Administrative Law - Evidence - Hearsay - Residuum Rule

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ADMINISTRATIVE LAW—EVIDENCE—HEARSAY—RESIDUUM RULE—An equally divided Supreme Court of Pennsylvania has held that uncorroborated hearsay evidence alone can support a factual finding in an administrative hearing if the proponent establishes some foundation for the hearsay's reliability or reliability is apparent on its face.


In January, 1977, Theresa J. Ceja was dismissed from her job with the Commonwealth of Pennsylvania, Department of Revenue. Subsequently, she was denied unemployment benefits upon a finding that she had been discharged for willful misconduct. She appealed and, after a hearing before a referee, was again denied benefits. The Unemployment Compensation Board of Review made certain findings of fact and affirmed the referee's decision, concluding that Ceja's conduct was clearly insubordinate and rose to the level of willful misconduct. On appeal, the

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1. Unemployment Compensation Bd. of Review v. Ceja, 493 Pa. 584, 427 A.2d 631, 632 (1981). Ceja had been warned repeatedly about her disruptive conduct in her work area and her refusal to follow instructions. Her employer dismissed her after an incident in which she directed profane and abusive language at her supervisor. Id.

2. Id. Section 402(e) of the Unemployment Compensation Law, as amended, PA. STAT. ANN. tit. 43, § 802(e) (Purdon 1964) provides: "An employee shall be ineligible for compensation for any week - . . . (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connect with his work, irrespective of whether or not such work is "employment" as defined in this act."

3. 493 Pa. at 590-91, 427 A.2d at 632.

4. Id. at 591, 427 A.2d at 632. At the compensation hearing below, several memoranda and letters pertaining to the appellant's employment history were offered into evidence by her employer without any formal objection by the appellant, who was not represented by counsel. This evidence included notices of suspension based upon the appellant's alleged disruptive behavior and insubordination. The documents presented by the employer went on to allege that the appellant called her supervisor an "S.O.B." The employer also presented two eyewitness accounts of the appellant's behavior. The appellant explicitly denied calling her supervisor an "S.O.B." and stated that the documents presented against her were misleading and inaccurate. At no time did the employer call any witness with first-hand knowledge of the events in dispute or of the way in which the documentary evidence had been prepared. Id. at 591-92, 427 A.2d at 633.
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commonwealth court reversed the Board's decision and held that the commonwealth had failed to sustain its burden of proving willful misconduct because it had presented only uncorroborated hearsay evidence.\(^5\)

The Supreme Court of Pennsylvania granted allocatur and affirmed the commonwealth court's order on different grounds.\(^6\) The court held, however, that uncorroborated hearsay evidence, if reliable, may support an administrative decision.\(^7\) The court formulated guidelines for applying a "common sense analysis" to test the reliability of hearsay evidence on a case-by-case basis rather than by an technical or rigid standard.\(^8\)

Justice Kauffman delivered a plurality opinion\(^9\) in which he held that the documents offered by the employer failed to meet the requirements of the Uniform Business Records as Evidence Act.\(^10\) Thus, Justice Kauffman observed that because the com-

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6. 493 Pa. at 591, 427 A.2d at 633.

7. \(\text{Id. at 607-08, 427 A.2d at 641-42.}\)

8. \(\text{Id. at 608-09, 427 A.2d at 642.}\)

9. \(\text{Id. at 590, 427 A.2d at 632.}\) Chief Justice O'Brien and Justice Nix joined in the plurality opinion.

10. \(\text{Id. at 593, 427 A.2d at 633.}\) The Uniform Business Records as Evidence Act, PA. STAT. ANN. tit. 28, §§ 91(a)-91(d) (Purdon 1958) [hereinafter cited as UBREA], subsequently was repealed and reenacted as 42 PA. CONS. STAT. ANN. § 6108 (1981). At the time of the compensation hearing, PA. STAT. ANN. tit. 28, § 91(b) provided:

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of the business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

\(\text{Id.}\) Justice Kauffman went on to note that the employer's attorney introduced the documents as the employer's total case without indicating that he had any personal knowledge of the events described in the documents. 493 Pa. at 593, 427 A.2d at 633. Because no attempt was made to show that the documents were prepared in the regular course of business or that they originated close to the time of the incidents they described, Justice Kauffman ruled that the employer failed to lay any foundation for introduction of the documents as business records under the UBREA exception to the hearsay rule. \(\text{Id. at 593, 427 A.2d at 634.}\)
com­mo­n­wealth court prop­er­ly treated the doc­u­ments as un­cor­robor­at­ed hears­ay, it cor­rect­ly applied the stan­dards set forth in Walker v. Un­em­ploy­ment Com­pen­sa­tion Board of Review¹¹ and prop­er­ly re­ject­ed the un­cor­robor­at­ed hears­ay as the sole ba­sis for a find­ing of fact.¹² He noted that ac­cord­ing to Walker, prop­er­ly ob­ject­ed­to hears­ay ev­i­dence is not com­pet­ent ev­i­dence to sup­port a find­ing of the Board; and hears­ay ev­i­dence ad­mit­ted with­out ob­jec­tion may sup­port a find­ing, but only if it is cor­ro­bo­rat­ed by some com­pet­ent ev­i­dence on the re­cord.¹³

Ju­stice Kauff­man be­gan an ex­am­i­na­tion of the Walker rule by not­ing that the civil jury trial rules of ev­i­dence are less use­ful and at times coun­ter­pro­duc­tive when ap­plied to ad­min­is­trative pro­ce­dur­es.¹⁴ He ob­served that the pur­pose of an ad­min­is­trative agen­cy is to effi­ciently car­ry out legis­la­tive pol­i­cies through ad­ju­di­ca­tion, and that this can be achieved only if agen­cies re­ceive all the re­le­vant and pro­ba­tive ev­i­dence that could con­tri­bute to an in­formed de­ci­sion.¹⁵ He also noted that it would be un­re­al­ist­ic to ex­pect ad­min­is­trative trib­u­na­les to ap­ply the strict exclu­sion­ary rules of ev­i­dence.¹⁶

