10.3 BURDEN OF PROOF AND STANDARD OF PROOF

The term *burden of proof* is often used loosely to refer both to the requirement that one party to a proceeding must bear the burden of proving the truth of a particular fact and to the kind of proof that must be offered to meet that party's burden.[1] As used here, *burden of proof* refers solely to the former concept. The term *standard of proof* is used to refer to the quantity and quality of evidence needed to satisfy a party's burden of proof on a particular issue.

10.3.1 Burden of Proof

The rules of the OAH specify that "[t]he party proposing that certain action be taken must prove the facts at issue . . . unless the substantive law provides a different burden."[2] In short, under the OAH rules, it is the proponent of a particular action who must bear the ultimate burden of persuading the finder of fact that the evidence supports that action. But it is not always easy to determine the proponent of a certain action. Under the OAH rules, it is the action of the agency in issuing a notice of and order for hearing that commences a contested case.[3] This, however, does not mean that the agency will always be considered the proponent of the action sought merely because it initiated the contested case proceeding.[4]

In occupational licensing matters, for example, a distinction can be drawn between contested cases involving parties who presently hold a license and those involving parties seeking initial licensure. Where a party possesses a license and the agency wishes to take it away (by suspension or revocation) or to impose a penalty on the licensee,[5] it is generally recognized that the agency is seeking action and must bear the burden of proof.[6] Where, however, someone seeks a license for the first time, he or she must normally show compliance with certain minimum requirements imposed by law or rule on all license applicants, such as age, education, experience, successful completion of an examination, or payment of required fees. In the latter situation, it is the applicant who seeks action by the

1 Burden of proof may also refer to the burden of going forward with evidence on a particular issue. *See infra* notes 12-13 and accompanying text in this chapter.

2 MINN. R. 1400.7300, subp. 5 (2013);*see In re* Minn. Pub. Utils. Comm'n, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985) (stating that "substantive law" is law that creates underlying rights and duties). Under the OAH rules, the party with the burden of proof makes the opening statement and begins the presentation of evidence (unless the parties have agreed otherwise or the administrative law judge determines that requiring another party to proceed first would be more expeditious and would not jeopardize the rights of any other party). MINN. R. 1400.7800(D)(E) (2013).

3 MINN. R. 1400.5600, subp. 1 (2013).

4 Before amendment in 1980, MINN. R. 1400.7300, subp. 5 (2013) provided that the party "initiating the contested case must prove the facts at issue."

5 Some agency statutes provide for civil monetary penalties against an offending licensee. *E.g.*, MINN. STAT §§ 60K.43, subd. 1, 45.027, subd. 6 (2014) (providing up to $10,000 for civil penalty against insurance licensees).

6 *See generally*. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW ch. 12, § 1 (1965).

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agency, in the form of a determination that a license should be granted, and it is generally held that the applicant has the burden of proof.[7]

In a case involving a license application by a hospital seeking to extend the service area for its non-emergency ambulance services, the Minnesota court of appeals rejected an effort by the applicant to shift the burden of proof to the licensing agency. Under the applicable statute, the hospital had the burden of showing a need for the extended services based on five factors. No evidence was submitted with respect to two of the factors. The hospital argued on appeal that the agency's finding of a lack of need for the extended services was unsupported by "any" evidence as to these two factors. The court rejected this ploy, noting that where an agency's decision is based on a license applicant's failure to submit evidence, "it is not proper for the applicant to seek reversal on the ground that the decision is not supported by evidence it had the burden to present."[8]

In one case, the Minnesota Supreme Court held that a city seeking a state permit to encroach on public waters had the burden of proving that the application should be granted.[9] The court first observed that the general rule in administrative cases is that "an applicant for relief, benefits, or a privilege has the burden of proof."[10] As such, the court stated: "In this state the burden of proof generally rests on the one who seeks to show he is entitled to the benefits of a statutory provision."[11]

