# FEBRUARY 2016 PUPILAGE TEAM WRITTEN MATERIALS

**What is Administrative Law?** It covers a wide and varied area of practice, encompassing many different types of governmental legal procedures and regulations, and is not easily defined. Much of government and its public programs operate largely through various agencies on different levels: federal, state, county, and city. These agencies are also known as boards, commissions, departments, and divisions.

They generally have their own specific rules and regulations, which are not usually found in the statutes, with stringent procedures individuals must follow to obtain assistance from the agency and to file claims, grievances and appeals. Legal rulings by Administrative Law Judges (ALJ's) have governing authority the same as most precedent law. Administrative law attorneys can offer assistance when maneuvering through these complicated proceedings.

The Administrative Procedure Act is the governing law for federal administrative agencies. Most states also have their own governing law for their state administrative agencies. These laws allow for the creation of the rules and regulations, as well as the procedures necessary for those unhappy with the agencies or their decisions to seek remedies via appeal or complaint. They are carried out with the same authority as the more well-known statutory laws, and so, as with other areas of law, the skills of an experienced administrative law attorney are often required.

The public's need for a professional in the administrative law practice area generally exists when dealing with governmental agencies that provide some type of specific public benefit or aid to individuals, and particularly when the benefit might be or has been terminated, limited or outright denied. Examples of these administrative bodies include some of the following: Social Security Administrations; Employment/Labor Boards; Unemployment Insurance Agencies; Workers' Compensation Boards; Licensing Agencies; Equal Opportunity Commissions (EEOC); and Zoning Boards.

When an individual wants to appeal an administrative law decision or determination, he must exhaust all of the options provided by the agency first, before he may proceed to a non-administrative court. For example, she would usually need to file an appeal and participate in an administrative hearing presided over by an ALJ as a first step, if she disagrees with a decision to deny, terminate or limit her benefits. Once an order is handed down, either side may appeal if it is an unsatisfactory outcome. Some agencies provide for another level within the department, while others allow the appellant to then appeal to a court outside of the agency. Even in these instances, a professional in the administrative law field is usually a necessity.



**Terms to Know**

- Administrative law judge - A judge who only hears cases related to a specific agency's regulations, such as a Social Security benefits appeal
- Agency - A regulatory body established by Congress or a state Legislature, usually given the power to write, monitor and enforce specific regulations
- Hearing - An administrative procedure similar to a trial, where an administrative law judge or review board hears evidence and arguments, then makes a ruling on an administrative issue
- Administrative Procedure Act (APA) - A federal law that governs how administrative agencies can propose and enact regulations
- Code of Federal Regulations (CFR) - An annual publication containing all of the rules and regulations passed by administrative agencies each year
- Federal Register - A daily publication containing notices of proposed rules that agencies intend to pass, as well as the final versions of rules and regulations expected to be enacted

For more definitions, visit the FindLaw Legal Dictionary.

**Important Considerations When Hiring an Administrative Law Attorney**

The federal government contains more than 100 administrative agencies spanning practically every subject area imaginable. There are agencies devoted to transportation safety, health care, homeland security, and environmental conservation, to name a few. Because each agency has its own distinct rules, regulations and procedures, it is important that you locate an attorney with experience in your particular issue.

Although rules and regulations passed by administrative agencies are not the same as laws passed by Congress or a state Legislature, they may carry similar penalties if you do not obey them. Many administrative agencies have the power to fine individuals and corporations that fail to comply with administrative regulations.

Many agencies, such as the Social Security Administration, make decisions that can severely affect your rights and benefits. If you are denied the benefits or action you seek, every agency has an appeal process. However, administrative appeal processes often have very complex and specific procedures and rules that you must follow, and skipping one step or missing a single deadline can doom your entire case. That's why it is important to consult a lawyer as soon as possible. An attorney will fight to ensure that all of the proper procedures and deadlines are followed and your rights are protected.

- See more at: http://hirealawyer.findlaw.com/choosing-the-right-lawyer/administrative-law.html#sthash.J7wjfKuC.dpuf

## THE OKLAHOMA ADMINISTRATIVE PROCEDURES ACT

The Oklahoma Administrative Procedure Act is found in Title 75, Chapter 8 of Oklahoma Statutes. According to 75 Okl. St. § 250.9, an Office of Administrative Rules is established within the Office of the Secretary of State for publishing The Oklahoma Register and the Oklahoma Administrative Code. 75 Okl. St. § 250.10 provides that the Governor or either house of the Legislature may request an agency to review its rules to determine whether or not the rules in question should be amended, repealed or redrafted. As per 75 Okl. St. § 251, on request of the Secretary of State, each agency should furnish to the Office of Administrative Rules, a complete set of its permanent rules.

According to 75 Okl. St. § 253, an agency may make an emergency rule, if an imminent peril exists to the preservation of the public health, safety, or welfare. Further, when public interest requires an emergency rule or amendment, revision, or revocation of an existing rule, an agency may make, at any time, any such rule. However, the Governor should approve an emergency rule.

According to 75 Okl. St. § 255 the Secretary of State should publish in The Oklahoma Register, new rules, any amendment, revision or revocation of an existing rule, emergency rules, any notices of such rulemaking process and Executive Orders. As per 75 Okl. St. § 256 the Secretary of State should provide for the codification, compilation, indexing and publication of agency rules and Executive Orders in the Oklahoma Administrative Code.

