

Tennessee Administrative Law Digest



Dedication



The Administrative Procedures Division wishes to recognize two persons, without whose contributions this digest would not exist:

William N. Bates, director of the division from 1979 through 1985, through whose foresight, imagination, and initiative the Tennessee Administrative Law Digest was originated in 1984, with the help of the administrative law judges and staff then working with the division; and

Zelimira Juric, who was the division's law clerk during 1993 through mid-1995 while she was a Vanderbilt Law student, and through whose dedication, talent, and hard work this comprehensive update and revision of the digest was accomplished, and is now available on disk for the first time.

July, 1995

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THE TENNESSEE ADMINISTRATIVE LAW DIGEST

Welcome to the Tennessee Administrative Law Digest. The Digest is primarily intended to be a research tool to find unreported legal precedent from state agencies utilizing Administrative Law Judges from the Administrative Procedures Division, Tennessee Secretary of State's Office. In many instances, reported legal precedent is also reported. However, the Digest does not attempt to report all unreported legal precedent arising from agencies, but rather reports selected legal precedent which the editors believe to be of importance. Therefore, the Digest should be used to supplement other means of legal research.

The Digest contains summaries on points of administrative law and procedure from the following sources:

- 1) Initial Orders (**IO**) and pre-hearing orders (**PHO**) rendered by Administrative Law Judges from the Administrative Procedures Division of the Office of the Tennessee Secretary of State;
- 2) Final Orders rendered by Tennessee state agencies, boards and commissions (**F.O.**);
- 3) Opinions of the Tennessee Attorney General (**OAG**);
- 4) Unpublished decisions of the Davidson County Chancery Court (**Ch. Ct.**);
- 5) Published and unpublished decisions of the Tennessee Court of Appeals and the Tennessee Supreme Court (**Tenn. App.** and **Tenn.**); and
- 6) Federal cases construing Tennessee law (**M.D. Tenn., 6th Cir., and U.S. S.Ct.**)

Citations at the end of digest entries, which summarize unreported legal precedent, are to the Administrative Procedures Reports (**APR**), a loose-leaf compilation on file in the Administrative Procedures Division of the Office of the Secretary of State. The Digest will be reprinted on a yearly basis. New Digest entries are available on a weekly basis by personal computer or mail for a nominal fee. Currently, the updates to the Digest cover the period between January 1, 1992 to June 30, 1995. Remember to always consult the Digest Supplement (**SUPPLEMENT**), located at the end of the Digest, for updates.

HOW TO USE THE DIGEST

1. ORGANIZATION

How is the Digest organized? The Summary Table of Contents and Table of Contents lists agencies and section numbers in the order they appear in the Digest. The Agency Topic Table of Contents lists agencies in alphabetical order. The Digest is divided into sections. A General Section at the beginning reports legal precedent of general applicability to all state agencies, while Sections 1 through 42 are each applicable to particular state agencies.

SAMPLE: 18.00 **DEPARTMENT OF REVENUE**
 19.00 **DEPARTMENT OF SAFETY**

Furthermore, the Digest also contains a supplement where the most recent entries, compiled but not yet inserted into the various sections, are located. This supplement will be found after Section 34.00 of the Digest. Refer to the Digest supplement for the most recent cases and to determine the status of orders.

2. FINDING LEGAL PRECEDENT

How do you find legal precedent in the Digest? State agencies, boards, and commissions may be located by reference to the Summary Table of Contents, Table of Contents, and Agency Topic Table of Contents in the front of the Digest. Each state agency legal precedent is divided into Divisions which contain Chapters and Headings.

SAMPLE: 19.00 **DEPARTMENT OF SAFETY**
 19.01 Drug Confiscation
 19.02 Arson Confiscation
 19.03 Stolen Vehicle
 19.04 Driver's License

3. THE DIGEST ENTRY

How is legal precedent presented in the Digest? Each digest entry contains a caption identifying the legal source and year of entry. Following this caption, a topic heading introduces the topic or central idea of the digest entry. The body of the digest entry is a short paragraph consisting of a brief statement of the fact situation and a brief statement of the rule of law that the judge applied to the fact situation. The summary of legal precedent is then followed by a citation to the order or the case. A citation consists of the name of the case, the page number if the case is printed in a reporter, and the date the case was decided. Some citations may even include a notation to the APR or WESTLAW.

SAMPLE:

Agency	19.00	DEPARTMENT OF SAFETY
Division	19.01	Drug Confiscation
Topic	3.	Notice
Topic Number	*3	
Caption	Tenn. 1976	
Heading	PRE-SEIZURE NOTICE	
Entry	Statement of fact and law.	
Citation	<u>Fuqua v. Armour</u> , 543 S.W.2d 64 (Tenn. 1976). 12 APR 72.	

When a digest entry refers to a final order which has a date which is approximately 10 days later than the date of a corresponding initial order, this generally means that the initial actually became the final order, under T.C.A. §4-5-318(f)(3), by virtue of no appeal or notice of agency review having been filed under T.C.A. §4-5-315.

Some, but not all, digest entries are indexed under a topic outline. A topic outline precedes certain sections or divisions of the digest. These topic outlines provide a guide to the location of digest entries in a number of the larger sections or divisions. Topic numbers are used in the sections or divisions containing a topic outline. The topic numbers appearing before the digest caption operate in conjunction with the topic outlines. These topic numbers are reference guides that indicate within which topic or sub-topic of the outline the digest entry belongs.

SAMPLE:	19.00	DEPARTMENT OF SAFETY
	19.01	Drug Confiscation
Topic	3.	Notice
Topic Number	*3	

The digest entries found within the sections of the topic outline are grouped by level of proceeding. The digest caption identifies the level of proceeding. The following, in hierarchical order, is a list of abbreviations used for digest captions:

SAMPLE:	U.S. S.Ct. --U.S. Supreme Court
	6th Cir. --6th Circuit Court of Appeals
	M.D. Tenn. --Middle District Court of Tennessee
	Tenn. --Tennessee Supreme Court
	Tenn. App. --Tennessee Court of Appeals
	Tenn. Cr. App. --Tennessee Criminal Appeals
	Ch. Ct. --Davidson County Chancery Court
	OAG --Tennessee Attorney General's Office
	F.O. --Final Order
	I.O. --Initial Order
	P.H.O. --Pre-hearing Order

Within each topic or sub-topic, the digest entries are generally organized according to the hierarchy of legal proceeding. Within each hierarchical grouping, the digest entries are arranged in reverse chronological order, with the most recent digest entry appearing first.

SAMPLE:	Tenn. 1993
	Tenn. 1992
	Tenn. App. 1994
	Ch. Ct. 1993
	OAG 1994
	F.O. 1983
	I.O. 1992
	I.O. 1988

4. LEGAL PRECEDENT

Do all state agencies have legal precedent reported in the Digest? No. Some agencies do not have legal precedent reported in the Digest. Where legal precedent is not reported there will be an entry: "No Cases Reported."

5. COMPUTER-ASSISTED RESEARCH

The Digest is now available on computer. For purposes of computer-assisted legal research, the format remains the same. However, on the computer, there is the added benefit of word or topic number searches.

In order to access the Digest on the computer, open the application entitled "MicroSoft Word 6.0." Once within the MicroSoft Word application, in order to access the Digest files, go to the menu and open the file (Alt + Ctrl + F2). Once the file is open, select the folder marked "**DIGEST**." The Digest will be found in the folder marked "DIGEST." In the DIGEST Folder, the sections of the Digest will be divided by and correspond to Agency section numbers. These sections, like the sections on the bound copy of the Digest, will range from 1.00-34.00, including the general precedent section and introduction.

SAMPLE:	2.00 DEPARTMENT OF AUDIT	=	DIGEST02
	19.00 DEPARTMENT OF SAFETY	=	DIGEST19
	GENERAL PRECEDENT	=	GENERAL
	DIGEST INTRODUCTION	=	INTRO
	DIGEST SUPPLEMENT	=	SUPPLEMENT

Therefore, in the file marked "**DIGEST 19**," the following digest subsections would be found: 1) 19.01 Drug Confiscation, 2) 19.02 Arson Confiscation, 3) 19.03 Stolen Vehicle, and 4) 19.04 Driver's License.

Within each computerized section of the Digest, word or topic number searches may be conducted. In order to conduct a topic number search, go to the menu, select "**EDIT**," then select the "**SEARCH**" function (Alt + E + S). Once the SEARCH box opens, type in the chosen number or word.

SAMPLE:	Step 1	Alt + E + S (activates SEARCH function)
	Step 2	Type either " *2 " (or any other topic number) or " Notice " (or any other word) in SEARCH Box
	Step 3	Computer will find and select word or topic number chosen.

GENERAL PRECEDENT

1. In General
2. Statutory Construction
3. Rules and Rulemaking
4. Contested Case Procedure
5. --Parties
6. --Administrative Law Judges
7. --Notice
8. --Institution of Proceedings; Filing
9. --Pleadings
10. --Discovery
11. --Continuances & Stays
12. --Default
13. --Dismissal of Actions
14. --Burden of Proof
15. --Estoppel
16. --Evidence
17. --Witnesses
18. --De Novo Hearings
19. --Initial orders
20. --Final orders
21. --Reconsideration
22. --Judicial Review
23. Constitutional Law
24. Open Meetings Act (Sunshine Law)

1. IN GENERAL

***1 Tenn. 1984 DEFERRAL TO BOARD; GENERAL RULE**--A claim that is first brought before the Chancery Court should be deferred to the administrative agency if 1) the deferral will be conducive toward uniformity of decision between courts and the agency, and 2) if the deferral will make possible the utilization of agency expertise.
Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984). 4 APR 739.

***1 Tenn. App. 1994 BIAS; BOARD MEMBERS**--Participation by one or more members of Board for Licensing Health Care Facilities in task force study of problems of chiropractors in hospitals did not indicate bias so as to require recusal of any member or invalidate Board's decision prohibiting hospitals from granting staff privileges to chiropractors.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***1 Tenn. App. 1994 BOARD'S FINDINGS OF FACT**--Findings of fact contained in declaratory order of Board for Licensing Health Care Facilities did not contradict Board's decision prohibiting hospitals from granting staff privileges to chiropractors where the findings constituted recitations of evidence, statements of what the Board could do, or other factual conclusions not inconsistent with Board's decision.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***1 Tenn. App. 1994 VOIR DIRE; BOARD MEMBERS**--Board members are not subject to voir dire.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***1 Tenn. App. 1993 AGENCY STANDING; INDEPENDENCE FROM THE BOARD**--The Division and the Department are sufficiently independent of the Board and sufficiently aggrieved within the meaning of the statute to have standing in the Chancery Court. The legislative intent behind T.C.A. §4-5-322(a)(2) is to preclude a subordinate agency from challenging a decision of its superior agency. See East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Comm., 626 S.W.2d 272 (Tenn. Ct. App. 1981). In the present case, the Division and the Department are independent of the Board

because they are superior agencies. Therefore, although the statute precludes the Board from challenging its own decision, the Division and the Department have standing, and the Chancery Court's exercise of jurisdiction below was proper.
Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. November 11, 1993).

***1 Tenn. App. 1993 AGENCY JURISDICTION TO IMPOSE CIVIL PENALTIES**--The Chancery Court erred in reversing the Administrative Law Judge's conclusion that the Board was without authority to impose civil penalties on persons practicing electrolysis without a license. The Board has no jurisdiction to impose civil penalties upon this Respondent. The Board is not a board attached to the division, as required by T.C.A. §63-1-134 for a board to exercise the power to promulgate civil penalty regulations. The terms of T.C.A. §63-1-101 and §63-1-102, as well as the terminology "attached to the division of health related boards," limited the applicability of §63-1-134 to the 17 boards enumerated in T.C.A. §68-1-101. The Board has no jurisdiction for civil penalty purposes over any person not licensed by it. An administrative agency has only those powers "based expressly upon a statutory grant of authority" or which "arise therefrom by necessary implication." See Wayne County v. Solid Waste Disposal Board, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988). The Court of Appeals reasoned that a board's power to fine or penalize individuals not licensed by the board is not a power lightly bestowed by the General Assembly. With regard to the true health-related boards, the General Assembly felt obliged to enact in T.C.A. §63-1-134 an express grant of such powers as to individuals not licensed by said boards.

Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. November 11, 1993).

***1 Tenn. App. 1992 REVERSAL OF TERMINATION DECISION; AUTHORITY**--Civil Service Commission had statutory authority to reverse decision of Department of Mental Health and Retardation to discharge employee pursuant to its mandatory termination regulation for striking patient.

Department of Mental Health and Mental Retardation v. Allison, 833 S.W.2d 82 (Tenn. Ct. App. 1992).

***1 Tenn. App. 1992 AGENCY POWER**--Administrative agencies have only those powers given them by the legislature. See Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988).

Sierra Club v. Department of Health and Environment, Division of Water Pollution Control, and CBL of Nashville, Inc., No. 01-A-01-9203CH00131, 1992 WL 288870 (Tenn. Ct. App. October 16, 1992).

***1 Tenn. App. 1992 ADMINISTRATIVE PROCEEDINGS; RULE OF FAIRNESS**--In a case where the Commissioner argued that the Claimant's objections were waived by failure to comply with Rule 12 T.R.Cr.P., the court held that this rule was inapplicable to administrative proceedings since a rule of fairness prevailed in administrative proceedings. Therefore, if the seizing authority was surprised by the objections of the Claimant, it had a right to a continuance to further prepare its case. However, since this right was not asserted, it was deemed waived.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992).

***1 Tenn. App. 1983 WAIVER OF RIGHT TO COMPLAIN**--Under a statute limiting civil service employees, on direct appeal to Civil Service Commission, to a complaint of discharge for "non merit grounds," an employee by taking such direct appeal waived his right to complain of merits of charge that he was wrongfully absent.

Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***1 Tenn. App. 1983 CONSTITUTIONAL ISSUES, RESOLUTION OF**--Constitutional issues need not be decided if a case can be resolved on non-constitutional grounds.

Bah v. Bah, 668 S.W.2d 663, 668 (Tenn. Ct. App. 1983); Watts v. Memphis Transit Management Co., 462 S.W.2d 495, 498 (Tenn. 1971).

***1 Tenn. App. 1983 DECLARATORY JUDGMENT**--Ideally and ordinarily, a declaratory judgment suit does not invoke disputed issues of fact. Although the court has the authority to settle disputed issues of fact in Declaratory Judgment matters such settlement is ordinarily left to other forums.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***1 Tenn. App. 1981 PRESUMPTION AGAINST FORFEITURES**--Forfeitures are not favored in the law, and statutes that impose forfeitures must be strictly construed.

Goldsmith v. Roberts, 622 S.W.2d 438, 440 (Tenn. Ct. App. 1981).

***1 Tenn. App. 1981 KNOWLEDGE OF THE LAW**--Every citizen is presumed to know of the passage of a law. The burden falls to the citizen to take whatever steps are necessary to stay informed.

Davidson v. Metropolitan Government of Nashville in Davidson County, 620 S.W.2d 532 (Tenn. Ct. App. 1981).

***1 Tenn. App. 1976 THERE ARE NO INHERENT COMMON LAW AGENCY POWERS**--Administrative agency such as County Air Pollution Control Board has no inherent or common-law power and, being creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute, and any action which is not authorized by statute is a null and void.

Gen. Portland v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910 (Tenn. Ct. App. 1976).

***1 Tenn. Crim. App. 1979 INJUNCTION OF BOARD HEARING, CRIMINAL COURT**--Although the criminal trial court had jurisdiction to enjoin a Board of Medical Examiners hearing on charges of unlawfully prescribing and dispensing controlled substances when the respondent was indicted on the same or similar charges, it is the obligation of the respondent to offer sufficient proof to show injunctive relief was warranted. The Court held that possible prejudicial pretrial publicity did not warrant enjoining the Board hearing in abeyance until criminal charges heard, as the trial court has means to protect the rights of the Respondent. In consideration of the strong public interest in the quick resolution of allegations against errant physicians, there is no reason to hold that the Board was or could be constitutionally required to hold its proceedings in abeyance until the criminal prosecution could be terminated.

