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HEARSAY IN STATE ADMINISTRATIVE HEARINGS: THE MARYLAND EXPERIENCE AND SUGGESTIONS FOR CHANGE

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It is generally accepted that the rules of evidence which govern the admissibility of evidence in courtroom trials do not apply to administrative agency adjudications.[1] Maryland has followed this general rule since its early days of administrative hearings.[2]

There are a few justifications for not requiring administrative agencies to be bound by the rules of evidence. First, the rules of evidence were developed for jury trials in order to keep unreliable evidence from influencing lay jurors.[3] Because administrative hearings

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1. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 7.2 (3d ed. 1991) (describing this as a "hornbook rule"); *see also* Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, *amended*, 312 U.S. 654 (1941); Willapoint Oysters v. Ewing, 174 F.2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); *In re* Kennedy, 472 A.2d 1317, 1329 (Del. 1984).
2. Standard Oil Co. v. Mealey, 147 Md. 249, 127 A. 850 (1925). Maryland, like many states, has codified this principle. MD. CODE ANN., STATE GOV'T § 10-208(a) (1984); *cf.* COLO. REV. STAT. ANN. § 24-4-105(4) (1990); GA. CODE ANN. § 50-13-15 (1990); MICH. COMP. LAWS ANN. § 24.275 (West 1981); N.D. CENT. CODE § 28-32-06 (1974 & Supp. 1991); R.I. GEN. LAWS § 42-35-10 (1988); TEX. REV. CIV. STAT. ANN. art. 6252-13a, sec. 14(a) (West Supp. 1993); W. VA. CODE ANN. § 29A-5-2 (1986).
3. *See* Kenneth C. Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689, 693-97 (1962) [hereinafter Davis, *Hearsay*]; Kenneth C. Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955) [hereinafter Davis, *Residuum Rule*]; Kenneth C. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 376 (1942) [hereinafter Davis, *Problems of Evidence*]; Ernest Gellhorn, *Rules of Evidence in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 14; Leonard M. Simon, Note, *The Weight to be Given Hearsay Evidence by Administrative*

are not heard by juries,[4] but rather by persons with legal expertise, there is no need to apply the rules of evidence.[5] Second, it has been argued that to require an administrative law judge or any presiding officer to reject inadmissible evidence "makes no sense"[6] because there is no jury to protect and the agency official is "equally exposed to the evidence whether he admits it or excludes it."[7] A third justification depends not on the absence of a jury in the administrative process, but on the nature of the administrative process itself and the reason for its existence. Administrative agencies further policy goals that the legislature has decided can be best promoted through a more efficient and speedy process than is available in the traditional judicial arena.[8] It has been stated that a "major reason for the creation of workmen's compensation commissions was to avoid the costly and often impossible burden of the hearsay rule."[9] Because application of the rules of evidence would be contrary to the goals of the administrative process, they should not apply in administrative hearings.[10]

Agencies: The Legal Residuum Rule, 26 BROOKLYN L. REV. 265 (1960); Eugene J. Jeka, Note, *Hearsay Evidence Held Admissible but Insubstantial in a Social Security Hearing*, 1 LOY. U. CHI. L.J. 155, 162 (1970); Mary J. Morris, Note, *Extent to Which Hearsay Evidence May Constitute Basis for Award by Workmen's Compensation Commission*, 42 MICH. L. REV. 154, 156 (1943); George P. Faines, Note, *Recent Decision:* Unemployment Compensation Board of Review v. Ceja, 427 A.2d 631 (Pa. 1981), 20 DUQ. L. REV. 343, 362 (1982); Note, *Hearsay - Admissibility Before Administrative Boards*, 37 YALE L.J. 993, 994 (1927).

4. *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977).
5. *See* Davis, *Residuum Rule*, *supra* note 3, at 3; Davis, *Problems of Evidence*, *supra* note 3, at 371; Simon, *supra* note 3, at 265. It has also been suggested that the rules of evidence were developed for jury trials because juries could not be trusted to read long documents. Thus, the evidentiary rules which place emphasis on live oral testimony are aimed at requiring the jury to properly consider the evidence, a purpose inapplicable to administrative hearings. Davis, *Problems of Evidence*, *supra* note 3, at 397.
6. *See* Gellhorn, *supra* note 3, at 14.
7. *Id.*; *see also* Donnelly Garment Co. v. NLRB, 123 F.2d 215, 224 (9th Cir. 1942). This argument may justify the distinction between following the rules of evidence in jury trials and not following them in administrative hearings. It does not, however, explain why judges who hear cases without juries are bound to follow the rules of evidence. *See* Pamela S. Sellnow, Note, *Administrative Adjudication: Effect of the New Texas Rules of Evidence*, 35 BAYLOR L. REV. 361 (1983).
8. *See* Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 634 (Pa. 1981).
9. Gellhorn, *supra* note 3, at 6.
10. There is, however, opposition to the majority view. *See* Spaulding v. Howlett, 375 N.E.2d 47 (Ill. App. Ct. 1978) (stating hearsay generally not admissible in Illinois administrative proceedings); Douglas M. Wyckoff, *Evidentiary Standards in Formal Administrative Proceedings*, FLA. B.J., Feb. 1990, at 67

Because the rules of evidence applicable in trials do not apply in administrative adjudications, the admission of evidence at an administrative hearing that would not be admissible at a trial does not constitute grounds for reversal.[11] One of the more significant consequences of this is that hearsay is not excluded at administrative hearings.[12] Just because the agency decision is immune from attack on the issue of admissibility, however, does not mean that the agency decision cannot be attacked on the basis of the evidentiary record.

All agency adjudicatory decisions must be supported by substantial evidence[13] and must comport with due process.[14] The substantial evidence requirement and due process considerations pose special problems when an agency decision is based solely on hearsay. "Substantial evidence" requires that the agency record contain sufficient relevant evidence that a reasonable mind might accept as adequate to support the agency conclusion.[15] In order to satisfy this reasonableness test, the evidence must be not only probative, but also reliable.[16] There are inherent impediments, however, towards

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(suggesting that the Florida Evidence Code should apply to administrative hearings); *see also* Thomas R. Mubroy, Jr. & Douglas G. McClure, *The Case for Allowing Hearsay in Illinois Administrative Proceedings*, ILL. B.J., June 1989, at 552.

11. This does not mean, however, that agencies must admit all evidence offered. Pursuant to Maryland's Administrative Procedure Act, the agency may exclude evidence that is incompetent, irrelevant, immaterial or unduly repetitious. MD. CODE ANN., STATE GOV'T § 10-208(c) (1984); *see also* Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (1988) ("[T]he agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."); Model State Administrative Procedure Act § 4-212(a), 15 U.L.A. 86 (1981) ("[U]pon proper objection, the presiding officer shall exclude evidence that is irrelevant, immaterial, unduly repetitious or excusable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state.").
12. *See* Model State Administrative Procedure Act § 4-212(a), 15 U.L.A. 86 (1981); Maryland Office of Administrative Hearings, Rules of Procedure, COMAR 28.02.01.18(C) (1992) [hereinafter *OAH Rules of Procedure*]; *see also OAH Rules of Procedure*, COMAR 28.02.01.15(B) (1992) (authorizing an administrative law judge to admit an affidavit as evidence).
13. MD. CODE ANN., STATE GOV'T § 10-215(g)(3)(v) (1984); *see also* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1988); Model State Administrative Procedure Act § 5-116(c)(7), 15 U.L.A. 127 (1981).
14. MD. CODE ANN., STATE GOV'T § 10-215(g)(3)(i) (1984); *see also* Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(B) (1988); Model State Administrative Procedure Act § 5-116(c)(1), 15 U.L.A. 127 (1981).
15. *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); American Radio-Tel. Serv. v. Public Serv. Comm'n, 33 Md. App. 423, 433, 365 A.2d 314, 319 (1976).
16. *See* Maryland Dep't of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 598, 565 A.2d 1015, 1027 (1989), *cert. denied*, 494 U.S. 1066 (1990); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1989 & Supp. 1992)

evaluating evidence that consists solely of hearsay, for there is no opportunity to test the evidence through cross-examination.[17] Moreover, cross-examination is part of the due process required in administrative hearings.[18]

Because of the tension between the substantial evidence requirement and the right of cross-examination on the one hand, and an agency's obligation to admit hearsay evidence on the other, courts subject administrative agency decisions based solely on hearsay to "exacting scrutiny."[19] Therefore, although an administrative agency's decision will not be reversed because of the admission of hearsay, administrative decisions based solely on hearsay may be reversed due to lack of adequate evidentiary support.[20]

The purpose of this Article is to review and analyze the role of hearsay in Maryland state agency adjudications. The Article first discusses early Maryland cases addressing the admissibility of hearsay evidence at de novo appeals of agency decisions.[21] The discussion then proceeds to later Maryland cases, where the early admissibility standards were applied to assess the sufficiency of hearsay directly at the agency adjudication level.

The analysis will show that although the Maryland courts have usually recognized the problems raised by reliance on hearsay, they have nonetheless failed to develop a uniform analytical approach towards the treatment of hearsay. The courts' haphazard approach has given rise to largely superficial opinions, and has created incon-

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(providing parameters for admissibility of out of court statements of child abuse victims).

17. Jadallah v. District of Columbia Dep't of Employment, 476 A.2d 671, 678 (D.C. 1984). The *Jadallah* court noted that when hearsay is presented, the agency "will not be able fully to explore and evaluate shortcomings in the original declarant's perception, memory and veracity as well as any defect in the transmission of information between the original declarant and the testifying witness." *Id.*

18. *See* MD. CODE ANN., STATE GOV'T § 10-208(e)(3) (1984); Colorado Dep't of Revenue v. Kirke, 743 P.2d 16, 21 (Colo. 1987); Dragen v. Connecticut Medical Exam. Bd., 591 A.2d 150, 153 (Conn. App. Ct. 1991); Cassella v. Civil Serv. Comm'n, 494 A.2d 909, 912 (Conn. App. Ct. 1985); Tron v. Prince George's County, 69 Md. App. 256, 262, 517 A.2d 113, 116 (1986); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 635 (Pa. 1981).

19. Lim v. Taxicab Comm'n, 564 A.2d 720, 724 (D.C. 1989); *see also* Nat Stern, *The Substantial Evidence Rule in Administrative Proceedings: Restrictions on the Use of Hearsay Since* Richardson v. Perales, 36 ARK. L. REV. 102, 110-11, 116 (1982).

20. *See* Martin v. District of Columbia Police & Firefighters Retirement Bd., 532 A.2d 102, 109 (D.C. 1987); Longe v. Department of Employment Sec., 380 A.2d 76, 78 (Vt. 1977); Davis, *Hearsay*, *supra* note 3, at 694-95.

21. For a discussion of the appeals process in early administrative adjudications, *see* Reuben Oppenheimer, *Administrative Law in Maryland*, 2 MD. L. REV. 185, 206-10 (1938).

sistent case law. Moreover, the failure to articulate a consistent analysis has denied litigants, presiding officers, and administrative agencies proper guidance on the role of hearsay in administrative adjudications.

After analyzing Maryland precedent, the Article develops an analytical framework around which administrative decisions based on hearsay can be evaluated. The foundation of this framework is the recognition that, because the nature and function of state agencies differ from one to another, the role of hearsay may similarly differ among the agencies. To properly account for the variance among agencies, the Article concludes that administrative guidelines for hearsay should be developed for each agency's adjudicative process.

THE EARLY YEARS (1916-1938)

Administrative adjudications first became a significant feature of the legal landscape with the enactment of workers' compensation statutes during the first few decades of the twentieth century.[22] These statutes created special administrative tribunals to provide compensation to workers who were accidentally injured on the job. In order to further this policy, the common law defenses of assumption of risk, contributory negligence and the fellow servant rule were abolished.[23] Moreover, the workers' compensation statutes provided that the common law and statutory rules of evidence would not apply at the agency hearings.[24] This statutory abolition of the rules of evidence gave birth to a debate on the proper role of hearsay in administrative adjudications.

Carroll v. Knickerbocker Ice Co.,[25] a 1916 New York case, is generally considered to be the first major case dealing with hearsay and administrative hearings.[26] *Carroll* was an appeal by the Knickerbocker Ice Company following a commission's award of workers' compensation to the plaintiff. The case involved Myles Carroll, an ice deliveryman who died, allegedly, from the effects of a 300 pound block of ice falling upon him. The only evidence offered at the commission hearing proving that the accident had occurred, however,

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22. Maryland's workers' compensation law was enacted in 1914. *See* General Motors Corp. v. Bark, 79 Md. App. 68, 72, 555 A.2d 542, 544 (1989).
23. 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§ 1.10, 1.20, 4.30-4.50, 5.20 (1991).
24. *See* Standard Oil Co. v. Mealey, 147 Md. 249, 252-53, 127 A. 850, 851 (1925); *see also* Gellhorn, *supra* note 3, at 61; 2B LARSON, *supra* note 23, § 79.30.
25. 113 N.E. 507 (N.Y. 1916).
26. In fact, there had been an earlier case from Michigan, Reck v. Whittlesberger, 148 N.W. 247 (Mich. 1914). *Carroll*, however, is generally regarded as the leading case in this area. *See* SCHWARTZ, *supra* note 1, §§ 7.2, 7.4; Morris, *supra* note 3, at 155; Davis, *Residuum Rule*, *supra* note 3, at 1.

was hearsay. Specifically, Carroll's widow, a neighbor, a treating physician, and physicians at the hospital each testified that Carroll had told them about the accident. Conversely, Carroll's helper on the ice wagon and two employees of the saloon where the accident allegedly occurred testified that they were present when and where the decedent was allegedly injured, but had seen no such accident. Moreover, physicians who had examined Carroll testified that they had found no bruises, discolorations or abrasions on Carroll's body.

The Court of Appeals of New York reversed the commission's finding that Carroll had died from a work related injury and that his widow was entitled to benefits under the statute. The court recognized that the legislature had abolished the rules of evidence for workers' compensation cases, and that the agency decision could not be "overturned on account of any alleged error in receiving evidence."[27] Emphasizing, however, that an award had to be supported by some competent (*i.e.* nonhearsay) evidence, the court devised what has become known as the legal residuum rule. The legal residuum rule mandates that there must be "a residuum of legal evidence to support the claim before an award can be made."[28] Because substantial evidence supported the view that no accident had occurred, the award was reversed.[29]

The *Carroll* legal residuum rule became the standard for other state courts when deciding the proper role of hearsay in agency hearings.[30] By 1925, the legal residuum rule had been adopted in at least six states[31] and had been rejected by none. As opposed to *Carroll*, Maryland's early cases pertaining to the role of hearsay in administrative hearings did not concern themselves with hearsay

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27. *Carroll*, 113 N.E. at 508.
28. *Id.* at 509.
29. *Id.* The majority opinion represented the views of four of the seven judges of the Court of Appeals of New York. One concurring judge thought that it was possible for hearsay to support a finding without some nonhearsay in the record, but that in this case the award could not stand because the hearsay was directly contradicted. *Id.* (Bartlett, C.J., concurring). In his dissent, Judge Seabury stated that in light of the "social benefit which the law was designed to promote," the decision could be based solely on hearsay as long as it was "trustworthy." *Id.* at 509-11 (Seabury, J., dissenting).
30. *See* SCHWARTZ, *supra* note 1, § 7.4; *see also* Brewerton Coal Co. v. Industrial Comm'n, 154 N.E. 412 (Ill. 1926); Swim v. Central Fuel Co., 215 N.W. 603 (Iowa 1927); Strout's Case, 140 A. 377 (Me. 1928).
31. By 1925, the legal residuum rule had been adopted in Iowa, Kentucky, Maine, Michigan, Pennsylvania and Utah. *See* Royal v. Hawkeye Portland Cement Co., 192 N.W. 406 (Iowa 1923); Valentine v. Weaver, 228 S.W. 1036 (Ky. 1921); Kelly's Case, 122 A. 580 (Me. 1923); Beck v. Whittlesberger, 148 N.W. 247 (Mich. 1914); Riley v. Carnegie Steel Co., 119 A. 832 (Pa. 1923); Garfield Smelting Co. v. Industrial Comm'n, 178 P. 57 (Utah 1918).

testimony presented at the agency level. Rather, these cases focused upon the admissibility of such hearsay when a party sought to introduce it at the de novo trial court review of the agency decision.[32]

The first Maryland case to discuss the proper role of hearsay in the agency hearing process was *Standard Oil Co. v. Mealey*.[33] *Mealey* was a workers' compensation case with facts similar to those in *Carroll*. Mr. Mealey delivered oil before dying of leukemia. It was alleged that the leukemia was aggravated by an accidental injury suffered during an oil delivery. Although there were no signs of any bruises on Mr. Mealey, Mr. Mealey's widow, his building superintendent, and three doctors who had treated him just before his death testified that Mealey had told each of them that he had slipped and hit his left side on his delivery wagon.[34] Mealey prevailed at the agency level, and on de novo appeal the trial court admitted the hearsay evidence pertaining to Mr. Mealey's alleged workplace injury.

