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OFFICE OF THE ATTORNEY GENERAL

ADMINISTRATIVE LAW HANDBOOK

DAVE YOST

OHIO ATTORNEY GENERAL

Acknowledgements

Warm thanks to the employees of the Ohio Attorney General whose contributions have made this publication possible over the years, with special recognition to the authors and editors of this edition:

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This version is not merely an update — it is a total overhaul.

Usually, updates to this handbook signify the simple addition of new cases. That was the nature of our last update, published in 2020 and all that was necessary. Cases in recent years, however, now require something far more substantial. As a result, this edition contains more than the simple addition of cases.

This edition imparts insight into critical developments that altered the nature of administrative law in Ohio. Review this handbook in its entirety with a careful eye. Each chapter also provides updates on case and statutory law that through October 2024. I'm proud of the work presented here by lawyers from the Ohio Attorney General's Office.

One of the most significant updates to this book addresses the answer about judicial deference, which long plagued Ohio and the federal courts: "Who decides? The courts, or agency administrators?"

Answers varied. Sometimes the courts would decide. Yet increasingly, the courts were deferring their decision-making power to agencies, with varying justifications given. The Ohio Supreme Court found it had "three different and irreconcilable formulations" for judicial deference.

Government works best when it is properly calibrated and its powers duly separated. But any imbalance will have government rushing to "gain ground" at the cost of liberty, as Thomas Jefferson observed.

Over time, courts relinquished their proper authority of independent judgment. But judges were never meant to defer to administrative agencies. It is the duty of judges "to say what the law is," as *Marbury* declared and the Ohio Supreme Court affirmed in *TWISM Enterprises, LLC v. State Board of Registration for Professional Engineers and Surveyors*.

To be clear, administrative agencies are helpful to good governance. They carry out the laws on those things that provide safety and security to Ohioans, especially the most vulnerable in our communities. But these agencies must answer to the constitutional branches that empower and oversee them. They do not have the power of the judiciary.

Courts forfeiting their independent judgment allowed agencies to supersede the law with their interpretations. Judicial deference went from being a useful, occasional tool into a mandate — something it was never meant to be. The courts kept feeding it well past midnight, and as a result it transformed into something ugly and insatiable.

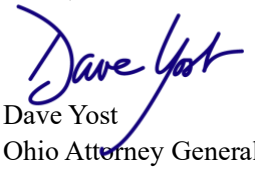
With *TWISM*, the Ohio Supreme Court provided timely clarity on what deference, if any, should be given to agency interpretation of the laws. Consistency in interpretation of the law breeds confidence in the rule of law. No confidence, no growth. Society stagnates. Entrepreneurs and their businesses vanish. Justice DeWine's ruling ensured Ohio won't meet such a fate.

TWISM is a landmark ruling. And only two years later, the U.S. Supreme Court adopted the same rule when it overruled the longstanding *Chevron* doctrine. Separation of powers regained its footing thanks to this critical shift in our administrative law. Judges now decide the law — with no requirement to defer to agency interpretations.

Going forward, be ready for more action in the courts. We should anticipate challenges to the pre-*TWISM* decisions that deferred to agencies in ways that may no longer be considered valid.

This book will assist you greatly in further understanding this seismic shift in administrative law, with greater insight and depth than this introductory letter could hope to accomplish. Enjoy.

Yours,



Dave Yost
Ohio Attorney General

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I. APPLICATION OF CHAPTER 119

An administrative agency is a "creation of statute," formed to fulfill the General Assembly's policies. Thus, agencies can exercise only powers that are expressly given to them or that may be reasonably necessary to make the express power effective. Most state agencies are subject to the Administrative Procedures Act set forth in R.C. Chapter 119, as stated in R.C. Chapter 119 or an agency's enabling statute, or because the agency engages in licensing functions.

A. Sources of agency's authority

1. An administrative agency is a "creation of statute." *In re Application of Firelands Wind, L.L.C.*, 2023-Ohio-2555, ¶ 10.
2. Administrative agencies are created by statute to fulfill the General Assembly's policies. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 567 (1998) ("administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code.").
3. An administrative agency can exercise only those powers expressly conferred upon it by the Ohio General Assembly. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 51; *Ohio Fresh Eggs, L.L.C. v. Boggs*, 2009-Ohio-3551, ¶ 18 (10th Dist.).
4. But agencies do possess some implied powers that may be "reasonably necessary" to make the express power effective. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47 (1917); *Green v. Western. Reserve Psych. Habilitation Ctr.*, 3 Ohio App.3d 218, 220 (9th Dist. 1981) (The State Personnel Board of Review had no implied power to suppress testimony as a sanction for failing to comply with a subpoena. Instead, the Board had specific authority to seek an attachment for contempt in the court of common pleas).

B. R.C. Chapter 119 (Administrative Procedures Act)

1. The Ohio Administrative Procedures Act was first enacted in 1953 and is codified as Chapter 119 of the Revised Code.
2. The Ohio Administrative Procedures Act is the general statute that governs agency rulemaking, adjudication, and appeals.
3. R.C. Chapter 119 applies only to state-level agencies. Other statutes, including R.C. Chapter 2506, apply to political subdivisions. R.C. 2506.01(A); *South Community, Inc. v. State Emp. Relations Bd.,* 38 Ohio St.3d 224, 227 (1988) ("Political subdivision" does not include the State of Ohio or its agencies, so R.C. 2506.01 does not apply to them.).

C. Governmental entities subject to R.C. Chapter 119

1. Not all state-level administrative agencies are subject to R.C. Chapter 119. A state agency, board, or commission may be required to follow R.C. Chapter 119 in one of three ways:
    a. R.C. Chapter 119 specifically names the agency, board, or commission; or

b. A statute specifically subjects the agency, board, or commission to R.C. Chapter 119; or

c. The agency, board, or commission has authority to issue, suspend, revoke, or cancel licenses. R.C. 119.01(A); *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Civ. Rights Comm.*, 66 Ohio St.2d 192, 193 (1981); *Baltimore Ravens v. Self-Insuring Employers Evaluation Bd.*, 94 Ohio St.3d 449, 452 (2002); *Abt v. Ohio Expositions Comm.*, 110 Ohio App.3d 696, 699 (10th Dist. 1996).

2. Some state agencies follow agency-specific administrative procedures. For example, R.C. 3745.02-.06 (Environmental Review Appeals Commission); R.C. 1509.35 and 1509.36 (Oil and Gas Commission); R.C. 3701-52-01 *et seq.* (Smoke Free Act).

D. Entities that are an "Agency" Subject to R.C. Chapter 119

1. R.C. 119.01(A) specifically names the following agencies:

   a. Any official, board, or commission that has the authority to promulgate rules or make adjudications in:

      i. the Civil Service Commission;

      ii. the Division of Liquor Control;

      iii. the Department of Taxation;

      iv. the Industrial Commission; and/or

      v. the Bureau of Workers' Compensation.

      R.C. 119.01(A)(1).

   b. Any administrative or executive officer, department, division, bureau, board, or commission of the state government specifically made subject to sections 119.01 to 119.13 of the Revised Code. R.C. 119.01(A)(1).

   c. The licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the state government having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. R.C. 119.01(A)(1).

   d. Any official or work unit having authority to promulgate rules or make adjudications in the Department of Job and Family Services specifically pertaining to:

      i. The adoption, amendment, or rescission of rules mandated by R.C. 5101.09;

      ii. The issuance, suspension, revocation, or cancellation of licenses. R.C. 119.01(A)(2).

   e. Exclusions from definition of "Agency" as stated by R.C. 119.01(A)(1):

      i. Public Utilities Commission;

      ii. Utility Radiological Safety Board;

      iii. Controlling Board;

iv. Actions of the superintendent of the Division of Financial Institutions and the superintendent of the Department of Insurance regarding the taking possession of, and rehabilitation or liquidation of, the business and property of various financial and insurance institutions;

v. Actions taken by the Division of Securities under R.C. 1707.201; and

vi. Actions of the Industrial Commission or Bureau of Worker's Compensation brought under R.C. 4123.01 through 4123.94, as well as other matters specified in R.C. 119.01(A)(1).

2. The entity's own law specifically makes it subject to R.C. Chapter 119.

   a. There must be a clear legislative intent to make an entity's actions subject to R.C. Chapter 119. *Springfield Fireworks, Inc. v. Dept. of Commerce*, 2003-Ohio-6940, ¶ 28 (10th Dist.); *Clifton Care Ctr. v. Dept. of Job & Family Servs.*, 2013-Ohio-2742, ¶ 11 (10th Dist.).

   b. A clear legislative intent to qualify a board as an agency exists when a statutory provision subjects the board to R.C. Chapter 119 without restriction to rulemaking. *South Community, Inc. v. State Emp. Relations Bd.*, 38 Ohio St.3d 224, 226 (1988).

3. The entity has authority for issuing, suspending, revoking, or canceling licenses.

   a. If an agency is not specifically mentioned in R.C. 119.01, the next step is to see if a licensing function of the agency is involved. *Brown v. Dept. of Transp.*, 83 Ohio App.3d 879, 881 (10th Dist. 1992).

   b. The Revised Code defines "license" as: "any license, permit, certificate, commission, or charter issued by any agency. 'License' does not include any arrangement whereby a person or government entity furnishes medicaid services under a provider agreement with the department of medicaid." R.C. 119.01(B).

   c. "A license is permission granted by some competent authority to do an act which, without such permission, would be illegal." *State v. Hipp*, 38 Ohio St. 199 (1882), paragraph two of the syllabus; *Harrah's Ohio Acquisition Co., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 2018-Ohio-4370, ¶ 20 (licenses authorize persons to engage in otherwise unlawful conduct); *Total Office Prods. v. Dept. of Adm. Servs.*, 2006-Ohio-3313, ¶ 19 (10th Dist.); *Karvo Cos., Inc. v. Dept. of Transp.*, 2019-Ohio-4556, ¶ 11 (9th Dist.) (Based upon the statutes, the certificate of qualification to bid for an agency contract confers a right and grants permission to do an act that would otherwise not be allowed and is therefore a license for purposes of R.C. Chapter 119.).

   d. The courts define an agency's licensing authority based on the entity's involvement with the processing of licenses.

   e. Examples of actions that are licensing functions include the following:

      i. The action of a superintendent of banks in approving branch applications constitutes a licensing function. *Genoa Banking Co. v. Mills*, 67 Ohio St.2d 106, 111 (1981).

      ii. Certification of a health care provider by the Ohio Department of Health for compliance with federal Medicaid requirements constitutes a license for purposes of R.C. 119.12; it is not an arrangement whereby a person, institution, or entity furnishes Medicaid services

under a provider agreement with Ohio Department of Human Services. Therefore, the act is a licensing function because it does not fall under the exemption included in R.C. 119.01(B). *Bayside Nursing Ctr. v. Dept. of Health*, 96 Ohio App.3d 754, 759 (10th Dist. 1994).

iii. The disapproval of a company's recertification as a Minority Business Enterprise (MBE) is a licensing function. *Total Office Prods. v. Dept. of Adm. Servs.*, 2006-Ohio-3313, ¶ 21 (10th Dist.).

f. Examples of actions that are not licensing functions under R.C. Chapter 119 include the following:

i. An act of the State Fire Marshal refusing to transfer a fireworks license was not classified as a licensing function because it did not involve the issuing, suspending, revoking, or canceling of a license. Since the act was not a licensing function, the refusal was not an agency decision and, therefore, was not appealable pursuant to R.C. Chapter 119. *Springfield Fireworks, Inc. v. Dept. of Commerce*, 2003-Ohio-6940, ¶ 24 (10th Dist.).

ii. The decision to hold a contractor in default of a contract is not a licensing function. *Asphalt Specialist, Inc. v. Dept. of Transp.*, 53 Ohio App.3d 45, 47 (10th Dist. 1988).

iii. The approval of a savings and loan branch location application is not a licensing function. *Home Sav. & Loan Assn. v. Boesch*, 41 Ohio St.2d 115, 118 (1975).

iv. The suspension of a Medicaid provider's agreement due to a "credible allegation of fraud" is not a licensing function under R.C. Chapter 119. *Ikemefuna Nkanginieme v. Dept. of Medicaid*, No. 14AP-596, 2015-Ohio-656, ¶ 26 (10th Dist.).

4. Entities can exercise derivative power. If an entity exercises power derived from another agency covered by R.C. Chapter 119, that entity is also subject to R.C. Chapter 119.

a. The Ohio State University was not itself an "agency" for purposes of R.C. Chapter 119. *Bd. of Trustees of Ohio State Univ. v. Dept. of Admn. Serv.*, 68 Ohio St.2d 149 (1981), paragraph one of the syllabus. The conduct at issue was authorized by R.C. 124.14(G), which then authorized state universities to exercise the powers, duties, and functions of the Department of Administrative Services with respect to civil service employees. The court held that to the extent that the university was exercising powers derived from the Department of Administrative Services, which *was* an agency subject to R.C. Chapter 119, the university was also bound by R.C. Chapter 119 in the exercise of those powers.

b. A municipal body exercising derivative power does not constitute an "agency" for purposes of R.C. Chapter 119; the entity exercising derivative power must be a state agency. *Karrick v. Board of Edn. of Findlay School Dist.*, 174 Ohio St. 467 (1963), paragraph two of the syllabus.

c. The Ohio Expositions Commission's requirement of an entry form and payment of a fee to exhibit an animal at the Ohio State Fair is not the issuance of a license, so R.C. Chapter 119 did not apply to a case where a person was disqualified from the Ohio State Fair for tampering with his steer before competition. *Abt v. Ohio Expositions Comm.*, 110 Ohio App.3d 696, 700-701 (10th Dist. 1996).

E. R.C. Chapter 119 application—adjudications, not ministerial acts

1. R.C. Chapter 119 provides certain rights in relation to adjudications:

   a. Right to an opportunity for hearing: "No adjudication order shall be valid unless an opportunity for hearing is afforded in accordance with sections 119.01 to 119.13." R.C. 119.06, ¶ 2.

   b. Right to an appeal: "Any party adversely affected by any order of an agency issued pursuant to an adjudication may appeal from the order of the agency to the court of common pleas designated in division (B) of this section." R.C. 119.12(A).

2. "Adjudication" is defined.

   a. Under R.C. 119.01(D), an "adjudication" is defined as:

      The determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specific person, but does not include the issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature.

   b. To constitute an "adjudication" for purposes of R.C. 119.12, a determination must be "(1) that of the highest or ultimate authority of an agency which (2) determines the rights, privileges, benefits, or other legal relationships of a person. Both elements are required." *Russell v. Harrison Twp. Montgomery Cty.*, 75 Ohio App.3d 643, 648 (2d Dist. 1991).

   c. Thus, R.C. Chapter 119 applies if the act of the agency constituted an adjudication and not merely a ministerial act.

      i. Examples of adjudications include the following:

         (a) Pursuant to R.C. Chapter 119, the State has a duty to provide licensees an opportunity for a hearing before rejecting their applications for renewal of their charitable bingo licenses. *Ohio Boys Town, Inc. v. Brown*, 69 Ohio St.2d 1, 12 (1982). The Supreme Court held that the rejection of the application for renewal was an adjudication by the highest or ultimate authority of an agency; therefore, the licensee was entitled to a hearing before being forced to cease bingo operations. *Id.*

         (b) The suspension of a childcare certificate, signed by the agency's director, was an "adjudication" and therefore subject to appeal under R.C. 119.12. *Miller v. Crawford*, 2006-Ohio-4689, ¶ 38 (7th Dist.).

         (c) A letter from the Department of Transportation denying an application for a permit to advertise on a billboard was an adjudication that could be appealed under R.C. 119.12. *Liberty Bell, Inc. v. State, Dept. of Transp.*, 34 Ohio App.3d 267, 269 (11th Dist. 1986).

         (d) The Attorney General's suspension of a fraternal organization's bingo operations was an adjudication that required a pre-termination hearing if requested by the organization. *Fraternal Order of Eagles 321 v. State*, No. 6424 (2d Dist. Jan. 14, 1981).

ii. Examples of nonadjudications are: (1) the issuance of a license in response to an application for which no question is raised and (2) other acts of a ministerial nature specifically excluded from the definition of "adjudication" and thus not subject to review under R.C. Chapter 119. R.C. 119.01(D).

(a) Little case law addresses what is meant by "the issuance of a license in response to an application with respect to which no question is raised." R.C. 119.01(D). This standard is often equated or conflated to the "ministerial act" standard below.

In *State ex rel. Ohio Ass'n. of Ins. Agents, Inc. v. Dept. of Ins.*, 29 Ohio St.2d 188, 188-89 (1972), relators sought a writ of mandamus to revoke the insurance agency license of intervenor and all other Ohio insurance agencies that were owned by non-residents. Relators claimed that they were entitled to a writ of mandamus because R.C. 119.12 was unavailable to them to contest the licenses issued to non-residents. Specifically, they argued that there was "no question raised" when the licenses were issued, so no adjudication was made. The Court denied the writ of mandamus, holding that there was no evidence that relators sought an adjudication regarding the jurisdiction of the Department of Insurance to issue licenses. And there was no evidence that an adjudication was foreclosed to relators. Because an adequate remedy at law existed, relators were not entitled to a writ of mandamus.

(b) A ministerial act had been described as follows:

(1) A ministerial act has been defined as an act a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done. *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 618 (1902); *Columbus Checkcashers, Inc. v. Guttermaster, Inc.*, 2013-Ohio-5543, ¶ 18 (10th Dist.) ("Ministerial acts are those performed in obedience to the mandate of legal authority, without the exercise of discretion, judgment, or skill.").

(2) Ministerial acts involve no discretion.

(i) An act is not "ministerial" if the agency has discretion, often evidenced by the use of the word "may." *Springfield City Sch. Support Personnel v. State Emp. Relations Bd.*, 84 Ohio App.3d 294, 300 (10th Dist. 1992) (Because the agency's rules allowed it to have discretion, its actions were not ministerial.).

(ii) Mandamus may be used to compel performance of purely ministerial acts. *State ex rel. LaChapelle v. Harkey*, 2023-Ohio-2723, ¶ 11 (granting peremptory writ of mandamus to transmit the referendum petition to the local board of elections*); State ex rel. Langhenry v. Britt*, 2017-Ohio-7172, ¶ 24; *Odita v. State Dept. of Human Servs.*, 88 Ohio App.3d 82, 88 (10th Dist. 1993) ("mandamus will lie to compel the performance of duties that are ministerial in nature and do not require the exercise of official judgment and discretion.").

(iii) See Chapter XIII for more information on mandamus actions.

(c) "Ordinarily, the word, 'shall,' is a mandatory one, whereas 'may' denotes the granting of discretion." *Dennison v. Dennison*, 165 Ohio St. 146, 149 (1956); *State ex rel. City of Niles v. Bernard*, 53 Ohio St.2d 31, 34 (1978) (comparing the effect of "may" and "shall" in a statute).

(d) Examples of ministerial acts include the following:

(1) The termination of the provider from the Medicaid program was ministerial, as it was based solely on the results of federal proceedings. *In re Seltzer*, 67 Ohio St.3d 220, 224-225 (1993).

(2) The action by the Clerk of Court to verify the sufficiency of the petition signatures was a ministerial act. *State ex rel. Langhenry v. Britt*, 2017-Ohio-7172, ¶ 24.

(3) The Division of Wildlife has no discretionary authority in reviewing a request to transfer a commercial fishing license; therefore, the act of denying the transfer application was a ministerial act to which no right to appeal attached. *Koch v. Dept. of Natural Resources*, 70 Ohio App.3d 612, 616 (6th Dist. 1990).

(4) Pursuant to R.C. 731.29, an auditor has a mandatory, ministerial duty to transmit a municipal referendum petition to the local board of elections. *State ex rel. LaChapelle v. Harkey*, 2023-Ohio-2723, ¶ 11.

II. RIGHT TO A HEARING

No adjudication order is valid (1) without specific statutory authority and (2) without giving the party an opportunity to request a hearing, subject to exceptions listed in R.C. 119.06. Certain statutes may allow an agency to summarily suspend a licensee, but a hearing must be held promptly after the suspension.

A. Specific statutory requirement

1. For an adjudication order of an agency to be valid, the agency must be specifically authorized by law to make such order and the party must have an opportunity for a hearing.

   > No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.
   >
   > R.C. 119.06, ¶ 1-2.

2. The agency must be specifically authorized to make an adjudication order.

   a. A statute gives the Department of Natural Resources authority to issue permits, to impose conditions on those permits, and to issue an order denying permit applications. Therefore, the order issuing appellants' permits was an adjudication order under R.C. 119.06. *State ex rel. Fisher v. Nacelle Land & Mgt. Corp.*, 90 Ohio App.3d 93, 97-98 (11th Dist. 1993).

   b. The Division of Banks is authorized by statute to impose a civil penalty against a bank or person participating in the conduct of the affairs of a bank. *In re Tonti*, Nos. 92AP-1361, 92AP-1386 (10th Dist. Aug. 3, 1993).

3. No adjudication order is valid unless the respondent had an opportunity for a hearing.

   a. A joint fire district's designation of a fire lane was invalid as no hearing was afforded to the respondent under R.C. 119.07. *Koutsounadis v. Newton Falls Joint Fire Dist.*, 2009-Ohio-6517, ¶ 27 (11th Dist.).

   b. The Ohio Civil Rights Commission was not subject to R.C. 119.06, so it was not required to provide the respondent with an opportunity for a hearing under that statute. *Jiashin Wu v. Civ. Rights Comm.*, 2021-Ohio-1541, ¶ 60-61 (11th Dist.).

B. Hearings granted upon request.

1. R.C. 119.06 lists five instances when an agency must grant a hearing upon request:

   a. When a statute permits suspension of a license without a prior hearing.

   b. When the agency asserts that an individual must obtain a license and the individual claims the law does not impose such a requirement.

   c. When an individual is refused admittance to an examination, which is a pre-requisite to the issuance of a license.

d. When an agency refuses to renew a license or issue a new license.

e. When a periodic registration of license is required, and registration for a license has been denied.

2. Exceptions to the requirement of a hearing upon request include the following:

   a. An agency need not grant a hearing upon request if a hearing was held before a refusal to admit the applicant to an examination when such examination is a prerequisite to issuing a license.

   b. Under R.C. 119.06, ¶ 10, no hearing is required for the following boards if the applicant for a **new** license failed a licensing examination:

      i. State Medical Board

      ii. State Chiropractic Board

      iii. Architects Board

      iv. Ohio Landscape Architects Board

      v. Any section of the Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board.

3. When an agency denies a required periodic license renewal or registration, R.C. 119.06 provides as follows:

   a. The agency must provide a hearing unless a hearing was held before the denial.

   b. If a licensee timely files for renewal or registration, the licensee is not required to discontinue the licensed business or profession merely because the agency fails to act on the application.

   c. An agency's rejection of an application for registration or renewal shall not be effective before 15 days after the notice of rejection was mailed to the licensee.

C. Orders effective without a hearing

1. Orders revoking a license are effective without a hearing if an agency is required by statute to revoke a license pursuant to a judgment of a court. R.C. 119.06(A).

2. Orders suspending a license are effective without a hearing if a statute specifically permits the suspension of a license without a hearing. R.C. 119.06(B).

3. Orders or decisions of an authority within an agency are effective without a hearing if the rules of the agency or the statutes governing such agency specifically (1) give a right of appeal to a higher authority within such agency, to another agency, or to the board of tax appeals and (2) also give the appellant a right to a hearing on such appeal. R.C. 119.06(C); *McNamee v. Tuscarawas Fireworks*, No. 93 AP 060040, (5th Dist. Dec. 17, 1993); *Harvard Refuse, Inc. v. Shank*, No. 88AP-01 (10th Dist. Sep. 29, 1988) (Relying on R.C. 119.06(C), the court held that because the appellants had an opportunity for a hearing before the Environmental Board of Review under R.C. 3745.04, they were not entitled to R.C. Chapter 119 notice and hearing requirements.).

4. Certain orders canceling or suspending a driver's license are effective without a hearing. R.C. 119.062.

D. Suspensions without a prior hearing (summary suspensions)

1. The general rule is that an agency must provide an opportunity for a hearing before issuing an adjudication order.

2. But if a statute permits the suspension of a license without a prior hearing, often called a "summary suspension," a hearing is not required before the suspension. R.C. 119.06, ¶ 3.

    a. An agency's statute may specify requirements for summary suspension. For example, R.C. 4731.22(G) sets forth the requirements for summary suspension due to a physician's impairment. *Ridgeway v. State Med. Bd.*, 2007-Ohio-5657, ¶ 12 (10th Dist.) (finding that arguments contesting the physician's summary suspension after the final adjudication was issued were moot).

    b. A hearing must be held following suspension, upon request. R.C. 119.06, ¶ 7:

        i. Failure to provide an opportunity for a hearing following the suspension violates due process. *Doriott v. State Med. Bd.*, 2006-Ohio-2171, ¶ 14 (10th Dist.).

        ii. A Medical Board statute permitting the board to suspend a license without a hearing when a licensee fails to submit to a medical examination must be read together with R.C. 119.07 to require the board to provide notice of opportunity for hearing after the suspension. *Doriott v. State Med. Bd.*, 2006-Ohio-2171, ¶ 12 (10th Dist.).

3. For pre-hearing suspensions, the agency must comply with the notice requirements of R.C. 119.07:

    a. Notice of suspension must state the following:

        i. The party's right to a hearing;

        ii. The charges or other reasons for the proposed action;

        iii. The law or rule directly involved;

        iv. The opportunity for hearing if requested within thirty days of service of the notice;

        v. That at the hearing, the party may appear in person, by the party's attorney, or by such other representative as is permitted to practice before the agency; and

        vi. That the party may present the party's position, arguments, or contentions in writing, and that, at the hearing, the party may present evidence and examine witnesses appearing for and against the party.

    b. The agency must serve the pre-hearing suspension notice in compliance with R.C. 119.05 and R.C. 119.07:

        i. The agency must serve notice on the party in accordance with R.C. 119.05 no later than the next business day after the order.

        ii. R.C. 119.05 allows for service by the following means: (a) electronic mail at the party's last known address; (b) facsimile transmission at the party's facsimile number appearing

in the agency's official records; (c) traceable delivery service at the party's last known address; or (d) personal service at the party's last known address.

iii. The agency must provide a copy of the notice to the attorney or other representative of record. R.C. 119.07.

c. A party may request a hearing.

i. When a party requests a hearing in accordance with R.C. 119.06 and R.C. 119.07, the agency must immediately set the date, time, and place for the hearing and serve the party with notice of the hearing.

ii. The hearing date must be within fifteen days, but not earlier than seven days, after the party has requested a hearing, unless otherwise agreed to by both the agency and the party. R.C. 119.07, ¶ 3.

d. An agency's failure to properly serve the pre-hearing suspension notice invalidates the order entered pursuant to the hearing.

i. If an agency fails to serve the notices for any hearing in accordance with R.C. 119.05 the order entered pursuant to the hearing will be invalid. R.C. 119.07, ¶ 4.

ii. If notice was not served, no valid notice informed the doctor of his right to a hearing. Therefore, the State Medical Board's order entered at the hearing revoking the physician's license was not valid. *Porter v. State Med. Bd.*, 2006-Ohio-5296, ¶ 14 (10th Dist.) (service under prior requirements).

4. Summary suspensions give rise to due process concerns.

a. Summary suspensions are generally constitutionally permitted to protect the public. *Mackey v. Montrym*, 443 U.S. 1, 15 (1979) (analyzing a Massachusetts statute that required a ninety-day suspension for any driver who refused a breath-analysis test upon arrest for operating a motor vehicle while under the influence of intoxicating liquor).

b. *Mackey* sets forth a three-step analysis of due-process concerns:

i. The nature and importance of the private interest affected by the official state action;

ii. The risk of erroneous deprivation of the private interest through the procedures used; and

iii. The fiscal or administrative burden that additional or substitute procedures would require.

Id. at 15 (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

c. The Ohio Supreme Court adopted the *Mackey* test in *Doyle v. Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 52 (1990), in which the court found that strict adherence to the judicial model of due process was not mandated for administrative hearings. Rather, if the *Mackey* test is met, then the due process rights of the individual are not violated.

i. The state may impose a summary suspension of a horse racing license pending a prompt hearing afterward to determine any unresolved issues. *Wagers v. State Racing Comm.*, No. CA-2885 (5th Dist. Jan. 22, 1992).

ii. Little case law addresses what constitutes a "prompt hearing" for a summary suspension. The Fourth District Court of Appeals rejected an argument by a pharmacist that the Board of Pharmacy lost jurisdiction to suspend him by failing to conduct the post-deprivation hearing until 105 days after his request for a hearing. *Vogelsong v. State Bd. of Pharmacy*, 123 Ohio App.3d 260, 268-269 (4th Dist. 1997). The Vogelsong Court noted that R.C. 119.07 requires a hearing be held within seven to fifteen days after request but that R.C. 119.09 allows an agency to postpone the hearing on its own motion. The hearing was properly set within the time frame, but nothing in R.C. 119.07 requires a decision be issued within a certain time. The Court ultimately held that, since the Board had since terminated the summary suspension, any due process arguments regarding the length of the summary suspension were rendered moot.

iii. The Second District Court of Appeals found a "post-suspension without pay" arbitration held one year after the suspension was not "prompt." *McDonald v. City of Dayton*, 146 Ohio App.3d 598, 609 (2d Dist. 2001).

iv. Other statutory schemes may require that a hearing must be held and a decision be issued within a set period of time. For example:

(a) The State Medical Board has five days to hold a post-deprivation hearing, and seventy-five days after completion of the hearing to issue a final adjudication order; failure to issue a timely order dissolves the summary suspension order (although it does not invalidate any subsequent, final adjudicative order). R.C. 4731.22(G)(2).

(b) If a party is arrested and receives an administrative driver's license suspension, the requested hearing must be held within five days of the person's arrest or the issuance of a citation. R.C. 4511.191(D)(2). In *Meadows v. Bur. of Motor Vehicles*, 71 Ohio Misc.2d 3, 5 (M.C. 1995), the Wadsworth Municipal Court found that the State did not follow the statutory scheme for an administrative license suspension when it did not afford the defendant a post-suspension hearing within five days. The *Meadows* Court ruled that the State's failure to follow the statute deprived the defendant of his right to due process. *Id.*

(c) Hearing decisions involving public assistance, social services, and child support services must be issued within 70 calendar days from the date of the hearing request. Adm.Code 5101:6-7-01(B)(1).

(d) A hearing examiner must issue a report and recommendation within 45 days of the close of the adjudication hearing on discipline by the counselor, social worker, and marriage and family therapist board. Adm.Code 4757-11-04(H)(1).

III. NOTICE REQUIREMENTS

Administrative proceedings must comply with due process. Generally, government licenses, registrations, and permits are protected property interests, and government-issued benefits may be protected property interests. In the administrative agency context, due process requires notice of the agency's proposed action and an opportunity to be heard. Agencies must provide enough information in the notice of opportunity for hearing so that the respondent can prepare a defense to the proposed action. Agencies must also serve the notice upon the respondent in compliance with statutory requirements. If an agency does not comply with due process requirements, its order may be invalidated.

A. Due process requirements

1. The government may not deprive an individual of a property interest without due process of law.
    a. Procedural due process imposes constraints on governmental decisions that deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
        i. A person must have more than an abstract need or unilateral expectation of a benefit to have a property interest in it - the person must, instead, have a legitimate claim of entitlement to it. A statutory entitlement may give rise to a property interest subject to due-process protection. *CT Ohio Portsmouth, L.L.C. v. Dept. of Medicaid*, 2020-Ohio-5091, ¶ 30 (10th Dist.).
        ii. Benefits promised under state law confer a property interest in the recipients; that interest is protected by the Due Process Clause. *State ex rel. Cottrill v. Meigs Cty. Bd. of Mental Retardation & Dev. Disabilities*, 86 Ohio App.3d 596, 601 (4th Dist. 1993).
        iii. A benefit is a protected property interest if there are substantial limitations upon state discretion in granting or denying the benefit. *M&M Excavating & Demolition, Inc. v. Taneyhill*, 2010-Ohio-1280, ¶ 11 (11th Dist.).
2. Protected property interests arise in several administrative-agency contexts.
    a. The government has an interest in regulating professions. *Krusling v. Bd. of Pharmacy*, 2012-Ohio-5356, ¶ 15 (12th Dist.).
    b. A licensed professional has a protected property interest in the practice of the profession after the license to practice has been acquired. *Althof v. State Bd. of Psychology*, 2007-Ohio-1010, ¶ 16-17 (10th Dist.); *Haver v. Accountancy Bd.*, 2006-Ohio-1162, ¶ 47 (10th Dist.); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 422 (1st Dist. 1998).
    c. The holder of a property interest in an intangible benefit, such as a permit, has, as a matter of procedural due process, a right to a hearing before the benefit is taken away. *State ex rel. AWMS Water Solutions, L.L.C. v. Mertz*, 2022-Ohio-4571, ¶ 62 (11th Dist.).
    d. A holder of an Ohio liquor license has a property interest protected under the Due Process Clause, and the state must grant a liquor licensee due process before revoking the license. *WCI, Inc. v. Liquor Control Comm.*, 2016-Ohio-4778, ¶ 37 (10th Dist.).

e. Developmentally disabled persons receiving benefits from a state agency have a protected property interest in those benefits such that due process attaches. *State ex rel. Cottrill v. Meigs Cty. Bd. of Mental Retardation & Dev. Disabilities*, 86 Ohio App.3d 596, 601 (4th Dist. 1993).

f. A licensed Medicaid provider has a legitimate property interest in the reimbursement rate provided for it under R.C. 5111.21 and 5111.22, and such interest may not be diminished absent due process of law. *Ohio Academy of Nursing Homes v. Barry*, 56 Ohio St.3d 120, 126-127 (1990).

3. Administrative proceedings must comply with due process.

   a. The Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution require that administrative proceedings comport with due process. *Khemsara v. Veterinary Med. Licensing Bd.* , 2023-Ohio-718, ¶ 47 (8th Dist.); *Edmands v. State Med. Bd.*, 2015-Ohio-2658, ¶ 23 (10th Dist.), citing *Mathews v. Eldridge*, 424 U.S. 319 (1976).

   b. Due process mandates that before an administrative action resulting in deprivation of an individual's liberty or property, the governmental agency must provide that individual with reasonable notice and an opportunity to be heard. *Donn v. Civil Rights Comm.*, 68 Ohio App.3d 561, 565 (8th Dist.1991), citing *State ex rel. Great Lakes College, Inc. v. State Med. Bd.*, 29 Ohio St.2d 198 (1972), paragraph one of the syllabus; *Alcover v. State Med. Bd.*, No. 54292 (8th Dist. Dec. 10, 1987).

   c. Procedural due process also embodies the concept of fundamental fairness. *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 422 (1st Dist. 1998).

4. In the administrative law context, due process requires notice and an opportunity to be heard.

   a. Although due process is flexible and calls for such procedural protections as the particular situation demands, the basic requirements of procedural due process are notice and an opportunity to be heard. *Khemsara v. Veterinary Med. Licensing Bd.*, 2023-Ohio-718, ¶ 47 (8th Dist.).

   b. In any proceeding that will be final, an elementary and fundamental requirement of due process is notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Krusling v. Bd. of Pharmacy*, 2012-Ohio-5356, ¶ 13 (12th Dist.).

   c. Due process requires that an individual receive fair notice of the precise nature of the charges that will be raised at a disciplinary hearing. *Griffin v. State Med. Bd.*, 2011-Ohio-6089, ¶ 22 (10th Dist.); *Johnson v. State Med. Bd.*, No. 98AP-1324 (10th Dist. Sept. 28, 1999).

   d. Procedural due process entitles a party to be informed of the issues on which a decision will be made and the factual material on which an agency relies so that the individual may have the opportunity to rebut it. *Fehrman v. Dept. of Commerce*, 141 Ohio App.3d 503, 511 (10th Dist. 2001).

   e. The right to a reasonable opportunity to be heard includes reasonable notice of the time, date, location, and subject matter of the hearing. *State ex rel. LTV Steel Co. v. Indus. Comm.*, 102 Ohio App.3d 100, 103-104 (10th Dist. 1995).

f. In addition, the right to a hearing includes the right to appear at the hearing prepared to defend oneself through testimony, evidence, or argument against the charges brought. *Bennett v. Dept. of Edn.*, 2022-Ohio-1747, ¶ 39 (4th Dist.); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 422 (1st Dist. 1998).

B. Content of the notice

1. R.C. Chapter 119 sets forth certain requirements for the notice.

   a. Except when a statute prescribes a notice and the persons who must receive the notice, if R.C. 119.06 requires an agency to provide an opportunity for a hearing before it issues an order, that agency must provide notice to the party. R.C. 119.07, ¶ 1.

   b. Under R.C. 119.07, the notice of hearing must include the following:

      i. Notice of the party's right to a hearing;

      ii. The charges or other reasons for the proposed action;

      iii. The law or rule directly involved;

      iv. A statement that the party is entitled to a hearing if the request is received within 30 days from service of the notice;

      v. A statement that the party may appear in person, by the party's attorney, or by such other representative who is permitted to practice before the agency;

      vi. A statement that the party, if personally appearing, may present evidence and examine witnesses appearing for and against the party; and

      vii. A statement that the party may, in lieu of personally appearing, present the party's position, argument, and contentions in writing.

   c. The notice must include instructions on how to request a hearing.

      i. A notice of opportunity for hearing fulfills the requirements of R.C. 119.07 if it states (1) that the request for a hearing must be in writing, and (2) the statutory deadline for requesting a hearing. Because of changes to R.C. 119.07, after October 3, 2023, the notice must state that the request must be received within 30 days of service, as opposed to mailing, of the notice. *McClendon v. Dept. of Edn.*, 2017-Ohio-187, ¶ 14 (8th Dist.).

      ii. A notice of opportunity for hearing fulfills the requirements of R.C. 119.07 if it states that "in the event that there is no request for such hearing received within thirty (30) days of the time of mailing of this notice, the State Medical Board may, in your absence and upon consideration of this matter, determine whether or not to limit, revoke, or suspend . . . your certificate to practice podiatry." *Davidson v. State Med. Bd.*, No. 97APE08-1036 (10th Dist. May 7, 1998) (decided before the change in R.C. 119.07, effective October 3, 2023, which made the date of service, as opposed to mailing, the trigger for the calculation of 30 days).

d. An agency's compliance with R.C. 119.07 satisfies procedural due process requirements because R.C. 119.07 sets forth a process reasonably calculated to apprise the party of the charges against the party and the opportunity to request a hearing. *Floyd's Legacy, L.L.C. v. Liquor Control Comm.*, 2020-Ohio-4074, ¶ 20 (10th Dist.); *Kellough v. State Bd. of Edn.*, 2011-Ohio-431, ¶ 36 (10th Dist.).

e. Specific agency statutes may require additional information beyond the statutory requirements of R.C. 119.07.

2. The notice must contain certain information.

a. The notice must contain sufficient information to enable the respondent to prepare a defense to the charges.

i. The purpose of a notice is to give a party charged with a violation adequate notice to enable the party to prepare a defense to the charges. *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 422 (1st Dist. 1998); *Geroc v. Veterinary Med. Licensing Bd.*, 37 Ohio App.3d 192, 198-199 (8th Dist. 1987); *Keaton v. Dept. of Commerce,* 2 Ohio App.3d 480, 483 (10th Dist. 1981).

ii. Procedural due process entitles a party to be informed of the issues on which a decision will be made and the factual material on which an agency relies so that the individual may have the opportunity to rebut it. *Fehrman v. Dept. of Commerce*, 141 Ohio App.3d 503, 511 (10th Dist. 2001).

iii. "It is every citizen's responsibility to know the law, and in fact, one is presumed to know the law." *State v. Smith*, 2008-Ohio-4778, ¶ 18 (3d Dist.). "[I]gnorance of the law does not amount to a lack of notice." *Krusling v. Bd. of Pharmacy*, 2012-Ohio-5356, ¶ 14 (12th Dist.). Accordingly, a respondent's ignorance of the precise meaning of a statutory term used in the notice of opportunity does not equate to a lack of notice. *Id.*, ¶ 17.

iv. If the record shows that the respondent had actual notice of the charges against him, that he knew exactly the nature of his alleged misconduct, and that he vigorously maintained a defense, there is no due-process violation. *Prinz v. State Counselor & Social Worker Bd.*, No. C-990200, (1st Dist. Jan. 21, 2000).

b. The allegations must be sufficiently specified.

i. A person receives due process in an agency adjudicatory hearing if the person was given (1) clear and actual notice of the reasons for the termination in sufficient detail to permit the person to present evidence relating to them, (2) notice of the names of those who made allegations against the person and the specific nature and basis for the charges, (3) a reasonable time and opportunity to present testimony, and (4) a hearing before an impartial board or tribunal. *Davidson v. State Med. Bd.*, No. 97APE08-1036 (10th Dist. May 7, 1998).

ii. As long as the notice of opportunity for hearing contains broad and specific allegations, the statute or rule allegedly violated, and a statement of the respondent's right to a

hearing, the notice does not need to contain all factual allegations or list every possible violation. *Seman v. State Med. Bd.*, 2020-Ohio-3342, ¶ 23 (10th Dist.).

iii. A notice of opportunity for hearing indicating the agency's reasoning, detailing the violations, and specifying the violations found, including dates and code sections, fulfills the requirements of R.C. 119.07 and does not violate due process requirements. *Crawford v. Dept. of Health*, 2021-Ohio-4302, ¶ 18 (7th Dist.).

iv. When the State Medical Board alleged a physician routinely mis-prescribed controlled substances and dangerous drugs for fifteen patients and provided a "patient key" with the notice, the Board complied with due process requirements. The board did not need to list every single prescription and patient visit in the notice. Due process does not require such specificity. *Johnson v. State Med. Bd.*, No. 98AP-1324 (10th Dist. Sep. 28, 1999).

v. An agency cannot sanction a licensee for misconduct against patients who were not named in the notice, as the licensee would be deprived of the ability to prepare a defense regarding the unnamed patients. *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 423 (1st Dist. 1998).

vi. A charging notice with details within each count, albeit with incorrect dates, allowed the respondent to determine what specific instance was being addressed and what details created the basis for the charges. Due process requires fair notice, not perfect notice. *Langdon v. Dept. of Edn.*, 2017-Ohio-8356, ¶ 28 (12th Dist.).

vii. Pleadings interposed in an administrative proceeding do not require the linguistic exactitude of those filed in a judicial proceeding. *Backside, Inc. v. Liquor Control Comm.*, 2004-Ohio-1009, ¶ 20 (10th Dist.).

c. Agencies may need to keep confidential the identities of witnesses and alleged victims.

i. Agency statutes should be carefully read to determine what confidentiality provisions apply to the investigation, case records, and names of witnesses or alleged victims.

ii. Some agencies use the initials of alleged victims in the notice to give sufficient information for the respondent to prepare for the hearing, but to protect victim identifying information from the public record until the hearing.

iii. Some agencies provide a "confidential key," stated in a separate document attached to the notice, to confidentially provide the names of witnesses such as patients, when that information is otherwise protected by statute.

(a) Due process is satisfied if the notice includes specific allegations along with a confidential key that identified witnesses, and at hearing, the respondent had the opportunity to cross-examine the agency's witnesses and to provide respondent's own testimony and exhibits. *Bennett v. Dept. of Edn.*, 2022-Ohio-1747, ¶ 41 (4th Dist.).

d. The agency must cite the statement of law or rule directly involved.

i. A notice that inaccurately paraphrased portions of the rule still complied with due process because the notice informed the respondent of the applicable rule at issue and a perusal of that rule would put respondent and respondent's counsel on notice that the rule implicated "a conviction for an act involving dishonesty." *Khan v. Bur. of Workers' Comp. Health Partnership Program*, 2010-Ohio-4441, ¶ 19 (10th Dist.).

ii. If an agency seeks to impose discipline based on a strict liability administrative rule, it must include that rule in the notice; otherwise, the agency must prove all elements of the rule it cites in the notice, including any elements involving intent. *Minges v. Dept. of Agriculture*, 2013-Ohio-1808, ¶ 21 (10th Dist.).

iii. If an agency notice cites statutes and rules that were renumbered after the notice was issued, but a reasonable person would not have substantial trouble locating the appropriate statutes and rules, there is no due process violation. As a licensed professional, respondent would have constructive notice of a simple statutory change in the rules governing his profession. *Prinz v. State Counselor & Social Worker Bd.*, No. C-990200 (1st Dist. Jan. 21, 2000).

iv. An agency may not charge a licensee with a violation of a standard neither promulgated by the rule nor adopted pursuant to a procedure authorized by statute. *Farina v. State Racing Comm.*, 2019-Ohio-3903, ¶ 28 (10th Dist.); *DelBianco v. State Racing Comm.*, No. 01AP-395 (10th Dist. Oct. 16, 2001).

C. Scope of the charges

1. An agency's action is limited to the charges in the notice.
    a. An appellate court may not uphold an agency's order based upon findings that, while supported by the record, are broader than the charges set forth in the notice of hearing. *Fehrman v. Dept. of Commerce*, 141 Ohio App.3d 503, 509-511 (10th Dist. 2001).
    b. The agency must give notice of the precise nature of the charges to be brought forth at a disciplinary hearing. Although evidence presented at the hearing may support a charge not alleged in the notice, the agency may not make findings broader than the charges set forth in the notice. *In re Morgenstern*, No. 91AP-1018 (10th Dist. May 28, 1992).
2. The agency can consider events outside the scope of the notice.
    a. Acts committed before the license year that is the subject of the administrative disciplinary action may be considered in combination with more recent acts to show a course or pattern of conduct of a continuing nature. *Suburban Inn, Inc. v. Liquor Control Comm.*, 2014-Ohio-4355, ¶ 18 (10th Dist.).
3. The agency can consider another agency's action.
    a. Violations of laws enforced by one agency may form the basis of an administrative disciplinary action taken by another agency based upon "demonstrating a disregard for the laws or regulations of this state." *Suburban Inn, Inc. v. Liquor Control Comm.*, 2014-Ohio-4355, ¶ 11 (10th Dist.).

D. Failure to give proper notice

1. An agency's order may be invalidated if the notice did not comply with due process requirements.
    a. If a respondent was not given proper notice as required under R.C. 119.07 and as dictated under procedural due process principles, the common pleas court may reverse the agency's order. *Diso v. Dept. of Commerce*, 2012-Ohio-4672, ¶ 70 (5th Dist.), citing *State ex rel. LTV Steel Co. v. Indus. Comm.*, 102 Ohio App.3d 100, 103-104 (10th Dist. 1995).
    b. The agency failed to provide adequate notice as to the issues to be considered by the commission, which omission unfairly prejudiced one of the parties by precluding a reasonable opportunity to be heard regarding the given subject. *State ex rel. B.F. Goodrich Co. v. Indus. Comm.*, 73 Ohio App.3d 271, 275 (10th Dist. 1991).
2. To show a violation of due process, the respondent must demonstrate prejudice.
    a. A respondent must show that any violation of due process resulted in prejudice. *Crawford v. Dept. of Health*, 2021-Ohio-4302, ¶ 14 (7th Dist.); *Floyd's Legacy, L.L.C. v. Liquor Control Comm.*, 2020-Ohio-4074, ¶ 17 (10th Dist.); *Seman v. State Med. Bd.*, 2020-Ohio-3342, ¶ 21 (10th Dist.).
    b. Even if the notice contained some deficiencies, a respondent fails to demonstrate any prejudice by failing to indicate what, if anything, he would have done differently to prepare his defense. If the respondent had a full and fair opportunity to prepare and present his defense at the disciplinary hearing, no violation of respondent's due process rights occurred. *Griffin v. State Med. Bd.*, 2011-Ohio-6089, ¶ 26 (10th Dist.).

E. Practical considerations

- Does the notice clearly and accurately state the factual charges or reasons for the proposed action?
- Can the respondent prepare a defense using only this statement?
- Does the notice include confidential information, such as patient names, that should be stated in a separate document attached to the notice?
- Does the agency have sufficient evidence to support every charge stated in the notice?
- Is the agency authorized by statute or administrative rule to take the proposed action?
- Does the notice comply with all procedural requirements set forth in statute and administrative rule that are unique to the agency?
- Does the notice cite all applicable statutes and administrative rules?
- Were the cited statutes and rules in effect on the dates of the stated charges? (Note: Unless the statute at issue is retroactive.)
- If multiple violations are alleged, is it clear which alleged facts violate each statute or rule stated in the notice?
- Does the notice state all the respondent's hearing and representation rights as specified in R.C. 119.07?
- Does the notice indicate the agency's address and telephone number and, if necessary, the name of a contact person?

- Does the notice accurately state the period of time for the respondent to request a hearing, where to send such a request, and whether the request is complete upon mailing or receipt by the agency?
- Does the notice indicate the method of service to be utilized?

F. Timing of the notice

1. Most agencies have no time limitations for bringing actions.
    a. The state is not subject to general requirements of statutes of limitations unless the statute in question has specifically included the government by its terms. Absent an express statutory provision to the contrary, an agency is exempt from the operation of a generally worded statute of limitation. *Ohio Dept. of Transp. v. Sullivan*, 38 Ohio St.3d 137, 139-140 (1988).
    b. But see *Mowery v. State Bd. of Pharmacy*, No. 96-G-2005, fn. 1 (11th Dist. Sep. 30, 1997), holding that although an administrative regulation may not have a time limitation for prosecution, an agency leaves itself vulnerable to due process challenges when significant delays occur between the violations, a conviction, an expungement, an administrative hearing, and the ultimate suspension of a respondent's license.
2. Some agencies have statutory limitations for bringing actions.
    a. Examples of statutory limitations include the following:
        i. R.C. 4735.051 (Ohio Department of Commerce, Division of Real Estate and Professional Licensing);
        ii. R.C. 1707.28 (Ohio Department of Commerce, Division of Securities);
        iii. R.C. 5164.57 (Ohio Department of Medicaid recovery of overpayments);
        iv. R.C. 4715.04 (Ohio State Dental Board); and
        v. R.C. 4112.05 (Ohio Civil Rights Commission).
    b. Is a time limitation mandatory or directory? It depends.
        i. A mandatory statute is one where the agency's noncompliance will render the agency's action to which it relates illegal and void. *In re Davis*, 1999-Ohio-419, ¶ 9. In contrast, an agency action taken in violation of a directory statute that provides a time for the performance of an official duty will not be rendered void for violation of the time requirement. *Id.*
        ii. The general rule is as follows:
            (a) R.C. 119.07 does not require a specific timeframe for issuing the notice other than "prior to the issuance of an order." R.C. 119.07, ¶ 1.
            (b) A statute providing a time to perform an official duty will be construed as directory so far as time for performance is concerned, especially if the statute fixes the time simply for convenience or orderly procedure. *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 473 (1946); *State ex rel. Smith v. Barnell*, 109 Ohio St. 246, 258 (1924) (Seemingly mandatory time limitations "imposed merely with a view to the prompt and orderly conduct of business, are directory and not mandatory.").

(c) A statute will be construed as directory unless the nature of the act to be performed or the phraseology of the statute or of other statutes relating to the same subject-matter is such that the designation of time must be considered a limitation upon the power of the administrative officer. *Boggs v. Real Estate Comm.*, 2009-Ohio-6325, ¶ 25 (10th Dist.); *Accord State ex rel. Smith v. Barnell*, 109 Ohio St. 246, 255 (1924).

iii. Specific statutes include the following:

(a) The time provisions of R.C. 4735.051(D) are directory, not mandatory. Consequently, the Division of Real Estate and Professional Licensing's failure to act within the statutory time periods does not strip the Ohio Real Estate Commission of jurisdiction. Moreover, the failure to meet the time limitations does not even amount to reversible error unless the licensee can demonstrate that the delay prejudiced him or her. *Wightman v. Real Estate Comm.*, 2011-Ohio-1816, ¶ 28 (10th Dist.); *Barlow v. Dept. of Commerce*, 2010-Ohio-3842, ¶ 31 (10th Dist.).

(b) Because R.C. 5164.57(A)(1) conditions the Ohio Department of Medicaid's authority to recover Medicaid overpayments on the Department's provision of notice to the provider within the requisite five-year period, compliance with the R.C. 5164.57(A)(1) notice provision is mandatory. *Clovernook Health Care Pavilion v. Dept. of Medicaid*, 2021-Ohio-337, ¶ 10 (10th Dist.).

(c) In an investigation pertaining to a standard-of-care violation, the supervisory investigatory board had two years to issue its recommendations even though the Board also found other violations. *Sohi v. State Dental Bd.*, 2015-Ohio-3854, ¶ 15 (1st Dist.).

(d) R.C. 4112.05(B)(7) is a statute of limitations, and the one-year time limit contained in the statute for the Ohio Civil Rights Commission to file an administrative complaint is mandatory. *Civ. Rights Comm. v. Countrywide Home Loans*, 2003-Ohio-4358, ¶ 6.

3. Delays in issuing the notice generally are not a defense to an administrative action, although excessive delays may violate due process.

a. As a general rule, the doctrine of estoppel is not a defense to an administrative action.

i. The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice. *State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 145 (1990).

ii. An agency cannot be estopped from its duty to protect the public welfare when it did not bring a disciplinary action as expeditiously as possible. If a government agency is not permitted to enforce the law when the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined. To hold otherwise would be to grant defendants a right to violate the law. *State Bd. of Pharmacy*

v. Frantz, 51 Ohio St.3d 143, 146 (1990); *Duncan v. Liquor Control Comm.* 2008-Ohio-4550, ¶ 16 (10th Dist.); *Goss Realty Co. v. Schregardus*, No. CT98-0036 (5th Dist. Aug. 26, 1999).

iii. An agency's prior failure to enforce a rule cannot estop the agency from enforcing that rule subsequently. *Care Circle L.L.C. v. Dept. of Mental Health & Addiction Servs.*, 2020-Ohio-1382, ¶ 39 (8th Dist.).

b. Generally, the doctrine of laches is not a defense to an administrative action.

i. The equitable doctrine of laches involves an omission by a party to assert a right for an unreasonable and unexplained length of time under circumstances that materially prejudice an opposing party. *Immke Circle Leasing, Inc. v. Bur. of Motor Vehicles*, 2006-Ohio-4227, ¶ 18 (10th Dist.).

ii. Absent a statute to the contrary, laches is generally not a defense to a suit by the government to enforce a public right or to protect a public interest. The principle that laches is not imputable to the government is based upon the public policy in enforcement of the law and protection of the public interest. *State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 146 (1990); *Gralewski v. Bur. Workers' Comp.*, 2006-Ohio-1529 ¶ 36 (10th Dist.) (Generally, absent a statute to the contrary, when the government brings a suit or takes some quasi-judicial action to enforce a public right or protect the public interest, laches is not a defense.).

iii. Even if laches could apply to a state agency, to successfully invoke the equitable doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting the claim. Prejudice is not inferred from a mere lapse of time. *Immke Circle Leasing, Inc. v. Bur. of Motor Vehicles*, 2006-Ohio-4227, ¶ 19 (10th Dist.); *Gralewski v. Bur. Workers' Comp.*, 2006-Ohio-1529, ¶ 37 (10th Dist.), citing *Smith v. Smith*, 168 Ohio St. 447 (1959), paragraph three of the syllabus.

iv. If a licensee was able to continue the licensed profession while the agency had not taken action and did not otherwise show evidence of loss of evidence or change in position, the licensee did not suffer material prejudice. *Sutton v. State Bd. of Pharmacy*, Nos. 2001-T-0030, 2001-T-0031 and 2001-T-0032, ¶ 20-21 (11th Dist. Apr. 30, 2002).

v. Despite the doctor lacking the minimum credentials to participate, he was able to include within his practice workers' compensation claimants whose treatment costs would be covered by the state workers' compensation fund for six years. There was no tenable claim of laches. *Gralewski v. Bur. Workers' Comp.*, 2006-Ohio-1529, ¶ 44 (10th Dist.).

c. However, excessive delays may violate due process.

i. A respondent was deprived of due process when a board issued a suspension based on a citation that was issued (1) five years after the agency's investigations, (2) over three years after the agency was notified of the licensee's convictions, (3) over two years after his criminal discharge, (4) one year after the expungement of his convictions, and (5) after the agency had continuously renewed the licensee's license in spite of knowledge of his convictions. *Mowery v. State Bd. of Pharmacy*, No. 96-G-2005 (11th Dist. Sept. 30, 1997).

G. Service of the notice

1. The service provisions of R.C. Chapter 119 have several amendments.
    a. In 2023, Am.Sub.H.B. No. 33 amended several provisions of R.C. Chapter 119 to change how an agency must serve the various documents required throughout R.C. Chapter 119 proceedings.
    b. Am.Sub.H.B. No. 33 added a new R.C. 119.05, which sets mailing and service requirements for most, if not all, types of documents required to be provided to a party under R.C. 119.06 through 119.13, including:
        i. The notice of opportunity for hearing;
        ii. The hearing scheduling documents;
        iii. The report and recommendation;
        iv. The final order; and
        v. Any attorney's fee determinations.
    c. While there is a large body of case law interpreting the service requirements under the previous versions of R.C. Chapter 119, the most recent version of the law is a significant departure from prior law. Case law relying on the previous versions of R.C. Chapter 119 should be reviewed carefully to determine if the holdings align with the most recent version of R.C. Chapter 119.
    d. The Am.Sub.H.B. No. 33 changes became effective October 3, 2023.
2. Initial notice must comply with R.C. 119.05.
    a. "Notice shall be served in accordance with section 119.05 of the Revised Code." R.C. 119.07, ¶ 1.
    b. R.C. 119.05(B) provides four initial methods of service:
        i. Electronic mail at the party's last known address;
        ii. Facsimile transmission at the party's facsimile number appearing in the agency's official records;
        iii. Traceable delivery service at the party's last known address; or
        iv. Personal service at the party's last known address.
    c. Initial methods of service must comply with R.C. 119.05(B) and (C) as follows:
        i. Electronic mail at the party's last known address. R.C. 119.05(B)(1).
            (a) "Last known address" means the electronic mail address appearing in an agency's official records. R.C. 119.05(A)(1).
            (b) Service is complete on "the date receipt of the document is relayed electronically to the agency either by a direct reply from the recipient or through electronic tracking software demonstrating that the recipient accessed the document." R.C. 119.05(C)(1).

ii. Facsimile transmission. R.C. 119.05(B)(2).

(a) The notice must be sent to the party's facsimile number appearing in the agency's official records. R.C. 119.05(B)(2).

(b) Service is complete on "the date indicated on the facsimile transmission confirmation page." R.C. 119.05(C)(2).

iii. Traceable delivery service at the party's last known address. R.C. 119.05(B)(3).

(a) "Last known address" means the mailing address appearing in an agency's official records. R.C. 119.05(A)(1).

(b) Service is complete on "the date of delivery indicated on the notice of completed delivery provided to the agency by the United States postal service or domestic commercial delivery service." R.C. 119.05(C)(3).

iv. Personal service at the party's last known address. R.C. 119.05(B)(4).

(a) "Last known address" means the mailing address appearing in an agency's official records. R.C. 119.05(A)(1).

(b) Service is complete on "the date indicated on a document confirming physical delivery signed by either the intended recipient, an adult located at the intended recipient's address, or delivery personnel." R.C. 119.05(C)(4).

d. An "alternative address" option is available upon failure to complete service via an initial method. R.C. 119.05(D).

i. If an agency fails to complete service using a party's last known address or facsimile number via email, facsimile, traceable delivery service, or personal service, the agency may complete service by any of those four methods at an alternative address or facsimile number. R.C. 119.05(D).

ii. The agency must verify the alternative address or number as current before service. If an agency completes service at an alternative address, the agency is not required to complete service via publication under R.C. 119.05(E).

e. Service when unable to complete service using an initial method. R.C. 119.05(E).

i. If an agency is unable to complete service using a method described in R.C. 119.05(B), the agency shall publish a summary of the notice's substantive provisions in a newspaper of general circulation in the county where the last known address of the party is located. R.C. 119.05(E).

ii. Notice by publication under this division is complete on the date of publication.

iii. An agency that completes service by publication under this division must send a proof of publication affidavit, with the publication of the notice set forth in the affidavit, to the party by ordinary mail at the party's last known address.

iv. R.C. 7.12(A) establishes general standards for service by newspaper publication by state agencies. It defines "newspaper of general circulation." R.C. 7.12(A)(1)–(5).

3. Exceptions to the notice requirements include the following:

    a. Under R.C. 119.062, the Registrar of the Ohio Bureau of Motor Vehicles "is not required to comply with section 119.05 of the Revised Code in connection with an order canceling or suspending a motor vehicle driver's or commercial driver's license or a notification to a person to surrender a certificate of registration and registration plates."

    b. Some state agencies have statutes that modify or override some or all provisions of R.C. Chapter 119. An agency's statutes should be read carefully in conjunction with R.C. Chapter 119 to determine which service provisions apply.

4. Copies of the notice must be provided to attorneys or representatives of record.

    a. "A copy of the notice shall be provided to attorneys or other representatives of record representing the party." R.C. 119.07, ¶ 1.

    b. R.C. 119.07 does not specify a method required to be used to serve attorneys or representatives of record.

    c. An agency has a limited obligation to find a respondent's attorney.

        i. If there is no attorney or other representative of record, R.C. 119.07 regarding service to the licensee's attorney or representative does not apply. *Beach v. Bd. of Nursing*, 2011-Ohio-3451, ¶ 28 (10th Dist.).

        ii. If an agency does not have notice of counsel's representation before the issuance of the initial notice, the agency need not provide notice to any counsel. *Floyd's Legacy, L.L.C. v. Liquor Control Comm.*, 2020-Ohio-4074, ¶ 22 (10th Dist.).

        iii. The agency is not required to search anything other than its own files to find out if the party is represented by counsel. *Amon v. State Med. Bd.*, 67 Ohio App.3d 287, 290 (10th Dist. 1990).

        iv. If the agency had no record of an attorney's representation, respondent plainly received the notices, and respondent did not object to service on only her, the agency did not commit reversible error by serving the notice on the appellant but not her attorney. *Beach v. Bd. of Nursing*, 2011-Ohio-3451, ¶ 30 (10th Dist.).

5. Notices for summary suspension cases.

    a. If a statute specifically permits the suspension of a license without a prior hearing, the agency must serve notice of its order on the party in accordance with R.C.119.05 not later than the business day next succeeding the order. R.C. 119.07, ¶ 2.

    b. The notice must state (1) the reasons for the agency's action, (2) cite the law or rule directly involved, and (3) state that the party will be afforded a hearing if the party requests it within 30 days of service. R.C. 119.07, ¶ 2.

    c. The agency must provide a copy of the notice to attorneys or other representatives of record representing the party. R.C. 119.07, ¶ 2.

6. Consequences for failure to properly serve a notice.

a. Failure to serve notices in compliance with R.C. Chapter 119 invalidates the agency's order.

   i. If an agency fails to serve the notices for any hearing as required by R.C. 119.01 to 119.13 and as provided in R.C. 119.05, the order entered pursuant to the hearing will be invalid. R.C. 119.07, ¶ 4.

   ii. If initial service by certified mail was unsuccessful, the Board must, under R.C. 119.07, either publish or personally serve the respondent. A second service by certified mail, although successful, did not abrogate the statutory requirement. *Porter v. State Med. Bd.*, 2006-Ohio-5296, ¶ 10-11 (10th Dist.).

b. A respondent may waive statutory notice.

   i. A person entitled to statutory notice may waive it, or any feature of it, or may, by his conduct, acknowledge the giving of notice to him, so as to be precluded from afterward challenging the proceeding for want of notice. *Fogt v. State Racing Comm.*, 3 Ohio App.2d 423, 425 (3d Dist. 1965).

   ii. Although the parties to an action may not agree or consent to jurisdiction of the subject matter, it is fundamental that jurisdiction over the person may be waived. Courts have frequently stated that knowledge is not notice, but knowledge, coupled with facts showing an express waiver and consent, precludes any later objection to the form of notice. *Fogt v. State Racing Comm.*, 3 Ohio App.2d 423, 425 (3d Dist. 1965).

   iii. For an administrative order to be valid without proper notice under R.C. 119.07, the record must demonstrate that the defendant had actual notice of the proceedings against him. Once a defendant has received actual notice of the proceedings, he may waive asserting the lack of notice as a defense, as any objection to jurisdiction over the person may be waived. *Jefferson Cty. Child Support Agency v. Harris*, 2003-Ohio-496, ¶ 12 (7th Dist.).

   iv. If the respondent telephoned the agency to inform the agency of his inability to attend and talked to the agency representative about the possible consequences of the hearing, and the respondent never objects to the form of service at any stage of the proceedings, the record demonstrates that the respondent actually received notice of the hearing even though he did not appear at the hearing. As a result, respondent waived any objection to the form of notice, and the form of notice does not provide a basis for invalidating the administrative order. *Jefferson Cty. Child Support Agency v. Harris*, 2003-Ohio-496, ¶ 13 (7th Dist.).

   v. If the record shows that the respondent (1) appeared in person before the agency, (2) indicated that he wanted to proceed without a lawyer, (3) specifically waived any defects in the notice, and (4) agreed to proceed with the hearing, the respondent was estopped from thereafter denying the validity of the agency's order based on defective notice. Delaying the hearing to issue notice again would have been a vain act and contrary to the wishes of the appellee himself. *Fogt v. State Racing Comm.*, 3 Ohio App.2d 423, 425 (3d Dist. 1965).

vi. If the agency properly served the respondent with notice of the hearing and time and date of the hearing but later changes the date of hearing, the respondent waives any objection to the failure to send a new scheduling notice by participating in the rescheduled hearing. *Woodford v. Real Estate Comm.*, 2019-Ohio-2885, ¶ 17 (10th Dist.).

vii. If the agency properly served the respondent with notice of the hearing and time and date of the hearing, a trial court did not abuse its discretion in finding that the service was proper on a presumption of regularity despite respondent's claim by affidavit that an unnamed agency person told him a different time than that stated in the notice. *Starr v. Dept. of Commerce*, 2021-Ohio-2243, ¶ 27-28 (10th Dist.).

H. Calculating time

1. R.C. 1.14 applies to deadline calculation under R.C. Chapter 119.

   a. "The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday." R.C. 1.14.

   b. "When a public office in which an act, required by law, is to be performed is closed to the public for the entire day that constitutes the last day for doing the act or before its usual closing time on that day, the act may be performed on the next succeeding day that is not a Sunday or a legal holiday as defined in this section." R.C. 1.14.

I. Rebuttable presumption of delivery

1. The presumption of valid service is rebuttable by sufficient evidence demonstrating non-service. To determine whether a party has sufficiently rebutted the presumption of valid service, the trial court may assess the credibility and competency of the submitted evidence of non-service. *Starr v. Dept. of Commerce*, 2021-Ohio-2243, ¶ 25 (10th Dist.).

2. An affidavit, by itself, stating that appellant did not receive service, may not be sufficient to rebut the presumption without any other evidence of a failure of service. *Starr v. Dept. of Commerce.*, 2021-Ohio-2243, ¶ 25 (10th Dist.); *New Coop. Co. v. Liquor Control Comm.*, 2002-Ohio-2244, ¶ 9 (10th Dist.).

IV. HEARING REQUESTS

While R.C. Chapter 119 does not specify a method for requesting a hearing, if any agency's statute or rule requires that a hearing request be in writing, an oral request for a hearing is insufficient. A party's action by requesting a hearing may waive any improper service by the agency. In certain circumstances, if a party fails to timely request a hearing, the agency must still conduct an evidentiary review in a so-called *Goldman* hearing.

A. Request for a hearing

As explained in Chapter III, the notice of opportunity for hearing must allow the respondent 30 days to request a hearing, unless the agency's statutorily created process mandates a different period, and the notice must include instructions for requesting a hearing. If the respondent timely and properly requests the hearing, the agency must schedule the hearing. R.C. 119.07, ¶ 2-3.

B. Method of requesting a hearing

1. A hearing may need to be requested in writing.
    a. R.C. Chapter 119 does not specifically provide that a request for hearing must be in writing. *Beach v. Bd. of Nursing*, 2011-Ohio-3451, ¶ 37 (10th Dist.).
    b. But an agency's specific statutes or rules may require that a request for hearing be in writing (and may specify that the request may be in writing or be sent electronically). Adm.Code 173-3-09(A)(2) (Older Americans Act); Adm.Code 901:3-4-08(B)(2) (appealing the proposed denial, suspension, or revocation of a retail food establishment license); Adm.Code 5160-80-01(B)(13) (Medicaid) (request must be in writing and signed by the appellant or the appellant's authorized representative); Adm.Code 5101:6-50-03(B)(1) (Department of Job and Family Services).
    c. If an agency's specific statute or rule requires a hearing request to be in writing, an oral request for a hearing is insufficient. *McClendon v. Dept. of Edn.*, 2017-Ohio-187, ¶ 19 (8th Dist.) (If an agency has instructed a respondent that the request must be in writing, an oral request is inadequate.); *Alcover v. State Med. Bd., No. 54292* (8th Dist. Dec. 10, 1987) (A telephone request to an assistant attorney general is insufficient, when that attorney advised the licensee that request must be made in writing to the board).
2. Reserving a right to hearing shows an intent to request a hearing.
    a. A licensee sent a letter proposing an informal settlement, which letter also stated that licensee was not waiving his right to a hearing. The court found this was sufficient notification because the licensee had expressly reserved the right to an adjudication hearing, showing intent to request hearing. The court held that the agency erred by failing to timely set a hearing date and time as mandated by R.C. Chapter 119. *Standard Oil Co. v. Williams*, No. 78AP-860 (10th Dist. Sept. 11, 1979).
3. Respondent's waiver of improper service.

a. If an administrative agency fails to give notice as prescribed, any order entered pursuant to the hearing could be invalid. R.C. 119.07, ¶ 4.

b. But a party can waive improper notice through his or her actions. *Jefferson Cty. Child Support Agency v. Harris*, 2003-Ohio-496 (4th Dist.) (The form of the notice was waived when the pro se defendant called the agency to inform it of his inability to attend the hearing and never objected to the form of notice at any stage in the proceedings).

c. "A person entitled to statutory notice may waive it, or any feature of it, or may, by his conduct, acknowledge the giving of notice to him, so as to be precluded from afterward challenging the proceeding for want of notice." *Fogt v. State Racing Comm.*, 3 Ohio App.2d 423, 425 (3d Dist. 1965), citing 41 Ohio Jur.2d 47, Section 28; *Woodford v. Real Estate Comm.*, 2019-Ohio-2885, ¶ 17 (10th Dist.).

C. Timing of a hearing request under R.C. 119.07

1. A party must request a hearing within 30 days of the date of service of the notice. R.C. 119.07, ¶ 2.

   a. The 30-day hearing request deadline provided by R.C. 119.07 begins on the date on which notice is served. R.C. 119.07, ¶ 2. The date on which service is complete depends on the method of service under R.C. 119.05.

      i. Electronic mail—completion of service occurs on (1) date of receipt of a direct reply from the party or (2) date that electronic tracking software demonstrates that the recipient accessed the document. R.C. 119.05(C)(1).

      ii. Facsimile—completion of service occurs on the date of the fax transmission confirmation page. R.C. 119.05(C)(2).

      iii. Traceable Mail (Certified Mail, Fed Ex, etc.)—date of delivery indicated on the notice of completed delivery provided to the agency by United States Postal Service or domestic commercial delivery service. R.C. 119.05(C)(3).

      iv. Personal Service—completion of service occurs on (1) the date indicated on the document confirming physical delivery, signed by recipient or adult located at the recipient's intended address; or (2) the date of the document confirming delivery, signed by delivery personnel. R.C. 119.05(C)(4).

   b. Civ.R. 6(D), which provides for three additional days for filing when a document is served by mail, does not apply to hearing requests under R.C. 119.07. *Moffett v. Salem City School Dist. Bd. of Ed.*, 2003-Ohio-7007, ¶ 36 (7th Dist.); *Great Northern Partnership v. Cuyahoga Cty. Bd. of Revision*, No. 57277 (8th Dist. July 19, 1990).

   c. A party's mere act of placing a request for a hearing in the mail within the 30-day period does not comply with R.C. 119.07. The notice must be received by the agency within the 30-day period. *McClendon v. Dept. of Edn.*, 2017-Ohio-187, ¶ 17 (8th Dist.); *Chirila v. State Chiropractic Bd.*, 145 Ohio App.3d 589, 596-597 (10th Dist. 2001) (The notice must state that the request for hearing must be received within 30 days, not simply requested within 30 days);

Alcover v. State Med. Bd., No. 54292 (8th Dist. Dec. 10, 1987); *Hsueh v. State Med. Bd.*, No. 88AP-276 (10th Dist. Oct. 17, 1989).

d. The "prison-mail rule" states that the date of filing for inmates is the date of delivery to prison authorities with sufficient time that a timely filing could be made. *Houston v. Lack*, 487 U.S. 266, 276 (1988). The Ohio Supreme Court rejected the prison-mailbox rule, holding that a notice of appeal is timely filed when received by the clerk of courts. *State ex rel. Tyler v. Alexander*, 52 Ohio St.3d 84, 84-85 (1990). Thus, the prison-mailbox rule is not recognized in Ohio. *State v. Boyd*, 2022-Ohio-4749, ¶ 6 (7th Dist.); *State v. West*, 2021-Ohio-4682, ¶ 47 (2d Dist.); *State v. Smith*, 2020-Ohio-1370, ¶ 11 (1st Dist.); *State v. Williams*, 2004-Ohio-2857, ¶ 12 (8th Dist.).