State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 4 APR 611.

***1 Ch. Ct. 1992 JURISDICTION OF AGENCY AFTER UNLAWFUL SEIZURE**--The fact that a seizure is unlawful does not affect the jurisdiction of the Commissioner of Safety to proceed in a forfeiture action.

Hardison v. Lawson, No. 91-2430-II (Davidson County Ch. Ct. February 14, 1992).

***1 Ch. Ct. 1992 DESIGNATES OF COMMISSIONER AUTHORIZED TO EFFECTUATE SEIZURES**--Officers who are designates of the Commissioner are authorized to effectuate seizures under the Tennessee Drug Control Act even if the ordinance creating the department in which the officers worked was invalid.

Hardison v. Lawson, No. 91-2430-II (Davidson County Ch. Ct. February 14, 1992).

***1 OAG 1986 LEGAL OPINIONS ARE NOT DISCLOSABLE**--Internal tax opinions from Department's legal office rendered to Commissioner are not disclosable under T.C.A. §4-5-218, but policy determinations by Department, which are used for future administrative action, would be available. T.C.A. §4-5-218 does not apply to attorney-client communications such as these legal opinions.

1986 Op. Tenn. Att'y Gen No. 86-177 (October 15, 1986). 7 APR 49.

***1 OAG 1985 PARTICIPATION IN BOARD DELIBERATIONS**--The technical secretary of the Tennessee Solid Waste Disposal Control Board should not participate in Board deliberations because of evidentiary, due process, and conflict of interest considerations. The appropriate manner of being apprised of the opinion, expertise, or information, which might be provided by such an individual is to hear from him as a sworn witness in the administrative proceedings.

Att. Gen. Op. to J. David Thomas (January 15, 1985). 5 APR 114.

***1 OAG 1984 EX PARTE COMMUNICATIONS**--The submission of letters concerning compromise of a pending rate case by counsel for the utility and the Public Service Commission staff during a recess of the deliberative session did not constitute ex parte communications by either side where each side was informed of the content of the other's letter and had opportunity to respond.

Att. Gen. Op., (March 14, 1984). 3 APR 270.

***1 OAG 1983 CONTESTED CASE DEFINITION**--The proceedings of the Board of Control of the Tennessee Corrections Institute, concerning certification of compliance by a local jail with minimum standards pursuant to T.C.A. §8-26-105, constitute a contested case under the Uniform Administrative Procedures Act §4-5-101, thus entitling the jailer to judicial review of a certification of noncompliance.

Att. Gen. Op., (October 5, 1983). 2 APR 528.

***1 OAG 1983 EXEMPTION FROM APA**--The Administrative Procedures Act does not apply to the Tennessee Board of Law Examiners.

Att. Gen. Op., (August 22, 1983). 4 APR 683.

***1 F.O. 1994 JURISDICTION**--The Commissioner retains jurisdiction over a corporation with a vision service plan even though it has dissolved and its Certificate of Authority has been cancelled. The Commissioner may properly exercise

jurisdiction over the dispute as to the fees to be paid to the Petitioner even after the dissolution of Tennessee Vision Services, Inc.

Joseph Dzik, O.D. v. Tennessee Vision Services, Inc., IO/11-1-94. FO/11-14-94. 8 APR 1.

***1 F.O. 1994 SUBJECT MATTER OF CIVIL LAWSUIT**--A matter that is the subject of a civil lawsuit is not properly before the Commissioner for determination.

Joseph Dzik, O.D. v. Tennessee Vision Services, Inc., IO/11-1-94. FO/11-14-94. 8 APR 1.

***1 I.O. 1994 RIGHT TO JURY TRIAL**--Citing state and federal case law, the Administrative Law Judge determined that, where a right is created by statute and committed to an administrative forum, jury trial is not required. Furthermore, where the State is a party in the case and the case involves the public right to combat illegal drug trafficking through the forfeiture procedure, no right to jury trial exists. The Administrative Law Judge recognized only one possible exception to this rule in cases where the forfeiture action is so punitive that it must reasonably be considered criminal.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***1 I.O. 1993 TIME IS OF THE ESSENCE**--As T.C.A. §68-11-109(a)(1), which creates the right to initiate a contested case, expresses the limits of time within which to file such an action, time is of the essence. Therefore, the limitation of the remedy is the limitation of the right.

Re: Medical University Center McFarland Hospital, IO/1-21-93. 8 APR 17.

***1 I.O. 1988 APPLICABILITY OF FEDERAL LAW; DISCRIMINATION CASES**--It is appropriate to look to federal case law in deciding a discrimination case, pursuant to Bruce v. Western Auto Supply, 669 S.W.2d 95 (Tenn. Ct. App. 1984). In the present case, since there was no Tennessee law on point, relevant federal case law and federal statutes were considered and relied upon in deciding this sex discrimination case.

Patricia M. Collett v. Harriman City Hospital, IO/7-22-88. 17 APR 1.

***1 I.O. 1984 JURISDICTION**--The ultimate determination of whether a real estate license will be reissued under T.C.A. §62-13-311 rests with the judgment of the Commission after consideration of the facts, independent of a court's determination. The fact that Chancery Court has ruled on issue of revocation of license does not preclude the Commission from instituting proceedings under T.C.A. §62-13-312.

Real Estate Commission v. Sarah M. Fryer, IO/8-28-84. 4 APR 687.

***1 NOTE 1995 LEGAL ISSUES IN PAE CONTESTED CASE HEARINGS**--For a discussion of current issues arising in hearings involving Medicaid recipients, consult the article entitled *Legal Issues in PAE Contested Case Hearings*. This article discusses the Uniform Administrative Procedures Act and addresses specific issues arising in PAE cases.

Ann M. Young, *Legal Issues in PAE Contested Case Hearings* (1995). 19 APR 94.

***1 NOTE 1995 REVIEW OF DRUG-RELATED FORFEITURE UNDER TDCA**--This paper contains a detailed discussion of the Tennessee Drug Control Act (TDCA).

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27. See also, Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

***1 NOTE 1983 CONTESTED CASES; PRE-HEARINGS**--Detailed discussion of the pre-hearing stage of contested cases under the Tennessee Uniform Administrative Procedures Act.

L. HAROLD LEVINSON, *The Pre-hearing Stage of Contested Cases under the Tennessee Uniform Administrative Procedures Act*, 13 MEMPHIS STATE UNIVERSITY LAW REVIEW 465 (1983).

2. STATUTORY CONSTRUCTION

***2 Tenn. 1993 STATUTORY CONSTRUCTION**--The guiding principle of statutory construction is to give effect to the legislative intent. The legislative intent is to be determined whenever possible from the plain language of a statute, read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.

State v. Spicewood Creek Watershed District, 848 S.W.2d 60, 62 (Tenn. 1993).

***2 Tenn. 1986 FEDERAL PREEMPTION**--Federal legislation is preemptive of both federal common law and state law in the area of control of pollution in interstate waters and environmental agency of one state may not take official action against

holder of valid discharge permits issued by another state, pursuant to authority granted by federal legislation, except as authorized by the federal statutes.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

***2 Tenn. 1986 STATUTORY CONSTRUCTION**--Normally, construction of a statute is restricted to the natural and ordinary meaning of the language unless ambiguity requires resort elsewhere to ascertain the legislative intent.

Memphis Publishing Company v. Holt, 710 S.W.2d 513, 516 (Tenn. 1986). 7 APR 41. 16 APR 280.

***2 Tenn. 1986 STATUTORY INTERPRETATION; LEGISLATIVE INTENT**--Forfeiture statutes are to be strictly construed because forfeitures are not favored in law. However, the court will not construe any statute, including a confiscation statute, so strictly as to result in a negation of the intentions of the legislators who passed the law.

Garret v. State, 717 S.W.2d 290 (Tenn. 1986).

***2 Tenn. 1977 STATUTORY PROVISION; HARMLESS ERROR**--The statute also contains a "harmless error" provision, stating that no agency decision in a contested case be reversed, remanded or modified "unless for errors which affect the merits of the decision complained of."

Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664, 667 (Tenn. 1977).

***2 Tenn. 1977 LEGISLATIVE INTENT OF STATUTES**--Legislative intent is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in the context of the entire statute, without any forced or subtle construction to limit or extend the import of the language.

Worall v. Kroger Co., 545 S.W.2d 736, 738 (Tenn. 1977).

***2 Tenn. 1976 PROCEDURAL STATUTE; RETROSPECTIVE APPLICATION**--Procedural statutes apply retrospectively not only to causes of action arising before such acts become law, but to all suits pending when legislation takes effect, unless legislature indicates contrary intention or immediate application would produce unjust results.

Saylors v. Riggsbell, 544 S.W.2d 609 (Tenn. 1976). 6 APR 22.

***2 Tenn. 1969 STATUTORY INTERPRETATION; PRESUMPTION OF CONSTITUTIONALITY**--In considering questions of constitutionality under the state constitution, our Supreme Court has held that all statutes are presumed to be constitutional and that presumption is a strong one.

Smithson v. State, 222 Tenn. 499, 438 S.W.2d 61 (1969).

***2 Tenn. 1956 STATUTES; APPLICATION TO SOVEREIGN**--The construing court is to infer that sovereign is not included under a general statute unless language compels the clear conclusion that the legislature intended to bind sovereign.

Davidson County v. Harmon, 292 S.W.2d 777 (Tenn. 1956).

***2 Tenn. 1924 STATUTORY CONSTRUCTION; CONFLICTING PROVISIONS**--When there is an irreconcilable conflict between the provisions of two statutes, the latter act must prevail.

Southern Construction Co. v. Halliburton, 149 Tenn. 319, 258 S.W. 409 (1924).

***2 Tenn. App. 1994 STATUTORY VAGUENESS; CONSTITUTIONAL TEST**--Statute is too vague to pass constitutional test when men of common intelligence must necessarily guess at its meaning and differ as to its application.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***2 Tenn. App. 1994 STATUTE; NOT VOID FOR VAGUENESS**--Statute prohibiting dispensing, prescribing or distribution of controlled substances for other than legitimate medical purposes, or not in good faith to relieve pain and suffering or cure ailment, physical infirmity or disease, was sufficiently clear to inform physician, claiming statute was void for vagueness, that he was prohibited from giving stimulants to obese patients for long periods of time, to help them feel better rather than to achieve weight loss.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***2 Tenn. App. 1994 APPELLATE REVIEW; STATUTORY CONSTRUCTION**--The construction of the statute and application of the law to the facts is a question of law. Therefore, the findings of an administrative law judge with regard to questions of statutory construction and the application of law are not binding on the reviewing court.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994); Beare Co. v. Tennessee Department of Revenue, 858 S.W.2d 906 (Tenn. 1993).

***2 Tenn. App. 1993 FORFEITURE STATUTES; STRICT CONSTRUCTION**--Forfeitures are not favored by the law. When a statute does provide for a forfeiture, statutes are to be strictly construed.

Hays v. Montague, 860 S.W.2d 403 (Tenn. Ct. App. 1993), Williams v. City of Knoxville, 220 Tenn. 257, 416 S.W.2d 758 (1967); Biggs v. State, 207 Tenn. 603, 341 S.W.2d 737 (1960).

***2 Tenn. App. 1993 FORFEITURE STATUTES; STRICT CONSTRUCTION**--Before a confiscation statute may be used to deprive a person of his property the facts must fall both within the spirit and the letter of the confiscation law under which the sovereign proposes to act.

Hays v. Montague, 860 S.W.2d 403, 406 (Tenn. Ct. App. 1993), Biggs v. State, 207 Tenn. 603, 608, 341 S.W.2d 737 (1960).

***2 Tenn. App. 1992 STATUTE PREVAILS OVER AGENCY RULES**--Department or agency of state created by legislature cannot by adoption of rules be permitted to thwart will of legislature.

Department of Mental Health and Mental Retardation v. Allison, 833 S.W.2d 82 (Tenn. Ct. App. 1992).

***2 Tenn. App. 1992 SUNSHINE LAW; STATUTORY CONSTRUCTION**--Sunshine Law is remedial and should be construed broadly to promote openness and accountability in government, and to protect public against closed door meetings at every stage of a government body's deliberations.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

***2 Tenn. App. 1989 FORFEITURE STATUTES, STRICT CONSTRUCTION OF**--Tennessee courts have held that statutes pertaining to forfeitures must be strictly construed.

Hooton v. Nacarato GMC Truck, Inc., 772 S.W.2d 41 (Tenn. Ct. App. 1989).

***2 Tenn. App. 1987 STATUTORY APPLICATION; DEFERENCE TO LEGISLATURE**--Although the application of this statutory scheme may seem harsh and unfair, it undoubtedly has a real tendency to effectuate the legislative purpose. Given that fact, the court is powerless to negate the impact of the statute, even though it may feel that its operation is inequitable. Any change, therefore, must be sought through the legislative process.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***2 Tenn. App. 1978 STATUTORY CONSTRUCTION**--In construing a statute, a cardinal rule is that the court must first ascertain the legislative intent in enacting the law and then construe that law to implement that intent.

City of Humboldt v. Morris, 579 S.W.2d 860 (Tenn. Ct. App. 1978).

***2 Tenn. Crim. App. 1985 STATUTORY INTERPRETATION**--It is an accepted rule of statutory interpretation that it must be presumed that the legislature in enacting a statute did not intend an absurdity, and that such a result must be avoided, if possible, by a reasonable construction of the statute.

State v. Harrison, 692 S.W.2d 29, 31 (Tenn. Crim. App. 1985).

***2 OAG 1984 STATUTORY CONSTRUCTION**--The general rule is that statutory provisions which relate to mode or time of doing act to which statute applies are not held to be mandatory, but directory only, especially absent showing of prejudice.

See also In re: James Hendrick, et al., IO/11-26-83.

Att. Gen. Op. to James Wood (June 27, 1984). 2 APR 574.

***2 I.O. 1995 STATUTORY CONSTRUCTION**--The guiding principle of statutory construction is to give effect to the legislative intent. The legislative intent is to be determined whenever possible from the plain language of a statute, read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning. Normally, construction of a statute is restricted to the natural and ordinary meaning of the language unless ambiguity requires resort elsewhere to ascertain the legislative intent.

Department of Commerce and Insurance v. Heritage Insurance Managers, Inc., IO/6-8-95. Appealed 6-19-95. 8 APR 105.

***2 I.O. 1995 CONSTRUCTION OF STATUTES PENAL IN NATURE**--It is an ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom the penalties are sought to be imposed. Two corollaries of this rule of statutory construction exist. First, when the law imposes a punishment on the offender which is discretionary and not in the form of redress to the injured

party, it will not be presumed that the legislature intended the punishment to extend farther than is expressly stated. Second, where there is doubt concerning the severity of the penalty prescribed by statute, a milder penalty over a harsher one will be favored. While such penal statutes comes with the general rule requiring strict construction, they must still be given a reasonable construction so as to carry out the intent of the legislature.

Department of Commerce and Insurance v. Heritage Insurance Managers, Inc., IO/6-8-95. Appealed 6-19-95. 8 APR 105.

***2 I.O. 1994 STATUTORY SCHEME; SOVEREIGN IMMUNITY**--The Postsecondary Education Authorization Act, T.C.A. §49-7-2001 does not grant authority for suits to be brought against the Tennessee Higher Education Commission. Although T.C.A. §49-7-2011 does allow a person to file a complaint *with the Commission* for damages resulting from any act by a postsecondary education institution or its agent, the Tennessee Higher Education Commission does not itself fall within the definition of either a postsecondary educational institution or an agent as such terms are defined in the Act. Therefore, it cannot be subjected to any of the remedial powers authorized by T.C.A. §49-7-2011 which the Commission itself administers. The statutory scheme clearly sets forth that the statute was enacted to provide a forum for the hearing of complaints, not for redress of any alleged misconduct of the Tennessee Higher Education Commission itself.

