ADMINISTRATIVE REVIEW TRAINING

Chicago Volunteer Legal Services, Access to Justice Program
Presenter: Matthew Hulstein
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Contact Information:
Email: mhulstein@cvls.org
Phone: 312-332-8217

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I. THE NATURE OF AN ADMINISTRATIVE AGENCY

A. Creatures of Statute

Administrative agencies are created by legislatures to implement complex legislation.

> *Administrative agencies…exercise purely statutory powers and possess no inherent or common law powers. Therefore, any power or authority claimed by an administrative agency must find its source within the provisions of the statute by which the agency was created. Furthermore, such rules as are lawfully adopted by an administrative agency pursuant to statutory authority have the force of law and bind the agency to them. To the extent that an agency acts outside its statutory authority, it acts without jurisdiction." Armstead v. Sheahan*, 298 Ill. App. 3d 892, 894 (1st Dist. 1998) (citations omitted).

The statute that creates the program is call the "enabling act" and defines the agency's purposes and powers. For example, the 1937 Housing Act (amended in 1974) created the U.S. subsidized housing program and the agency to run it: the Department of Housing and Urban Development ("HUD"). 42 U.S.C.A. § 1437. HUD then created local housing authorities to run the Section 8 Housing Choice Voucher program, such as the Chicago Housing Authority ("CHA") and the Housing Authority of Cook County ("HACC"). 24 C.F.R. § 982.54.

The legislation provides an outline for the program, but the agency adds the meat to this skeleton in the form of rules and regulations. For example, the housing program is intended for low income people, so the Housing Act provides:

> *The Secretary [HUD] shall establish procedures which are appropriate and necessary to assure that income data provided to public housing agencies and owners by families applying for or receiving assistance under this section is complete and accurate*. 42 U.S.C. § 1437f(k).

Then HUD regulations describe in detail what is included in "income." 24 C.F.R. § 5.609. The regulations also explain how HUD would enforce the reporting requirements:

> *"Family Obligations": "The family must supply any information requested by the PHA or HUD for use in a regularly scheduled reexamination or interim reexamination of family income and composition in accordance with HUD requirements.* 24 C.F.R. § 982.551
>
> And…
>
> *The PHA (Public Housing Authority) may at any time deny program assistance for an applicant, or terminate program assistance for a participant, for any of the following grounds: (i) If the family violates any family obligations under the program (see § 982.551).* 24 C.F.R. § 982.552

These requirements are then translated into the PHA's Administrative Plan. For example:

> *The CHA will terminate a family's assistance if:*
> - *The family has failed to comply with any family obligations under the program.*
> - *The family does not provide complete or accurate information that the CHA or HUD determines is necessary in the administration of the program.* CHA Admin. Plan, p 12-6.

B. <u>Perform legislative, and executive and judicial functions</u>

The agency also performs executive and judicial functions by running the program and deciding who is compliant and who is not. For the CHA, that means deciding who didn't comply with their "family obligation" to report income and then sanctioning those people.

Because agencies must run the program, courts defer to them as experts in their field. However, administrative agencies are not politically accountable. Judicial review is an important checking function to ensure the agency runs within its statutory authority and doesn't abuse its vested discretion.

II. JUDICIAL REVIEW

An administrative agency must pursue the procedure and rules laid down by the legislature to give validity to its action…and the purpose of judicial review of an administrative agency's decision and orders is to keep the agency within the jurisdictional and judicial bounds guaranteed by the Constitution and statutes. *Chicago Transit Auth. v. Fair Employment Practices Comm'n*, 103 Ill. App. 2d 329, 339 (1st Dist. 1968).

A. Source of Procedure: The ARL or Common Law Writ?

There are two modes to review an agency's decision: the Administrative Review Law ("ARL"; 735 ILCS 5/3) and by common law *writ of certiorari*. The ARL only applies if the agency's enabling act adopts the ARL. 735 ILCS 5/3-102. For example, the CHA has not adopted the ARL so their decisions are reviewable by common law writ. However, the Chicago Department of Administrative Hearings ("DOAH") has adopted it, so the ARL would apply. Mun. Code of Chicago, Art. 1, Sect. 2-14-102. The standards of review between the two are nearly identical; however, the timing requirements are different.

