

10-15-2002

## Legal Summaries

Tina Serebrakian

Ryan Yahne

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), and the [Jurisprudence Commons](#)

---

### Recommended Citation

Tina Serebrakian and Ryan Yahne, *Legal Summaries*, 22 J. Nat'l Ass'n Admin. L. Judges. (2002)  
available at <https://digitalcommons.pepperdine.edu/naalj/vol22/iss2/8>

This Legal Summary is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Pepperdine University School of Law

## Legal Summaries\*

### TABLE OF CASES

UNITED STATES SUPREME COURT .....	503
Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002) .....	503
Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001).....	504
Dusenbery v. United States, 534 U.S. 161 (2002).....	505
Fed. Mar. Comm’n v. South Carolina Ports Auth., 535 U.S. 743 (2002).....	506
Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).....	508
Porter v. Nussle, 534 U.S. 516 (2002) .....	509
Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).....	510
U.S. Postal Serv. v. Gregory, 534 U.S. 1 (2001) .....	511
 SUPREME COURT OF ALASKA .....	 513
Snyder v. State, Dep’t of Pub. Safety, DMV, 43 P.3d 157 (Alaska 2002).....	513
 SUPREME COURT OF COLORADO .....	 514
Lawley v. Dep’t of Higher Educ., 36 P.3d 1239 (Colo. 2001) ..	514
 SUPREME COURT OF ILLINOIS .....	 515
AFM Messenger Serv., Inc. v. Dep’t of Employment Servs., 763 N.E.2d 272 (Ill. 2001) .....	515
 SUPREME COURT OF IOWA.....	 516
Schreiber v. Bastemeyer, 644 N.W.2d 296 (Iowa 2002).....	516

---

\* Prepared by the editors of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

---

SUPREME COURT OF KANSAS .....	517
Am. Trust Adm'rs, Inc., v. Sebelius, 44 P.3d 1253 (Kan. 2002) .....	517
SUPREME COURT OF LOUISIANA .....	518
Evans v. DeRidder Mun. Fire, 815 So.2d 61 (La. 2002) .....	518
SUPREME COURT OF MINNESOTA .....	519
Jasper v. Comm'r of Pub. Safety, 642 N.W.2d 435 (Minn. 2002) .....	519
SUPREME COURT OF WYOMING.....	520
Griffin v. State <i>ex rel.</i> Dep't of Transp., 47 P.3d 194 (Wyo. 2002) .....	520
ARIZONA COURT OF APPEALS .....	521
Webb v. State <i>ex rel.</i> Ariz. Bd. of Med. Exam'rs, 48 P.3d 505 (Ariz. Ct. App. 2002) .....	521
DISTRICT OF COLUMBIA COURT OF APPEALS.....	522
Branson v. D.C. Dep't of Employment Servs., 801 A.2d 975 (D.C. 2002) .....	522

**UNITED STATES SUPREME COURT****Chao v. Mallard Bay Drilling, Inc.**, 534 U.S. 235 (2002).

**LAW:** Occupational Safety and Health Act of 1970 clarifies that possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace jurisdiction of the Occupational Safety and Health Administration (OSHA), under an OSHA provision which excludes OSHA jurisdiction over working conditions “with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.”

**FACTS:** Respondent operates a fleet of barges used for oil and gas exploration. Rig 52, the subject barge, was drilling a well over two miles deep in the territorial waters of Louisiana, when an explosion occurred and killed four members of the crew and injured two others. Under a United States Coast Guard regulation the incident was considered a marine casualty. The United States Coast Guard conducted an investigation of the casualty and found that natural gas had leaked from the well, spread throughout the barge, and was likely ignited by sparks in the pump room. Pursuant to a report from the Coast Guard, OSHA found Rig 52 in violation of several clauses of the Occupational Safety and Health Act. Respondent did not deny the charges but challenged OSHA’s jurisdiction. The ALJ found that OSHA did have jurisdiction. However, the United States Court of Appeals for the Fifth Circuit reversed. Certiorari was granted and the Court of Appeals was reversed.

**ANALYSIS:** Barges such as Rig 52 represent a different regulatory situation. Rig 52 was an uninspected vessel, thus the Coast Guard’s regulatory authority is more limited. Since the general marine safety regulations by the Coast Guard in these situations do not address the occupational safety and health concerns faced by inland drilling operations on uninspected vessels, they do not preempt OSHA’s authority.

**HOLDING:** General marine safety regulations issued by the Coast Guard did not preempt OSHA's jurisdiction over working conditions on an "uninspected" vessel conducting inland drilling operations, where the Coast Guard regulations did not address the occupational safety and health risks specifically posed by inland drilling operations on uninspected vessels. The oil and gas exploration barge which was anchored in state territorial waters was a "workplace" for purposes of OSHA jurisdiction.

**IMPACT:** Administrative agencies and their jurisdictions are strengthened.

**Corr. Servs. Corp. v. Malesko**, 534 U.S. 61 (2001).

**LAW:** In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1999), the Court recognized an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.