¹² 493 Pa. at 593, 427 A.2d at 634. The lower court held that the com­mon­wealth had failed to meet its bur­den of prove­ing will­ful mis­con­duct. See Mc­Lean v. Un­em­ploy­ment Com­pen­sa­tion Bd. of Review, 476 Pa. 617, 383 A.2d 533 (1978) (bur­den of prove­ing will­ful mis­con­duct is on the em­ploy­er).
¹⁴ 493 Pa. at 594, 427 A.2d at 634. See 1 J. Wig­more, Ev­i­dence § 46, at 31 (3d ed. 1940).
¹⁵ 493 Pa. at 594, 427 A.2d at 634. Ju­stice Kauff­man cited Sec­tion 505 of the Penn­syl­va­nia Ad­min­is­tra­tive Agency Law, 2 Pa. Cons. Stat. Ann § 505 (1981) which pro­vi­des: "Agen­cies shall not be bound by tech­ni­cal rules of ev­i­dence at agency hear­ings and all re­le­vant ev­i­dence of rea­son­ably pro­ba­tive value may be re­ceived. Rea­son­able exam­i­na­tion and cross-ex­am­i­na­tion shall be per­mit­ted." As re­flect­ing this con­sider­a­tion at the time of the un­em­ploy­ment com­pen­sa­tion hear­ing in Ceja, this pro­vi­sion ap­peared at Pa. Stat. Ann. tit. 71, § 1710.32 (Purdon 1962).
¹⁶ 493 Pa. at 595, 427 A.2d at 634. See R. Ben­jamin, Ad­min­is­tra­tive Ad­ju­di­ca­tion in the State of New York, 174-175 (1942). See Wig­more, supra note 14, at 36, which pro­vi­des:

[T]he jury-trial sys­tem of Ev­i­dence—rules cannot be im­posed upon ad­min­is­trative trib­u­na­les without im­pos­ing the lawyers also upon them; and this would be the heaviest cal­am­ity. The com­plex mass of Ev­i­dence—rules cannot be ap­plied except by tech­ni­cally trained lawyers; and, fur­ther­more, many of these tech­ni­cal lawyers will be­long to the over-tech­ni­cal type. No one can wish that the pet­ty snar­ling con­tent­ious­ness over tech­ni­cal­i­ties of
However, Justice Kauffman recognized that the notion of fairness and the due process rights of the litigants must be considered. He noted that the most common due process issue raised in judicial review of agency decisions is whether and how to admit hearsay and how to weigh it. Justice Kauffman observed that despite the importance of the issue, its resolution in various jurisdictions has not been uniform.

Justice Kauffman cited Professor McCormick's argument that restrictions against the admission of hearsay in administrative tribunals should be eliminated. After noting some of the concerns and competing interests recognized by McCormick, Justice Kauffman observed that the seminal Pennsylvania case attempting to reconcile them was McCauley v. Imperial Woolen Co., a workmen's compensation case, which held that a finding must be based on relevant and competent evidence of sound, probative character. He stated that the McCauley holding reiterated a rule of law first pronounced by the New York Court of Appeals in Carroll v. Knickerbocker Ice Co., another workmen's compensation case. Knickerbocker articulated the "legal residuum rule," which stipulates that an agency can accept any evidence offered, but that ultimately a decision must be supported by a residuum of legal evidence.

trial tactics, so typical of jury-trial, should be transferred to the administrative tribunals. And yet, how can the system be transferred without transferring the only persons who can use it?

Id. (emphasis in original).

17. 493 Pa. at 596, 427 A.2d at 635.
18. Id.
19. Id. See C. McCormick, HANDBOOK OF THE LAW OF EVIDENCE § 350 (2d ed. 1972). Professor McCormick argues strongly for abolishing the exclusionary restrictions against admitting hearsay evidence in administrative proceedings because these restraints have nothing to do with the hearsay's probative value. McCormick points out that there should be no technical distinction between hearsay and non-hearsay evidence because both types range from the least to the most reliable forms of evidence. He quotes Professor Davis's opinion that "the guide should be a judgment about the reliability of particular evidence in a particular record in particular circumstances, not the technical hearsay rule with all its complex exceptions." Id. at 842 (quoting Davis, Hearsay in Administrative Hearings, 32 GEO. WASH. L. REV. 689, 689 (1964)). Furthermore, McCormick argues that it is illogical to require a trial examiner to refuse to admit hearsay when there is no jury to protect and the examiner will be exposed to the evidence whether he admits or excludes it. Id.

20. 261 Pa. 312, 104 A. 617 (1918).
21. Id. at 326, 104 A. at 622.
23. Id. at 440, 113 N.E. at 509.
Justice Kauffman noted that this residuum rule has persisted in a number of jurisdictions, including Pennsylvania, and that despite the rule's purpose of ensuring fairness in administrative hearings, it has been strongly criticized by scholars. Furthermore, Justice Kauffman concluded that the residuum rule actually imposes a stricter evidentiary standard than that utilized in jury trials because the rule renders all hearsay ineffective unless corroborated, ignoring its potential reliability.

Justice Kauffman cited Professor Davis's proposal that administrative agencies be given more discretion to determine on a case-by-case basis whether or not the evidence before them is reliable even though inadmissible in a jury trial. Justice Kauffman also noted that Judge Learned Hand advocated administrative reliance on hearsay evidence when there is no better evidence available and such evidence is the kind on which responsible persons are accustomed to rely in serious affairs. Justice Kauffman cited Davis's contention that there exists a need for a more rational standard for evaluating evidence in administrative proceedings based on the variable circumstances of each case, not solely on whether the hearsay is corroborated or not.