The Court of Appeals of Maryland first stated that because the rules of evidence were developed for jury trials, it could not be expected that administrative hearing commissions could adhere to them.[35] Furthermore, the court noted that the Maryland Workmen's Compensation Act expressly provided that the commission was not bound by the rules of evidence.[36] The *Mealey* court then discussed *Carroll*, wherein a similar provision in New York's workers' compensation statute was interpreted as permitting hearsay to be considered by the commission, but barring an award from being based on hearsay alone. The Maryland court also recognized that the *Carroll* approach had been followed in six other states.[37]

Nevertheless, the *Mealey* court elected not to follow the *Carroll* approach, holding instead that because of the "increased latitude allowed to the Commission," the courts must "adapt" the procedures involving the admissibility of evidence as long as there is an "assurance of reliability."[38] The court then held that even though hearsay was the only evidence of the accidental nature of the injury, the

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32. Review of workers' compensation cases is still de novo. *See* General Motors Corp. v. Bark, 79 Md. App. 68, 555 A.2d 542 (1989).
33. 147 Md. 249, 127 A. 850 (1925).
34. *Id.* at 251-52, 127 A. at 851.
35. *Id.* at 252, 127 A. at 851. At the time, section 10 of the Maryland Workmen's Compensation Act, 3 Code Pub. Gen. Laws, art. 101, provided that "[t]he commission shall not be bound by the usual common law or statutory rules of evidence or by any technical or formal rules of procedure . . . but may make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this act." *Id.* at 252-53, 127 A. at 851.
36. *Id.* at 252-53, 127 A. at 851.
37. *Id.* at 253, 127 A. at 851.
38. *Id.* at 254, 127 A. at 851.

commission's finding that the fall had occurred was sufficiently supported. The court's holding was based on two factors: the number of witnesses who had testified as to the same event and that the hearsay concerned a simple fact with "no room for substantial misunderstanding."[39]

The *Mealey* decision led Maryland on a path different from other states in the early years of administrative law. Not until more than fifty years later did a significant number of other states join Maryland in rejecting *Carroll's* legal residuum rule. By forging a new path at this early date, however, Maryland courts could not look to other state opinions for assistance in dealing with the proper role of hearsay absent a legal residuum requirement. Because Maryland has such a long history on this issue, a close analysis of its hearsay and administrative adjudication cases is useful to illuminate not only the present state of the law in Maryland, but also to aid in understanding cases from other states which have more recently rejected the legal residuum rule.

There are a few criticisms of *Mealey*. The first is that although the court adopted a reliability test as the appropriate test, it did not distinguish between the reliability of the testimony of the different witnesses. For example, the testimony of the doctors should have been viewed as more reliable than the testimony from the widow or superintendent because statements to treating physicians by patients are more likely to be truthful due to the patient's interest in receiving proper medical care.[40] Moreover, unlike the widow, the doctors were disinterested persons in this compensation hearing. The testimony of disinterested witnesses about hearsay statements should be viewed as more reliable than testimony from interested persons.[41]

A second criticism of *Mealey* is that the court was persuaded that the hearsay was reliable because it concerned a simple fact with no room for misunderstanding.[42] This, however, confuses the issue, for the focus ought not to be on whether Mr. Mealey's widow correctly reported what her husband told her, but rather whether Mr. Mealey's statement was true. The simplicity of the factual component of the statement may support the position that Mrs.

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39. *Id.* at 255, 127 A. at 852.
40. *See* FED. R. EVID. 803(4); MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1989 & Supp. 1992); Idaho v. Wright, 497 U.S. 805, 820 (1990); Maryland Dep't of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 589-90, 565 A.2d 1015, 1023 (1989); 2 MCCORMICK ON EVIDENCE § 277 (John W. Strong et al. eds., 4th ed. 1992) [hereinafter MCCORMICK].
41. This is primarily a matter of credibility, *see, e.g.*, 1 MCCORMICK, *supra* note 40, § 39, but is also related to the hearsay reliability issues of the witness's perception and memory of the out-of-hearing statements, *id.* § 245.
42. Standard Oil Co. v. Mealey, 147 Md. 249, 255, 127 A. 850, 852 (1925).

Mealey did not inaccurately report her conversation with her husband, but this was not especially crucial in light of the fact that she testified in person and was subject to cross-examination. The real problem with hearsay evidence arises when it is offered to prove the truth of the matter asserted. Because the hearsay in *Mealey* was introduced to prove the assertion that there had been a fall, the simplicity of the statement does not prove its reliability.

Two years after the decision in *Mealey*, the Court of Appeals of Maryland heard *Standard Gas Equipment Corp. v. Baldwin*.[43] *Baldwin* involved a death certificate signed by a coroner that listed the cause of death as heart disease, aggravated by burns caused by an accidental fall on hot metal.[44] The death certificate was the only evidence linking Mr. Baldwin's death to an injury suffered while working as an iron molder. The health department had been told this information by the deceased's widow.[45]

In deciding *Baldwin*, the Court of Appeals of Maryland first noted that, although the report would not be admissible under the rules of evidence, *Mealey* had relaxed the use of hearsay in the review of workers' compensation cases. Nonetheless, the reviewing court still had a duty to review the administrative decision for sufficiency of evidence. The court of appeals found that the evidence had "no probative value" because it "lacked the indicia of reliability,"[46] and therefore, "should have been excluded."[47]

There are various criticisms that can be made of *Baldwin*. The major criticism is that its conclusion was reached without any analysis. Although the court of appeals said that it was employing a reliability test, there was no discussion of the reliability issue. For example, the court did not recognize that the evidence was in fact double hearsay which requires an evaluation of the reliability of each layer of hearsay.[48] Moreover, the court seemed to be confusing probative value and reliability. Evidence is probative if it is relevant to the issue and is useful to either prove or disprove a fact;[49] evidence

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43. 152 Md. 321, 136 A. 644 (1927).
44. The death certificate provided that "[t]he cause of death was as follows: Valvular heart disease. Contributory — burns on body accidental resulting from fall (secondary) on hot metal." *Id.* at 326, 136 A. at 646.
45. *Id.*
46. *Id.*
47. *Id.*
48. *See* FED. R. EVID. 805; 2 MCCORMICK, *supra* note 40, § 324.1; Porter v. District of Columbia Dep't of Employment Servs., 518 A.2d 1020, 1025 n.3 (D.C. 1986); Longe v. Department of Employment Sec., 380 A.2d 76, 79 (Vt. 1977).
49. Relevant evidence has been defined in the following way. One fact is relevant to another fact whenever, according to the common course of events, the existence of the one, taken alone or in connection with other facts, renders

which is not probative may be excluded at an agency adjudication.[50] Conversely, reliability pertains not to relevancy, but rather to credibility, and whether the evidence is worthy of belief.[51] Whereas it is possible that evidence may be probative but not reliable, or reliable but not probative, the *Baldwin* court improperly treated reliability and probative value as synonymous.

Despite these criticisms, the conclusion reached in *Baldwin* seems correct. Unlike in *Mealy*, the widow did not testify about how she learned of the accident. It is clear she was not at the worksite; therefore, she had to have been told of the accident by some third person. Although fellow workers were present, none actually witnessed the accident.[52] Furthermore, Baldwin's widow did not testify and was not subject to cross-examination about the basis of the report. Moreover, unlike in *Mealy*, the deceased never was able to tell anyone about the accident. Mr. Baldwin was apparently unconscious from the time of his heart attack until his death, so there were no statements made to any treating physicians.[53] Therefore, although the court's analysis in *Baldwin* is not helpful, a close examination of the facts provides support for its conclusion.

Similar to *Mealy*, *Bethlehem Steel Co. v. Traylor*[54] involved using a deceased worker's statements to prove that death resulted from an accidental work related injury. Hearsay testimony from both Traylor's widow and his landlady alleged that he had been exposed to carbon monoxide while repairing a gasoline engine at his employer's plant. Additionally, there was eyewitness testimony as to the

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the existence of the other either certain or more probable. Miko v. Committee on Human Rights & Opportunities, 596 A.2d 396, 406 (Conn. 1991) (citing State v. McClendon, 505 A.2d 685, 687 (Conn. 1986)). Evidence is "probative" when it has the tendency "to establish the proposition that it is offered to prove. . . . Evidence that is probative often is said to have 'logical relevance.'" 1 McCormick, *supra* note 40, § 185.

50. *See* Md. Code Ann., State Gov't §§ 10-208(b) to 10-208(c) (1984).

51. Reliable evidence has been defined as the kind of evidence which responsible persons are accustomed to rely upon in serious affairs. It is evidence that is intrinsically trustworthy. 2 McCormick, *supra* note 40, § 353.

52. Baldwin's fellow employee, Herman Roffles, was present at the time of the alleged accident. He testified:

> I was sitting down watching some metal in the process of melting in a furnace . . . . Mr. Baldwin came past . . . . I took my eye off of him to look at the furnace, and as I did some one [sic] hollered, and I immediately looked around, and I saw Mr. Baldwin in a sitting position.

Standard Gas Equip. Corp. v. Baldwin, 152 Md. 321, 328, 136 A. 644, 647 (1927).

53. *Baldwin*, 152 Md. at 323-24, 136 A. at 645. Baldwin was carried to the hospital, but was pronounced dead on arrival. *Id.*

54. 158 Md. 116, 148 A. 246 (1929).

carbon monoxide exposure. The court ruled that the hearsay was "merely cumulative,"[55] and therefore upheld the commission's award.

It is not clear whether *Traylor* employed the earlier reliability test or a new harmless error approach. Because other witnesses testified as to their personal observation of the gas exposure, the hearsay was merely cumulative; the hearsay, therefore, need not have been relied upon to prove the accident. Although it might be seen as "harmless" to consider hearsay that merely repeats eyewitness testimony,[56] one might question how "harmless" it was when used to evaluate the credibility of other witnesses.[57] To the extent that *Traylor* does develop a harmless error approach, this limitation should be recognized.

Conversely, *Traylor* is perhaps better seen as merely an application of *Mealey's* reliability test. It has been argued that hearsay is reliable if supported by nonhearsay.[58] The hearsay in *Traylor* thus manifested indicia of reliability because it was consistent with eyewitness accounts. Another argument in support of *Traylor* is that, unlike in *Baldwin*, there was a disinterested witness — the landlady. Testimony of disinterested witnesses is generally viewed as more reliable than testimony from witnesses who have an interest in the matter. Moreover, both the landlady and the widow were available for cross-examination.

In *Waddell George's Creek Coal Co. v. Chisholm*,[59] hearsay testimony was offered by a deceased worker's widow. Apparently, the widow had been told before her husband's death that he had been injured while mining coal. As in *Traylor*, there were also eyewitnesses to the accidental injury. Nonetheless, the widow's claim was disallowed by the commission. The reviewing court, however, passing judgment on the same hearsay evidence heard by the commission, reversed. Affirming the lower court, the court of appeals stated that while some hearsay might have to be excluded as unworthy of reliance, "nothing in the hearsay evidence in the present record . . . would have required its exclusion" for it added "little more"

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55. *Id.* at 124, 130, 148 A. at 249, 252.
56. *See* Idaho v. Wright, 497 U.S. 805, 822 (1990).
57. *See* Langlois v. Department of Employment Training, 546 A.2d 1365, 1370 (Vt. 1988). This concern applies not only to hearsay, but also whenever harmless error is argued. *See generally* Charles F. Campbell, *An Economic View of Developments in the Harmless Error and Exclusionary Rules*, 42 BAYLOR L. REV. 499 (1990).
58. *See Idaho v. Wright*, 497 U.S. at 897 (Kennedy, J., dissenting); Hentges v. Bartach, 533 P.2d 66 (Colo. Ct. App. 1975); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 641 (Pa. 1981); Davis, *Residuum Rule*, *supra* note 3, at 6.
59. 163 Md. 49, 161 A. 276 (1932).

than the testimony of eyewitnesses.[60] The court pointed out that although there was no need to have received hearsay that merely duplicated the direct evidence, this turned out to be "unimportant."[61] More persuasive to the court was that, as in *Mealey*, the hearsay referred to a "single fact and a simple occurrence."[62] The court also rejected the argument that hearsay in general is inherently more subject to falsity than direct evidence.[63]

On one level, *Chisholm* might be viewed as merely an application of *Mealey*, for the hearsay was consistent with direct evidence and the subject matter of the hearsay was relatively simple. Therefore, the same criticisms directed towards *Mealey* also apply to *Chisholm*.[64] *Chisholm's* import, however, extends significantly beyond *Mealey*, for it is the first case discussing the need for hearsay based on the availability of nonhearsay.[65] Although this has been discussed by later courts and commentators as especially relevant,[66] the *Chisholm* court did not believe it to be significant in reaching its decision.[67]

Chisholm is also significant in its rejection of the notion that all hearsay is inherently more unreliable than direct evidence. This position later became a focus of those who argued against the legal residuum rule in other states.[68]

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60. *Id.* at 53, 161 A. at 278. The court noted that although it was a novelty to discriminate between hearsay, this process was not entirely new. *Id.*
61. *Id.* at 54, 161 A. at 278.
62. *Id.*
63. *Id.* The court stated that "there is of course, danger of falsity in thus reproducing statements, but hardly any greater danger than there is of falsity in the testimony of eyewitnesses." *Id.*
64. *See* discussion *supra* notes 40-42 and accompanying text.
65. *See Chisholm*, 163 Md. at 54, 161 A. at 278.
66. *See* NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1939); Cassella v. Civil Serv. Comm'n, 494 A.2d 909, 913 (Conn. App. Ct. 1985); Judallah v. District of Columbia Dep't of Employment Servs., 476 A.2d 671, 678 (D.C. 1984); Wallace v. District Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 835 (Mass. 1988) (Lynch, J., dissenting); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 641 (Pa. 1981); Ronald K. L. Collins, *Hearsay and the Administrative Process: A Review and Reconsideration of the State of the Law of Certain Evidentiary Procedures Applicable in California Administrative Proceedings*, 8 Sw. U. L. Rev. 577, 645-46 (1976); Gellhorn, *supra* note 3, at 19-22.
67. *Chisholm*, 163 Md. at 54, 161 A. at 278. The court stated "[t]he remaining part of the hearsay . . . seems to us not to be so unsafe and unreliable as a basis for the adjudication that the jury should not have been permitted to consider it." *Id.*
68. *See Cassella*, 494 A.2d at 914; *Ceja*, 427 A.2d at 637-38; Collins, *supra* note 66, at 613; Davis, *Residuum Rule*, *supra* note 3, at 5; Jeka, *supra* note 3, at 162.