B. Jurisdiction: Exhausting Administrative Remedies, Timing, and Parties

Before our client can get into court, she must exhaust her administrative remedies, meaning she must appeal the agency's decision up through the agency until the agency arrives at a final decision.

> *[T]he general rule is that parties aggrieved by the action of an administrative agency cannot seek review in the courts without first exhausting all administrative remedies available to them. Requiring the exhaustion of remedies allows the administrative agency to fully develop and consider the cause before it, use its expertise to resolve matters, correct its own errors, and conserve judicial time by avoiding unnecessary or piecemeal appeals. Where the administrative rules allow for applications for rehearing, a party must do so in order to exhaust his administrative remedies and preserve his right to seek judicial review. Burns v. Dep't of Ins.*, 2013 WL 122449, 997 N.E.2d 938, 942 (1st Dist., Sept. 30, 2013).

There are exceptions to this general rule, which are rarely at issue in the cases CVLS handles.[1] If a person has not exhausted her remedies, the court lacks subject matter jurisdiction, and the case must be dismissed. *Id.*

[1]"[S]everal exceptions have been recognized…which allow a party to seek judicial review of an administrative decision without exhausting all administrative remedies available to him, including: (1) where a statute, ordinance or rule is attacked as facially unconstitutional; (2) where multiple administrative remedies exist and at least one is

The complaint must also be filed and summons issued with a certain time. For the ARL, the deadline is 35 days "from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." 735 ILCS 5/3-103. The ARL also requires the plaintiff to add all "necessary parties," though there is some flexibility. *See* Id. at 3-107.

Review by common law writ does not have these strict timing requirements. The complaint must be filed and summons issued within 6 months of the final agency decision. *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310 (1st Dist. 1992). Again, if these requirements are not met, the court must dismiss the complaint for lack of subject matter jurisdiction. *Id.*

C. Procedure

1. The Complaint

The complaint simply must allege that the Plaintiff was a party to the administrative action and was aggrieved by it. That is the cause of action. The complaint should also specify what the plaintiff believes the agency's mistake was.

> *The pleading requirements for administrative review are less exacting than for other causes of action. A complaint for administrative review must allege that the plaintiff was a party of record to the agency's proceedings and that his rights, privileges or duties were adversely affected by the agency's decision. However, it is not contemplated that issues of fact will be framed by complaint and answer; rather, the review is upon the record of the administrative agency. Mueller v. Bd. of Fire & Police Comm'rs of Vill. of Lake Zurich*, 267 Ill. App. 3d 726, 733-34 (1st Dist. 1994).

Because the ARL (or common law writ) does not require the agency to deny allegations of a party seeking review, allegations that are not denied are not deemed admitted. *Watra, Inc. v. License Appeal Comm., City of Chicago*, 71 Ill. App. 3d 596, 601 (1st Dist. 1979).

Petitions for review might be joined with other equitable remedies, such as declaratory judgment or mandamus.

2. The Administrative Record

As its answer to the complaint, the agency must file the administrative record. The record should contain all the evidence that was presented during the administrative hearing. If our client believes some piece of information that she presented is not in the record and should be, the record can be amended by motion.

Because the court reviews the agency's decision at the time it was made, the court can only consider evidence presented at the agency hearing. *Jackson v. Dep't of Labor, Bd. of Review*, 168

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exhausted; (3) where the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency; (4) where no issues of fact are presented or agency expertise is not involved; (5) where irreparable harm will result from further pursuit of administrative remedies; or (6) where the agency's jurisdiction is attacked because it is not authorized by statute. *Id.*

Ill. App. 3d 494, 500 (1st Dist. 1988). It is the agency's duty to ensure the record filed with the reviewing court is complete. *Mueller*, 267 Ill. App. 3d at 734. The record could contain a transcript of the administrative hearing, but some agencies do not provide a transcript. However, if the record does not contain a transcript, the agency is not entitled to a presumption that its summary of testimony is correct and may lose for having insufficient evidence to support its position. *Miles v. HACC*, 2015 IL App (1st) 141292, ¶ 18 (Aug. 13, 2015).