24. 493 Pa. at 598, 427 A.2d at 636. See infra note 85 and accompanying text.
25. 493 Pa. at 598, 427 A.2d at 636. The residuum rule reflects a concern for claimant’s right to confrontation and cross-examination.
26. Id. at 599, 427 A.2d at 637. See McCORMICK, supra note 19, at 848. Unobjected-to hearsay is competent evidence in jury trials. 493 Pa. at 601, 427 A.2d at 638.
27. Id. at 600-01, 427 A.2d at 637. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.10 (1958).
28. 493 Pa. at 599-600, 427 A.2d at 637. See NLRB v. Remington Rand, 94 F.2d 862 (2d Cir.), cert. denied, 304 U.S. 576 (1938). In Remington Rand Judge Learned Hand stated that:

[The examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides . . . no doubt, that does not mean that mere rumor will serve to “support” a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs. Id. at 873. Justice Kauffman then noted that Judge Hand later applied this formulation to the residuum rule in United States v. Costello, 221 F.2d 668 (2d Cir. 1955), which held that it is illogical to require that hearsay must be supplemented by some first-hand evidence in order to support a finding. Id. at 677-78.
29. 493 Pa. at 600-01, 427 A.2d 637. See DAVIS, supra note 27, § 14.13 which states that:

[the reliability of evidence cannot be adequately judged by wholesale
Justice Kauffman then noted that the Pennsylvania residuum rule is embodied in the two-part test set forth in Walker. While Justice Kauffman found the Walker objective of preventing administrative decisions based on insubstantial evidence laudable, he maintained that this goal could be attained much more efficiently by adopting simple guidelines, rather than inflexible, mechanical standards, for determining whether the evidence is reliable enough to support a finding. Thus, he noted that his criticism of Walker is similar to criticisms of the residuum rule. He stated that the Walker rule hampers the administrative decision-making process and fails to thoroughly protect the due process rights of litigants before the agency. As a result, Justice Kauffman concluded that the Walker standard is too rigid and indefinite and that the court should formulate more appropriate guidelines.

thinking that ignores circumstances but must be determined in the light of variable circumstances, including the supporting evidence or lack of it, the purpose of the proceeding, the practical consequences of a finding either way, the degree of precision needed, the degree of efficacy of cross-examination with respect to a hearsay declaration, and many other such factors.

Id.

30. 493 Pa. at 601, 427 A.2d at 637-38. See supra text accompanying note 13. Justice Kauffman noted that the Board of Review's criticism of Walker's holding, that unobjected-to hearsay alone is not competent, is not in accord with the precedent cited in Walker. 493 Pa. at 601, 427 A.2d at 638. He stated, however, that the Board's criticism was not basic to the inherent weaknesses of the residuum rule, but rather demonstrated the artificial nature of the Walker rule itself in that it fails to distinguish reliable from unreliable hearsay. Justice Kauffman noted that the first part of the Walker rule preserves the technical distinction between objected-to and unobjected-to hearsay, but that the second part distorts the traditional standard regarding competency of unobjected-to hearsay by requiring the hearsay to be corroborated. Id. at 601-02, 427 A.2d at 638.

31. Id. at 602, 427 A.2d at 638.

32. Id. Justice Kauffman's first criticism of the Walker rule was that it fails to distinguish between reliable and unreliable hearsay, thus hampering the administrative decision-making process. His second criticism is that it equally fails to protect a claimant's due process rights, because unobjected-to hearsay, if corroborated, no matter how unreliable, and no matter how slight the legal evidence, may provide the substantial evidence needed to support an administrative finding. Further, Justice Kauffman observed that corroboration in and of itself is not dispositive of the issue of reliability. He noted that if it is available, corroboration may be a factor in determining reliability, but that corroboration or the lack of it neither ensures nor precludes reliability. Id.

33. Id.
Justice Kauffman began a survey of some of the standards for administrative fact-finding that have been adopted by noting that some jurisdictions have adopted Judge Hand's formulation. Next, he cited the Administrative Procedure Act (APA), which requires reliable, probative and substantial evidence and allows any oral or documentary evidence to be admitted as long as it is not irrelevant, immaterial, or unduly repetitious.

Justice Kauffman noted that the Supreme Court attempted to define the terms "reliable" and "substantial" evidence in Consolidated Edison Co. v. NLRB, which adopted a definition similar in form to Judge Hand's guidelines. He pointed out, however, that the Consolidated Edison Court also stated that mere uncorroborated hearsay or rumor does not constitute substantial evidence, and that the case has been used to support the various forms of the residuum rule in the state and federal courts.

Justice Kauffman observed that the substantial evidence standard was more accurately explained in Richardson v. Perales, a later Supreme Court case which defined material which failed to constitute substantial evidence as that which lacks any rational, probative force. Further, he noted that the Perales Court's
holding, that in some administrative proceedings circumstantial guarantees of reliability will be sufficient to make uncorroborated hearsay evidence competent, has been followed in at least one other recent federal case.\textsuperscript{42}

Justice Kauffman observed that in a court of law hearsay may be competent if it fits into any of the recognized exceptions to the rule and that once evidence is admitted under a recognized exception, it is given full probative weight.\textsuperscript{43} He also noted that the competency of uncorroborated hearsay was recognized under the common law.\textsuperscript{44} He concluded, therefore, that hearsay could be substantial evidence in support of an administrative finding if it falls within the statutory or common law exceptions to the technical hearsay rule or if it has circumstantial guarantees of reliability equivalent to those implicit in the recognized exceptions.\textsuperscript{45}

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\item reliable. However, Justice Kuffman observed that the \textit{Perales} Court did not clarify whether the above guarantees, standing alone, would have warranted the reliability of the medical reports because the claimant's failure to exercise his right to subpoena the examining physicians could have been instrumental in persuading the Court to consider the documents "substantial evidence." \textit{Id.} at 604-05, 427 A.2d at 639-40.
\item 42. \textit{Id.} at 605, 427 A.2d at 640. \textit{See} Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 3033 (1981) (rejecting any per se rule holding that hearsay can never be substantial evidence and holding that hearsay will be admissible in administrative proceedings if it is reliable and has probative worth).
\item 43. 493 Pa. at 606-07, 427 A.2d at 640-41. Justice Kauffman cited Rule 803(24) of the Federal Rules of Evidence which makes hearsay competent if: not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.
\item 44. \textit{Id.} at 607, 427 A.2d at 641.
\item 45. \textit{Id.} Justice Kauffman cited 11 J. Moore, \textit{Moore's Federal Practice} § 803(24)[7], at 208 (2d ed. 1976), in which it is noted:
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A mechanical and unreasoned application of the hearsay rule that denies vital, trustworthy evidence is not warranted. In referring to circumstantial guarantees of trustworthiness which are equivalent to those which support the specifically enumerated exceptions, Rules 803(24) and 804(5) are not referring to any one specific quantifiable degree of trustworthiness. Within the specifically authorized exceptions there is a great variation in the level of reliability.