It should be noted that the ultimate burden of proof that the OAH rules place on the proponent of a particular action is distinct from the so-called "burden of going forward" with evidence,[12] which the rules apparently do not address. The burden of going forward with evidence will generally be governed by the substantive law and may shift back and forth between the parties during the presentation of evidence in a case.[13] For example, proof of

[7] *See generally* COOPER, *supra* note 6, at ch. 12, § 1. *Cf.* Anton's v. City of Minneapolis, 375 N.W.2d 504, 506 (Minn. Ct. App. 1985) (holding that the liquor license applicant has the burden of proving the city acted in an arbitrary manner).

[8] N. Mem'l Med. Ctr. v. Minn. Dep't of Health, 423 N.W.2d 737, 740 (Minn. Ct. App. 1988); *see also In re* Rochester Ambulance Service, Div. of Hiawatha Aviation, Inc., 500 N.W.2d 495, 499 (Minn. Ct. App. 1993).

[9] *In re* City of White Bear Lake, 311 Minn. 146, 156 247 N.W.2d 901, 906-07 (1976); *cf.* Minn. Ctr. for Envtl. Advocacy v. Comm'r of Pollution Control Agency, 696 N.W.2d 95 (Minn. Ct. App. 2005) (burden of proof properly placed on challengers to wastewater treatment permit issued to city by PCA because although city had sought the permit, the challengers sought to have a limit added to the permit and were therefore the party proposing that action be taken).

[10] *In re* City of White Bear Lake, 311 Minn. at 150, 247 N.W.2d at 904.

[11] *Id.; see, e.g.,* Chemlease Worldwide v. Brace, 338 N.W.2d 428, 437 (Minn. 1983) (holding that the burden of proof is on the party who will benefit from affirmative proof of the essential fact); Holman v. All Nation Ins. Co., 288 N.W.2d 244, 248 (Minn. 1980) (holding that the burden of proving fact is on the party who must allege fact); *see also* Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, 523 F.2d 25, 34-37 (7th Cir. 1975) (stating that the ultimate burden of proof in a federal coal mine shut-down proceedings rests with mine owner who has "best knowledge" of condition of mine's safety).

[12] The burden of going forward with evidence to meet an opponent's case or to nullify a rebuttable presumption is sometimes confusingly characterized as a "shift" in the burden of proof. What shifts, however, is not the ultimate burden of persuading the finder of fact but, rather, the burden of producing sufficient evidence to avoid a directed verdict on the issue. *See* Peterson v. Minneapolis Street Ry., 226 Minn. 27, 34, 31 N.W.2d 905, 909 (1948).

[13] Fidelity Bank & Trust Co. v. Fitzsimons, 261 N.W.2d 586, 590 n.10 (Minn. 1977); *cf.* Minnesota Loan & Thrift Co. v. Commerce Comm'n, 278 N.W.2d 522, 525-26 (Minn. 1979) (stating that the burden of proof on appeal is on the appellant).

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discrimination in the trial of cases under the Minnesota Human Rights Act[14] may require a shift in the burden of production from the complainant to the alleged violator and back again to the complainant.[15] The ultimate burden of persuasion, however, always rests with the party seeking to prove discrimination.[16] In addition, in the case of family foster care and day care licenses issued by the department of human services, the concept of shifting burdens of proof has been adopted by statute.[17] It is not unusual in cases with pro se parties that a represented agency will be asked to proceed first even though the pro se party has the burden of proof.

10.3.2 Standard of Proof

Under the OAH rules, the party with the burden of proof "must prove the facts at issue by a *preponderance of the evidence*, unless the substantive law provides a different . . . standard."[18] This standard of proof applies to all contested cases unless a constitutional provision, statute, or case law requires the application of an alternate standard.[19] In Minnesota, some of the most troublesome cases involving a determination of the proper standard of proof have involved disciplinary matters against persons holding occupational licenses issued by the state. Basically, the argument put forward by licensees is that because licensing proceedings entail a severe penalty, the possible loss of the licensee's livelihood, the licensing body should be required to prove misconduct by a higher standard than a preponderance of the evidence. Because the OAH rules permit a different standard of proof when the "substantive law" so provides,[20] arguments concerning the proper standard may be based on both statutory interpretation and constitutional grounds.