As per 75 Okl. St. § 303, before adopting a rule, an agency should publish the notice of intended action in The Oklahoma Register. Further, the agency should consider all written and oral submissions about the proposed rule and a hearing should also be held. On completion of all requirements of law, an agency may adopt a proposed rule.

According to 75 Okl. St. § 303.1, within ten days after adoption of a permanent rule, the agency should file two copies of new rules or amendments and revisions or revocations to an existing rule proposed by an agency with the Governor, the Speaker of the House of Representatives and the President Pro Tempore of the Senate. The agency should also submit to the Office of Administrative Rules for publication in The Oklahoma Register, a statement that the adopted rules have been submitted

to the Governor and the Legislature. As per 75 Okl. St. § 303.2, the Governor has forty-five days from receipt of a rule to approve or disapprove the rule. If the Governor approves the rule, the Governor should immediately notify the agency in writing of the approval. A copy of such approval is given by the Governor to the Speaker of the House of Representatives and the President Pro Tempore of the Senate. Upon receipt of the approval, the agency should submit a notice of such approval to the Office of Administrative Rules for publication in The Oklahoma Register. If the Governor disapproves the adopted rule, the Governor should return the entire document to the agency with reasons in writing for the disapproval.

75 Okl. St. § 304 states that each agency should file copies of the rule finally adopted by it with the Secretary of State. According to 75 Okl. St. § 305, an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule.

According to 75 Okl. St. § 307.1, the Speaker of the House of Representatives and the President Pro Tempore of the Senate may each establish a rule review committee or designate standing committees of each such house to review administrative rules. As per 75 Okl. St. § 308, the Legislature may disapprove or approve any rule which has been submitted for review by adoption of a joint resolution. As per 75 Okl. St. § 308.2, an agency rule is not valid, until it has been promulgated as required in the Administrative Procedures Act.

75 Okl. St. § 312 provides that a final agency order should be in writing and should include findings of fact and conclusions of law. As per 75 Okl. St. § 318, any party aggrieved by a final agency order in an individual proceeding is entitled to speedy, adequate and complete judicial review. According to 75 Okl. St. § 323, an aggrieved party or the agency, may secure a review of any final judgment of a district or superior court by appeal to the Supreme Court.

- See more at: http://administrativelaw.uslegal.com/administrative-procedure-acts/oklahoma/#sthash.uKDu5Nd6.dpuf

## Exhaustion of Administrative Remedies

Where relief is available from an administrative agency, a plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts. Walker v, Group Health Services, Inc., 2001 OK 2, 37 P.3d 749. The exhaustion rule is one of "orderly procedure", "designed to allow administrative bodies to perform their statutory functions free from premature and unnecessary interference by preliminary court litigation." Arbuckle Abstract Co., 975 P.2d at 886. There are several policy rationales for requiring exhaustion of administrative remedies. First, exhaustion of administrative remedies allows the agency to apply its expertise and discretion under the statutory scheme the agency itself is charged with administering. Arbuckle Abstract Co., 975 P.2d at 887. Second, exhaustion of administrative remedies allows the agency opportunity to correct errors in the administrative process, possibly vindicating the rights of a plaintiff before the courts ever become involved. See Arbuckle Abstract Co., 975 P.2d at 887. Finally, exhaustion allows an administrative agency to compile a record which is adequate for judicial review. Moore v. City of East Cleveland Ohio, 431 U.S. 494, 524-25, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

In cases in which exhaustion of remedies is not required by statute, this Court has held that the requirement to exhaust administrative remedies is a prudential rule, rather than a jurisdictional bar. Walker, 37 P.3d at 761-62. The exhaustion rule "presents a remedial barrier to judicial proceedings when an agency's rule-prescribed administrative review process is not pursued to conclusion." Id. at 762. In such cases, the exhaustion requirement is discretionary with the court and may be excused if the administrative remedy is unavailable, ineffective or would have been futile to purse. Tinker Inv. &

Mortgage Corp. v. City of Midwest City, 1994 OK 41, 873 P.2d 1029. When an administrative remedy is unavailable, ineffective or futile to pursue, the policy justifications for invoking the exhaustion of administrative remedies doctrine are no longer compelling.

The notion that an administrative process may be inadequate to fully and satisfactorily protect a right in question forms the basis of an exception to the doctrine of exhaustion of remedies for constitutional claims. The exception is a recognition that administrative agencies lack the power to pass on constitutional questions. Dow Jones & Co. Inc. v. State ex rel. Oklahoma Tax Comm'n, 1990 OK 6, 787 P.2d 843, 845 n. 9; Conoco, Inc. v. State Dept. of Health of State of Oklahoma, 1982 OK 94, 651 P.2d 125, 128-29. However, the exhaustion requirement is not excused merely because a party asserts a constitutional claim in a request for judicial relief. If relief may be granted on non-constitutional grounds, the necessity of deciding constitutional issues may be avoided and exhaustion may be required. Public Utilities Comm'n of the State of California v. U.S., 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470, rehearing denied by 356 U.S. 925, 78 S.Ct. 713, 2 L.Ed.2d 760 (1958).

In addition, a plaintiff need not exhaust administrative remedies when the Administrative Procedures Act (APA) states that exhaustion is not required. Title 75 O.S.2011, § 306 of the APA provides an exception to the exhaustion rule. Section 306 provides that the validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that "the rule, or its threatened application, interferes with or impairs ... the legal rights or privileges of the plaintiff." 75 O.S.2011, § 306(A). Section 306(D) specifically provides that the "declaratory judgment may be rendered whether the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question."