In re: Sandra Curless, IO/2-14-94. 8 APR 121.

***2 I.O. 1994 STATUTORY INTERPRETATION**--In construing a statute or regulation, an absurd result must be avoided by a reasonable construction.

Lottie Disney v. Bureau of Medicaid, IO/1-6-94. 18 APR 273.

***2 I.O. 1988 CONTROLLING LAW; CONFLICTING STATE & FEDERAL STATUTES**--Federal statutes and regulations control over a conflicting state statute in cases dealing with the administration of a federal program such as Medicaid.

Bureau of Medicaid v. Jerry Collins, IO/6-20-88. 16 APR 256.

3. RULES AND RULEMAKING

***3 E.D. Tenn. 1983 RULEMAKING**--Agency need not respond to all specific issues raised in comments on proposed rule; responses must be sufficient for court to determine whether agency considered relevant factors in reaching the final decision.

Athens Community Hospital v. Heckler, 565 F.Supp. 695 (E.D. Tenn. 1983).

***3 Tenn. 1984 AGENCY INTERPRETATION OF RULES**--An agency's interpretation of its own rules is generally given deference and controlling weight, unless plainly erroneous or inconsistent with the regulation.

Jackson Express v. Tennessee Public Service Commission, 679 S.W.2d 942, 945 (Tenn. 1984).

***3 Tenn. 1978 NOTICE OF RULE**--Only where parties have been actually informed in advance of a policy not promulgated under the Uniform Administrative Procedures Act and where parties have dealt in good faith at arm's length in reliance on such a policy, can such a policy be enforced.

State ex rel Eads v. Humphries, 562 S.W.2d 805, 807 (Tenn. 1978).

***3 Tenn. 1978 RULES AND POLICIES MUST BE DULY PROMULGATED**--Any statement of policy that falls under the definition of "rule" in the Uniform Administrative Procedures Act (UAPA) must be properly promulgated pursuant to the requirements of the UAPA in order to be valid.

State Board of Regents v. Gray, 561 S.W.2d 140, 143 (Tenn. 1978)

***3 Tenn. 1977 DEFINITION OF RULE**--The words "rule or regulation" within statute, which provides that "Before any rule or regulation of any state board shall become effective, [it] shall be approved by the Attorney General, and filed with the Secretary of State," refers to a statement of general applicability, of a State administrative officer or agency which either is legislative in nature and implements or prescribes law or policy, within scope of authority of such officer or agency, or prescribes rules of procedure or practice governing proceedings before such officer or agency, excepting those rules and regulations relating to organization or internal management of agency.

Chastain v. Tennessee Water Quality Control Board, 555 S.W.2d 113 (Tenn. 1977).

***3 Tenn. 1977 FISH COUNTING PROCEDURES RESOLUTION IS NOT A PROPER RULE**--Water Quality Control Board's resolution endorsing American Fisheries Society procedures for counting fish, which instructed its field personnel to employ certain procedure in estimating number of fish killed in a stream and their value and which determined that the estimates thus obtained would be admissible, was not a "rule or regulation" within meaning of statute that provides that

"Before any rule or regulation of any state board shall become effective such rule or regulation shall be approved as to legality by the Attorney General, printed by said agency and filed with the Secretary of State."
Chastain v. Water Quality Control Board, 55 S.W.2d 113 (Tenn. 1977).

***3 Tenn. 1966 DEFERENCE TO INTERPRETATION OF RULES BY AGENCY**--Where legislature has before it facts and things known to it and has enacted legislation that is apparently for protection of the public safety, health or morals, the court in its wisdom should not encroach upon the legislation or the right of the legislature, the court's only purpose in such matters being to determine whether or not there is plausible reason for the enactment of such legislation.
Tennessee Board of Dispensing Opticians v. Eyewear Corporation, 400 S.W.2d 734 (Tenn. 1966).

***3 Tenn. App. 1992 STATUTE PREVAILS OVER AGENCY RULES**--Department or agency of state created by legislature cannot by adoption of rules be permitted to thwart will of legislature.
Department of Mental Health and Mental Retardation v. Allison, 833 S.W.2d 82 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING REQUIREMENTS; SUBSTANTIAL COMPLIANCE**--Organization challenged order of Solid Waste Disposal Board adopting rule regulating commercial hazardous waste management facilities. The Court of Appeals held that Board substantially complied with rule-making requirements, and its order was to be affirmed, despite its failure to republish rule as altered following original publication and public hearings.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING**--It would be unreasonable and inefficient to require agency to publish exact text of proposed rule in order to obtain public reaction thereto and then require republication and rehearing for every alteration made in proposed rule before final adoption.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 STANDING TO COMPLAIN ABOUT RULE-MAKING**--Organization that was informed of proposed rule making by Solid Waste Disposal Board and that participated fully in proceedings before Board did not have standing to complain that it was aggrieved that others did not have equal opportunity to participate, by virtue of lack of a second publication before adoption of final draft of rule.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING; NOTICE REQUIREMENTS**--Solid Waste Disposal Board substantially complied with rule-making notice requirements before adopting rule regulating commercial hazardous waste management facilities, and its action had to be affirmed, though Board declined to repeat publication of rule for alterations made following initial publication and public hearings.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING; NOTICE**--Administrative rule making does not require that specific terms of rule be determined in advance and be finally adopted without modifications; it is sufficient if statutory publication is adequate to inform public of subject matter of rule to be considered and that public have adequate opportunity to present and support its view as to what rule should be made regarding that subject matter.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 PUBLICATION OF RULE**--Interested parties are not entitled to new publication of rule, as modified after original notice and hearing, in order to validate consideration of additional factual information nor to an opportunity of rebuttal so long as finished product is within bounds of original publication.
Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1976 STATUTORY AUTHORITY; ENFORCEMENT OF RULES**--In the absence of statutory authority, administrative agencies may not enforce their own determinations. Administrative determinations are enforceable only by method and in manner conferred by statute and by no other means, and exercise of any authority outside provisions of statute is of no consequence.

Gen. Portland v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910 (Tenn. Ct. App. 1976).

***3 Tenn. Crim. App. 1985 INTERPRETATION OF RULES**--An interpretation of a rule or statute found to create an absurd result must be avoided by a "reasonable construction."
State v. Harrison, 692 S.W.2d 29, 31. (Tenn. Crim. App. 1985).

***3 Ch. Ct. 1981 RULES AND POLICIES MUST BE DULY PROMULGATED**--A policy may constitute a "rule" under the definition in the UAPA, but if it is not properly promulgated under the UAPA, it does not have the effect of a rule and is null and void.

Tennessee State Employee's Association v. Atkins, No. 81-1564-II (Davidson County Ch. Ct. December 1, 1981).

***3 Ch. Ct. 1980 AGENCY POLICY AND RULES**--An agency's statement of policy is a "rule" under the Uniform Administrative Procedures Act and must be properly promulgated. See State Board of Regents v. Gray, 561 S.W.2d 140, 143 (Tenn. 1978).

Tennessee State Employees Association Incorporated v. Darrel D. Atkins, No. 81-1564-II (Davidson County Ch. Ct. December 1, 1980).

***3 OAG 1984 RULEMAKING**--Agencies are authorized to use the Administrative Procedures Act to promulgate regulations defining "proprietary records" and exempt them from public inspection.

Att. Gen. Op. to Commissioner John L. Parish (May 8, 1984). 3 APR 399.

***3 OAG 1983 RULEMAKING; EFFECTIVE DATE**--Rules filed with the Secretary of State pursuant to T.C.A. §4-5-207 become effective at the expiration of the thirty (30) day period regardless if this falls on a weekend or holiday.

Att. Gen. Op. to William M. Barrick (October 31, 1983). 2 APR 565.

***3 OAG 1983 RULES AND POLICIES MUST BE DULY PROMULGATED**--A Department of Transportation memorandum which defines "natural disaster", and which was not promulgated as a rule is invalid because it constitutes a rule under T.C.A. §4-5-102(2),(10).

Att. Gen. Op. to Representative Bob Davis (June 29, 1983). 2 APR 402.

***3 F.O. 1995 POLICY ANALYSIS OF RULE TO DETERMINE APPROPRIATE DISCIPLINE**--It is necessary to carefully analyze the wording of the Department policy to determine what portion of the policy was violated as well as what disciplinary action is appropriate.

Department of Correction v. Willie Jones, IO/12-12-94. FO/2-24-95. *Appealed* 1-19-95. 19 APR 242.

***3 F.O. 1994 RULES AND POLICIES MUST BE DULY PROMULGATED**--Even though a policy would constitute a rule under the definition of the Uniform Administrative Procedures Act, the fact that the policy has never been 1) properly promulgated under the UAPA, or 2) the subject of any prior notification or arms-length dealings in good faith between the Bureau and Medicaid recipient renders it void and of no effect against the Petitioner, pursuant to T.C.A. §4-5-216. Incorporation by reference of non-UAPA promulgated rules in Traci Stills v. Bureau of Medicaid is limited in application to Medicaid providers, not Medicaid recipients, and applies to the specific policy of accommodating new drugs and procedures.

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***3 F.O. 1994 AGENCY POLICY AND RULES**--Any statement of policy that falls under the definition of "rule" under the Uniform Administrative Procedures Act (UAPA) must be properly promulgated pursuant to the requirements of the UAPA in order to be valid. Only where parties have actually been informed in advance of a non-UAPA-promulgated policy and where parties have dealt in good faith at arm's length in reliance on such a policy, can such a policy be enforced.

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***3 F.O. 1994 POLICY INTERPRETATION OF RULE**--A policy interpretation does not have the force of law. It only represents the agency's view of what the law means. The agency is not even legally bound by its own interpretive rulings. Therefore, the administrative law judge can disagree with the agency's requirement and substitute his own judgment, especially in circumstances where there is a substantive modification in the rules.

In re: Creative Foods, Inc. d/b/a Wilma's Restaurant, IO/1-3-94. FO/1-13-94. 8 APR 140.

***3 F.O. 1993 DEFERENCE TO COMMISSIONER'S INTERPRETATION OF RULES**--The rules as interpreted by the Department through its Commissioner should be given deference unless plainly erroneous.

Sarah Simpson v. Department of Health, Bureau of Medicaid, FO/8-16-93. 19 APR 1. See also IO/7-14-93.

***3 I.O. 1994 DEFERENCE TO AGENCY INTERPRETATION OF REGULATION**--The Tennessee Department of Transportation is charged with the interpretation of the statutes under which it regulates. A reasonable interpretation of the statute by the Department controls, even though there may be another reasonable interpretation.

In re: Naegele Outdoor Advertising, IO/1-19-94. 8 APR 217.

***3 I.O. 1994 AGENCY RULES, COMPLIANCE**--In the absence of a finding that the rules are clearly contrary to State statutes, or otherwise invalidated by a State or Federal court of competent jurisdiction, the Commissioner is bound to comply with the plain language of the Department's duly promulgated rules.

Arlene Sommer v. Bureau of Medicaid, IO/1-11-94. 19 APR 272.

***3 I.O. 1994 DEFERENCE TO INTERPRETATION OF RULES BY AGENCY**--In the absence of a finding that the rules are clearly contrary to State statutes, or otherwise invalidated by a State or Federal court of competent jurisdiction, the Commissioner is bound to comply with the plain language of the Department's duly promulgated rules.

Arlene Sommer v. Department of Health, Bureau of Medicaid, IO/1-11-94. 19 APR 272.

***3 I.O. 1993 AGENCY AUTHORITY; ENFORCEMENT OF RULES**--Although Rule 0780-1-4-.04(5) was promulgated by the Commissioner of the Department of Commerce and Insurance, it was issued under the authority of Title 45, and therefore, the Commissioner of the Department of Financial Institutions is authorized to enforce the rule.

In re: Cleveland Loan and Finance Corporation; Cash Loans, Inc.; and Cash Loans of Nashville, Inc., IO/12-23-93. 8 APR 223.

***3 I.O. 1993 DEFERENCE TO AGENCY INTERPRETATION OF REGULATION**--In determining what interpretation is to be given a regulation, the question is not which interpretation would be adopted were the matter to be decided *ab initio*, but rather, whether the interpretation by the agency of its own regulation is reasonable and consistent with the regulation's language. An agency's interpretation of its own regulation is entitled to considerable deference, especially since the agency is charged with the regulation's implementation and enforcement.

Department of Health, Bureau of Medicaid v. Rescare-Sic Management, Inc., Community Home Health Professionals, Inc., Procure of Tennessee, Medshares Management Group, Inc., IO/11-19-93. 19 APR 278.

***3 I.O. 1993 UNPROMULGATED RULES; MEDICAID BULLETINS**--A Medicaid bulletin stating which drugs were Medicaid-reimbursable should not void under T.C.A. §4-5-216 for the following reasons: 1) the functional difficulties the Bureau would incur if it had to promulgate a rule under the Uniform Administrative Procedures Act every time it changed its policy, and 2) the need for discretion in order to function, especially in regard to new drugs that need to be made available to patients quickly.

Traci Stills v. Bureau of Medicaid, IO/8-31-93. 16 APR 86.

***3 I.O. 1993 UNPROMULGATED RULES; MEDICAID BULLETINS**--A "rule" found in a State Medicaid Manual Transmittal," as it has apparently not been promulgated pursuant to the Administrative Procedures Act, may not be legally invoked by the bureau for any purposes in any case.

Loretta Hollars v. Department of Health, Bureau of Medicaid, IO/8-19-93, 18 APR 350; see also FO/10-31-94, 18 APR 339.

***3 I.O. 1988 UNPROMULGATED RULES; DEAD ZONE POLICY IS VOID**--The unwritten dead zone policy of the Department of Transportation is void for the following reasons: 1) it is not a statement of pre-existing statutory policy, 2) it is more restrictive in some respects than the statute itself when it does not take rebuttable presumptions into account, and 3) it is an unwritten policy not properly promulgated pursuant to T.C.A. §4-5-202 or Uniform Administrative Procedures Act, and 4) it is not formally adopted as a rule or regulation of some state agency.

Fleming Properties, Inc. and Naegele Outdoor Advertising, IO/9-21-88. 17 APR 84.

***3 I.O. 1987 RULES AND POLICIES MUST BE DULY PROMULGATED**--The Department of Transportation's Outdoor Advertising Control Office's policy memorandum mailed to all then-existing sign permit holders dealing with the subject of: "Policy pertaining to non-conforming Signs destroyed by natural disaster," is a "rule" as defined by the Uniform Administrative Procedures Act (UAPA) which was not adopted in compliance with the UAPA and therefore is void, pursuant to T.C.A. §4-5-216.

Tenn. Dept. of Transportation v. Outdoor Communications, Inc., IO/10-1-87. 7 APR 307.

4. CONTESTED CASE PROCEDURE

***4 M.D. Tenn. 1987 DOE CASES; PROCEDURAL MATTERS**--The case of Doe v. Word is noteworthy in several respects. Certain sections of the case contain important information regarding 1) parties entitled to notice, 2) processing the PAE application, 3) contents of notices of denial, 4) administrative appeals, and 5) access to the PAE system. Doe v. Word, No. 3-84-1260 (M.D. Tenn. January 9, 1987). 7 APR 313. 16 APR 65.

***4 Tenn. 1981 FAILURE TO INITIATE APPEAL; APPELLATE JURISDICTION**--In those cases where the applicable statute provides that the time for appeal shall not be extended, failure to initiate the appeal within the prescribed period deprives the appellate court of jurisdiction. State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

***4 Tenn. App. 1992 STANDING; RELEVANT INQUIRY**--When plaintiff's standing is brought into issue, relevant inquiry is whether plaintiff has shown injury to himself that is likely to be redressed by favorable decision. Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***4 Tenn. App. 1992 STANDING; CHALLENGE TO AGENCY ACTIONS**--Person challenging actions of administrative agency must satisfy requirements of standing to sue. Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***4 Tenn. App. 1992 ADMINISTRATIVE PROCEEDINGS; RULE OF FAIRNESS**--In a case where the Commissioner argued that the Claimant's objections were waived by failure to comply with Rule 12 T.R.Cr.P., the court held that this rule was inapplicable to administrative proceedings since a rule of fairness prevailed in administrative proceedings. Therefore, if the seizing authority was surprised by the objections of the Claimant, it had a right to a continuance to further prepare its case. However, since this right was not asserted, it was deemed waived. Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992).