**FACTS:** The Correctional Services Corporation (CSC) operated LeMarquis Community Correctional Center, which is a halfway house located in New York City. Malesko is a former federal inmate who had been convicted of federal securities fraud in December 1992 and had to serve an eighteen month sentence. Malesko was diagnosed with a heart condition and needed special prescription medication. Further, Malesko's condition limited his physical abilities, such as climbing stairs. Due to his heart condition, Malesko was exempted from the policy that required inmates to use the stairs instead of the elevator. However, on March 28, 1994, Jorge Urena, an employee of CSC told Malesko he must use the stairs, and although Malesko explained his heart condition and exemption, the employee was persistent. Malesko used the stairs and suffered a heart attack, due to which he fell and injured his ear. Three years after the incident occurred respondent attempted to file an action pro se. Two years following this attempt he filed an amended complaint with counsel. The District Court treated the action as a *Bivens* claim and dismissed the claim in its entirety because a *Bivens* action may only be maintained against an individual. The Court of Appeals for

the Second Circuit affirmed in part, reversed in part, and remanded. Certiorari was granted.

**ANALYSIS:** Although the lower courts followed the *Bivens* line of reasoning, the Supreme Court recognized that this case was outside the scope of *Bivens*. The Court reasons that *Bivens* does not extend to corporate entities. Further, alternative remedies are as good, if not better than *Bivens* remedies. For instance, federal prisoners in private facilities enjoy a parallel tort remedy that is unavailable to prisoners housed in government facilities.

**HOLDING:** The *Bivens* decision is meant to deter individual federal officers, and not the agency from committing constitutional violations. There is no implied private right of action for damages against private entities that engaged in alleged constitutional deprivations while acting under the color of federal law.

**IMPACT:** This decision weakens the broad reach of constitutional protections. The Court limits the individual from seeking adequate protections.

**Dusenbery v. United States**, 534 U.S. 161 (2002).

**LAW:** Under the Fifth Amendment, individuals whose property interests are at stake due to governmental actions are entitled, under the due process clause, to notice and an opportunity to be heard. This applies to federal prisoners as well. The notice of a forfeiture proceeding must be “reasonably calculated to apprise a party of the pendency of the action and the criterion is not the possibility of conceivable injury, but the just and reasonable character of the requirement.”

**FACTS:** The Federal Bureau of Investigations arrested Larry Dean Dusenbery at a trailer house in Ohio. Later the same day they obtained and executed a search warrant, which led to the seizure of drugs, drug paraphernalia and other items of personal property such as cash found in his pockets, in the dining room and other locations. Dusenbery pled guilty to a charge of possession with intent to distribute 813 grams of cocaine. Two years pursuant to his sentence,

the FBI began the process of administratively forfeiting certain personal items and destroying those items that would no longer be needed as evidence. Under statute, the FBI was required to provide written notice of this activity and provide publishing in a local newspaper of this activity for three consecutive weeks. Thus, the FBI sent letters of its intentions by certified mail addressed to the petitioner, care of the Federal Correctional Institution (FCI) in Milan, Michigan, where he was then incarcerated. Letters were also sent to the address of the residence where the petitioner was arrested, and to an address in Randolph, Ohio, the town where petitioner's mother lived. The FBI received no response to these notices within the time allotted and in effect declared the items administratively forfeited. Five years later, petitioner sought return of his property in District Court. The District Court denied his motion. The Court of Appeals for the Sixth Circuit vacated the District Court's judgment and remanded. Then the District Court ruled that petitioner's due process rights were not violated and the Court of Appeals affirmed. Finally, certiorari was granted and the decision was affirmed.

**ANALYSIS:** The Court held that pursuant to the *Mullane* test the use of the mail addressed to the petitioner at the penitentiary was acceptable. "Short of allowing the prisoner to go the post office himself, the remaining portion of the delivery would necessarily depend on a system in effect within the prison itself relying on prison staff."

**HOLDING:** The FBI's notice of the cash forfeiture was reasonably calculated, under all the circumstances, to apprise petitioner of the pendency of the action."

**IMPACT:** The *Mullane* test allows the FBI flexibility in establishing notice.

**Fed. Mar. Comm'n v. South Carolina Ports Auth.**, 535 U.S. 743 (2002).

**LAW:** State sovereign immunity bars Federal Maritime Commission (FMC) from adjudicating complaints filed by private parties against a non-consenting State.

