Meachem Overview

The impact of the Meachem litigation on fair hearings involving mailing issues.

3 hours of CLE Training
Friday, April 15, 2005
Brooklyn, New York

Course Description

This course is designed to improve hearing officer performance through an increased awareness of recent court decisions and settlements addressing procedural due process requirements at administrative hearings. There will be discussion of the various procedural due process requirements as they arise in the context of cases addressing the issue of proof of mailing, as raised in the federal class action, *Meachem v. Wing*, 99 Civ. 4630. This course will address the proper means of conducting an OTDA administrative hearing, including, among other matters, making an opening statement, identifying parties on the record, taking evidence and developing the record, subpoenas, adjournments and handling proof of mailing issues.

Faculty

David B. Amiraian, Esq.

David Amiraian has been a practicing attorney in the Albany, New York area since 1981. He began his legal career in 1979, clerking for the NYS Department of Social Services Office of Counsel while attending law school. Upon graduation from Albany Law School in 1981, he began working for the Office of Administrative Hearings in various capacities, including hearing officer, training coordinator, Director of Fair Hearing Compliance and Litigation Unit attorney. He has been the Supervising Attorney for the Office of Administrative Hearings Litigation Unit since 1998. He is the OTDA lead attorney in the *Meachem* litigation.

Joselle A.Gagliano, Esq.

Joselle Gagliano has been a practicing attorney in the Albany, New York area since 1979. The majority of her professional experience has been in trial and administrative practice. She began her career in Public Service as an Assistant District Attorney in the Albany County District Attorney's office In 1982, Joselle became a Hearing Officer for the Office of Administrative Hearings, Special Hearings Bureau. After three years in that post, she was assigned, as a Deputy Counsel in Counsel's Office for the Department of Social Services (NYSDSS), to manage a unit of attorneys arguing federal funding appeals before the Departmental Appeals Board for the United States Department of Health and Human Services. In 1993, Ms. Gagliano moved on to manage the NYSDSS Enforcement Bureau, a unit of attorneys prosecuting regulatory violations and licensing cases related to Adult Homes, Division of Youth activities and Day Care Providers. While a Deputy Counsel, Joselle was a member of a team receiving a Commissioner's Distinguished Service Award. She returned to the Office of Administrative Hearings (OAH) in 1995, held hearings as a member of the Eastern Region ALJ staff until September 2001, when she joined the OAH Litigation Unit. Today, she remains an ALJ, but is assigned as an attorney on matters of litigation in which the Office of Temporary and Disability Assistance is a named party.

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INTRODUCTION TO TRAINING

Many of you are aware of the ***Meachem*** litigation, involving the issue of proof of mailing. The following is a summary of that litigation and its significance.

In July 1999, plaintiffs brought a class action for declaratory and injunctive relief and attorney's fees in the United States District Court for the Southern District of New York. Defendants are OTDA, the NYS Department of Health and the NYS Department of Labor. Plaintiffs contended that:

> In administrative hearings, when the recipient alleges non-receipt of an allegedly mailed letter or notice, OAH ALJs engage in a pattern, practice and policy of failing and refusing to provide recipients with "fair" hearings in violation of federal statutes and implementing regulations and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and that OAH ALJs routinely:
>
> 1) Fail and refuse to provide appellants with a full and fair opportunity to testify and present their case without interference;
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> 2) Deny appellants the right and opportunity to effectively cross-examine adverse witnesses;
>
> 3) Deny appellants the right and opportunity to examine or rebut adverse testimony or other evidence;
>
> 4) Fail and refuse to provide appellants an adequate opportunity to subpoena or otherwise obtain documents or witnesses or both to present their defense;
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> 5) Fail or refuse to provide appellants with a meaningful explanation of the parties' burdens of proof and to ensure that all relevant issues are considered;
>
> 6) Find the testimony of appellants to be incredible without giving a reason, and
>
> 7) Decide administrative hearings without making necessary findings of fact and without regard to the evidence adduced at the hearing.

Keep in mind that plaintiffs' case alleged due process and statutory violations in the context of mailing issue cases. However, fundamental due process hearing standards are required in all of our hearings.

The ***Meachem*** lawsuit was settled with a stipulation that OTDA engage in ALJ training intended to address the alleged lack of due process complained of by the plaintiffs. We are engaging in that training today and we will meet and engage in further training in the near future in order to satisfy our responsibilities under the stipulation and in order to prepare for the monitoring of our

decisions. I can tell you from personal experience, reviewing more than 8000 hearing records during the discovery phase of the ***Meachem*** lawsuit and in defending numerous Article 78 proceedings, that the complaints as to the hearing process alleged by the ***Meachem*** plaintiffs were not wholly unfounded. The manner in which hearings are conducted must now conform to a more formal procedure than has been required of our hearings historically. Our hearings must be more consistent and structured. The courts are now requiring that our hearings more consistently and reliably adhere to certain hallmarks of procedural due process. This training is intended to provide you with guidelines that offer more consistency and structure, protect the due process rights of our appellants and attain the goals of well-established records and well-reasoned decisions that will withstand Article 78 challenge.

By the terms of the stipulation, a "tracking" code (issue code #930) will be assigned to the hearing by (a) the hearing officer at the conclusion of the hearing; (b) the hearing officer's supervisor upon review of the hearing record; or (c) the commissioner's designee prior to issuance of the fair hearing decision. Although not required by the stipulation, as a practical matter, the code may be assigned by intake staff when it is clear from the appellant's request that a mailing issue is involved. The code must be assigned if an appellant indicates at or before the hearing that the appellant failed to receive a letter, notice or any other mailing to which he or she is alleged not to have responded, or did not receive a notice of intent. Cases addressing agency action without notice do not, by definition, involve a mailing issue.

The tracking code allows us to track the mailing issue cases. Care must be taken to properly identify and code mailing issue cases, as plaintiffs will be conducting audits of our hearings to confirm that the codes are properly placed on mailing issue cases and not placed on non-mailing issue cases. Any case-specific questions can be referred to me through Sebastian Addamo.