***4 Tenn. App. 1990 RIGHT TO APPEAL DURING PROBATIONARY PERIOD**--Rules of State Department of Personnel are clear that, during probationary period, employee may be separated from service without right of appeal or hearing. Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***4 Tenn. App. 1990 NATURE OF HEARING**--Even though a criminal prosecution is subject to more formal procedure than an administrative forfeiture proceeding, there should be equivalent attention to the needs of the tribunal and the rights of the litigants. Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***4 Tenn. App. 1989 HEARING, SCHEDULING OF**--The Commissioner is required to schedule a hearing only when the claim AND a cost bond or pauper's oath are timely failed. Woodall v. Lawson, 784 S.W.2d 657, 659 (Tenn. Ct. App. 1989); Johnson v. Roberts, 638 S.W.2d 401, 403 (Tenn. Ct. App. 1982).

***4 Tenn. App. 1989 APPEAL OF ORDERS; STRICT ADHERENCE TO TIME LIMITS**--The Claimant was notified separately of the seizure of his vehicle and his currency, but the Claimant's attorney sent a letter to the Commissioner within the fifteen day period requesting a hearing on the truck, but failing to mention the currency. The Claimant failed to appeal the forfeiture order of November 20, 1987 which notified him that the currency had been forfeited due to the lack of a petition alleging an interest in or requesting a hearing on the currency. The order also notified the Claimant of his right to appeal the order to the chancery court within sixty days. The Claimant's interest in the currency was alleged for the first time in his complaint filed June 17, 1988. In spite of the fact that the money was initially forfeited due to a mistake made by his attorney and through no fault of the his own, the Claimant eventually lost his rights to the currency because of his failure to appeal the forfeiture order within sixty days after it was issued. Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***4 Tenn. App. 1985 CONSOLIDATION**--Respondents are not permitted to request and agree to a consolidation and then assign that action as error. It is proper to consolidate interrelated cases for hearing, so long as there is not violation of constitutional principles. Fairweather, et al. v. William Long, Commissioner, et al., (Tenn. Ct. App. February 18, 1985). 5 APR 213.

***4 Tenn. App. 1983 WAIVER OF RIGHT TO COMPLAIN**--Under a statute limiting civil service employees, on direct appeal to Civil Service Commission, to a complaint of discharge for "non merit grounds," an employee by taking such direct appeal waived his right to complain of merits of charge that he was wrongfully absent.
Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***4 Tenn. App. 1983 LETTERS CONSTITUTED PETITION FOR HEARING**--Letters from County to Board, asking that the deadline for closing landfill be extended amounted to a petition for a contested case hearing. However, failure to hold a hearing on the petition was not fatal to the Board's later assessment of penalty and damages, because a later hearing was held, in which the issues raised in the request for an extension were considered. However, the case was remanded to the Board to enter further findings to support action taken, as there were no findings of fact made by the Board regarding: allowable extension, factors listed in T.C.A. §68-31-117(c) on penalty, what regulations the county violated, or what conduct was deemed a violation. See Solid Waste Disposal Control Board v. Anderson County Landfill, FO/2-8-84. Appealed to and pending in Davidson County Chancery Court as of March, 1985. 3 APR 160.
Anderson County v. Tennessee Solid Waste Disposal Board, (Tenn. Ct. App. May 25, 1983). 3 APR 141.

***4 Tenn. App. 1982 UNTIMELY REQUESTS FOR HEARING DENIED**--Where requests for hearing seeking return of currency seized at time of defendants' arrests for possession of a controlled substance were not filed within 15 days, after defendants received notice at time the money was seized and signed receipts containing language directing the action to be taken by an aggrieved party, subsequent untimely requests for hearing were properly denied.
Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982).

***4 OAG 1987 UNAUTHORIZED PRACTICE OF LAW**--Representation of a taxpayer before the State Board of Equalization (including filing of an administrative appeal to the Board) constitutes unauthorized practice of law if such representation is performed by a person other than the taxpayer himself or a person not licensed to practice in Tennessee. Such representation would violate both T.C.A. §23-3-103(b) and Tennessee Supreme Court Rules 6, 7, and 9 which regulate admission, licensing, and disciplinary enforcement of attorneys. Under T.C.A. §23-3-101(a), this decision applies equally to any unauthorized practice of law before "any body, board, committee, or commission constituted by law or having authority to settle controversies."
1987 Op. Tenn. Att'y Gen. No. 87-58 (April 2, 1987). 16 APR 276.

***4 OAG 1984 TIME DEADLINE FOR COMMENCEMENT OF HEARING**--Commencement of review of denial of water discharge permit before State Water Quality Control Board within 60 days from receipt of written petition was sufficient absent showing of prejudice not apparent in record; there was no requirement that such hearing be completed with 60 days.
Att. Gen. Op. to James Word (June 27, 1984). 4 APR 574. Solid Waste Disposal Control v. James Hedrick et al., IO/11-26-83. 3 APR 598.

***4 OAG 1983 CONTESTED CASE DEFINITION**--The proceedings of the Board of Control of the Tennessee Corrections Institute, concerning certification of compliance by a local jail with minimum standards pursuant to T.C.A. §8-26-105, constitute a contested case under the Uniform Administrative Procedures Act §4-5-101, thus entitling the jailer to judicial review of a certification of noncompliance.
Att. Gen. Op., (October 5, 1983). 2 APR 528.

***4 F.O. 1987 FAILURE TO TIMELY FILE A COST BOND**--Although failure to timely file a claim and petition for hearing has been treated as a requirement that is jurisdictional in nature, under Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982), failure to file a cost bond is treated as a curable defect. A claimant will therefore be permitted to execute a cost bond or file an affidavit indicating inability to pay, if appropriate.
Department of Safety v. Raymond Dean Martin, FO/11-12-87. 16 APR 239.

***4 P.H.O. 1987 MOTION TO QUASH SUBPOENA OF COMMISSIONER**--Motion to quash subpoena of Commissioner granted due to Commissioner's exempt status under T.C.A. §24-9-101(a).
Department of Correction v. Bijaura Ramakrishnaiah, PHO/4-27-87. 16 APR 304.

***4 F.O. 1983 TIME DEADLINE, APPEAL OF ASSESSMENT**--Motion for Summary Judgment by Department was granted because the company failed to timely appeal the assessment, and, therefore, under T.C.A. §59-8-318(a) the assessment became final and must be paid by the company.
White Oak Coal Company v. Department of Public Health, IO/3-10-83. FO/3-25-83. 1 APR 280.

***4 I.O. 1995 ALJ RULINGS MADE AT HEARINGS**--Various legal issues concerning the search of the claimant's residence and the admissibility of evidence were raised during the hearing. However, these issues were not pursued by either party and briefs were not filed by the parties with regard to these issues. Therefore, the administrative law judge decided that all rulings made at the hearing would stand.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***4 I.O. 1995 EFFECT OF CRIMINAL CONVICTION**--Grievant, who was convicted and sentenced for the crimes which served as the grounds for his termination, was precluded from contesting the acts for which he was dismissed since he had already been convicted of these acts under higher standard of proof in criminal court.

In the Matter of Robert Pugh, IO/6-26-95. 19 APR 32.

***4 I.O. 1994 RIGHT TO JURY TRIAL**--Citing state and federal case law, the Administrative Law Judge determined that, where a right is created by statute and committed to an administrative forum, jury trial is not required. Furthermore, where the State is a party in the case and the case involves the public right to combat illegal drug trafficking through the forfeiture procedure, no right to jury trial exists. The Administrative Law Judge recognized only one possible exception to this rule in cases where the forfeiture action is so punitive that it must reasonably be considered criminal.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***4 I.O. 1983 TIME DEADLINE TO HOLD HEARING**--Statutory provisions relating to mode or time of acting are not mandatory, but directory only; therefore, failure to hold hearing within 60 days specified at T.C.A. §68-31-113(e) does not mandate dismissal of case, where no prejudice shown. However, failure of the Respondent to assert right to hearing within the time limit constituted affirmative waiver of deadlines imposed by statute.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***4 NOTE 1995 LEGAL ISSUES IN PAE CONTESTED CASE HEARINGS**--For a discussion of current issues arising in hearings involving Medicaid recipients, consult the article entitled *Legal Issues in PAE Contested Case Hearings*. This article discusses the Uniform Administrative Procedures Act and addresses specific issues arising in PAE cases.

Ann M. Young, *Legal Issues in PAE Contested Case Hearings* (1995). 19 APR 94.

***4 NOTE 1995 REVIEW OF DRUG-RELATED FORFEITURE UNDER TDCA**--This paper contains a detailed discussion of the Tennessee Drug Control Act (TDCA).

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27. See also, Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

***4 NOTE 1983 CONTESTED CASES; PRE-HEARINGS**--Detailed discussion of the pre-hearing stage of contested cases under the Tennessee Uniform Administrative Procedures Act.

L. HAROLD LEVINSON, *The Pre-hearing Stage of Contested Cases under the Tennessee Uniform Administrative Procedures Act*, 13 MEMPHIS STATE UNIVERSITY LAW REVIEW 465 (1983).

5. PARTIES

***5 Tenn. 1969 PARTY; DEFINITION**--The Tennessee Supreme Court has defined the term "party" to mean "one having the right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from a judgment."

City of Chattanooga v. Swift, 442 S.W.2d 257, 258 (Tenn. 1969).

***5 Tenn. 1966 PARTY INTERVENTION MUST BE TIMELY**--T.C.A. §4-5-310 and T.C.A. §68-11-109 are not in conflict. Where the former provides for a general right to intervene while the latter provides for a specific 30-day time frame in which to file a petition for a contested case hearing, it is well settled in Tennessee that a special provision of a particular statute controls a general provision of another statute. The specific jurisdiction on a 30-day time frame must control the right to intervene. The right to intervene would still exist, but is would not be available to one who participated in the proceedings and tried, but failed to file a petition for a contested case hearing in a timely manner. Therefore, a Petitioner in a contested case hearing, who files late under the provisions of T.C.A. §68-11-109 and consequently has this petition dismissed, can not file a motion to intervene in the same matter under T.C.A. §4-5-310. To allow such intervention would effectively circumvent T.C.A. §68-11-109 in its 30-day limitation for filing a contested case hearing and render it meaningless.

Strider v. United Family Life Insurance Company, 403 S.W.2d 765, 768 (Tenn. 1966).

***5 Tenn. App. 1983 STANDING; PARTY AGGRIEVED**--At the very least, a party should allege facts demonstrating that he, she or it is adversely affected by decision of administrative agency in order to be classified as "aggrieved person" and therefore entitled to judicial review, and the "aggrieved and directly affected" person should be able to show a special interest in the final decision and that he, she or it is subject to a special injury not common to the public generally.

League Cent. Credit Union v. Mottern, 660 S.W.2d 787 (Tenn. Ct. App. 1983).

***5 OAG 1987 REPRESENTATION OF CORPORATIONS**--For a corporation to be represented by a "duly authorized representative" (ie. officer, director, or employee) of that corporation in a contested case hearing does not constitute unauthorized practice of law provided that the representative is connected with the corporation and does not act as an unlicensed advocate or legal representative. Corporations or other artificial entities may participate in a hearing through a duly authorized representative of the corporation. Such participation would not contravene the rationale prohibiting unauthorized practice of law. The purpose of the unauthorized practice of law provisions was to "prevent the public from being preyed upon by those who for valuable consideration seek to perform services which require skill, training and character, without adequate qualifications." Thus, although corporations (unlike natural persons) can not be represented in a court without a licensed attorney, the fact that a duly authorized representative may participate as well as give non-legal advice does not contradict this general policy against the unauthorized practice of law.

1987 Op. Tenn. Att'y Gen No. 87-183 (December 3, 1987). 16 APR 295.

***5 F.O. 1994 PROPER PARTY TO MAKE A CLAIM; PRESENCE**--Even if it was determined that the claimants at issue are not the owners of the seized money, the claimants could still be proper parties to file a claim because they were on the premises at the time of seizure and could reasonably be considered in possession of the money.

Department of Safety v. Callie Harris et al., FO/11-23-94. 19 APR 156. *See also* IO/7-25-94. 8 APR 235.

***5 I.O. 1994 PROPER PARTY**--Standing involves the determination of whether an individual is a proper party to make a claim for seized property. An owner or an individual who in possession of seized property is a property party to make a claim. Under the facts of the present case, even if it was determined that the Claimants are not owners, they could still be proper parties to file a claim because they were on the premises at the time of the seizure and could reasonably be considered in possession of the hidden money.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***5 I.O. 1994 TENNESSEE HIGHER EDUCATION COMMISSION HAS SOVEREIGN IMMUNITY**--The Postsecondary Education Authorization Act, T.C.A. §49-7-2001 does not grant authority for suits to be brought against the Tennessee Higher Education Commission. Although T.C.A. §49-7-2011 does allow a person to file a complaint *with the Commission* for damages resulting from any act by a postsecondary education institution or its agent, the Tennessee Higher Education Commission does not itself fall within the definition of either a postsecondary educational institution or an agent as such terms are defined in the Act. Therefore, it cannot be subjected to any of the remedial powers authorized by T.C.A. §49-7-2011 which the Commission itself administers. The statutory scheme clearly sets forth that the statute was enacted to provide a forum for the hearing of complaints, not for redress of any alleged misconduct of the Tennessee Higher Education Commission itself.

In re: Sandra Curless, IO/2-14-94. 8 APR 121.

***5 I.O. 1984 PERSON NAMED IN CITIZEN'S COMPLAINT IS A NECESSARY PARTY**--Person named in citizens' complaint is a necessary party to the hearing and must be properly notified.

Department of Health and Environment v. The United States Department of Energy, IO/4-6-84. 3 APR 314.

***5 I.O. 1979 PARTY'S STANDING TO INTERVENE**--Guidelines of Administrative Procedures Division establish that standing to intervene and standing to seek judicial review under APA synonymous; therefore, as no injury in fact shown, and no legislative intent to authorize such standing, Regional Development Agency's petition to intervene denied.

Environmental Defense Fund, et al. v. Department of Public Health, IO/2-27-79. 1 APR 32.

***5 I.O. 1976 POLITICAL SUBDIVISIONS**--Political subdivisions are not immune from suit by the State for damages pursuant to valid statute.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

6. ADMINISTRATIVE LAW JUDGES

***6 Tenn. 1977 DETERMINATION BY ALJ; CREDIBILITY AND WEIGHT OF TESTIMONY**--The credibility of the witnesses and the weight to be given their testimony was, of course, primarily a matter for determination by the hearing officer. Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The trier of fact may draw reasonable and legitimate inferences from established facts.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***6 Tenn. App. 1994 DISCRETION OF ALJ**--In the present case, the petitioner challenged the decision of the Administrative Law Judge to quash a *subpoena duces tecum* to the Tennessee Medical Association to produce all documents made, sent or received from January 1, 1980, to January 1, 1990. The Administrative Law Judge determined that the subpoena would impose an undue burden and substantial expense, that most of the materials were readily available elsewhere, and that the materials were not sufficiently relevant to the proceedings to justify the burden and expense. The Court of Appeals held that such a determination rested within the sound discretion of the Administrative Law Judge and insufficient grounds are shown for disturbing this discretionary decision.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***6 Tenn. App. 1993 CREDIBILITY DETERMINATION BY ALJ**--The administrative law judge, as the trier of fact, had the opportunity to observe the manner and demeanor of all of the witnesses as they testified from the witness stand. The weight, faith and credit to be given to any witness' testimony lies in the first instance with the trier of fact and the credibility accorded will be given great weight by the appellate court. Although there are possible inconsistencies, the administrative law judge's determination of the witnesses' credibility and accreditation of their testimony will be given great weight by the reviewing court.