**FACTS:** South Carolina Maritime Services, Inc. (SCMS) sought permission from South Carolina State Ports Authority (SCPA, Respondent), to berth a cruise ship at their port on several occasions. SCMS intended to offer trips where passengers would be permitted to participate in gambling. Mainly due to the possibility of gambling trips SCMS was denied permission to berth cruise ships at the SCPA port. In effect, SCMS filed a complaint with the Federal Maritime Commission (FMC, Petitioner), claiming that SCPA violated the Shipping Act of 1984. Further, SCMS claimed that SCPA was enforcing their antigambling policy in a discriminatory fashion because SCPA had granted berthing permission to two other Carnival cruise ships which practiced gambling on board. SCMS's complaint was originally referred to an administrative law judge who dismissed the complaint. However, the FMC on its own motion reviewed the ALJ's ruling and subsequently overruled the decision. Next, the SCPA filed a petition for review and the United States Court of Appeals for the Fourth Circuit reversed. Finally, the FMC's petition for certiorari was granted and the decision was affirmed.

**ANALYSIS:** The Court reasoned that the FMC is created under Article I powers. Thus as an agency, it cannot disregard the eleventh amendment or its related doctrine of State Immunity from private suits. The SCPA is an arm of the State of South Carolina, thus sovereign immunity precludes the FMC from adjudicating SCMS' complaint.

**HOLDING:** State sovereign immunity precludes Federal Maritime Commission from adjudicating a private party's complaint against a non-consenting State.

**IMPACT:** This Court's use of formal analogy and rigid framework in decision-making reinstates the importance of the letter of the law. The Executive and Legislative branches of the government lose structural flexibility to change the law with the times.



**Hoffman Plastic Compounds, Inc. v. NLRB**, 535 U.S. 137 (2002).

**LAW:** Immigration Reform Act of 1986 (IRCA) foreclosed the National Labor Relations Board (NLRB) from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States, even though the alien had been unlawfully terminated in violation of the National Labor Relations Act (NLRA).

**FACTS:** Hoffman Plastic Compounds, Inc., hired Jose Castro to operate various blending machines. Castro was hired on the basis of documents appearing to verify his authorization to work in the United States. Hoffman Plastic Compounds, Inc. later laid off Castro and other employees after they collectively supported a union organizing campaign at petitioner's plant. Three years later, in January 1992, the NLRB found that the layoffs violated the NLRA and ordered back pay and other relief. In June 1993, the parties came before an ALJ to determine the amount of back pay. At this proceeding it was revealed, based on Castro's testimony that he was never working legally. In effect, the ALJ found that the NLRB was precluded from awarding Castro relief. Four years later, the NLRB reversed with respect to back pay. Hoffman filed a petition for review of the NLRB's order in the Court of Appeals, which was denied. Certiorari was granted, and the order affirmed.

**ANALYSIS:** Based on precedent, the NLRB's authority was limited with respect to the selection of remedies, and they could not make an exception even if the employee was in violation of the NLRA.

**HOLDING:** Based on IRCA, federal immigration policy foreclosed the NLRB from awarding back pay to an undocumented alien who has never been legally authorized to work in the United States.

**IMPACT:** Although federal immigration policy has been strengthened by this decision, this decision also leaves open room for employers to take advantage of this system. It remains to be seen how employers would be punished for their wrongdoings, given that

the employer here was under the impression that he was dealing with legal employees when he violated the NLRA.

**Porter v. Nussle**, 534 U.S. 516 (2002).

**LAW:** Prison Litigation Reform Act (PLRA), as amended by 42 U.S.C. § 1997e(a), directs that “No action shall be brought with respect to prison conditions under section 1983 . . . or any other Federal Law, by a prisoner . . . until such administrative remedies as are available are exhausted.”

**FACTS:** Nussle, a state prison inmate, was allegedly harassed and badly beaten by several officers. The officers, including Porter, the petitioner, allegedly “ordered Nussle to leave his cell, placed him against a wall and struck him with their hands, kneed him in the back, [and] pulled his hair.” Nussle claimed the attack was unprovoked and unjustified. Nussle alleged that he was singled out because he was perceived to be a friend of the Governor of Connecticut, whom the correction officers did not like due to the Governor’s stand on certain labor issues. Nussle did not seek any administrative remedies. Rather, he bypassed the grievance procedure asserted under the PLRA and sought relief directly from the court. The Court of Appeals for the Second Circuit held that section 1997e(a) governs only conditions affecting prisoners *generally*, not single incidents, such as corrections officers’ use of excessive force, or actions that immediately affect only particular prisoners. The Supreme Court rejects this position.

**ANALYSIS:** Section 1997e(a) should be construed narrowly. PLRA’s legislative history overwhelmingly suggests that Congress sought to curtail suits qualified as “frivolous” because of their subject matter. In addition, the Court reaches this decision pursuant to case precedent set forth in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and others. Finally, the Court recognizes that an opportunity to address these matters internally first, might improve prison administration and satisfy the inmate, thereby diminishing the need for litigation.

**HOLDING:** The exhaustion requirement under section 1197e(a) applies to all prisoners seeking redress for prison circumstances or occurrences.

**IMPACT:** The Supreme Court draws attention to precedent. The presumption becomes evident, that Congress expects its statutes to be read in conformity with the Supreme Court's precedents.

