8.6 CONSTITUTIONAL RIGHT TO DISCOVERY

The majority rule is that there is no due process right to even limited discovery in an administrative proceeding.[1] In *Waller v. Powers Department Store*, the Minnesota Supreme Court adopted the majority view with only a footnote reference to concerns of due process.[2] The minority rule, originating in *Shively v. Stewart*,[3] is that fundamental fairness requires that administrative discovery be available to a person seeking to protect a vested right.[4] Following *Shively*, a limited number of courts have held that under particular circumstances, a denial of discovery would be improper.[5] The California Supreme Court's ruling in *Shively* was specifically rejected by the Minnesota Supreme Court in *Waller v. Powers Department Store.*[6]

Although full prehearing discovery is not a constitutional due process requirement, its availability is one consideration in determining whether a party to an administrative proceeding was afforded a fair and meaningful hearing.[7] Whether a denial of a particular discovery request deprives a party of a fair hearing must be determined from the totality of the circumstances, including the specificity of the charges, if any,[8] the importance of the requested information to the preparation of a defense,[9] and the equal application of neutral procedural standards. Regardless of the broad language of *Waller*,[10] in a proper case, a denial of expanded discovery when coupled with a lack of a meaningful opportunity to present a defense may deny a fair hearing and violate due process. For example, the court of appeals held that a school district denied the due process rights of a student by refusing to disclose the identities of non-testifying witnesses to a bomb scare incident, so that the student could call them as witnesses at the hearing.[11]

1 *See* Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977); Frilette v. Kimberlin, 508 F.2d 205, 208 (3rd Cir. 1974); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir. 1961); Starr v. Comm'r of Internal Revenue, 226 F.2d 721, 722 (7th Cir. 1955); *In re* Del Rio, 400 Mich. 665, 687 n.7, 256 N.W.2d 727, 735 n.7 (1977); Pa. Human Relations Comm'n v. St. Joe Minerals Corp. Zinc Smelting Div., 24 Pa. Commw. 455, 459-60, 357 A.2d 233, 236 (1976), *aff'd*, 476 Pa. 302, 382 A.2d 731 (1978).

2 343 N.W.2d 655, 657, n.2 (Minn. 1984).

3 65 Cal.2d 475, 479-80, 421 P.2d 65, 68, 55 Cal. Rptr. 217, 220 (1966).

4 The broad language of *Shively,* regarding the need for the availability of discovery in administrative contested case proceedings, has been limited by subsequent California decisions. *See* Cooper v. Bd. of Med. Exam'rs, 49 Cal. App. 3d 931, 945, 123 Cal. Rptr. 563, 572 (1975); Stevenson v. State Bd. of Med. Exam'rs, 10 Cal. App. 3d 433, 439, 88 Cal. Rptr. 815, 819 (1970); Everett v. Gorden, 266 Cal. App. 2d 667, 672-73, 72 Cal. Rptr. 379, 382 (1968).

5 *See* McClelland v. Andrus, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979); Smith v. Schlesinger, 513 F.2d 462, 475-77 (D.C. Cir. 1975); Hoffmann-La Roche, Inc. v. Kleindienst, 464 F.2d 1068, 1072 (3d Cir. 1972); Russo v. Governor , 22 N.J. 156, 174-75, 123 A.2d 482, 493 (1956); *In re* Nieman v. Axelrod, 434 N.Y.S.2d 817, 818-19, 79 A.D.2d 764, 765 (1980); *see also In re* Irving, 600 F.2d 1027, 1035-36 (2d Cir. 1979).

6 343 N.W.2d at 657 n.2.

7 Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977).

8 *Cf.* Secrest v. Dep't of Corr., 64 Ill. App. 3d 458, 459-60, 381 N.E.2d 367, 368 (1978); Costa v. Bd. of Selectmen, 377 Mass. 853, 861-62, 388 N.E.2d 696, 700-01 (1979); Hughes v. Dep't of Pub. Safety, 200 Minn. 16, 21-23, 273 N.W. 618, 621-22 (1937).

9 *Nieman,* 434 N.Y.S.2d at 818-19, 79 A.D.2d at 765; *see McClelland,* 606 F.2d at 1285-86.

10 343 N.W.2d at 657.

11 *In re* Expulsion of E.J.W., 632 N.W.2d 775, 780-82 (Minn. Ct. App. 2001).

Under the OAH rules, the ALJ has broad discretionary powers concerning discovery. Administrative hearings vary in scope from multi-issue hearings to determine vital public questions to hearings between unrepresented parties involving a single issue of particular concern only to the litigants. Under some circumstances, limiting the application of the judicial model applicable to the district court is appropriate. A primary concern in adopting the original discovery rule[12] was to arrive at an appropriate balance between the competing interests of disclosure, expeditious hearings, and fundamental fairness.[13] Since the types of hearings that arise under the single pretrial discovery rule of the OAH vary from conciliation-court-level matters to cases analogous to the most sophisticated district court proceeding, discretion must be placed in the ALJ.[14]

In complex cases, the discretion of the ALJ may well be exercised in favor of broad discovery. Doing so would be consistent with the prevailing view that the same breadth of discovery available in a judicial proceeding should be afforded in an administrative contested case.[15] The reasoning of the commentators is based on their view of the success of discovery in judicial proceedings and their assumption that the judicial model should be applied to administrative contested cases.

Discovery is designed to narrow and clarify the issues between the parties and to eliminate surprise at trial by permitting advance knowledge of all relevant facts in order to ascertain facts that may be used to prove a claim or defense.[16] It can be argued that the same reasons that support broad discovery in a judicial forum support similar discovery rights in complex administrative proceeding.

[12] 9 MCAR § 2.214 (1982).

[13] *Final Report of Hearing Examiner, In re* Proposed Amendments to the Rules of the Office of Hearing Examiners Relating to Rulemaking Procedures in Contested Cases and the Adoption of Procedures for Hearings Relating to the Routing or Siting of Large Electric Transmission Facilities, OAH File No. OHE 78-001-AK, 42-43 (1978).

[14] A rule restricting the availability of discretionary discovery in specified cases was originally proposed in the 1985 amendments to the rules of the OAH. 9 Minn. Reg. 802, 810 (Oct. 22, 1984). That portion of the amendment was withdrawn.

[15] *See, e.g.,* 2 Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 9.5, at 43 (3d ed. 1994); Adams, *State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Proceedings,* 74 N.W. L. REV. 854, 873-85 (1980)..

[16] Sandberg v. Comm'r of Revenue, 383 N.W.2d 277, 281-82 (Minn. 1986); Jeppesen v. Swanson, 243 Minn. 547, 560, 68 N.W.2d 649, 656-57 (1955); 3 D. MCFARLAND & W. KEPPEL, MINNESOTA CIVIL PRACTICE § 1501, at 307-08 (1990).