In *Horn Ice Cream v. Yost*,[69] the mother of a deceased worker testified as to the accidental nature of the injury which caused her son's death. Relying on *Traylor* and *Chisholm*, the court in *Yost* found no reversible error because the hearsay added little more than had been given by eyewitnesses. The court did not identify whether it was viewing the cumulative nature of the hearsay as relating to its reliability or the harmlessness of its use, although its statement that "it is not apparent how the ruling could have injured appellants"[70] adds more support to a harmless error theory. The same criticism of a harmless error approach made in regard to the *Traylor* opinion would also apply here.[71]

Another case, *Dembeck v. Bethlehem Shipbuilding Corp.*,[72] involved a medical report prepared by a Dr. Bay, the medical examiner and advisor to the State Industrial Accident Commission, who had examined Mr. Dembeck. The report was submitted after the hearing, but prior to the final decision of the commission. The commission suspended Dembeck's benefits, a holding affirmed by the trial-level reviewing court. The court of appeals reversed the trial court's decision to suspend benefits because "no opportunity was afforded the claimant to interrogate Dr. Bay as to the report or cross-examine him."[73] This, the court wrote, denied Dembeck his right "to be confronted with the witnesses against [him], and an opportunity to test the correctness or truthfulness of the evidence by cross-examination."[74] The court also stated that justice requires that "the parties be informed of the source of the information against them and be given the opportunity to prove the information is not true."[75] Even though Dr. Bay's report seemed to be nothing more than cumulative testimony to that offered by Dembeck, reversal was still warranted because the court had "no way of determining the effect or the additional weight given by the commission" to the report since "it was made by an employee of the commission who was supposed to be, and doubtless was, entirely disinterested and impartial."[76]

Although *Dembeck* may be best explained on the basis of a violation of the exclusiveness of the record doctrine,[77] it has been

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69. 164 Md. 24, 163 A. 823 (1933).
70. *Id.* at 30, 163 A. at 825.
71. *See* discussion *supra* notes 56-57 and accompanying text.
72. 166 Md. 21, 170 A. 158 (1934).
73. *Id.* at 27, 170 A. at 160.
74. *Id.*
75. *Id.* at 28, 170 A. at 160.
76. *Id.*
77. The doctrine of exclusiveness of the record has been explained as follows:
> Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination

cited subsequently as a hearsay case,[78] and therefore raises various issues involving hearsay. Even though the hearsay was cumulative, unlike earlier cases, *Dembeck* rejected a harmless error approach. In *Dembeck* there was recognition that hearsay could tip the balance if there is conflicting direct evidence. *Dembeck* also has very broad language concerning a claimant's right of cross-examination and confrontation, which, if taken literally, would severely limit the use of hearsay at agency hearings. This concern of the *Dembeck* court had not been evident from earlier opinions. Moreover, the court's discussion of whether the witnesses were disinterested was a new approach. In *Dembeck*, because the hearsay was from a disinterested witness, the court was unwilling to view the hearsay as harmless. In earlier cases, the fact that the hearsay came from a disinterested witness indicated its reliability.[79] It should be noted, however, that reliability was not the major concern of the court in *Dembeck*. In general, *Dembeck* is much narrower than earlier Maryland cases, and, as will be seen, is much narrower than later cases. Its validity, however, has never been questioned by subsequent Maryland opinions.

Spence v. Bethlehem Steel Co.[80] again involved a worker who died after alleged accidental exposure to poisonous gas. The evidence in the record relating to the alleged accident were statements made by the deceased worker to his wife and testimony by an examining physician that the worker had said that he had been poisoned. The employer offered no evidence to refute that an accident occurred. The court first noted that the "weight of authority . . . seems to be that the statements of the patient as to the cause of his condition or injury would not be admissible,"[81] but that there was also authority for admitting such evidence when it related to the doctor's ability to diagnose and treat the case.[82] The Court of Appeals of Maryland, citing its earlier cases, stated that it "has allowed more latitude in the admission of statements in compensation cases of one injured,

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> that has not been introduced in some manner into the record of the hearing . . . . Unless the principle is observed, the right to a hearing becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision?

Mazza v. Cavicchia, 105 A.2d 545, 554 (N.J. 1954); *see also* MD. CODE ANN., STATE GOV'T § 10-209 (1984).

78. *See, e.g.*, Rodgers v. Radio Shack, 271 Md. 126, 129, 314 A.2d 113, 115 (1974).
79. *See* Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 A. 246 (1930).
80. 173 Md. 539, 197 A. 302 (1938).
81. *Id.* at 547, 197 A. at 305.
82. *Id.* at 547, 197 A. at 306.

where death ensued, as to the cause of the injury."[83] The court added that such hearsay "should be received with great caution" only from workers who are unavailable because of their death, and only if the statement had been made "so promptly after the alleged injury and so closely related to the facts and physical conditions as to give them substantial probative value."[84] The court concluded that it was appropriate in this case for the agency to rely upon both the testimony of the wife and doctor.

Although not as narrow as *Dembeck*, *Spence* does take a narrower approach to hearsay than that taken by the Court of Appeals of Maryland in its earliest cases. First, *Spence* reflects a distrust of hearsay. Earlier, in *Chisholm*, the court expressly rejected the notion that hearsay is inherently more unreliable than nonhearsay.[85] Moreover, *Spence* permits reliance on hearsay only when the declarant is unavailable because of death. This also was not the rule of earlier cases. *Spence* also viewed reliability in light of the fact that the statement was made near the time of the injury. Despite these new considerations, *Spence* does mark a return to reliability as the court's major concern.

Summary

Between 1925 and 1938, Maryland rejected the legal residuum approach and adopted the rule that hearsay by itself could support an administrative decision as long as the reviewing court was assured of the hearsay's reliability. The earliest cases indicate that hearsay was more likely to be found reliable if the hearsay involved a simple fact not subject to misunderstanding, and if the hearsay was corroborated by more than one witness, preferably one of whom was disinterested. The Maryland courts had also relied on harmless error to resolve the hearsay issue, but had written inconsistent opinions relating to harmless error. The judiciary had also considered the availability of the declarant, but it was not clear how important this was. The last two opinions during this period evidenced some hesitation and concern about allowing agencies to rely on hearsay.

THE MIDDLE YEARS (1950-1971)

During the period after World War II until the United States Supreme Court decision in *Richardson v. Perales*[86] in 1971, the legal

83. *Id.* at 548, 197 A. at 306.
84. *Id.* at 549-50, 197 A. at 307.
85. Waddell George's Creek Coal Co. v. Chisholm, 163 Md. 49, 53, 161 A. 267, 278 (1932); *see supra* note 63 and accompanying text.
86. 402 U.S. 389 (1971).

residuum rule was, despite scholarly criticism, the majority approach.[87] Such criticism noted that the legal residuum rule failed to distinguish between reliable and unreliable hearsay.[88] Moreover, it was argued that the rule did not fully protect litigants because it allowed a small amount of nonhearsay to bootstrap a large amount of hearsay,[89] and likewise, that in applying the legal residuum rule, the courts seemed to always find some residuum of competent evidence.[90] The central debate in the majority of states during this period — whether to abandon the legal residuum rule — was not relevant in Maryland because Maryland never adopted it. Despite having resolved the general issue that hearsay by itself could support an agency finding, however, Maryland courts still struggled in an attempt to find the appropriate balance between the administrative process's desire for efficiency and reliance on hearsay, and the parties' interest in a fair hearing.

Nearly thirty years elapsed between the Court of Appeals of Maryland's *Spence* opinion and its next significant opinion on hearsay and administrative hearings, *Commercial Transfer Co. v. Quasny*.[91] Factually and procedurally similar to many of its predecessors, *Quasny* involved the testimony of a widow concerning statements made to her by her husband prior to his death relating to an alleged work related injury. The widow's claim was allowed by the commission and affirmed by the trial-level reviewing court. The employer argued that Maryland's earlier line of cases established the rule that in order for the agency to rely on the hearsay, "there must be some other corroborative testimony, and the statement must refer to a simple fact and leave no room for substantial misunderstanding."[92] The *Quasny* court rejected this test and said that the court of appeals in its earlier cases had "been careful to formulate no binding rule."[93] *Quasny* then concluded that, in this case, the widow's testimony had "substantial probative value."[94] Although the husband's statement to his wife was made six to eight hours after the accident, the

87. *See* 1 JOHN WIGMORE, EVIDENCE, § 4(b), at 40-41 (3d ed. 1940); Collins, *supra* note 66, at 607; Davis, *Hearsay*, *supra* note 3, at 689.
88. *See* Davis, *Hearsay*, *supra* note 3, at 689; Davis, *Residuum Rule*, *supra* note 3, at 4.
89. *See* Associated Gen. Contractors of Am. v. Cardillo, 106 F.2d 327 (D.C. Cir. 1939); Davis, *Hearsay*, *supra* note 3, at 696; *see also* Unemployment Compensation Bd. v. Ceja, 427 A.2d 631 (Pa. 1981).
90. *See* Davis, *Residuum Rule*, *supra* note 3, at 30; Simon, *supra* note 3, at 276. *But see* Ptaszynski v. American Sugar Ref. Co., 114 N.E.2d 38 (N.Y. 1953).
91. 245 Md. 572, 227 A.2d 20 (1967).
92. *Id.* at 580, 227 A.2d at 24.
93. *Id.*
94. *Id.*

husband had not been physically able to make a statement until that time. The court also found it significant that the husband had been given last rites by a priest before speaking with his wife, and that the widow's testimony had not been contradicted. Moreover, the court found the explanation of the accident "coherent and plausible."[95] The court was not troubled by the lack of any evidence that corroborated the hearsay.

The *Quasny* analysis, with its major focus on the reliability of the hearsay, is typical of the approach the Maryland courts took during the sixties and early seventies. In most of the cases during this period, however, the courts seemed to be very willing to find reliability. For example, the *Quasny* court emphasized the lack of contradictory evidence and downplayed the lack of corroboration, when in fact both stemmed from one common factor — that no one saw the accident. There also seemed to be no reason to find the widow's hearsay testimony reliable merely because it was "plausible" where other explanations, for example, that there had been no "accidental" injury, were equally plausible. Moreover, the court was influenced in its reliability finding by the administration of last rites even though there was no argument and thus no finding that the statement was a "dying declaration."[96] *Quasny* is an excellent example of Maryland's liberal treatment of hearsay during the middle period.

The next decision, *Neuman v. Mayor of Baltimore*,[97] was a zoning case involving whether a doctor's office could be located in a residential apartment building. The owner of the apartment house testified at the hearing that 95% of the doctor's patients lived in the immediate area. The owner claimed that he had been told this by the doctor, who was not present at the hearing. In permitting the zoning variance for the doctor's office, the zoning board expressly relied upon this 95% figure. In reviewing the zoning board's decision, the court first cited *Mealey* and *Quasny* for the principle that hearsay that is "credible and has sufficient probative force" may serve as the basis of an administrative decision.[98] In this case, the apartment owner's testimony "bore the indicia of reliability"[99] because he had heard the doctor's claims several times, the doctor's statement was "simple and direct and not likely to have been misunderstood by the

95. *Id.* at 581, 227 A.2d at 24.
96. Dying declarations have long been held to be admissible in court as an exception to the hearsay rule because of their presumed reliability. *See* Idaho v. Wright, 497 U.S. 805, 820 (1990) (citing Mattox v. U.S., 156 U.S. 237 (1895) and Queen v. Osman, 15 Cox Crim. Cas. 1 (Eng. N. Wales Cir. 1881)).
97. 251 Md. 92, 246 A.2d 583 (1968).
98. *Id.* at 97, 246 A.2d at 586.
99. *Id.* at 98, 246 A.2d at 587.

hearer,"[100] and it was not contradicted by the opposing party.[101]

The court's analysis in *Neuman* is conclusory and again reflects a very liberal approach towards the use of hearsay at administrative hearings. A less cursory approach, however, might have led to a different conclusion. A self-serving statement by a tenant to a landlord cannot be equated in terms of reliability to statements of injury made by a worker to a treating physician or even a spouse. There is nothing inherently reliable about statements made by tenants to landlords. Moreover, the fact that it was repeated several times did not prove the underlying reliability of the statement, for while the doctor may have honestly believed that 95% of his patients were from the area, cross-examination might have revealed that this figure was based on speculation or improper data.

Properly framed, the issue in *Neuman* should not have been whether the apartment owner correctly testified as to what was reported to him (simple, direct and not misunderstood), but rather, whether the information related to him had a substantial basis in reality. This evidence was uniquely within the doctor's possession, yet he did not testify. The zoning variance opponents did not have access to the patient's addresses, and therefore should not have been faulted for not offering contradictory evidence. Nevertheless, the court had no problem upholding the agency's reliance on this testimony. *Neuman* is perhaps the most liberal case allowing the use of hearsay.

Eger v. Stone,[102] another zoning case, involved a special exception request for a parking lot. A resident opposing the petition testified that she had investigated traffic accidents in the area; she further submitted a list of these accidents. The zoning board denied the special request, but the circuit court reversed, disregarding the resident's testimony because it was hearsay.[103] The court of appeals, however, reversed the lower court and upheld the agency.[104] The *Eger* court wrote that the circuit court had issued its ruling before *Neuman* was decided, but that the court of appeals had recently decided that hearsay, "if credible and of sufficient probative force, may indeed be the sole basis" of an administrative decision.[105] Again, the *Eger* court took only a quick look at the hearsay, concluding that the resident's testimony was of "sufficient credibility and probative

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100. *Id.*
101. *Id.*
102. 253 Md. 533, 253 A.2d 372 (1969).
103. *Id.* at 541, 253 A.2d at 376.
104. *Id.* at 542, 253 A.2d at 377.
105. *Id.*

force"[106] because it supported expert testimony that the area posed a potential traffic hazard.

Several points are worth noting here. First, the circuit court opinion could not be explained solely because it was drafted prior to *Neuman* because *Neuman* was not the first case to hold hearsay sufficient to support an agency finding. Rather, this became established as the Maryland rule in *Mealey* in 1925.[107] Second, the *Eger* court seemed satisfied with the reliability of the hearsay merely because it complemented direct evidence. Other arguments for upholding the agency, however, seem more persuasive. For example, the accident reports were available from the police and were accessible to both parties. The resident who testified had merely gathered the data and testified to the fact that accidents had occurred. Accident reports are clearly reliable on that issue, if not on attribution of fault. Third, unlike in *Neuman*, the hearsay testimony was not subject to an attack on its reliability. *Eger* would have been more analogous to *Neuman* had the witness testified about a poll someone else had taken of which she knew only the results. *Eger* therefore was a much easier case than *Neuman* in which to uphold the use of hearsay.

Redding v. Board of County Commissioners[108] was the last Maryland decision dealing with hearsay and administrative hearings prior to the United States Supreme Court's opinion in *Richardson v. Perales*. The *Redding* opinion is bare. *Redding* involved a dismissal hearing of a police officer where tape recordings were introduced into evidence. The court upheld the use of the hearsay noting that there had been no objection to the hearsay when it was introduced at the hearing. There is not much in *Redding* to analyze; the most significant feature of the opinion was the court's willingness to accept hearsay without regard for those issues that make hearsay evidence suspect. *Redding* gives the impression that by 1971 the Maryland court had reached the position that these hearsay cases did not merit much attention.

Summary

The case law in Maryland during the period 1967-1971 evidences a very liberal approach towards the use of hearsay by administrative agencies. The court in each case was very willing to rely on hearsay as the basis of an administrative decision without much analysis of the issue. Although the courts still cited the need to find reliability, they were lax in their scrutiny of the reliability issue. Moreover, the judiciary during this period eschewed any attempt to develop a

106. *Id.* at 543, 253 A.2d at 377.
107. *See* supra notes 35-39 and accompanying text.
108. 263 Md. 94, 282 A.2d 136 (1971), *cert. denied*, 406 U.S. 923 (1972).

uniform set of rules for analyzing the hearsay issue, relying instead on an inconsistent case by case approach. The result was the acceptance of hearsay without much critical analysis of its reliability. It appears that some of the concerns expressed in earlier cases became subordinated to the desire of the court to promote an informal administrative process.

THE MODERN PERIOD (1971-PRESENT)

In 1971, the United States Supreme Court decided *Richardson v. Perales*,[109] which is generally now considered the leading opinion on hearsay in administrative law.[110] Perales involved a claim for disability benefits after an alleged work injury. At the administrative hearing, evidence supporting the claim of disability consisted of live testimony by Perales, his physician, and a fellow employee. Conversely, the written reports of four examining physicians and the live testimony of a doctor who had not examined Perales, but who had read the reports of the examining physicians, were presented to refute the claim.