Donihe and Donihe Graphics, Inc. v. Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***6 Tenn. App. 1992 CREDIBILITY DETERMINATION BY ALJ**--Where trier of fact believes one witness over other after taking into account factors that affect credibility, that finding will not be upset by reviewing court unless there is other real evidence to contrary.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992).

***6 Tenn. App. 1992 INCONSISTENT TESTIMONY; CREDIBILITY DETERMINATION BY ALJ UPHELD ON REVIEW**--Where the Claimant argued that inconsistencies in the testimony of the two officers who were on the scene detract from the weight of the one officer's testimony, the reviewing court upheld the credibility determination made by the administrative law judge. The inconsistencies were found to be but one factor out of many that make up the whole question of credibility. Therefore, where the trier of fact believes one witness over the other after taking into account the factors that affect credibility, that finding will not be upset by a reviewing court unless there is other real evidence to the contrary.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992); State ex rel. Balsinger v. Town of Madisonville, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968).

***6 Tenn. App. 1992 CREDIBILITY DETERMINATION TO BE MADE BY ALJ**--The credibility of the witnesses and the weight to be given their testimony is a matter for determination by the administrative law judge. Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The administrative law judge may draw reasonable and legitimate inferences from established facts.

Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***6 Tenn. App. 1992 ALJ DISCRETION; EVIDENCE RULES**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence. In the present case, the court found that the Administrative Law Judge did not abuse his discretion in applying the Rules of Evidence to exclude a deposition.

Rivers v. Tennessee Board of Dentistry, No. 01A01-9111-CH-00409 (Tenn. Ct. App. June 30, 1992). 16 APR 5.

***6 Tenn. App. 1990 DETERMINATION BY ALJ; WEIGHT OF EXPERT OPINION**--The hearing officer is not bound by a consulting physician's conclusory statement that the petitioner has a mental impairment which limits some of her work related activities. The ultimate determination of disability rests with the hearing officer and not with the treating or consulting physician. See Duncan v. Secretary of Health and Human Services, 801 F.2d 847 (6th Cir. 1986). Therefore, the court found that the hearing officer did not err in finding that the petitioner retained the capacity to work and that her generalized anxiety disorder could be resolved within 12 months with mental health treatment.

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***6 Tenn. App. 1990 AGENCY REVIEW OF ALJ DECISIONS**--The administrative law judge, as the presiding officer and not the agency, has jurisdiction to determine all procedural questions. Whatever duties are assigned to administrative law judges as such do not place the administrative law judges in a position superior to that of the agency. The clear intent of the statutes is that the administrative law judge shall serve the agency in a manner similar to a special master, and that all actions of the administrative law judges shall be subject to review and revision by the agency.
Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***6 Tenn. App. 1990 ALJ ORDER NOT AGENCY ACTION**--The order of the Administrative Judge was not an "agency" action until the expiration of the time for petition for review to the agency (Commissioner), and it never became an agency action because it was set aside by the agency.
Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***6 Tenn. App. 1988 DISQUALIFICATION OF HEARING OFFICERS**--Judges and other decision makers have been held to be disqualified without a showing of actual bias where "experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."
Hookanson v. Jones, 757 S.W.2d 347 (Tenn. Ct. App. 1988).

***6 F.O. 1995 DETERMINATION BY ALJ; CONFLICTING TESTIMONY**--In an administrative hearing, the administrative law judge makes the sole determination as to credibility. Any resolution of a conflict in testimony requiring a determination of the credibility is for the trial court and is binding on the reviewing court unless other real evidence compels a contrary conclusion.
Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***6 F.O. 1995 DETERMINATION BY ALJ; CREDIBILITY**--In determining which witness is credible and which witness is not, the administrative law judge must consider the various witnesses, source of knowledge, the witness' interest in the outcome of the hearing, their good intentions, their seeming honesty, their respective opportunities for personal knowledge of the facts of which they are testifying, and their conduct and demeanor during their testimony.
Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***6 F.O. 1995 ALJ DISCRETION; MOTIONS**--Rulings on motions are within the complete discretion of the administrative law judge. A judicial determination to take a motion under advisement is appropriate where the circumstances indicate a need to elicit testimony which will enlighten the trier of fact as to the totality of the evidence material to the case and the respective positions of the parties, or where legal research would be instructive. Where one party is unrepresented by counsel, there is an additional motivation on the judge's part to obtain a comprehensive understanding of the facts of the case and complete the judicial record prior to reaching conclusions of law. In the present case, the administrative law judge decided to take the State's motion for directed verdict under advisement and proceeded to hear the proof in the case.
Department of Safety v. Eric W. Risner, IO/5-5-95. FO/5-15-95. 8 APR 252.

***6 F.O. 1995 DEFERENCE TO ALJ DETERMINATION OF CREDIBILITY**--The State argued that the claimant son's knowledge of his father's reputation and record as a drug dealer coupled with the overpowering smell of marijuana in the vehicle at the time of seizure undermined the claimant son's assertion of innocent ownership. The Commissioner deferred to the administrative law judge's determination of the claimant's credibility and noted that nothing in the record undermined this determination on the credibility of the claimant. In view of the administrative law judge's determination on the claimant's credibility and after considering the record in the case, the Commissioner ruled that the claimant had met his burden of showing innocent ownership and was entitled to the return of the seized vehicle.
Department of Safety v. Mark E. Chouinard, FO/4-6-95. 16 APR 194.

***6 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--Evidence which is not admissible in a court of law may be admissible at the discretion of an administrative law judge in an administrative hearing. Likewise, evidence considered admissible may be excluded at the discretion of the administrative law judge on the basis of relevance and where exclusion is not prejudicial to either party and does not change the outcome of the case.
Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***6 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is

necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence.
Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***6 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--In the present case, the State argued that the ruling of the administrative law judge (ALJ) to hold evidence of claimant's prior arrests as inadmissible was contrary to the holding of Lettner v. Plummer, which allows for the admissibility of prior bad acts (ie. arrests). The Commissioner held that rulings on the admissibility of evidence are left solely to the discretion of the ALJ. Although, under the authority of Lettner v. Plummer, evidence not traditionally admissible in court is allowed at administrative hearings, whether or not to admit this evidence rests within the discretion of the ALJ. Therefore, the ruling of the ALJ in not admitting evidence of prior arrests did not contravene the holding in Lettner v. Plummer.
Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***6 F.O. 1994 ALJ RULINGS ON VALIDITY OF STATUTES**--Where the Claimant moved to dismiss the forfeiture hearing on the grounds that the forfeiture procedure was unconstitutional and in violation of Due Process, the Administrative Law Judge ruled that he was without authority to rule on the validity of a statute.
Department of Safety v. John M. Woodacre, IO/12-7-94. FO/12-19-94. 8 APR 260.

***6 I.O. 1995 ALJ RULINGS MADE AT HEARINGS**--Various legal issues concerning the search of the claimant's residence and the admissibility of evidence were raised during the hearing. However, these issues were not pursued by either party and briefs were not filed by the parties with regard to these issues. Therefore, the administrative law judge decided that all rulings made at the hearing would stand.
Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***6 I.O. 1994 CONSTITUTIONAL ISSUES; ALJ POWER TO HEAR**--Administrative Law Judges do not lack jurisdiction to hear issues of constitutionality. Following recent case law, the Administrative Law Judge determined that, since administrative agencies have the authority to consider the constitutionality of a statute, an administrative law judge sitting for an agency possesses the same authority, especially in regard to legal issues. See L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292, 298 (Tenn. 1991).
Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***6 I.O. 1985 HEARING OFFICER "OBJECTIONS"**--Case remanded for new hearing because of appearance of impropriety in hearing officer's "objection" to evidence proffered by Petitioner and relying on facts not in evidence.
Department of Safety v. Southern, IO/12-13-85. 6 APR 253.

***6 I.O. 1983 AUTHORITY OF ALJ TO REOPEN HEARING FOR ADDITIONAL PROOF**--Administrative Law Judge has authority to order hearing for additional proof on his/her own. Although in this case, order to such effect withdrawn to expedite issuance of Initial Order.
Department of Public Health v. Malone and Hyde Drug Distributors, IO/9-12-83. 2 APR 493.

7. NOTICE

***7 U.S. S.Ct. 1976 NOTICE UNDER DUE PROCESS**--Notice is an indispensable element of due process, but it can take a variety of constitutionally acceptable forms, depending on the circumstances and the accommodation of the competing interests involved. The essential inquiry is whether the information provided is "reasonably" calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976).

***7 Tenn. 1995 REQUIREMENT OF ADEQUATE NOTICE TO ALL INTERESTED PARTIES**--One of the essential elements of due process in the confiscation and forfeiture of private property is adequate notice to all interested parties. Where the State had knowledge of the Claimant's ownership interest in the forfeited property, both federal and state due process required the Department to have made a reasonable effort to notify the Claimant of the seizure and the possible forfeiture of the property. Under the facts presented on this appeal, it was clear that the Department of Safety possessed the requisite knowledge of the Claimant's possible proprietary interest in the seized property. Such knowledge required the Department to give notice to the Claimant of the seizure and possible forfeiture of the property.
Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***7 Tenn. 1976 PRE-SEIZURE NOTICE**--Automobile owner was not entitled to notice prior to seizure of automobile used in violation of Drug Control Act.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***7 Tenn. App. 1993 DEFECTIVE NOTICE, ABSENCE OF**--The notice of seizure in this matter was not defective because it indicated that the Claimant, Tom Donihe, is the owner of the vehicle, whereas the company, Donihe Graphics, Inc., is the actual owner of the vehicle. It is undisputed that the Claimant is the sole owner of Donihe Graphics. It must also be noted that the Claimant accepted the notice in question and pursuant to that notice filed the request for a hearing on behalf of himself and Donihe Graphics, Inc. Thus, the notice fulfilled the function it was intended to fulfill since it notified the primary, if not the only human being, who would have had any real interest in filing a claim in this matter. Therefore, it can not be considered defective under the facts of this case.
Donihe and Donihe Graphics, Inc. v. Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE**--Procedural due process embodies flexible standards requiring different procedural safeguards according to the circumstances of each case. However, deeply engrained in the concept is the principle that the State cannot interfere with a person's significant property interests without first providing a hearing at a meaningful time and in a meaningful manner. Adequate notice is an essential due process ingredient.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE REQUIREMENTS**--The right to a hearing has little reality or worth unless the affected parties are informed that the matter is pending and can choose for themselves whether to appear or default, acquiesce, or contest. Thus, in order to satisfy due process, the procedure for notice must, under all the circumstances, be reasonably calculated to apprise all interested persons of the pending action in order to afford them an opportunity to present their objections.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***7 Tenn. App. 1992 NOTICE; REASONABLE EFFORTS REQUIRED**--The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property, (2) the means available to the State to discover the identity of persons claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding. It follows, therefore, that the notice procedure used in cases of this sort should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992); Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992); Fell v. Armour, 355 F.Supp. 1319, 1329 (Tenn. 1972).

***7 Tenn. App. 1992 REASONABLE EFFORTS TO PROVIDE NOTICE**--The record in this case shows that the State had two appearances on behalf of the Claimant. The first attorney making an appearance on the Claimant's behalf notified the seizing agency that henceforth all notices should be given to the Claimant's second attorney. Despite that knowledge, the State did not notify the Claimant's second attorney, even after the first attorney to whom notice had been given said he would not attend the hearing because he had not heard from the Claimant. In the court's judgment, the State failed to take the reasonable steps necessary to give the Claimant notice of the hearing. The court found that State was required to make a reasonable effort to provide the Claimant's second attorney with notice even though he had not made an appearance on behalf of the Claimant. Therefore, where one attorney has made a formal appearance and then in his withdrawal designates another attorney as the Claimant's representative, that fact gives the State information that it cannot ignore in according the Claimant his due process rights.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE**--In order to determine whether a particular notice procedure comports with due process, the proper inquiry is whether the State acted reasonably in selecting a means likely to inform persons affected, not whether each property owner actually received notice. As long as the State employs reasonable means and makes reasonable efforts to notify a claimant, it has discharged its burden with respect to providing notice. The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property, (2) the means available to the State to discover the identity of persons

claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; CONSTRUCTIVE NOTICE**--Constructive notice is constitutionally inadequate with regard to persons whose identity is known or easily ascertainable.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE**--The notice procedure used should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; SCOPE OF NOTICE**--The scope of the constitutional requirement of timely and adequate notice should not depend on the State's suspicions about the source of the seized property or its belief that the likely claimants are involved in some sort of illegal activity. Likewise, it should not be influenced by the State's legitimate desire to separate criminals from their ill-gotten gains, to lessen the economic power of organized crime or drug enterprises, or to use the seized property to support other law enforcement activities.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***7 Tenn. App. 1992 PROCEDURAL DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE NOT FOUND**--In the present case, the officers made no effort to give notice to anyone other than claimant Brown, even though they had seized other evidence indicating that at least two other persons lived in the house where the money was found. With the names and addresses of these potential claimants already in their possession, the officers are required to expend some additional effort to provide the other residents of the house with notice of the seizure. Moreover, claimant Brown, the only resident of the house present when the money was seized, denied that he owned the money and, according to the arrest report, stated that "he did not know who the money belonged to." In light of this evidence, giving notice to claimant Brown and then relying on him to pass the notice along does not meet even the minimum requirements of procedural due process. Giving notice to a person who denies any knowledge of the ownership of property cannot be viewed as being reasonably calculated to notify potential claimants of their right to seek the property's return.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***7 Tenn. App. 1991 PROCEDURAL DUE PROCESS; ACTUAL NOTICE**--In the present case, the record reflected that law officers of Unicoi County were searching the premises of one Michael Sparks pursuant to a search warrant, and Claimant Thomas was found on the premises at that time in the van here in question. The van was searched pursuant to the search warrant. Thomas, an escapee from the Unicoi County Jail at the time, was in possession of the van. The amount of drugs found in the van was consistent with the amount a person would have for resale and not for personal use. Thomas contended that he was denied due process because he did not receive notice to the effect that a confiscation hearing was to be held on May 16, 1989. In support of his contention, he asserted that, at the time the notice was sent, he was incarcerated in the regional correctional facility in Wartburg whereas the notice of the hearing was mailed to the Unicoi County Jail. However, the Court of Appeals determined that Thomas still had notice of the hearing. In his pleadings to appeal the initial order, Thomas stated that he was aware that he was in default because he could not attend the administrative hearing on May 16, 1989. Furthermore, in his petition for reconsideration, Thomas made a similar assertion. Therefore, the Court of Appeals held that there was no denial of due process because Thomas did receive actual notice, as evidenced by his later pleadings.

Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***7 Tenn. App. 1990 NOTICE OF SPECIFIC ALLEGATIONS**--Grievant was found to have been denied minimum due process when at each level of the grievance procedure he was faced with new or additional allegations to which he was unprepared to respond. In the court's opinion, the lack of adequate notice of the charges pending against him obviously affected the manner in which he could defend the charges before the Commission and probably resulted in the Commission's finding that he should be demoted from his position. The court held that the Commission was obligated to provide minimum due process in the form of notice of specific allegations of inefficiency to the Grievant before a hearing on the merits.

Danny Tinnel v. Department of Correction, No. 01-A-01-9002-CH-00091 (Tenn. Ct. App. October 10, 1990). 16 APR 118.

