10.2 RESIDUUM RULE

Although agencies are permitted to receive hearsay and other evidence that would not be admissible in a court of law, may they base their decisions *solely* on evidence that would be inadmissible in a civil or criminal trial? The notion that they may not is what is commonly referred to as the residuum rule.

The residuum rule was developed by courts in jurisdictions outside Minnesota to counterbalance the relaxed rules of admissibility applicable in administrative proceedings.[1] Under the residuum rule, when all the evidence received by an agency has been sifted through by a reviewing court, there must be present at least a residuum or residue of legally competent evidence[2] that supports the agency's findings.[3]

Although the Minnesota cases do not specifically refer to the residuum rule, the Minnesota Supreme Court has observed that administrative agencies may not rest their decisions solely on hearsay or other incompetent evidence.[4] The source of the requirement that there be a minimum of legally sufficient evidence to support an agency's decision appears to be the "substantial evidence" requirement. The APA provides that an agency decision may be reversed or modified by a reviewing court if it is "unsupported by substantial evidence in view of the entire record as submitted."[5] The court has apparently concluded that substantial evidence to support an agency decision means that some minimal amount of legally admissible evidence must be present in the hearing record. However, in light of the considerable criticism of the residuum rule leveled by commentators and its rejection by the drafters of the model APA, the vitality of the rule in Minnesota may be in doubt.[6] Reliability may be based on the presence of corroborating evidence or on the circumstances under which the hearsay statement was made.[7] This approach is consistent with the APA's evidentiary standard[8] that evidence of probative value should be admitted in administrative cases regardless of its technical admissibility under the formal rules of evidence.[9]

1 Consol. Edison Co. v. NLRB, 305 U.S. 197, 230 (1938) ("Mere uncorroborated hearsay or rumor does not constitute substantial evidence."). A reviewing court may be loath to rely on agency findings that are unsupported by any legally admissible evidence. 3 CHARLES H.KOCH, JR., ADMINISTRATIVE LAW & PRACTICE § 12.23, at 209-10 (1997).

2 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 410-12 (1965) (stating that legally competent evidence means the type of evidence that would be admissible in jury trial).

3 The residuum rule is strictly an administrative law doctrine and has no application to judicial proceedings. Shepp v. Uehlinger, 775 F.2d 452, 454-55 (1st Cir. 1985).

4 *In re* Wang, 441 N.W.2d 488, 495 n. 9 (Minn. 1989) (holding that out-of-court admissions are hearsay at common law and must have probative quality if they serve as basis for agency decision); Sabes v. City of Minneapolis, 265 Minn. 166, 173, 120 N.W.2d 871, 876 (1963).

5 MINN. STAT. § 14.69(e) (2014).

6 2 KENNETH CULP DAVIS & RICHARD J. PIERCE , JR., ADMINISTRATIVE LAW TREATISE § 10.4 (3rd ed. 1994); MODEL STATE ADMIN. PROCEDURE ACT. § 4-215(d), cmt. (1981).

7 *Cf.* Springer v. Norton, 32 Conn. Supp. 560, 564-65, 345 A.2d 590, 592-93 (1975) (holding that discontinuance of public assistance benefits cannot rest on hearsay where more reliable evidence is available).

8 MINN. STAT. § 14.60, subd. 1 (2014).

9 Some courts continue to follow the residuum rule, although they often find independent grounds for the admission of the objectionable evidence. *E.g.*, Caprioti v. Northridge Hosp. Found. Med. Center, 147 Cal. App. 3d 144, 155 n.2, 196 Cal. Rptr. 367, 373 n.2 (1983); The Yacht Club v. Utah Liquor Control

However, in light of the requirement of the existing Minnesota decisions that a minimum amount of admissible evidence is needed to support an agency decision on appeal, there are circumstances in which a party is obliged to object to evidence that is clearly admissible under the relaxed rules governing administrative hearings. For example, the Minnesota Supreme Court has stated that "in the absence of a special statute, an administrative agency cannot, *at least over objection*, rest its finding of fact solely on hearsay evidence which is inadmissible in a judicial proceeding."[10] This statement by the court suggests that the failure to object to hearsay may have the effect of allowing the agency to base its decision on hearsay evidence.[11] Furthermore, the general rule is that hearsay evidence that is not objected to may not be the basis for a claim of error on appeal.[12] Consequently, by failing to object to hearsay evidence, a party may waive the right to raise the argument that the evidence is not "substantial" on appeal.[13]