From the evidence, the agency concluded that Perales was not disabled. The United States Court of Appeals for the Fifth Circuit reversed, ruling that the hearsay of the doctors refuting the claim did not constitute substantial evidence because it was contradicted by the "only live witnesses."[111] Prompted by a "number of factors . . . that assure[d] underlying reliability and probative value"[112] of the evidence, the Supreme Court reversed the fifth circuit decision and upheld the agency's decision to deny benefits. Among those factors cited by the Court to justify its opinion were: (1) the doctors who wrote the report had independently examined Perales; (2) the reports were based on accepted medical procedures and tests; (3) no doctor was biased or had any interest in the outcome of the hearing; (4) there were no inconsistencies among the five reports; (5) Perales had not exercised his right under Social Security Administration regulations to subpoena the doctors and cross-examine them; (6) the social security administrative system is not adversarial, but one in which the agency acts as an adjudicator not an advocate; and (7) the "pragmatic factor" that to require live testimony would create an administrative burden because of the number of cases and the expense of live witnesses.[113]

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109. 402 U.S. 389 (1971).
110. *See* SCHWARTZ, *supra* note 1, § 7.6; Stern, *supra* note 19, at 105-06; Faines, *supra* note 3, at 360-62.
111. Cohen v. Perales, 412 F.2d 44, 53 (5th Cir. 1969), *rev'd sub nom.* Richardson v. Perales, 402 U.S. 389 (1971), *noted in* Jeka, *supra* note 3.
112. Richardson v. Perales, 402 U.S. 389, 402 (1972).
113. *Id.* at 402-06.

The *Perales* court also distinguished an earlier case, *Goldberg v. Kelly*,[114] in which the Court held that due process required an "effective opportunity to defend by confronting any adverse witness."[115] The Court noted that, unlike *Perales*, *Kelly* involved the termination, not the initial grant, of a benefit, and that termination cases present issues of credibility and veracity which are not present in an initial request for benefits.[116]

Perales has had a tremendous impact on the law of administrative adjudications. Because it was the first Supreme Court case to address the issue of hearsay and administrative hearings, and because its analysis was so elaborate, it replaced *Carroll* as the preeminent case on the hearsay issue. Although the legal residuum rule had never become as entrenched at the federal level as it had in the states,[117] *Perales* marked the death knell for *Carroll's* legal residuum rule in federal agencies.[118] Furthermore, many states looked to *Perales* to evaluate their state agency's reliance on hearsay.[119] At least initially,

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114. 397 U.S. 254 (1970).
115. *Perales*, 402 U.S. at 406-07 (quoting Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970)).
116. *Id.*
117. *See* NLRB v. Remington Rand, 94 F.2d 862 (2d Cir.), *cert. denied*, 304 U.S. 576 (1938); Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969), *noted in Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C. L. REV. 608 (1969); Morelli v. United States, 177 Ct. Cl. 848 (1966); Davis, *Hearsay*, *supra* note 3, at 695; Davis, *Residuum Rule*, *supra* note 3, at 11; Faines, *supra* note 3, at 359.
118. Johnson v. United States, 628 F.2d 187 (D.C. Cir. 1980); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); Cassella v. Civil Serv. Comm'n, 494 A.2d 909, 912 (Conn. App. Ct. 1985), *aff'd*, 519 A.2d 67 (Conn. 1987); Martin v. District of Columbia Police & Firefighters Retirement Bd., 532 A.2d 102, 110 (D.C. 1987); Sellnow, *supra* note 7, at 369; Stern, *supra* note 19, at 116 n.79; Faines, *supra* note 3, at 360 n.103.
119. *See* Employer's Commercial Union Ins. Group v. Schoen, 519 P.2d 819 (Alaska 1974); *In re* Appeal in Maricopa County, 536 P.2d 197 (Ariz. 1975); Smith v. Everett, 637 S.W.2d 537 (Ark. 1982); Kirke v. Colorado Dep't of Revenue, 743 P.2d 16 (Colo. 1987); Cassella v. Civil Serv. Comm'n, 494 A.2d 909 (Conn. App. Ct. 1985), *aff'd*, 519 A.2d 67 (Conn. 1987); *In re* Kennedy, 503 A.2d 1198 (Del. 1985); District of Columbia v. Jones, 442 A.2d 512 (D.C. 1982); Baehr v. Health & Hosp. Governing Comm'n, 407 N.E.2d 817 (Ill. App. Ct. 1980); McConnell v. Iowa Dep't of Job Serv., 327 N.W.2d 234 (Iowa 1982); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830 (Mass. 1988); Georgia-Pacific Corp. v. McLaurin, 370 So. 2d 1359 (Miss. 1979); Conners v. Missouri Div. of Family Serv., 576 S.W.2d 568 (Mo. Ct. App. 1979); Hartford Accident & Indem. Co. v. Duvall, 300 A.2d 732 (N.H. 1973); Spilotro v. Nevada Gaming Comm'n, 661 P.2d 467 (Nev. 1983); Chavez v. Employment Sec. Comm'n, 649 P.2d 1375 (N.M. 1982); State Div. of Human Rights v. Sweet Home Cent. Sch. Dist. Bd., 423 N.Y.S.2d 748 (App. Div. 1979); City of Dayton v. Rutledge, 454 N.E.2d 611 (Ohio 1983); Matthew v. Juras, 519 P.2d 402 (Or. Ct. App. 1974); Craig v. Pare, 497 A.2d 316 (R.I. 1985); Brooks v. Klevenhagen, 807 S.W.2d 777 (Tex. App. Ct. 1991); Longe v. Department of Employment Sec., 380 A.2d 76 (Vt. 1977).

however, *Perales* did not have a particularly significant impact in Maryland, for Maryland had never adopted the *Carroll* doctrine.

The first post-*Perales* case in Maryland involving hearsay and administrative hearings was *Fairchild Hiller Corp. v. Supervisor of Assessments for Washington County*.[120] *Fairchild* involved a decision of the Maryland Tax Court, a state agency not bound by the rules of evidence.[121] In determining the value of a parcel of land, the agency considered an appraisal report. Upon review of the tax court's decision, the court of appeals noted that the rules of evidence do not apply to administrative hearings, and that hearsay, if credible and of sufficient probative force, may be the sole basis of the decision.[122] Viewing the record as a whole, the court perfunctorily concluded that there had been "no violation of the basic rules of fairness."[123] No attempt was made to discuss the reliability of the report in light of either past Maryland decisions or *Perales*.

The next case, *Rogers v. Radio Shack*,[124] dealt with unemployment compensation benefits in a situation where the claimant was discharged for alleged misconduct. The allegations of misconduct were presented in an affidavit signed by a "tax accountant" of Radio Shack. Rogers testified on his own behalf, denying the allegations. The agency found evidence of gross misconduct and denied benefits. The claimant then pressed an administrative appeal at which the record was reopened and new evidence was presented. Despite a newly introduced letter from a Radio Shack vice president contradicting the tax accountant's allegations and concluding that Radio Shack would rehire Rogers, the agency nonetheless found evidence of ordinary misconduct and disqualified Rogers from receiving benefits for a ten-week period. The administrative decision was then affirmed by the Circuit Court for Prince George's County.

Several months after the final agency decision, Rogers learned that the agency had conducted its own investigation and had included the investigation report in the administrative record filed with the circuit court. Having never had the opportunity to cross-examine the investigator or rebut the report's contents, Rogers motioned to strike the report from the record. The circuit court denied the motion to strike this report, a decision the court of appeals found to be erroneous. The court of appeals recognized that although the rules of evidence do not apply at hearings before administrative agencies, such agencies must nonetheless observe the "basic rules of fairness as to parties appearing before them."[125] The court found that "fun-

120. 267 Md. 519, 298 A.2d 148 (1973).
121. *Id.* at 521, 298 A.2d at 149.
122. *Id.* at 523, 298 A.2d at 150.
123. *Id.* at 524, 298 A.2d at 150.
124. 271 Md. 126, 314 A.2d 113 (1974).
125. *Id.* at 129, 314 A.2d at 115.

damental fairness would preclude reliance upon the report" because there was "no opportunity for cross-examination or rebuttal."[126]

Convinced by its "examination of the record . . . that neither the Board of Appeals nor the circuit court placed any weight upon the investigator's report," the court ruled the admission of the investigator's report was harmless error that did not require reversal of the denial of benefits.[127] The court did, however, reverse the denial of benefits because of insufficiency of evidence.[128] The evidence in the record consisted of two contradictory statements from Radio Shack, a written statement by Rogers, and live testimony by Rogers. The tax accountant's affidavit contained no facts describing or delineating the misconduct.[129] Additionally, because the affidavit was contradicted by the vice president's letter, the tax accountant's affidavit furnished "no evidentiary support"[130] for the misconduct findings.

The *Rogers* opinion, although lengthier than others, is again conclusory and devoid of analysis. It does, however, raise several germane issues. First, although not necessary to the decision, the court was willing to apply a harmless error approach to the use of hearsay. The harmless error approach here, however, was based on the court's conclusion that the investigator's report had not been relied upon by the agency. In earlier Maryland cases, the court's harmless error conclusions had been based on the cumulative nature of the hearsay.[131]

Second, the court's conclusion that the investigator's report was not relied upon by the agency is inexplicable, for without the report the record does not support a finding of misconduct. The more likely conclusion is that the agency did rely on the report. This once again illustrates a major problem with the harmless error approach — the difficulty of evaluating the impact of the hearsay.

Third, despite earlier cases in Maryland which focused on reliability in deciding whether the hearsay could support an administrative decision, the *Rogers* court did not analyze the reliability of the two letters submitted by Radio Shack. The court assumed that the tax accountant's affidavit was unreliable because it was contradicted by the vice president's letter. There is no rule, however, that hearsay offered later in time is more reliable than previously offered hearsay.

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126. *Id.*
127. *Id.*
128. *Id.* at 130, 314 A.2d at 116.
129. *Id.* at 131, 314 A.2d at 116.
130. *Id.* at 131, 314 A.2d at 117.
131. *See* Horn Ice Cream Co. v. Yost, 164 Md. 24, 163 A. 823 (1933); Waddell George's Creek Coal Co. v. Chisholm, 163 Md. 49, 53-54, 161 A. 276, 277-78 (1932).

The *Rogers* court should have performed a more complete reliability analysis. The court should have focused on the nature of the investigation by the tax accountant and the vice president, including from whom the information was gathered and the responsibilities of both Radio Shack officers. Similarly, cross-examination would have been useful on these issues. The court should have recognized that the vice president's letter was detrimental to Radio Shack's position, and thus was a declaration against interest. Such declarations have traditionally been viewed as reliable.[132] The Maryland court, however, once again showed little interest in fully analyzing the matter.

A few years later, the Court of Special Appeals of Maryland decided *American Radio-Telephone Service v. Public Service Commission*[133] which involved the granting of mobile radio operating rights to Radio Communications, Inc. (RCI) based on the agency's finding that RCI was entitled to be "grandfathered" because of its earlier service in the area. Three witnesses testified on behalf of RCI at the administrative hearing relating to past service and past customers. Affidavits of two RCI customers stating that they had used RCI's services in the past were also introduced. One of these affiants was on vacation in Florida while the other was never summoned. Two witnesses testified at the hearing in opposition to RCI.

The Court of Special Appeals of Maryland first held that the affidavits should not have been admitted. Echoing the court of appeals' opinion in *Rogers*, the court wrote that although administrative agencies are not bound by the technical common law rules of evidence, agencies nonetheless "must observe the basic rules of fairness,"[134] including the opportunity for reasonable cross-examination. Because the affiants were not available for cross-examination, the court held that admitting the affidavits constituted error. The court then concluded, however, that the error was harmless because

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132. The Federal Rules of Evidence expressly allow declarations against interest when the declarant is unavailable and "a reasonable person in the declarant's position would not have made the statement unless believing it to be true." FED. R. EVID. 804(b)(3). McCormick finds these types of statements reliable because "people generally do not lightly make statements that are damaging to their interests." 2 MCCORMICK, *supra* note 40, § 316. Maryland has adopted the hearsay exception for declarations against interest. *See* Kammer v. Young, 73 Md. App. 565, 581, 535 A.2d 936, 944, *cert. denied*, 488 U.S. 919 (1988) (finding statements which are in fact against interest and which a reasonable declarant would perceive to be against interest under the circumstances to be admissible as an exception to the hearsay rule); Agnew v. State, 51 Md. App. 614, 627, 446 A.2d 425, 433 (1982) (trustworthiness is indicated when statement of declarant is against pecuniary, proprietary or penal interest).

133. 33 Md. App. 423, 365 A.2d 314 (1976).

134. *Id.* at 434, 365 A.2d at 320.

the opponents "made no request for a postponement or for an opportunity to bring the affiants in for cross-examination."[135] Moreover, the affidavits were merely cumulative and "infinitesimal"[136] compared to the whole record. Additionally, the court noted that the hearing examiner, when admitting the affidavits, said that they "would not be given the same weight as if the people were cross-examined."[137]

American Radio-Telephone imbues Maryland case law with several new developments. First, although not citing *Perales*, the court considered whether the opponents of the hearsay attempted to have the out of hearing hearsay declarants testify at the agency hearing. The court implied that if the hearsay was so prejudicial, the opponents would have sought to attack it through cross-examination. Second, the court adopted as a general rule that hearsay should not be given as much weight as nonhearsay. This is inconsistent with earlier Maryland decisions which rejected such a hostile view toward hearsay.[138] Because of the court's reliance on this general hostility against hearsay, the court did not evaluate the reliability of the particular hearsay presented at this agency hearing. This is also contrary to earlier cases where the court evaluated the reliability of the specific hearsay at issue.[139]

Besides ignoring the issue of reliability, the court also ignored the issue of the availability of the declarants. When deciding whether to permit an agency to rely on hearsay, earlier Maryland decisions had been influenced by whether the hearsay declarant was available. These cases had indicated a greater willingness to uphold the use of hearsay if the declarant was truly unavailable, for example, if the hearsay declarant was dead.[140] Here, the declarants were not unavailable; it was merely inconvenient for them to testify. This factor was not even mentioned by the court. Finally, the court's holding that the affidavits were not *admissible* is narrower than even the legal residuum rule, never followed in Maryland, and totally contrary to earlier opinions[141] and to the Maryland Administrative Procedure

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135. *Id.* at 435, 365 A.2d at 320.
136. *Id.* at 436, 365 A.2d at 321.
137. *Id.* at 435, 365 A.2d at 320.
138. *See* Waddell George's Creek Coal Co. v. Chisholm, 163 Md. 49, 161 A. 276 (1932).
139. *See* Commercial Transfer Co. v. Quasny, 245 Md. 572, 227 A.2d 20 (1967).
140. *See, e.g.*, Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938).
141. The only opinion that had stated that the hearsay should have been "excluded" was Standard Gas Equip. Corp. v. Baldwin, 152 Md. 321, 136 A. 644 (1927). Every other case recognized that the issue is not one of admissibility, but rather whether the hearsay was sufficiently reliable to support a finding.

Act (APA).[142] Therefore, except for its emphasis on the cumulative nature of the hearsay, *American Radio-Telephone* is a poorly crafted opinion that ignored relevant issues identified in earlier opinions. Reliance on this opinion, therefore, should be avoided.