14 MINN. STAT. §§ 363A.03-.41 (2014)..

15 Hubbard v. United Press Int'l, 330 N.W.2d 428, 444-45 (Minn. 1983); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

16 St. Mary's Honor Ctr.e v. Hicks, 509 U.S. 502, 506-07 (1993); Hasnudeen v. Onan Corp., 552 N.W.2d 555, 557 (Minn. 1996); Kaster v. Indep. Sch. Dist. No. 625, 284 N.W.2d 362, 364 (Minn. 1979);*Danz*, 263 N.W.2d at 399; *cf.* , *Old Ben Coal Corp*, 523 F.2d at 39-40 (concluding that the government has the initial burden of going forward in coal mine shut-down proceeding, but the mine owner hasthe ultimate burden of proof that mine is safe).

17 MINN. STAT. § 245A.08, subd. 3 (2014) provides that in proceedings against foster care and day care licensees, the local welfare agency first makes a prima facie showing of grounds to take action against the licensee, based on "statements, reports, or affidavits." On a showing of reasonable grounds to take action, the burden of proving compliance by a preponderance of the evidence shifts to the license holder.

18 MINN. R. 1400.7300, subp. 5 (2013) (emphasis added). *See generally* 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 5.51 (1997).

19 *See generally* 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2498 (Chadbourn rev. 1981 & Best, Supp. 1997).

20 MINN. R.1400.7300, subp. 5 (2013); s*ee In re* Minn.Pub. Util. Comm'n, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985) (defining "substantive law"). In Minnesota public utility rate-making cases, where the agency acts in a legislative (as opposed to quasi-judicial) capacity in the allocation of rates, the agency's determinations on rates are reviewed under a "clear and convincing" evidence standard. Its quasi-judicial determinations, such as those relating to the appropriate rate of return on a utility's equity, are reviewed under the familiar substantial evidence standard. *In re* Excess Surplus Status of Blue Cross and Blue Shield of Minn., 624 N.W.2d 264, 274 (Minn. 2001); City of Moorhead v. Minn. Pub. Util. Comm'n, 343 N.W.2d 843, 846 (Minn. 1984); Hibbing Taconite Co. v. Minn. Pub. Util. Comm'n, 302 N.W.2d 5, 9 (Minn. 1981); *see also* Giles Lowery Stockyards v. Dep'tof Agric., 565 F.2d 321 (5th Cir. 1977) (party challenging rate set by

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The reported Minnesota licensing cases dealing with standard of proof have focused on the proof required to sustain disciplinary action against attorneys at law.[21] The proper standard has been described as "clear and convincing evidence," "full, clear, and convincing," "cogent and compelling," and "a strong and convincing showing."[22] Similar standards apply to the discipline of a judge.[23] The argument based on these decisions has been that if attorneys can be disciplined only on a clear and convincing showing, it is unfair or even unconstitutional to discipline real estate brokers or insurance agents on a mere preponderance of the proof. Unfortunately, this argument ignores the fact that attorney disciplinary proceedings, which are under the supervision and control of the judiciary, have historically been regarded as unique.[24]

There is nothing in the APA to suggest that the legislature intended to import the standards applied in attorney disbarment cases into contested cases involving licenses issued by the executive branch. When given the opportunity to determine the standard applicable in SEC proceedings against persons in the investment business, the United States Supreme Court construed the federal APA to require no more than proof by a preponderance of the evidence, even where the grounds for discipline included allegations of fraud.[25] State courts have expressly followed the preponderance standard in proceedings against a real estate broker's license,[26] in proceedings against a physician's license,[27] and

federal agency must prove rate unreasonable by clear and convincing evidence). However, cases of this type, which relate to judicial review of agency decisions, should not be confused with those cases setting the standard of proof to be met by a party before the agency. *In re* Minn. Power & Light Co., 435 N.W.2d 550, 554 (Minn. Ct. App. 1989) (utility seeking rate change must prove change is just and reasonable by preponderance of the evidence; legislative decision of agency in approving rates is sustained on appeal absent clear and convincing evidence of error).