D. Effect of failure to timely request a hearing within 30 days

1. Agencies still may need to hold an evidentiary review in lieu of a hearing.

   a. If a respondent fails to timely request a hearing, the agency need not hold a full R.C. Chapter 119 hearing. However, the Tenth District Court of Appeals held that in some circumstances, the agency must review some evidence in support of the notice even if the licensee fails to request a hearing. In *Goldman v. State Medical Bd.*, 110 Ohio App.3d 124, 128-129 (10th Dist.1996) (*Goldman I*), the Tenth District Court of Appeals held that R.C. 119.06 makes an adjudication order effective only as provided in the agency's statute; because the Medical Board could act only "pursuant to an adjudicatory hearing under Chapter 119 of the Revised Code," the State Medical Board was required to hold a hearing before revoking Goldman's license.

   b. Later cases held that "to satisfy the requirements set forth in *Goldman*, a hearing need not be a full adversarial or evidentiary proceeding. However, there must be some sort of review of the circumstances of the case and of reliable evidence more than the investigative report alone, and the evidence must include the sworn testimony of the investigator." *Davidson v. State Med. Bd.*, No. 97APE08-1036 (10th Dist. May 7, 1998). To satisfy the requirements of Goldman, "a hearing must include more than only an unsworn investigative report of the agent that issued the violation in question." *B & N Ent., Inc. v. Liquor Control Comm.*, 131 Ohio App.3d 394, 398 (10th Dist. 1999); *S&P Lebos, Inc. v. Liquor Control Comm.*, 2005-Ohio-4552, ¶ 29 (10th Dist.).

   c. In response to the Goldman decision, many agencies amended their statutes to provide that no hearing must be held if one is not requested; however, in the interest of due process, agencies generally perform an evidentiary review before taking any action. R.C. 4731.22(J) (State Medical Board); R.C. 4723.28(D) (Nursing Board); R.C. 4729.96(D) (Board of Pharmacy).

   d. Certain statutory language may require Goldman hearings. For example, under the hotel licensing statutes, "[u]pon notice and hearing, the state fire marshal may suspend or revoke any license or impose a fine against an owner, proprietor, or agent of a hotel or SRO facility licensed under this chapter for violation of sections 3731.01 to 3731.21 of the Revised Code, the rules adopted pursuant to those sections, or the state fire code adopted pursuant to section 3737.82 of the Revised Code."

e. Several statutes include language that provides that all actions to impose a sanction "shall be taken in accordance with Chapter 119. of the Revised Code." R.C. 4734.31(A) (Chiropractic Board); R.C. 4729.552(D) (Pharmacy Board).

   i. R.C. 119.06 states that "[n]o adjudication order shall be valid unless *an opportunity for a hearing* is afforded in accordance with sections 119.01 to 119.13 of the Revised Code." (Emphasis added.). R.C. 119.06 goes on to say that "[u]nless a hearing was held prior to the refusal to issue the license, every agency *shall afford a hearing upon the request* of a person whose application for a license has been rejected and to whom the agency has refused to issue a license…" (Emphasis added.). Reading the provisions together, Goldman hearings may not be required when the requirement is that actions "shall be taken in accordance with Chapter 119."

2. In *Goldman*, following remand, the court clarified a respondent's right to participate. *Goldman v. State Med. Bd. (Goldman II)*, No. 98AP-238 (10th Dist. Oct. 20, 1998). Absent a timely request for a hearing, the respondent may still participate as follows:

   a. The respondent may attend the *Goldman* hearing because of its public nature. *Tipton v. Woltz*, 2005-Ohio-6989, ¶ 3-4 (9th Dist.).

   b. The respondent may not make arguments, testify, call witnesses, or present other evidence. *Goldman v. State Med. Bd.*, No. 98AP-238 (10th Dist. Oct. 20, 1998); *Kellough v. State Bd. of Edn.*, 2011-Ohio-431, ¶ 38 (10th Dist.).

   c. Nothing in the Board's statute or in R.C. Chapter 119 gives a Board discretion to allow respondent to participate in the hearing. *McClendon v. Dept. of Edn.*, 2017-Ohio-187, ¶ 21 (8th Dist.); *Kellough v. State Bd. of Edn.*, 2011-Ohio-431, ¶ 39-41 (10th Dist.).

3. The *Goldman* analysis applies when there is only one interested party and one regulatory agency. The Tenth District Court of Appeals has rejected the analysis when there are multiple interested parties and multiple supervisory agencies. *Izzo v. Dept. of Edn.*, 2019-Ohio-1008, ¶ 11-12 (10th Dist.). (Where there were three interested parties—the appellants, the school districts, and the Board of Education—the court rejected the claim that only the party requesting the hearing was allowed to participate.)

4. Effect on appeal rights to the common pleas court.

   a. The failure to timely request a hearing may waive the administrative hearing, but it does not deprive a respondent of the right to appeal. *Edmands v. State Med. Bd. of Ohio*, 2015-Ohio-2658, ¶ 10 (10th Dist.); *Oak Grove Manor, Inc. v. Dept. of Human Servs.*, Nos. 01AP-71 and 01AP-72 (10th Dist. Oct. 23, 2001), citing *In re Turner Nursing Home*, No. 86AP-767 (10th Dist. Jan. 29, 1987). The failure to timely request a hearing does not preclude a court's consideration of whether an agency's procedures complied with due process. *Chirila v. State Chiropractic Bd.*, 145 Ohio App.3d 589, 595-596 (10th Dist. 2001).

   b. By failing to request an appeal, the party may, however, have waived any arguments contrary to the agency's proposed action that the party could have raised at the hearing. *State ex rel. Schlegel v. Stykemain Pontiac Buick GMC, Ltd.*, 2008-Ohio-5303, ¶ 17; *Demas v.*

State Med. Bd., 2019-Ohio-2932, ¶ 29 (10th Dist.); *Edmands v. State Med. Bd.*, 2015-Ohio-2658. ¶ 18 (10th Dist.).

E. Summary suspensions

1. Service of summary suspensions orders must comply with R.C. 119.07:
    a. In cases of summary suspension, the agency must serve notice of the order pursuant to R.C. 119.05 "not later than the business day next succeeding such order." R.C. 119.07, ¶ 2. Given this short timeline, certified mail will likely not be fast enough; email, fax, or personal service is likely required.
    b. The notice of summary suspension must state the reasons for the agency's action, cite the law or rule directly involved, and state that the party will be afforded a hearing if the party requests it within 30 days of the date on which notice is served. R.C. 119.07, ¶ 2.
    c. The agency must provide a copy of the notice to the respondent's attorney or other representative of record. R.C. 119.07, ¶ 2.
2. Some agencies have specific summary suspension statutes that override notice per R.C. 119.07, so those statutes must always be consulted. *See, e.g.*, R.C. 4731.22(G) (State Medical Board); R.C. 4735.13(C) (Real Estate Commission); R.C. 3734.09 (Boards of Health/Director of Ohio EPA). These statutes may include specific appeal procedures.
3. A doctor's due process rights were violated when the Board summarily suspended her license without proper notice and without the opportunity to request a hearing, as required by R.C. 119.07. *Doriott v. State Med. Bd.*, 2006-Ohio-2171, ¶ 14 (10th Dist.).
4. Once the agency issues a final order, any attempt to contest a summary suspension is rendered moot because the respondent is no longer under a summary suspension. The agency's action is now final. *Ridgeway v. State Med. Bd.*, 2007-Ohio-5657, ¶ 12 (10th Dist.); *Vogelsong v. State Bd. of Pharmacy*, 123 Ohio App.3d 260, 267 (4th Dist. 1997) (Summary suspension was moot after the agency entered the final adjudication order and the respondent did not request a stay in the common pleas court).

V. SCHEDULING OF THE HEARING

Section 119.07 of the Revised Code requires that, once a party requests a hearing, the agency must immediately set the date, time, and place for the hearing, and serve the party with notice of the hearing. That hearing date must be set between seven and fifteen days after the party requested the hearing. Courts differ as to whether the hearing-date provision is mandatory or directory, but the best practice is for agencies to set the date and, in the same notice, continue the hearing to a more practical date for the parties.

A. Initial scheduling

1. Once a party requests a hearing, the agency must immediately set the date, time, and place for the hearing and serve the party with notice of the hearing. R.C. 119.07, ¶ 3.

2. The date set must be between seven and fifteen days after the party requested a hearing, unless otherwise agreed upon by both the agency and the party. R.C. 119.07, ¶ 3. There is a split among the districts as to whether that requirement is mandatory or directory.

    a. A mandatory statute is one where the agency's noncompliance will render the agency's action to which it relates illegal and void. *In re Davis*, 1999-Ohio-419, ¶ 9. In contrast, an agency action taken in violation of a directory statute that provides a time for the performance of an official duty will not be rendered void for violation of the time requirement. *Id.*

    b. Courts differ as to whether initial scheduling is a jurisdictional requirement.

        i. Jurisdictional. R.C. 119.07 creates a mandatory duty upon the agency to schedule the hearing within 15 days after a party has requested a hearing. Failure to do so divests the agency of jurisdiction and renders its decision void. *Royer v. Real Estate Comm.*, 131 Ohio App.3d 265, 270 (3d Dist. 1999) (The time requirement in R.C. 4735.051(D), the real estate investigation report deadline, has the same mandatory nature as the time requirement in R.C. 119.07.); *Kizer v. McCullion*, No. CA2867 (5th Dist. Dec. 9, 1991) (distinguishing *In re Barnes*, 31 Ohio App.3d 201 (10th Dist. 1986).

        ii. Not jurisdictional. R.C. 119.07's requirement to set the hearing within 15 days of the request for a hearing is mandatory, but not jurisdictional. Accordingly, violation of the requirement will not render the order void. *Watkins v. Bd. of Edn.*, 2023-Ohio-2595, ¶ 28 (10th Dist.); *State ex rel. Vernon Place Extended Care Ctr., Inc. v. State Certificate of Need Review Bd.*, No. 82AP-1044 (10th Dist. Aug. 11, 1983).

    c. Initial scheduling is directory.

        i. As a general rule, a statute providing a time to perform an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure; and, unless the purpose of the time requirement the statute's language, the statute is directory and not mandatory. *State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 472 (1946), citing *State ex rel. Smith v. Barnell, Dir.*, 109 Ohio St. 246, 254 (1924).

        ii. A deadline provision that does not mandate a particular result for its violation is directory and not mandatory. *State ex rel. Larkins v. Wilkinson*, 79 Ohio St.3d 477, 479, 1997-

Ohio-139. The use of the verb "shall" does not change the deadline to mandatory . *In re Davis*, 1999-Ohio-419, ¶ 10. Note: these cases do not interpret the time limits set forth in R.C. Chapter 119.

iii. The requirement to hold a hearing within 15 days is directory, not mandatory, because the agency has the authority to continue a hearing upon its own motion. *Wightman v. Real Estate Comm.*, 2011-Ohio-1816, ¶ 28 (interpreting R.C. 4735.051(D)); *Vogelsong v. State Bd. of Pharmacy*, 123 Ohio App.3d 260, 268 (4th Dist. 1997); *Sahely v. State Racing Comm.*, No. 92AP-1430 (10th Dist. Apr. 6, 1993); *Korn v. State Med. Bd.*, 61 Ohio App.3d 677, 683-684 (10th Dist. 1988) (The agency does not lose jurisdiction if it fails to hold the hearing within 15 days.); *State Racing Comm. v. Kash*, 61 Ohio App.3d 256, 262 (8th Dist. 1988); *Yoder v. State Bd. of Edn.*, 40 Ohio App.3d 111, 113 (9th Dist. 1988); *In re Barnes*, 31 Ohio App.3d 201 (10th Dist. 1986).

iv. There is no error when a respondent fails to object to a hearing being scheduled more than 15 days after the request for a hearing and also does not object to the agency's continuance of the hearing. *Dept. of Commerce v. Vild*, No. 60858 (8th Dist. June 6, 1991).

3. Practical Note. The agency will often set the initial hearing date and then, in the same notice, continue the hearing and inform the party of the continuance. It is a best practice to continue the hearing to a specific new date, not indefinitely. The date may be further adjusted for the parties' convenience.

B. Continuances

1. The agency may postpone or continue a scheduled hearing upon its own motion or the motion of any party. R.C. 119.09. A decision whether to grant a continuance lies within the agency's discretion. *Moore v. Bd. of Nursing*, 2013-Ohio-913, ¶ 17 (10th Dist.); *Korn v. State Medical Bd.*, 61 Ohio App.3d 677, 683 (10th Dist. 1988).

2. An agency may not continue a hearing for an unreasonable amount of time. A fair hearing by an administrative agency requires that the hearing and determination be held in an expeditious and timely manner as possible under the circumstances. *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 166 (10th Dist. 1969).

   a. The agency's delay of the hearing for over two years without explanation was a violation of a fair hearing. *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 166 (10th Dist. 1969).

   b. A 283-day delay of the hearing is not per se unreasonable. The agency's reasons for the delay (the voluminous nature of the charges and the sporadic nature of the board's meetings) explain, at least in part, the delay. *Immke Circle Leasing, Inc. v. Bur. of Motor Vehicles*, 2006-Ohio-4227, ¶ 14 (10th Dist.).

   c. A hearing delay of approximately seven years, largely due to protracted litigation over two preliminary procedural/jurisdictional issues, did not violate due process. *Gourmet Beverage Ctr., Inc. v. Liquor Control Comm.*, 2002-Ohio-3338 (10th Dist.).

d. A two-year period between the request for hearing and the issuance of the final order did not violate due process as the applicant suffered no stigma or financial liability. The agency had to review voluminous applications while dealing with a new program and subject matter, and the hearing officer and agency had to review voluminous filings. *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2022-Ohio-4281, ¶ 74 (11th Dist.).

3. Even with late delivery of the notice of the hearing date, time, and place, respondent waived error by participating in the prior telephone conference at which the date and time for the hearing were set. *Woodford v. Real Estate Comm.*, 2019-Ohio-2885, ¶ 16-18 (10th Dist.).

4. Requesting a continuance

   a. Unless otherwise proscribed in statute or rule, a party may request from either the hearing officer or the agency a continuance of a scheduled hearing.

   b. Requests for continuances should not be made ex parte.

5. Merits of request for continuance.

   a. R.C. Chapter 119 does not set forth guidelines for continuances, but agencies often consider the following reasons when considering a request for a continuance:

      - Conflict of counsel due to a priority matter, including prior scheduling of trial or other court date.
      - Health or medical issues preventing counsel or licensee from attending hearing.
      - Availability of key witnesses.
      - Complexity of case and adequacy of time for counsel to prepare a defense.
      - The need for additional time for active settlement negotiations.
      - Whether the licensee retains an active license.
      - Whether the delay of the hearing, and resulting delay in agency action, presents a risk of danger to the public.
      - Whether previous requests for continuances have been granted.

   b. Agency law or rules may set guidelines for considering motions to continue a hearing.

   c. Courts have also used the test established for continuances generally as established in *State v. Unger*, 67 Ohio St.2d 65, 67-68 (1981): the length of the request; whether other continuances have been granted; the inconvenience to the court, litigants, opposing counsel, and witnesses; whether the request is legitimate or dilatory; and whether the party contributed to the circumstance giving rise to the request. *Herman v. State Med. Bd.*, No. 99AP-967 (10th Dist. Nov. 28, 2000).

6. Denial of an administrative-hearing continuance is reviewed under an abuse-of-discretion standard. *Earth 'N Wood Prod., Inc. v. Akron Bd. of Zoning Appeals*, 2003-Ohio-1801, ¶ 11 (9th Dist.), citing *Coats v. Limbach*, 47 Ohio St.3d 114 (1989). To abuse this discretion, a hearing examiner's attitude in reaching a decision to deny a motion for a continuance must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

a. Denial of a motion for continuance of a hearing was **not** an abuse of discretion. *Bivins v. State Bd. of Emergency Med. Servs.*, 2005-Ohio-5999, ¶ 19-20 (6th Dist.) (request made on day of hearing when hearing was requested six months earlier); *Lonergan v. State Med. Bd.*, 2006-Ohio-6790, ¶ 14 (10th Dist.) (denial of a fourth continuance after three previous requests over seven months); *Tedeschi v. Grover*, 39 Ohio App.3d 109, 111 (8th Dist. 1988) (no continuance in a civil matter merely because a criminal investigation or trial is pending); *Urban v. State Med. Bd.*, 2004-Ohio-104, ¶ 33-35 (10th Dist.) (applying *Tedeschi* to administrative hearings).

b. Denial was an abuse of discretion. *Coats v. Limbach*, 47 Ohio St.3d 114, 117 (1989) (continuance requested to allow testimony of critical witness (the taxpayer's tax preparer) who was ill); *Adeen v. Dept. of Commerce*, 2006-Ohio-3604 (8th Dist.) (first continuance request made the day before the hearing in order to obtain counsel and evidence).

VI. OBTAINING EVIDENCE AND SECURING WITNESSES

Obtaining evidence and securing witnesses for an administrative hearing can differ significantly from a court hearing. The Due Process Clause does not require the exchange of discovery and the Civil or Criminal Rules regarding discovery do not generally apply to administrative hearings. R.C. Chapter 119 does not require pre-hearing discovery, although an adjudicatory body's specific statute may require some discovery or exchange of witness lists and exhibits prior to hearing. R.C. 109.09 does provide for depositions in lieu of appearance at hearing. R.C. 109.09 also provides for the issuance of subpoenas at the request of the party, and enforcement of those subpoenas through the local common pleas court. Finally, the Public Records Act may provide litigants with a separate means for obtaining some government records.

A. The Due Process Clause does not require the exchange of discovery in administrative hearings under R.C. Chapter 119.

1. "Discovery is a technical procedural rule for civil and *criminal trials*. *There is no constitutional support for the* procedural right of discovery." (Emphasis in original.) *Harrison v. Dayton*, No. 9796 (2d Dist. Feb. 13, 1987); *see also Carratola v. State Dental Bd.*, No. 18658 (9th Dist. May 6, 1998) (rejected a claim that absence of discovery (including exchange of witness and expert statements) in an administrative hearing violated due process because "[t]he rules of civil procedure (including discovery) do not apply to administrative proceedings.").

2. There is no constitutional due process right for an employer to depose a physician who renders a report regarding a workers' compensation claim. *LTV Steel Co. v. Indus. Comm.*, 140 Ohio App.3d 680, 690 (10th Dist. 2000) (applying the test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976)); *State ex rel. R & L Shared Servs., L.L.C. v. Indus. Comm.*, 2016-Ohio-1082, ¶ 84-86 (10th Dist.).

B. R.C. Chapter 119 does not provide for discovery pursuant to the Civil or Criminal Rules of Procedure.

1. R.C. 119.09 does not provide for pre-hearing discovery prior to an adjudication hearing. *Casey v. Mahoning Cty. Dept. of Human Servs.*, 2002-Ohio-606 (7th Dist.), citing *State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143 (1990).

2. The Ohio Rules of Civil Procedure, including the discovery rules, are not applicable to the administrative hearing procedure.

   a. Civ.R. 1(A) limits the Civil Rules to "all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in division (C) of this rule."

   b. Civ.R. 1(C) lists exceptions to the Civil Rules, and states: "[t]hese rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure ….(8) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules." *Price v. Westinghouse Electric Corp.*, 70 Ohio St.2d 131, 133 (1982) ("The civil rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was

originally provided in the special statutory action."); *State ex rel. Millington, v. Weir*, 60 Ohio App.2d 348, 349 (10th Dist. 1978).

c. An administrative hearing under R.C. 119.09 is a special statutory proceeding. *Huntsman v. State*, 2017-Ohio-2622, ¶ 36 (5th Dist.) (proceeding under the Dangerous Wild Animal Act); *Wheat v. State Bd. of Chiropractic Examiners*, No. 13538 (9th Dist. Nov. 30, 1988) (medical disciplinary proceeding).

d. Because the Civil Rules do not apply to an administrative hearing, the agency is not required to provide discovery, including a list of proposed witnesses, prior to the hearing. *Khemsara v. Veterinary Med. Licensing Bd*., 2023-Ohio-718, ¶ 55-56 (8th Dist*.); Ohio Releaf, L.L.C. v. Dept. of Commerce*, Franklin C.P. No. 19CV-4319 (Dec. 18, 2019) (The discovery methods contained in the Civil Rules, and therefore the discovery sanctions, including the doctrine of spoliation of evidence, are not applicable to administrative proceedings.).

e. Numerous other courts have concluded that the Rules of Civil Procedure do not apply to administrative hearings. *Froug v. Bd. of Nursing*, No. 00AP-523 (10th Dist. Feb. 1, 2001); *Leake v. State Bd. of Psychology*, No. S-92-32 (6th Dist. June 30, 1993); *Harrison v. Dayton*, No. 9796 (2d Dist. Feb. 13, 1987);

3. The Criminal Rules of Procedure generally do not apply to proceedings conducted pursuant to R.C. Chapter 119. *Miller v. State Bd. of Pharmacy*, 2012-Ohio-1002, ¶ 43 (5th Dist.) (Criminal Rules requiring disclosure of discovery that may include exculpatory evidence did not apply in R.C. 119.12 appeal).

4. The agency's own statutes or rules may provide for a discovery-like exchange of information.

   a. In the absence of statutory requirements to the contrary, administrative agencies may enact their own rules regarding hearing procedures and admissibility, as long as they are procedurally fair. *Harner v. Bd. of Nursing Edn. & Nursing Registration*, No. CA-3315 (5th Dist. Dec. 30, 1987); *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 161 (10th Dist. 1969).

   b. Examples of discovery-like exchanges of information:

      i. R.C. 4517.57(B) authorizes the parties in a motor vehicle dealer protest to engage in discovery, prior to the hearing, in accordance with the Rules of Civil Procedure. *Bob Daniels Buick Co. v. General Motors Corp.*, No. 97AP-1701 (10th Dist. Oct. 13, 1998).

      ii. Adm.Code 5101:6-50-07(A) provides for some pre-hearing discovery in certain hearings under R.C. Chapter 119 held before the Ohio Department of Job & Family Services.

      iii. Full discovery: Adm.Code Chapter 3746-6 (Environmental. Review Appeals Commission); Adm.Code 4901-1-16 (Public Utilities Commission of Ohio); Adm.Code 4906-2-14 (Ohio Power Siting Board)

5. The agency's own statutes and rules may provide limitations on the use of certain records even where discovery-like exchanges are authorized. Examples include:

   a. R.C. 4731.22(F)(5) provides that complaints to the State Medical Board are confidential and not discoverable.

b. R.C. 5101.29 provides that certain records held by the Ohio Department of Job & Family Services or a county department of job & family services are not public records pursuant to R.C. 149.43 and are not discoverable.

c. R.C. 5160.45(B) provides that no person shall disclose information regarding a medical assistance recipient for any person not directly connected with the administration of the medical assistance program (such as Medicaid).

C. Depositions

1. R.C. Chapter 119 provides for the subpoena of witnesses or depositions in lieu of appearance when the witness is unavailable for hearing.

   a. According to R.C. 119.09, "[f]or the purpose of conducting any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency . . . may take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the taking of depositions in civil actions in the court of common pleas . . . ." R.C. 119.09, ¶ 2.

   b. For adjudication hearings, an administrative agency may allow testimony by deposition for witnesses who will be unavailable at the time of the hearing. The taking of the deposition shall be in the same manner as is prescribed by law for the taking of depositions in civil actions. Finally, the deposition may be used at hearing against a party who was present or represented at the taking of the deposition. *In re Heath*, 80 Ohio App.3d 605, 611-12 (10th Dist. 1992).

   c. If requested by a party to the adjudicatory hearing, an administrative agency must issue a subpoena to compel attendance of a witness. R.C. 119.09, ¶ 2; *Walters v. State Dept. of Adm. Servs*., 2006-Ohio-6739, ¶ 29 (10th Dist.) (Respondent's due process rights were not affected when there was no evidence that she requested the agency to subpoena a witness.). *See* Section D below.

2. R.C. Chapter 119 does not provide for discovery depositions.

   a. R.C. 119.09 does not provide for prehearing discovery depositions by a party prior to an adjudication hearing. The mandatory language in R.C. 119.09 pertains to securing the attendance of witnesses and the production of books, records, or papers for the purpose of conducting an adjudication hearing. *State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143 (1990), paragraph one of the syllabus; *Casey v. Mahoning Cty. Dept. of Human Servs.*, 2002-Ohio-606 (7th Dist.) (R.C. 119.09 does not provide for prehearing discovery by a party to an adjudication hearing.).

   b. Parties cannot obtain prehearing discovery depositions regardless of whether the depositions are described as "depositions" or "prehearing discovery depositions." *State Med. Bd. v. Murray*, 66 Ohio St.3d 527, 535 (1993).

D. Subpoenas for Purposes of a Hearing

1. Issuance of Subpoenas

a. For the purpose of conducting an adjudication hearing, the agency may and, upon request of any party, shall issue a subpoena for any witness or a subpoena duces tecum to compel the production of books, records, or papers. R.C. 119.09, ¶ 2.

b. The agency is required to subpoena a witness only upon request. The absence of a witness at a hearing does not violate a licensee's rights when the licensee did not request the issuance of a subpoena. *Khemsara v. Veterinary Med. Licensing Bd.*, 2023-Ohio-718, ¶ 56 (8th Dist.).

c. The confidentiality of a respondent's own answers to the board's investigative interrogatories could be waived by respondent, and therefore the board must issue a subpoena duces tecum and produce the answers in response to the respondent's request for a hearing subpoena. *Mansour v. State Med. Bd.*, 2015-Ohio-1716, ¶ 31 (10th Dist.).

2. Agency's Failure or Refusal to Issue Subpoenas

a. Under R.C. 119.09, an agency must issue a subpoena to compel attendance of a witness or to compel production of documents if requested by a party to the hearing. *Carratola v. State Dental Bd.,* No. 18658 (9th Dist. May 6, 1998); *Walters v. State Dept. of Adm. Servs.*, 2006-Ohio-6739, ¶ 29 (10th Dist.).

b. To show reversible error in an agency's failure to issue a requested subpoena pursuant to R.C. 119.09, a party must demonstrate that the failure resulted in prejudice. *Burneson v. State Racing Comm.*, 2009-Ohio-1103, ¶ 24 (10th Dist.); *State Bd. of Pharmacy v. Poppe*, 48 Ohio App.3d 222 (12th Dist. 1988), paragraph five of the syllabus; *Flynn v. State Med. Bd.*, 2016-Ohio-5903, ¶ 58 (10th Dist.).

c. An agency properly declined to issue a subpoena when the request for the subpoena was insufficient and did not specify the full name of the person to be subpoenaed, the address of the person to be subpoenaed, or an accurate date and time at which the individual or entity was to appear to produce the records. In addition, the request did not comport with an agency rule that required a subpoena request provide at least fourteen days for compliance with the subpoena. *Flynn v. State Med. Bd.*, 2016-Ohio-5903, ¶ 56, 59 (10th Dist.).

3. Agency's Authority to Limit or Quash Subpoenas

a. A hearing examiner has the discretion to limit or quash subpoenas requested during disciplinary proceedings, even though such authority is not specified in R.C. 119.09. Having been granted the power to issue subpoenas, all administrative agencies must have the corollary power to quash subpoenas. *Clayton v. Bd. of Nursing*, 2016-Ohio-643, ¶ 34.

b. A hearing examiner did not abuse his discretion by quashing subpoenas served on out-of-state non-parties. *Ohio Releaf, L.L.C. v. Dept. of Commerce*, Franklin C.P. No. 19CV-4319 (Dec. 18, 2019), citing *Gibsonburg Health, L.L.C. v. Miniet*, 2018-Ohio-3510, ¶ 8 (6th Dist.) ("an Ohio court's subpoena power does not reach out-of-state nonparties.."); *State v. Adams*, 2009-Ohio-6491, ¶ 29 (4th Dist.) (criminal rules do not give authority for clerk to issue a subpoena outside the state). However, a party may serve a subpoena upon an out-of-state non-party under the Uniform Interstate Depositions and Discovery Act if the state where the nonparty resides has adopted the Act. The Act sets forth the procedure to be followed to have the local clerk of court serve the requested subpoena. *See* R.C. 2319.09.

c. A non-party to the subpoena enforcement action in the court of common pleas does not have standing to assert that witnesses were not properly served with a subpoena or did not have sufficient time to respond. *State Dental Bd. v. HealthCare Venture Partners, L.L.C.,* 2014-Ohio-2508, ¶ 14-15 (10th Dist.) (Licensee subject to pending agency's administrative disciplinary action was not a party to the subpoena enforcement action, which was brought by the agency to enforce a subpoena propounded upon an entity witness not a party to the agency's administrative action.).

d. A hearing examiner properly quashed subpoenas seeking records or testimony that were confidential under statute. *Bennett v. Dept. of Edn*., 2022-Ohio-1747, ¶ 30-31 (4th Dist.).

e. A hearing examiner's issuance of a broad subpoena relevant to the issue to be determined at the hearing, and denial of issuance of subpoenas for the cumulative and irrelevant evidence requested by the respondent, was not a violation of due process when respondent had an opportunity to present the facts to support his argument. *Reid v. MetroHealth Sys.*, 2017-Ohio-1154, ¶ 28-29 (8th Dist.).

f. The hearing examiner properly quashed a subpoena duces tecum seeking investigative information deemed confidential under R.C. 4731.22(F)(5). The hearing examiner did not err by allowing the investigator to testify as to matters in the notice letter after granting the motion to quash. *Gipe v. State Med. Bd.*, 2003-Ohio-4061, ¶ 41-42 (10th Dist.).

4. Timing of Compliance with Subpoena

   a. Because R.C. Chapter 119 provides that a party may request the issuance of a subpoena duces tecum for the purpose of conducting any adjudication hearing, R.C. 119.09 is satisfied when the agency subpoenas records to be delivered at the commencement of the hearing. *Froug v. State Bd. of Nursing*, No. 00AP-523 (10th Dist. Feb. 1, 2001).

      i. The respondent was not denied due process when she failed to attend the hearing and avail herself of the opportunity to review the records. *Id.*

      ii. The respondent could have requested a continuance if more time was necessary to review the records. *Id.*

5. Proper Service of Subpoenas and Fees

   a. Method of service

      i. R.C. 119.09, ¶ 2 provides that a subpoena "shall be served and returned in the same manner as a subpoena in a criminal case is served and returned. The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases."

      ii. A subpoena may be served by a "sheriff, bailiff, coroner, clerk of court, constable, marshal, or a deputy of any, by a municipal or township policeman, by an attorney at law or by any person designated by order of the court who is not a party and is not less than eighteen years of age." Crim.R. 17(D).

      iii. Service of a subpoena upon a person shall be made by delivering a copy to such person or by reading the subpoena to him in person, or by leaving it at his usual place of residence. Crim.R. 17(D).

b. Traveling and witness fees

i. A witness living in the same county as the agency waives the right to fees if not demanded upon service, and the witness may not later refuse to appear solely because the fees were not tendered upon service. 1986 Ohio Atty.Gen.Ops. No. 86-066.

ii. Where a witness lives outside the county in which the adjudicatory hearing is located, witness fees and mileage fees must be attached to the subpoena and tendered without demand, or the witness is not obligated to appear at an adjudicatory hearing. A.*O. Smith Corp. v. Perfection Corp.*, 2004-Ohio-4041, ¶ 26 (10th Dist.) (The trial court abused its discretion in ordering a party to comply with the subpoena when there were no witness fees tendered.); *Trick v. Scherker*, 2015-Ohio-2972, ¶ 19 (2d Dist.); 1986 Ohio Atty.Gen.Ops. No. 86-066 When the fees were not tendered with the subpoena, error could be cured by subsequently tendering the fees if tendered prior to the time appearance is compelled. *A.O. Smith Corp. v. Perfection Corp.*, 2004-Ohio-4041, ¶ 26 (10th Dist.).

iii. The sheriff shall be paid the same fees for services as are allowed in the court of common pleas in criminal cases. R.C. 119.09, ¶ 2.

iv. Witnesses shall be paid witness fees and mileage according to R.C. 119.094 (2009). R.C. 119.09, ¶ 2. Each witness subpoenaed to appear at an adjudication hearing shall be paid $12.00 for each full day's attendance, $6.00 for each half day's attendance, and 50 ½ cents per mile for travel from the witnesses' residence to the hearing location and back. R.C. 119.094(A).

Witness residence in relationship to hearing location	**Fees**	**Mileage**	**Witness must demand fees?**
Within county	One day's attendance ($12)	50 ½ cents per mile from residence to hearing	Yes
Outside the county	One day's attendance ($12)	50 ½ cents per mile from residence to hearing	No

v. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid. R.C. 119.09, ¶ 2.

vi. Always check the agency's specific statute, as it may include different requirements for the service of subpoenas. For example, Adm.Code 5101:6-5-01(G)(3) governs subpoenas issued in certain hearings before the Ohio Department of Job & Family Services ("[s]ubpoenas shall be served by mail. The payment of witness fees for attendance and travel is not required.").

6. Return of the Subpoena

a. The return of the subpoena must be made in the same manner as a subpoena in a criminal case. R.C. 119.09, ¶ 2.

b. The person serving the subpoena shall file a return with the clerk. Crim.R. 17(D).

E. Enforcement of Subpoenas

1. "In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which the witness may lawfully be interrogated, the court of common pleas of any county where such disobedience, neglect, or refusal occurs or any judge thereof, on application by the agency shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein." R.C. 119.09, ¶ 4.
2. An agency must, upon a party's request, apply to the common pleas court to enforce a subpoena.
    a. As noted above, under R.C. 119.09, an agency must issue a subpoena to compel attendance of a witness or to compel production of documents if requested by a party to the hearing. *Carratola v. State Dental Bd.,* No. 18658 (9th Dist. May 6, 1998); *Walters v. State Dept. of Adm. Servs.*, 2006-Ohio-6739, ¶ 29 (10th Dist.).
    b. If the subpoenaed person refuses to attend, the agency may apply to enforce the subpoena by attachment proceedings for contempt to the court of common pleas where the refusal occurs as described in R.C. 119.09. *Carratola v. State Dental Bd.,* No. 18658 (9th Dist. May 6, 1998).
    c. An agency need not enforce a subpoena on behalf of a respondent if the respondent fails to request of the agency enforcement. *Carratola v. State Dental Bd.,* No. 18658 (9th Dist. May 6, 1998). When a hearing examiner presides over the hearing, he has the same power as the agency in conducting the hearing, therefore if the respondent does not request that the hearing examiner or the agency enforce the subpoena, the court need not reverse the agency's decision on that ground. *Id.*
    d. If a party requests that the agency enforce obedience to a subpoena through attachment proceedings, and if the agency fails to do so, reversal of the agency's order is appropriate, but only if the party shows prejudice resulting from the failure. *Burneson v. State Racing Comm.*, 2009-Ohio-1103, ¶ 20-24 (10th Dist.).
3. Consequences of failing to obey a subpoena include attachment proceedings for contempt.
    a. Upon failure to comply, an agency may file an application to enforce the subpoena if requested by the party desiring the witness's appearance. R.C. 119.09.
    b. The court of common pleas must fulfill the mandatory duty imposed upon it by R.C. 119.09 to compel obedience by attachment proceedings when a witness refuses to testify to matters relevant in an R.C. 119.09 administrative hearing, limited only by the right of the witness to refuse to testify at such hearing based upon his Fifth Amendment privilege against criminal self-incrimination or any other applicable privilege the witness may assert. *Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d 26, 27 (1983).
    c. In an attachment proceeding for contempt, the common pleas court may not consider a hearing examiner's discretionary ruling on the relevance of testimony sought to be compelled. The relevancy argument must be made at the hearing and upon judicial review of the agency's final order. *Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d 26, 27 (1983).

d. An agency is limited to the statutory attachment procedures to sanction contempt of its subpoenas, and may not resort to other forms of punishment, such as limiting testimony of other witnesses. *Green v. Western Reserve Psych. Habilitation Ctr.,* 3 Ohio App.3d 218, 220 (9th Dist. 1981); *Althof v. State Bd. of Psychology*, 2007-Ohio-1010, ¶ 48-49 (10th Dist.).

4. The application to enforce is filed in the court of common pleas where the disobedience occurred.

   a. The application is a "summary proceeding, rather than requiring a summons under the rules of civil procedure." *State ex rel. Galbraith v. Indus. Comm.*, 2003-Ohio-7025, ¶ 13 (10th Dist.); *Cleveland v. Amazing Tickets, Inc.*, 2018-Ohio-743, ¶ 5 (8th Dist.) (an action to enforce an administrative subpoena is a special statutory proceeding to which the Ohio Rules of Civil Procedure generally do not apply.).

   b. The "disobedience" of the subpoena occurs in the county where the witnesses were required to testify or produce records at the administrative hearing. *State Dental Bd. v. HealthCare Venture Partners, L.L.C.*, 2014-Ohio-2508, ¶ 18 (10th Dist.).

5. If the matter is one in which the witness may be subject to lawful questioning, the court shall compel obedience by attachment proceedings for contempt.

   a. The process for attachment proceedings for contempt is set forth in R.C. 2317.21. It does not apply to cases in which a witness has demanded, but has not been paid, his traveling fees and fees for one day's attendance. R.C. 2317.21.

   b. The court examiner may issue to the sheriff of the county a writ of attachment, commanding him to arrest and bring the named person to the court to give testimony and answer for the contempt. R.C. 2317.21; R.C. 2317.25.

   c. The witness bears the burden to prove why he need not comply with the subpoena. *State Med. Bd. v. Liss,* No. 87AP-249 (10th Dist. May 17, 1988); *Ohio Elections Comm. v. Chamber of Commerce & Citizens for a Strong Ohio*, 2004-Ohio-5253, ¶ 22 (10th Dist.) (burden of proof rests with the party challenging the subpoena).

   d. The court may fine the witness between $5.00 and $50.00, or the court may imprison the witness in the county jail until the witness submits to be sworn, testifies, or gives his deposition. R.C. 2317.22; R.C. 2317.26. The witness shall also be liable to the party injured for any damages occasioned by his failure to attend, refusal to be sworn or to testify, or to give his deposition. R.C. 2317.23.

F. Investigative Subpoenas Issued by a State Agency

1. Investigative subpoenas are used to compel testimony or the production of records, for purposes of investigation, prior to hearing.

2. An agency's investigative subpoena power is limited by its authorizing statute. It is for the trial court in the first instance to assess whether all the materials sought under the subpoena fall within the scope of the board's lawful investigative authority. *State v. Standard Wellness Co., L.L.C.*, 2022-Ohio-1604, ¶ 44 (10th Dist.).

3. Numerous agencies have statutory authority to issue investigative subpoenas. Examples include:

a. State Medical Board - R.C. 4731.22(F)(3)

b. Dental Board – R.C. 4715.03(D)

c. Board of Nursing - R.C. 4723.29

d. Chiropractic Board - R.C. 4734.48(A)(2)

e. Department of Aging, Ombudsman – R.C. 173.20(H)

f. Division of Securities - R.C. 1707.23

g. Attorney General (Consumer Sales Practices Act) – R.C. 1345.06(B)

h. Board of Elections – R.C. 3501.11(J)

i. Civil Rights Commission – R.C. 4112.04(B)(3)(a)

4. Enforcement of Investigative Subpoenas

   a. Some agencies have specific statutory procedures for enforcement of these investigative subpoenas. Examples include:

      i. State Medical Board - R.C. 4731.22(F)(3)

      ii. Dental Board - R.C. 4715.03(D)

      iii. Board of Nursing - R.C. 4723.29

      iv. Chiropractic Board - R.C. 4734.48(A)(2)

      v. Department of Aging, Ombudsman - R.C. 173.20(H)

      vi. Division of Securities - R.C. 1707.23-.24

      vii. Attorney General (Consumer Sales Practices Act) - R.C. 1345.06(B)

   b. Some statutes grant enforcement under the Civil Rules. For example, R.C. 4723.29 governs enforcement of an investigative subpoena by the Board of Nursing and provides that "upon failure to comply with any subpoena issued by the board and after reasonable notice to the person being subpoenaed, the board may move for an order compelling the production of persons or records pursuant to Ohio Rules of Civil Procedure."

   c. There is no mechanism under R.C. Chapter 119 for a respondent to move to quash an investigative subpoena in court. Absent specific statutory authority or a pending case or appeal, the court of common pleas has no jurisdiction to entertain a motion to quash an administrative subpoena. *In re Polen*, 108 Ohio App.3d 305, 308 (10th Dist. 1996) (No complaint or administrative appeal was pending, nor was any action to compel under R.C. 119.09.); *In re Investigation of Laplow*, 96 Ohio App.3d 386, 389 (10th Dist. 1994) (common pleas court lacked jurisdiction to consider motion to quash administrative subpoena. The statute allowed the requester to enforce a subpoena by contempt and provided for no additional actions).

   d. There may be statutory procedures for the challenge or enforcement of an investigative subpoena. For example, subpoenas issued by the Civil Rights Commission may be challenged within five days of service by petition to the Commission. R.C. 4112.04(B)(3)(d). Subpoenas

may be enforced in the court of common pleas in the county in which the person subpoenaed resides, was served, or transacts business. R.C. 4112.04(B)(3)(e).

e. The decision of a trial court to enforce an investigative subpoena issued by the Division of Securities is, although final for the subpoena enforcement matter, not a final appealable order. *In re Coastal States Petroleum, Inc.*, 32 Ohio St.2d 81, 85 (1972). *See also Borden, Inc. v. State*, 65 Ohio App.2d 1, 4 (10th Dist. 1979) (court's order to enforce Attorney General's civil investigative demand not a final appealable order).

G. Respondents May Obtain Certain Agency Records through the Ohio Public Records Act, R.C. 149.43

(The following is a brief outline of the Ohio Public Records Law. For more detail, see the most recent version of *Ohio Sunshine Laws: An Open Government Resource Manual*, published by the Ohio Attorney General at www.ohioattorneygeneral.gov/sunshine.)

1. Seeking records under The Public Records Law is a separate procedure from administrative hearings, and therefore "Ohio law does not require a hearing to be postponed on the basis that a respondent has not received a response to a public records request from an agency . . . ." *Div. of Securities v. Treece*, 2022-Ohio-3267, ¶ 30 (6th Dist.).
2. The Public Records Act applies to any record, not exempt by law, of a public office, as defined under R.C. 149.011.
    a. As defined by R.C. 149.011(G), a "record" is any document, device, or item, regardless of physical form or characteristic (including an electronic record) that:
        i. Is created, received, or sent under the jurisdiction of a public office; and
        ii. Documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.
    b. Uncirculated personal notes are not records "due to the circumstances of their creation: when the notes are taken by an official for his own personal convenience and are not required to be maintained, they are not records of the *office*." (Emphasis in original.) *State ex rel. Summers v. Fox*, 2020-Ohio-5585, ¶ 66. *See also State ex rel. Carr v. Akron*, 2006-Ohio-6714, ¶ 56 (personal notes of accessors of a fire-lieutenant examination are not public records); *Hunter v. Bur. of Workers' Comp.*, 2014-Ohio-5660, ¶ 17-18, 35 (10th Dist.) (interviewer's notes that were discussed while preparing a written report were not public records.); *State ex rel. Murray v. Netting*, No. 97-CA-24 (5th Dist. Sep. 18, 1998) (request for notes of interviews for police chief were denied as they were the personal papers of the interviewers used to complete the evaluation form).
        i. The agency is required to provide sufficient evidence that the notes were personal notes. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, ¶ 78 (5th Dist.) (attorney's notes taken during an investigation on behalf of the township were held to be public records because the agency did not provide enough evidence that the interview notes were personal notes.).

ii. The fact that an agency encourages scorers or evaluators to take notes does not transform personal notes into public records. *Barnes v. Columbus Civ. Serv. Comm.*, 2011-Ohio-2808, ¶ 24-27 (10th Dist.); *Silberstein v. Montgomery Cty. Community College Dist.*, 2009-Ohio-6138, ¶ 54-68 (2d Dist.) (interview question forms that were provided to interviewers with space for notes were not public records because the interviewers took notes for their own convenience and the notes were not used by others); *State ex rel. Medina County Gazette v. Brunswick*, 109 Ohio App.3d 661 (9th Dist. 1996) (Evaluations completed on a form supplied to Council members, which were then turned over to the consultant to formulate discussion guides and goals in a meeting between the Council and City Manager, were personal notes and not public records.).

3. The requested records must be promptly prepared and made available for inspection unless they fall within an exemption or exception to the Public Records Act. R.C. 149.43(B)(1).

4. The provisions of the Public Records Act that provide access are to be liberally interpreted and the exemptions are to be strictly construed. Any doubts are to be resolved in favor of disclosure. *State ex rel. Griffin v. Doe*, 2021-Ohio-3626, ¶ 5; *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 2011-Ohio-117 (8th Dist.); *State ex rel. Mahajan v. State Med. Bd.*, 2010-Ohio-5995, ¶ 21.

5. When requested records are not in the agency's possession, the agency has no duty to produce them. *State ex rel. Armatas v. Plain Twp. Bd. of Trustees*, 2020-Ohio-1225, ¶ 12 (5th Dist.); *Parks v. McClain*, 2021-Ohio-3129 (Ct. of Cl.), *Special Master's Report and Recommendation adopted*, 2021-Ohio-3243 (Ct. of Cl.) (A public office is not required to find records in the possession of another agency. Requestor must make the request of the possessing agency.).

6. There is no requirement for an agency to provide or compile information. Requests must be for actual records. *State ex rel. Kesterson v. Kent State Univ.*, 2018-Ohio-5110, ¶ 28-30; *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 455 (1992); *State ex rel. Evans v. Parma*, 2003-Ohio-1159, ¶ 14 (8th Dist.).

7. Selected Exemptions/Exceptions to the Public Records Act:

   a. Unless it is obvious from the record itself, in a public records-access proceeding brought pursuant to R.C. 2743.75, a public office or records custodian asserting a statutory exemption must produce competent, admissible evidence to support the asserted exemption. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 2020-Ohio-5371, ¶ 27.

   b. Medical records - R.C. 149.43(A)(1)(a) and R.C. 149.43(A)(3):

      i. Medical records are generally privileged from disclosure under R.C. 2317.02(B)(1). *Med. Mut. of Ohio v. Schlotterer*, 2009-Ohio-2496, ¶ 14; *Hageman v. Southwest Gen. Health Ctr.,* 2008-Ohio-3343, ¶ 9.

      ii. As provided by R.C. 149.43(A)(3), the document must both:

         (a) Pertain to the medical history, diagnosis, prognosis or medical condition of a patient; and

         (b) be generated and maintained in the process of medical treatment.

iii. The records must be generated for the process of medical treatment and cannot simply touch on a person's medical history. *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 2012-Ohio-115, ¶ 42 (certain lead poisoning records, including the completed questionnaires and medical-release authorizations, were not exempted medical records, even though they touch upon a child's medical history, because they are not created for the purpose of medical treatment, but rather are compiled to help reduce lead exposure in residences.).

iv. If a record is not created for medical treatment, it is not exempt. *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 144-145 (1995) (A report of a medical professional generated as part of the decision-making process regarding employment, rather than in the process of medical treatment, is not covered by the medical records exception.); *Miller v. Dept. of Health, Vital Statistics*, , 2021-Ohio-996 (Ct. of Cl.), *adopted by court*, 2021-Ohio-1901 (Ct. of Cl.).

c. Trial preparation records - R.C. 149.43(A)(1)(g) and R.C. 149.43(A)(4):

i. A trial preparation record is defined as: "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney." R.C. 149.43(A)(4); *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 502 (1992).

ii. To meet the exception, the documents must have been "specifically compiled" in reasonable anticipation of civil or criminal litigation. When an investigation has multiple purposes, the resulting documents from the investigation are not trial preparation records. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.*, 63 Ohio St.3d 498, 502 (1992).

iii. When, in anticipation of a legal proceeding, an attorney strategically assembles necessary documents—including a document that may be construed to be a public record—such an assemblage of documents incorporates the attorney's thought processes and personal trial preparation which, in turn, constitutes a "trial preparation record" for purposes of R.C. 149.43. *Spehar v. Opportunities for Ohioans with Disabilities*, 2020-Ohio-4901, ¶ 9 (Ct. of Cl.).

d. Confidential Law Enforcement Investigatory Records ("CLEIR" exception) – R.C. 149.43(A)(1)(h) and R.C. 149.43(A)(2).

i. Exempting records from release under the CLEIR exception involves a two-step analysis: (1) is the record a confidential law enforcement record, and (2) would release of the record create a high probability of disclosure of any of the four types of information specified in R.C. 149.43(A)(2)? *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 684 (1996).

ii. *First Step* - Is the record a confidential law enforcement record relating to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature?

(a) Records are confidential law enforcement records if they relate to an investigation into possible wrongdoing by government officials. *State ex rel. Musial v. N.*

Olmsted, 2005-Ohio-5521, ¶ 20 (records generated by police investigation into alleged misconduct by the mayor).

(b) Records compiled by a regulatory agency while investigating whether a licensee violated the law meet the requirement that the records pertain to a law-enforcement matter of an administrative nature. *State ex rel. Mahajan v. State Med. Bd.*, 2010-Ohio-5995, ¶ 29; *State ex rel. McGee v. State Bd. of Psychology*, 49 Ohio St.3d 59, 60 (1990).

(c) Records are not confidential law enforcement records if they relate to employment or personnel matters rather than directly to the enforcement of law. *State ex rel. Morgan v. New Lexington*, 2006-Ohio-6365, ¶ 49.

iii. *Second Step* – Would the release of the record create a high probability of disclosure of any of the following as listed in R.C. 149.43(A)(2)(a)-(d)?:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised (R.C. 149.43(A)(2)(a));

(b) Identity of an information source or witness to whom confidentiality has been reasonably promised (R.C. 149.43(A)(2)(b));

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product (R.C. 149.43(A)(2)(c)); or

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source (R.C. 149.43(A)(2)(d)).

e. Records the release of which is prohibited by state or federal law – R.C. 149.43(A)(1)(v). (This is not an exclusive list.)

i. Attorney-client privilege

(a) In Ohio, attorney-client privilege is based upon both statutory and common law. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 2009-Ohio-1767, ¶ 24; *State ex. rel. Leslie v. Hous. Fin. Agency*, 2005-Ohio-1508, ¶ 18 ("[T]he attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.").

(b) Under the attorney-client privilege, "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." *State ex rel. Leslie v. Hous. Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 21.

(c) Statutory privilege

(1) R.C. 2317.02(A)(1) limits an attorney testifying "concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client * * *."

(2) The statutory privilege applies only to attorneys, not agents. The statutory privilege does not define "attorney" as including an agent, employee, or representative of the attorney. *State v. McDermott*, 72 Ohio St.3d 570, 573-574 (1995).

(3) R.C. 2317.02(A) provides the exclusive means by which the privilege protecting communications directly between an attorney and a client can be waived. *State v. McDermott*, 72 Ohio St.3d 570, 574 (1995); *Jackson v. Greger*, 2006-Ohio-4968, paragraph one of the syllabus. Privilege is not waived by mere disclosure of communications to a third party, and the Court refused to create a judicially created waiver to a statutorily created privilege. *Id.* at ¶ 11-13.

(4) Exceptions to the statutory attorney-client privilege are set forth in R.C. 2317.02(A)(1):

(i) The client expressly consents.

(ii) The deceased client's surviving spouse or executor/administrator expressly consents.

(ii) The client voluntarily testified or is deemed by R.C. 2151.421 to have waived the privilege. R.C. 2317.021 defines "client" in the privilege statute to include the client's "agent, employee, or other representative."

(d) Common-law privilege:

(1) The common-law attorney-client privilege applies to communications between a client and an agent of the attorney. *State v. Post*, 32 Ohio St.3d 380, 385-386 (1987) (Defendant's discussion with polygraph examiner hired by attorney for defendant was privileged; however, the privilege was waived when the witness discussed his statements to polygraph examiner with a third party who was not an agent of the attorney.).

(2) The common-law privilege is not necessarily limited to precluding an attorney's testimony. The statute's language prohibits testimony by an attorney, whereas the common-law privilege can be viewed more broadly, and "protects against any dissemination of information obtained in the confidential relationship." *American Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 348 (1991).

(3) Communications must be made in confidence and not in the presence of strangers. The general rule that communications between an attorney and his client in the presence of a third person are not privileged does not apply when such third person is the agent of either the client or the attorney. *State*

ex rel. Dawson v. Bloom-Carroll Local School Dist., 2011-Ohio-6009, ¶ 30 (insurance company stands in the shoes of its insured and the insurance company's letter, copied to the retained attorney, is a preliminary communication with that attorney about the case); *Foley v. Poschke*, 137 Ohio St. 593, 595 (1941).

(4) To the extent that narrative portions of attorney-fee statements are descriptions of legal services performed by counsel for a client, they are protected by the attorney-client privilege. *State ex rel. Dawson v. Bloom-Carroll*, 2011-Ohio-6009, ¶ 28.

(5) Waiver

(i) The common-law privilege is destroyed by voluntary disclosure to others of the content of the statement because no intention of confidentiality exists. *State ex rel. Hicks v. Fraley*, 2021-Ohio-2724, ¶ 16-17 (Attorney-client privilege was waived when a legal-opinion letter from a private attorney was voluntarily provided to a third-party, a special prosecutor, on multiple occasions. The letter was no longer exempt from release under the Public Records Act.); *Travelers Indemnity Co. v. Cochrane*, 155 Ohio St. 305, 316 (1951).

(ii) When an email is directed to a non-attorney staff member requesting that staff member's review of a document, simply copying an attorney does not make the document privileged as long as no legal advice, questions, or comments were sought from the attorney or posed to the attorney. *Cleveland Firefighters Assn. IAFF Local 93 v. Cleveland Dept. of Law,* 2021-Ohio-3602, ¶ 44.

(iii) The common-law attorney-client privilege can be waived unintentionally by conduct that implies a waiver. Courts apply a case-by-case analysis in determining whether inadvertent disclosure of privileged documents results in waiver and balance a five-factor test including considerations of: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness." *Morgan v. Butler*, 2017-Ohio-816, ¶ 26 (10th Dist.).

(iv) A partial, voluntary disclosure of privileged communications can result in the loss of attorney-client privilege for all other communications that deal with the same subject matter. *Mid-American Natl. Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 489 (6th Dist.1991).

ii. Agency-specific confidentiality administrative rules

(a) An agency rule designating particular records as confidential that is properly promulgated by a state or federal agency will constitute a valid exception under R.C. 149.43(A)(1)(v) as long as the rules are not unreasonable and do not conflict with statutes that cover the same subject matter, because such rules have the effect of law. *Columbus & Southern Elec. Co. v. Indus. Comm.*, 64 Ohio St.3d 119, 122 (1992); *Doyle v. Bur. of Motor Vehicles*, 51 Ohio St.3d 46, 48 (1990); *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462, 466-467 (10th Dist. 1996); 2000 Ohio Atty.Gen.Ops. No. 036 (Service member's DD Form 214 (discharge record) is not a public record, as its release is prohibited by 32 C.F.R. § 45.3(e).).

(b) If an agency rule was promulgated outside the statutory authority granted to the agency, the rule is not valid and will not constitute an exception to the Public Records Act. It is not sufficient that the agency had general rulemaking authority under R.C. 119.03, as that would allow any agency with such rule-making authority to exempt records and "eviscerate" the Public Records Act. *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App.3d 554, 560-561 (10th Dist. 1997); *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462, 466-467 (10th Dist. 1996); *Graham v. Lake Cty. JFS/CSEA*, 2023-Ohio-2321, ¶ 13 (Ct. of Cl.).

(c) Many state administrative clients have statutes making specific information confidential. *State ex rel. Renfro v. Cuyahoga Cty. Dept. of Human Serv.*, 54 Ohio St.3d 25, 27 (1990) (child abuse investigation report is not a public record under R.C. 149.43(B)).

(d) Examples of specific agency confidentiality provisions:

(1) R.C. 173.22 (Long-term care ombudsman investigative files)

(2) R.C. 5153.17 (County children services agency investigations)

(3) R.C. 2151.421 (Child abuse and neglect investigation records)

(4) R.C. 3304.21 (Client records of rehabilitation services for the Opportunities for Ohioans with Disabilities Agency)

(5) R.C. 145.27, R.C. 3307.20, and R.C. 3309.22 (Public Employees Retirement System, State Teachers Retirement System, and School Employees Retirement System member information)

(6) R.C. 3769.041 (Horse racing investigations)

iii. General confidentiality provisions:

(a) There are also general state statutes, not related to any one specific agency, that create confidentiality.

(b) Examples of general confidentiality provisions include:

(1) R.C. 1333.61 et seq. – The Uniform Trade Secrets Act

(2) R.C. 149.435 – confidentiality of records concerning abused children

(3) Crim.R. 6(E) – Grand Jury records

iv. Federally protected information

(a) In most instances, records made confidential when in the custody of an agency of the federal government are usually not exempt when in the custody of a state agency, unless the state agency is acting for the federal agency in some substantial respect. Exemptions under the Freedom of Information Act, 5 U.S.C. 552, do not generally act to exempt records in the custody of a state agency. *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 2002-Ohio-7041, ¶ 32.

(b) Examples of federally protected information:

(1) *Social Security Numbers* - Based upon a federal privacy interest, social security numbers should be redacted. E.g. 28 C.F.R. 802.23; *State ex rel. Beacon Journal Publishing Co. v. Akron*, 70 Ohio St.3d 605, 612 (1994); *State ex rel. Montgomery Cty. Pub. Defender v. Siroki*, 2006-Ohio-662, ¶ 17 ("One of the recognized exemptions is the constitutional right of privacy, which precludes disclosure of Social Security numbers."). In addition, R.C. 149.45(A)(1)(a) defines "personal information" to include social security numbers and requires government agencies to redact or truncate an individual's social security number before placing the information on the internet. R.C. 149.45(B)(1).

(2) *Student Education Records* - The Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g(b)(1), generally protects the release of educational records without written consent of the student or the student's parents.

(3) *Confidentiality of tax returns* – 26 U.S.C. 6103

8. Mechanics of making and responding to a public records request.

a. The requester's purpose for seeking public records is normally immaterial. *State ex rel. Summers v. Fox*, 2020-Ohio-5585, ¶ 93.

b. Requests do not have to be in writing. The agency may ask that the request be put in writing to assist it in responding to the request, but it may not require a written request. R.C. 149.43(B)(5).

c. R.C. 149.43 provides:

i. Upon request, all responsive records must be promptly prepared and available for inspection at all reasonable times during regular business hours. R.C. 149.43(B)(1).

ii. Upon request, the agency shall make copies available at cost and within a reasonable time. R.C. 149.43(B)(1). There is no predetermined time for responding to a request. "Reasonableness" depends upon the facts and circumstances of a particular request. *Compare, for example, Strothers v. Norton*, 2012-Ohio-1007, ¶ 23 (45 days was reasonable when records responsive to multiple requests were voluminous.) and *State ex rel. Miller v. Dept. of Edn.*, 2016-Ohio-8534, ¶ 8 (10th Dist.) (Delay of 61 days was unreasonable when "the limited number of documents sought by relator in his public

records request were clearly identified and should not have been difficult to locate, review, and produce.").

iii. The requestor makes an overly broad or an ambiguous request, the agency may deny the request, but must provide the requestor with an opportunity to revise the request. R.C. 149.43(B)(2). When denying the request, the agency must also inform the requester how the office ordinarily maintains and accesses its records, so that the request may be revised accordingly. R.C. 149.43(B)(2); *State ex rel. ESPN v. Ohio State Univ.*, 2012-Ohio-2690, ¶ 11.

iv. A requester has an obligation to cooperate with the public-records custodian fulfilling a request, including an obligation to inform the public agency when she feels that a request has been incomplete or slow. *State ex rel. DiFranco v. S. Euclid*, 2015-Ohio-4914, ¶ 25.

v. If information within a public record is exempt, the agency must provide a redacted copy.

(a) Redaction must be plainly visible. R.C. 149.43(B)(1).

(b) Redaction is considered a denial of the records. R.C. 149.43(B)(1).

(1) Personal Information – R.C. 149.43(A)(1)(dd) precludes the release of personal information as defined in R.C. 149.45.

(2) R.C. 149.45 requires a public office to redact personal information from documents placed on the internet, including an individual's: social security number, federal or state tax identification number, driver's license number or state identification number, checking account number, savings account number, credit or debit card number, and deposit account number, money mark account number, mutual fund account number, or any other financial or medical account number.

vi. If the public records request is denied, in whole or in part, the agency must provide an explanation for denial, indicating legal authority for the denial. R.C. 149.43(B)(3); *State ex rel. Myers v. Meyers*, 2022-Ohio-1915, ¶ 72; *State ex rel. Armatas v. Plain Twp. Bd. of Trustees*, 2021-Ohio-1176, ¶ 30 (The public office must provide an explanation even when the record does not exist.). If the initial request was made in writing, the explanation shall also be provided to the requester in writing. R.C. 149.43(B)(3).

vii. The agency must provide the records "at cost" which includes copying and postage but does not include employee labor time. R.C. 149.43(B)(7)(a) (The public office "may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission."); *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 625 (1994); *State ex rel. Data Trace Information Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 2012-Ohio-753, ¶ 43.

viii. If asking for copies, the requestor can specify the medium in which the copy is provided. R.C. 149.43(B)(6); *State ex rel. Gilreath v. Cuyahoga Job & Family Servs.*,

2024-Ohio-103, ¶ 20 (If seeking copies, a requester can specify the medium, pursuant to R.C. 149.43(B)(6), but the provision does not apply to inspection of records).

d. Inspection of public records

i. The public office cannot charge for inspection. *State ex rel. McDougald v. Sehlmeyer*, 2020-Ohio-4637, ¶ 13.

ii. There is a right to inspect records, but it is not absolute. An incarcerated person's right to personally inspect records is limited to those public records held in the facility in which he or she is incarcerated. *State ex rel. Penland v. Dept. of Rehab. & Corr.*, 2019-Ohio-4130, ¶ 20.

iii. A requester does not have a right to inspect unredacted records. The public office must first review and remove any nonpublic records, and information that is protected from public release. *State ex rel. Watkins v. Columbus City Schools*, 2019-Ohio-4949, ¶ 3, 20 (10th Dist.); *State ex rel. Strothers v. Keenon*, 2016-Ohio-405, ¶ 26 (8th Dist.).

iv. A requester does not have a right in inspect records "in their native electronic format." *State ex rel. Gilreath v. Cuyahoga Job & Family Servs.*, 2024-Ohio-103, ¶ 20-21 (requester not permitted to inspect agency's database, which includes confidential information of other beneficiaries).

v. Records shall be made available for inspection "at all reasonable times during regular business hours." R.C. 149.43(B)(1). Regular business hours for a business that is open 24 hours a day (such as a police department) are normal administrative hours. *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 622 (1994).

VII. ADMINISTRATIVE HEARING PROCESS

R.C. 119.09 generally describes the conduct of administrative hearings, although agency-specific statutes and rules may provide specifics for hearings by that agency. Generally, administrative hearings must be open to the public, must be recorded, must include sworn testimony, and must follow court procedures. In enforcement actions, the burden of proof rests with the agency, while in licensure-application cases, the respondent bears the burden of proof. R.C. 119.09 provides for representation of witnesses, the agency, and the respondent. Corporations, limited liability companies, and partnerships must be represented by an Ohio-licensed attorney. An agency may appoint a referee or hearing examiner to hear the evidence and submit a report and recommendation. After the time for objections to the report and recommendation, the agency reviews the transcript, the exhibits, the report, and any objections to the report and issues a final order.

A. Nature of Administrative Hearings

1. Administrative hearings are generally open to the public.

    a. Unless an agency has a specific law to the contrary, all administrative hearings are open to the public. R.C. 119.01(E).

    b. Other statutes or rules also specify that administrative hearings must be held in public. Adm.Code 4757-11-04(C)(2) (disciplinary actions for licenses issued by the Counselor, Social Worker, and Marriage and Family Therapist Board); Adm.Code 4731-13-03(B) (State Medical Board rule provides that "[a]ll hearings shall be open to the public, but the hearing examiner conducting a hearing may close the hearing to the extent necessary to protect compelling interests and rights or to comply with statutory requirements. In the event the hearing examiner determines to close the hearing, the hearing examiner shall state the reasons in the public record."); Adm.Code 3301-73-09(B) (Professional Conduct Educator rules provide that hearings will be public except when necessary to protect compelling interests and rights or to comply with statutory requirements).

    c. Quasi-judicial administrative hearings and the deliberations to decide such hearings are not "meetings" and are therefore not subject to the Open Meetings Act, R.C. 121.22. *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3d 58, 61-62 (1998) (The Open Meetings Act does not apply to adjudication proceedings at the Board of Tax Appeals because its adjudications are quasi-judicial, and board members are permitted to deliberate in private); *Howard v. State Racing Comm.,* 2019-Ohio-4013, ¶ 44 (10th Dist.); *Pennell v. Brown Twp.*, 2016-Ohio-2652, ¶ 36 (5th Dist.) (deliberations on applications for conditional use by the Board of Zoning Appeals is a quasi-judicial function); *Beachland Ents. v. Cleveland Bd. of Rev.*, 2013-Ohio-5585, ¶ 44 (8th Dist.) (hearing before the Board of Review was quasi-judicial and not subject to the open meeting requirements); *Jones v. Liquor Control Comm*., 2001-Ohio-8766, ¶ 18 (10th Dist) (Ohio Liquor Control Commission was acting as a quasi-judicial body when it revoked a liquor permit holder found to be in violation of its promulgated rules); *Angerman v. State Med. Bd.*, 70 Ohio App.3d 346, 352 (10th Dist. 1990) (hearing public under Chapter 119, but deliberations need not be in open meeting).

2. Administrative hearings are held before the agency, or an appointed referee or hearing examiner. R.C. 119.09, ¶ 8-9; *Douglas Bigelow Chevrolet, Inc. v. Gen. Motors Corp.*, 2003-Ohio-

5942, ¶ 57 (10th Dist.) (R.C. 119.09 allows an agency to appoint a hearing examiner but does not require a second evidentiary hearing upon remand.).

a. A referee or examiner has the same powers and authority in conducting the hearing as is granted to the agency. R.C. 119.09, ¶ 9.

b. A referee or examiner must be admitted to the practice of law in Ohio and possess whatever additional qualifications that the agency requires. R.C. 119.09, ¶ 9.

3. Administrative hearings are to be recorded.

a. A stenographic record will be made of the testimony and other evidence submitted at "any adjudication hearing . . . the record of which may be the basis of an appeal to court." R.C. 119.09, ¶ 5.

b. "Stenographic record" means "a record provided by stenographic means or by the use of audio electronic recording devices, as the agency determines." R.C. 119.09, ¶ 1.

c. The stenographic record will be taken at the expense of the agency. R.C. 119.09, ¶ 5. The rules of an agency may specify the situations in which a stenographic record will be made only on request of the party; otherwise, such a record will be made at every adjudication hearing from which an appeal to court might be taken. R.C. 119.09, ¶ 5.

d. The agency may choose to use audio electronic recording devices but bears the risk if the recording fails. *Citizens for Akron v. Elections Comm.*, 2011-Ohio-6387, ¶ 33 (10th Dist.) (when the stenographic record was made but was unusable, remand is not appropriate, and judgment must be rendered in respondent's favor).

e. R.C. 119.09 does not require that a stenographic record be made of the commission meeting at which the commission deliberated and adopted the hearing examiner's report and recommendation. *Angerbauer v. State Med. Bd.*, 2017-Ohio-7420, ¶ 23-24 (10th Dist.); *Huff v. State Racing Comm.*, 2016-Ohio-8336, ¶ 17 (10th Dist.) (reconsideration granted on other grounds).

B. Legal Representation

1. The agency must be represented by the attorney general, an assistant attorney general, or special counsel appointed by the attorney general. R.C. 119.10; R.C. 109.02.

2. Respondents generally may represent themselves or be represented by an Ohio attorney.

a. A respondent may be represented by an attorney at law licensed to practice in Ohio or other person lawfully permitted to practice before the agency in question. R.C. 119.13.

b. A respondent may represent herself or himself at an administrative hearing. *Williams v. Griffith*, 2009-Ohio-4045, ¶ 14 (10th Dist.) (a person has an inherent right to proceed pro se in any court, but that right pertains only to that person.).

c. There is no general constitutional right to appointed counsel in civil litigation. *Adeen v. Dept. of Commerce*, 2006-Ohio-3604, ¶ 12 (8th Dist.).

d. There is no constitutional or statutory right to the effective assistance of counsel in civil cases, other than certain cases terminating parental rights or in which contempt could result in incarceration. *Pandey v. Piqua Bd. of Zoning Appeals*, 2023-Ohio-1302, ¶ 15 (2d Dist.) (rejecting ineffective assistance of counsel claim in zoning matter); *Marshall v. Scalf*, 2007-Ohio-3667, ¶ 26 (8th Dist.); *Wolford v. Wolford*, 2009-Ohio-5459, ¶ 32 (4th Dist.).

   i. In most cases, a party may be represented by only an attorney at law licensed to practice in Ohio. R.C. 119.13 provides that only an attorney at law may represent a party at a hearing at which a record is taken that may be the basis of an appeal to court); *Ohio State Bar Assn. v. Cleminshaw*, 2013-Ohio-5200 (A non-attorney consultant for a county board of revision engaged in the unauthorized practice of law when he questioned a witness in a hearing before the board.); *Office of Disciplinary Counsel v. Molnar*, 57 Ohio Misc.2d 39, 39 (Bd.Unauth.Prac. 1990).

   ii. Hearings before the State Personnel Board of Review under R.C. 124.03 allow a person to be represented by someone who is not an attorney, so long as the representative does not receive any compensation for the representation. R.C. 119.13; R.C. 124.03(A)(1).

3. Most business entities must be represented by an Ohio attorney.

   a. R.C. 4705.01 prohibits non-attorneys from representing another person and provides that no person may practice as an attorney in a proceeding in which the person is not a party unless the person has been admitted to the bar of Ohio.

   b. A "person" "includes an individual, corporation, business trust, estate, trust, partnership, and association." R.C. 1.59(C).

      i. A trust must be represented by an attorney. *Tax Ease Ohio II, L.L.C. v. Cramer*, 2023-Ohio-4067, ¶ 7 (8th Dist.) (a suspended attorney was engaged in the unauthorized practice of law when she tried to represent a trust); *Williams R v. LCNB Natl. Bank*, 2021-Ohio-975, ¶ 4 (2d Dist.) (notice of appeal was a nullity after filing by a non-attorney on behalf of a trust); *Bank of New York v. Miller*, 2009-Ohio-6117, ¶ 10 (5th Dist.) ("A trustee of a trust, who is not a licensed and registered attorney at law, may not file pleadings, argue or otherwise represent the trust as its counsel in a court.").

      ii. For-profit and non-profit corporations are separate legal entities and must be represented by an Ohio attorney. R.C. 1701.01(A) (definition of for-profit corporation); R.C. 1702.01(A) (definition of non-profit corporation); *Sokol v. Redeemed Christian Church of God*, 2006-Ohio-5873, ¶ 8 (10th Dist.) (A corporate officer may not represent a nonprofit corporation unless he or she is a licensed attorney).

         (a) Generally, a corporation cannot be represented by non-attorney officers, directors, or shareholders, or agents. *Union Savs. Assn. v. Home Owners Aid, Inc.,* 23 Ohio St.2d 60, 60 (1970); *Nigh Law Group L.L.C. v. Pond Medical Ctr., Inc.,* 2022-Ohio-2036, ¶ 26 (10th Dist.); *Harvey v. Austinburg Dev. Corp.,* 2007-Ohio-3025, ¶ 4-5 (11th Dist.).