The next case, *Eichberg v. Maryland Board of Pharmacy*,[143] involved an administrative hearing to revoke a pharmacist's license. At the hearing, testimony offered at an earlier criminal proceeding was admitted. The court of special appeals' opinion in *Eichberg* is confusing. The court first states that "it is well settled in Maryland that hearsay evidence is admissible" before administrative agencies,[144] and that "the test of admissibility under the Maryland APA is the probative value of the evidence, not its credibility."[145] Probative value, the court stated, "relates to the degree by which the evidence advances the inquiry, whereas credibility relates to the weight to be given to the evidence by the trier of fact."[146] The court noted that in the case at hand, there was no objection on grounds of probative value or relevancy, but only as to the credibility of the evidence. This, according to the court, was not grounds for exclusion in this case because the testimony from the criminal proceeding had been given under oath and had been subject to cross-examination. Moreover, the witness was unavailable "because she was beyond the jurisdiction of the Board and the State's effort to produce her was unsuccessful."[147]

The *Eichberg* opinion is confusing for several reasons. Despite statements in the opinion that "probativity" is the only criterion to be used when evaluating an administrative agency's reliance on hearsay, the court actually used a reliability analysis. The confusion here results from the court's failure to distinguish between reliability and credibility. Credibility is in fact a component of reliability.[148] When reliability is affected by the credibility of a witness who has not testified before the agency, a reviewing court must still make the reliability determination and consequently consider credibility.[149] Moreover, in making such a reliability determination, the reviewing court is not bound by the agency's determination of credibility.[150]

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142. *See* MD. CODE ANN., STATE GOV'T §10-208 (1984).
143. 50 Md. App. 189, 436 A.2d 525 (1981).
144. *Id.* at 193, 436 A.2d at 528.
145. *Id.* at 193, 436 A.2d at 529.
146. *Id.* at 194, 436 A.2d at 529.
147. *Id.*
148. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 835 (Mass. 1988) (Lynch, J., dissenting).
149. *Id.*
150. *Id.* Factors that a reviewing court may consider when looking for indicia of reliability include "independence or possible bias of the declarant, the type of hearsay materials submitted, whether statements are sworn to, whether statements are contradicted by direct testimony, availability of the declarant, and

Contrary to *Eichberg*, earlier Maryland cases indicate that credibility is a relevant concern to a court reviewing the reliability of hearsay.[151] Dependence on this aspect of *Eichberg* should therefore be avoided.

Eichberg's basic holding, however, is not troublesome. If the out-of-hearing declarant is the subject of cross-examination by the same party in a criminal case, it is appropriate for the agency in an administrative proceeding to rely on that testimony. Because lack of opportunity for cross-examination is the major problem with hearsay, earlier cross-examination should negate this concern.[152]

It was not until *Tron v. Prince George's County*[153] that a Maryland court relied on the then fifteen year old *Perales* decision. *Tron* involved a disability claim allegedly arising from a work-related injury. The claimant presented live testimony from a doctor who testified that the injury was work-related. The county offered no witnesses to dispute the claimant's contentions, but introduced a booklet containing the written report of three physicians who had earlier examined Tron and an opinion from a Dr. Weintraub, who had never examined Tron. The reports from the examining physicians described Tron's physical condition but did not address the issue of whether the condition was work-related. Based upon an examination of the three reports, however, Dr. Weintraub's written opinion concluded that the disability was not work-related. Tron challenged the admission of the booklet on the ground that there was no opportunity to cross-examine any of the doctors.

The *Tron* court first noted that hearsay generally is admissible in administrative hearings, and "if credible and of sufficient probative

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credibility of the declarant." *Id.* (citing Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981)).

151. *See, e.g.*, Fairchild-Hiller Corp. v. Supervisor of Assessments, 267 Md. 519, 523-24, 298 A.2d 148, 150 (1973); Neuman v. Mayor of Baltimore, 251 Md. 92, 97-98, 246 A.2d 583, 586-87 (1968).

152. Under the Federal Rules of Evidence, former testimony is admissible as a hearsay exception if the declarant is unavailable and if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony in a previous proceeding by direct, cross or redirect examination. FED. R. EVID. 804(b)(1). Furthermore, prior inconsistent testimony made under oath is considered nonhearsay under the Federal Rules. *Id.* at 801(d)(1)(A). Lack of opportunity for cross-examination has been the principal justification for the exclusion of hearsay evidence. 2 MCCORMICK, *supra* note 40, § 245. Maryland has adopted this reasoning. *See* Lawson v. State, 25 Md. App. 537, 549, 335 A.2d 135, 141 (1975) (quoting 4 WIGMORE, EVIDENCE § 1048 (Chadbourn rev. 1972), for the proposition that "an extrajudicial assertion is excluded unless there has been sufficient opportunity to test the grounds of the assertion and the credit of the witness, by cross-examination by the party against whom it is offered"); *see also* MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1989 & Supp. 1992) (providing parameters for admissibility of out-of-court statements of child abuse victims).

153. 69 Md. App. 256, 517 A.2d 113 (1986).

force, may be the sole basis for the decision."[154] But the court also noted that in administrative hearings "a reasonable right of cross-examination must be allowed."[155] The court then held that "the opportunity to cross-examine witnesses is a requirement of administrative adjudicatory hearings,"[156] and that "[b]ecause no live witnesses were produced,"[157] Tron had been denied his right to a fair hearing.

The court of special appeals found this case "remarkably similar"[158] to *Perales*, but distinguished it based on the availability of subpoena power. In *Perales*, the claimant did not exercise his right under the Social Security Act to subpoena the doctor. Conversely, in *Tron*, the claimant had not been provided any subpoena power by the Prince George's County Disability Review Board.[159] The court interpreted *Perales* to mean that claimants who forgo their right to subpoena witnesses cannot later be heard to complain about their lack of opportunity to cross-examine witnesses.[160] The *Tron* court determined that Maryland case law is in accord with *Perales*,[161] so that as long as there is an opportunity to cross-examine, the use of hearsay does not violate a claimant's rights.[162] Because Tron had no opportunity to cross-examine, the court reversed the agency, remanding the case "so that the Board can do a proper job as to both the evidence and fact finding."[163]

Tron's significance is two-fold. First, the court's reliance upon *Perales* opened the door for use as persuasive authority in Maryland applications of *Perales* from other states.[164] Secondly, *Tron* represented the first reversal of a Maryland agency decision based upon a hearsay opponent's inability to cross-examine the out-of-court declarant. Whereas previous agency decisions had been reversed on other grounds, never had the court focused on the issue of whether the witness could have been subpoenaed.[165] Moreover, earlier Maryland cases had upheld agency decisions based on hearsay even when

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154. *Id.* at 261, 517 A.2d at 116 (quoting Redding v. Board of County Comm'rs, 263 Md. 94, 110, 282 A.2d 136, 145 (1971), *cert. denied*, 406 U.S. 923 (1972)).
155. *Id.* (quoting Hyson v. Montgomery County Council, 242 Md. 55, 67, 217 A.2d 578, 585 (1966)).
156. *Id.* at 263, 517 A.2d at 117.
157. *Id.*
158. *Id.*
159. *Id.* at 264-65, 517 A.2d at 117-18.
160. *Id.* at 264, 517 A.2d at 117.
161. *Id.* at 265, 517 A.2d at 118.
162. *Id.* at 266, 517 A.2d at 119.
163. *Id.* at 272, 517 A.2d at 122.
164. *See supra* note 119.
165. *See, e.g.*, Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113 (1974).

there had been no opportunity for cross-examination, such as when the declarant had since died.[166] Reading *Tron* as requiring that there must always be an opportunity for cross-examination would limit reliance on hearsay more than had earlier cases. Rather, the holding is more appropriately limited to those cases in which there are no live witnesses nor an opportunity to subpoena live witnesses.

It is interesting that *Tron* relied on the "ability to subpoena" aspect of *Perales* rather than the reliability analysis, which may in fact better explain *Perales*. Whereas Maryland courts had long based decisions on a reliability analysis, Maryland's first embrace of *Perales* was, curiously, not on the reliability issue. Had the *Tron* court utilized a reliability analysis, its conclusion may well have been different, for under such an analysis, the court may have recognized the high reliability of medical reports even absent any live testimony. Thus the hearsay evidence presented may well have been sufficiently reliable to support the agency's decision. *Tron*'s emphasis on the right of cross-examination, therefore, takes on great significance.

Department of Public Safety & Correctional Services v. Scruggs[167] involved admission of polygraph evidence in an administrative hearing. Despite the well settled law in Maryland that polygraph results could not be admitted in trial courts,[168] it was argued in *Scruggs* that the relaxed evidentiary standards in administrative hearings dictated that polygraph results should be admitted.[169] The court of special appeals rejected this argument, finding that the Administrative Procedure Act indicated a clear legislative intent that evidence which is incompetent in judicial proceedings should be excluded in proceedings before administrative agencies.[170] After finding that polygraph evidence had "never been held to be competent" in Maryland,[171] the court held that "unless and until the 'state of the art' of polygraph testing improves to the extent that it is considered reliable and trustworthy," such evidence must also be inadmissible at agency hearings.[172] The court further rejected an argument that the admission was harmless error,[173] as the polygraph evidence was admitted to bolster the credibility of several persons whose credibility was at the crux of the case.[174]

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166. *See, e.g.*, Spence v. Bethlehem Steel Co., 173 Md. 539, 197 A. 302 (1938).
167. 79 Md. App. 312, 556 A.2d 736 (1989).
168. Rawlings v. State, 7 Md. App. 611, 256 A.2d 704 (1969).
169. *Scruggs*, 79 Md. App. at 321, 556 A.2d at 740.
170. *Id.* at 322, 556 A.2d at 741.
171. *Id.* at 323, 556 A.2d at 741 (quoting Kelley v. State, 288 Md. 298, 303, 418 A.2d 217, 220 (1980)).
172. *Id.* at 313-14, 556 A.2d at 737.
173. *See id.* at 324, 556 A.2d at 742.
174. *Id.* at 325, 556 A.2d at 742.

Strictly speaking, although *Scruggs* concerns hearsay at an administrative hearing, it is better viewed as a "polygraph" case. The debate over polygraph evidence in Maryland courtrooms had been resolved, and the unreliability of polygraph evidence was not open for discussion in *Scruggs*. *Scruggs* is significant as an administrative law and hearsay case, however, because of its rejection of a harmless error approach.

In *Maryland Department of Human Resources v. Bo Peep Day Nursery*,[175] a child care center's state license was revoked based on testimony at an agency adjudication that a number of preschool-aged children had been physically and sexually abused at the center. None of the children who had allegedly been abused testified at the hearing,[176] but parents and social workers were permitted to testify as to what the children had told them.[177]

Upon initial review of the administrative decision, the circuit court ruled that the hearing officer should not have considered any of the children's hearsay statements because there had been no opportunity to cross-examine them.[178] The court of appeals, however, reversed the circuit court, upholding the agency's revocation order. Citing *Perales*, the court stated that "due process does not prevent an agency from supporting its decision wholly by hearsay if there is underlying reliability and probative value."[179] Rather than using the tests for reliability developed in earlier Maryland cases or in *Perales*, however, the court utilized a due process balancing test delineated by the Supreme Court in 1976 in *Mathews v. Eldridge*.[180]

In *Mathews*, the Supreme Court was asked to decide whether due process required an adversarial hearing *before* termination of social security disability benefits. The Court held that due process was satisfied by a post-termination hearing where the recipient could argue for reconsideration, and, if successful, would be entitled to retroactive payments.[181] *Mathews* held that "due process is flexible and calls for such procedural protections as the particular situation demands."[182] The Supreme Court's flexible due process analysis

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175. 317 Md. 573, 565 A.2d 1015 (1989), *cert. denied*, 494 U.S. 1067 (1990).
176. The day care center licensee had not sought to have the children testify at the administrative hearing, but instead requested an opportunity for a psychologist chosen by the licensee, to interview the children prior to the open hearing. *Id.* at 580, 565 A.2d at 1018.
177. *Cf.* MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1989 & Supp. 1992) (providing parameters for admissibility of out-of-court statements of child abuse victims).
178. *Bo Peep Day Nursery*, 317 Md. at 583, 565 A.2d at 1020.
179. *Id.* at 595, 565 A.2d at 1026.
180. 424 U.S. 319 (1976).
181. *Id.* at 335-39, 349.
182. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

involved a cost-benefit test balancing three factors: (1) the private interest affected; (2) the risk of an erroneous determination through the process accorded and the probable value of added procedural safeguards; and (3) the public interest and administrative burdens, including costs that the additional procedures would involve.[183]

Relying on *Mathews*, the Court of Appeals of Maryland held in *Bo Peep* that there had been no due process violation because: (1) the revocation of a day care center license did not place any liberty interest at stake; (2) two hearings had afforded the day care center procedural protection; and (3) the decision was based only to a degree (not quantified by the court) on hearsay.[184] Moreover, the court felt that only minimal value would have been gained from "additional or substitute procedural safeguards."[185]

Although the *Bo Peep* court agreed that due process requires a meaningful opportunity to test the credibility of hearsay statements, the court was not persuaded that the circumstances presented amounted to a due process violation. The credibility of the hearsay statements, according to the court, embraced at least four potential problems: (1) whether the child's statement to the parents was false; (2) whether the parents intentionally or unintentionally inaccurately conveyed the child's testimony at the hearing; (3) whether the adult witness may have drawn an erroneous conclusion from the child's accurate description; and (4) whether the adult witness may have omitted matters that the witness deemed insignificant but which would be significant to another.[186] In response to the possibility that the children were lying, the court relied on findings in psychological studies that "[y]oung children almost never initiate false allegations without influence from an adult."[187] In addition, the day care center had cross-examined, or had the opportunity to cross-examine, adult witnesses who testified as to the children's statements. This afforded Bo Peep the ability to explore whether the other three potential problems in fact existed.[188] Thus, the court declined to find any due process violation stemming from a lack of an opportunity to cross-examine the children.[189]

Relying on *Perales*' emphasis on the ability of the adverse party to subpoena the hearsay declarant, the state further argued that

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183. *Id.* at 335.
184. Maryland Dep't of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 598, 565 A.2d 1015, 1027 (1989), *cert. denied*, 494 U.S. 1067 (1990).
185. *Id.*
186. *Id.* at 600, 565 A.2d at 1028.
187. *Id.*
188. *Id.* at 600, 565 A.2d at 1028-29.
189. *Id.* The court also recognized the state's interest in protecting the children from further anxiety. *Id.* at 601, 565 A.2d at 1029.

admission of the hearsay was not reversible error because the day care center could have subpoenaed the allegedly abused children.[190] The court refused, however, to "rest [its] decision on this argument" because the issue of whether the hearing officer would have been correct in quashing requests for subpoenas for the children was not before the court.[191]

Although *Bo Peep* is Maryland's most elaborate decision involving hearsay evidence at administrative hearings, its implications are unclear. *Bo Peep* relies neither on any Maryland cases on point nor on *Perales*. Nor does *Bo Peep* rely on a reliability analysis, long a touchstone in Maryland law on the subject, and which had become well accepted in other states and in the federal courts after *Perales*. Because it eschewed a reliability analysis, and because, unlike Maryland cases before and after it, *Bo Peep* relied almost exclusively on *Mathews*, *Bo Peep* provides little guidance as to the proper role of hearsay in Maryland administrative determinations.[192]

The next administrative hearing case after *Bo Peep*, *Kade v. Charles H. Hickey School*,[193] involved the suspension for alleged misconduct of a supervisor at a state operated detention facility. At the administrative hearing, the school's superintendent, who was not present during the alleged incidents, testified as to statements made to him by others concerning Kade's conduct. Also admitted was a report by the employee who was the alleged target of the impropriety and written statements of students who allegedly witnessed the incident.[194]

The *Kade* court wrote that although hearsay is admissible in an administrative proceeding and, if credible and probative, can be the sole basis for a decision by an administrative agency, there are,

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190. *Id.* at 594 n.6, 565 A.2d at 1026 n.6.

191. *Id.*

192. To the extent there is any reliability analysis in *Bo Peep*, it is subject to criticism. The court cited an article in the Canadian Journal of Psychiatry to support the view that the children's statements were not fabricated. *Bo Peep*, 317 Md. at 600, 565 A.2d at 1028 (citing H. Klajnerdiamond, et al., *Assessing the Credibility of Young Children's Allegations of Sexual Abuse: Clinical Issues*, 32 CAN. J. PSYCHIATRY 610, 611 (1987)). The court did not recognize that there are other studies indicating that the testimony of children in sexual abuse cases should not always be believed, and that experts are divided on the reliability of such testimony. At a recent conference, there was deep division among psychologists over whether child witnesses should be believed in sexual abuse cases. Some psychologists believe that children may be influenced by adult suggestions of abuse. Liz Hunt, *Psychologists Divided on Children Testifying*, WASH. POST, July 26, 1991, at A3; *cf.* MD. CODE ANN., CTS. & JUD. PROC. § 9-103.1 (1989 & Supp. 1992) (providing parameters for admissibility of out of court statements of child abuse victims).

