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## Unrebutted Evidence

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### UNREBUTTED EVIDENCE

The following paragraphs are adapted from Dean E. J. Watts' lecture on Decision Making. While he made the point somewhat differently (and in the more effective setting of a classroom discussion) the central idea, and the illustration, are both his.

It is axiomatic that the unrebutted testimony of a witness, not shown to be unworthy of belief, as to a fact which is not inherently incredible, cannot be rejected by an administrative law judge without some articulable reason, and that, moreover, such testimony does not generally require corroboration. On its face, the rule seems entirely reasonable. Where the witness is intelligent and disinterested, and testifies with conviction as to a simple, objectively verifiable fact, recently and thoroughly studied by the witness, would it not be preposterous, in the absence of contrary evidence, to inquire further into the matter? Consider the following illustration.

The issue, for the sake of argument, is the letter "F." Our star witness, having given the matter careful and patient study, will testify as to the number of times the letter "F" appears in the following sentence:

Finished files are the result of years of scientific study combined with the experience of many years.

#### Exhibit I

Since our witness possesses all of the admirable characteristics described above, and since the issue is simple in the extreme, his testimony is predictable, and predictably correct. What will the testimony be?

The fact of the matter is, that when the question was asked in class, the answers ranged from three to six. Even after repeated study, almost half of the judges present (including this writer) could see no more than three "F's" in the foregoing example.

The illustration makes at least two points. One point is that the mere statement of a truism ("it is necessary to examine, thoroughly and carefully, all of the available evidence") teaches nothing; if behavioral

change is to take place, the learner must become involved in the material. This, of course, is the justification for all educational endeavors.

The second point is that a judge must train himself (or herself) to keep an open mind until the last item of proof has been studied, the final argument considered: in the face of all time pressures, the judge must resist the temptation to prejudge any issue in a case. Four witnesses have testified that there are three "F's" in Exhibit 1. Is the testimony of a fifth witness merely cumulative? Or will the potentially contrary testimony of a fifth witness (whatever the testimony may be) provoke further inquiry into the matter, leading, perhaps, to some closer approximation of the truth? (There are six "F's" in Exhibit 1: see page 40).

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