STANDARD OF REVIEW ON APPEAL FROM AN AGENCY ORDER:

If the correctness of an administrative agency order is before a court, the Oklahoma Administrative Procedures Act (OAPA), 75 O.S. 2011 § 250 et seq., governs the court's review. Under the OAPA a district court and an appellate court apply the same review standards to the administrative record. *City of Tulsa v. State ex rel. Public Employees Relations Bd.*, 1998 OK 92, ¶12, 967 P.2d 1214. Except in certain cases of alleged irregularities in procedure before the agency, the review is confined to the record made before the administrative tribunal. 75 O.S.1991, § 321; *Lowry v. Board of Chiropractic Examiners*, 1981 OK 80, 631 P.2d 737.

Generally, an administrative decision should be affirmed by a district court if it is a valid order and the administrative proceedings are free from prejudicial error to the appealing party. 75 O.S.1991, § 322(3). An administrative order, however, is subject to reversal if an appealing party's substantial rights are prejudiced because the agency's decision is entered in excess of statutory authority or jurisdiction, or an order is entered based on an error of law. § 322(1)(b) & (d). Reversal is also appropriate if the agency's findings are clearly erroneous in view of the reliable, material, probative and substantial competent evidence in the record. § 322(1)(e).

As to factual questions, neither a district court nor an appellate court is entitled to substitute its judgment for that of the agency as to the weight of the evidence. City of Tulsa at ¶13.

Orders of an administrative body are presumptively correct. *R&R Eng'g Co. v. Okla. Employment Sec. Comm'n*, 1987 OK 36, ¶7, 737 P.2d 118, 119.

IMPACT OF AGENCY'S RULES AND REGULATIONS:

According to Toxic Waste Impact Group, Inc. v. Leavitt, 755 P.2d 626, The rules and regulations enacted by administrative agencies pursuant to the powers delegated to them have the force and effect of law and are presumed to be reasonable and valid. The party complaining of the rule has the burden of establishing that an administrative rule is not reasonable or valid.

Great weight is to be accorded the expertise of an administrative agency, and a presumption of validity attaches to the exercise of expertise when the administrative agency is reviewed by a court. A court should not substitute its own judgment for that of an agency, particularly in the area of expertise which the agency supervises.

# Regulatory Law

**Regulatory Law** deals with procedures established by federal, state, and local administrative agencies, as opposed to laws created by the legislature (statutory laws) or by court decisions (case law). Regulations can relate to a large array of executive branch activities, such as applications for licenses, oversight of environmental laws, and administration of social services like welfare, just to name a few.

**Functions of Administrative Law**

Also known as **administrative law,** regulatory laws can include everything from rulemaking to adjudication and enforcement. In other words, administrative laws often relate to functions akin to all three branches of government (i.e., legislative, judicial, and executive), but all of them flow from agencies that are considered to be a part of the executive branch. To demonstrate how regulatory law is often like three branches of government in one, consider how administrative laws usually come into being:

1. The legislative branch passes a law authorizing the creation of a new executive branch agency to enforce a set of laws (for example, the Environmental Protection Agency in order to enforce certain environmental clean-up and preservation laws).

2. The statute authorizes the agency to pass regulations to meet the goals of its mandate and to enforce its rules. Thus the legislative rulemaking authority is delegated, in part, to the administrative agency.

3. The agency enacts regulations (sometimes they require legislative approval, sometimes they do not), then begins to enforce those rules (e.g., through fining or arrests). The enforcement of laws is a traditionally executive function.

4. The agency may also have procedures for hearings, and the results of those proceedings can become precedent on agency policies. These hearings are akin to the trial procedures for the judicial branch.

While administrative agencies are still a part of the executive branch and are still checked by the other two branches of government, their regulations and enforcement schema often resemble their own subsystem of government, inclusive of functions for all three branches. Consequently, when discussing any law that may be administered by an agency, it is important to look not just to the statutory law or the case law, but also to any regulatory rules and decisions related to that matter. Failing to do so may amount to overlooking an enormous portion of the body of law affecting that topic.

**Non-Executive Branch Agencies**

Not all regulatory law flows from the executive branch. The U.S. Congress has also created several judicial bodies called Article I tribunals. These tribunals have different levels of independence from the executive and legislative branches, and serve functions such as reviewing agency decisions, military courts-martial appeal courts, ancillary courts with judges appointed by judicial branch appeals court judges, or administrative agencies.

Article I tribunals are often controversial and their power has frequently been challenged before the United States Supreme Court. So far, the Supreme Court has supported the existence of Article I tribunals, but has held that their power must be limited and, when a potential deprivation of life, liberty, or property is at stake, their decisions will normally be subject to review by a judicial branch court.

## Regulatory Law - US

- ABA - Administrative Law and Regulatory Practice Section

  The Administrative Law Section serves its members, the bar and the public at-large, by providing a congenial forum to share new ideas and the most recent information on substantive and procedural developments in Administrative Law and Regulatory Practice.

- Administrative Procedure Act (APA)

  The Administrative Procedure Act (APA) (P.L. 79-404) is the United States federal law that governs the way in which administrative agencies of the federal government of the United States may propose and establish regulations. The APA also sets up a process for the United States federal courts to directly review agency decisions. It is one of the most important pieces of United States administrative law.