(b) Status as a statutory agent does not confer the right to file pleadings in a court of law on behalf of a corporation. *State ex rel. Army of the Twelve Monkeys v. Warren Cty. Court of Common Pleas*, 2019-Ohio-901, ¶ 6.

iii. Limited liability companies are also separate legal entities. R.C. 1706.04(A) (a limited liability company is a separate legal entity under the Revised Limited Liability Company Act). A limited liability company must be represented by an attorney licensed to practice law in Ohio. *Disciplinary Counsel v. Kafele*, 2006-Ohio-904, ¶ 18; *Campus Pitt Stop, L.L.C. v. Liquor Control Comm.,* 2014-Ohio-227, ¶ 13 (10th Dist.); *Whitehall City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 2002-Ohio-1256 (10th Dist.) (pro se member cannot represent the limited liability company).

iv. It is less clear whether partnerships must be represented by an attorney. Partnerships are also entities separate from its partners. R.C. 1776.21(A). In *Rasberry v. Taylor*, 2013-Ohio-2175, ¶ 11 (9th Dist.), the court states in dicta, and without citing supporting caselaw, that a partnership must be represented by counsel.

v. Certain exceptions to the requirement that a corporation and limited liability company retain an attorney:

(a) *Small Claims Court.* R.C. 1925.17 (allows a corporation to appear, through any bona fide officer or salaried employee, in Small Claims Court, and present its claim or defense to a claim based on a contract, so long as the corporation does not engage in cross-examination, argument, or other advocacy); *Cleveland Bar Assn. v. Pearlman*, 2005-Ohio-4107, ¶ 27.

(b) *Board of Revision*. R.C. 5715.19; *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision*, 2006-Ohio-5852, syllabus (a corporate officer does not engage in the unauthorized practice of law by preparing and filing a complaint with a board of revision and by presenting the claimed value as long as the corporate officer does not make legal arguments, examine witnesses, or undertake any other tasks that can only be performed by an attorney.).

(c) *Ohio Bureau of Employment Services and the Unemployment Compensation Board of Review*. *See* Henize v. Giles, 22 Ohio St.3d 213, 215 (1986).

(d) *Bureau of Workers' Compensation and the Industrial Commission*. *Cleveland Bar Assn. v. CompManagement, Inc.*, 2006-Ohio-6108 (third-party benefits administrator could perform certain non-legal tasks on behalf of employers before the agency and the Commission).

(e) *Admission of a Violation*. A non-attorney with authority may appear before the agency to admit to the charges, as such admission does not constitute the practice of law. *Steelton Village Market, Inc. v. Liquor Control Comm.,* 2004-Ohio-5260, ¶ 13 (10th Dist.) (an admission of fact does not necessarily constitute the practice of law. Admissions by a corporation are admissible only if made by an authorized agent of the corporation, such as the president or designated agent of the corporation.); *S&P Lebos, Inc. v. Liquor Control Comm.,* 2004-Ohio-1613, ¶ 18 (10th Dist.); *Lindner v. Liquor Control Comm.,* No. 00AP-1430 (10th Dist. May

31, 2001) (permit holder's husband, who was the manager of the premises, did not practice law when he appeared before the Liquor Commission and admitted to the charges against his wife/permit holder).

c. The practice of law "embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients and, in general, all advice to clients and all action taken for them in matters connected with the law." *Lindner v. Liquor Control Comm.,* No. 00AP-1430 (10th Dist. May 31, 2001).

i. A non-attorney member may not file a notice of appeal in court on behalf of a limited liability company. *Unemp. Comp. Rev. Comm. v. Blue Machine, L.L.C.,* 2017-Ohio-7495, ¶ 7 (10th Dist.); *Campus Pitt Stop, L.L.C. v. Liquor Control Comm.,* 2014-Ohio-227, ¶ 13 (10th Dist.); *Gass v. Headlands Contracting & Tunneling. Inc.,* 2008-Ohio-6057, ¶ 6 (11th Dist.). Any notice of appeal filed by a non-attorney on behalf of a limited liability company is a nullity even if an attorney later enters an appearance on behalf of the company and opposes a motion to dismiss. *Campus Pitt Stop, L.L.C. v. Liquor Control Comm.,* 2014-Ohio-227, ¶ 13 (10th Dist.).

ii. A complaint filed on behalf of a limited liability company by a non-attorney is a legal nullity as is any attempt to amend the complaint. *Cannabis for Cures, L.L.C. v. State Bd. of Pharmacy*, 2018-Ohio-3193, ¶ 11 (2d Dist.).

4. Witnesses can have legal representation.

a. The agency will permit a witness to be accompanied, represented, and advised by an attorney. R.C. 119.13. That representation is limited to the protection of the witness's rights. The attorney may not examine or cross-examine witnesses, and the witness must be advised of the right to counsel before examination.

b. An agency may have specific rules regarding attorneys for witnesses. *See, e.g.,* Adm.Code 102-9-01(C) (in hearings before the Ohio Ethics Commission, a witness may be accompanied and advised by legal counsel, but participation by a witness's counsel is limited to protection of the client's rights. Counsel for a non-party witness may neither examine nor cross-examine any witness.).

i. Attorneys not licensed in Ohio may represent a witness if the following applies:

(a) The body responsible for regulating the practice of law in Ohio is the Supreme Court of Ohio. The Supreme Court has exclusive original jurisdiction of admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law. Ohio Const., art. IV, § 2(B)(1)(g); *Davis v. Yuspeh*, 2023-Ohio-219, ¶ 3 (8th Dist.); *Calhoun v. Supreme Court of Ohio*, 61 Ohio App.2d 1, 8 (10th Dist. 1978).

(b) Generally, attorneys not licensed in Ohio may not represent a respondent in an administrative hearing unless admitted pro hac vice ("for this time only") under Gov.Bar R. XII. *State ex rel. Hadley v. Pike*, 2014-Ohio-3310, ¶ 15 (7th Dist.).

(c) Out-of-state attorneys seeking permission to appear pro hac vice in an Ohio proceeding must first register with the Supreme Court Office of Bar

Admissions. Gov.Bar R. XII(2)(A)(3); *Krugliak, Wilkins, Griffiths & Dougherty Co. L.P.A. v. Lavin*, 2020-Ohio-3123, ¶ 15 (5th Dist.).

(1) After an out-of-state attorney completes the registration requirements and receives a Certificate of Pro Hac Vice Registration, the attorney must file a Motion for Permission to Appear Pro Hac Vice with the tribunal. If the out-of-state attorney receives permission to appear pro hac vice in an Ohio proceeding, the attorney must notify the Office of Bar Admissions. Gov.Bar R. XII. The Notice of Permission to Appear Pro Hac Vice may be filed through the online registration system.

(2) Under the Rules for the Government of Bar of Ohio, the pro hac vice registration requirements apply in proceedings involving any adjudicative matter pending before a tribunal. Gov.Bar R. XII(2).

(3) A tribunal is defined to include an administrative agency, or other body acting in an adjudicative capacity. An administrative agency acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interest in a particular matter. Gov.Bar R. XII(1)(A).

(4) Some agencies have specific rules addressing who may represent an individual before a particular state agency. Adm.Code 4731-13-01(B) (State Medical Board); Adm.Code 4715-15-02(B) (Dental Board); Adm.Code 4723-16-02(A) (Board of Nursing).

C. Burden of Proof

1. The party asserting affirmative issues bears the burdens of production and of persuasion.
   a. "It is axiomatic that the term 'burden of proof' encompasses both the burden of going forward with evidence (or burden of production) and the burden of persuasion." *Burroughs v. Dept. of Adm. Servs.*, 2013-Ohio-3261, ¶ 20 (10th Dist.); *Jackson Cty. Environmental Commt. v. Shank*, Nos. 91AP-57 and 91AP-58 (10th Dist. Dec. 10, 1991).
   b. The party asserting the affirmative issues bears the burden of proof. *Burroughs v. Dept. of Adm. Servs.*, 2013-Ohio-3261, ¶ 21 (10th Dist.).
2. The burden of production determines which party must provide evidence to support its case.
   a. "'The term "burden of production" tells a court which party must come forward with evidence to support a particular proposition . . . .'" *Burroughs v. Dept. of Adm. Servs.*, 2013-Ohio-3261, ¶ 20 (10th Dist.).
   b. In enforcement cases, the party asserting the affirmative issue will generally be the agency, so the agency will usually present its case-in-chief first. *State ex rel. Potten v. Kuth*, 61 Ohio St.2d 321, 324-325 (1980) (agency has burden of proving factual allegations to support the agency's action); *Nucklos v. State Med. Bd.*, 2010-Ohio-2973, ¶ 17 (10th Dist.).

c. In application cases, the applicant may have the burden to produce evidence of qualification for licensure, if contested, and may therefore present such evidence first. *St. Augustine Catholic Church v. Atty. Gen.*, 67 Ohio St.2d 133, 138 (1981); *Advanced Med. Sys. v. Dept. of Health*, 2002-Ohio-5978, ¶ 14 (8th Dist.).

3. The burden of persuasion determines which party must convince the judge.

   a. The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established. *State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012-Ohio-2569, ¶ 23 (12th Dist.).

   b. The party asserting the affirmative issues bears the burden of persuasion. *Zingale v. Casino Control Comm.*, 2014-Ohio-4937, ¶ 33 (8th Dist.).

   c. The burden of persuasion never leaves the party on which it is originally cast; rather what shifts is the burden of production rather than the actual burden of proof. *Id.* The applicant for a license has the initial burden of producing facts sufficient to demonstrate satisfaction of the minimum requirements for issuance of the license. *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 65 Ohio St.3d 86, 104 (1992); *Ascension Biomedical, L.L.C. v. Dept. of Commerce*, 2023-Ohio-469, ¶ 38-39 (8th Dist.) (rejecting argument that after the applicant demonstrated its qualifications, that the burden shifted to the agency. The court noted that the Request for Application placed the burden on the applicant and did not set forth a burden-shifting scheme.).

   d. Evidence of the applicant's failure to disclose information in the applicant's possession can support the agency's conclusion that the applicant acted with intent to mislead or deceive the agency. *Menkes v. State Med. Bd.*, 2020-Ohio-4656, ¶ 37 (10th Dist.).

   e. Contrary to an application denial case, the agency has the burden of proof when it suspends or revokes an existing license. *Schrenk v. Butler*, 2017-Ohio-8745, ¶ 22 (10th Dist.) (Ohio Environmental Protection Agency bears burden to prove that it correctly suspended a certification under Adm.Code 3745-47-15); *In re Scott*, 69 Ohio App.3d 585, 590 (10th Dist. 1990) (Division of Securities bears the burden to prove individual is not of good business repute under R.C. 1707.19).

   f. The agency's enabling statute or rules may state which party bears the burden of proof regarding specific issues. R.C. 1513.073(B) (person petitioning chief regarding coal mining operations and reclamation bears the burden to have the area designated as unsuitable); R.C. 3796.09(B) (governs medical marijuana cultivator and processor licenses and requires that the applicant demonstrate it meets certain licensure eligibility requirements); R.C. 4509.101(L) (the Financial Responsibility Act provides that drivers have the burden to establish defenses to the act by clear and convincing evidence); Adm.Code 109:1-4-02(B) (applicant for a license for charitable bingo has the burden of proving, by clear and convincing evidence, that it is qualified for the license); Adm.Code 1513-3-16(B)(1)-(2) (Reclamation Commission puts the burden of persuasion of certain cases on the Division of Mineral Resources Management).

D. Standard of Proof Required

1. Administrative Hearings have a preponderance-of-the-evidence standard.

    a. R.C. Chapter 119 does not explicitly define the burden of proof required, but courts have held that the standard for administrative cases is a preponderance of the evidence. *VFW Post 8586 v. Liquor Control Comm.*, 83 Ohio St.3d 79, 84 (1998); *Zonnie Ents. Inc. v. State*, No. 41468 (8th Dist. Sep. 25, 1980); *Buckeye Bar, Inc. v. Liquor Control Comm.,* 32 Ohio App.2d 89, 91 (10th Dist. 1972).

    b. The "preponderance of evidence means the greater weight of evidence. This rule is plain and simple and involved in no difficulty. The greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium." *Travelers' Ins. Co. v. Gath*, 118 Ohio St. 257, 261 (1928); *Harting v. Massillon Civ. Serv. Comm.*, 2015-Ohio-666, ¶ 28 (5th Dist.) (preponderance of the evidence means "the greater weight of the evidence.").

2. Administrative Appeals require reliable, probative, and substantial evidence.

    a. On appeal of an agency's order, a court affirms the agency's order if it finds that the order was supported by "reliable, probative, and substantial evidence" and is in accordance with law. R.C. 119.12(N). Accordingly, all agency orders should be based upon reliable, probative, and substantial evidence.

    b. *Our Place, Inc. v. Liquor Control Comm*., 63 Ohio St.3d 570, 571 (1992) defines reliable, probative, and substantial evidence:

        i. Reliable evidence is dependable, and there is a reasonable probability that the evidence is true;

        ii. Probative evidence tends to prove the issue in question; it must be relevant in determining the issue;

        iii. Substantial evidence is evidence with some weight, and it must have importance and value;

    c. *See* Chapter XI for more discussion of reliable, probative, and substantial evidence.

E. Summary of Hearing Procedure

1. R.C. Chapter 119 says very little about the procedure to be followed during an administrative hearing. The only references to hearing procedures appear in R.C. 119.07 and 119.09.

    a. General procedure. R.C. 119.09 sets forth the basic parameters of a hearing: (1) a stenographic record may be made of the hearing; (2) the agency or hearing examiner may administer oaths or affirmations; (3) the agency may ask any party to testify under oath as upon cross-examination; (4) the agency will determine the admissibility of evidence; (5) a party may make evidentiary objections to the evidentiary rulings of the agency; and (6) upon the agency's refusal to admit evidence offered by a party, the party may proffer the evidence into the record.

b. R.C. 119.07 provides that "at the hearing the party may present evidence and examine witnesses appearing for and against the party." This section is silent regarding the manner in which evidence is to be presented.

2. Courts have consistently held that a proper hearing includes a substantial adherence to courtroom procedures.

   a. "While the technical rules of a hearing by a court are not required to be strictly observed in hearings before administrative bodies, it is the duty of such bodies to permit a full hearing upon all subjects pertinent to the issue, and to base their conclusion upon competent evidence; and such result can better be accomplished by a substantial adherence to the rules observed in hearings in court." *Bucyrus v. State Dept. of Health*, 120 Ohio St. 426, 430 (1929).

   b. "It is our feeling that basic evidentiary procedures should be followed in administrative hearings; and in this regard exhibits should be offered for identification purposes and should be introduced and the admission of such made a part of the record." *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 165 (10th Dist. 1969).

   c. However, the strict rules of judicial hearings do not govern administrative hearings. An administrative agency may adopt and follow procedures for hearings and fact finding that are not strictly in accord with the rules of practice in civil court trials. *State ex rel. Mayers v. Gray*, 114 Ohio St. 270, 275 (1926); *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 161 (10th Dist. 1969).

The following is an overview of the suggested procedure for the typical administrative hearing involving an enforcement action:

- Pre-hearing matters such as separation of witnesses, motions in limine, etc. should be addressed.
- The hearing begins with opening statements by both parties, or the respondent may choose to present an opening argument after the agency concludes presentation of its case-in-chief.
- The agency presents its case-in-chief and submits evidence into the record.
- The respondent presents his or her case-in-chief and submits evidence into the record. The respondent proffers any evidence that has been excluded.
- The agency presents any rebuttal case and submits evidence into the record. The agency proffers any evidence that has been excluded.
- The agency, and then the respondent, present closing arguments. Closing arguments may be oral or written. In some cases, it may also be advisable to file post-hearing briefs, e.g., when complicated factual and legal questions are at issue in the case.

The following is an overview of the suggested procedure for the typical administrative hearing involving an application for a license:

- Pre-hearing matters such as separation of witnesses, motions in limine, etc. should be addressed.
- The hearing begins with opening statements by both parties, or the agency may choose to present an opening argument after the respondent concludes presentation of his or her case-in-chief.
- The respondent presents his or her case-in-chief and submits evidence into the record. The respondent proffers any evidence that has been excluded.
- The agency presents its case-in-chief and submits evidence into the record. The agency proffers any evidence that has been excluded.
- The respondent presents any rebuttal case and submits evidence into the record. The respondent proffers any evidence that has been excluded. (In de novo appeal hearings, such as before the Environmental Review Appeals Commission, if an agency had previously provided a record to the administrative review board, the documents provided are not in evidence. Only evidence admitted at the hearing before the Commission is included in the record of the final action.)
- The respondent, and then the agency, present closing arguments. Closing arguments may be oral or written. In some cases, it may also be advisable to file post-hearing briefs, e.g., when complicated factual and legal questions are at issue in the case.

F. Pre-hearing matters

1. Witnesses may be separated in certain circumstances.

    a. The exclusion and separation of witnesses is governed by Evid.R. 615. While the Rules of Evidence do not strictly apply to administrative hearings, agencies often look to Evid.R. 615 to determine whether witnesses should be separated.

    b. The representative of the agency and the representative of the respondent are not separated. Evid.R. 615(B)(2).

    c. Evid.R. 615(B)(3) precludes separation of a "person whose presence is shown by a party to be essential to the presentation of the party's case." Thus, an expert is generally subject to a separation order unless the party demonstrates that the expert's presence is essential to the presentation of the party's cause. *Kinn v. HCR ManorCare*, 2013-Ohio-4086, ¶ 75 (6th Dist.).

    d. A party must request the separation of witnesses, and if the party fails to request the separation, the hearing examiner is not required to do so. Evid.R. 615(A) ("at the request of a party the court shall order witnesses excluded"); *Turjanica v. Turjanica*, 10th Dist. Franklin No. 12AP-439 (Dec. 28, 2012). A court may also order separation of witnesses by its own motion. Evid.R. 615(A).

    e. The agency may have specific statutes or rules governing separation of witnesses. R.C. 3301.121(D)(3) (referee who conducts an adjudication hearing regarding expulsion of a public school student may require the separation of witnesses); Adm.Code 4757-11-04(L)(4) (at hearings before the Counselor, Social Worker, and Marriage and Family Therapist Board, "[a]ny representative of record may move for a separation of witnesses. Expert witnesses shall not be separated.").

    f. Because the licensee had neither subpoenaed an individual to testify at the hearing nor listed her as a potential witness, a hearing examiner did not err in allowing the individual, despite a separation order, to remain in the hearing room after her testimony during the agency's case in chief. *Summerfield v. State Dental Bd.,* No. 98CA00046 (5th Dist. Dec. 3, 1998).

    g. The order to separate or to refuse to separate a witness is subject to an abuse of discretion standard upon judicial review. *Oakwood v. Makar*, 11 Ohio App.3d 46, 48 (8th Dist.1983).

2. Motions in limine may be used to request prohibition of certain evidence.

    a. "A motion in limine is defined as a pretrial motion requesting the court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to the moving party that curative instructions cannot prevent a predispositional effect on the jury." (Quotations and citations omitted.) *State v. French*, 72 Ohio St.3d 446, 449 (1995). The purpose of a motion in limine is to avoid injection into the hearing of matters that are irrelevant, inadmissible, and prejudicial. *State v. French*, 72 Ohio St.3d 446, 449-50 (1995).

    b. The sustaining of a motion in limine does not determine the admissibility of evidence, and it is only a preliminary interlocutory order precluding certain questions from being asked until the board or examiner can review the total circumstances to determine if the evidence is admissible. *State v. Grubb*, 28 Ohio St.3d 199, 201-202 (1986). "Thus, a motion in limine, if granted, is a

tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. In virtually all circumstances, finality does not attach when the motion is granted." *Id.* at 201-202; *State v. Dunn*, 2023-Ohio-2828, ¶ 51 (11th Dist.).

c. In the administrative context, a ruling on a motion in limine is "committed to the sound discretion of the administrative tribunal." *Little Forest Medical Ctr. of Akron v. Civ. Rights Comm.*, 61 Ohio St.3d 607, 617 (1991).

d. Motions in limine are interlocutory in nature:

i. Unlike a motion to suppress, a motion in limine is not a final, appealable order. *Gable v. Village of Gates Mills*, 2004-Ohio-5719, ¶ 34. "In virtually all circumstances finality does not attach when the motion [in limine] is granted." *State v. Grubb*, 28 Ohio St.3d 199, 202 (1986).

ii. A party against whom a motion in limine has been granted is required to seek introduction of the evidence at the proper part of the trial or hearing, in order to allow the court to make a final decision on its admissibility and preserve any objection on the record. Failure to do so is a waiver of the party's right to argue the evidentiary issue on appeal. *Garrett v. Sandusky*, 68 Ohio St.3d 139, 140 (1994); *State v. Grubb*, 28 Ohio St.3d 199, 202-203; *Riverside Methodist Hosp. Assn. v. Guthrie*, 3 Ohio App.3d 308, (10th Dist. 1982), paragraph two of the syllabus.

iii. A motion in limine requires a two-step procedure: a pre-hearing consideration as to whether any reference to the area in question should be precluded until admissibility can be ascertained during the hearing; and second, during the hearing when the party desires to introduce the evidence that is the subject of the motion in limine, a final determination by the trial court as to the admissibility of the evidence, which is determined by the circumstances and evidence adduced in the hearing and the issues raised by the evidence. *Riverside Methodist Hosp. Assn. v. Guthrie*, 3 Ohio App.3d 308, (10th Dist. 1982), paragraph two of the syllabus.

3. The statute governing court interpreters does not apply.

a. The statute governing court interpreters, R.C. 2311.14(A)(1), does not apply to administrative hearings. R.C. 2311.01 (defining "trial" to mean a "judicial examination of the issues, whether of law or of fact, in action or proceeding.").

b. An agency did not violate the respondent's right to due process when the administrative agency provided an interpreter who spoke the respondent's language, but not her exact dialect. *Hirsi v. Franklin Cty. Dept. of Job & Family Servs.*, Franklin C.P. No. 12CV-3355 (Dec. 21, 2012), affirmed on appeal at *Hirsi v. Franklin Cty. Dept. of Job & Family Servs.*, 2014-Ohio-1804, ¶ 27 (10th Dist.) (court of appeals rejected the argument that the interpreter was biased and declined to reweigh the credibility of witnesses. The court held that there was no due process violation.).

c. If a party fails to object to the interpreter's performance or qualifications at the hearing, he waives the ability to contest the interpreter's effectiveness on appeal. *State v. Cenexant*, 2023-Ohio-3388, ¶ 15 (2d Dist.).

G. Opening Statements

1. Both parties are generally permitted to present an opening argument or statement.
2. The respondent may choose to present its opening statement at the start of its case-in-chief.
3. But "arguments of counsel are not evidence." *State v. Palmer*, 80 Ohio St.3d 543, 562 (1997); *State v. Snyder*, 2004-Ohio-3200, ¶ 7 (7th Dist.).

H. Case-in-Chief

1. The agency generally presents its case-in-chief and submits evidence into the record. If, however, the hearing involves the denial of an application, the respondent may present its case-in-chief first. *E.g. Solomon Cultivation Corp. v. Dept. of Commerce*, Franklin C.P. No. 19CV-7657 (Feb. 27, 2020) (applicant for a cultivator license bears the burden to show it met the requirements for provisional license, then the burden shifted to the department to show why the applicant did not meet the requirements), *aff'd*, 2021-Ohio-46, ¶ 32 (10th Dist.).

I. Considerations Surrounding the Admissibility of Evidence.

1. Admissibility of Evidence
    a. R.C. 119.09, ¶ 6 provides that an agency "shall pass on the admissibility of evidence" presented at the hearing.
    b. The Ohio Rules of Evidence are not strictly applicable under administrative hearings. "'Evid.R. 101(A) does not mention administrative agencies as forums to which the Rules of Evidence apply.'" *Robinson v. Springfield Local School Dist. Bd. of Edn.,* 144 Ohio App.3d 38, 48 (9th Dist.), quoting *Board of Edn. for Orange City School Dist. v. Cuyahoga Cty. Bd. of Revision*, 74 Ohio St.3d 415, 417 (1996). The rules of evidence, including the hearsay rule, do not control in administrative hearings, but the agency may consult the rules for guidance. Evid.R. 101(A); *Healthsouth v. Testa*, 2012-Ohio-1871, ¶ 13; *Plain Local Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 2011-Ohio-3362, ¶ 20; *Bd. of Edn. for Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision,* 74 Ohio St.3d 415, 417 (1996); *Brisker v. Dept. of Ins.*, 2021-Ohio-3141, ¶ 24 (4th Dist.).
    c. Agency-specific statutes or rules may provide standards for that agency's hearings. These standards may range from mandating adherence to the rules of judicial hearings to expressly releasing the agency from the common-law or statutory rules of evidence. *See, e.g.,* Adm.Code 3301-73-18(A) (Professional Conduct Educator rule provides that the "rules of evidence may be taken into consideration by the hearing officer in determining the admissibility of evidence, but shall not be controlling."); R.C. 4141.281(C)(2) (Unemployment Compensation); R.C. 4123.10 (Industrial Commission); Adm.Code 4723-16-01(E) (Board of Nursing).
    d. Any agency statutes or rules regarding evidence must be fair and reasonable.
        i. When an administrative agency enacts rules as to the standards of admissibility of evidence to be followed in its hearings, such rules must be consistent with the guaranty that such hearings shall be fair in all their procedural respects. *In re Milton Hardware Co.*, 19 Ohio App.2d 157 (10th Dist. 1969).

ii. When an agency enacts procedural rules governing the administrative process, it must abide by those rules. *State ex rel. Old Dominion Freight Line, Inc. v. Indus. Comm.*, 2016-Ohio-343, ¶ 36; *State ex rel. H.C.F., Inc. v. Bur. of Workers' Comp.,* 80 Ohio St.3d 642, 647 (1998); *Mulhausen v. Counselor, Social Worker & Marriage & Family Therapy Bd.*, 2007-Ohio-3917, ¶ 11 (8th Dist.).

iii. An administrative body should not be inhibited by strict rules of evidence, but "freedom from such inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended." *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252, 263 (1955).

iv. An administrative agency may not sanction as evidence something that is clearly not evidence. Furthermore, an administrative agency should not act on evidence that is clearly not admissible, competent, or probative of facts that the agency is to determine. *Haley v. State Dental Bd.*, 7 Ohio App.3d 1, 6 (2d Dist. 1982) ("The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner"); *In re Milton Hardware Co*., 19 Ohio App.2d 157, 162 (10th Dist. 1969).

v. Administrative agencies have a duty to base their conclusions on competent evidence. *State ex rel. Chrysler Plastic Products Corp. v. Indus. Comm.*, 39 Ohio App.3d 15, 16 (10th Dist. 1987). The evidence must be probative and relevant. *Citizens to Protect Environment, Inc. v. Universal Disposal, Inc.*, 56 Ohio App.3d 45, 49 (10th Dist. 1988).

2. There are limits on use of hearsay evidence.

   a. The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Miller v. State Bd. of Pharmacy*, 2012-Ohio-1002, ¶ 37 (5th Dist.); *Haley v. State Dental Bd.*, 7 Ohio App.3d 1, 6 (2d Dist. 1982).

   b. Hearsay evidence is generally admissible in administrative hearings and may constitute reliable, probative, and substantial evidence. *Simon v. Lake Geauga Printing Co.,* 69 Ohio St.2d 41, 44 (1982); *Katsande v. Dept. of Medicaid*, 2020-Ohio-5488, ¶ 33-34 (10th Dist.); *Groves v. State Racing Comm.*, 2020-Ohio-1250, ¶ 17 (10th Dist.) ("Unless it is inherently unreliable, hearsay evidence is admissible in administrative hearings, and it can constitute reliable, probative, and substantial evidence."); *Kellough v. State Bd. of Edn.,* 2011-Ohio-431, ¶ 47 (10th Dist.); *Bivins v. State Bd. of Emergency Med. Servs.*, 2005-Ohio-5999, ¶ 22 (6th Dist.).

   c. Some courts have held that it is unreasonable for the agency to rely solely on hearsay to contradict the sworn testimony of a claimant personally appearing before the agency. *Mason v. Bur. of Emp. Servs.*, No. C990573 (1st Dist. Apr. 7, 2000); *Green v. Invacare Corp.*, No. 92CA5451 (9th Dist. May 26, 1993); *Taylor v. Bd. of Review*, 20 Ohio App.3d 297, 299 (8th Dist. 1984).

   d. Other courts have held that it is not always unreasonable to consider hearsay evidence that conflicts with sworn testimony. *Valdez v. Spud's Auto Parts*, No. L-98-1105 (6th Dist. Dec. 11, 1998) (both parties were permitted to present hearsay evidence and appellant's testimony was contradicted by both hearsay, and testimony of several live witnesses); *Todd v. Admr., Dept. of Job & Family Services*, 2004-Ohio-2185, ¶ 26 (4th Dist.) (court is "required to give great

deference to the hearing officer's findings of fact," i.e., witness credibility, "and it would be inappropriate to disregard his findings simply because they are partially based on admissible hearsay testimony.").

3. Special types of testimonial and documentary evidence may be barred.

   a. *Impairment* - certain references to substance abuse are barred if the charges in the Notice of Opportunity for Hearing are not related to impairment. *In re Eastway*, 95 Ohio App.3d 516, 520 (10th Dist. 1994). In *Eastway*, the violation was not related to impairment, but the respondent argued that his impairment led to the conduct at issue. The Board then imposed discipline, including drug screening and counseling during a probationary period for reinstatement. The Tenth District ruled that the Board's orders were improper because the physician was not charged with anything related to impairment in the Notice of Opportunity for Hearing and the agency cannot impose conditions outside the charges alleged in a Notice of Opportunity for Hearing.

   b. *Eastway's* holding may be limited only to the imposition of drug or alcohol screenings. In *de Bourbon v. State Med. Bd.,* 2018-Ohio-4682, ¶ 41-42 (10th Dist.), the appellant relied on *Eastway* and argued that the board erred when it ordered a practice plan and monitoring requirements to oversee all of his practice areas, including areas in which there were no violations. The Court found *Eastway* inapplicable and noted that in this case, there were other concerns about the doctor's standard of care that would warrant monitoring during his probationary period.

   c. *Criminal Records* – Various records relating to criminal convictions may be protected and should not be used in administrative hearings. *See* Chapter VIII, Effects of Criminal Convictions, for more information about the use of criminal records in administrative hearings.

      i. Information obtained by a government agency or person relating to state or federal background checks should not be released or disclosed. R.C. 109.57(H); R.C. 2913.04(D) (cannot disseminate information from The Ohio Law Enforcement Gateway (OHLEG) without permission from the Superintendent of the Ohio Bureau of Criminal Identification & Investigation (BCI&I)).

      ii. An applicant for a license may be questioned about sealed convictions but only if the question bears a direct and substantial relationship to the position for which the person is being considered. R.C. 2953.34(N)(2)(a).

      iii. An agency may not question an applicant about records sealed under R.C. 2953.57 (a conviction that was vacated, set-aside, and sealed after DNA testing). R.C. 2953.60.

      iv. *See* Chapter VIII, Effects of Criminal Convictions, addressing using records from cases that have been sealed/expunged.

4. A party may object to evidence offered at a hearing. R.C. 119.09, ¶6.

   a. Who rules on objections varies:

      i. In cases before a referee or hearing examiner, the referee or hearing examiner rules on objections. R.C. 119.09, ¶ 9. One should always check for agency-specific rules

granting authority for a hearing examiner to rule on objections. *See, e.g.,* Adm.Code 5101:6-50-05(E)(3) (Department of Job and Family Services).

ii. In hearings before the entire board or commission, it is less clear who rules on objections. No R.C. Chapter 119 statutory guidance addresses which individual within an agency or board should rule on objections. Agencies are free to designate an individual to rule on objections during a hearing. In situations where a hearing is held before a full board, the board may choose to have the board president or other designee rule on objections or have the board members vote on objections. It is important, however, that the board or agency be consistent and follow the same procedure in each hearing.

iii. The hearing examiner's rulings on objections are not immediately appealable to a court. "The hearing examiner's ruling on the relevancy of testimony is a matter for judicial review on appeal, and not a matter to be second-guessed while a hearing is in progress, by virtue of the fifth paragraph of R.C. 119.09[.]* * * Any other solution than we have prescribed here would cause administrative hearings to cease having the integrity of a fact-finding adjudication subject to judicial review, and would easily be disrupted and stonewalled." *Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d 26, 27-28 (1983).

5. If evidence is excluded, the party may proffer the evidence.

   a. Hearings examiners have the authority to exclude evidence and argument if it is outside the scope of the hearing as set forth in the Notice of Opportunity for Hearing. *In re Whitmer*, No. 52822 (8th Dist. Oct. 8, 1987) (affirmed a hearing examiner's issuance of a protective order to preclude subpoenas of witnesses who were irrelevant, holding that under R.C. 119.09, an agency is required to subpoena a party only if the witness' testimony is relevant.).

   b. If evidence is offered but not admitted, the party may proffer the evidence, and any proffer will be made a part of the hearing record. R.C. 119.09, ¶ 6.

   c. Proffering creates a record to ensure that the reviewing court will know the nature of the excluded evidence. A proffer is necessary so the reviewing court can determine if the evidentiary exclusion was proper or if said exclusion constitutes reversible error. *Hetrick v. Dept. of Agriculture*, 2017-Ohio-303, ¶ 48 (10th Dist.).

   d. The proffer may also convince the hearing examiner to change his or her mind as to the evidentiary value of the evidence.

   e. Agency-specific statutes or rules may apply to the proffering of evidence. *See, e.g.,* Adm.Code 5101:6-50-09(A)(3) (Department of Job and Family Services); Adm.Code 4501:1-1-24(I) (Bureau of Motor Vehicles).

   f. Other agencies are not subject to the proffer requirements of R.C. 119.09. *Wu v. Civ. Rights Comm.*, 2021-Ohio-1541, ¶ 82-83 (11th Dist.) (court rejected respondent's argument that the Commission violated R.C. 119.09 by failing to include his proffer of evidence in the record because R.C. 4112.06(B) governed the filing of the record; the Civil Rights Commission is not subject to R.C. 119.09).

   g. To provide an "offer of proof" or to "proffer" requires only that counsel may explain, on the record, what the testimony would have included had it been permitted. *Committee to Elect*

Straus Prosecutor v. Elections Comm., 2007-Ohio-5447, ¶ 15 (10th Dist.) (after a subpoenaed judge was unavailable to testify, a party proffered an affidavit regarding a judge's probable testimony).

i. The proffer can be done in two ways:

(a) The proffering attorney or party, in narrative fashion, describes the proposed testimony or documents. *Ross v. St. Elizabeth Health Ctr.*, 2009-Ohio-1506, ¶ 28 (7th Dist.); *Buckmaster v. Buckmaster*, 2014-Ohio-793, ¶ 25-27(after court excluded child's testimony, counsel summarized what the boy would say, and the proffer was deemed sufficient to preserve the argument that the testimony had been improperly excluded).

(b) The proffering attorney or party examines a witness in a question-and-answer format concerning matters deemed objectionable by the hearing examiner. *Elkins v. Veolia Transp., Inc.*, 2010-Ohio-5209, ¶ 30, citing *State v. Heinish*, 50 Ohio St.3d 231, 240 (1990).

ii. Regardless of which method is chosen, it must meet two elements: "First, the offering party must inform the trial court as to the legal theory upon which admissibility is proposed. Second, an offering party must show what a witness was expected to testify to and what that evidence would have proven or tended to prove." *State v. Darrah*, 2007-Ohio-7080, ¶ 22 (12th Dist.), quoting *Moser v. Moser*, 72 Ohio App.3d 575, 580 (3d Dist. 1991).

iii. The proffer of expected testimony need not be as specific as testimony would have been, but it must be sufficient to enable a reviewing court to determine what, if any, impact the testimony would have had upon the final disposition of the case. *State v. Darrah*, 2007-Ohio-7080, ¶ 22 (12th Dist.), quoting *Moser v. Moser*, 72 Ohio App.3d 575, 580 (3d Dist. 1991).

J. Examination of Witnesses

1. All witnesses should swear an oath or affirmance.

a. R.C. 119.09, ¶ 7 provides that "[i]n any adjudication hearing required by sections 119.01 to 119.13 of the Revised Code, the agency may call any party to testify under oath as upon cross-examination."

b. Even though R.C. Chapter 119 language is permissive, and not mandatory, it is recommended that all witnesses be placed under oath or affirmance.

c. R.C. Chapter 119 grants the agency or anyone delegated to conduct the hearing with the power to administer oaths or affirmations. R.C. 119.09, ¶ 8.

d. There may be agency-specific rules regarding oaths or affirmations. *See, e.g.,* Adm.Code 102-9-01(C) (Ohio Ethics Commission); Adm.Code 124-9-07(A) (State Personnel Board of Review).

e. If the entire record consists of witnesses who are not placed under oath, and the other side objects, an appellate court cannot affirm the agency's decision. Such decision could not be

justified by reliable, probative, and substantial evidence. *Spremulli v. Fairview Park*, No. 62971 (8th Dist. July 8, 1993); *Zurow v. Cleveland*, 61 Ohio App.2d 14, 23 (8th Dist. 1978).

f. The failure to swear a witness is a waivable error. If the party does not object, the agency's decision will not be reversed, even though the witness was not sworn. *Gearhart v. Union Twp. Bd. of Trustees*, 2020-Ohio-5615, ¶ 17-18 (4th Dist.); *BD Dev. v. Vandalia*, 2014-Ohio-2996, ¶ 29 (2d Dist.); *Neague v. Worthington City School Dist.*, 122 Ohio App.3d 433, 441-442 (10th Dist. 1997).

2. The agency may allow or disallow certain types of witnesses.

   a. In discussing the character or business reputation of a licensee, the licensee may call witnesses who will vouch for his or her character. An agency's refusal to accept testimony of multiple character witnesses is not an abuse of discretion. *Kaufman v. Veterinary Med. Licensing Bd.*, 69 Ohio App.3d 79, 87 (3d Dist. 1990).

   b. The testimony of a board member, who recused herself from all deliberation and decisions regarding the case, did not violate the licensee's due process rights. *Khemsara v. Veterinary Med. Licensing Bd.*, 2023-Ohio-718, ¶ 52 (8th Dist.).

   c. Corporate Officers as witnesses in a hearing against a corporation may or may not be allowed to testify.

      i. Most hearing examiners will permit a pro se corporate officer to testify about his or her personal knowledge in a narrative form, even though he or she cannot legally represent the corporate entity.

      ii. But in *K & Y Corp. v. Liquor Control Comm.*, No. 01AP-219 (10th Dist. Aug. 16, 2001), the court of appeals affirmed the trial court's ruling that a pro se manager of a market could not represent the corporation at a Liquor Control Commission hearing. The court specifically rejected the argument that the manager was merely a witness, calling it "disingenuous." The court held that "[a]ttorneys call the witnesses, and through their witnesses educe testimony. There was no one at the hearing authorized to call the manager as a witness. Thus, there was no violation of due process in refusing to allow the manager to make a statement." *Id.*

   d. Expert witnesses may be allowed in certain circumstances.

      i. "The purpose of expert testimony is generally to assist a factfinder in understanding issues that require scientific or specialized knowledge or experience beyond common knowledge or experience." *Khemsara v. Veterinary Med. Licensing Bd.*, 2023-Ohio-718, ¶ 57 (8th Dist.).

      ii. When determining the qualifications necessary for a person to testify as an expert, the administrative agency properly adhered to the language of Evid.R. 702. *Remy v. Limbach*, Nos. 88-CA-5, 88-CA-6, and 88CA-7 (4th Dist. Aug. 24, 1989).

      iii. Boards and commissions are composed of people with necessary knowledge and experience relating to a particular field. *Arlen v. State Medical Bd.*, 61 Ohio St.2d 168, 173 (1980). Thus, Board members may rely on their own expertise when determining whether a respondent violated statutes and rules. *Khemsara v. Veterinary Med. Licensing*

Bd., 2023-Ohio-718, ¶ 57 (8th Dist.); *Valko v. State Med. Bd.*, 2023-Ohio-4676, ¶ 13 (10th Dist.); *Bennett v. State Med. Bd.*, 2011-Ohio-3158, ¶ 33 (10th Dist.).

iv. Expert testimony is improper when it involves a question of law, such as the interpretation of a statute, or the existence of a legal duty. *State ex rel. Simmons v. Geauga Cty. Dept. of Emergency Servs.*, 131 Ohio App.3d 482, 493 (11th Dist. 1998) (holding that the construction and interpretation of a statute involves a question of law, not a factual issue, and thus expert testimony is not admissible); *Sikorski v. Link Elec. & Safety Control Co.*, 117 Ohio App.3d 822, 831 (8th Dist.1997) (determining that expert testimony as to whether a product's manufacturer has a duty to install its product is not admissible because it is a legal issue not a factual issue—whether a duty is owed or not is a question of law for the court to determine); *Wagenheim v. Alexander Grant & Co.*, 19 Ohio App.3d 7, 19 (10th Dist. 1983) (An expert's interpretation of the law should not be permitted as testimony, as the interpretation of the law is within the sole province of the court.).

v. A hearing examiner was not asked to determine whether the witness was an expert witness, but the witness testified as to his training, experience, and education, and to matters requiring specialized expertise and the scientific processes used. Thus, the expert testimony was properly admitted. *Cowans v. State Racing Comm.*, 2014-Ohio-1811, ¶ 20 (10th Dist.).

vi. Expert testimony as to a standard of practice is not mandatory in a disciplinary proceeding to determine whether a licensee's conduct falls below a reasonable standard of professional care. *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168 (1980), paragraph one of the syllabus; *Khemsara v. Veterinary Med. Licensing Bd.*, No. 111845, 2023-Ohio-718, ¶ 57 (8th Dist.) (because majority of Veterinary Board members were veterinarians, they could rely on their technical knowledge to decide a standard-of-care case without expert witness testimony); *Demint v. State Med. Bd.*, 2016-Ohio-3531, ¶ 54 (10th Dist.) (the board is composed of experts in the field of medicine and, therefore, the board is in the best position to determine whether a physician met the standard of care in the field of medicine); *In re Griffith*, 66 Ohio App.3d 658, 663-64 (10th Dist. 1991) (the State Medical Board, sitting as the trier of facts, possessed the expertise to determine whether appellant's conduct conformed to minimal standards of care); *Vradenburg v. Real Estate Comm.*, 8 Ohio App.3d 102, 104 (10th Dist.1982) (Ohio Real Estate Commission is composed, at least in part, of persons who are licensed to engage in the business over which they exercise licensing and disciplinary control as members of a state commission—the testimony of expert witnesses may be given such weight as the board deems appropriate).

vii. Expert opinion testimony can be presented in an administrative proceeding, but the board is not required to reach the same conclusion as the expert witness. *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168, 174 (1980). If competing evidence in the record, including testimony and documents, counters the expert testimony offered by the respondent, the agency need not adopt the expert's opinions. *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2022-Ohio-4281, ¶ 51 (11th Dist.).

viii. The weight to be given to such expert opinion testimony depends upon the board's estimate as to the propriety and reasonableness, but such testimony is not binding upon an experienced and professional board. An administrative board has the authority, if not a duty, to review the evidence itself for violations under applicable law and may properly disagree with expert testimony. *Snyder v. Real Estate Appraiser Bd.*, 2017-Ohio-5790, ¶ 32 (5th Dist.).

ix. An agency need not present expert testimony to support a charge in every case, but the agency cannot convert its own disagreement with the licensee's expert's opinion into affirmative evidence of a contrary proposition if the issue is one on which experts are divided, and no statute or rule governs the situation. *In re Williams*, 60 Ohio St.3d 85, 87 (1991), distinguishing *Arlen v. State Med. Bd.*, 61 Ohio St.2d 168 (1980). In *Demint v. State Med. Bd.*, 2016-Ohio-3531, ¶ 54 (10th Dist.), both sides presented expert opinion evidence. The board did not simply choose the position opposite the respondent's; rather, the board chose an expert opinion other than respondent's expert, and therefore, the record contains evidence supporting the board's position.

x. If the General Assembly has prohibited a particular practice, or the agency has done so through rule-making, the agency is not required to consider an expert who opines that the prohibited action is warranted. *In re Williams*, 60 Ohio St.3d 85, 87 (1991); *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2022-Ohio-4281, ¶ 51 (11th Dist.).

xi. Although an expert's testimony need not be considered, when a board does hear expert witness testimony, the expert must be capable of expressing an opinion grounded in the particular standard of care applicable to the area of practice for a physician facing discipline. *Demint v. State Med. Bd.*, 2016-Ohio-3531, ¶ 16 (10th Dist.); *Leak v. State Med. Bd.*, 2011-Ohio-2483, ¶ 12 (10th Dist.).

xii. An agency is permitted to adopt a harsher penalty within its statutory authority than that recommended by an expert witness, because the agency is not bound by the expert's conclusion. *Valko v. State Med. Bd.*, 2023-Ohio-4676, ¶ 14 (10th Dist.).

e. Inspectors or investigators whose assigned duties require the observation of conditions and determinations of whether they constitute violations of regulatory framework are permitted to testify to those observations and opinions without qualification as an expert witness. Evid.R. 701; *Murray Energy Corp. v. Div. of Mineral Resources Mgt.*, 2013-Ohio-4162, ¶ 55 (7th Dist.) (The Reclamation Commission did not err in allowing opinion and other observations based upon experience from a non-expert agency witness whose job duties required him to make mine safety determinations.).

f. Cross-Examination may concern relevant matters and credibility.

i. Under the Ohio Rules of Evidence, which may be used as a guide, cross-examination may concern any relevant matters and matters affecting credibility, even if beyond the scope of direct. Evid.R. 611(B).

ii. The agency may call a party to testify under oath as upon cross-examination. R.C. 119.09, ¶ 7.

iii. When a party to an adjudication hearing held under Sections 119.01 to 119.13 presents the party's position in writing and does not testify in his own behalf, the administrative agency conducting the hearing has the right, under R.C. 119.09, to call such party to testify under oath as upon cross-examination. 1960 Ohio Atty.Gen.Ops. No. 60-1573, syllabus.

iv. Agency-specific rules may address cross-examination. *See, e.g.,* Adm.Code 5101:6-50-09(A)(2) (Department of Job and Family Services); Adm.Code 1513-3-16(C) (Reclamation Commission).

g. Closing arguments and post-hearing briefs are generally allowed.

i. The hearing examiner should generally allow the parties to present closing arguments and may request written closing arguments.

ii. Agency-specific rules may provide for closing arguments or post-hearing briefs. *See, e.g.,* Adm.Code 1513-3-16(J) (Reclamation Commission); Adm.Code 3339-8-03(H)(1)(d)(xi)(e) (Miami University faculty discipline).

iii. It is improper for a party to present new evidence in a closing argument, as closing arguments are not evidence. *In re Estate of Leichman*, 2016-Ohio-4592, ¶ 31 (12th Dist.); *Di v. Cleveland Clinic Found.*, 2016-Ohio-686, ¶ 109 ("opening and closing statements are not evidence"); *see also Jenkins v. Hill*, 2015-Ohio-118, ¶ 12 (4th Dist.).

K. Remote or Virtual Hearings

1. Some agencies have specific rules that permit remote or virtual hearings. *See, e.g.,* Adm.Code 3301-73-09(D)(10) (authority of the hearing examiner includes a requirement to "[i]ssue instructions as to how the proceeding is to be conducted in the event of a virtual hearing.").
2. Although they do not strictly apply in administrative hearings, the Rules of Evidence and Rules of Civil Procedure were amended to allow remote hearings.
   a. The Rules of Evidence were amended, effective July 1, 2023, to allow for remote hearings. Evid.R. 101 adds the definition of "present" to mean the "physical or remote presence of an individual." "Remote presence" means the "presence of a person who is using live two-way video and audio technology."
   b. The Rules of Civil Procedure were also amended, effective July 1, 2023, to allow for remote hearings. Civ.R. 1.1 (defines "appear" or "in person" to mean the physical or remote presence of an individual; "Attendance" means the "physical or remote presence of an individual."); Civ. R. 43 (allowing taking testimony by remote presence for good cause and with appropriate safeguards).

L. Practical Considerations Regarding Documentary Evidence

1. Exhibits should be marked (the agency hearing manual or the hearing examiner's order may specify numbering or lettering and require exhibits to be pre-marked).
2. Marked exhibits should be shown to opposing counsel.
3. Hearing examiner and opposing counsel should be given a copy.

4. Marked exhibits should be presented to the witness for identification and authentication.
5. If a party desires to introduce marked exhibits into the record, the party should so move, giving opposing counsel opportunity to voice objections. Exhibits also may be admitted at the close of case-in-chief, at which time the opposing party may object.
6. The hearing examiner or board should rule on a motion to admit evidence after entertaining any objections to the introduction of evidence.
7. Jurisdictional items should always be placed into the record, including the notice letter, proof of mailing by certified mail or electronic mail, proof of receipt, hearing request, letter to the respondent scheduling the hearing, and any written memoranda in which the court granted continuances, or the parties agreed to the continuances.

M. Additional Information Regarding Documentary Evidence

1. If a document is never properly authenticated, and therefore excluded from evidence, the respondent waives arguments regarding the document. *Div. of Securities. v. Treece*, 2022-Ohio-3267, ¶ 20 (6th Dist.).
2. If evidence is offered but not admitted, the party shall make a proffer of the evidence, and the proffer will be made a part of the hearing record. R.C. 119.09, ¶ 6.
3. While a copy of the notice can verify the substance of the notice, it cannot verify how it was served. Only a record of deposit bearing a date stamp by the U.S. Postal Service can verify that, and when the agency deposited the notice for delivery by regular mail. *Crum v. Bur. of Motor Vehicles*, Franklin C.P. No. 22CV-5849 (Jan 11, 2023).
4. If documentary evidence is not properly introduced and admitted into the record at the administrative hearing but nevertheless becomes part of the record on appeal, the court may consider the evidence to reverse the agency's action. *In re Milton Hardware Co.*, 19 Ohio App.2d 157, 165-67 (10th Dist. 1969).
5. The notary seal is not required on an affidavit if the notary properly signed the affidavit, the notary's commission is on file with the Secretary of State, and it can be readily ascertained that the sworn affidavit was taken before the proper officer. *State ex rel. Andrews v. Chardon Police Dept*., 2013-Ohio-338, ¶ 8 (11th Dist.).

N. Continuances of Hearings

1. An agency has a duty to hear matters before it without unreasonable delay and with due regard to the rights and interests of the litigants. *Immke Circle Leasing, Inc. v. Bur. of Motor Vehicles*, 2006-Ohio-4227, ¶ 13 (10th Dist.).

2. R.C. 119.07's requirement that a hearing be set between seven and 15 days of the request for the hearing is not mandatory when read in conjunction with R.C. 119.09's allowance for continuances of the hearing. *State Racing Comm. v. Kash*, 61 Ohio App.3d 256, 263 (8th Dist 1988). "Administrative agencies, just like parties and attorneys, must be entitled to continuances, as long as such continuances do not extend beyond a reasonable period of time. In the case at bar, the commission rescheduled the hearing to occur in less than two weeks after the expiration of the initial 15-day period." *Id.*

3. Courts may find a violation of due process based on an unreasonable delay in holding an administrative proceeding. *Yellow Cab Leasing, Inc. v. Bd. of Motor Vehicles Dealers*, 2002-Ohio-5296, ¶ 1-3 (5th Dist.) (Hearing held 562 days after request was made violated due process); *Morgan v. Liquor Control Comm.*, 2009-Ohio-3232, ¶ 21 (10th Dist.) (failed to hold hearing on revocation of liquor permit for 36 months with no explanation).

4. For a court to find a violation of due process, the delay must be prejudicial. *See Yellow Cab Leasing, Inc. v. Bd. of Motor Vehicles Dealers*, 2002-Ohio-5296, ¶ 20 (5th Dist.). Courts may find that a stigma due to a citation that a respondent is unable to contest in a timely manner to be prejudicial. *Id.; Mowery v. State Bd. of Pharmacy*, No. 96-G-2005 (11th Dist. Sept. 30, 1997) (violation of due process when board issued a suspension five years after the investigation and one year after the expungement of his conviction); *In re Milton Hardware Co.*, 19 Ohio App.2d 157 (10th Dist. 1969) (two-year delay was unreasonable to keep taxpayer in limbo).

5. In *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2022-Ohio-4281, ¶ 72-75 (11th Dist.), the court rejected a due process argument, noting that R.C. 119.07 does not impose any time limits beyond the scheduling of the administrative hearing. "Prior to the preparation and issuance of his report and recommendation, the hearing officer had to review the evidentiary record and the parties' closing briefs. Prior to the preparation and issuance of its final order, the department had to review, among other things, Lake Front's 53 objections. The fact that an administrative proceeding takes time does not necessarily equate to unfairness." *Id.* at ¶ 74.

6. Seeking records under the Public Records Law is a separate procedure from administrative hearings, and therefore "Ohio law does not require a hearing to be postponed on the basis that a respondent has not received a response to a public records request from an agency . . . " *Div. of Securities v. Treece*, 2022-Ohio-3267, ¶ 30 (6th Dist.).

O. Dismissal of Charges Prior to a Hearing

1. An agency has the inherent power to dismiss charges against an individual against whom the agency has levied charges. *State ex rel. Sizemore v. Veterinary Med. Licensing Bd.*, 2012-Ohio-2725, ¶ 3 ("The remand orders of the court of appeals and the common pleas court did not prevent the board from dismissing the charges."); *Wightman v. Real Estate Comm.*, 2017-Ohio-756, ¶ 15 (10th Dist.).

2. An administrative agency, after dismissing charges against a licensee, retains jurisdiction to issue charges anew against the same licensee, so long as any applicable statute of limitations is met. *Wightman v. Real Estate Comm.*, 2017-Ohio-756, ¶ 15-16 (10th Dist.) (after commission dismissed charges prior to hearing, res judicata did not bar it from re-filing charges after additional investigation).

3. Although due process considerations would probably preclude an agency from dismissing a requested hearing on its merits before a full adjudication hearing is completed, dismissals (without a hearing) based on procedural issues such as res judicata and subject matter jurisdiction have been upheld by the courts on appeal. *Dressler Coal Co. v. Div. of Reclamation*, 23 Ohio St.3d 131, 137 (1986) (Board's dismissal of second appeal upheld because issue raised in second appeal could have been raised in first appeal. Thus, the decision in the first appeal was res judicata.); *Fields v. Summit Cty. Executive Branch*, 83 Ohio App.3d 68, 72-73 (9th Dist. 1992) (collective bargaining agreement divests State Personnel Board of Review of jurisdiction to hear appeal of termination).

4. A respondent has the right to withdraw from his or her own hearing, but the administrative agency is entitled to discipline the respondent absent respondent's presence so long as the opportunity for a hearing was afforded upon request. R.C. 119.06; *Beach v. Bd. of Nursing*, 2011-Ohio-3451, ¶ 37 (10th Dist.) ("in the absence of a statutory provision to the contrary, a hearing may be requested and rescinded orally.").

P. Addressing Constitutional Arguments

1. Statutes or "administrative rules may be constitutionally challenged on their face or as applied." *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 20.

2. An as-applied constitutional challenge alleges that the application of the statute in a particular context is unconstitutional. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 22.

    a. To prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect. *Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 2018-Ohio-3220, ¶ 26; *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 2006-Ohio-5512, ¶ 21.

    b. "Because an as-applied challenge depends upon a particular set of facts, this type of constitutional challenge to a rule must be raised before the administrative agency to develop the necessary factual record." *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 22; *State ex rel. Kingsley v. State Emp. Relations Bd.*, 2011-Ohio-5519, ¶ 18; *Temponeras v. State Med. Bd.*, 2015-Ohio-3043, ¶ 15 (10th Dist.).

    c. In at least one case, however, the Tenth District held that such as-applied challenges could be raised for the first time on appeal if the necessary evidence is admitted in the record. *In the Matter of: Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.*, No. 91AP-1493 (10th Dist. Sept. 24, 1992), in which the Tenth District Court of Appeals concluded that as-applied constitutional challenges could be raised for the first time in the court of common pleas as long as all of the evidence necessary for consideration of the issue was either already in the administrative record or properly admissible as "newly discovered" evidence under R.C. 119.12. *VFW Post 1238 Bellevue v. Liquor Control Comm.*, 131 Ohio App.3d 591, 595-96 (6th

Dist.1998). The prudent choice, however, would be to raise the issue at hearing to ensure proper development of the record, as no court, including the Tenth District, has relied on the *Hal Artz* reasoning.

3. "A facial challenge alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate governmental purpose." *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 21.

   a. If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances.

   b. "When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases." *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 21.

   c. A facial challenge must be proven beyond a reasonable doubt. *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 2006-Ohio-5512, ¶ 21.

   d. A party may raise a facial constitutional challenge in an administrative appeal even where the party did not raise the challenge before the agency. *State ex rel. Kingsley v. State Emp. Relations Bd.*, 2011-Ohio-428, ¶ 18 (10th Dist.), citing *Reading v. Pub. Util. Comm.*, 2006-Ohio-2181, ¶ 16 (4th Dist.).

   e. A facial challenge is decided without regard to extrinsic facts. *Garrett v. Columbus Civ. Serv. Comm.*, 2012-Ohio-3271, ¶ 28 (10th Dist.). Because they are not dependent on a factual record, facial constitutional challenges may be raised for the first time on appeal. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231(1988).

4. An agency may not rule on the constitutionality of a statute. As creations of statute, administrative agencies themselves are without jurisdiction to rule on the constitutionality of a statute. Such determinations are reserved for courts alone. *Reading v. Public Utilities Comm*., 2006-Ohio-2181, ¶ 14 (4th Dist.); *Herrick v. Kosydar*, 44 Ohio St.2d 128, 130 (1975); *S.S. Kresge Co. v. Bowers*, 170 Ohio St. 405, 407 (1960); *Smith v. Lindsay Excavating & Concrete*, 2004-Ohio-986, ¶ 54 (5th Dist.).

   a. Even though the agency cannot rule on the constitutional challenge, a respondent must raise as-applied constitutional challenges at the administrative hearing. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 26; *Reading v. Pub. Util. Comm.*, 2006-Ohio-2181, ¶ 12 (4th Dist.); Cleveland Gear Co. v. Limbach, 35 Ohio St.3d 229, 231-232 (1988). A facial challenge can be raised for the first time on appeal to the common pleas court. *V.T. Larney Ltd. v. Civ. Rights Comm.*, 2023-Ohio-3123, ¶ 73 (11th Dist.).

   b. Both facial and as-applied constitutional challenges can be pursued on further appeal from an administrative agency to a court. *State ex rel. Kingsley v. State Emp. Relations Bd.*, 2011-Ohio-5519, ¶ 18; *Masters v. Dept. of Medicaid*, 2022-Ohio-3075, ¶ 94 (2d Dist.).

5. The Declaration of Independence does not provide a private right of action. *Troxel v. Granville*, 530U.S.57,91 (2000) (Scalia, J., dissenting)("The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts."); *Rose v. Roe*, 6th Cir. Nos. 18-5775 & 18-5970 (Apr. 10, 2019) ("The Constitution—not the Declaration of Independence—provides the vehicle for pursing

Rose's claim."); *Rywelski v. President*, No. 23-CV-217-CVE-SH (N.D.Okla July 10, 2023) ("the Declaration of Independence does not create a private right of action enforceable against the federal government."); *Morgan v. Cty. of Hawaii,* D.Haw. No. 14-00551 SOM-BMK (Mar. 29, 2016) ("To the extent it asserts a violation of the Declaration of Independence, the claim is not cognizable. The Declaration of Independence is an important historical document, but it is not law.").

6. An unconstitutional provision may be severed.

    a. If a court finds that a particular statutory provision is unconstitutional, the entire statute is not necessarily unconstitutional or otherwise invalid. The remainder of the statute is valid and enforceable if the unconstitutional provision is severable from the rest of the statute. R.C. 1.50; *Perkins v. Stockert*, 45 Ohio App.2d 211, 216 (2nd Dist. 1975) ("It is a fundamental principle that a chapter or section may be unconstitutional as to a severable part. Accordingly, it is necessary to consider the part, or parts, which the plaintiffs argue may be unconstitutional.").

    b. If a court finds an unconstitutional provision is capable of separation from the remainder of the statute, that remainder should not be disturbed, so the intent of the legislature is preserved to the fullest extent possible. *State v. Noling*, 2016-Ohio-8252, ¶ 52 ("We have reiterated the primacy of preserving the legislature's intent on a number of occasions."); *State ex rel. Doersam v. Indus. Comm.*, 45 Ohio St.3d 115, 121 (1989) ("Indeed, it is our obligation to preserve as much of the General Assembly's handiwork as is constitutionally permissible. We are assisted in this responsibility by R.C. 1.50 . . . .").

    c. Before severing a portion of a statute, a court must determine that severability will not "fundamentally disrupt the statutory scheme of which the unconstitutional provision is a part." *State v. Hochhaulser*, 76 Ohio St.3d 455, 464 (1996). The Ohio Supreme Court adopted a three-part inquiry for determining whether a provision is severable in *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927):

        i. Are the constitutional and unconstitutional parts capable of separation so that each may be read and may stand by itself?

        ii. Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?

        iii. Is the insertion of words or terms necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only?

    d. An unconstitutional provision is severable from the remainder if the answer to the first question is yes and the answers to the second and third questions are no. *State v. Noling,* 2016-Ohio-8252, ¶ 35.

7. Agencies cannot determine the constitutionality of a statute.

    a. Although an agency is precluded from passing upon the constitutional validity of a statute or its application, nothing precludes an agency from applying the constitution to properly construe a statute that is at issue. *Consumers' Counsel v. Pub. Util. Comm.*, 70 Ohio St.3d 244, 248 (1994); R.C. 1.47(A) (legislative intent is that statutes comply with constitutional

requirements); *State ex rel. Bays v. Indus. Comm.*, 2004-Ohio-2944, ¶ 4 (10th Dist.); *Worster v. Registrar*, No. CA95-05-029 (12th Dist. Oct. 9, 1995).

b. Collateral challenges to the validity of a statute or its application:

i. *See* Chapter XIII for additional information on collateral attacks on administrative agency decisions.

ii. Under certain circumstances, parties may bypass the administrative hearing and raise constitutional challenges to a statute or its application directly in court by means of such collateral actions as declaratory judgment (R.C. 2721.03), injunctive relief, and 42 U.S.C. 1983. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 149 (1992) (declaratory judgment).

iii. Declaratory judgment may be possible.

(a) Where the relief sought rests solely on a constitutional claim, declaratory relief has been allowed because the administrative agency could not provide the relief sought. *Herrick v. Kosydar*, 44 Ohio St.2d 128, 129 (1975); *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 275 (1975). But when "a specialized statutory [administrative] remedy is available in the form of an adjudicatory hearing, a suit seeking a declaration of rights which would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed." *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist. 1987).

(b) The decision whether to allow a declaratory judgment collateral challenge lies within the sound discretion of the trial court. *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 185 (10th Dist. 1987).

iv. Failure to exhaust administrative remedies is not a proper defense to an action asserting federal constitutional rights violations under 42 U.S.C. 1983. *Porter v. Nussle*, 534 U.S. 516, 523 (2002) (holding that the exhaustion requirements imposed by prisoners under the federal Prison Litigation Reform Act is an exception to the general rule that a party need not exhaust prior to filing a Section 1983 claim); *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 91 (1994).

v. Other defenses may preclude collateral attacks on statutes. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Eleventh Amendment immunity); *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498 (1990) (the lack of enforceable Section 1983 rights, privileges or immunities in the statute, and/or the foreclosure of enforcement).

Q. Hearing Examiner

1. R.C. 119.09 permits the appointment of a referee or examiner to conduct hearings.

a. The hearing examiner must be licensed to practice law in Ohio. R.C. 119.09, ¶ 9.

b. The hearing examiner must possess additional qualifications as required by the agency. R.C. 119.09, ¶ 9.

c. Depending on the agency's specific rules, a hearing examiner may be employed by the state agency or under contract to the state agency. Adm.Code 5101:6-50-05(E) (Department of Job and Family Services); Adm.Code 5160-71-05(E) (Department of Medicaid).

2. The hearing examiner has certain responsibilities.

   a. The hearing examiner may administer oaths or affirmations. R.C. 119.09, ¶ 8.

   b. The hearing examiner has the same powers and authority in conducting the hearing as is granted to the agency. R.C. 119.09, ¶ 9.

   c. The hearing examiner directs and facilitates the conduct of the hearing. R.C. 119.09, ¶ 9.

   d. The hearing examiner rules on motions to continue and other motions. R.C. 119.09, ¶¶ 3, 9.

   e. The hearing examiner rules on objections made at the hearing. R.C. 119.09, ¶ 6.

   f. The agency's specific rules may provide for issuing pre-hearing entries, setting deadlines for requesting subpoenas, disclosing witnesses, exchanging exhibits, and setting a pre-hearing status conference. Adm.Code 5101:6-50-05 (Department of Job and Family Services); Adm.Code 101-7-10 (Ethics Commission).

   g. The hearing examiner may evaluate the qualifications of a witness and assess the weight to be given a witness's testimony. *Royder v. State Med. Bd.*, 2002-Ohio-7192, ¶ 315 (10th Dist.); *Landefeld v. State Med. Bd.*, No. 99AP-612 (10th Dist. June 15, 2000).

   h. The hearing examiner may require the submission of briefs. Adm.Code 5101:6-50-05(E) (authority of hearing examiners under rules established by the Department of Job and Family Services).

   i. The examiner issues a written Report and Recommendation to the agency. R.C. 119.09, ¶ 9. *See* Report and Recommendation below.

3. The hearing examiner can recommend dismissal of charges.

   a. Because the hearing examiner makes a recommendation to the agency as to findings of fact and conclusions of law, the hearing examiner cannot dismiss a case, but rather recommend dismissal of a case or charge, with the agency to accept or reject that conclusion.

   b. An agency's rules may specifically address a hearing examiner's authority to dismiss a case or specific charges. Adm.Code 5101:6-50-05(E)(7) ("Nothing in this rule nor in any other ODJFS rule is to be construed as granting a hearing examiner the authority to dismiss any hearing.").

4. Allegations of bias by the hearing examiner.

   a. A reviewing court presumes that a decision of an agency is valid and reached in a sound manner. *Armatas v. Plain Twp.*, 2023-Ohio-204, ¶ 55 (5th Dist.); *Solomon Cultivation Corp. v. Dept. of Commerce*, 2021-Ohio-46, ¶ 13 (10th Dist.).

   b. This presumption of regularity imposes upon the party raising the issue of bias to prove that any bias adversely affected a decision. *Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975), (administrators are assumed to be of conscience and intellectual discipline, capable of judging a particular controversy fairly based on its own circumstances); *West Virginia v. Hazardous Waste Facility Approval Bd.*, 28 Ohio St.3d 83, 86 (1986); *Motor Vehicle Dealers Bd. v. Central*

Cadillac Co., 14 Ohio St.3d 64, 66-67 (1984); *In re Tonti*, Nos. 92AP-1361 and 92AP-1386 (10th Dist. Aug. 3, 1993).

c. Evidence of "substantial showing of personal bias" will be required before a hearing examiner may be disqualified or the results of the hearing vacated. *Cooper State Bank v. Columbus*, 2015-Ohio-2533, ¶ 27 (10th Dist.). In practice this means a personal bias so extreme as to display clear inability to render a fair judgment. *Meadowbrook Care Ctr. v. Dept. of Job & Family Servs.*, 2007-Ohio-6534, ¶ 25 (10th Dist.).

d. The appellant bears the burden of making a showing that he was denied a hearing before a fair and impartial hearing officer. *Med. Bd. v. Sun*, No. 81AP-679 (10th Dist. Dec. 10, 1981); *Liteky v. United States*, 510 U.S. 540, 551 (1994) (description of what is personal bias (as applied to federal judges)).

e. The outcome of the proceeding alone is not proof of bias. *In re Disqualification of Searcy*, 2020-Ohio-1092, ¶ 5 (a party's dissatisfaction with a ruling is not evidence of judicial bias or prejudice); *Meadowbrook Care Ctr. v. Dept. of Job & Family Servs.*, 2007-Ohio-6534, ¶ 26-27 (10th Dist.) (rejecting a claim of bias based upon the appellant's affidavit containing a statistical breakdown of the hearing examiner's prior rulings).

f. A hearing examiner's present or former employment alone is not sufficient to require disqualification.

   i. A hearing examiner having been previously employed by an administrative agency before which a matter is pending is not, in and of itself, sufficient to disqualify a hearing examiner for bias. *West Virginia v. Hazardous Waste Facility Approval Bd.*, 28 Ohio St.3d 83, 86 (1986).

   ii. A hearing examiner is not biased merely because the hearing officer works for the administrative agency. *Wells v. Dept. of Transp.*, 2006-Ohio-4443, ¶ 44 (5th Dist.); *Smith v. State Med. Bd.*, No. 00AP-1301 (10th Dist. July 19, 2001).

   iii. A respondent's due process rights are not violated merely because the agency selected the hearing examiner. *Hirsi v. Franklin Cty. Dept. of Job & Family Servs.*, 2014-Ohio-1804, ¶ 50 (10th Dist.).

5. Ex parte communications with the hearing examiner are not expressly prohibited in R.C. Chapter 119.

   a. A specific agency's statute or rule may expressly limit ex parte communications or require a hearing examiner or board member to disclose any ex parte communications. Adm.Code 4715-15-02(J)-(K) (Dental Board); Adm.Code 4734-4-02(L)-(M) (Chiropractic Board); Adm.Code 4757-11-04(A)(8) (Counselor, Social Worker, and Marriage and Family Therapist Board); Adm.Code 4901-1-09 (Public Utilities Commission).

   b. Even if no agency-specific rule prevents ex parte communications, once a case is assigned for hearing, the appearance of fairness is enhanced when the hearing examiner limits contacts with the agency to those made in the presence or hearing of the parties or counsel.

   c. Appellate courts will review claims of ex parte communications to determine violations of respondents' due process rights. *Hlatky v. Asplundh Tree Expert Co.*, No. 63434 (8th Dist. Aug.

19, 1993) (rejected appellant's argument that it was improper for opposing counsel to inform the hearing examiner of the appellant's death after a worker's compensation proceeding); *Gipe v. State Med. Bd.*, 2003-Ohio-4061, ¶ 71-74 (10th Dist.) (Board's questioning of assistant attorney general in an open meeting was not an ex parte communication); *Triton Servs. v. Facilities Constr. Comm.*, Franklin C.P. No. 14CV-4111 (Aug. 21, 2014) (any alleged ex parte communications with the hearing examiner were procedural in nature and not substantive, so they did not violate any due process rights of the appellant).

6. No express provision in R.C. Chapter 119 provides for an interlocutory appeal of hearing examiner rulings to either the administrative agency, or to the court of common pleas.

   a. R.C. 119.09 does not express or infer an intent to grant jurisdiction for interlocutory appeals from the decisions of a hearing examiner. As such, the suggestion is strong that there exists no such right of appeal. *In re Charter Hosp. of Cincinnati, Inc.*, Nos. 90AP-960, 90AP-961, 90AP-962, 90AP-963, 90AP-964, 90AP-965, 90AP-966, 90AP-967, 90AP-968, 90AP-969, 90AP-972, 90AP-970, 90AP-971, 90AP-973 (10th Dist. Dec. 27, 1990) (where there is a question about whether an interlocutory order is appealable, the agency is not divested of jurisdiction if a party appeals, as allowing a stay in that case would allow excessive jurisdictional interference with and delay of administrative proceedings).

   b. R.C. 119.09 gives an administrative agency the authority to have the matter before it heard by a referee or hearing examiner. Absent a specific statute to the contrary, an agency lacks the authority to review such determinations, before issuing a final report and recommendation. *Motor Vehicle Dealers Bd. v. Remlinger*, 8 Ohio St.3d 26, 27-28 (1983) (the hearing examiner decides on admissibility of evidence, and courts are to review only after the adjudication is complete). Allowing a respondent to appeal every agency decision to the court "would cause administrative hearings to cease having the integrity of a fact-finding adjudication subject to judicial review, and would easily be disrupted and stonewalled." *Id.* at 28.

   c. In addition, R.C. 119.12 allows appeals of an agency's order issued only pursuant to an "adjudication," which is defined as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person . . . ." R.C. 119.01(D); *In re Dixon Health Care Ctr., Inc.*, No. 85AP-244 (10th Dist. July 11, 1985) (interlocutory orders cannot be the basis of an appeal).

   d. Not allowing interlocutory appeals is supported further by the statutory provisions under R.C. 2505.02 and 2505.03, which set forth the jurisdiction of the courts to hear appeals. Generally, courts have held that interlocutory orders are not appealable if they do not affect a substantial right of the parties or are not made in a special proceeding. *McHenry v. General Accident Ins. Co.*, 104 Ohio App.3d 350, 351 (8th Dist. 1995) (decisions on discovery matters are generally interlocutory in nature and not immediately appealable).

   e. The administrative appeals provisions of R.C. 2506.01 et seq., allows an appeal of only a "final decision" of a political subdivision. *State ex rel. DeWeaver v. Faust*, 1 Ohio St.2d 100, 101 (1965) (court denied realtor's application for a writ of prohibition).

   f. A party may not seek a writ of mandamus to bypass the lack of ability to appeal interlocutory orders. *State ex rel. Allen Mem. Hosp.*, No. 85AP-128 (10th Dist. Aug. 5, 1986) (mandamus

will not lie to challenge the failure of an agency to issue subpoenas; the issue should be raised on appeal of a final order).

g. Some agency-specific rules provide that no interlocutory appeals are permitted. Adm.Code 3301-73-09(I) (Professional Conduct Educator rules provide that "[a]ll rulings by a hearing officer on evidence and motions, including motions for recusal, and on any other procedural matters will be subject to review by the state board upon presentation of the proposed findings of fact and conclusions of law of the hearing officer. When such rulings warrant, the matter may be remanded to the hearing officer for further proceedings or clarification.").

