivation of the private interest through the procedures used.

- (3) Fiscal or administrative burden that additional or substitute procedures would require.
- c. The Ohio Supreme Court adopted the Mackey test in *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 52 (1990), in which the court found that strict adherence to the judicial model of due process was not mandated for administrative hearings. Rather, if the Mackey test is met, then the due process rights of the individual are not violated.
- (1) The Supreme Court of Ohio ruled that the state may impose a summary suspension of a horse racing license pending a prompt hearing afterward to determine any unresolved issues. *Wagers v. Ohio State Racing Comm.*, 5th Dist. Richland No. CA-2885, 1992 Ohio App. LEXIS 556, \*7 (Jan. 22, 1992).
  - (2) However, in *Meadows v. Ohio Bur. of Motor Vehicles*, 71 Ohio Misc.2d 3, 5 (M.C.1995), the Wadsworth Municipal Court found that the state did not follow the statutory scheme for an administrative license suspension when it did not afford the defendant a post-suspension hearing within five days. The Meadows court ruled that the state's failure to follow the statute deprived the defendant of his rights to due process. *Id.*

### III. NOTICE REQUIREMENTS

#### A. Mandatory Requirement

1. If a party has a right to a hearing, the agency must give proper notice of the opportunity for hearing. R.C. 119.07, ¶ 1.
2. Failure to give proper notice invalidates any order entered pursuant to the hearing. R.C. 119.07, ¶ 5.
3. Although proper notice of the opportunity for hearing is mandatory, the time frame for filing the notice is discretionary.
  - a. The agency is subject to a reasonable standard; the party has a right to a reasonable notice of hearing and a reasonable opportunity to be heard. *State ex rel. LTV Steel Co. v. Industrial Comm. of Ohio*, 102 Ohio App.3d 100, 103-04 (10th Dist.1995); *State ex rel. Finley v. Dusty Drilling Co.*, 2 Ohio App.3d 323, 325 (10th Dist.1981).
  - b. The Tenth District Court of Appeals held that timeframes are directory, not mandatory, and that, as a result, an appellant must demonstrate prejudice from any failure to meet the timeframes. *Wightman v. Ohio Real Estate Comm.*, 10th Dist. Franklin No. 10AP-699, 2011-Ohio-1816; *Barlow v. Ohio State Dept. of Commerce, Div. of Real Estate and Professional Licensing*, 10th Dist. Franklin No.

09AP-1050, 2010-Ohio-3842, ¶ 31; *Cunningham v. Ohio Real Estate Comm.*, Franklin C.P. No. 10CVF-3027 (Aug. 24, 2010).

4. Instructions on how to request a hearing must be included.

Even though there is no specific statutory requirement, absence of instructions of how to appeal and the deadlines involved violated due process requirements. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 6th Dist. Lucas No. L-11-1177, 2012-Ohio-3506, ¶ 16 and 17. A Notice of Opportunity for Hearing that stated the request for a hearing must be in writing and that it must be received in the agency's office within 30 days of the date of mailing of the notice adequately fulfills the requirements of R.C. 119.07. *McClendon v. Ohio Dept. of Edn.*, 2017-Ohio-187, 77 N.E.3d 523 (8<sup>th</sup> Dist.).

## **B. Content of Notice**

1. Pursuant to R.C. 119.07, in all cases in which an agency must afford an opportunity for a hearing prior to issuing an order, the notice of hearing must include:
  - a. Notice of the party's right to a hearing;
  - b. The charges or other reasons for the proposed action;
  - c. The law or rule directly involved;
  - d. Statement that the party is entitled to a hearing if the request is received within thirty days from the time that the notice was mailed;
  - e. Statement that the party may appear in person, by his or her attorney, or by such other representative who is permitted to practice before the agency;
  - f. Statement that the party, if personally appearing, may present evidence and examine witnesses appearing for and against him or her; and
  - g. Statement that the party may, in lieu of personally appearing, present his or her position, argument, and contentions in writing.
2. Purpose of the notice requirement
  - a. Must be clear enough to allow the party to prepare a defense.
    - (1) The purpose of the notice required by R.C. 119.07 is to enable the respondent to prepare a defense to the charges. *Geroch v. Ohio Veterinary Med. Bd.*, 37 Ohio App.3d 192, 198 (8th Dist.1987); *Keaton v. Ohio Dept. of Commerce*, 2 Ohio App.3d 480, 482-83 (10th Dist.1981).



- (2) Because the dental board provided in the notice of charges the names of only two patients of the licensee, the licensee was deprived of the ability to prepare a defense with regard to other patients. *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 423 (1st Dist.1998).
  - (3) Violations of laws enforced by one agency may form the basis of an administrative disciplinary action taken by another agency based upon “demonstrating a disregard for the laws or regulations of this state.” *Suburban Inn, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 13AP-811, 2014-Ohio-4355.
  - (4) Acts committed prior to the license year that is subject of the administrative disciplinary action may be considered in combination with more recent acts to show a course or pattern of conduct which was of a continuing nature. *Suburban Inn, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 13AP-811, 2014-Ohio-4355.
- e. Limits the scope of the charges.
- (1) An appellate court may not uphold an agency's order based upon findings which, while supported by the record, are broader than the charges set forth in the notice of hearing. *See Fehrman v. Ohio Dept. of Commerce, Div. of Securities*, 141 Ohio App.3d 503, 509-11 (10th Dist.2001); *In re Morgenstern*, 10th Dist. Franklin No. 91AP-1018, 1992 Ohio App. LEXIS 2753, \*7 (May 28, 1992); *Sohi*, 130 Ohio App.3d at 423.
  - (2) Administrative code section that is a strict liability provision must be included in the notice of opportunity for hearing in order for the agency to avoid proving intent as required by other statutes. *Minges v. Ohio Dept. of Agriculture*, 10th Dist. Franklin No. 12AP-738, 2013-Ohio-1808.

### 3. Practical Considerations

- a. Does the notice clearly and accurately state the factual charges or reasons for the proposed action? Can the respondent prepare a defense using only this statement?
- b. Does the notice include confidential information, such as patient names, that should be stated in a separate document attached to the notice?
- c. Does the agency have sufficient evidence to support every charge stated in the notice?

- d. Is the agency authorized by statute or administrative rule to take the proposed action?
- e. Does the notice comply with all procedural requirements set forth in statute and administrative rule that are unique to the agency?
- f. Does the notice cite all applicable statutes and administrative rules? Were the cited statutes and rules in effect on the dates of the stated charges? (Note: Unless the statute at issue is retroactive.)
- g. Does the notice state all of the respondent's hearing and representation rights as specified in R.C. 119.07?
- h. Does the notice indicate the agency's address and telephone number and, if necessary, the name of a contact person?
- i. Does the notice indicate the method of service to be utilized?
- j. If multiple violations, is it clear which alleged facts violate each statute or rule stated in the notice?

### **C. Due Process**

1. Procedural due process in administrative hearings constitutes the right to a reasonable notice of hearing and a reasonable opportunity to be heard, including reasonable notice of the subject matter of the hearing. *State ex rel. LTV Steel Co. v. Industrial Comm. of Ohio*, 102 Ohio App.3d 100, 103-04 (10th Dist.1995); *State ex rel. Finley v. Dusty Drilling Co.*, 2 Ohio App.3d 323, 325 (10th Dist.1981). The notice of opportunity for hearing sufficiently apprises the respondent of the precise nature of the charges against him, even if the notice contains some deficiencies. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 11AP-174, 2011-Ohio-6089, ¶ 26. In order to show a violation of due process, the respondent must demonstrate prejudice by indicating what, if anything, he or she would have done differently in preparation of his or her defense. *Id.*
2. Charging notice with details within each count, albeit with incorrect dates, allowed the respondent to determine what specific instance was being addressed and what details created the basis for the charges. Due process requires fair notice, not perfect notice. *Langdon v. Ohio Dept. of Edn.*, 2017-Ohio-8356, 87 N.E.3d 1276 (12th Dist.)
3. Delays in Issuing Notice
  - a. Most administrative agencies have no time limits for bringing charges.

- b. The Supreme Court of Ohio has held that the state, absent an express statutory provision to the contrary, is exempt from the operation of a generally worded statute of limitation. *State v. Sullivan*, 38 Ohio St.3d 137, 140 (1988).
- c. Failure to meet statutory time frames
  - (1) An agency does not lose jurisdiction to take action when it fails to comply with time period set by statute. *Boggs v. Ohio Real Estate Comm.*, 186 Ohio App.3d 96, 2009-Ohio-6325, ¶ 27 (10th Dist.).
  - (2) Failure to meet time period is not reversible error if the appellant cannot show prejudice resulting from the delay. *Wightman v. Ohio Real Estate Comm.*, 10th Dist. Franklin No. 10AP-699, 2011-Ohio-1816, ¶ 28.
- d. As a general rule, laches is generally not a defense to a suit by the government to enforce a public right or to protect a public interest. *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143 (1990), paragraph three of the syllabus.
- e. Estoppel does not apply against the state in the exercise of a government function. *Sekerak v. Fairhill Mental Health Center*, 25 Ohio St.3d 38, 39 (1986); *Frantz*, 51 Ohio St.3d, at 146; *Journey v. Ohio Motor Vehicle Salvage Dealers Licensing Bd.*, 4th Dist. Scioto No. 01CA2780, 2002-Ohio-413.
  - (1) The government cannot be estopped from its duty to protect public welfare.
  - (2) The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud or injustice.
  - (3) A board cannot be estopped from its duty to protect the public welfare because it did not bring a disciplinary action as expeditiously as possible. If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to estoppel, the interest of all citizens in obedience to the rule of law is undermined. To hold otherwise would be to grant defendants the right to violate the law. *Frantz*, 51 Ohio St.3d, at 146.
- f. Excessive delays may violate due process
  - (1) A respondent was deprived of due process when a board issued a suspension based on a citation that was issued 5 years after the agency's investigations, 3 ½ years after the agency was notified of the licensee's convictions, 2 ½ years after his criminal discharge, 1 year after the expungement of his convictions, and after the agency had continuously renewed the licensee's license in spite of

knowledge of his convictions. *Mowery v. Ohio State Bd. of Pharmacy*, 11th Dist. Geauga No. 96-G-2005, 1997 Ohio App. LEXIS 4414, \*8-10 (Sept. 30, 1997).

- (2) A board's issuance of a summary suspension one year after it had knowledge of the licensee's practice violations was unconstitutional. *Angerman v. State Med. Bd.*, Franklin C.P. Nos. 89CV-01-64 and 88CV12-8615 (July 3, 1989).

#### **D. Annotations**

1. Rights as to notice and hearing in proceeding to revoke or suspend license to practice medicine, 10 A.L.R.5th 1 (1993).
2. Sufficiency of notice or hearing required prior to termination of welfare benefits, 47 A.L.R.3d 277 (1973).
3. Necessity of notice and hearing before revocation or suspension of motor vehicle driver's license, 60 A.L.R.3d 361 (1974).

#### **E. Service of Notice**

1. Initial service of notice
  - a. Notice of opportunity for hearing must be sent to the party by registered mail, return receipt requested, R.C. 119.07.
    - (1) Note: registered mail and certified mail are interchangeable, R.C. 1.02(G).
    - (2) When an item is sent by certified mail, return receipt requested, and thereafter a signed receipt is returned to the sender, a rebuttable presumption of delivery to the addressee is established. *Tripodi v. Liquor Control Comm.*, 21 Ohio App.2d 110, 111-12 (7th Dist.1970). The recipient need not be an agent of the licensee. *New Co-Operative Co. v. Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-1124, 2002-Ohio-2244, ¶ 8.
      - (a) Receipt of written notice by registered mail by an employee of a permit holder at his place of business raises a presumption of receipt of such notice by the permit holder. *Id.*, at 112.
      - (b) An affidavit, by itself, stating that appellant did not receive service, may not be sufficient to rebut the presumption without any other evidence of a failure of service. *New Co-Operative Co. v. Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-1124, 2002-Ohio-2244, ¶ 9.

- (c) Presumption of delivery was successfully rebutted by licensee, who testified that his wife never gave him the notice of opportunity for hearing, which the board sent to the licensee's home. *Menon v. State Med. Bd. of Ohio*, Franklin C.P. No. 06CVF01-404 (Aug. 11, 2006). *See, also, Sandhu v. State Med. Bd. of Ohio*, Franklin C.P. No. 07CVF-12-17446 (Dec. 3, 2008).
  - (d) There is no requirement that the agency demonstrate the person who signed for the order was authorized to receive it, as would be the case if personal service was utilized. *New Co-Operative Co. v. Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-1124, 2002-Ohio-2244, ¶ 13.
- (3) In a case involving revocation or suspension of a driver's license, registered mail is not required. R.C. 119.062. *State v. Gilbo*, 96 Ohio App.3d 332, 339 (2d Dist.1994).
  - (4) In a case involving a zoning violation, a notice of violation that was addressed to the managing trustee and to the contact person of a limited liability company, and that in detail described the operation of the respondent businesses was properly addressed and fulfilled the requirement to serve the responsible person, especially when the ordinance proscribing the service procedure does not specify where or how the responsible person should be addressed. *SP9 Enterprise Trust v. Brauen*, 3d Dist. Allen No. 1-14-03, 2014-Ohio 4870.
- b. "A copy of the notice shall be mailed to attorneys or other representatives of record representing the party." R.C. 119.07; *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431, ¶ 35.
    - (1) The agency is not required to send the notice to counsel by registered /certified mail.
    - (2) The agency is not required to search anything other than its own files to find out if the party is represented by counsel. *Amon v. Ohio State Med. Bd.*, 67 Ohio App.3d 287, 290 (10th Dist.1990).
2. R.C. 119.07 makes a distinction between failure to claim, failure of delivery and refusal of delivery.
    - a. Failure to claim
      - (1) Failure to claim occurs when a party fails to claim the notice sent by registered mail, as required by sections 119.01 to 119.13 of the Revised Code.
      - (2) If a party fails to claim the notice:

- (a) The agency shall send the notice by ordinary mail at the party's last known address. The last known address is the mailing address of the party contained in the records of the agency. R.C. 119.07, ¶ 6.
  - (b) The agency shall obtain a certificate of mailing from the U.S. Postal Service.
  - (c) Service is complete when the certificate of mailing is obtained, unless the notice is returned showing failure of delivery.
- b. Failure of delivery
- (1) Failure of delivery occurs when a mailed notice is returned by the postal authorities marked "undeliverable," "address or addressee unknown," or "forwarding address unknown or expired."
    - (a) If notice is returned because of failure of delivery, the agency must serve the notice by personal service or publication.
  - (2) After failure of service via registered mail, an agency may not reserve the same notice via registered mail. It must be sent either via personal delivery or via publication. Even if the second notice sent via registered mail was received by the licensee, the second notice is ineffective. *Porter v. State Med. Bd. of Ohio*, Franklin C.P. No. 05CVF-04-4765 (Nov. 23, 2005).
  - (3) Personal Service
    - (a) Performed by an employee or agent of the agency.
    - (b) Refusal of delivery by personal service is not failure of delivery.
    - (c) Personal delivery may be made at any time.
    - (d) Personal service requires actual delivery to the licensee, or to someone who is authorized to receive service on the licensee's behalf. *C&H Investors, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 98AP-1519 (Dec. 9, 1999).
  - (4) Publication
    - (a) Must publish a summary of the substantive provisions of the notice.
    - (b) Notice must be published in a newspaper of general circulation in the county of last known address of the party.

(i) Last known address is the mailing address of the party contained in the records of the agency. R.C. 119.07, ¶ 6.

(c) Must be published once a week for three consecutive weeks.

(d) A proof of publication affidavit, with the first publication of the notice set forth in the affidavit, must be mailed by ordinary mail to the party at the last known address.

(e) Notice deemed received as of the date of last publication.

c. Refusal of delivery

(1) Refusal of delivery occurs when unopened mail that is not accepted by the addressee is returned to the sender. The addressee must mark “refused” on the mail piece. United States Postal Service Publication 32, Glossary of Postal Terms, April 2011.

(2) Service is deemed complete if the respondent refuses delivery via certified mail of the notice.

3. Consequences of Ignoring Mailed Notice

a. In *Rhoden v. Akron*, 61 Ohio App.3d 725 (9th Dist.1988), the court upheld the decision of the agency when the notice informing the respondent of the hearing date, time and place sent via certified mail was returned as “unclaimed.” “A person has no right to shut his eyes or his ears to avoid information, and then say that he has not been given any notice . . . A person who fails to claim a letter sent by certified mail may not later complain that he did not receive notice.” *Rhoden*, 61 Ohio App.3d at 728. *See, also, Kear v. Liquor Control Comm.*, 1st Dist. Hamilton No. C-950386 (June 26, 1996) (court affirmed violation of selling beer while under suspension, and relying on *Rhoden*, rejected Appellant’s argument that he was out of town and did not know about the permit suspension. “*Kear*’s failure to have his mail opened while he was out of town is not a sufficient excuse to justify selling liquor while under suspension.”).

b. The return of “undeliverable” is distinguishable from that of “unclaimed.” In *C&H Investors v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 98AP-1519 (Dec. 9, 1999), the court declined to apply the *Rhoden* analysis when certified mail was returned “undeliverable.”

## **F. Failure to Give Proper Notice**

1. Failure of an agency to give notice as prescribed results in the invalidation of any order entered into pursuant to the hearing. R.C. 119.07, ¶ 7.
  - a. An agency cannot enforce an order resulting from an improper notice of charges. *Columbus v. Sliker*, 30 Ohio App.3d 74, 76 (10th Dist.1986); *City of Lakewood v. Kirresh*, 8th Dist. Cuyahoga No. 62337, 1992 Ohio App. LEXIS 4755, \*3 (Sept. 17, 1992).
2. Waiver
  - a. “A person entitled to statutory notice may waive it, or any feature of it, or may, by his conduct, acknowledge the giving of notice to him, so as to be precluded from afterward challenging the proceeding for want of notice.” *Fogt v. Ohio State Racing Comm.*, 3 Ohio App.2d 423, 424-25 (3rd Dist.1965). *See, also, Jefferson Cty. Child Support Enforcement Agency v. Harris*, 7th Dist. Jefferson No. 02 JE 22, 2003-Ohio-496; *Prinz v. State Counselor and Social Worker Bd.*, 1st Dist. Hamilton No. C-990200, 2000 Ohio App. LEXIS 116, \*12-13 (Jan. 21, 2000).

## **G. Computing Time Pursuant to R.C. 1.14**

The time computations set forth in R.C. 1.14 apply to proceedings conducted pursuant to R.C. Chapter 119.

1. The time within which an act is required by law to be done shall be computed by “excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday”. R.C. 1.14.
2. R.C. 1.14 states that when a public office is closed to the public and it is the last day to do a required act, “the act may be performed on the next succeeding day that is not a Sunday or a legal holiday.”

## **IV. HEARING REQUESTS**

### **A. Method of Requesting a Hearing**

1. In writing
  - a. Chapter 119 does not specifically provide that a request for hearing must be in writing. But see, *Alcover v. Ohio State Med. Bd.*, 8th Dist. Cuyahoga No. 54292, 1987 Ohio App. LEXIS 9961, \*9 (Dec. 10, 1987) (telephone request to assistant attorney general insufficient, where attorney advised the licensee that request must be made in writing to the board). *See, also, McClendon v. Ohio Dept. of Edn.*,



2017-Ohio-187, 77 N.E.3d 523 (8th Dist.) (where an agency has instructed a respondent that the request must be in writing, an oral request is inadequate.)

2. Reserving right to hearing shows intent to request.
  - a. Licensee sent a letter proposing an informal settlement, which letter also stated that licensee was not waiving his right to a hearing. The court found this was sufficient notification because licensee had expressly reserved the right to adjudication, showing intent to request hearing. Agency erred by failing to timely set a hearing date and time as mandated by R.C. Chapter 119. *Standard Oil Co. v. Williams*, 10th Dist. Franklin No. 78AP-860, 1979 Ohio App. LEXIS 11662, \*9 (Sept. 11, 1979).

#### **B. Timing of Request (R.C. 119.07)**

1. A party must request a hearing within 30 days of the date of mailing the notice.
  - a. The 30 days provided by R.C. 119.07 begins to run on the date the agency or board mails the notice by certified mail. *Harrison v. Ohio State Med. Bd.*, 103 Ohio App.3d 317, 318 (10th Dist.1995).
  - b. A party's mere act of placing a request for hearing in the mail within the 30 day period does not constitute compliance with the requirements of R.C. 119.07. The notice must be received by the agency within the 30 day time period. *Chirila v. Ohio State Chiropractic Bd.*, 145 Ohio App.3d 589, 596-97 (10th Dist.2001); *Alcover v. Ohio State Med. Bd.*, 8th Dist. Cuyahoga No. 54292, 1987 Ohio App. LEXIS 9961, \*7 (Dec. 10, 1987); *Hsueh v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 88AP-276, 1989 Ohio App. LEXIS 3977, \*5-6 (Oct. 17, 1989). Agency has no discretion to allow the respondent's participation in a hearing for which no request was made. Cites *Kellough v. Ohio State Bd. of Educ.*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431, ¶ 43-44. Request for a hearing must be received within 30 days of the date of mailing. Putting the request in the mail within the 30 day period does not constitute compliance with R.C. 119.07. *McClendon v. Ohio Dept. of Edn.*, 2017-Ohio-187, 77 N.E.3d 523 (8th Dist.).
2. The "prison-mail rule" – which states that the date of filing for inmates is the date of delivery to prison authorities - may or may not be implicated when prisoners request a hearing. See *Amon v. Ohio State Med. Bd.*, 67 Ohio App.3d 287, 291 (10th Dist.1990) (court declined to decide issue).

#### **C. Effect of Failure to Timely Request a Hearing within Thirty (30) Days**

1. Failure to request an administrative hearing does not preclude an appeal of the agency's final order pursuant to R.C. 119.12. By failing to request an appeal, the party may,

however, have forfeited (waived) any arguments contrary to the agency's proposed action that the party could have raised at the hearing. *Edmands v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 14AP-778, 2015-Ohio-2658.

2. Evidentiary review in lieu of hearing
  - a. If respondent fails to timely request a hearing, the agency need not hold a full-blown R.C. Chapter 119 hearing; however, in 1996, the Tenth District Court of Appeals held that the agency must review some evidence in support of the notice even if the licensee fails to request a hearing:

“[T]he procedural safeguards which would make any hearing meaningful may not require a full adversarial and evidentiary proceeding, but some sort of reliable evidentiary review, including the sworn testimony of the investigator, as well as a more considered review of the circumstances of the case, would be needed to fulfill the requirement for a hearing . . . .” *Goldman v. State Med. Bd. of Ohio*, 110 Ohio App.3d 124, 129 (10th Dist.1996).
  - b. Note: Many agencies (e.g., Medical Board, R.C. 4731.22(J), Nursing Board, R.C. 4123.28(D)) amended their statutes in response to the Goldman decision, to provide that no hearing must be held if one is not requested; however, in the interest of due process, agencies generally perform an evidentiary review prior to taking action.
3. Loss of party's right to participate, *Goldman v. State Med. Bd.*, 10th Dist. Franklin No. 98AP-238, 1998 Ohio App. LEXIS 4918, \*8-9 (Oct. 20, 1998) (appeal following remand).
  - a. May attend hearing, because of public nature.
  - b. Cannot testify, call witnesses, or present other evidence.
  - c. No right to make argument.
  - d. “...nothing in the Board's enabling statutes or R.C. Chapter 119 sanctions [plaintiff's] participation in the hearing . . . the Board lacked any statutory authority to permit [plaintiff's] participation.” *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431.
4. Effect on appeal rights (split in decisions); see Section IX APPEALS, *infra*.

## V. SCHEDULING OF THE HEARING

### A. Initial Scheduling

1. Once a party requests a hearing, the agency shall immediately schedule the time, date and place for the hearing, and forthwith notify the party. R.C. 119.07, ¶ 3.
2. The date set must be 7-15 days from the time the party requested a hearing, unless otherwise agreed upon by both the agency and the party. R.C. 119.07, ¶ 3.
  - a. Initial scheduling is mandatory
    - (1) The agency was not permitted to continue the hearing on its own motion after first scheduling the hearing 19 days after the request for hearing. *Kizer v. McCullion*, 5th Dist. Richland No. CA2867, 1991 Ohio App. LEXIS 6173, \*4-5 (Dec. 9, 1991).
    - (2) Thus, the agency must initially schedule the hearing for 7-15 days from the date of the request, but may then continue the hearing to a later date.
  - b. Initial scheduling is directory. Requirement to hold hearing within 15 days is directory, not mandatory, because the agency has the authority to continue a hearing upon its own motion. *Wightman v. Ohio Real Estate Comm.*, 195 Ohio App. 3d 561, 2011-Ohio-1816, ¶ 17; *Vogelsong v. Ohio State Bd. of Pharmacy*, 123 Ohio App. 3d 260, 268 (4<sup>th</sup> Dist. 1997); *Sahely v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 92AP-1430, 1993 Ohio App. LEXIS 2034, \*7-8 (April 6, 1993); *Ohio Dept. of Commerce v. Vild*, 8th Dist. Cuyahoga No. 60858, 1991 Ohio App. LEXIS 2713, \*7 (June 6, 1991); *Korn v. State Med. Bd.*, 61 Ohio App. 3d 677, 683, 573 N.E. 2d 1100 (10<sup>th</sup> Dist. 1988); *Ohio State Racing Comm. v. Kash*, 61 Ohio App.3d 256, 262 (8th Dist.1988); *Yoder v. Ohio St. Bd. of Edn.*, 40 Ohio App.3d 111, 113 (9th Dist.1988); *In re Barnes*, 31 Ohio App.3d 201 (10th Dist.1986).
3. Even with late delivery of the hearing date, time, and place notice, respondent waived error by participating in the prior telephone conference at which the date and time for the hearing was set. *Woodford v. Ohio Real Estate Comm.*, 10th Dist. Franklin No. 18AP-778, 2019-Ohio-2885.
4. Practical Note. The agency will often set the initial hearing date, and then, in the same notice, inform the party of the continuance.

### B. Continuances

1. The agency may postpone or continue a scheduled hearing upon its own motion or the motion of any party. R.C. 119.09. A decision whether to grant a continuance lies

within the discretion of the agency. *Monroe v. Ohio Bd. Of Nursing*, 10<sup>th</sup> Dist Franklin No. 12AP 514, 2013-Ohio-913, ¶ 17; *Korn v. State Medical Bd.*, 61 Ohio App. 3d 677, 683, 573 N.E 2d 1100 (10<sup>th</sup> Dist. 1988).

- a. A hearing cannot be continued for an unreasonable amount of time. *See In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 166 (10th Dist.1969).
- b. A fair hearing by an administrative agency requires that such hearing and determination be had in as expeditious and timely manner as possible under the circumstances. *Id.*

(1) In *In re Application of Milton Hardware Co.*, the court said that two (2) years was an unreasonable delay. *Id.*

(2) The Tenth District held that a 283-day continuance of the hearing was permissible when the party did not object and the delay was at least partially explained. *Immke Circle Leasing, Inc. v. Ohio Bur. of Motor Vehicles*, 10th Dist. Franklin No. 05AP-1179, 2006-Ohio-4227, ¶ 14.

(3) Disputes over preliminary procedural/jurisdictional issues that delay a hearing on the merits are not unreasonable delays. *Gourmet Bev. Ctr., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-1217, 2002-Ohio-3338.

(4) A delay in holding a hearing is not reversible error unless the party can show prejudice from the delay. *Immke Circle Leasing, Inc. v. Ohio Bur. of Motor Vehicles*, 2006-Ohio-4227, ¶ 20.

## 2. Requesting a continuance

- a. A party may request of either the hearing officer or the agency a continuance of a scheduled hearing.
- b. Agency law and rules may further delineate the process for requesting a continuance.
- c. Requests should not be made ex parte.

## 3. Merits of request for continuance

- a. R.C. Chapter 119 does not set forth guidelines for continuances, but agencies often consider the following reasons for requesting a continuance:
  - (1) Conflict of counsel due to priority matter, including prior scheduling of trial or other court date.

- (2) Health or medical issues preventing counsel or licensee from attending hearing.
  - (3) Availability of key witnesses.
  - (4) Complexity of case and adequacy of time for counsel to prepare a defense.
  - (5) The need for additional time for active settlement negotiations.
- b. Other considerations
- (1) Whether the licensee retains an active license.
  - (2) Whether the delay of the hearing, and resulting delay in agency action, presents a risk of danger to the public.
  - (3) Whether previous requests for continuances have been granted.
- c. Agency law or rules may set guidelines for consideration of motions for continuance of hearing.

## VI. OBTAINING EVIDENCE AND SECURING WITNESSES FOR HEARING

### A. R.C. Chapter 119 Does Not Provide for Discovery Under Civil or Criminal Rules of Procedure

1. The Ohio Rules of Civil Procedure, including discovery rules, are not applicable to the administrative hearing procedure.
  - a. Civ. R. 1(A) limits the Civil Rules to “all courts of this state in the exercise of civil jurisdiction at law or in equity . . . .”
  - b. The courts have held that because the Civil Rules are not applicable to administrative hearings, discovery rules do not apply. *See Moffett v. Salem City School Dist. Bd. of Ed.*, 7th Dist. Columbiana No. 2003 CO 7, 2003-Ohio-7007, ¶¶ 24 and 32; *Casey v. Mahoning Cty. Dept. of Human Serv.*, 7th Dist. Mahoning No. 00 CA 264, 2002-Ohio-606, \*10; *Froug v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 00AP-523, 2001 Ohio App. LEXIS 305, \*9 (Feb. 1, 2001); *Leake v. Ohio State Bd. of Psychology*, 6th Dist. Sandusky No. S-32-92, 1993 Ohio App. LEXIS 3290, \*10 (June 30, 1993).
2. Similar to the civil rules, the Criminal Rules of Procedure do not apply to proceedings conducted pursuant to R.C. Chapter 119. *Miller v. Ohio State Bd. of Pharmacy*, 5th Dist. Coshocton No. 11-CA-9, 2012-Ohio-1002, ¶ 43.

3. The agency's own law and rules may provide for a discovery-like exchange of information.
  - a. "The formulation of procedural rules of administrative agencies is basically left to the discretion of the agencies." *White Consol. Industries v. Wayne S. Nichols*, 15 Ohio St.3d 7, 9 (1984).
  - b. R.C. 4517.57(B) authorizes the parties in a motor vehicle dealer protest to engage in discovery, prior to the hearing, in accordance with the Rules of Civil Procedure. *Bob Daniels Buick Co. v. General Motors Corp.*, 10th Dist. Franklin No. 97APE12-1701, 1998 WL 720018 (Oct. 13, 1998).
4. The agency's own law and rules may provide protection to certain records. *Gipe v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 02AP-1315, 2003-Ohio-4061, ¶ 40.

## **B. Depositions**

1. R.C. Chapter 119 provides for depositions in lieu of hearing.
  - a. According to R.C. 119.09: "For the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency. . . may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas . . . ." R.C. 119.09, ¶ 2 (emphasis added).
  - b. For the purpose of conducting an adjudication hearing, an administrative agency may allow testimony by deposition for witnesses who will not be available at the time of the hearing. The taking of the deposition shall be in the same manner as is prescribed by law for the taking of depositions in civil actions. Finally, the deposition may be used at hearing against a party who was present or represented at the taking of the deposition. *In re Heath*, 80 Ohio App.3d 605, 611-12 (10th Dist.1992).
2. R.C. Chapter 119 does not provide for discovery depositions.
  - a. R.C. 119.09 does not provide for prehearing discovery depositions by a party to an adjudication hearing. The mandatory language in R.C. 119.09 pertains to securing the attendance of witnesses and the production of records and documents for the purpose of conducting an adjudication hearing. *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145 (1990).
  - b. Parties cannot obtain prehearing discovery depositions regardless of whether the depositions are described as "depositions" or "prehearing discovery depositions." *State Med. Bd. of Ohio v. Murray*, 66 Ohio St.3d 527, 535 (1993).