In addition "to the matters of record before an administrative agency, a court conducting an administrative review may also consider any fact of which judicial notice may be taken." *North Ave. Properties v. Zoning Bd. Of Appeals of City of Chicago*, 312 Ill. App. 3d 182, 185-87 (1st Dist. 2000). For example, if a housing voucher termination is based on an eviction, the review court could take judicial notice of an order vacated the order of possession. Public records that contradict the agency's findings could also be introduced.

3. Motions for a TRO

If the benefit has only recently been terminated, a Plaintiff could file a motion for a temporary restraining order, which would enjoin the agency from terminating the benefit until a final decision on the merits. The purpose of a TRO is to preserve the "status quo," which is "the last actual, peaceable, uncontested status which preceded the controversy." *Bd. of Ed. of Springfield Pub. Sch., Dist. No. 186 v. Springfield Ed. Ass'n*, 47 Ill. App. 3d 193, 196 (1st Dist. 1977). If too much time has passed from the agency decision to the motion, the motion then asks for the "ultimate relief" and becomes a motion for a "mandatory injunction." *Grillo v. Sidney Wanzer & Sons, Inc.*, 26 Ill. App. 3d 1007, 1011 (1st Dist. 1975). Such a motion has a much higher burden of proof.[2]

To get a TRO under the ARL: must show "good cause.":

1) that an immediate stay is required in order to preserve the status quo without endangering the public,
2) that it is not contrary to public policy, and
3) that there exists a reasonable likelihood of success on the merits. 3-111.

Under the Common Law, must show:

1) a clearly ascertained right in need of protection exists,
2) irreparable harm will occur without the injunction,
3) there is no adequate remedy at law for the injury, and
4) success on the merits is likely. *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 156 (Ill. 1992).

[2] For a mandatory injunction, the right must be "clearly established" and "free from doubt." The emergency must also be "extreme," and the measure is "drastic." *Peckler v. Cullerton*, 92 Ill. App. 2d 290, 294 (1st Dist. 1968).

If the motion is brought as an emergency, the moving party must also show the basis for the emergency. *See Nagel v. Gerald Dennen & Co.*, 272 Ill.App.3d 516, 519-20 (1st Dist. 1995) for what constitutes an emergency. Notice should be provided to the other side.

Because the party must show a likelihood of success on the merits, the moving party must give a preview of the legal argument on which she hopes to prevail. However, a ruling on a TRO motion is not a ruling on the merits of the case.

Motions for a TRO in HCV housing cases are very important. Our client has a private lease contract with a landlord which requires rent, with or without the Section 8 subsidy. If our client does not receive the benefit during the lawsuit, they could face a secondary eviction action for non-payment of rent.

4. Briefing

After the record is filed and preliminary motions are resolved, the judge will enter a briefing schedule. The Plaintiff files a brief in support explaining the agency's mistake. The agency files a responsive brief, and the Plaintiff has the final say with a reply brief. Briefs should be no more than 15 pages long—check the judge's standing order. The briefs typically contain an Introduction, a Statement of Law, a Statement of Facts and an Argument section. All factual references should be backed up with citations to the filed administrative record. There is no need to attach these exhibits to the briefs.

After briefing, the judge will usually have an oral hearing so the parties can recap their arguments. The judge will either rule from the bench or take the matter under advisement and issue a written ruling.

5. Remedies

The judge may reverse the agency, remand for further fact finding or to correct some procedural mistake, or affirm the decision. The best result for our client is a full reversal. If the case is remanded, the agency could simply correct any flaws and stand by its initial decision.

If the judge reverses the agency, try to include language in the order that requires the agency to retroactively pay any withheld benefits. *See Campbell v. Dept. of Pub. Aid*, 61 Ill.2d 1 (Ill. 1975); *Holbrook v. Pitt*, 643 F.2d 1261 (7th Cir. 1981). For example, in a housing voucher case, the judge may have denied the initial motion for a TRO but eventually reversed the CHA, meaning there are now back-payments owed. The CHA may not believe it needs to pay those benefits without explicit direction from the court to do so.