***7 Tenn. App. 1989 NOTICE; DEFECTS**--Notice of seizure containing wrong statute number did not prejudice claimants. Failure of claimants to timely claim money seized in connection with arrest for drug offense was not excused by notice of seizure form which contained former number rather than present number of statute pertaining to filing of claims to seized property.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***7 Tenn. App. 1989 NOTICE; ESTOPPEL**--A claimant is estopped from claiming right to written notice by her failure to assert ownership of cash at scene of seizure. Claimant's right to written notice of seizure of cash was waived by her action in acquiescing to companion's representation to seizing officer that the money belonged to him and by her failure to assert ownership at scene of seizure.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***7 Tenn. App. 1989 REQUIREMENT OF STATUTORY CLAIM FOR RECEIPT OF NOTICE**--Attorney's letter referring to seizure of automobile did not constitute a statutory claim for seized cash, particularly where no bond or pauper's oath was filed as required by statute. Commissioner of Safety was not required to search records of property on hand for any property seized from a claimant who had contacted an attorney about claims to certain property without asserting a claim to other property for purposes of determining to whom to send forfeiture notice. Therefore, claimants were not excused from seeking judicial relief within time allowed by statute on the basis that they had not received notice.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***7 F.O. 1995 NO DEFECTIVE NOTICE FOUND**--Where the claimant switched the license tag from one car to another without changing the registration with the State, the seizure notice containing the wrong vehicle identification was not considered prejudicial to the claimant. The error on the first seizure notice receipt, which was later corrected with subsequent notice, was held to be harmless error as it did not prejudice the rights of the Claimant. Consequently, the claimant was held to have received adequate notice of the seizure, and the State properly followed Tennessee law and procedure in notifying the claimant.

Department of Safety v. Lillian Graham, FO/3-4-95. 16 APR 221.

***7 I.O. 1994 DEFECTIVE NOTICE NOT GROUNDS TO EXCUSE UNTIMELY FILING**--Where the Claimant contended that the seizure notice was so outdated, inaccurate, and confusing that it did not constitute adequate notice, the administrative law judge determined that it was not necessary to resolve those issues before addressing the merits of the forfeiture. Even if it was conceded that the seizure notice form could be confusing to some claimants under the circumstances, there was no proof that the Claimant was actually confused or misunderstood the pertinent elements of the notice. Therefore, Claimant's untimely filing was not excused for lack of notice.

Department of Safety v. William K. Gardner, IO/8-24-94. 8 APR 269.

***7 I.O. 1994 DEFECTIVE NOTICE NOT A BASIS FOR DISMISSAL**--Claimant's assertion that defective notice rendered the entire forfeiture untenable was rejected by the administrative law judge. While it was clear that the notice received by the Claimant was defective, any such error was considered harmless since she nevertheless filed a claim within the appropriate time. Defective notice, without prejudice and without more, is not a basis for the dismissal of a forfeiture.

Department of Safety v. Carolyn Atencio, IO/7-26-94. 8 APR 279.

***7 I.O. 1988 ADEQUACY OF NOTICE**--As long as it is undisputed that a Claimant had knowledge that the vehicle in question had been seized, then the State had given adequate notice to the Claimant and had made sufficient effort to notify the owner.

Department of Safety v. Raymond Leonard Carroll, Jr., IO/5-19-88.

***7 I.O. 1986 SPECIFICITY OF NOTICE**--"Notice", under T.C.A. §4-5-307(b)(2), must include specific factual allegations and specific reference to rules and statute sections allegedly violated, unless the Agency is actually "unable to state the matter in detail at the time the notice is served", in which case, "the initial notice may be limited to a statement of the issues involved. In this case, the Agency could have easily indicated which rule and statute section were allegedly violated, and the particular incidents upon which the proposed suspension is based.

Department of Safety v. Monique Zoller, IO/10-3-86. 7 APR 114.

***7 I.O. 1985 ADEQUACY OF NOTICE**--Respondent, who raised the issue of the adequacy of the notice of the hearing date, even though he did so in an inarticulate manner, and who alleged that he only received notice the day before the hearing, should have been asked whether he had adequate opportunity to prepare for the hearing. If he had claimed he needed more time, a continuance would have been in order. Case remanded for new hearing after reasonable and timely notice as to date and place of hearing to respondent. To avoid appearance of impropriety, new hearing should be before different hearing officer.

Department of Safety v. Randolph, IO/2-28-85. 5 APR 154.

***7 I.O. 1984 NOTICE, OPPORTUNITY TO SHOW COMPLIANCE**--T.C.A. §4-5-320(c) does not require opportunity to show compliance with lawful requirements prior to filing of charges, but rather requires opportunity to show compliance at a hearing under Uniform Administrative Procedures Act prior to any agency action which might adversely affect licensee (except in summary suspensions); therefore, motion to dismiss for failure to comply with §4-5-320(c) denied.
Department of Health and Environment v. Henry N. Peters, O.D., IO/4-12-84. 3 APR 307.

8. INSTITUTION OF PROCEEDINGS; FILING

***8 Tenn. 1995 FILING; BURDEN ON OWNER OF PROPERTY**--Once a seizure is made, the burden falls upon the owner, or someone with a legal interest in the property, to file for its return. Failure to make a claim within the statutorily prescribed time will result in a summary forfeiture.
Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***8 Tenn. 1981 FAILURE TO INITIATE APPEAL; APPELLATE JURISDICTION**--In those cases where the applicable statute provides that the time for appeal shall not be extended, failure to initiate the appeal within the prescribed period deprives the appellate court of jurisdiction.
State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

***8 Tenn. App. 1994 TIMELY FILING; NO EXCEPTIONS**--In the present case, the Commissioner notified the Claimant that the request for a hearing was untimely, having been filed one day after the statutorily required time limit. The Claimant then petitioned the Davidson County Chancery Court for relief, and the Chancellor ruled the Commissioner had no discretion under the drug control statute to waive or extend the statutory filing limit time, and since the claimant acted outside the time limit no relief would be afforded. The Court of Appeals held that the obvious intent of the drug control statute is that claims are to be considered only if timely received by the Commissioner and the Court of Appeals had no authority to grant exceptions.
Bonner v. State, No. 01A01-9404-CH-00197, 1994 WL 503894 (Tenn. Ct. App. September 16, 1994).

***8 Tenn. App. 1991 TIMELY FILING; NO SHOWING OF PREJUDICE**--Where the Claimant alleged the following procedural errors: (a) the final order of the Commissioner failed to state when the order was entered and effective; (b) the final order did not include a statement outlining the available procedures and time limits for seeking judicial review of the final order; (c) the trial court failed to grant a default judgment, although some ninety-seven days allegedly had elapsed from the time the claimant was served with summons until the motion for default was filed; (d) the trial court erred in not granting a declaratory judgment in his favor because claimant had not answered or responded to the suit. Citing Garrett v. State Dept. of Safety, 717 S.W.2d 290 (Tenn. 1986), the Court of Appeals recognized that the general rule in this state is that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory. The court held that this is especially true absent some showing of prejudice. Thus, in cases like the present one where no prejudice has been shown, less than strict adherence to time limits does not nullify an order.
Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***8 Tenn. App. 1989 HEARING, SCHEDULING OF**--The Commissioner is required to schedule a hearing only when the claim AND a cost bond or pauper's oath are timely failed.
Woodall v. Lawson, 784 S.W.2d 657, 659 (Tenn. Ct. App. 1989); Johnson v. Roberts, 638 S.W.2d 401, 403 (Tenn. Ct. App. 1982).

***8 Tenn. App. 1989 FAILURE TO TIMELY CLAIM; EXCUSE**--Failure to timely claim the money, in exceptional circumstances, is excused by the inadequacy of the notice of seizure. However, where there is no showing that either of the claimants was prejudiced by the printed form containing the former number rather than the present number of the statute, there is no excuse for failure to make a timely claim. By failing to make timely claim for the money, the Claimant has lost the right to contest the forfeiture of the money.
Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***8 Tenn. App. 1984 NO EXCUSE FOR UNTIMELY FILING OF CLAIM**--Owners of forfeited money could not be excused for failing to initiate their appeal within time prescribed by statute merely because they did not anticipate delay in delivery of their petition for review through the mail.
Houseal v. Roberts, 709 S.W.2d 580 (Tenn. Ct. App. 1984).

***8 Tenn. App. 1982 BURDEN UPON OWNER TO FILE PETITION FOR RETURN OF PROPERTY**--The Tennessee statute clearly puts the burden upon the owner of the seized goods to request a hearing within fifteen (15) days of notification of

seizure. Upon completion of these two requirements, the Commissioner of Safety is then required to set a date for a hearing within fifteen (15) days. Plaintiffs did not comply with the statutory requirements. The Commissioner of Safety properly denied untimely requests for a hearing.

Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982).

***8 Tenn. App. 1982 UNTIMELY REQUESTS FOR HEARING DENIED**--Where requests for hearing seeking return of currency seized at time of defendants' arrests for possession of a controlled substance were not filed within 15 days, after defendants received notice at time the money was seized and signed receipts containing language directing the action to be taken by an aggrieved party, subsequent untimely requests for hearing were properly denied.

Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982).

***8 Ch. Ct. 1991 LACK OF SEIZURE NOTICE DOES NOT EXCUSE UNTIMELY FILING**--If the Claimant wished to dispute the seizure of his vehicle, he was obligated to file a request for a hearing within 21 days after notice of the seizure. The court held that it was immaterial that the Claimant never received notification of the seizure since the Claimant, as evidenced by his untimely request for a hearing, was aware of the steps necessary to file a claim and yet failed to complete those steps in a timely manner.

Strong v. Department of Safety, No. 91-804-III (Davidson County Ch. Ct. October 7, 1991).

***8 F.O. 1995 CLAIM FILED BY MINOR**--A minor must file a claim for seized property either by his guardian or by an adult as next friend of the minor.

Department of Safety v. Harley D. Ellis and James D. Ellis, IO/4-6-95. FO/5-18-95. 8 APR 288.

***8 I.O. 1995 TIMELY FILING REQUIRED AFTER NOTICE OF SEIZURE**--A petition for a hearing seeking the return of seized property must be filed within thirty days of a claimant's receipt of the Notice of Seizure. The petition must also specifically identify the seized property and state the claimant's interest in it. The statute requiring timely filing of the hearing petition has been strictly construed by judges. In the present case, the petition was received 47 days after the claimant received the seizure notice with regard to the confiscated money. The claimant was aware of the seizure and the need to file a timely petition as evidenced by the two petitions she filed earlier seeking the return of other property. Since no proper petition was filed for the seized money, the money was forfeited to the State.

Department of Safety v. Deborah K. Burns, IO/6-28-95. 14 APR 24.

***8 I.O. 1984 INSTITUTION OF PROCEEDINGS AND JURISDICTION**--The ultimate determination of whether a real estate license will be reissued under T.C.A. §62-13-311 rests with the judgment of the Commission, independent of a court's determination, after consideration of the facts. The fact that Chancery Court has ruled on the issue of revocation of a license does not preclude the Commission from instituting proceedings under T.C.A. §62-13-312.

Tennessee Real Estate Commission v. Sarah M. Fryer, IO/8-28-84. 4 APR 687.

9. PLEADINGS

***9 6th Cir. 1990 PLEA OF NOLO CONTENDRE**--In an administrative proceeding, a plea of nolo contendere may be viewed as constituting an admission to the charges upon which the is made, subject to rebuttal by other evidence.

Myers v. Secretary of HHS, 893 F.2d 840, 845 (6th Cir. 1990).

***9 Tenn. App. 1983 PLEADING ALTERNATIVE THEORIES**--A party is permitted to allege alternative and even repugnant theories, but is not permitted to allege alternative or repugnant facts when knowledge of true facts are available to that party.

Johnson v. Tennessee Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

***9 Tenn. App. 1983 LACHES; PREJUDICE IS REQUIRED**--Mere delay is not sufficient for laches to be invoked. The delay must be unreasonable and the rights of another party must be materially affected. The party pleading laches as a defense must have been prejudiced by the delay.

W.F. Holt Company v. A & E Electric Company, Inc., 665 S.W.2d 722 (Tenn. Ct. App. 1983).

***9 Ch. Ct. 1984 NO LACHES AGAINST STATE**--Petitioner appealed January 1983 action by State Board of Accountancy revoking his certificate of public accountancy for violating T.C.A. §62-1-107(8) by inducing clients to make unsecured loans in 1972, 1974 and 1975, on the grounds of laches, among others. Laches cannot be asserted against the state or its instrumentalities. *See State of Tennessee v. Bomar*, 365 S.W.2d 295 (Tenn. 1962).

William F. Jordan v. Tennessee State Board of Accountancy, No. 83-834-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 246.

***9 I.O. 1995 LACHES**--Motion to dismiss Grievant's appeal of his three-day suspension granted after Grievant failed to submit all relevant documentation within thirty days of the receipt of the decision pursuant to a Department of Personnel rule. Although this thirty-day time limit could have been extended by written agreement between the manager involved and the Grievant, the Grievant made not attempt to comply or apply for an extension. Given the fact that 1) the Grievant has a pattern for delay, 2) there exists no good excuse for failing to submit the required documents, 3) and the Department has been prejudiced because of the Grievant's delay, the case was dismissed for failure to comply with the Department of Personnel rule and for laches.

Department of Environment and Conservation v. Danny Card, IO/6-8-95. Appealed 6-19-95. 8 APR 293.

10. DISCOVERY

***10 Tenn. App. 1983 PRETRIAL PROCEDURE**--Prejudice to Plaintiff by her exclusion from deposition was not shown where counsel for Plaintiff did not attend the deposition taking and fully cross-examined all witnesses and no argument was made on appeal that any more, less, or different questions would have been asked by counsel if his client had been present. Fact that Defendant's counsel forbade Plaintiff to attend deposition taking because of fear and physical condition of witnesses did not prevent Plaintiff from attending the depositions.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***10 Tenn. App. 1982 TAX ASSESSOR'S COMPUTER PRINTOUTS**--Computer printouts from the data banks in the hands of the tax assessor's Division of Property Assessments are public records within the meaning of T.C.A. §10-7-503, and are subject to discovery.

Real Estate Research Systems, Inc., et al. v. Haynes Baltimore, et al., (Tenn. Ct. App. December 27, 1982). 1 APR 143.

***10 Ch. Ct. 1984 LEGISLATIVE PRIVILEGE**--The speech and debate privilege of Art. 2, §13 is a privilege which can only be invoked by individual Senators to prevent compulsory testimony by them or their orders concerning their legislative actions. The privilege extends only to legislative activities and not political activities.

Joe Haynes v. David Collins, et al., No. 84-1278-III (Davidson County Ch. Ct. July 2, 1984). 4 APR 582.

***10 Ch. Ct. 1984 GOVERNMENT OFFICIALS**--Government officials cannot be examined in judicial proceedings concerning the mental processes they use in making decisions. Protective order seeking to prevent the deposition of the Secretary of State granted until Plaintiff can show information sought is not obtainable through a source other than oral deposition, such as written interrogatories.

Lyndon H. LaRoache and Van Hall v. Gentry Crowell, Secretary of State, No. 84-810-III (Davidson County Ch. Ct. June 13, 1984). 4 APR 552.

***10 OAG 1983 PREHEARING CONFERENCE**--A board or commission may not conduct an investigatory hearing for the purposes of obtaining facts from a Respondent and/or other witness pursuant to T.C.A. §4-5-306(a) (5) which permits pre-hearing conferences.

Att. Gen. Op. to Commissioner John C. Neff (January 13, 1983). 1 APR 166.

***10 I.O. 1995 DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANT**--Climant's request for disclosure of the identity of a confidential informant was denied. Relying on recent caselaw, the administrative law judge determined that the identity of the informant might arguably be disclosable given that the events of which he had only direct knowledge were relied upon by the State at the hearing. However, in the absence of any request by the claimant for further proceedings at which the use of the informant as a witness might in any way aid the claimant in this case, the request for the disclosure of the informant's identity was denied.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***10 P.H.O. 1987 GOVERNMENT OFFICIALS**--Motion to quash subpoena of Commissioner granted based on Commissioners exempt status under T.C.A. §24-9-101(2) as an "officer of the State." This was found to be a circumstance authorizing deposition since 1) grievant offered no reason sufficient to require Commissioner's testimony at the hearing and 2) grievant found able to prepare himself adequately through less burdensome discovery such as a deposition.

Bijaura Ramkrishnaiah v. Department of Correction, PHO/4-27-87. 19 APR 210.