### C. Subpoenas for Purposes of a Hearing

1. For the purpose of conducting an adjudication hearing, the agency may, and upon request of any party shall, issue a subpoena for any witness or subpoena duces tecum to compel the production of records. R.C. 119.09.
  - a. Because R.C. Chapter 119 provides that a party may request the issuance of a subpoena duces tecum for the purpose of conducting a hearing, R.C. 119.09 is satisfied when the agency subpoenas records to be delivered at the commencement of the hearing. *See Froug v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 00AP-523, 2001 Ohio App. LEXIS 305, \*9-12 (Feb. 1, 2001).
    - (1) The *Froug* court held that the respondent was not denied due process when she failed to attend the hearing and avail herself of the opportunity to review the records. *Id.* at \*11.
    - (2) The court further indicated that *Froug* could have requested a continuance if more time was necessary to review the records. *Id.*
  - b. Confidentiality of respondents' own answers to the board's interrogatories could be waived by respondent, and therefore the board must produce them in response to respondent's hearing subpoena duces tecum. *Mansour v. State Med. Bd. of Ohio*, 2015-Ohio-1716, 32 N.E.3d 508 (10th Dist.).
  - c. Hearing officer's issuance of a broad subpoena relevant to the issue to be determined at the hearing, and denial of issuance of subpoenas for the cumulative and irrelevant evidence requested by the respondent was not a violation of due process when respondent had an opportunity to present the facts to support his argument. *Reid v. MetroHealth Sys.*, 2017-Ohio-1154, 87 N.E.3d 879 (8th Dist.).
  - d. The agency violates R.C. 119.09 by not issuing a subpoena when requested by the respondent; however, reversal of the agency's final order is not necessary where the respondent fails to show prejudice. To secure a reversal of an administrative agency's decision on the basis that the agency failed to issue a requested subpoena pursuant to R.C. 119.09, a party must demonstrate that the failure resulted in prejudice. *Burneson v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 08AP-794, 2009-Ohio-1103, ¶ 24; *Ohio State Bd. of Pharmacy v. Poppe*, 48 Ohio App.3d 222, 28-29 (12th Dist.1988).
  - e. A hearing examiner has the discretion to limit or quash subpoenas requested during disciplinary proceedings. Having been granted the power to issue subpoenas, all administrative agencies must have the corollary power to quash subpoenas in licensure-related hearings. *Clayton v. Ohio Bd. of Nursing*, 147 Ohio St.3d 114,

2016-Ohio-643, 62 N.E.3d 132 (Motion for reconsideration pending as of the date of publication).

2. Proper service and fees

a. The subpoena shall be directed to the sheriff of the county where the witness resides or is found, and served and returned in the same manner as a subpoena in a criminal case is served and returned. R.C. 119.09, ¶ 2.

b. Method of delivery

(1) Criminal Rule 17(D) provides that service of a subpoena upon a person shall be made by delivering a copy to such person or by reading the subpoena to him in person, or by leaving it at his usual place of residence.

(2) When a subpoena was sent via regular mail to the witness's usual place of residence and the witness has actual knowledge of the subpoena and of the consequences for failing to comply with the subpoena, valid service is completed. *State v. Castle*, 92 Ohio App.3d 732, 734 (9th Dist.1994).

c. Fees

(1) Witness residing within county: Crim. R. 17(D) provides that proper service is effected by tendering to the witness, upon demand, the fees for one day's attendance and the mileage fees allowed by law.

(a) A witness living in the same county as the agency waives the right to fees if not demanded upon services, and the witness may not later refuse to appear solely because the fees were not tendered upon service.  
1986 Ohio Atty.Gen.Ops. No. 86-066.

(2) Witness outside the county: Crim. R. 17(D) provides that if the witness resides outside the county where the agency is located, fees shall be tendered without demand.

(a) Where a witness lives outside the county in which the agency is located, witness fees and mileage fees must be attached to the subpoena and tendered without demand or the witness is not obligated to appear.  
1986 Ohio Atty.Gen.Ops. No. 86-066.

(b) When the fees were not tendered with the subpoena, error could be cured by subsequently tendering the fees, if tendered prior to the time appearance is compelled. *A.O. Smith Corp. v. Perfection Corp.*, 10th Dist. Franklin No. 03AP-266, 2004-Ohio-4041, ¶ 26.



- (3) The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases. R.C. 119.09, ¶ 2.
- (4) Witnesses shall be paid witness fees and mileage according to R.C. 119.094. R.C. 119.09, ¶ 2. These fees are set at \$12.00 for each full day's attendance, \$6.00 for each half day's attendance and 50 ½ cents per mile for travel to and from the hearing. R.C. 119.094(A).
- (5) Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid. R.C. 119.09, ¶ 2.

5. Return of subpoena

- a. Must be returned in the same manner as a subpoena in a criminal case.
- b. Crim. R. 17(D) provides that the return may be forwarded through the postal service, or otherwise.

4. Failure to obey subpoena/sanctions

- a. Contempt proceedings, R.C. 119.09.

(1) Upon failure to comply:

- (a) Agency may file an application to enforce the subpoena if requested by the party desiring the witness's appearance.
- (b) The application is filed in the court of common pleas where the disobedience occurred.
- (c) If the matter is one in which the witness may be subject to lawful questioning, the court shall compel obedience by attachment proceedings for contempt.
- (d) Court shall compel compliance as in cases of disobedience of court subpoena.

(2) Attachment proceedings for contempt are set forth in R.C. 2317.21.

- (a) This statute is inapplicable if proper fees are not paid to the witness.

- (b) Court issues a “writ of attachment” to the sheriff or constable to bring the witness before the Court “to give his testimony and answer for the contempt.” R.C. 2317.21.
  - (c) The writ will only issue for disobedience of a subpoena “personally served” on the witness. But the court "by a rule, may order, him to show cause why such writ should not issue against him" if the witness was served with the subpoena in some other fashion. R.C. 2317.21.
- (3) Requirement to Enforce if Requested.
- (a) An agency must issue a subpoena upon a party’s request.
    - (i) Under R.C. 119.09, an agency must issue a subpoena to compel attendance of a witness or to compel production of documents if requested by a party or the hearing. *Carratola v. Ohio State Dental Bd.*, 9th Dist. Summit No. 18658 (May 6, 1998). *See, also, Walters v. Ohio State Dept. of Adm. Servs.*, 10th Dist. Franklin No. 06AP-472, 2006-Ohio-6739, ¶ 29.
    - (ii) If the subpoenaed person refuses to attend, the agency may apply to enforce the subpoena by attachment proceedings for contempt to the court of common pleas where the refusal occurs as described in R.C. 119.09. *Carratola*, 9th Dist. Summit No. 18658, at \*5. When a hearing examiner presides over the hearing, he has the same power as the agency has in conducting the hearing. *Id.*
  - (b) An agency need not enforce a subpoena on behalf of a respondent if the respondent fails to request of the agency enforcement. *Carratola*, 9th Dist. Summit No. 18658, at \*5.
  - (c) If a party requests that the agency enforce obedience to a subpoena through attachment proceedings, and the agency fails to do so, reversal of the agency’s order is appropriate only if the party shows prejudice resulting from the failure. *Burneson v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 08AP-794, 2009-Ohio-1103, ¶ 20-24.
  - (d) The court of common pleas must compel obedience to a subpoena by attachment proceedings (upon an agency’s application) when a witness refuses to testify in a matter relevant to a hearing pursuant to R.C. 119.09 unless the witness asserts an applicable privilege. *Ohio Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d 26, 27 (1983).

- (e) A hearing examiner’s discretionary ruling on the relevancy of testimony sought to be compelled by attachment proceedings for contempt is a matter for judicial review on appeal after the agency issues its final order, but not while the hearing is in progress. *Ohio Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d at 27.
- (4) An agency is limited to the statutory attachment procedures to sanction contempt of its subpoenas, and may not resort to other forms of punishment, such as limiting testimony of other witnesses. *Green v. W. Res. Psych. Habilitation Ctr.*, 3 Ohio App.3d 218, 220 (9th Dist.1981).
- b. Motions to Quash not authorized by R.C. Chapter 119.
  - (1) Absent specific statutory authority or a pending case or appeal, the court of common pleas has no jurisdiction to entertain a motion to quash an administrative subpoena. *In re David E. Polen*, D.C., 108 Ohio App.3d 305, 307 (10th Dist.1996); *In re Investigation of Laplow*, 96 Ohio App.3d 386, 390-91 (10th Dist.1994); *In re Investigation of Laplow*, 87 Ohio App.3d 59, 61 (9th Dist.1993).
  - (2) Thus, because R.C. Chapter 119 does not provide statutory authority for a motion to quash, the only avenue available to a witness is to defend an action to compel.

**D. Investigative Subpoenas**

- 1. Investigatory subpoenas are those to compel testimony or the production of records, for purposes of investigation, prior to hearing.
- 2. Some agencies have statutory authority to issue investigative subpoenas. (E.g., Medical Bd., R.C. 4731.22(F)(3); Dept. of Aging, Ombudsman, R.C. 173.20(H); Chiropractic Bd., R.C. 4734.48(A)(2); Div. of Securities, R.C. 1707.24; Board of Nursing, R.C. 4723.29).
- 3. Enforcement
  - a. Specified authority
    - (1) Some agencies have specific statutory procedures for enforcement of these subpoenas. (e.g., State Med. Bd., R.C. 4731.22(F)(3); Dept. of Aging, Ombudsman, R.C. 173.20(H); Div. of Securities, R.C. 1707.24; Board of Nursing, R.C. 4723.29).
    - (2) If the statute grants enforcement according to the Civil Rules, it is reasonable to argue that the sanctions permitted by Civ. R. 45(E) may be granted.

- b. Implied power. Other agencies, e.g., Chiropractic Board, do not have specific statutory procedures for enforcement of investigative subpoenas. However, since the legislature has empowered them to issue subpoenas, there is an implied power to enforce them through the court. *See State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1 (1915), ¶ 4 of the syllabus, for general principle of implied power to perform duty.
4. Medical records
- a. The Medical Board’s statutory authority to subpoena patient records is not dependent upon patient consent. *State Med. Bd. v. Thompson*, Franklin C.P. No. 00MS000041 (July 24, 2000).
  - b. See discussion re: Health Insurance Portability and Accountability Act (“HIPAA”), below.

**E. Respondents May Obtain Certain Agency Records through the Ohio Public Records Act, R.C. 149.43**

(The following is a brief outline of Public Records Law. For more detail, see the most recent version of Ohio Sunshine Laws: An Open Government Resource Manual, published by the Ohio Attorney General at [www.ohioattorneygeneral.gov/sunshine](http://www.ohioattorneygeneral.gov/sunshine).)

- 1. The Public Records Act applies to any record, not exempt by law, of a public office, as defined under R.C. 149.011.
  - a. A “record” is any item that:
    - (1) Contains information stored on a fixed medium (such as paper, computer, film, etc.);
    - (2) Is created, received, or sent under the jurisdiction of a public office; and
    - (3) Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office. Uncirculated personal notes do not constitute records. *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 22 (notes taken during public employee’s pre-disciplinary conference are not “records.”); *State ex rel. Doe v. Tetrault*, 12th Dist. Clermont No. CA 2011-10-070, 2012-Ohio-3879, ¶ 38.

R.C. 149.011(G).
  - b. The requested records must be released unless they fall within an exemption or exception to the Public Records Act. R.C. 149.43(B).

- c. The provisions of the Act that provide access are to be liberally interpreted and exemptions are to be strictly construed. Any doubts are to be resolved in favor of disclosure. *State ex rel. Mahajan v. State Med. Bd.*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 21; *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Comms.*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17.
2. Exemptions/Exceptions:
- a. For a complete list of exemptions, see R.C. 149.43(A)(1).
  - b. Medical records, R.C. 149.43(A)(1) and (3).
    - (1) The information must pertain to the medical history, diagnosis, prognosis or medical condition of a patient.
    - (2) The record must have been generated in the course of medical treatment.
      - (a) A report of a medical professional generated as part of the decision making process regarding employment, but not generated in the process of medical treatment is not covered by the medical records exception. *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142 (1995).
  - c. Trial preparation records, R.C. 149.43(A)(1)(g) and (4).
    - (1) Trial preparation records is defined as: “any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.” R.C. 149.43(A)(4).
    - (2) In the criminal context, information in a prosecutor’s files is deemed to be trial preparation material. *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 431-32 (1994).
    - (3) The application of this exemption appears to be more limited in the civil and administrative context, requiring a showing that the information was not gathered for some purpose other than litigation, i.e., probable cause determination or investigation into wrongdoing. *State ex rel. Franklin County Sheriff’s Dept. v. SERB*, 63 Ohio St.3d 498, 502 (1992); *Barton v. Shupe*, 37 Ohio St.3d 308, 309 (1988).
    - (4) Dicta contained in *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 60-61 (1989), reversed on other grounds, *State ex rel. Steckman*, 70 Ohio St.3d 420, suggests that when an assistant attorney general is consulted in regard to an administrative licensing investigation to determine if there may

also be evidence for a Medicaid Fraud prosecution, the administrative agency's investigative file may be trial preparation if criminal prosecution was anticipated by the AAG.

d. Confidential Law Enforcement Investigatory Records ("CLEIR" Exception), R.C. 149.43(A)(1)(h) and (2).

(1) Two-step analysis for determining applicability of this exemption.

(a) Step 1: Does the record pertain to a law enforcement matter? This includes three elements:

(i) Has an investigation been initiated upon specific suspicion of wrongdoing?

(ii) Does the alleged conduct violate criminal, quasi-criminal, civil, or administrative law?

(iii) Does the public office have the authority to investigate or enforce the law allegedly violated?

(b) Step 2: Would release of the record create a high probability of disclosing any of the following:

(i) Identity of an uncharged suspect. *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St.3d 28, 29-30 (1988).

(ii) Identity of an information source or witness to whom confidentiality has been reasonably promised. *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 682 (1996).

(iii) Information creating a serious danger to law enforcement personnel, crime victims, witnesses or information sources. *State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156 (1993).

(iv) Specific investigatory techniques and procedures. *State ex rel. Beacon Journal v. University of Akron*, 64 Ohio St.2d 392 (1980) (routine techniques not protected).

(v) Specific investigatory work product.

*See State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681 (1996); *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185 (1995); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420 (1994); *State ex rel. Leonard v. White*, 75 Ohio St.3d 516 (1996); *State ex rel. Ohio*

*Patrolmen's Benevolent Assn. v. Mentor*, 89 Ohio St.3d 440, (2000); *Toledo Police Patrolman's Assn. Local 10 v. Toledo*, 6th Dist. Lucas No. L-99-1143, 2000 Ohio App. LEXIS 875 (Mar. 10, 2000).

- (2) Once applicable, the confidential law enforcement investigatory record exemption remains applicable until all proceedings are complete for investigatory work product. *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 360 (1997). Investigatory records that fall under the exceptions of uncharged suspect, confidential source or witness, confidential investigatory techniques, and information threatening physical safety apply regardless of the termination of the action. *State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155 (1993); *State ex rel. Broom v. Cleveland*, 8th Dist. Cuyahoga No. 59571 (Aug. 27, 1992); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 54 (1990).
- e. Records the release of which is prohibited by state or federal law.  
R.C. 149.43(A)(1)(v).
- (1) Although state and federal statutes and rules can create both mandatory and discretionary exceptions by themselves, the provision also incorporates as exceptions by reference any statutes or administrative rules that prohibit the release of specific records.
    - (a) An agency rule designating particular records as confidential that is properly promulgated by a state or federal agency will constitute a valid exception under R.C. 149.43(A)(1)(v) because such rules have the effect of law. *Columbus and Southern Elec. Co. v. Indus. Comm.*, 64 Ohio St.3d 119, 122 (1992); *Doyle v. Ohio Bur. Of Motor Vehicles*, 51 Ohio St.3d 46, 48 (1990); *State ex rel. DeBac v. Indus. Comm.*, 161 Ohio St. 67 (1954), paragraph one of the syllabus; *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462 (10th Dist.1996); 2000 Ohio Atty.Gen.Ops. No. 036. If an agency rule was promulgated outside the statutory authority granted to the agency, the rule is not valid and will not constitute an exception to discovery. *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App.3d 554, 560-561 (10th Dist.1997).
  - (2) Agency confidentiality provisions
    - (a) Many state administrative clients have statutes making specific information confidential. *See, e.g., State ex rel. Renfro v. Cuyahoga County Dept. of Human Serv.*, 54 Ohio St.3d 25, 27 (1990) (child abuse investigation reports).

(b) The legislative language used to create confidentiality may be phrased in different ways. So long as the statute can be read to prohibit general release, the statute likely qualifies as an exemption under this statute. The following are a few examples: R.C. 145.27 (PERS member information); R.C. 173.22 (Long term care ombudsman investigative files); R.C. 5153.17 (Director of Commerce Investigations); R.C. 2151.421 (Child abuse and neglect investigation records); R.C. 3304.21 (Client records of rehabilitation services); R.C. 3307.20 and 3309.22 (STRS and SERS member information). For a partial list, see An Open Government Resource Manual, Appendix B, published by the Ohio Attorney General at [www.ohioattorneygeneral.gov/sunshine](http://www.ohioattorneygeneral.gov/sunshine).

(3) General confidentiality provisions: There are also general state statutes, not related to any one specific agency, that create confidentiality, for example the Trade Secrets Act, R.C. 1333.65.

(4) Federally protected information

(a) Social Security Numbers. Based upon a federal privacy interest, social security number should be redacted. *State ex rel. Beacon Journal v. City of Akron*, 70 Ohio St.3d 605, 612 (1994).

(b) Student Education Records. The Family Education Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g(b)(1), protects the release of educational records without written consent of the student or the student’s parents. Consult FERPA for requirements and exceptions.

(c) When determining whether a federal exemption applies, remember, in most instances, records made confidential in the hands of an agency of the federal government are usually not exempt when in the hands of the state agency, unless the state agency is acting for the federal agency in some substantial respect. Exemptions under the Federal Freedom of Information Act, 5 U.S.C. § 552, do not generally act to exempt records in the hands of a state agency.

(5) Privileged information

(a) See discussion below, Section F, Protected Information regarding privileged information.

3. Mechanics of making and responding to a public records request.

a. The agency may ask that the request be put in writing to assist it in responding to the request, but the agency may not demand that the request be put in writing.



R.C. 149.43(B)(5).

b. R.C. 149.43 provides:

(1) Upon request, all responsive records must be promptly prepared and available for inspection at all reasonable times during regular business hours, R.C. 149.43(B)(1).

(2) Upon request, the agency shall make copies available at cost and within a reasonable time, R.C. 149.43(B)(1).

(3) If the requestor makes an overly broad or an ambiguous request, the agency may deny the request, but must provide the requestor with an opportunity to revise the request. R.C. 149.43(B)(2). When denying the request, the agency must also inform the requester how the office ordinarily maintains and accesses its records, so that the request may be revised. *Id.*; *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, ¶ 11.

(4) If information within a public record is exempt, the agency must provide a redacted copy.

(a) Redaction must be plainly visible. R.C. 149.43(B)(1).

(b) Redaction is considered a denial. R.C. 149.43(B)(1).

(5) If the request is denied, in whole or in part, the agency must provide an explanation for denial, indicating legal authority for denial. R.C. 149.43(B)(3).

c. *State ex rel. Warren Newspapers v. Hutson*, 70 Ohio St.3d 619, 621-26 (1994), provides insight into how the operative terms in R.C. 149.43(B) are to be interpreted.

(1) At cost does not include employee labor time.

(2) The public office cannot charge for inspection.

(3) Regular business hours for a police department which is open 24 hours a day are normal administrative hours (i.e. 9-4).

d. If a specific statute requires a party to an action to pay a designated fee to the court reporter for transcripts or copies of transcripts, that party cannot obtain the documents at cost under the Public Records Act, R.C. 149.43. The specific statute trumps R.C. 149.43, therefore, the party must pay the court reporter to get a copy of the court transcripts in common pleas court. However, if a party seeks

only a copy of an audiotape of court proceedings, rather than a transcript of the audiotape, the party is entitled to the copy at cost. *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 2004-Ohio-4354, ¶ 15-17.

#### 4. Enforcing Public Records Act

a. Anyone aggrieved by an agency's failure to release a public record may bring a mandamus action to compel release. R.C. 149.43(C).

#### b. Liabilities

##### (1) Statutory Damages:

(a) \$100 for each business day, up to a maximum of \$1,000, beginning with the day on which the relator files the mandamus action. The accrual of damages stops upon compliance with the request.

(b) Only awarded if the requestor transmits a written request via hand delivery or certified mail.

R.C. 149.143(C)(1)

##### (2) Attorneys Fees:

(a) The aggrieved party may obtain attorneys fees when:

(i) The court orders the agency to comply with the request.  
R.C. 149.43(C)(2)(b);

(ii) The custodian of the public records failed to comply with the party's request;

(iii) The requesting party filed a mandamus action pursuant to R.C. 149.43 to obtain copies of the records;

(iv) The party received the requested public records only after the mandamus action was filed.

*State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 174 (1996).

## F. Protected Information

1. Confidential records: *See* Public Records Act Section E(2), exemptions/exceptions, above.

2. Health Insurance Portability and Accountability Act (“HIPAA”).

- a. Protects the privacy of Protected Health Information (“PHI”), and in most cases requires the consent of the patient for release.
- b. Exceptions that may permit agencies to subpoena PHI without patient consent:
  - (1) 45 CFR § 164.512(a): Disclosures Required by Law;
  - (2) 45 CFR § 164.512(d): Disclosures for Health Oversight Activities;
  - (3) 45 CFR § 164.512(e): Disclosures for Judicial and Administrative Proceedings;
  - (4) 45 CFR § 164.512(f): Disclosure for Law Enforcement Purposes.

Note: regulations state specific parameters and conditions for application of each type of exception.

3. Deliberative process privilege/executive privilege

- a. Relation between the executive privilege and the deliberative process privilege.

The general deliberative process privilege is routinely grouped and usually interchangeable with the executive privilege because:

- (1) the actors are the same;
- (2) the rationale for the privileges are similar;
- (3) both of the privileges are limited in application.

- b. What is protected?

- (1) Protects advice, opinions, recommendations, and other communicative means used by a government decision-maker in the process of reaching a decision. *In re Franklin Natl. Bank Securities Litigation*, 478 F. Supp. 577, 582 (E.D.N.Y.1979).
- (2) The privilege allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *Id.* at 383, quoting *In re Sealed Case*, 121 F.3d 729, 737 (C.A.D.C.1997), quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.1966).

- (3) The judiciary is barred from probing into “the methods by which a decision is reached . . . [and] the contributing influences” of an administrative decision. *Id.* at 581 (quoting *Carl Zeiss Stiftung v. V.E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 332-26 (D.D.C.1966)) (executive privilege case).

c. Purpose

- (1) To protect the decision-making process of government officials. *U.S. v. Morgan*, 313 U.S. 409, 61 S.Ct. 999 (1941).
- (2) The primary rationale for the privilege is that forced disclosure of the decision-making process would discourage future communications and diminish the efficiency and validity of executive decision-making, thereby harming the public interest. *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825 at 58 (2006 Supreme Court); *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C.Cir.1978).

d. Common law recognition of the privilege

- (1) The deliberative process privilege has been recognized and sanctioned by Ohio courts. *Dann*, 2006-Ohio-1825, at 34, 42, 45-49; *T. Marzetti Co. v. Doyle*, 37 Ohio App.3d 25, 28-29 (10th Dist.1987); *Libis v. Bd. of Zoning Appeals of Akron*, 33 Ohio App.2d 94, 96 (9th Dist.1972). *See, also, Henneman v. City of Toledo*, 35 Ohio St.3d 241, 243 (1988) (executive privilege).
- (2) However, *see State ex rel. Dist. 1199 Health Care & Social Serv. Union, SEIU, AFL-CIO v. Gulyassy*, 107 Ohio App.3d 729, 736-37 (10th Dist.1995), which holds that there is no deliberative process exemption to the public records law.
- (3) The Supreme Court has held that in an administrative proceeding in which R.C. Chapter 119 does not apply, the “judicial mental process” privilege prohibits the release of the attorney-examiner’s report to the parties, and that the privilege is an exception to the Public Records Law. *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 64 (1998).

e. Requirements for application of the privilege

- (1) Asserted by high-level government official.
  - (a) Someone with sufficient authority as determined by role or hierarchical status, *e.g.* head of the agency, or by a high-level subordinate/delegate. *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y.1991); *Natl. Lawyers Guild v. Atty. Gen.*, 96 F.R.D. 390, 396 (S.D.N.Y.1982).

(2) Information sought to be protected must be pre-decisional and the communications must be part of the deliberative process. *Mary Imogene Bassett Hosp. v. Sullivan*, 136 F.R.D. 42, 44 (N.D.N.Y. 1991).

f. The deliberative process privilege and the executive privilege are qualified privileges.

(1) Courts review evidence in camera.

(2) Courts use a balancing test.

(a) Court weighs the government's interest in non-disclosure versus the court's fact-finding needs. *U.S. v. Nixon*, 418 U.S. 683, 707 94 S.Ct. 3090 (1974); *In re Franklin Natl. Bank Securities Litigation*, 478 F.Supp. 577, at 582-87 (E.D.N.Y.1979); *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825 at 62-69.

(b) Factors

(i) The relevance of evidence sought to be protected.

(ii) The availability of other evidence.

(iii)The importance of the litigation.

(iv)The role of the government in the litigation.

(v) The possibility of future apprehension by government employees who will realize that their secrets could be breached.

*In re Franklin Natl. Bank Securities Litigation*, 478 F.Supp. 577, at 583 (E.D.N.Y.1979).

4. Attorney-client privilege

a. In Ohio, attorney-client privilege is based upon both statutory and common law.

b. Statutory privilege

(1) R.C. 2317.02(A) limits an attorney testifying "concerning a communication made to him by his client in that relation or his advice to his client."

(2) Exceptions

- (a) Client expressly consents.
  - (b) Deceased client's executor/administrator expressly consents.
  - (c) Client voluntarily testifies or is deemed by R.C. 2151.421 to have waived the privilege.
  - (d) Note: R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived; privilege is not waived by mere disclosure of communications to a third party. *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, paragraph one of the syllabus.
- (3) Definition of client. R.C. 2317.021 defines “client” in the privilege statute to include the client’s “agent, employee, or other representative.”
  - (4) Applies to attorney only, not agents. The statutory privilege does not define “attorney” as including an agent, employee, or representative of the attorney. *State v. McDermott*, 72 Ohio St.3d 570, 573-74 (1995).
- c. Common law privilege
- (1) The common law attorney-client privilege applies to communications between a client and an agent of the attorney. *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, ¶ 30 (Insurance company stands in the shoes of its insured and the insurance company’s letter, copied to the retained attorney, is a preliminary communication with that attorney about the case); *State v. Post*, 32 Ohio St.3d 380, 385 (1987) (defendant's discussion with polygraph examiner hired by attorney for defendant was privileged; however, privilege was waived when witness discussed his statements to polygraph examiner with third party who was not agent of attorney.)
  - (2) Not necessarily limited to precluding attorney’s testimony. The statute’s language prohibits testimony by an attorney, whereas the common-law privilege could be viewed more broadly.
  - (3) Communications must be made in confidence and not in the presence of strangers.
  - (4) To the extent that narrative portions of attorney-fee statements are descriptions of legal services performed by counsel for a client, they are protected by the

attorney-client privilege. *State ex rel. Dawson v. Bloom-Carroll*, 131 Ohio St.3d 10, 2011-Ohio-6009, ¶ 28.

(5) Waiver

(a) The common-law privilege is destroyed by voluntary disclosure to others of the content of the statement, because no intention of confidentiality exists. *State v. Post*, 32 Ohio St.3d 380, at 385; *Travelers Indemnity Co. v. Cochrane*, 155 Ohio St. 305, 316 (1951).

(b) Practical Note. The privilege can be waived unintentionally by conduct which implies a waiver. Such conduct might include not screening files released in a discovery production of records; careless or inadequate document screening procedures; leaving documents in a place where third parties have access to them and no measures are taken to maintain confidentiality; keeping privileged documents in files that are routinely reviewed by third parties; and leaving privileged documents in a public hallway. Also, a partial, voluntary disclosure of privileged communications can result in the loss of privilege for all other communications that deal with the same subject matter. Last, if the communication was not intended to be confidential, it is not privileged and must be produced. *See* Treatises, below.

5. Treatises

- a. Attorney-Client Privilege in the United States, Paul R. Rice (1993).
- b. 8 Wigmore, Evidence (4th Ed. 1983).
- c. 44 Ohio Jurisprudence 3d, Evidence and Witnesses, Sections 824-847.

## VII. THE CONDUCT OF HEARINGS

### A. Nature of Proceeding

1. Open to the public

- a. Unless an agency has a specific law to the contrary, all administrative hearings are open to the public. R.C. 119.01(E).
- b. However, quasi-judicial hearings are not “meetings,” and are not subject to the Open Meetings Act. *TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 61 (1998) (“sunshine law” does not apply to adjudication proceedings at the Board of Tax Appeals because its adjudication is quasi-judicial, and therefore should be held in “executive session”); *Jones v. Liquor Control*

*Comm.*, 10th Dist. Franklin No. 01AP-344, 2001-Ohio-8766, 2001 Ohio App. LEXIS 5719 (Dec. 20, 2001); *Angerman v. State Med. Bd.*, 70 Ohio App.3d 346, 352 (10th Dist.1990) (hearing public pursuant to Chapter 119, but deliberations need not be in open meeting); *In re Petition for Annexation*, 52 Ohio App.3d 8, 11-12 (10th Dist.1988). *See, also, TBC Westlake, Inc. v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 61 (1998).

2. Held before the agency, or an appointed referee or examiner, R.C. 119.09.
3. Recorded
  - a. A stenographic record shall be made of the testimony and evidence submitted at “any adjudication hearing...the record of which may be the basis of an appeal to court.” R.C.119.09, ¶ 5.
  - b. “Stenographic record” means a record provided by stenographic means or by the use of audio electronic recording devices. R.C. 119.09, ¶ 1.
  - c. R.C. 119.09 does not require that a stenographic record be made of the commission meeting at which the commission adopted the hearing officer’s report and recommendation. *Huff v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 15AP-586, 2016-Ohio-8336; *Angerbauer v. State Med. Bd. of Ohio*, 2017-Ohio-7420, 96 N.E.3d 1100 (10th Dist.).

## **B. Legal Representation**

1. Representation of the agency: The agency must be represented by the attorney general or any of his assistant or special counsel who has been designated by the attorney general. R.C. 119.10.
2. Representation of the respondent
  - a. A Respondent may be represented by an attorney at law licensed to practice in Ohio or other person lawfully permitted to practice before the agency in question. R.C. 119.13. There is no general right to counsel in civil litigation. *Adeen v. Ohio Dept. of Commerce*, 8th Dist. Cuyahoga No. 87135, 2006-Ohio-3604, ¶ 12.
  - b. Most cases, a party may be represented by only an attorney at law licensed to practice in Ohio.
    - (1) Only an attorney at law may represent a party at a hearing at which a record is taken that may be the basis of an appeal to court. R.C. 119.13. *See Office of Disciplinary Counsel v. Molnar*, 57 Ohio Misc.2d 39 (Ohio Bd. Unauth. Prac.1990).



- (2) A non-attorney consultant for a county board of revision engaged in the unauthorized practice of law when he questioned a witness in a hearing before the board. *Ohio State Bar Assn. v. Cleminshaw*, 137 Ohio St.3d 576, 2013-Ohio-5200.
  - (3) Exception: hearings before the state personnel board of review under R.C. 124.03. R.C. 119.13.
- d. Representation of business entities
- (1) Only an attorney licensed to practice law may represent a corporation. A corporation cannot be represented by officers, directors, or shareholders. *Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 85 Ohio St.3d 156, 160 (1999); *Harvey v. Austinburg Dev. Corp.*, 11th Dist. Ashtabula No. 2006-A-0044, 2007-Ohio-3025, ¶ 4-5; *K & Y Corp. v. Ohio State Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-219, 2001 Ohio App. LEXIS 3591, \*4 (Aug. 16, 2001); *Sheridan Mobile Village, Inc. v. Larson*, 78 Ohio App.3d 203, 205 (4th Dist.1992); But see, *Dayton Supply & Tool Company, Inc. v. Montgomery County Board of Revisions*, 111 Ohio St.3d 367, 2006-Ohio-5852, ¶ 29 (limits holding of *Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 85 Ohio St.3d 156, 160 (1999) to hold that it is not necessary for a corporation to hire an attorney to file a complaint with the board of revision unless legal issues exist or arise in the case).
  - (2) Individual non-attorney members of a limited liability company improperly filed a notice of appeal on behalf of the limited liability company. Court dismissed the appeal even though later an attorney made an appearance on behalf of the limited liability company and filed a memo contra the motion to dismiss. The court noted that filing a notice of appeal is considered the practice of law. *Campus Pitt Stop, L.L.C. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 13AP-622, 2014-Ohio-227. A non-attorney may not file a notice of appeal on behalf of a limited liability company. The filed purported notice is void. *Unemp. Comp. Rev. Comm. v. Blue Machine, LLC*, 10th Dist. Franklin No. 17AP-176, 2017-Ohio-7495.
  - (3) In *Raspberry v. Taylor*, 9<sup>th</sup> Dist. Summit No. 26510, 2013-Ohio-2175 at ¶ 11, the court states in dicta, and without supporting authority, that a partnership must be represented by counsel.
  - (4) In *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revisions*, the court held that a corporate officer does not engage in the unauthorized practice of law by preparing or filing a complaint with a board of revision and by presenting the claimed value as long as the corporate officer does not make

legal arguments, examine witnesses, or undertake any other tasks that can only be performed by an attorney. *Dayton*, 111 Ohio St.3d 367, 2006-Ohio-5852, syllabus.