- National Association of Administrative Law Judiciary (NAALJ)

  NAALJ, a nonprofit corporation founded in Illinois in 1974, is the largest professional organization devoted exclusively to administrative adjudication within the executive branch of government. Its voting members exercise a broad subject matter jurisdiction and include state, federal, and local administrative law judges, administrative judges, hearing officers, referees, trial examiners, agency chairs, commissioners, and appellate authorities.

- Regulatory Law - Definition

  Regulatory laws are procedures created by administrative agencies (governmental bodies of the city, county, state or Federal government) involving rules, regulations, applications, licenses, permits, available information, hearings, appeals and decision-making. Federal agency procedures are governed by the Administrative Procedure Act, and many states have adopted similar procedural formats either by law or regulation.



The following materials can be found at www.epic.org/open_gov/Administrative-Procedure-Act.html :

# The Administrative Procedure Act (APA)

The Administrative Procedure Act (APA) governs internal procedures of administrative agencies, including how they interact with the public. The APA is codified at 5 U.S.C. §§ 551-559, and encompasses the Freedom of Information Act (FOIA) (5 U.S.C. § 552) and the Privacy Act (5 U.S.C. § 552a). The APA defines an "agency" broadly, and does not explicitly exclude the Office of the President, though it is generally believed that Congress would have to expressly act in order to apply APA requirements to the President.

The APA serves to police improper agency behavior, protect public safety, and secure proper entitlements. The APA governs all three main agency functions: rulemakings, adjudications, and licensing.

## Rulemakings

The APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." In short, an agency creates a rule when it seeks to "implement, interpret, or prescribe law or policy."

The APA describes a particular rulemaking process with which agencies are required to comply. Typically, the agency must give a notice of a proposed rulemaking, published in the Federal Register. The Federal Register "is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents." The notice must include the date the rule will come into effect, the legal authority the agency has proposed the rule under, and the substance of the rule.

After notice is given, the agency is required to solicit and accept public comments on the rule. There is no minimum period specified for the comment period to remain open, and it often varies with the complexity of the rule. Most comment periods last between 30 and 60 days, and some are re-opened if the agency believes that there was insufficient time for the public to respond or that the agency did not receive as much feedback as it would like. The agency must then consider all of the comments that are submitted in passing the final rule.

In certain cases, an agency must undergo a formal rulemaking, which requires a courtroom-style hearing. During formal rulemaking, decisions are reached on the basis of evidence given and received on the record. Formal rulemaking is appropriate in two cases: (1) where a statute provides that rules are "required to be made on the record after opportunity for an agency hearing"; and (2) in rulemakings that involve adjudicative facts, or facts specific to the rights of an individual. A statute that requires more than an informal notice and comment rulemaking, but is less stringent than a formal rulemaking, may result in a hybrid rulemaking that blends elements of each.

The APA also describes certain cases where the notice and comment rulemaking process is not required, including 2 general exceptions and 2 specific exceptions:

- General Exception 1: the Rule involves a military or foreign affairs function of the United States
- General Exception 2: The Rules involves a matter relating to agency management or personally or to public property, loans, grants, benefits, or contracts

- Specific Exception 1: Cases of interpretative rules, general statements of policy, or rules of agency organizations, procedure, or practice
- Specific Exception 2: When the agency finds for good cause that the notice and comment process is impracticable, unnecessary, or contrary to the public interest.

Note that courts employ a functional analysis to determine if a rule is procedural or substantive, in that substantive rules embody value judgments or substantially alter the rights or interests of parties (*see Air Transp. Ass'n of Am. v. Dep't of Transp*., 900 F.2d 369). Also, under Specific Exception 2, the agency's own delay cannot bring about good cause that the notice and comment process is impracticable, unnecessary, or contrary to the public interest.

### Adjudications

Like rulemakings, adjudications come in two forms - formal and informal. A formal adjudication is expressly required by statute to be held "on the record after opportunity for an agency hearing," though certain limited exceptions apply. The APA does not set out rules for informal adjudications, leaving it to each agency to determine its own procedures. However, formal adjudications require the same measures as formal rulemakings, including evidence introduced on the record.

Notice must be given to an individual subject to a formal adjudication, including the time, place, and nature of the hearing, the legal authority and jurisdiction, and the matters of asserted fact and law. An agency does not need to have a private party plaintiff - instead an agency can choose to initiate action to explore an issue or an alleged violation of some law or rule (*see Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994). However, when a private party would have standing to appeal a decision, they will also have the right to intervene in a formal adjudication.

Formal hearings (and rulemakings) are presided over by an Administrative Law Judge (ALJ). The ALJ renders a final decision on the record, which can be held as final or appealed to the full agency. Final agency decisions are subject to judicial review.

Adjudications are subject to due process requirements when two requirements are met: (1) the hearing involves issues of adjudicative facts, or facts that effect a small, individualized group, and (2) the hearing involves the possibility of a deprivation of a property or liberty interest. That interest must be created and defined by existing rules or understandings that stem from independent sources (*see Board of Regents v. Roth*, 408 U.S. 564).

### Licensing

When a license is required by a law, the agency in granting that license must comply with the same procedures governing formal rulemaking and adjudication. Application for all other licenses is governed by internal agency rules. An agency cannot revoke a license while an application for a new license remains pending. Further, licenses cannot be revoked unless the agency gives notice as to what action has provided cause for the revocation and has allowed the licensee an opportunity to correct that action.

### Judicial Review

Final agency decisions are subject to judicial review. Generally, challenges to agency regulations have a six-year statute of limitations.