... Each case must be judged on its own unique facts and the issue of
While noting that reliability must be judged on a case-by-case basis, Justice Kauffman stated that several factors are significant in the determination to base a decision solely on hearsay: (1) whether the hearsay is corroborated, (2) the type of hearsay offered, and (3) the necessity of using the hearsay. Thus, he reasoned that a simple common sense analysis, employing recognized hearsay exceptions or equivalent circumstantial guarantees of trustworthiness to test the reliability of hearsay evidence, would be appropriate in informal administrative settings.

Justice Kauffman then noted that a standard of trustworthiness and necessity for the use of hearsay to support findings of fact in administrative settings, including a reasonable opportunity to challenge the reliability of any adverse hearsay evidence, satisfies due process requirements. What constitutes a reasonable opportunity will depend, Justice Kauffman observed, on the claimant's interest in avoiding grievous loss and the government's interest in a summary adjudication.

Admissibility should be determined in light of the basic purposes of the rules of evidence, which, according to Rule 102, are to facilitate truth ascertainment in order fairly to resolve controversies brought to the courts for adjudication.

Id.

46. 493 Pa. at 607, 427 A.2d at 641. Other factors cited were whether the hearsay statements are written or oral; signed or anonymous; sworn or unsworn; or whether the hearsay declarant is disinterested or biased. Id.

47. Id. Justice Kauffman observed that some documents, such as reports from licensed professionals, are more prone to be trustworthy than documents of a more general and subjective nature. Id. at 607-08, 427 A.2d at 641.

48. Id. at 608, 427 A.2d at 641. It must be determined whether the hearsay declarant is available to testify, or if not, whether better evidence is available. Id.

49. Id. at 608-09, 427 A.2d at 642.


51. 493 Pa. at 609-10, 427 A.2d at 642. Justice Kauffman also noted that in Perales, the claimant's reasonable opportunity to attack the hearsay documents consisted of the right to subpoena the declarants, while in other cases a reasonable opportunity could consist of as little as the hearing officer's probing the adverse party to determine the extent and credibility of the challenge. He further observed that if the referee concludes that the party's challenge raises a credibility question regarding the hearsay evidence, the referee may then exercise his power to subpoena the declarant. Id. at 610, 427 A.2d at 642. Section 506 of the Pennsylvania Unemployment Compensation Act, PA. STAT. ANN. tit. 43, § 826 (Purdon 1964) provides that the referee has the power to subpoena the declarant. Justice Kauffman noted that this decision on the referee's part varies according to the circumstances of each hearing. 493 Pa. at 610, 427 A.2d at 642.
Justice Kauffman concluded that the proper standard must serve the government's interest in simple and routine administrative adjudication; the interest of all concerned parties in guaranteeing the proper evaluation of the reliability of the hearsay evidence; and the claimant's interest in preserving his due process right to have reasonable opportunities to challenge the reliability of any adverse evidence. He rejected any purely technical distinction between objected-to and unobjected-to hearsay, noting that such a rigid rule would fail to separate evidence that is reliable and probative from that which has little if any probative value. He reasoned, therefore, that any relevant and reliable evidence, regardless of whether corroborated or not, is capable of supporting an administrative finding.

Justice Kauffman adopted guidelines stipulating that all hearsay evidence, even if objected to, is generally admissible in an administrative hearing. To ensure reliability and competency, Justice Kauffman stated, hearsay evidence must fall within a common law or statutory exception to the hearsay rule or else have equivalent circumstantial guarantees of trustworthiness and be more probative of the point for which it is offered than any other evidence which is reasonably available. He also required that the hearsay proponent prove the competency of the evidence he offers before it can be used to support a finding.

Justice Kauffman noted that in administering the above guidelines, fairness must be the touchstone. Referring to the regulations promulgated pursuant to the Pennsylvania Administrative Agency Law, he observed that when a party contradicts hearsay, the referee must give him a reasonable opportunity to attack the reliability of the evidence at the time it is admitted. Regardless of whether or not the adverse party initiates such a challenge, Justice Kauffman noted that there must

52. Id. at 610, 427 A.2d at 642-43.
53. Id. at 610-11, 427 A.2d at 643.
54. Id. at 611, 427 A.2d at 643.
55. PA. STAT. ANN. tit. 71, § 1710.35 (Purdon 1962) (current version at 2 PA. CONS. STAT. ANN. § 102(a) (Purdon 1981)). The regulation cited by Justice Kauffman provides:
(a) In any hearing the tribunal may examine the parties and their witnesses. Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross-examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties.
34 PA. ADMIN. CODE § 101.21 (Shepard's 1981).
be some foundation for the hearsay's reliability unless it is reliable on its face. He stated that the referee is required to set forth the evidentiary basis for his decision, whether it be live testimony (or other direct evidence), hearsay alone, or a combination of the two.

Reviewing the record in the instant case, Justice Kauffman concluded that the referee's conduct at the hearing below fell short of the pertinent administrative rules and common law requirements. Because Ceja was given no real opportunity to cross-examine or challenge the employer's hearsay documents, which were the sole basis of the employer's case, the referee failed to meet the standards of the Board's own regulations. Justice Kauffman noted that the referee at no time tested the reliability of the employer's evidence nor did the referee aid the claimant in her efforts to articulate a challenge to the evidence.