- (5) In *Steelton Village Market, Inc. v. Liquor Control Comm.*, 10th Dist. Franklin No. 03AP-920, 2004-Ohio-5260, ¶ 13, the appellate court stated that an admission of fact does not necessarily constitute the practice of law. Admissions by a corporation are admissible only if made by an authorized agent of the corporation, i.e., admissions by the president of a corporation or an agent authorized by the board of directors may be admissible against a corporation.
- (6) The Tenth District Court of Appeals has held that it is not the practice of law or legal representation of a corporation when a permit holder makes admissions of violations and requests that his/her permit be revoked in front of the commission. The court further held that nothing prohibits the commission from considering these statements before the commission. *S & P Lebos, Inc. v. Liquor Control Comm.*, 10th Dist. Franklin No. 03AP-447, 2004-Ohio-1613, ¶ 18. Please note that the appellate court did not consider whether the permit holder had authority to bind the corporation.
- (7) Notice of appeal filed by a non-attorney on behalf of a corporation did not properly commence the judicial appeal of an administrative decision. Later appearance of an attorney did not cure the defect of the notice being filed by a non-attorney. *Laster v. Ohio State Bd. of Cosmetology*, Franklin C.P. No. 15CVF-11333 (Feb. 25, 2016).

d. Attorneys not licensed in Ohio:

- (1) May not represent a respondent in an administrative hearing unless admitted pro hac vice.
  - (a) Some agencies have a statute or rule addressing who may represent an individual before a particular state agency. *See, e.g.*, Ohio Admin. Code 4731-13-01(B). (State Medical Board of Ohio administrative rule stating that only Ohio licensed attorneys may represent an individual appearing before the Board); Ohio Admin. Code 4715-15-02(B) (Dental Board); Ohio Admin. Code 4723-16-02(A) (Board of Nursing).
- (2) May be admitted pro hac vice pursuant to Gov.Bar R. XII.
  - (a) The body responsible for regulating the practice of law in Ohio is the Supreme Court of Ohio. The Supreme Court has exclusive original jurisdiction of admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. *See Ohio*

Constitution, Article IV, Section 2(B)(1)(g); Gov.Bar R. I, § 9; Royal Indemnity Co. v. J.C. Penney, 27 Ohio St.3d 31, 34 (1986).

(3) Beginning Jan. 1, 2011, out-of-state attorneys seeking permission to appear pro hac vice in an Ohio proceeding must first register with the Supreme Court Office of Attorney Services. Online pro hac vice registration is now available. After an out-of-state attorney completes the registration requirements and receives a Certificate of Pro Hac Vice Registration, the attorney must file a Motion for Permission to Appear Pro Hac Vice with the tribunal. If the out-of-state attorney receives permission to appear pro hac vice in an Ohio proceeding, the attorney must notify the Office of Attorney Services. The Notice of Permission to Appear Pro Hac Vice may be filed through the online registration system. Gov.Bar R. XII.

(a) Pursuant to the rules of the Supreme Court, the pro hac vice registration requirements apply in proceedings involving any adjudicative matter pending before a tribunal. Gov.Bar R. XII, Section 2.

(b) A tribunal is defined to include an administrative agency, or other body acting in an adjudicative capacity. An administrative agency acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interest in a particular matter. Gov.Bar R. XII Section 1.

(c) Requirements for permission to appear pro hac vice are set forth in Section 2 of Gov.Bar R. XII:

<http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule12> .

### 3. Representation of a witness

a. The agency shall permit a witness, if he or she so requests, to be accompanied, represented, and advised by an attorney. R.C. 119.13. That representation is limited to the protection of the rights of the witness. The attorney may not examine or cross-examine witnesses, and the witness shall be advised of his right to counsel before he or she is interrogated.

b. The respondent who also appears as a witness has a right to counsel and may be entitled to a continuance of the hearing in order to obtain counsel. *Adeen v. Ohio Dept. of Commerce*, 8th Dist. Cuyahoga No. 87135, 2006-Ohio-3604, ¶ 14.

## C. Burden of Proof

1. Generally, the agency has the burden of proof.
  - a. The agency has the burden of proof when it suspends or revokes an existing license. *In re Scott*, 69 Ohio App.3d 585, 590 (10th Dist.1990); *Sanders v. Fleckner*, 59 Ohio Law Abs. 135 (2d Dist.1950); *Buckeye Bar, Inc. v. Liquor Control Comm.*, 32 Ohio App.2d 89, 89-91 (10th Dist.1972).
2. Burden in cases involving applications for licensure.
  - a. An applicant for a license has the initial burden of producing facts sufficient to demonstrate satisfaction of the minimum requirements for issuance of the license. *See St. Augustine Catholic Church v. Attorney General*, 67 Ohio St.2d 133, 138 (1981). *See, also, Advanced Med. Sys. v. Ohio Dept. of Health*, 8<sup>th</sup> Dist. Cuyahoga No. 81277, 2002-Ohio-5978; *In re Application of Gram*, 53 Ohio Law Abs. 470, 86 N.E.2d 48, 39 Ohio Op. 477 (Tuscarawas C.P.1948) (person who claims he passed a licensing examination that the agency maintains he failed, has the burden of proving he passed the examination).
  - b. The agency then has the burden of proving the basis for denying a license to an applicant. *See R.C. 1707.163(D)* (agency “shall” issue a license if the applicant has met specific qualifications. The inference is that the agency must articulate the qualification the applicant has failed.)
  - c. The agency’s enabling statute may assign the burden of proof with regard to specific issues. *See Clermont Co. Auditor v. Schregardus*, Ohio Environmental Bd. of Rev. No. EBR 132753, EBR 132761 (June 10, 1993).
  - d. For example, the Financial Responsibility Act provides that drivers have the burden to establish defenses to the act by clear and convincing evidence. R.C. 4509.101(L).
3. Burden of production
  - a. The party attempting to establish that the averments in the notice of hearing are correct has the burden of going forward with the evidence. *Chiero v. Bur. of Motor Vehicles*, 55 Ohio Misc. 22, 24 (Franklin C.P.1977).
  - b. Typically, this will be the agency, so the agency will usually present its case-in-chief first.

- c. In application cases, the applicant may have the burden to produce evidence of qualification for licensure, if contested, and may therefore present such evidence first.
- d. Note: An agency's enabling act may specify which party maintains the burden of production with respect to specific issues. *See Clermont Co. Auditor v. Schregardus*, Ohio Environmental Bd. of Rev. No. EBR 132753, EBR 132761 (June 10, 1993).

#### **D. Standard of Proof Required**

##### 1. Preponderance of the evidence standard

- a. R.C. Chapter 119 does not explicitly define the burden of proof required, but the Supreme Court of Ohio has held that the standard for administrative cases is a preponderance of the evidence. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81 (1998). *See, also, Ohio State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25, 27 (Hamilton C.P.1987); *Buckeye Bar, Inc. v. Liquor Control Comm.*, 32 Ohio App.2d 89, 91 (10th Dist.1972); *Sanders v. Fleckner*, 59 Ohio Law Abs. 135 (2d Dist.1950).
- b. Preponderance of evidence means that the agency has the burden to show that it is more likely than not that the events charged occurred. *See Pang v. Minch*, 53 Ohio St.3d 186, 197 (1990).
- c. The standard of "clear and convincing" evidence has been rejected as inappropriate. *Sanders v. Fleckner*, 59 Ohio Law Abs. 135 (2d Dist.1950).

##### 2. Reliable, probative and substantial evidence

- a. On appeal of an agency's order, a court may reverse the agency's order if it finds that the order was not supported by "reliable, probative and substantial evidence." R.C. 119.12, ¶ 13.
- b. Accordingly, all agency orders should be based upon reliable, probative and substantial evidence.
- c. See discussion, Section IX APPEALS, below, for definitions of reliable, probative and substantial evidence.
- d. Bartender's statement that she sold drinks to an intoxicated group of people, which included a particular customer, and described continuous alcohol services until the bar's closing, coupled with the particular customer's elevated blood alcohol level, support a reasonable inference that the bartender served the customer alcohol after

the bartender knew the customer was intoxicated. Dissent: because the state did not establish a timeline of knowledge of intoxication and sale or furnishing, the evidence was insufficient to prove a violation. *Tauring Corp. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 14AP-622, 2015-Ohio-1967.

## E. Standards for Consideration of Evidence

1. R.C. 119.09 states agencies “shall pass on the admissibility of evidence” presented at the hearing, but R.C. 119.09 does not incorporate the Ohio Rules of Evidence. Statutes or rules specific to an agency may provide standards for that agency. These standards may range from mandating adhering to the rules of judicial hearings to that of an express release from the common-law or statutory rules of evidence.
2. Ohio Rules of Evidence not strictly applicable.
  - a. Evidence Rule 101(A) specifically states: “these rules govern proceedings in the courts of this state.”
  - b. Evidence Rule 101(A) does not mention administrative agencies as forums to which the rules of evidence apply, and therefore the Rules of Evidence are not applicable in administrative proceedings. *Board of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417 (1996).
  - c. Some agency statutes or rules expressly provide that the agency is not bound by the rules of evidence. *See, e.g.*, R.C. 4141.28 (Unemployment Compensation); R.C. 4123.10 (Worker’s Compensation); OAC 4723-16-01(E) (Nursing).
  - d. However, the rules of evidence may be considered in an advisory capacity in an administrative hearing. *Board of Edn. for Orange City School Dist.*, 74 Ohio St.3d at 417; *Ohio State Racing Comm. v. Kash*, 61 Ohio App.3d 256, 263 (8th Dist.1988). *See, e.g.*, OAC 4723-16-01(E) (in Board of Nursing hearings, rules may be taken into consideration, but are not controlling).
3. Agency standards must be fair and reasonable.
  - a. When an administrative agency enacts rules as to the standards of admissibility of evidence to be followed in its hearings, such rules must be consistent with the guaranty that such hearings shall be fair in all their procedural respects. *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 163 (10th Dist.1969).
  - b. An administrative body should not be inhibited by strict rules of evidence, but “freedom from such inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended.” *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263 (1955).

- c. An administrative agency may not sanction as evidence something which is clearly not evidence. Furthermore, an administrative agency should not act on evidence that is clearly not admissible, competent or probative of facts that the agency is to determine. *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6 (2d Dist.1982); *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 162 (10th Dist.1969).
  - d. Administrative agencies have a duty to base their conclusions on competent evidence. *State ex rel. Chrysler Plastic Products Corp. v. Industrial Commission*, 39 Ohio App.3d 15, 16 (10th Dist.1987). The evidence must be probative and relevant. *Citizens to Protect Environment, Inc. v. Universal Disposal, Inc.*, 56 Ohio App.3d 45, 49 (10th Dist.1988).
  - e. Health department reports identified by a police officer were admissible. *Douglas v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 11AP-133, 2012-Ohio-2218.
4. Limits on use of hearsay evidence.
- a. The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Miller v. Ohio State Bd. of Pharmacy*, 5th Dist. Coshocton No. 11-CA-9, 2012-Ohio-1002; *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431; *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6 (2nd Dist.1982); *Erdeljohn v. Ohio State Bd. of Pharmacy*, 38 Ohio Misc.2d 1, 9 (Hamilton C.P.1987).
  - b. Some courts have held that it is unreasonable for the agency to rely solely on hearsay to contradict the sworn testimony of a claimant personally appearing before the agency. *Green v. Invacare Corp.*, 9th Dist. Lorain No. 92CA5451, 1993 Ohio App. LEXIS 2687, \*5 (May 26, 1993); *Taylor v. Bd. of Review*, 20 Ohio App.3d 297, 299 (8th Dist.1984); *Mason v. Bur. of Emp. Servs.*, 1st Dist. Hamilton No. C-990573, 2000 Ohio App. LEXIS 1524, \*12 (Apr. 7, 2000).
  - c. It is not always unreasonable, however, to consider hearsay evidence that is in conflict with sworn testimony.
    - (1) See *Valdez v. Spud's Auto Parts*, 6th Dist. Lucas No. L-98-1105, 1998 Ohio App. LEXIS 5887, \*17 (Dec. 11, 1998), stating that Taylor is not applicable where both parties were permitted to present hearsay evidence at the hearing, and appellant's testimony was contradicted not only by appellee's hearsay evidence, but by sworn testimony of several live witnesses who testified on behalf of appellee.
    - (2) In addition, in *Todd v. Ohio Dept. of Job & Family Servs.*, 4th Dist. Scioto No. 03CA2894, 2004-Ohio-2185, ¶ 26, the Fourth Appellate District concluded that

it is “required to give great deference to the hearing officer’s findings of fact,” i.e. witness credibility, “and it would be inappropriate to disregard his findings simply because they are partially based on admissible hearsay testimony.”

## F. Hearing Procedure

1. Chapter 119 says very little about the procedure to be followed during an administrative hearing. The only references to hearing procedures appear in R.C. 119.07 and 119.09.
  - a. General procedure. R.C. 119.09 sets forth the basic parameters of a hearing: (1) a stenographic record may be made of the hearing; (2) the agency or hearing examiner may administer oaths or affirmations; (3) the agency may ask any party to testify under oath as upon cross-examination; (4) the agency shall pass upon the admissibility of evidence; (5) a party may make evidentiary objections to the evidentiary rulings of the agency; and (6) upon the agency’s refusal to admit evidence offered by a party, the party must proffer the evidence into the record.
  - b. R.C. 119.07 provides that “at the hearing, [the party] may . . . present evidence and examine witnesses appearing for and against him.” This section is silent regarding the manner in which evidence is to be presented.
2. Courts have consistently held that a proper hearing bears a substantial adherence to courtroom procedures; see:
  - a. *Bucyrus v. State Dept. of Health*, 166 N.E. 370 120 Ohio St. 426, 430 (1929): “While the technical rules of a hearing by a court are not required to be strictly observed in hearings before administrative bodies, it is the duty of such bodies to permit a full hearing upon all subjects pertinent to the issue, and to base their conclusion upon competent evidence; and such result can better be accomplished by a substantial adherence to the rules observed in hearings in court.”
  - b. *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 165 (10th Dist.1969): “It is our feeling that basic evidentiary procedures should be followed in administrative hearings; and in this regard, exhibits should be offered for identification purposes and should be introduced and the admission of such made a part of the record.”
  - c. *Remy v. Limbach*, 4th Dist. Pickaway Nos. 88-CA-5, 88-CA-6, 88CA-7, 1989 Ohio App. LEXIS 3363, \*6 (Aug. 24, 1989) (quoting *Bucyrus*, 120 Ohio St. at 430 (1929)), holding that when determining the qualifications necessary for a person to testify as an expert, the administrative agency properly adhered to the language of Evid.R. 702.



3. Practical notes: The following is an overview of the suggested procedure for the typical administrative hearing.
  - Hearing convenes with opening statements. The respondent may choose to present an opening argument after the agency concludes presentation of its case-in-chief.
  - The agency presents its case-in-chief and submits evidence into the record.
  - The respondent presents its/his/her case-in-chief and submits evidence into the record.
  - The agency presents any rebuttal case and submits evidence into the record.
  - The agency, and then the respondent, present closing arguments. Closing arguments may be oral or written. In some cases it may also be advisable to file post-hearing briefs, e.g. when complicated factual and legal questions are at issue in the case.
4. Other Issues:

Interpreter. The statute governing court interpreters, R.C. 2311.14(A)(1), does not apply to administrative hearings. Thus, the agency did not violate the respondent's right to Due Process when the administrative agency provided an interpreter who spoke the respondent's language, but not her exact dialect. *Hirsi v. Franklin Cty. Dept. of Job & Family Servs.*, Franklin C.P. No. 12CV-3355, 2012-Ohio Misc. LEXIS 16889, \*5.

## **G. Introduction of Evidence**

1. Generally speaking, procedures to be followed before administrative agencies are not those that are required in ordinary civil actions; and strict rules of a judicial hearing do not govern in administrative hearings. Accordingly, an administrative agency may adopt and follow procedures for hearings and fact finding that are not strictly according to the rules of practice in civil court trials. *State ex rel. Mayers v. Gray*, 114 Ohio St. 270, 275 (1926); *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 161 (10th Dist.1969).
2. "The doctrine of substantial adherence to judicial rules of evidence by administrative agencies in conducting their hearings requires that basic evidentiary procedures should be followed: exhibits should be offered for identification purposes, should be introduced, and the admission of such be made part of the record." *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157 (10th Dist.1969), ¶ 2 of the syllabus.
3. Objections

- a. A party may object to evidence offered at a hearing. R.C. 119.09, ¶ 6.
- b. Who rules on objections?
  - (1) In cases before a hearing examiner, the examiner rules on objections.
  - (2) In cases before the entire board, the authorities are less clear.
    - (a) There is no R.C. Chapter 119 statutory guidance regarding which individual within an agency or board should make rulings on objections.
    - (b) In light of the dearth of any authority addressing who within an agency or board may make rulings on objections during a hearing pursuant to R.C. 119.09, agencies are free to designate an individual(s) to perform this function. In situations where a hearing is held before a full board, the board may choose to have the board president or other designee rule on objections or have the board members vote on objections. It is important, however, that the board/agency be consistent and follow the same procedure in each hearing.

#### 4. Proffer of evidence

- a. If evidence is offered but not admitted, the party shall make proffer of the evidence, and the proffer shall be made a part of the hearing record. R.C. 119.09, ¶ 6.
- b. Reasons for making a proffer: It will create a record to ensure that the reviewing court will know the nature of the excluded evidence. From the reviewing court's perspective, a proffer is necessary so the court can determine if the evidentiary exclusion was proper or if said exclusion constitutes reversible error. The proffer may also convince the hearing examiner to change his/her mind as to the evidentiary value of the evidence.
- c. Methods of making a proffer
  - (1) The proffering attorney or party, in narrative fashion, describes the proposed testimony or document(s).
  - (2) The proffering attorney or party examines witness(s) concerning matters deemed objectionable by the hearing officer.
- d. Opposing counsel can make any appropriate objections during the offer of proof.

## H. Motions in Limine

1. “A motion in limine is defined as a pretrial motion requesting the court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to the moving party that curative instructions cannot prevent a predispositional effect on the jury.” *State v. French*, 72 Ohio St.3d 446, 449 (1995) (quotations and citations omitted).
2. A ruling on a motion in limine is “a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of [an] evidentiary issue.” *State v. Ullis*, 65 Ohio St.3d 83, 85 (1992), fn.1 (quoting *State v. Grubb*, 28 Ohio St.3d 199, 201-02 (1986)).
3. In the administrative context, a ruling on a motion in limine is “committed to the sound discretion of the administrative tribunal.” *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607, 617 (1991).
4. Interlocutory nature; two-step process.
  - a. Unlike a motion to suppress, a motion in limine is not a final, appealable order. “In virtually all circumstances finality does not attach when the motion [in limine] is granted.” *State v. Grubb*, 28 Ohio St.3d 199 at 202 (1986).
  - b. A party against whom a motion in limine has been granted is required to seek introduction of the evidence at the proper part of the trial or hearing, in order to allow the court to make a final decision on its admissibility and preserve any objection on the record. Failure to do so is a waiver of the party’s right to argue the evidentiary issue on appeal. *State v. Grubb*, 28 Ohio St.3d at 202; *Garrett v. City of Sandusky*, 68 Ohio St.3d 139, 140 (1994). *See, also, Riverside Methodist Hosp. Assn. of Ohio v. Guthrie*, 3 Ohio App.3d 308, (10th Dist.1982), paragraph two of the syllabus.
  - c. A motion in limine requires a two-step procedure: a pretrial consideration as to whether any reference to the area in question should be precluded until admissibility can be ascertained during trial; and second, during the trial when the party desires to introduce the evidence which is the subject of the motion in limine, a determination by the trial court as to the admissibility of the evidence, which is determined by the circumstances and evidence adduced in the trial and the issues raised by the evidence.

## I. Examination of Witnesses

1. Witness oath or affirmation

- a. All witnesses placed under oath.
    - (1) Even though the R.C. Chapter 119 language is permissive, and not mandatory, it is recommended that all witnesses be placed under oath or affirmation.
    - (2) If the entire record consists of witnesses who are not placed under oath, and the other side objects, an appellate court cannot affirm the agency's decision, because such decision could not be justified by reliable, probative, and substantial evidence. *Zurow v. Cleveland*, 61 Ohio App.2d 14, 18-19 (8th Dist.1978).
    - (3) The failure to swear a witness is a waivable error. If the party does not object, the agency's decision will not be reversed. *Id.* at 19.
  - b. Who can administer oaths: R.C. Chapter 119 grants the agency or anyone delegated to conduct the hearing with the power to administer oaths. R.C. 119.09, ¶ 8.
2. Direct examination
- a. Ask witnesses to state and spell their names for the record after being sworn in, and to speak audibly and clearly for the reporter.
  - b. Character Witnesses
    - (1) In discussing the character or business reputation of a licensee, the licensee may call witnesses who will vouch for his/her/its character.
    - (2) An agency's refusal to accept testimony of more than two character witnesses is not an abuse of discretion. *Kaufman v. Ohio Veterinary Med. Bd.*, 69 Ohio App.3d 79, 87 (3rd Dist.1990).
  - c. Expert Witnesses
    - (1) Even though the hearing officer was not asked to determine whether the witness was an expert witness, the witness testified as to his training, experience, and education, as well as to matters requiring specialized expertise and the scientific processes used. Thus, the testimony was properly admitted. *Cowans v. Ohio State Racing Comm.*, 10th Dist. Franklin no. 13AP-828, 2014-Ohio-1811. Expert testimony as to a standard of practice is not mandatory in a disciplinary proceeding to determine whether a licensee's conduct falls below a reasonable standard of professional care. *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168, syllabus; *In re Griffith*, 66 Ohio App.3d 658, 663-664 (10th Dist.1991); *Vradenburg v. Ohio Real Estate Comm.*, 8 Ohio App.3d 102, 104 (10th Dist.1982). Expert opinion testimony can be presented in an administrative

proceeding, but the board is not required to reach the same conclusion as the expert witness. *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168, 174. The weight to be given to such expert opinion testimony depends upon the board's estimate as to the propriety and reasonableness, but such testimony is not binding upon an experienced and professional board. *Id.* Administrative board has the authority, if not a duty, to review the evidence itself for violations under applicable law, and may properly disagree with expert testimony. *Snyder v. Ohio Real Estate Appraiser Bd.*, 5th Dist. Tuscarawas No. 2016 AP 11 0058, 2017-Ohio-5790.

- (2) An agency need not present expert testimony to support a charge in every case, but the agency cannot convert its own disagreement with the licensee's expert's opinion into affirmative evidence of a contrary proposition where the issue is one on which experts are divided and there is no statute or rule governing the situation. *In re Williams*, 60 Ohio St.3d 85, 87 (1991), distinguishing *Arlen v. Ohio State Med. Bd.*, 61 Ohio St.2d 168 (1980). In *Demint v. State Med. Bd. of Ohio*, 2016-Ohio-3531, 70 N.E.3d 21 (10th Dist.), both sides presented expert opinion evidence. The board did not simply choose the position opposite the respondent's, rather the board chose an expert opinion other than respondent's, and therefore, the record contains evidence supporting the board's position. Distinguishes *In re Williams*, 60 Ohio St.3d 85, 573 N.E.2d 638 (1991).

### 3. Cross Examination

- a. Under the Ohio Rules of Evidence, which may be used as a guide, cross-examination may concern any relevant area of inquiry even if beyond the scope of direct. Evid. R. 611.
- b. The agency may call a party to testify under oath as upon cross-examination. R.C. 119.09, ¶ 7. When a party to an adjudication hearing held pursuant to R.C. Chapter 119 presents the party's position in writing and does not testify, the administrative agency conducting the hearing has the right, under R.C. 119.09, to call such party to testify under oath as upon cross-examination. 1960 Ohio Atty.Gen.Ops. No. 60-1573, syllabus.

## **J. Documentary Evidence; Practical Considerations**

1. Exhibits should be marked.
2. Marked exhibits should be shown to opposing counsel.
3. Hearing officer and opposing counsel should be given a copy.

4. Marked exhibits should be presented to the witness for identification and authentication.
5. If a party desires to introduce marked exhibits into the record, he/she should so move, giving opposing counsel opportunity to voice objections. Exhibits also may be admitted at the close of case-in-chief, at which time the opposing party may object.
6. The hearing examiner should rule on a motion to admit evidence after entertaining any objections to the introduction of evidence.
7. *In re Application of Milton Hardware Co.*, 19 Ohio App.2d 157, 165-67 (10th Dist.1969): if documentary evidence is not properly introduced and admitted into the record at the administrative hearing, but nevertheless becomes part of the record on appeal, the court may reverse the agency's action.
8. Jurisdictional items should always be placed into the record: e.g., notice letter, proof of mailing by certified mail, proof of receipt, hearing request, letter to Respondent scheduling hearing, any written memoranda in which continuances were granted, or were agreed to by the parties.
9. Pursuant to *State ex rel. Andrews v. Chardon Police Dept.*, 11th Dist. Geauga No. 2012-G-3074, 2013-Ohio-338:
  - a. The notary seal is not required on an affidavit if the notary properly signed the affidavit, the notary's commission is on file with the Secretary of State, and it can be readily ascertained that the sworn affidavit was taken before the proper officer.
  - b. On an affidavit, no particular form of oath is required. Here, the statement that the affiant was duly sworn and cautioned is sufficient to give the affidavit proper evidentiary quality.

#### **K. Can A Case Be Dismissed Prior to Hearing?**

1. An agency has inherent power to dismiss charges against an individual who has had claims of misconduct levied against her or him. *State ex rel. Sizemore v. Ohio Veterinary Med. Licensing Bd.*, 132 Ohio St.3d 296, 2012-Ohio-2725, ¶ 3 (“The remand orders of the court of appeals and the common pleas court did not prevent the board from dismissing the charges.”). An administrative agency, after dismissing charges against a licensee, retains jurisdiction to issue charges anew against the same licensee. *Wightman v. Ohio Real Estate Comm.*, 2017-Ohio-756, 85 N.E.3d 1061 (10th Dist.).
2. Although due process considerations would probably preclude an agency from dismissing a case on its merits before a full adjudication hearing is completed,

dismissals (without a hearing) based on procedural issues such as res judicata and subject matter jurisdiction have been upheld by the courts on appeal. *Dressler Coal Co. v. Div. of Reclamation*, 23 Ohio St.3d 131, 137 (1986) (Board's dismissal of second appeal upheld because issue raised in second appeal could have been raised in first appeal. Decision in first appeal was res judicata.); *Fields v. Summit Cty. Executive Branch*, 83 Ohio App.3d 68, 72-73 (9th Dist.1992) (collective bargaining agreement divests State Personnel Board of Review of jurisdiction to hear appeal of termination) *Hacker v. PPG Industries, Inc.*, 9th Dist. Summit No. 13792 (Mar. 15, 1989); *Yoder v. State Bd. of Edn.*, 40 Ohio App.3d 111 (9th Dist.1988); *Sayler v. State Racing Comm.*, 7 Ohio App.3d 189 (1st Dist.1982).

3. Where the legislature has provided special statutory proceedings for the discipline of a licensee, including the right to appeal any agency decision pursuant to R.C. 119.12, a licensee may not bypass the special statutory proceedings in the guise of obtaining declaratory relief. *State ex rel. Gary Charles Gelesh, D.O. v. The State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328 (10th Dist.), ¶ 25-27; *Aust v. Ohio State Dental Bd.*, 136 Ohio App.3d 677 at 683 (10th Dist.2000).

4. Exceptions:

a. Failure to state a claim.

(1) In order to dismiss a complaint for failure to state a claim upon which relief can be granted, under Civ. R. 12, it must appear beyond reasonable doubt from the complaint that the plaintiff/relator can prove no set of facts entitling him or her recovery. *State ex rel. Williams v. Bessey*, 10th Dist. Franklin No. 08AP-158, 2009-Ohio-5852.

(2) "A complaint in mandamus states a claim if it alleges the existence of the legal duty and the want of an adequate remedy at law with sufficient particularity so that the respondent is given reasonable notice of the claim asserted." *Talwar v. State Med. Bd. of Ohio*, 156 Ohio App.3d 485, 2004-Ohio-1301, ¶ 4 (10th Dist.) (citing *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 95 (1995) (quoting *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992)).

(3) In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the non-moving party. *State ex rel. Hanson*, 65 Ohio St.3d 545, 548.

b. Withdrawal by respondent

(1) Although respondent has the right to withdraw from his or her own hearing, the administrative agency is entitled to discipline the respondent absent

respondent's presence so long as the opportunity for a hearing was afforded upon request. R.C. 119.06.

## **L. Addressing Constitutional Issues**

1. Issues involving challenges to the validity of statute or its application.
  - a. Agency may not rule on the constitutionality of a statute. As creatures of statute, administrative agencies themselves are without jurisdiction to rule on the constitutionality of a statute. Such determinations are reserved to the courts alone. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130 (1975). This is true whether the challenge is a facial challenge to the statute, *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 406-07 (1960), or whether the allegation is that the statute is unconstitutional as applied, *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 197-99 (1994).
  - b. Party should raise “as applied” constitutional challenges at hearing.
    - (1) Although the agency itself may not determine whether a statute has been applied in a manner that is unconstitutional, such challenges must first be raised before the agency because they require both the development of an evidentiary record for review by the appellate courts, and the expert commentary of the agency on the issue. *See Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, at 231 (1988); *Bd. of Edn. of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184 (1986), syllabus; *Zieverink v. Ackerman*, 1 Ohio App.3d 10, 11 (1st Dist.1981); *Skalsky v. Hairston*, 7th Dist. Belmont No. 90-B-20, 1991 Ohio App. LEXIS 4932, \*5 (Oct. 15, 1991). If an as-applied constitutional challenge is not raised at the agency hearing or no review is sought at all, a declaratory judgment action cannot be used to challenge the statute. *Deaconess Hosp., v. Ohio Dept. of Job and Family Serv.*, Franklin C.P. No. 10CVH06-9455 (Oct. 17, 2012).
    - (2) In at least one case, however, the Tenth District held that such challenges could be raised for the first time on appeal as long as the necessary evidence is admitted in the record. *See In the Matter of: Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, 10th Dist. Franklin No. 91AP-1493, 1992 Ohio App. LEXIS 4883, \*24-25 (Sept. 24, 1992), in which the Tenth District Court of Appeals distinguished *Cleveland Gear* as inapplicable to R.C. Chapter 119 proceedings and concluded that “as applied” constitutional challenges could be raised for the first time in the court of common pleas as long as all of the evidence necessary for consideration of the issue was either already in the administrative record or properly admissible as “newly discovered” evidence under R.C. Section 119.12. *See, also, VFW Post 1238 Bellevue v. Ohio Liquor Control Comm.*, 131 Ohio App.3d 591, 595-96 (6th Dist.1998). The prudent choice,



however, would be to raise the issue at hearing to ensure proper development of the record.

- c. Facial constitutional challenges may be raised for the first time on appeal because they are not dependent on a factual record. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988).
2. Issues involving the construction of a statute.
    - a. Although an agency is precluded from passing upon the constitutional validity of a statute or its application, nothing precludes an agency from applying the constitution to properly construe a statute that is at issue. *Office of Consumer's Counsel v. Public Util. Comm.*, 70 Ohio St.3d 244, 247 (1994); R.C. 1.47(A) (legislative intent is that statutes comply with constitutional requirements).
    - b. Agencies with authority to administer and enforce legislative enactments may constitutionally determine the precise scope of their authority and the proper objects of their jurisdiction, *Hodgson v. Hamilton Mun. Ct.*, 349 F.Supp. 1125, 1133 (S.D. Ohio 1972). Due deference is ordinarily given to such interpretations, *Pons v. State Med. Bd. of Ohio*, 66 Ohio St.3d 619, 621 (1993).
  3. Collateral challenges to the validity of a statute and/or its application.
    - a. Under certain circumstances, parties may bypass the administrative hearing and raise constitutional challenges to a statute and/or its application directly in court by means of such collateral actions as declaratory judgment (R.C. 2721.03), injunctive relief, and 42 U.S.C. § 1983. *Buckeye Quality Care Centers v. Fletcher*, 48 Ohio App.3d 150, 154 (10th Dist.1988).
    - b. Declaratory judgment
      - (1) Where the relief sought rests solely on a constitutional claim, declaratory relief has been allowed because the administrative agency could not provide the relief sought. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 129 (1975); *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263 (1975).
      - (2) When “a specialized statutory [administrative] remedy is available in the form of an adjudicatory hearing, a suit seeking a declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed.” *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist.1987); *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 417 (1951).
      - (3) The decision whether to allow a declaratory judgment collateral challenge lies within the sound discretion of the trial court. *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 185 (10th Dist.1987).