## Scope of Review

The reviewing court shall decide "all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The reviewing court must (A) compel agency action that was either "unlawfully withheld or unreasonably delayed" and (B) find unlawful and "set aside agency action, findings, and conclusions" that are: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in a case subject to sections 556 and 557 of Title 5 (Government Organization and Employees) of the United States Code or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extend that the facts are subject to trial de novo by the reviewing court.

## Standards of Review

There are three standards of review: (1) substantial evidence; (2) arbitrary and capricious; and (3) statutory interpretation.

The "substantial evidence" standard of review is required for formal rulemaking and formal adjudication. Courts are required to uphold a rule if they find the agency's decision to be "reasonable, or the record contains such evidence as a reasonable mind might accept as adequate to support a conclusion." Agency actions that are invalidated by substantial evidence review are typically abandoned.

The "arbitrary and capricious" standard is mainly applied to informal rulemakings. In *Citizens to Preserve Overton Park v. Volpe* (401 U.S. 402), the Supreme Court held that in order to find agency decisions arbitrary in informal adjudications, courts must first "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." In performing this inquiry, courts cannot inquire as to why agencies relied upon particular data to make their decisions; however, courts can inquire as to what data the agency reviewed. Typically, when agency action is invalidated under the arbitrary and capricious standard of review, the action is remanded to the agency to substantiate the record. In the *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance*, the Supreme Court held that "the agency nevertheless must examine the relevant data and articulate a satisfactory explanation for its action" including a "rational connection between facts and judgment . . . to pass muster under the 'arbitrary and capricious' standard."

The "statutory interpretation" standard of review involves a two-step analysis, which derived from *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (468 U.S. 1227). Under *Chevron*, courts must first assess whether Congress has spoken to the "precise question at issue." To do this, courts must look to the language and design of the statute, as well as look to the traditional canons of construction. If the court finds that Congress has not directly addressed the precise issue, the court must then determine if the agency's action is based on a "permissible construction of the statute." Under *Chevron*, legislative regulations are given deference unless they are arbitrary, capricious, or manifestly contrary to the statute.

## Mixed Judicial Review

Mixed judicial review encompasses judicial review of both law and fact. Judicial review of law investigates the statutory authority that permits the agency to make its regulation; judicial review of fact investigates the agency's factual findings that guided its decision-making process.

## Standing

Persons who suffer a "legal wrong because of agency action" or are "adversely affected or aggrieved by agency action within the meaning of a relevant statute" has standing to receive judicial review of the agency's action (5 U.S.C. § 702). There are four elements that must be proven to gain judicial review: (1) injury in fact; (2)causation; (3) redressability; and (4) zone of interest.

## Injury in Fact

In *Sierra Club v. Morton* (405 U.S. 727), the Supreme Court held that agency action which affected environmental, aesthetic, or recreational interest, could qualify as injury in fact for standing purposes. The Supreme Court also held that agency action must directly affect personal interests, not simply those of a corporation. Additionally, if government action or inaction injures a third person in a direct fashion, that person has suffered sufficient injury in fact for standing purposes.

## Causation

Causation is the connection between the injury and the agency action.

**Redressability**

Redressability analyzes whether judicial review of agency action is likely to bring relief to the complaining party.

**Zone of Interest**

The "zone of interest" requires the complaining party to demonstrate that her injury is the type of injury protected by the statute or regulation.

**EPIC's APA Comments**

Since 1997, EPIC has consistently submitted extensive public comments to federal agencies pursuant to the APA. EPIC has also submitted administrative comments to state and international agencies. Through these comments, EPIC makes detailed recommendations, grounded in both policy and law, for stronger privacy protection. A list of comments that EPIC has submitted since 1997 can be found at EPIC: EPIC Administrative Procedure Act (APA) Comments.

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Pretty much anything you could possibly ever want to know about Administrative Law can be found at www.administrativelaw.uslegal.com The following was taken from that website:

## Judicial Review of Administrative Decisions

Judicial review is defined as the process by which courts examine the actions of the three wings of the government i.e., legislative, executive, and administrative wings. It also determines whether such actions are consistent with the constitution of the country.

The function of judicial review of agency action is to determine:

- The authority of the agency;
- Compliance by the agency with appropriate procedural requirements;
- Whether an agency action is arbitrary, capricious or an abuse of discretion. *Arrow Int'l v. Spire Biomedical*, 443 F. Supp. 2d 182 (D. Mass. 2006).

Thus, judicial review ensures that an essentially fair process is employed by an agency, invalidating only those actions in which governmental regularity has lapsed into mere will. *Phillips v. Merit Systems Protection Bd.*, 666 F. Supp. 109, 110 (E.D. Tex. 1987).

The Administrative Procedure Act provides for comprehensive judicial review of agency actions. Any person adversely affected or aggrieved by agency action is entitled to judicial review as long as the action is a final agency action for which there is no other adequate remedy in a court. *Yeboah v. INS*, 2001 U.S. Dist. LEXIS 17360 (E.D. Pa. Oct. 26, 2001).

In *Yeboah v. INS*, 2001 U.S. Dist. LEXIS 17360 (E.D. Pa. Oct. 26, 2001), it was observed that there are three criteria by which courts consider while deciding whether action of an agency is reviewable:

- Firstly, the agency must have broad discretionary powers.
- Secondly, courts have to consider whether the action implicates any political, military, economic, or other choices not essentially legal in nature and, thus, whether the action is not readily susceptible to judicial review.
- Thirdly, even actions committed to agency discretion by law are reviewable on grounds that the agency lacked jurisdiction, decision of the agency resulted from impermissible influences or such decision violates any constitutional, statutory, or regulatory command.