193. 80 Md. App. 721, 566 A.2d 148 (1991).

194. *Id.* at 724-26, 566 A.2d at 150-51.

nonetheless, limits placed on the use of hearsay.[195] In this case, the court determined that it was improper to base the supervisor's suspension solely on hearsay evidence, because "[e]ven though the statements were relevant, there was no indication that this hearsay evidence was reliable, credible or competent."[196] The court relied on the following factors to reach this conclusion: (1) the employee's statement was not sworn nor did it reflect the circumstances under which it was obtained; (2) the statements from the students were not sworn, dated, or verified; and (3) the statements did not indicate the students' ages, nor any other information about them to show whether they were competent witnesses.[197]

Moreover, the *Kade* court was concerned that there was no explanation in the record as to why the hearsay declarants were unavailable to testify in person, nor as to why the school had failed to exercise its right to compel their attendance at the hearing.[198] Although determinations of credibility were crucial, the hearing officer had "no basis for evaluating the credibility" of the hearsay declarants.[199] Finally, the court noted that the hearsay had been directly contradicted by live testimony.[200] The court also distinguished *Eichberg*, *Mealey* and *Quasny*, because in those cases, there was someone who could have been "examined as to when, where and how the hearsay statements were made."[201] Furthermore, in those cases, unlike in the case at hand, there was some logical or practical reason why the declarant was not available to testify at the administrative hearing.[202] The *Kade* court thus concluded that because the agency based its decision on unreliable hearsay, the decision was not supported by substantial evidence.[203]

Kade marked a return to a reliability analysis. It is generally consistent with earlier opinions and presents perhaps the best analysis of the hearsay issue by a Maryland court. *Kade* does, however, present one interesting departure from earlier case law in that it relied on the fact that the *proponent* of the hearsay did not subpoena the out-of-hearing declarant, whereas both *Perales* and *Tron* concerned the ability of the *opponent* to subpoena the declarant. Placing

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195. *Id.* at 725, 566 A.2d at 150.
196. *Id.* at 726, 566 A.2d at 151.
197. *Id.*
198. *Id.*
199. *Id.* at 727, 566 A.2d at 151.
200. *Id.*
201. *Id.* at 728, 566 A.2d at 151.
202. *Id.* at 728, 566 A.2d at 151-52.
203. *Id.* at 728, 566 A.2d at 152. Because of its reversal on substantial evidence grounds, the court found that it was not necessary to address the issue of whether Kade's constitutional rights to confront and cross-examine witnesses had been violated. *Id.* at 728-29, 566 A.2d at 152.

the burden on the proponent to subpoena the declarant may tip the balance toward limiting the role of hearsay at agency hearings, something which would be quite significant should it be adopted as the Maryland rule. Furthermore, *Kade*'s emphasis on the availability of the witness to testify at the administrative hearing appears to be stronger than expressed in earlier cases. Although the *Kade* court claimed that unreliability of the hearsay was the basis for reversing the decision, it seemed at least equally influenced by the lack of necessity for the hearsay.

The most recent Maryland case discussing hearsay at administrative hearings is *Changing Point, Inc. v. Maryland Health Resources Planning Commission*,[204] which involved a license application for an alcohol and drug abuse treatment facility. In this case, an existing substance abuse treatment facility challenged the agency's decision to approve a new center. One of the arguments made by the existing facility was that the agency decision was improperly based on a written trust agreement which constituted hearsay.[205] The court found no problem with the trust agreement because it had been available to the opponent to examine before the hearing.[206] Moreover, the person who knew the most about the trust agreement testified as a witness and was thus available for cross-examination.[207]

The hearsay challenge made in *Changing Point* was rather weak. Two points are worth noting, however. First, the court maintained that an opponent of the hearsay should not be able to object if the opponent did not subpoena those responsible for the hearsay. This is the more traditional attitude, but one contrary to *Kade*'s focus on the failure of the hearsay proponent to subpoena out-of-hearing declarants. Second, the court was influenced by the prior availability of the hearsay, a factor that had not been treated as significant in prior Maryland decisions.

Summary

In reviewing the cases decided in Maryland from 1971 to the present, most notable is the Maryland courts' failure to adopt any consistent analytical framework addressing the hearsay issue. Perhaps most significant is Maryland's lack of express reliance on *Perales*, even though *Perales* has become the basis of most decisions in other states. Although some recent Maryland opinions discuss the hearsay issue in greater detail than most earlier cases, the lack of a consistent approach has led to inconsistent opinions. In reviewing all of the

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204. 87 Md. App. 150, 589 A.2d 502 (1991).
205. *Id.* at 169-71, 589 A.2d at 511-12.
206. *Id.* at 171, 589 A.2d at 512.
207. *Id.*

Maryland cases on the subject, litigants can find support for a variety of arguments, many of which are entirely contradictory. Moreover, the inconsistency of the reported decisions can create confusion not only among the litigants, but also within the administrative agencies which have not been given sufficiently clear guidance as to the parameters that should govern reliance on hearsay.

PROPOSALS FOR CHANGE

For over sixty-five years, Maryland courts have dealt with the issue of hearsay in administrative hearings on an ad hoc basis, resulting in inconsistent and generally unsatisfactory opinions. For the most part, Maryland courts have not identified considerations that would justify different treatment of hearsay from one case to another. The hearsay issue should be resolved as part of an analytical framework that: (1) provides predictable guidance to administrative agencies; (2) takes into account the fact that not all administrative adjudications are the same; and (3) recognizes that hearsay which is sufficiently reliable in one adjudication may not be sufficiently reliable in another.[208] The next section focuses on developing such a framework.

Nature of the Claim or Issue

In developing a framework to determine when hearsay is sufficient by itself to support an agency decision, the nature of the claim or issue pending before the agency should be considered.[209] It has been suggested, for example, that proceedings such as revocations of professional licenses warrant greater scrutiny of, and less willingness to rely on, hearsay than proceedings such as initial claims for disability, workers' compensation, or unemployment benefits.[210]

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208. *See* Colorado Dep't of Revenue v. Kirke, 743 P.2d 16, 22 (Colo. 1987) (differing hearsay standards are appropriate based on the particular type of proceeding); *see also* Davis, *Hearsay*, *supra* note 3, at 698; Davis, *Problems of Evidence*, *supra* note 3, at 423; Gellhorn, *supra* note 3, at 16.

209. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 642 (Pa. 1981); Davis, *Problems of Evidence*, *supra* note 3, at 387, 393; Gellhorn, *supra* note 3, at 21; John M. Hutchins, *Hearsay Evidence and the Residuum Rule in Colorado*, 17 COLO. LAW. 651, 652 (1988); Odes L. Stroupe, Jr., Note, *Hearsay Need Not Be Supported by Competent Guidance in Exclusionary Proceedings Pursuant to the Casino Control Act*, 18 SETON HALL L. REV. 214, 216 (1988).

210. *See* Davis, *Problems of Evidence*, *supra* note 3, at 387 (positing that taking away a license equivalent to livelihood should not be done without opportunity for cross-examination); Gellhorn, *supra* note 3, at 21 (positing that an agency may rely on evidence to deny the grant of a license that would be inadequate to revoke the same license).

Such a disparate treatment of hearsay is warranted for several reasons. First, the number of license revocation cases is small relative to the number of cases in which persons are seeking benefits. Therefore, the cumulative burden on an agency to develop a factual record not solely dependent on hearsay is not as great in license revocation cases. Although hearsay may be a "necessary evil" in such an immense setup as the social security disability system,[211] those agencies that do not have such a large adjudicatory caseload need not rely on the hearsay "shortcut."

Second, someone faced with a license revocation is far more likely to be represented by counsel at the agency hearing than someone merely seeking a benefit.[212] An attorney's involvement will tend to formalize the process regardless of whether or not hearsay is admitted. Thus one of the major justifications for acceptance of hearsay — the informality of administrative proceedings — becomes much less relevant. Moreover, a party's right of cross-examination becomes much more meaningful when counsel is present. Reliance on hearsay defeats this right and inappropriately limits the role of the lawyer.

A third justification for focusing on the nature of the pending claim or issue is simply that certain matters are more important than others. For matters of greater import, reliance on hearsay ought to be discouraged.[213] One problem inherent in such an approach is distinguishing the "more important" from the "less important" case. For example, while a routine unemployment compensation case might ordinarily be viewed as less important than a professional license revocation case, to the unemployed person seeking benefits there is

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211. *See Perales*, 402 U.S. at 406; Davis, *Hearsay*, *supra* note 3, at 699; Harry Kalven, Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 329 (1971).

212. *See* Davis, *Problems of Evidence*, *supra* note 3, at 365, 396-97; Stephen D. Natcher, Note, *Hearsay Under the Administrative Procedure Act*, 15 HASTINGS L.J. 369, 371 (1964) (comparing representation by counsel in civil trials to representation at administrative hearings).

213. *See, e.g.*, Lim v. Taxicab Comm'n, 564 A.2d 720, 724-25 (D.C. 1989); Chavez v. Employment Sec. Comm'n, 649 P.2d 1375, 1380 (N.M. 1982) (Easley, C.J., dissenting); Trujillo v. Employment Sec. Comm'n, 610 P.2d 747, 748 (N.M. 1980); Young v. Board of Pharmacy, 462 P.2d 139, 143 (N.M. 1969); Davis, *Residuum Rule*, *supra* note 3, at 7; Gellhorn, *supra* note 3, at 21; Jeka, *supra* note 3, at 161; *see also Perales*, 402 U.S. 389; Goldberg v. Kelly, 397 U.S. 254 (1970); *Ceja*, 427 A.2d 631; Davis, *Hearsay*, *supra* note 3, at 699; *cf.* Bernard Schwartz, *A Decade of Administrative Law: 1942 - 1951*, 51 MICH. L. REV. 775, 817 (1953) (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945), for the position that the seriousness of the penalty of deportation mandates that "meticulous care" be taken to achieve "essential standards of fairness" in deportation hearings).

no more important case.[214] Nevertheless, when evaluating the reliability of hearsay in order to determine whether it is sufficient to support an agency decision, consideration of the nature of the claim or issue involved is a reasonable criterion.

Nature of the Evidence

In addition to focusing on the nature of the issue involved, the agency should give consideration to the nature of the hearsay evidence sought to be introduced. First, agencies should consider whether the substantive nature of the evidence is more easily understood if presented in written form or if presented orally.[215] For example, it has been suggested that complicated medical testimony is more easily digested by an agency when presented in written form.[216] In such cases, a liberal attitude toward hearsay may be justified in order to save the agency's time and to increase the agency's understanding of the evidence. On the other hand, as discussed later, consideration should also be given to whether the author of the report should be available for cross-examination even if the presentation of the case is adequate via the written report.[217] This would be true, for example, if the report were so complicated that without the author's in-person explanation, the agency would not be able to comprehend it.

Other considerations involving the nature of the evidence include whether the hearsay evidence is conclusory[218] or ambiguous,[219] for such evidence is unlikely to be sufficient to support an agency finding. Additionally, courts have been especially reluctant to find double hearsay sufficiently reliable to support an administrative decision.[220] Other factors useful in analyzing the reliability of hearsay at administrative hearings include: (1) whether the hearsay was sworn under oath;[221] (2) whether the hearsay statements were made close in time

214. *See Ceja*, 427 A.2d at 646 (Roberts, J., concurring) ("to the claimant the administrative hearing is not 'routine'").
215. *See* Jadallah v. District of Columbia Dep't of Employment Servs., 476 A.2d 671, 678-79 (D.C. 1984) (Ferren, J., concurring).
216. *See* Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 821-22 (Alaska 1974).
217. *See infra* notes 240-247 discussing usefulness of cross-examination.
218. *See* Martin v. Police & Firefighters Retirement Relief Bd., 532 A.2d 102, 111 (D.C. 1987).
219. *See* Collins v. D'Elia, 480 N.Y.S.2d 948, 950 (App. Div. 1984).
220. *See supra* note 48 and accompanying text.
221. *See* Kade v. Hickey, 80 Md. App. 721, 726, 566 A.2d 148, 151 (1989); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 835 (Mass. 1988) (Lynch, J., dissenting); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 641 (Pa. 1981).

to the incident at issue;[222] and (3) whether the hearsay has been corroborated.[223] For example, uncorroborated hearsay is rarely viewed to be reliable.[224] Uncorroborated hearsay that has been contradicted is even more unlikely to be held to be reliable.[225] All these factors which relate to the nature of the evidence are appropriate to consider in analyzing the reliability of hearsay and in determining whether the hearsay is sufficient to support an administrative decision.

Identity of the Out of Hearing Declarant

In addition to the nature of the issue and the nature of the evidence, the identity of the hearsay declarant should be a relevant consideration in evaluating the reliability of the hearsay. As a general rule, hearsay evidence from unidentified persons should never be

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222. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971); *Ceja*, 427 A.2d at 639 (deeming medical reports reliable because they were written immediately after examination); Hutchins, *supra* note 209, at 652; Jeka, *supra* note 3, at 160.

223. *See* Hentges v. Bartsch, 533 P.2d 66, 69 (Colo. Ct. App. 1975); Jadallah v. District of Columbia Dep't of Employment Servs., 476 A.2d 671, 678 (D.C. 1984) (Ferren, J., concurring); McConnell v. Iowa Dep't of Job Serv., 327 N.W.2d 234, 237 (Iowa 1982) (finding hearsay evidence that "merely supplements" other evidence admissible); *Ceja*, 427 A.2d at 641; Davis, *Residuum Rule*, *supra* note 3, at 6; Stern, *supra* note 19, at 115.

Hearsay has been allowed to be corroborated by other hearsay. *See* Peters v. United States, 408 F.2d 719, 722-24 (Ct. Cl. 1969). *But see id.* at 738 (Skelten, J., dissenting) ("Adding hearsay to hearsay is like adding zero to zero which still equals zero."). Also relevant is whether the corroboration of the hearsay is by the opponent of the hearsay. Corroboration by an opponent will lend strong support to the reliability of the hearsay. *See* Altholtz v. Connecticut Dental Comm'n, 493 A.2d 917, 921 (Conn. App. Ct. 1985); *Embers of Salisbury*, 517 N.E.2d at 833.

224. *See* Consolidated Edison v. NLRB, 305 U.S. 197, 230 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); Silver v. California Unemployment Ins. Appeals Bd., 129 Cal. Rptr. 411, 416 (Ct. App. 1976) (uncorroborated hearsay that is contradicted is not sufficient by itself to support a finding); Wallace v. District of Columbia Unemployment Compensation Bd., 294 A.2d 177, 179 (D.C. 1972) (substantial evidence includes more than uncorroborated hearsay); Stroupe, *supra* note 209, at 610 n.14 (collecting cases citing the substantial evidence test in *Consolidated Edison*).