- (4) Where a specialized statutory remedy is available in the form of an adjudicatory hearing, a suit seeking a declaration of rights that would bypass, rather than supplement, the legislative scheme ordinarily is not permissible. *State of Ohio ex rel. Gary Charles Gelesh, D.O. v. The State Med. Bd. of Ohio*, 172 Ohio App. 365, 2007-Ohio-3328 (10th Dist.), ¶ 25. Where a licensee does not challenge the validity of a statute, but merely seeks interpretation that could be resolved in an administrative appeal, the licensee may not bypass the administrative process through a declaratory judgment action. *Id.* at ¶ 30.
- (5) If an as-applied constitutional challenge is not raised at the agency hearing or no review is sought at all, a declaratory judgment action cannot be used to challenge the statute. *Deaconess Hosp. v. Ohio Dept. of Job and Family Serv.*, Franklin C.P. No. 10CVH06-9455 (Oct. 17, 2012).
- (6) An “as applied” challenge can be properly raised on appeal pursuant to R.C. Chapter 2506, whereas a facial challenge can be brought only through a separate declaratory judgment action. *Steiner v. Morrison*, 2016-Ohio-4798, 68 N.E.3d 151 (7th Dist.), ¶ 9. Challenge to a zoning ordinance arguing that the ordinance failed to put a reasonable person on notice and cannot be constitutionally applied in any situation is a facial challenge, and must be brought in a declaratory judgment action. *Steiner v. Morrison*, 2016-Ohio-4798, 68 N.E.3d 151, (7th Dist.).

#### 4. 42 U.S.C. § 1983 actions

- a. Failure to exhaust administrative remedies is not a proper defense to an action asserting federal constitutional rights violations under 42 U.S.C. § 1983. *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988); *Gibney v. Toledo Bd. of Edn.*, 40 Ohio St.3d 152, 155 (1988); *Grybosky v. Ohio Civ. Rights Comm.*, 11th Dist. Ashtabula No. 2010-A-0047, 2012-Ohio-3637; *Grybosky v. Ohio Civ. Rights Comm.*, 11th Dist. Ashtabula No. 2010-A-0047, 2011-Ohio-6843; *Johnson v. Wilkinson*, 84 Ohio App.3d 509, 514-15 (4th Dist.1992). But see, *Higgason v. Stogsdill*, 818 N.E.2d 486 (Indiana App.2004) (noting exception for prisoner lawsuits pursuant to Federal Prisoner Litigation Reform Act).
- b. Other defenses such as Eleventh Amendment immunity, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996); *Pennhurst State School and Hosp. v. Haldeman*, 465 U.S. 89, 104 S.Ct. 900 (1984); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974), the lack of enforceable Section 1983 rights, privileges or immunities in the statute, and/or the foreclosure of enforcement, *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 110 S.Ct. 2510 (1990); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444 (1989), may preclude collateral attacks on statutes.

## M. Hearing Examiner

1. R.C. 119.09 permits the appointment of a referee or examiner to conduct hearings.
  - a. Examiner must be a licensed to practice law in Ohio.
  - b. Examiner must possess other qualifications as required by the agency.
2. Role of the examiner
  - a. The examiner may administer oaths or affirmations. R.C. 119.09.
  - b. The examiner has the same authority in conducting hearing as is granted to the agency. R.C. 119.09.
  - c. The examiner directs and facilitates the conduct of the hearing.
  - d. The examiner rules on motions to continue and other motions.
  - e. The examiner rules on objections made at the hearing.
  - f. Agency's rules may provide for the issuance of pre-hearing entries, setting deadlines for requesting subpoenas, disclosing witnesses, etc.
  - g. The hearing examiner may evaluate the qualifications of a witness, and assess the weight to be given a witness's testimony. *Landefeld v. State Med. Bd.*, 10th Dist. Franklin No. 99AP-612, 2000 Ohio App. LEXIS 2556, \*35 (June 15, 2000).
  - h. The examiner issues a Report and Recommendation to the agency. R.C. 119.09. See Section VII(M)(7), Report and Recommendation, below.
  - i. Dismissal of charges
    - (1) The referee or examiner appointed to conduct an administrative hearing under R.C. 119.09 "shall have the same powers and authority in conducting said hearing as granted to the agency." R.C. 119.09, ¶ 9. Thus, a hearing examiner is limited to the same due process constraints as is an agency in deciding whether an action should be dismissed.
    - (2) Because the hearing examiner makes a recommendation to the agency as to findings and fact and conclusions of law, the hearing examiner should not dismiss a case, but, rather recommend dismissal of a case or charge, with the agency to accept or reject that conclusion.

### 3. Allegations of bias

- a. A reviewing court presumes that a decision of an agency is valid and reached in a sound manner. This presumption imposes upon the party raising the issue of bias to prove that any bias adversely affected a decision. *West Virginia v. Ohio Hazardous Waste*, 28 Ohio St.3d 83, 86 (1986); *Ohio Motor Vehicle Dealers Bd. v. Central Cadillac Co.*, 14 Ohio St.3d 64, 67 (1984); *Wheeling Steel Corp. v. Evatt*, 143 Ohio St. 71, 84 (1944); *Cleveland v. Budget Comm.*, 50 Ohio St.2d 97, 98-99 (1977). See *Withrow v. Larkin*, 421 U.S. 35, 47, 55, 95 S.Ct. 1456 (1975), (administrators are assumed to be of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.)
- b. A hearing examiner having been previously employed by an administrative agency before which a matter is pending is not, in and of itself, sufficient to disqualify a hearing examiner for bias. *West Virginia v. Ohio Hazardous Waste*, 28 Ohio St.3d at 86.
- c. Standards for assessing bias in the judiciary
  - (1) The same standards to determine bias for a judge arguably should be applicable to an administrative hearing examiner.
  - (2) Rule 2.11 of the Code of Judicial Conduct requires disclosure to the parties if the judge served as a lawyer in the controversy or the judge and/or judge's family has a financial interest or served as a party in the proceeding. Instead of withdrawing from the proceeding, the judge may disclose the potential conflict to the parties and with the consent of all parties may continue on the case. If, however, the judge has a personal bias or prejudice concerning a party or lawyer or personal knowledge of facts in dispute, then the judge must recuse him- or herself. Gov.Jud.R. 2.11(C).
  - (3) To support a bias claim, knowledge must be gained through extra-judicial means. The Supreme Court of Ohio has held that, "A judge need not recuse himself simply because he acquired knowledge of the facts during a prior proceeding." *State v. D'Ambrosio*, 67 Ohio St.3d 185, 188 (1993).
  - (4) "The basis of the disqualification of a judge for bias or prejudice is that of personal bias or prejudice, for or against a party, which renders the judge unable to exercise his or her functions impartially in the particular case. The words 'bias' and 'prejudice' refer to the mental attitude or disposition of the judge toward a party to the litigation and not to any views that he or she may entertain regarding the subject matter involved." 46 Am. Jur. 2d Judges § 132.

4. Ex parte communications

- a. There is no express prohibition against ex parte communications in R.C. Chapter 119.
- b. Once a case is assigned for hearing, the appearance of fairness is enhanced when the hearing examiner limits contacts with the agency to those made in the presence or hearing of the parties or counsel.
- c. Agency law or rules may expressly limit ex parte communications.

5. Interlocutory appeals of examiner rulings

- a. There is no express provision in the Ohio Revised Code for an interlocutory appeal of hearing examiner rulings to either the administrative agency or board, or to the court of common pleas from which an agency appeal may ultimately lie. The language of R.C. 119.09 seems to suggest that the opposite is true, that there was no express intent to grant jurisdiction to take interlocutory appeals from the decisions of a hearing examiner who may be appointed to hear a case. As such, the suggestion is strong that there exists no such right of appeal.
- b. R.C. 119.09 gives an administrative agency the authority to have the matter before it heard by a hearing examiner, an attorney at law who will usually rule on issues pertinent to the case as well as hear the evidence and determine the admissibility of evidence and testimony. Many of these decisions must be made prior to the actual hearing, and the issue of the authority of the hearing examiner to make such rulings has not been set forth by statute. Nor has the ability of the agency to review such determinations, absent the issuance of a final report and recommendation.
- c. Under R.C. 119.09, the hearing examiner has the same rights and responsibilities as the agency in conducting the hearing. The argument is strong that the hearing examiner's determinations should not be disturbed until the final recommendation is issued. Certainly, if intermediate orders were appealable, parties would always run to the administrative agency for full board consideration. This would certainly hamper the administrative hearing process, and would undermine the statutory authority given to the hearing examiner. For that reason alone, no agency would ever assign a case to a hearing examiner, as the final adjudication process would necessarily be longer than if the agency had heard the matter fully itself.
- d. Further, such interlocutory appeals would render meaningless the requirement that the hearing examiner issue findings of fact and conclusions of law, as these matters would have previously been determined by such interlocutory appeals, if they were available. The exception might be denial of a request for a hearing de novo, because it is deemed to be a final order affecting a substantial right. *See, e.g., Union Camp*

*Corp. v. Whitman*, 54 Ohio St.2d 159, 162-63 (1978). Several courts support this view, and hold that the remedy for any errors or omissions during the proceedings is through the right of appeal of the final order to the common pleas courts. The appeal may include all errors or omissions contained in interlocutory orders.

- e. The concept of not allowing interlocutory appeals to the agencies are to be supported further by the statutory provisions under R.C. 2505.02 and 2505.03, which set forth the jurisdiction of the courts to hear appeals. Generally, the courts have held that interlocutory orders are not appealable if they do not affect a substantial right of the parties or are not made in a special proceeding. *See McHenry v. General Accident Ins. Co.*, 104 Ohio App.3d 350, 351 (8th Dist.1995) (decisions on discovery matters generally not appealable on interlocutory appeal). Arguably, if the matter cannot survive as a separate interlocutory appeal to the courts, it would follow that there is no ability to appeal the decision of the hearing examiner, as no final report and recommendation is issued, and the matter would otherwise be bifurcated. While there is little or no case law on this subject, the better rule to follow is that there is no right of review by the agency until the final report and recommendation is issued.
- f. Further, an analogy may be found in the administrative appeals provisions of R.C. 2506.01, et seq. Section 2506.01 provides, in part:

Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas . . . . A “final order, adjudication, or decision” means an order, adjudication, or decision that determines rights, duties, privileges, benefits or legal relationships of a person, but does not include any order, adjudication, or decision from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority if a right to a hearing on such appeal is provided . . . R.C. 2506.01 (emphasis added).

- g. It is clear that unless a final determination is made, the interlocutory decisions of an agency would not create the avenue for an appeal to either the agency or the courts. *See In re Petition for Annexation of 5.11 Acres in Northampton Township*, 34 Ohio App.3d 18, 19 (9th Dist.1986) (the decision to consider a petition for annexation of land is not appealable, and a final order is not issued until a resolution is passed specifically granting or denying the relief requested in the petition); *Flair Corp. v. Brecksville*, 49 Ohio App. 2d 77 (8th Dist.1976), paragraph one of the syllabus (recommendation of a planning commission to the city for further action is not a final appealable order).
- h. For administrative agencies involving political subdivisions, there is no direct right of appeal to the courts from the determinations of hearing examiners on matters issued prior to a final determination on the merits. The courts have held that the

remedy of appeal to the courts provides adequate remedies for any procedural defects or irregularities. *State ex rel. DeWeaver v. Faust*, 1 Ohio St.2d 100, 101 (1965) (court denied realtor's application for a writ of prohibition).

- i. In short, the courts will not entertain an action where the failure to exhaust administrative remedies doctrine may be applied. Similarly, if the agency still has jurisdiction and there is a right of review from an intervening order (such as a report and recommendation), the agency must give deference to the hearing examiner, and should not take jurisdiction over the matter until such time as the final report and recommendation is issued. To hold otherwise would circumvent the hearing examiner process, and would slow the proceedings to a crawl. Otherwise, each ruling on the procedural aspect of a case would then be subject to scrutiny and review, and presumably to court review. Clearly, the legislature did not intend this result, and the consequences of such an interpretation of the law would be arduous.
6. Hearing examiner unable or fails to issue the Report and Recommendation
- a. If a hearing examiner is unable or fails to issue a report and recommendation, an administrative agency or board may substitute hearing examiners.
  - b. An administrative agency or board may substitute hearing examiners without affecting the due process rights of the respondent in an administrative hearing. "It is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence if he reviews and examines the record of the proceeding." *Laughlin v. Pub. Util. Comm.*, 6 Ohio St.2d 110, 112 (1966). See also, *Halleen Chevrolet v. Gen Motors Corp.*, 10th Dist. Franklin No. 00AP-1454, 2001 Ohio App. LEXIS 2862 (June 28, 2001) (citing *In re Christian Care Home of Cincinnati*, 74 Ohio App.3d 453 (10th Dist.1991)).
  - c. This issue was also addressed in *State v. Carroll*, 54 Ohio App.2d 160 (6th Dist.1977). The court cited with approval 1 Ohio Jurisprudence 2d 570, Administrative Law and Procedure, Section 114: "In the absence of a contrary statute, due process or the concept of a fair hearing does not require that the actual taking of testimony be before the same officers as are to determine the matter involved. Where an agency expressly or impliedly has authority to delegate the taking of evidence to less than the whole number of its members or to an examiner or investigator, a hearing by such delegate does not deny due process and is not unfair, provided the evidence so taken is considered by the agency in making its ultimate decision." *Carroll*, 54 Ohio App.2d at 171. In *Carroll*, the court reversed the board's decision because only one board member considered the evidence. *Id.* at 171-72.
  - d. *Laughlin v. Pub. Util. Comm.*, 6 Ohio St.2d 110 (1966) and *Carroll*, were followed in a Tenth District Court of Appeals decision, *Kremer v. State Med. Bd. of Ohio*,

10th Dist. Franklin No. 95APE09-1247, 1996 Ohio App. LEXIS 949, \*5-7 (Mar. 12, 1996). In that case a hearing examiner for the medical board held the record open for more than seventeen months after the hearing, then resigned before issuing findings of fact and conclusions of law. The Court held at 832: “It matters not whether the Board, itself, heard the testimony and observed the witnesses’ demeanor as long as the members of the Board review all of the evidence, including transcripts and exhibits, and determine the credibility of the expert testimony. There is simply nothing constitutionally suspect, or statutorily prohibited, with respect to the substitution of hearing examiners here.”

- e. The Ninth District Court of Appeals also held that the second hearing examiner could assess credibility of the witness without personally observing witness testimony, by review of the record and inconsistencies therein. *Aircraft Baking Sys. Corp. v. Ohio Civ. Rights Comm.*, 9th Dist. Summit No. 22841, 2006-Ohio-1304, ¶ 25.
  - f. If a report and recommendation is not issued, a party might bring a mandamus action to cause the administrative agency to act. But *see, State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186, 187 (1992) (mandamus will not issue for board’s failure to issue decision when appellant had statutory right of appeal, and, therefore, there existed an adequate remedy at law).
7. Report and Recommendation
- a. Required elements, R.C. 119.09, ¶ 9:
    - (1) Written report; and
    - (2) Must set forth the following:
      - (a) Findings of fact;
      - (b) Conclusions of law;
      - (c) Recommendation of the action to be taken by the agency.
  - b. Findings and conclusions
    - (1) The purpose of findings of fact is “to aid the reviewing court and to protect the due process rights of those affected by an agency’s actions.” *Erie Care Center, Inc. v. Ackerman*, 5 Ohio App.3d 102, 103 (6th Dist.1982). Although some of the findings of fact made by a hearing examiner may be more in the nature of a narrative of the evidence presented at the hearing, the court may still find there is ample evidence in the record to support the agency's decision to revoke a license. *Id.*



- (2) At least one court has held that an administrative board may properly base its decision on the hearing examiner's written findings of fact provided that "the findings of fact constitute a basis for making informed, deliberate, and independent conclusions about the issues, and the board members need not read the entire transcript of testimony in the absence of any affirmative demonstration that the findings of fact are in any way defective." *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 210 (1st Dist.1981). But see, *Kremer v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 95APE09-1247, 1996 Ohio App. LEXIS 949, \*6 (Mar. 12, 1996) ("It matters not whether the Board, itself, heard the testimony and observed the witnesses' demeanor as long as the members of the Board review all of the evidence, including transcripts and exhibits, and determine the credibility of the expert testimony") (emphasis added) and *State v. Carroll*, 54 Ohio App.2d 160 at 171-72 (6th Dist.1977) (decision reversed because only one board member reviewed evidence).
- (3) R.C. 119.09 does not require that a hearing officer recommend a specific sanction. *Zingale v. Ohio Casino Control Comm.*, 8th Dist. Cuyahoga No. 10138, 2014-Ohio-4937. A report and recommendation need not contain a specific recommendation, as long as it contains a basis for upholding the initial agency decision or proposed action. *Shree Swaminrayam Corp v. Ohio Lottery Comm.*, 2016-Ohio-2641, 63 N.E.3d 768 (8<sup>th</sup> Dist.).

c. Effect of Report and Recommendation

- (1) The hearing examiner's Report and Recommendation is submitted to the appropriate agency representatives to be approved, modified or disapproved. *Miller v. Ohio Rehab. Serv. Comm.*, 85 Ohio App.3d 701, 714 (10th Dist.1993).
- (2) Recommendation is not final until confirmed and approved by the agency.  
R.C. 119.09, ¶ 9.

d. Service of the Report and Recommendation, R.C. 119.09, ¶ 9.

- (1) Copy must be sent by certified mail within five days of filing with the agency.
- (2) The five-day session time is directory, not mandatory. Thus, a party objection to the time an agency took to serve the Report and Recommendation must show prejudice in order to obtain relief. *In re Wedgewood Realty*, 10th Dist. Franklin No. 06273, 2006-Ohio-6734, at 20.
- (3) Serve upon the party or the party's attorney or representative of record.

(4) Service of the Report and Recommendation may be accomplished by serving the attorney representing the respondent via certified mail. *Wedgewood Realty*, 2006-Ohio-6734, at 18.

8. Objections to Report and Recommendation, R.C. 119.09, ¶ 9.

a. Respondent may file objections to the Report and Recommendation.

(1) Note: R.C. 119.09 provides that “the party” may file objections; “Party” is defined under R.C. 119.01(G) as “the person whose interests are the subject of an adjudication by an agency; thus, it is argued that only the respondent, not the State, may file objections to the hearing examiner’s report.

(2) It has also been argued that although the state may not file objections itself, the state may file a response to the respondent’s objections; Chapter 119 is silent on this issue.

b. Objections must be filed within ten days of receipt of the Report and Recommendation.

(1) Extension to file objections may be granted by the agency.

(2) The Agency may not issue a final order without allowing ten days for objections to be filed.

c. The agency must consider the objections before approving, modifying, or disapproving the recommendation of the examiner.

## VIII. AGENCY ACTION

### A. Hearings Held Before the Agency

1. R.C. 119.09 permits, but does not require, agencies to appoint a hearing examiner to conduct the hearing. R.C. 119.09, ¶ 9.
2. Accordingly, some agencies conduct hearings without a hearing examiner.
3. In such cases, no report and recommendation is needed, and the agency can issue an order following deliberations on the case.

## **B. Personal Appearances Before the Agency**

1. Some agencies permit parties to personally appear before the agency prior to the agency's deliberations. *See, e.g.*, R.C. 4735.051(F) (Real Estate Commission); OAC 4731-31-15(G) (Medical Board); OAC 4723-16-12 (Nursing Board).
2. The party may appear on his or her own or through counsel, depending on agency statutes and rules.
3. Due Process does not require the personal appearance of the respondent, only the opportunity for hearing. Accordingly, the agency is not required to arrange for appearance via teleconference. *Wolfe v. Accountancy Bd. of Ohio*, 2016-Ohio-8542, 79 N.E.3d 1261 (10th Dist.).

## **C. Taking of Additional Evidence**

1. Prior to issuance of a final order, the agency may order the taking of additional testimony, or the introduction of further documentary evidence. R.C. 119.09, ¶ 9. However, there is no requirement that the agency take additional evidence. *Landefeld v. State Med. Bd.*, 10th Dist. Franklin No. 99AP-612, \*51 (June 15, 2000); *Frazier v. Ohio State Bd. of Edn.*, 8th Dist. Cuyahoga No. 75042, 1999 WL 1204871, \*6 (Dec. 16, 1999).
2. Agencies sometimes remand cases to the hearing examiner for the taking of additional evidence.

## **D. Failure to Hold Hearing Prior to Expiration of License/Surrender of License**

1. The failure of an agency to hold a hearing prior to the expiration of a license does not deprive the agency of jurisdiction to hold the hearing or to issue a final order regarding the license. R.C. 119.091; *Haehn v. Ohio State Racing Comm.*, 83 Ohio App.3d 208, 211-212 (10th Dist.1992).
2. A licensee's voluntary surrender of his or her license prior to an adjudication hearing does not deprive the agency of its jurisdiction to hold the hearing and revoke the license. *Wise v. Ohio Motor Vehicle Dealers Bd.*, 106 Ohio App.3d 562, 567(9th Dist.1995).
3. After the licensee notified the board that he intended to retire and surrender his license, regulatory boards in other states started disciplinary proceedings and revoked his licenses in those states. The Ohio board then started a disciplinary action to revoke the license based upon the other states' revocations. The court held that the board did not have jurisdiction to take action against respondent's license because the license had long since been surrendered. *VanBolden v. Sate Med. Bd.*, Franklin C.P. No. 95CVF02-744 (Aug. 7, 1995).

## E. Remand to Hearing Examiner

### 1. Implied remand

- a. Administrative powers are only implied when clearly necessary to effect an express power. *Green v. W. Res. Psych. Habilitation Ctr.*, 3 Ohio App.3d 218, 220 (9th Dist.1981), paragraph two of the syllabus.

- (1) Generally, an administrative agency or board has no greater power than that expressly conferred upon it by the enabling statute. *Id.*; *State ex rel. Mallory v. Public Emp. Retirement Bd.*, 82 Ohio St.3d 235, 246-47 (1998); *See, also, Washington v. Pub. Util. Comm.*, 99 Ohio St. 70, 72 (1918).

- (2) Such implied power can be no greater than the express power and must be exercised subject to the same express power limitations. *Green*, 3 Ohio App.3d at 220. These “implied powers . . . are limited to those that ‘may reasonably be necessary to make the express power effective.’” *State ex rel. Mallory v. Public Emp. Retirement Bd.*, 82 Ohio St.3d 235, 246-47 (1998) (quoting *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47 (1917)).

- (3) Power will not be implied when the agency has the means to decide the issue within the confines of its express authority. *Mallory*.

- b. Courts have implicitly, if not explicitly, recognized the power of agencies to remand cases to the examiner. *See Lally v. American Isuzu Motors, Inc.*, 10th Dist. Franklin No. 05AP-1137, 2006-Ohio-3315, ¶ 9 (remand for purpose of determining attorney’s fees); *Zak v Ohio State Dental Bd.*, 8th Dist. Cuyahoga No. 82692, 2004-Ohio-2981, ¶ 98 (remand to consider previously excluded testimony); *Marion Ob/Gyn v. State Med. Bd.*, 137 Ohio App.3d 522, 525 (10th Dist.2000) (remand to consider additional evidence); *Urella v. State of Ohio Med. Bd.*, 118 Ohio App.3d 555, 560 (10th Dist.1997) (remand for briefing of legal issue); *State ex rel. Slavin-Ford, Inc. v. Ford Motor Co.*, 10th Dist. Franklin No. 91AP-354, 1991 Ohio App. LEXIS 3665, \*5-6 (Aug. 1, 1991) (holding that remand was an interlocutory decision, not a final order).

2. Some agency rules provide that the agency may remand a case back to a hearing examiner for the purpose of taking additional evidence.

- a. Chiropractic Board: OAC 4734-4-13(E)

- b. Counselor and Social Work Board: OAC 4757-11-04(H)(3)

- c. Dental Board: OAC 4715-15-16(E)

- d. Medical Board: OAC 4731-13-15(E)
  - e. Respiratory Care Board: OAC 4761-11-14(E)
3. An agency's decision to remand to the examiner is an interlocutory, non-appealable order. *State ex rel. Slavin-Ford, Inc.*, 1991 Ohio App. LEXIS 3665, at \*5-6.

#### **F. Consideration of the Record**

1. The agency's order must be "based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence." R.C. 119.09, ¶ 9.
2. R.C. 119.09 does not create a mandatory duty for the board/agency to read the transcript of the hearing, but states that the board's decision must be based on the transcript and evidence. *Khan v. State Med. Bd. of Ohio*, 10th Dist. Franklin Nos. 14AP-722, 14AP-773, 2015-Ohio-1242. Also, several courts have held that, while R.C. 119.09 provides that an agency's order must be "based on" the evidence, this language does not necessarily require agencies to read the entire transcript of the proceeding, in the absence of any showing that the findings of fact are defective. In *Khan*, the board's meeting minutes reflect that the board reviewed the procedural history of the case, summarized the allegations, reviewed in detail the issue and evidence that was being remanded, and discussed the charge before ultimately deciding. The Court held that the board considered the evidence and based its review and decision on the record. *Khan v. State Med. Bd. of Ohio*, 10th Dist. Franklin Nos. 14AP-722, 14AP-773, 2015-Ohio-1242; *Vonderwell v. Ohio Veterinary Licensing Bd.*, 3d Dist. Van Wert No. 15-2000-13, 2000 Ohio App. Lexis 6234 (Dec. 29, 2000); *Chapman v. Ohio State Dental Board*, 33 Ohio App.3d 324, 326-27 (9th Dist.1986).
3. In a disciplinary action, the agency may rely on its own expertise in deciding whether a licensee engaged in conduct that violates the laws, rules, or standards of the real estate industry. *Boggs v. Ohio Real Estate Commission*, 186 Ohio App.3d 96, 2009-Ohio-6325 (10th Dist.), ¶ 33. See, also, *Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate*, 48 Ohio St.3d 74, 77 (1990) (Commission, in applying its expertise in the field of licensing and disciplining real estate sales people, reached its conclusion supported by reliable, probative and substantial evidence.). See, also, *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168 (1980), syllabus and at 173; *In re Griffith*, 66 Ohio App.3d 658, 663-664.

#### **G. Agency Review of the Report and Recommendation of the Hearing Examiner**

1. The Agency may approve, modify, or disapprove the recommendation of the examiner. R.C. 119.09.

2. The Agency is permitted to independently review the evidence, to make its own findings, and draw its own conclusions from the evidence. *In re Certificate of Need Application of Providence Hosp.*, 67 Ohio App.3d 391, 398 (10th Dist.1990). In a disciplinary action, the agency may rely on its own expertise in deciding whether a licensee engaged in conduct that violates the laws, rules, or standards of the real estate industry. *Boggs v. Ohio Real Estate Commission*, 186 Ohio App.3d 96, 2009-Ohio-6325 (10th Dist.), ¶ 33. *See, also, Richard T. Kiko Agency, Inc. v. Ohio Dept. of Commerce, Div. of Real Estate*, 48 Ohio St.3d 74, 77 (1990) (Commission, in applying its expertise in the field of licensing and disciplining real estate sales people, reached its conclusion supported by reliable, probative and substantial evidence.).
3. Failure to act promptly on a Report and Recommendation
  - a. Some agencies' statutes provide time limits for the issuance of orders following a recommendation. *See, e.g., R.C. 4731.23(D)* (board must issue order within 60 days or within any time period agreed upon by the party).
  - b. Under some statutes, if the agency fails to act within a certain time period from the issuance of the Report and Recommendation, the hearing examiner's Report and Recommendation is deemed accepted, and should not be modified upon the issuance of the final agency order. *See, e.g., R.C. 4517.55*.
4. Approving the Report and Recommendation
  - a. R.C. 119.09 provides that no recommendation shall be final "until confirmed and approved by the agency as indicated by the order entered in its record."
  - b. Accordingly, if the agency accepts the recommendations of the hearing examiner without any determination to modify the same, it should indicate in its order that the Report and Recommendation is "confirmed and approved." These may be "magic words" that should be used in all orders that accept the recommendation of a hearing examiner.
  - c. "[T]he order of the agency, based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and any additional testimony and evidence, shall have the same effect as if such hearing had been conducted by the agency." *Miller v. Ohio Rehab. Serv. Comm.*, 85 Ohio App.3d 701, 713-14 (10th Dist.1993).
  - d. The agency must look at the facts of the case in order to be able to support any argument that it reviewed and considered the record of the hearing, and to avoid charges that it rubber-stamped the recommendations of the hearing examiner. *See Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 210 (1st Dist. 1981) (unclear whether each board member reviewed entire record); *Vonderwell v. Ohio*

*Veterinary Licensing Bd.*, 3rd Dist. Van Wert No. 15-2000-13, 2000 Ohio App. Lexis 6234 (Dec. 29, 2000) (board did not read entire transcript).

5. Modifying or disapproving the recommendation of the examiner

- a. Ohio courts have indicated that, when considering a report and recommendation under 119.09, an administrative agency, as the ultimate factfinder, may make de novo findings of fact and conclusions of law. *In re Certificate of Need Application of Providence Hosp.*, 67 Ohio App.3d 391, 398 (10th Dist.1990); *Blinn v. Ohio Bur. of Emp. Serv.*, 29 Ohio App.3d 77, 79 (10th Dist.1985); *Crow v. City of Springfield*, S.D. Ohio No. C-3-96-010, 1999 U.S. Dist. LEXIS 22065, \*21-22 (Mar. 3, 1999); *Trout v. Ohio Dept. of Edn.*, 10th Dist. Franklin No. 02AP-783, 2003-Ohio-987, ¶ 17.
- b. Although the agency has the authority to make de novo findings of fact, the Supreme Court of Ohio has held that where the findings are based upon assessments of credibility driven by observance of witnesses' demeanor, the agency should afford due deference to the findings of the examiner. *Brown v. Ohio Bur. of Emp. Serv.*, 70 Ohio St.3d 1, 2 (1994).
- c. If the agency modifies or disapproves the recommendation of the examiner, it must include in the record the reasons for such modification or disapproval. R.C. 119.09, ¶ 9.
- d. A reviewing court will need to be able to determine what the agency relied upon, and what the agency considered to be facts supported by the record. The agency should be able to both articulate and demonstrate how it is applying the law to the case before it. Further, it should be able to demonstrate the conclusions it draws from the facts, and the reasons why it relied on certain facts as opposed to others. This is just as important even if the case is not appealed, as the agency may be called upon in subsequent hearings to apply the facts in a similar fashion.
- e. Agency modifying the penalty
  - (1) Per *Brown v. Ohio Bur. of Emp. Serv.*, 70 Ohio St.3d 1, 2 (1994), the agency should give due deference to the recommendations of the hearing examiner. If the penalty is to be less than that proposed by the hearing examiner, then the mitigating factors warranting the lesser penalty should be specifically set forth. If the converse is true, then the exacerbating factors should be stated with particularity. *Graziano v. Amherst Village Bd. of Edn.*, 32 Ohio St.3d 289, 293 (1987).
  - (2) The agency must be careful to avoid the appearance that it was not giving proper deference to the hearing examiner as criticized in *Brown*. See *Brown v. Ohio*

*Bur. of Emp. Serv.* at 2. In the *Brown* case, the Supreme Court noted that the agency did not indicate that it examined the record, and further adopted the findings of fact, but did not accept the recommendation. *Id.* (citing *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40 (1990)).

## H. Disciplinary Actions

1. The Agency may only take actions or impose penalties authorized by law.
2. Suspensions
  - a. The term suspension implies temporary loss of license. *Richter v. State Med. Bd. of Ohio*, 161 Ohio App.3d 606, 2005-Ohio-2995 (10th Dist.), ¶ 12.
3. Revocations
  - a. Non-permanent revocations: licensee may reapply or be reinstated.
  - b. Permanent revocations
    - (1) At least one court has held that for a revocation to be permanent, the order, or incorporated law, must expressly state that the revocation is permanent. *State ex rel. Poignon v. Ohio Bd. of Pharmacy*, 10th Dist. Franklin No. 03AP-178, 2004-Ohio-2709, ¶ 7.
    - (2) The Tenth District has held that, in some circumstances, following a permanent license revocation, an applicant may apply for a new license. *See Richter*, 2005-Ohio-2995, at ¶ 14.
    - (3) Under this interpretation, the agency must accept and process a subsequent application for a new license, unless the law in effect at the time of the revocation precludes further application. *Richter*, 2005-Ohio-2995, at ¶ 14, 20 (French, concurring).
    - (4) In the context of a driver's license, however, the Supreme Court of Ohio has held that the term revocation means a "permanent taking without the expectation of reinstatement." *State v. White*, 29 Ohio St.3d 39, 40 (1987).
4. Multiple penalties
  - a. The agency may not impose multiple penalties for one violation of a statute.