All mailing issue cases identified with the mailing issue tracking code should be flagged to the hearing officer's supervisor for careful review prior to issuance. THIS APPLIES TO ALL DECISIONS, INCLUDING CHECKLIST DECISIONS AND THOSE DRAFTED BY SELF-ISSUERS. This allows OAH to ensure that all mailing issue cases have been properly handled. Mistakes identified in the review process will, if necessary, result in the reopening of the hearing to correct the mistakes.

All decisions with a mailing issue tracking code are subject to monitoring and review by the plaintiffs, and perhaps, eventually, the court. The complete documentary and audio hearing record for five hundred randomly selected mailing issue cases will be provided to the plaintiffs for each of three consecutive six month periods. So please pay careful attention to the training you are about to receive.

Hold your hearings as if someone is looking over your shoulder – because they are!

The essential message of this training is – become comfortable with the concept of good hearing practice. The following are some elements of good hearing practice, which we will address in greater detail during this training.

1) Begin the hearing by reading verbatim an opening statement from the Fair Hearing Summary sheet – Form 1962.

2) Make sure that the audio and physical record is complete and unambiguous.

3) Make sure that all appellants needing translation are adequately assisted by competent translators and ensure that translation is complete and accurate.

4) Make sure the issue for review is clarified and confirmed.

5) Make sure documents submitted at the hearing are properly marked for identification and that a separate determination is made regarding whether the documents are admitted into evidence.

6) Make sure that all parties have had a full and fair opportunity to present their case and to question the evidence and witnesses of the opposing party.

7) Provide adjournments when necessary and appropriate.

8) Direct the production of evidence when necessary and appropriate.

9) Make sure that affidavits are properly scrutinized each and every time the offering party presents them for your consideration.

10) Make sure that all non-verbal communication that takes place during the hearing is summarized for the record.

11) Consistently render sound credibility determinations supported by the record.

12) Draft a well-reasoned decision that incorporates and refers to evidence in the record and is properly supported by the necessary findings of fact and the appropriate law.

13) Draft a decision that provides easily understood and uncomplicated compliance guidance to the parties and which resolves the issue of the hearing.

HOLDING THE BEST POSSIBLE HEARING

A. Recording the hearing

1. Recording equipment should be functioning and recording properly.

2. Require all parties to speak up and to speak toward the recording receiver.

3. Require translators to enunciate clearly and audibly.

B Opening statement

Make a detailed formal opening statement.

1. Read aloud, verbatim, the opening statement set forth in the 1962. Do not read in a rapid-fire fashion.

2. Obtain unambiguous audible responses to all preliminary questions set forth on the 1962.

3. After reading the opening statement, carefully explain the hearing process, i.e. who proceeds first, etc. Explain your role as the ALJ.

4. After reading the opening statement, clarify the issue for the hearing in greater detail, avoiding jargon, and obtain the assent of the parties on the issues presented.

5. Proceed only when each party has clearly asserted their ability to do so. Specifically ask each party if they are ready to proceed and obtain a response.

C. Parties

1. Have the appellant and any representative or witness clearly identify themselves for the audio record.

2. Have the agency representative and any agency witnesses clearly identify themselves for the audio record. NOTE: Identify everyone in the hearing room. Voice identification is important for transcription. Have each person state their name aloud. Obtain correct spelling when necessary and annotate the 1962.

D. Developing the record

1. Documentary Evidence

a. Generally:

1) Make certain there is a copy for each party.

2) Make certain it is legible.

3) Clearly and audibly identify and *describe* each document.

4) Clearly and sequentially mark each document for identification. Maintain a uniformity of marking style. Note - You can mark a document for identification but not admit it into evidence. ***Do not otherwise mark documents.***

5) Indicate on the record that each party has a copy or is being shown a copy of the documents offered into evidence and give each party an opportunity to review it and ask questions regarding the document. The opposing party can ask questions pertaining to admissibility (relevance, materiality, authenticity, probative value, reliability, etc). However, the offering party should have an opportunity to develop their presentation before the opposing party further questions the offering party regarding the document.

6) After a document has been offered as evidence and marked for identification, the hearing officer should indicate on the 1962, as well as on the record whether a document is or is not being accepted into evidence. In the rare circumstance where the hearing officer does not accept a document into evidence, he/she should explain the reason on the record. If the hearing officer chooses not to accept into evidence a document marked for identification, the hearing officer should explain the reason on the record but the document will nonetheless be made part of the fair hearing record.

In the rare case when voluminous irrelevant documents are offered, although we don't have to keep a copy for the record, we must identify them clearly on the record and explain on the record why they are deemed irrelevant.

b. Voluminous packets of documents. Such packets should be carefully examined and described aloud for the audio record. At a minimum an ALJ should do the following:

1) Describe each page.

2) Announce the number of pages in the packet.

3) Mark the documents for identification, numbering the pages in the same spot on each page if not already numbered.

4) Describe aloud any significant documents.

5) Allow the opposing party an opportunity to examine the offering and state any objections they may have to the admission of the document into evidence.

6) State aloud if all or part of the packet is being admitted into evidence and why. Clearly describe what is "in" and what is "out" and record the ruling on the 1962.

2. Testimony

a. Allow each party to provide relevant testimonial evidence.

b. Allow the opposing party to question a witness immediately after direct testimony.

c. Hearsay testimony is allowed.

d. Caution against repetitiveness, however, be mindful of not appearing to limit appellant's due process right to offer testimony.

e. Diplomatically alert a party to irrelevance and steer the speaker back to relevant testimony.

f. Encourage civility and stay above the fray! Do not lose control of the hearing.

g. Be proactive. Be mindful of inconsistencies. Ask for explanations. Be aware of a future need to explain conclusions drawn in the forthcoming DAFH.

(Note: Uncorroborated testimony is sufficient to establish a fact found. For example: appellant's uncorroborated testimony can be deemed sufficient to rebut an agency claim that the appellant received a notice.)