**Thompson v. W. States Med. Ctr.**, 535 U.S. 357 (2002).

**LAW:** Under the *Central Hudson* test, commercial speech that neither concerns unlawful activity nor is misleading may be regulated if: (1) asserted governmental interest is substantial; (2) regulation directly advances that interest; and (3) regulation is not more extensive than is necessary to serve that interest.

**FACTS:** Section 503A of the Food and Drug Administration Modernization Act (FDAMA) exempts compounded drugs from the drug approval requirements as long as the providers of those drugs abide by several restrictions, including not advertising or promoting the compounded drugs. This law was the result of policy intending to curb abuse of the compounded drug exemption. However, a group of licensed pharmacies that specialize in compounding drugs, sought to enjoin enforcement of the subsections of the Food and Drug Administration Modernization Act that deal with advertising and solicitation. The pharmacists argued that these provisions violate the First Amendment "free speech" clause of the Constitution.

The District Court agreed with respondents and granted their motion for summary judgment holding that the provisions do not meet the requisite test under *Central Hudson*. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, agreeing that the provisions regarding advertisement and promotion are unconstitutional but finding them not to be severable from the rest of section 503A. Petitioners challenged only the Court of Appeals constitutional holding in their petition for certiorari, and respondents did not file a cross petition. The Court addressed only the constitutional question and affirmed.

**ANALYSIS:** The Court finds that soliciting of prescriptions for particular compounded drugs and advertising of such drugs, as prohibited by the Food and Drug Administration Modernization Act (FDAMA) constituted “commercial speech” for purposes of the First Amendment. However, the Court found that the provisions failed *Central Hudson* because the government had not demonstrated that the restrictions would directly advance its interests or that alternatives less restrictive of speech were unavailable.

**HOLDING:** The provisions of FDAMA that exempted compounded drugs from the Food and Drug Administration’s drug approval requirements, if providers of such drugs refrained from advertising, promoting, or soliciting prescriptions for particular compounded drugs were unconstitutional restrictions of commercial speech.

**IMPACT:** This decision broadens the arena of free speech, and strengthens the possibility of a constitutionality concern.

**United States Postal Serv. v. Gregory**, 534 U.S. 1 (2001).

**LAW:** The *Bowling* standard provides for “de novo review of prior disciplinary actions unless: (1) The employee was informed of the action in writing; (2) the action is a matter of record; (3) the employee was given the opportunity to dispute the charges to a higher level than the authority that imposed the discipline.” If these conditions are met, Board review of prior disciplinary action is limited to determining whether the action is clearly erroneous. Further, the Federal Circuit’s statutory review of the substance of the Board’s decision is limited to determining whether they are unsupported by substantial evidence or are arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law.

**FACTS:** Maria Gregory worked for the United States Postal Service as a letter technician. Through the course of her employment she received at least four warnings for violations of the Postal Service’s guidelines. For instance, Gregory ignored her supervisor’s instructions to sort the mail for her route before leaving in order to take her daughter to the doctor and as a result received a warning for

insubordination. Further, Gregory was cited for delaying the mail and as a result she was suspended. Then, pursuant to a third citation she was suspended for fourteen days. Gregory filed for a grievance on each of these citations. Pursuant to her fourth citation Gregory's supervisor recommended that she be removed, and it was so ordered. Gregory served in the army, placing her in a special category of workers known as "preference eligible" who are covered by the Civil Service Reform Act of 1978 (CSRA). These employees can appeal disciplinary actions to the Merit Systems Protection Board or seek relief through the negotiated grievance procedure, but not both. Gregory chose to appeal to the Board. The ALJ upheld the termination. The United States Court of Appeals for the Federal Circuit affirmed the Board's decision to uphold the ALJ's factual findings with respect to the last incident. The court further took judicial notice of the fact that one of the grievances was resolved in Gregory's favor. The court held that "prior disciplinary actions that are subject to ongoing proceedings may not be used to support a penalty's reasonableness." It therefore vacated the Board's decision in part and remanded for further proceedings. Certiorari was granted.

**ANALYSIS:** The Court reasoned that although the Board independently reviews prior disciplinary actions pending in grievance, it also has a policy of not relying upon disciplinary actions that have already been overturned in grievance proceedings at the time of Board review.

**HOLDING:** One of Respondent's disciplinary actions was overturned in arbitration before the Board rendered its decision, thus the Postal Service agrees that a remand to the Federal Circuit is necessary to determine the effect of the reversal on Respondent's termination. The decision was vacated and remanded.

**IMPACT:** The Board has broad discretion in determining how to review prior disciplinary actions and need not adopt the Federal Circuit's rule.