III. STANDARDS OF REVIEW

For the following section, we will use a typical CHA termination case as an example. Oftentimes, the CHA will terminate a family's housing voucher because one family member was engaged in "drug-related criminal activity" in violation of the family's obligations. The CHA may prove its case using a criminal background check or police report.

A. General Duty:

Provide Sufficient Reasoning to Support Conclusions/Not Act Arbitrarily and Capriciously

Case example: If the termination is discretionary, did the CHA consider all relevant mitigating circumstances? *See*, *Gaston v. CHAC*, 375 Ill.App.3d 16 (1st Dist. 2007). Did the CHA explain where the activity took place? Give a run-down of the various charges and disposition?

Standard of Review: Logical, reasoned conclusion between evidence and agency action

Reversed If: If agency acted arbitrarily, capriciously, or otherwise abused its discretion

> *A decision of an administrative agency must contain findings so as to make judicial review of that decision possible. The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. Thompson v. Gorman*, 405 Ill. App. 3d 979, 982 (1st Dist. 2010).

> *While it is probably not possible to enumerate all the kinds of acts or omissions which will constitute arbitrary and capricious conduct, the following guidelines apply. Agency action is arbitrary and capricious if the agency: (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 505-06 (Ill. 1988).

B. Constitutional Issues

Case Example: Did the CHA's "Intent to Terminate" notice properly appraise the family of the alleged violation? Did the CHA rely solely on hearsay to support its case? Did the family have a meaningful opportunity to refute the charges? Did the family have proper access to their records before the hearing? Did the CHA hold a hearing and issue a decision in a timely way?

Standard of Review: *De Novo*

Reversed if: Prejudicial error

> *On administrative review, a court has a duty to examine the procedural methods employed at the administrative hearing, to insure that a fair and impartial procedure was used…[A]n administrative proceeding is governed by the fundamental principles and requirements of due process of law. However, due process is a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand…[P]rocedural due process in an administrative proceeding does not*

> *require a proceeding in the nature of a judicial proceeding. Abrahamson v. Ill. Dep't. of Prof. Reg.*, 153 Ill. 2d 76, 92-93 (Ill. 1992).

Procedural due process requires two things: 1) notice and 2) meaningful opportunity to be heard. For notice, "the charge in an administrative proceeding need only reasonably advise the respondent as to the charges so that he or she will intelligently be able to prepare a defense." Id. at 93. In CHA cases, that could mean seeking to terminate the housing voucher for reasons not adequately stated in the intent to terminate letter.

In recent HCV cases, the court has been clear that the question of notice must be answered solely from the ITT. Actual notice is insufficient:

> *It was the responsibility of the HACC to put petitioner on notice as to the precise conduct she allegedly engaged in that warranted terminating her participation in the HCV Program. Due process imposes the burden of providing adequate notice on the government, not on the individual. Without any information such as the dates on which the alleged unreported income was earned or any calculations or underlying data, petitioner could not have known how to prepare rebuttal evidence to introduce at her hearings or to adequately defend against the claims and allegations asserted against her by the HACC. Due process "requires such information in order for the tenant to adequately prepare for the hearing and to understand what factors motivated the final decision, particularly where more than one potential ground for termination exists." Tolliver v. HACC*, 2017 IL App (1st) 153615, ¶ 24 (May 19, 2017) (*citing, Driver v. Housing Authority*, 713 N.W.2d 670, 676 (Wis. Ct. App. 2006)).

For the second due process component, a court can do "Mathews balancing," weighing three factors:

> *(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. In Interest of C.J.*, 272 Ill. App. 3d 461, 465 (3d Dist. 1995) (applying *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

If the cost of the additional procedure is lighter than the weight of the right and the protection against wrongful future deprivations with the safeguard, than the existing procedures are insufficient and unconstitutional.

The right to confront could elevate hearsay objections to due process violations. Although the "technical" rules of evidence usually do not apply at administrative hearings, hearsay is a substantive rule of evidence. However, "Where there is sufficient competent evidence to support an administrative decision, the improper admission of hearsay evidence in the administrative proceeding is not prejudicial error and does not constitute a due process violation." *Morris v. Dep't of Prof'l Reg.*, 356 Ill. App. 3d 83, 91 (1st Dist. 2005).