3. Translators

a. Be certain that the translator is appropriate to the task. Note dialect, etc.

b. Have the translators clearly identify themselves on the record and instruct them to speak up and to speak clearly.

c. Please use only an official translator. Do not accept appellant's relatives, landlord, business associate, or caretaker as a translator.

d. Instruct translators to translate testimony verbatim.

e. The offering party should fully describe the document offered and the translator should translate those statements.

E. General hearing management

1. Elicit evidence, seek clarifications, question witnesses, but do not become a party's representative.

18 NYCRR 358-5.6(b)(3) – which provides:

> *To ensure a complete record at the hearing, the hearing officer must:*
>
> *(3) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness; however, the hearing officer will not act as a party's representative;*

2. Recording equipment

a. Should be recording throughout the entire hearing.

b. In the rare instance of an off the record conversation between the hearing officer and the parties, it should be summarized on the record. Seek party agreement to the summary on the record.

c. The hearing officer is well-served to keep the recording equipment running as long as possible and should only turn it off and then turn it back on in order to begin the next hearing.

3. Subpoenas

The hearing officer is empowered to issue a subpoena, when, at his/her discretion, it is necessary to develop a complete evidentiary record. Assuming a subpoena is otherwise appropriate and necessary in the following circumstances:

a. Represented by lawyer or paralegal - Allow an adjournment in order for the law office to issue a subpoena.

b. Unrepresented appellant where the agency is the subpoena target - Provide the agency with an opportunity to produce the document. If they fail or refuse, take appropriate action pursuant to 358-3.7(b) (4), which provides the hearing officer discretion to *take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements.* Also see 358-5.6(b)(8)...*To ensure a complete record at the hearing, the hearing officer must...at the hearing officer's discretion, where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records...*

c. Unrepresented appellant where a non-party is the subpoena target - We have authority to issue the subpoena. As for enforcement of the subpoena, CPLR 2308(b) provides that the issuer of the subpoena or the party on whose behalf the subpoena was issued may move in supreme court to compel compliance. We require that the appellant must pursue enforcement, perhaps with the assistance of Legal Aid.

4. Adjournments

The hearing officer must ... *consider adjourning or recessing a hearing where, in the judgment of the hearing officer, it would be prejudicial to the due process rights of the parties to go forward with the hearing on the scheduled hearing date. For example, an adjournment may be granted for an appellant to obtain additional relevant supporting documentation, where the hearing officer determines that there was a good reason for the appellant's failure to produce it at the hearing on the scheduled date. This may include situations where it is found that an appellant did not know that a particular type of document would have an effect on the outcome of the hearing. When such an adjournment is granted and it appears that the appellant is uncertain as to exactly what documents are needed, the hearing officer should make clear to the appellant what types of documents would be preferred forms of evidence in a particular case.* – See Hanks' memo dated December 11, 1996.

F. Closing the hearing

1. Before closing the hearing, ask each party if there is anything further. Allow additional presentation of evidence or argument that is relevant and not unduly repetitive.

2. Do not close the hearing without having each party state or agree that there is nothing further to present.

3. As the hearing is being closed, make an affirmative closing statement. Use a script. The following may be used:

"There being nothing further, this hearing is concluded. The parties will receive a written fair hearing decision." Do not offer time frames for receipt of the decision.

4. After the hearing is closed and the appellant has left the hearing room, turn off the recording equipment and do not engage in any further discussion with persons remaining in the room until the recording equipment is running for the next hearing.

G. Shepherding the file

1. Be conscientious of the need for the file to contain all documents offered and marked in evidence. It is the ALJ's responsibility to ensure that documents made part of the hearing record are copied and placed in the hearing file folder. Perhaps you should consider not starting the next hearing until you are satisfied that the just concluded hearing file contains the entire hearing record.

2. Properly annotate the file jacket.

3. Flag the proof of mailing cases for your supervisor. Consult with your supervisor as to the mechanics for this process.

QUESTIONS

DISCUSSION

All documents should be reviewed by the ALJ for relevance, legible quality, and reliability. All analysis relating to a ruling of admissibility should be stated aloud on the record. All rulings should be stated aloud on the record. If you are reserving the ruling, say so and clearly explain the form in which the ruling will be issued, i.e., "The ruling will be set forth in the hearing decision."

10 MINUTE BREAK

PROOF OF MAILING: DISCUSSION OF THE ISSUE AND ITS DISPOSITION

A. Identification of proof of mailing cases

1. Coded at intake. When a fair hearing request indicates a proof of mailing issue, tracking code #930 is assigned to the case.

2. Coded by ALJ. When information on the 1891, hearing testimony or case presentation indicates that a proof of mailing issue exists, the ALJ should ensure that tracking code 930 is included in the paper and electronic file.

3. Coded by SALJ prior to issuance. If the SALJ identifies a mailing issue that is not already assigned to the case, the SALJ must ensure that tracking code #930 is added to the paper and electronic file and that the issue is properly addressed by the ALJ.

B. When do issues related to proof of mailing arise?

The question of whether or not an agency mailed a significant piece of correspondence and the question of whether or not an appellant received a significant piece of correspondence cause proof of mailing issues to arise.

If the appellant says, "I didn't get the letter (or notice, or other form of essential mail which gives rise to a discontinuation or reduction in benefits or SOL issue)," then the issue as to receipt of mail has been presented.

C. How is proof of mailing established?

If the appellant alleges non-receipt of a mailed document, the hearing officer should explain to both parties that the agency will first be asked to provide evidence that establishes the document was properly mailed and, if mailing is established, the appellant will have a full and fair opportunity to explain why the document at issue was not received.

1. Agency's presentation

When the appellant raises the non-receipt of a document concerning which the failure to respond is the basis for the agency's notice, the agency must present proof of mailing of the document and receipt by the appellant. In order to establish receipt by the appellant of the subject document, the agency will typically rely on two evidentiary presumptions:

a. that regular office mailing procedures took place in this case in order to get the document into the possession of the US Postal Service – to establish that the document was mailed.

b. the regularity of the US Mail – to establish that the document was received.