**SUPREME COURT OF ALASKA**

**Snyder v. State, Dep't of Pub. Safety, DMV**, 43 P.3d 157 (Alaska 2002).

**LAW:** Due process requires that an appellant be allowed to testify in a new hearing if credibility is an issue.

**FACTS:** Appellant Snyder appealed the decision to revoke his driver's license after an alleged driving while intoxicated (DWI) violation. At the first hearing, the hearing officer was not convinced by appellant's testimony, which was that he consumed alcohol only after the accident. Consequently, the hearing officer ruled that appellant did not meet the burden of proof to show that his blood alcohol was below the legal limit. On appeal, the Superior Court remanded the case because the hearing officer had erroneously placed the burden of proof on the appellant.

On remand, the case was assigned to a new hearing officer, but Snyder was not given notice. The new hearing officer did not hold another hearing, but instead looked at the record of the previous hearing and Snyder's previous DWI record and affirmed the decision, because she did not find Snyder's former testimony credible. Snyder appealed again, and the Superior Court affirmed. Snyder appealed to the state Supreme Court.

**ANALYSIS:** The court reasons that live testimony is especially important when a witness' credibility is at issue. Here, the new hearing officer never got a chance to listen to the testimony of the appellant, yet she affirmed the decision on the issue of credibility. The new hearing officer's decision to base her decision on the original credibility findings was fundamentally unfair.

**HOLDING:** This was a due process violation and a new hearing was ordered.

**IMPACT:** If a new hearing officer is assigned to review a former hearing officer's decision, the appellant must be given a chance to testify before the new hearing officer if credibility is an issue. As a result, an increasing number of new hearings may be issued in order

to comply with due process of law.

## **SUPREME COURT OF COLORADO**

**Lawley v. Dep't of Higher Educ.**, 36 P.3d 1239 (Colo. 2001).

**LAW:** A review board may substitute its own conclusions of law for those of a reviewing Administrative Law Judge when the issue is one of ultimate fact.

**FACTS:** Lawley brought a gender discrimination suit against the University of Northern Colorado stemming from the University's decision to abolish her position as Director of Parking Services. Her claim was that the University's decision was discriminatory, arbitrary and capricious. Lawley presented her claim to the Colorado State Personnel Board (Board), which first gave it to an Administrative Law Judge (ALJ) for an evidentiary hearing. The ALJ denied relief on both grounds and concluded that the University did not discriminate and did not act arbitrarily, capriciously or contrary to the law. Subsequent to this ruling, the Board adopted the ALJ's finding of facts, but rejected the ALJ's conclusions of law, thereby reversing the decision.

**ANALYSIS:** The court first examined the relationship between the ALJ and the Board, as designated by state statute, and determined that the authority of the ALJ is fundamentally grounded in the authority of the Board. The court then distinguished the ALJ's finding as one of evidentiary fact instead of ultimate fact. Evidentiary facts generally include detailed factual or historical findings, while ultimate conclusions of fact involve conclusions of law that determine the rights and liabilities of the parties.

**HOLDING:** The finding of the Board, that the University intentionally discriminated and acted arbitrarily and capriciously, was an ultimate conclusion of fact. Accordingly, the Board was allowed to substitute its own judgment for that of the ALJ's.

**IMPACT:** As argued by the University in this case, this decision may usurp some of the function and power of Administrative Law Judges.

**SUPREME COURT OF ILLINOIS**

**AFM Messenger Serv., Inc. v. Dep't of Employment Servs.,** 763 N.E.2d 272 (Ill. 2001).

**LAW:** When a court examines an issue that is a mixed question of law and fact, the standard of review is a “clearly erroneous” standard.

**FACTS:** Appellant AFM Messenger Service appealed a decision by the Department of Employment Services (DOES), which held that delivery drivers who worked for AFM were not independent contractors. The Illinois Supreme Court looked at which standard of review to use in this situation, which hinged on whether the issue was one of fact or was a mixed question of law and fact.

**ANALYSIS:** The appellant argued that the question before the court was one of law and therefore was entitled to *de novo* review. The court went on to hold that the issue was a mixed question of law and fact because it involved an examination of the legal effect of a given set of facts. The court further held that the proper standard of review is a “clearly erroneous” standard. The court reasoned that on mixed questions of law and fact, the court was to provide deference to the agency’s decision. In adopting this standard, the court held that the definition to be used would be the one used in Rule 52(a) of the Federal Rules of Civil Procedure.

**HOLDING:** The standard to be used in an issue of a mixed question of law and fact is “clearly erroneous,” where the decision of the agency will be reversed only if it is clearly erroneous.

**IMPACT:** This decision imparts substantial deference to an agency when the issue presented is a mixed question of law and fact.



## SUPREME COURT OF IOWA

**Schreiber v. Bastemeyer**, 644 N.W.2d 296 (Iowa 2002).

**LAW:** The Iowa Supreme Court Board of Professional Ethics and Conduct is considered a component of the state judicial branch, and not an agency.

**FACTS:** Appellant Schreiber appealed a decision by the Iowa Supreme Court Board of Professional Ethics and Conduct (Board) to dismiss his complaint of professional misconduct brought against his former lawyer. Schreiber appealed under the applicable state Administrative Procedure Act (APA), which permits judicial review of an agency's decision if any person has been "aggrieved or adversely affected by any final agency action."