Given the partial recognition that the residuum rule has received in Minnesota, it seems prudent for a party to make a timely and specific objection to legally inadmissible evidence, at least when the evidence relates to a critical part of the contested case and it is unlikely that admissible evidence can be produced. This is true even though the evidence is "admissible" under the APA or the OAH rules. The failure to object may have the consequence of converting hearsay or other objectionable evidence into "substantial evidence" that will support the agency's decision on appeal.[14] Nonetheless, even if Minnesota would follow the modern trend in rejection of the residuum rule, reliance on uncorroborated hearsay for proof of significant facts invites reversal.[15] For example, the Minnesota Court of Appeals reversed a student expulsion by a school district that was based on the objected-to hearsay testimony of two police officers relating what non-

Comm'n, 681 P.2d 1224, 1226 (Utah 1984); Wagstaff v. Dep't of Emp. Sec., 826 P.2d 1069, 1072-73 (Utah App. 1992).;.

[10] State *ex rel.* Indep. Sch. Dist. No. 276 v. Dep't of Educ., 256 N.W.2d 619, 627 (Minn. 1977) (emphasis added).

[11] Failure to object may have the effect of lulling the agency into believing that its hearsay evidence is proper or sufficient where other nonobjectionable evidence might have been readily available.

[12] MINN. R. EVID. 103(a)(1).;*see* Larson v. Foley Bros., 277 Minn. 99, 102, 151 N.W.2d 780, 783 (1967); Nelson v. O'Neil Amusements, 274 Minn. 555, 556, 142 N.W.2d 647, 648 (1966).

[13] Ernest H. Schopler, Annotation, *Hearsay Evidence in Proceedings Before State Administrative Agencies*, 36 A.L.R.3d 12, § 31 (1971 & Supp. 1997)

[14] The residuum rule has been abandoned by the federal courts and many state courts. *See, e.g.*, Johnson v. United States, 628 F.2d 187, 190-91 (D.C. Cir. 1980) (holding that hearsay that is probative may constitute substantial evidence to support agency decision; the residuum rule no longer controls); Sch. Bd. v. Dep't of HEW, 525 F.2d 900, 905-6 (5th Cir. 1976) (stating that "underlying reliability and probative value" determine whether evidence constitutes "substantial evidence"); Eagle v. Paterson, 57 N.Y.2d 831, 442 N.E.2d 56, 455 N.Y.S.2d 770 (1982) (residuum rule not followed).

[15] *See* KOCH, *supra* note 1, at § 12.23; *see also In re* Wang, 441 N.W.2d 488, 495 (Minn. 1989) (finding that investigator's testimony regarding dentist's out-of-court statement that he authorized prescription refills was hearsay at common law and was "too insubstantial" to justify the ALJ's finding); Beranek v. Joint Indep. Sch. Dist. No. 287, 395 N.W.2d 123, 126-27 (Minn. Ct. App. 1986) (reversing teacher discharge determination based in part on hearsay evidence of prior misconduct); *cf.* Skarhus v. Davanni's, Inc., 721 N.W.2d 340 (Minn. Ct. App. 2006) (stating that a ULJ is authorized to conduct a hearing without conforming to the rules of evidence); Vang v. A-1 Maint. Serv., 376 N.W.2d 479, 482 (Minn. Ct. App. 1985) (concluding that hearsay may be admissible and sufficient to support a decision in an unemployment compensation case). .

testifying witnesses had told them.[16] The court noted that the allegations of the non-testifying witnesses were contradictory and held that the decision was not supported by substantial evidence.

[16] *In re* Expulsion of E.J.W. , 632 N.W.2d 775, 782 (Minn. Ct. App. 2001).