[21] There is a lack of uniformity among the jurisdictions concerning the requisite standard of proof in attorney disciplinary cases. Some courts follow the familiar civil standard of "a preponderance of the evidence," while others, including the federal courts, tend to require proof by the highest standard of "clear and convincing evidence." *See generally* 7A C.J.S. *Attorney & Client* § 103 (1980 & Supp. 1997); 7 AM. JUR. 2D *Attorneys at Law* § 112 (1997).

[22] *In re* Strid, 551 N.W.2d 212, 215 (Minn. 1996) (dismissing a petition against an attorney where allegations were not supported by clear and convincing evidence); *In re* Schmidt, 402 N.W.2d 544, 545 (Minn. 1987); *In re* Rerat, 232 Minn. 1, 5-6, 44 N.W.2d 273, 275 (1950); 4 DUNNELL MINN. DIGEST 2d *Attorneys* § 4.03(n) (4th ed. 1989 & Supp. 1997).

[23] *In re* Disbarment of Gillard, 271 N.W.2d 785, 805 n.3 (Minn. 1978).

[24] *In re* Wang, 441 N.W.2d 488, 492 n. 5 (Minn. 1989) ("Attorney misconduct, striking as it does at the heart of our justice system, gives society a heightened interest in the outcome of attorney discipline. A high standard of proof is indicated."); *In re* Rerat , 232 Minn. at 4, 44 N.W.2d at 274-75 (stating attorney proceedings are "sui generis").

[25] Steadman v. SEC, 450 U.S. 91, 103 (1981). For a post-*Steadman* decision, see *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (holding that the preponderance standard applies in private damage actions for fraud under § 10(b) of Exchange Act).

[26] Bernstein v. Real Estate Comm'n, 221 Md. 221, 232, 156 A.2d 657, 663(1959).

[27] *In re* Polk, 90 N.J. 550, 569, 449 A.2d 7, 16 (1982); *see, infra*, note 46.

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in proceedings to dismiss a teacher.[28] It has also been held that the preponderance standard governs "informal hearings" which are not required under the federal APA.[29]

The Minnesota Court of Appeals addressed this issue in the case of *In re Schultz*, concluding summarily that a preponderance of the evidence standard governs disciplinary proceedings against a licensed dentist.[30] After noting that the general standard of proof in administrative cases is a preponderance of the evidence,[31] the court concluded that because the substantive law provides no different standard, the preponderance standard applies to dental licensing cases.[32] The court disposed of the dentist's claim that a clear and convincing evidence standard should have been applied in summary fashion and, because the parties raised the issue for the first time on appeal, the court did not discuss the constitutionality of applying the preponderance standard in the occupational licensing context.[33]

In *In re Wang*, the Minnesota Supreme Court confirmed the application of a preponderance of the evidence standard in professional licensing proceedings involving disciplinary action against a licensed dentist.[34] However, the court admonished that in applying a preponderance standard in a professional licensing matter, the agency's decision must be supported by evidence of considerable weight:

> Even so, these proceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft. The reputation of a profession, and the reputation of a professional as well as the public's trust are at stake.[35]

[28] Bd. of Educ. of St. Charles Cmty. Sch. Unit Sch. Dist. No. 303 v. Adleman, 97 Ill. App. 3d 530, 531-33, 423 N.E.2d 254, 256-57 (1981).