**ANALYSIS:** The court determined that components of the judicial branch are specifically excluded from the state APA, according to the language of the statute. Then, the court went on to analyze whether the Board was a part of the judicial system. The court looked at the fact that one of the Iowa Supreme Court's responsibilities was to supervise the conduct of attorneys. This court reasoned that the Iowa Supreme Court intended to delegate the supervising responsibility to the Board upon its creation. This is further demonstrated by the functions of the Board, specifically its duties to investigate complaints filed against lawyers of the state.

**HOLDING:** The Board is not an agency under the Iowa APA.

**IMPACT:** The Board in this case has several attributes that could hypothetically qualify it as an agency. By ruling to the contrary, this court may have taken away the opportunity for people who have been wronged by the Board to seek remedies against it under the state APA.

**SUPREME COURT OF KANSAS****Am. Trust Adm'rs, Inc., v. Sebelius, 44 P.3d 1253 (Kan. 2002).**

**LAW:** In situations that require filing and publication to promulgate law from an agency, the law must be published in a proper medium.

**FACTS:** American Trust Administrators (ATA) appealed a decision from the Insurance Commissioner of the state of Kansas, who withdrew the previous approval of ATA's stop-loss insurance policy. ATA based their appeal on the argument that Sebelius did not have statutory authority to withdraw the approval under the state Administrative Procedure Act (APA). Also, the ATA argued that the Commissioner, when she withdrew her approval, relied on criteria that was not stated in the statutory authority, but instead was only published in a bulletin. Therefore, ATA argued, the Commissioner failed to follow the proper procedure for promulgating a policy. Specifically, the Commissioner failed to follow the procedure of filing and publication required of agency actions resulting in an effective regulation.

**ANALYSIS:** The court first held that the Commissioner had statutory authority to regulate the stop-loss insurance policy of the appellant. However, the court further looked at the method in which the Commissioner regulated the policy, which was by a published set of criteria. The court held that because this criterion is what was used, it is binding law and must therefore be promulgated through proper APA procedure. The court reasoned that although the criterion was published in a widely distributed bulletin, it still did not fulfill the requirements of filing and publication prescribed by statute.

**HOLDING:** Reversed and remanded, due to the Commissioner's failure to follow procedure in promulgating the law.

**IMPACT:** This decision better defines the proper procedure that must be followed by agencies in promulgating laws. Publishing laws in bulletins, like in the above case, even if they are widely read, will not fulfill the requirement of filing and publication.

**SUPREME COURT OF LOUISIANA****Evans v. DeRidder Mun. Fire**, 815 So.2d 61 (La. 2002).

**LAW:** Results from polygraph testd are admissible in administrative review hearings.

**FACTS:** Johnny Evans, Sr. was a police officer for the DeRidder City Police force. Based on some information given to Evans by Prater, a police informant, another man named Pickens was arrested on drug charges. Evans allegedly then leaked information that Prater worked as an informant for the police department, and Prater was murdered soon after. Pickens was arrested and convicted for the killing of Prater, and soon after his arrest he told the police that he received the information about Prater from Evans.

Evans was investigated for his alleged divulging of information and was asked to take a polygraph test. Evans did not pass the polygraph test, and as a result he was dismissed for disclosing confidential information. Evans appealed this decision to the DeRidder Municipal Fire and Police Civil Service Board (Board).

On appeal, when Pickens pleaded his Fifth Amendment right against self-incrimination, the City offered his prior statements as evidence. Evidence that Evans failed the polygraph test was also entered. The Board affirmed the decision, and Evans appealed.

**ANALYSIS:** The court reasoned that an administrative agency is not held to the same standards of evidence as in civil court. However, the evidence presented nevertheless must be competent. As to the results of the polygraph, the court stated that civil servants, especially police officers, are routinely subjected to polygraph tests, and the results of those tests are used in the screening and hiring process. Furthermore, the fact that a police officer is a civil servant and in a position of great public trust heightens the necessity of hiring trustworthy and able candidates. Therefore, the results were both competent and admissible.

**HOLDING:** Results of polygraph tests are admissible in administrative review hearings.

**IMPACT:** With this ruling, the role of polygraph tests may become more important when dealing with civil servant administrative hearings. Still, as the concurring opinion by Justice Knoll suggests, expanding the role of these tests may have some danger attached, as results from the tests are not known to be 100% accurate.

## **SUPREME COURT OF MINNESOTA**

**Jasper v. Comm'r of Pub. Safety**, 642 N.W.2d 435 (Minn. 2002).

**LAW:** Although an issue may be technically moot, a court can still find the issue functionally justiciable, and therefore rule on it, if the decision has statewide significance.