To successfully establish the first presumption, the agency must show there is:

- an established office mailing procedure, and
- that the procedure was followed in this particular case

The agency will attempt to do this with a mailing affidavit or through direct testimony by someone familiar with the process or with this specific mailing. The mailing affidavit must describe a regular office mailing procedure that is relevant to the document in question. The affidavit must also establish a basis, or nexus, for asserting that the document in this case followed that procedure. This can be shown by the affidavit clearly stating, for instance, that if the document follows the described mailing procedure, the file copy of the document will contain a particular marking in the upper right hand corner of the document. The agency must then show that their file copy contains that marking. Remember, we are working with presumptions. If the presumption is not established, the evidence must fail.

a. Affidavits – Should be applicable to the mailing, current and complete.

1) The hearing officer should evaluate whether the affidavit is appropriate for the type of document mailed. For example, does it refer to a specific kind of appointment notice. Also, the evidence presented should correspond with the process described in the affidavit (e.g., a manually-addressed letter but the affidavit describes a computer-generated letter).

2) Is the affidavit current and reliable?

Stale-dated affidavits - agency representatives should always testify whether or not the process described in the affidavit was the process in place at the time of the mailing. This should apply whether the affidavit post-dates or pre-dates the mailing. If the affidavit pre-dates the mailing by more than a year – it should be rejected.

3) Is the affidavit complete? Is the complete mailing process described?

Examine the affidavit to confirm that it establishes to your satisfaction the regular office mailing procedure for the type of mailing at issue. If there is a deficiency in the agency's affidavit, ask the agency's representative to comment on your concern. For example, the affidavit refers to the mailing of a document not in issue or the affidavit refers to a nexus that has not been established by the agency's representative.

b. Direct testimony – An agency representative may testify as to the agency's mailing process.

c. Client Notice System mailings. If CNS notices are the subject of a claim of non-receipt, the agency MUST present affidavits from OTDA's Division of Information Technology. That operation is responsible for mailing CNS notices and therefore prepares the affidavit concerning mailing of those notices but HRA is responsible for the submission at the hearing.

2. Appellant's rebuttal

If there is some question as to whether or not the agency has established mailing of the essential correspondence, the ALJ should probe and question sufficiently to establish a record that would support a finding that either the presumption was established or that it was not established.

If the agency fails to establish mailing and receipt, their case fails. However, because our hearing officers are not authorized to make final determinations at the hearing, we must still at this point turn to the appellant as if the agency established mailing and receipt to obtain the appellant's cross exam and direct case.

If the agency establishes the presumption of mailing and receipt to the ALJ's satisfaction, the burden of going forward shifts to the appellant. It is recommended that an ALJ wait for the agency to complete its presentation.

- If the agency establishes its prima facie case, the appellant may attempt to overcome the agency's use of the presumption of regular office practice by showing, for instance, that the document was not properly addressed.

- Also, the appellant may attempt to overcome the presumption of the regular delivery of the US mail by showing, for instance, that his/her mailbox was broken or that he/she filed a complaint of non-delivery with the USPS, etc…

Appellants should be afforded a full opportunity to address the alleged failure to receive the correspondence. If little information is provided, the following are a few, non-exclusive avenues of inquiry:

- Correct address and address of record (not always the same).
- Was a change of address timely and properly reported.
- Was a change of address made to the residence address or mailing address and was it properly recorded.
- Reliability of mail delivery.
- Expectation of the mailing.
- Does the agency have any indication in the case record of returned mail?

Adjournments to obtain documents or witnesses – Adjournments are appropriate when there is *good cause* for not bringing them to the hearing (§358-5.3(a)) or "*when in the judgment of OAH or the hearing officer the parties' due process rights would best be served by adjourning the fair hearing, or if there are special circumstances which make proceeding with the case fundamentally unfair*" (§358-5.3(b)). Typically, the need for documents or witnesses related to issues of non-receipt of mail arise for the first time at the hearing and therefore adjournments may well be appropriate.

D. Evaluating the evidence

Initially, the ALJ must decide if the presumption of receipt has been established. If not, the agency has not established a necessary element of its case. If the presumption of receipt is established, then the ALJ must next evaluate whether the appellant's explanation successfully rebuts the presumption. Is the explanation plausible and believable? Did the appellant testify in a credible manner? What are those facts established at the hearing that support a finding that the correspondence was not received? The rationale relied upon to find either in favor of receipt of mail or non-receipt of mail should be clearly articulated in the "DISCUSSION" section of the DAFH. The future need to engage in this exercise should be kept in mind by the ALJ as the hearing is being held. Thus, be certain that before closing the hearing, your record is as well developed as the circumstances permit.

Credibility calls are not just applicable to hearing appellants. Witnesses or written statements must also be examined for credibility. For example, agency representatives may make unclear assertions related to the their interactions with the appellant. Conflicting information may surface within agency documentation. In any instance in which the credibility of an account arises as a concern, the ALJ has the responsibility to develop the record sufficiently in order to make a well-reasoned judgment as to what are the supported facts of the case.

After allowing the witness to provide her/his account, consider its believability and compare it to other independent evidence presented. Be a proactive fact finder. If something does not make sense to you, say so and seek clarification. If conflicting statements have been made or inconsistent accounts exist, actively seek an explanation from hearing participants. If a party says it needs additional time to provide the information you seek, afford that additional time to the party.

E. "Discussion" section of the decision

1. In all cases, summarize the proof presented. What has been proven and what has not been proven. What has been rebutted and what has not been rebutted.

2. When credibility is in issue, *the basis for the determination should be included in the decision as specifically as possible. For example, if the appellant's testimony is found to be vague and inconsistent, some explanation should be included to explain why it is so found. Please note that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be credible, especially where it is found to be uncontradicted or internally consistent.* See Russ Hanks' memo dated December 11, 1996.

   If you believe a witness or a given account, explain why. If the reverse is true, explain why. Rely only on facts supported by the record. Be able to point to a statement made, a document submitted, a fact corroborated – or, in the instance of an account that is not believable, refer to matters not corroborated. You may also rely on your subjective impression of the appellant's believability, for instance, based upon your observation and response to the appellant's demeanor.