Finally, participants have the right to a timely hearing and decision. The first question in this analysis is whether adjudicative deadlines are mandatory or directive. *Stull v. DCFS*, 239 Ill. App. 3d 325, 333 (5th Dist., 1992).

> *[W]hen a statute prescribes the performance of an act by a public official or a public body, the question of whether it is mandatory or directory depends on its purpose. If the provision merely directs a manner of conduct for the guidance of the officials or specifies the time for the performance of an official duty, it is directory, absent negative language denying the performance after the specified time. If, however, the conduct is prescribed in order to safeguard someone's rights, which may be injuriously affected by failure to act within the specified time, the statute is mandatory. Stull*, 239 Ill. App. 3d at 333.

If the deadline is mandatory, the agency blowing the deadline renders the decision void.

If the deadline is directive, whether the decision is void depends (again) upon Mathews v. Eldridge balancing with an eye toward the proscribed time. ""[T]he time limitations set forth in the…administrative rules at the very least reflect the judgment of…the agency as to what constitutes a reasonable length of time in which the agency must act…[A] gross deviation from those time limitations would be deemed to be unreasonable." *Stull*, 239 Ill. App. 3.d at 334.

C. Questions of Fact

Case Example: Did the family member actually commit the criminal activity? Did the crime occur within a one-mile radius of the subsidized unit? Did the family report the criminal activity? Is future compliance with the family obligations likely?

Standard of Review: Against the manifest weight of the evidence

Reversed if: Opposite conclusion clearly evident. Reverse "only if, after reviewing the evidence in the light most favorable to the agency, the reviewing court determines that no rational trier of fact could have reached the agency's conclusion." *Daley v. El Flanboyan Corp.*, 321 Ill. App. 3d 68, 77 (2001). The decision should not be reversed if there is any evidence in the record to support the agency's action. *Id.*

If the agency's decision is based solely on inadmissible hearsay, the decision may still be against the manifest weight of the evidence when the hearsay is properly excluded. *Miles*, 2015 IL App (1st) 141292.

D. Questions of Law

Case Example: Is the violation a basis for mandatory or discretionary termination?

Standard: *De novo*

Reversed if: Agency erred in interpreting/apply the law/regulation or acted outside of the scope of its authority

E. Mixed Questions

Case Example: Is the alleged crime "criminal activity that threatens the health, safety and welfare of the residents in the immediate vicinity" per the CHA guide?

> *A mixed question of law and fact is whether the facts satisfy a statutory standard or whether the rule of law, as applied to the established facts, is violated. The clearly-erroneous standard of review lies somewhere between a de novo and a manifest-weight-of-the-evidence standard, but provides some deference to the agency's experience and expertise. Lombard Pub. Facilities Corp. v. Dep't of Revenue*, 378 Ill. App. 3d 921, 928 (1st Dist. 2008).

Standard of Review: Clear error

Reversed if: "The reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed." *AFM Messenger Serv., Inc. v. Dep't of Employment Sec.*, 198 Ill. 2d 380, 395 (Ill. 2001).

F. Sanctions

Case Example: Is the alleged violation serious enough to justify terminating the family's voucher as a sanction?

Standard of Review: Reasonableness

Reversed if: "The sanction is unreasonable, arbitrary, or unrelated to the purpose of the relevant statute." *Morris*, 356 Ill. App. 3d at 93. "If the reviewing court finds that the sanction is unreasonable, it cannot modify the sanction; rather, the court must remand to the agency for further proceedings consistent with the court's expressed opinion." *Obasi v. Dep't of Prof'l Reg.*, 266 Ill. App. 3d 693, 704 (Ill. App. Ct. 1994).

IV. WHERE TO FIND THE REGS (SECTION 8 CASES)

- 1937 Housing Act (Amended in 1974): 42 U.S.C.A. § 1401 et seq.
- HUD Regulations: 24 C.F.R Part 982. Check 24 C.F.R. Parts 1-8 for Fair Housing Issues
- HUD Guidebooks: http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/guidebooks/7420.10G.
- CHA/HACC Admin Plan: You're best off just Google-ing "CHA/HACC Administrative Plan."