**FACTS:** Petitioner Jasper had his driver's license revoked due to driving under the influence of alcohol. The police officer that stopped Jasper determined his blood alcohol content (BAC) to be .024, well above the legal limit of .01. The police officer determined Jasper's BAC by using a device called the Intoxilyzer 5000 series 68-01. The Commissioner of Public Safety did not specifically approve this particular series, but did approve the previous series, which had no substantial differences. Jasper appealed the decision on the grounds that the Commissioner had not approved this device. The court ruled that the issue was technically moot, because the Commissioner issued a regulation specifically approving the 68-01 series after the Supreme Court of Minnesota granted review of the case.

**ANALYSIS:** Although the court does not issue an advisory decision or decide cases merely to establish precedent, it does decide questions that are technically moot if it is an issue that is functionally justiciable. The court defined a case to be functionally justiciable if the record contains raw material traditionally associated with effective judicial decision making. Here, the court cites to substantial litigation about this device and decided that the issue is one of public importance and statewide significance that should be decided.

**HOLDING:** Due to the statewide significance of this decision, the court is entitled to rule on it.

**IMPACT:** This decision broadens the role of judicial review of agency rulemaking by allowing issues that are technically moot to come before the court if there is significant public importance.

#### **SUPREME COURT OF WYOMING**

**Griffin v. State ex rel. Dep't of Transp.**, 47 P.3d 194 (Wyo. 2002).

**LAW:** Proper scientific and technical foundation to admit results from a field sobriety test is not necessary in administrative hearings.

**FACTS:** Officer Hampton stopped Griffin under suspicion that he was driving while under the influence of drugs or alcohol. After administering a field sobriety test, the officer arrested Griffin for driving while under the influence. After his arrest, Griffin refused to submit to chemical testing to test for alcohol. The Department of Transportation informed Griffin by letter that they intended to suspend his driver's license for eighteen months due to his refusal to submit to chemical testing. The case came before the Office of Administrative Hearings (OAH), which upheld the suspension of Griffin's license for eighteen months. Griffin appealed.

**ANALYSIS:** Administrative agencies that act in a judicial role are not bound by the same rules of evidence that govern trials by courts or juries. Instead, the evidence must be the type that is commonly relied upon by "a reasonably prudent man in the conduct of their serious affairs." In this case, the agency articulated that the officer showed the proper training and knowledge in administering field sobriety test, and thus the lowered burden to determine admissibility was met. As a result, the hearing officer did not err when he admitted and relied on this evidence.

As for the determination by the agency that the officer had probable cause, the court stated that when an agency's action or decision is based on a consideration of relevant factors and is rational, the reviewing court would not rule that the action or decision is arbitrary or capricious. Here, while considering the

knowledge and experience of the officer and the facts surrounding the arrest of Griffin, the court ruled that it was justified for a reasonable person to conclude that Griffin was intoxicated. Therefore, the decision on probable cause by the agency would not be disturbed.

**HOLDING:** Since agencies are not governed by the same rules of evidence as civil and criminal courts, proper scientific and technical foundation to admit results from a field sobriety test is not necessary in administrative hearings. Further, since there was no evidence that the agency's decision was arbitrary or capricious, the agency's ruling on probable cause was not disturbed.

**IMPACT:** This case enforces the proposition that the rules of evidence are less stringent in administrative hearings. The relaxation of the rules of evidence gives more discretion to an agency. As this ruling suggests, relaxation of the rules of evidence seems to be a recent trend.

#### ARIZONA COURT OF APPEALS

**Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs**, 48 P.3d 505 (Ariz. Ct. App. 2002).

**LAW:** Due process requires minimum procedural safeguards, such as informing appellant that he has the right to refuse an interview, has the right to request a hearing and has the right to examine adverse witnesses.

**FACTS:** Appellant Webb was censured by the Arizona Board of Medical Examiners (ABME) because of a complaint of unprofessional conduct by a former patient. The ABME sent Dr. Webb a letter, citing the nature of the charges against him and requesting him to appear for an informal interview. Dr. Webb was not informed that he could refuse the interview and receive a more formal hearing, nor was he informed that he would have the opportunity to examine adverse witnesses. At the interview, Dr. Webb was asked questions pertaining to the incident, but was not

given a full opportunity to question the investigating officer. At the end of the interview, the Board imposed a punishment of permanent and public sanction.

**ANALYSIS:** The court held that the right to practice medicine is a property right, thereby invoking due process safeguards. The court further reasoned that a person facing such a range of consequences, such as Dr. Webb, should be afforded, at a minimum, a chance to confront adverse evidence and question adverse witnesses.

**HOLDING:** Dr. Webb was denied minimum procedural safeguards, which due process requires.

**IMPACT:** When facing a decision that would result in a deprivation of a fundamental right, such as property, investigating agencies must adhere to due process procedural safeguards. The agency must give a petitioner full opportunity to examine adverse witnesses. This may increase costs for agencies, since more formal-type hearings may have to be used in situations with due process implications.