   Note: Do not find an appellant not credible simply because the testimony presented was self-serving. Most testimony is self-serving and is not inherently unreliable. Probing of the testimony and development of the record should produce a sound basis for making a credibility determination.

3. Find the balance. Without being unnecessarily verbose, err on the side of thoroughness.

QUESTIONS AND DISCUSSION

BREAK

DRAFTING THE BEST POSSIBLE PROPOSED HEARING DECISIONS

A. Non-variables

1. Accurately set forth dates, parties and place.

2. If any issues have been waived or resolved by stipulation:
   a. Clearly set forth the withdrawal of the issue.

   b. Clearly articulate the terms of the stipulation.

B. Issue(s) for review

List all issues scheduled for review. If an issue is resolved without the need of a hearing, make the fact of the resolution a fact found, and make the account of that resolution the first paragraph in the discussion.

C. Facts

1. State facts chronologically, clearly and succinctly.

2. Set forth all undisputed facts clearly.

3. State all facts supported by the weight of the evidence.

4. There should be no inconsistency between the facts found and the conclusion reached.

D. Law

1. The "Law" section should support and address the issues presented and decided.

2. If additional legal references are needed for a fully supportive section add them. In other words, if you are relying on a particular citation that is not common law, add it in text form to the "Law" section of the decision.

3. If the pre-prepared scripts do not suit the hearing issues, prepare a decision independent of the scripts.

E. Discussion

1. Summarize any issues waived or otherwise resolved and address their resolution.

2. Restate the issue presented and summarize the evidence presented.

3. Assess any explanations presented in the context of evidence presented.

4. Clearly evaluate and assess credibility. Do not make conclusory statements. Credibility determinations must be supported.

5. Do not draw a conclusion without fully presenting the "why" and "how" of it.
   a. If something is found to be not reliable or believable, articulate why.

   b. Do not state that an appellant's testimony is unreliable because it is self-serving. That is an illogical statement and a court may find it to be reversible error. Most testimony is self-serving but that does not make it inherently unreliable. Probing of the testimony and development of the record should produce a sound basis for making a credibility determination.

   c. Examine your own analysis for its logic and reasonable qualities.

6. Seek to be comprehensive in evidence assessment.

F. Decretal

1. Make clear conclusions.

2. Give clear and concise direction.

3. Seek to avoid simply sending something back to the agency with an unspecific or unpredictable result.

4. When reversing the agency, the decretal paragraph must include the language, "is not correct and is reversed," consistent with the settlement in the case, *Gossom v. Toia,* (see 82 ADM-63).

If the agency is directed to take action, be very specific in the action to be taken. This avoids revolving door adequacy hearings. Where there is a reasonable expectation that the agency, given time, can obtain the evidence, consider adjourning or recessing the hearing. This is a superior approach to simply having multiple hearings on the same or nearly the same issue with the same appellant.

DUE PROCESS CASES

Roche v. Turner, 186 Misc2d 581, (New York Supreme, 2000)

Due Process

The State agency's regulations (18 NYCRR 358-5.6 [b]) clearly state the ALJ must ensure a complete record by, *inter alia,* doing the following:

"(2) make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which the fair hearing will be conducted;

"(3) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness ...

"(4) where the hearing officer considers independent medical assessment necessary, require that an independent medical assessment be made part of the record when the fair hearing involves medical issues ...

"(6) adjourn the fair hearing when in the judgment of the hearing officer it would be prejudicial to the due process rights of the parties to go forward with the hearing ...

"(8) ... where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records."

As evidenced from this fair hearing transcript, the ALJ failed to make a complete record. Although it appears that passages are missing, what is transcribed demonstrates a departure from the agency's own regulations. Petitioner was never advised as to the nature of the proceeding, the issues to be heard or the manner in which the hearing would be conducted. In addition, the ALJ failed to elicit documents and testimony, and failed to consider an independent medical assessment. This last failure is salient in light of the fact that the City agency was planning to schedule petitioner for an HSS exam regarding the Second Notice, and this evidence was before the ALJ.

Hence, the fair hearing held here was in violation of the State agency's own regulation (18 NYCRR 358-5.6 [b]), and was a denial of due process such that a remand for a de novo hearing is required *Matter of Blackman v Perales,* 188 AD2d 339, 340 [1st Dept 1992] the Administrative Law Judge "(did not) delineate the issues so that (*pro se*) petitioner would know the conditions under which she would be entitled to a grant of assistance and be in a position properly to present her case"; *Matter of Schnurr v Perales,* 115 AD2d 740, 741 [2d Dept 1985] ALJ's failure to "delineate the issues upon which the hearing was to focus or to develop the testimony presented ... effectively deprived (*pro se* claimant) of her right to a fair hearing"; *Matter of Dreher v Smith,* 65 AD2d 572, 573 [2d Dept 1978] *pro se* claimant was not given proper assistance nor "was there sufficient development by the hearing officer of the testimony

presented by her"; *Matter of Rezoagli v Toia,* 62 AD2d 1020 [2d Dept 1978] *pro se* claimant "not accorded the opportunity to make a clear presentation of her evidence ... and was not advised of her right to procure an adjournment of the hearing to enable her to produce witnesses essential to her case"; *Feliz v Wing,* NYLJ, Feb. 1, 2000 at 27, cols 1, 3 [Sup Ct, NY County, Schlesinger, J.] hearing transcript consists of four pages; ALJ utterly failed to elicit a complete record: "Due process, as guaranteed by the Constitutions of New York and the United States, stands for the proposition that a statutorily mandated hearing provide a (*pro se* petitioner a) meaningful opportunity to understand the proceedings, to participate in the proceeding, and to be adequately heard"]; *Matter of Nembhard v Turner,* 183 Misc 2d 73, 77 [Sup Ct, NY County 1999, Moskowitz, J.] "In reviewing (*pro se* claimant's) fair hearing transcript and decision, the court finds that NYCHRA and the State agency failed to follow many of the procedural requirements to ensure fundamental fairness"; *Matter of Santana v Hammons,* 177 Misc 2d 223, 232 [Sup Ct, NY County 1998, Goodman, J.] "The agency ALJs also appear to be violating the agency's own directives which require assistance to *pro se* claimants", *revd and mod on other grounds sub nom. Mitchell v Barrios-Paoli,* 253 AD2d 281 [1st Dept 1999]; *Matter of Acevedo v Wing,* NYLJ, Apr. 18, 1997, at 27, cols 2, 3 [Sup Ct, Bronx County, Green, J.] "Despite the fact that (*pro se*) petitioner was clearly a person in need of assistance in presenting evidence and questioning witnesses, no effort was made to obtain the information about the nature and extent of her medical treatment or to assist her in cross-examining witnesses in order to ensure a complete record."