7. Hearing in Writing.

   a. A respondent may choose to present his or her position, arguments, or contentions in writing. R.C. 119.07, ¶ 1.

   b. Agency-specific rules may also permit a respondent to present his or her case entirely in writing. Adm.Code 5101:6-50-09(A)(2) (Department of Job and Family Services). The agency may call a party to testify under oath as upon cross-examination. R.C. 119.09, ¶ 7. If a party to an adjudication hearing held under R.C. Chapter 119 presents the party's position in writing and does not testify, the administrative agency conducting the hearing has the right, under R.C. 119.09, to call such party to testify under oath as upon cross-examination. 1960 Ohio Atty.Gen.Ops. No. 60-1573, syllabus.

8. Additional evidence may be filed after the hearing concludes.

   a. Some agencies have specific rules regarding the filing of additional evidence after the adjudication hearing concludes. Adm.Code 1509-1-19(D) (Oil & Gas Commission; newly discovered evidence); Adm.Code 1513-3-16(L) (Reclamation Commission; reopening of hearing before final decision).

   b. Admission of additional evidence after the conclusion of the adjudication hearing is in the sound discretion of the administrative tribunal. *In re 138 Mazal Health Care*, 117 Ohio App.3d 679, 693 (10th Dist. 1997); *Arnett v. State Racing Comm.,* No. 83AP-721 (10th Dist. Apr. 19, 1984).

R. Report and Recommendation

1. Under R.C. 119.09, ¶ 9, the required elements of a report and recommendation include a written report setting forth the following:

   a. Findings of fact;

   b. Conclusions of law;

   c. Recommendation of the action to be taken by the agency.

2. Findings of fact and conclusions of law are to aid the reviewing court.

   a. The purpose of findings of fact is "to aid the reviewing court and to protect the due process rights of those affected by an agency's actions." *Erie Care Ctr., Inc. v. Ackerman*, 5 Ohio App.3d 102, 103 (6th Dist. 1982); *Ganley, Inc. v. Motor Vehicle Dealers Bd.*, No. 93AP-1646 (10th Dist. Sep. 29, 1994).

b. Even if the findings of fact are more in the form of a narrative, the court may find evidence to support the board's or commission's decision. *Erie Care Ctr., Inc. v. Ackerman*, 5 Ohio App.3d 102, 103 (6th Dist.1982).

c. An administrative board may properly base its decision on the hearing examiner's written findings of fact provided that "the findings of fact constitute a basis for making informed, deliberate, and independent conclusions about the issues, and the board members need not read the entire transcript of testimony in the absence of any affirmative demonstration that the findings of fact are in any way defective." *Lies v. Veterinary Med. Licensing Bd.*, 2 Ohio App.3d 204, 210 (1st Dist. 1981); *Laughlin v. Pub. Util. Comm.,* 6 Ohio St.2d 110, 112 (1966) ("It is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding."); *Kremer v. State Med. Bd.*, No. 95AP-1247 (10th Dist. Mar. 12, 1996) ("It matters not whether the Board, itself, heard the testimony and observed the witnesses' demeanor as long as the members of the Board review all of the evidence, including transcripts and exhibits, and determine the credibility of the expert testimony").

d. Even if a hearing examiner's report is "less than exemplary," a board or commission "has extensive authority to review and resolve independently evidentiary conflicts in the record." *Cowans v. Ohio State Racing Comm*., 2014-Ohio-1811, ¶ 15 (10th Dist.), quoting *Bharmota v. State Medical Bd.*, No. 93AP-630 (10th Dist. Dec. 7, 1993).

e. R.C. 119.09 does not require that a hearing examiner recommend a specific sanction if it contains a basis for upholding the initial agency decision or proposed action. *Shree Swaminarayam Corp. v. Lottery Comm.*, 2016-Ohio-2641, ¶ 23 (8th Dist.) ("A hearing officer's failure to make a specific recommendation is not fatal when the report indicates a basis for upholding the initial agency decision."); *Zingale v. Casino Control Comm.*, 2014-Ohio-4937, ¶ 59 (8th Dist.) ("R.C. 119.09 does not require a hearing officer to recommend a specific penalty.").

3. Hearing examiners do not necessarily need to issue a report and recommendation within a certain time.

   a. R.C. 119.09 does not mandate a time for the hearing examiner to issue a report and recommendation after the close of evidence.

   b. Some agencies set a time for a hearing examiner to issue the report and recommendation. Adm.Code 4723-16-13(H) (hearing examiner must submit report and recommendation to the State Medical Board within 120 days from the date an adjudication hearing is closed). Generally, such timelines are directory so far as time for performance is concerned, as the rules fix the time simply for convenience. *State ex rel. Jones v. Farrar*, 146 Ohio St. 467 (1946); *Boggs v. Real Estate Comm.*, 2009-Ohio-6325, ¶ 27 (10th Dist.) (Commission did not lose jurisdiction as the statutory time frame was directory); *Sicking v. State Medical Bd.*, 62 Ohio App.3d 387, 392 (1991).

4. If a hearing examiner is unable or fails to issue the report and recommendation, the agency may be allowed to substitute another hearing examiner.

a. If a hearing examiner is unable or fails to issue a report and recommendation, an administrative agency or board may substitute hearing examiners without affecting the due process rights of the respondent in an administrative hearing. "It is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding." *Laughlin v. Pub. Util. Comm.,* 6 Ohio St.2d 110, 112 (1966); *Halleen Chevrolet, Inc. v. General Motors Corporation*, No. 00AP-1454 (10th Dist. June 28, 2001); *In re Christian Care Home of Cincinnati, Inc.*, 74 Ohio App.3d 453, 461 (10th Dist. 1991).

b. Absent a showing that using one hearing examiner to preside over the hearing and another to write the report violated R.C. 119.09, the court will not overturn the agency decision. *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 30 (10th Dist.); *State v. Carroll*, 54 Ohio App.2d 160 (6th Dist. 1977), citing 1 Ohio Jur.2d, Administrative Law and Procedure § 114, at 507.

c. In *Kremer v. State Med. Bd.*, No. 95APE-1247 (10th Dist. Mar. 12, 1996) the hearing examiner held the record open for more than seventeen months after the hearing, and then resigned before issuing findings of fact and conclusions of law. The Court of Appeals held that "[i]t matters not whether the Board, itself, heard the testimony and observed the witnesses' demeanor as long as the members of the Board review all of the evidence, including transcripts and exhibits, and determine the credibility of the expert testimony. There is simply nothing constitutionally suspect, or statutorily prohibited, with respect to the substitution of hearing examiners here." *See also Aircraft Braking Sys. Corp. v. Civ. Rights Comm.*, 2006-Ohio-1304, ¶ 25 (9th Dist.) (the second hearing examiner could assess credibility of the witness without personally observing witness testimony by review of the record and facts and inconsistencies therein).

d. If no report and recommendation is issued, a party may bring a mandamus action to cause the administrative agency to act. *E.g. State ex rel. Cincinnati v. Civ. Rights Comm.,* 2 App.3d 287, 288-289 (10th Dist. 1981) (granting writ of mandamus after commission failed to timely render a decision after the issuance of the report and recommendation).

5. The hearing examiner's report and recommendation is submitted to the appropriate agency representatives to be approved, modified, or disapproved. R.C. 119.09, ¶ 9; *Miller v. Rehab. Serv. Comm.*, 85 Ohio App.3d 701, 714 (10th Dist. 1993).

   a. A copy of the report and recommendation must be served upon the party or on the party's attorney or representative within five days of the date that it is submitted to the agency. R.C. 119.09, ¶ 9. The five-day service time is directory, not mandatory. *In re Wedgewood Realty, L.L.C.*, 2006-Ohio-6734, ¶ 20 (10th Dist.). Thus, a party objecting to the time an agency took to serve a report and recommendation must show prejudice to obtain relief. *Id.*

   b. The service of the report and recommendation must be made by one of the means set forth in R.C. 119.05. R.C. 119.09, ¶ 9.

   c. After the hearing examiner issues the report and recommendation, the "agency may order additional testimony to be taken or permit the introduction of further documentary evidence." R.C. 119.09, ¶ 9.

      i. "The clear wording of the statute reveals that R.C. 119.09 does not require agencies to take additional evidence . . . ." *Miller v. Dept. of Edn.*, 2017-Ohio-7197, ¶ 75 (2d Dist.).

ii. An agency did not abuse its discretion by allowing a party to supplement the record by means of attaching exhibits to a post-hearing brief. *In re 138 Mazal Health Care*, 117 Ohio App.3d 679, 693 (10th Dist.1997); *Geronimo v. State Medical Bd.*, No. L-81-186 (6th Dist. Jan. 29, 1982) (An agency did not abuse its discretion by allowing the Attorney General to supplement the record with evidence obtained after the hearing.).

S. Objections to Report and Recommendation

1. The respondent may file objections to the report and recommendation. R.C. 119.09, ¶ 9.
2. R.C. 119.09 provides that "the party" may file objections. "Party" is defined as the "person whose interests are the subject of an adjudication by an agency." R.C. 119.01(G). "Person" is defined by R.C. 119.01(F) as a "person, firm, corporation, association, or partnership." "To be a *party* one must first be a *person*. The Administrative Procedure Act's definition of the word *person* does not include the state. Nor does it include any state agency. Nor does it include the director of any agency. Nor is the state on the relation of any department, director or agency a *person*." (Emphasis in original.) *State ex rel. Osborn v. Jackson*, 46 Ohio St.2d 41, 49 (1976) (overruled on other grounds); *In re Christian Care Home of Cincinnati, Inc.*, 64 Ohio App.3d 461, 467 (10th Dist. 1989) (under R.C. 119.09, the hearing takes place before the same agency that issues the contested order. An agency would have no need to file objections to a hearing examiner's report because the agency itself adjudicates the controversy and it can simply reject the report.).
3. Some agencies have rules that specifically allow an agency to file objections or to respond to objections. Adm.Code 4731-13-15(C) (State Medical Board); Adm.Code 3745-47-02(P)(1)(a) (defines "party" to include the Environmental Protection Agency); Adm.Code 3745-47-16(C) (Any person to whom a copy of the report and recommendation must be provided may file written objections, but parties cannot respond to any objections.).
4. While the Ohio Supreme Court held that R.C. 119.09 does not provide for an agency to file objections, some lower courts have concluded that nothing in R.C. 119.09 expressly *prohibits* a representative of an agency from filing objections to the report and recommendation, and a rule allowing an agency to object does not clearly conflict with R.C. 119.09. *Brindle v. State Med. Bd.*, 2006-Ohio-4364, ¶ 31 (10th Dist.) (holding that Adm.Code 4731-13-15(C), which allows the respondent and the State to file written objections to the hearing examiner's report, is a valid rule and does not conflict with R.C. 119.09); *In re Christian Care Home of Cincinnati, Inc.*, 64 Ohio App.3d 461, 466-67 (10th Dist. 1989).
5. Objections must be filed within ten days of receipt of the report and recommendation. R.C. 119.09, ¶ 9.
    a. The agency may grant an extension of time to file objections. R.C. 119.09, ¶ 9; *In re Lake Med. Ctr*., 10th Dist. Franklin Nos. 93APH05-705 & 93APH05-706 (Dec. 14, 1993).
    b. The agency may not issue a final order without allowing ten days for objections to be filed. R.C. 119.09, ¶ 9,
6. If an argument was otherwise raised in the administrative process, the failure to file objections to the report and recommendation does not act as a waiver of those arguments on appeal (as it does if a party fails to file written objections to a magistrate's report under Civ.R. 53(D)(3)(b)(iv)). "The

failure to file written objections to a hearing examiner's report does not operate as a waiver of matters otherwise litigated during the R.C. Chapter 119 evidentiary hearing." *Howard v. State Racing Comm.*, 2019-Ohio-4013, ¶ 40 (10th Dist.); *Harrison v. Veterinary Med. Licensing Bd.*, No. 00AP-254 (10th Dist. Dec. 19, 2000) ("Nothing in the language of R.C. 119.09 or in 119.12, which governs appeals to the court of common pleas, indicates that a party must file objections or that failure to do so operates as a waiver of certain issues on appeal.").

VIII. Effects of Criminal Convictions

Many administrative agencies can discipline a licensee because that licensee has been convicted of a crime. In addition, many agencies can deny an initial application for licensure if the applicant has a certain type of criminal conviction. Before denying an initial application for licensure, an agency may be required to consider the conviction's connection to the nature of the licensee's work, whether the person with a criminal conviction holds a certificate of qualification for employment or certificate of achievement and employability, and other mitigating or aggravating factors. An agency must be cautious about the use of criminal background checks in administrative hearings, the consideration of sealed or expunged records, and the possibility of parallel criminal and administrative proceedings.

A. Disciplinary Actions Based on Criminal Convictions

1. Agency action against current licensee.
    a. Many administrative agencies have statutes permitting them to discipline a licensee who has been convicted of, pleaded guilty to, or pleaded no contest to a crime, or has been subject to a judicial finding of guilt, or has a judicial finding of eligibility for intervention in lieu of conviction.
    b. A criminal conviction alone may be sufficient grounds for disciplinary action based on the agency's statutory scheme.
        i. A felony conviction of Medicaid fraud was sufficient to support the revocation of a psychologist's license. *McGee v. State Bd. of Psychology*, 82 Ohio App.3d 301 (10th Dist.1993); see also *Leake v. State Bd. of Psychology*, No. S-92-32 (6th Dist. June 30, 1993).
        ii. A conviction for federal drug felonies, in and of itself, violated the State Medical Board of Ohio's statutes, and was grounds for disciplinary action. *Orr v. State Med. Bd.*, No. 97AP-1170 (10th Dist. Mar. 31, 1998).
    c. Some agency statutes specify which types of offenses can be grounds for disciplinary action.
        i. Where the Accountancy Board of Ohio's statute authorized disciplinary action against a licensee who is convicted of any crime, an element of which is dishonesty or fraud, the Accountancy Board properly revoked the license of a certified public accountant who was convicted of unauthorized use of property, which, by definition, is a theft offense and therefore an offense of dishonesty. *Millard v. Accountancy Bd.*, 2017-Ohio-7677, ¶ 19 (1st Dist.).
        ii. A conviction for willfully failing to file an income tax return where such return is required by law is not a crime of which an element is dishonesty or fraud for purposes of disciplinary action against a certified public accountant. *Doelker v. Accountancy Bd.*, 12 Ohio St.2d 76, 79 (1967).
        iii. Where the State Medical Board of Ohio's statute permitted disciplinary action based upon a misdemeanor committed in the course of practice, the Board did not err in disciplining a physician where the evidence showed that the physician assaulted an

employee at his medical office during a discussion on how the employee's employment was going, and then terminated the employee after assaulting her. The facts demonstrated a direct link to the physician's management and operation of his medical practice. *Froehlich v. State Med. Bd.*, 2016-Ohio-1035, ¶ 36 (10th Dist.).

d. R.C. 9.79 (Limitations on initial license refusal)

i. Under R.C. 9.79, first enacted in 2021, a licensing authority is limited in its ability to automatically deny a license based solely on an applicant's criminal conviction, judicial finding of guilt, or plea of guilty. R.C. 9.79 does not apply to persons who already hold a license with the agency. It applies only to applications for initial licensure.

ii. However, under R.C. 9.79(K), if the agency issues an initial license after considering a conviction of, judicial finding of guilt of, or plea of guilty to an offense, the agency shall not refuse to renew the individual's license based on that conviction, judicial finding of guilty, or plea of guilty.

2. Evidence required

a. Proof of a felony conviction by itself may be sufficient evidence to permit disciplinary action.

i. The State Medical Board of Ohio's statute requires only proof of a felony conviction prior to the imposition of discipline. *Berezoski v. State Med. Bd.*, 48 Ohio App.3d 231, 232 (2d Dist.1988).

ii. A judgment entry of conviction is reliable, probative, and substantial evidence of the conviction. *Reynolds v. State Bd. of Examiners of Nursing Home Admrs.*, 2003-Ohio-4958, ¶ 26 (10th Dist.); *Columbus Bar Assn. v. Gloeckner*, 1 Ohio St.3d 83,84 (1982), quoting *Bar Assn. v. Chvosta*, 62 Ohio St.2d 429, 430 (1980) ("A certified copy of a judgment entry of conviction of an offense shall be conclusive evidence of the commission of that offense in any disciplinary proceedings instituted against an attorney based upon the conviction.").

b. A respondent's admission or stipulation to the conviction may be sufficient to permit disciplinary action.

i. The State Medical Board of Ohio was authorized to revoke a physician's certificate to practice medicine and surgery where the physician stipulated to the exhibits introduced and admitted in the record that he had been convicted of two felonies and the agency's statutory scheme allowed for disciplinary action based on those convictions. *Roy v. State Med. Bd.*, 80 Ohio App.3d 675 (10th Dist.1992); see also *DeBlanco v. State Med. Bd.*, 78 Ohio App.3d 194, 202 (10th Dist.1992).

ii. Where a liquor permit holder did not dispute that she had been convicted of food stamp fraud, the Ohio Liquor Control Commission was permitted to revoke the liquor permit because the agency is authorized to either suspend or revoke a liquor permit when the holder violates a state liquor law. *Auchi v. Liquor Control Comm.*, 2006-Ohio-6003 (10th Dist.); see also *WW & I Subhis, Inc. v. Liquor Control Comm.*, 2006-Ohio-6901, ¶ 13 (10th Dist.).

iii. Where the respondents did not dispute their employee's conviction for falsification, the Motor Vehicle Dealer's Board decision to suspend the respondents' licenses was supported by reliable, probative, and substantial evidence. *Jordan Motor Co. v. Bureau of Motor Vehicles*, No. 18305 (9th Dist. Sep. 24, 1997).

c. Absence of final record of conviction.

i. Although the State Medical Board of Ohio did not introduce a final court record showing a conviction, the testimony and certified records submitted included the disposition sheet, the probation flash notices, the arrest report, and testimony. Taken together, the disposition sheet and the probation flash notices sufficiently identify the charges filed, the pleas made, and the final disposition. This evidence constituted reliable, probative, and substantial evidence that a conviction occurred. *Hoxie v. State Med. Bd.*, 2006-Ohio-646, ¶ 27 (10th Dist.).

ii. Although the Ohio Motor Vehicle Dealers Board did not introduce a final court record showing a conviction, the Board's statute did not require the production of a judgment of conviction. The docket sheet that bears the plea, the sentence, and the judge's signature, combined with the admission of the respondent's representative to the conviction, constitutes reliable, probative, and substantial evidence of the conviction, especially where the appellee in no way challenged or contested the existence of its conviction. *Pioneer Chevrolet-Cadillac, Inc. v. Motor Vehicle Dealers Bd.*, 17 Ohio St.3d 50, 53 (1985).

3. Automatic suspension of a license after a criminal conviction.

a. Many agencies have statutes that automatically suspend a person's license upon that person's conviction of or plea of guilty to a criminal offence or upon a judicial finding of certain types of crimes. A person whose license is suspended in this way must be given an opportunity for a hearing. See, e.g. R.C. 4723.281(C) (nurses); R.C. 4731.22(I) (physicians); R.C. 4741.22(G) (veterinarians); R.C. 4757.361 (counselors, social workers, and marriage and family therapists).

4. Reporting of a criminal conviction.

a. Some administrative agencies have statutes or rules requiring licensees to report certain arrests, criminal charges, or criminal convictions within a specific time. See, e.g. R.C. 3905.22(B) (insurance agents); R.C. 4707.15(A)(15) (auctioneers); R.C. 4735.13(C) (real estate brokers); Adm.Code 109:6-1-02 (solid or hazardous waste permit holders).

5. False representations to the agency regarding past criminal actions.

a. An agency may be authorized to deny a license application or discipline a licensee for falsely representing to the agency that the licensee has not been convicted of a crime.

i. The State Medical Board of Ohio was authorized to revoke a doctor's license to practice medicine where the doctor lied by stating that he had never been arrested, and then failed to cooperate in an investigation by giving false answers on his license applications, during an interview, and during a deposition. *Hoxie v. State Med. Bd.*, 2006-Ohio-646, ¶ 32-33 (10th Dist.).

ii. An agency may properly find that an applicant made false material statements in a license application, where the applicant answered "no" to the application question of whether he had been found guilty of violating federal drug laws, but his record of conviction had not been sealed at the time the application was submitted. *State Bd. of Pharmacy v. Friendly Drugs*, 27 Ohio App.3d 32, 35 (8th Dist.1985).

B. Criminal Convictions and Professional Licensure Applications

1. Pre-application determinations under R.C. 9.78.

   a. Under R.C. 9.78, first enacted in 2019, a person who has a criminal conviction but is interested in obtaining a license can apply to a licensing authority for a determination of their eligibility for a license before applying for the license.

      i. "License" means an authorization evidenced by a license, certificate, registration, permit, card, or other authority that is issued or conferred by a licensing authority to an individual by which the individual has or claims the privilege to engage in a profession, occupation, or occupational activity over which the licensing authority has jurisdiction. R.C. 9.78(A)(1).

      ii. "Licensing authority" means both of the following:

         (a) A board, commission, or other entity that issues licenses under R.C. Title 47 or any other provision of the Revised Code to practice an occupation or profession. R.C. 9.78(A)(2)(a).

         (b) A political subdivision that issues a license or that charges a fee for an individual to practice an occupation or profession in that political subdivision. R.C. 9.78(A)(2)(b).

   b. Agency list of potentially disqualifying offenses.

      i. Under R.C. 9.78(C), a licensing authority, as defined by R.C. 9.78(A)(2), is required to post the following on its website:

         (a) A list of all criminal offenses for which conviction will disqualify an individual from obtaining a license issued or conferred by the licensing authority. R.C. 9.78(C)(1).

         (b) A statement that a disqualification may be overcome if the individual applying for the license or, as applicable, the individual's employee, holds a certificate of qualification for employment issued under R.C. 2953.25, or a certificate of achievement and employability issued under R.C. 2961.22. R.C. 9.78(C)(2).

         (c) A reference to the certificate of qualification for employment web site maintained by the Department of Rehabilitation and Correction. R.C. 9.78(C)(3).

   c. Required disclosures by licensing authorities.

      i. A licensing authority shall include on any form, policy, manual, or other material that lists criminal offenses, the convictions that would disqualify an individual from obtaining a

license, a statement that a disqualification may be overcome by the individual applying for the license or, as applicable, by the individual's employee, holding a certificate of qualification for employment issued under R.C. 2953.25 or a certificate of achievement and employability issued under R.C. 2961.22, including a reference to the certificate of qualification for employment web site maintained by the Department of Rehabilitation and Correction. R.C. 9.78(D).

ii. Any predetermination form, non-conviction statement form, or other form used by a licensing authority to determine whether a conviction or adjudication record disqualifies an applicant from obtaining a particular license shall include a section requesting the applicant to provide information if they are a recipient of a certificate of qualification for employment under R.C. 2953.25 or a certificate of achievement and employability under R.C. 2961.22. R.C. 9.78(E).

d. Pre-application determination process.

i. Under R.C. 9.78(B), an individual who has been convicted of any criminal offense may request, at any time, that a licensing authority determine whether the individual's criminal conviction disqualifies the individual from obtaining a license issued or conferred by the licensing authority.

(a) An individual making such a request shall include details of the individual's criminal conviction and any payment required by the licensing authority.

(b) Not later than thirty days after receiving a request under R.C. 9.78(B), the licensing authority shall inform the individual whether, based on the criminal record information submitted, the individual is disqualified from receiving or holding the license about which the individual inquired.

(c) A licensing authority is not bound by a determination made under R.C. 9.78, if, on further investigation, the licensing authority determines that the individual's criminal convictions differ from the information presented in the determination request.

2. Initial license applications determinations under R.C. 9.79.

a. Under R.C. 9.79, first enacted in 2021, a licensing authority is limited in its ability to automatically deny a license based solely on an applicant's criminal conviction, judicial finding of guilt, or plea of guilty.

i. "License" means an authorization evidenced by a license, certificate, registration, permit, card, or other authority that is issued or conferred by a licensing authority to an individual by which the individual has or claims the privilege to engage in a profession, occupation, or occupational activity over which the licensing authority has jurisdiction. R.C. 9.79(A)(1).

ii. "Licensing authority" means a state agency that issues licenses under R.C. Title 47 or any other provision of the Revised Code to practice an occupation or profession. R.C. 9.79(A)(2).

b. Agency list of potentially disqualifying offenses.

i. Under R.C. 9.79(B)(1), a licensing authority, as defined by R.C. 9.79(A)(2), is required to post the following on its website:

(a) For each type of license issued or conferred by a licensing authority, a list of specific criminal offenses for which a conviction, judicial finding of guilt, or plea of guilty may disqualify an individual from obtaining an initial license. R.C. 9.79(B)(1).

(b) The list should include only the disqualifying offenses that are "directly related" to the duties and responsibilities of the licensed occupation and must identify the offense(s) by name or by Revised Code Section. R.C. 9.79(B)(1)(a).

ii. Under R.C. 9.79(B)(1), in adopting the list, the licensing authority shall do both of the following:

(a) Identify each disqualifying offense by name or by the Revised Code section number that creates the offense;

(b) Include in the list only criminal offenses that are directly related to the duties and responsibilities of the licensed occupation.

iii. Under R.C. 9.79(B)(2), the licensing authority may include in the list an existing or former municipal ordinance or law of Ohio, any other state, or the United States that is substantially equivalent to any section or offense included in the list.

c. Exceptions.

i. Under R.C. 9.79(I), agencies are not required to follow R.C. 9.79 for certain types of licenses:

(a) Any position for which appointment requires compliance with R.C. 109.77 or in which an individual may satisfy the requirements for appointment or election by complying with that section;

(b) Any position for which federal law requires disqualification from licensure or employment based on a conviction of, judicial finding of guilt of, or plea of guilty to an offense;

(c) Community-based long-term care services certificates and community-based long-term care services contracts or grants issued under R.C. 173.381;

(d) Certifications of a provider to provide community-based long-term care services under R.C. 173.391;

(e) Certificates of authority to a health insuring corporation issued under R.C. 1751.05;

(f) Licenses to operate a home or residential care facility issued under R.C. 3721.07;

(g) Certificates of authority to make contracts of indemnity issued under R.C. 3931.10;

(h) Supported living certificates issued under R.C. 5123.161;

(i) Certificates to administer medications and perform health-related activities under R.C. 5123.45.

d. Refusal to issue an initial license

i. Under R.C. 9.79(C)(1), a licensing authority shall not refuse to issue an initial license to an individual based on any of the following:

(a) Solely or in part on a conviction of, judicial finding of guilt of, or plea of guilty to an offense.

(b) A criminal charge that does not result in a conviction, judicial finding of guilt, or plea of guilty.

(c) A nonspecific qualification such as "moral turpitude" or lack of "moral character."

(d) A disqualifying offense included in the list established under R.C. 9.79(B) if consideration of that offense occurs after the time periods permitted in R.C. 9.79(D).

ii. The legislation that implemented R.C. 9.79 also added language to many agencies' statutes prohibiting the agency from refusing to issue an initial license because of the criminal conviction unless the refusal is in accordance with R.C. 9.79.

e. Timing

i. Under R.C. 9.79(D)(2), if an individual has been convicted of, found guilty pursuant to a judicial finding of, or pleaded guilty to a disqualifying offense included in the state licensing authority's list, the licensing authority may consider the disqualifying offense only during certain time periods:

(a) For an offense not involving breach of fiduciary duty that is not a sexually oriented offense or offense of violence: within 5 years of the date of conviction, release from incarceration, or sanction, and where the individual did not enter a plea of guilty to any other offense during the applicable period;

(b) For a conviction of, judicial finding of guilt of, or plea of guilty to a disqualifying offense that involves a breach of fiduciary duty and that is not an offense of violence or a sexually oriented offense: within 10 years of the date of conviction, release from incarceration, or sanction, and where the individual did not enter a plea of guilty to any other offense during the applicable period;

(c) For sexually oriented offenses and offenses of violence: any time.

f. Exceptions.

i. R.C. 9.79 does not apply to certain exempt occupations, as listed in R.C. 9.79(I)(1) through (9).

ii. A licensing authority may consider past discipline when deciding whether to issue a license to an individual. R.C. 9.79(J).

iii. A licensing authority may refuse to issue a license if the applicant fails to truthfully answer questions on an application relating to prior criminal convictions. *Gyugo v. Franklin Cty. Bd. of Dev. Disabilities*, 2017-Ohio-6953.

iv. R.C. 9.79 applies only to initial licensure and does not affect any law related to renewing a license or disciplining a current license holder. However, a licensing authority cannot refuse to renew a license based on a conviction of, judicial finding of guilt, or guilty plea to an offense if the licensing authority issued the initial license after considering the conviction, judicial finding of guilt, or guilty plea. R.C. 9.79(K).

g. Factors to be considered.

i. Under R.C. 9.79(D), a licensing authority may consider a conviction, a judicial finding of guilt, or a plea of guilty to an offense listed on the list established under R.C. 9.79(B) in determining whether to refuse to issue an initial license, but only after considering the following factors:

(a) The nature and seriousness of the offense for which the individual was convicted, found guilty pursuant to a judicial finding of guilt, or pleaded guilty;

(b) The passage of time since the individual committed the offense;

(c) The relationship of the offense to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the occupation;

(d) Any evidence of mitigating rehabilitation or treatment undertaken by the individual, including whether the individual has been issued a certificate of qualification for employment under R.C. 2953.25 or a certificate of achievement and employability under R.C. 2961.22;

(e) Whether the denial of a license is reasonably necessary to ensure public safety.

ii. The licensing authority must evaluate these factors under a preponderance of the evidence standard. R.C. 9.79(D)(1).

h. Hearing process.

i. Under R.C. 9.79(E), if a licensing authority refuses to issue an initial license to an individual pursuant to 9.79(D), the licensing authority shall notify the individual in writing of all of the following:

(a) The grounds and reasons for the refusal, including an explanation of the licensing authority's application of the factors under R.C. 9.79(D) to the evidence the licensing authority used to reach the decision;

(b) The individual's right to a hearing regarding the licensing authority's decision under R.C. 119.06;

(c) The earliest date the individual may reapply for a license; and

(d) Notice that evidence of rehabilitation may be considered on reapplication.

ii. In an administrative hearing or civil action reviewing a licensing authority's refusal under R.C. 9.79(B) to (K) to issue an initial license to an individual, the licensing authority has

the burden of proof on the question of whether the individual's conviction of, judicial finding of guilt of, or plea of guilty to an offense directly relates to the licensed occupation. R.C. 9.79(F).

i. Post-release control and intervention plans.

i. A licensing authority that is authorized by law to limit or otherwise place restrictions on a license may do so to comply with the terms and conditions of a community control sanction, post-release control sanction, or an intervention plan established in accordance with R.C. 2951.041. R.C. 9.79(G).

3. Elimination of "moral character" considerations.

a. Prior to the creation of R.C. 9.79, many agencies had statutory provisions permitting them to deny an initial license or discipline a license holder due to "crimes of moral turpitude," for a lack of "good moral character," or other similar reasons.

b. Under 9.79(C)(1), a licensing authority is not permitted to refuse to issue an initial license based on a nonspecific qualification such as "moral turpitude" or lack of "moral character."

c. The legislation that implemented R.C. 9.79(C)(1) also eliminated most, if not all, "moral turpitude" and "good moral character" provisions from individual agency statutes.

C. Certificates of Qualification for Employment and Certificates of Achievement and Employability in Administrative Proceedings

1. Certificate of Qualification for Employment (CQE) under R.C. 2953.25.

a. What is a CQE?

i. A CQE allows a person who had a previous felony or misdemeanor conviction under the laws of this state to apply to a court to lift the collateral sanction that prevents them from being considered for licensure or employment in a particular field.

(a) "Collateral sanction" means "a penalty, disability, or disadvantage that is related to employment or occupational licensing, however denominated, as a result of the individual's conviction of or plea of guilty to an offense and that applies by operation of law in this state whether or not the penalty, disability, or disadvantage is included in the sentence or judgment imposed." R.C. 2953.25(A)(1).

ii. If an applicant holding a CQE applies for a license or to restore a previously-issued license, the agency is prohibited from automatically denying the application, and must instead consider the application on a case-by-case basis.

2. Qualifications.

i. An individual who is subject to one or more collateral sanctions as a result of being convicted of or pleading guilty to an offense and who either has served a term in a state correctional institution for any offense or has spent time in a department-funded program for any offense may file a petition with the designee of the deputy director of the division

of parole and community services for a certificate of qualification for employment. R.C. 2953.25(B)(1).

ii. Certain sanctions are not eligible for relief. R.C. 2953.25(C)(7).

iii. The person must wait a specified period of time before applying, depending on the type of offense. R.C. 2953.25(B)(4).

3. Consideration of a CQE in licensing decisions.

   a. A CQE issued to an individual lifts any automatic bar of a collateral sanction. R.C. 2953.25(D)(1).

   b. A licensing authority must consider on a case-by-case basis whether to grant or deny the issuance or restoration of an occupational license, notwithstanding the individual's possession of the CQE, without, however, reconsidering or rejecting any finding made by a designee or court under R.C. 2953.25(C)(3).

   c. The CQE constitutes a rebuttable presumption that the person's criminal convictions are insufficient evidence that the person is unfit for the license, employment opportunity, or certification in question. R.C. 2953.25(D)(2).

   d. Notwithstanding the presumption established under R.C. 2953.25(D), the agency may deny the license or certification for the person if it determines that the person is unfit for issuance of the license. R.C. 2953.25(D)(2).

   e. The Department of Rehabilitation and Correction, upon request, will verify that a CQE has been issued to an individual. R.C. 2953.25(K).

4. Considerations under R.C. 9.78 and 9.79

   a. Under R.C. 9.78, a licensing authority that is required to create predetermination forms must include a section on the form requesting the applicant to identify if the applicant is the recipient of a CQE. R.C. 9.78(D).

   b. Under R.C. 9.79, if a licensing authority has proposed to deny a license application based on a criminal conviction, a CQE is evidence of "mitigating rehabilitation or treatment undertaken by the individual" for purposes of an agency's analysis. R.C. 9.79(D)(1)(d).

5. Certificate of Achievement and Employability (CAE) under R.C. 2961.22.

   a. What is a CAE?

      i. A CAE allows a prisoner currently serving a prison term in a state correctional institution to lift any "mandatory civil impacts" that would affect a potential job within a field in which the prisoner trained as part of the prisoner's in-person vocational program.

         (a) Under R.C. 2961.21(D)(1)(a)-(c), "mandatory civil impact" means any section of the Revised Code or the Administrative Code that creates a penalty, disability, or disadvantage, however denominated, to which all of the following apply:

      ii. It is triggered automatically solely by a person's conviction of an offense, whether or not the penalty, disability, or disadvantage is included in the judgment or sentence;

iii. It is imposed on a person, licensing agency, or employer; and

iv. It precludes the person with the criminal record from maintaining or obtaining licensure or employment, precludes the agency from issuing a license or certification to the person with the criminal record or business, or precludes a business from being certified or from employing the person with the criminal record.

(a) If an applicant holding a CAE applies for a license, the agency cannot deny an application solely based on a mandatory civil impact.

6. Qualifications.

a. The prisoner must be currently serving a prison term or have been released from a state correctional institution but still under supervision on parole or under a post-release control sanction. R.C. 2961.22(A)(1) and (B)(1).

b. The prisoner must have satisfactorily completed one or more in-prison vocational programs approved by rule by the Department of Rehabilitation and Correction. R.C. 2961.22(A)(1)(a).

c. The prisoner must have "demonstrated exemplary performance as determined by completion of one or more cognitive or behavioral improvement programs approved by rule by the department while incarcerated in a state correctional institution, while under supervision, or during both periods of time." R.C. 2961.22(A)(1)(b)

d. The prisoner must have completed community service hours. R.C. 2961.22(A)(1)(c).

e. The prisoner must show other evidence of achievement and rehabilitation while under the jurisdiction of the department. R.C. 2961.22(A)(1)(d).

7. Timing.

a. A currently incarcerated prisoner must apply "no earlier than one year prior to the date scheduled for the release of the prisoner from department custody and no later than the date of release of the prisoner." R.C. 2961.22(A)(2).

b. A person on supervision on parole or under a post-release control sanction may apply at any time while on parole or post-release control sanction. R.C. 2961.22(B)(2).

8. Consideration of a CAE in licensing decisions.

a. A CAE issued to an individual lifts any automatic bar of a mandatory civil impact. R.C. 2961.22(C)(2).

b. If a person holds a CAE, an agency is required to treat any mandatory civil impact as a discretionary civil impact and must give the person "individualized consideration for the license or certification." R.C. 2961.23(A)(1).

c. The CAE constitutes "a rebuttable presumption that the person's criminal convictions are insufficient evidence that the person is unfit for the license or certification in question." R.C. 2961.23(A)(1).

d. However, "notwithstanding the presumption established under this division, the agency may deny the license or certification for the person if it determines that the person is unfit for issuance of the license." R.C. 2961.23(A)(1).

9. Considerations under R.C. 9.78 and 9.79

a. Under R.C. 9.78, a licensing authority that is required to create predetermination forms must include a section on the form requesting the applicant to identify if the applicant is the recipient of a CAE. R.C. 9.78(D).

b. Under R.C. 9.79, if a licensing authority has proposed to deny a license application based on a criminal conviction, a CAE is evidence of "mitigating rehabilitation or treatment undertaken by the individual" for purposes of an agency's analysis. R.C. 9.79(D)(1)(d).

D. Use of Criminal Background Checks in Administrative Proceedings

1. The Ohio Bureau of Criminal Identification and Investigation of the Attorney General of Ohio (Bureau) conducts criminal background checks.

a. R.C. 109.572 governs criminal records checks by the Bureau. The Ohio Law Enforcement Gateway (OHLEG) allows authorized users access to data including an individual's image, criminal history, address, and vehicle description.

b. Many statutes require applicants for various licenses to undergo a criminal background check pursuant to R.C. 109.572, and if certain "disqualifying offenses" are discovered, the applicant is barred from licensure. R.C. 3319.39 (school employees); R.C. 3772.10(C)(1) (applicants for a license from the Casino Control Commission); R.C. 3796.12 (applicants for a license from the Medical Marijuana Control Program); R.C. 4764.07 (home inspectors); R.C. 5164.34(D) (Medicaid providers).

2. Federal Bureau of Investigation (FBI) background checks.

a. 28 C.F.R. 50.12 governs the exchange of any Federal Bureau of Investigation (FBI) identification records that the agency may pull for purposes of licensing and employment. Because of the risk of errors on the background check, the applicant must be given a reasonable time to correct or complete the record, or to decline to do so, before the agency declines employment or denies the license based on an offense listed in the background check. 28 C.F.R. 50.12(b).

b. Some statutes require that the criminal background check include information obtained by the FBI as part of the background check. R.C. 173.38(F)(1) (Department of Aging direct-care positions); R.C. 3301.32(A)(1) (employment by Head Start Agency).

3. Confidentiality of background checks.

a. Information obtained by a government entity or person under R.C. 109.57 relating to a background check (both state and federal) is confidential and shall not be released or disseminated. R.C. 109.57(H).

b. In addition, R.C. 2913.04(D) provides that no person shall disseminate information from access to OHLEG, including Bureau background checks obtained under R.C. 109.57, without consent

of the Bureau superintendent. A violation of R.C. 2913.04(D) is a felony of the fifth degree. R.C. 2913.04(I).

c. Due to the confidentiality of background checks and the possibility of errors, an agency should obtain and rely on criminal conviction records, rather than background check reports, in administrative proceedings.

E. Use of Sealed or Expunged Records in Administrative Proceedings

1. Differences between sealed and expunged records.

   a. Expungement often refers to the destruction, deletion, or erasure of records so they are no longer retrievable. Sealing, to the contrary, does not require destruction of the records but limits access to the records. *State v. Aguirre*, 2014-Ohio-4603, ¶ 5, fn. 2; *State v. T.C.N.*, 2023-Ohio-3156, ¶ 9 (8th Dist.) (referencing former R.C. 2953.32).

   b. The authority to seal or expunge a record of conviction comes from R.C. 2953.32, and the authority to seal records of dismissal comes from R.C. 2953.33.

2. Sealing or expunging a record of conviction under R.C. 2953.32.

   a. R.C. 2953.32 permits an eligible offender to apply to the sentencing court for an order sealing or expunging the record of conviction.

      i. An eligible offender can seek to have the records of any number of convictions sealed or expunged, provided the offenses are eligible for sealing or expunging. R.C. 2953.32(B).

      ii. Several types of offenses are not eligible. R.C. 2953.32(A)(1)(a)–(g). This includes, but is not limited to, first- or second-degree felonies, violent offenses, most sexual offenses, domestic violence, violations of protective orders, traffic offenses, and most offenses where the victim was under 13 years of age.

      iii. The timing for eligibility for sealing or expunging depends on the type or classification of the offense. R.C. 2953.32(B)(1) and (2).

      iv. The court must hold a hearing not less than 45 days, and no more than 90 days, from the date of the filing of the application. R.C. 2953.32(C).

      v. The prosecutor's objection must be filed not later than 30 days prior to the date set for the hearing. R.C. 2953.32(C).

      vi. The prosecutor must provide notice of the application and the date for the hearing to the victim of the offense not less than 60 days prior to the hearing. R.C. 2953.32(C).

      vii. The court must evaluate several factors in determining whether to seal the conviction. R.C. 2953.32(D)(1)(a)-(g). If the applicant is a victim of human trafficking as defined in R.C. 2953.36(A)(3), the court may also consider additional factors. R.C. 2953.32(D)(1)(h).

      viii. Pending criminal charges may prevent relief. R.C. 2953.32(D)(2).

   b. Effects of sealing or expunging.

i. When a record is sealed, it is kept in a separate file, but not permanently deleted. All index references are to be deleted. The proceedings are deemed not to have occurred, although certain entities have access to the records. R.C. 2953.32(D)(2)(b); R.C. 2953.34.

(a) A sealed conviction is not permanently irretrievable, however; it is "shield[ed] from the public's gaze," but not for all purposes. *Gyugo v. Franklin Cty. Bd. of Dev. Disabilities*, 2017-Ohio-6953, ¶ 15.

ii. When a record is expunged, the official records are destroyed, deleted, and erased as appropriate for the record's physical or electronic form or characteristic so that the record is permanently irretrievable. All index references are to be deleted. The proceedings are considered not to have occurred. Only the Bureau of Criminal Investigations shall maintain the records, to be used for the sole purpose of determining a person's eligibility for employment in law enforcement. R.C. 2953.32(D).

c. Separate statutes apply when a prosecutor initiates a sealing or expungement for certain offenses such as low-level controlled substance offenses, R.C. 2953.39(B)(1), certain firearms offenses, R.C. 2953.35, and offenses where the applicant is a victim of human trafficking, R.C. 2953.36 and R.C. 2953.521.

3. Sealing or expunging a record of a not guilty finding, a dismissal of proceedings, a dismissed indictment, a completion of intervention in lieu of conviction, or a grand jury no bill under R.C. 2953.33.

a. Anyone found not guilty of an offense; any person named in a dismissed complaint, indictment, or information; any defendant who has successfully completed an intervention in lieu of conviction program pursuant to R.C. 2951.041; any person against whom a no bill is entered by a grand jury; or any person who is granted an absolute and entire pardon, a partial pardon, or a pardon upon conditions precedent or subsequent by the governor may apply to the court for an order to seal or expunge the person's official records in the case. R.C. 2953.33(A); see also R.C. 2951.041(E) (regarding intervention in lieu of conviction).

i. Some exceptions apply.

ii. The timing for eligibility depends upon the type of finding, dismissal, or pardon.

iii. The court must hold a hearing not less than 45 days, and no more than 90 days, from the date of the filing of the application. R.C. 2953.33(B)(1).

iv. The prosecutor's objection must be filed not later than 30 days prior to the date set for the hearing. R.C. 2953.33(B)(1).

v. The court must evaluate several factors in determining whether to seal the conviction. R.C. 2953.32(B)(2)(a)-(e).

vi. Pending criminal charges may prevent relief until the pending case concludes. As long as there is no active probation, the person can apply to seal or expunge other cases. R.C. 2953.33(B)(2)(b).

4. Administrative agency inquiry into sealed or expunged records.

a. Agency inquiry into sealed or expunged dismissal.

   i. An applicant for a license may not be questioned about dismissals that have been sealed or expunged pursuant to R.C. 2953.33 (expungement after not guilty finding, dismissal, dismissed indictment, completion of intervention in lieu of conviction or grand jury no bill). R.C. 2953.34(L)(1).

   ii. If an inquiry is made in violation of R.C. 2953.34(L)(1), the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response.

b. Agency inquiry into convictions sealed after DNA testing.

   i. Under R.C. 2953.60, an agency may not question an applicant about records sealed pursuant to R.C. 2953.57 (a conviction that was vacated, set-aside, and sealed after DNA testing). If an applicant is so questioned, the person whose official record was sealed may respond as if the arrest underlying the case to which the sealed official records pertain and all other proceedings in that case did not occur, and the person whose official record was sealed shall not be subject to any adverse action because of the arrest, the proceedings, or the person's response. R.C. 2953.60(A).

c. Agency inquiry into sealed or expunged convictions generally.

   i. An applicant for a license may be questioned about convictions "not sealed," but only if the question bears a direct and substantial relationship to the position for which the person is being considered. R.C. 2953.34(N)(2)(a).

      (a) R.C. 2953.34(N)(2)(a) uses the phrase "convictions not sealed." It does not outright state whether both sealed and expunged are eligible for agency inquiry, or only sealed convictions.

      (b) Whether an agency may also inquire into expunged convictions with a direct and substantial relationship to the position has yet to be interpreted by Ohio courts.

   ii. "Direct and substantial relationship to the position for which the person is being considered" requires a case-by-case review of the facts. An agency is not required to list every offense that might be directly and substantially related to the position, as a particular offense might be sufficiently related to require disqualification in some circumstances but not in others. *Gyugo v. Franklin Cty. Bd. of Dev. Disabilities*, 2017-Ohio-6953, ¶ 32.

   iii. "When considered in the context of the entire statute, it does not appear that the General Assembly intended for the reference to 'questioning' the person to be construed as a definitive statement as to what a board could consider in relation to the sealed conviction. Instead, it would appear that the reference was merely made to indicate that the general issue of the sealed conviction could be raised and considered as part of the determination concerning the license." *Szep v. State Bd. of Pharmacy*, 106 Ohio App.3d 621, 625 (11th Dist.1995).

iv. R.C. 2953.34(N)(2)(a) is not limited to consideration of sealed records only with respect to the questioning of an applicant for professional licensure, but also encompasses any other inquiry which bears a direct and substantial relationship to other rights and privileges associated with such license. *In re Niehaus*, 62 Ohio App.3d 89, 96 (10th Dist.1989).

d. Courts have permitted agency inquiry into sealed convictions in the following scenarios:

i. An inquiry into past charges or convictions for violating state and federal drug laws bears a direct and substantial relationship to a position as a pharmacist. *State Bd. of Pharmacy v. Friendly Drugs*, 27 Ohio App.3d 32, 34 (8th Dist.1985).

ii. The Motor Vehicle Salvage Board was permitted to deny an application due to a sealed record of conviction for selling a vehicle with an altered VIN tag. *Moyer v. Motor Vehicle Salvage Dealer's Licensing Bd.*, 2001-Ohio-2338 (3d Dist.).

iii. The Counselor and Social Worker Board was permitted to deny an application due to the applicant's sealed conviction for menacing by stalking, where the applicant had refused to attend court-ordered counseling or complete a Board-requested mental health assessment. *Schmitt v. Counselor & Social Worker Bd.*, 2003-Ohio-3496, ¶ 26 (11th Dist.).

e. Questions on licensing applications regarding sealed or expunged convictions.

i. The Ohio Supreme Court has held that "registration-application questions explicitly requiring disclosure of sealed convictions" do not violate R.C. 2953.34(L)(1) and that the board could discipline an applicant for failing to disclose a conviction when answering those questions on the applications that the applicant submitted. *Gyugo v. Franklin Cty. Bd. of Dev. Disabilities*, 2017-Ohio-6953, ¶ 12.

ii. It stands to reason that if the board is entitled to inquire about expunged drug convictions, it is also entitled to receive a truthful and accurate response. *State Bd. of Pharmacy v. Friendly Drugs*, 27 Ohio App.3d 32, 35 (8th Dist.1985).

F. Parallel Criminal and Administrative Investigations and Proceedings

1. Parallel proceedings.

a. Sometimes the government conducts both a criminal investigation and a civil or administrative investigation arising out of the same set of facts, which may be referred to as "parallel proceedings."

b. Parallel proceedings are permitted by law.

i. The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable. *Lee v. Trump*, 2024 U.S. Dist. LEXIS 81317 (D.C.Cir.); *Clifford v. Trump*, 2018 U.S. Dist. LEXIS 122521 (C.D.Cal.); *Securities and Exchange Comm. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C.Cir.1980).

ii. Civil and criminal proceedings each serve separate and important government functions. A government agency is not required to choose between a civil and criminal proceeding. It is not required to forgo a recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial. *United States v. Kordel*, 397 U.S. 1, 11 (1970).

iii. Although an agency may have the authority to discipline a licensee based upon an actual conviction, the agency is not required to wait for a criminal prosecution before it acts, since the agency is not required to prove a crime beyond a reasonable doubt, but rather must prove a violation of a licensing statute by reliable, probative, and substantial evidence under R.C. Chapter 119. *Hayes v. State Med. Bd.*, 138 Ohio App.3d 762, 771-772 (10th Dist.2000).

iv. The government may conduct parallel civil and criminal investigations without violating the due process clause, so long as it does not act in bad faith. *United States v. Stringer*, 535 F.3d 929, 936 (9th Cir.2008).

2. Potential issues in parallel proceedings.

a. Pretextual investigations.

i. The government cannot conduct a civil or administrative investigation or discovery proceeding as a mere pretext for criminal proceedings, as such conduct would violate the Fourth and/or Fifth Amendment of the U.S. Constitution. *United States v. Stringer*, 535 F.3d 929, 937-41 (9th Cir.2008).

ii. A government official must not affirmatively lead the subject of parallel civil and criminal investigations "into believing that the investigation is exclusively civil in nature and will not lead to criminal charges." *United States v. Robson*, 477 F.2d 13, 18 (9th Cir.1973).

b. Use of evidence obtained by the agency.

i. Evidence obtained during a civil investigation may be used in criminal proceedings if the government does not act in bad faith.

(a) The government could be acting in bad faith where it brings a civil action solely to obtain evidence for its criminal prosecution; where it has failed to advise the defendant in its civil proceeding that it contemplates the defendant's criminal prosecution; where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or unfair injury; or other special circumstances suggesting unconstitutionality or impropriety of the criminal prosecution. *United States v. Kordel*, 397 U.S. 1, 11-12 (1970).

(b) The government did not violate the due process rights of corporate executives when, to convict the executives of criminal misbranding, the government used evidence it obtained from an FDA civil investigation. The FDA made similar requests as a matter of course in three-fourths of similar civil investigations. *United States v. Kordel*, 397 U.S. 1, 6 (1970).

c. Statements made by a licensee during an agency investigation.

i. Many agencies have statutes requiring licensees to cooperate in any agency investigation.

ii. Where a license is a property right, the threatened loss of the license can be a form of coercion. Thus, an administrative agency interview of a licensee who could also be subject to a criminal investigation may implicate the licensee's Fifth Amendment privilege against self-incrimination. *State v. Gideon*, 2020-Ohio-6961, ¶ 1.

d. Threat of criminal action.

i. Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter. Prof.Cond.R. 1.2(e).

e. Grand jury evidence.

i. Evidence obtained through a grand jury is secret and can be released only through a Criminal Rule 6(E) release signed by the Court. A civil subpoena cannot be used to circumvent Criminal Rule 6(E).

IX. SETTLEMENTS WITH AGENCIES

A settlement agreement is a contract, but special statutes apply to settlement agreements with state agencies. A draft settlement agreement is not binding on a public agency until signed by the director or board. If the settlement includes a state agency paying state funds, the settlement agreement must be conditioned on the availability of funds and be approved by the director of the Office of Budget and Management and the Ohio Attorney General.

A. Settlement Agreements as a Contract

1. A "'settlement agreement is a contract designed to terminate a claim by preventing or ending litigation," and [] the construction of a written contract is a question of law . . . ."' *In re. All Kelley & Ferraro Asbestos Cases*, 2004-Ohio-7104, ¶ 28, quoting *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.*, 74 Ohio St.3d 501, 502 (1996).

2. Like any other contract, a settlement agreement requires an offer, acceptance, consideration, and mutual assent between two or more parties with the legal capacity to act. *Wilson v. Pride*, 2019-Ohio-3513, ¶ 30 (8th Dist.); *Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 16.

3. "'To constitute a valid settlement agreement, the terms of the agreement must be reasonably certain and clear,' and if there is uncertainty as to the terms then the court should hold a hearing to determine if an enforceable settlement exists." *Kostelnik v. Helper*, 2002-Ohio-2985, ¶ 17, quoting *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376-377 (1997). Settlement agreements should be rescinded only upon a showing of clear and convincing evidence that there was no meeting of the minds. *Marchbanks v. Ice House Ventures, L.L.C.*, 2023-Ohio-1866, ¶ 20.

4. Special statutes apply to settlement agreements executed between a respondent and a state agency.

    a. Settlement agreements may generally be either written or oral agreements, even though written agreements are preferable. *Tackett v. Gunnels*, 2023-Ohio-3611, ¶ 31 (4th Dist.). But "'political subdivisions cannot be bound by contract unless the agreement is in writing and formally ratified through proper channels.'" *Steinen v. Div. of Wildlife*, 2015-Ohio-2975, ¶ 16 (6th Dist.), quoting *Schmitt v. Educational Serv. Ctr. of Cuyahoga Cty.*, 2012-Ohio-2208, ¶ 18 (8th Dist.). But *see Watson v. Columbus State Community College*, 2016-Ohio-3037, ¶ 22 (10th Dist.) (remanding matter to the State Personnel Board of Review to hold an evidentiary hearing to determine if the parties entered into an oral settlement that was read into the court record).

    b. A draft settlement agreement shared by a public agency with the opposing party is not an offer and is not binding on the State until full execution of the agreement. *Cincinnati City School Dist. Bd. of Edn. v. State Bd. of Edn., Hamilton Cty.* C.P. No. A0603908 (Nov. 22, 2006) (court declined to enforce a draft settlement that was never signed by the superintendent and was never presented to the Office of Budget and Management for approval under R.C. 126.071).

5. Agency-specific statutes and rules may apply to settlements. R.C. 102.06(G) (Ethics Commission); R.C. 4123.65 (Worker's Compensation); Adm.Code 1301:16-1-08 (Department of Commerce); Adm.Code 1301:5-3-14 (Real Estate Appraiser Board).

B. Terms Not Allowed in Settlement Agreements with Public Agencies

1. Exceed the Current Biennium - The time for payment made by an agency cannot extend beyond the current biennium (two-year budget period). R.C. 131.33(A) (no state agency shall incur an obligation that exceeds the agency's current appropriation authority).

2. Require Indemnification - An indemnification provision that requires the State "hold harmless" another party is almost always unconstitutional because it creates a contingent liability that could occur beyond the end of the current biennium. Ohio Const., art. II, § 22 ("No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years."); R.C. 131.33.

    a. Provisions requiring payment of attorney's fees or costs are also generally impermissible indemnification. There are two exceptions to this general rule:

        i. The State voluntarily agrees to pay an amount certain for attorney's fees payable within the then-current biennium.

        ii. A court orders the agency to pay attorney's fees or costs. *State ex rel. Celebrezze v. Tele-Communications, Inc.*, 62 Ohio Misc.2d 440, 443 (Ct. of Cl. 1991) (rejecting application of Ohio Const., art. II, §22 when the state engages in litigation in the Court of Claims).

    b. If the opposing party is a governmental entity (a city, county, etc.), indemnification clauses are enforceable only if they meet the requirements set forth in Ohio Attorney General Opinion Nos. 99-049 and 05-007, including the following: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause.

3. Involves Limitations on Public Release – The agency's statutory duty to comply with R.C. 149.43, the Ohio Public Records Act, cannot be limited by any agreement.

    a. A state agency cannot agree to treat any public record, including a settlement, as confidential. *State ex rel. Gannett Satellite Information Network v. Shirey*, 78 Ohio St.3d 400, 403 (1997) ("promises of confidentiality . . . did not alter the public nature of [the requested documents]"); *State ex rel. Findlay Publ. Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 137 (1997) ("A public entity cannot enter into enforceable promises of confidentiality regarding public records."); *State ex rel. National Broadcasting Co. v. Cleveland*, 82 Ohio App.3d 202, 212-13 (8th Dist. 1992) ("The city, however, cannot enter into enforceable promises of confidentiality with respect to public records.").

    b. In December 2023, the Ohio Board of Professional Conduct issued an opinion providing that a "lawyer may not participate in either the offer or acceptance of a settlement agreement that includes a prohibition on a lawyer's disclosure of the same. However, due to the complexity of exemptions contained in state or federal law, not all requests to prohibit disclosure will be a violation of Prof.Cond.R. 5.6(b). A lawyer is not required to abide by a client's decision to settle a matter if the settlement is conditioned on a restriction to practice and must withdraw from the representation." Ohio Bd. of Prof. Conduct, Opinion 2023-13, syllabus.

c. Intellectual property records are exempt from a public records request. R.C. 149.43(A)(1)(m). An "intellectual property record" means "a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented." R.C. 149.43(A)(5); *Citak v. Ohio State Univ.*, 2022-Ohio-1195, ¶ 11 (requested records exempt from disclosure as they are the university's intellectual property).

4. Include Terms that Provides for Choice of Law/Jurisdiction other than Ohio – Except for certain instances involving the State Fire Marshal, Ohio has generally waived its sovereign immunity and consented to suit only if the action is brought in the Ohio Court of Claims. R.C. 2743.02(A)(1). Any lawsuit against a state agency for money damages must be brought in the Ohio Court of Claims under R.C. 2743.03.

5. Includes a Waiver of Sovereign Immunity – Under the Eleventh Amendment of the Federal Constitution, the state and state agencies generally have sovereign immunity from suit unless that immunity is waived by the state or the state consents to be sued. Ohio has waived its immunity and consented to suit only if the action is brought in the Ohio Court of Claims. R.C. 2743.02(A)(1). A settlement may include provisions explicitly stating that nothing in the agreement waives sovereign immunity and that the Ohio Court of Claims is the only venue where the state may be sued for money damages.

6. Binding Arbitration or Binding Mediation – The State cannot agree to binding arbitration or binding mediation because that would determine liability outside of the Ohio Court of Claims, the only place where the State of Ohio has waived its sovereign immunity under R.C. 2743.02(A)(1).

   a. The consent granted by Ohio is "to be sued, and have its liability determined." R.C. 2743.02(A)(1). Thus, except for listed exceptions, Ohio has consented to have its liability determined only in the Ohio Court of Claims. Binding arbitration determines liability outside the Ohio Court of Claims and is thus inconsistent with Ohio law.

   b. Non-binding mediation or non-binding arbitration is permitted (note that costs for non-binding mediation are also subject to the biennium and certification of funds requirements set forth above).

7. Waiver/Variation of Approvals or Signature Authority – If appropriate approvals are not obtained or if the signatories do not have authority to bind the signing party, signatories may be personally liable for performance on the contract. R.C. 3.12.

C. Terms Required in Settlement Agreements with Public Agencies

1. Biennium Limitation – the time for payment cannot extend beyond the current biennium (two-year budget period). Ohio Const., art. II, § 22; R.C. 131.33(A).

   a. All payments under the settlement agreement or consent order must take place before the end of the biennium.

b. A renewal option for the State may be included if payments must continue into the next biennium; however, the opposing party must understand that the State cannot guarantee those funds will be available in the next biennium and assumes the risk of not receiving those funds if they are not appropriated or available.

2. Certification of Funds – All state expenditures must be encumbered and available before an agreement or contract can be binding on the State. R.C. 126.071.

D. Provisions Specific to State Universities

1. Disclaimer of Warranties – A state university will not warrant that the licensed technology is free from the rights of third parties for much the same reasons discussed above with respect to "indemnification." For similar reasons, a state university will make no representations or warranties as to the merchantability or fitness for a particular use.

2. Various state provisions affecting intellectual property apply to state universities. R.C. 3345.14(B) (initial ownership of intellectual property); Adm.Code 3349-20-50.

3. Federal provisions may also apply to settlement agreements/contracts with state universities including (1) Export Control Laws; (2) 35 U.S.C. 287(a) (patent marketing); (3) 35 U.S.C. 200-212 (Bayh-Dole Act regarding patent rights for inventions made with federal assistance); and (4) reservation of rights to continue to make and use technology for its own internal, non-commercial research and educational purposes.

E. Other statutes affecting settlement agreements with agencies

1. R.C. 9.58 – As of September 2021, in any civil action in state or federal court, no public official (including an attorney representing or acting on behalf of a public official), can settle the action or consent to any condition that "nullifies, suspends, enjoins, alters, or conflicts with any provision of the Revised Code." R.C. 9.58(B). Any settlement that conflicts with R.C. 9.58(B) is void and has no legal effect. R.C. 9.58(C).

2. R.C. 126.071 – If a state agency agrees to a monetary settlement in which the state agency will pay state funds, it must first consult with the Director of Budget and Management. R.C. 126.071 ("No state agency shall agree to any monetary settlement that obligates payment from any fund within the state treasury without consulting with the director of budget and management.").

3. R.C. 127.19 – Controlling Board approval may be necessary for expenditures to satisfy settlements or judgments if the funds are not available in the agency's approved budget.

4. Collections – The Ohio Attorney General is authorized to collect debts owed to the state and agencies. R.C. 131.02. When settling money that has been certified to the Attorney General for collections, the respondent may have to pay various fees including collection costs (R.C. 109.081); special counsel fees (R.C. 109.08); and interest.

F. Practical Terms to Include in Settlement Agreements:

1. A consent to the agency's jurisdiction over the administrative matter.

2. Findings of facts and a list of alleged violations.

3. Admission of the facts and violations. (Some agencies require a party to admit to violations or facts, while others do not.).
4. A statement of hearing rights and a waiver of the respondent's right to an administrative hearing and any appeals.
    a. A party can waive statutory appeal rights as part of a settlement, provided that the waiver does not violate public policy. *Sanitary Commercial Servs., Inc. v. Shank*, 57 Ohio St.3d 178, 181 (1991); *Med. Imaging Network, Inc. v. Med. Resources*, 2005-Ohio-2783, ¶ 22 (7th Dist.); *"The Washington D" v. Dept. of Human Servs.*, No. 00AP-939 (10th Dist. June 14, 2001); *State v. Butts*, 112 Ohio App.3d 683, 686 (8th Dist. 1996) (a party can waive statutory appeal rights in a settlement agreement.).
    b. If the settlement agreement contains no waiver of appeal rights, the respondent may continue with his or her administrative hearing and any R.C. 119.12 appeals. *SGN Internatl. Oil Co. v. Liquor Control Comm.*, 2008-Ohio-6816, ¶ 14 (10th Dist.).
5. A waiver of the respondent's right to file any other civil actions arising from the same set of facts.
6. An acknowledgement that board members can review the facts and the file and that the board will not be liable if the board rejects the settlement.
7. An acknowledgment of the agency's lack of control or limitation upon potential collateral consequences as a result of entering into the settlement agreement (such as actions taken by other jurisdictions or other agencies).
8. An acknowledgement of the parties' right to be represented by counsel and a place for signature of counsel of record.
9. An acknowledgement that the parties have read and understand the agreement.
10. A statement that the settlement agreement is subject to the Public Records Act (R.C. 149.43) and that there can be no promise of confidentiality.
11. A reservation that the settlement agreement is not effective until final execution by all parties. The settlement agreement is subject to approval by a vote of the board or agency director and the Ohio Attorney General. If the State is directed to pay money, then approval of the Office of Budget and Management is also required.
12. A provision allowing it to be executed in counterparts, and scanned, emailed, or faxed signatures to have the same force as an original signature (if needed).
13. A statement of the consequences of failure to pay any fines or costs. If a license is involved, the agency can suspend a license should the fine not be paid by a date certain.
14. A clear statement of payment amounts and terms. The agency may agree to a payment plan, subject to approval by the Attorney General and the Collections Section, if the fine has been certified to the Attorney General under R.C. 131.02.

G. Effects of Settlement Agreements on others

1. "'[A] judgment entry and settlement agreement issued in a different court of common pleas case in a proceeding in which the defendants were not parties is not generally controlling here.'" *Miller v. Rice Drilling D L.L.C.*, 2023-Ohio-3588, ¶ 15, fn. 2 (7th Dist.) quoting *Henderson v. Haverfield*, 2022-Ohio-2194, ¶ 79 (7th Dist.); *Niederst v. Niederst*, Summit C.P. No. CV-2022-01-0050 (Apr. 14, 2023).
2. Factual stipulations are not binding on a non-party. *State Bar Assn. v. Pro-Net Fin., Inc.*, 2022-Ohio-726, ¶ 18; *State ex rel. Jeany v. Cleveland Concrete Constr., Inc.*, 2005-Ohio-5828, ¶ 8; *Thomas v. Wright State Physicians, Inc.*, 2013-Ohio-3338, ¶ 17 (10th Dist.).

H. Litigation regarding enforcement of settlement agreements

1. Entering into a settlement agreement waives the defense of lack of personal jurisdiction and is a consent to personal jurisdiction solely for enforcement of the settlement agreement absent some provision in the agreement itself to the contrary. *Figueroa v. Showtime Builders, Inc.*, 2011-Ohio-2912, ¶ 10 (8th Dist.); *Ohio State Tie & Timber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 236, 240 (10th Dist. 1982).
2. A settlement agreement cannot include consent to subject-matter jurisdiction. "The lack of subject-matter jurisdiction may be raised for the first time on appeal," and "[t]he parties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking." *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 238 (1976), overruled on other grounds by *Manning v. State Library Bd.*, 62 Ohio St.3d 24, 29 (1991); *Infinite Sec. Solutions, L.L.C. v. Karam Properties I, Ltd.*, 2013-Ohio-4415, ¶ 10 (6th Dist.).
3. If a settlement agreement is made after the administrative hearing, as a result of an administrative appeal or a civil action, a court loses its jurisdiction to enforce a settlement agreement if the court unconditionally dismisses the underlying action. *Safety 4th Fireworks, Inc. v. Dept. of Commerce,* 2003-Ohio-3477, ¶ 13 (7th Dist.).
    a. The standard of review in the court of appeals in connection with a settlement agreement is whether the trial court erred as a matter of law. *N. Hampton Day Care v. State Dept. of Human Servs.*, No. 96-CA-20 (2d Dist. Apr. 4, 1997).
    b. A "court's principal objective is to give effect to the intent of the parties to the agreement." *State of Ohio ex rel. Ohio Atty. Gen. v. Tabacalera Nacional, S.A.A.*, 2013-Ohio-2070, ¶ 18 (10th Dist.). A court must presume that the intent of the parties resides in the language they chose to employ in the agreement. *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. When that language is clear, a court may look no further than the writing itself to find the intent of the parties. *State of Ohio ex rel. Ohio Atty. Gen. v. Tabacalera Nacional, S.A.A.*, 2013-Ohio-2070, ¶ 18 (10th Dist.).
    c. Courts will consider extrinsic evidence to give effect to the parties' intentions only when the language of the contract is unclear or ambiguous or when the circumstances surrounding the agreement invest the contract with special meaning. *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638 (1992); *Cyrus v. Rehab. Servs. Comm.*, 2023-Ohio-1506, ¶ 39 (6th Dist.).

X. AGENCY ADJUDICATIONS

R.C. 119.09 allows an agency to appoint a hearing examiner to conduct the hearing. After the hearing, the agency reviews the hearing examiner's report and recommendation, the transcript, exhibits, and any objections before issuing a final order. Some agencies also allow respondents or their attorneys to make a personal appearance before the board or commission before final action, but that is not required by R.C. 119.09. Due deference must be given to the hearing officer's factual findings and recommendation, and the agency's final order must approve, modify, or reject the hearing examiner's report and recommendation. The final order must include a statement of the time and method by which an appeal may be perfected. Failure to include such notice of appeal means that the time for appeal never begins to run. The agency must also journalize the order on its record, and then serve a certified copy of the final order by one of the means set forth in R.C. 119.05. A final order may result in discipline to a licensee, such as suspension or revocation of a license, or other sanctions consistent with the agency's statutory authority.

A. Authority of Agency

1. R.C. 119.09 permits, but does not require, agencies to appoint a referee or hearing examiner to conduct the hearing. R.C. 119.09, ¶ 9.

2. Accordingly, some agencies conduct hearings without a hearing examiner. In such cases, no report and recommendation is needed, and the agency can issue an order following deliberations on the case.

3. When a statutory provision specifically addresses the agency's ability to act and in the same provision limits that ability based on a time limit, those time limits are mandatory. *Clovernook Health Care Pavilion v. Dept. of Medicaid*, 2021-Ohio-337, ¶ 21-22 (10th Dist.) (R.C. 5164.57(A)(1) states that ODM may recover a Medicaid payment to which the provider is not entitled if the department notifies the provider of the overpayment during the five-year period immediately following the end of the state fiscal year in which the overpayment was made.).

4. The agency may approve, modify, or disapprove the recommendation of the examiner. R.C. 119.09, ¶ 9. The agency is permitted to independently review the evidence, to make its own findings, and to draw its own conclusions from the evidence. *In re Certificate of Need Application of Providence Hosp.*, 67 Ohio App.3d 391, 398 (10th Dist. 1990).

5. In a disciplinary action, the agency may rely on its own expertise in deciding whether a licensee engaged in conduct that violates the laws, rules, or standards of the real estate industry. *Richard T. Kiko Agency, Inc. v. Dept. of Commerce,* 48 Ohio St.3d 74, 76-77 (1990) (Commission, in applying its expertise in the field of licensing and disciplining real estate salespersons, reached its conclusion supported by reliable, probative, and substantial evidence.); *Boggs v. Real Estate Comm.*, 2009-Ohio-6325, ¶ 33 (10th Dist.).

6. Although an agency can make de novo findings of fact, the Supreme Court of Ohio has held that if the findings are based upon assessments of credibility driven by observance of witnesses' demeanor, the agency should afford due deference to the findings of the hearing examiner. *Civ. Rights Comm. v. Case Western Reserve Univ.*, 76 Ohio St.3d 168, 180, (1996) ("[A]n administrative agency should accord due deference to the findings and recommendations of its referee, especially where there exist evidentiary conflicts."), citing *Brown v. Bur. of Emp. Serv.*, 70 Ohio St.3d 1, 2 (1994); *Miller*

v. Dept. of Edn., 2017-Ohio-7197, ¶ 62 (2d Dist.); *Blinn v. Bur. of Emp. Serv.*, 29 Ohio App.3d 77, 80 (10th Dist. 1985).

B. Personal Appearances Before the Agency

1. Due process does not require the personal appearance of the respondent before the board at hearing; due process only requires the opportunity for hearing. Accordingly, the agency need not arrange for an incarcerated respondent's appearance before the board via teleconference, especially since respondent's attorney could have appeared on his behalf, or respondent could have submitted his arguments in writing. *Wolfe v. Accountancy Bd.*, 2016-Ohio-8542, ¶ 11-13 (10th Dist.).
2. Some agencies permit parties to personally appear before the agency prior to the agency's deliberations. R.C. 4735.051(F) (Real Estate Commission); R.C.4715.039 (Dental Board); Adm.Code 4731-13-15(G) (Medical Board); Adm.Code 4723-16-12 (Nursing Board); Adm.Code 4757-11-04(H)(4)-(5) (Counselor, Social Worker, and Marriage and Family Therapist Board).
3. The party may appear themselves, through counsel, or both, depending on agency statutes or rules.
4. Taking of additional evidence.
    a. Before issuing a final order, the agency may order the taking of additional testimony, or the introduction of further documentary evidence. R.C. 119.09, ¶ 9. But nothing requires the agency to take additional evidence. *Landefeld v. State Med. Bd.*, No. 99AP-612 (10th Dist. June 15, 2000); *Frazier v. State Bd. of Edn.*, No. 75042 (8th Dist. Dec. 16, 1999).
    b. R.C. 119.09 authorizes the board to consider additional evidence, but it does not confer a right to be heard beyond the hearing before the hearing officer. Thus, the respondent is not entitled to be heard at the board's meeting to consider the report and recommendation. *Miller v. Dept. of Edn.*, 2017-Ohio-7197, ¶ 75 (2d Dist.); *Berezoski v. State Med. Bd.*, 48 Ohio App.3d 231, 238 (2d Dist. 1988).