225. *See* Jacabowitz v. United States, 424 F.2d 555, 562-63 (Ct. Cl. 1970); Kowal v. United States, 412 F.2d 867, 871-73 (Ct. Cl. 1969); *Embers of Salisbury*, 517 N.E.2d at 835 (Lynch, J., dissenting); *Ceja*, 427 A.2d at 641; *cf.* Cassella v. Civil Serv. Comm'n, 494 A.2d 909, 913 (Conn. App. Ct. 1985) (corroborated hearsay has a high degree of probative value); *In re* Thompson, 583 A.2d 1006, 1007 (D.C. 1990) (uncorroborated hearsay is reliable if declarant also testified at hearing and could have been cross-examined about out-of-hearing statements).

acceptable as the basis of an administrative decision.[226] Hearsay from an out-of-hearing declarant who might be biased should not enjoy a presumption of reliability and should be viewed with strong suspicion and carefully evaluated.[227] For example, in unemployment compensation cases involving allegations of employee misconduct, the hearsay statements of those customers who have alleged the misconduct should be carefully scrutinized because the customers cannot be viewed as neutral.[228] Hearsay evidence of misconduct offered from the employer should be scrutinized even more intensely because of the interested nature of their testimony.[229]

Conversely, courts have found certain classes of hearsay declarants to be especially reliable. For example, courts have held physician's reports to be highly reliable because of the medical profession's high standards of expertise.[230] Reports from both examining physicians,[231] and physicians who assess the records of examining

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226. Hutchins, *supra* note 209, at 652 (citing Griffin v. Evans Electrical Constr. Co., 529 S.W.2d 172 (Mo. App. 1975)); *see also*, Kade v. Hickey Sch., 80 Md. App. 721, 566 A.2d 148 (1989).
227. *See* Jadallah v. District of Columbia Dep't of Employment, 476 A.2d 671, 679 (D.C. 1984) (Ferren, J., concurring) (stating that an agency should consider bias and interest of the witness, consistency of statement with other evidence, and opportunity for opposing counsel to investigate the statement); Cassella v. Civil Service Comm'n, 494 A.2d 909, 912 (Conn. App. Ct. 1985); Peters v. United States, 408 F.2d 719, 724 (Cl. Ct. 1969) (affidavit signed in return for government's promise of immunity); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 832 (Mass. 1988) (minor's hearsay testimony that she had been sold alcohol was attacked as unreliable because of bias based on her attempt to prove intoxication as a defense to a serious criminal charge); Longe v. Department of Employment Sec., 380 A.2d 76 (Vt. 1977); Bonney v. Oregon State Penitentiary, 519 P.2d 383, 388 (Or. Ct. App. 1974) (reports written by inmate's accusers are less detached).
228. *See* Farmer v. Everett, 648 S.W.2d 513, 515 (Ark. Ct. App. 1983) (Cooper, J., dissenting).
229. Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 644 (Pa. 1981); Langlois v. Department of Employment & Training, 546 A.2d 1365, 1368 (Vt. 1988); *see also* Drogaris v. Martine's Inc., 118 So. 2d 95, 97 (Fla. Dist. Ct. App. 1960) (hearsay from fellow employees should also be viewed suspiciously because of their reluctance to testify against employer's interest).
230. Richardson v. Perales, 402 U.S. 389 (1971); Carlson v. Kozlowski, 374 A.2d 207, 208 (Conn. 1977) (citing *Perales*); Lackey v. North Carolina Dep't of Human Resources, 293 S.E.2d 171, 176 (N.C. 1982); Martin v. District of Columbia Police & Firefighters Retirement Bd., 532 A.2d 102, 110 (D.C. 1987) (citing *Perales*); *see also*, Hutchins, *supra* note 209, at 652 (citing *Perales* and *Ceja*); Kalven, *supra* note 211, at 330-31 (construing *Perales* and Kelly v. Goldberg, 397 U.S. 254 (1970)).
231. *Perales*, 402 U.S. at 402; *Martin*, 532 A.2d at 111 (applying *Perales*). *Cf.* Candella v. Subsequent Injury Fund, 277 Md. 120, 353 A.2d 263 (1976) (testimony of a nontreating physician is inadmissible).

physicians[232] are deemed reliable. Courts have also generally found reliable written reports of "licensed medical professionals" so long as the hearsay involves matters within their expertise and is unbiased.[233] Similarly deemed reliable are police reports made in connection with an officer's law enforcement duties,[234] as well as official reports made by other public employees.[235]

Courts have found dealing with the hearsay statements of children especially troublesome, particularly where sexual abuse is alleged. Psychologists are divided on whether children testify accurately about such events.[236] Because of this conflict, in cases where a minor is the hearsay declarant, various factors relating to reliability should be closely evaluated. For example, the testimony of social workers concerning a child's hearsay statements is generally more reliable than testimony from the child's parents, who cannot be viewed as disinterested.[237] Other relevant factors in determining the reliability of a child's testimony include whether the child's story was ambiguous or subject to misinterpretation,[238] and whether the child's statements were made as part of a narrative or in response to leading questions.[239]

Availability of Nonhearsay and Usefulness of Cross-Examination

Other relevant areas of inquiry are the availability of nonhearsay and whether cross-examination of the hearsay declarant would be useful.[240] Nonhearsay should generally be preferred, and, if available,

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232. *Perales*, 402 U.S. at 404; *Ceja*, 427 A.2d at 639. *But see* Georgia Pac. Corp. v. McLaurin, 370 So. 2d 1359, 1362 (Miss. 1979) (doctors are merely human and may not be considered wholly free from the frailties that beset the rest of us).

233. Schaffer v. Colorado Dep't of Social Servs., 759 P.2d 837 (Colo. Ct. App. 1988) (nurses); Altholtz v. Connecticut Dental Comm'n, 493 A.2d 917, 921 (Conn. App. Ct. 1985) (dentists); *Ceja*, 427 A.2d at 641 (listing factors affecting reliability); *see also* Hutchins, *supra* note 209, at 652.

234. *See* Colorado Dep't of Revenue v. Kirke, 743 P.2d 16 (Colo. 1987).

235. *See In re* Kevin G., 363 N.Y.S.2d 999, 1005 (1975) (Fam. Ct. 1975) (relying on presumption of "official regularity" and on fact that report was "routine" and "impersonal" in concluding that a laboratory report by a police chemist was reliable); Webster *ex rel* Lisa v. Workmen's Compensation Appeal Bd., 499 A.2d 1117, 1120 (Pa. Commw. Ct. 1985) (medical examiner's report); Craig v. Pare, 497 A.2d 316, 320 (R.I. 1985) (accident reports prepared by Division of Motor Vehicles); *see also*, Steven P. Grossman & Stephen P. Shapiro, *The Admission of Government Fact Findings Under Federal Rule of Evidence 803(8)(C): Limiting the Dangers of Unreliable Hearsay*, 38 KAN. L. REV. 767 (1990).

236. *See* Hunt, *supra* note 192, at A3.

237. A.Y. v. Department of Pub. Welfare, 583 A.2d 515, 518 (Pa. Commw. Ct. 1990) (quoting L.W.B. v. Sosnowski, 343 A.2d 1241, 1247 (Pa. Commw. Ct. 1988)).

238. *Id.* at 520; B.G. v. Department of Pub. Welfare, 583 A.2d 672, 674 (Pa. Commw. Ct. 1990).

239. *See* Idaho v. Wright, 497 U.S. 805, 818-19 (1990).

240. *See* Calhoun v. Bailar, 626 F.2d 145, 149 (9th Cir. 1980), *cert. denied*, 452

there should be less willingness to permit an agency to rely on hearsay.[241] When forced to rely on hearsay, it is more acceptable that the hearsay be from a declarant who is truly not available, such as a decedent, rather than from a declarant who is absent without excuse or merely because of inconvenience.[242] Nonetheless, the concept of unavailability must embrace the practical expense of producing a live witness.[243] For example, the expense of producing a doctor to testify might be so burdensome as to justify an agency's reliance on hearsay testimony from the doctor.[244]

The value of cross-examination of the particular hearsay declarant has also been cited as a relevant factor in evaluating an agency's reliance on hearsay.[245] If it can be concluded that cross-examination would not have benefitted the hearsay opponent, then there would seem to be little problem with the agency's reliance on hearsay. Such was the situation in a New York case where the court relied on the written report of a police laboratory chemist out of a belief that it would have been impossible for the chemist to recall the particular tests he performed when writing the report.[246] Although this approach may sometimes be useful, it must be exercised with caution. Predicting the utility of cross-examination in any given case may be difficult because cross-examination often brings out unexpected matters.[247] In order to avoid unjust reliance on the presumption that cross-examination would not be beneficial, the hearsay proponent

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U.S. 906 (1981); Cassella v. Civil Serv. Comm'n of New Britain, 494 A.2d 909, 913 (Conn. App. Ct. 1985) (relying on 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.7-8 (1980)); Unemployment Compensation Bd. v. Ceja, 427 A.2d 631 (Pa. 1981) (citing DAVIS, *supra*, § 14.10 (1958 & Supp. 1970)); Langlois v. Department of Employment & Training, 546 A.2d 1365 (Vt. 1988); Davis, *Residuum Rule*, *supra* note 3, at 5.

241. *See* Gellhorn, *supra* note 3, at 2; Davis, *Residuum Rule*, *supra* note 3, at 5; Davis, *Problems of Evidence*, *supra* note 3, at 376; Unemployment Compensation Bd. v. Ceja, 427 A.2d at 641; Longe v. Department of Employment Sec., 380 A.2d 76, 79 (Vt. 1977).
242. *See Longe*, 380 A.2d at 79. *Compare* Bethlehem Steel Co. v. Traylor, 158 Md. 116, 148 A. 246 (1930) (declarant deceased) *with* Rogers v. Radio Shack, 271 Md. 126, 314 A.2d 113 (1974) (declarant available but not called).
243. *See* Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 822 (Alaska 1974) (cost of medical experts); Kalven, *supra* note 211, at 329 (administrative efficiency).
244. *See* Richardson v. Perales, 402 U.S. 389, 406 (1971).
245. *See* Davis, *Residuum Rule*, *supra* note 3, at 11.
246. *In re* Kevin G., 363 N.Y.S.2d 999, 1005 (Fam. Ct. 1975).
247. *See* Town of Somerset v. Montgomery County Bd. of Appeals, 245 Md. 52, 225 A.2d 294 (1966). The court wrote that it would be a mockery of justice to hold that a person cannot complain of the denial of the right to cross-examine unless it can be shown what the result of the cross-examination would have been because that result is "often as unexpected as it is revealing." *Id.* at 66, 225 A.2d at 303.

ought to bear the burden of proving that cross-examination would not benefit the hearsay opponent.

Another consideration related to availability and usefulness of hearsay is whether the proponent exercised a right to subpoena the out-of-hearing declarant.[248] Hearsay opponents who have a right to subpoena and who believe that cross-examination would be helpful ought to exercise their subpoena rights; failure to do so should effectively waive any claim of prejudice in not being able to cross-examine. Conversely, it would be improper for an agency that lacks procedures that allow an opponent to subpoena a hearsay declarant to rest a decision on hearsay.[249]

A few qualifications to this view seem appropriate. First, even when subpoena procedures are available, some have expressed concern about the propriety of requiring the hearsay opponents to subpoena as a witness someone whose hearsay is damaging to them.[250] One Pennsylvania judge wrote that it is "contrary to our jurisprudence to require an individual to call adverse witnesses against himself."[251] It has also been noted that to require the opponent to subpoena the unfavorable witness unfairly shifts the burden of proof to the opponent.[252] This is especially troublesome in matters where the state has the burden yet attempts to prove its case solely through hearsay.

Another concern expressed with the subpoena rule involves the expense of producing the hearsay declarant. The Supreme Court of Alaska has held that there is no waiver if the hearsay opponent is required to bear the cost of producing the witness at the hearing.[253] The court suggested that the agency be required to pay the cost or

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248. *See Perales*, 402 U.S. at 404-05; Unemployment Compensation Bd. v. Ceja, 427 A.2d 631 (Pa. 1981); Kirke v. Colorado Dep't of Revenue, 743 P.2d 16 (Colo. 1987); Langlois v. Department of Employment Training, 546 A.2d 1365, 1369-70 (Vt. 1988); Webster *ex rel* Lisa v. Workman's Compensation Appeal Bd., 499 A.2d 1117, 1120 (Pa. Commw. Ct. 1985); Dowd v. District of Columbia Police & Firefighters' Retirement Bd., 485 A.2d 212, 215-16 (D.C. 1984).

249. *See* Souch v. Califano, 599 F.2d 577 (4th Cir. 1979); Sisler v. Califano, 484 F. Supp. 326 (N.D.W.V. 1979); Smith v. Everett, 637 S.W.2d 537, 538 (Ark. 1982); Tron v. Prince George's County, 69 Md. App. 256, 517 A.2d 113 (1986); *Ceja*, 427 A.2d at 646 (Roberts, J., concurring); *see also* Stern, *supra* note 19, at 118.

250. *See* Jeka, *supra* note 3, at 155, 159, 164; Stroupe, *supra* note 209, at 612-16.

251. *Ceja*, 427 A.2d at 647 (Roberts, J., concurring); *see also* Dragan v. Connecticut Medical Examining Bd., 591 A.2d 150, 154 (Conn. App. Ct. 1991), *aff'd* 613 A.2d 739 (Conn. 1992).

252. *See In re* Appeal in Maricopa County, 536 P.2d 197, 201-02 (Ariz. 1975); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 835 (Mass. 1988) (Lynch, J., dissenting); *Ceja*, 427 A.2d at 647 (Roberts, J., concurring); Collins, *supra* note 66, at 600.

253. Commercial Union Co. v. Smallwood, 550 P.2d 1261, 1266-67 (Alaska 1976).

that the cost be taxed to the losing party.[254] It has also been suggested that once a party has raised a "credible reason to question the reliability of the hearsay," the agency itself should issue the subpoena so that the declarant can personally testify.[255]

Nature of the Agency and Its Adjudicatory Hearings

Differences between agencies may lead to disparate treatment of hearsay by these agencies. For example, differences in the required qualifications of both those who preside at the hearings and of those who may make the decision might be taken into account.[256] It has been suggested that nonlawyer hearing officers will be less able to ignore questionable hearsay than hearing officers who are lawyers.[257] Lawyers are accustomed to dealing with the rules of evidence and admissibility at jury trials, and thus are able to ignore evidence even after it has been presented, while nonlawyers may not be able to disregard such evidence.[258] This reasoning leads to the conclusion that there should be more reluctance to permit a decision to be based on hearsay if a nonlawyer, as opposed to a lawyer, presided. Conversely, nonlawyer hearing officers will most likely be employed in informal proceedings where the parties are unlikely to be represented by counsel, in which case a stricter rule concerning hearsay and nonlawyer presiding officers would be counterproductive.

The distinction between lawyer and nonlawyer presiding officers may be even more significant where the issue is whether unreliable hearsay was used to buttress other evidence in the record or to support the credibility of a witness, the so called "harmless error" approach.[259] If it is accepted that nonlawyers are less able to disregard unreliable evidence, then reliance on a harmless error argument should be closely scrutinized if a nonlawyer official is involved.[260] Another consideration focuses on the workload of the hearing officer. It can be argued that hearing officers who hear a wide variety of

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254. *Id.*
255. *Ceja*, 427 A.2d at 642.
256. Davis, *Problems of Evidence*, *supra* note 3, at 396-97.
257. Sellnow, *supra* note 7, at 366-67. In Maryland, the Chief Administrative Law Judge (ALJ) must be a member of the Maryland Bar. MD. CODE ANN., STATE GOV'T § 9-1603(c)(2) (Supp. 1992). The Chief ALJ is charged with establishing ALJ qualifications. *Id.* § 9-1604(a)(2). Qualification standards currently in force require that any ALJ appointed after February 1, 1990, be a member in good standing of a bar in any jurisdiction. *Qualification Standards Administrative Law Judge*, 1990 OFFICE OF ADMINISTRATIVE HEARINGS ANN. REP., app. 5.
258. Sellnow, *supra* note 7, at 366-67.
259. *See supra* notes 56-57 and accompanying text.
260. Sellnow, *supra* note 7, at 366-67.

cases involving diverse fact patterns might have greater difficulty evaluating the reliability of hearsay than hearing officers who routinely hear cases with common factual and legal issues.[261] Hearing officers presiding over cases from a number of dissimilar agencies should be especially cautious in their hearsay analysis.