56. 493 Pa. at 612, 427 A.2d at 643. Justice Kauffman stated that if the hearsay's reliability is questionable due to a challenge by the claimant or the lack of a foundation, then the referee must determine if live testimony is needed. Id. Justice Kauffman distinguished Perales, see supra text accompanying notes 40 & 41, where the hearsay declarants had no interest adverse to the claimant, from Goldberg v. Kelly, 397 U.S. 254 (1969), and the instant case, where the veracity of the declarants was the key issue, thus enhancing the need for confrontation and cross-examination. Furthermore, he noted that in such cases the referee has a duty to determine whether additional testimony is needed to reach an informed decision, and if so, the referee or the Board must call such additional witnesses. 432 Pa. at 612, 427 A.2d at 643. See Phillips v. Unemployment Compensation Bd. of Review, 152 Pa. Super. 75, 30 A.2d 718, 723 (1943) (when employer fails to appear at unemployment compensation proceeding and additional testimony is required, it is the duty of the referee or Board to call witnesses who can supply such testimony).

57. 493 Pa. at 612, 427 A.2d at 643-44.

58. Id. at 612, 427 A.2d at 644.

59. Id. When the employer's representative began introducing exhibits, Ceja attempted to interrupt the proceedings, but was abruptly cut off by the referee. Justice Kauffman reasoned that the referee's conduct may have actually discouraged her from making further attempts to question the reliability of the adverse evidence because she remained quite while the employer subsequently introduced 12 more exhibits into evidence. Justice Kauffman emphasized that under the applicable statute, the referee should be expected to ask an uncounseled claimant whether he or she wants to object to the introduction of each exhibit as it is being offered into evidence. He noted that the referee did not attempt to ascertain the appellant's view regarding the credibility of the exhibits. He observed that after all of the exhibits were introduced into evidence, the appellant again tried to challenge the adverse evidence, but the referee, instead of aiding the claimant in her attempt to challenge the employer's evidence, only appeared to reinforce the employer's case by cross-examining the claimant with the aid of the employer's counsel. Id.
Thus, Justice Kauffman concluded that the commonwealth’s documents lacked reliability and trustworthiness because they were unsworn, subjective statements prepared solely at the request of the employer and directly contradicted by Ceja’s live testimony.60 Moreover, he noted that the declarants may have been biased against Ceja, and that because the credibility of the declarants was the key issue in dispute, there should have been a demonstration of the necessity for relying solely upon the hearsay documents.61 Therefore, he affirmed the order of the commonwealth court, concluding that the employer failed to meet its burden of proving willful misconduct.62

Justice Roberts, in a concurring opinion, agreed that the commonwealth court order should be affirmed because the Board of Review presented uncorroborated hearsay evidence and failed to meet its burden of proving willful misconduct on the part of the appellant.63 He noted that Justice Kauffman reached this result by employing his newly announced administrative guidelines, which Justice Roberts deemed unnecessary to the affirmance of the commonwealth court’s order and an invitation to confusion and lack of uniformity.64 Further, he stated not only that Justice Kauffman provided no guidance about how the guidelines should be applied, but that the result reached by the court was not mandated by a proper application of the guidelines to the facts of the instant case.65 He postulated that under Justice Kauffman’s guidelines, each decision by an administrative tribunal regarding the sufficiency of hearsay evidence would be subject to a possible appeal to determine if the court had applied the proper common sense, resulting in widely disparate and irreconcilable administrative rulings.66

60. Id. at 613-14, 427 A.2d at 644.
61. Id.
62. Id.
63. Id. at 614, 427 A.2d at 645 (Roberts, J., concurring). Justices Larsen and Flaherty joined in the opinion.
64. Id. at 614-15, 427 A.2d at 645 (Roberts, J., concurring).
65. Id. at 615, 427 A.2d at 645 (Roberts, J., concurring). Justice Roberts argued that a proper application of these guidelines to the facts of the instant case would clearly result in a reversal, rather than an affirmance of the commonwealth court’s order because the documents presented by the commonwealth had “some foundation” for their reliability. He noted that the employer’s documents “were prepared close in time to the events they purport to relate, were kept as part of the employer’s records and included two eyewitness accounts of the allegedly ‘willful’ misconduct in dispute.” Id.
66. Id.
Justice Roberts noted that these guidelines discard the commonwealth's longstanding position that administrative findings must be supported by some evidence that would be admissible over objection in a court of law.\(^6\) He also stated that an application of the suggested guidelines would deny claimants in administrative proceedings the same due process protections regarding the admissibility of hearsay evidence that are given to civil jury trial litigants.\(^8\) He urged that the need for routine and summary adjudication in administrative proceedings is outweighed by the need to protect a claimant's due process rights. Justice Roberts noted that where the claimant is not represented by counsel and does not object to hearsay evidence, the fairness of the administrative process requires that a decision cannot be based solely upon hearsay.\(^9\) Thus, in order to base a decision on hearsay evidence, Justice Roberts emphasized, the hearsay must be corroborated by legally competent evidence.\(^7\)

Because an administrative adjudication need only be supported by "substantial evidence" to avoid judicial review,\(^71\) Justice Roberts stressed the claimant's need for protection when the decision maker relies solely on unsworn statements that were not subject to cross-examination.\(^72\) He concluded that, to provide this

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\(^{68}\) 493 Pa. at 616, 426 A.2d 645 (Roberts, J., concurring). Justice Roberts stated that administrative hearings are not routine to the claimant because these proceedings can determine the claimant's very livelihood. Id. at 616, 427 A.2d at 645-46 (Roberts, J., concurring).

\(^{69}\) Id. at 616, 427 A.2d at 646 (Roberts, J., concurring).

\(^{70}\) Id. Justice Roberts pointed out that many claimants have no understanding of the technical rules of evidence. Id.

\(^{71}\) See MCCORMICK, supra note 19, § 349, at 838.