- b. The agency may impose multiple penalties when each penalty is based on a different violation of the statutes. *Wesco Ohio Ltd. v. Ohio State Bd. of Pharmacy*, 55 Ohio App.3d 94, 98-99 (10th Dist.1988).
5. Impossible requirements
- a. In an appeal taken pursuant to R.C. 2506.01, an agency’s final order was unreasonable when it required the respondent to perform an impossible task in order for the agency to approve the respondent’s registration application. *Adams Quality Heating & Cooling v. Erie Cty. Health Dept.*, 6th Dist. Erie No. E-13-040, 2014-Ohio-2318.
6. Independent of criminal penalties
- a. Administrative actions against a license or permit as may be specifically authorized by statute do not constitute a bar against criminal prosecution based on the facts that underlie both actions.
  - b. For example, placing a defendant under an administrative license suspension for DUI does not constitute a punishment that triggers a double jeopardy impediment to further governmental enforcement action, nor does it violate procedural due process or create a valid argument of issue preclusion. *State v. Gustafson*, 76 Ohio St.3d 425, 435-36 (1996) (double jeopardy); *State v. Hochhausler*, 76 Ohio St.3d 455, 463 (1996) (procedural due process); *State v. Williams*, 76 Ohio St.3d 290 (1996), paragraph one of the syllabus (issue preclusion).

**I. Content and Issuance of the Order**

- 1. The order approving the Report and Recommendation should state that the recommendation is “confirmed and approved.” R.C. 119.09, ¶ 9.
- 2. The order modifying or disapproving the Report and Recommendation must state the reasons for the modification or disapproval. R.C. 119.09, ¶ 9.
- 3. The agency may incorporate by reference the entire Report and Recommendation, and should attach a copy of the same to its final order.
- 4. The order must include or have attached a statement of the time and method by which an appeal may be perfected, R.C. 119.09, ¶ 10.
  - a. The following language is recommended for the general statement of time and method:

Any party desiring to appeal shall file a Notice of Appeal with the [Agency/ Board/ Commission] [address], setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The Notice of Appeal shall also be filed by the appellant with the [appropriate court of common pleas]. Such notices of appeal shall be filed within fifteen (15) days after the mailing of the notice of the [Agency's/ Board's/Commission's] Order as provided in Section 119.12 of the Ohio Revised Code.

- b. Language that tracks the language of R.C. 119.12, was found sufficient to put a party on notice as to how to file an appeal of an agency's order. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶ 16. Agency's final order is not a final appealable order if it misstates the statutory requirements for perfecting an appeal. When the respondent has already filed a notice of appeal of an agency's order that contains misleading language, remand to the trial court for further proceedings on the merits is proper. The agency need not issue a new order. *Robinson v. Portage Cty. Sheriff's Office*, 11th Dist. Portage No. 2014-P-0071, 2015-Ohio-1219.
5. The order must be entered on the agency's journal, R.C. 119.09, ¶ 10.
6. The agency did not enter its final adjudication order on its journal, as required by R.C. 119.09. Therefore, even though a certified copy of the order was sent via certified mail to the respondent and the agency kept the original, the order was not ripe for appeal. Note: the agency conceded that the order was not entered on its journal, so the court does not describe of what a journal consists. *Massey v. Ohio Election(s) Comm.*, 10th Dist. Franklin No. 13AP-20, 2013-Ohio-3498.
7. For R.C. 2505.07, journalization of a final order is not required, thus board of zoning appeals order that was sent on agency letterhead, was signed by the assistant planner, and unequivocally stated that the request for variances was denied, was a final order even though the meeting minutes had not yet been approved by the board. *DAMSA, Ltd. v. City of Sandusky*, 6th Dist. Erie No. E-15-036, 2016-Ohio-5069.

#### **J. Service of the Order**

1. The party must be served with a certified copy of the order. R.C. 119.09, ¶ 10.
  - a. A certified copy is a duplicate of an original, certified as an exact reproduction by the officer responsible for keeping the original. *Hughes v. Ohio Dept. of Commerce*, 2007-Ohio-2877, ¶ 14-15.

- b. The agency must maintain the original order in its files. R.C. 119.09, ¶ 10.
- c. The following language is recommended for the certification:

State of Ohio  
County of \_\_\_\_\_, SS

I, [name] the undersigned [Director/Chairperson] for the [agency/board commission] hereby certify that the foregoing is a true and exact reproduction of the original order of the [agency/board/ commission], entered on its journal on the \_\_\_ day of \_\_\_\_\_,[year].

\_\_\_\_\_[signature]\_\_\_\_\_  
Name  
Title  
Date

(seal)

- 2. The agency must send a certified copy of the order to the party by certified mail.
  - a. If delivery fails, the agency may use other methods of service as provided, R.C. 119.07.
  - b. See failure of delivery of notice, supra.
- 3. The agency must also mail a copy of the order to the party’s attorney. There is no requirement that the copy to be sent to the attorney be certified. *Kellough v. Ohio State Bd. of Edn.*, 10th Dist. Franklin No. 10AP-419, 2011-Ohio-431, ¶ 35
- 4. Note: There are differences between the service requirements for an order and for a report and recommendation. A report and recommendation must be sent by certified mail to the party OR the party’s attorney. For the order, both the party and the attorney must be served. However, the party must be served with a certified copy by certified mail, and the attorney may be served with an uncertified copy by regular mail.
- 5. The time period for appeal of an agency decision does not commence until the party is properly served with the agency’s order. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶ 12; *Sun Refining Marketing Co. v. Brennan*, 31 Ohio St.3d 306, 308 (1987).
- 6. The agency is not required to research the respondent’s current address. The address given on the application with the agency is enough for proper service of the final

adjudication order. *Jones v. Ohio Motor Vehicle Dealers Bd.*, 10th Dist. Franklin No. 12AP-785, 2013-Ohio-1212.

7. Final order sent via certified mail and returned “unclaimed,” and then resent via ordinary mail and not returned as undeliverable, was properly served pursuant to R.C. 119.07. When an agency serves via certified mail the final adjudicatory order upon the respondent at the address on file with the agency, which mailing is returned as “unclaimed,” and the agency then sends the order via ordinary mail obtaining a certificate of mailing, which mailing is not returned, the agency has perfected service as required by R.C. 119.09. *Oakes v. Ohio Dept. of Pub. Safety*, 11th Dist. Trumbull No. 2014-T-0010, 2014-Ohio-5314. Appeal time commences on the date the order was sent via ordinary mail. Civ.R. 6(E) (3-day mail rule) does not apply to appeals delineated by statute. *Coleman v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 12-AP-869, 2013-Ohio-2073, ¶ 12; *Redding v. Ohio Dept. of Agriculture*, Hamilton C.P. No. A 1206435 (July 18, 2013).
8. The agency bears the burden of proving the date on which the final order was sent to the party. Without evidence linking the tracking number in the post office’s tracking sheet to the final order, the agency did not meet its burden. *Helms v. Summit Cty. Combined Gen. Health Dist.*, 9th Dist. Summit No. 28554, 2017-Ohio-7915.

#### **K. Continuing Jurisdiction of Agency over Orders**

An agency continues to have jurisdiction to modify its final orders until the actual institution of an appeal therefrom or the expiration of the time for an appeal. *Diltz v. Crouch*, 173 Ohio St. 367 (1962).

#### **L. Effect of Orders – Claim/Issue Preclusion**

1. Issue preclusion/collateral estoppel precludes the relitigation of an issue actually and necessarily litigated and determined in a prior action.
2. Claim preclusion/res judicata applies to administrative proceedings that are of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding. *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263 (1987); *Cooper v. Administrator of Ohio Bur. of Workers’ Compensation*, 12th Dist. Warren Nos. CA99-07-082 and CA99-09-108, 2000 Ohio App. LEXIS 2268, \*7 (May 30, 2000).
3. Res judicata does not bar agency’s proposed denial of application for license renewal after having already brought an action to revoke the license based on the same charges. *Elhanise, Inv. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 13AP-937, 2014-Ohio-2243.

4. An agency's denial of a license application or a license reinstatement application is not tantamount to a permanent revocation. The applicant may file new applications in the future, but the agency is under no obligation to grant the application in lights of past transgressions. *Shree Swaminarayam Corp. v. Ohio Lottery Comm.*, 2016-Ohio-2641, 63 N.E.3d 768, ¶ 12 (8th Dist.).
5. Application of issue preclusion/collateral estoppel
  - a. In order to prevail on the defense of collateral estoppel, a party must plead and prove that:
    - (1) the party against whom estoppel is sought was a party in privity with a party to the prior action;
    - (2) there was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue;
    - (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and
    - (4) the issue must have been identical to the issue involved in the prior suit.
  - b. Identity of the issues

A judgment or decree in a former action does not bar a subsequent action when the causes of action are not the same, even though each action relates to the same subject matter. To determine whether a second action was barred by this rule of law, one of the primary considerations is the identity of the evidence necessary to sustain the action. *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395 (1998).
  - c. Mutuality of the parties

In Ohio, the general rule is that mutuality of parties is a pre-requisite to collateral estoppel, or issue preclusion. As a general principle, collateral estoppel operates only where all of the parties to the present proceeding were bound by the prior judgment. A judgment, in order to preclude either party from relitigating an issue, must be preclusive upon both. A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. *Goodson v. McDonough Power Equip.*, 2 Ohio St.3d 193 (1983), syllabus.
  - d. A final, unappealed judgment on the merits that may have been wrong or rested on a legal principle subsequently overruled in another case does not alter the preclusive

consequences of that judgment. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424 (1981).

- e. Res judicata/collateral estoppel applies to administrative decisions of a judicial nature.
  - (1) “Ordinarily, where an administrative proceeding is of a judicial nature and where the parties have had an adequate opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding.” *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133 (1980), syllabus.
  - (2) The Supreme Court has further held, however, that the doctrine should be applied with flexibility in the administrative context. *Jacobs v. Teledyne*, 39 Ohio St.3d 168, 171 (1988).
- f. Findings made in civil litigation involving licensee and the board’s complainant can preclude re-litigating issues when the board’s interests align with the complainant’s such that privity is established, and, despite the default judgment, the matter was actually litigated (here evidence was admitted and determinations made at a damages hearing). Those determinations can constitute reliable, probative, and substantial evidence of a licensee’s misconduct for purposes of the board’s disciplinary order. *Fidler v. Accountancy Bd. of Ohio*, Franklin C.P. No. 17CVF-11213 (Oct. 29, 2018) (no appeal taken).

## **M. Final Appealable Orders**

- a. Board of Zoning Appeals order that required conditions be fulfilled before the applicant could use the property as requested and before the Board would approve the application was not a final appealable order. Review may be sought after the Board approves the final plan. *Tramontana v. Vermilion Fish & Game*, 6th Dist. Erie No. E-14-127, 2015-Ohio-3301.
- b. Letter by zoning official directing applicant to file a complete application for zoning variance approval is not a final appealable order. *Golf Village N., LLC v. City of Powell*, 5th Dist. Delaware No. 17 CAH 04 0024, 2018-Ohio-151.

## **IX. APPEALS (R.C. 119.12)**

### **A. Who May Appeal**

- 1. No inherent right to appeal

- a. The right to appeal the action or the determination of an administrative body is neither inherent nor inalienable. At common law, the right to appeal may be exercised only by those parties who are able to demonstrate a present interest in the subject matter that has been prejudiced by the action of the body from which the appeal is taken. The right to appeal must be derived from a constitutional or statutory right. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26 (1992); *Corn v. Bd. of Liquor Control*, 160 Ohio St. 9, 11 (1953); *G & D, Inc. v. Ohio State Liquor Control Comm.*, 3rd Dist. Crawford No. 3-02-04, 2002-Ohio-4407, ¶ 12; *Zelnick v. Troy City Council*, 85 Ohio Misc.2d 67, 70 (Miami C.P.1997); *In re Annexation in Mad River Twp.*, 25 Ohio Misc. 175, 176 (Montgomery C.P.1970).
  - b. For a court of common pleas to have subject matter jurisdiction over an appeal of an agency decision, the Ohio legislature must have granted the appellant the right to pursue the appeal. Similarly, an appellant cannot appeal a state agency decision in federal district court, under the court's exercise of supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, if no right to appeal exists under state law. *Lexington Supermarket, Inc. v. USDA*, 84 F.Supp.2d 886, 889 (S.D. Ohio 1999). Likewise, when a federal program funded with federal dollars has a regulatory scheme that (1) clearly defines the method of resolving claims as comprising an independent hearing and (2) mandates that the hearing determination is the final administrative determination, Ohio's R.C. Chapter 119 administrative appeal process may not be used to appeal the hearing determination. *Mahoning-Youngstown Community Action Partnership v. Ohio Dept. of Edn.*, 10th Dist. Franklin Nos. 11AP-582 and 11AP-83, 2011-Ohio-394.
  - c. R.C. 119.12 governs appeals taken pursuant to R.C. Chapter 119. When a statute provides for appeal of an administrative agency's decision but does not reference the statute pursuant to which the appeal must be taken, R.C. Chapter 2505 governs the procedure for administrative appeals. *Deaconess Hosp. v. Ohio Dept. of Job and Family Serv.*, 10th Dist. Franklin No. 11AP-259, 2012-Ohio-95.
  - d. When statute provides that an agency's decision is "final" and does not include a separate specific, statutory grant of jurisdiction to the trial court under R.C. 119.12, appeal pursuant to R.C. 119.12 is precluded. *Electronic Classroom of Tomorrow v. Ohio State Bd. of Edn.*, 10<sup>th</sup> Dist. Franklin No. 17AP-767, 2019 Ohio 1540. Follows *Brookwood Presbyterian Church v. Ohio Dept of Edn.*, 127 Ohio St.3d 469, 2010-Ohio-5710. On February 3, 2020, ECOT filed a notice of appeal and memorandum in support of jurisdiction with the Ohio Supreme Court (Case No. 2020-0182).
2. The right to appeal administrative decisions is provided only through statute.

- a. Where a right to appeal is provided only through statute, the party must strictly comply with the statutory requirements for filing an appeal. *Ramsdell v. Civil Rights Comm.*, 56 Ohio St.3d 24, 27 (1990); *Holmes v. Union Gospel Press*, 64 Ohio St.2d 187, 188 (1980).
  - b. R.C. Chapters 2505 and 2506 are inapplicable to administrative appeals that are governed by R.C. Chapter 119, therefore notices of appeal must conform to R.C. 119.12. *Geraldine Laster, et al. v. Ohio State Board of Cosmetology*, Franklin Co. C.P. No. 15CVF-11333 (Feb. 25, 2016). Court of common pleas lacks subject matter jurisdiction to consider the appeal of a state agency's order if that appeal is brought pursuant to R.C. 2506.01. Appeals of state agencies' decisions must be brought pursuant to R.C. 119.12. *State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.*, 22 Ohio St.3d 1, 7 (1986); *Anchor Lodge Condominium Assn. v. Ohio Dept. of Health*, Franklin C.P. No. 10CV 7389, 2010 Ohio Misc. LEXIS 19597, \*1 (Nov. 2, 2010).
  - c. The phrase "unless otherwise provided by law" in R.C. 2505.07, setting forth the deadline for filing a notice of appeal of any agency's final order, refers to the other state statutes, and does not permit a city via local ordinance to change the deadline. *Black v. Calvert*, 5th Dist. Fairfield No. 15-CA-42, 2016-Ohio-2712.
3. Party adversely affected
- a. "Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, . . . may appeal from the order of the agency." R.C. 119.12, ¶ 1.
  - b. "Party" is defined as "the person whose interests are the subject of an adjudication by an agency." R.C. 119.01(G).
  - c. "Person" is defined as "a person, firm, corporation, association, or partnership." R.C. 119.01(F).
  - d. Unless a statute provides otherwise, no person may appeal from an adjudicatory order of an administrative agency to which he was not a party. *Harrison v. Public Utilities Comm.*, 134 Ohio St. 346, 347 (1938); *Northeast Ohio Harness v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 85AP-221 (Jul.18, 1985); *Blue Cross of Northeast Ohio v. Ratchford*, 21 Ohio App.3d 113, 114 (10th Dist.1984); *Lebanon Trotting Club, Inc. v. Ohio State Racing Comm.*, Franklin C.P. No. 13CV 5488 (Jul. 3, 2014).
  - e. Government entities as parties for purposes of R.C. 119.12



- (1) Neither the state, a state agency, nor its director was a “party” within the meaning of R.C. 119.01(G). *State ex rel. Osborn v. Jackson*, 46 Ohio St.2d 41, 47 (1976); rev’d on other grounds, *Dept. of Admin. Serv. v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 49 (1990); *Collyer v. Broadview Developmental Ctr.*, 74 Ohio App.3d 99, 102 (10th Dist.1991).
- (2) When the State acts merely as an adjudicator, without an independent interest in the matter, the State is not a proper party to an appeal pursuant to 119.12. *Haig v. Ohio State Bd. of Edn.* (1992), 62 Ohio St.3d 507, 510; *Akron City School Dist. Bd. of Edn. v. Parents of Students Attending Edge Academy of Akron & Ida B. Wells Community School*, 10th Dist. Franklin No. 01AP-786, 2002 Ohio App. Lexis 1285 (Mar. 21, 2002).
- (3) An administrative body performing the quasi-judicial function of hearing appeals, not being the administrative body that issued the decision being appealed, and not having a legally cognizable interest in the outcome, is not proper party to an administrative appeal of its decision. Here, the city civil service board heard the appeal from a decision of the city school board, and therefore the civil service board was not a proper party in the appeal to common pleas. *Dayton Pub. Schools v. Dayton Civ. Serv. Bd.*, 2nd Dist. Montgomery No. 26133, 2014-Ohio-4702.
- (4) County governmental units were persons and therefore parties entitled to appeal within the meaning of R.C. 119.01. *Hamilton Cty. Bd. of Mental Retardation and Dev. Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 150-51 (1989).
- (5) An “appointing authority” has no right of appeal to the common pleas court from a decision of the state personnel board of review disaffirming a job-abolishment by such appointing authority because the appointing authority is not a “party” whose interests are the subject of the adjudication nor is it adversely affected by the decision. *In re Job Abolishment of Jenkins*, 120 Ohio App. 385, 387 (10th Dist.1963) (*State ex rel. Osborn*, 46 Ohio St.2d 41, 47-50 (1976); compare *Seneca County Bd. of Mental Retardation & Dev. Disabilities v. Siesel*, 3rd Dist. Seneca No. 13-02-15, 2002-Ohio-4235, ¶ 6 (Ohio State Personnel Board of Review decisions may be appealed by a county board of mental retardation and development to the courts of common pleas pursuant to R.C. Chapter 119).
- (6) Appeals of administrative adjudicatory orders by combined joint health districts are governed by R.C. 119.12. The combined joint health district is made up of multiple counties pursuant to R.C. 3709.01 and is therefore a state agency for purposes of R.C. Chapter 119. *Helms v. Summit Cty. Combined Gen. Health Dist.*, 9th Dist. Summit No. 28554, 2017-Ohio-7915.

- f. A party is not adversely affected for purposes of R.C. 119.12 when there is no agency determination (here the state agency remanded the matter to the county agency for a new determination). Without an adversely affected party, the court of common pleas lacks jurisdiction to consider the appeal. *Johnson v. Ohio Dept. of Job and Family Serv.*, 8th Dist. Cuyahoga No. 98918, 2013-Ohio-1451.

## **B. Other Parties**

1. A bank that receives notice pursuant to R.C. 1111.02 of a hearing on an application for the establishment of a new branch by an applicant bank is a “party adversely affected” under R.C. 119.12, and has standing, under R.C. 119.12, to appeal an order by the superintendent of banks granting the application. *Clermont Natl. Bank v. Edwards*, 27 Ohio App.2d 91 (10th Dist.1970), paragraph one of the syllabus.
2. Community residents had no right to appeal, pursuant to R.C. 119.12, a certificate of plan approval granted to a real estate developer for the construction of a mall complex. *Pinkney v. Ohio Dept. of Industrial Relations*, 10th Dist. Franklin. No. 74AP-231, 1974 Ohio App. LEXIS 3041, \*4-5 (Sept. 17, 1974).
3. Residents of a school district had no right to appeal a decision of the State Board of Education assigning or joining a school district to a joint vocational school district, as they are not parties under R.C. 119.12. Only the local school board could bring the appeal. *Barnes v. State Bd. of Edn.*, 10th Dist. Franklin No. 76AP-423, 1976 Ohio App. LEXIS 8150, \*6 (Dec. 14, 1976).

## **C. Notice of Appeal**

1. Content of Notice of Appeal
  - a. The notice of appeal must set forth the order appealed from and state that the order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. R.C. 119.12, ¶ 4.
  - b. Setting forth the order appealed from: attach OR sufficiently describe.
    - (1) Attaching a copy of the order satisfies the requirement to set “forth the order appealed.” *Hunnewell v. Ohio State Bd. of Nursing*, Franklin C.P. No. 05CVF06-6560 (June 15, 2006).
    - (2) The party need not attach a copy of the order as long as the appellant sufficiently describes the order appealed from. *Johnson v. Ferguson-Ramos*, 10th Dist. Franklin No. 05AP-511, ¶ 10 (Dec. 6, 2005).

c. Required language

- (1) The notice of appeal must state that the order is not supported by reliable, probative, and substantial evidence, and is not in accordance with law. R.C. 119.12, ¶ 4. “Magic language” from R.C. 119.12 (not supported by reliable probative and substantial evidence and not in accordance with law) is required in a notice of appeal. *Fisher v. Ohio Bureau of Motor Vehicles*, Lorain C.P. No. 14CV182657 (June 5, 2014). Notice of appeal without the “magic language” does not confirm to R.C. 119.12, and therefore is jurisdictionally defective. *Laster v. Ohio State Bd. of Cosmetology*, Franklin C.P. No. 15CVF-11333 (Feb. 25, 2016).
- (2) Notice of appeal stating “there is no evidence that I caused damage to the witness’s vehicle” adequately alleges that the agency’s order was not supported by the evidence, and thus meets the requirement of R.C. 119.12. *Lee v. Bureau of Motor Vehicles*, Hamilton C.P. No. A1700293 (Mar. 14, 2017).
- (3) An appellant’s notice of appeal of an administrative agency’s final order must name the appellee agency. Without it, the common pleas court lacks subject-matter jurisdiction to hear the appeal. *Home Health Accessibility, LLC v. Ohio Dept. of Medicaid*, 10th Dist. Franklin No. 18AP-488, 2019-Ohio-487, ¶ 8.

2. Form of the Notice of Appeal

- a. Effective May 8, 2009, the General Assembly revised R.C. 119.12 to remove the requirement to file the original notice of appeal with the agency, and a copy with the court. The statute now provides that, “[i]n filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice.” R.C. 119.12, ¶ 4.
- b. The notices of appeals filed with the agency and with the court of common pleas must be identical, although both may be originals or an original and a copy. Distinguishes *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499. *Legleiter v. Ohio Dept. of Edn.*, 10th Dist. Franklin No. 12AP-253, 2012-Ohio-5668.
- c. The notice of appeal filed with the agency and with the court of common pleas need not be exact copies of each other as long as they timely inform the respective recipients of the respondent’s intent to appeal the agency’s order. *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499, ¶ 39. The notice of appeal need not contain the language specified by R.C. 119.12 (that “the agency’s order is not supported by reliable, probative, and substantial evidence and is not in accordance with law”)—the filing of the notice of appeal is an affirmative statement that the respondent believes that the underlying order is not supported by

reliable, probative and substantial evidence and/or is not in accordance with law. *Zidian v Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499, ¶ 43-44.

#### **D. Where and How to File**

1. Under R.C. 119.12, the notice of appeal must be filed with the agency and with the appropriate court of common pleas. *Dudukovich v. Lorain Metro.*, 58 Ohio St.2d 202, 204 (1979). The notices that are filed with the agency and with the court may be either the original notice or a copy of the notice. R.C. 119.12(D). Service on counsel for the agency does not satisfy R.C. 119.12(A)(1)'s requirement that the notice of appeal be filed with the agency. *Salyers v. Ohio Dept. of Public Safety, Bur. of Motor Vehicles*, Lucas C.P. No. G-4801-CI-201503828-000 (Nov. 5, 2015).
2. For appeals filed pursuant to R.C. 119.12, there is a split in the courts as to the whether or not the mere forwarding of a copy of a notice of appeal by a court, pursuant to its routine administrative practice, is sufficient to confer jurisdiction on that court. In *Mahmoud v. Medical Bd. of Ohio*, Franklin C.P. No. 13CVF02-1907 (May 2, 2013), the Franklin County Court of Common Pleas held that service by the court is insufficient even when the agency receives from the court the copy of the notice of appeal within the 15-day time limit. (Court dismissed appeal for lack of jurisdiction because appellant had filed the notice of appeal with the court, which, in turn, served the agency within the 15-day time limit). *See, also, Gacsady v. Ohio Bd. of Cosmetology*, Franklin C.P. No. 12CVF03-02747 (Apr. 30, 2012). But in *Lana v. Ohio Bureau of Motor Vehicles*, Clermont C.P. No. 2014 CVF 01304 (Jan. 25, 2016) the Clermont County Court of Common Pleas held that the trial court has jurisdiction over appeal of an agency order pursuant to R.C. 119.12 when the respondent files the notice of appeal with the court of common pleas, and the clerk timely serves the agency with a copy of the notice.
3. For appeals filed pursuant to R.C. 2505.04, the appeal is perfected when the court serves the agency with a copy of notice of appeal within the time allowed for appeal. *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604.
4. “[W]hen a party chooses to rely on ordinary mail for delivery of the notice of appeal, the party must accept the consequences when that manner of delivery proves inadequate.” *State ex rel. Crabtree v. State Teachers Retirement Sys. Bd. of Ohio*, 10th Dist. Franklin No. 11AP-187, 2012-Ohio-1916, ¶ 12.
5. Place of business is location where person engages in business. Receiving of mail is a function of engaging in business. Despite licensee’s contention that it operates through the internet and cellular phones, and that most of its work is done in one county, the county where the business receives its mail is the county with jurisdiction to hear the

appeal. *ePro Services, LLC v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, Franklin C.P. No. 15CV010060 (Mar. 7, 2016).

6. Which court of common pleas: R.C. 119.12

a. County of place of business or county of residence

(1) In most cases, the notice of appeal must be filed in the common pleas court of the county in which the place of business of the licensee is located or the county in which the licensee is a resident. R.C. 119.12(A)(1).

(2) The party must choose one, not both. The party must choose whether to file a notice of appeal in the county of place of business or the county of residence, and may not file notices of appeal in both counties. *Altoff v. State of Ohio Bd. of Psychology*, 4th Dist. Gallia No. 04CA16, 2006-Ohio-502, ¶ 12.

(3) County of place of business

(a) The county where the dentist worked four days per week, not the county where the dentist worked one day per week, was the county of place of business. *Duchon v. Ohio State Dental Bd.*, Miami C.P. No. 07-564 (July 30, 2007).

(b) Where the psychologist worked twice per month in Gallia County, performing services not regulated by the Psychology Board, Gallia County was not the county of place of business for purposes of an appeal of an order of the Psychology Board. *Altof*, 2006-Ohio-502, at ¶ 15.

b. Franklin County Court of Common Pleas

(1) Appeals from the following agencies must be filed in the Franklin County Court of Common Pleas. R.C. 119.12(A)(2):

(a) Liquor Control Commission

(b) Medical Board

(c) Chiropractic Board

(d) Board of Nursing

(2) If the party is not an Ohio resident, and has no place of business in Ohio, the party may file an appeal in Franklin County. R.C. 119.12(A)(3).

(3) Appeals of adjudications that do not deny an application, revoke or suspend a license may be filed in Franklin County. R.C. 119.12(B).

c. Special designations

(1) Appeals from the fire marshal pursuant to R.C. Chapter 3737 must be filed in the county in which the building of the aggrieved person is located. R.C. 119.12(B). *BP Exploration & Oil, Inc. v. Dept. of Commerce*, 10th Dist. Franklin No. 04AP-619 and 04AP-620, 2005-Ohio-1533; *Peter Garg v. Ohio State Fire Marshal*, Franklin C.P. No. 12CVF-7204 (Oct. 17, 2012).

(2) Appeals from a decision of the State Personnel Board of Review or a municipal or civil service township civil service commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the Department of Rehabilitation and Correction, to the Court of Common Pleas of Franklin County. R.C. 119.12(B).

7. Which court of common pleas: R.C. 2506.01

a. In most cases, the notice of appeal made pursuant to R.C. Chapter 2506 must be filed in the court of common pleas of the county in which the principal office of the political subdivision from which an order is being appealed is located. R.C. 2506.01(A).

b. R.C. Chapter 2505 governs the manner for filing appeals under R.C. 511.42(C). *Deaconess Hosp. v. Ohio Dept. of Job and Family Serv.*, 10th Dist. Franklin No. 11AP-259, 2012-Ohio-95.

c. R.C. 2505.04 requires to invoke the court of common pleas' jurisdiction only that a notice of appeal be filed with the commission within 30 days. The appellant need not file a notice with the court. *Slusser v. City of Celina*, 3d Dist. Mercer No. 10-15-09, 2015-Ohio-3721. Pursuant to 2505.07, the notice of appeal of an administrative agency's final order must be received by the agency within 30 days of the date the agency mailed to the respondent the copy of the final decision. *Digonna v. Hamilton*, 12th Dist. Butler No. CA 2018-08-168, 2019-Ohio-2273.

d. Civ.R. 4.2(N), governing service of a complaint upon a municipality, is not applicable to an administrative appeal taken pursuant to R.C. Chapter 2506. *Huffman v. City of Cleveland*, 8th Dist. Cuyahoga No. 103447, 2016-Ohio-496.

**E. Time for Filing the Notice of Appeal**

1. Pursuant to R.C. 119.12, both notices of appeal, one to the agency and the other to the court, must be filed within 15 days of the mailing of the agency's order. R.C. 119.12,

- ¶ 4; *Yeager v. Mansfield*, 5th Dist. Richland No. 2011 CA 0085, 2012-Ohio-2908, ¶ 28 (R.C. 2505.07); *Nibert v. Ohio Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 103 (1998); *Bailey v. Ohio Dept. of Admin. Serv.*, 114 Ohio Misc.2d 48, 51 (Franklin C.P.2000). Service by the clerk of courts upon the agency is insufficient, even if the agency receives it within the allowable time period. *Ruiz v. Ohio State Dept. of Public Safety*, Franklin C.P. No. 15CVF-01-782 (Mar. 18, 2015).
2. Failure to file the notice of appeal with the appropriate agency within the fifteen-day limit provided for in R.C. 119.12 deprives the court of jurisdiction over the appeal and mandates dismissal. *Morrison v. Ohio Dept. of Ins.*, 4th Dist. Gallia No. 01CA13, 2002-Ohio-5986, ¶ 14; *Nibert*, 84 Ohio St.3d at 102; *Harrison v. Ohio State Med. Bd.*, 103 Ohio App.3d 317, 321 (10th Dist.1995); *Arndt v. Scott*, 72 Ohio Law Abs. 189 (2d Dist.1955).
  3. The actual mailing date of the order is the event that triggers the appeal period. *Colonial, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 02AP-1019, 2003-Ohio-3121, ¶ 13; *Geroc v. Ohio Veterinary Med. Bd.*, 37 Ohio App.3d 192, 195 (8th Dist.1987).
  4. Thirty day period within which a notice of appeal must be filed pursuant to R.C. 2515.07 begins when an administrative agency enters a final order, adjudication, or decision, not when it orally votes on that decision. *Lupo v. Columbus*, 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792.
  5. Proper service pursuant to R.C. 119.12 is a condition precedent to the running of the time for appeal. *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶ 1 of the syllabus.
  6. Notice of opportunity for hearing and final order were sent via certified mail, returned “unclaimed,” and then sent via regular mail and not returned. Licensee had moved, but failed to notify the board of his new address. The court held that the notice of appeal of the final order was filed late when it was filed outside the 15-day deadline set forth in R.C. 119.12 because (1) R.C. 119.12 required 15 days, and (2) the licensee failed to inform the board of his new address. *Coleman v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 12AP-869, 2013-Ohio-2073.
  7. The jurisdictional requirements for filing a notice of appeal pursuant to R.C. 119.12 are met if the notice is timely received by the agency and the court of common pleas, even if the clerk of courts refuses to accept the notice of appeal because the security deposit was not tendered. The receipt of the security deposit is not a jurisdictional requirement. *Bobbs v. Longview State Hosp.*, 10th Dist. Franklin No. 79AP-357 (Nov. 8, 1979).
  8. Amendments to a notice of appeal can be made during the 15-day period following the mailing of the notice of the agency order as set forth in R.C. 119.12. However, an

amendment must occur within the 15-day period, and an amendment made after that will not be successful. *McCullough v. Registrar of the Bur. of Motor Vehicles*, Cuyahoga CP No. CV-14-830412 (Sept. 18, 2014); *Home Health Accessibility, LLC v. Ohio Dept. of Medicaid*, 10th Dist. Franklin No. 18AP-488, 2019-Ohio-487, ¶ 8.