- See more at: http://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/#sthash.6E8w3tGp.dpuf

**What Judicial Review Embraces**

When an administrative action is challenged in a court of law, all questions that arise in deciding the matter will come under the purview of judicial review. According to 5 USCS § 704, there are two types of administrative actions that can be judicially reviewed:

- Administrative actions which are made reviewable by the statute, and
- Administrative actions for which there is no other adequate remedy in a court.

Also under 5 USCS § 704, when a final agency action is being reviewed, courts can also review a preliminary, procedural, or intermediate agency action or ruling which is not otherwise directly reviewable. Judicial review is conducted based on various provisions listed in the constitution, relevant statutes, and general right of the court to invoke the power to review. *Bowen v. Massachusetts,* 487 U.S. 879 (U.S. 1988).

When an administrative action is subject to judicial review, the extent of the judicial review allowed should be double checked. When an agency has decided that a case is within its limits, judicial review should be limited to the extent to which the agency has exceeded its conferred authority. *Shields v. Utah I. C. R. Co*., 305 U.S. 177 (U.S.1938).

A request for relief will not be denied even if it is sought against the U.S. government. *Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994). When the relief sought is other than monetary damages sovereign immunity is waived under 5 USCS § 702. *Lulac E. Park Place Trust v. United States HUD,* 32 F. Supp. 2d 418 (W.D. Tex. 1998). Also in *Kanemoto v. Reno*, 41 F.3d 641 (Fed. Cir. 1994), it was observed that, if the relief sought by an aggrieved party is for relief other than money damages, relief will not be denied. However, all requests for monetary relief are not necessarily considered requests for money damages under 5 USCS § 702. *Bowen v. Massachusetts*, 487 U.S. 879, 101 L. Ed. 2d 749, 108 S. Ct. 2722 (1988).

When an administrative action is inadequate, procedurally or substantively, the responsibility for a thorough review is entrusted to the court handling the matter. In doing this review a court is responsible for providing relief to the effected party and to further the public interest. *Hess & Clark, Div. of Rhodia, Inc. v. Food & Drug Admin*., 495 F.2d 975, 990 (D.C. Cir. 1974). It is also the duty of the court to reconcile democratic safeguards and standards of fair play with the effective conduct of government. Thus, it can be seen that a balance is to be brought out through the court's intervention in administrative matters. Usually questions of fact, policy or discretion are decided by the administrative agency and the court decides questions of law and its validity. *Bowen v. Massachusetts,* 487 U.S. 879 (U.S. 1988).

- See more at: http://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/what-judicial-review-embraces/#sthash.Naea6AIP.dpuf

**Judicial Role**

5 USCS § 706 explains the scope of judicial review with regards to administrative act. The reviewing court shall:

- decide all relevant questions of law;
- interpret constitutional and statutory provisions; and
- decide the meaning and applicability of the terms of an administrative action.

While deciding the above, the reviewing court has the power to compel performance of administrative action which is unlawfully withheld or unreasonably delayed. The reviewing court is empowered to hold an administrative action unlawful and also to set aside the same, if found to be not in accordance with law, contrary to constitutional right, power, privilege, or immunity, or in excess of statutory power. The court shall review the whole record or those parts of it cited by a party in making the above determinations.

There are wide differences between administrative agencies and courts. Origin and purpose of the movement for administrative regulation and traditional scope of judicial process will be disregarded on assimilating the relation of administrative bodies and the courts to the relationship between lower and upper court. Courts will wander off their jurisdictional area unless they observe the vital difference between the functions of administrative and judicial tribunals. Agencies should be free to frame their own rules of procedure and inquiry capable of permitting them to discharge their innumerable duties. *FCC v. Pottsville Broadcasting Co*., 309 U.S. 134, 143 (U.S. 1940).

An agency which is designed to effect policies follows inquisitorial proceedings. On the other hand, courts are structured in adjudicative model and the proceedings followed there are adversarial. *Amburgey v. Barnhart*, 288 F. Supp. 2d 821, 834 (S.D. Tex. 2003).

The standards of judicial review was discussed in *United States v. Morgan*, 313 U.S. 409 (U.S. 1941). The *Morgan* court observed that courts need not look into the mental processes behind administrative decisions and that the integrity of the administrative process must be respected. Moreover, administrative process and judicial process should be mutual instrumentalities of justice and appropriate independence of each should be respected by the other. However, substantial evidence i.e., a level of proof that a reasonable mind might accept as adequate to support a conclusion must be present to support an administrative decision. *Phillips v. Merit Systems Protection Bd*., 666 F. Supp. 109, 110 (E.D. Tex. 1987).

In reviewing an administrative action, courts should not act as super-commission or advisers to administrative agency. Courts should themselves frame the extent to which they can use judicial power in reviewing administrative action. In *Calcek v. Comm'r of Soc. Sec.*, 2003 U.S. Dist. LEXIS 13564 (M.D. Pa. 2003), it was observed that it is the Administrative Law Judge's duty to investigate the facts and develop the arguments both for and against granting benefits and the reviewing court has no function to provide justification for the Administrative Law Judge's decision.