[29] Bender v. Clark, 744 F.2d 1424, 1428-30 (10th Cir. 1984) (holding that the preponderance standard applies unless liberty, citizenship, or parental rights are at stake).

[30] 375 N.W.2d 509, 513-14 (Minn. Ct. App. 1985).

[31] *Id.* at 514 (citing MINN. R. 1400.7300, subp. 5 (1983)).

[32] *Id.; see also In re* Casey,540 N.W.2d 854, 857 (Minn. Ct. App. 1996) (stating that the preponderance of the evidence standard of proof applies to disciplinary proceeding against insurance agents); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, § 16:9 (2d ed. 1980).

[33] *In re* Schultz, 375 N.W.2d at 514. The court's summary treatment of this issue may be attributable to the fact that the issue apparently arose as an afterthought on appeal, the dentist having advocated a preponderance standard in agency proceedings. In addition, no constitutional challenge to the use of a preponderance standard was raised in the parties' briefs. Brief of Appellant at 11-12, No. 9-85-761 (Minn. Ct. App.); Brief of Respondent at 7-8,. (briefs on file at Minnesota State Law Library); *see* Hansen v. C.W. Mears, Inc., 486 N.W.2d 776, 779 (Minn. Ct. App. 1992) and Manos v. First Bank Minnehaha, 357 N.W.2d 372, 374-75 (Minn. Ct. App. 1984) (holding that the standard of proof in a proceeding to deny unemployment compensation benefits to employee discharged for gross misconduct is preponderance of evidence).

[34] 441 N.W.2d 488, 492,n. 5 (Minn. 1989) (declining to consider whether the application of differing burdens of proof in attorney and dentist disciplinary cases might be a denial of equal protection, as the issue was raised for the first time at oral argument).

[35] *Id*. at 492.

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In *Wang*, the supreme court reversed the decision of the ALJ, the agency and the court of appeals, holding that in light of the record as a whole and the seriousness of the charges, the decision was unsupported by substantial evidence.[36] Hence, although the court affirmed the use of a preponderance standard in non-attorney professional disciplinary matters, it is apparent that the court will carefully scrutinize the record in these proceedings to assure that findings upon which disciplinary action is based are "reasonable in the context of the record as a whole, having in mind, as a reasonable person would, the seriousness of the matter under review."[37]

In *In re Insurance. Agents' Licenses of Kane,*[38] the Minnesota Court of Appeals did address the constitutionality of applying the preponderance standard to non-attorney licensing matters. In this case, insurance agents facing disciplinary action argued that application of the preponderance of the evidence standard violated equal protection since their licenses could be revoked pursuant to a lower standard of proof, while attorneys' licenses could only be revoked upon a showing of clear and convincing evidence of misconduct. Citing *Wang*,[39] the court rejected the agents' equal protection arguments based on the unique sui generis nature of attorney disciplinary hearings and society's heightened interest in the outcome of attorney discipline.[40] The court held that these distinctions provide a rational basis for employing the clear and convincing standard in attorney licensing proceedings and the preponderance of the evidence standard in other licensing proceedings.[41]

Finally, in *In re Medical License of Friedenson*,[42] the Minnesota Court of Appeals held that the preponderance of the evidence standard applies to professional disciplinary proceedings against a licensed medical doctor. As in *Schultz*, the court noted that the general standard of proof in administrative proceedings is preponderance of the evidence unless the substantive law establishes a different burden.[43] As the statute governing the Board of Medical Practice's discipline of medical doctors is silent regarding the standard of proof, the court applied the preponderance standard.[44] In *Uckun v. State Bd. of Med. Practice*,[45] the Minnesota Court of Appeals found that the State Board of Medical Practice properly applied the preponderance of the evidence standard of proof in its temporary suspension of a licensed medical doctor. This is the first time that the court addressed the correct standard to be applied in temporary suspensions of physician licenses pending contested case hearings.