9. R.C. 2505.07 provides the general timeline for appeal of an administrative decision and applies unless otherwise specifically provided. *Bode v. Concord Twp. Bd. of Trustees*, 11th Dist. Lake No. 2018-L-043, 2019-Ohio-2666.
10. The agency must receive the notice of appeal by whatever method used for delivery (here the clerk of courts) by the deadline set forth in R.C. 2505.27 (30 days). *Henson v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 104274, 2016-Ohio-8146.
11. R.C. 1.14 applies to an administrative appeal taken pursuant to R.C. Chapter 2505, so that if the 30-day deadline to file the notice of appeal falls on a Sunday, the notice may be filed on the following day that is not a holiday. *NVR, Inc. v. City of Centerville*, 2016-Ohio-6960, 71 N.E.3d 745 (2d Dist.).

#### **F. Finality of Final Order**

1. Pursuant to R.C. 2505.07, the notice of appeal must be filed within 30 days following the agency's entry of its final order. A village's final order is entered upon the entry of the resolution, order, or directive in the official minute book. *Cline v. Village of New Lexington*, 5th Dist. Perry No. 15 CA 00003, 2015-Ohio-3727, ¶ 31.
2. Appeal time begins to run when board approves/memorializes the minutes at which the discipline was announced. *Bode v. Concord Twp. Bd. of Trustees*, 11th Dist. Lake No. 2018-L-043, 2019-Ohio-2666.
3. For R.C. 2505.07, appeal time begins to run on date the agency issues the order ("entry of a final order"). *DAMSA, Ltd. v. City of Sandusky*, 6th Dist. Erie No. E-15-036, 2016-Ohio-5069, ¶ 15.
4. Due process requires that an agency's decision becomes final and appealable when the respondent is provided a copy of the final decision. *Safety 4th Fireworks, Inc. v. Liberty Twp. Bd. of Trustees & Liberty Twp. Bd. of Zoning Appeals*, 12th Dist. Butler No. CA2019-04-053, 2019-Ohio-3435.

#### **G. Suspension (Stay) of Agency's Order on Appeal**

1. A stay of execution of the agency's order pending appeal is not automatic.
  - a. The filing of an appeal does not automatically operate to suspend or stay the agency's order, R.C. 119.12, ¶ 5.



- b. Normal practice is for the appellant to file a motion for stay or suspension of the agency's order after filing the notice of appeal.
2. Granting of suspension of the order
- a. Because the filing of a notice of appeal pursuant to R.C. 119.12 does not automatically operate as a suspension, the appellant bears the burden of proving that a stay is appropriate. *Walsh v. Ohio Bur. of Motor Vehicles*, Fairfield C.P. No. 15CV143 (Apr. 7, 2015).
  - b. Unusual Hardship required. A court may grant suspension of an agency's order if it appears that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal. R.C. 119.12, ¶ 5.
    - (1) "Unusual hardship" is more than the mere loss of the right to practice one's profession. *See Leo D'Souza, M.D. v. The State Medical Bd. of Ohio*, Franklin C.P. No. 08CVF-05-7342 (June 12, 2008); *Dolce v. State Bd. of Chiropractic Examiners*, Franklin C.P. No. 92CVF11-9231 (Mar. 10, 1993).
    - (2) Expected financial hardship of losing one's license is not "unusual hardship" required for a stay. *See Gill v. Ohio State Med. Bd.*, Franklin C.P. No. 07-CVF09-11839 (Sept. 14, 2007), at 4 (Court held that, "[t]he loss of income, property, clients, employees and reputation are all inherent results of the revocation of a medical license" and therefore do not constitute an unusual hardship.); *Roy v. State Med. Bd. of Ohio*, Franklin C.P. No. 93CVF05-3734 (Aug. 9, 1993); *Hoffman v. Ohio State Med. Bd.*, Franklin C.P. No. 93CVF09-6881 (Dec. 29, 1993) (foreseeable financial hardship alone is not unusual hardship); Economic hardship of the revocation of a commercial driver's license does not cause an "unusual hardship," thus a stay of the agency's order is not appropriate. *Walsh v. Ohio Bur. of Motor Vehicles*, Fairfield C.P. No. 15CV143 (Apr. 7, 2015); *Williams v. State of Ohio Dept. of Ins.*, Franklin C.P. No. 93CVF08-5808 (Jan. 12, 1994); *Roland v. Ohio State Dental Bd.*, Franklin C.P. No. 94CVF05-3308 (June 6, 1994); *Essig v. Ohio State Med. Bd.*, Franklin C.P. No. 94CVF10-7097 (Nov. 2, 1994). Loss of practice, home, ability to support family and reputation in the community are predictable consequences of a license suspension, and thus do not qualify as unusual hardship. *de Bourbon v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 16AP-669, 2017-Ohio-5526.
    - (3) In *Larach v. Ohio State Med. Bd.*, Franklin C.P. No. 96CVF05-3566 (June 5, 1996), the licensee alleged that the Medical Board may report his suspension to the National Practitioners Data Bank, and that certain insurance plans, HMOs and PPOs would then require the termination of any suspended physician from

their reimbursement policies. The court found that this would amount to an unusual hardship.

- (4) Suspension of practice in another state is not an "unusual hardship." *Hazem S. Garada, M.D. v. State Med. Bd. of Ohio*, Franklin C.P. No. 98CVF06-4873 (July 10, 1998).
- (5) There is no usual hardship in simply having to find a new place to work. *Karen Burden v. Ohio Dept. of Job and Family Serv.*, Franklin C.P. No. 10CV12006 (Oct. 5, 2010).
- (6) Court applied factors from *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App.3d 777, 782, 753 N.E.2d 864 (10th Dist.2001), and held that because (1) the board's restrictions on employment do not prohibit respondent from working as a licensed nurse, (2) the cause of respondent's embarrassment, humiliation and emotional distress is due to her own acts, and not the board's order, and (3) the board offered respondent all process due her, she did not suffer unusual hardship, and affirmed the trial court's denial of the motion to stay execution of the board's order. *Prince-Paul v. Ohio Bd. of Nursing*, 2015-Ohio-3984, 43 N.E.3d 13 (10th Dist.).
- (7) Loss of business, for which nothing will compensate, as opposed to just the loss of sole source of income, constitutes unusual hardship. *Groves v. Ohio State Racing Commission*, Franklin C.P. No. 19CV1608 (Mar. 20, 2019) (Decision on Motion for Stay of Execution). (Final decision appealed to the 10th Dist. in the 10<sup>th</sup> Dist. Franklin No. 19AP-577. No decision at time of printing.)
- (8) When the agency fails to cite to actual harm to the public, the court will find that the health, safety, and welfare of the public will not be threatened by a suspension of the agency's order. *Groves v. Ohio State Racing Commission*, Franklin C.P. No. 19CV1608 (Mar. 20, 2019) (Decision on Motion for Stay of Execution) and (October 3, 2019) (Decision on Motion for Stay of Enforcement During Appeal).

c. Other Factors to Consider

- (1) Medical Board and Chiropractic Board
  - (a) For appeals from these boards, it must also be shown that granting a suspension will not threaten the "health, safety, and welfare of the public." See R.C. 119.12, ¶ 5.
  - (b) The Medical Board determined that a doctor's over-prescription of drugs with indifference to the prescription abuses of his patients allegedly contributed to the suicides of three patients. The Court found that such an

allegation constitutes a threat to the health, safety, and welfare of the public. *Haw-Chyr Wu v. Ohio State Med. Bd.*, Franklin C.P. No. 96CVF09-7055 (Oct. 9, 1996). *See, also, O. Herman Dreskin, M.D. v. State Med. Bd. of Ohio*, Franklin C.P. No. 97CVF-09-8830 (Oct. 27, 1997).

- (2) Logical considerations: The Court of Appeals for the Tenth Appellate District has held that the following factors are “logical considerations” when determining whether to stay an administrative order pending appeal:
- (a) whether the appellant has shown a strong or substantial likelihood or probability of success on the merits;
  - (b) whether the appellant has shown that it will suffer irreparable injury;
  - (c) whether the issuance of a stay will cause harm to others; and
  - (d) whether the public interest would be served by granting a stay.

*Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 783 (10th Dist.2001); *Leo D'Souza, M.D. v. The State Medical Bd. of Ohio*, Franklin C.P. No. 08CVF-05-7342 (June 12, 2008). Factors from *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App.3d 777, 753 N.E.2d 864 (10th Dist.2001), are not required. The ultimate question is set forth in R.C. 119.12(E): unusual hardship and threat to the health and safety and welfare of the public. *de Bourbon v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 16AP-669, 2017-Ohio-5526.

- (3) The court generally has broad discretion on what factors to consider in granting a suspension of the agency’s order. Deciding a motion for suspension of agency order is wholly within sound discretion of the trial court. Standard of review of trial court decision on this issue is “abuse of discretion.” *Hunter v. City of Cincinnati Civil Service Comm.*, 1st Dist. Hamilton No. C-800651, 1981 Ohio App. LEXIS 13852, \*9-10 (Sept. 9, 1981).

#### 4. Terms of the suspension

- a. In granting a suspension of an agency’s order, the Court may fix the terms of the suspension order. R.C. 119.12, ¶ 5.
- b. The Court may set terms during duration of suspension including restrictions on practice. *See, e.g., Fattah v. Ohio State Med. Bd.*, Franklin C.P. No. 92CVF05-4202 (July 15, 1992).

- c. An order denying a stay of an agency's order may constitute a final appealable order when the court will be unable to fashion a remedy to repair the appellant's loss. *Krihwan*, 141 Ohio App.3d at 781-82 (10th Dist.2001).
5. Duration of the stay/suspension of the agency's order
- a. Generally, suspension of the order remains in effect until the matter is "finally adjudicated," that is, until all appeals are exhausted and agency's order becomes final. R.C. 119.12, ¶ 5.
    - (1) If an appeal is taken from a common pleas court decision when the court previously granted a suspension of the agency order, then the suspension "shall not be vacated" and will continue until the matter is finally adjudicated. *See* R.C. 119.12, ¶ 5.
    - (2) Generally where a timely appeal is taken from a trial court order, any trial court order suspending an agency order will remain in effect until the appellate process is complete.
    - (3) However, the trial court order will expire at the close of the time allowed for perfecting any appeal and the failure of a party to timely perfect an appeal will not revive the expired stay order. *Giovanetti v. Ohio State Dental Bd.*, 63 Ohio App.3d 262, 265 (7th Dist.1991).
  - b. Exceptions
    - (1) Liquor Control Commission, R.C. 119.12, ¶ 7
      - (a) Stays of certain orders by the Liquor Control Commission must terminate no more than six months after the filing of the certified record in the common pleas court.
      - (b) The court is required to enter judgment within six months of filing of the record.
      - (c) The General Assembly set a definite time period for the duration of a suspension of the agency's order, and did not intend for the limit to be evaded with successive stays. *City of Dayton v. Haddix*, 2d Dist. Montgomery No. 9951, 1987 Ohio App. LEXIS 5639, \*6 (Jan. 22, 1987).
    - (2) Medical Board or Chiropractic Board

(a) A court order suspending an order of the Medical Board or Chiropractic Board terminates 15 months after the date of the filing of the appeal, or upon a final decision of the common pleas court, whichever occurs first. R.C. 119.12, ¶ 8.

(i) The stay does not continue on appeal to court of appeals.

(b) Fifteen-month limitation on suspension of agency order is constitutional and does not violate due process or equal protection rights. *Plotnick v. State Med. Bd. of Ohio*, 10th Dist. Franklin Nos. 84AP-225 and 84AP-362, 1984 Ohio App. LEXIS 10933, \*24-25 (Sept. 27, 1984).

#### 6. License renewal and suspended agency orders

- a. A license renewal cannot be denied by reason of an agency order that is on appeal and has been suspended by the court. R.C. 119.12, ¶ 5.
- b. The final adjudication order may apply to a license that was renewed during the appeal (regardless of stay/suspension of agency order). R.C. 119.12, ¶ 6.
- c. Expiration of license shall not affect the appeal. R.C. 119.121.
- d. If appellant wins on appeal, court shall order agency to renew license upon payment of fee. R.C. 119.121.

#### 7. Mootness

If appellant fails to seek a stay of execution of the agency's order and the approved action takes place, then the matter is moot and the appeal must be dismissed. *Osborne v. North Canton*, 5<sup>th</sup> Dist. Stark No. 2016 CA 00175, 2017-Ohio-1116 (Appeal of permit became moot when no stay requested and parking lot construction was completed). See *Pinkney v. Southwick Investments, LLC*, 8th Dist. Nos. 85074 and 85075, 2005-Ohio-4167 (residents sought to prevent land development for certain use; trial court found there were no restrictions on the use of the land; residents appealed, but did not seek a stay; construction was substantially complete by the time the case was heard; appeal moot); *Neighbors for Responsible Land Use v. Akron*, 9th Dist. No. 23191, 2006-Ohio-6966 (Akron approved the building of bus terminal; neighbor appealed, but did not seek stay; appeal moot because construction completed); *Walouke v. Mentor Bd. of Bldg. and Zoning Appeals* (Dec. 28, 1984), 11th Dist. No. 10-136 (neighbors objected to landowner building a garage; zoning board granted variance, neighbors appealed, but did not request a stay; garage was built during pendency of appeal; moot); *Bd. of Commrs. of Montgomery Cty. v. Saunders* (Nov. 2, 2001), 2d Dist. No. 18592 (board sought and obtained easements on landowner's property to construct drainage improvement).

## H. Applicability of Civil Rules to Administrative Appeals

1. Courts have looked to Civ. R. 1 for guidance. Civ. R. 1 provides that the Civil Rules are to be followed in all courts in Ohio in the exercise of civil jurisdiction at law or in equity.
2. Civ. R. 1(C) states that the Civil Rules “to the extent that they would by their nature be clearly inapplicable, shall not apply . . . (7) in all other special statutory proceedings . . . .” An administrative appeal is a special statutory proceeding. *See* D-1 Liquor Permit Filed with the Ohio Dept. of Liquor Control by *Stover v. Bd. of Cty. Commrs.*, 10th Dist. Franklin No. 84AP-1085, 1985 Ohio App. LEXIS 8285, \*4-5 (July 2, 1985) (citing *Sweetbriar Co. v. Liquor Control Comm.*, 8th Dist. Cuyahoga No. 33089, 1974 Ohio App. LEXIS 3871, \*6 (May 30, 1974)) (administrative appeal pursuant to R.C. 119.12 is a special statutory proceeding to which the rules of civil procedure do not apply).
3. Case-by-case determination for special statutory proceedings.
  - a. The Civil Rules are not categorically inapplicable to appeals from administrative orders. Under Civ. R. 1(C), the Rules apply unless by their nature they are clearly inapplicable. The Civil Rules will be applicable to special statutory proceedings that are adversarial in nature, unless there is a good and sufficient reason not to apply the rules. This question must be decided on a case-by-case basis. *Ramsdell v. Ohio Civil Rights Comm.*, 56 Ohio St.3d 24, 27 (1990); *Talley v. Warner*, 99 Ohio Misc.2d 42, 45 (Cleveland M.C.1999) (determinations made on a “rule-by-rule” basis).
  - b. Civil Rules may apply when the common pleas court conducts a trial de novo, as in appeals under R.C. 2506, but not in Chapter 119 appeals. The 11th District has held that when the common pleas court must decide questions of law and fact, such as when an appeal requires a trial de novo, then there is no reason not to apply the Civil Rules; however, the court held that in an appeal under 119.12, the court is limited to the record below, and the court held that Rule 60(B) was inapplicable to such proceedings. *Giovanetti v. Ohio State Dental Bd.*, 66 Ohio App.3d 381, 383 (11th Dist.1990).
  - c. Administrative appeals are special statutory proceedings, and attorneys should look to the statute granting the right of appeal to determine whether the rules guide the procedure.
  - d. Civ. R. 1 is clearly a rule of inclusion rather than exclusion. To the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are “clearly inapplicable.” The Civil Rules should be held to be clearly inapplicable

only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action. *Price v. Westinghouse*, 70 Ohio St.2d 131, 133 (1982).

4. Decisions on particular civil rules.
  - a. Rule 59 (Motion for new trial) is not applicable to administrative appeals. A court of common pleas has no authority to grant a new trial pursuant to Civ. R. 59(C), because a trial was never conducted by the court of common pleas. In interpreting the authority of a common pleas court in reviewing state agency decisions under analogous R.C. 119.12, several appellate courts have held that a common pleas court has no power to grant a new trial from a judgment rendered in an administrative appeal. *See Ohio State Medical Bd. v. PLA*, 42 Ohio App.3d 239, 240 (8th Dist.1988); *Shady Acres Nursing Home, Inc. v. Bd. of Bldg. Appeals*, 50 Ohio App.2d 391 (11th Dist.1976), syllabus; *See, also, Warren v. Bd. of Cty. Comms.*, 11th Dist. Portage No. 94-P-0056, 1995 Ohio App. LEXIS 2301, \*3-4 (June 2, 1995) (political subdivision appeal under R.C. Chapter 2506).
  - b. Civ.R. 59 can be applicable to the common pleas appeal of an administrative decision, but only when a proceeding took place in which the parties or counsel presented evidence and argument in court to a trial judge or magistrate. *Gallick v. Franklin Cty. Bd. of Revision*, 2018-Ohio-818, 108 N.E.3d 237 (10th Dist.).
  - c. Rule 60(B) (Motion for relief from judgment) is not applicable to administrative appeals. *Buchler v. Ohio Dept. of Commerce*, 110 Ohio App.3d 20, 22 (8th Dist.1996); *McConnell v. Ohio Bur. of Emp. Servs.*, 10th Dist. Franklin No. 96APE03-360, 1996 Ohio App. LEXIS 3889 (Sept. 3, 1996); *Giovanetti v. Ohio State Dental Bd.*, 66 Ohio App.3d 381 at 383 (11th Dist.1990); *In re Multi-Fund of Columbus, Inc.*, Franklin C.P. No. 09CVF-12-18865 (Mar. 29, 2011).
  - d. A stay order under Civil Rule 62(A) is not applicable to an administrative appeal. *Sweetbriar Co. v. Liquor Control Comm.*, 8th Dist. Cuyahoga No. 33089, 1974 Ohio App. LEXIS 3871, \*5 (May 30, 1974).
  - e. Rules 60(A)(4) and (5) (motion for relief from judgment) are not applicable to an administrative appeal. *Sweetbriar*, 1974 Ohio App. LEXIS 3871, at \*6.
5. Local rules of a court of common pleas, such as rule setting page limitations for briefs, may be enforced in an administrative appeal. *Boggs v. Ohio Real Estate Comm.*, 186 Ohio App.3d 96, 2009-Ohio-6325 (10th Dist.), ¶ 42.

## I. Certification of the Record

1. Pursuant to R.C. 119.12, an agency is required to prepare and certify to the court a complete record of the proceedings in the case.
2. Time for filing
  - a. A record must be filed within thirty days after receipt of a notice of appeal. R.C. 119.12, ¶ 9. *See Schupp v. City of Cincinnati Civ. Serv. Comm.*, 1st Dist. Hamilton No. C-020176, 2002-Ohio-7077, ¶ 11; *Geroc v. Ohio Veterinary Med. Bd.*, 8th Dist. Cuyahoga No. 59100, 1991 Ohio App. LEXIS 5350, \*17 (Nov. 7, 1991).
  - b. Additional time may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. R.C. 119.12, ¶ 9.
3. Content of the record
  - a. Complete record of the proceedings
    - (1) “Complete record of proceedings” was defined by the court in *Checker Realty Co. v. Ohio Real Estate Comm.*, 41 Ohio App.2d 37, 42 (10th Dist.1974), as “[a] precise history of the administrative proceedings from their commencement to their termination.” *See Kramp v. Ohio State Racing Comm.*, 81 Ohio App.3d 186, 189 (9th Dist.1991); *Bergdahl v. Ohio State Bd. of Psychology*, 70 Ohio App.3d 488, 490 (4th Dist.1990).
    - (2) Specific items that must be included (Note--this is not an exhaustive list).
      - (a) The agency’s order. *Brockmeyer v. Ohio Real Estate Comm.*, 5 Ohio App.2d 161 (10th Dist.1996), paragraph two of the syllabus.
      - (b) Minutes of the board meeting at which the order was approved. *Bergdahl*, 70 Ohio App.3d at 491.
      - (c) Transcript of the hearing, *Hyde Park Neighborhood Council, Inc. v. Cincinnati*, 1st Dist. Hamilton No. C-110579, 2012-Ohio-3331; *Linbaugh Corp. v. Ohio Liquor Control Comm.*, 11th Dist. Trumbull No. 95-T-5323, 1996 Ohio App. LEXIS 1704, \*7 (Apr. 26, 1996).
      - (d) Motions and other filings. *See Adamson v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 03AP-926, 2004-Ohio-5261, ¶ 26.
      - (e) Exhibits admitted at hearing



(f) Proffered evidence

- (i) The record must include proffered material when necessary to avoid prejudice on appeal. *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, 4th Dist. Jackson No. 532, 1987 Ohio App. LEXIS 6439, \*5 (Apr. 3, 1987).

- (3) Memorandum prepared by the commission's in-house legal counsel for use by the commission was protected by attorney-client privilege and therefore was properly excluded from the record certified to the court of common pleas. *Zingale v. Ohio Casino Control Comm.*, 8th Dist. Cuyahoga No. 10138, 2014-Ohio-4937.

b. Original records v. certified copies

- (1) A record of the proceedings in the case before an administrative agency may be complete within the meaning of R.C. 119.12, even though it contains a certified copy of, and not the original, final order of the agency. *McKenzie v. Ohio State Racing Comm.*, 5 Ohio St.2d 229, 232 (1966).

- (2) A copy of an exhibit may be used to complete the record certified by the Board for appeal so long as a party is not prejudiced. *Vogelsong v. Ohio State Bd. of Pharm.*, 123 Ohio App.3d 260, 267 (4th Dist.1997).

- c. Proceedings before a body other than the agency are not part of the record and need not be included in the record on appeal, unless they were considered by the agency in making its decision. *Kramp v. Ohio State Racing Comm.*, 81 Ohio App.3d 186 (9th Dist.1991).

4. Burden on the agency

- a. The agency, not the appellant, has the burden of ensuring that a complete record is filed in the common pleas court. *Linbaugh Corp. v. Ohio Liquor Control Comm.*, 11th Dist. Trumbull No. 95-T-5323, 1996 Ohio App. LEXIS 1704, \*7 (Apr. 26, 1996).
- b. The agency has a duty to prepare and certify a transcript of the hearing as part of the record and must assume the cost of preparing the record; *See Stephan v. State Veterinary Med. Bd.*, 113 Ohio App. 538, 540-43 (1960).

5. Certification of the record

- a. Who can certify the record?

- (1) Certification of the record by the clerk of the board satisfies the requirement of certification by the agency. *Tisone v. Bd. of Liquor Control*, 1 Ohio App.2d 126 (10th Dist.1964), syllabus.
- (2) There is a sufficient certification by “the agency” under R.C. 119.12 where a member or employee of the agency certifies that what purports to be a record of such proceedings is a complete record thereof, that any copies of material herein are certified to be true copies of the original matter, and that such certificate is made by order of the agency and acting in its behalf, unless it is made to appear affirmatively that the one so certifying did not have authority to do so or that the record so certified is not a complete record of the proceedings. *McKenzie v. Ohio State Racing Comm.*, 5 Ohio St.2d 229, 232 (1966).
- (3) R.C. 119.12 does not require that all members of a multi-member agency certify the record. *McKenzie*, 5 Ohio St.2d 229, paragraph one of the syllabus.

b. How to certify

- (1) The record must include a certification page. *Bd. of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413, 414 (2d Dist.1964); *Minarik v. Bd. of Review*, Dept. of State Personnel, 118 Ohio App. 71, 74 (10th Dist.1962); *McKenzie v. Ohio State Racing Comm.*, 1 Ohio App.2d 283, 288 (10th Dist.1965). Affidavit of agency’s record keeper stating that the attached records are “a true and accurate copy” of the administrative records fulfills R.C. 119.12’s requirement that the agency “certify to the court a complete record of the proceedings in the case.” *Knight v. Cleveland Civ. Serv. Comm.*, 2016-Ohio-5133, 76 N.E.3d 321 (8th Dist.).
- (2) The record certification must contain a statement that the record is complete. *Peth*, 4 Ohio App.2d 413, 415.
- (3) When the record filed with the court consists of a group of detached exhibits, none of which bears the filing stamp of the agency, and papers, some of which are merely unsigned carbon copies of letters, accompanied by a letter of transmittal bearing only the rubber stamp facsimile of the signature of the secretary of the agency, it is not a certification of a complete record of the proceedings in the case, as required by R.C. 119.12. *Bd. of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413, syllabus.

6. Failure to certify the complete record

- a. R.C. 119.12 provides that “[f]ailure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected.” R.C. 119.12, ¶ 9.

- (1) Motion required
  - (a) Court may enter a finding based upon failure to certify record only upon a party's motion. *See Wolf v. City of Cleveland*, 8th Dist. Cuyahoga No. 82135, 2003-Ohio-3261, ¶ 12, fn. 2.
  - (b) An appellant must object or otherwise take affirmative action before a court may grant him judgment due to the agency's failure to timely certify a complete record. *McDonald v. Hamilton County Welfare Dept.*, 1st Dist. Hamilton No. C-860124, 1987 Ohio App. LEXIS 5492, \*7 (Jan. 14, 1987).
  - (c) If a party neglects to file a motion, the party waives the right to object to failure to certify the complete record. *Linbaugh Corp. v. Ohio Liquor Control Comm.*, 11th Dist. Trumbull No. 95-T-5321, 1996 Ohio App. LEXIS 1704, \* 6-7 (Apr. 26, 1996).
- b. Distinction between complete failure to file the record and omission from record.
  - (1) In a total failure to timely certify, the judgment is mandatory; in other circumstances, the party is required to show prejudice. *See Arlow v. Ohio Rehab. Serv. Comm.*, 24 Ohio St.3d 153, 155 (1986); *Gourmet Bev. Ctr., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 01AP-1217, 2002-Ohio-3338; *Jenneman v. Ohio State Bd. of Chiropractic Examiners*, 21 Ohio App. 3d 225, 227 (1st Dist.1985).
  - (2) "Failure requires reversal; omission requires correction." *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, 4th Dist. Jackson No. 532, 1987 Ohio App. LEXIS 6439, \*4 (Apr. 3, 1987).
- c. Prejudice required for incomplete record
  - (1) When an agency timely files the record, but the record is not complete, the party is entitled to judgment only if the party is "adversely affected" as provided in R.C. 119.12.
  - (2) "Adversely affected" requires a showing of prejudice resulting from the item being omitted from the record. *Barlow v. Ohio State Dept. of Commerce*, Div. of Real Estate and Professional Licensing, 10th Dist. Franklin No. 09AP-1050, 2010-Ohio-3842, ¶ 10; *Lorms v. Ohio Dept. of Commerce*, 48 Ohio St.2d 153, 155 (1976); *Arlow v. Ohio Rehab. Serv. Comm.*, 24 Ohio St.3d at 155 (1986).

- (3) Showing of prejudice
- (a) Failure to file minutes was prejudicial when the issue in the case was whether agency based its decision upon one of its administrative rules. *Bergdahl v. Ohio State Bd. of Psychology*, 70 Ohio App.3d 488 at 491-92 (4th Dist.1990).
  - (b) No prejudice when items omitted did not appear to be outcome determinative. *McCauley v. Noble County*, 7th Dist. Noble No. 234, 1999 Ohio App. LEXIS 465, \*14 (Feb. 8, 1999). (Court found that when the agency's action was based upon procedure, e.g., untimely request for hearing, items omitted were unlikely to have altered the trial court's decision on appeal).
  - (c) When the agency failed to file minutes prior to the deadline because the minutes had not been transcribed and approved by that time, but filed them after they were approved and prior to the court's decision, there was no prejudice. *McGee v. Ohio State Bd. of Psychology*, 82 Ohio App.3d 301, 305 (10th Dist.1993).
- (4) The court may permit the agency to correct a defect by filing omitted evidence. *See Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, 4th Dist. Jackson No. 532, 1987 Ohio App. LEXIS 6439, \*4 (Apr. 3, 1987).
- (5) In an appeal of board of zoning appeals' decision, township waived any claim of error for the common pleas courts' refusal to conduct an evidentiary hearing when the township failed to object to the transcript filed by the board. *Dixon v. Caesarscreek Twp. Bd. of Zoning Appeals*, 2d Dist. Greene No. 2018-CA-1, 2018-Ohio-2549.
- d. Prejudice required if the record was filed with a wrong or omitted case number.
- (1) No finding for party in absence of a showing of prejudice. *Arlow v. Ohio Rehab. Serv. Comm.*, 24 Ohio St.3d 153 at 155 (1986); *State ex rel. Williams Ford Sales, Inc. v. Connor*, 72 Ohio St.3d 111, 114 (1995).
- e. Mandatory judgment if complete failure to file record by due date.
- (1) No prejudice requirement. Where the agency fails to file any record within the time allowed, judgment for the party, upon motion, is mandatory. *See Arlow*, 24 Ohio St. 3d 153 at 155; *Sinha v. Ohio Dept. of Agriculture*, 10th Dist. Franklin No. 95APE09-1239, 1996 Ohio App. LEXIS 863, \* 4 (Mar. 5, 1996); *Geroc v. Ohio Veterinary Med. Bd.*, 37 Ohio App.3d 192 at 197 (8th Dist.1987).

(2) Additional time may be granted. R.C. 119.12, ¶ 9.

(a) Not to exceed 30 days.

(b) Agency must show it has made substantial effort to comply.

f. Court must grant judgment in favor of the respondent when the agency recorded the adjudication hearing but, due to mechanical failure, was unable to produce a transcript, thus prejudicing the respondent. R.C. 119.09 permits a rehearing upon the respondent's request only when no stenographic record was made. When the stenographic record was made but was unusable, remand is not appropriate, and judgment must be rendered in respondent's favor. *Citizens for Akron v. Ohio Elections Comm.*, 10th Dist. Franklin Nos. 11AP-152 and 11AP-153, 2011-Ohio-6387.

g. Finding in favor of party

(1) A finding in favor of the appealing party entitles the party to be put in same position as if the order was reversed on the merits. *State ex rel. Crockett v. Robinson*, 67 Ohio St.2d 363, 365 (1981); *Jenneman v. Ohio State Bd. of Chiropractic Examiners*, 21 Ohio App.3d 225 at 227-28 (1st Dist.1985).

(2) For res judicata purposes, judgment based upon a defect in the record on appeal is procedural, not on the merits; the agency is therefore not barred by res judicata in a subsequent action. *Jenneman*, 21 Ohio App.3d at 227.

#### **J. Record on Appeal/Submission of Additional Evidence**

1. Unless otherwise provided by law, the court is confined to the record as certified to it by the agency, R.C. 119.12, ¶ 11.

2. The court, in its sound discretion, may grant a request for the admission of additional evidence when it is satisfied that such additional evidence is:

a. Newly discovered; and

b. Could not with reasonable diligence have been ascertained prior to the hearing before the agency.

R.C. 119.12; *Baughman v. Dept. of Pub. Safety Motor Vehicle Salvage*, 118 Ohio App.3d 564, 572 (4th Dist.1997).

3. In an appeal taken pursuant to R.C. 119.12, it is proper to allow the agency to supplement the record with evidence inadvertently missing from the originally

submitted certified record, even if done after the briefs have been filed and the matter orally argued. *Lana v. Ohio Bureau of Motor Vehicles*, Clermont C.P. No. 2014 CVF 01304 (Jan. 25, 2016).