In reviewing administrative decisions, courts must assure that:

- the administrative agency has employed essentially fair process in framing administrative decision, *Phillips v. Merit Systems Protection Bd*., 666 F. Supp. 109, 110 (E.D. Tex. 1987); and that
- the administrative agency complied with legislative policy as expressed in the agency's enabling statute. *United States v. Haggar Apparel Co*., 526 U.S. 380 (U.S. 1999).

The reviewing court is empowered to invalidate those administrative decisions where governmental regularity has lapsed into mere will, and overrule a regulation which is inconsistent with the statutory language or is an unreasonable implementation of the statute.

- See more at: http://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/judicial-role/#sthash.znpHLqct.dpuf

**Right To Judicial Review of Federal Agency Decisions**

Administrative acts are reviewable by courts. There is a strong presumption that Congress intends judicial review of administrative actions. Judicial review is denied only when it is proved by clear and cogent evidence that the relevant statute has barred the review. Judicial review is the rule and nonreviewability is the exception. The Administrative Procedure Act ("APA") permits judicial review of agency actions under two circumstances:

- agency action that are reviewable by statute; and
- final agency action for which there is no other adequate remedy in a court.
  Judicial review of a final agency action will not be denied unless there is reason to believe that Congress intended denial. There should be clear and cogent evidence to deny. *Rusk v. Cort***,** 369 U.S. 367 (U.S. 1962).

The presumption favoring judicial review like any other presumptions can be overcome by specific language indicating Congress intent. Congressional intent to overcome the presumption can be inferred from the judicial history of a statute. Judicial review of an issue is impliedly precluded when the statute itself provides an alternate mechanism for resolving the issue.

The necessity of judicial review arises:

- when a person suffers legal wrong because of agency action, or
- when a person is adversely affected or aggrieved by agency action.
  When there is substantial doubt as to Congressional intent, general presumption favoring judicial review is preferred.

- See more at: http://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/right-to-judicial-review-of-federal-agency-decisions/#sthash.ybhS1Ons.dpuf

**Right to Judicial Review of State Agency Decisions**

There is no inherent right to a judicial appeal from an administrative agency's decision. The right of appeal is also not a constitutional or inalienable right. The enabling statute has to grant the right of appeal, and the appeal must conform to the statute granting the right of appeal and regulating the process. *In re Vandiford,* 56 N.C. App. 224 (N.C. Ct. App. 1982)

The statutory requirement is mandatory and not directory. Statutory requirement is a condition precedent to require a review by courts and must be observed. Its non-compliance will result in the dismissal of the appeal.

The enabling statute defines the scope of a particular agency's power. The enabling statute is the primary source from which particular agency gets its power and right of judicial review. The extent of power and right of judicial review of a particular agency is determined by:

- The express language of the enabling statute;
- The structure of the statutory scheme;
- The objectives of the particular agency;
- The legislative history of the particular agency; and
- The nature of the administrative action involved.

It is well settled that appeals from administrative agencies exist only under statutory authority and if the enabling statute do not provide for such appeal, courts cannot hear the appeals for want of jurisdiction. Thus, courts have no inherent appellate jurisdiction over official acts of a particular agency unless the enabling statute has provided for the same.

As statutory authority is a pre-requisite for filing of appeal from administrative agency's decision, statutory provisions should be strictly complied with. Statutory provisions are mandatory and should be strictly followed.

If the enabling statute has set a time for filing an appeal from an administrative agency's decision, failure to file the appeal within the said time makes the appeal invalid and deprives the courts of jurisdiction to hear it. *Cassella v. Department of Liquor Control,* 30 Conn. App. 738 (Conn. App. Ct. 1993).

Similarly, if the enabling statute has set boundary on the subject matter jurisdiction, the same should be strictly followed. Subject matter jurisdiction concerns the cause of action and the relief sought. It exists when the court proceeds to determine the issues involved or grant a relief sought. *State Tax Com. v. Administrative Hearing Com*., 641 S.W.2d 69, 72 (Mo. 1982). Where a statute specifically provides that an appeal must be filed in a certain court, that court alone has jurisdiction to entertain the appeal. Thus, where a statute gives the aggrieved party the right to file an appeal in the Circuit Court of Cole County, the party should file the appeal only in the Circuit Court of Cole County. Other circuit courts will not have jurisdiction over the subject matter. Subject matter jurisdiction cannot be conferred by consent or agreement between the parties. The question of lack of jurisdiction can be raised for the first time at any stage in a proceeding, even before the Supreme Court. *State v. Rogers*, 351 Mo. 321 (Mo. 1943).

Similarly, where a statute gives exclusive jurisdiction to review the agency's decision to a legislatively created panel, a court is without jurisdiction to review such agency decisions.

Courts always come to the aid of public to hear meritorious complaints against illegal acts of non-judicial authorities and agencies. When a statute does not confer a right of appeal, judicial redress for fraudulent, oppressive or illegal official conduct will have to be invoked through appropriate, and extraordinary legal remedies like injunction, mandamus or quo warranto.