Furthermore, due process considerations require that when the "claimant is unrepresented by counsel, the ALJ is under a heightened duty 'to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts.' " (*Echevarria v Secretary of Health & Human Servs.,* 685 F2d 751, 755 [2d Cir 1982], citing *Hankerson v Harris,* 636 F2d 893, 896 [2d Cir 1980], and *Gold v Secretary of Health, Educ. & Welfare,* 463 F2d 38, 43 [2d Cir 1972].) These seminal Federal cases delineate the due process requirements in disability cases under the Social Security Act and regulations (42 USC § 402 *et seq.;* 20 CFR 404.1 *et seq.*). Similarly, under New York State's Social Services Law and regulations (18 NYCRR 358-5.6 [b]), procedural due process requires such a heightened duty on the part of State ALJs to develop the record.

Specifically, the ALJ here not only failed to make an opening statement as required by 18 NYCRR 358-5.6 (b) (2), but fundamentally, the record fails to address: (1) as to the burden of proof, the standard to be applied, and the party who has the burden; (2) petitioner's rights regarding the presentment of evidence; (3) identification of the documents which the ALJ rejected; (4) whether petitioner should be referred for a medical exam, and if not, why not; (5) if there was a need for petitioner to submit recent medical evidence, and his right to adjourn the hearing in order to obtain the evidence. (*See, e.g., Echevarria v Secretary of Health & Human Servs.,* 685 F2d, *supra,* at 755 [2d Cir 1982]; *Hankerson v Harris,* 636 F2d, *supra,* at 896 [2d Cir 1980]; *Gold v Secretary of Health, Educ. & Welfare,* 463 F2d, *supra,* at 43 [2d Cir 1972].)

Earl v Turner, 303 A.D.2d 282, (App Div. 1st Dept., 2003)

The article 78 court properly annulled respondent's Decision After Fair Hearing and remanded the matter for further proceedings upon the ground that the hearing conducted before the Administrative Law Judge (ALJ) did not meet due process requirements. As the record demonstrates, the brevity of the hearing and the ALJ's complete failure to develop the record effectively deprived petitioner of a fair hearing. Significantly, the article 78 court, after listening to the audiotape of the hearing, found that although the ALJ recited petitioner's rights, they were "rattled off so rapidly as to be nearly incomprehensible."

Lizotte v. Johnson, 4 Misc 3d 334, (New York Supreme, 2004)

Here, the hearing officer failed to: (1) explain the nature of the hearing and the showing that the petitioner needed to make in order to prevail; (2) show any of the documents offered by ACS to petitioner; (3) ensure that petitioner received adequate translation; and (4)ensure a complete record by developing testimony that would go to the question of whether the petitioner's great-grandson required a high degree of supervision.

Kassler v. Wing, 239 AD2d 583, (App. Div. 2nd Dept., 1997)

The affidavits offered by the City in support of their contention that a proper office routine was followed alleged, in substance, that the addresses (including the names) used for mailings are all obtained from the same database, and are identical to those contained in the database. However, two of the notices offered as exhibits by the City in support of its position contain an incorrect spelling of Kassler's name, while the third has the correct spelling. Additionally, the three notices give varying names for the post office which is appurtenant to zip code 11357. No explanation is offered for the variations in the post office names or for the misspellings of Kassler's name. Thus, the City's own exhibits appear to be at variance with important portions of the affidavits submitted on its behalf. Under these circumstances, the affidavits, which are the only evidence of the mailing procedure followed by the City, are insufficient to meet the burden of establishing the existence of a proper office routine and procedure, which could then establish a rebuttable presumption of receipt *(see, Matter of Gonzalez,* 47 NY2d 922; *cf., Nassau Ins. Co. v Murray,* 46 NY2d 828). The determination is therefore not supported by substantial evidence, and it is annulled *(see, Matter of Berenhaus v Ward,* 70 NY2d 436).

358-3.4 Rights in the fair hearing process.

As an appellant you have the right:

(a) to the continuation or reinstatement of your public assistance, medical assistance authorization, food stamp benefits or services until the issuance of a decision in your fair hearing, to the extent authorized by section 358-3.6 of this Part. You have the right to request that your assistance, benefits or services not be continued or reinstated until the fair hearing decision is issued;

(b) to examine your case record and to receive copies of documents in your case record which you need to prepare for the fair hearing, upon your request, to the extent authorized by and within the time periods set forth in section 358-3.7 of this Part;

(c) to examine and receive copies of all documents and records which will be submitted into evidence at the fair hearing by a social services agency, upon your request, to the extent authorized by and within the time periods set forth in section 358-3.7 of this Part;

(d) to the rescheduling (adjournment) of your hearing, to the extent authorized by section 358-5.3 of this Part;

(e) to be represented by an attorney or other representative at any conference and hearing, or to represent yourself;

(f) to have an interpreter at any fair hearing, at no charge to you, if you do not speak English or if you are deaf. You should advise OAH prior to the date of the fair hearing if you will need an interpreter;

(g) to appear and participate at your conference and fair hearing, to explain your situation, to offer documents, to ask questions of witnesses, to offer evidence in opposition to the evidence presented by the social services agency and to examine any documents offered by the social services agency;

(h) to bring witnesses to present written and oral evidence at any conference or fair hearing;

(i) at your request to the social services agency, to receive necessary transportation or transportation expenses to and from the fair hearing for yourself and your representatives and witnesses and to receive payment for your necessary child care costs and for any other necessary costs and expenditures related to your fair hearing;

(j) to have the fair hearing held at a time and place convenient to you as far as practicable, taking into account circumstances such as your physical inability to travel to the regular hearing location;

(k) to request removal of a hearing officer in accordance with section 358-5.6 of this Part; and

(l) to seek review by a court if the decision is not in your favor.