Another issue to consider is whether the agency's hearings are adversarial. Agencies whose hearings are adversarial should not be permitted to rest their decisions on hearsay to the same degree as agencies whose hearings are less adversarial and more informal.[262] A related inquiry is whether the parties usually are represented by counsel.[263] If lawyers typically represent parties at an agency's hearing, then reliance on hearsay may be less justified than if lawyers are not typically present, for the mere participation by a lawyer will tend to formalize the process, regardless of the issue at hand. Moreover, the right of cross-examination is more meaningful when exercised by a lawyer. It can also be argued that because lawyers understand and appreciate the value of cross-examination, the use of hearsay may be a tactical decision by a lawyer to deny the opponent an opportunity to discredit the evidence. In such a situation, the agency should be especially careful in permitting hearsay to be the sole basis of its decision.

The amount of precision required in making the agency decision is yet another factor to consider. Some agency decisions require precise factual findings, while others require only general conclusions, perhaps of a more legislative quality. The scrutiny given the reliability of the hearsay should rise commensurately with the precision required for resolution of the factual issues.[264] A further inquiry is whether the adjudication relates to particular facts involving a particular party

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261. *See* Stern, *supra* note 19, at 103-04 (quoting 1 S. WIGMORE, EVIDENCE 36 (3d ed. 1940)). At the Maryland OAH, the Chief Administrative Law Judge has the power to assign administrative law judges. MD. CODE ANN., STATE GOV'T § 9-1604(a)(4) (Supp. 1992). A system of regional dockets has been implemented in order to increase efficiency and convenience. OFFICE OF ADMINISTRATIVE HEARINGS, 1990 ANN. REP. 1. In conjunction with this, a quality assurance program was developed. After an ALJ is cross-trained in new areas, his or her draft decisions are reviewed by experienced Subject Matter Specialists (SMS). Once competence is demonstrated in that subject area, the ALJ is certified by the Chief Administrative Law Judge as qualified to hear that type of case without SMS supervision. *Id.* at 2-3.

262. *See* Richardson v. Perales, 402 U.S. 389, 400 (1971); Davis, *Problems of Evidence*, *supra* note 3, at 379; Jeka, *supra* note 3, at 161.

263. *See* Davis, *Problems of Evidence*, *supra* note 3, at 365, 396-97.

264. *See* Davis, *Residuum Rule*, *supra* note 3, at 9-11; Davis, *Problems of Evidence*, *supra* note 3, at 388-90.

or whether it relates to a broader policy issue.[265] More leeway should be permitted with hearsay in hearings which are aimed at developing policy rather than adjudicating particular private rights.

The standard of proof at the agency hearing might also be relevant in evaluating the reliability of hearsay and its ability to support a finding. Less flexibility should be permitted in relying on hearsay if the standard necessitates a finding supported by clear and convincing evidence as opposed to a finding that must be supported only by a preponderance of the evidence.[266] This would typically also relate to the importance of the issue being litigated.[267]

The standard of judicial review might also be relevant. If the standard of review on appeal is de novo, it seems appropriate to accept hearsay at the administrative level.[268] The most liberal approach to hearsay would be to create as full a record as possible. This could facilitate settlements and totally bypass the need for judicial review. Moreover, because a trial de novo is available, there can be little claim of prejudice from the hearsay.

Procedural Safeguards

As well as the aforementioned substantive factors which should be used to evaluate the proper role of hearsay, agencies should also consider implementing procedures to alleviate some of the problems that arise from reliance on hearsay. For example, it has been suggested that if a party intends to rely on hearsay, the hearsay should be provided to the opponent prior to the hearing,[269] thus enabling the opponent to contact the declarant to discuss the hearsay, or

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265. *See* Davis, *Problems of Evidence*, *supra* note 3, at 424.
266. Hutchins, *supra* note 209, at 363.
267. *See* discussion *supra* notes 209-214. The higher standard of proof should be viewed as indicative of an increased sense of importance of that issue.
268. *See* Sellnow, *supra* note 7, at 363.
269. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971); Jadallah v. District of Columbia Dep't of Employment Servs., 476 A.2d 671, 679 (D.C. 1984) (Ferren, J., concurring) (citing Johnson v. United States, 628 F.2d 187, 191 (D.C. Cir. 1980)); Farmer v. Everett, 648 S.W.2d 513, 518 (Ark. Ct. App. 1983) (Cooper, J., dissenting); Dragan v. Connecticut Medical Examining Bd., 591 A.2d 150, 154 (Conn. App. Ct. 1991); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 517 N.E.2d 830, 832-33 (Mass. 1988); Kalven, *supra* note 211, at 331.

Maryland provides for testimony to be received in written form in the discretion of the administrative law judge; if allowed, such testimony must be filed with the Office of Administrative Hearings and served on opposing parties no later than 10 days before the hearing. *OAH Rules of Procedure*, COMAR 28.02.01.18(E). As this provision is permissive, not mandatory, the practical significance of this section is as yet unclear.

alternatively, to file with the agency a notice of intent to cross-examine.[270] It would then be the duty of the agency to issue a subpoena for the declarant or rule that a subpoena was not necessary.[271] The burden of showing that a subpoena should not be issued should be on the proponent of the hearsay.

It has also been suggested that if a system of prior notice is not established, agencies should liberally grant continuances if, after the hearsay has been presented, the opponent requests an opportunity for cross-examination.[272] Another suggested alternative is that if the agency's decision does rely on hearsay, the losing party would have a right to request the reopening of the record for the purpose of subpoenaing and cross-examining the adverse hearsay witnesses.[273] At this point, the burden should be on the opponent of the hearsay to justify the need for cross-examination.

Summary

Because Maryland case law has proceeded on an ad hoc basis, parties and agency personnel are without a consistent, predictable framework upon which to rely when dealing with the proper role of hearsay in administrative adjudications. This section of the article has defined those factors which could form the basis of a framework of analysis on the hearsay issue. These factors are: (1) the issue involved; (2) the nature of the evidence presented; (3) the identity of the out of hearing declarant; (4) the availability of the out of hearing declarant and the usefulness of cross-examination; and (5) the nature of the agency and its adjudicatory hearings. Procedural rules have also been offered which could help avoid potential unfairness that may result from an agency's reliance on hearsay. The next section will discuss how these proposals can be implemented in Maryland.

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270. *See* Employers Commercial Union Ins. Group v. Schoen, 519 P.2d 819, 823 (Alaska 1974).

271. *See* Unemployment Compensation Bd. v. Ceja, 427 A.2d 631, 642 (Pa. 1981). Various rules of the Maryland OAH relate to subpoenas. The notice of hearing must contain a statement "of the right to request subpoenas for witnesses and evidence." COMAR 28.02.01.05(B)(3). The ALJ has power to "[i]ssue subpoenas for witnesses and the production of evidence. COMAR 28.02.01.08(B)(2). Other rules guide the request of, issuance of, service of, objection to, and enforcement of subpoenas. COMAR 28.02.01.11.

272. *See* Silver v. California Unemployment Ins. Appeal Bd., 129 Cal. Rptr. 411, 415 (Ct. App. 1976); Dowd v. District of Columbia Police & Firefighters' Retirement Bd., 485 A.2d 212, 215-16 (D.C. 1984); State Div. of Human Rights v. Sweet Home Cent. Sch. Dist. Bd. of Educ., 423 N.Y.S.2d 748, 749 (App. Div. 1979); Langlois v. Department of Employment & Training, 546 A.2d 1365, 1369 (Vt. 1988); *see also OAH Rules of Procedure*, COMAR 28.02.01.08(B)(7) (granting ALJ power to grant continuances); COMAR 28.02.01.08(B)(2) (granting ALJ power to issue subpoenas).

273. *See* Farmer v. Everett, 648 S.W.2d 513, 516 (Ark. Ct. App. 1983); *see also* Reynolds v. Triborough Bridge & Tunnel Auth., 94 N.Y.S.2d 841 (App. Div. 1950).

IMPLEMENTATION AND JUDICIAL REVIEW

There is a practical reason why a consistent and predictable approach to the proper role of hearsay at administrative hearings is desirable. When preparing for an administrative hearing, an attorney or an unrepresented litigant must decide whether to ask a supporting witness to make a personal appearance, possibly requiring the witness to take time off from work or to incur child care or travel expenses, or whether the witness' sworn testimony in the form of an affidavit would be sufficient. Because Maryland cases lack sufficient guidance on the proper role of hearsay at administrative hearings, the only safe posture at present would be to request the witness to testify in person. Yet this is antithetical to the administrative process' function of providing an informal process and its willingness to rely on hearsay. Refinement of the treatment of hearsay is therefore important not only to guide the litigants, but also to maintain the integrity of the administrative process.

Such refinement is best provided not at the judicial level, but at the administrative level. As discussed in the previous section, differences inherent in administrative adjudications may lead to different conclusions about the role of hearsay in those adjudications. What may be reliable to support one agency adjudication may not be sufficiently reliable to support another. That this point has generally not been recognized in court decisions is not surprising, given that courts have no special understanding or insight into the adjudications each agency conducts. Such understanding and insight does, however, exist at the administrative level. Therefore, it is suggested that *administrative* guidelines be adopted in order to achieve some predictability on the hearsay issue.[274]

In Maryland, this process would need to be done at various levels because of the advent of the Office of Administrative Hearings (OAH). Prior to 1990, most administrative cases in Maryland were adjudicated by hearing examiners employed by the individual agencies. In 1990, however, the OAH was created as a central hearings agency,[275] and was given the power to adjudicate cases from many,[276]

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274. *See* Commercial Union Cos. v. Smallwood, 550 P.2d 1261 (Alaska 1976). The court "strongly recommended" to the Workmen's Compensation Board that they adopt procedures to fill the "procedural void relating to medical reports and the right to cross-examination." *Id.* at 1267.

275. MD. CODE ANN., STATE GOV'T § 9-1602 (Supp. 1992).

276. OAH hears cases on behalf of about twenty state agencies administering over two hundred different programs. The vast majority of hearings before OAH are from the Motor Vehicle Administration. Other agencies whose cases are heard by OAH include Department of Mental Health and Hygiene, Department of Human Resources, Department of Licensing and Regulation, Department of Personnel, Department of the Environment, Department of Natural Resources, Human Relations Commission, Tax Court, Department of Education,

but not all,[277] administrative agencies. Those agencies that do not come under OAH jurisdiction should independently promulgate their own guidelines for hearsay. These guidelines should be based on the factors discussed earlier in this Article.[278] For those agencies that do come under OAH jurisdiction, the process will be a bit more complicated. Because OAH hears cases from different agencies, it will need to work with each agency to develop hearsay guidelines for that particular agency's adjudications.[279] In going through this process,

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Maryland State Retirement and Pension Systems, Board of Public Works, Higher Education Commission, Office of the Attorney General, Secretary of State, and Department of Agriculture. *See* OFFICE OF ADMINISTRATIVE HEARINGS INFORMATIONAL BROCHURE; OFFICE OF ADMINISTRATIVE HEARINGS, 1990 ANN. REP., app. 1.

277. MD. CODE ANN., STATE GOV'T § 9-1601 (Supp. 1992) excludes the Governor, the Comptroller of the Treasury, and the Inmate Grievance, Public Service, Workmen's Compensation, Parole, Health Services Cost Review, and Health Resources Planning Commissions from OAH jurisdiction. Furthermore, local and county agencies do not come under OAH jurisdiction.

278. Although it is beyond the scope of this article to draft hearsay regulations for every agency, application of some of the factors discussed earlier in the article to some of the Maryland agencies not under OAH jurisdiction is possible. For example, the fact that judicial review of Workmen's Compensation Commission cases is de novo, *see* General Motors Corp. v. Bark, 79 Md. App. 68, 555 A.2d 542 (1989), should be most significant in the Commission's adoption of hearsay regulations. *See supra* note 268 and accompanying text. Decisions of the Public Service Commission and the Health Services Cost Review Commission would most likely involve decisions involving factual precision. *See supra* note 264 and accompanying text. Decisions of the Health Resources Planning Commission, on the other hand, tend to be based on future facts and the broader policy issue of whether a certificate of need for a new hospital should be issued. *See supra* note 265 and accompanying text. Public Service Commission decisions are sometimes based on technical reports without the author being available for reports. This type of hearsay should be treated differently than hearsay statements made to a utility investigator by a neighbor of a customer who is being investigated for fraud. *See supra* notes 223-235 and accompanying text. It should also be noted that Maryland agencies already have the statutory authority to adopt the type of hearsay regulations proposed in this article. In fact, MD. CODE ANN., STATE GOV'T § 10-204(a) (1984), requires each agency to adopt regulations to govern procedures for contested cases.

279. Although it is beyond the scope of this Article to draft hearsay regulations for every agency, application of some of the factors discussed earlier in the Article to some of the Maryland agencies under OAH jurisdiction is possible. For example, development of hearsay regulations for the Motor Vehicle Administration should take into consideration the vast number of MVA cases heard each year (over 37,000 in 1990). *See supra* note 210. This should be compared to hearings before the Department of the Environment where attorneys usually are present. Additionally, MVA hearsay regulations should recognize that hearsay should not be treated the same in all MVA adjudications. For example, hearings involving complaints against dealers might treat hearsay differently than hearings involving the assessment of points against a driver. *See supra*

OAH may find that it is possible to develop guidelines that relate to a group of agencies or group of adjudications. On the other hand, some agency adjudications under OAH may need their own hearsay guidelines and concomitant procedural rules.[280]

The adoption of hearsay guidelines by the agencies should have an impact on judicial review of administrative decisions based on hearsay. In the future, after the guidelines are in place, the major judicial inquiry will be whether the agency reasonably applied its guidelines and properly followed its procedures. This should simplify judicial review by avoiding the fact specific analysis of earlier cases. It would also add predictability to the judicial review process and hopefully avoid the inconsistent ad hoc approach that plagued earlier decisions.

CONCLUSION

State administrative agencies should be permitted to rely on hearsay in reaching a decision. Refusing to consider hearsay would be counterproductive to the goals of the administrative process. When

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notes 209-214 and accompanying text. Moreover, the reliability of medical reports would be most relevant to MVA Medical Advisory Board decisions. *See supra* notes 230-233 and accompanying text.

Another illustration involves the Department of Health and Mental Hygiene. Although most agency decisions need be supported only by the preponderance of the evidence, some decisions from DHMH must be supported by clear and convincing evidence. For example, under MD. CODE ANN., HEALTH OCC. § 14-405(b) (1991), factual findings by the Board of Physician Quality Assurance relating to disciplinary actions against physicians must be supported by clear and convincing evidence. Hearsay guidelines for such hearings should take this into consideration. *See supra* notes 266-267 and accompanying text. *Accord* MD. CODE ANN., HEALTH-GEN. § 7-503(e) (1990) (requiring clear and convincing evidence for involuntary admission of a person to a state residential center for mental retardation); MD. CODE ANN., HEALTH-GEN. § 19-1407(l)(2) (1990 & Supp. 1992) (requiring clear and convincing evidence in hearings assessing monetary penalties against nursing homes).

In many adjudications before OAH, credibility is not a major concern. In MVA hearings concerning suspension of a license, MVA documents are the major source of evidence. On the other hand, in a Human Relations Commission matter involving employment or sex discrimination, issues of credibility are crucial. Hearing guidelines for OAH should take this into account.

Not all OAH hearings are adversarial. Hearings for the Department of Health and Mental Hygiene which are aimed at deciding what is "best" for the patient, such as forced medication issues, might take this nonadversarial nature into account when developing hearsay rules.

280. OAH has the statutory authority to implement the suggestions in this article. MD. CODE ANN., STATE GOV'T § 9-1604(a)(8) (Supp. 1992) requires the Chief Administrative Law Judge to develop model rules of procedure and other guidelines for administrative hearings.

an agency decision is based solely on hearsay, however, the hearsay must be reliable in order to ensure fundamental fairness. Agencies should adopt guidelines that govern the treatment of hearsay so that unreliable hearsay will not be considered. Such guidelines should take into account factors unique to the particular agency and the particular adjudication. In addition, agencies should promulgate procedural rules to help safeguard a party's right to test the reliability of the evidence offered at the hearing. Adoption of the suggestions set forth in this Article will provide guidance to parties and agency personnel, and result in simpler, more consistent judicial review.