In light of *Schultz, Wang, Kane* and *Friedenson*, the standard of proof to be applied in non-attorney licensee disciplinary cases under the APA is clearly a preponderance of the evidence. The determination of the appropriate standard necessarily involves a delicate balancing of the public's right to be protected against unscrupulous or unreliable licensees

36 *Id*. at 493-94.
37 *Id*. at 492.
38 473 N.W.2d 869 (Minn. Ct. App. 1991)
39 441 N.W.2d at 488.
40 *In re Kane,* 473 N.W.2d at 874.
41 *Id*.
42 574 N.W.2d 463, 466 (Minn. Ct. App. 1998).
43 *Id*. at 465-66 (citing MINN. R. 1400.7300, subp. 5 (1995)).
44 *Id*. (citing MINN. STAT. § 147.091 (1996)).
45 733 N.W.2d 778, 783 (Minn. Ct. App. 2007).

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and the individual's right to pursue his or her livelihood in the absence of clear proof that the exercise of that right is a threat to the public.[46]

[46] A number of cases have considered whether a particular standard of proof in a contested case may be mandated by constitutional provision. Vance v. Terrazas, 444 U.S. 252, 266-67 (1980) (holding that the Constitution permits the use of the preponderance standard in voluntary relinquishment of citizenship proceedings, despite the court's preference for the clear and convincing standard in earlier deportation and denaturalization decisions); Addington v. Texas, 441 U.S. 418, 422-24 (1979) (holding that the Constitution requires a minimum of clear and convincing evidence in state involuntary commitment proceedings). However, the issue was expressly reserved in Steadman v. SEC, , as the parties had not addressed it. 450 U.S. 91, 97 n.15 (1981). The New Jersey Supreme Court has expressly concluded, in a well-reasoned opinion, that the use of a preponderance standard in physician's license disciplinary proceedings does not violate due process. *In re* Polk, 90 N.J. 550, 560-69, 449 A.2d 7, 12-17 (1982)., Similarly, the court concluded that the application of a higher clear and convincing evidence standard in attorney disciplinary proceedings (presumably making attorneys less likely to be subject to discipline) did not violate a physician's equal protection rights. *Id.* at 569-73, 449 A.2d at 17-19; *see also*, Eaves v. Bd. of Med. Exam'rs, 467 N.W.2d 234, 237 (Iowa 1991) (holding that the preponderance of the evidence standard is sufficient to satisfy due process in medical disciplinary cases); Gandhi v. Med. Examining Bd., 483 N.W.2d 295, 310-11 (Wis. Ct. App. 1992) (holding that the application of the preponderance of the evidence standard did not violate due process or equal protection).

But see Ettinger v. Bd. of Med. Quality Assurance, 135 Cal.App.3d 853, 856-57, 185 Cal.Rptr. 601, 603-04 (Ct. App. 1982) (holding that the vested right in professional employment requires "clear and convincing proof to a reasonable certainty" in physician disciplinary proceeding); Nair v. Dep't of Bus. & Prof'l Regulation, 654 So.2d 205, 207 (Fla.Dist. Ct. App.. 1995) (holding that evidence must be clear and convincing to revoke or suspend a professional license); Poor v. State, 266 Neb. 183, 190, 663 N.W.2d 109, 115 (2003); Davis v. Wright, 243 Neb. 931, 939, 503 N.W.2d 814, 819 (1993) (holding that allegations in disciplinary proceedings involving physicians must be proved by clear and convincing evidence); Johnson v. Bd. of Gov. of Registered. Dentists, 913 P.2d 1339, 1353 (Okla. 1996) (holding that constitutional due process requires that the standard of proof in disciplinary proceedings against a person holding a professional license be clear and convincing); *In re* Zar, 434 N.W.2d 598, 602 (S.D. 1989) (holding that, in professional license revocation matters, the appropriate standard of proof is clear and convincing).

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