4. The party moving for admission of newly discovered evidence has the burden of demonstrating that the evidence is newly discovered, that the movant exercised due diligence, and that the evidence is material. *O'Wesney v. State Bd. of Registration for Professional Engineers and Surveyors*, 5th Dist. Stark No. 2009-CA-00074, 2009-Ohio-6444, ¶ 79, citing *Clark v. State Bd. of Registration for Professional Engineers*, 121 Ohio App.3d 278, 287-288 (9th Dist.1997). See, also, *Adeen v. Ohio Dept. of Commerce*, 8th Dist. Cuyahoga No. 87135, 2006-Ohio-3604, ¶ 15; *CVS/Pharmacy # 3131 v. Ohio State Bd. of Pharmacy*, 8th Dist. Cuyahoga No. 82215, 2003-Ohio-3806, ¶ 36.
5. Newly discovered evidence
  - a. “Newly discovered evidence refers to evidence that was in existence at the time of the administrative hearing but which was incapable of discovery by due diligence; however, newly discovered evidence does not refer to newly created evidence.” *Mayer v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-380, 2012-Ohio-948, ¶ 11; *Jain v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 09AP-1180, 2010-Ohio-2855, ¶ 17; *O'Wesney*, 2009-Ohio-6444, ¶ 84; *CVS/Pharmacy #3131 v. Ohio State Bd. of Pharmacy*, 8th Dist. Cuyahoga No. 82215, 2003-Ohio-3806, ¶ 36; *Steckler v. Ohio State Bd. of Psychology*, 83 Ohio App.3d 33, 38 (8th Dist.1992). Newly discovered evidence is not newly created evidence. Under R.C. 119.12(K), showing compliance with the agency order on the day after the hearing was not evidence that existed at the time of the hearing and is therefore not newly discovered evidence. *Cty. Med, Inc. v. Ohio Dept. of Dev. Disabilities*, 8th Dist. Cuyahoga No. 104921, 2017-Ohio-5745.
  - b. A newly created affidavit containing facts in existence at the time of the hearing is newly created and not newly discovered. *Beach v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 10AP-940, 2011-Ohio-3451, ¶ 17.
  - c. On appeal taken pursuant to R.C. Chapter 2506, court of common pleas erred by failing to hear additional evidence when administrative board members considered in their decision-making conversations held outside the hearing, conversations to which the applicant was not able to offer refuting evidence. R.C. 2506.04(A)(12). *Steck's Buckeye Storage Unit, LLC v. Catawba Island Twp. Bd. of Trustees*, 6th Dist. Ottawa No. OT-17-014, 2018-Ohio-886.
6. Incapable of discovery by due diligence
  - a. “Unavailable” without further explanation is not incapable of discovery.

*Jain*, 2010-Ohio-2855, ¶ 19.

7. Materiality

- a. Newly discovered evidence must be material, not merely impeaching or cumulative, the movant must show that a new trial would probably produce a different result.” *Adeen*, 2006-Ohio-3604, ¶ 15; *CVS/Pharmacy #3131*, 2003-Ohio-3806, ¶ 36; *Holden v. Ohio Bur. of Motor Vehicles*, 67 Ohio App.3d 531, 540 (9th Dist.1990); *Diversified Benefit Plans Agency, Inc. v. Duryee*, 101 Ohio App.3d 495, 495 (9th Dist.1995); *Clark*, 121 Ohio App.3d at 288.

8. Language in R.C. 119.12 relating to newly discovered evidence is analogous to language in Civil Rule 60(B)(2); cases interpreting Rule 60(B)(2) may therefore be helpful in interpreting R.C. 119.12. *Clark*, 121 Ohio App.3d at 287-288.

9. New evidence of constitutional issues

- a. If an appellant presents evidence before a state agency concerning the constitutionality of a statute as applied, then the trial court may also determine the constitutionality of the statute as applied. If the appellant does not present such evidence before the agency, he or she cannot then raise the constitutional issue by introducing new evidence before the trial court unless the evidence is newly discovered and was not ascertainable with reasonable diligence prior to the hearing before the agency. In other words, a party challenging the constitutionality of a statute as applied must raise the challenge at the first available opportunity during the administrative proceedings. *See Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 22; *City of Toledo v. Jaber*, 113 Ohio App.3d 874, 879 (6th Dist.1996); *American Legion Post 0046 Bellevue v. Ohio Liquor Control Comm.*, 111 Ohio App. 3d 795, 797 (6th Dist.1996); *Zieverink v. Ackerman*, 1 Ohio App.3d 10, 11 (1st Dist.1981).

- b. The court of common pleas properly allowed both parties to present evidence as to the statute’s constitutionality when the respondent/appellant did not raise the constitutional challenge until the end of the hearing. The state could not have discovered the evidence in time no matter the diligence. *In re Henneke*, 12th Dist. Clermont No. CA2011-05-039, 2012-Ohio-996, ¶ 79.

10. Failure to request or attend a hearing and admission of newly discovered evidence

The requirements of the admission of newly discovered evidence apply to situations in which a respondent was given a proper opportunity to request and participate in a hearing and chose not to do so. *Jain v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 09AP-1180, 2010-Ohio-2855, ¶ 20.

## 11. Newly discovered evidence as a substitute for denied discovery

R.C. 119.12 authorizes, in certain limited circumstances, a common pleas court in an appeal of an administrative proceeding to admit additional evidence, however, “it does not authorize a common pleas court to reopen discovery and allow a party to search for evidence that the party might then attempt to admit into the record.” *Bob Daniels Buick Company. v. General Motors Corporation*, 10th Dist. Franklin No. 97APE12-1701 (Oct. 13, 1998); *Baughman v. Dept. of Pub. Safety Motor Vehicle Salvage*, 118 Ohio App.3d 564, 573 (4th Dist.1997).

## K. Exhaustion of Administrative Remedies Doctrine

### 1. Definition

- a. The doctrine of exhaustion of administrative remedies mandates that when an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 416-1 (1951) (must exhaust administrative remedies prior to mandamus action); *Noernberg v. City of Brook Park*, 63 Ohio St.2d 26, 29 (1980) (prior to seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal). *See, also, Covell v. BMV*, 2d Dist. Montgomery No. 16895, 1998 Ohio App. LEXIS 2964, at \*5 (July 2, 1998); *Al-Sadeq Islamic Educational Ctr. v. Lucas Cty. Educational Serv. Ctr.*, 6th Dist. Lucas No. L-03-1089, 2003-Ohio-7251, ¶ 21.
- b. Failure to timely request a hearing does not preclude a court's consideration of a due process violation. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 6th Dist. Lucas No. L-11-1177, 2012-Ohio-3506, ¶ 5. Challenge to the sufficiency of the administrative charging document (notice of opportunity for hearing) cannot be brought at the hearing, and so, must be brought for the first time on appeal to the court of common pleas. Thus, the challenge is not waived if the party fails to request a hearing. *Edmands v. State Med. Bd. Of Ohio*. 10<sup>th</sup> Dist. Franklin No. 14AP-778-Ohio-2658.
- c. Because the statute in question was part of the statutory framework that the board should have applied in its analysis, the respondent, by failing to raise the issue as a defense at the administrative hearing, did not waive the issue on appeal. *Berning v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 11AP-837, 2012-Ohio-2991.

### 2. Rationale

- a. The United States Supreme Court in *McKart v. U.S.*, 395 U.S. 185, 193, 89 S.Ct. 1657 (1969), provided the following reasons for the requirement:



- (1) the need for the litigant to allow the agency to build a factual record;
  - (2) the need for the litigant to allow the agency to exercise its discretion or apply its expertise;
  - (3) the needless invocation of the courts when the agency could grant every relief to which the party was entitled;
  - (4) the need to give the agency the opportunity to discover and correct its own errors; and
  - (5) such deliberate abuse of the administrative process will destroy its effectiveness by encouraging people to flout its procedures.
- b. Ohio case law supports the reasons stated in *McKart*.

- (1) Ohio courts have held the exhaustion of administrative remedies to be a condition precedent to resort to the courts. *State ex rel. Foreman v. Bellefontaine City Council*, 1 Ohio St.2d 132 (1965). Without such a requirement the court would have nothing to review in rendering its decision. *Babcock v. Bureau of Motor Vehicles*, 46 Ohio App.2d 34, 37-38 (10th Dist.1975).
- (2) When administrative remedies can provide full relief, a party may not bypass these remedies and seek relief in the court. *Ladd v. New York Cent. R.R. Co.*, 170 Ohio St. 491, 501 (1960); *State ex rel. Lieux*, 154 Ohio St. 412, 417 (1951); *Dworning v. City of Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, citing *Noernberg v. City of Brook Park*, 63 Ohio St.2d 26, 29 (1980) (“It is a well-established principle that a party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court.”).
- (3) If exhaustion is not required, then there is no incentive to appeal to the agency from which there was an unfavorable decision and people are thereby encouraged to ignore the procedures of that agency. *See Anderson v. Interface Elec. Inc.*, 10th Dist. Franklin No. 03AP-354, 2003-Ohio-7031, ¶ 11.

### 3. Exhaustion requirements for particular actions

#### a. Declaratory judgment

- (1) Declaratory judgment is not available when the plaintiff asserts a determination of statutory rights without a constitutional issue, but has failed to exhaust administrative remedies. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146,

152 (1992); *State ex rel. Gary Charles Gelesh, D.O. v. The State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328 (10th Dist.2007), ¶ 28.

- (2) Permitting such an action without exhaustion would serve only to circumvent the administrative process and by-pass the legislative scheme. *Fairview Gen. Hosp.*, 63 Ohio St.3d, at 152.
- (3) Failure to exhaust is an affirmative defense to a declaratory judgment action. *Covell v. BMV*, 2d Dist. Montgomery No. 16895, 1998 Ohio App. LEXIS 2964, \*6 (July 2, 1998); *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997); *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273 (1975).

b. Mandamus

- (1) Exhaustion of administrative remedies is required prior to bringing action in mandamus. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, at 418 (1951); *State ex rel. Rennell v. Industrial Comm. of Ohio*, 10th Dist. Franklin No. 07AP-67, 2007-Ohio-4597, ¶ 6.
- (2) Courts have denied attempts to circumvent the administrative appeal process by denying writs of mandamus: *State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186 (1992) (mandamus will not issue for board's failure to issue decision when appellant had statutory right of appeal, and, therefore, there existed an adequate remedy at law).

c. Action Pursuant to 42 U.S.C. § 1983

- (1) Exhaustion is not required prior to bringing § 1983 action in state court. *Gibney v. Toledo Bd. of Edn.*, 40 Ohio St.3d 152, 158 (1988).

4. Exception to the Exhaustion Doctrine: a "Vain Act"

- a. A "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the power of the administrative body to afford the requested relief, and not on the likelihood of the relief being granted. *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990).
- b. However, "a lack of authority to grant relief is a subset of the greater concept that the doctrine of exhaustion of remedies will apply only ' . . . if there is a remedy that is effectual to afford the relief sought.'" *Grudzinski v. Med. College of Ohio*, 6th Dist. Lucas No. L-00-1098, 2000 Ohio App. LEXIS 1622, \*15-16 (Apr. 12, 2000) (quoting *Kaufman v. Newburgh Heights*, 26 Ohio St.2d 217 (1971), syllabus).

- c. When proceeding with the administrative process would constitute a vain act, a party need not exhaust. *Consolidated Land Co. v. Capstone Holding Co.*, 7th Dist. Belmont No. 02-BA-22, 2002-Ohio-7378, ¶ 37 (citing *Pappas & Assoc. Agency, Inc. v. State Auto. Mut. Ins. Co.*, 9th Dist. Summit No. 18458, 1998 Ohio App. LEXIS 22 (Jan. 7, 1998)). Thus, a vain act is an exception to the doctrine of failure to exhaust administrative remedies. *Consolidated Land Co.*, 2002-Ohio-7378, ¶ 37.
  - d. If an administrative appeal would be “wholly futile,” an appellant is not required to exhaust administrative remedies. A belief that an administrative agency is “likely” to find against an appellant does not make that appeal wholly futile. As long as the agency has the authority to grant relief, then administrative remedies must be exhausted. *Bermann v. Ohio Dept. of Job & Family Servs.*, 7th Dist. Mahoning No. 14 MA 151, 2015-Ohio-3963.
- H. Exception to the Exhausting Doctrine: Unusual Expense
- Plaintiff, in a declaratory judgment or injunction action, has the burden of pleading all aspects of the exception of unusual expense in order to avoid dismissal for failure to exhaust administrative remedies. The plaintiff must plead that the administrative proceeding is unusually burdensome in comparison with other administrative or judicial proceedings. *OMG MSTR LSCO, L.L.C. v. Dept. of Medicaid*, 10th Dist. Franklin No. 18AP-223, 2018-Ohio-4843.
6. Affirmative defense or jurisdictional defect?
- a. Failure to exhaust administrative remedies is not a jurisdictional defect, but is an affirmative defense, which must be timely asserted in an action or it is waived. *Jones v. Chagrin Falls*, 77 Ohio St.3d 456 at 462 (1997) (declaratory judgment action); *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, at 273 (1975) (declaratory judgment action); *Covell v. BMV*, 2d Dist. Montgomery No. 16895, 1998 Ohio App. LEXIS 2964, \*6 (July 2, 1998) (declaratory judgment action); *See, also, Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 1998-Ohio-414. Because the defense of failure to exhaust administrative agencies is an affirmative defense, the appellee bears the burden of proof. *SP9 Enterprise Trust v. Brauen*, 3rd Dist. Allen No. 1-14-03, 2014-Ohio-4850.
  - b. Some courts have held that a failure to request a hearing within the 30-day limit constitutes a failure to exhaust administrative remedies, which deprives the common pleas court of jurisdiction over the merits of a 119.12 appeal. *See Thomson v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. Franklin No. 09AP-782, 2010-Ohio-416; *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575 (2d Dist.), ¶ 6; *Reichart-Spaeth v. Ohio Counselor and Social Worker Bd.*, 2d Dist. Montgomery No. 18521, 2001 Ohio App. LEXIS 1194, \*6-7 (Mar. 16, 2001); *Harrison v. Ohio State Med. Bd.*, 103 Ohio App.3d 317, 319-20 (10th Dist.1995); *State Med. Bd. v. Fiorica*, 10th Dist. Franklin No. 88AP-516, 1988 Ohio App.

LEXIS 4367, \*4 (Nov. 3, 1988); *Alcover v. Ohio State Med. Bd.*, 8th Dist. Cuyahoga No. 54292, 1987 Ohio App. LEXIS 9961 (Dec. 10, 1987). *Lind v. Ohio Dept. of Agriculture*, Medina C.P. No. 12CI0809 (Aug. 31, 2012). But see, *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 07AP-261, 2007-Ohio-5802, ¶ 24 (holding that failure to exhaust is an affirmative defense that can be waived, not a jurisdictional defect).

6. Failure to request hearing as failure to exhaust (split in authority)

- a. No right to consideration of merits on appeal. Some courts have held that a failure to request a hearing within the 30-day limit constitutes a failure to exhaust administrative remedies, which deprives the common pleas court of jurisdiction over the merits of the appeal. See *Carmack v. Caltrider*, 164 Ohio App.3d 76, 2005-Ohio-5575, ¶ 6 (2d Dist.); *Reichart-Spaeth*, 2001 Ohio App. LEXIS 1194, \*6-7; *Harrison v. Ohio State Med. Bd.*, 103 Ohio App.3d at 319-20; *State Med. Bd. v. Fiorica*, 1988 Ohio App. LEXIS 4367, \*4; *Alcover*, 1987 Ohio App. LEXIS 9961.
- b. No adverse affect on right to appeal. Some cases have held that a failure to timely request a hearing constitutes a waiver of hearing, but does not deprive a person of the right to appeal. See *Oak Grove Manor, Inc. v. Ohio Dept. of Human Services*, 10th Dist. Franklin Nos. 01AP-71 and 01AP-72, 2001-Ohio-4113 (citing *In re Turner Nursing Home*, 10th Dist. Franklin No. 86AP-767, 1987 Ohio App. LEXIS 5729, \*3 (Jan. 29, 1987)).
- c. Limited jurisdiction
  - (1) Jurisdiction to determine timeliness of request
    - (a) Courts holding that failure to timely request a hearing precludes consideration of the merits on appeal have held that the court retains jurisdiction to determine timeliness of the hearing request. See *Harrison*, 103 Ohio App.3d, at 319-20; *Alcover*, 1987 Ohio App. LEXIS 9961, at \*10-11.
    - (b) When a party alleges that a hearing request was timely sent to the agency and establishes the elements necessary for the presumption of due receipt, the agency can rebut the presumption with evidence that the request was never received. *Blackburn Sec., Inc. v. Ohio Dept. of Commerce*, 2d Dist. Montgomery No. 13660, 1993 Ohio App. LEXIS 2665, at \*8-9 (May 24, 1993).
- d. Jurisdiction to consider constitutional challenges

- (1) Exhaustion not required for facial constitutional challenge. The administrative agency does not have authority to declare its statutes unconstitutional; accordingly, raising such a challenge in an administrative action would be futile, and therefore exhaustion is not required for a facial constitutional challenge. *Derakhshan v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 07AP-261, 2007-Ohio-5802, at ¶ 26.
  - (2) Exhaustion required for “as applied” constitutional challenge. Constitutional challenges must be raised at the first opportunity; if such challenges are not raised in an administrative proceeding, it will be impossible to develop the record supporting the challenge; accordingly, failure to request a hearing bars an as applied constitutional challenge on appeal. *Id.*, at ¶ 28-29.
  - (3) Injunctive Relief. “...injunctive and declaratory relief are inappropriate if they act to by-pass special statutory proceedings.” *DBM Enterprises, LTD v. Bd. of Twp. Trustees of Etna Twp.*, 5th Dist. Licking No. 00-CA-99, 2001 Ohio App. LEXIS 2030 (May 3, 2001) (Court lacks jurisdiction to consider injunctive relief when statutory administrative remedies were not first pursued); *See, also, Avery v. Rossford*, Ohio Transp. Improvement Dist., 145 Ohio App.3d 155 (6th Dist.2001) (holding that in order to seek injunctive relief, plaintiff must exhaust administrative remedies if available).
7. Failure to appear at the hearing does not constitute failure to exhaust administrative remedies. However, failure to participate in the hearing waives any issue with the factual determination made by the agency. The respondent is limited to questions of law. *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499.

#### **L. Role of the Common Pleas Court on Administrative Appeal**

1. Administrative appeals take precedence: The court shall give preference to R.C. Chapter 119 proceedings over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. R.C. 119.12, ¶ 12.
2. Conduct a “hearing” on the appeal
  - a. The “hearing” may consist solely of a review of the record certified to the court. *Ohio Motor Vehicle Dealers Bd. v. Central Cadillac Co.*, 14 Ohio St.3d 64, 67 (1984). *See, also, Creager v. Ohio Dept. of Agriculture*, 10th Dist. Franklin No. 04AP-142, 2004-Ohio-6068, ¶ 10 (“The hearing may be limited to a review of the record, or, at the judge’s discretion, the hearing may involve the acceptance of briefs, oral argument and/or newly discovered evidence.”)

- b. The trial court may allow further evidence or arguments. It is within the discretion of the trial court to allow the parties to present oral argument, submit briefs, and/or introduce newly discovered evidence. *Id.*
  - c. R.C. 2506.03's language, "[t]he hearing of an [administrative] appeal shall proceed as in the trial of a civil action" does not require the court of common pleas to act as a trial court, hearing an action de novo, but rather authorizes the court to admit and consider new evidence if permitted and to weigh evidence on the whole record. *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, ¶ 13.
  - d. Under R.C. 2506.06, appellant's failure to post a supersedeas bond divests the common pleas court of jurisdiction to only the fact portion of the appeal. Without the bond, appeal may go forward on questions of law (including the weight and sufficiency of the evidence), regardless of how the appeal is described in the notice of appeal. Pursuant to R.C. 2505.01(A), "appeals on questions of fact" mean a rehearing and retrial of cause. *Salida Invest. Group v. Lake Cty. Util. Dept.*, 2015-Ohio-5066, 53 N.E.3d 857 (11th Dist.).
  - e. In an appeal taken pursuant to R.C. 2506.01, the court may hear additional evidence on the issue of standing if at least one deficiency listed in R.C. 2606.03 is identified. *Lupo v. Columbus*, 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792.
3. A court of common pleas when reviewing an agency's order need only find substantial, reliable and probative evidence supporting one ground for revocation in order to uphold the agency's order. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 11AP-174, 2011-Ohio-6089, ¶ 37.
4. Affirm, reverse, vacate, or modify the agency's order
- a. The role of the trial court in an appeal from a decision of an administrative agency is to determine whether:
    - (1) The agency's decision is supported by a preponderance of reliable, probative, and substantial evidence. *Griffin v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 11AP-174, 2011-Ohio-6089, ¶ 37; *Mathews v. Ohio State Liquor Control Comm.*, 10th Dist. Franklin No. 04AP-46, 2004-Ohio-3726, ¶ 11; In reviewing an appeal of the city's decision as to a water bill pursuant to R.C. Chapter 2506, the court of common pleas must examine the entire record, weighing the evidence to determine whether a preponderance of substantial, reliable and probative evidence supports the city's decision. *One Neighborhood Condominium Assn. v. City of Columbus*, 2017-Ohio-4195, 92 N.E.3d 205 (10th Dist.); Trial court incorrectly applied a standard of review of "substantially reliable and probative evidence," and "substantial and reliable enough." The

correct standard under R.C. 2506.04 is “preponderance of substantial, reliable, and probative evidence.” *Overholt v. Emrick*, 9th Dist. Medina No. 16CA0016-M, 2017-Ohio-5838.

- (2) The agency’s decision is in accordance with law. *Smith v. Liquor Control Comm.*, 4th Dist. Athens No. 98CA03, 1998 Ohio App. LEXIS 6331, \*8 (Dec. 10, 1998).

b. Affirmance

- (1) “The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.” R.C. 119.12, ¶ 13 (emphasis added).

- (2) Reliable, probative and substantial evidence

- (a) “Reliable” evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

- (b) “Probative” evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.*

- (c) “Substantial” evidence is evidence with some weight; it must have importance and value. *Id.*

- (3) The standard of review for R.C. Chapter 2506 appeals articulated in *Henley v. City of Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 2000-Ohio-493 (unconstitutional, illegal arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence) is not applicable to R.C. 119.12 appeals. *Yohannes Parkwood, Inc. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 13AP-974, 2014-Ohio-2736.

c. Reverse, vacate, or modify order, or other ruling

- (1) A court may reverse, vacate or modify the agency’s order if the court finds that the agency order is not supported by reliable, probative, and substantial evidence, or is not in accordance with law. R.C. 119.12, ¶ 13.

- (2) Any other ruling is permitted as long as it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12, ¶ 13.

- (3) Court of common pleas may order a remand to an agency for further consideration under the “other ruling” authority in R.C. 119.12. An order remanding action to the agency is not a final order, but an interlocutory order. The law of the case doctrine does not apply to interlocutory orders. *Denuit v. Ohio State Bd. of Pharmacy*, 4th Dist. Jackson Nos. 11CA11 and 11CA12, 2013-Ohio-2484.
- (4) When the purpose of a remand from the court of common pleas to the board/agency is solely to reconsider previously submitted evidence, the licensee is not entitled to a second adjudicatory hearing. *Khan v. State Med. Bd. of Ohio*, 10th Dist. Franklin Nos. 14AP-722 and 14AP-773, 2015-Ohio-1242.
- (5) Under R.C. 2506.04, a common pleas court does not have authority to remand a case to an agency for the purpose of conducting an evidentiary hearing. It may only reverse, vacate or modify with instructions to enter an order consistent with its findings or opinion. *Lee v. Lafayette Twp. Bd. of Zoning Appeals*, 9th Dist. Medina No. 12CA0028-M, 2012-Ohio-5563. Such an order does not dismiss or terminate the administrative proceeding but, rather, means that the agency may take a fresh look at the matter. *Chapman v. Ohio State Dental Bd.*, 33 Ohio App.3d 324, 328 (9th Dist.1986).
- (6) An agency need not present expert testimony to support a charge in every case, but the charge must be supported by some reliable, probative and substantial evidence. The agency cannot convert its own disagreement with the licensee’s expert’s opinion into affirmative evidence of a contrary proposition where the issue is one on which experts are divided and there is no statute or rule governing the situation. *In re Williams*, 60 Ohio St.3d 85, 87 (1991), distinguishing *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168 (1980).

## 5. Dismiss

### a. Dismissal for failure to prosecute

- (1) The court of common pleas may not dismiss an appeal taken pursuant to R.C. 119.12 for failure to prosecute when the appellant has not filed a brief, but rather, must review the entire record to determine if the administrative decision is supported by reliable, probative, and substantial evidence and is in accordance with law. There is no requirement that the Court review briefs or entertain oral argument. *Coman v. Ohio Dept. of Job and Family Services*, Franklin C.P. No. 13CVF-09-10047 (Dec. 4, 2014); *Grecian Gardens, Inc. v. Bd. of Liquor Control*, 2 Ohio App.2d 112, 113 (10th Dist.1964).
- (2) There is no distinction between the statutory requirements of a hearing and findings set forth in R.C. Chapter 119 and those in R.C. Chapter 2506. A trial



court has no authority to dismiss an appeal taken pursuant to R.C. Chapter 2506 without complying with the mandatory requirements of R.C. 2506.04 to hear the appeal and issue findings regarding whether the agency's order was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Mastantuono v. Olmsted Twp. Bd. of Zoning Appeals*, 8th Dist. Cuyahoga No. 91318, 2009-Ohio-864, ¶ 20. But see, *Parker v. Lake Metro.Hous. Auth.*, 11th Dist. Lake No. 2012-L-054, 2012-Ohio-5580; *Genesis Outdoor Advertising, Inc. v. Troy Twp. Bd. of Zoning Appeals*, 11th Dist. Geauga No. 2001-G-2399, 2003-Ohio-3692 (In administrative appeals taken pursuant to R.C. Chapter 2506, dismissals for failure to prosecute are governed by Civ.R. 41(B)(1). The court must give appellant notice of its intention prior to dismissing for failure to prosecute.).

b. Dismissal for lack of standing

- (1) Civ.R. 12(B)(6) motions to dismiss for failure to state a claim are inapplicable to R.C. 2506.01 appeals. Appeals of administrative agency orders do not commence with a claim that can be dismissed. On the other hand, motions to dismiss made pursuant to Civ.R. 7(B)(1) and arguing lack of standing and the court's innate ability to manage its docket and to rule on a motion to dismiss are applicable to R.C. 2506.01 appeals. *Lupo v. Columbus*, 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792.
- (2) Materials that are pertinent to the claim that the trial court lacked subject matter jurisdiction may be properly received and considered by the court of common pleas and the submission of such materials does not require that a motion to dismiss be converted into a motion for summary judgment. *Oakes v. Ohio Dept. of Pub. Safety*, 11th Dist. Trumbull No. 2014-T-0010, 2014-Ohio-5314.

c. Death of a Licensee

- (1) Upon the death of the respondent-licensee while an administrative appeal is pending before the court, the court must dismiss the appeal as moot. The agency cannot reinstate the licensee of someone not alive. *Polisetty v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 15AP-482, 2015-Ohio-5278.
- (2) The criminal doctrine of abatement (vacation of criminal conviction if the defendant dies while the conviction is on appeal) does not apply to administrative appeals. *Polisetty v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 15AP-482, 2015-Ohio-5278.

6. Standard of Review: Common Pleas Court

a. Appellate “hybrid” review

- (1) The statute directs the common pleas court to function as an appellate court. The review of the administrative record is a hybrid review which is neither a trial de novo nor an appeal on questions of law only. *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d 526, 528 (10th Dist.1991); *Bingham v. Ohio Veterinary Med. Licensing Bd.*, 9th Dist. Summit No. 18510, 1998 Ohio App. LEXIS 532, \*6-7 (Feb. 11, 1998).
- (2) An appeal to the trial court of an administrative order is not a trial de novo. *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 279 (1955).
- (3) Absent a showing to the contrary, the reviewing court must presume the regularity of the administrative proceedings. When the record is silent as to consideration of the objections, the reviewing court must presume the commission reviewed the objections. *Cowans v. Ohio State Racing Comm.*, 10th Dist. Franklin No. 13AP-828, 2014-Ohio-1811.

b. De Novo Review on issues of law

- (1) The common pleas court conducts a de novo review on issues of law. *Wells v. Ohio Dept. of Jobs and Family Serv.*, 5th Dist. Fairfield No. 2005-CA-86, 2006-Ohio-4443, ¶ 18.
- (2) A de novo review means an appellate court must independently make a determination without giving deference to the lower court’s decision. *Mathews v. Ohio State Liquor Control Comm.*, 10th Dist. Franklin No. 04AP-46, 2004-Ohio-3726, ¶ 11; *See Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

c. Deference on interpretation of statute and rules

- (1) When reviewing an agency’s application of statute or rules, the court must first determine if the provision’s meaning is clear. If it is clear, the court must apply that meaning. If the provision is ambiguous, then the court must consider whether the agency’s interpretation is reasonable and not contrary to law. If the agency’s interpretation is reasonable and lawful, then the court must defer to the agency’s interpretation. *Lang v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St. 3d 296, 2012-Ohio-5366, 982 N.E. 2d 636, ¶ 12-15 (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 476 U.S. 837, 842-843 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984)). *See, also, State ex rel McCann v. Delaware Cty. Bd. of Elections*, 155 Ohio St.3d 14, 2018-Ohio-

3342, 118 N.E.3d 224, ¶ 20; *State ex rel. Turner v. Eberlin*, 117 Ohio St. 3d 381, 2008-Ohio-1117, 884 N.E.2d, 39, ¶ 17; *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287-288, 750 N.E.2d 130 (2001).

- (2) But in concurring in judgment only, two justices of the Supreme Court of Ohio would consider the deference doctrine to be a violation of constitutional separation of powers principal. *State ex rel McCann v. Delaware Cty. Bd. of Elections*, 155 Ohio St.3d 14, 2018-Ohio-3342, 118 N.E.3d 224, ¶ 30-33 (Dewine, J. concurring in judgment only, Fisher, J. concurring with that opinion).

d. Due Deference on questions of fact

- (1) The reviewing court must give due deference to the administrative resolution of evidentiary conflicts. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980); *Mitchell v. Bainbridge Twp.*, 11th Dist. Geauga Nos. 2003-G-2505 and 2003-G-2513, 2004-Ohio-3687, ¶ 40; *See, also, Asad v. State Med. Bd. of Ohio*, 79 Ohio App.3d 143 (10th Dist.1992).
- (2) “For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility.” *University of Cincinnati v. Conrad*, 63 Ohio St.2d at ¶ 111.
- (3) A common pleas court in such cases “should not weigh the evidence anew, but should simply see if there is credible evidence in the record to support the Board’s finding.” *Herbert v. Administrator, OBES*, 9th Dist. Summit No. 11740, 1984 Ohio App. LEXIS 12259, \*3 (Dec. 28, 1984).
- (4) The reviewing court may reevaluate the credibility of the evidence, with due deference given to the administrative resolution of evidentiary conflicts. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, at 111 (1980); *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d, ¶ 528 (10th Dist. 1991).
- (5) A reviewing court should not substitute its judgment for that of an administrative board. *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984); *Bingham v. Ohio Veterinary Med. Licensing Bd.*, 9th Dist. Summit No. 18510, 1998 Ohio App. LEXIS 532 (Feb. 11, 1998). Court of Common Pleas abused its discretion and substituted its judgment of facts for that of the board when the court made the opposite conclusion of fact to the hearing officer and the board adopted the report and recommendation. *Calloway v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 12AP-599, 2013-Ohio-2069, ¶ 37.