\(^{72}\) 493 Pa. at 617, 427 A.2d at 646 (Roberts, J., concurring). Justice Roberts noted that a claimant is denied the opportunity to effectively challenge hearsay evidence unless he can cross-examine his accusers and that when not afforded this opportunity, he can only counter with denials which have less probative effect. Id.

The importance of the right to cross-examination is illustrated by comparing Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969) with Jacobowitz v. United States, 424 F.2d 555 (Ct. Cl. 1970). In Peters, ex parte hearsay statements of persons who had bribed the plaintiff regarding his official duties, which were
protection, present administrative rules of evidence have always required that an agency adjudication be based on competent evidence subject to a claimant's right of cross-examination.\textsuperscript{73}

Justice Roberts stated that \textit{Richardson v. Perales} does not support Justice Kauffman's position that hearsay alone can support a decision adverse to the claimant in all administrative proceedings because the special conditions which were present in \textit{Perales} are not present here.\textsuperscript{74} Moreover, he also noted that it is contrary to our legal principles to require a claimant to call adverse witnesses because the burden of proving willful misconduct is on the employer, who must establish his own case.\textsuperscript{75}

Justice Roberts concluded that because the admission of hearsay is a denial of the constitutional rights of confrontation and cross-examination, any modification of existing rules against hearsay should be made cautiously, if at all.\textsuperscript{76}

Justice Flaherty filed a separate concurring opinion, agreeing only with the result reached by the plurality opinion.\textsuperscript{77} He agreed that in some instances hearsay would be admissible in an administrative proceeding, but he limited these instances to situations where the hearsay evidence falls under a common law or statutory exception to the hearsay rule or where reports, opinions, and statements of charge are submitted by licensed professionals.\textsuperscript{78} Justice Flaherty concluded that the new guidelines

the government's sole evidence and to which plaintiff objected, had sufficient probative value to support the plaintiff's termination from his job by an administrative agency. 408 F.2d at 723-24. By comparison, Jacobowitz held that hearsay evidence produced by the government regarding the discharge of an Internal Revenue Service employee was not substantial evidence, irrespective of the definition or test used, where such evidence was contradicted by direct, legal and competent evidence at the hearing, and where it was not the type of relevant evidence a reasonable mind would accept as the basis for a decision. 424 F.2d at 562-63.

73. 493 Pa. at 617, 427 A.2d at 646 (Roberts, J., concurring).
74. \textit{Id.} Justice Roberts distinguished \textit{Perales}, where the documents were recognized as unbiased from \textit{Ceja}, where the credibility and veracity of the authors of the documents were central to the dispute. Moreover, in \textit{Perales}, the claimant had a right to subpoena the hearsay declarants whereas in the instant case, the appellant had no such right. \textit{Id.} at 617-18, 427 A.2d at 646 (Roberts, J., concurring).
75. \textit{Id.} at 618, 427 A.2d at 647 (Roberts, J., concurring).
76. \textit{Id.} Furthermore, Justice Roberts held that because no error was committed below, this case was not the proper vehicle for modifying the hearsay rules nor did Justice Kauffman's opinion provide the needed direction. \textit{Id.}
77. \textit{Id.} at 619, 427 A.2d at 647 (Flaherty, J., concurring).
78. \textit{Id.}
adopted in the plurality opinion are contrary to centuries of tradition and admonished that a claimant's fundamental due process rights require that no determination be based solely upon hearsay. 79

The residuum rule requires a reviewing court to set aside an administrative finding unless it is supported by some evidence that would be admissible in a jury trial. Under the rule, hearsay evidence alone cannot support an administrative decision, regardless of how reliable the evidence may appear to the agency and notwithstanding the evidence or lack of evidence presented by the other side. 80

The residuum rule can be traced to a 1916 New York Court of Appeals decision, Carroll v. Knickerbocker Ice Co., 81 which held that although the Workmen's Compensation Commission could accept any evidence presented before it, "still in the end there must be a residuum of legal evidence to support the claim before an award can be made." 82 In Pennsylvania, the residuum rule was first articulated in 1918 in McCauley v. Imperial Woolen Co., 83 and evolved into the two-part Walker rule, 84 rejected by the Ceja court.

The residuum rule is followed by the vast majority of state courts that have ruled on the question of the admissibility of hearsay evidence in an administrative proceeding. 85 Only a few

79. Id.
82. Id. at 440, 113 N.E. at 509.
84. See supra note 11.
jurisdictions have expressly abolished the rule and very few of the cases in these jurisdictions have provided guidelines for upholding administrative reliance on hearsay evidence. On the


86. In Arizona and Maryland, courts have held that hearsay, standing alone, may support an administrative finding. In Reynolds Metals Co. v. Indus. Comm'n, 98 Ariz. 97, 402 P.2d 414 (1965), the Arizona Supreme Court rejected the residuum rule and held that the commission may rely on hearsay where it is the kind on which reasonable men are accustomed to rely in serious affairs. The Reynolds court pointed out that "this objective [of preventing compensation awards based on insubstantial evidence] can be better achieved by upholding awards based on evidence that is technically hearsay, but of the persuasive type, rather than on the mechanical requirement that there must be a residuum of 'legal evidence' somewhere in the record." Id. at 102-03, 402 P.2d at 418.