***10 I.O. 1986 AGENCY MEMBERS**--An agency member is immune from discovery as to the agency member's decisionmaking in a case. However, this protection is not extended to include an agency member who consults with and assists the State's attorney in preparing for a hearing on a license denial.

Board of Examiners in Psychology v. Karel Saalwaechter, IO/10-3-86. Affirmed: Davidson County Ch. Ct. 7 APR 294.

***10 I.O. 1984 INTERVIEWS OF WITNESS IS NOT WORK PRODUCT**--Tape recorded interview of witness by attorney held discoverable because it in no manner, directly or indirectly, revealed attorney's mental impressions or legal theories but merely gave accounts of what witnesses observed and when they observed it.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/2-17-84. 3 APR 220.

***10 I.O. 1983 DISCOVERY OF OTHER PATIENTS**--State denied right to discover information about "other patients" of Respondent who were not part of the charges in the case, because questions on such other patients lacked subject matter relevancy in that they were not reasonably likely to produce or lead to production of evidence relevant to allegations in charges. However, the State may continue investigation and later amend charges if other violations are found.

Department of Health and Environment v. Henry N. Peters, O.D., IO/11-9-83. 2 APR 584.

11. CONTINUANCES & STAYS

***11 Tenn. App. 1992 RIGHT TO CONTINUANCE**--In a case where the Commissioner argued that the Claimant's objections were waived by failure to comply with Rule 12 T.R.Cr.P., the court held that this rule was inapplicable to administrative proceedings since a rule of fairness prevailed in administrative proceedings. Therefore, if the seizing authority was surprised by the objections of the Claimant, it had a right to a continuance to further prepare its case. However, since this right was not asserted, it was deemed waived.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992).

***11 Tenn. Crim. App. 1979 CONTINUANCE FOR CRIMINAL CASE**--Criminal Court may enjoin administrative proceedings under certain conditions where Respondent has criminal case pending, provided the Respondent/Defendant affirmatively shows that he would be constitutionally deprived and prejudiced in the absence of injunctive relief.

State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 4 APR 611.

***11 Tenn. Crim. App. 1979 INJUNCTION OF BOARD HEARING BY CRIMINAL COURT**--Although the criminal trial court had jurisdiction to enjoin a Board of Medical Examiners hearing on charges of unlawfully prescribing and dispensing controlled substances when the Respondent was indicted on the same or similar charges, it is the obligation of the Respondent to offer sufficient proof to show injunctive relief was warranted. The court held that possible prejudicial pre-trial publicity did not warrant enjoining the Board hearing in abeyance until criminal charges heard, as trial court has means to protect rights of Respondent. In consideration of the strong public interest in the quick resolution of allegations against errant physicians, there is no reason to hold that Board was or could be constitutionally required to hold its proceedings in abeyance until the criminal prosecution could be terminated.

State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 1 APR 44.

***11 Ch. Ct. 1983 STAY TO PERMIT INTERLOCUTORY REVIEW**--Administrative Law Judge may grant stay pending outcome of petition for interlocutory review filed in Chancery Court; stay lifted when Chancery Court dismissed petition (on grounds that adequate remedy afforded by review of final agency decision).

Water Quality Control Board v. M.C. Coal Company, Inc., No. 82-153-II (Davidson County Ch. Ct. May 28, 1983). 3 APR 438. IO/4-29-83. IO/5-17-83.

***11 F.O. 1984 REQUEST FOR CONTINUANCE**--Counsel for the State asked for a continuance on the ground that his prosecuting witness was not at the hearing. Administrative Law Judge determined that the witness knew of the fact that he would be in another court on that date and failed to ask the Administrative Law Judge for a continuance. Respondent and attorney traveled to Nashville expecting to have a hearing as the prosecuting witness failed to ask for a continuance in advance and as the amount involved was only \$100.00, Administrative Law Judge refused to grant a continuance and the state had to dismiss its case.

Department of Safety v. Yvonne Marable, IO/4-12-84. FO/5-30-84. 3 APR 316.

***11 I.O. 1994 ENTITLEMENT TO CONTINUANCE; MOTION TO SUPPRESS; TIMELINESS**--In the present case, the Claimant first raised the question of the legality of the search during cross-examination of one of the State's witnesses and after the evidence of the search had been introduced into the record. Although the Claimant failed to raise the issue prior to the

proof being taken, he did not waive his right to raise the issue in this matter. The Administrative Law Judge determined that the Claimant was not required to file a written motion or raise the issue of the search prior to the testimony being taken. Moreover, if the State considered itself prejudiced in this respect, it was entitled to request a continuance. However, since no motion for a continuance was filed by the State, the Administrative Law Judge was obligated to consider the merits of the Claimant's objection.

Department of Safety v. Michael Smith, IO/7-8-94. 8 APR 299.

12. DEFAULT

***12 Tenn. App. 1992 RELIEF ON APPEAL; DEFAULT JUDGMENTS**--Assuming the Commissioner's order is not void, a Claimant is not entitled to relief from the default judgment when he has not shown that he has a meritorious defense to the forfeiture. However, if the Commissioner's order is void, then it may be attacked directly on appeal, and the claimant does not have to show a meritorious defense to get the order set aside. No showing of a meritorious defense is necessary to support a motion to vacate a void judgment by default.

Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***12 F.O. 1995 DEFAULT OF BOND**--State's motion that the bond be defaulted was denied. Claimant executed a bond upon the seizure of his vehicle by the first seizing agency. In exchange for posting this bond, the claimant regained possession of his vehicle pending the first forfeiture hearing, which was continued at the request of the claimant. In the interim, the vehicle was seized again by a second seizing agency and was ordered forfeited to this seizing agency. Because the claimant could not deliver the subject vehicle to the first forfeiture hearing when it was convened, the State moved to have the bond defaulted for the claimant's failure to produce the vehicle. The State argued that the \$10,375 bond should be forfeited in lieu of the vehicle. Relying on statutory and case law, the administrative law judge denied the State's motion since the State, as express beneficiary under the bond, had been made whole by the forfeiture of the vehicle to the second seizing agency. In the judge's opinion, no bond forfeiture could be triggered once the vehicle was already in the possession of the State, albeit a different seizing agency than the one that negotiated the bond. The fact that the claimant is rendered incapable of returning the vehicle to the possession of the first seizing agency (even by virtue of his illegal activity) did not negate the fact that the vehicle was currently in permanent possession of the State. Moreover, the statute providing for the posting of a bond expressly requires that the benefit of that bond flow to the State, not to the seizing agency.

Department of Safety v. Young Sok Chang and Sangtae Chang, IO/4-20-95. FO/5-1-95. 8 APR 309.

***12 F.O. 1995 FAILURE TO APPEAR**--Since the State bears the burden of establishing that the seizure of the property was valid, Claimant's motion for return of the seized property due to the failure of the State to prosecute was granted. After having been properly notified yet having failed to appear on two separate occasions to present a case justifying seizure, fundamental fairness and due process required that the seized property be returned to the Claimant.

Department of Safety v. Wiley Adamson, IO/12-22-94. FO/1-3-95. 8 APR 320.

***12 F.O. 1993 DISMISSAL WITH PREJUDICE**--Rule 1360-4-1-.16, Official Compilation of the Rules and Regulations of the State of Tennessee, provides that, upon entry into the record of the default of the petitioner at a contested case hearing, the charges shall be dismissed as to all issues on which the petitioner bears the burden of proof.

Calvin Roe v. Department of Health, IO/5-11-93. FO/5-21-93. 19 APR 212.

***12 F.O. 1985 DEFAULT; NOTICE BY CERTIFIED MAIL**--Where Notice of Charges and Hearing was sent by certified mail to Respondent, but was returned "unclaimed", Respondent received adequate notice under the law and was thus held in default.

Department of Commerce and Insurance v. Ernest Dickey, Jr., IO/12-12-85. FO/12-24-85. 6 APR 241.

***12 F.O. 1984 HEARING WITHOUT PARTICIPATION OF RESPONDENT**--Respondent's failure to appear at the hearing of a contested case is grounds for holding Respondent in default and conducting the hearing without participation of Respondent and in such cases, the Initial Order shall include written Notice of Default, T.C.A. §4-5-309.

Insurance Division v. John Schuster, IO/5-10-84. FO/5-31-84. 3 APR 406.

***12 F.O. 1984 MOTION FOR DEFAULT; IN GENERAL**--A motion for default properly filed shall be granted by the Administrative Law Judge if the statutory time limits have expired. It may be set aside for good cause shown if a petition for reconsideration is filed within ten (10) days.

Department of Safety v. Terry Britt, IO/12-16-83. FO/1-6-84. 2 APR 669.

***12 F.O. 1983 PROOF OF GROUNDS FOR DEFAULT MOTION**--Failure to appear at hearing after receiving adequate notice resulted in default judgment. Request to have default set aside should include reasons to justify Respondent's failure to attend. State must submit proof at default hearing.

Tennessee Department of Safety v. Judy Hilton and Vernon Bowman, IO/11-10-83. FO/12-1-83. 2 APR 586.

***12 F.O. 1983 FAILURE TO SUBPOENA**--Failure of either party to procure necessary witnesses under subpoena may allow the other party, upon proper motion, to secure a default judgment.

George Templin v. Department of Safety, IO/11-7-83. FO/11-29-83. 2 APR 568.

***12 I.O. 1993 LENIENCY WHERE ATTORNEY IS AT FAULT**--An administrative agency should be lenient towards an innocent client who is subject to default because of an attorney's act or failure to act when the client is not responsible for the attorney's failure. When the client has done all he reasonably can do to file a timely claim and relies on counsel, any further omissions are the responsibility of the attorney, not the client.

Department of Safety v. James Bradley, IO/4-27-93. 8 APR 325.

***12 I.O. 1984 DEFAULT; IN GENERAL**--Party had notice and was aware of importance of attending.

Jones v. Department of Mental Health, IO/11-1-84. 4 APR 840.

13. DISMISSAL OF ACTIONS

***13 Tenn. App. 1993 LACK OF AGENCY STANDING**--The Chancery Court should have dismissed the appellees' petition because the agencies involved lacked standing under the U.A.P.A. to challenge the ALJ's final order and that therefore the Chancery Court lacked jurisdiction over the case. When the appellees failed to file a timely petition for review of the ALJ's order, it became a final order of the Board itself. The Board does not qualify as a "person who is aggrieved" as required for judicial review, pursuant to T.C.A. §4-5-322(a)(1), because the Board seeks judicial review of its own order. The legislative intent behind T.C.A. §4-5-322(a)(2) is to preclude the state from filing a petition for judicial review where the appeal would constitute in reality the agency appealing its own order.

Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. November 11, 1993).

***13 Ch. Ct. 1983 DISMISSAL FOR LACK OF STATE INTEREST; PRIVATE BUSINESS DECISION**--Revenue Rule 1320-4-07(3) was held to be legally invalid, and Capital Distributing's appeal seeking the State's interference into a private business decision, for reasons other than those representing legitimate State interests, was dismissed.

Capital Distributing Company v. Martha Olsen, No. 83-1245-II (Davidson County Ch. Ct. December 14, 1983). 2 APR 658.

***13 F.O. 1995 DISMISSAL FOR FAILURE TO APPEAR**--Since the officers of the seizing agency failed to appear for the hearing, despite having received notice, the State failed to present any evidence to support the forfeiture of the seized property. Consequently, the property was returned to the claimant.

Department of Safety v. Harley D. Ellis and James D. Ellis, IO/4-6-95. FO/5-18-95. 8 APR 288.

***13 F.O. 1995 DISMISSAL FOR FAILURE TO PROSECUTE**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where the Petitioner failed to comply with the administrative law judge's oral instructions and order directing the Petitioner to choose a hearing date so that the case could be re-set and heard, the case was dismissed with prejudice.

In The Matter of Angela Harris, IO/4-20-95. FO/5-1-95. 8 APR 333.

***13 F.O. 1995 DISMISSAL FOR FAILURE TO PROSECUTE**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where the Petitioner failed to comply with the administrative law judge's oral instructions and order directing the Petitioner to choose a hearing date so that the case could be re-set and heard, the case was dismissed with prejudice.

In The Matter of Matthew Baugh, IO/4-20-95. FO/5-1-95. 8 APR 339.

***13 F.O. 1995 MOTION TO DISMISS**--Claimant's motion to dismiss granted where no officer's from the seizing agency appeared to present the State's case. Since the State failed to present any evidence supporting forfeiture of the seized vehicle, the State was ordered to return the vehicle to the Claimant.

Department of Safety v. Peggy Lint, IO/4-10-95. FO/4-20-95. 8 APR 344.

***13 F.O. 1995 MOTION TO DISMISS**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where there was no good cause shown for the absence of the State's witness, the claimant's motion to dismiss the case was granted, and the State was ordered to return the seized money to the Claimant.

Department of Safety v. James Leonard Jones, IO/4-10-95. FO/4-20-95. 8 APR 350.

***13 F.O. 1987 MOTION TO DISMISS**--When a Respondent moves to dismiss at the conclusion of a Petitioner's case in a non-jury, administrative proceeding before an Administrative Law Judge, the standard to apply is whether the Petitioner proved his case by a preponderance of the evidence. If the Petitioner's case is not proved by a preponderance of the evidence, then 1) a judgment may be rendered against the Petitioner on the merits, or 2) the judge, at his discretion, may decline to render judgment until the close of the evidence. Regardless, the action should be dismissed if, on the facts found under the applicable law, the Petitioner has shown no right to relief.

Alcohol Beverage Commission v. Grannie White Liquors, IO/10-19-87. FO/12-10-87. 16 APR 313.

***13 F.O. 1987 MOTION TO DISMISS; STANDARD**--When a respondent moves to dismiss at the conclusion of a petitioner's case in an administrative proceeding before an administrative law judge, the standard to apply is whether the petitioner has made out his or her case by a preponderance of the evidence. If the petitioner's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the petitioner on the merits, or the judge, in his discretion, may decline to render judgment until the close of evidence; but the action should be dismissed if, on the facts found under the applicable law, the petitioner has shown no right to relief.

Alcoholic Beverage Commission v. Grannie White Liquors, FO/4-23-76. 16 APR 313.

***13 F.O. 1986 FAILURE TO TAKE DEPOSITION**--A Grievant who failed on two occasions to appear for the taking of her deposition after having been advised of the consequences of such conduct, had her grievances dismissed pursuant to Rules 37.02(e) and 37.04 of the Tennessee Rules of Civil Procedure.

Patricia Price v. Department of Correction, IO/2-18-86. FO/3-3-86. 6 APR 284.

***13 I.O. 1995 DISMISSAL WITH PREJUDICE**--Where the Petitioner bears the burden of proof and yet fails to appear and carry that burden, dismissal with prejudice, absent any good cause shown, is allowed on all issues as to which the Petitioner bears the burden of proof.

Michael Argo v. Department of Health, IO/6-13-95. 9 APR 1.

***13 I.O. 1995 DISMISSAL FOR LACHES**--Motion to dismiss Grievant's appeal of his three-day suspension granted after Grievant failed to submit all relevant documentation within thirty days of the receipt of the decision pursuant to a Department of Personnel rule. Although this thirty-day time limit could have been extended by written agreement between the manager involved and the Grievant, the Grievant made not attempt to comply or apply for an extension. Given the fact that 1) the Grievant has a pattern for delay, 2) there exists no good excuse for failing to submit the required documents, 3) and the Department has been prejudiced because of the Grievant's delay, the case was dismissed for failure to comply with the Department of Personnel rule and for laches.

Department of Environment and Conservation v. Danny Card, IO/6-8-95. Appealed 6-19-95. 8 APR 293.