C. Board or Agency Deliberation

1. The board and agency must follow certain procedures.
    a. The hearing examiner's report and recommendation is not final until confirmed and approved by the agency. R.C. 119.09, ¶ 9.
    b. The agency's order must be "based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence." R.C. 119.09, ¶ 9.
    c. R.C. 119.09 does not require the board or commission members to review the transcript of a hearing, so long as the findings of fact constitute a basis for making informed, deliberate, and independent conclusions about the issues. *Khan v. State Med. Bd.*, 2015-Ohio-1242, ¶ 22 (10th Dist.); *Prinz v. State Counselor & Social Worker Bd.*, No. C-990200 (1st Dist. Jan. 21, 2000) (affirming decision when the hearing examiner's finding were based on evidence at hearing); *WADE v. W. Res. Psych. Habilitation Ctr.*, No. 11945 (9th Dist. Apr. 24, 1985); *Lies v. Veterinary Med. Licensing Bd.*, 2 Ohio App.3d 204, 210 (1st Dist. 1981).

d. Under R.C. 119.09, an administrative board need not read the entire transcript before issuing a ruling. *Vonderwell v. Veterinary Med. Licensing Bd.*, No. 15-2000-13 (3d Dist. Dec. 29, 2000). The trial court, however, had properly reversed the Board's order because it held that the hearing examiner's report did not fully reflect the evidence presented at the hearing and contained in the transcript. *Id.*

e. The agency must consider the objections before approving, modifying, or disapproving the recommendation of the examiner. R.C. 119.09, ¶ 9; *Starr v. Dept. of Commerce,* 2021-Ohio-2243, ¶ 79 (10th Dist.).

f. It is best practice for an agency's final order to specifically state that it considered the objections. But failure to include such language is not fatal if a respondent does not affirmatively demonstrate that the agency failed to consider the objections. *Starr v. Dept. of Commerce*, 2021-Ohio-2243, ¶ 79 (10th Dist.) (court presumed the regularity of the administrative proceeding and noted that the Real Estate Commission indicated during deliberation that it had gone over the objections in depth).

g. If the agency modifies or disapproves the hearing examiner's recommendation, it must include the reasons for the modification or disapproval in the record. R.C. 119.09, ¶ 9; *Slingluff v. State Med. Bd.*, 2006-Ohio-3614, ¶ 14 (10th Dist.) (statute is complied with when the board's minutes reveal the reasons for modifying a hearing examiner's recommendation); *Feldman v. State Med. Bd.*, No. 98AP-1627 (10th Dist. Sep. 30, 1999).

h. After the agency had withdrawn a count at hearing, a hearing examiner erroneously recommended affirming that violation. In adopting the Report & Recommendation, the agency did not adopt that finding but did not explain the reason for modifying the recommendation. The court of appeals held that "the basis for the modification was self-explanatory" and "any deficiency in the department's explanation was not prejudicial because the modification was to [respondent's] benefit." *Redmond v. Dept. of Ins.*, 2021-Ohio-2570, ¶ 21 (10th Dist.).

i. If the attorney representing the agency is present in the board's private deliberations but the respondent's attorney is not present, the respondent's right to due process has been violated. However, the error may be harmless if a trial de novo is available on appeal. *Barga v. St. Paris Village Council*, 2023-Ohio-1067, ¶ 22 (2d Dist.) (hearing held under R.C. 737.171) (jurisdiction accepted on August 29, 2023, 2023-Ohio-2972).

2. Timing

a. R.C. 119 does not mandate a time for the board or agency to issue a decision after issuing the report and recommendation. An excessive delay in issuing a decision under R.C. 119.09, however, could violate due process. In *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2022-Ohio-4281, ¶ 70-74 (11th Dist.), the court held that there was no due process violation when it took 24 months between the request for hearing and issuing the final order. There was no prejudice when department scheduled hearing within 13 days after request. The department had to review voluminous pleadings when considering a new program and subject matter (the new medical marijuana program). The Court noted that "[t]he fact that an administrative proceeding

takes time does not necessarily equate to unfairness." *Id.*, ¶ 74 (jurisdiction denied, *Lake Front Med., L.L.C. v. Dept. of Commerce*, 2023-Ohio-921).

b. Some agency-specific statutes or rules set forth a deadline for the agency to act after issuing a report and recommendation. R.C. 4731.23(D) (State Medical Board must issue decision within 60 days after receiving the hearing examiner's proposed findings of fact and conclusions of law or within any longer period mutually agreed upon by the board and the license or certificate holder); R.C. 4729.171(C) (Board of Pharmacy must issue a decision within 90 days of receiving the report and recommendation).

c. Statutory deadlines for the issuance of a final order are generally directory rather than mandatory. *Pruneau v. Dept. of Commerce*, 2010-Ohio-6043, ¶ 27-28 (10th Dist.); *Hughes v. Real Estate Comm.*, Nos. 74480 and74481 (8th Dist. July 22, 1999); *Riffe v. Real Estate Appraiser Bd.*, 130 Ohio App.3d 46, 50 (9th Dist. 1998); *In re Heath*, 80 Ohio App.3d 605, 608 (10th Dist. 1992) (State Medical Board did not lose jurisdiction when it failed to act within 60 days of receiving the hearing examiner's report as required).

d. Under other statutes, if the agency fails to act within a specified time period from issuing the report and recommendation, the hearing examiner's report and recommendation is deemed approved, and the agency should not modify the report and recommendation when issuing the final agency order. R.C. 4517.58 (Motor Vehicle Dealers, Auction Owners, and Salespersons Board).

e. Courts disagree as to whether mandamus lies to require an agency to issue a decision after it fails to comply with the statutory deadline. *State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186, 187 (1992) (mandamus will not issue for board's failure to issue decision within statutory deadline when appellant had statutory right of appeal, and, therefore, there existed an adequate remedy at law). *But see State ex rel. Cincinnati v. Civ. Rights Comm.*, 2 Ohio App.3d 287, 288-289 (10th Dist. 1981) (granting writ of mandamus after commission failed to timely render a decision after issuing the report and recommendation).

f. When the parties execute a settlement before the agency holding an administrative hearing, the parties fulfil their obligations under the settlement, and the agency does not issue a decision because of the settlement, there is no final appealable order and, thus, nothing for the court to review. *Williams-Lindsey v. Dept. of Health*, 2020-Ohio-1337, ¶ 19 (11th Dist.).

D. Agency Decision Making

1. Agencies generally can remand to the hearing examiner.

   a. R.C. 119.09 does not specifically provide for remand to the hearing examiner, but courts have implicitly, if not explicitly, recognized the power of agencies to remand cases to the examiner. *Zak v. State Dental Bd.*, 2004-Ohio-2981, ¶ 98 (8th Dist.) (remand to consider previously excluded testimony); *Marion Ob/Gyn v. State Med. Bd.*, 137 Ohio App.3d 522, 525 (10th Dist. 2000) (remand to consider additional evidence); *Urella v. State Med. Bd.*, 118 Ohio App.3d 555, 560 (10th Dist.1997) (remand for briefing of legal issue).

   b. Generally, no second hearing is held on remand. Instead, the hearing examiner reviews the evidence again and issues another report and recommendation. *Douglas Bigelow Chevrolet,*

Inc. v. Gen. Motors Corp., 2003-Ohio-5942, ¶ 57 (10th Dist.) ("R.C. 119.09 does not provide for a second hearing on remand. To hold otherwise would be to impermissibly add, enlarge, supply, expand, extend or improve R.C. 119.09 to meet a situation not provided for.") (Bryant, J., concurring).

c. Some agency rules specifically provide that the agency may remand a case back to a hearing examiner to take additional evidence. Adm.Code 4734-4-13(E) (Chiropractic Board); Adm.Code 4757-11-04(H)(3) (Counselor, Social Worker, and Marriage and Family Therapist Board); Adm.Code 4715-15-16(E) (Dental Board); Adm.Code 4731-13-15(E) (Medical Board); Adm.Code 5101:6-8-01(I)(5) (Department of Job and Family Services).

d. An agency's decision to remand to the hearing examiner is an interlocutory, non-appealable order. *Fuller v. Dept. of Transp.*, 2016-Ohio-5116, ¶ 14 (10th Dist.); *Slavin Ford, Inc. v. Ford Motor Co.*, No. 91AP-354 (10th Dist. Aug. 1, 1991).

2. Approving the Report and Recommendation

a. No recommendation is final "until confirmed and approved by the agency as indicated by the order entered in its record of proceedings." R.C. 119.09, ¶ 9; *State Med. Bd. v. Zwick*, 59 Ohio App.2d 133, 137 (9th Dist. 1978). Accordingly, if the agency accepts the recommendations of the hearing examiner without any modification, it should indicate in its order that the report and recommendation is "confirmed and approved."

b. The order of the agency based on the report, recommendation, or testimony and evidence, has the same effect as if such hearing had been conducted by the agency. R.C. 119.09, ¶ 9.

c. The agency must look at the facts of the case to support any argument that it reviewed and consider the record of the hearing, to avoid charges that it rubber-stamped the recommendations of the hearing examiner. *Vonderwell v. Veterinary Med. Licensing Bd.*, 2000-Ohio-1812 (3d Dist.) (under R.C. 119.09, an administrative board need not read the entire transcript before issuing a ruling, the statute does require that the ruling be "based on" the evidence.).

3. An agency may modify or disapprove the report and recommendation.

a. If the agency modifies or disapproves the recommendation of the examiner, it must include in the record the reasons for such modification or disapproval. R.C. 119.09, ¶ 9; *Slingluff v. State Med. Bd.*, 2006-Ohio-3614, ¶ 14 (10th Dist.) (statute is complied with when the board's minutes reveal the reasons for modifying a hearing examiner's recommendation); *Feldman v. State Med. Bd.*, No. 98AP-1627 (10th Dist. Sep. 30, 1999).

b. "Just as a court speaks through its journal entries, an administrative agency speaks through its orders." *Howard v. State Racing Comm.*, 2019-Ohio-4013, ¶ 34 (10th Dist). Thus, the agency's order must allow a reviewing court to determine what the agency relied upon, and what the agency considered to be facts supported by the record. The agency should be able to both articulate and demonstrate how it is applying the law to the case before it. Further, it should be able to demonstrate the conclusions it draws from the facts, and the reasons why it relied on certain facts as opposed to others. This is as important even if the case is not appealed, as the agency may be called upon in subsequent hearings to apply the facts in a similar fashion.

c. Agencies may modify the hearing examiner's recommended penalty.

i. "An administrative agency should accord due deference to the findings and recommendation of its referee, especially if there exists evidentiary conflicts, because it is the referee who is best able to observe the demeanor of the witnesses and weigh their credibility." *Brown v. Bur. of Emp. Serv.*, 70 Ohio St.3d 1, 2 (1994); *Aldridge v. Huntington Local School Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 157-159 (1988); *Pennessi v. Hanger Prosthetics & Orthotics, Inc.*, 2018-Ohio-4631, ¶ 68 (2d Dist.).

ii. The agency must avoid the appearance that it was not giving proper deference to the hearing examiner. In the *Brown* case, the Ohio Supreme Court noted that the agency did not indicate that it examined the record and further adopted the findings of fact but did not accept the recommendation. The Supreme Court, therefore, agreed with the trial court that reversed the agency decision. *Brown v. Bur. of Emp. Serv.,* 70 Ohio St.3d 1, 2 (1994), citing *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 43 (1990).

iii. While an agency should give deference to a hearing examiner's recommendation, the agency is not bound by that recommendation. R.C. 119.09, ¶ 9. If the agency rejects or modifies the recommended penalty, however, it "should, in the spirit of due process, articulate its reasons therefor." *Graziano v. Bd. of Edn.*, 32 Ohio St.3d 289, 293 (1987); *Aldridge v. Huntington Local School Dist. Bd. of Edn.*, 38 Ohio St.3d 154, 158 (1988).

E. Agency Discipline

1. The agency may only impose penalties authorized by law. *DeBlanco v. State Med. Bd.*, 78 Ohio App.3d 194, 202 (10th Dist. 1992).
2. Courts cannot modify the penalty if the agency was authorized to impose the penalty. *Henry's Cafe, Inc. v. Liquor Control Comm.*, 170 Ohio St. 233, 233 (1959), paragraph three of the syllabus; *DeBlanco v. State Med. Bd.*, 78 Ohio App.3d 194, 202 (10th Dist. 1992): *Gibbons v. State Dental Bd.*, 2022-Ohio-2463, ¶ 37 (11th Dist.); *Jaroscak v. Bd. of Pharmacy*, 2021-Ohio-3867, ¶ 21 (9th Dist.).
3. An agency may adopt a harsher penalty than that recommended by an expert witness because the agency is not bound by the expert's conclusion. *Valko v. State Med. Bd.*, 2023-Ohio-4676, ¶ 14 (10th Dist.).
4. The term "suspension" implies temporary loss of license. *State v. White*, 29 Ohio St.3d 39, 40 (1987); *Richter v. State Med. Bd.*, 2005-Ohio-2995, ¶ 12 (10th Dist.).
5. Agencies may revoke a license.
    a. Agencies may revoke permanent licenses.
        i. "Revocation," is a "permanent taking without the expectation of reinstatement." *State v. White*, 29 Ohio St.3d 39, 40 (1987).
        ii. Some agency-specific statues and rules specify that a license may be revoked permanently, and that a revoked license will not be reinstated. Adm.Code 4729:1-1-01(R) (Pharmacy Board); Adm.Code 3301-73-22(A)(2) (Department of Education).

iii. At least one court has held that for a revocation to be permanent, the order, or incorporated law, must expressly state that the revocation is permanent. *State ex rel. Poignon v. Bd. of Pharmacy*, 2004-Ohio-2709, ¶ 6-7 (10th Dist.).

iv. In some circumstances, following a permanent license revocation, an applicant may apply for a new license. *Haynam v. State Bd. of Edn.*, 2011-Ohio-6499, ¶ 27 (6th Dist.) ("revocation generally means a permanent taking, but not always."); *Richter v. State Med. Bd.*, 2005-Ohio-2995, ¶ 14 (10th Dist.); *Bouquett v. State Med. Bd.*, 74 Ohio App.3d 203, 208 (10th Dist. 1991). Under this interpretation, the agency must accept and process a subsequent application for a new license, unless the law in effect at the time of the revocation precludes further application. *Richter v. State Med. Bd.*, 2005-Ohio-2995, ¶ 14, 20 (10th Dist.) (French, concurring).

b. Agencies may allow reinstatement.

i. In spite of the permanent nature of revocation, some agencies permit a licensee to reapply or to seek to be reinstated after license revocation.

ii. To apply for reinstatement, a suspended licensee must meet the requirements set forth by the agency's statutes or rules. R.C. 4731.22 (State Medical Board); Adm.Code 4755-23-10 (Physical Therapists);

iii. As part of a consent agreement, a licensee may agree not to seek reinstatement. Adm.Code 4729:1-1-01(G)(9) (Pharmacy Board); *State ex rel. Mathur v. State Dental Bd.*, 2005-Ohio-1538, ¶ 15 (10th Dist.).

6. Agencies are limited in imposing multiple penalties.

a. The agency may not impose multiple penalties for one violation of a statute. *Petrilla v. State Bd. of Pharmacy*, 2003-Ohio-3276, ¶ 38 (7th Dist.); *Wesco Ohio, Ltd. v. State Bd. of Pharmacy*, 55 Ohio App.3d 94, 98 (10th Dist.1988).

b. The agency may impose multiple penalties when each penalty is based on a different violation of the statutes. *Petrilla v. State Bd. of Pharmacy*, 153 Ohio App.3d 428, 2003-Ohio-3276, ¶ 38 (7th Dist.); *Wesco Ohio, Ltd. v. State Bd. of Pharmacy*, 55 Ohio App.3d 94, 98-99 (10th Dist. 1988).

7. In an appeal taken under R.C. 2506.01, an agency's final order was unreasonable when it required the respondent to perform an impossible act for the agency to approve the respondent's registration application. *Adams Quality Heating & Cooling v. Erie Cty. Health Dept.*, 2014-Ohio-2318, ¶ 36 (6th Dist.).

8. Discipline is independent of criminal penalties:

a. Administrative actions against a license or permit as may be specifically authorized by statute do not constitute a bar against criminal prosecution based on the facts that underlie both actions.

b. Placing a defendant under an administrative license suspension for driving while intoxicated does not constitute a punishment that triggers a double jeopardy impediment to further governmental enforcement action, nor does it violate procedural due process or create a valid argument of issue preclusion. *State v. Gustafson*, 76 Ohio St.3d 425, 435-436 (1996) (double

jeopardy); *State v. Hochhausler*, 76 Ohio St.3d 455, 463 (1996) (procedural due process); *State v. Williams*, 76 Ohio St.3d 290, 296 (1996).

c. An acquittal in a criminal proceeding is not a bar to subsequent administrative charges since the burdens of proof in the criminal case and the administrative proceeding are different. *Zak v. State Dental Bd.*, 2004-Ohio-2981, ¶ 21 (8th Dist.).

For more information on a criminal conviction's effect on a license, *see* Chapter XIV.

F. Content of the Agency Order

1. R.C. 119.09 does not require an agency to provide an explanation of its decision. *Beef & Beer Keowee v. Liquor Control Comm.*, No. 97AP-1272 (10th Dist. Aug. 20, 1998); *Sayed v. Liquor Control Comm.*, No. L-94-232 (6th Dist. Mar. 3, 1995); *Erie Care Ctr., Inc. v. Ackerman*, 5 Ohio App.3d 102, 103 (6th Dist. 1982). It is a best practice to provide an explanation of the decision.

2. If the order modifies or disapproves the hearing examiner's recommendation, the decision must state the reasons for the modification or disapproval. R.C. 119.09, ¶ 9; *Snyder v. Real Estate Appraiser Bd.*, 2017-Ohio-5790, ¶ 37 (5th Dist.); *Bennett v. State Med. Bd.*, 2011-Ohio-3158, ¶ 16 (10th Dist.); *Howard v. State Racing Comm.*, 2019-Ohio-4013, ¶ 33-36 (10th Dist.). (Factual findings contained in final order satisfied R.C. 119.09's requirement for a statement of reasons for modifying or disapproving the hearing officer's recommendation). *But see Conners v. Dept. of Commerce*, 7 Ohio App.3d 237, 238-39 (1st Dist. 1982) (holding that the requirement is directory with respect to a commission's increase of a recommended penalty, if the increased penalty is within the scope of the commission's authority because a court lacks authority to reverse, vacate, or modify it).

3. If the order approves the hearing examiner's recommendation, it should state that the recommendation is "confirmed and approved." R.C. 119.09, ¶ 9. The agency may incorporate by reference the entire report and recommendation, and should attach a copy of the same to its final order.

4. Under R.C. 119.09, an agency need not file written objections to the hearing officer's report and recommendation before modifying or disapproving a hearing officer's recommendation. *Howard v. State Racing Comm.*, 2019-Ohio-4013, ¶ 40 (10th Dist.).

5. The order must include or have attached a statement of the time and method by which an appeal may be perfected. R.C. 119.09, ¶ 10.

   a. Language that tracks the language of R.C. 119.12, was sufficient to put a party on notice as to how to file an appeal of an agency's order. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 16.

   b. The following language is an example of the general statement of time and method of appeal:

      > Any party desiring to appeal must file a Notice of Appeal with the [Agency/ Board/ Commission] [address], setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with

law. The same Notice of Appeal must also be filed by the party with the [appropriate court of common pleas]. R.C. 119.12 requires that such notices of appeal must be filed within 15 days after the service of the notice of the [Agency's/ Board's/Commission's] Order as provided in Section 119.05 of the Ohio Revised Code.

c. An agency's final order is not a final appealable order if it misstates the statutory requirements for perfecting an appeal. *Robinson v. Portage Cty. Sheriff's Office*, 2015-Ohio-1219, ¶ 18 (11th Dist.). The appellant had relied on an improper statement of appeal rights and thus filed a notice of appeal after the15-day statutory deadline. Because the appellant had already filed a notice of appeal from the trial court's dismissal, the court of appeals remanded the appeal back to the trial court to consider the appeal on the merits. The Court held that no new Notice with proper appeal instructions was required to be sent, and the case could proceed in the trial court as if the appeal was timely filed in the first instance. *Id.*, at ¶ 18, fn. 1.

d. If the notice of appellate rights is incorrect, the period for appeal never begins to run. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 16, 19.

e. The notice that sets forth the time and method for perfecting an appeal may be included in the order or a separate cover letter. *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 19 (10th Dist.); *Drago v. Dept. of Mental Retardation & Dev. Disabilities*, 2008-Ohio-768, ¶ 9 (10th Dist.).

f. Errors in the instructions included in the final order do not affect the court of common pleas's subject matter jurisdiction on review but rather are an affirmative defense that must be timely asserted or be waived. *Karvo Cos., Inc. v. Dept. of Transp.*, 2019-Ohio-4556 (9th Dist.) (Interpreting *Hughes v. Dept. of Commerce*, 2007-Ohio-2877).

G. Journalization of the Agency Order

1. The agency must enter the decision in its journal. R.C. 119.09, ¶ 10.
2. Failure to comply with jounalization requirements renders a subsequent appeal to the common pleas court premature. *Massey v. Election[s] Comm.*, 2013-Ohio-3498, ¶ 14, 16 (10th Dist.) (the agency did not enter its final adjudication order on its journal as required by R.C. 119.09, ¶ 10, so the order was not ripe for appeal even though a certified copy of the order was sent via certified mail to the respondent and the agency kept the original).
3. For orders made under R.C. 2505.07, journalizing a final order is not required. *State ex rel. Nicholson v. Toledo*, 2012-Ohio-4325, ¶ 21 (6th Dist.). A city board of zoning appeals order that was sent on agency letterhead, was signed by the assistant planner, and unequivocally stated that the request for variances was denied, was a final order even though the meeting minutes had not yet been approved by the board. *DAMSA, Ltd. v. Sandusky*, 2016-Ohio-5069, ¶ 13 (6th Dist.); *Akron Dept. of Neighborhood Assistance v. Helms*, 2019-Ohio-4554, ¶ 13 (9th Dist.) (if final order was served on appellant, the period of appeal began to run as of service of the final order, even though the board meeting minutes had not yet been approved).

H. Service of the Agency Order

1. After the order is entered on the agency's journal, the agency must serve the party affected a certified copy of the order and a statement of the time and method by which the appeal may be perfected.

2. The agency must serve the certified copy of the final decision and statement of appeal rights by one of the methods set forth in R.C. 119.05: (1) electronic mail; (2) facsimile transmission; (3) traceable delivery service; or (4) personal service. R.C. 119.09, ¶ 10. When the record does not contain evidence of service of the final order, then the appeal time does not begin to run. *Loves v. Dept. of Public Safety*, Franklin C.P. No. 19CV-9545 (Apr. 20, 2020).

    a. If an agency fails to complete service using the party's last known address or facsimile number, the agency may complete service by any of the four methods listed using an alternate address of facsimile number, after verifying the alternative address or facsimile number as current before service. R.C. 119.05(D). If such service is complete, the agency does not need to serve by publication. R.C. 119.05(D).

    b. If an agency is unable to complete service using one of the four methods listed in R.C. 119.05(B), the agency must publish a summary of the notice's substantive provisions in a newspaper of general circulation in the county where the party's last known address is located. Notice by publication under this division is complete on the date of publication. An agency that completes service by publication under this division must send a proof-of-publication affidavit, with the publication of the notice set forth in the affidavit, to the party by ordinary mail at the party's last known address. R.C. 119.05(E).

    c. Practice Pointer–nothing in R.C. 119.05 states that an agency cannot attempt service by the same method more than once or by multiple methods, although this issue will likely be decided by the courts.

3. The agency must also "provide" a copy of the order to the respondent's attorney or other representative of record. R.C. 119.09, ¶ 10. The statute does not specify how the final order should be "provided" to counsel.

4. R.C. 119.09 requires that notices of the final action be sent to all affected parties and their counsel of record; however, there is no requirement to send the notices simultaneously. *Brisker v. Dept. of Ins.*, 2021-Ohio-3141, ¶ 51 (4th Dist.).

5. Certified Copy

    a. A certified copy is a duplicate of an original, certified as an exact reproduction of the original by the officer responsible for keeping the original. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 14-15; *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 16 (10th Dist.).

b. The following language is recommended for the certification:

State of Ohio

County of _____, SS

I, [name] the undersigned [Director/Chairperson] for the [agency/board commission] hereby certify that the foregoing is a true and exact reproduction of the original order of the [agency/board/ commission], entered on its journal on the ___ day of _____, [year]

___[signature]_____

Name

Title

Date

(seal)

6. Under R.C. 119.12(D), the time for appeal to the appropriate common pleas court does not begin until the agency fully complies with the journalization and service requirements of R.C. 119.09. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 12 (because agency failed to properly serve the final order, respondent's time for appeal never began to run); *Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St.3d 306, 306 (1987) (same); *Robinson v. Richter*, 2004-Ohio-2716, ¶ 8 (10th Dist.) (appeal time never began to run because final order did not include time by which appeal must be perfected).

I. Failure to Hold Hearing Before Expiration of License/Surrender of License

1. The failure of an agency to hold a hearing before the license expires does not deprive the agency of jurisdiction to hold the hearing or to issue a final order regarding the license. R.C. 119.091; *Haehn v. State Racing Comm.*, 83 Ohio App.3d 208, 211-212 (10th Dist. 1992).
2. A licensee's voluntary surrender of his or her license before an adjudication hearing does not deprive the agency of its jurisdiction to hold the hearing and revoke the license. *Appeal of Ohio Radio, Inc.*, 25 Ohio App.2d 84, 89 (6th Dist. 1970); *Wise v. Motor Vehicle Dealers Bd.*, 106 Ohio App.3d 562, 567 (9th Dist. 1995); *Haehn v. State Racing Comm.*, 83 Ohio App.3d 208, 211 (10th Dist. 1992).

J. Agency's Reconsideration of its Order

1. Generally, administrative agencies have inherent authority to reconsider their own decision because the power to decide in the first instance carries with it the power to reconsider. The agencies retain jurisdiction to set aside or otherwise reconsider their decisions until the actual institution of a court appeal or until the time for appeal expires, absent specific statutory limitation to the contrary.

State ex rel. Borsuk v. Cleveland, 28 Ohio St.2d 224, paragraph one of the syllabus (1972); *Wilde v. Veterinary Med. Licensing Bd.*, Nos. 98CA00138 and 98CA00025 (5th Dist. Oct. 1, 1999).

2. When a notice of appeal is filed with the court, the agency is divested of its jurisdiction to reconsider, vacate, or modify the decision. *Lorain Edn. Assn. v. Lorain City School Dist. Bd. of Edn.*, 46 Ohio St.3d 12, syllabus (1989).

K. Effect of Orders – Claim/Issue Preclusion

See Chapter XI for additional information on the collateral effect of orders.

1. In Ohio, "res judicata" encompasses both claim preclusion and issue preclusion (collateral estoppel). *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 2008-Ohio-6254, ¶ 27.

   a. Claim preclusion is broad and seeks to promote judicial efficiency by requiring plaintiffs "to present every ground for relief in the first action, or be forever barred from asserting it." *Natl. Amusements, Inc. v. Springdale*, 53 Ohio St.3d 60, 62 (1990), citing *Rogers v. Whitehall*, 25 Ohio St.3d 67, 69 (1986). Claim preclusion has four elements in Ohio: "(1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action." *Lycan v. City of Cleveland*, 2022-Ohio-4676, ¶ 22-23, quoting *Hapgood v. Warren*, 127 F.3d 490, 493 (6th Cir 1997).

   b. "[I]ssue preclusion, [or] collateral estoppel, holds that a fact or a point that was actually and directly at issue in a previous action, and was passed upon and determined by a court of competent jurisdiction, may not be drawn into question in a subsequent action between the same parties or their privies, whether the cause of action in the two actions be identical or different." *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 2008-Ohio-6254, ¶ 27; *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995).

      i. The general rule is that mutuality of parties is a prerequisite to issue preclusion (collateral estoppel). *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 202 (1983); *Aspinwall v. Bd. of Tax Rev.*, 2001-Ohio-8896 (11th Dist.).

      ii. Collateral estoppel operates only if all parties to the present proceeding were bound by the prior judgment. *533 Short North LLC v. Zwerin*, 2015-Ohio-4040, ¶ 30-31 (10th Dist.).

      iii. A prior judgment estops a party, or a person in privity with him, from subsequently relitigating the identical issue raised in the prior action. *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193 (1983), paragraph one of the syllabus.

   c. A final, unappealed judgment on the merits that may have been wrong or rested on a legal principle subsequently overruled in another case does not alter that judgment's preclusive consequences. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981); *Nozik v. Sanson*, Nos. 69948 and 70198 (8th Dist. Oct. 24, 1996).

2. Res judicata applies to administrative proceedings that are of a judicial nature and if the parties have had an ample opportunity to litigate the issues. *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260, 263 (1987); *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, syllabus (1980); *Yoder v. State Bd. of Edn.*, 40 Ohio App.3d 111, 112 (9th Dist.1988).

3. "For the purposes of res judicata, an administrative proceeding is quasi-judicial if the parties have had an ample opportunity to litigate the issues involved in the proceeding." *Elhanise, Inc. v. Liquor Control Comm.*, 2014-Ohio-2243, ¶ 14 (10th Dist.). Res judicata does not attach until there has been a determination on the merits. *Yoder v. State Bd. of Edn.*, 40 Ohio App.3d 111, 112 (9th Dist. 1988).

4. Res judicata does not apply when a subsequent administrative action is based upon a different cause of action and based on a different subjection of a rule. *Mohlman v. Dept. of Ins.*, Montgomery C.P. No. 2022 CV 01049 (Mar. 1, 2023).

5. Res judicata does not bar an agency's proposed denial of application for license renewal after having already brought an action to revoke the license based on the same charges. *Elhanise, Inc. v. Liquor Control Comm.*, 2014-Ohio-2243, ¶ 20 (10th Dist.).

6. An agency's denial of a license application or a license reinstatement application is not tantamount to a permanent revocation. The applicant may file new applications in the future, but the agency is under no obligation to issue a new license, given past transgressions. *Shree Swaminarayam Corp. v. Lottery Comm.*, 2016-Ohio-2641, ¶ 12 (8th Dist.).

7. Claim preclusion/issue preclusion applies to administrative decisions of a quasi-judicial nature.

    a. Claim preclusion/issue preclusion applies to administrative decisions of a quasi-judicial nature.

        i. "[O]rdinarily, if an administrative proceeding is of a judicial nature and if the parties have had an adequate opportunity to litigate the issues involved in the proceeding, the doctrine of collateral estoppel may be used to bar litigation of issues in a second administrative proceeding." *Superior's Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, 135 (1980); *Doan v. S. Ohio Adm. Dist. Council*, 145 Ohio App.3d 482, 486 (10th Dist. 2001).

        ii. The doctrine of res judicata "is based on an overall fairness rationale and is not to be rigidly applied." *Henninger v. Sabatini*, Nos. 90-T-4369 and 90-T-4394 (11th Dist. Feb. 8, 1991). Stated another way, res judicata is not a shield to protect the blameworthy. *Davis v. Wal-Mart Stores, Inc.*, 93 Ohio St.3d 488, 491 (2001).

    b. A judgment or decree in a former action does not bar a subsequent action when the causes of action are not the same, even though each action relates to the same subject matter. To determine whether a second action was barred by this rule of law, one of the primary considerations is the identity of the evidence necessary to sustain the action. *Ft. Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.*, 81 Ohio St.3d 392, 395-396 (1998).

8. Most cases hold that appeal does not affect the application of res judicata.

    a. Most Ohio cases hold that a pending appeal does not preclude the application of res judicata. *State v. Wise*, 2004-Ohio-6241, ¶ 13 (12th Dist.); *New York Life Ins. Co. v. Tomchik*, Nos. 98-CO-38 and 98-CO-71 (7th Dist. Mar. 17, 1999) ("judgment which fully disposes of a

case is a final judgment for purposes of collateral estoppel, even if that judgment is pending appeal."); *Cully v. Lutheran Med. Ctr.*, 37 Ohio App.3d 64, 65 (8th Dist. 1987) (If the judgment is later reversed on appeal, the party can petition the trial court to vacate the judgment in the second action pursuant to Civ.R. 60(B)(4)); *Armstrong v. Armstrong*, 99 Ohio App. 7, 13 (1st Dist.1954).

b. A minority of cases have held that an appeal may preclude the application of res judicata. *Uebel v. Bd. of Edn. of Edgewood City School Dist.,* 2002-Ohio-864, ¶ 8 (12th Dist.)) ("If a previous judgment is still pending on appeal, there is no 'existing final judgment' upon which res judicata could be invoked to bar a subsequent action."); *Vincent v. Wheeling Pittsburgh Steel Corp.*, No. 99-JE-7 (7th Dist. July 27, 1999) (rejecting application of res judicata when pending appeal from the Industrial Commission to the common pleas court was a de novo review).

XI. JUDICIAL REVIEW

There is no inherent right to appeal an order of an administrative agency. However, a right to appeal may be provided by statute. R.C. 119.12 sets forth a party's ability to appeal the adjudications of many administrative agencies. The statute provides procedures for who may appeal; where and when to file an appeal; and how to perfect an appeal. The statute establishes the duties of an agency to file the administrative record. The statute also permits an appellant to move for a stay of an agency's order pending the outcome of the appeal and also to move for the admission of additional evidence. The statute also sets standard of review before both the common pleas court and the appellate court.

A. The Right to Appeal

1. There is no inherent right to appeal.
    a. The right to appeal the action or the determination of an administrative body is neither inherent nor inalienable. At common law, the right to appeal may be exercised by only those parties who are able to demonstrate being prejudiced by the action of the body from which the appeal is taken. The right to appeal must be derived from a constitutional or statutory right. *Willoughby Hills v. C.C. Bar's Sahara, Inc.*, 64 Ohio St.3d 24, 26 (1992); *Corn v. Liquor Control Comm.*, 160 Ohio St. 9, 11 (1953); *G & D, Inc. v. Liquor Control Comm.*, 2002-Ohio-4407, ¶ 12 (3d Dist.).
    b. "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." Ohio Const., art. IV, § 4(B).
2. An administrative appeal must be authorized by statute.
    a. In the context of administrative appeals, courts of common pleas have the power to review proceedings of administrative officers and agencies only as may be provided by law. *Nkanginieme v. Dept. of Medicaid*, 2015-Ohio-656, ¶ 15 (10th Dist.).
    b. The common pleas court does not have jurisdiction to review actions of administrative agencies unless granted by R.C. 119.12 or other specific statutory authority. *Biser v. Dept. of Health*, 2020-Ohio-6836, ¶ 8 (7th Dist.); *Abt v. Ohio Expositions Comm.*, 110 Ohio App.3d 696, 699 (10th Dist. 1996).
3. Which statute governs the appeal?
    a. Absent a more specific statutory authorization, R.C. 119.12 generally governs appeals from adjudications of state agencies.
        i. "Any party adversely affected by any order of an agency issued pursuant to an adjudication may appeal from the order of the agency to the court of common pleas [in the designated county]." R.C. 119.12(A). "Agency" and "adjudication" are defined by R.C. 119.01, and R.C. 119.12 delineates the appropriate county for filing.
        ii. R.C. 119.12, the appeals section of the Ohio Administrative Procedure Act, generally applies to appeals from administrative adjudications from state agencies. *Hummel v. Dept. of Job & Family Servs.*, 2005-Ohio-6651, ¶ 15 (6th Dist.).

iii. R.C. 119.12(B) does not provide for judicial review of all decisions made by all governmental agencies; it applies only to state agencies as defined by R.C. 119.01(A)(1). *Geyer v. Clinton Cty. Dept. of Job & Family Servs.*, 2021-Ohio-411, ¶ 12 (12th Dist.); *State ex rel. Small World Early Learning Ctr. v. Dept. of Job & Family Servs.*, 2019-Ohio-4329, ¶ 29 (10th Dist.).

b. R.C. 2506.01 generally governs appeals from decisions of political subdivisions.

i. "[E]very final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be reviewed by the court of common pleas of the county in which the principal office of the political subdivision is located as provided in Chapter 2505. of the Revised Code." R.C. 2506.01(A). "Final order, adjudication, or decision" is defined by R.C. 2506.01(C).

ii. R.C. 2506.01 authorizes a court of common pleas to review a final decision from an agency of a political subdivision; in contrast, R.C. 119.12 confers subject matter jurisdiction on a trial court over an appeal from a decision rendered by a state agency. *Crane v. Adult Parole Auth.*, 2023-Ohio-3031, ¶ 17 (10th Dist.).

iii. R.C. 119.12 does not apply to appeals brought under R.C. 2506.01. *Dembie v. Cleveland*, 2008-Ohio-3971, ¶ 7 (8th Dist.).

iv. Likewise, R.C. 2506.01 applies only to orders from political subdivisions, not to orders from state agencies. *Garg v. State Fire Marshal*, Franklin C.P. No. 12CVF-06-7204 (Oct. 17, 2012).

c. Specific agency statutes may provide appellate procedures that differ from or modify R.C. 119.12 procedures.

i. Statutes other than R.C. Chapter 119 may grant the right to appeal an adjudication by a state agency and may have their own procedures. R.C. 4112.06 (judicial review of a final order of the Ohio Civil Rights Commission); R.C. 5101.35 (judicial review of adjudications involving family services programs); R.C. 3745.04 (review of actions of the Director of the Ohio Environmental Protection Agency).

ii. If a state agency's judicial review proceedings are not specifically made subject to R.C. Chapter 119, then R.C. Chapter 119 does not apply. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Civ. Rights Comm.*, 66 Ohio St.2d 192, 194 (1981).

d. R.C. Chapter 2505 governs appeals that are authorized by statute but do not reference a specific statutory appellate process.

i. If a statute provides for appeal of an administrative agency's decision but does not reference the statute under which the appeal must be taken, R.C. Chapter 2505 governs the procedure for administrative appeals. *Deaconess Hosp. v. Dept. of Job & Family Servs.*, 2012-Ohio-95, ¶ 13 (10th Dist.).

ii. The phrase "unless otherwise provided by law" in R.C. 2505.07, setting forth the deadline for filing a notice of appeal of any agency's final order, refers to the other state

statutes, and does not permit a city via local ordinance to change the deadline. *Black v. Calvert*, 2016-Ohio-2712, ¶ 15 (5th Dist.).

e. If a statute does not grant the right to appeal a final agency order, there is no right to appeal.

   i. Not all orders issued by administrative agencies, even ones that are denoted as "final," are subject to appeal; if a statute provides that an agency's decision is "final" and does not include a separate, specific statutory grant of jurisdiction to the trial court under R.C. 119.12, appeal under R.C. 119.12 is precluded. *Electronic Classroom of Tomorrow v. State Bd. of Edn.*, 2021-Ohio-3445, ¶ 10.

   ii. If an administrative rule provides for administrative review of an agency's decision under R.C. 119.01 to 119.09, but specifically does not invoke R.C. 119.12, the agency is not an "agency" for judicial review of its decision, and thus the courts do not have jurisdiction to review the administrative decision. *Vendors Representative Commt. v. Opportunities for Ohioans with Disabilities*, 2022-Ohio-1252, ¶ 14-16.

f. Administrative appeals may not be filed in federal court absent statutory authority.

   i. An appellant cannot appeal a state agency decision in federal district court under the court's exercise of supplemental jurisdiction under 28 U.S.C. 1367 if no right to appeal exists under state law. *Lexington Supermarket, Inc. v. U.S. Dept. of Ag.*, 84 F.Supp.2d 886, 889 (S.D.Ohio 1999).

   ii. If a federal program funded with federal dollars has a regulatory scheme that (a) clearly defines the method of resolving claims as comprising an independent hearing and (b) mandates that the hearing determination is the final administrative determination, Ohio's R.C. Chapter 119 administrative appeal process may not be used to appeal the hearing determination. *Mahoning-Youngstown Community Action Partnership v. Dept. of Edn.*, 2011-Ohio-6394, ¶ 7-8 (10th Dist.).

B. Who May Appeal

1. Under R.C. 119.12, only a "party" may appeal.

   a. Under R.C. 119.12(A), any party adversely affected by an agency order issued under an adjudication may appeal from that order to the court of common pleas of the county designated in R.C. 119.12(B).

   b. "Party" is defined as "the person whose interests are the subject of an adjudication by an agency." R.C. 119.01(G).

   c. "Person" is defined as "a person, firm, corporation, association, or partnership." R.C. 119.01(F).

   d. Unless a statute provides otherwise, no person may appeal from an adjudicatory order of an administrative agency to which he was not a party. *Harrison v. Public Utilities Comm.*, 134 Ohio St. 346, 347 (1938); *Blue Cross of Northeast Ohio v. Ratchford*, 21 Ohio App.3d 113, 114 (10th Dist. 1984).

i. A person who had not applied for a permit could not appeal the Ohio State Racing Commission's approval of another person's application for a permit. *Northeast Ohio Harness v. State Racing Comm.*, No. 85AP-221 (10th Dist. July 18, 1985).

ii. Under R.C. 119.12, community residents had no right to appeal a plan approval granted to a real estate developer for the construction of a mall complex. *Pinkney v. Dept. of Indus. Relations*, No. 74AP-231 (10th Dist. Sept. 17, 1974).

iii. Residents of a school district had no right to appeal a decision of the State Board of Education assigning or joining a school district to a joint vocational school district, as they are not parties under R.C. 119.12. Only the local school board could bring the appeal. *Barnes v. State Bd. of Edn.*, No. 76AP-423 (10th Dist. Dec. 14, 1976).

e. Government entities are generally not "parties" under R.C. 119.12.

i. A government entity is not a "party."

(a) Because "Party" is defined as "the person," R.C. 119.01(G), and "Person" is defined as "a person, firm, corporation, association, or partnership," R.C. 119.01(F), which list excludes any government entity or agency, a government agency cannot be a party for appeals under R.C. 119.12.

(b) Neither the state, a state agency, nor its director was a "party" within the meaning of R.C. 119.01(G). *State ex rel. Osborn v. Jackson*, 46 Ohio St.2d 41, 47 (1976); rev'd on other grounds, *Dept. of Adm. Servs. v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 52-53 (1990); *Collyer v. Broadview Dev. Ctr.*, 74 Ohio App.3d 99, 102 (10th Dist. 1991).

(c) If the State acts merely as an adjudicator, without an independent interest in the matter, the State is not a proper party to an appeal under 119.12. *Haig v. State Bd. of Edn.*, 62 Ohio St.3d 507, 510 (1992).

(d) An administrative body performing the quasi-judicial function of hearing appeals, not being the administrative body that issued the decision being appealed, and not having a legally cognizable interest in the outcome, is not proper party to an administrative appeal of its decision. *Dayton Pub. Schools v. Dayton Civ. Serv. Bd.*, 2014-Ohio-4702. ¶ 13 (2d Dist.).

(e) An "appointing authority" has no right of appeal to the common pleas court from a decision of the state personnel board of review disaffirming a job-abolishment by such appointing authority because the appointing authority is not a "party" whose interests are the subject of the adjudication nor is it adversely affected by the decision. *In re Job Abolishment of Jenkins*, 120 Ohio App. 385, 387-88 (10th Dist. 1963).

ii. The government agency is a "party":

A local county board of developmental disabilities is a "party" within the meaning of R.C. 119.01 and may file an appeal if the proceedings of the state administrative agency

are quasi-judicial in nature. *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St.3d 147, 150, (1989).

2. The party must be adversely affected by the agency's decision.

   a. The party is adversely affected by an adjudication under R.C. 119.12.

      i. The action of an agency is not an adjudication if it does not determine the rights, duties, privileges, benefits, or legal relationships of any party. *Ninth Street Church of Christ, Inc. v. Reich*, 1 Ohio App.3d 141, 144-145 (10th Dist. 1981).

      ii. A party is adversely affected under R.C. 119.12 when its rights, privileges, benefits, or pecuniary interests are the subject of the administrative adjudication. *Rose v. Dept. of Job & Family Servs.*, 2005-Ohio-1804, ¶ 11 (12th Dist.).

      iii. The party must be "adversely affected" by an agency's decision to appeal to the court under R.C. 119.12. *Ward v. Dept. of Job & Family Servs.*, 2015-Ohio-5539, ¶ 22 (9th Dist.).

      iv. A party is not adversely affected under R.C. 119.12 if there is no agency determination at all. For example, a party is not adversely affected where a state agency remanded the matter to the county agency for a new determination. *Johnson v. Dept. of Job & Family Servs.*, 2013-Ohio-1451, ¶ 12 (8th Dist.).

      v. When the parties execute a settlement prior to the agency holding an administrative hearing, the parties fulfill their obligations pursuant to the settlement, and the agency, because of the settlement, does not issue a decision, there is no final appealable order and, thus, nothing for the court to review. *Williams-Lindsey v. Dept. of Health*, 2020-Ohio-1337, ¶ 19 (11th Dist.).

      vi. A consent agreement is not an adjudication under R.C. Chapter 119. However, the court of common pleas can review the legality of a consent agreement on appeal under R.C. 119.12. *Gibbons v. State Dental Bd.*, 2022-Ohio-2463, ¶ 33-34 (11th Dist.).

      vii. Some examples include the following:

         (a) A bank that receives notice under R.C. 1111.02 of a hearing on an application for the establishment of a new branch by an applicant bank is a "party adversely affected" under R.C. 119.12 and has standing to appeal an order by the superintendent of banks granting the application. *Clermont Natl. Bank v. Edwards*, 27 Ohio App.2d 91 (10th Dist. 1970), paragraph one of the syllabus.

         (b) Under R.C. 119.12, community residents had no right to appeal a plan approval granted to a real estate developer for the construction of a mall complex. There was no requirement of notice to the community residents, nor a requirement of a hearing, and there had been no hearing, no record, nor proceedings of any kind; therefore there was nothing from which to appeal. *Pinkney v. Dept. of Indus. Relations*, No. 74AP-231 (10th Dist. Sept. 17, 1974).

         (c) Residents of a school district had no right to appeal a decision of the State Board of Education assigning or joining a school district to a joint vocational school district,

as they are not parties under R.C. 119.12. Only the local school board could bring the appeal. *Barnes v. State Bd. of Edn.*, No. 76AP-423 (10th Dist. Dec. 14, 1976).

b. Adjudications under R.C. Chapter 2506.

i. The Supreme Court of Ohio has consistently held that the class of persons entitled to appeal under R.C. Chapter 2506 is limited to those persons directly affected by the administrative decision. While a nonprofit corporation or unincorporated association has standing to file an action for declaratory judgment or injunctive relief on behalf of its members who have standing to sue individually, "the right to appeal [pursuant to R.C. 2506.01] exists only where expressly conferred by statute. There is nothing in R.C. Chapter 2506 or 2505 in any way suggesting that an appeal may be brought on behalf of a person entitled to appeal by a voluntary association of which he is a member." *Women of the Old West End v. Toledo*, No. L-97-1204 (6th Dist. June 5, 1998).

ii. An administrator's letter did not exercise discretion and did not trigger notice and a hearing. Thus, the letter did not result from a quasi-judicial proceeding, and the court of common pleas did not have jurisdiction to review the letter under R.C. Chapter 2506. *Johnson v. Danbury Twp.*, 2021-Ohio-755, ¶ 13 (6th Dist.).

iii. Board of township trustees' declaration, under R.C. 507.87, that a property constitutes a nuisance does not require notice or a hearing before the declaration and therefore does not constitute a quasi-judicial act. Under R.C. 2506.01(A), the court of common pleas has no jurisdiction to review the declaration. Even if the Board holds an evidentiary hearing, the action is not transformed into a quasi-judicial determination. *Grater v. Damascus Twp. Trustees*, 2021-Ohio-1929, ¶ 17 (3d Dist.).

c. Non-attorneys may not file a notice of appeal on behalf of others.

d. A notice of appeal filed under R.C. 119.12 is a nullity if filed by a non-attorney on behalf of another. If it appears that one not licensed to practice law has instituted legal proceedings on behalf of another in a court of record, such suit should be dismissed. *Williams v. Global Constr. Co.*, 26 Ohio App.3d 119, 121 (10th Dist. 1985).

e. Considering the holding that a non-attorney cannot file a complaint on behalf of a corporation, the filing of a notice of appeal under R.C. 119.12 by a non-attorney is similarly a nullity and must be dismissed. *Williams v. Global Constr. Co.*, 26 Ohio App.3d 121 (10th Dist. 1995); *Amvets Post 84 v. Dept. of Health*, Franklin C.P. No. 11CVF08-11597 (Dec. 8, 2011).

C. Perfecting an Appeal

1. The court must have subject matter jurisdiction.

a. "Jurisdiction" refers to a court's statutory or constitutional power to adjudicate the case. Courts of common pleas have only such powers of review of proceedings of administrative officers and agencies as may be provided by law. Courts of common pleas lack jurisdiction to review actions of administrative agencies unless R.C. 119.12 or some other specific statutory authority grants it. *Clifton Care Ctr. v. Dept. of Job & Family Servs.*, 2013-Ohio-2742, ¶ 9 (10th Dist.). *See*, for example, R.C. 4112.06 (judicial review of a final order of the Ohio Civil Rights

Commission); R.C. 3745.06 (review of decisions by the Environmental Review Appeals Commission).

b. An appellant must strictly comply with all statutory requirements to invoke the jurisdiction of the common pleas court.

   i. If a right to appeal is provided only through statute, the party must strictly comply with the statutory requirements for filing an appeal. *Ramsdell v. Civil Rights Comm.*, 56 Ohio St.3d 24, 27 (1990); *Holmes v. Union Gospel Press*, 64 Ohio St.2d 187, 188 (1980).

   ii. The Ohio Supreme Court has repeatedly "held that conditions for pursuing an appeal are mandatory and jurisdictional." *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 2007-Ohio-4641, ¶ 10.

   iii. A party adversely affected by an agency decision must strictly comply with R.C. 119.12 to perfect an appeal. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 17; *Everett v. Dept. of Job & Family Servs.*, 2019-Ohio-4504, ¶ 13 (6th Dist.); *Swartz v. Dept. of Job & Family Servs.*, 2014-Ohio-3552, ¶ 8 (12th Dist.); *Brass Pole v. Dept. of Health*, 2009-Ohio-5021, ¶ 13 (10th Dist.); *Civil Serv. Personnel Assn. v. State Emp. Relations. Bd.*, No. 13035 (9th Dist. Sep. 16, 1987).

   iv. Compliance with the requirements as to the filing of the notice of appeal—the time of filing, the place of filing and the content of the notice as specified in the statute—are all conditions precedent to jurisdiction. *Zier v. Bur. of Unemp. Comp.*, 151 Ohio St. 123, 125 (1949).

   v. Failure to properly perfect the appeal is fatal, as it divests the court of subject-matter jurisdiction. *Williams v. Drabik*, 115 Ohio App.3d 295, 297 (10th Dist. 1996).

c. The jurisdiction of the court may be raised at any time by motion or by the court sua sponte, and it cannot be waived. *Hickey v. State Med. Bd.*, No. 50520 (8th Dist. June 12, 1986).

d. A trial court has authority to consider any pertinent evidentiary material, including affidavits, when determining its own jurisdiction. The submission of such materials does not require that a motion to dismiss be converted into a motion for summary judgment. *Oakes v. Dept. of Pub. Safety*, 2014-Ohio-5314, ¶ 27-28 (11th Dist.).

D. Notice of Appeal

1. The notice of appeal must contain the following:

   a. The notice must name the appellee agency.

      i. An appellant's notice of appeal of an administrative agency's final order must name the appellee agency. Without it, the common pleas court lacks subject-matter jurisdiction to hear the appeal. *Home Health Accessibility, L.L.C. v. Dept. of Medicaid*, 2019-Ohio-487, ¶ 8 (10th Dist.), citing *Kingsley v. State Personnel Bd. of Review*, 2011-Ohio-2227, ¶ 29 (10th Dist.).

   b. The notice must state that the order "is not supported by reliable, probative, and substantial evidence and is not in accordance with law." R.C. 119.12(D).

i. "The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law." R.C. 119.12(D).

ii. Courts are split on whether failing to include this specific language in the notice of appeal results in a lack of subject matter jurisdiction.

iii. Cases holding that R.C. 119.12(D) language is jurisdictional include the following:

(a) The appellant must state that the agency's order "is not supported by reliable, probative, and substantial evidence and is not in accordance with law." *River Room, Inc. v. Liquor Control Comm.*, 2015-Ohio-2924, ¶ 10 (10th Dist.); *Siegler v. Ohio State Univ.*, 2011-Ohio-2485, ¶ 6 (10th Dist.); *Foreman v. Lucas Cty. Court of Common Pleas*, 2010-Ohio-4731, ¶ 15 (10th Dist.); *Fisher v. Bur. of Motor Vehicles*, Lorain C.P. No. 14CV182657 (June 3, 2014).

(b) If the notice of appeal does not include this required statement, the court lacks subject matter jurisdiction over the appeal. *Everett v. Dept. of Job & Family Servs.*, 2019-Ohio-4504, ¶ 24 (6th Dist.); *Laster v. State Bd. of Cosmetology*, Franklin C.P. No. 15CV-11333, p. 2 (Feb. 25, 2016).

iv. Cases holding that R.C. 119.12(D) language is not jurisdictional include the following:

(a) The filing of the notice of appeal itself is an affirmative statement that the respondent believes that the underlying order is not supported by reliable, probative and substantial evidence or is not in accordance with law, and therefore the requirement to put the standard of review in the notice of appeal is redundant. *Zidian v Dept. of Commerce*, 2012-Ohio-1499, ¶ 43-45 (7th Dist.); *State Bd. of Pharmacy v. Evankovich*, 2011-Ohio-3172, ¶ 31 (7th Dist.).

v. The notice must set forth the order appealed from.

(a) Attaching a copy of the order satisfies the requirement to set "forth the order appealed." *Hunnewell v. State Bd. of Nursing*, Franklin C.P. No. 05CV6560 (June 15, 2006).

(b) The party need not attach a copy of the order as long as the appellant sufficiently describes the order appealed from. *Gross v. Dept. of Agriculture*, 2022-Ohio-2154, ¶ 8 (10th Dist.).

vi. Individual agency statutes may change or eliminate these requirements. For example, the requirement under R.C. 119.12 to set forth the "grounds of the party's appeal" does not apply to appeals made under R.C. 5101.35(E). *Giese v. Dir., Dept. of Job & Family Servs.*, 2007-Ohio-2395, ¶ 27 (6th Dist.); *Hummel v. Dept. of Job & Family Servs.*, 2005-Ohio-6651, ¶ 15 (6th Dist.).

2. The notice of appeal must be filed with the agency and the court.

a. Effective May 8, 2009, the General Assembly revised R.C. 119.12 to remove a requirement to file the original notice of appeal with the agency, and a copy with the court. The statute now

provides that, "[i]n filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice." R.C. 119.12(D).

b. Courts are split on whether the notice filed with the agency and the notice filed with the court of common pleas must be identical:

i. The notices must be identical:

(a) Although an appellant can file an original or a copy of the original with either the agency or the common pleas court, R.C. 119.12 nonetheless continues to require the two documents be identical. *Legleiter v. Dept. of Edn.*, 2012-Ohio-5668, ¶ 17 (10th Dist.).

ii. The notices need not be identical:

(a) Although an appellant filed two notices of appeal that were not identical, the notices informed the court and the agency of the appeal of the agency's order, and therefore the appellant complied with R.C. 119.12's filing requirement "and the spirit of the statute." The notices need not be exact copies of each other as long as they timely inform the respective recipients of the respondent's intent to appeal the agency's order. *Zidian v. Dept. of Commerce*, 2012-Ohio-1499, ¶ 39 (7th Dist.).

(b) Although the two notices of appeal had different signatures and were not photocopies of each other, the notices were filed with both the agency and the trial court, and the appellant met the requirements of R.C. 119.12. *Morrison v. Dept. of Ins.*, 2002-Ohio-5986, ¶ 18 (4th Dist.).

E. Where to File

1. An appeal must be filed with both the agency and the court of common pleas.

a. "Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. . . . The notice of appeal shall also be filed by the appellant with the court." R.C. 119.12(D).

2. In which court of common pleas must the appeal be filed? R.C. 119.12

a. Under R.C. 119.12(A) (effective October 3, 2023), any party adversely affected by any order of an agency issued under an adjudication may appeal from the order of the agency to the court of common pleas of the county designated as follows:

i. R.C. 119.12(B)(1): Appeals of an order (1) denying an applicant admission to an examination, (2) denying the issuance or renewal of a license or registration of a licensee, (3) revoking or suspending a license, or (4) allowing the payment of a forfeiture under R.C. 4301.252 must be filed in the county where the place of business of the licensee is located or the county where the licensee is a resident.

ii. R.C. 119.12(B)(2): An appeal from an order issued by any of the following agencies must be made to the court of common pleas of Franklin County or the court of common

pleas in the county where the place of business of the licensee is located or the county where the licensee is a resident:

(a) Liquor Control Commission

(b) Ohio Casino Control Commission

(c) State Medical Board

(d) State Chiropractic Board

(e) Board of Nursing

(f) Certain Bureau of Workers' Compensation cases.

iii. R.C. 119.12(B)(3): Appeals from orders of the fire marshal issued under R.C. Chapter 3737 must be to the court of common pleas of the county where the building of the aggrieved person is located.

iv. R.C. 119.12.(B)(4): Appeals under R.C. 124.34(B) from a decision of the State Personnel Board of Review or a municipal or civil service township civil service commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the Department of Rehabilitation and Correction, to the Franklin County Court of Common Pleas.

v. R.C. 119.12(B)(5): If any party appealing from an order described in R.C. 119.12(B)(1), (2), or (6) is not a resident of and has no place of business in this state, the party must appeal to the Franklin County Court of Common Pleas.

vi. R.C. 119.12(B)(6): Parties adversely affected by "any other adjudication" may appeal to the Franklin County Court of Common Pleas, or in the county where the place of business of the party is located or the county where the party resides.

3. The legislature's use of the word "or" strongly connotes the concept that a licensee must choose either the court of common pleas located in the county of his or her place of business, or the court of common pleas located in his or her county of residence, as determined at the time of filing, in which to file an appeal. Filing in both jurisdictions constitutes forum shopping and is not an option. *Althof v. State Bd. of Psychology*, 2006-Ohio-502, ¶ 12 (4th Dist.).

4. Where is the place of business?

   a. If a psychologist worked twice per month in Gallia County, performing services not regulated by the Psychology Board, Gallia County was not the county of place of business for purposes of an appeal of an order of the Psychology Board. *Althof v. State Bd. of Psychology*, 2006-Ohio-502, ¶ 15 (4th Dist.).

   b. If a medical marijuana facility license applicant was not located in or a resident of Cuyahoga County, the Cuyahoga County Court of Common Pleas lacked subject-matter jurisdiction to hear the appeal. *Hanging Gardens OH, LLC v. Dept. of Commerce*, Cuyahoga C.P. No. CV-21-943385 (May 10, 2021).

   c. The place of business is the location where the person engages in business. Receiving mail is a function of engaging in business. Despite a licensee's contention that it operates through the

internet and cellular phones, and that most of its work is done in one county, the county where the business receives its mail is the county with jurisdiction to hear the appeal. *ePro Services, LLC v. Dept. of Commerce*, Franklin C.P. No. 15CV10060, pp. 7-8 (Mar. 7, 2016).

d. The county where the dentist worked four days per week, and the address he gave to the Ohio State Dental Board for mailing purposes, was the county of place of business, rather than the county where the dentist worked one day per week. *Duchon v. State Dental Bd.*, Miami C.P. No. 07 CV 00564 (July 30, 2007).

e. If a licensee both resided in and had his place of business in Cuyahoga County, the Franklin County Common Pleas Court lacked jurisdiction to hear the appeal. *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 39 (10th Dist.).

f. No provision in R.C. 119.12 permits a common pleas court to transfer, rather than dismiss, a case filed in the incorrect county. *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 38 (10th Dist.).

5. In which court of common pleas should the appeal be filed under R.C. 2506.01?

a. In most cases, the notice of appeal made under R.C. Chapter 2506 must be filed in the court of common pleas of the county where the principal office of the political subdivision from which an order is being appealed is located. R.C. 2506.01(A).

b. As used in R.C. 2506.01, the use of the word "may" plainly and unambiguously refers to a party's discretion to appeal an administrative ruling—it does not provide that party any discretion as to where the notice of appeal must be filed. *Hamer v. Danbury Twp. Bd. of Zoning Appeals*, 2020-Ohio-3209, ¶ 14 (6th Dist.).

c. Civ.R. 4.2(N), governing service of a complaint upon a municipality, does not apply to an administrative appeal taken under R.C. Chapter 2506. *Huffman v. Cleveland, Parking Violations Bur.*, 2016-Ohio-496, ¶ 25 (8th Dist.).

F. How to File

1. "Filing" requires actual delivery.

a. The act of depositing the notice in the mail, in itself, does not constitute a "filing," at least where the notice is not received until after the expiration of the prescribed time limit. The term "filed" requires actual delivery. *Dudukovich v. Housing Authority*, 58 Ohio St.2d 202, 204 (1979); *State ex rel. Crabtree v. State Teachers Retirement Sys.*, 2012-Ohio-1916, ¶ 41 (10th Dist.); *Frasca v. State Bd. of Chiropractic Examiners*, No. 97AP-1387 (10th Dist. July 30, 1998); *Jackson v. State Bur. of Motor Vehicles*, No. CA88-10-142 (12th Dist. June 30, 1989).

b. The term "filing" means actual delivery into the official custody and control of the administrative agency. *Duffy v. Hamilton Cty. Bd. of Commrs.*, 92 Ohio App.3d 717, 721 (1st Dist. 1994).

c. Filing occurs when an appellant actually and timely delivers the written notice of appeal to the correct tribunal. *Lupo v. Columbus*, 2014-Ohio-2792, ¶ 15 (10th Dist.).

d. An appellant may use any method reasonably certain to accomplish delivery to the agency within the required 30 days. *Lupo v. Columbus*, 10th Dist. Franklin No. 13AP-1063, 2014-Ohio-2792, ¶ 15.

e. The jurisdictional requirements for filing a notice of appeal under R.C. 119.12 are met if the notice is timely received by the agency and the court of common pleas, even if the clerk of courts refuses to accept the notice of appeal because the security deposit was not tendered. The receipt of the security deposit is not a jurisdictional requirement. *Bobbs v. Longview State Hosp.*, No. 79AP-357 (10th Dist. Nov. 8, 1979).

2. Does a court's service copy upon the agency constitute "filing?"

a. For appeals filed under R.C. 119.12, the courts are split as to whether the forwarding of a copy of a notice of appeal by a court to the agency, in its routine administrative practice, is sufficient to confer jurisdiction on that court.

i. Court service is insufficient:

(a) Service by the court is insufficient even when the agency receives from the court the copy of the notice of appeal within the fifteen-day time limit. *Ruiz v. State Dept. of Public Safety*, Franklin C.P. No. 15 CV782, p. 3 (Mar. 18, 2015); *Mahmoud v. State Med. Bd.*, Franklin C.P. No. 13 CV 1907, p. 3 (May 2, 2013).

ii. Court service is sufficient:

(a) Delivery of the notice of appeal by the clerk of courts to the agency is compliant with R.C. 119.12 if the notice is received by the agency within the fifteen-day deadline. *Loves v. Dept. of Public Safety*, Franklin C.P. No. 19 CV 9545, p. 3 (April 20, 2020); *Lana v. Bureau of Motor Vehicles*, Clermont C.P. No. 2014 CVF 01304, p. 9 (Jan. 25, 2016); *Tarjanyi v. Dept. of Ins.*, Montgomery C.P. No. 2023 CV 03220, p. 4 (Aug. 16, 2023).

b. For appeals filed under R.C. 2505.04, the appeal is perfected when the court serves the agency with a copy of notice of appeal within the time allowed for appeal. *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm.*, 2011-Ohio-1604, ¶ 32.

i. The agency must receive the notice of appeal by whatever method used for delivery, which could include service by the clerk of courts by the deadline in R.C. 2505.07. *Henson v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 104274, 2016-Ohio-8146, ¶¶ 10-12.

3. The appellant must file with the agency itself, not its counsel.

a. Under R.C. 119.12, service on the attorney representing the agency within the 15-day time frame for filing the notices of appeal is not a timely filing with the agency. *Blasko v. State of Bd. of Pharmacy*, 2001-Ohio-3270, ¶ 11 (7th Dist.); *Anda-Brenner v. State Dental Bd.*, No. 99-P-0064 (11th Dist. Aug. 11, 2000); *Chorpenning v. Div. of Real Estate*, No. 88 CA 7 (4th Dist. May 9, 1989).

b. Under R.C. 2506.04, service of a notice of appeal on the opposing party's lawyer is not the same as filing it with the appropriate administrative body. *Li v. Revere Local Schools Bd. of*

Edn., 2020-Ohio-3157, ¶ 12 (9th Dist.); *Patrick Media Group, Inc. v. Cleveland Bd. of Zoning*, 55 Ohio App.3d 124, 125 (8th Dist. 1988).

G. When to File

1. Timeliness is a jurisdictional requirement.

    a. Failure to file the notice of appeal with the appropriate agency within the 15-day limit provided for in R.C. 119.12 deprives the court of jurisdiction over the appeal and mandates dismissal. *Nibert v. Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 103 (1998); *Jones v. Motor Vehicle Dealers Bd.*, 2013-Ohio-1212, ¶ 8 (10th Dist.); *Morrison v. Dept. of Ins.*, 2002-Ohio-5986, ¶ 14 (4th Dist.).

    b. Timeliness is a jurisdictional requirement and cannot be waived. The jurisdiction of the court may be raised at any time by motion or by the court. *Hickey v. State Med. Bd.*, No. 50520 (8th Dist. June 12, 1986).

2. Time to file an appeal is generally 15 days under R.C. 119.12.

    a. Unless otherwise provided by law relating to a particular agency, notices of appeal must be filed within 15 days after the service of the notice of the agency's order as provided in R.C. 119.05. R.C. 119.12(D) (eff. Oct. 3, 2023).

    b. In 2023, the General Assembly amended R.C. 119.12(D) to change the filing deadline calculation trigger from the date of "mailing" to the date of "service."

        Before October 3, 2023, a notice of appeal had to be filed within 15 days after "the mailing of the notice of the agency's order." R.C. 119.12(D). While notices of appeal must still be timely filed with both the court and the agency for a court to have subject matter jurisdiction, the method of calculating the deadline changed after October 3, 2023. *Nibert v. Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 103 (1998); *Bailey v. Dept. of Admin. Serv.*, 114 Ohio Misc.2d 48, 51 (C.P. 2000). The actual mailing date of the order was the event that triggered the appeal period. *Colonial, Inc. v. Liquor Control Comm.*, 2003-Ohio-3121, ¶ 13 (10th Dist.); *Geroc v. Veterinary Med. Licensing Bd.*, 37 Ohio App.3d 192, 195 (8th Dist.1987).

        i. After October 3, 2023, the agency must serve the final order upon the respondent using the procedure outlined in R.C. 119.05, and the filing deadline is 15 days after the date of service of the notice of the agency's order. R.C. 119.12(D).

        ii. Agency-specific statutes may alter the 15-day deadline for filing an appeal. R.C. 5101.35(E)(2) (party must appeal within 30 days, but deadline can be extended to a total of six months upon "good cause shown").

3. The time to file an appeal is generally 30 days under R.C. 2505.07.

    a. After the entry of a final order of an administrative officer, agency, or other instrumentality, the time to perfect an appeal, unless otherwise provided by law, is 30 days. R.C. 2505.07.

    b. Under R.C. 2505.07, the notice of appeal must be filed within 30 days following the agency's entry of its final order.

i. It is not enough that the appeal is filed in the appellate court with orders to serve the agency. The notice of appeal of an administrative agency's final order must be received by the agency within 30 days of the date the agency entered the final administrative order. *Digonno v. Hamilton*, 2019-Ohio-2273, ¶ 21 (12th Dist.), citing *Welsh Dev. Co. v. Warren Cty. Regional Planning Comm.*, 2011-Ohio-1604, ¶ 40; *Yeager v. Mansfield*, 2012-Ohio-2908, ¶ 28 (5th Dist.).

ii. The 30-day period within which a notice of appeal must be filed under R.C. 2505.07 begins when an administrative agency enters a final order, adjudication, or decision, not when it orally votes on that decision. *Lupo v. Columbus*, 2014-Ohio-2792, ¶ 14 (10th Dist.).

iii. A commission's minutes in which the decision is recorded are the final order for purposes of appeal under R.C. 2505.07. Entry of that order occurs when the commission approves the minutes. *State ex rel. Cox v. Youngstown Civ. Serv. Comm.*, 2021-Ohio-2799, ¶ 20; *Bode v. Concord Twp. Bd. of Trustees*, 2019-Ohio-2666, ¶ 18 (11th Dist.). A village's final order is entered upon the entry of the resolution, order, or directive into the official minute book. *Cline v. New Lexington*, 2015-Ohio-3727, ¶ 31 (5th Dist.).

iv. Memorialization, i.e., the drawing up and signing of the minutes was the "entry of the final order" of a board of zoning appeals under R.C. 2505.07. *Snell v. City of Mt. Vernon Bd. of Zoning Appeals*, No. 95 CA 24 (5th Dist. Dec. 18, 1995).

v. If no evidence in the record refutes the board's entry of the final order when the minutes were approved and signed, the time to file the notice of appeal begins on that date. *Rushworth v. Hinckley Twp. Bd. of Zoning Appeals*, 2021-Ohio-2230, ¶ 10 (9th Dist.).

vi. If an agency-specific rule defines how a final order is to be communicated, due process requires that the appeal of the order be within 30 days of the agency's compliance with its rule. Here, the agency's decision became final and appealable when the board of zoning appeals sent, by certified mail, a copy of its final decision as set forth in its zoning code. *Safety 4th Fireworks, Inc. v. Liberty Twp. Bd. of Trustees*, 2019-Ohio-3435, ¶ 28 (12th Dist); *American Water Mgt. Servs., L.L.C. v. Div. of Oil & Gas Resources Mgt.*, 2016-Ohio-2860 (10th Dist.) (period of appeal had not commenced because the Ohio Oil and Gas Commission had not complied with its statutory requirement).

4. For R.C. 119.12 appeals, the agency must comply with R.C. 119.09 before the deadline to appeal begins to run.

   a. Under R.C. 119.09, "the agency shall, in accordance with section 119.05 of the Revised Code, serve the party affected thereby a certified copy of the order and a statement of the time and method by which an appeal may be perfected. A copy of such order shall be provided to the attorneys or other representatives of record representing the party."

   b. An administrative agency must strictly comply with the procedural requirements of R.C. 119.12 for serving the final order of adjudication upon the party affected by it before the 15-day appeal period prescribed in R.C. 119.12 commences. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 19; *Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St.3d 306, 309 (1987).

c. Establishing valid service requires the following:

i. If a notice is sent by registered mail, with a return receipt requested, and thereafter a signed receipt is returned, a prima facie case is established that delivery of notice to that address occurred. The appellant then has the burden to rebut this evidence. *Tripodi v. Liquor Control Comm.*, 21 Ohio App.2d 110, 112 (7th Dist. 1970).

ii. The presumption of valid service is rebuttable by sufficient evidence demonstrating non-service. To determine whether a party has sufficiently rebutted the presumption of valid service, the trial court may assess the credibility and competency of the submitted evidence of non-service. *Starr v. Dept. of Commerce*, 2021-Ohio-2243, ¶ 25 (10th Dist.).

iii. An affidavit, by itself, stating that appellant did not receive service, may not be sufficient to rebut the presumption without any other evidence of a failure of service. *Starr v. Dept. Commerce,* 2021-Ohio-2243, ¶ 25 (10th Dist.).

d. Some examples include the following:

i. If an agency sent a copy of the final order to the respondent's attorney but never sent a copy of the final order to the respondent, the agency failed to comply with R.C. 119.09 and the 15-day deadline did not begin to run. *Sun Refining & Marketing Co. v. Brennan*, 31 Ohio St.3d 306, 308 (1987).

ii. If the certification on the agency's adjudication order did not contain a signed statement that it is a true and exact reproduction of the original document, the agency failed to serve a certified copy of the order upon the respondent and therefore failed to comply with R.C. 119.09. *Hughes v. Dept. of Commerce*, 2007-Ohio-2877, ¶ 15.

iii. If the agency's adjudication order did not adequately recite the respondent's appeal rights, the agency failed to comply with all procedural requirements and the time for appeal has not begun to run. *Pryor v. Dir., Dept. of Job & Family Servs*., 2016-Ohio-2907, ¶ 24.

iv. If the adjudication order sent to appellant was a certified copy that complied with the procedural requirements of R.C. 119.09, the appeal period properly commenced. *Calo v. Real Estate Comm.,* 2011-Ohio-2413, ¶ 19 (10th Dist.).

v. If there is evidence in the record that the letter and certified copy of the order were sent via certified mail, were signed for, and were date stamped, the agency has complied with R.C. 119.09, and the time to file an appeal has begun. *Jackson v. Dept. of Edn.*, 2016-Ohio-2818, ¶ 17 (9th Dist.).

vi. If the agency mailed the adjudication order to the licensee's address on file, the licensee received mail at that address during the proceedings without issue or complaint, and the licensee signed for the certified mail copy of the adjudication order, the agency complied with R.C. 119.09 and the licensee's due process rights, even if the address the agency used did not contain a street suffix or the plus-four digits after the zip code. *Large v. Dept. of Ins.*, 2024-Ohio-29, ¶ 15-17 (9th Dist.).