#### **DISTRICT OF COLUMBIA COURT OF APPEALS**

**Branson v. District of Columbia Department of Employment Services**, 801 A.2d 975 (D.C. 2002).

**LAW:** An agency has a duty to address all issues brought by a petitioner and give adequate reasons why each issue was either accepted or dismissed.

**FACTS:** Claimant Branson petitioned for review from the Department of Employment Services' (DOES) decision to deny her unemployment compensation. Branson voluntarily left her job as an attorney because she had been subjected to constant secondhand cigarette smoke. Branson applied for unemployment compensation on two grounds: (1) medical reasons, since she was allergic to cigarette smoke; and in the alternative (2) unsafe working conditions. The DOES denied her claim on the basis that she did not present

evidence that she had a medical condition of being allergic to cigarette smoke. Branson brought this appeal on the argument that the DOES did not sufficiently consider her second argument that she quit her job due to unsafe working conditions.

**ANALYSIS:** The record of the DOES's decision shows that the examining officer thoroughly considered Branson's failure to show good medical cause. However, there was nothing in the record that shows that the DOES considered her unsafe working conditions claim, although the record does show that Branson's counsel adequately raised the issue.

**HOLDING:** Remanded. An agency must give full and reasoned consideration to all material facts and issues and must disclose the basis of its order by an articulation with reasonable clarity of its reasons for the decisions.

**IMPACT:** This decision may expand the role of the adjudicative function of an agency. It strengthens the idea that agencies must operate like judicial bodies and give petitioners due process by considering each and every claim that is brought before them.



## JOURNAL BOARD OF ADVISORS

Hon. Edward J. Schoenbaum, Chair  
Illinois Dept. of Employment Security-Tax  
1108 South Grand Avenue West  
Springfield, IL 62704-3553  
(217) 524-7386 FAX (217) 524-7824  
edschoen@juno.com

Hon. Edward J. Schoenbaum, Chair  
Illinois Dept. of Employment Security – Tax  
1108 South Grand Avenue West  
Springfield, IL 62704-3553  
(217) 524-7836 Fax (217) 524-7824  
edschoen@abanet.org

Professor Michael Asimow  
UCLA School of Law  
405 Hilgard Avenue  
Los Angeles, CA 90095-1476  
(310) 825-1086  
asimow@law.ucla.edu

Hon. Susie Bargo  
85 State Police Road  
Regional State Building  
London, KY 41741  
(606) 878-7576  
Susie.bargo@mail.state.ky.us

Professor Ron Beal  
Baylor University School of Law  
1400 South 5th Street  
P.O. Box 97288  
Waco, TX 76798-7288  
(254) 710-6590  
ron\_beal@baylor.edu

Hon. Abigail S. Bernhardt  
Office of Legal Services  
NYS Education Department  
475 Park Ave. South, 2nd Floor  
New York, NY 10016-6901

Hon. Stan Cygan  
401 S. State Street  
Chicago, IL 60605  
(312) 793-1118  
stancycyan@justice.com

Hon. Larry Craddock  
Texas Dept. of Banking  
2601 N. Lamar Blvd.  
Austin, TX 78705-4207

(512) 475-1306 Fax (512) 475-1313  
larry.craddock@banking.state.tx.us

Hon. William Dorsey, Vice-Chair  
Office of Administrative Law Judges  
U.S. Department of Labor  
50 Fremont Street, Suite 2100  
San Francisco, CA 94105  
(415) 744-6577  
wdorsey@oalj.dol.gov

Hon. William A. Dressel, President  
The National Judicial College  
Judicial College Building  
University of Nevada  
Reno, NV 89557  
(775) 784-6747 Fax (775) 784-4234  
dressel@judges.org

Hon. Robert Robinson Gales  
Defense Office of Hearings & Appeals  
P.O. Box 3627  
Arlington, VA 22203  
(703) 696-4542  
GalesR@asdgc.osd.mil

Hon. Gina Hale  
Office of Administrative Hearings  
800 Franklin Street, 1st Floor  
Vancouver, WA 98660  
(360) 690-7189  
ghale@oah.wa.gov

Hon. Gregory Holiday  
Michigan Dept. of Consumer & Industry  
5372 Pocono Dr.  
West Bloomfield, MI 48323-2340  
(313) 256-2300 Fax (313) 256-3497  
holijudge@mediaone.net

Professor Gregory Ogden, Faculty Editor  
Pepperdine University School of Law  
Malibu, CA 90263  
(310) 506-4671  
gregory.ogden@pepperdine.edu

Hon. Ronnie A. Yoder  
U.S. Department of Transportation  
400 7th Street, S.W., Suite 5411  
Washington, DC 20590  
(703) 998-4024  
Ronnie.Yoder@ost.dot.gov

**NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES**

**P.O. Box 418, Glenview, IL 60025-0418**

**(847) 562-0783 FAX (847) 562-0783 NAALJ@aol.com**