10.9 THE RIGHT TO CROSS-EXAMINATION

The APA guarantees all parties to a contested case the opportunity to cross-examine: “Every party or agency shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.”[1] The OAH rules affirm this right[2] and extend it to include the right to call an adverse party for cross-examination as part of a party's case in chief.[3] In the case of multiple parties, the sequence of cross-examination is determined by the ALJ.[4]

While application of the right to cross-examine is a simple matter in the case of witnesses who testify, does the existence of this right prevent the use of evidence from witnesses who do not give oral testimony? In short, is it ever proper to receive written evidence[5] in contested cases, sworn or unsworn, offered by a party who fails to call the author of the written evidence. In *Richardson v. Perales,* the United States Supreme Court held that where the written evidence consisted of unsworn statements of medical experts, receipt of the evidence was proper.[6]

Perales involved a claim for social security disability benefits based on a back injury. At the hearing, Perales offered the oral testimony of a general practitioner who had examined him. The government countered with written medical reports, containing observations and conclusions of four specialists who had examined Perales in connection with his claim at various times.[7] The reports were received over several objections by Perales's counsel, including hearsay and lack of an opportunity to cross-examine. Although the lower courts refused to uphold the denial of Perales's claim on the basis of the written evidence, the Supreme Court reversed six to three, holding that the receipt of written medical evidence, in the context of a social security disability determination hearing, was consistent with procedural due process requirements and could constitute substantial evidence sufficient to support a hearing examiner's findings.[8] The Court therefore remanded to the district court for a consideration of whether the entire record, including the medical reports, contained substantial evidence to support the denial of the claim.[9]

On its face, the *Perales* case would appear to be clear authority for the use of written testimony, at least insofar as it relates to the opinions of experts, without the right to cross-examine.[10] However, that is not the case. The *Perales* Court focused on the fact that

[1] MINN. STAT. § 14.60, subd. 3 (2014).
[2] MINN. R. 1400.7100 subp. 1,.7800(B)(1) (2013).
[3] *Id*. 1400.7300, subp. 6).
[4] *Id*. 1400.7800(F)).
[5] *See supra* § 10.7 note 10 - § 10.8 note 3 and accompanying text in those subchapters.
[6] 402 U.S. 389, 410 (1971).
[7] *Id.* at 395 (explaining that the only oral medical testimony, other than by Perales's medical expert, was given by a physician called by hearing examiner as an “independent medical adviser.” This medical adviser did not examine Perales, but offered his opinion based on medical evidence of all examining physicians contained in record).
[8] *Id.* at 402.
[9] *Id.* at 410.
[10] One federal court observed: “Hearsay reports may constitute substantial evidence in administrative proceedings, even when contradicted by direct evidence, if such reports have ‘rational probative force.’” Mobile Consortium of CETA v. United States Dep't of Labor, 745 F.2d 1416, 1419 n.2 (11th Cir. 1984).

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Perales had the opportunity to obtain cross-examination of the adverse medical experts had he utilized the subpoena power available to him under the agency's procedural rules.[11] Hence, rather than holding that cross-examination is a nonessential element of procedural due process,[12] *Perales* shifted the burden of producing the witness from the proponent of the written testimony to the party seeking cross-examination. Had Perales attempted to subpoena these witnesses or had one or more of the witnesses been shown to be unavailable, the admissibility or "substantial" character of the written evidence might well have been analyzed differently.[13]

Following *Perales*, the Minnesota Court of Appeals, in an unpublished opinion,[14] affirmed a decision by the Commissioner of Agriculture which was based in part on hearsay evidence (primarily invoices and receipts). The court agreed with the ALJ that the documentary evidence at issue was of the type appropriately relied upon by reasonable, prudent persons (namely, Department of Agriculture personnel) in the due course of their affairs. Citing to *Perales*, the court noted that the respondent could have subpoenaed the claimants in order to "examine them about these documents," but chose not to.[15] Consequently, the court found that the Commissioner did not err in relying on the documentary evidence.

However, in *Demenech v. Secretary of DHHS*,[16] the Eleventh Circuit held that an ALJ abused his discretion and violated a claimant's right to procedural due process where he denied the claimant's request to depose and cross-examine the author of an adverse medical report and then substantially relied on the report as the basis for finding the claimant was no longer disabled.

[11] Richardson v. Perales, 402 U.S. 389, 404-05 (1971) ((noting that Perales had the opportunity to request a supplemental hearing for purpose of conducting cross-examination of medical witnesses and failed to do so).

[12] The Court listed nine factors in support of its conclusion that Perales was afforded procedural due process. *Id.* at 402-06.

[13] In part, the *Perales* decision may be attributable to the Court's reluctance to add costly and burdensome requirements "to the special difficulties presented by the mass administration of the social security system." Califano v. Boles, 443 U.S. 282, 285 (1979).

[14] *In re* Grain Buyer's Bond No. MTC 182, No. CX-95-298, 1995 WL 365400, at *3 (Minn. Ct. App. June 20, 1995).

[15] *Id.*

[16] 913 F.2d 882, 885 (11th Cir. 1990).

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In *Perales*, the Supreme Court also noted that the "extent to which procedural due process must be afforded [to a party] is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[17] Similarly, the extent to which "credibility and veracity are at issue"[18] may have a bearing on the propriety of receiving evidence where there has been no effective opportunity to confront the adverse witnesses.[19] So, for example, in a contested case where a licensee is charged with making fraudulent representations, consideration of the potential for loss of livelihood and witness credibility would appear to swing the scales in favor of an absolute right to confront the adverse witnesses.[20]

Furthermore, it can be argued that under the APA and OAH rules, due process considerations aside, there is a clear and unequivocal right to cross-examine that cannot be taken away in the absence of an express statutory provision. In *Perales*, the procedural rules appeared to balance the right to cross-examine by permitting it where necessary for "a full and true disclosure of the facts"[21] and by placing hearing procedures "in the discretion of the hearing examiner" as long as they afford "a reasonable opportunity for a fair hearing."[22] The Minnesota APA and OAH rules do not balance the right to cross-examine against the overall procedural fairness afforded by the hearing.[23]

In conclusion, although the Constitution may not guarantee the right of cross-examination in all contested cases, Minnesota's APA and rules appear to do so in the absence of a specific statute to the contrary.

[17] 402 U.S. at 401-02 (citing Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (termination of AFDC benefits)).

[18] Richardson v. Perales, 402 U.S. 389, 408 (1971).

[19] For example, Connecticut has upheld the use of written reports of dentists who were not biased or interested in a license proceeding, Altholtz v. Conn. Dental Comm'n, 4 Conn. App. 307, 311-14, 493 A.2d 917, 921-22 (1985), but has rejected the hearsay affidavits of accident witnesses in a driver's license revocation proceeding, Carlson v. Kozlowski, 172 Conn. 263, 268, 374 A.2d 207, 209 (1977).

[20] A licensee may also argue that licensing proceedings are quasi-criminal and may attempt to invoke the Sixth Amendment right "to be confronted with the witnesses against him." *See* Padilla v. Minn. Bd. of Med. Exam's, 382 N.W.2d 876, 883 (Minn. Ct. App. 1986) (holding that the admission of medical records prepared by a physician in a physician disciplinary proceeding does not deny rights to cross-examine or confront witnesses).

[21] 402 U.S. at 409.

[22] *Id.* at 400.

[23] For a discussion of the post-*Perales* case law, see 3 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.8 (3rd ed. 1994).

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