5. Calculating the statutory deadline is done as follows:

a. R.C. 1.14 applies to deadline calculation.

i. "The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls on Sunday or a legal holiday, the act may be done on the next succeeding day that is not Sunday or a legal holiday." R.C. 1.14.

ii. Courts have applied R.C. 1.14 when calculating filing deadlines under R.C. 119.12. *Everett v. Dept. of Job & Family Servs.*, 2019-Ohio-4504, ¶ 16 (6th Dist.); *Amoako v. Motor Vehicle Dealers Bd.*, 2014-Ohio-801, ¶ 7 (10th Dist.).

iii. R.C. 1.14 applies to an administrative appeal taken under R.C. Chapter 2505, so if the 30-day deadline to file the notice of appeal falls on a Sunday, the notice may be filed on the following day that is not a holiday. *NVR, Inc. v. Centerville*, 2016-Ohio-6960, ¶ 15 (2d Dist.).

b. The Civil Rules and Appellate Rules do not extend the time for filing.

i. Civ. R. 1(C) provides that the Civil Rules do not apply to procedures upon appeal to "review any judgment order or ruling." By their nature, the Civil Rules do not apply. *Townsend v. Bd. of Bldg. Appeals*, 49 Ohio App.2d 402, 403 (9th Dist. 1976).

ii. Civ.R. 6(B), which gives a court discretion to extend civil rule- and court-imposed deadlines, cannot be used to extend or limit a court's jurisdiction. Civ.R. 6(B) cannot be used to create subject matter jurisdiction if none exists. Civil Rules are procedural devices that do not extend or limit the jurisdiction of the courts of this state. R.C. 4112.06 required service through the clerk of court to invoke jurisdiction on the court, and the complainant failed to follow the statute's requirement. *Newman v. Civ. Rights Comm.*, 2019-Ohio-4183, ¶ 19 (2d Dist.).

iii. Civ.R. 6(E) does not apply to administrative appeals. R.C. 119.12 does not require a party to do some act within a prescribed period after the service of notice upon him; rather, it requires the filing of a notice of appeal with the agency and a copy with the court within 15 days after the mailing of the notice of the agency's order. *Ramsdell v. Civil Rights Comm.*, 56 Ohio St.3d 24, 28 (1990); *Townsend v. Bd. of Bldg. Appeals*, 49 Ohio App.2d 402, 403 (9th Dist. 1976).

iv. The Ohio Rules of Appellate Procedure do not apply when they conflict with specific provisions of R.C. Chapter 119. *Frasca v. State Bd. of Chiropractic Examiners*, No. 97AP-1387 (10th Dist. July 30, 1998).

v. R.C. 2505.07 specifically addresses the time for perfecting an appeal, and reference to App.R. 14(C) therefore does not apply. App.R. 14(C) does not apply to jurisdictional requirements of timeliness in filing an appeal with a court. *Kyser v. Summit Cty. Children Servs.*, 2022-Ohio-3467, ¶ 21 (9th Dist.).

c. The "mailbox" rule does not apply.

i. Although R.C. 119.12 permits the appellant to file by regular mail a notice with an agency, the burden still lies with the appellant to meet the statutory filing deadlines. *Burton v. Dept. of Agriculture*, No. 92AP-1499 (10th Dist. Feb. 9, 1993).

ii. To be timely filed, the agency must receive a notice of appeal within the time set forth in R.C. 119.12; it is not enough that the notice be merely mailed within that time. *Frasca v. State Bd. of Chiropractic Examiners*, No. 97AP-1387 (10th Dist. July 30, 1998).

iii. The act of depositing the notice of appeal in the mail is not, in and of itself, a "filing" if the notice is not received until after the prescribed time limit expires. If an appellant chooses to rely on ordinary mail for delivery of the notice of appeal, the appellant must accept the consequences if that manner of delivery proves inadequate. *Burton v. Dept. of Agriculture*, No. 92AP-1499 (10th Dist. Feb. 9, 1993).

iv. A notice of appeal filed with an agency on the 16th day is untimely, and the court lacks subject matter jurisdiction over the appeal. *Brass Pole v. Dept. of Health*, 2009-Ohio-5021, ¶ 12-17 (10th Dist.); *Frasca v. State Bd. of Chiropractic Examiners*, No. 97AP-1387 (10th Dist. July 30, 1998).

d. Licensees are responsible for maintaining the correct addresses on file with the agency.

i. A letter mailed to an incorrect address supplied by the party involved is that party's own negligence. If the address is in error because of the licensee's fault, the licensee cannot later be heard to complain that the licensee did not get the notice at the last known address. *Townsend v. Dollison*, 66 Ohio St.2d 225, 228 (1981).

ii. If an agency's statute requires a licensee to update an address within a certain amount of time after a change in that address, that licensee cannot rely on a delay in receiving the order to justify a late filing of the notice of appeal. *Coleman v. Bd. of Nursing*, 2013-Ohio-2073, ¶ 14 (10th Dist.); *State v. May*, No. 94CA2075 (4th Dist. July 19, 1995).

iii. If an agency's statute requires a licensee to notify the agency of a change of address, and there is no evidence that the licensee notified the agency of a change of address, the agency fully complies with R.C. 119.09 when it uses the licensee's address on file to mail a final order. *Large v. Dept. of Ins.*, 2024-Ohio-29, ¶ 15-17 (9th Dist.).

6. Additional consequences of failing to timely file are as follows:

a. When a court lacks subject matter jurisdiction due to the untimely filing of a notice of appeal with the trial court, the court may not consider evidence regarding service of the initial notice of opportunity for hearing. Had the licensee properly invoked the jurisdiction of the trial court, the trial court could have addressed the claim of lack of service of the notice of opportunity for hearing. Without such proper invocation of the trial court's jurisdiction, however, the trial court had neither the discretion nor the power to reach that issue. *Cyr v. State Med. Bd.*, 2022-Ohio-25, ¶ 11 (10th Dist.).

b. Amendments to a notice of appeal must occur within the 15-day period as set forth in R.C. 119.12. An attempt to amend made after that will be denied. *Home Health Accessibility, L.L.C. v. Dept. of Medicaid*, 2019-Ohio-487, ¶ 8 (10th Dist.); *Kingsley v. State Personnel Bd. of Review*, 2011-Ohio-2227, ¶ 12 (10th Dist.).

7. A court cannot grant a motion to transfer an R.C. 119.12 appeal to another common pleas court.

a. If a court lacks subject-matter jurisdiction to consider an administrative appeal, it cannot grant a motion to transfer venue to the appropriate court. *Nibert v. Dept. of Rehab. & Corr.*, 119 Ohio App.3d 431, 433 (10th Dist. 1997).

b. No provision in R.C. 119.12 permits a common pleas court to transfer, rather than dismiss, a case filed in the incorrect county. *Calo v. Real Estate Comm.*, 2011-Ohio-2413, ¶ 38 (10th Dist.).

c. If an appellant files an appeal in the wrong county under R.C. 2506.01, the court lacks jurisdiction, as R.C. 2506.02 is a jurisdictional statute, not a venue statute. The court cannot transfer the action to another court and must dismiss the appeal. *Bogan v. Mahoning Cty. Children Servs.*, 2021-Ohio-3933, ¶ 12 (10th Dist.).

H. Suspension (Stay) of Agency's Order on Appeal

1. A stay of execution of the agency's order pending appeal is not automatic.

   a. "The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency." R.C. 119.12(E).

   b. To delay the effect of the agency order, the appellant must file a motion for stay or suspension of the agency's order either with or after filing the notice of appeal.

2. The common pleas court has broad discretion in deciding a motion to stay.

   a. The General Assembly has given trial courts broad discretion to determine when a stay should be granted. *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 782 (10th Dist. 2001).

   b. On appeal, the appellate district court reviews the trial court's decision on a motion to stay for an abuse of discretion. An abuse of discretion occurs when a trial court acts in an unreasonable, arbitrary, or unconscionable manner. *de Bourbon v. State Med. Bd.*, 2017-Ohio-5526, ¶ 7 (10th Dist.).

   c. The court generally has broad discretion on what factors to consider in granting a suspension of the agency's order. Deciding a motion for suspension of an agency's order is wholly within the sound discretion of the trial court. *Hunter v. Cincinnati Civil Service Comm.*, No. C-800651 (1st Dist. Sept. 9, 1981).

   d. Even if the common pleas court finds an unusual hardship, it is not required to grant a suspension upon that finding. R.C. 119.12(E) simply reserves the discretion of the trial court the ability to stay an agency order. *Lots of Love, Inc. v. Dept. of Dev. Disabilities*, 2018-Ohio-371, ¶ 5 (9th Dist.).

   e. When asked to stay an administrative order, courts give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme. *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 782 (10th Dist. 2001).

3. The appellant must show "unusual hardship."

a. A court may grant suspension of an agency's order if it appears that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal. R.C. 119.12(E).

b. Because the filing of a notice of appeal under R.C. 119.12 does not automatically operate as a suspension, the appellant bears the burden of proving that a stay is appropriate. *Walsh v. Bur. of Motor Vehicles*, Fairfield C.P. No. 15CV143 (Apr. 7, 2015).

c. Virtually all license suspension or terminations involve some degree of "hardship," but only those involving "unusual hardship" are candidates for a stay. *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 782 (10th Dist. 2001).

d. "Unusual hardship" is not defined in R.C. 119.12, but federal courts have defined the term as being "more than mere unpleasantness or garden-variety difficulty," and proof of an undue hardship usually requires some extraordinary circumstances. *de Bourbon v. State Med. Bd.*, 10th Dist. Franklin No. 16AP-669, 2017-Ohio-5526, ¶ 9; *Prince-Paul v. Bd. of Nursing*, 2015-Ohio-3984, ¶ 14 (10th Dist.).

e. Giving their plain and ordinary meanings, "unusual" means "not usual," "uncommon," or "rare," and "hardship" means "suffering," "privation," or "something that causes or entails suffering or privation." *Khemsara v. Veterinary Med. Licensing Bd.*, 2022-Ohio-833, ¶ 13 (8th Dist.).

f. Economic hardship is not automatically an unusual hardship.

    i. Although a licensee will no doubt suffer financial consequences when a license is revoked, the licensee must still show unusual hardship. A conclusory affidavit generally alleging loss of money and time, inconvenience, diminished business, damaged reputation, or other injuries, without specific information or detail or supporting evidence, does not establish unusual hardship. *Khemsara v. Veterinary Med. Licensing Bd.*, 2022-Ohio-833, ¶ 14, 21-22 (8th Dist.).

    ii. Loss of practice, home, ability to support family, and reputation in the community are predictable consequences of a license suspension and thus do not qualify as unusual hardship. *de Bourbon v. State Med. Bd.*, 2017-Ohio-5526, ¶ 10 (10th Dist.); *Joseph v. Dept. of Ins.*, Franklin C.P. No. 23CV6364 (Dec. 20, 2023).

    iii. The loss of income, property, clients, employees, and reputation are all inherent results of the revocation of a medical license and therefore do not constitute an unusual hardship. *Gill v. State Med. Bd.*, Franklin C.P. No. 07CV11839 (Sept. 14, 2007); *Hoffman v. State Med. Bd.*, Franklin C.P. No. 93CV6881 (Dec. 29, 1993); *Roy v. State Med. Bd.*, Franklin C.P. No. 93CV3734 (Aug. 12, 1993).

    iv. Economic hardship of the revocation of a commercial driver's license does not cause an "unusual hardship;" thus a stay of the agency's order is not appropriate. *Walsh v. Bur. of Motor Vehicles*, Fairfield C.P. No. 15CV143 (Apr. 7, 2015).

    v. There is no usual hardship in simply having to find a new place to work. *Burden v. Dept. of Job and Family Servs.*, Franklin C.P. No. 10CV12006 (Oct. 5, 2010).

vi. Loss of business, for which nothing will compensate, as opposed to just the loss of sole source of income, constitutes unusual hardship. *Groves v. State Racing Commission*, Franklin C.P. No. 19CV1608 (Mar. 20, 2019).

g. Collateral consequences of a license suspension may be an unusual hardship.

i. The potential for the State Medical Board of Ohio to report a suspension to the National Practitioners Data Bank, causing certain insurance plans, HMOs, and PPOs to require termination of a suspended physician from reimbursement policies, would amount to an unusual hardship. *Larach v. State Med. Bd.*, Franklin C.P. No. 96CV3566 (June 5, 1996).

4. The court may also make "logical considerations" in evaluating a motion to stay.

a. The court in *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 782 (10th Dist. 2001) set forth the additional "logical considerations" that a court may use in evaluating a motion to stay:

i. Whether the appellant has shown a strong or substantial likelihood or probability of success on the merits;

ii. Whether appellant has shown that it will suffer irreparable injury;

iii. Whether the issuance of a stay will cause harm to others; and

iv. Whether the public interest would be served by granting a stay.

b. Applying the "logical considerations," if (1) the board's restrictions on employment did not prohibit the licensee from working as a licensed nurse, (2) the cause of respondent's embarrassment, humiliation and severe emotional distress is due to the licensee's own acts, and not the board's order, and (3) the board offered respondent all process due to the licensee, the licensee did not suffer unusual hardship. *Prince-Paul v. Bd. of Nursing*, 2015-Ohio-3984 (10th Dist.).

c. If the agency fails to cite to actual harm to the public, the court will find that the health, safety, and welfare of the public will not be threatened by a suspension of the board's order. *Groves v. State Racing Commission*, Franklin C.P. No. 19CV1608 (Mar. 20, 2019).

d. The ultimate question is set forth in R.C. 119.12(E): unusual hardship and threat to the health and safety and welfare of the public. *de Bourbon v. State Med. Bd.*, 2017-Ohio-5526, ¶ 7 (10th Dist.).

e. If the facts of the case were uncontested in the tribunal below, and the appellant has not suggested any legal error that occurred below in his application for a stay, he has not offered any basis for the court to believe that he might succeed in this appeal. *Joseph v. Dept. of Ins.*, Franklin C.P. No. 23CV6364 (Dec. 20, 2023).

5. Specific agencies have additional considerations.

a. R.C. 119.12(E) includes an additional requirement for appeals from the Ohio Casino Control Commission, the State Medical Board, and the State Chiropractic Board. For appeals from these boards, it must also be shown that granting a suspension will not threaten the "health, safety, and welfare of the public."

b. The State Medical Board determined that a doctor's over-prescription of drugs with indifference to the prescription abuses of his patients allegedly contributed to the suicides of three patients. The Court found that such an allegation constitutes a threat to the health, safety, and welfare of the public. *Dreskin v. State Med. Bd.*, Franklin C.P. No. 97CV8830 (Oct. 27, 1997); *Wu v. State Med. Bd.*, Franklin C.P. No. 96CV7055 (Oct. 9, 1996).

6. The court may set the terms of the suspension.

   a. If the court orders a stay of the agency's order, the court may fix the terms of the suspension order. R.C. 119.12(E).

   b. The Court may set terms for the duration of suspension, including restrictions on practice. *Fattah v. State Med. Bd.*, Franklin C.P. No. 92CV4202 (July 15, 1992).

7. A denial of the motion for stay of the agency's order may be appealed.

   a. An order denying a stay of an agency's order may constitute a final appealable order if the court will be unable to fashion a remedy to repair the appellant's loss. *Little Butterflies Daycare & Preschool v. Dept. of Job & Family Servs.*, 2020-Ohio-1349, ¶ 4-5 (10th Dist.); *Bob Krihwan Pontiac-GMC Truck, Inc. v. General Motors Corp.*, 141 Ohio App.3d 777, 782 (10th Dist. 2001).

   b. A stay granted under App.R. 7 is not appropriate on appeal to the court of appeals from a court of common pleas's denial of a motion for stay of administrative order. Rather, the proper remedy is an injunction. *Little Butterflies Daycare & Preschool v. Dept. of Job & Family Servs.*, 2020-Ohio-1349, ¶ 5 (10th Dist.).

8. The stay of the agency's order remains in effect until finally adjudicated.

   a. Generally, a stay of the order remains in effect until the matter is "finally adjudicated," that is, until all appeals are exhausted, and the agency's order becomes final. R.C. 119.12(E).

   b. If an appeal is taken from a common pleas court decision when the court previously granted a suspension of the agency order, then the suspension "shall not be vacated" and will continue until the matter is finally adjudicated. R.C. 119.12(E).

   c. If the common pleas court initially grants a suspension of an order and a timely notice of appeal is filed from the judgment of the common pleas court, then the original suspension of the agency's order will continue in effect until the appellate process is complete. If the appellant does not timely appeal the common pleas court decision, the suspension order expires at the conclusion of the appeal time. *Giovanetti v. State Dental Bd.*, 63 Ohio App.3d 262, 265 (7th Dist. 1991).

9. Specific agencies have certain statutory requirements for stays of execution.

   a. R.C. 119.12(G) sets forth the requirements for the Liquor Control Commission:

   b. Stays of certain orders by the Liquor Control Commission terminate not more than six months after the record's filing date in the common pleas court and will not be extended.

   c. The court must enter judgment within six months of the record's filing date. A court of appeals shall not issue an order extending this date.

d. The General Assembly set a definite period for the duration of a suspension of the agency's order and did not intend for the limit to be evaded with successive stays. *Dayton v. Haddix*, No. 9951, (2d Dist. Jan. 22, 1987).

e. R.C. 119.12(H) sets forth the requirements for the Casino Control Commission:

   i. Stays of certain orders by the Ohio Casino Control Commission shall terminate no more than six months after the date of the filing of the certified record in the common pleas court and shall not be extended.

   ii. The court must enter judgment within six months of the record's filing date.

f. R.C. 119.12(I) sets forth the requirements for the Medical Board or Chiropractic Board:

   i. Stays of certain orders of the State Medical Board of Ohio or State Chiropractic Board shall terminate not more than fifteen months after the date of the filing of a notice of appeal in the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

   ii. The 15-month limitation on suspension of the State Medical Board's order is constitutional and does not violate due process or equal protection rights. *Plotnick v. State Med. Bd.*, Nos. 84AP-225 and 84AP-362 (10th Dist. Sept. 27, 1984).

10. Appeals are generally not affected by license or permit renewal and suspended agency orders.

    a. A license or permit renewal cannot be denied because of an agency order that is on appeal and has been suspended by the court. R.C. 119.12(E).

    b. The final adjudication order may apply to any license or permit that was renewed during the period of the appeal (regardless of stay/suspension of agency order). R.C. 119.12(F).

    c. The expiration of license will not affect the appeal. R.C. 119.121. If the appellant wins on appeal, the court must order the agency to renew the license upon payment of the fee prescribed by law for the license. R.C. 119.121.

11. If appellant fails to seek a stay of execution of the agency's order and the approved action takes place, then the matter is moot, and the appeal must be dismissed. *Osborne v. North Canton*, No. 2016 CA 00175, 2017-Ohio-1116, ¶ 25 (5th Dist.); *Neighbors for Responsible Land Use v. Akron*, 2006-Ohio-6966, ¶ 12 (9th Dist.); *Montgomery Cty. Bd. of Commrs. v. Saunders*, 2001-Ohio-1710 (2d Dist.).

I. Applicability of Civil Rules to Administrative Appeals

1. Courts have looked to Civ.R. 1 for guidance in administrative appeals.

   a. Civ.R. 1(A) provides that the Civil Rules are to be followed in all courts in Ohio in the exercise of civil jurisdiction at law or in equity.

   b. Civ R. 1(C) states that the Civil Rules "to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure . . . (8) in all other special statutory proceedings . . . ."

c. Whether the Civil Rules apply requires two considerations: whether the procedural statute governs a special statutory proceeding and whether that statute renders the civil rule at issue "clearly inapplicable." *Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, ¶ 21.

2. Special statutory proceedings follow a case-by-case determination for special statutory proceedings.

   a. The Civil Rules may apply to appeals from administrative orders. Under Civ.R. 1(C), the Rules apply unless by their nature they are clearly inapplicable. The Civil Rules will apply to special statutory proceedings that are adversarial in nature, unless there is a good and sufficient reason not to apply the rules. This question must be decided on a case-by-case basis, depending on the statute involved. *Ramsdell v. Civil Rights Comm.*, 56 Ohio St.3d 24, 27 (1990).

   b. Civ.R. 1 is clearly a rule of inclusion rather than exclusion. To the extent that the issue in question is procedural in nature, the Civil Rules should apply unless they are "clearly inapplicable." The Civil Rules should be held to be clearly inapplicable only when their use will alter the basic statutory purpose for which the specific procedure was originally provided in the special statutory action. *Price v. Westinghouse Electric Corp.*, 70 Ohio St.2d 131, 132-133 (1982).

3. Administrative appeals are special statutory proceedings, and attorneys should look to the statute granting the right of appeal to determine whether the rules guide the procedure.

   a. Civ.R. 1(C) provides that the Civil Rules do not apply to special statutory proceedings. An appeal under the Administrative Procedure Act, Chapter 119, is a special statutory proceeding and therefore the Civil Rules do not apply to such proceeding. *D-1 Liquor Permit Filed with the Dept. of Liquor Control by Stover v. Preble Cty. Bd. of Commrs.*, No. 84AP-1085 (10th Dist. July 2, 1985); *Sweetbriar Co. v. Liquor Control Comm.*, No. 33089 (8th Dist. May 30, 1974).

   b. The Civil Rules may apply when the common pleas court conducts a trial de novo, as in appeals under R.C. 2506, but not in Chapter 119 appeals. If the common pleas court must decide questions of law and fact, such as if an appeal requires a trial de novo, then there is no reason not to apply the Civil Rules. However, in an appeal under 119.12, the court is limited to the record of proceedings below, and Rule 60(B) did not apply to such proceedings. *Giovanetti v. State Dental Bd.*, 66 Ohio App.3d 381, 383 (11th Dist. 1990).

4. Courts have addressed particular Civil Rules.

   a. Civil Rule 59 addresses a motion for new trial.

      i. Civil Rule 59 does not apply to administrative appeals. Because a trial was never conducted by the court of common pleas, a court of common pleas has no authority to grant a new trial, under Civ. R. 59(C), from a judgment rendered in an administrative appeal. *Warren v. Portage Cty. Bd. of Comms.*, No. 94-P-0056 (11th Dist. June 2, 1995) (political subdivision appeal under R.C. Chapter 2506); *Giovanetti v. State Dental Bd.*, 66 Ohio App.3d 381, 383 (11th Dist. 1990); *Shady Acres Nursing Home, Inc. v. Bd. of Bldg. Appeals*, 50 Ohio App.2d 391, 392 (11th Dist. 1976).

      ii. By statute, the court is limited in its review to the record as certified by the agency plus any newly discovered evidence that the court, in its discretion, allows. R.C. 119.12. There is no provision for the court to conduct a new trial of the evidence already

submitted and heard by the agency. A motion for a new trial filed in the common pleas court in an appeal from an administrative agency is a nullity and does not extend the time to file a notice of appeal in the court of appeals. *State Med. Bd. v. Pla*, 42 Ohio App.3d 239, 240 (8th Dist.1988).

iii. Civ.R. 59 can apply to the common pleas appeal of an administrative decision, but only if a proceeding took place in which the parties or counsel presented evidence and arguments in court to a trial judge or magistrate. *Gallick v. Franklin Cty. Bd. of Revision*, 2018-Ohio-818, ¶ 20 (10th Dist.) (describing nine "indicia" of a trial proceeding).

b. Civil Rule 60 addresses a motion for relief from judgment.

i. Civil Rule 60(A)(4) and (5) do not apply to administrative appeals. *Sweetbriar Co. v. Liquor Control Comm.*, No. 33089 (8th Dist. May 30, 1974).

ii. Civil Rule 60(B) do not apply to administrative appeals. *McConnell v. Bur. of Emp. Servs.*, No. 96AP-360 (10th Dist. Sept. 3, 1996); *Buchler v. Dept. of Commerce*, 110 Ohio App.3d 20, 22 (8th Dist. 1996); *Giovanetti v. State Dental Bd.*, 66 Ohio App.3d 381, 383 (11th Dist. 1990).

c. Civil Rule 62 addresses a motion for stay. A stay order under Civil Rule 62(A) does not apply to an administrative appeal. *Sweetbriar Co. v. Liquor Control Comm.*, No. 33089 (8th Dist. May 30, 1974).

5. Local rules of a court of common pleas, such as a rule setting page limitations for briefs, may be enforced in an administrative appeal. *Boggs v. Real Estate Comm.*, 2009-Ohio-6325, ¶ 42 (10th Dist.).

J. Certification of the Record

1. Under R.C. 119.12(J), an agency must prepare and certify to the court a complete record of the proceedings in the case.

a. "Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case." R.C. 119.12(J).

b. The court may grant additional time, not to exceed 30 days, if it is shown that the agency has made substantial effort to comply. R.C. 119.12(J).

2. A record must be filed within thirty days after receipt of a notice of appeal. R.C. 119.12(J); *Schupp v. Cincinnati Civ. Serv. Comm.*, No. C-020176, 2002-Ohio-7077, ¶ 11 (1st Dist.); *Geroc v. Veterinary Med. Licensing Bd.*, No. 59100 (8th Dist. Nov. 7, 1991).

3. The record must be complete.

a. The agency must file a complete record of the proceedings.

i. A "complete record of the proceedings" in the case would be a "precise history" of the administrative proceedings from their commencement to their termination. *Kramp v. State Racing Comm.*, 81 Ohio App.3d 186, 189 (9th Dist. 1991); *Bergdahl v. State Bd. of*

Psychology, 70 Ohio App.3d 488, 490 (4th Dist. 1990); *Checker Realty Co. v. Real Estate Comm.*, 41 Ohio App.2d 37, 42 (10th Dist. 1974).

ii. Items that must be included are as follows (not an exhaustive list):

(a) The agency's order. *Brockmeyer v. Real Estate Comm.*, 5 Ohio App.2d 161 (10th Dist. 1996), overruled on other grounds, *Checker Realty Co. v. Real Estate Comm.*, 41 Ohio App.2d 37, 46 (10th Dist. 1974).

(b) Procedural documents. *Royer v. Real Estate Comm.*, 131 Ohio App.3d 265, 269 (3d Dist. 1999).

(c) Minutes of the board meeting at which the order was approved. *Bergdahl v. State Bd. of Psychology*, 70 Ohio App.3d 488, 491 (4th Dist. 1990).

(d) Transcript of the hearing. *Hyde Park Neighborhood Council, Inc. v. Cincinnati*, 2012-Ohio-3331 (1st Dist.); *Linbaugh Corp., Inc., d/b/a DJ's Lounge v. Liquor Control Comm.*, No. 95-T-5323 (11th Dist. Apr. 26, 1996).

(e) Motions and other filings. *Adamson v. State Med. Bd.*, 2004-Ohio-5261, ¶ 26 (10th Dist.).

(f) Exhibits admitted at hearing. *Board of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413, 416 (2d Dist. 1964).

(g) Proffered evidence. *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, No. 532 (4th Dist. Apr. 3, 1987).

iii. Some items are not required to be included:

(a) A memorandum prepared by the commission's in-house legal counsel for use by the commission was protected by attorney-client privilege and therefore was properly excluded from the certified record to the court of common pleas. *Zingale v. Casino Control Comm.*, 2014-Ohio-4937, ¶ 30 (8th Dist.).

(b) Proceedings before a body other than the agency are not part of the record and need not be included in the record on appeal, unless they were considered by the agency in making its decision. *Kramp v. State Racing Comm.*, 81 Ohio App.3d 186, 189 (9th Dist. 1991).

b. The record may include certified copies.

i. A record of the proceedings in the case before an administrative agency may be complete within the meaning of R.C. 119.12, even though it contains a certified copy of, and not the original, final order of the agency. The reason for allowing the filing of a certified copy is to permit the original to stay with the agency where it properly belongs. *McKenzie v. State Racing Comm.*, 5 Ohio St.2d 229, 232 (1966).

ii. A copy of an exhibit may be used to complete the record certified by the Board for appeal so long as a party is not prejudiced. *Vogelsong v. State Bd. of Pharmacy*, 123 Ohio App.3d 260, 267 (4th Dist. 1997).

4. The agency has the burden to complete the record.

a. The agency is responsible for filing a complete record.

   i. The agency, not the appellant, has the burden of ensuring that a complete record is filed in the common pleas court. *Linbaugh Corp., Inc., d/b/a DJ's Lounge v. Liquor Control Comm.*, No. 95-T-5323 (11th Dist. Apr. 26, 1996).

   ii. The agency must prepare and certify a transcript of the hearing as part of the record. *Stephan v. State Veterinary Med. Licensing Bd.*, 113 Ohio App. 538, 540-543 (1st Dist. 1960).

b. "The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas." R.C. 119.12(J).

c. An interested party can request a copy of the complete record. "Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record." R.C. 119.12(J).

5. The record must be certified.

   a. Who can certify the record?

      i. There is a sufficient certification by "the agency" under R.C. 119.12 if a member or employee of the agency certifies that what purports to be a record of such proceedings is a complete record, that any copies of material within it are certified to be true copies of the original matter, and that such certificate is made by order of the agency and acting in its behalf, unless it is made to appear affirmatively that the one so certifying did not have authority to do so or that the record so certified is not a complete record of the proceedings. *McKenzie v. State Racing Comm.*, 5 Ohio St.2d 229, 32 (1966).

      ii. R.C. 119.12 does not require that all members of a multi-member agency certify the record. *McKenzie v. State Racing Comm.*, 5 Ohio St.2d 229, 232 (1966).

      iii. Certification of the record by the clerk of the board satisfies the requirement of certification by the agency. *Tisone v. Liquor Control Comm.*, 1 Ohio App.2d 126, 132-133 (10th Dist. 1964)

   b. How is the record certified?

      i. The record must include a certification page. *McKenzie v. State Racing Comm.*, 1 Ohio App.2d 283, 288 (10th Dist. 1965); *Board of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413 (2d Dist. 1964); *Minarik v. Board of Review, Dept. of State Personnel*, 118 Ohio App. 71, 74 (10th Dist. 1962).

      ii. Affidavit of agency's record keeper stating that the attached records are "a true and accurate copy" of the administrative records fulfills R.C. 119.12's requirement that the agency "certify to the court a complete record of the proceedings in the case." *Knight v. Cleveland Civ. Serv. Comm.*, 2016-Ohio-5133, ¶ 13 (8th Dist.).

      iii. The record certification must contain a statement that the record is complete. *Board of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413, 414 (2d Dist.1964).

iv. A complete record of the proceedings, as required by R.C. 119.12 does not exist if the record filed with the court consists of a group of detached exhibits, none of which bears the filing stamp of the agency, and papers, some of which are unsigned carbon copies of letters, accompanied by a letter of transmittal bearing only the rubber stamp facsimile of the signature of the secretary of the agency. *Board of Real Estate Examiners v. Peth*, 4 Ohio App.2d 413 (2d Dist. 1964).

v. If the agency's official seal is affixed to the certification statement, the copy of the record must be received in evidence in any court in lieu of the original. R.C. 121.20. The agency seal is the State coat of arms as described in R.C. 5.04 within a circle 1¼ inches in diameter and surrounded by the proper name of the agency. R.C. 121.20.

6. The court may grant extensions of time.

   a. Upon motion by the agency, the court may grant an extension of time, not to exceed thirty days. R.C. 119.12(J).

   b. The agency must have made "substantial effort to comply" with the initial thirty-day deadline. R.C. 119.12(J).

   c. An extension may be granted only one time. R.C. 119.12(J).

7. Failure to certify the complete record will affect the result of the proceedings.

   a. R.C. 119.12 provides that "[f]ailure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected." R.C. 119.12(J).

      i. A motion is required.

         (a) A court may enter a finding based upon failure to certify record only upon a party's motion. *Wolf v. Cleveland*, 2003-Ohio-3261, ¶ 12, fn. 2 (8th Dist.).

         (b) An appellant must object or otherwise take affirmative action before a court may grant judgment due to the agency's failure to timely certify a complete record. *McDonald v. Hamilton Cty. Welfare Dept.*, No. C-860124, (1st Dist. Jan. 14, 1987).

         (c) If a party neglects to file a motion, the party waives the right to object to failure to certify the complete record. *Linbaugh Corp., Inc., d/b/a DJ's Lounge v. Liquor Control Comm.*, No. 95-T-5321, (11th Dist. Apr. 26, 1996).

   b. The record may be supplemented.

      i. The court may permit the agency to correct a defect by filing omitted evidence. *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, No. 532 (4th Dist. Apr. 3, 1987).

      ii. In an appeal taken under R.C. 119.12, the agency may be allowed to supplement the record with evidence inadvertently missing from the originally submitted certified record, even if done after the briefs have been filed and the matter orally argued. *Lana v. Ohio Bureau of Motor Vehicles*, Clermont C.P. No. 2014 CVF 01304 (Jan. 25, 2016).

   c. Prejudice is required for dismissal.

i. In *Goudy v. Tuscarawas Cty. Pub. Defender*, 2022-Ohio-4121, the Ohio Supreme Court clarified its precedent regarding the consequences for an agency's failure to file a record.

(a) A first line of case law, stemming from *Matash v. Dept. of Ins.*, 177 Ohio St. 55 (1964), held that if an agency fails to timely file a certified record at all, dismissal was required. *Sinha v. Dept. of Agriculture*, 95AP-1239 (10th Dist. Mar. 5, 1996); *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, 4 532 (4th Dist. Apr. 3, 1987); *In re Troiano*, 33 Ohio App.3d 316, 317 (8th Dist. 1986).

(b) A second line of case law, stemming from *Lorms v. Dept. of Commerce*, 48 Ohio St.2d 153 (1976), held that if an agency files a certified record, but the record is inadvertently incomplete, the appellant must show they are a "party adversely affected" and therefore must show prejudice in presenting the appeal. *Arlow v. Rehab. Serv. Comm.*, 24 Ohio St.3d 153, 155 (1986).

(c) The two lines of cases described above led to courts creating two standards. Courts held that in a total failure to timely certify, the judgment for the party is mandatory; but where a record was timely filed but incomplete, the party is required to show prejudice. *Arlow v. Rehab. Serv. Comm.*, 24 Ohio St.3d 153, 155 (1986); *Gourmet Beverage Ctr., Inc. v. Liquor Control Comm.*, 2002-Ohio-3338, ¶ 29 (10th Dist.); *Jordan v. State Bd. of Nursing Edn. and Nurse Registration*, No. 532 (4th Dist. Apr. 3, 1987) ("Failure requires reversal; omission requires correction."); *Jenneman v. State Bd. of Chiropractic Examiners*, 21 Ohio App.3d 225, 227 (1st Dist. 1985). In both lines of cases, a motion is required to raise the issue. *Wolf v. Cleveland*, 2003-Ohio-3261, ¶ 12, fn. 2 (8th Dist.).

ii. In *Goudy v. Tuscarawas Cty. Pub. Defender*, 2022-Ohio-4121, the Ohio Supreme Court clarified that an appellant must always show prejudice, regardless of what was filed or when.

(a) In Goudy, the Ohio Supreme Court found that a party must always show the party was "adversely affected" by the failure to file a complete record. Therefore, a showing of prejudice is required whether or not the agency completely failed to timely file the record, or whether the agency timely filed the record but the record was incomplete. *Id.* at ¶ 28.

(b) R.C. 119.12(J) does not distinguish "mere omissions" from more serious failures. The "adversely affected" language applies universally to all failures to timely file a complete record. *Id.* at ¶ 27.

iii. Some examples of prejudice include the following:

(a) Any delay suffered because of the party's own filing of the motion for judgment for failure to file the certified record cannot be considered to cause prejudice to the party. *Goudy v. Tuscarawas Cty. Pub. Defender*, 2022-Ohio-4121, ¶ 27.

(b) Failure to file meeting minutes was prejudicial because the issue in the case was whether the agency based its decision upon one if its administrative rules.

Bergdahl v. State Bd. of Psychology, 70 Ohio App.3d 488, 491-492 (4th Dist. 1990).

(c) If the agency failed to file minutes before the deadline because the minutes had not been transcribed and approved by that time but filed them after they were approved and before the court's decision, there was no prejudice. *McGee v. State Bd. of Psychology*, 82 Ohio App.3d 301, 305 (10th Dist. 1993).

(d) If an agency's action is based upon procedure, such as an untimely request for the hearing, items omitted were unlikely to have altered the trial court's decision on appeal. There was no prejudice when items omitted did not appear to be outcome determinative. *McCauley v. Noble County*, No. 234, (7th Dist. Feb. 8, 1999).

(e) Courts must grant judgment in favor of the respondent if the agency recorded the adjudication hearing but, due to mechanical failure, was unable to produce a transcript, thus prejudicing the respondent. R.C. 119.09 permits a rehearing upon the respondent's request only when no stenographic record was made. When the stenographic record was made but was unusable, remand is not appropriate, and judgment must be rendered in respondent's favor. *Citizens for Akron v. Elections Comm.*, 10th Dist. 2011-Ohio-6387, ¶ 28 (10th Dist.).

(f) Although a clerk of court committed a clerical error by failing to time stamp the record within 30 days, an agency has complied with R.C. 119.12 where it submits a complete administrative record to the trial court, verifies the court's receipt of the record, and notifies appellant's counsel of that certification, all within the required 30-day period. *Kroehle Lincoln Mercury, Inc. v. Bur. of Motor Vehicles*, 2007-Ohio-5204, ¶ 24-25 (11th Dist.).

(g) If a record has been timely submitted to a court of common pleas, albeit with an unintentionally erroneous or omitted case number, absent prejudice to the party appealing the administrative action, such submission does not constitute a failure of certification. *State ex rel. Williams Ford Sales v. Connor*, 72 Ohio St.3d 111, 114 (1995).

d. Courts differ on the impact of a judgment in favor of the party adversely affected.

i. If a court rules in favor of a certificate holder adversely affected by an agency's failure to timely file the certified record, the agency must reinstate the appellant's certification. *Graham v. State Bd. of Accountancy*, No. CA91-11-087 (12th Dist. Nov. 9, 1992).

ii. A finding in favor of the appealing party is procedural, as the administrative agency's decision was not reviewed and ruled on for its substantive validity. Because a finding in favor of the appealing party is procedural, the agency is not precluded by the doctrine of res judicata from considering the charges against the appellant-licensee a second time. *Jenneman v. State Bd. of Chiropractic Examiners*, 21 Ohio App.3d 225, 228 (1st Dist. 1985); *Sayler v. State Racing Comm.*, 7 Ohio App.3d 189, 190 (1st Dist. 1982).

K. Consideration of Additional Evidence

1. In general, under R.C. 119.12, the common pleas court is confined to the certified record. "Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency." R.C. 119.12(L).
2. A court may, in its sound discretion, grant a request for the admission of newly discovered evidence. Under R.C. 119.12(L), the evidence must be both newly discovered and not ascertainable with reasonable diligence before the hearing.
3. The decision to admit additional evidence under R.C. 119.12 lies within the sound discretion of the reviewing trial court. Its ruling will not be disturbed absent a showing of an abuse of that discretion. *Baughman v. Dept. of Pub.*, 118 Ohio App.3d 564, 572 (4th Dist. 1997).
4. The party moving for admission of newly discovered evidence bears the burden.
    a. The party moving for admission of newly discovered evidence has the burden of demonstrating: (1) that the evidence is newly discovered (i.e., it must have been discovered after the hearing); (2) that the movant exercised due diligence, and (3) that the evidence is material, not merely impeaching or cumulative, and (4) that a new trial would probably produce a different result. *O'Wesney v. State Bd. of Registration for Professional Engineers & Surveyors*, 2009-Ohio-6444, ¶ 79 (5th Dist.); *Adeen v. Dept. of Commerce*, 2006-Ohio-3604, ¶ 15 (8th Dist.); *CVS/Pharmacy #3131 v. Bd. of Pharmacy*, 2003-Ohio-3806, ¶ 36 (8th Dist.); *Clark v. State Bd. of Registration for Professional Engineers & Surveyors*, 121 Ohio App.3d 278, 287-288 (9th Dist. 1997).
    b. Language in R.C. 119.12 relating to newly discovered evidence is analogous to language in Civil Rule 60(B)(2); therefore, cases interpreting Rule 60(B)(2) may therefore be helpful in interpreting R.C. 119.12. *Clark v. State Bd. of Registration for Professional Engineers & Surveyors*, 121 Ohio App.3d 278, 288 (9th Dist. 1997).
5. Newly discovered evidence cannot be newly created.
    a. Newly discovered evidence refers to evidence that existed at the time of the administrative hearing but which was incapable of discovery by reasonable diligence. Newly discovered evidence does not refer to newly created evidence. *Mayer v. Dept. of Rehab. & Corr.*, 2012-Ohio-948, ¶ 11 (10th Dist.); *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 17 (10th Dist.); *CVS/Pharmacy #3131 v. Bd. of Pharmacy*, 2003-Ohio-3806, ¶ 36 (8th Dist.); *Steckler v. State Bd. of Psychology*, 83 Ohio App.3d 33, 38 (8th Dist. 1992).
    b. A trial court errs in deciding to hear additional testimony that could have been presented at the administrative hearing; this amounted to a de novo review. *Adeen v. Dept. of Commerce*, 2006-Ohio-3604, ¶ 20 (8th Dist.).
    c. A new affidavit containing facts in existence at the time of the hearing is newly created and not newly discovered. *Beach v. Bd. Of Nursing,* 2011-Ohio-3451, ¶ 17 (10th Dist.).

d. Items not in existence at the time of a state licensing board's meeting cannot be deemed to be newly discovered evidence. *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 19 (10th Dist.).

e. An affidavit prepared for another case that could have been ascertained at the time of the board hearing is not newly discovered evidence. *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 19 (10th Dist.).

f. Information that was known to the appellant before the hearing, such as a record of court proceedings, is not newly discovered. *Clem D's Auto Sales v. Bur. of Motor Vehicles*, 2014-Ohio-951, ¶ 23 (2d Dist.).

g. On appeal taken under R.C. Chapter 2506, the court of common pleas erred by failing to hear additional evidence if, in their-decision making, the administrative board members considered conversations held outside the hearing, conversations to which the applicant was not able to offer refuting evidence. *Steck's Buckeye Storage Unit, L.L.C. v. Catawba Island Twp. Bd. of Trustees*, 2018-Ohio-886, ¶ 24 (6th Dist.); R.C. 2506.03(B).

6. Evidence must have been incapable of discovery by due diligence.

   a. Witness's reluctance to testify did not make his testimony newly discovered such that his testimony could be introduced upon appeal as newly discovered, especially if the appellant chose not to seek a subpoena for that witness's testimony. *Northfield Park Assocs. v. State Racing Comm.*, 2006-Ohio-3446, ¶ 58 (10th Dist.).

   b. If an appellant chooses to proceed pro se at the administrative hearing and chooses not to call character witnesses, the appellant cannot later call those witnesses upon appeal if they do not have newly discovered information. A lack of counsel at an administrative hearing does not prevent an appellant from adequately questioning character witnesses. *Adeen v. Dept. of Commerce*, 2006-Ohio-3604, ¶ 16 (8th Dist.).

   c. The newly discovered evidence provision of R.C. 119.12 is not a means for the appellant to conduct a fishing expedition. Although exercising due diligence, an appellant who made no showing that he was prevented from discovering the evidence does not meet the standard for newly discovered evidence. *Clark v. State Bd. of Registration for Professional Engineers & Surveyors*, 121 Ohio App.3d 278, 287-288 (9th Dist. 1997).

7. The evidence must be material.

   a. Newly discovered evidence must be material, not merely impeaching or cumulative. The movant must show that a new trial would probably produce a different result. *Adeen v. Dept. of Commerce*, 2006-Ohio-3604, ¶ 15 (8th Dist.).

   b. Evidence is not material if it would have been used merely to impeach a board's decision and if nothing would suggest that such evidence would have altered the outcome of the hearing. *CVS/Pharmacy #3131 v. Bd. of Pharmacy*, 2003-Ohio-3806, ¶ 36 (8th Dist.).

   c. Cumulative documentation does not meet the standard for newly discovered evidence. *Holden v. Bur. of Motor Vehicles*, 67 Ohio App.3d 531, 540 (9th Dist. 1990).

d. Evidence offered solely for impeachment purposes does not meet the standard for newly discovered evidence. *Diversified Benefit Plans Agency, Inc. v. Duryee*, 101 Ohio App.3d 495, 502 (9th Dist. 1995).

8. Some evidence may be admitted using the "unless otherwise provided by law" language.

   a. In dicta, the Supreme Court focused on the "unless otherwise provided by law" language in R.C. 119.12(L) and suggested that a common pleas court, in limited circumstances, may admit additional evidence that is not truly "newly discovered" evidence. *Highland Tavern, L.L.C. v. DeWine*, 2023-Ohio-2577, ¶ 20.

   b. The Tenth District Court of Appeals referenced Highland Tavern in its decision to remand the action to the court of common pleas to admit additional evidence. *Omni Energy Group, L.L.C. v. Vendel*, 2024-Ohio-2439, ¶ 24-25. The Tenth District held that because the statutory proceeding in that case did not permit a hearing before the agency, due process mandated the court of common pleas admit additional evidence, whether or not it was newly discovered evidence. *Id.*, ¶ 25.

9. Courts may sometimes consider new evidence of constitutional issues.

   a. If an appellant presents evidence before a state agency concerning the constitutionality of a statute as applied, then the trial court may also determine the constitutionality of the statute as applied. If the appellant does not present such evidence before the agency, appellant cannot then raise the constitutional issue by introducing new evidence before the reviewing court unless the evidence is newly discovered and was not ascertainable with reasonable diligence prior to the hearing before the agency. In other words, a party challenging the constitutionality of a statute as applied must raise the challenge at the first available opportunity during the administrative proceedings. *Wymsylo v. Bartec, Inc.*, 2012-Ohio-2187, ¶ 22; *Toledo v. Jaber*, 113 Ohio App.3d 874, 879 (6th Dist. 1996); *Am. Legion Post 0046 Bellevue v. Liquor Control Comm.*, 111 Ohio App.3d 795, 797 (6th Dist. 1996); *Zieverink v. Ackerman*, 1 Ohio App.3d 10, 11 (1st Dist. 1981).

   b. *But see Highland Tavern, L.L.C. v. DeWine*, 173 Ohio St.3d 59, 2023-Ohio-2577, at ¶ 20-22, in which the Ohio Supreme Court suggested, in dicta, that R.C. 119.12(L)'s phrase "unless otherwise provided by law," would allow the presentation of evidence before the common pleas court in an administrative appeal on the constitutionality of statutes or rules as long as declaratory judgment or injunction claims had been added to the administrative appeal.

   c. The court of common pleas properly allowed both parties to present evidence as to the statute's constitutionality when the respondent/appellant did not raise the constitutional challenge until the end of the hearing. The state could not have discovered the evidence in time no matter the diligence. *In re Henneke*, 2012-Ohio-996, ¶ 79 (12th Dist.).

10. Failure to request or attend a hearing and admission of newly discovered evidence.

    a. The requirements of the admission of newly discovered evidence apply to situations in which a respondent was given a proper opportunity to request and participate in a hearing and failed to do so. *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 20 (10th Dist.).

11. The civil rules pertaining to discovery do not apply to proceedings conducted pursuant to R.C. 119.12. An appellant is not permitted to use R.C. 119.12 to obtain additional evidence through discovery and then have this new evidence admitted to the record. *Baughman v. Dept. of Pub. Safety*, 118 Ohio App.3d 564, 573 (4th Dist. 1997).

12. Agency-specific statutes may permit the consideration of additional evidence. R.C. 3781.031(D) permits the court of common pleas to consider evidence additional to that in the record without qualification. R.C. 3781.031(D) is the specific statute that controls over the general statute R.C. 119.12(K) [now, R.C. 119.12(L)], which provides for a specific statute in the language, "[u]nless otherwise provided by law." *Gainer v. Cavanaugh*, 2020-Ohio-175, ¶ 19 (5th Dist.).

L. Exhaustion of Administrative Remedies Doctrine

1. Exhaustion of administrative remedies is defined.
    a. A party seeking relief from an administrative decision must pursue available administrative remedies before pursuing action in a court.
        i. The doctrine of exhaustion of administrative remedies mandates that when an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 415-417 (1951).
        ii. Before seeking court action in an administrative matter, the party must exhaust the available avenues of administrative relief through administrative appeal. *Noernberg v. Brook Park*, 63 Ohio St.2d 26, 29 (1980); *Al-Sadeq Islamic Edn. Ctr. v. Lucas Cty. Educational Serv. Ctr.*, 2003-Ohio-7251, ¶ 21 (6th Dist.); *Covell v. Bur. of Motor Vehicles*, No. 16895 (2d Dist. July 2, 1998).
2. Courts provide a rationale for the exhaustion requirement:
    a. The United States Supreme Court in *McKart v. U.S.*, 395 U.S. 185, 193 (1969), provided the following reasons for the exhaustion requirement:
        i. The need for the litigant to allow the agency to build a factual record;
        ii. The need for the litigant to allow the agency to exercise its discretion or apply its expertise;
        iii. The needless invocation of the courts when the agency could grant every relief to which the party was entitled;
        iv. The need to give the agency the opportunity to discover and correct its own errors; and
        v. Such deliberate abuse of the administrative process will destroy its effectiveness by encouraging people to flout its procedures.
    b. Ohio case law supports the reasons stated in *McKart v. U.S.*, 395 U.S. 185, 193 (1969).
        i. The exhaustion of administrative remedies is a condition precedent to resort to the courts. *State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St.2d 132 (1965).

ii. Without the requirement to exhaust administrative remedies, the court would have nothing to review in rendering its decision. *Babcock v. Bur. of Motor Vehicles*, 46 Ohio App.2d 34, 37-38 (10th Dist. 1975).

iii. Allowing a claimant to raise an issue for the first time in an appeal to the court of common pleas would frustrate the statutory system for having issues raised and decided through the administrative process. *Derakhshan v. State Med. Bd.*, 2007-Ohio-5802, ¶ 24 (10th Dist.).

iv. The purpose of the doctrine is to allow an administrative agency to apply its expertise in developing a factual record without premature judicial intervention in administrative processes. *Derakhshan v. State Med. Bd.*, 2007-Ohio-5802, ¶ 23 (10th Dist.).

v. In Ohio, the doctrine is a court-made rule of judicial economy that is generally required as a matter of preventing premature [judicial] interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record adequate for judicial review. If interested parties do not exhaust available administrative remedies, frequent and deliberate flouting of administrative processes could weaken the agency's effectiveness by encouraging people to ignore its procedures. If exhaustion is not required, then there is no incentive to appeal to the agency from which there was an unfavorable decision and people are thereby encouraged to ignore the procedures of that agency. *Anderson v. Interface Electric Inc.*, 2003-Ohio-7031, ¶ 11 (10th Dist.) (internal citations omitted).

vi. Exhaustion is necessary because an administrative agency utilizes its special expertise in hearing the issue and rendering a decision. *Zidian v. Dept. of Commerce*, 2012-Ohio-1499, ¶ 48 (7th Dist.).

3. Authorities are split on whether exhaustion is an affirmative defense or jurisdictional defect.

   a. It is an affirmative defense:

      i. Failure to exhaust administrative remedies is not a jurisdictional defect but is an affirmative defense that must be timely asserted in an action, or it may be waived. *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997); *SP9 Ent. Trust v. Brauen*, 2014-Ohio-4870, ¶ 17 (3d Dist.); *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 10 (10th Dist.); *Derakhshan v. State Med. Bd.*, 2007-Ohio-5802, ¶ 24 (10th Dist.); *Mentor Headlands Community Ctr., Inc. v. Brown*, No. 7-018 (11th Dist. Mar. 26, 1979).

      ii. Although failure to exhaust administrative remedies is not a jurisdictional defect per se, under Ohio law a complainant must exhaust any administrative remedies before invoking the common pleas court's jurisdiction. *Zidian v. Dept. of Commerce*, 2012-Ohio-1499, ¶ 46 (7th Dist.).

      iii. The party asserting the affirmative defense bears the burden of proving failure to exhaust administrative remedies by a preponderance of the evidence. *SP9 Ent. Trust v. Brauen*, 2014-Ohio-4870, ¶ 17 (3d Dist.).

   b. It is a jurisdictional defect:

i. If no adjudicatory hearing took place at the administrative level, R.C. 119.12 does not provide a right of appeal and the trial court lacked jurisdiction over the subject matter of appellant's appeal. *Harrison v. State Med. Bd.*, 103 Ohio App.3d 317, 321 (10th Dist. 1995); *State Med. Bd. v. Fiorica*, 10th Dist. Franklin No. 88AP-516 (Nov. 3, 1988); *Lind v. Dept. of Agriculture*, Medina C.P. No. 12CIV0809 (Aug. 31, 2012).

ii. An applicant's failure to request an administrative hearing before a state licensing board and thereby exhaust his administrative remedies divests the trial court and the appellate court of jurisdiction to hear the appeal. *Reichart-Spaeth v. Counselor & Social Worker Bd.*, No. 18521 (2d Dist. Mar. 16, 2001).

iii. Once the common pleas court determined that the appellant failed to timely request a hearing, and thereby did not exhaust her administrative remedies, it does not have jurisdiction to determine the merits of the case. *Alcover v. State Med. Bd.*, No. 54292 (8th Dist. Dec. 10, 1987).

4. Failure to timely request a hearing is failure to exhaust administrative remedies.

   a. Failure to timely request an administrative hearing constitutes a failure to exhaust administrative remedies. *Carmack v. Caltrider*, 2005-Ohio-5575, ¶ 6 (2d Dist.); *Reichart-Spaeth v. Counselor & Social Worker Bd.*, No. 18521 (2d Dist. Mar. 16, 2001).

   b. A party who fails to request a hearing waives the right to challenge the agency's findings.

      i. A party who fails to request a hearing after receiving notice from the agency has waived the right to challenge the findings by the agency. *Dipre v. Dept. of Ins.*, 2023-Ohio-3060, ¶ 14 (8th Dist.).

      ii. An administrative hearing provides a forum for a party to raise legal and factual arguments propounding why an agency should not take the proposed action against the party. By not requesting a hearing, the party forfeits its opportunity to raise those arguments before the agency. *Edmands v. State Med. Bd.*, 2015-Ohio-2658, ¶ 18 (10th Dist.).

   c. Failure to request a hearing affects appeals depending on whether exhaustion is an affirmative defense or jurisdictional defect.

      i. In jurisdictions where failure to exhaust administrative remedies is an affirmative defense, failure to timely request a hearing is a waiver of hearing but does not deprive a person of the right to appeal. *Crosby-Edwards v. Bd. of Embalmers & Funeral Dirs.*, 2008-Ohio-762, ¶ 37-38 (10th Dist.); *Oak Grove Manor, Inc. v. Dept. of Human Servs.*, 2001-Ohio-4113, ¶ 23 (10th Dist.).

      ii. In jurisdictions where failure to exhaust administrative remedies is a jurisdictional defect, failure to request a hearing within the 30-day limit deprives the common pleas court of jurisdiction over the merits of the appeal. *Reichart-Spaeth v. Counselor & Social Worker Bd.*, No. 18521 (2d Dist. Mar. 16, 2001); *Harrison v. State Med. Bd.*, 103 Ohio App.3d 317, 319-320 (10th Dist. 1995); *Alcover v. State Med. Bd.*, No. 54292 (8th Dist. Dec. 10, 1987).

d. Even where an appellant fails to request a hearing, a court may still review due process challenges to the content or service of a notice of opportunity for hearing.

   i. Failure to timely request a hearing does not preclude a court's consideration of a due process violation. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 2012-Ohio-3506, ¶ 5 (6th Dist.).

   ii. The common pleas court retains jurisdiction to determine if a notice was properly served and if a hearing was timely requested. *Harrison v. State Med. Bd.*, 103 Ohio App.3d 317, 319-320 (10th Dist. 1995); *Alcover v. State Med. Bd.*, No. 54292 (8th Dist. Dec. 10, 1987).

   iii. The waiver doctrine does not apply to challenges to the content or service of a notice of opportunity for hearing that cause a party not to request a hearing. *Edmands v. State Med. Bd.*, 2015-Ohio-2658, ¶ 19 (10th Dist.).

   iv. If a licensee argues that the content of the notice of opportunity for hearing caused him to misinterpret the notice and therefore not understand the significance of failing to request a hearing, but the licensee had told the agency that he was not requesting a hearing, the content of the notice complies with due process requirements. *Edmands v. State Med. Bd.*, 2015-Ohio-2658, ¶ 26 (10th Dist.).

e. If a party alleges that a hearing request was timely sent to the agency and establishes the elements necessary for the presumption of due receipt, the agency can rebut the presumption with evidence that the request was never received. *Blackburn Sec., Inc. v. Dept. of Commerce*, No. 13660 (2d Dist. May 24, 1993).

f. A hearing request must have certain content.

   i. If the licensee sent a letter to the agency in response to the notice of opportunity for hearing, but the letter merely stated that "[w]ith regard to a request for a hearing, [the licensee] is in the process of obtaining Ohio counsel," the letter does not sufficiently request a hearing, and the licensee failed to exhaust administrative remedies. *Jain v. State Med. Bd.*, 2010-Ohio-2855, ¶ 15 (10th Dist.).

   ii. If the licensee sent a letter to the agency stating, "we do not request a hearing realizing that we have spoken multiple times and answered all questions honestly," the licensee explicitly declined to exercise his right to a hearing and waived the right to challenge the agency's findings. *Dipre v. Dept. of Ins.*, 2023-Ohio-3060, ¶ 14 (8th Dist.).

g. Failure to appear at the hearing does not constitute failure to exhaust administrative remedies. However, failure to participate in the hearings waives any issue the licensee has with the factual determinations made by the agency. The licensee's arguments are limited to questions of law. *Zidian v. Dept. of Commerce*, 2012-Ohio-1499, ¶ 56 (7th Dist.).

5. Collateral attacks on the administrative process are rarely allowed.

   See Chapter XIII, Collateral Attacks, for additional information on collateral attacks on agency actions.

   a. Collateral attacks on an administrative agency process are generally not permitted.

i. If the General Assembly has enacted a complete and comprehensive statutory scheme governing review by an administrative agency, exclusive jurisdiction is vested within such agency. *BCL Ents. v. Liquor Control Comm.*, 77 Ohio St.3d 467, 471 (1997); *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St.3d 147, 153 (1991).

ii. The Ohio Supreme Court has found patent and unambiguous lack of jurisdiction and has granted writs of prohibition in cases in which courts tried to bypass special statutory proceedings by agencies that have exclusive jurisdiction over a particular subject matter. *State ex rel. Dir., Dept. of Agriculture v. Forchione*, 2016-Ohio-3049, ¶ 22; *State ex rel. Wilkinson v. Reed*, 2003-Ohio-2506, ¶ 16, 18, 21; *State ex rel. Taft-O'Connor '98 v. Franklin Cty. Court. of Common Pleas*, 83 Ohio St.3d 487, 488-489 (1998); *State ex rel. Albright v. Delaware Cty. Court of Common Pleas*, 60 Ohio St.3d 40, 42 (1991).

iii. In rare instances, statutory authority exists for the pursuit of remedies outside of the administrative process. R.C. 1509.36 ("Sections 1509.01 to 1509.37 of the Revised Code . . . do not constitute the exclusive procedure that any person who believes the person's rights to be unlawfully affected by those sections or any official action taken thereunder must pursue in order to protect and preserve those rights, nor do those sections constitute a procedure that that person must pursue before that person may lawfully appeal to the courts to protect and preserve those rights.").

b. Declaratory judgment and injunction actions are rarely appropriate.

i. Declaratory judgment is not available if the plaintiff asserts a determination of statutory rights without a constitutional issue but has failed to exhaust administrative remedies. Permitting such an action without exhaustion would serve only to circumvent the administrative process and bypass the legislative scheme.
Fairview Gen. Hosp. v. Fletcher, 63 Ohio St.3d 146, 152 (1992).

ii. Actions for declaratory judgment and injunction are inappropriate where special statutory proceedings would be bypassed. *Zupancic v. Wilkins*, 2009-Ohio-3688, ¶ 19 (10th Dist.); *Greatorex v. Univ. of Cincinnati*, No. C-790204 (1st Dist. June 18, 1980).

iii. To circumvent a special statutory procedure by way of declaratory judgment would nullify the legislative intent to have specialized questions initially determined by boards and agencies specifically designed and created for that purpose. *One Energy Ents., L.L.C. v. Dept. of Transp.*, 2019-Ohio-359, ¶ 44 (10th Dist.); *Wagner v. Krouse*, 7 Ohio App.3d 378, 380 (6th Dist. 1983).

iv. The exhaustion of administrative remedies is usually required to prevent a premature interference with agency processes. This permits the agency to function efficiently and provides it with an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record adequate for judicial review. *Avery v. City of Rossford*, 145 Ohio App.3d 155, 163 (6th Dist. 2001).

v. If a specialized statutory remedy was available in the form of an adjudicatory hearing, a suit seeking a declaration of rights that would bypass, rather than supplement, the legislative scheme ordinarily should not be allowed. *Aust v. State Dental Bd.*, 136 Ohio

App.3d 677, 683 (10th Dist. 2000); *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist. 1987).

(a) A medical disciplinary proceeding constitutes a special statutory proceeding. The State Medical Board has been authorized by statute to enforce the provisions of R.C. Chapter 4731, to investigate violations thereof, to conduct disciplinary proceedings, and to discipline those persons within the Board's licensing authority. Furthermore, R.C. Chapter 119 provides an appeal of the administrative proceedings to the court of common pleas. A claim for declaratory relief constitutes an improper attempt to bypass the special statutory proceeding. *State ex rel. Gelesh v. State Med. Bd.*, 2007-Ohio-3328, ¶ 26 (10th Dist.).

(b) The General Assembly enacted a complete and comprehensive statutory scheme governing licensure actions under the Medical Marijuana Control Program, including medical marijuana cultivator licenses. The General Assembly has granted the Ohio Department of Commerce exclusive jurisdiction over the licensing of cultivators under the Program and has enacted special statutory remedies for disputes involving those licenses. *State ex rel. CannAscend Ohio L.L.C. v. Williams*, 2020-Ohio-359, ¶ 41 (10th Dist.).

vi. Failure to exhaust administrative remedies is an affirmative defense to a declaratory judgment action. *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 462 (1997); *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 273 (1975); *Covell v. Bureau of Motor Vehicles*, No. 16895 (2d Dist. July 2, 1998).

c. Mandamus actions are rarely appropriate.

i. Mandamus is not a proper remedy if there is a plain and adequate remedy in the ordinary course of law. *State ex rel. Sibarco v. Berea*, 7 Ohio St.2d 85, 90 (1966); *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 153 (1967); *Withintime, Inc. v. Cuyahoga Cty. Fiscal Officer*, 2016-Ohio-2944, ¶ 15 (8th Dist.).

ii. Exhaustion of administrative remedies is required before bringing action in mandamus. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 417-418 (1951); *State ex rel. Rennell v. Indus. Comm.*, 2007-Ohio-4597, ¶ 6 (10th Dist.).

iii. If a person has a right to an appeal under R.C. 119.12 but did not exhaust that administrative remedy, the person had an adequate remedy at law and mandamus is inappropriate. *State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186, 187 (1992); *State ex rel. Rennell v. Indus. Comm.*, 2007-Ohio-4597, ¶ 6 (10th Dist.).

iv. An applicant for a building permit, whose application was refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus, compelling the issuance of such permit because the ordinance as a whole is unconstitutional, without first exhausting administrative remedies provided by such ordinance, if such administrative remedies might enable her to secure such a permit. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 417 (1951).

v. In an action for a writ of mandamus filed simultaneously with the notice of appeal to the court of appeals of a board of zoning appeals decision, dismissal of the mandamus action is proper as the plaintiff has not exhausted the available administrative remedies. *TS Tech USA Corp. v. Pataskala*, 2023-Ohio-826, ¶ 11 (5th Dist.).

d. Action under 42 U.S.C. 1983 has special considerations.

i. Exhaustion is generally not required before bringing a Section 1983 action in state court. *Gibney v. Toledo Bd. of Edn.*, 40 Ohio St.3d 152, 158 (1988).

ii. Incarcerated persons must exhaust administrative remedies before bringing a Section 1983 claim in federal or state courts regarding prison conditions. 42 U.S.C. 1997e(a); *Thomson v. Dept. of Rehab. & Corr.*, 2010-Ohio-416, ¶ 16 (10th Dist.).

6. Constitutional challenges present special considerations.

a. In a facial constitutional challenge, exhaustion is not required.

i. Failure to exhaust administrative remedies is not a necessary prerequisite to an action challenging the constitutionality of a statute, ordinance, or administrative rule. *Jones v. Chagrin Falls*, 77 Ohio St.3d 456, 460 (1997).

ii. The administrative agency does not have authority to declare its statutes unconstitutional; accordingly, raising such a challenge in an administrative action would be futile, and therefore exhaustion is not required for a facial constitutional challenge. *Derakhshan v. State Med. Bd.*, 2007-Ohio-5802, ¶ 26 (10th Dist.).

iii. Generally, the exhaustion of administrative remedies is a prerequisite to any further judicial action. One of the exceptions to this rule is an instance in which an administrative proceeding can afford no meaningful relief. Accordingly, because administrative agencies generally cannot address whether a statute, ordinance, or rule is unconstitutional, a party may institute judicial proceedings raising this claim without first exhausting his or her administrative remedies. *Avery v. City of Rossford*, 145 Ohio App.3d 155, 163 (6th Dist. 2001).

iv. An agency cannot determine the constitutionality of any regulation it may adopt under statute. That role is reserved for the courts under the separation-of-powers doctrine. *S & P Lebos, Inc. v. Liquor Control Comm.*, 2005-Ohio-5424, ¶ 10 (10th Dist.)

b. An as-applied constitutional challenge must be raised during the administrative proceeding.

i. A person who challenges the constitutional application of legislation to particular facts must raise that challenge at the first available opportunity during the proceedings before the administrative agency. *Bd. of Edn. v. Kinney*, 24 Ohio St.3d 184, 185 (1986).

ii. An as-applied constitutional challenge must be raised at the first opportunity; if such challenges are not raised in an administrative proceeding, it will be impossible to develop the record supporting the challenge; accordingly, failure to request a hearing bars an as-applied constitutional challenge on appeal. *Derakhshan v. State Med. Bd.*, 2007-Ohio-5802, ¶ 28-29 (10th Dist.); *S & P Lebos, Inc. v. Liquor Control Comm.*, 2005-Ohio-5424, ¶ 9 (10th Dist.).

iii. An appellant who fails to timely request a hearing has failed to exhaust administrative remedies and has therefore waived the opportunity to raise an as-applied constitutional challenge in the first instance in front of the agency. *State Med. Bd. v. Fiorica*, 10th Dist. Franklin No. 88AP-516 (Nov. 3, 1988).

iv. *But see Highland Tavern, L.L.C. v. DeWine*, 2023-Ohio-2577, in which the Ohio Supreme Court suggested, in dicta, that R.C. 119.12(L)'s phrase "unless otherwise provided by law," would allow the presentation of evidence before the common pleas court in an administrative appeal on the constitutionality of statutes or rules as long as declaratory judgment or injunction claims had been added to the administrative appeal.

7. There are exceptions to the exhaustion doctrine.

   a. Vain acts are an exception.

      i. A "vain act" occurs when an administrative body lacks the authority to grant the relief sought; a vain act does not entail the petitioner's probability of receiving the remedy. The focus is on the power of the administrative body to afford the requested relief, and not on the likelihood of the relief being granted. *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990).

      ii. However, a lack of authority to grant relief is a subset of the greater concept that the doctrine of exhaustion of remedies will apply only if there is a remedy that is effectual to afford the relief sought. *Grudzinski v. Med. College of Ohio*, No. L-00-1098 (6th Dist. Apr. 12, 2000), quoting *Kaufman v. Newburgh Hts.*, 26 Ohio St.2d 217 (1971), syllabus.

      iii. When proceeding with the administrative process would constitute a vain act, a party need not exhaust. Thus, a vain act is an exception to the doctrine of failure to exhaust administrative remedies. *Consol. Land Co. v. Capstone Holding Co.*, 2002-Ohio-7378, ¶ 37 (7th Dist.); *Pappas & Assocs. Agency, Inc. v. State Auto. Mut. Ins. Co.*, No. 18458 (9th Dist. Jan. 7, 1998).

      iv. If an administrative appeal would be "wholly futile," an appellant need not exhaust administrative remedies. A belief that an administrative agency is "likely" to find against an appellant does not make that appeal wholly futile. As long as the agency has the authority to grant relief, then administrative remedies must be exhausted. *Bermann v. Dept. of Job & Family Servs.*, 2015-Ohio-3963, ¶ 16-17 (7th Dist.).

   b. Unusual expense is an exception.

      i. In a declaratory judgment or injunction action, the plaintiff has the burden of pleading all aspects of the exception of unusual expense to avoid dismissal for failure to exhaust administrative remedies. The plaintiff must plead that the administrative proceeding is unusually burdensome as compared to other administrative or judicial proceedings. *OMG MSTR LSCO, L.L.C. v. Dept. of Medicaid*, 2018-Ohio-4843, ¶ 18 (10th Dist.).

      ii. "Onerous or burdensome" does not mean merely that the pending administrative proceedings are expensive and inconvenient. The question is whether the pending administrative action is unusually burdensome as compared to other administrative or

judicial proceedings. *OMG MSTR LSCO, LLC v. Dept. of Medicaid*, 2018-Ohio-4843, ¶ 19 (10th Dist.).

iii. If the appellant cannot demonstrate the administrative remedy would have forced him to incur substantially more expense than the declaratory judgment action, the court cannot say the administrative remedy was not an equally serviceable remedy. *Aust v. State Dental Bd.*, 136 Ohio App.3d 677, 682 (10th Dist. 2000).

c. Delay is an exception.

i. Merely because the administrative remedy takes more time than plaintiff desires is not a sufficient reason to bypass the statutory procedures for review. *Champaign Cty. Nursing Home v. Dept. of Human Serv.*, 2003-Ohio-1706, ¶ 39 (10th Dist.).

ii. The fact that appellants may endure some delay and inconvenience in utilizing the agency's administrative proceedings does not render the process legally inadequate. *Transky v. Civ. Rights Comm.*, 2011-Ohio-1865, ¶ 38 (11th Dist.).

M. Role of the Common Pleas Court on Administrative Appeal

1. Appeals should follow requirements of R.C. 119.12 or R.C. 2506.03.

a. R.C. 119.12 appeals take precedence.

i. R.C. 119.12 administrative appeals take precedence over the regular docket. The common pleas court "shall give preference to [R.C. Chapter 119 proceedings] over all other civil cases, irrespective of the position of the proceedings on the calendar of the court." R.C. 119.12(M).

(a) Appeals from orders of the State Medical Board, State Chiropractic Board, Liquor Control Commission, or Casino Control Commission "shall be set down for hearing at the earliest possible time and take precedence over all other actions." R.C. 119.12(M).

(b) "The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action." R.C. 119.12(M).

(c) R.C. 119.12 requires only a hearing. The hearing may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument, and/or newly discovered evidence. *Motor Vehicle Dealers Bd. v. Central Cadillac Co.*, 14 Ohio St.3d 64, 67 (1984); *Creager v. Dept. of Agriculture*, 2004-Ohio-6068, ¶ 10 (10th Dist.); *Kramp v. State Racing Comm.*, 81 Ohio App.3d 186, 190 (9th Dist. 1991); *Geroc v. Veterinary Med. Licensing Bd.*, 37 Ohio App.3d 192, 193 (8th Dist. 1987).

(d) A common pleas court may limit the mandatory hearing required by R.C. 119.12 to a review of the record if it so desires. The parties may submit briefs, engage in oral argument, and present additional evidence only at the discretion of the court. If a party chooses to submit newly discovered evidence, it must move the court to do so. However, R.C. 119.12 does not mandate that oral arguments be allowed on

every administrative appeal to a court of common pleas.
Collett v. Dept. of Hwy. Safety, No. 96-T-5543 (11th Dist. Sep. 30, 1997).

ii. Local rules may place administrative appeals on an expedited calendar. *See, e.g.*, Franklin Cty. C.P. L.R. 59; Stark Cty. C.P. L.R. 21.01; Licking Cty. C.P. L.R. 34(C).

b. . R.C. 2506.03 governs R.C. Chapter 2506 appeals.

i. "The hearing of an appeal taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code shall proceed as in the trial of a civil action." R.C. 2506.03(A).

ii. R.C. 2506.03(A) does not require the court of common pleas to act as a trial court, hearing an action de novo, but rather authorizes the court to admit and consider new evidence if permitted and to weigh evidence on the whole record.
AT&T Communications of Ohio, Inc. v. Lynch, 2012-Ohio-1975, ¶ 13.

iii. No statutory authority requires a common pleas court to give the appellant in an administrative appeal the opportunity to file a brief before the court can issue its decision. This holds true even though the language found in R.C. 2506.03(A) requires the matter to proceed as in the trial of a civil action. *West Jefferson Properties, L.L.C. v. West Jefferson Village Council*, 2022-Ohio-3277, ¶ 10 (12th Dist.).