Under a state administrative procedure act, any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies given by a statute is

entitled to judicial review of such decisions if the statute provides judicial review. Thus, a party can seek for judicial review of an adverse administrative determination, when s/he proves that:

- The person is aggrieved;
- There is a final agency decision;
- The decision is in a contested case;
- There is no other adequate procedure for judicial review; and
- The person has exhausted administrative remedies. *State of Tennessee on behalf of Tennessee Dep't of Health & Environment v. Environmental Management Com.,* 78 N.C. App. 763, 766 (N.C. Ct. App. 1986)

- See more at: http://administrativelaw.uslegal.com/judicial-review-of-administrative-decisions/right-to-judicial-review-of-state-agency-decisions/#sthash.t9UN0sgV.dpuf

# 5 U.S. Code § 556 - Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

**(a)** This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

**(b)**There shall preside at the taking of evidence—

**(1)** the agency;

**(2)** one or more members of the body which comprises the agency; or

**(3)** one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

**(c)**Subject to published rules of the agency and within its powers, employees presiding at hearings may—

**(1)** administer oaths and affirmations;

**(2)** issue subpoenas authorized by law;

**(3)** rule on offers of proof and receive relevant evidence;

**(4)** take depositions or have depositions taken when the ends of justice would be served;

**(5)** regulate the course of the hearing;

**(6)** hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

**(7)** inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

**(8)** require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

**(9)** dispose of procedural requests or similar matters;

**(10)** make or recommend decisions in accordance with section 557 of this title; and

**(11)** take other action authorized by agency rule consistent with this subchapter.

**(d)** Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

**(e)** The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

# 5 U.S. Code § 557 - Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

**(a)** This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

**(b)**When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or

review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

**(1)** instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

**(2)** this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

**(c)** Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

**(1)** proposed findings and conclusions; or

**(2)** exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

**(3)** supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

**(A)** findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

**(B)** the appropriate rule, order, sanction, relief, or denial thereof.

**(d)**

**(1)** In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

**(A)** no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

**(B)** no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

**(C)** a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

**(i)** all such written communications;

**(ii)** memoranda stating the substance of all such oral communications; and

**(iii)** all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

**(D)** upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

**(E)** the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

**(2)** This subsection does not constitute authority to withhold information from Congress.

## Publications Related to Regulatory Law

- Journal of Regulation

  Regulation can be defined as a set of mechanisms, rules, institutions, decisions and principles that allow certain sectors of the economy to grow and maintain equilibriums that they could not establish solely via their own economic strength.

- OIRA - Regulatory Matters

  Under the Paperwork Reduction Act, OIRA reviews all collections of information by the Federal Government. OIRA also develops and oversees the implementation of government-wide policies in several areas, including information quality and statistical standards. In addition, OIRA reviews draft regulations under Executive Order 12866.

**LEGAL AUTHORITY FOR STATE ADMIN LAW SKIT**

A. The Board has the burden of proof in an individual proceeding affecting or prejudicing Respondent's license. Because of the interest at stake in the loss of a license and the potential damage to a professional reputation resulting from disciplinary proceedings, the Oklahoma Supreme Court has recognized that the standard of proof in revocation proceedings against a person holding a professional license is a clear-and-convincing-evidence standard. *State ex rel. State Bd. of Official Shorthand Reporters v. Isbell*, 803 P.2d 1143 (Okla. 1990); *State ex rel. Oklahoma Bar Association v. McMillian*, 770 P.2d 892, 895, n. 6 (Okla. 1989).

B. Respondent has a constitutionally guaranteed right to procedural due process. The interests of the Respondent are substantial. (S)he suffers the possible loss of a constitutionally protected property

right, the continued loss of livelihood, and the loss of a professional reputation. These losses are greater than monetary losses. The loss of a professional license, which is required for to work in a chosen field, negatively impacts both a person's livelihood and reputation. *Johnson v. Bd. of Governors of Registered Dentists*, 1996 OK 41, ¶ 19, 913 P.2d 1339, 1345.

C. Minimum standards of due process require administrative proceedings that may directly and adversely affect legally protected interests be preceded by notice calculated to provide knowledge of the exercise of adjudicative power and an opportunity to be heard. *DuLaney v. Oklahoma State Dept. of Health*, 1993 OK 113, 868 P.2d 676.

D. The power to revoke a license, once granted, and thus destroy in a measure the means of livelihood, is penal and therefore must be strictly construed. The issues in an administrative proceeding are limited to those raised by the pleadings. A hearing should be confined to the points at issue, so as to insure to the persons affected full opportunity to be heard on any matter before a ruling thereon is made. *State ex rel. Okla. State Bd. Of Embalmers and Funeral Dirs. v. Guardian Funeral Home*, 1967 OK 141, 429 P.2d 732; *Moore v. Vincent*, 1935 OK 763, 50 P 2.d 388; *Bd. Of Examiners of Veterinary Medicine v. Mohr*, 1971 OK 64, 485 P.2d 235.

E. There must be an “express” statutory or regulatory provision which clearly sets forth the violation or prohibited behavior before disciplinary action is permitted and where there is no express statute or rule, it is improper for the Board to “insert” such. *State ex rel. Protective Health Services, State Department of Health v. Vaughn,* 2009 OK 61, 222 P.3d 1058.

F. An agency must have sufficiently definite regulations and standards to ensure the essential quality of fairly predictable decisions. Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation. *Adams v. Professional Practices Commission*, 1974 OK 88, 524 P.2d 932.

G. If a term is not defined in the law or the administrative rules, one must turn to its plain and ordinary meaning. *Garcia v. Teitler*, 443 F.3d 202, 207 (2nd Cir. 2006); see *Welch v. Crow*, 2009 OK 20, ¶ 10, 206 P.3d 599, 603. See also, *Vaughn*, supra.

H. In making the determination of the appropriate discipline, if any, to be imposed, the Board must consider all of the evidence - including that which fairly detracts from its weight. *Massengale v. Oklahoma Bd. of Examiners in Optometry*, 2001 OK 55, 29 P.3d 558.