As early as 1925, the Maryland Supreme Court upheld a workmen's compensation award based on hearsay evidence in Standard Oil Co. v. Mealey, 147 Md. 249, 127 A. 850 (1925). The court rejected the residuum rule asserting that "Wigmore ... questions the propriety of 'the insistence that every part of the evidence shall be tested by the jury trial rules of admissibility.'" Id. at 253, 127 A. at 851. More recently, in Neuman v. Mayor of Baltimore, 251 Md. 92, 246 A.2d 583 (1968) the court held that in administrative proceedings, hearsay is not only admissible but may serve as the sole basis for a decision if it is credible and has sufficient probative force. Id. at 97, 246 A.2d at 586. See Redding v. Board of County Comm'rs, 263 Md. 94, 282 A.2d 136 (1971) (hearsay evidence supported administrative body's decision sustaining dismissal of county police officer); Eger v. Stone, 253 Md. 533, 253 A.2d 372 (1969) (in an administrative proceeding on application for special exception for off-street parking, hearsay evidence as to the number of accidents that had occurred in the area was of sufficient credibility and probative force to be the sole basis for the decision). California, Ohio and Virginia allow hearsay, standing alone, to support an administrative decision in their workmen's compensation proceedings. See Hendricks v. Industrial Accident Comm'n, 25 Cal. App. 2d 534, 78 P.2d 189 (1938); Sada v. Industrial Accident Comm'n, 11 Cal. 2d 263, 78 P.2d 1127 (1938); State Compensation Ins. Fund v. Industrial Accident Comm'n, 195 Cal. 174, 231 P. 996 (1924); Baker v. Industrial Comm'n, 44 Ohio App. 539, 186 N.E. 10 (1933); Williams v. Fuqua, 199 Va. 709, 101 S.E.2d 562 (1958); Derby J. Swift & Co., 188 Va. 336, 49 S.E.2d 417 (1948); and American Furniture Co. v. Graves, 141 Va. 1, 126 S.E. 213 (1925).
other hand, the current trend in the federal courts has clearly been to abandon the residuum rule.\textsuperscript{87}

In a 1938 Second Circuit case, \textit{NLRB v. Remington Rand},\textsuperscript{88} Judge Learned Hand ruled that hearsay could support an administrative finding if it was "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."\textsuperscript{89} This classic common sense standard has been followed by federal administrative hearing officers and agencies for several years.\textsuperscript{90}

That same year, the United States Supreme Court, in \textit{Consolidated Edison Co. v. NLRB},\textsuperscript{91} announced the "substantial evidence" rule which measures both the qualitative and quantitative sufficiency of supporting evidence and evaluates whether such evidence is substantial enough to support an administrative decision.\textsuperscript{92} \textit{Consolidated Edison} created confusion, however, because after appearing to reiterate Judge Hand's classic formulation, the Court stated that "mere uncorroborated hearsay or rumor does not constitute substantial evidence."\textsuperscript{93} Courts, especially state appellate courts, have used the \textit{Consolidated Edison} language to incorporate the residuum rule into their application of the "substantial evidence" rule. Consequently, administrative trial examiners, in order to avoid possible error, are encouraged to apply the residuum rule.\textsuperscript{94}

The first major development that eroded the residuum rule in federal administrative law was the passage of the APA in 1946.\textsuperscript{95} Section 556(d) of the APA provides that any evidence will be received in an administrative proceeding as long as it is not irrelevant, immaterial, or unduly repetitious.\textsuperscript{96} Under the APA stan-

\begin{itemize}
\item \textsuperscript{87} See infra note 103.
\item \textsuperscript{88} 94 F.2d 862 (2d Cir.), \textit{cert. denied}, 304 U.S. 576 (1938).
\item \textsuperscript{89} 94 F.2d at 873.
\item \textsuperscript{90} See \textit{McCORMICK, supra} note 19, \textsection 351. See also Reynolds Metals Co. v. Industrial Comm'n, 98 Ariz. 97, 402 P.2d 414 (1965) (Industrial Commission may rely on hearsay where it is of the kind on which reasonable men are accustomed to rely in serious affairs).
\item \textsuperscript{91} 305 U.S 197 (1938).
\item \textsuperscript{92} \textit{Id.} at 229. See \textit{McCORMICK, supra} note 19, \textsection 352 (discussion of the substantial evidence rule). Substantial evidence is evidence "affording a substantial basis of fact from which the fact in issue can be reasonably inferred." \textit{NLRB v. Columbian Enameling & Stamping Co.}, 306 U.S. 292, 299 (1939) (citations omitted). See also \textit{DAVIS, supra} note 27, \textsection 29.02.
\item \textsuperscript{93} 305 U.S. at 230.
\item \textsuperscript{94} See \textit{McCORMICK, supra} note 19, \textsection 352.
\item \textsuperscript{95} Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237.
\item \textsuperscript{96} See \textit{supra} note 36.
\end{itemize}
standard, an examiner could no longer commit reversible error by admitting hearsay evidence. This standard is significant because four previous bills introduced at the same session of Congress required "competent" evidence to support a finding.\textsuperscript{77} Section 556(d) of the APA, however, makes no reference to that term and requires only reliable, probative, and substantial evidence.\textsuperscript{78}

The trend to abandon the residuum rule in the federal courts continued with the Supreme Court's decision in \textit{Richardson v. Perales}.\textsuperscript{79} The \textit{Perales} Court held that written reports by licensed physicians who had examined the claimant may be received as evidence despite their hearsay character and the absence of cross-examination. Even though the claimant's failure to subpoena the physicians, resulting in their unavailability to testify, was an important factor in the Court's holding,\textsuperscript{100} the Court implied that the medical reports alone were "substantial evidence" on which to base a finding.\textsuperscript{101} The most important aspect of the \textit{Perales} decision is its new interpretation of Chief Justice Hughes' remark in \textit{Consolidated Edison} that mere uncorroborated hearsay or rumor does not constitute substantial evidence. The \textit{Perales} Court deflated this remark by emphasizing that Chief Justice Hughes did not suggest a blanket rejection of administrative reliance on hearsay evidence.\textsuperscript{102}