2. R.C. 119.12 appeals have a specific standard of review.

a. The common pleas court functions as an appellate court.

i. R.C. 119.12 directs the common pleas court to function as an appellate court. The review of the administrative record is a hybrid review that is neither a trial de novo nor an appeal on questions of law only. *Bingham v. Veterinary Med. Licensing Bd.*, No. 18510 (9th Dist. Feb. 11, 1998); *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d 526, 528 (10th Dist. 1991).

ii. An appeal to the trial court of an administrative order is not a trial de novo.
Andrews v. Bd. of Liquor Control, 164 Ohio St. 275, 279 (1955).

iii. When reviewing an order of an administrative agency under R.C. 119.12, a common pleas court must consider the entire record to determine whether the agency's order is supported by reliable, probative, and substantial evidence, and whether the order is in accordance with law. *JG City L.L.C. v. State Pharmacy Bd.*, 2021-Ohio-4624, ¶ 21 (10th Dist.).

iv. Absent a showing to the contrary, the reviewing court must presume the regularity of the administrative proceedings. When the record is silent as to consideration of the objections, the reviewing court must presume the commission reviewed the objections. *Cowans v. State Racing Comm.*, 2014-Ohio-1811, ¶ 39 (10th Dist.).

v. A basic tenet of appellate jurisdiction is that a party may not present an argument on appeal that was not raised below. The waiver doctrine applies equally to an administrative appeal. *Care Circle L.L.C. v. Dept. of Mental Health & Addiction Servs.*, 2020-Ohio-1382, ¶ 37 (8th Dist.).

b. Courts defer to the agency on questions of fact and conducts a de novo review on questions of law.

i. Courts defer to the agency on questions of fact.

(a) Determining whether an agency order is supported by reliable, probative, and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

(b) The common pleas court conducts a hybrid review in which it must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980); *Crumpler v. State Bd. of Edn.*, 71 Ohio App.3d 526, 528 (10th Dist. 1991).

(c) The reviewing court must give due deference to the administrative resolution of evidentiary conflicts. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980); *Mitchell v. Bainbridge Twp.*, 2004-Ohio-3687, ¶ 40 (11th Dist.); *Asad v. State Med. Bd.*, 79 Ohio App.3d 143, 145 (10th Dist. 1992).

(d) The court must defer to the factual findings unless the findings are internally inconsistent, rest on improper inferences, or are otherwise unsupportable. *VFW Post 8586 v. Liquor Control Comm.*, 83 Ohio St.3d 79, 81 (1998).

(e) If the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, could observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

(f) A common pleas court in such cases "should not weigh the evidence anew, but should simply see if there is credible evidence in the record to support the board's finding." *Herbert v. Administrator, Bureau of Employment Svs.*, No. 11740 (9th Dist. Dec. 28, 1984).

(g) If a witness's testimony is internally inconsistent or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, if it seems that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order. *University of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

(h) A reviewing court should not substitute its judgment for that of an administrative board. *Bingham v. Veterinary Med. Licensing Bd.*, No. 18510 (9th Dist. Feb. 11, 1998); *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34 (1984).

(i) A reviewing court may not make essential findings of fact that were completely absent from the board's order, were directly contrary to the hearing examiner's

findings of fact, and were not otherwise supported by the record. *Calloway v. State Med. Bd.*, 2013-Ohio-2069, ¶ 37 (10th Dist.).

(j) As long as the administrative agency's order is supported by reliable, probative, and substantial evidence and is in accordance with law, it is immaterial that the reviewing court, if it were the original trier of fact, may have reached a different conclusion. *Gruber v. Dept. of Human Servs.*, 98 Ohio App.3d 72, 76 (5th Dist. 1994); *Westerville City Schools v. Civil Rights Comm.*, No. 80AP-82 (10th Dist. Dec. 30, 1980).

(k) A common pleas court abused its discretion when it found a lack of reliable, probative, and substantial evidence without showing where witnesses' testimony was contradictory, lacked credibility, or was internally inconsistent. *Langdon v. Dept. of Edn.*, 2017-Ohio-8356, ¶ 78 (12th Dist.).

ii. Courts conduct a de novo review on questions of law.

(a) The common pleas court conducts a de novo review on issues of law. *Wells v. Dept. of Jobs and Family Serv.*, 2006-Ohio-4443, ¶ 18 (5th Dist.).

(b) A de novo review means an appellate court must independently review the record without giving deference to the trial court's decision. *Mathews v. Liquor Control Comm.*, 2004-Ohio-3726, ¶ 11 (10th Dist.); *Brown v. Cty. Commrs. of Scioto Cty.*, 87 Ohio App.3d 704, 711 (4th Dist. 1993).

(c) In determining whether an agency order is in accordance with law, the common pleas court undertakes a de novo review and exercises its independent judgment. *JG City L.L.C. v. State Pharmacy Bd.*, 2021-Ohio-4624, ¶ 21 (10th Dist.).

iii. The common pleas court must determine whether "the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12(N); *Griffin v. State Med. Bd.*, 2011-Ohio-6089, ¶ 15 (10th Dist.).

(a) "Reliable" evidence is dependable; that is, it can be confidently trusted. To be reliable, there must be a reasonable probability that the evidence is true. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

(b) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

(c) "Substantial" evidence is evidence with some weight; it must have importance and value. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

c. The order must be made in accordance with law.

i. Questions of law include questions of constitutionality, construction, or interpretation of statutes and rules and regulations of the agency, questions related to due process, and an agency's statutory authorization to act.

ii. Determining whether due process requirements have been satisfied, and therefore the agency action is in accordance with law, presents a legal question to be reviewed de

novo. *Floyd's Legacy, L.L.C. v. Liquor Control Comm.*, 2020-Ohio-4074, ¶ 17 (10th Dist.).

iii. Courts need not defer to agency interpretation of its statute.

(a) In 2022, the Ohio Supreme Court decided *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677. The court clarified that reviewing courts need not defer to an agency's interpretation of a statute, nor must courts defer to an agency's interpretation of an ambiguous statute.

(b) Courts need not ever defer to the judgment of an administrative agency. A court may consider an administrative agency's construction of a legal text in exercising its duty to independently interpret the law. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 40, 42.

(c) An administrative interpretation should never be used to alter the meaning of a clear statute. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 44 ("To start, an administrative interpretation should never be used to alter the meaning of clear text. If the text is unambiguous, the court should stop right there.").

(d) If a court does find ambiguity and considers an administrative interpretation along with other tools of interpretation, the weight, if any, the court assigns to the administrative interpretation should depend on the persuasive power of the agency's interpretation and not merely because it is being offered by an administrative agency. A court may find agency input informative, or the court may find the agency position unconvincing. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 45.

(e) The *TWISM* decision does not preclude a court from considering the agency's interpretation of an ambiguous statute. If a statute is truly ambiguous in that there are two equally persuasive and competing interpretations of the law, a court may consider an administrative construction of the statute. *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*, 2021-Ohio-3156, ¶ 21, citing R.C. 1.49(F); *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 2014-Ohio-4809, ¶ 29; *State ex rel. AutoZone Stores, Inc. v. Indus. Comm.*, 2023-Ohio-633 ¶ 16 (10th Dist.).

(f) If a statute conveys specific authority on the administrative agency to make interpretations of its statute, a court should only determine if the agency's exercise of that authority is within its statutory charge. *In re Application of Firelands Wind, L.L.C.*, 2023-Ohio-2555 ¶ 14-15. In determining whether an agency's interpretation is reasonable under its statue, the court should not disturb the board's factual determinations. *In re Complaints of Lycourt-Donovan v. Columbia Gas of Ohio, Inc.*, 2017-Ohio-7566, ¶ 35; *In re Application of Champaign Wind, L.L.C.*, 2016-Ohio-1513, ¶ 7.

(g) *TWISM* has been applied to interpretations of elections statutes by the Ohio Secretary of State, *State ex rel. Hildreth v. LaRose*, 2023-Ohio-3667, ¶ 22, as well as a decision by a zoning board, *Turner v. Bexley Bd. of Zoning & Planning*, 2023-Ohio-3225, ¶ 26-27 (10th Dist.) (specifically overturning *Access Ohio, L.L.C. v. Gahanna*, 2020-Ohio-2908 (10th Dist.)).

iv. In dicta, the Supreme Court claimed it was applying the principles of *TWISM* and to the Ohio Power Siting Board's interpretation of its rules for siting a solar power facility. *In re Application of Alamo Solar I, L.L.C.*, 2023-Ohio-3778, ¶ 12. In its opinion, the Court stressed that it was not deferring to the Board's interpretation of its rules; but rather, it was determining if the Board's interpretations of its rules were reasonable in light of its statute as it had held in *In re Application of Firelands Wind, L.L.C.,* 2023-Ohio-2555 ¶ 15. The Court agreed with the Board in every interpretation. *Id.* at 70. And in dissent, Justice Brunner pointed out pointedly that this case never raised a *TWISM* issue. *Id.* at ¶ 74-79.

3. Courts may make certain rulings on agency orders.

a. Courts may affirm the order.

i. The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12(N).

ii. A court of common pleas when reviewing an agency's order need find only reliable, probative, and substantial evidence supporting one ground for revocation in order to uphold the agency's order. *Griffin v. State Med. Bd.*, 2011-Ohio-6089, ¶ 37 (10th Dist.).

b. Courts may reverse, vacate, or modify order, or make another ruling.

i. Absent a finding that the agency order is supported by reliable, probative, and substantial evidence and is in accordance with law, a court may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 119.12(N).

ii. To reverse an agency's order, the respondent must show prejudice resulting from a due process error. When the respondent acknowledges the conduct and receives the minimum allowable penalty, the respondent cannot show prejudice. *Seman v. State Med. Bd.*, 2020-Ohio-3342, ¶ 25 (10th Dist.).

c. Courts may remand to the agency.

i. Because R.C. 119.12(N) gives a court of common pleas the power to reverse and vacate decisions, a court of common pleas necessarily has the power to remand the cause to the decision maker. *Guru Pramukh Swami Inc. v. Lottery Comm.*, 2020-Ohio-5137, ¶ 14 (3d Dist.).

ii. A remand for further proceedings means that the case is returned to the administrative agency so that it may take further action in accordance with applicable law. Such a remand does not dismiss or terminate the administrative proceeding but, rather, means

that the agency may take a fresh look at the matter.
Chapman v. State Dental Bd., 33 Ohio App.3d 324, 328 (9th Dist. 1986).

iii. An order from an administrative agency that remands for further hearing on the merits is interlocutory in nature and thus is not a final appealable order.
Fuller v. Dept. of Transp., 2016-Ohio-5116, ¶ 14 (10th Dist.).

iv. The law of the case doctrine applies only to final orders and not to interlocutory orders that are subject to the trial court's reconsideration.
Denuit v. State Bd. of Pharmacy, 2013-Ohio-2484, ¶ 19 (4th Dist.).

v. Under R.C. 2506.04, a common pleas court does not have authority to remand a case to an agency to conduct an evidentiary hearing. It may only reverse, vacate or modify with instructions to enter an order consistent with its findings or opinion.
Lee v. Lafayette Twp. Bd. of Zoning Appeals, 2012-Ohio-5563, ¶ 8 (9th Dist.).

d. Courts may not modify the penalty.

i. If a reviewing court finds that the agency's order is supported by reliable, probative, and substantial evidence and is made in accordance with law, under R.C. 119.12, a court cannot modify the penalty. The court can only affirm, and cannot reverse, vacate, or modify. *Henry's Cafe, Inc. v. Bd. of Liquor Control*, 170 Ohio St. 233, 236 (1959).

ii. If the agency's decision is supported by sufficient evidence and the law, the common pleas court lacks authority to review the agency's exercise of discretion, even if its decision is admittedly harsh. *Capital Care Network of Toledo v. Dept. of Health*, 2018-Ohio-440, ¶ 25; *Griffin v. State Med. Bd.*, 2011-Ohio-6089, ¶ 42 (10th Dist.).

iii. If the agency can sanction the respondent, and the chosen sanction is authorized by statute, the common pleas court cannot interfere with or modify the penalty imposed. *Shah v. State Med. Bd.*, 2014-Ohio-4067, ¶ 17 (10th Dist.).

iv. The discretion granted to the board in imposing a wide range of potential sanctions reflects the deference due to the board's expertise in carrying out its statutorily granted authority over the medical profession. *Demint v. State Med. Bd.*, 2016-Ohio-3531, ¶ 63 (10th Dist.).

v. If the reviewing court finds that the agency was within its authority to deny a renewal application, the court has no power to review the penalty handed by the agency.
Floyd's Legacy, L.L.C. v. Liquor Control Comm., 2020-Ohio-4074, ¶ 30 (10th Dist.).

vi. Certain reviewing authorities outside of R.C. Chapter 119 may have additional power. *See, e.g.*, R.C. 1509.36, ¶ 10 ("…if the [oil and gas] commission finds that the order was unreasonable or unlawful, it shall make a written order vacating the order appealed from and making the order that it finds the chief should have made."); R.C. 3745.05(F) ("If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from."); R.C. 1513.13(B) ("The commission shall affirm the notice of violation, order, or decision of the chief

unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law; in that case the [reclamation] commission may modify the notice of violation, order, or decision or vacate it and remand it to the chief for further proceedings that the commission may direct.")

e. Dismissal of an appeal is sometimes allowed.

i. Courts are split on whether an appeal can be dismissed for failure to prosecute.

(a) R.C. 119.12 does not permit the dismissal of an administrative appeal for failure to file briefs. An R.C. 119.12 appeal cannot be dismissed without examination of the record to find whether the order is or is not supported by reliable, probative, and substantial evidence and made in accordance with law. *Red Hotz, Inc. v. Liquor Control Comm.*, No. 93AP-87 (10th Dist. Aug. 17, 1993); *Grecian Gardens, Inc. v. Bd. of Liquor Control*, 2 Ohio App.2d 112, 113 (10th Dist. 1964).

(b) A trial court cannot dismiss an appeal taken under R.C. Chapter 2506 without complying with the mandatory requirements of R.C. 2506.04 to hear the appeal and issue findings regarding whether the agency's order was "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." *Mastantuono v. Olmsted Twp. Bd. of Zoning Appeals*, 2009-Ohio-864, ¶ 20 (10th Dist.).

(c) But *see Childs v. Midwest Laundry*, 2023-Ohio-3505, ¶ 7-8 (2d Dist.), holding that a court of common pleas may dismiss an administrative appeal for failure to prosecute under Civ.R. 41(B)(1) if the appellant had notice that dismissal was a possibility. The decision to dismiss an action under Civ.R. 41(B)(1) is within the sound discretion of the trial court.

(d) See *also Parker v. Lake Metro. Hous. Auth.*, 2012-Ohio-5580, ¶ 14 (11th Dist.), in which the court held that in administrative appeals taken under R.C. Chapter 2506, dismissals for failure to prosecute are governed by Civ.R. 41(B)(1). The court must give appellant notice of its intention before dismissing for failure to prosecute.

ii. Courts must dismiss upon the death of a licensee.

(a) Upon the death of the respondent while an administrative appeal is pending before the court, the court must dismiss the appeal as moot. The agency cannot reinstate the license of a deceased individual. *Polisetty v. State Med. Bd.*, 2015-Ohio-5278, ¶ 2 (10th Dist.).

(b) The criminal doctrine of abatement (vacation of criminal conviction if the defendant dies while the conviction is on appeal) does not apply to administrative appeals. *Polisetty v. State Med. Bd.*, 2015-Ohio-5278, ¶ 3 (10th Dist.).

iii. An administrative appeal is moot as a matter of law if the record demonstrates the appellant has achieved all the relief the court could afford the appellant regarding the matters on appeal. *Linder v. Dept. of Aging*, 2022-Ohio-177, ¶ 11 (1st Dist.); *Soltesz v. Dept. of Job & Family Servs.*, 2020-Ohio-365, ¶ 14 (10th Dist.).

f. The judgment of the court will be final and conclusive unless reversed, vacated, or modified on appeal. R.C. 119.12(O).

N. Appeal from the Common Pleas Court to the Court of Appeals

1. The party and the agency have the right to an appeal to the court of appeals.

   a. An appeal may be taken by either the party or the agency, will proceed as in the case of appeals in civil actions, and will be under the Rules of Appellate Procedure and, to the extent not in conflict with those rules, R.C. Chapter 2505. R.C. 119.12(O).

   b. An appeal by the agency, however, can be taken only on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency. R.C. 119.12(O).

      i. If the common pleas court construes a particular statute or regulatory provision in its decision under R.C. 119.12, a reviewing court is able to entertain the agency appeal on that question of law and any supplementary issue going to the weight of the evidence. *Swope v. Bd. of Bldg. Stds.*, No. 93AP-595 (10th Dist. Dec. 23, 1993).

      ii. The mere application of the law to the facts does not constitute an interpretation of law within the meaning of R.C. 119.12 and therefore the agency cannot appeal. A genuine question must be presented, and the trial court must make a specific finding as to the meaning of the statute or rule. *Wolff v. Dept. of Job & Family Servs.*, 2006-Ohio-214, ¶ 9 (10th Dist.).

      iii. An agency cannot appeal if its only assignment of error concerns only the application of facts to a statutory definition; such an assignment of error is not a question of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency. *TAP Mgt., Inc. v. Dept. of Commerce*, 2021-Ohio-4390, ¶ 14 (10th Dist.).

      iv. An agency cannot appeal if the common pleas court's judgment is made entirely upon the evidence and if the common pleas court did not specifically determine the meaning of a statute, rule, or regulation. *Ladd v. Counselor & Social Worker Bd.*, 76 Ohio App.3d 323, 328-329 (6th Dist. 1991).

   c. If the agency appeals on a question of law, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record. R.C. 119.12(O); *Swope v. Bd. of Bldg. Stds.*, No. 93AP-595 (10th Dist. Dec. 23, 1993).

2. The standard of review in appeals court is more limited.

   a. Issues of fact require an abuse-of-discretion standard.

      i. On appeal, the court of appeals has a more limited role than that of the trial court in reviewing an order of an administrative agency. On issues of fact, the court of appeals is to determine only if the trial court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988); *Mathews v. Liquor Control Comm.*, 2004-Ohio-3726, ¶ 11 (10th Dist.); *Bingham v. Veterinary Med. Licensing Bd.*, No. 18510 (9th Dist. Feb. 11, 1998).

ii. An abuse of discretion implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988).

iii. An abuse of discretion implies a decision that is without a reasonable basis or one that is clearly wrong. *Wise v. Motor Vehicle Dealers Bd.*, 106 Ohio App.3d 562, 565 (9th Dist. 1995).

iv. Absent an abuse of discretion by the trial court, a court of appeals may not substitute its judgment for that of the agency or a trial court. *In re Jim's Sales, Inc.*, 2005-Ohio-4086, ¶ 35 (9th Dist.).

b. Issues of law require a *de novo* review.

i. On whether the agency's order was in accordance with the law, the court of appeals exercises plenary powers of review. *Spitznagel v. State Bd. of Edn.*, 2010-Ohio-2715, ¶ 14; *A-1 Natl. Agency Group, LLC No. 1167 v. Dept. of Ins.*, 2004-Ohio-3553, ¶ 14 (3d Dist.); *1800 Riverhouse, Inc. v. Liquor Control Comm.*, 2004-Ohio-3831, ¶ 8 (10th Dist.).

ii. A court of appeals conducts a de novo review on issues of law. A de novo review means an appellate court must independently review the record without deferring to the trial court's decision. *Mathews v. Liquor Control Comm.*, 2004-Ohio-3726, ¶ 11 (10th Dist.).

iii. Questions on appeal relating to statutory construction are legal issues that a court of appeals reviews de novo. *Univ. Hosp., Univ. of Cincinnati College of Med. v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992); *Pacella v. Dept. of Commerce*, 2003-Ohio-3432, ¶ 21 (10th Dist.).

iv. Issues relating to constitutionality and procedural due process are given plenary review by the court of appeals. *Crawford-Cole v. Lucas Cty. Dept. of Job & Family Servs.*, 2012-Ohio-3506, ¶ 12 (6th Dist.).

v. In R.C. Chapter 2506 appeals, courts of appeals have a limited scope of a review, but interpretation of a city's ordinance presents a question of law that must be reviewed de novo. *Homan v. Franklin Twp. Bd. of Zoning Appeals*, 2018-Ohio-3717, ¶ 13 (3d Dist.).

XII. Attorneys Fees

Under the "American Rule," parties are generally responsible for the payment of their own attorney's fees. However, R.C. Chapter 119 contains two provisions that allow a prevailing eligible party to seek attorney's fees. R.C. 119.092 allows for the payment of attorney's fees incurred at an administrative hearing before certain state agencies, while R.C. 119.12(N) allows a prevailing party in administrative appeal to seek attorney's fees in court. A party's frivolous conduct or bad faith may also result in payment of attorney's fees to the other side. In addition, specific statutory provisions, such as the Public Records Law, may provide for attorney's fees in certain situations.

A. R.C. Chapter 119 Attorney's-Fee Provisions

1. R.C. 119.092 allows prevailing eligible parties to move for attorney's fees incurred at an administrative hearing.

2. R.C. 119.12(N) allows a prevailing party on appeal to the common pleas court to move the court for attorney's fees in accordance with R.C. 2335.39.

B. Recovery of Attorney's Fees by Prevailing Party under R.C. 119.092

1. If an agency conducts an adjudication hearing under R.C. Chapter 119, the prevailing eligible party may be entitled to compensation for fees incurred by the party in connection with the hearing. R.C. 119.092(B)(1).

2. Some state entities are not "agencies" under R.C. 119.092. *State ex rel. Auglaize Mercer Community Action Comm., Inc. v. Civ. Rights Comm.*, 73 Ohio St.3d 723, 725 (1995) (Ohio Civil Rights Commission); *Knight v. Bd. of Elections*, 65 Ohio App.3d 317, 321 (11th Dist. 1989) (Board of Elections).

3. R.C. 119.092 does not apply to administrative hearings conducted by the State Personnel Board of Review under R.C. 124.03. R.C. 119.092(F)(4); *Carruthers v. O'Connor*, 121 Ohio App.3d 39, 43 (10th Dist. 1997). R.C. 119.092 does not apply to administrative hearings conducted by the State Employment Relations Board under R.C. Chapter 4117. R.C. 119.092(F)(4); *Lima Pub. Library Bd. of Trustees v. State Emp. Relations Bd.*, 2011-Ohio-1730, ¶ 41 (3d Dist.).

4. If any agency is subject to R.C. 119.092, "prevailing eligible parties" may seek attorney's fees. A "prevailing eligible party" means "an eligible party that prevails after an adjudication hearing, as reflected in an order entered in the journal of the agency." R.C. 119.092(A)(4).

    a. R.C. 119.092 requires that an adjudication hearing must be held for a party to be eligible for attorney's fees. Compensation may be awarded for fees incurred in connection with that adjudication hearing. If an agency terminates a notice of proposed action without prejudice, there is no "prevailing party" under R.C. 119.092. *Mr. T's Heart of Gold and Diamonds, L.L.C. v. Dept. of Commerce*, Franklin C.P. No. 13CV-2280 (Oct. 24, 2014).

    b. Under R.C. 119.092(A)(1), an "eligible party" means a party to an adjudication hearing other than the following:

        i. The agency;

ii. An individual whose net worth exceeded $1 million at the time the individual received notification of the hearing;

iii. A sole owner of a business entity or organization that had a net worth exceeding $5 million at the time the party received notification of the hearing, except for organizations described in subsection 501(c)(3) and tax exempt under subsection 501(a) of the Internal Revenue Code; or

iv. A sole owner of a business entity or an organization that employed more than 500 persons at the time the party received notification of the hearing.

c. R.C. 119.093 and Adm.Code 109-2-01 define "net worth" for purposes of awarding attorney's fees under R.C. 119.092 and R.C. 2335.39.

d. "Fees" means reasonable attorney's fees, in an amount not to exceed $75 per hour or a higher hourly fee that the agency establishes by rule and that applies under the circumstances. R.C. 119.092(A)(2).

e. A prevailing eligible party is entitled to attorney's fees; however, the award is not automatic. *Wilde v. Veterinary Med. Licensing Bd.*, Nos. 98CA00138 and 98CA00025 (5th Dist. Oct. 1, 1999).

5. The attorney's-fees provision of R.C. 119.092 does not apply in the following circumstances:

a. The fees of the prevailing eligible party were $100 or less. R.C. 119.092(B)(2)(c).

b. An adjudication hearing was held to establish or fix a rate. R.C. 119.092(F)(1).

c. An adjudication hearing was held to determine eligibility or entitlement of any individual to benefits. R.C. 119.092(F)(2); *Ward v. Dept. of Job & Family Servs.*, 2020-Ohio-3551, ¶ 9 (6th Dist.); but *see Haghighi v. Moody*, 2003-Ohio-2203, ¶ 14-16 (1st Dist.) (hearing to determine what financial information the applicant's sponsor must provide to the agency was not a hearing to determine eligibility for benefits, so R.C. 119.092(F)(2) would not bar recovery of fees).

d. A prevailing eligible party was represented in an adjudication hearing by an attorney who was paid through an appropriation by the federal, state, or local government. R.C. 119.092(F)(3).

e. An adjudication was conducted by the State Employment Relations Board (SERB) under R.C. Chapter 4117 (regarding public employees' collective bargaining). R.C. 119.092(F)(4).

f. An adjudication hearing was conducted by the State Personnel Board of Review (SPBR) under R.C. 124.03 (involving reduction in pay or position, job abolishment, layoff, suspension, discharge, assignment or reassignment to a new or different position). R.C. 119.092(F)(4). Authorities are split on the scope of R.C. 119.092(F)(4) as it pertains to SPBR.

i. The First District Court of Appeals has distinguished two categories of SPBR hearings: those arising under R.C. 124.03 (involving discharges or layoffs) and those arising under R.C. 124.34 (involving removals or reduction of pay for disciplinary reasons). Relying on the plain language of R.C. 119.092(F)(4), the First District has held that attorney's fees may be recovered after hearings under R.C. 124.34, but not after hearings under R.C.

124.03. *Estate of Kirby v. Hamilton Cty. Court of Common Pleas*, Juvenile Div., 78 Ohio App.3d 397, 401-02 (1st Dist. 1992).

ii. The Tenth District Court of Appeals has held that all lawful hearings before the SPBR are necessarily in accordance with R.C. 124.03—because that is the enabling statute conferring the powers and duties of the board—and therefore attorney's fees are never available following an SPBR adjudication. *Carruthers v. O'Connor*, 121 Ohio App.3d 39, 43 (10th Dist. 1997); *Lima Pub. Library Bd. of Trustees v. State Emp. Relations Bd.*, 2011-Ohio-1730, ¶ 41 (3d Dist.) (Third District followed Carruthers and held that it was not error for the trial court to deny a request for attorney's fees without holding a hearing).

6. A motion filed with the agency is the only mechanism for recovering fees under R.C. 119.092, as it does not enable an eligible prevailing party to file a separate action for fees in the common pleas court. *Discount Fireworks, Inc. v. Stetz*, No. 1999CA00055 (5th Dist. Aug. 2, 1999).

7. The motion for fees must be filed with the agency within 30 days after the date that the order of the agency is entered in its journal. R.C. 119.092(B)(1).

8. Under R.C. 119.092(B)(1), the motion for fees does all of the following:

   a. Identify the party;

   b. Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;

   c. Include a statement that the agency's position in initiating the matter in controversy was not substantially justified;

   d. Indicate the amount sought as an award; and

   e. Itemize all fees sought in the requested award. This itemization must include a statement from any attorney who represented the prevailing eligible party, indicating the fees charged, the actual time expended, and the rate at which the fees were calculated.

9. The fees must be properly itemized.

   a. Because of the paucity of case law regarding itemization requirements under R.C. 119.092, it is useful to look at case law regarding itemization in motions for attorney's fee under R.C. 119.12, which includes the same language.

   b. Block billing is defined as "lumping multiple tasks into a single entry." *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 6. The Ohio Supreme Court will not grant attorney's-fee applications that include block-billed time entries. *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 7. Block billing is also disfavored by hearing examiners reviewing motions for attorney's fees as it makes it impossible to determine whether the amount of time spent on each task was reasonable. *Sims v. Nissan N. Am., Inc.*, 2015-Ohio-5367, ¶ 30 (10th Dist.) (review of protest under R.C. 4517.65(C)).

   c. Generally, billing should be listed in sixths of an hour, rather than by quarter-hour. *Bigler v. Personal Serv. Ins. Co.*, 2014-Ohio-1467 (7th Dist.).

10. The motion for fees will be reviewed by the hearing examiner.

a. The request for attorney's fees is reviewed by the hearing examiner who conducted the adjudication hearing. R.C. 119.092(B)(2).

b. If the hearing was not conducted before a hearing examiner, the agency considers the motion. R.C. 119.092(B)(2).

c. If the determination is made by the hearing examiner or referee, that determination is not subject to review by the agency. R.C. 119.092(B)(3); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 425 (1st Dist. 1998); *Gladieux v. State Med. Bd.*, 133 Ohio App.3d 465, 474 (10th Dist. 1999).

d. R.C. 119.092 does not require a hearing on the motion for attorney's fees. Instead, R.C. 119.092 requires only a "review" by the referee, examiner, or agency who conducted the adjudication hearing. *State ex rel. Auglaize Mercer Community Action Comm., Inc. v. Civ. Rights Comm.*, 73 Ohio St.3d 723, 726 (1995).

11. The burden is on the agency to prove the award is unjust.

a. Under R.C. 119.092(B)(2), the agency has the burden to prove the following:

i. that its position in initiating the matter was substantially justified;

ii. that special circumstances make the award unjust; or

iii. that the prevailing eligible party engaged in conduct during the hearing that unduly and unreasonably protracted the final resolution of the matter.

12. Hearing examiner will review the motion for fees.

a. When is the action initiated?

i. To "initiate" means to commence an action, not continue a proceeding that has already begun. Moreover, Black's Law Dictionary defines "matter in controversy" as "[s]ubject of litigation; matter on which action is brought and issue is joined and in relation to which, if issue be one of fact, testimony is taken."
State ex rel. Ohio Dept. of Health v. Sowald, 65 Ohio St.3d 338, 342 (1992).

ii. "'To initiate' means to commence an action, not to continue a proceeding already begun." *Penix v. Real Estate Appraiser Bd.*, 2011-Ohio-191, ¶ 19 (5th Dist.); *Wall v. State Bd. of Edn.*, 2015-Ohio-1418, ¶ 33 (3d Dist.).

iii. Generally, a matter is initiated by issuing a notice of opportunity for hearing under R.C. 119.06 and 119.07. *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342 (1992); *Wall v. State Bd. of Edn.*, 2015-Ohio-1418, ¶ 34-35 (3d Dist.) (Board was not "initiating" the action when it rejected the hearing examiner's report and recommendation but was continuing a proceeding that had already begun).

iv. An agency did not "initiate" an action when it denied an application to a medical marijuana processor. *Cielo Processing v. Dept. of Commerce,* Cuyahoga C.P. No. CV-20-936938 (Aug. 24, 2021) (court affirmed hearing examiner's denial of attorney's fees under R.C. 119.092).

v. For more information on "initiating" the matter, whether an agency was "substantially justified," or whether "special circumstances make an award unjust," see analysis for R.C. 119.12 below.

b. The initiation of the action was substantially justified is evaluated at the time of initiating the action. R.C. 2335.39(B)(2); *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338 (1992); *Gilmore v. State Dental Bd.*, 2005-Ohio-2856, ¶ 4 (1st Dist.).

13. The decision on the motion for fees must meet certain requirements.

a. Under R.C. 119.092(B)(2), the hearing examiner, referee, or the agency must make the following determinations:

i. Whether the fees incurred by the prevailing eligible party exceeded $100;

ii. Whether the agency's position in initiating the matter was substantially justified;

iii. Whether special circumstances make an award unjust; and

iv. Whether the prevailing eligible party engaged in conduct during the hearing that unduly and unreasonably protracted the final resolution.

b. The examiner may deny or reduce the fees requested.

i. Under R.C. 119.092(B)(2), the referee, examiner or the agency may *deny* the motion for fees if:

(a) The agency's position in initiating the action was substantially justified, or special circumstances make an award unjust. R.C. 119.092(B)(2)(a).

(b) The fees do not exceed $100. R.C. 119.092(B)(2)(c).

ii. The referee, examiner or the agency may *reduce* the fees requested if the prevailing eligible party engaged in conduct during the hearing that unduly and unreasonably protracted the final resolution of the matter. R.C. 119.092(B)(2)(b).

c. What is the format for attorney's-fees decisions?

i. Under R.C. 119.092(B)(2), the decision as to fees must be in writing and must state the following:

(a) Whether an award has been granted;

(b) Findings and conclusions underlying the decision;

(c) Reasons or bases for the findings and conclusions; and

(d) Amount of the award, if any.

ii. The determination must be entered into the record, and a copy must be served to the prevailing eligible party in accordance with R.C. 119.05.

14. How will the award be paid?

a. The award may be paid by the agency from any funds available to it for payment of such compensation. R.C. 119.092(D).

b. If an agency does not pay compensation from such funds or no funds are available, the award is treated as a judgment under R.C. Chapter 2743 in the Court of Claims, except no interest is paid. R.C. 119.092(D).

c. Each agency that is required to pay compensation under R.C. 119.092 must prepare and file with the General Assembly a report by October 1st of the fiscal year following the year covered by the report. R.C. 119.092(E). The report must include the information specified in R.C. 119.092(E).

d. The determination for a board to pay any fee award does not mean the board has an unconstitutional pecuniary interest in the outcome of the matter. Attorney's-fee motions are decided by the independent hearing examiner and are not appealed to the board or agency. *Gladieux v. State Med. Bd.*, 133 Ohio App.3d 465, 474 (10th Dist. 1999); *Sohi v. State Dental Bd.*, 130 Ohio App.3d 414, 425 (1st Dist. 1998).

15. Parties may appeal to common pleas court under R.C. 119.092.

a. The prevailing eligible party may appeal the award.

i. The prevailing eligible party may appeal the denial or reduction of award of attorney's fees. R.C. 119.092(C).

ii. The appeal should be filed in the same common pleas court where a party would appeal an agency adjudication order under R.C. 119.12. R.C. 119.092(C).

iii. An attorney's-fees motion filed with the court of common pleas, with a copy served on the agency does not fulfill R.C. 119.092's requirement that the motion be filed with the agency. *Orth v. Dept. of Edn.*, 2015-Ohio-3977 (10th Dist.).

iv. Notices of appeal must be filed in the manner and within the period specified in R.C. 119.12. One notice of appeal must be filed with the agency, and one must be filed in the proper court of common pleas, within 15 days after the date of service of the fee award. R.C. 119.092(C).

(a) Courts are split on whether the notice filed with the agency and the notice filed with the court of common pleas must be identical. *Legleiter v. Dept. of Edn.*, 10th Dist. Franklin No. 12AP-253, 2012-Ohio-5668, ¶ 17 (both notices of appeal must be identical); *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499, ¶ 39 (notices of appeal need not be exact copies of each other).

b. The agency may appeal the award.

i. If a referee or examiner makes the final determination on the fee award, an agency may appeal the grant of award. R.C. 119.092(C).

ii. The appeal should be filed in the same common pleas court where an appeal could have been filed under R.C. 119.12. R.C. 119.092(C).

iii. One notice of appeal must be filed with the agency, and an identical must be filed in the proper court of appeals, within 15 days from the date of service. R.C. 119.092(C).

(a) Courts are split on whether the notice filed with the agency and the notice filed with the court of common pleas must be identical. *Legleiter v. Dept. of Edn.*, 10th Dist. Franklin No. 12AP-253, 2012-Ohio-5668, ¶ 17 (both notices of appeal must be identical); *Zidian v. Dept. of Commerce*, 7th Dist. Mahoning No. 11 MA 39, 2012-Ohio-1499, ¶ 39 (notices of appeal need not be exact copies of each other).

c. The agency must prepare and certify the record.

i. Upon the filing of a notice of appeal of the award of attorney's fees, the agency must prepare and certify to the court a complete record of the case. R.C. 119.092(C).

ii. The court must "conduct a hearing on the appeal." R.C. 119.092(C). The agency, and the court must do so "in accordance with the procedures established in" R.C. 119.12 unless otherwise provided in R.C. 119.092.

iii. The court may modify the determination of the referee, examiner, or agency regarding the motion for fees "only if the court finds that the failure to grant an award, or the calculation of the amount of an award, involved an abuse of discretion." R.C. 119.092(C).

iv. A copy of the judgment of the court must be certified to the agency involved and the prevailing eligible party. R.C. 119.092(C).

v. The judgment of the court is final and not appealable. R.C. 119.092(C). However, the Tenth District has held that R.C. 119.092(C) does not preclude an appeal to the Court of Appeals on questions of law. *Orth v. Dept. of Edn.*, 2015-Ohio-3977, ¶ 16 (10th Dist.); *Carruthers v. O'Connor*, 121 Ohio App.3d 39, 42-43 (10th Dist. 1997).

C. Recovery of Attorney's Fees by Prevailing Party in an Appeal of an Agency Order under R.C. 119.12

1. This attorney's-fee provision applies only to administrative appeals brought under R.C. 119.12.
2. R.C. 119.12(N) provides that the "court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section."
3. Thus, R.C. 119.12(N) incorporates R.C. 2335.39, Ohio's Equal Access to Justice Act, in determining whether attorney's fees are warranted. The intent of the attorney's-fees section of R.C. 2335.39 is to protect citizens from unjustified state action and to censure frivolous government action. *Gilmore v. State Dental Bd.*, 2005-Ohio-2856, ¶ 13 (1st Dist.).
4. Numerous exceptions to R.C. 2335.39 apply to administrative appeals under R.C. 119.12, including the following:

a. Adjudication orders are exempted under R.C. 119.092(F). R.C. 2335.39(F)(3)(a).

b. If the eligible party's attorney's fee was paid through an appropriation by federal, state, or local government. R.C. 2335.39(F)(3)(b).

c. An administrative appeal decision under R.C. 5101.35. R.C. 2335.39(F)(3)(c); *Wright v. Dept. of Job & Family Servs.*, 2022-Ohio-1046, ¶ 18 (9th Dist.).

d. Pro se litigants may not be awarded attorney's fees under R.C. 2335.39. *State ex rel. Freeman v. Morris*, 65 Ohio St.3d 458, 460 (1992) citing *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197, 198 (1991); *Grine ex rel. Grine v. Sylvania Schools Bd. of Edn.*, 2008-Ohio-1562, ¶ 34 (6th Dist.).

i. Licensed attorneys who are representing themselves are also considered pro se and may not recover attorney's fees. *Horenstein, Nicholson & Blumenthal, L.P.A. v. Hilgeman*, 2021-Ohio-3049, ¶ 224 (2d Dist.) (even when a pro se party is an attorney, the party is disadvantaged by representing herself, and granting attorney's fees to pro se attorneys would disincentivize retaining counsel); *State ex rel. Ullmann v. Klein*, 2020-Ohio-2974, ¶ 15.

5. R.C. 2335.39 sets forth general rules governing the award of attorney's fees in actions or appeals involving the state and provides that an individual may recover attorney's fees if: (1) he or she prevails; (2) he or she is financially eligible; and (3) the state's position in initiating the matter in controversy was not substantially justified. *In re Williams*, 78 Ohio App.3d 556, 558 (10th Dist.1992); *Harrison v. Veterinary Med. Licensing Bd.*, 2003-Ohio-3816, ¶ 10 (10th Dist.).

a. Who is a "Prevailing Eligible Party"?

i. Eligible Party - As defined by R.C. 2335.39(A)(2), an "eligible party" means a party to an action or appeal involving the state, other than the following:

(a) The state;

(b) An individual whose net worth exceeded $1 million at the time the action or appeal was filed;

(c) A sole owner of a business entity or organization that had, a net worth exceeding $5 million at the time the action or appeal was filed, except for an organization described in subsection 501(c)(3) and tax exempt under subsection 501(a) of the Internal Revenue Code; or

(d) A sole owner of a business entity organization that employed more than 500 persons at the time the action or appeal was filed.

ii. Prevailing Party—a prevailing party "prevails in an action or appeal involving the state." R.C. 2335.39(A)(5).

(a) To "prevail," an eligible party need not obtain complete victory, such as reversal of all charges. *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, 487 (10th Dist. 1991).

(b) A party who appeals an order or judgment and prevails to the extent of obtaining a new trial or a modification of the judgment is a "prevailing party." *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, 487 (10th Dist. 1991).

(c) However, the court may take the partial victory into account when determining the amount of the fees to be awarded. *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2003-Ohio-6657, ¶ 18-22 (10th Dist.) (pharmacy was a prevailing party

because, although a serious charge remained, the most egregious charges were reversed. Note that the attorney's fees were denied after remand in *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2005-Ohio-6961 (10th Dist.)); *Korn v. State Medical Bd.*, 71 Ohio App.3d 483, 487 (10th Dist. 1991).

(d) If parties enter into a consent agreement resulting in dismissal of the case, then there is no "prevailing party," even if the state changed its behavior because of the action. *GMS Mgt. Co, Inc. v. Civ. Rights Comm.*, 2016-Ohio-7486, ¶ 48-50 (8th Dist.)).

b. The state "initiated" the "matter in controversy."

i. In an enforcement action, the agency "initiates" the matter in controversy when it issues the notice of opportunity for hearing. *State ex rel. Ohio Dept. of Health v. Sowald*, 65 Ohio St.3d 338, 342-343 (1992); *Wall v. State Bd. of Edn.*, 2015-Ohio-1418, ¶ 34-35 (3d Dist.) (Board was not "initiating" the action when it rejected the hearing examiner's report and recommendation but was continuing a proceeding that had already begun).

ii. The state does not "initiate" the matter in controversy when it denies an application for a license or certificate. *Thermal-Tron, Inc. v. Schregardus*, No. 93AP-331 (10th Dist. Feb. 24, 1994) (the successful appeal of a permit denial to the Board of Review was the initiation of litigation); *Aztec Electric, Inc. v. Dept. of Adm. Servs.*, No. 91AP-64 (10th Dist. May 21, 1991); In *re Van Arsdal*, No. 91AP-190 (10th Dist. Nov. 5, 1991) (distinguishing applications for a license with suspensions of existing licenses); *Highway Valets, Inc. v. Dept. of Transp.*, 38 Ohio App.3d 45, 47 (10th Dist. 1987).

c. The state was not "substantially justified" in initiating the matter in controversy.

i. The state bears the burden of proving that its position in initiating the matter in controversy was substantially justified. R.C. 2335.39(B)(2).

ii. In deciding whether an agency was substantially justified in initiating the matter, the court must rely on the investigation, evidence, and information that the agency had in its possession at the time it initiated the charges and not upon evidence introduced during or after the administrative hearing. *Gilmore v. State Dental Bd.*, 2005-Ohio-2856, ¶ 16 (1st Dist.); *Warren's Eastside Auto Sales v. Dept. of Pub. Safety,* 2003-Ohio-5702, ¶ 14 (11th Dist.); *Harrison v. Veterinary Med. Licensing Bd.*, 2003-Ohio-3816, ¶ 11 (10th Dist.).

iii. The state's failure to prevail on the merits does not establish a presumption that its position was not substantially justified. In *re Williams*, 78 Ohio App.3d 556, 558 (10th Dist. 1992). *Boyle v. State Med. Bd.*, No. 89AP-1186 (10th Dist. Aug. 7, 1990) ("a position may be justified even though it is not correct if there is a genuine pretrial dispute concerning the propriety of the state's action from the facts of the case or the law applicable thereto. . . . If a reasonable person, knowledgeable in the area of law, believes that the state's position is correct, then the substantially justified standard has been met.")

6. A motion for attorney's fees must meet certain requirements.

a. The motion for attorney's fees must be filed within 30 days after the reviewing court enters final judgment in the action or appeal. R.C. 2335.39(B)(1).

b. A motion for attorney's fees must meet the requirements of R.C. 2335.39(B), and failure to comply with the statute renders the motion ineffective. *Mechanical Contrs. Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 2003-Ohio-1837, ¶ 47 (10th Dist.) (denying a non-conforming motion for attorney's fees).

c. Under R.C. 2335.39(B)(1), the motion must do all of the following:

   i. Identify the party;

   ii. Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;

   iii. Include a statement that the state's position in initiating the matter in controversy was not substantially justified;

   iv. Indicate the amount sought as an award; and

   v. Itemize all fees sought in the requested award. The itemization must include a statement from any attorney who represented the prevailing eligible party, that indicates the fees charged, the actual time expended, and the rate at which the fees were calculated.

d. The motion must be itemized.

   i. The motion and itemization may request both fees incurred in appeal and in the adjudication hearing as stated in R.C. 119.092(B)(1)(e). R.C. 2335.39(D).

   ii. Block-billing is defined as "lumping multiple tasks into a single entry." *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 6. "Block billing is disfavored by many clients and courts, because 'there is simply no way . . . to assess whether the time spent on each of those tasks was reasonable when they are lumped together.'" *Id*. at ¶ 6, quoting *Tridico v. Dist. of Columbia*, 235 F.Supp.3d 100, 109 (D.D.C. 2017).

   iii. The Ohio Supreme Court "will no longer grant attorney's-fee applications that include block-billed time entries. Future fee applications submitted to the Court should contain separate time entries for each task, with the time expended on each task denoted in tenths of an hour. Applications failing to meet these criteria risk denial in full. *Calypso Asset Mgt., L.L.C. v. 180 Indus., L.L.C.*, 2021-Ohio-1171, ¶ 22 (10th Dist.) (excluding all block-billed entries except for nine entries that were improperly deemed to be block-billed); *McGraw v. Jarvis*, 2021-Ohio-522, ¶ 49 (10th Dist.) (holding that Rubino doesn't bar court from considering testimony to clarify block billing entries); *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 7.

   iv. The reasonableness of fees for specific legal tasks can be evaluated by courts. *Northeast Ohio Coalition for Homeless v. Husted*, 831 F.3d 686 (6th Cir. 2016) (detailed analysis of charges in an attorney's-fees petition).

   v. "[Q]uarter-hour billing increments have been frowned upon by some judges as fee-enhancing as applied to certain services in certain cases." *Bigler v. Personal Serv. Ins. Co.*, 2014-Ohio-1467, ¶ 1203 (7th Dist.); *Miller v. Commr. of the Social Sec. Administration*, No. 3:l7-CV-00414 (S.D.Ohio Jan. 10, 2020).

7. Courts must review the motion for attorney's fees.

a. Under R.C. 2335.39(B)(2), the court must determine:

   i. Whether the position of the state in initiating the matter in controversy was substantially justified;

   ii. Whether special circumstances make the award unjust; and

   iii. Whether the prevailing eligible party engaged in conduct during the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

b. Fees may be denied under the substantially justified standard.

   i. Fees may be denied if the position of the state in initiating the matter in controversy was "substantially justified." R.C. 2335.39(B)(2)(a); *State ex rel. Richter v. State Med. Bd.*, 2008-Ohio-2459, ¶ 8 (10th Dist.).

   ii. "Substantially justified" translates into determining whether the state's action or inaction was "unreasonable on the facts or on the law." *Collyer v. Broadview Dev. Ctr.*, 81 Ohio App.3d 445, 449 (10th Dist. 1992).

   iii. This standard is based in part on interpretations of federal courts applying the Equal Access to Justice Act, 28 U.S.C. § 2412, which also uses a "substantially justified" test for awarding attorney's fees. *Boyle v. State Med. Bd.*, 10th Dist. Franklin No. 89AP-1186 (Aug. 7, 1990).

   iv. A common pleas court offered an evidentiary test for "substantial justification." The court held that, to withstand an award of fees, the state must "prove by the preponderance of the evidence that it was substantially probable that evidence in its possession would lead to a finding of a legal violation committed by the alleged violator." *State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25 (C.P. 1987), syllabus. To meet this standard, the state "must demonstrate that it had sufficient material and essential evidence in support of all of the necessary elements of the offense charged, and that based on that evidence it was reasonable to believe that it was more likely than not (i.e., substantially probable), and not just possible, that reasonable minds could make a finding of legal violation by a preponderance of that evidence." *Id*.

   v. Even when a statute or regulation is found later to be unconstitutional on its face, there may be substantial justification for its enforcement at the time it was considered constitutional. *O'Brien v. Lottery Comm.*, 2005-Ohio-1564, ¶ 18-19 (11th Dist.) (agency has the right to rely on the presumption of constitutionality of a statute or rule unless and until it is held otherwise by a court and therefore may be substantially justified in bringing the action).

   vi. The common pleas court erred in failing to consider the evidence that the board had at the time it initiated the action. *Gilmore v. State Dental Bd.*, 2005-Ohio-2856, ¶ 18 (1st Dist.), ¶ 18; *Malik v. State Med. Bd.*, No. 88AP-741 (10th Dist. Sep. 28, 1989).

   vii. The agency may be substantially justified in relying upon incorrect information. In *Holden v. Bur. of Motor Vehicles*, 67 Ohio App.3d 531, 539 (9th Dist. 1990), the state initiated an automatic suspension of a driver's license based on records from a municipal court indicating that the appellant was convicted of leaving the scene of an accident. The

error was not discovered and corrected by the municipal court until after the Ohio Bureau of Motor Vehicle (BMV) initiated the license revocation. Under these circumstances, the court of appeals found that the state's position had been substantially justified. *Id.*

viii. The Board did not err by failing to address the special circumstances prong after finding that the Board was substantially justified in initiating the matter in controversy. *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2005-Ohio-6961, ¶ 11 (10th Dist.).

c. Special circumstances may make the award unjust.

i. A motion for fees will be denied if the state establishes either a substantial justification for initiating the matter in controversy or special circumstances that make an award of attorney's fees unjust. R.C. 2335.39(B)(2)(a); *State ex rel. Richter v. State Med. Bd.*, 2008-Ohio-2459, ¶ 8 (10th Dist.).

ii. State courts have found a "special circumstance" when the case is one of first impression. *State ex rel. DeWine v. Makedonija Tabak 2000*, Franklin C.P. No. 04CV-11791 (Apr. 26, 2013) (court denied attorney's fees under R.C. 2335.39, noting that, "[a]s this was a case of first impression, the State's arguments cannot be found to have been frivolous or made in bad faith, even though ultimately rejected by this Court.").

iii. Given the lack of state caselaw interpreting "special circumstances," courts often look to case law interpreting the federal Equal Access to Justice Act (28 U.S.C. § 2412) upon which the Ohio law is based. *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2005-Ohio-6961, ¶ 19-20 (10th Dist.) (specifically choosing not to follow the holding of *State Bd. of Pharmacy v. Weinstein*, 33 Ohio Misc.2d 25, 28 (C.P. 1987), and instead looking to the Equal Access to Justice Act). "The 'special circumstances safety valve' does not create a different, less rigorous standard of review for all cases of first impression. It merely preserves government efforts to present creative legal interpretations, which though not yet commonly accepted, still merit the court's careful examination." *Nunes-Correia v. Haig*, 543 F.Supp. 812, 820 (D.D.C. 1982).

iv. The Equal Access to Justice Act "explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party." *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 2005-Ohio-6961, ¶ 21 (10th Dist.).

d. The fees must be reasonable.

i. "Fees" means "reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee approved by the court." R.C. 2335.39(B)(3).

ii. Some prevailing parties may ask the court to approve a higher hourly rate.

iii. Generally, before awarding attorney's fees, a trial court must determine the reasonableness of the time spent on the matter and the reasonableness of the hourly rate. *Bagnola v. Bagnola*, 2004-Ohio-7286, ¶ 36 (5th Dist.).

iv. Sup.R. 71(A) provides that attorney's fees in all matters "will be governed by Rule 1.5 of the Ohio Rules of Professional Conduct."

v. The factors set forth in Prof.Cond.R. 1.5(a) include to the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent.

vi. The Court then excludes hours that were unnecessary, redundant, or excessive. *State ex rel. Kesterson v. Kent State Univ.*, 2019-Ohio-1852, ¶ 14.

vii. Fees should be reduced for non-legal work done, and that work should not be billed at attorney rates, even if done by an attorney. *State ex rel. Kesterson v. Kent State Univ.*, 2019-Ohio-1852, ¶ 23-24; In *re Estate of Fetters*, 2016-Ohio-8232, ¶ 14 (12th Dist.) (clerical tasks cannot be billed at attorney rates); *Jarmon v. Friendship Auto Sales Co., Inc.*, 2006-Ohio-1587, ¶ 12 (8th Dist.) (court limited attorney's fees awarded for law clerk's work).

viii. A reasonable hourly rate is the prevailing market rate in the relevant community, given the complexity of the issues and the experience of the attorney. *State ex rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 4.

ix. One common resource for Ohio prevailing-market information is a report published periodically by the Ohio State Bar Association (OSBA). It details market rates for legal work, broken down by factors such as firm size, experience, geographic location, and specialty. An update to this report was published in 2019 and is titled The Economics of Law Practice in Ohio in 2019: A Desktop Reference.

x. Courts rely on the report to determine prevailing market rates for a particular location and field. *Harkless v. Husted*, No. 1:06-CV-02284 (N.D.Ohio Mar. 31, 2011) (reducing requested rates, based partly on the 2007 version of the OSBA report); *Project Vote v. Blackwell*, No. 1:06-CV-1628 (N.D.Ohio Mar. 31, 2009) (relying partly on the 2007 version of the OSBA report to award lower-than-requested hourly rates); *United Assn. of Journeyman & Apprentices of the Plumbing & Pipe Fitting Industry v. Jack's Heating, Air Conditioning & Plumbing, Inc.*, 2013-Ohio-144, ¶ 6-7 (3d Dist.); *but see Flynn, Py & Kruse Co., L.P.A. v. Highfield*, 2014-Ohio-634, ¶ 22 (6th Dist.) (failed to provide a foundation for the OSBA report, so it was properly excluded).

e. The state has the burden of proof

i. Under R.C. 2335.39(B)(2), the state has the burden of proving that:

(a) its position in initiating the matter in controversy was substantially justified;

(b) special circumstances make an award unjust; or

(c) the prevailing eligible party engaged in conduct during the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

ii. Because the board had the burden to prove that it was substantially justified in initiating the matter, the trial court erred when it declined to allow the board an evidentiary hearing to present what evidence it possessed at the time of the administrative hearing. *Gilmore v. State Dental Bd.*, 2005-Ohio-2856, ¶ 19-21 (1st Dist.).

f. The court decision must meet certain requirements.

i. Under R.C. 2335.39(B)(2), the court must issue its order in writing and include:

(a) An indication of whether the award is granted;

(b) Findings and conclusions underlying the decision;

(c) Reasons or bases for the findings and conclusions; and

(d) The amount of award, if any.

ii. The order must be included in the record of the action or appeal. R.C. 2335.39(B)(2).

iii. The clerk of court will mail a certified copy of the court decision to the state and the prevailing eligible party. R.C. 2335.39(B)(2).

8. An award of attorney's fees may be appealed.

a. An order of a court considering a motion under this section is appealable as in other cases, by a prevailing eligible party who is denied an award or receives a reduced award. R.C. 2335.39(B)(2)(b).

b. The state can appeal an award of attorney's fees. *Holden v. Bur. of Motor Vehicles*, 67 Ohio App.3d 531, 534-535 (9th Dist. 1990).

c. The order of the court may be modified by the appellate court only if it finds that the grant or the failure to grant an award, or the calculation of the award amount, involved an abuse of discretion. R.C. 2335.39(B)(2)(b); *James v. Counselor & Social Worker Bd.*, No. 96-CO-65 (7th Dist. Nov. 25, 1997).

d. Because the board's response to the motion for attorney's fees gave no indication of a substantial justification for its allegation that the respondent had deviated from the ordinary standard of care, the trial court abused its discretion in not awarding attorney's fees. *In re Williams*, 78 Ohio App.3d 556, 560 (10th Dist. 1992).

D. Other Bases for Attorney's Fees

1. A court can also award attorney's fees for frivolous conduct. R.C. 2323.51.
    a. R.C. 2323.51(A)(2)(a)(i)–(iv) defines "frivolous conduct" to mean conduct by an inmate or other party to a civil action or the inmate's or other party's counsel that satisfies any of the following:
        i. It obviously serves merely to harass or maliciously injure another party to the civil action or appeal or is for another improper purpose, including causing unnecessary delay or a needless increase in the cost of litigation.
        ii. It is not warranted under existing law, cannot be supported by a good faith argument for an extension, modification, or reversal of existing law, or cannot be supported by a good faith argument for the establishment of new law.
        iii. The conduct consists of allegations or other factual contentions that have no evidentiary support or, if specifically so identified, are not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
        iv. The conduct consists of denials or factual contentions not warranted by the evidence or, if specifically so identified, are not reasonably based on a lack of information or belief.
    b. "Frivolous conduct" by inmates is also set forth in R.C. 2323.51(A)(2)(a)–(b). *See also* R.C. 2969.21 (regarding civil actions by inmates against governmental entities).
    c. R.C. 2323.51 applies only to "civil actions" and not to administrative hearings. *Tomsu v. Civ. Rights Comm.*, 116 Ohio Misc.2d 24, 28 (Ct. of Cl. 2001). Thus, a plaintiff cannot recover in a collateral action attorney's fees for alleged frivolous conduct by the agency in the administrative proceedings. *Id.*
    d. Pro se litigants cannot recover attorney's fees under R.C. 2323.51. *State ex rel. Freeman v. Wilkinson*, 64 Ohio St.3d 516, 517 (1992); *Sallock v. Tillimon*, 2023-Ohio-3193, ¶ 31 (6th Dist.); *Smallwood v. State*, 2011-Ohio-3910, ¶ 12 (12th Dist.).
    e. A court must conduct a hearing before awarding attorney's fees under R.C. 2323.51, so that the attorney who signed the complaint or motion can have an opportunity to state the good-faith basis upon which the attorney filed the complaint. *In re Appeal of Roe* 2007-Ohio-4639, ¶ 29 (7th Dist.).
2. Special remedies may be available. (For more information about special remedies and collateral attacks, see Chapter XIII):
    a. Mandamus actions are governed by R.C. Chapter 2731, which provides for the award of "damages" and "costs" when mandamus is awarded. R.C. 2731.11.
        i. "Attorney's fees are not recoverable as damages in a mandamus action that has been brought pursuant to R.C. 2731.11." *Calloway v. Wasik*, 2009-Ohio-6215, ¶ 25 (8th Dist.) citing *State ex rel. Chapnick v. E. Cleveland City School Dist. Bd. of Edn.*, 2001-Ohio-1585.

ii. Courts have repeatedly held that R.C. 2335.39 does not apply to mandamus actions. *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 2012-Ohio-4837, ¶ 46 ("Appellants are also not entitled to an award of attorney's fees under R.C. 2335.39, which is inapplicable to mandamus actions."); *State ex rel. Ohio Liberty Council v. Brunner*, 2010-Ohio-3331 ("R.C. 2335.39 is inapplicable to mandamus actions."); *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 2005-Ohio-2974, ¶ 78 ("Attorney's fees are not recoverable as damages in a mandamus action under R.C. 2731.11").

b. Injunctions are governed by R.C. 2727.02 and Civ.R. 65. Neither R.C. 2727.02 nor Civ.R. 65 specifically provide for an award of attorney's fees.

c. Declaratory judgments are governed by R.C. Chapter 2721.

i. R.C. 2721.11 provides that in "any action or proceeding in which declaratory relief is sought under this chapter, the court may make an award of court costs as is equitable and just."

ii. References in another section of the Revised Code simply to "costs" or "expenses" do not authorize attorney's fees under R.C. 2721.16. R.C. 2721.16(A)(2).

iii. R.C. 2721.09 allows for those who have been awarded declaratory judgment to be granted "further relief." The right to attorney's fees in a declaratory judgment action is limited by R.C. 2721.16, which provides that a "court of record shall not award attorney's fees to any party on a claim or proceeding for declaratory relief under this chapter unless:" (a) a section of the Revised Code authorizes attorney's fees for a claim for declaratory relief; (b) the award is a result of frivolous conduct under R.C. 2323.51, the Civil Rules, or the court has awarded punitive or exemplary damages; or (c) attorney's fees are awarded in accordance with equitable principles that permit recovery of attorney's fees incurred for certain services that are beneficial to the trust or estate. R.C. 2721.16(A)(1)(a)-(c).

iv. R.C. Chapter 2721 intends to recognize the American Rule for payment of each party's own fees in declaratory judgment actions. *City of Cincinnati ex rel. Smitherman v. Cincinnati*, 2010-Ohio-2768, ¶ 29 (1st Dist.). If a party seeks declaratory relief, and another claim (e.g., for injunction), then R.C. 2721.16 may not apply. *City of Cincinnati ex rel. Smitherman v. Cincinnati*, 2010-Ohio-2768, ¶ 29 (1st Dist.) (R.C. 2721.16 did not apply because the party filed for declaratory relief and for an injunction under R.C. 733.59); *Ashwood Home Owners' Assn. v. Reitor*, 2004-Ohio-3536, ¶ 28-29 (12th Dist.) (R.C. 2721.16 did not apply because plaintiff sought declaratory relief and a claim relating to enforcement of a restrictive covenant).

v. R.C. 2335.39 could provide the statutory authorization for an award of attorney's fees, as required by R.C. 2721.16. But the moving party would have to timely file a motion for fees and meet the requirements of R.C. 2335.39. *Mechanical Contrs. Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 2003-Ohio-1837, ¶ 47 (10th Dist.).

3. Bad faith will generally preclude an award of attorney's fees.

a. "It is well established that the general rule in Ohio is that attorney's fees are not recoverable as part of the costs of litigation in the absence of statutory authorization." *State ex rel. Murphy v.*

Indus. Comm., 61 Ohio St.2d 312, 313 (1980). The only nonstatutory exception to the American Rule, which provides that each party bears its own costs, is the bad faith of the party against whom fees are sought. *State ex rel. Durkin v. Ungar*, 39 Ohio St.3d 191, 193 (1988) ("[A]bsent a statutory provision allowing attorney's fees as costs, the prevailing party is not entitled to an award of attorney's fees unless the party against whom the fees are taxed was found to have acted in bad faith.").

b. "'Bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.'" *State ex rel. Gerchak v. Tablack*, 117 Ohio App.3d 222, 227-28 (7th Dist. 1997), quoting Ohio Jurisprudence 3d Words and Phrases (1996 Supplement) 20.

c. The requester has the burden to establish improper action or bad faith. *State ex rel. Murphy v. Indus. Comm.*, 61 Ohio St.2d 312, 313 (1980).

d. A court finding against a party does not, in and of itself, demonstrate that party's bad faith. *State ex rel. Kabatek v. Stackhouse*, 6 Ohio St.3d 55, 56 (1983); *State ex rel. Crockett v. Robinson*, 67 Ohio St.2d 363, 369 (1981).

4. Some specific provisions apply.

a. R.C. 9.68 provides for the payment of reasonable attorney's fees to a prevailing party adversely affected by an ordinance by a political subdivision that impedes gun ownership. *Kellard v. Cincinnati*, 2021-Ohio-1420, ¶ 37 (1st Dist.).

b. R.C. 149.43(C)(3)(b) provides for attorney's fees to a party who prevails in a mandamus action seeking public records in certain circumstances. See Chapter VI for additional information on actions under the public records law.

XIII. COLLATERAL ATTACKS

Collateral attacks, such as declaratory judgment actions, mandamus actions, and injunctions, on an administrative agency process are permitted only in limited circumstances. A party generally must exhaust administrative remedies, and failure to do so precludes a collateral attack. A party may also seek relief in federal courts under 42 U.S.C. 1983. Section 1983 claims must be based on federal statutes or constitutional claims, rather than state claims. Finally, federal courts may abstain from cases that seek to interfere with state administrative proceedings.

A. Declaratory Judgment Actions

1. A declaratory judgment action is a civil action and provides a remedy in addition to other legal and equitable remedies available. R.C. Ch. 2721; *Victory Academy of Toledo v. Zelman*, 2008-Ohio-3561, ¶ 8 (10th Dist.).
2. The essential elements for declaratory relief are as follows: (a) a real controversy exists between the parties; (b) the controversy is justiciable in character; and (c) speedy relief is necessary to preserve the rights of the parties. *Moore v. Middletown*, 2012-Ohio-3897, ¶ 49; *Riverside v. State of Ohio*, 2014-Ohio-1974, ¶ 36 (2d Dist.).
3. Actions for a declaratory judgment and a prohibitory injunction are not within the Supreme Court's or courts of appeals' original jurisdiction. Ohio Const., art. IV, § 2(B)(1) and 3(B)(1); *State ex rel. Ames v. Portage Cty. Bd. of Commrs.*, 2023-Ohio-3382, ¶ 34; *State ex rel. Crenshaw v. Cuyahoga Cty. Bd. of Elections*, 2023-Ohio-3377, ¶ 15 (Ohio Supreme Court dismissed claims because "this court lacks original jurisdiction over claims seeking only declaratory judgment and a prohibitory injunction.").
4. Courts of common pleas can enter declaratory judgment and prohibitory injunction in an original action. Ohio Const., art. IV, § 4(B). A court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the action in which the declaratory relief is sought. R.C. 2721.07.
5. When a party seeks declaratory relief by claiming that a municipal ordinance or state statute is unconstitutional, the Attorney General must be served with a copy of the complaint and must be heard. R.C. 2721.12(A). While R.C. 2721.12(A) requires a party to serve its pleading on the attorney general before a court can rule on a claim for declaratory relief challenging the constitutionality of a statute or ordinance, the failure to serve the attorney general at the inception of the action does not divest the trial court of its subject-matter jurisdiction. *Cincinnati v. Fourth Natl. Realty, L.L.C.*, 2020-Ohio-6802, ¶ 2.
6. If a party is raising only a constitutional challenge to a statute or rule, it may bypass the administrative process and raise those challenges directly in court by means of a declaratory judgment. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 149 (1992).
7. If a claim is not based solely on a constitutional challenge, declaratory judgment is not available when the party has failed to exhaust administrative remedies. Permitting declaratory relief without exhaustion would serve only to circumvent the administrative process and bypass the legislative scheme. *Fairview Gen. Hosp. v. Fletcher*, 63 Ohio St.3d 146, 152 (1992); *Thomson v. Dept. of*

Rehab. & Corr., 2010-Ohio-416, ¶ 15 (10th Dist.); *Rocky Fork Hunt & Country Club v. Testa*, 120 Ohio App.3d 442, 447-448 (10th Dist. 1997) (in considering a property tax dispute, the Court held that declaratory judgment was improper because the party failed to exhaust administrative remedies.); *Alcover v. State Med. Bd., No. 54292* (8th Dist. Dec. 10, 1987).

8. Exhaustion of administrative remedies is usually required to prevent premature interference with agency processes. This permits the agency to function efficiently and provides it with an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record adequate for judicial review. *Avery v. City of Rossford*, 145 Ohio App.3d 155, 163 (6th Dist. 2001).

9. Failure to exhaust administrative remedies is not a jurisdictional defect but is an affirmative defense that must be timely raised and maintained, or it is waived. *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 276 (1975); *Horvath v. Barberton Bd. of Bldg. & Zoning Appeals*, No. 29921, 2022-Ohio-1302, ¶ 11 (9th Dist.); *OMG MSTR LSCO, L.L.C. v. Dept. of Medicaid*, 2018-Ohio-4843, ¶ 14-19 (10th Dist.) (holding that motion to dismiss under Civ.R. 12(B)(6) does not generally apply to affirmative defenses unless it is clear from the complaint that plaintiff failed to exhaust administrative remedies); *Telsat, Inc. v. Micro Ctr., Inc.*, 2010-Ohio-5628, ¶ 16 (10th Dist.) (failure to timely assert and maintain the affirmative defense of failure to exhaust administrative remedies results in waiver).

10. For the exhaustion requirement to apply, (1) the administrative remedy cannot be "onerous or unusually expensive," (2) another "equally serviceable remedy" must be provided by law, and (3) the administrative remedies cannot require a "futile or vain act." *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17 (1988); *Haig v. State Bd. of Edn.*, 62 Ohio St.3d 507, 511 (1992); *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.,* 2012-Ohio-1861, ¶ 24.

11. The remedy cannot be onerous or unusually expensive:

    a. Exhaustion of administrative remedies is not required if the performance of the remedy would be onerous or unusually expensive. *Karches v. City of Cincinnati*, 38 Ohio St.3d 12, 17 (1988); *Burt Realty Corp. v. Columbus*, 21 Ohio St.2d 265, 267 (1970).

    b. The "onerous or burdensome" exception "cannot mean merely that the pending administrative proceedings are expensive and inconvenient—regulated entities would generally adjudge that to be the case with any enforcement or recoupment action. The question is whether the pending administrative action is unusually burdensome in comparison with other administrative or judicial proceedings." *OMG MSTR LSCO, L.L.C. v. Dept. of Medicaid*, 2018-Ohio-4843, ¶ 19 (10th Dist.) (dismissing declaratory judgment because of failure to exhaust when the complaint merely states that the administrative proceedings would cause $80,000 per person, but there is no evidence whether this is an exceptional or burdensome amount compared to other proceedings in the industry).

    c. Courts will reject the "onerous or unusually expensive" exception when the costs arise, not from the administrative proceeding, but from pursuing the declaratory judgment action itself. *T & M Machines, L.L.C. v. Atty.Gen.*, 10th Dist. Franklin No. 19AP-124, 2020-Ohio-551, ¶ 27.

12. There must be an equally serviceable remedy:

a. For the exhaustion requirement to apply, "another 'equally serviceable' remedy" must be provided for in the law. *Swander Ditch Landowners' Assn. v. Joint Bd. of Huron & Seneca Cty. Commrs.*, 51 Ohio St.3d 131, 135 (1990); *State ex rel. CannAscend Ohio L.L.C. v. Williams*, 2020-Ohio-359, ¶ 41 (10th Dist.); *Friends of Ferguson v. Elections Comm.*, 117 Ohio App.3d 332, 335-336 (10th Dist. 1997) (availability of advisory opinions from the Ohio Elections Commission is an "equally serviceable remedy," so trial court properly dismissed the declaratory judgment action).

b. Generally, an administrative hearing with appeal rights under R.C. 119.12 is an "equally serviceable remedy," meaning that declaratory relief is inappropriate. *Autumn Health Care, Inc. v. Todd*, 2014-Ohio-5851, ¶ 29-33 (5th Dist.) (Court of Appeals upheld the dismissal of the declaratory judgment action because the administrative appeal was still pending in court, so the plaintiff had not exhausted its administrative remedies); *Mack v. State Dental Bd.*, No. 00AP-578 (10th Dist. Mar. 30, 2001) (trial court granted summary judgment because declaratory judgment was inappropriate when dental board's administrative review was sufficient.); *Gourmet Beverage Ctr. v. Akrouche*, No. 95AP-355 (10th Dist. Sep. 21, 1995) ("Declaratory relief is never appropriate, however, when the other adequate remedy is administrative appeal.").

13. Remedies cannot require a futile or vain act:

a. If proceeding with the administrative process would constitute a vain act, a party need not exhaust. *Consol. Land Co. v. Capstone Holding Co.*, No. 02-BA-22, 2002-Ohio-7378, ¶ 37 (7th Dist.).

b. The Supreme Court of Ohio has described the futility exception as not requiring a litigant to take a "vain act" before initiating a judicial action. *State ex rel. Teamsters Local Union No. 436 v. Cuyahoga Cty. Bd. of Commrs.*, 2012-Ohio-1861, ¶ 24, citing *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990).

c. "A futile or vain act is defined in the context of lack of authority to grant administrative relief and not in the sense of lack of probability that the application for administrative relief will be granted." *Nemazee v. Mt. Sinai Med. Ctr.*, 56 Ohio St.3d 109, 115 (1990). Thus, the futility of an act rests on the power of the administrative body to afford the requested relief, and not on the likelihood of the relief being granted. *Id.*

d. Futility "'means not that the administrative agency would not grant the requested relief, but that the administrative agency lacks the authority or power to grant the relief sought.'" *Ohio Academy of Nursing Homes, Inc. v. Dept. of Job & Family Servs.*, 2021-Ohio-1414, ¶ 24 (10th Dist.), quoting *Rural Bldg. of Cincinnati, L.L.C. v. Evendale*, 2015-Ohio-1614, ¶ 11 (1st Dist.). If an agency lacks authority to grant relief, the remedy is not a "serviceable remedy" because it is not a "remedy which is effectual to afford the relief sought." *Kaufman v. Newburgh Hts.*, 26 Ohio St.2d 217 (1971), paragraph one of the syllabus.

e. A "party's speculation as to how his claim would be resolved is insufficient to overcome the requirement to exhaust administrative remedies." *State ex rel. Rennell v. Indus. Comm.*, 2007-Ohio-4597, ¶ 5 (10th Dist.).