- (6) Although the common pleas court should afford due deference to the factual findings of the agency, the agency's findings are not conclusive. *Café Napoli Partnership v. Ohio State Liquor Control Comm.*, 10th Dist. Franklin No. 06AP-1055, 2007-Ohio-3210, ¶ 16.
  - (7) As long as the administrative agency's order is supported by reliable, probative and substantial evidence and is in accordance with law, it is immaterial that the reviewing court, if it were the original trier of fact, may have reached a different conclusion. *Westerville City Schools v. State of Ohio, Civil Rights Comm.*, 1 OBR 312, 319 (10th Dist.1980); *Farrao v. Bur. of Motor Vehicles*, 46 Ohio App.2d 120, 122-23 (5th Dist.1975).
  - (8) The court must defer to the factual findings unless the findings are internally inconsistent, rest on improper inferences, or are otherwise insupportable. *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 81 (1998).
  - (9) Reviewing courts act with a high degree of deference toward administrative findings, "based upon the assumption that [administrative bodies] have accumulated expertise in their own content area." *Riffe v. Ohio Real Estate Appraiser Bd.*, 130 Ohio App.3d 46, 50 (9th Dist.1998). Considerable discretion must be given a licensing and disciplinary commission when it determines whether a term applies to a specific set of facts. *Vradenburg v. Ohio Real Estate Commission*, 8 Ohio App.3d 102, 104 (10th Dist.1982). *See, also, Singer v. Davids*, 5th Dist. Fairfield No. 10-CA-55, 2011-Ohio-4434, ¶ 17. [Courts must defer to the agency's interpretation of the technical and ethical requirements of its profession. Citing *Pons v. State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993 Ohio 122, 614 N.E.2d 748 (1993)]. *Demint v. State Med. Bd. of Ohio*, 2016-Ohio-3531, 70 N.E.3d 21 (10th Dist.).
  - (10) Common Pleas Court abused its discretion when it found a lack of reliable, probative, and substantial evidence without showing where witnesses' testimony was contradictory, lacked credibility, or was internally inconsistent. *Langdon v. Ohio Dept. of Edn.*, 2017-Ohio-8356, 87 N.E.3d 1276 (12th Dist.).
- e. A reviewing court has no power to review penalties
- (1) The Court of Common Pleas may reverse, vacate or modify an order of an agency unless it finds that the order is supported by reliable, probative and substantial evidence, but, where it makes such a finding, it can only affirm and cannot reverse, vacate or modify." *Henry's Cafe, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233, 236 (1959). A reviewing court has no power to review penalties meted out by the agency. A reviewing court may not modify a sanction authorized by statute. Relies upon *Henry's Café, Inc. v. Ohio Bd. of Liquor Control*, 170 Ohio St. 233 (1959). *Shah v. State Med. Bd. of Ohio*, 10th Dist.

Franklin No. 14AP-147, 2014-Ohio-4067; *Griffin v. State Med. Bd. of Ohio*, 10th Dist. Franklin No. 11AP-174, 2011-Ohio-6089, ¶ 42.

- (2) In an appeal taken pursuant to R.C. 124.34(C), as opposed to one taken pursuant to R.C. 119.12, the court of common pleas may review and modify the punishment imposed by the civil service commission. Under R.C. 119.12, if the court of common pleas finds that reliable, probative and substantial evidence supports the agency's decision and that decision is in accordance with law, the court of common pleas may not modify the punishment ordered by the agency. *Westlake Civ. Serv. Comm. v. Pietrick*, 142 Ohio St.3d 495, 2015-Ohio-961.

### **M. Appeal from the Common Pleas Court to the Court of Appeals**

1. Appeals from common pleas court by the agency are limited.
  - a. Agency may appeal only on questions of law relating to the constitutionality, construction or interpretation of statutes and rules of the agency. R.C. 119.12, ¶ 14.
  - b. The court of appeals has jurisdiction to consider the appeal by an agency pursuant to R.C. 119.12 when the common pleas court construed a particular regulatory provision. *Swope v. Bd. of Bldg. Stds.*, 10th Dist. Franklin No. 93AP-595, 1993 WL 538310, \*2 (Dec. 23, 1993).
  - c. An agency may appeal from a common pleas court's review of an agency decision only upon questions of law. Therefore, where it is clear that the common pleas court's judgment was made entirely upon the evidence, the agency cannot appeal. Furthermore, when the trial court has made no specific determination as to the meaning of a statute, rule, or regulation, the court of appeals is without jurisdiction to review that court's judgment. *Miami-Jacobs Career College v. Ohio Bd. of Nursing*, 10th Dist. Franklin No. 11AP-544, 2012-Ohio-1416; *Ladd v. Ohio Counselor and Social Worker Bd.*, 76 Ohio App.3d 323, 328-29 (6th Dist.1991).
  - d. On an appeal of those specific questions of law, the court may also review the correctness of a judgment of the common pleas court that the agency's order is not supported by reliable, probative, or substantial evidence. R.C. 119.12, ¶ 14; *Swope*, 1993 WL 538310, \*2.
2. Standard of Review
  - a. Abuse of discretion standard on issues of fact

- (1) When a court of appeals reviews the decision of the trial court, a court of appeals must determine whether the trial court abused its discretion as to issues of fact. *Mathews v. Ohio State Liquor Control Comm.*, 10th Dist. Franklin No. 04AP-46, 2004-Ohio-3726, ¶ 11; *Bingham v. Ohio Veterinary Med. Licensing Bd.*, 9th Dist. Summit No. 18510, 1998 Ohio App. LEXIS 532, \*7-8 (Feb. 11, 1998); *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, ¶ 711 (4th Dist.1993); *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 260-61 (1988); *Hawkins v. Marion Corr. Inst.*, 62 Ohio App.3d 863, 871 (3rd Dist.1990).
  - (2) An abuse of discretion “implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.” *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d, at ¶ 260-61 (quoting *State ex rel. Lovelace Motor Freight, Inc. v. Lancaster*, 22 Ohio St.3d 191, 193 (1986).
  - (3) “In order to have an ‘abuse’ in reaching such determination the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *State v. Jenkins*, 15 Ohio St.3d 164, 222 (1984).
  - (4) Most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result”. *Id.*
- b. De novo review on questions of law
- (1) When questions of law are raised on appeal from an administrative agency, the court of appeals exercises plenary powers of review. *See A-1 Natl. Agency Group, LLC No. 1167 v. Dept. of Ins.*, 3rd Dist. Van Wert No. 15-04-01, 2004-Ohio-3553, ¶ 14; *1800 Riverhouse, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 03AP-732, 2004-Ohio-3831, ¶ 8; *Glassco v. Ohio Dept. of Job and Family Serv.*, 10th Dist. Franklin No. 03AP-871, 2004-Ohio-2168, ¶ 5.
  - (2) Questions on appeal relating to statutory construction are legal issues that a court of appeals reviews de novo. *Univ. Hosp., Univ. of Cincinnati College of Med. v. State Emp. Relations Bd.*, 63 Ohio St. 3d 339, 343 (1992); *Pacella v. Ohio Dept. of Commerce*, 10th Dist. Franklin No. 02AP-1223, 2003-Ohio-3432, ¶ 21.

- (3) Issues relating to constitutionality and procedural due process are given plenary review by the court of appeals. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 6th Dist. Lucas No. L-11-1177, 2012-Ohio-3506, ¶ 12.
- (4) Court discussed recent case law regarding a court of appeals' standard of review in R.C. Chapter 2506 administrative appeals, and concluded that it will review de novo whether the court of common pleas correctly interpreted the law and administrative code, and will use an abuse of discretion standard to review whether the court of common pleas application of the law to the facts was supported by reliable, probative, and substantial evidence. *Homan v. Franklin Twp. Bd. of Zoning Appeals*, 3d Dist. Mercer No. 10-18-04, 2018-Ohio-3717.

## **X. ATTORNEY FEES**

### **A. R.C. Chapter 119 contains two attorney fee provisions:**

1. R.C. 119.092, allowing "prevailing eligible parties" to move for compensation for attorney fees at the agency level; and
2. R.C. 119.12, which allows a prevailing party on appeal to move the court for attorney fees in accordance with R.C. 2335.39.

### **B. Recovery of Attorney Fees by Party Prevailing at Hearing (R.C. 119.092)**

1. What are "fees"?
  - a. "Fees" means reasonable attorney fees, in an amount not to exceed \$75 per hour, unless the agency has established a higher hourly rate by rule that is applicable under the circumstances. R.C. 119.092(A)(2).
2. Non-recoverable fees
  - a. The fees of the prevailing eligible party were one hundred dollars or less. R.C. 119.092(B)(2)(c).
  - b. An adjudication hearing was held to establish or fix a rate. R.C. 119.092(F)(1).
  - c. An adjudication hearing was held to determine eligibility or entitlement of any individual to benefits. R.C. 119.092(F)(2).
    - (1) A hearing to determine what information an agency may legally demand is not a hearing to determine eligibility for benefits, and R.C. 119.092(F)(2) would not bar recovery of fees. *Haghighi v. Moody*, 152 Ohio App.3d 600, 2003-Ohio-2203 (1st Dist.), syllabus.

- d. A prevailing eligible party was represented by an attorney paid pursuant to an appropriation by the federal, state, or local government. R.C. 119.092(F)(3).
  - e. An adjudication hearing was held by the state personnel board of review pursuant to R.C. 124.03. R.C. 119.092(F)(4).
    - (1) NOTE: There is a split of authority concerning the scope of R.C. 119.092(F)(4) as it pertains to the state personnel board of review.
    - (2) The First District Court of Appeals has distinguished two categories of SPBR hearings: those that arise under R.C. 124.03 (involving discharges or layoffs) and those arising R.C. 124.34 (involving removals or reductions for disciplinary reasons). Relying on the plain language of R.C. 119.092(F)(4), the First District has held that attorney fees may be recovered after hearings under R.C. 124.34, but not after hearings under R.C. 124.03. *Estate of Kirby v. Hamilton Cty. Ct. of Common Pleas, Juvenile Div.*, 78 Ohio App.3d 397, 401-02 (1st Dist.1992).
    - (3) The Tenth District Court of Appeals has held that all lawful hearings before the SPBR are necessarily in accordance with R.C. 124.03 -- because that is the enabling statute which confers the powers and duties of the board – and therefore attorney fees are never available following an SPBR adjudication. *Carruthers v. O'Connor*, 121 Ohio App.3d 39, 43 (10th Dist.1997).
  - f. An adjudication hearing was held by the state employment relations board pursuant to R.C. Chapter 4117. R.C. 119.092(F)(4).
  - g. The Ohio Civil Rights Commission is not an “agency” for purposes of R.C. 119.092. *State ex rel. Auglaize Mercer Community Action Comm. v. Ohio Civil Rights Comm.*, 73 Ohio St.3d 723, 725 (1995).
3. Who can recover fees: prevailing eligible party?
- a. See discussion below re: “prevailing party” under R.C. 119.12
  - b. An “eligible party” means a party to an adjudication hearing other than the following:
    - (1) The agency;
    - (2) An individual whose net worth exceeded one million dollars at the time he received notification of the hearing;



- (3) A sole owner of an unincorporated business, or an organization that had a net worth exceeding five million dollars at the time the party received notification of the hearing, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code, shall not be excluded as an eligible party because of its net worth; and
  - (4) An employer that employed more than five hundred people at the time the party received notification of the hearing. R.C. 119.092(A)(1).
4. Procedure for requesting fees from the agency
  - a. A prevailing party is entitled to attorney fees; however, the award is not automatic. *Wilde v. Ohio Veterinary Med. Licensing Bd.*, 5th Dist. Licking Nos. 98CA00138 and 98CA00025, 1999 Ohio App. LEXIS 4813, \*37 (Oct. 1, 1999).
  - b. A motion to the agency is the only mechanism for recovering fees. R.C. 119.092 does not permit an eligible prevailing party to file a separate action for fees in common pleas court. *Discount Fireworks, Inc. v. Stetz*, 5th Dist. Stark No. 1999CA00055, 1999 Ohio App. LEXIS 3536, \*7-8 (Aug. 2, 1999).
  - c. A prevailing eligible party must file a motion requesting the award with the agency within 30 days after the date that the order of the agency is entered in its journal. R.C. 119.092(B)(1).
5. The motion shall do all of the following:
  - a. Identify the party;
  - b. Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;
  - c. Include a statement that the agency's position in initiating the matter in controversy was not substantially justified;
  - d. Indicate the amount sought as an award; and
  - e. Itemize all fees sought in the requested award. This itemization shall include a statement from any attorney who represented the prevailing eligible party that indicates the fees charged, the actual time expended, and the rate at which the fees were calculated.
6. Consideration of the motion for fees
  - a. Reviewed by the examiner or agency

- (1) The request for attorney fees is reviewed by the hearing examiner who conducted the adjudication hearing.
  - (2) If there was no hearing examiner, the agency may consider the motion. R.C. 119.092(B)(2).
  - (3) If the determination is made by the hearing examiner or referee, that determination is not subject to review by the agency. R.C. 119.092(B)(3); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 425 (1st Dist.1998).
- b. No hearing required. R.C. 119.092 does not require a hearing on the motion for attorney fees. Instead, R.C. 119.092 requires only a “review” by the referee or examiner who conducted the adjudication hearing. *State ex rel. Auglaize Mercer Community Action Comm. v. Ohio Civil Rights Comm.*, 73 Ohio St.3d 723, 726 (1995).
7. Burden on the agency
- a. The agency has the burden to prove the following:
    - (1) that its position in initiating the matter was substantially justified;
    - (2) that special circumstances make the award unjust; or
    - (3) that the prevailing eligible party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution of the matter.
8. Merits of the motion: was the agency “substantially justified” in initiating the action?
- a. Initiating action
    - (1) “Initiate” means to commence an action, not continue a proceeding that has already begun, as found by the court of appeals. Moreover, Black’s Law Dictionary defines “matter in controversy” as “[s]ubject of litigation; matter on which action is brought and issue is joined and in relation to which, if issue be one of fact, testimony is taken. *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342 (1992).
    - (2) Generally, matter is initiated by issuing a notice of opportunity for hearing pursuant to R.C. 119.06 and 119.07. *Sowald*, 65 Ohio St.3d 338.

- (3) When an agency continues to investigate deficiencies following the issuance of notice of opportunity for hearing, and finds improvement in deficiencies, the decision to go forward with hearing is a continuation of the matter initiated by the notice of opportunity, not its initiation. *Id.*, at 342-43.

b. Substantially justified

- (1) Whether the initiation of the action was substantially justified is evaluated at the time of initiating the action, i.e., issuance of the notice of opportunity for hearing. *Sowald*, 65 Ohio St.3d 338.
- (2) See cases below interpreting “substantially justified” language in R.C. 119.12’s provision for attorney fees.

9. Decision on the motion for fees

a. The examiner or the agency must make the following determinations:

- (1) Whether the fees incurred by the prevailing eligible party exceeded \$100;
- (2) Whether the position of the agency in initiating the matter was substantially justified;
- (3) Whether special circumstances make an award unjust; and
- (4) Whether the prevailing party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution.  
R.C. 119.092(B)(2).

b. Denial or reduction of fees requested

- (1) The examiner or the agency may deny the motion for fees if:
  - (a) The agency’s position in initiating the action was substantially justified, or special circumstances make an award unjust. R.C. 119.092(B)(2)(a).
  - (b) If the fees do not exceed \$100. R.C. 119.092(B)(2)(c).
- (2) The examiner or the agency may reduce the fees requested if the prevailing eligible party engaged in conduct during the course of the hearing that unduly and unreasonably protracted the final resolution of the matter.  
R.C. 119.092(B)(2)(b).

- c. Per R.C. 119.092(B)(2), the decision as to fees must be in writing and must state:
  - (1) Whether an award has been granted;
  - (2) Findings and conclusions underlying the decision;
  - (3) Reasons or bases for the findings and conclusions; and
  - (4) Amount of the award, if any.
- d. Filing and service
  - (1) Determination must be entered in the record.
  - (2) Copy must be mailed to the prevailing eligible party.

10. Payment of award

- a. May be paid by agency from any funds available for such compensation.
- b. If no funds are available, the award is treated as a judgment under R.C. Chapter 2743, except no interest is paid. R.C. 119.092(D).
- c. The agency must file a report to be filed with the general assembly. R.C. 119.092(E).
  - (1) To be filed October 1 in the fiscal year following the fiscal year covered by the report.
  - (2) Must include specific information listed in R.C. 119.092(E).
- d. The fact that the board must pay any fee award does not mean the board has an unconstitutional pecuniary interest in the outcome of the matter, because appeals are decided by the common pleas court, not the board. *Gladioux v. Ohio State Med. Bd.*, 133 Ohio App.3d 465, 474 (10th Dist.1999); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 425 (1st Dist.1998).

11. Appeal to common pleas court under R.C. 119.092.

- a. Eligible party appeal
  - (1) May appeal denial or reduction of award. R.C. 119.092(C).

(2) File in same court in which the party would appeal agency's adjudication order. R.C. 119.092(C).

b. Agency appeal

(1) The agency may only appeal a fee award if the award was determined by a hearing examiner or referee, not the agency itself.

(2) The agency's appeal would be filed in the manner specified by R.C. 119.12. R.C. 119.092(C).

c. The agency must file a certified record as required in R.C. 119.12 for appeals. R.C. 119.092(C).

d. Common pleas court decision, R.C. 119.092(C).

(1) The court may modify the decision of the examiner or the agency only if the failure to grant, or calculation involved an abuse of discretion.

(2) Decision is final and not appealable.

(3) A copy of the decision must be certified to the agency and the eligible party.

**C. Recovery of Attorney Fees by Prevailing Party in an Appeal of an Agency Order, R.C. 119.12**

1. This attorney fee provision applies only to appeals brought pursuant to R.C. 119.12.

2. R.C. 119.12 provides that the court shall award compensation for fees to a prevailing party, in accordance with R.C. 2335.39.

3. R.C. 2335.39 sets forth general rules governing the award of attorney fees in actions against the state.

4. Statutory framework: R.C. 2335.39

a. R.C. 2335.39(B) provides that an individual may recover attorney fees if (1) he prevails; (2) he is financially eligible; and (3) the state's position in initiating the matter in controversy was not substantially justified. *In re Williams*, 78 Ohio App.3d 556, 558 (1992); *Harrison v. Ohio Veterinary Med. Licensing Bd.*, 10th Dist. Franklin No. 02AP-955, 2003-Ohio-3816, ¶ 10.

5. Ability to receive fees: prevailing eligible party

- a. “Prevailing party”
- (1) A party need not attain a complete victory, i.e., dismissal of all charges without remand, to qualify as the prevailing party. *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, 487 (10th Dist.1991).
  - (2) A party who appeals an order or judgment and prevails to the extent of obtaining a new trial or a modification of the judgment is a “prevailing party.” *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, at 487.
  - (3) The court may take the partial victory into account when determining the amount of the fees to be awarded. *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, at 487.
  - (5) R.C. 119.092 requires that an adjudication hearing have been held for a party to be eligible for attorney fees. Compensation may be awarded for fees incurred in connection with that adjudication hearing. When an agency terminates without prejudice a notice of proposed action, there is no prevailing party for purposes of R.C. 119.092. *Mr. T’s Heart of Gold and Diamonds, LLC v. Ohio Dept. of Commerce, Div. of Financial Institutions*, Franklin CP No. 13CVF-2280 (Oct. 24, 2014).
- b. “Eligible party” means a party to an action or appeal involving the state, other than the following:
- (1) The state;
  - (2) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed;
  - (3) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the action or appeal was filed, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth; or
  - (4) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed. R.C. 2335.39(A)(2).

6. Motion for fees

- a. The motion must be filed within 30 days of the final judgment by the reviewing court in the action or appeal. R.C. 2335.39(B)(1).
- b. Same requirements for content of motion as in R.C. 119.092. See above.
- c. The motion may request both fees incurred in appeal and in the administrative hearing. R.C. 2335.39(D).
- d. A motion for attorney fees filed with the court of common pleas and copied to the agency does not fulfill R.C. 119.092's requirement that the motion be filed with the agency. *Orth v. State*, 10th Dist. Franklin No. 14AP-937, 2015-Ohio-3977.

7. Court review

- a. The court must determine:
  - (1) Whether the position of the state in initiating the matter in controversy was substantially justified;
  - (2) Whether special circumstances make the award unjust;
  - (3) Whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.
- b. The court may deny the award or reduce the amount as follows:
  - (1) The court may deny if:
    - (2) the state's position in initiating matter was substantially justified; or
    - (3) special circumstances make an award unjust.
  - (2) The court may reduce or deny if the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.
- c. Burden of proof
  - (1) The state has the burden of proving that its position in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct during the

course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy. R.C. 2335.39(B)(2).

- d. The court must issue its order in writing and include:
    - (1) An indication of whether the award is granted
    - (2) Findings and conclusions underlying the decision
    - (3) Reasons or bases for the findings and conclusions
    - (4) Amount of award, if any
  - e. The order must be included in the record of the appeal.
  - f. The clerk of court shall mail a certified copy to the state and the prevailing eligible party.
8. Denial of award: substantially justified standard
- a. Fees may be denied if the position of the agency initiating the matter in controversy was “substantially justified.” R.C. 2335.39(B)(2)(a).
  - b. The State’s failure to prevail on the merits does not create a presumption that its position was not substantially justified. The State’s position may be substantially justified so long as “there is a genuine pretrial dispute concerning the propriety of the state’s action from the facts of the case or the law applicable thereto \*\*\*. If a reasonable person, knowledgeable in the area of the law, believes that the state’s position is correct, then the substantially justified standard has been met.” *Warren’s Eastside Auto Sales v. Ohio Dept. of Pub. Safety*, 11th Dist. Trumbull No. 2002-T-0098, 2003-Ohio-5702, ¶ 13; *In re Williams*, 78 Ohio App.3d 556, 558 (1992); *Penix v. Ohio Real Estate Appraiser Bd.*, 5th Dist. Fairfield No. 10-CA-19, 2011-Ohio-191, citing *In re Williams*, 78 Ohio App.3d 556, 558.
  - c. This articulation of the standard is based in part on interpretations of federal courts in applying the Equal Access to Justice Act, 28 U.S.C. § 2412, which also uses a “substantially justified” test for awarding attorney fees. *Boyle v. Ohio State Med. Bd.*, 10th Dist. Franklin No. 89AP-1186, 1990 Ohio App. LEXIS 3470, \*4 (Aug. 7, 1990).
  - d. In *Ohio State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25 (Hamilton C.P.1987), the court offered an evidentiary test for substantial justification.



- (1) The court held that, to withstand an award of fees, the State in a R.C. 119.12 appeal must “prove by the preponderance of the evidence that it was substantially probable that evidence in its possession would lead to a finding of a legal violation committed by the alleged violator.” *Ohio State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25, syllabus.
  - (2) To meet this standard, the State “must demonstrate that it had sufficient material and essential evidence in support of all of the necessary elements of the offense charged, and that based on that evidence it was reasonable to believe that it was more likely than not (i.e., substantially probable), and not just possible, that reasonable minds could make a finding of legal violation by a preponderance of that evidence.” *Id.*
- e. The court must evaluate information that the agency had before it at the time it initiated the action.
- (1) The common pleas court erred in failing to permit the agency to introduce evidence that the agency possessed at the time it initiated the action. *Gilmore v. Ohio State Dental Board*, 161 Ohio App.3d 551, 2005-Ohio-2856 (1st Dist.), ¶ 18.
  - (2) The agency may be substantially justified in relying upon incorrect information. In *Holden v. Ohio Bur. of Motor Vehicles*, 67 Ohio App.3d 531, 539 (9th Dist.1990), the State initiated an automatic suspension of a driver’s license based on records from a municipal court indicating that the appellant was convicted of leaving the scene of an accident. The error was not discovered and corrected by the municipal court until after BMV initiated the license revocation. Under these circumstances, the court of appeals found that the State's position had been substantially justified.
9. Denial of award: unsuccessful application of license or certificate
- a. Attorney fees have generally been denied in cases where the appellant has unsuccessfully applied for a license or certificate. *See, e.g., In re Van Arsdal*, 10th Dist. Franklin No. 91AP-190, 1991 Ohio App. LEXIS 5391, \*4 (Nov. 5, 1991), which held that “where the state through administrative action denies certification or licensure, the state is not the initiating party for purposes of an award of attorney's fees pursuant to R.C. 2335.39(B).” This principle was reaffirmed in *Thermal-Tron, Inc. v. Schregardus*, 10th Dist. Franklin No. 93AP-331, 1994 Ohio App. LEXIS 6174, \*6-7 (Feb. 24, 1994).
  - b. However, the court in *In re Van Arsdal* distinguished cases such as *Holden v. Ohio Bur. of Motor Vehicles* (9th Dist. 1990), 67 Ohio App.3d 531, where the state sought to take away a license already held by an individual. *See, also, State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338 (1992), where the court assumed

(without deciding) that, under the right circumstances, attorney fees could be awarded in a proceeding where the state attempted to decertify a nursing home.

10. Exemptions from R.C. 2335.39

- a. Adjudication orders exempted under R.C. 119.092(F). R.C. 2335.39(F)(3)(a).
- b. When the eligible party's attorney was paid pursuant to appropriation by federal, state, or local government. R.C. 2335.39(F)(3)(b).
- c. An administrative appeal decision under R.C. 5101.35. R.C. 2335.39(F)(3)(c).
- d. Pro se litigants may not be awarded attorney fees under R.C. 2335.39. *State ex rel. Freeman v. Morris*, 65 Ohio St.3d 458, 460 (1992).

11. Appealing an award of attorney fees under R.C. 2335.39(B)(2).

- a. An order of a court considering a motion under this section is appealable as in other cases, by a prevailing eligible party that is denied an award or receives a reduced award.
- b. If the case is an appeal of the adjudication order of an agency pursuant to section 119.12 of the Revised Code, the agency may appeal an order granting an award.
- c. The order of the court may be modified by the appellate court only if it finds that the grant or the failure to grant an award, or the calculation of the amount of an award, involved an abuse of discretion. R.C. 2335.39(B)(2).

## **XII. COLLATERAL ATTACKS ON ADMINISTRATIVE AGENCY ACTIONS**

Respondents may not collaterally attack administrative orders by bringing suits for declaratory judgment or for a writ of mandamus.

### **A. Declaratory Judgment Actions**

1. When the statutorily provided administrative process affords a respondent the opportunity for an adjudication hearing, a declaratory judgment action cannot be used to bypass the administrative appeal procedure *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 152 (1992); *Thomson v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. Franklin No. 09AP-782, 2010-Ohio-416, ¶ 15; *Alcover v. Ohio State Med. Bd.*, 8th Dist. Cuyahoga No. 54292 (Dec. 10, 1987). When the General Assembly has provided a special statutory proceeding (including administrative proceedings), an action for

declaratory relief is an attempt to bypass those proceedings. *State ex rel. Gary Charles Gelesh, D.O. v. State Med. Bd. of Ohio*, 172 Ohio App.3d 365, 2007-Ohio-3328, ¶ 26 (10th Dist.). A declaratory action may be maintained when there is no administrative adjudication pending concerning the subject matter, and when there is no special statutory proceeding applicable to the issue presented in the declaratory judgment action. *One Energy Ents., LLC v. Ohio DOT*, 10th Dist. Franklin No. 17AP-829, 2019-Ohio-359.

2. Declaratory judgment is not available when the plaintiff demands a determination of statutory rights without a constitutional claim, and has failed to exhaust administrative remedies. *Fairview Gen. Hosp.*, 63 Ohio St.3d. at 152.
3. Failure to exhaust is an affirmative defense to a declaratory judgment action. *Clagg v. Baycliffs Corp.*, 82 Ohio St.3d 277, 1998-Ohio-414; *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997); *Driscoll v. Austintown Assoc.*, 42 Ohio St.2d 263, 273 (1975). *Covell v. BMV*, 2d Dist. Montgomery No. 16895, \*6 (July 2, 1998).
4. A board of zoning appeals' final decision is a quasi-judicial act involving notice and an evidentiary hearing. A challenge to the final decision therefore must be made by appeal pursuant to R.C. 2506.01, not by an original action. *Pennell v. Brown Twp.*, 5th Dist, Delaware No. 15 CAH 09 0074, 2016-Ohio-2652.
5. Plaintiff must plead facts establishing that he would require speedy relief in order to maintain a declaratory judgment action challenging an administrative rule. Statements that the plaintiff is a member of the group to which the rule applies is not enough. *Hamilton v. Ohio Dept. of Health*, 10th Dist. Franklin No. 14AP-1035, 2015-Ohio-4041.
6. African hair braiders' complaint that the content of the natural hair braiding courses is not appropriate to the profession does not violate guarantees of substantive due process. The complaint should be directed to the schools themselves, not to the regulatory board that requires a certain amount of classroom and practical hours in natural hair styling. The rule is rationally related to the legitimate governmental interest. *Bah v. AG of Tenn.*, 610 F.Appx. 547 (6th Cir.2015).
7. An issue not raised in an administrative hearing and appeals is precluded from being raised in a collateral action pursuant to the aspect of res judicata known as issue preclusion. *Smith v. Ohio Edison Co.*, 2015-Ohio-4540, 46 N.E.3d 1103 (11th Dist.).
8. Exception to the Exhaustion Doctrine: a "Vain Act"
  - a. A "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the power of the administrative body to afford the

requested relief, and not on the likelihood of the relief being granted. *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990).

- b. However, “a lack of authority to grant relief is a subset of the greater concept that the doctrine of exhaustion of remedies will apply only ‘ . . . if there is a remedy that is effectual to afford the relief sought.’” *Grudzinski v. Med. College of Ohio*, 6th Dist. Lucas No. L-00-1098, 2000 Ohio App. LEXIS 1622, \*15-16 (Apr. 12, 2000) (quoting *Kaufman v. Newburgh Heights*, 26 Ohio St.2d 217 (1971), syllabus).
- c. When proceeding with the administrative process would constitute a vain act, a party need not exhaust. *Consolidated Land Co. v. Capstone Holding Co.*, 7th Dist. Belmont No. 02-BA-22, 2002-Ohio-7378, ¶ 37 (citing *Pappas & Assoc. Agency, Inc. v. State Auto. Mut. Ins. Co.*, 9th Dist. Summit No. 18458, 1998 Ohio App. LEXIS 22 (Jan. 7, 1998)). Thus, a vain act is an exception to the doctrine of failure to exhaust administrative remedies. *Consolidated Land Co.*, 2002-Ohio-7378, ¶ 37.

## **B. Mandamus**

1. Exhaustion of administrative remedies is required prior to bringing action in mandamus. *State ex rel. Foreman v. Bellefontaine City Council*, 1 Ohio St.2d 132 (1965); *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 418 (1951); *State ex rel. Rennell v. Industrial Comm. of Ohio*, 10th Dist. Franklin No. 07AP-67, 2007-Ohio-4597, ¶ 6.
2. A writ of mandamus will not issue for an agency’s failure to issue a decision when the appellant had a statutory right of appeal, and, therefore, there existed an adequate remedy at law. *State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186 (1992).

## **C. Injunctive Relief**

1. “...injunctive and declaratory relief are inappropriate if they act to by-pass special statutory proceedings.” *DBM Enterprises, LTD v. Bd. of Twp. Trustees of Etna Twp.*, 5th Dist. Licking No. 00-CA-99, 2001 Ohio App. LEXIS 2030 (May 3, 2001) (Court lacks jurisdiction to consider injunctive relief when statutory administrative remedies were not first pursued); *See, also, Avery v. Rossford, Ohio Transp. Improvement Dist.*, 145 Ohio App.3d 155 (6th Dist.2001) (holding that in order to seek injunctive relief, plaintiff must exhaust administrative remedies if available).
2. When the General Assembly grants exclusive administrative authority to an agency, a court of common pleas has no jurisdiction to consider a complaint for temporary restraining order and an injunction to block the agency’s action. Here, the Director of the Department of Agriculture has the exclusive authority to remove dangerous wild animals from the owner’s property. A court of common pleas patently and

unambiguously lacks jurisdiction to issue an injunction to block the Director's removal order, and therefore a writ of prohibition will lie to prevent the court from exercising jurisdiction. *State ex rel. Dir., Ohio Dept. of Agriculture v. Forchione*, 148 Ohio St.3d 105, 2016-Ohio-3049, 69 N.E.3d 636.

#### **D. Action Pursuant to 42 U.S.C. § 1983**

1. Exhaustion is not required prior to bringing in state court an action pursuant to 42 U.S.C. § 1983. *Gibney v. Toledo Bd. of Edn.*, 40 Ohio St.3d 152, 158 (1988).

#### **E. Automatic Stay When State Appeals**

1. Pursuant to Civ.R. 62(C), when taking an appeal from a decision of a court of common pleas, a state agency, political subdivision, or administrative agency of either is entitled to a stay of execution of the order as a matter of right. *State ex rel. Geauga County Bd. of Comm'rs v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608; *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 2000-Ohio-248, 722 N.E.2d 73.

#### **F. Defense of Res Judicata**

1. Res judicata, pursuant to Civ.R. 12 (C), is an affirmative defense that because evidence outside the complaint must be considered, may not be raised in a Civ.R. 12(B) motion to dismiss. Such a defense is appropriate for a motion for summary judgment. *State ex rel. Green v. Wetzel*, Slip Op., 2019-Ohio-4228, ¶ 6; *Jefferson v. Bunting*, 140 Ohio St.3d 62, 107, 109, 579 N.E. 2d 702 (1991).

Note: For additional information on administrative law, you may wish to consult the Ohio Administrative Law Handbook and Agency Directory in Baldwin's Ohio Administrative Code.



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OHIO ATTORNEY GENERAL

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# ADMINISTRATIVE LAW HANDBOOK

## 2020

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