Although \textit{Perales} came close to completely rejecting the residuum rule, it fell short of doing so because the physicians were not subpoenaed. However, more recent federal cases have disregarded this technicality and have relied on the \textit{Perales} language discrediting the residuum rule.\textsuperscript{103} Most post-\textit{Perales} cases hold

\begin{itemize}
\item \textsuperscript{97} See \textit{Davis}, supra note 27, § 14.05.
\item \textsuperscript{98} See id.; \textit{McCormick}, supra note 19, § 350.
\item \textsuperscript{99} 402 U.S. 389. See supra note 41.
\item \textsuperscript{100} 402 U.S. at 402.
\item \textsuperscript{101} Id. at 399.
\item \textsuperscript{102} Id. at 407-08. The \textit{Perales} Court stated:
\begin{quote}
The contrast the Chief Justice was drawing, at the very page cited, was not with material that would be deemed formally inadmissible in judicial proceedings but with material 'without a basis in evidence having rational probative force.' This was not a blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value.
\end{quote}
The opposite was the case.
\item \textsuperscript{103} See \textit{Klinestiver v. Drug Enforcement Admin.}, 606 F.2d 1128 (D.C. Cir. 1979) (hearsay can constitute substantive evidence in support of a Drug Enforcement Administration decision); United States Pipe & Foundry Co. v.
that substantiality of evidence should be determined by appraising it in its full context, rejecting any technical rule that evidence inadmissible in a jury trial is not substantial.104

One of the more important post-Perales decisions is School Board v. HEW,105 in which the same court of appeals that was reversed by the Supreme Court in Perales analyzed the overall influence of the Perales decision on administrative agencies and rejected the per se rule that hearsay can never constitute substantial evidence. The court held that one must look for factors that assure reliability of hearsay evidence.106 Recently, in Johnson v. United States,107 the United States Court of Appeals for the District of Columbia completely renounced the residuum rule, holding that it no longer applies in administrative hearings and rejected a per se rule that brands hearsay insubstantial.108

In his concurring opinion in Ceja, Justice Roberts criticized Justice Kauffman's reliance on Perales as authority for a general rule of admissibility of all objected-to hearsay.109 Justice Roberts, however, interpreted Perales in an extremely limited manner by restricting its precedential use to those cases with identical
facts.\textsuperscript{110} This limited application of \textit{Perales} ignores the line of post-\textit{Perales} cases in the federal courts which has expanded its holding to a variety of factual situations.\textsuperscript{111}

The hearsay rule was designed to determine admissibility or exclusion of evidence in cases tried before a jury. The residuum rule uses the hearsay rule to evaluate evidence in non-jury administrative proceedings. There are no rules of evidence, however, for non-jury trials,\textsuperscript{112} and judges sitting without juries exercise wide discretion and often depart from jury trial rules.\textsuperscript{113}

Because administrative agencies handle so many cases, requiring them to follow the strict evidence rules of jury trials is impractical, unrealistic, and most importantly, counterproductive. The courtroom rules of evidence were created for the settlement of controversies, not the discovery of facts, which is the purpose of most administrative hearings.\textsuperscript{114} Furthermore, courtroom rules were adopted to protect juries from being exposed to legally incompetent evidence, not to protect agency examiners, who, like judges are presumed to admit all relevant evidence and base their decision only on what they deem to be reliable and probative evidence.\textsuperscript{115}

The decision of the Supreme Court of Pennsylvania in \textit{Ceja} is part of the current trend away from the residuum rule and responds to the strong criticism regarding the rule's ineffectiveness. \textit{Ceja} adopts new extremely flexible guidelines for evaluating hearsay in administrative proceedings. They are based upon what Justice Kauffman termed a "simple common sense analysis" that determines the reliability of hearsay evidence on a case-by-case basis.\textsuperscript{116} The discretion that \textit{Ceja} affords to agency ex-

\textsuperscript{110} Id.
\textsuperscript{111} See supra note 103.
\textsuperscript{112} See \textsc{Davis}, supra note 27, § 14.04.
\textsuperscript{113} See \textsc{Davis}, supra note 27, § 14.03 which states that "our evidence system is indeed queer: we have rules of evidence for the less than 3 per cent of trials that use juries but we have no rules of evidence for the more than 97% that are without juries." See also \textsc{Davis}, \textit{An Approach to Rules of Evidence for Nonjury Cases}, 50 A.B.A. J. 723 (1964).
\textsuperscript{114} \textsc{Davis}, \textit{Evidence in the Administrative Process}, 55 \textsc{Harv. L. Rev.} 364, 423-24 (1942).
\textsuperscript{115} See \textsc{McCormick}, supra note 19, § 348.
\textsuperscript{116} 493 Pa. at 609, 427 A.2d at 642. This is a reversal from the strict residuum rule which ignores the consequences of each case and determines the reliability of hearsay solely on whether it is corroborated or not.
aminers has long been advocated by legal scholars and is in line with the liberal standard of the APA.\textsuperscript{117}

Whether the "common sense" guidelines provided by Justice Kauffman will improve administrative proceedings or only add confusion to the whole administrative process is the key question raised by the \textit{Ceja} decision. Although Justice Roberts, concerned with the due process rights of claimants, criticized what he considered Justice Kauffman's failure to provide guidance as to how the new guidelines should be applied, Justice Kauffman's opinion sets forth in explicit detail how referees are to apply his guidelines in order to safeguard the due process rights of claimants.\textsuperscript{119}

Moreover, \textit{Ceja} exemplifies the protection which Justice Kauffman's guidelines afford claimants in administrative proceedings because the application of these guidelines in \textit{Ceja} resulted in the court's finding that the referee's conduct at the hearing fell far short of protecting the due process rights of the unrepresented appellant.\textsuperscript{119}

The "common sense" guidelines adopted in \textit{Ceja} should provide a more adaptable, rational, and pragmatic standard for evaluating hearsay evidence than that existing under the rigid resi-duum rule. Because Justice Kauffman's opinion was a plurality opinion with all six justices agreeing in the result but equally divided regarding the reasoning, it carries less precedential weight than if it were a majority opinion.\textsuperscript{120} For this reason, the true effect of the \textit{Ceja} decision will depend upon how future decisions apply Justice Kauffman's guidelines.

\textit{George P. Faines}

\textsuperscript{117} See supra note 36.
\textsuperscript{118} 493 Pa. at 610-12, 427 A.2d at 642-44.
\textsuperscript{119} Id. at 612-13, 427 A.2d at 644.
\textsuperscript{120} See United States v. Pink, 315 U.S. 203 (1942).