14. An action for declaratory judgment is also improper where a "special statutory proceeding" would be bypassed. *Zupancic v. Wilkins*, 2009-Ohio-3688, ¶ 19 (10th Dist.); *State ex rel. Gelesh, v. State Med. Bd.*, 2007-Ohio-3328, ¶ 26 (10th Dist.); *Greatorex v. Univ. of Cincinnati*, No. C-790204 (1st Dist. June 18, 1980).

    a. To circumvent a special statutory procedure by way of declaratory judgment would nullify the legislative intent to have specialized questions initially determined by boards and agencies specifically designed and created for that purpose. *One Energy Ents., L.L.C. v. Dept. of Transp.*, 2019-Ohio-359, ¶ 44 (10th Dist.); *Aust v. State Dental Bd.*, 136 Ohio App.3d 677, 683-84 (10th Dist. 2000) (declaratory judgment improper to bypass the investigation by the Dental Board, as the investigation is part of the "proceeding".); *Arbor Health Care Co. v. Jackson*, 39 Ohio App.3d 183, 186 (10th Dist. 1987).

    b. If the General Assembly has enacted a complete and comprehensive statutory scheme governing review by an administrative agency, exclusive jurisdiction is vested within such agency. *State ex rel. Rocky Ridge Dev., L.L.C. v. Winters*, 2017-Ohio-7678, ¶ 9-11 (dispute over removal of soil fell under the exclusive jurisdiction of Environmental Review Appeals Comm.); *State ex rel. Dir., Dept. of Agriculture v. Forchione*, 2016-Ohio-3049, ¶ 5 (Director of Agriculture had exclusive authority to transfer dangerous wild animals); *State ex rel. Wilkinson v. Reed*, 2003-Ohio-2506, ¶¶ 16, 18, 21 (State Employment Relations Board had exclusive jurisdiction over unfair labor practices); *State ex rel. Taft-O'Connor'98 v. Franklin Cty. Court of Common Pleas*, 83 Ohio St.3d 487, 488 (1998) (case dismissed because the Ohio Elections Commission had exclusive jurisdiction over election-related cases); *BCL Enterprises v. Dept. of Liquor Control*, 77 Ohio St.3d 467, 471 (1997); *Kazmaier Supermarket v. Toledo Edison Co.*, 61 Ohio St.3d 147, 153 (1991).

    c. An action for declaratory judgment may be maintained if there is no administrative adjudication pending concerning the subject matter and no special statutory proceeding applies to the issue presented in the declaratory judgment action. *One Energy Ents., L.L.C. v. Dept. of Transp.*, 2019-Ohio-359, ¶ 46 (10th Dist.).

    d. A medical disciplinary proceeding constitutes a special statutory proceeding. The State Medical Board has been authorized by statute to enforce R.C. Chapter 4731, to investigate violations thereof, to conduct disciplinary proceedings, and to discipline those persons within the Board's licensing authority. Furthermore, R.C. Chapter 119 provides an appeal of the administrative proceedings to the court of common pleas. A claim for declaratory relief constitutes an improper attempt to bypass the special statutory proceeding. *State ex rel. Gelesh v. State Med. Bd.*, 2007-Ohio-3328, ¶ 26 (10th Dist.) (declaratory judgment is improper attempt to bypass administrative process set forth for physician discipline).

    e. The General Assembly enacted a complete and comprehensive statutory scheme governing licensure actions under the Medical Marijuana Control Program, including medical marijuana cultivator licenses. The General Assembly has granted the Ohio Department of Commerce exclusive jurisdiction over the licensing of cultivators under the Program and has enacted special statutory remedies for disputes involving those licenses.
    State ex rel. CannAscend Ohio L.L.C. v. Williams, 2020-Ohio-359, ¶ 41 (10th Dist.).

f. The General Assembly has created a complete and comprehensive statutory scheme and has given the Ohio Department of Agriculture authority over the Dangerous Wild Animal Act. The appellant's declaratory judgment action was properly dismissed as it was an attempt to circumvent the special statutory proceeding and administrative process.
State ex rel. Dir., Dept. of Agriculture v. Forchione, 2016-Ohio-3049, ¶ 5; *Huntsman v. State*, 2017-Ohio-2622, ¶ 35-37 (5th Dist.).

g. The Ohio Supreme Court has found patent and unambiguous lack of jurisdiction and has granted writs of prohibition in cases in which courts tried to bypass special statutory proceedings by agencies that have exclusive jurisdiction over a particular subject matter. *State ex rel. Dir., Dept. of Agriculture v. Forchione*, 2016-Ohio-3049, ¶ 22; *State ex rel. Wilkinson v. Reed*, 2003-Ohio-2506, ¶ 16-21; *State ex rel. Taft-O'Connor '98 v. Franklin Cty. Court of Common Pleas*, 83 Ohio St.3d 487, 488-489 (1998); *State ex rel. Albright v. Delaware Cty. Court of Common Pleas*, 60 Ohio St.3d 40, 42 (1991).

B. Mandamus Actions

1. Mandamus is an extraordinary remedy that is to be exercised with caution and issued only if the right is clear. To be entitled to a writ of mandamus, a relator must show "(1) a clear legal right to the requested relief, (2) a clear legal duty on [the agency's] part to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law." *State ex rel. Parker v. Russo*, 2019-Ohio-4420, ¶ 4; *State ex rel. Waters v. Spaeth*, 2012-Ohio-69, ¶ 6.

2. A mandamus action must be brought "in the name of the state on the relation of the person applying." R.C. 2731.04. This caption requirement is not jurisdictional, and leave should be freely given to amend the caption to bring it in the name of the state on relation to the person applying. *State ex rel. Doe v. Gallia Cty. Common Pleas Court*, 2018-Ohio-2168, ¶ 8. But if the respondent raised the issue, and relator fails to seek leave to amend the caption, dismissal of the complaint is required. *State ex rel. Antler v. Columbus*, 2022-Ohio-772, ¶ 5 (10th Dist.).

3. R.C. 2731.04 also requires an application for a writ of mandamus to be "verified by affidavit." Courts have held, however, that the failure to comply with the statute's affidavit requirement is not a fatal defect because the statutory verification requirements have been displaced by Civ.R. 11, which does not require an affidavit. *State ex rel. Madison v. Cotner*, 66 Ohio St.2d 448, 449 (1981), citing *State ex rel. Millington v. Weir*, 60 Ohio App.2d 348, 348 (10th Dist. 1978) ("The requirement in R.C. 2731.04 that an application for a writ of mandamus be verified by an affidavit is no longer applicable."); *Chine v. Mahoning Cty. Bd. of Elections*, 2011-Ohio-5574, ¶ 3 (7th Dist.).

   a. An important exception to the rule is that a mandamus petition need not be accompanied by an affidavit—a filing in an original mandamus action in the Ohio Supreme Court. A mandamus action filed in the Ohio Supreme Court is governed by S.Ct.Prac.R. 12.02 and must include "an affidavit specifying the details of the claim" that is "made on personal knowledge." S.Ct.Prac.R. 12.02(B)(1)–(2). Any attempt to qualify the personal knowledge requirement does not comply with Sup.Ct.Prac.R.12.02(B)(2); *State ex rel. Beard v. Hardin*, 2018-Ohio-1286, ¶ 11; *State ex rel. Simonetti v. Summit Cty. Bd. of Elections*, 2017-Ohio-8115, ¶ 11-12 (relator failed to comply with the affidavit requirement by stating that the allegations in the complaint are "based upon my personal knowledge and information.").

   b. Failure to expressly state that the facts in the complaint were based on the affiant's personal knowledge results in dismissal. *State ex rel. Hackworth v. Hughes*, 2002-Ohio-5334, ¶ 24; *State ex rel. Esarco v. Youngstown City Council*, 2007-Ohio-5699, ¶ 15-16 (dismissal is warranted because verification is insufficient when it states that he has "personal knowledge" but does not state that the facts in his complaint were based on that personal knowledge).

4. Mandamus can be used to require an agency to act where it has a duty. *State ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 103 (1986) (if an applicant has met all requirements to obtain a license, the agency must act upon the application). However, mandamus cannot compel the exercise of agency discretion. "Mandamus will lie to compel an administrative officer or board to exercise discretion, but it will not lie to control discretion." *State ex rel. Benton's Village Sanitation Serv., Inc. v. Usher*, 34 Ohio St.2d 59, 60 (1973); *State ex rel. Talwar v. State Med. Bd.*, 2004-Ohio-6410 (an agency might be ordered to investigate, but mandamus cannot control whether it initiates disciplinary charges).

5. An agency's decision is reviewable in mandamus if the relevant statute does not provide for an appeal of the decision. *State ex rel. Powell v. Pub. Emps. Retirement Sys.*, 2021-Ohio-920, ¶ 5 (10th Dist.) ("Because there is no statutory appeal from the board's determination that relator is not entitled to disability benefits, mandamus is an appropriate remedy."); *State ex rel. Portage Lakes Edn. Assn., OEA/NEA v. State Emp. Relations Bd.*, 2002-Ohio-2839, ¶ 35 (State Employment Relations Board's dismissal of unfair-labor-practice charges).

6. A party cannot seek mandamus for a future action and it "will not lie to remedy the anticipated nonperformance of a duty." *State ex rel. Home Care Pharmacy, Inc. v. Creasy*, 67 Ohio St.2d 342, 343 (1981); *State ex rel. Evans v. Tieman*, 2019-Ohio-2411, ¶ 16. Mandamus will not issue to require a public officer to prospectively observe the law. *State ex rel. E. Cleveland v. Norton*, No. 98772, 2013-Ohio-3723, ¶ 4 (8th Dist.).

7. Where an action is in the form of a proceeding in mandamus, but it is manifest that the real object of the relator is for an injunction, the court has no original jurisdiction of the subject matter of the suit and the cause must be dismissed for want of jurisdiction."
State ex rel. Pressley v. Indus. Comm., 11 Ohio St.2d 141, 163 (1967).

8. Mandamus is not a proper remedy if there is a plain and adequate remedy in the ordinary course of law, such as a statutory administrative appeal under R.C. 119.12. *State ex rel. Kingsley v. State Emp. Relations. Bd.*, 2011-Ohio-5519, ¶ 15, 17; *State ex rel. Natl. Employers Network Alliance v. Ryan*, 2010-Ohio-578, ¶ 1 ("An administrative appeal generally constitutes an adequate remedy in the ordinary course of law that precludes a writ of mandamus."); *State ex rel. Heath v. State Med. Bd.*, 64 Ohio St.3d 186, 187 (1992). If an agency denies a permit, mandamus may not substitute for the appeal of the agency determination. *State ex rel. Casey Outdoor Advertising v. Dept. of Transp.*, No. 88AP-1045 (10th Dist. Feb. 27, 1990).

9. Exhaustion of administrative remedies is generally required before bringing a mandamus action. *State ex rel. Cotterman*, 46 Ohio St.3d 42, 44 (1989); *State ex rel. Foreman v. City Council of Bellefontaine*, 1 Ohio St.2d 132 (1965); *TS Tech USA Corp. v. Pataskala*, 2023-Ohio-826 (5th Dist.) (mandamus action filed simultaneously with the notice of appeal to the court of appeals regarding a board of zoning appeals decision was properly dismissed as the plaintiff had not exhausted the available administrative remedies); *State ex rel. Rennell v. Indus. Comm.*, 2007-Ohio-4597, ¶ 6 (10th Dist.) (remedy was an administrative appeal under R.C. 119.12, and the fact "that relator may not have been successful at the common pleas level does not determine the adequacy of the remedy.").

    a. Failure to exhaust administrative remedies is not jurisdictional but is an affirmative defense that must be raised and maintained; otherwise it is waived. *Ohio Academy of Nursing Homes, Inc. v. Dept. of Job & Family Servs.*, 2021-Ohio-1414, ¶ 19 (10th Dist.).

    b. A party cannot preempt a pending administrative process by seeking a writ of mandamus. *State ex rel. Dynamic Industries, Inc. v. Cincinnati*, 2016-Ohio-7663, ¶ 12 (The company had failed to exhaust its administrative remedies that would have allowed the city to make a final decision on the demolition process; therefore the mandamus action was dismissed for failure to state a claim upon which relief can be granted.).

c. An applicant for a building permit, whose application is refused because of the provisions of a zoning ordinance, cannot secure a writ of mandamus compelling such permit on the ground that the ordinance as a whole is unconstitutional without first exhausting administrative remedies that might enable her to secure such a permit as provided by such ordinance. *State ex rel. Lieux v. Westlake*, 154 Ohio St. 412, 417 (1951).

d. There are two exceptions to the exhaustion requirement: (1) if the remedy would be futile; or (2) if the available remedy is "onerous or unusually expensive." *Ohio Academy of Nursing Homes, Inc. v. Dept. of Job & Family Servs.*, 2021-Ohio-1414, ¶ 19 (10th Dist.).

   i. There is no need to pursue administrative remedies before filing a mandamus action if doing so would be a futile act. *State ex rel. Cotterman*, 46 Ohio St.3d 42, 44 (1989); *Rural Bldg. of Cincinnati, L.L.C. v. Evendale*, 2015-Ohio-1614, ¶ 11 (1st Dist.). A futile act is one in which the administrative agency lacks the power to grant the relief sought. *Id.*

   ii. Exhaustion is not required when the administrative remedy is onerous or unusually expensive. "An administrative remedy would be considered onerous if it were burdensome or oppressive, for example, a municipality's procedure, which requires complicated proceedings in regard to an application for simple relief. Administrative relief would be considered unduly expensive whereby a procedure requires a party to make excessive expenditures for a simple request of relief such as requiring a complete set of plans and specifications before determination of a building setback line." *Gates Mills Invest. Co. v. Pepper Pike*, 59 Ohio App.2d 155, 167 (8th Dist. 1978); *Driscoll v. Austintown Assocs.*, 42 Ohio St.2d 263, 275 (1975) (no evidence that variance procedure was unusually onerous); *Burt Realty Corp. v. Columbus*, 21 Ohio St.2d 265, 267 (1970) (requirement to prepare a detailed set of plans and specifications for the proposed construction was onerous and precluded the requirement for exhaustion of administrative remedies); *Shemo v. Mayfield Hts.*, No. 64453 (8th Dist. Sep. 30, 1993) (exhaustion was unduly expensive upon a showing that providing architectural drawings and obtaining six-month construction requirement would cost over $75,000).

e. Mandamus is also a remedy for alleged failure to comply with the Public Records Act. *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 2006-Ohio-903, ¶ 6; R.C. 149.43(C)(1)(b).

   i. *See* Chapter VI for additional information regarding mandamus in a public records case. For more details, see the most recent version of Ohio Sunshine Laws: An Open Government Resource Manual, published by the Ohio Attorney General at www.OhioAttorneyGeneral.gov/Sunshine.)

10. Mandamus is an extraordinary remedy and may not ordinarily be employed as a substitute for an action at law to recover money. *State ex rel. Levin v. Schremp*, 73 Ohio St.3d 733, 735 (1995).

11. The Ohio Supreme Court has repeatedly held that R.C. 2335.39, which allows for an award of attorney's fees to prevailing parties in certain "civil actions" involving a state agency, does not apply to mandamus actions. *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commrs.*, 2012-Ohio-4837, ¶ 46; *State ex rel. Ohio Liberty Council v. Brunner*, 2010-Ohio-3331 ("R.C. 2335.39 is inapplicable to mandamus actions."); *State ex rel. Myles v. Brunner*, 2008-Ohio-6166; *State ex rel.*

Stacy v. Batavia Local School Dist. Bd. of Edn., 2005-Ohio-2974, ¶ 78 (Attorney's fees are not recoverable as damages in a mandamus action under R.C. 2731.11).

C. Injunctive Relief

1. In determining whether to grant preliminary injunctive relief, a court must consider four factors: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits; (2) whether plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. R.C. 2727.02; *Youngstown City Sch. Dist. Bd. of Edn. v. State*, 2017-Ohio-555, ¶ 50 (10th Dist.). No one of the four preliminary injunction factors is dispositive; rather, a balancing should be applied. *Id*. To establish a right to a preliminary injunction, the movant must demonstrate clear and convincing evidence of each of these four factors. *Columbus v. State*, 2023-Ohio-2858, ¶ 20 (10th Dist.), citing *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.*, 109 Ohio App.3d 786, 790 (10th Dist. 1996).
2. Injunctive relief is inappropriate if it acts to bypass special statutory proceedings. *DBM Ents. v. Bd. of Trustees Etna Twp.*, No. 00-CA-99 (5th Dist. May 3, 2001) (court lacks jurisdiction to consider injunctive relief if statutory administrative remedies were not first pursued); *Avery v. City of Rossford*, 145 Ohio App.3d 155, 163 (6th Dist. 2001) (holding that to seek injunctive relief, plaintiff must exhaust administrative remedies if available).
3. If the General Assembly has granted exclusive administrative authority to an agency, a court of common pleas cannot consider a complaint for temporary restraining order and an injunction to block the agency's action. Because the Director of the Department of Agriculture had the exclusive authority to remove dangerous wild animals from the owner's property, a common pleas court patently and unambiguously lacks jurisdiction to issue an injunction to block the Director's removal order, and therefore a writ of prohibition will lie to prevent the court from exercising jurisdiction. *State ex rel. Dir., Dept. of Agriculture v. Forchione*, 2016-Ohio-3049, ¶ 28-30.

D. Action Pursuant to 42 U.S.C. 1983

1. 42 U.S.C. 1983 provides that: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."
2. A Section 1983 claim can be made in either a federal court or in a state common pleas court. The Ohio Supreme Court lacks original jurisdiction to hear a Section 1983 action. *State ex rel. New Wen, Inc. v. Marchbanks,* 2020-Ohio-4865, ¶ 13.
3. To establish a claim under Section 1983, a plaintiff must prove: the violation of a right secured by the U.S. Constitution or federal law and that the alleged violation was committed by a person acting under color of state law. *SuperValu Holdings, Inc. v. Jackson Ctr. Assocs.*, LP, 2006-Ohio-3472, ¶ 17 (12th Dist.).

4. A Section 1983 claim must be based on an alleged violation of the United States Constitution or laws and cannot be based on alleged violation of the Ohio constitution or state laws or regulations. *Allen v. Louisville City Police Dept.*, 6th Cir. No. 91-6277 (July 17, 1992).

5. Neither a state agency, nor a state official sued in his or her official capacity, is a "person" under Section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66 (1989). However, a Section 1983 claim can be brought against a state actor in that actor's official capacity for prospective declaratory or injunctive relief only. Ex parte Young, 209 U.S. 123 (1908). This exception applies only to state officials and does not extend to the state or state agency itself. *Singleton v. Kentucky*, 176 F. Supp.3d 704, 723 (S.D.Ky. 2016); *Neal v. Treglia*, 2019-Ohio-3609, ¶ 16 (2d Dist.).

6. Exhaustion is not required before bringing a Section 1983 action in state court. *Gibney v. Toledo Bd. of Edn.*, 40 Ohio St.3d 152, 158 (1988); *Bowersock v. Lima*, No. 3:07- CV-730 (N.D.Ohio June 12, 2008); *Rodefer v. McCarthy*, 2015-Ohio-3052, ¶ 40 (2d Dist.).

    a. Federal courts routinely reject claims that the Section 1983 statute of limitations is tolled until after administrative remedies have been exhausted. *South Park, Ltd. v. Avon*, No. 1:06-CV-2468 (N.D.Ohio Mar. 26, 2007) (collecting cases).

    b. However, a Section 1983 claim was dismissed as it was based on the same facts that formed the basis of a prior administrative appeal taken under R.C. 5101.35. *Stolmayer v. McCarthy*, 171 F.Supp.3d 690, 695-696 (N.D. Ohio 2016). But see *Watkins v. Columbus City Schools*, No. 2:19-CV-394 (S.D.Ohio June 27, 2019) (subsequent Section 1983 claim was not precluded by an earlier administrative appeal under R.C. 3319.16 because the administrative proceedings did not address issues relevant to the Section 1983 claim).

E. Eleventh Amendment and Sovereign Immunity

1. A strip club's complaint against state agencies in seeking money damages, as well as declaratory and injunctive relief, was barred by sovereign immunity. *WCI, Inc. v. Dept. of Pub. Safety*, 18 F.4th 509, 513 (6th Cir. 2021). In WCI, the Sixth Circuit differentiates Eleventh Amendment immunity and the common-law doctrine of sovereign immunity. The Court noted that the Eleventh Amendment involves subject-matter jurisdiction and includes a diversity requirement. State sovereign immunity refers to a state's right not to be sued without its consent and its origins predate the constitution and the Eleventh Amendment. *Id*. at 514. Sovereign immunity involves personal jurisdiction, and a motion to dismiss brought under the doctrine of sovereign immunity should be brought under Fed.R.Civ.P. 12(b)(2). *Thomas v. Tennessee Dept. of Human Servs.*, M.D.Tenn. No. 3:21-CV-00426 (June 23, 2022).

F. Federal Abstention

1. Several varieties of abstention may cause a federal court to suspend a case or decline jurisdiction, including a *Younger* abstention, a *Pullman* abstention, a *Burford* abstention, and a *Colorado River* abstention. *Rooker-Feldman* abstention should also be considered, but it generally doesn't apply to decisions by state administrative agencies.

2. *Younger.* Under *Younger* abstention, a federal court will abstain from exercising jurisdiction when a pending state proceeding is capable of hearing the federal issue presented and the exercise of federal jurisdiction would unduly interfere with the state proceeding. *Younger v. Harris*, 401 U.S. 37 (1971). A federal district court may abstain from hearing a case if the following three elements are met: a pending or ongoing state proceeding is judicial in nature; the state proceeding implicates important state interests; and the state proceeding affords an adequate opportunity to raise any constitutional issues. *Middlesex County Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982).

   a. "[O]nly three categories of cases call for *Younger* abstention: ongoing state criminal prosecutions, state proceedings that are 'akin to criminal prosecution,' and civil proceedings 'involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions.'" *Doe v. Franklin Cty. Children Servs.*, 6th Cir. No. 20-398 (Sep. 30, 2020), quoting *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72-73, 78 (2013).

   b. *Younger* abstention may be applied to state administrative proceedings "in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his constitutional claim." *Civ. Rights Comm. v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (holding that plaintiff had a full and fair opportunity to litigate his constitutional claims because, while he couldn't raise them before the agency, he could raise constitutional claims in the administrative appeal to the court).

   c. *Younger* abstention does not apply when a federal court finds that "the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" *Lundeen v. State Med. Bd.*, No. 2:11-CV-1128 (S.D.Ohio May 7, 2012), quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 594 (1975).

   d. Administrative proceedings initiated by a board or a commission qualify as "an ongoing judicial proceeding" for purposes of *Younger* abstention. *Lundeen v. State Med. Bd.*, No. 2:11-CV-1128 (S.D.Ohio May 7, 2012) (state judicial proceeding is ongoing because plaintiff chose to appeal to the common pleas court regarding the revocation of his medical license); *Civ. Rights Comm. v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 627 (1986) (applying Younger abstention to administrative proceedings as they are "judicial in nature," even if they have progressed to state-court review by the time the federal injunction case is heard); *Watts v. Burkhart*, 854 F.2d 839, 846 (6th Cir. 1988) (finding proceedings initiated by the Tennessee Division of Health Related Boards to summarily suspend a doctor's license to be "judicial proceedings" subject to *Younger* abstention).

   e. If *Younger* abstention is proper, the court should stay the case, rather than dismiss it. *Neal El v. Pugh*, 6th Cir. No. 22-3871 (May 22, 2023).

3. *Pullman*. Under *Pullman* abstention, abstention "is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Smith v. Husted*, No. 2:16-CV-212 (S.D.Ohio Mar. 11, 2016), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976), citing *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

   a. The application of the *Pullman* abstention doctrine "is warranted only when a state law is challenged and resolution by the state of certain questions of state law may obviate the federal claims, or when the challenged law is susceptible of a construction by state courts that would eliminate the need to reach the federal question." *GTE North, Inc. v. Strand*, 209 F.3d 909, 921 (6th Cir. 2000). There are two requirements under Pullman abstention: (1) an unclear state law and (2) the likelihood that a clarification of the state law would obviate the necessity of deciding the federal claim question. *Smith v. Husted*, No. 2:16-CV-212 (S.D.Ohio Mar. 11, 2016).

   b. *Pullman* abstention "requires that . . . 'the federal court should stay its hand in order to provide the state court an opportunity to settle the underlying state law question[.]'" *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 739 (6th Cir. 2000), quoting *Harris County Commrs. Court v. Moore*, 420 U.S. 77, 83 (1975).

4. *Burford*. Abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) is appropriate if timely and adequate state-court review is available and either (a) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar or (b) the exercise of federal review of the question in a case and in similar cases would disrupt state efforts to establish a coherent policy regarding a matter of substantial public concern. *Adrian Energy Associates v. Michigan Public Service Comm.*, 481 F.3d 414, 423 (6th Cir. 2007); *Caudill v. Eubanks Farms, Inc.* 301 F.3d 658, 660 (6th Cir. 2002).

5. *Colorado River*. *Colorado River* abstention allows a federal court to abstain if there is a parallel state-court proceeding pending and hearing the federal action would be duplicative or unwise. *Blake v. Wells Fargo Bank*, NA, 917 F.Supp.2d 732, 737 (S.D.Ohio 2013), citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) and *Bates v. Van Buren Twp.*, 122 Fed.Appx. 803, 806-807 (6th Cir. 2004)). To be "parallel," the two cases need only be "substantially similar," not identical, and the parties also need not be identical.

   a. If there is a parallel proceeding, a federal court in deciding whether to abstain under the *Colorado River* abstention doctrine considers the following: (1) which court first acquired jurisdiction over the property (if any); (2) the relative convenience of the forums; (3) which court first acquired jurisdiction over the matter; (4) whether abstention would avoid piecemeal litigation; (5) whether the merits turn on state or federal law, (6) whether the state-court action can adequately protect the plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. *Devlin v. Kalm*, 493 Fed.Appx. 678, 684 (6th Cir. 2012); *Blake v. Wells Fargo Bank*, NA, 917 F.Supp.2d 732, 737 (S.D.Ohio 2013).

   b. The avoidance of piecemeal litigation—with its waste of resources and risk of inconsistency—is the "paramount" consideration in Colorado River abstention. *Brand Energy Servs., L.L.C. v. Enerfab Power & Industrial, Inc.*, No. 1:16-CV-1043 (S.D.Ohio Nov. 8, 2016); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983); *S.D. v. Dazzo*, No. 11-15347

(E.D. Mich. July 9, 2012) (finding *Colorado River* abstention appropriate because the plaintiff was appealing to state court from an administrative Medicaid-benefits decision).

6. *Rooker-Feldman*. Lower federal courts cannot review state court judgments under the *Rooker-Feldman* abstention doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–417 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482–483 (1983). The *Rooker-Feldman* doctrine deprives federal courts of subject-matter jurisdiction over claims by plaintiffs who lost in state court if the federal claim: (a) is "inextricably intertwined" with a claim raised in a prior state court proceeding and (b) asserts a "specific grievance that a law was invalidly . . . applied" to the plaintiff's case. *Hutcherson v. Lauderdale Cty.*, 326 F.3d 747, 755–756 (6th Cir. 2003). A claim is "inextricably intertwined" if the federal court could not grant the plaintiff the relief sought without issuing a judgment that conflicts with the state-court judgment. *Catz v. Chalker*, 142 F.3d 279, 294 (6th Cir. 1998) (overruled on other grounds as stated in *Coles v. Granville*, 448 F.3d 853, 859 (6th Cir. 2010).

   a. The Sixth Circuit Court of Appeals has "distinguished between plaintiffs who bring an impermissible attack on a state court judgment—situations in which Rooker-Feldman applies—and plaintiffs who assert independent claims before the district court—situations in which *Rooker-Feldman* does not apply." *Kovacic v. Cuyahoga Cty. Dept. of Child. & Family Servs.*, 606 F.3d 301, 309 (6th Cir. 2010). For example, if the claims "do not seek review or reversal of the decision of the juvenile court to award temporary custody to the state, but instead focus on the conduct of Family Services and of the social workers *that led up* to the juvenile court's decision to award temporary custody to the County," *Rooker-Feldman* does not bar the action. *Id*. at 310. (Emphasis sic.)

   b. Note that *Rooker-Feldman* abstention does not apply to decisions by state administrative agencies. Specifically, the "*Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. 1331 is a grant of original jurisdiction and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, see 28 U.S.C. § 1257(a). The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency." *Verizon Maryland Inc. v. PSC*, 535 U.S. 635, 644, fn. 3 (2002); *S.D. v. Dazzo,* No. 11-15347 (E.D.Mich. July 9, 2012) (July 9, 2012); *In re Smith,* 349 F.Appx. 12, 15 (6th Cir. 2009) (the doctrine does not apply to parallel state and federal litigation, nor to decisions by state administrative agencies).

G. Res Judicata/Issue and Claim Preclusion

1. In Ohio, "res judicata" encompasses both claim preclusion and issue preclusion (collateral estoppel). *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 2008-Ohio-6254, ¶ 27.

2. The doctrine of res judicata—involving both claim preclusion and issue preclusion—can apply to administrative proceedings of a judicial nature if the parties have had an ample opportunity to litigate the issues involved in the proceeding. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 381 (1995); *Set Products, Inc. v. Bainbridge Twp. Bd. of Zoning Appeals*, 31 Ohio St.3d 260 (1987), paragraph one of the syllabus; *State ex rel. Schachter v. Pub. Emps. Retirement Bd.*, 2009-Ohio-1704, ¶ 29 ("Res judicata, whether claim preclusion or issue preclusion, applies to quasi-judicial administrative proceedings"); *In re Application of Ohio Power Co.*, 2015-Ohio-2056, ¶ 20.

3. A quasi-judicial administrative proceeding requires notice, hearing, and the opportunity for introduction of evidence. *M. J. Kelley Co. v. Cleveland*, 32 Ohio St.2d 150 (1972), paragraph two of the syllabus.

4. The application of the doctrine of res judicata and collateral estoppel is not mandatory in every case and will not be applied to defeat the ends of justice or so to work an injustice. *Davis v. Wal-Mart Stores*, Inc., 93 Ohio St.3d 488, 491 (2001) (res judicata will not stand to protect against a subsequent claim of spoliation); *Combs v. Oxford Mining Co.*, 2020-Ohio-876, ¶ 40-42 (5th Dist.).

5. Issue preclusion, also called "collateral estoppel" bars an issue that has actually been litigated and decided on the merits in a prior suit. An issue not raised in an administrative hearing and appeals is precluded from being raised in a collateral action under the doctrine of issue preclusion. *Smith v. Ohio Edison Co.*, 2015-Ohio-4540, ¶ 18 (11th Dist.) (failure to raise spoliation issue in administrative proceedings bars appellant from raising the spoliation issue later in an original action).

    a. The Ohio Reclamation Commission issued detailed findings of fact regarding appellant's water loss and mining in the area and held that the water loss was not impacted by a company's mining activities. The landowner did not appeal to the court but instead filed an action to enjoin mining activity. On appeal, the Fifth District Court of Appeals held that the doctrine of issue preclusion applies in this case and precludes the re-litigation of whether the company's mining activities caused appellants' water losses. *Combs v. Oxford Mining Co.*, 2020-Ohio-876, ¶ 39 (5th Dist.).

    b. Most Ohio cases hold that a pending appeal does not preclude the application of res judicata. *New York Life Ins. Co. v. Tomchik*, Nos. 98-CO-38 and 98-CO-71 (7th Dist. Mar. 17, 1999) ("judgment which fully disposes of a case is a final judgment for purposes of collateral estoppel, even if that judgment is pending appeal" and if the judgment is later reversed on appeal, the party can petition the trial court to vacate the judgment in the second action under Civ.R. 60(B)(4)); *State v. Wise*, 2004-Ohio-6241, ¶ 13 (12th Dist.); *Cully v. Lutheran Med. Ctr.*, 37 Ohio App.3d 64, 65 (8th Dist. 1987). But in *Uebel v. Bd. of Edn. of Edgewood City School Dist.*, 2002-Ohio-864 (12th Dist.), the Court held that voluntary dismissal of a prior case makes res judicata inapplicable. In addition, if "a previous judgment is still pending on appeal, there is no 'existing final judgment' upon which res judicata could be invoked to bar a subsequent action." (Emphasis sic.)

6. Claim preclusion, also called "res judicata," bars a claim that was brought or could have been brought in a prior suit if there is identity of parties and issues and a final judgment on the merits in the prior suit. *Jacobs v. Teledyne, Inc.*, 39 Ohio St.3d 168, 171 (1988); *Althof v. State Bd. of Psychology*, 2006-Ohio-502, ¶ 13-14 (4th Dist.).

    a. "'[C]laim preclusion has four elements in Ohio: (1) a prior final, valid decision on the merits by a court of competent jurisdiction; (2) a second action involving the same parties, or their privies, as the first; (3) a second action raising claims that were or could have been litigated in the first action; and (4) a second action arising out of the transaction or occurrence that was the subject matter of the previous action.'" *Lycan v. Cleveland*, 2022-Ohio-4676, ¶ 23, quoting *Hapgood v. Warren*, 127 F.3d 490, 493 (6th Cir. 1997).

    b. An administrative-appeal decision can preclude subsequent Section 1983 claims if the actions arise from the same set of facts. *Walczak v. Chi. Bd. of Edn.*, 739 F.3d 1013 (7th Cir. 2014) (A plaintiff who loses in a state court for administrative review of an adverse employment decision is barred from bringing the same claim under Section 1983 in federal court).

H. Constitutional Provisions and Private Causes of Action

1. Self-executing constitutional provisions create a private cause of action.

   a. "The Ohio Supreme Court has held that a provision under the Ohio Constitution only creates a private cause of action if it is self-executing." *Calvey v. Village of Walton Hills*, No. 1:18-CV-2938 (N.D.Ohio Jan. 15, 2020).

   b. "A constitutional provision is self-executing when it is complete in itself and becomes operative without the aid of supplemental or enabling legislation. Likewise, a constitutional provision is not self-executing if its language, duly construed, cannot provide for adequate and meaningful enforcement of its terms without other legislative enactment." (Citations omitted.) *State v. Williams*, 88 Ohio St.3d 513, 521 (2000). The words of a constitutional provision must be "sufficiently precise in order to provide clear guidance to courts with respect to their application if the provision is to be deemed self-executing." *Id.*

   c. Although the "presumption now is that all provisions of the constitution are self-executing," *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 151 (1951), that presumption can be overcome. A constitutional provision is not self-executing when "the provision is not one which is complete in itself and operates without the aid of supplemental or enabling legislation." *State v. Smithers*, No. L-99-1110 (6th Dist. May 12, 2000).

   d. Some constitutional provisions contain statements that the amendment is self-executing; however, the absence of a statement of self-execution is not dispositive. *Brenneman v. Cincinnati Bengals, Inc.*, No. 1:14-CV-136 (S.D.Ohio Oct. 24, 2014); *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 150 (1951).

   e. A claim based on a constitutional provision that is not a self-executing right subject to enforcement must fail. *Cooper v. Jones*, 2006-Ohio-1770, ¶ 36 (4th Dist.) (affirmed summary judgment dismissing a claim under Ohio Const., art. I, § 1, right to contract, as it is not self-executing). "[U]nlike the federal system where 42 U.S.C. § 1983 creates a private cause of action to remedy violations of the United States Constitution, there exists no statute in Ohio analogous to Section 1983." *PDU, Inc. v. Cleveland*, 2003-Ohio-3671, ¶ 27 (8th Dist.).

   f. Some Ohio constitutional provisions that have been held to be self-executing:

      i. Article II, Section 1g (initiative, supplementary, or referendum processes), by its own language, is a self-executing provision. *State ex rel. Ethics First-You Decide Ohio Political Action Commt. v. DeWine*, 2016-Ohio-3144, ¶ 16; *In re Protest Filed with Franklin Cty. Bd. of Elections*, 49 Ohio St.3d 102, 104 (1990) (referendum petitions); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 1-2 (1915).

      ii. Article XVIII, Section 4 (allows municipality to enter into a contract with a public utility company to supply utilities to the municipality) is self-executing. *Link v. Pub. Util. Comm.*, 102 Ohio St. 336, 336 (1921), paragraph one of the syllabus.

      iii. Article XVIII, Section 3 (Home Rule) is self-executing. *Perrysburg v. Ridgway*, 108 Ohio St. 245, 245 (1923), paragraph three of the syllabus ("The above constitutional grant of power to municipalities is 'self-executing,' in the sense that no legislative action is necessary in order to make it available to the municipality.").

iv. Article I, Section 10a(E) (Marsy's Law, Crime Victims Amendment) states that: "[a]ll provisions of this section shall be self-executing and severable, and shall supersede all conflicting state laws." *See also City of Cleveland v. Fuller*, 2023-Ohio-1669, ¶ 15-16 (8th Dist.).

v. Article V, Section 2a (placement of candidates for a general election appearing on ballot) is self-executing. *State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 147 (1951).

vi. Article II, Section 34a (State Minimum Wage) may be self-executing. *Brenneman v. Cincinnati Bengals, Inc.*, No. 1:14-CV-136 (S. D. Ohio Oct. 24, 2014); *Castillo v. Morales, Inc.*, 302 F.R.D. 480, 489 (S.D.Ohio 2014). *But see Haight v. Minchak*, 2016-Ohio-1053, ¶ 16-18 (because it incorporates the federal Fair Labor Standards Act, a court need not determine whether Article II, Section 34a is self-executing.).

vii. The Ohio Takings Clause may be self-executing *Pippin v. City of Reynoldsburg*, No. 2:17-CV-598 (S.D.Ohio Sep. 27, 2019) (relating to eminent domain). *But see Tarrify Properties, LLC v. Cuyahoga Cty.*, No. 1:19-CV-2293 (N.D.Ohio July 17, 2020) ("Ohio courts have not recognized a common-law cause of action to remedy violations of the Ohio Constitution's taking clause.").

g. Some of Ohio constitutional provisions that have been held to be not self-executing:

i. Article 1, Section 1 (rights of life, liberty, property, and happiness are inalienable) is not self-executing. *State v. Williams*, 88 Ohio St.3d 513, 521 (2000).

ii. Article I, Section 1 (Right to Contract) is not self-executing. *Cooper v. Jones*, 2006-Ohio-1770, ¶ 36 (4th Dist.).

iii. Article I, Section 16 (Due Process) is not self-executing. *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 354 (1974); *Autumn Care Ctr., Inc. v. Todd*, 2014-Ohio-5235, ¶ 14 (5th Dist.); *PDU, Inc. v. Cleveland*, 2003-Ohio-3671, ¶ 24-27 (8th Dist.) (there is no private cause of action under Ohio's Due Process clause because that clause is not self-executing); *Estate of Q.W. v. Lucas Cty. Children Servs.*, No. 3:22-CV-00671-JGC (N.D.Ohio July 17, 2023); *Calvey v. Village of Walton Hills*, No. 1:18-CV-2938 (N.D.Ohio Jan. 15, 2020).

iv. Article I, Section 2 (Equal Protection) is not self-executing. *Provens v. Stark Cty. Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St.3d 252, 261 (1992); *PDU, Inc. v. Cleveland*, 2003-Ohio-3671, ¶ 24-27 (8th Dist.), review denied, 100 Ohio St.3d 1485 (2003).

v. Article V, Section 5 (Ballot Secrecy) is not self-executing. *State v. Jackson*, 2004-Ohio-3206, ¶ 24.

vi. Article I, Section 10 (Right to a Jury Trial) is not self-executing. *Bright v. Curry*, 35 Ohio Misc. 51, 52 (Franklin M.C. 1973).

vii. Article I, Section 9 (Excessive Bail) is not self-executing. *Talley v. Cleveland*, No. 1:14-CV-1697 (N.D.Ohio Jan. 26, 2015).

viii. Article I, Section 10 (Right to a Speedy Trial) is not self-executing. *Partsch v. Haskins*, 175 Ohio St. 139, 140 (1963); *State v. Mize*, 2022-Ohio-3163, ¶ 69 (2d Dist.).

ix. Article I, Section 11 (Freedom of Speech) is not self-executing. *PDU, Inc. v. Cleveland*, 2003-Ohio-3671, ¶ 24-27 (8th Dist.).

x. Article I, Section 16 (Partial Immunity of Political Subdivisions in Tort Suits) is not self-executing. *Estate of Tokes v. Dept. of Rehab. & Corr.*, 2019-Ohio-1794, ¶29 (10th Dist.) ("we hold Section 16 is not self-executing under its own plain language"); *Martin v. Weaver*, 666 F.2d 1013, 1016 (6th Cir. 1981).

XIV. RULEMAKING

Agencies are creatures of statute, created by the General Assembly to assist the Governor in executing and administrating programs and processes established by legislation. Statutes set the framework for an agency's administration of any legislation. In furtherance of this, rules are adopted as standards of general and uniform application within any statutory program to flesh out the procedural and substantive requirements within any legislative initiative. The statewide rulemaking process is governed by R.C. 119.03 and R.C. 111.15.

A. Types of Rulemaking Authority

1. As explained in more detail below, agencies may be subject to two different rulemaking statutes—R.C. 119.03 and R.C. 111.15.

    a. As stated in *Abt v. Ohio Expositions Comm*., 110 Ohio App.3d 696, 699 (10th Dist. 1996), R.C. 119.03 applies to agencies in one of three ways:

        i. the agency is specifically named as an agency in R.C. 119.01(A)(1);

        ii. the functions of the agency or commission are specifically made subject to R.C. Chapter 119 (through language in the agency's authorizing statute); or

        iii. the agency is authorized and using its power to issue, suspend, or revoke licenses.

    See Chapter I for more information on what agencies are subject to R.C. Chapter 119.

    b. R.C. 111.15 applies to any agency not subject to R.C. Chapter 119. *O'Neal v. State of Ohio*, 2020-Ohio-506, ¶ 16 (10th Dist.), *aff'd* 2021-Ohio-3663 ("Agencies such as ODRC that are not subject to the rulemaking requirements in R.C. Chapter 119 are required to promulgate their rules under R.C. 111.15.").

B. Rulemaking Procedures—R.C. 119.03

1. Rulemaking procedures apply to any "rule, regulation, or standard, having general and uniform operation, adopted, promulgated, and enforced by any agency" under that agency's authority. R.C. 119.01(C).
2. Public notice must be filed in the Register of Ohio at least 30 days before a public hearing on the proposed rules. R.C. 119.03(A).
3. Public notice requirements, as stated in R.C. 119.03(A) are as follows:

    a. A statement of the agency's intention to adopt, amend, or rescind a rule must be included.

    b. A synopsis of the proposed rule, amendment, or rescission, or a general statement of the subject matter must be included.

    c. A statement of purpose or reason for adoption, amendment, or rescission must be included.

    d. The date, time, and place of the public hearing(s) on the proposed action must be included. The date must not be earlier than 31 days from the notice of the proposed action or more than 40 days after the proposed action.

e. The agency should give additional notice when the agency believes more notice is necessary to ensure notice to all persons who are or may be subject to or affected by the proposed action.

f. The agency must give notice to any person who requests such notice and pays a reasonable fee not exceeding the cost of copying and mailing.

4. A rule may be amended or revised as follows:

   a. Amendments that are finally adopted under R.C. 119.03(D) may differ from the synopsis of proposed amendments published under R.C. 119.03(A) and the full text of the proposed amendments filed under R.C. 119.03(B). The amendments finally adopted, however, must be sufficiently consistent with the public notice to insure that all persons affected have been afforded a reasonable opportunity to present their views on the substance and effect of the amendments at the public hearing. *Jamison Plumbing & Heating Co. v. Rose*, 14 Ohio App.2d 47 (10th Dist. 1967), paragraph two of the syllabus.

   b. An agency may revise a rule after the original proposal is presented at the public hearing; the rule, as adopted, may contain amendments, substitutions, and additions to the original proposed by the agency, but revisions are limited by the requirements that the rule adopted be "consistent with the public notice." *Ohio State Federation of Licensed Nursing Homes v. Public Health Council*, 113 Ohio App. 113 (10th Dist. 1961), *aff'd*, 172 Ohio St. 227 (1961).

5. A proposed rule must be electronically filed with the Secretary of State and the Director of the Legislative Service Commission, under R.C. 119.03(B) and include the following:

   a. The full text of the proposed rule, amendment, or rescission;

   b. The public notice issued under R.C. 119.03(A);

   c. The rule summary and fiscal analysis as required by R.C. 106.024; and

   d. The public hearing report.

6. Filing must be at least 65 days before the date of the agency order adopting the proposed rule, amendment, or rescission required by R.C. 119.03(E).

7. A proposed rule also must be electronically filed with the Joint Committee on Agency Rule Review (JCARR), under R.C. 119.03(C).

   a. The full text of the proposed rule, amendment, or rescission must be included.

   b. The public notice issued under R.C. 119.03(A) must be included.

   c. The rule summary and fiscal analysis as required by R.C. 106.024 must be included.

   d. The proposed rule must state if the proposal has an adverse impact on business, the business analysis, or recommendations from the Common Sense Initiative Office, and the agency's response thereto, if any.

   e. The public hearing report must be included.

   f. Any revision made to the proposed rule, amendment, or rescission done after the initial filing with JCARR must be included.

g. If the proposed action will require liability insurance, a bond, or other financial responsibility instruments, the agency must file a certification to JCARR of a search confirming that such instruments are readily available.

h. If the proposed action implements a federal law or regulation, the agency must file a citation to that law or regulation and a statement whether the proposed rule, amendment, or rescission is more or less stringent than the federal requirement.

i. All filings are due to JCARR before its public hearing on the proposed action.

j. No rule, amendment, or rescission may be adopted or filed under R.C. 119.04 until all filings with JCARR are complete and the time for legislative review has expired without a resolution to invalidate the proposed rule, amendment, or rescission.

k. Exceptions to filing requirements include the following:

   i. An emergency rule, amendment, or rescission.

   ii. A rule, amendment, or rescission that must be adopted verbatim under federal law or regulation to become effective within 60 days of adoption to continue a federally reimbursed program.

   iii. A rule, amendment, or rescission that must be adopted under R.C. 3719.41 by the State Board of Pharmacy to become effective within 60 days of adoption, so long as the proposed rule contains a statement that it is proposed to comply with federal law or rule.

8. An agency must conduct a public hearing as required by R.C. 119.03(D).

   a. Any person affected may appear and be heard in person, by the person's attorney, or both.

   b. A person affected or the person's attorney may present evidence, offer and examine witnesses, or present a position, argument, or contention that the proposed rule will be unreasonable or unlawful.

      i. The right to be heard in an administrative hearing does not include the right to receive a response to public comments from the agency at the hearing. *Youngstown Sheet & Tube Co. v. Maynard*, 22 Ohio App.3d 3, 9 (10th Dist. 1984).

      ii. Presentation of evidence by examination of witnesses does not include the cross-examination of witnesses. Rules hearings are not adversarial proceedings and are primarily legislative. *Sterling Drug, Inc. v. Wickham*, No. 78AP-478 (10th Dist. Dec. 26,1978), *aff'd*, 63 Ohio St.2d 16 (1980).

   c. Any submission allowed by statute may be made in writing at, before, or after the hearing for a reasonable period established by the agency. If a presentation is done in writing, the person need not attend. R.C. 119.03(D).

   d. Testimony at the hearing will be recorded at the agency's expense, but transcription is not required unless a person requests all or part of the record. A requester may be required to pay for part or all of the cost of the requested transcription in advance. R.C. 119.03(D).

e. The agency must prepare a hearing summary and a report of any issues raised and how they are addressed in the rule, amendment, or rescission or, if the issue is not addressed, why it is not. R.C. 119.03(D). The hearing report, with hearing summary attached, must be provided to JCARR as set forth in R.C. 119.03(B) and (C).

9. The agency may adopt the proposed rules as follows:

   a. After the periods set forth in R.C. 106.02, 106.22, and 105.023 expire, and absent the adoption of a resolution to invalidate, the agency may issue an order adopting the proposed rule, amendment, or rescission. R.C. 119.03(E). The rule's effective date may not be earlier than 10 days after it was filed in final form as provided in R.C. 119.04.

   b. The agency must make "a reasonable effort to inform those affected by the rule, amendment, or rescission" and provide copies to those who request them. R.C. 119.03(F).

C. Rulemaking Appeals

1. The ultimate test of an agency rule is whether it is unreasonable or unlawful. R.C. 119.03(D); *Sterling Drug, Inc. v. Wickham*, 63 Ohio St.2d 16, 19 (1980).

2. A rule may be invalidated for three reasons: (1) the rule exceeds the statutory rulemaking authority; (2) the agency failed to comply with the procedural requirements of R.C. Chapter 119; or (3) the rule is otherwise unreasonable. *Sterling Drug, Inc. v. Wickham*, 63 Ohio St.2d 16, 19 (1980).

3. Pre-enforcement review of a rule adopted under R.C. Chapter 119 through a declaratory judgment action is proper. *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 96-97 (1973).

4. If rulemaking is conducted under a specific statutory scheme (R.C. 3745.04), a person has standing to appeal a rule adopted through that scheme only if that person participated in that rulemaking. *New Boston Coke v. Tyler*, 32 Ohio St.3d 216, 218 (1987). However, a constitutional challenge to such a rule, and any rule, may still be raised by declaratory judgment action. *Ohio Chemical Recyclers Assn. v. Fisher*, 79 Ohio App.3d 480, 483-484 (10th Dist. 1992).

5. If procedural requirements are not followed, a court need not address reasonableness or constitutionality in invalidating the adopted rule. *Maggiore v. Bd. of Liquor Control*, 115 Ohio App. 131, 137 (10th Dist. 1961).

D. Emergency Rulemaking—R.C. 119.03

1. Upon request from an agency, the Governor may issue an order suspending the requirements of R.C. 119.03 if the Governor determines that an emergency requires immediate action. R.C. 119.03(G)(1); *W6 Restaurant Group, Ltd. v. Liquor Control Comm.*, 2022-Ohio-3511, ¶ 29 (10th Dist.).

2. The Governor's order must be filed with the agency, Secretary of State, JCARR, and the Director of the Legislative Service Commission (LSC). Upon filing of the Governor's order, the agency may immediately adopt the rule, amendment, or rescission effective the date it was filed electronically with the Secretary of State, JCARR, and the Director of the LSC. The Director of the LSC must publish the full text in the Register of Ohio. R.C. 119.03(G)(1).

3. The emergency rule is invalid after 120 days. Before the expiration, the agency may adopt the rule, amendment, or rescission as a non-emergency rule. An agency may not readopt the rule, amendment, or rescission as an emergency to gain another 120 days of effectiveness *unless* the review process of R.C. 106.02 prevents non-emergency adoption in the first 120 days. R.C. 119.03(G)(1).

4. An emergency rule adding a substance to a controlled substance schedule becomes invalid after 180 days. Before that expiration, the State Pharmacy Board must adopt the rule as a non-emergency. The Board may not use the emergency procedures to gain another 180 days. R.C. 119.03(G)(2).

5. By concurrent resolution, adopted in accordance with R.C. 107.43, the General Assembly may do the following:

    a. It may invalidate an emergency rule in whole or in part. R.C. 119.03(G)(3)(a).

    b. It may authorize an agency to readopt in whole or in part a rule rescinded as an emergency. R.C. 119.03(G)(3)(b).

6. There are some exceptions to emergency rulemaking.

    a. Rules adopted by the Department of Job and Family Services under R.C. Chapter 4141 or the Department of Tax will be effective without a hearing if statutes allow the rule to be appealed directly to the Board of Tax Appeals or a higher authority with a right to a hearing there. R.C. 119.03(H).

        i. This exception does not apply to rules, amendments, or recissions adopted by the Tax Commissioner under R.C. 5117.02(C)(1) or (2). R.C. 119.03(H).

        ii. This exception does not preclude the filing of a declaratory judgment action challenging a decision by the Board of Tax Appeals or of the higher authority within such agency. R.C. 119.03(H).

E. Rulemaking Procedures under R.C. 111.15

1. Procedures in R.C. Chapter 111 apply to "any rule, regulation, bylaw, or standard having a general and uniform operation adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule." (R.C. 111.15(A)(1) (Compare to R.C. 119.03, which does not apply to internal rules).
2. An internal management rule is any standard governing the day-to-day operations and staff procedures of an agency. R.C. 111.15(A)(3).
3. "Agency" includes any governmental entity at any level including educational institutions but does not include the general assembly, the controlling board, the adjutant general's department, or any court. R.C. 111.15(A)(2).
4. The filing requirements are as follows:
    a. The proposed rule must be filed electronically with the Secretary of State and the Director of the Legislative Service Commission (LSC). R.C. 111.15(B)(1)(a).
    b. The proposed rule, rule summary, fiscal analysis, and the business impact analysis from the Common Sense Initiative (if any) must be filed electronically with the Joint Committee on Agency Rule Review (JCARR) at least 65 days before filing with the Secretary of State or the LSC, unless excepted in R.C. 111.15(D). R.C. 111.15(B)(1)(b) and 111.15(D).
    c. The proposed rule is subject to legislative review before filing with the Secretary of State and LSC. The rule is not valid until after the period for JCARR review has expired without recommendation of a concurrent resolution to invalidate it. R.C. 111.15(D).
    d. If the proposed rule implements federal law or regulation, the agency must file a citation to that law or regulation and a statement whether the proposed rule will be more or less stringent or burdensome. R.C. 111.15(D).
5. Effective Date. The proposed rule shall be effective 10 days after completion of all filing and reviews as may apply. R.C. 111.15(B)(1). The rule is subject to review no later than five years after its effective date. R.C.111.15(B)(1)(b).
6. Emergency rule. If the rule is necessary to immediately preserve the public peace, health, or safety, the agency must state the reasons therefor. The emergency rule is effective immediately on the date of the final filing date or any later date set by the agency. The rule is effective for 120 days and cannot be refiled as an emergency. R.C. 111.15(B)(2).
7. Exceptions. The filing requirements of R.C. 111.15(D) are not required if the rule is excepted by R.C. 111.15(D)(1)-(7), including internal management rules. If a rule is excepted from the requirements of R.C. 111.15(D), it is also excepted from R.C. 111.15(B)(1)(b).

F. When Rulemaking Is Required

1. Rule defined.

   a. R.C.119.01(C): "Rule" means any rule, regulation, or standard, having a general and uniform operation, adopted and enforced by any agency under the authority of the laws governing the agency and includes any appendix to a rule. "Rule" does not include any internal management rule of an agency unless the internal management rule affects private rights and does not include any guideline adopted under section 3301.0714 of the Revised Code.

   b. R.C. 111.15(A)(1): "Rule" includes any rule, regulation, bylaw, or standard, having a general and uniform operation, adopted by an agency under the authority of the laws governing the agency; any appendix to a rule; and any internal management rule. "Rule" does not include (1) any guideline adopted under section 3301.0714 of the Revised Code, (2) any order respecting the duties of employees, (3) any finding, (4) any determination of a question of law or fact in a matter presented to an agency, or (5) any rule promulgated under Chapter 119 or division (C)(1) or (2) of section 5117.02 of the Revised Code. "Rule" includes any amendment or rescission of a rule.

2. Regardless of its nomenclature, if the agency guideline, policy, instruction, etc. has general or uniform application, it is a rule and should be adopted by rulemaking. *Condee v. Lindley*, 12 Ohio St.3d 90, 93 (1984) (an internal formula to determine multi-county tax apportionment should have been a rule despite its having been in use for over 15 years); *McLean Trucking Co. v. Lindley*, 70 Ohio St.2d 106, 114-16 (1982) (a "Special Instruction" used by the Tax Commissioner to calculate tax on interstate carriers had uniform application and should have been adopted by rulemaking); *Dayton Power & Light Co. v. Schregardus*, 123 Ohio App.3d 476, 481-82 (10th Dist. 1997) (a list of polluted properties statewide maintained by Ohio EPA should have been adopted by rulemaking because inclusion on the list affected property values and owners had no recourse for the agency's decision including the property); *Jackson Cty. Environmental Committee, et al. v. Schregardus*, 95 Ohio App.3d 527, 530 (10th Dist. 1994) (a guideline for determining an acceptable concentration for dioxin in sewage sludge should have been adopted by rule).

3. Interpretations of statutes or rules may be rules themselves if such interpretations have general or uniform application. *Ohio Nurses Assn. v. State Bd, of Nursing Edn. & Nurse Registration*, 44 Ohio St.3d 73, 76 (1989) (a position paper that clarified licensed practical nurses' authority to administer certain care was more than advisory and established a new standard that should have been adopted as a rule); *DelBianco v. State Racing Comm.*, No. 01AP395, ¶ 14 (10th Dist. Oct. 16, 2001) (the Commission relied upon an independent standard to determine how much of a "foreign substance" in a horse's blood was too much and, in so doing, gave the standard uniform application).

4. Some policies may be adopted and implemented without rulemaking if the policy is consistent with statutory authority. *O'Neal v. State of Ohio*, 2020-Ohio-506, ¶ 33 (a death penalty protocol did not require rulemaking because it was consistent with agency's authority provided by statute to administer a program and did not exceed that authority); *Ohio Podiatric Medical Assn. v. Taylor*, 2012-Ohio-2732, ¶ 38 (a publicly distributed legal memorandum clarifying statutory standards for reimbursement for specified health care professionals did not expand or vary from the plain meaning in the statute and therefore was not illegal rulemaking); *Arbogast v. Peterson*, 91 Ohio App.3d 22 (9th Dist.1993) (a nonsmoking policy at a state psychiatric institution was consistent with authority given to the managing officer of the institution).

5. A rule or interpretation of a rule may not expand or subtract from the authority granted in the agency's statute or other applicable law. *Williams v. Spitzer Autoworld Canton, L.L.C.*, 2009-Ohio-3554, ¶ 18; *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶ 54-55 (Board had no authority to adopt a smoking ban); *Ohio Nurses Assn. v. State Board of Nursing Education and Nurse Registration*, 44 Ohio St.3d 73 (1989); *Central Ohio Joint Vocational School Dist. Bd. of Edn. v. Admr., Bur. of Employment Servs.*, 21 Ohio St.3d 5, 10 (1986) (rule limiting contract renewals to one when the statute allowed three impermissibly subtracted from the statutory authority); *Franklin Iron & Metal Corp. v. Petroleum Underground Storage Tank Release Compensation Bd.*, 117 Ohio App.3d 509, 517-18 (2nd Dist. 1996) (Board impermissibly expanded the statute in setting criteria for certificates of coverage).

6. Some agency interpretations may be consistent with statutory authority and do not expand or subtract from it. *State ex rel. Saunders v. Indus. Comm.*, 2004-Ohio-339 ¶ 42 (Industrial Commission memo cited to deny benefits was only an interpretation of a statute); *Electronic Classroom of Tomorrow v. State Bd. of Edn.*, 2017-Ohio-5607, ¶ 30-31 (manuals used to calculate staffing for educational funding purposes were not rulemaking); *Princeton City School District, Bd. of Edn. v. State Bd. of Edn.*, 96 Ohio App.3d 558, 564 (1st Dist. 1994) (guidelines for school districts' use of an Information Management System were not rules).

7. In some instances, rulemaking may be done by adjudication. *Discount Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 21 (The PUCO could deregulate public telecommunications service by agency order—and rulemaking was not required—because the General Assembly had granted the PUCO this express authority in R.C. 4927.03(A)(1), and the issuance of the order did not abrogate or diminish this express authority.); *Marion Ob/Gyn, Inc. v. State Medical Bd.*, 137 Ohio App.3d 522 (10th Dist. 2000) (The Board had direct and implied authority to adopt a rule regarding the use of midwives by adjudication (denial) of treatment plans because the Board was charged by the General Assembly to safeguard the public from unqualified care.).

8. In some instances, rulemaking may not be done by adjudication. *Farina v. State Racing Comm.*, 2019-Ohio-3903, ¶ 27-28 (10th Dist.) (despite a rule that allowed consideration of external standards, a post-race determination that a winning horse had five times the limit of a substance in his blood (as determined by independent professionals) was impermissible rulemaking); *Fagan v. Boggs*, 2011-Ohio-5884, ¶ 42 (4th Dist.) (an order to stop selling pet food containing raw milk was illegal rulemaking as to what was a "prohibited substance" by adjudication).

9. Even if the agency utilizes a published industry standard or a properly adopted federal regulation, it is illegal rulemaking. *Fairfield Cty. Bd. of Commrs. v. Nally*, 2015-Ohio-991 ¶ 29 (using an EPA-adopted regulation to set an Ohio wastewater permit limitation was illegal rulemaking); *Progressive Plastics, Inc. v. Testa*, 2012-Ohio-4759, ¶ 31 (Tax Commissioner's use of the accepted accounting principle of first in, first out was illegal rulemaking); *Farina v. State Racing Comm.*, 2019-Ohio-3903, ¶ 27 (10th Dist.) (even if a properly adopted rule referenced using a racing industry standard, the determination that the amount of a substance in a horse's blood exceeding that standard was then a violation of Ohio rule regarding foreign substance and could not be done absent rulemaking); *Fagan v. Boggs*, 2011-Ohio-5884 (4th Dist.) (a determination that raw milk was a prohibited feed ingredient because it was not on an approved list issued by the American Association of Feed Control Officials and published by the Department of Agriculture was illegal rulemaking).

G. Rule Interpretation

1. There must be statutory authority for an agency to adopt rules. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶ 38. The authority must be expressly designated by or clearly implied from an express power granted by the General Assembly. *Waliga v. Bd. of Trustees of Kent State Univ.*, 22 Ohio St.3d 55, 57 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 470-471 (1981) (an agency's choice of method to disseminate information to the public is one of its implied powers).

2. Even if rulemaking authority is granted, it is not unlimited. The extent of the rulemaking authority should be clear, and any question about its extent should be resolved against the extension. *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47 (1917); *In re Application of Black Fork Wind Energy, L.L.C.*, 2018-Ohio-5206, ¶ 46 (although the PUCO had rulemaking authority to grant permits and conduct hearings, it could not allow amendments to applications by means of a motion at hearing; the amendment must be filed by application).

3. Even if the rulemaking is generally consistent with the agency's purposes or the rule's purpose is admirable, there must be clear or clearly implied authority from the General Assembly for the rule. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 2002-Ohio-4172, ¶ 41 (there was no express delegation or implied authority for the Board to adopt a smoking ban. Administrative rules cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly); *Carroll v. Dept. of Admin. Services*, 10 Ohio App.3d 108, 110 (10th Dist. 1983) (the director may not promulgate rules that add to his delegated powers, no matter how laudable or sensible the ends sought to be accomplished).

4. Rules that further the purpose of the agency's statutory authority or fill gaps in the statutory authority are proper exercises of agency rulemaking. *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 289 (2001) (a legislative gap is not the equivalent to a lack of authority for the agency to act), citing *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("[t]he power of an administrative agency to administer a * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly"); *Carroll v. Dept. of Admin. Services*, 10 Ohio App.3d 108, 110 (10th Dist. 1983) (the purpose of administrative rulemaking is to facilitate the administrative agency's placing into effect the policy declared by the General Assembly in the statutes to be administered by the agency).

5. A rule that impermissibly adds to or subtracts from a statute automatically creates a clear conflict, invalidating the rule. A rule is also invalid if it is not a reasonable or supportable interpretation of a statute. *Franklin Iron & Metal Corp. v. Petroleum Underground Storage Tank Release Compensation Bd.*, 117 Ohio App.3d 509, 515-516 (2d Dist. 1996).

6. "An administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." *McAninch v. Crumbley*, 65 Ohio St.2d 31, 34 (1981), citing *State ex rel. Curtis v. DeCorps*, 134 Ohio St. 295 (1938) (A rule that would preclude a statute's application must yield to the statute.). A rule that purported to exclude Asian-Indians from the definition of "Orientals" was in derogation of R.C. 122.71(E)(1). *DLZ Corp. v. Dept. of Admin. Servs.*, 102 Ohio App.3d 777, 781-782 (10th Dist. 1995).

7. Agencies must use reasonable interpretations of statutory and regulatory authority in administrating programs. *State ex rel. Clark v. Great Lakes Constr. Co.*, 2003-Oho-3802, ¶ 10 ("It is a fundamental tenet of administrative law that an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable."); *Swallow v. Indus. Comm.*, 36 Ohio St.3d 55, 57 (1988) (A determination that consecutive disability payments would be more beneficial than concurrent payments was consistent with the Commission's administration of its authority.); *Defender Sec. Co. v. Testa*, 2019-Ohio-725, ¶ 29-30 (10th Dist.) (Deference may be given to the Commission's interpretation of its statute based upon the agency's specific expertise. The court adopted the agency's interpretation as reasonable.).

H. Deference to Agency Rule Interpretation

1. Traditional/federal rule. An agency is entitled to deference for its reasonable interpretation and implementation of ambiguities in its statutes and regulations. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (unanimously holding that the U.S. EPA was entitled to deference in its interpretation of the *Clean Air Act; Auer v. Robbins*, 519 U.S. 452 (1997) (unanimously holding that the Department of Labor was entitled to deference in the interpretation of its regulation under the Fair Labor Standards Act).
2. Federal standard change. In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244 (2024), the Supreme Court overruled Chevron but left unchanged and reaffirmed any decisions based upon Chevron. The Court ruled that interpretations of ambiguities in the law are the constitutional province of the courts, not agencies.
    a. A court still may give considerable deference to an agency's interpretation if the court finds it to be well reasoned. Loper Bright, 144 S.Ct. at 2249 and 2259, both citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).
    b. An agency's interpretation should be given deference if, in the statute itself, Congress conveyed to the agency the authority to make determinations. Loper Bright, 144 S.Ct. at 2259-2260, citing *Gray v. Powell*, 314 U.S. 402, 412-413 (1941).
3. In Ohio, courts may but do not have to defer to an agency's interpretation and implementation of a statute. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 3.
4. There must be ambiguity before considering whether to defer to an agency's interpretation. *State ex rel. Hildreth v. LaRose*, 2023-Ohio-3667, ¶ 22 (a court cannot interpret if the statute is unambiguous); *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 44; *Gerritsen v. State Med. Bd.*, 2023-Ohio-943, ¶ 24 (10th Dist.) (if there was no ambiguity, the Board and the court applied an unambiguous and clear statute).
5. Even if there is ambiguity, mandatory deference to an agency's interpretation of a statute is inappropriate and violates Ohio's Constitution and statutes. *TWISM Ents., L.L.C. v. State Bd. of Registration for Professional Engineers & Surveyors*, 2022-Ohio-4677, ¶ 3; R.C. 1.49.
6. If a statute is ambiguous, a court may consider the agency's interpretation. *State ex rel. AutoZone Stores, Inc. v. Indus. Comm.*, 2023-Ohio-633, ¶ 16 (10th Dist.); *Hawkins v. Dept. of Natural Resources*, 2023-Ohio-3493, ¶ 30 (10th Dist.); *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*, 2021-Ohio-3156, ¶ 21.

7. A court should defer to agency interpretations if the agency has particular expertise or is charged by its enabling statute to make the determinations in question. *In re Application of Firelands Wind, L.L.C.*, 2023-Ohio-2555, ¶ 14-15; *In re Application of Alamo Solar I, L.L.C.,* 2023-Ohio-3778, ¶ 15; *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 19 (permitting reliance on the expertise of a state agency in interpreting a specialized law); *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 2004-Ohio-6767, ¶ 51 ("Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility."); *Yoonessi v. State Med. Bd.*, 2024-Ohio-169, ¶ 5 (10th Dist.) (rejecting applicability of *TWISM*, as board was simply applying the law and the board's expertise to the facts of the case).

I. Required Rulemaking

1. Agencies have an ongoing responsibility to review their operations to identify principles of law or policy that have not been stated in a rule, but upon which the agency is relying in conducting determinations of rights and liabilities or in issuing materials, including instructions, directives, policy statements, guidelines, handbooks, manuals, advisories, notices, circulars, advertisements, forms, letters, opinions, or adjudications used to determine rights and responsibilities within their statutory authority. If a principle not adopted as rule is found, agencies must adopt the principle through rulemaking within six months of determining that it exists. R.C. 121.93.

2. Agencies and JCARR must review policies and, if the agency is "relying upon a principle of law or policy that, under section 121.93 of the Revised Code, should have been supplanted by its restatement in a rule," the agency must go through the rulemaking procedure. R.C. 101.352.

3. If JCARR "becomes aware" that an agency is relying on a principle or policy that, under R.C. 121.93, should be a rule, the Chair of JCARR may require an agency to appear before the Committee to justify its failure to adopt a rule. After the hearing, JCARR may "recommend" that the agency adopt a rule and provide reasons for the recommendation. If the recommendation is made, the agency must conduct rulemaking within six months of the recommendation. If it does so, the agency may continue to rely upon the policy or principle during the rulemaking period. R.C. 101.352.

4. A person who was a party to an adjudication or civil judgment involving a policy or principle that the person believes should have been in a rule may petition the agency to create a rule within 90 days of the adjudication or judgment. Any petition must also be sent to the Joint Committee on Agency Rule Review. If the agency decides to grant the petition, rulemaking must commence within six months. R.C. 121.931.

5. If the agency intends to deny the petition filed under R.C. 121.931, it must give the petitioner notice, a "brief" explanation for the intended denial, and an opportunity for a hearing. After that, the petitioner has 15 days after receiving the notice to request the hearing. If requested, the agency must provide an informal hearing not earlier than 30 days after the request. The petitioner may be represented by counsel. R.C. 121.931.

6. After a hearing conducted under R.C. 121.931, if the agency grants the petition, rulemaking must commence within six months. If the agency denies the petition, the agency must provide a brief explanation for its decision. The petitioner may not appeal the decision. R.C. 121.931.

7. If JCARR becomes aware, such as through its own inquiries or by receiving complaints from interested parties or stakeholders, that an agency is required expressly or impliedly by a statute to adopt a rule, the chairperson may request the agency to appear before JCARR to address its apparent dereliction. The request must identify the statute that expressly or impliedly requires rulemaking. The agency may designate a representative to appear before JCARR. R.C. 101.353.
8. After the hearing, JCARR may, by majority vote, advise the agency to commence rulemaking "as soon as it is reasonably feasible." JCARR must transmit this advisory electronically to the agency, and the agency must publish the advisory on its website. R.C. 101.353.

J. Ongoing Rulemaking Responsibilities

1. As of December 2019, agencies should have inventoried all existing rules to determine all rules with regulatory restrictions that require or prohibit an action (language such as "shall," "must," "prohibit," etc.) and determine under what statute the rules were adopted and whether amending the rules will require statutory amendment. R.C. 121.95(B). Not all agencies are subject to these requirements. R.C. 121.95(A).
2. Continuing from October 17, 2019, until June 30, 2025, no new regulatory restriction may be adopted unless the agency simultaneously removes two or more restrictions. R.C. 121.95(F).
3. Agencies have rule reduction quotas, culminating in a required 30% reduction by June 30, 2025. If this reduction is not achieved, agencies cannot adopt new rules. R.C. 121.951.
4. If the agency cannot achieve statutorily required reductions, JCARR can establish a new target percentage. R.C. 121.952.
5. Effective July 1, 2025, agencies may not exceed their JCARR-established number of rules and must contact JCARR to confirm they will not exceed their total before submitting any proposed rule. R.C. 121.953(A).
6. The required rule reductions established in R.C. 121.95 and 121.953 do not apply to internal management rules, emergency rules, rules required to be adopted verbatim by state or federal law, rules of the Ohio Casino Commission, and certain other specific exceptions. R.C. 121.95(E).

K. The Effect of Rulemaking

1. Even though rulemaking is done by law (R.C. 119.03), violation of the adopted rule is not the equivalent of violating a law in establishing negligence per se. However, the violation still may be considered evidence of negligence. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 568 (1998); *Lang v. Holly Hill Motel, Inc.*, 2009-Ohio-2495 ¶ 20-21 (building code violations do not establish negligence per se). *But see Gibbs v. Speedway, LLC*, 2014-Ohio-3055 ¶ 40-44 (2d Dist.) (distinguishing *Chambers* when finding violation of an ordinance as negligence per se).
2. A policy that should have been adopted as a rule was not the basis for invalidating a permit. *Buckeye Forest Council, Inc. v. Div. of Mineral Resources Mgt.*, 2007-Ohio-965, ¶ 23 (7th Dist.).
3. Failure to follow the filing requirements of R.C. 111.15 meant that federal regulations could not be enforced by the PUCO as Ohio rules. *B&T Express, Inc. v. Public Utilities Comm.*, 145 Ohio App.3d 656, 667 (10th Dist. 2001).

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