.....

358-3.7 Examination of case record before the fair hearing.

(a) (1) At any reasonable time before the date of your fair hearing and also at the fair hearing, you or your authorized representative have the right to examine the contents of your case record and all documents and records to be used by the social services agency at your fair hearing.

(2) Except as provided in paragraph (3) of this subdivision, the only exceptions to access to your case record are:

(i) those materials to which access is governed by separate statutes, such as records regarding child welfare, foster care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Service; and

(ii) those materials being maintained separately from public assistance files for the purposes of criminal prosecution and referral to the district attorney's office. This exception applies only to records which are part of an active and ongoing investigatory action; and

(iii) the county attorney or county welfare attorney's files.

(3) Case records secured by the Commission for the Visually Handicapped or by a local rehabilitation agency acting on behalf of such Commission will not ordinarily be made available for examination since they contain information secured from outside sources; however, particular extracts will be furnished to you or your authorized representative when provision of such information will be beneficial to you. The case record, or any part thereof, admitted as evidence in a fair hearing shall be available for review by you or your authorized representative.

(b) (1) Upon request, you have a right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of all documents which the social services agency will present at the fair hearing in support of its determination. If the request for copies of documents which the social services agency will present at the hearing is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documentation must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(2) Upon request, you have the right to be provided at a reasonable time before the date of the hearing, at no charge, with copies of any additional documents which you identify and request for purposes of preparing for your fair hearing. If the request for copies of documents is made less than five business days before the hearing, the social services agency must provide you with such copies no later than at the time of the hearing. If you or your representative request that such documents be mailed, such documents must be mailed within a reasonable time from the date of the request; provided however, if there is insufficient time for such documents to be mailed and received before the scheduled date of the hearing such documents may be presented at the hearing instead of being mailed;

(3) Your request for copies of documents pursuant to paragraphs (1) and (2) of this subdivision may at your option be made in writing, or orally, including by telephone.

(4) If the social services agency fails to comply with the requirements of this subdivision the hearing officer may adjourn the case, allow a brief recess for the appellant to review the documents, preclude the introduction of the documents where a delay would be prejudicial to the appellant, or take other appropriate action to ensure that the appellant is not harmed by the agency's failure to comply with these requirements.

.....

358-5.6 Hearing officer.

(a) The hearing shall be conducted by an impartial hearing officer assigned by OAH to conduct the hearing, who has not been involved in any way with the action in question.

(b) To ensure a complete record at the hearing, the hearing officer must:

(1) preside over the fair hearing and regulate the conduct and course of the fair hearing, including at the hearing officer's discretion, requiring sworn testimony, and administering the necessary oaths; and

(2) make an opening statement explaining the nature of the proceeding, the issues to be heard and the manner in which the fair hearing will be conducted; and

(3) elicit documents and testimony, including questioning the parties and witnesses, if necessary, particularly where the appellant demonstrates difficulty or inability to question a witness; however, the hearing officer will not act as a party's representative; and

(4) where the hearing officer considers independent medical assessment necessary, require that an independent medical assessment be made part of the record when the fair hearing

involves medical issues such as a diagnosis, an examining physician's report, or a medical review team's decision; and

(5) adjourn the fair hearing to another time on the hearing officer's own motion or on the request of either party, to the extent allowable by section 358-5.3 of this Part; and

(6) adjourn the fair hearing when in the judgment of the hearing officer it would be prejudicial to the due process rights of the parties to go forward with the hearing on the scheduled hearing date; and

(7) review and evaluate the evidence, rule on the admissibility of evidence, determine the credibility of witnesses, make findings of fact relevant to the issues of the hearing which will be binding upon the commissioner unless such person has read a complete transcript of the hearing or has listened to the electronic recording of the fair hearing; and

(8) at the hearing officer's discretion, where necessary to develop a complete evidentiary record, issue subpoenas, and/or require the attendance of witnesses and the production of books and records; and

(9) prepare an official report containing the substance of what transpired at the fair hearing and including a recommended decision to the commissioner or the commissioner's designee.

(c) A party to a hearing may make a request to a hearing officer that the hearing officer remove himself or herself from presiding at the hearing.

(1) The grounds for removing a hearing officer are that such hearing officer has:

(i) previously dealt in any way with the substance of the matter which is the subject of the hearing except in the capacity of hearing officer; or

(ii) any interest in the matter, financial or otherwise, direct or indirect, which will impair the independent judgment of the hearing officer; or

(iii) displayed bias or partiality to any party to the hearing.

(2) The hearing officer may independently determine to remove himself or herself from presiding at a hearing on the grounds set forth in paragraph (1) of this subdivision.

(3) The request for removal made by a party must:

(i) be made in good faith; and

(ii) be made at the hearing in writing or orally on the record; and

(iii) describe in detail the grounds for requesting that the hearing officer be removed.

(4) Upon receipt of a request for removal, the hearing officer must determine on the record whether to remove himself or herself from the hearing.

(5) If the hearing officer determines not to remove himself or herself from presiding at the hearing, the hearing officer must advise the party requesting removal that the hearing will continue but the request for removal will automatically be reviewed by the general counsel of ODTA or the general counsel's designee.

(6) The determination of the hearing officer not to remove himself or herself will be reviewed by the general counsel of OTDA or the general counsel's designee. Such review will include review of written documents submitted by the parties and the transcript of the hearing.

(7) The general counsel of OTDA or the general counsel's designee must issue a written determination of whether the hearing officer should be removed from presiding at the hearing within 15 business days of the close of the hearing.

(8) The written determination of the general counsel or the general counsel's designee will be made part of the record.

State of New York Department of Social Services

MEMORANDUM
DSS-524EL

TO: All Hearing Officers and Supervising Hearing Officers

DATE: December 11, 1996

FROM: Russell J. Hanks
RJH

SUBJECT: Policy Guidelines

The purpose of this memorandum is to reaffirm Office of Administrative Hearings' (OAH) policy on the development of an adequate hearing record and related matters. Portions of this memorandum were addressed previously in my memorandum of May 1, 1991, concerning policy clarifications. These guidelines are premised upon the recognition that each case is unique and must be addressed in accordance with its particular circumstances. Administrative hearings are designed as a means of efficiently resolving disputes between the parties in a fundamentally fair manner. The State Administrative Procedures Act, federal and Departmental regulations contain procedural provisions which address fundamental fairness. Bearing in mind that administrative hearings require less procedural and evidentiary rigor than civil courts, these guidelines are intended to provide hearing officers with illustrative instructions for ensuring fundamental fairness.

INADEQUATE NOTICES

The content requirements for notices of intent set forth in Part 358 reflect concern for appellants' due process rights. Where a hearing involves a notice of intent, the hearing officer must review the sufficiency of the notice to assess whether it complies with regulatory requirements and whether any deficiencies in the notice impinge on the appellant's due process rights. This assessment must include consideration of the notice's deficiencies, the issues for review, the appellant's circumstances, and the need to direct specific relief. This assessment should be conducted on the record and, where appropriate, reflected in the decision. The hearing officer must determine whether to find a notice void, require the social services district to provide additional information, or grant a recess or adjournment on the appellant's behalf.

In evaluating the adequacy of a notice, the hearing officer should consider if the appropriate notice was sent and if the explanation of the district's intended action, contained in the notice, is understandable by the particular appellant. A notice that fails to provide any reason or explanation for an intended action is void. A notice that cites the wrong regulation as justification for the intended action or an unclear explanation, while deficient, may or may not be void. In every case involving a deficient notice, the hearing officer must ensure that the deficiency does not result in harm to the appellant.

INTRODUCTION OF DOCUMENTS

When documents are introduced at a hearing, by the agency or by the appellant, it is important that they be identified, marked, and verbally noted as they are entered into the record. Each page of the agency's packet should be marked in case the pages should become separated. (The exhibit letter or number should be the only mark made on a submitted document; any other notations made by the hearing officer serve only to compromise the integrity of the document). The hearing officer should ensure that all parties have had an opportunity to see the documents introduced before proceeding. Where the documents have not been seen previously, a brief recess or an adjournment may be necessary, as the hearing officer deems appropriate. This approach is limited in New York City by the decision in Rivera, which requires that if documents or evidentiary packages are not sent out timely where requested, the notice of intent must be withdrawn.

The hearing officer also should ensure that the appellant is given a reasonable opportunity to question the agency representative concerning any documents that the social services district seeks to introduce, and to state any objections to the introduction of such evidence. The agency also should be given the opportunity to question the appellant concerning any documents introduced by the appellant at the hearing.

DEVELOPING THE RECORD

While it can be difficult to focus on its importance in light of heavy calendar assignments, the development of a complete record is an essential element of the hearing officer's responsibilities. In addition to the formal entry of documents discussed above, the hearing officer must ask questions, if necessary, to complete the record, particularly where the appellant demonstrates difficulty or inability to question a witness. (See 18 NYCRR §358-5.6). This may involve the questioning of either party to elicit information that may not have been volunteered due to a lack of understanding of its relevance.

The hearing officer must also consider adjourning or recessing a hearing where, in the judgment of the hearing officer, it would be prejudicial to the due process rights of the parties to go forward with the hearing on the scheduled hearing date. For example, an adjournment may be granted for an appellant to obtain additional relevant supporting documentation, where the hearing officer determines that there was a good reason for the appellant's failure to produce it at the hearing on the first scheduled date. This may include situations where it is found that an appellant did not know that a particular type of document would have an effect on the outcome of the hearing. When such an adjournment is granted and it appears that the appellant is uncertain as to exactly what documents are needed, the hearing officer should make clear to the appellant what types of documents would be preferred forms of evidence in a particular case.

BURDEN OF PROOF

18 NYCRR §358-5.9 provides that the social services agency has the burden of establishing that its determination was correct where the issue for the hearing involves the discontinuance, reduction or suspension of benefits or services. To meet its burden of proof, the

agency must establish facts in support of the basis for the action as stated in the notice of discontinuance or reduction. For example, where the agency has determined to impose a sanction for failure to comply with work rules, the agency must produce evidence establishing the elements of the appellant's willful failure to cooperate without good cause, or its determination cannot be affirmed.

The burden is on the appellant to establish that a denial of benefits was incorrect, or that the benefit level determined by the agency is inadequate. When an appellant claims, for instance, that his or her benefits have been inadequate for a long period of time (e.g., "since 1992"), the appellant should be questioned as to exactly how the assistance was inadequate, rather than requiring the agency to establish that it was.

CREDIBILITY

When a decision turns on the credibility of the appellant, the basis for the determination should be included in the decision as specifically as possible. For example, if the appellant's testimony is found to be vague and inconsistent, some explanation should be included to explain why it is so found. Please note that the lack of documentary evidence is not a per se basis for finding an appellant's testimony incredible. A hearing officer may find uncorroborated testimony to be credible, especially where it is found to be uncontradicted or internally consistent.

OTHER CONCERNS

Hearing officers must always demonstrate appropriate demeanor and maintain, and appear to maintain, their impartiality prior to, during, and after hearings. This includes avoiding ex-parte conversations with either the agency or the appellant, or suggesting to the parties how the case may be decided. Off-the-record discussions should also be avoided; where such discussions do take place, a precise summary of the conversation should be stated for the record, and agreed upon by the parties, before proceeding. A simpler method would be to leave the tape recorder running at all times. Cassette tapes are cheaper than litigation losses due to incomplete records, and no time need be spent summarizing off the record activity.

RJH:hp

cc: John E. Robitzek
Sebastian Addamo