***13 I.O. 1995 DISMISSAL DUE TO NO CIVIL PENALTIES AGAINST APPLICANTS**--Action assessing civil penalty against Respondent for violations of the Retail Food Store Inspection Act was dismissed after the State failed to establish that the Respondent was subject to *any* civil penalty as an applicant for a retail food store permit. Provisions relative to correction of violations by a permittee were not applicable to the Respondent since at the time of the inspection uncovering the violations, the Respondent had only applied for a permit. The State had no authority to impose civil penalties for any failure of the Respondent to correct violations found to exist prior to the issuance of a permit to the Respondent. According to the administrative law judge, the State's remedy in these situations would be limited to withholding approval of the applicant's permit until the facility was in compliance with the pertinent provisions.

In re: Manoocher Jashfar d/b/a K Express Quick Mart, IO/5-11-95. 9 APR 8.

***13 I.O. 1994 DISMISSAL FOR FAILURE TO PROSECUTE**--Rule 41 of the Tennessee Rules of Civil Procedure provides for dismissal of a claim for failure to prosecute. Where the Grievant permitted a case to stagnate and grow stale, involuntary dismissal was justified. The Grievant, by her conduct, evidenced a disinterest in prosecuting this matter and did not offer the Administrative Law Judge any excuses for the lengthy passage of time, any explanation for her inaction in the matter, any explanation for her failure to remain involved in the case, nor any indication of her desire to have the matter set for hearing. Therefore, in view of the fact that this matter was pending for six years, the Grievant's request for a hearing was dismissed for failure to prosecute.

Anita Johnson v. Department of Mental and Mental Retardation, IO/9-30-94. 9 APR 18.

***13 I.O. 1994 DEFECTIVE NOTICE NOT A BASIS FOR DISMISSAL**--Claimant's assertion that defective notice rendered the entire forfeiture untenable was rejected by the administrative law judge. While it was clear that the notice received by the Claimant was defective, any such error was considered harmless since she nevertheless filed a claim within the appropriate time. Defective notice, without prejudice and without more, is not a basis for the dismissal of a forfeiture.

Department of Safety v. Carolyn Atencio, IO/7-26-94. 8 APR 279.

***13 I.O. 1983 MOTION TO DISMISS, LACK OF KNOWLEDGE**--Assertion of lack of knowledge or intent to violate laws is a defense pertaining to merits of case and a question that can only be decided after hearing on the matter, therefore is not a ground for dismissal of case.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***13 I.O. 1983 DISMISSAL DUE TO EVIDENCE ILLEGALLY OBTAINED**--Assertion that Respondent's property was subjected to unreasonable search and seizure was not a proper basis for dismissal where evidence that was not received illegally might be introduced at hearing.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***13 I.O. 1983 DISMISSAL NOT MANDATED; TIME DEADLINE TO HOLD HEARING**--Statutory provisions relating to mode or time of acting are not mandatory, but directory only; therefore, failure to hold hearing within 60 days specified at T.C.A. §68-31-113(e) does not mandate dismissal of case, where no prejudice shown. However, failure of the Respondent to assert right to hearing within the time limit constituted affirmative waiver of deadlines imposed by statute.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***13 I.O. 1977 MOTION TO DISMISS; SCOPE OF FEDERAL IMMUNITY**--Immunity granted under 12 U.S.C. §884 is co-extensive with the self-incrimination constitutional privilege and only affords protection from criminal prosecution. Unless the state administrative hearing can be said to be criminal in nature, no protection would exist from suspension or revocation of Respondent's license to practice pharmacy. The exercise of the State's police power in conducting a quasi-judicial hearing to consider suspension or revocation of a license can in no way be considered a "criminal case" upon which immunity constitutionally attaches.

Tennessee v. Dr. Howard P. Burley, IO/9-29-77. 1 APR 12.

14. BURDEN OF PROOF

***14 Tenn. 1977 BURDEN OF PROOF; STATE**--The State has the burden of proving by a preponderance of the evidence that the property is subject to forfeiture.

Lettner v. Plummer, 559 S.W.2d 785, 787 (Tenn. 1977).

***14 Tenn. App. 1994 DISABILITY; BURDEN OF PROOF**--The burden of establishing disability is on the individual seeking benefits, and any impairments must be demonstrated by medically acceptable clinical laboratory diagnostic techniques. In addition to the fact of impairment as defined by the Social Security Act and the regulations thereunder, the individual must prove that such impairment is severe enough to preclude him from engaging in any substantial gainful employment activity.

Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

***14 Tenn. App. 1993 BURDEN OF PROOF; STATE**--At the forfeiture hearing, the State shall have the burden of proving by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture under the provisions of the Tennessee Drug Control Act. Failure to carry the burden of proof shall operate as a bar to any forfeiture.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***14 Tenn. App. 1991 DETERMINATION OF DISABILITY; BURDEN OF PROOF**--Although a prior determination of compensable disability raises a presumption of continuance of the disability, the presumption is rebuttable. In the present case, the court found that there was substantial and material evidence to support a finding contrary to the presumption. Relying on federal case law, the court held that a prior determination of disability does not shift the burden of proof. Evidence of improved condition leaves the ultimate burden upon the applicant to prove continued qualifying disability despite the improvement. See Haynes v. Secretary of Health and Human Services, 734 F.2d 284 (6th Cir. 1984) and Harmon v. Secretary of Health and Human Services, 749 F.2d 357 (6th Cir. 1984).
Brown v. Grunow, Commissioner, Department of Human Services, No. 01-A-019010CH00356, 1991 WL 24529 (Tenn. Ct. App. February 27, 1991).

***14 Tenn. App. 1987 BURDEN OF PROOF; NEED FOR NURSING HOME CARE**--In present case, the appellant asserted that the decision of the agency should be reversed because there is no substantial material evidence that the Medicare benefits should not be allowed. The Court of Appeals held that it is not the burden of Medicaid to show that benefits should not be allowed. Rather, it is the burden of the applicant to show that benefits should be allowed.
Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***14 Tenn. App. 1981 BURDEN OF PROOF; IN GENERAL**--In administrative proceedings, burden of proof ordinarily rests on one seeking relief, benefits or privilege.
Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***14 Tenn. App. 1981 BURDEN OF PROOF; IN GENERAL**--Burden of proof is on party having affirmative of issue, and such burden does not shift.
Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***14 F.O. 1995 BURDEN OF PROOF; STATE**--The State has the burden of proving by a preponderance of the evidence that the Respondent abused or intentionally neglected an elderly or vulnerable individual. Upon carrying this burden, the Department of Health then includes the Respondent's name on the registry of persons who have abused or intentionally neglected elderly or vulnerable individuals.
In The Matter of Alma Carver, IO/6-14-95. FO/6-27-95. 9 APR 39.

***14 F.O. 1995 BURDEN OF PROOF; INNOCENT OWNER**--Once the State establishes a *prima facie* case that the seized vehicle is subject to forfeiture, the Claimant must show that she has an interest acquired in good faith and that she neither had knowledge or nor consented to the illegal use of the vehicle.
Department of Safety v. Sharon L. Hansel, IO/1-10-95. FO/1-20-95. 9 APR 23.

***14 F.O. 1995 BURDEN OF PROOF; BOARD**--The Board was assigned the burden of proof in this case based upon its having initially approved reimbursement for in-patient care and then ordering decertification of the recipient.
Ashley Fielder v. Bureau of Medicaid, IO/1-6-95. FO/1-17-95. 9 APR 31.

***14 F.O. 1994 BURDEN OF PROOF; RECIPIENT**--To require one to prove how bad their condition is by going to a less supervised setting than a nursing home and actually getting worse is an absurd interpretation of Rule 1200-13-1-.10. Such an absurd construction must be avoided by a reasonable construction. See State v. Harrison, 692 S.W.2d 29, 31 (Tenn. Crim. App. 1985).
Charles Church v. Bureau of Medicaid, IO/8-18-94. FO/8-29-94. 18 APR 208; Vinnie Kingrey v. Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***14 F.O. 1993 BURDEN OF PROOF; DEFAULT**--Upon entry into the record of the default of the Petitioner at a contested case hearing after receipt of adequate notice, the charges shall be dismissed as to all issues on which the Petitioner bears the burden of proof. Rule 1360-4-1-.16 Official Compilation of the Rules and Regulations of the State of Tennessee.
Sam Huff v. Department of Health, Bureau of Medicaid, IO/10-1-93. FO/10-11-93. 19 APR 286.

***14 I.O. 1992 BURDEN OF PROOF; IMPAIRMENT**--Evidence of an impairment must be substantiated by professional medical testimony, not lay person opinion.
Joe C. Sartin v. Bureau of Medicaid, IO/7-15-92.

15. ESTOPPEL

***15 Tenn. 1966 ESTOPPEL AGAINST THE STATE**--The doctrine of estoppel cannot be invoked against the state. Board of Dispensing Opticians v. Eyewear Corporation, 400 S.W.2d 734 (Tenn. 1966).

***15 Tenn. App. 1991 OVERCHARGES; CORRECTIVE ACTION; ESTOPPEL**--In the present case, Bristol Nursing Home, Inc. (BNH) has appealed from the judgment of the Chancery Court affirming an administrative decision of the Tennessee Department of Health and Environment, Bureau of Medicaid, in two contested cases regarding a refund of overcharges and proper criteria for computing charges for care of indigent patients. BNH insists that the Chancery Court erred in failing to hold that, by previous acquiescence in the billings from BNH without the documentation which it now requires, the Agency is estopped from taking corrective action under state and federal law. However, the Court of Appeals held that estoppel does not apply against the State. The State's long-standing and expressly documented approval of BNH's cost allocation system does not amount to an estoppel and a waiver of the State's right to now challenge and disallow those charges. See Memphis Shoppers News, Inc. v. Woods, 584 S.W.2d 196 (Tenn. 1979); Bledsoe County v. McReynolds, 703 S.W. 123 (Tenn.1985); State v. Williams, 207 Tenn. 685, 343 S.W.2d 857 (1961). Bristol Nursing Home, Inc. v. Department of Health, Bureau of Medicaid, No. 01-A-01-9106-CH-00239, 1991 WL 244469 (Tenn. Ct. App. November 22, 1991).

***15 Tenn. App. 1989 NOTICE; ESTOPPEL**--A claimant is estopped from claiming right to written notice by her failure to assert ownership of cash at scene of seizure. Claimant's right to written notice of seizure of cash was waived by her action in acquiescing to companion's representation to seizing officer that the money belonged to him and by her failure to assert ownership at scene of seizure. Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***15 Tenn. App. 1983 ESTOPPEL FROM SEEKING REINSTATEMENT**--When a party applies for and obtains retirement from employment by the State and receives retirement benefits based upon a statement of incapacity to serve, the party is estopped from seeking reinstatement to the former position from which party was retired. Johnson v. Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

***15 F.O. 1986 COLLATERAL ESTOPPEL**--The doctrine of collateral estoppel may be applied in administrative law forums where the underlying issues are the same as well as in the interpretation of a statutory provision . Department of Transportation v. E. E. Rivers, IO/5-13-86. FO/5-28-86. 7 APR 261.

***15 I.O. 1993 ESTOPPEL AGAINST THE STATE**--As a rule, estoppel of a governmental agency is not favored. The only cases in which estoppel can be applied against a governmental agency is where the agency involved took some affirmative step or steps to induce reliance upon the party seeking estoppel. Reliance upon Respondent's own interpretation of the regulation is not sufficient grounds for estoppel. Department of Health, Bureau of Medicaid v. Rescare-Sic Management, Inc., Community Home Health Professionals, Inc., Procure of Tennessee, Medshares Management Group, Inc., IO/11-19-93. 19 APR 278.

***15 I.O. 1993 ESTOPPEL AGAINST A STATE AGENCY**--The doctrine of estoppel generally does not apply to the acts of public officials or public agencies. Public agencies are not subject to equitable estoppel or estoppel in pars to the same extent as private parties and very exceptional circumstances are required to invoke the doctrine against the State and its governmental subdivisions. Exceptional circumstances have been described as those cases where "the public body took affirmative action that clearly induced the private party to act to his or her detriment, as distinguished from silence, non-action, or acquiescence." Department of Correction v. Ray Sanders, IO/2-24-93. 9 APR 47.

16. EVIDENCE

***16 U.S. S.Ct. 1976 ADVERSE INFERENCE; FAILURE TO TESTIFY**--Drawing an adverse inference from a party's failure to testify does not violate their Fifth Amendment right where such inference alone is not used to support a decision against such party and where there is other substantial evidence to support the decision. Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976)

***16 U.S. S.Ct. 1965 EXCLUSIONARY RULE**--The exclusionary rule is applicable to [state] forfeiture proceedings when evidence is obtained under a defective search warrant.

One Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 1251 (1965).

***16 6th Cir. 1990 NOLO CONTENDRE PLEA; REBUTTAL BY OTHER EVIDENCE**--In an administrative proceeding, a plea of nolo contendere may be viewed as constituting an admission to the charges upon which the is made, subject to rebuttal by other evidence.

Myers v. Secretary of HHS, 893 F.2d 840, 845 (6th Cir. 1990).

***16 6th Cir. 1985 WEIGHT OF TREATING PHYSICIAN OPINION**--The opinions of treating physicians should be given greater weight than those held by physicians hired by the Secretary of Health and Human Services who only examined the patient once.

Farris v. Secretary of Health and Human Services, 773 F.2d 85, 90 (6th Cir. 1985); Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1054 (6th Cir. 1983).

***16 D.N.J. 1989 EVIDENTIARY CONSIDERATIONS; ATTENDANT CIRCUMSTANCES**--The trier of fact may consider common experience and the realities of normal life and may base its conclusions on all attendant circumstances.

U.S. v. \$87,375.00, 727 F.Supp. 155 (D.N.J. 1989).

***16 Tenn. 1977 TESTIMONY OF INVESTIGATING OFFICERS; ADMISSIBILITY**--Contrary to contention that testimony adduced in proceeding to forfeit funds under 1971 Drug Control Act was inadmissible hearsay, testimony of investigating officers as to reputation of four persons found on premises where funds were confiscated by police was based on investigating officers' personal knowledge, not upon hearsay or rumor. The court held that such testimony was admissible in forfeiture proceeding even if hearsay.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***16 Tenn. 1977 CIRCUMSTANTIAL EVIDENCE; INFERENCES**--Any fact may be established by direct testimony, circumstantial evidence, or both. The trier of fact may draw reasonable and legitimate inferences from established facts.

Lettner v. Plummer, 559 S.W.2d 785, 787 (Tenn. 1977).

***16 Tenn. 1977 CIRCUMSTANTIAL EVIDENCE**--Circumstantial evidence may establish the necessary facts to prove grounds for forfeiture, and legitimate inferences may be drawn from established facts.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***16 Tenn. App. 1994 SUBPOENA DUCES TECUM; MOTION TO QUASH**--It was within administrative law judge's sound discretion to quash subpoena duces tecum which sought production of documents issued over ten-year period on grounds that subpoena would impose undue burden and expense, materials sought were not sufficiently relevant to justify burden and expense, and materials sought were readily available elsewhere.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***16 Tenn. App. 1992 EXCLUSIONARY RULE**--Fruits of invalid stop and search were inadmissible as fruits of poisonous tree in civil forfeiture proceeding.

Williams v. Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992). 16 APR 103.

***16 Tenn. App. 1992 ALJ DISCRETION; EVIDENCE RULES**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence. In the present case, the court found that the Administrative Law Judge did not abuse his discretion in applying the Rules of Evidence to exclude a deposition.

Rivers v. Tennessee Board of Dentistry, No. 01A01-9111-CH-00409 (Tenn. Ct. App. June 30, 1992). 16 APR 5.

***16 Tenn. App. 1986 HEARSAY**--The claimants argue that the administrative law judge's decision should be set aside because it relies upon Richardson's out-of-court statements made at the time he was arrested. Richardson told the officers that he was delivering cocaine for Campbell. This is without merit for two reasons. First, there is overwhelming evidence of Campbell's possession of cocaine independent of Richardson's testimony. Second, Richardson's testimony, even if hearsay, was admissible pursuant to T.C.A. §4-5-313(1) if it possessed probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Therefore, Richardson's statement was certainly admissible to show probable cause for stopping Campbell's automobile.

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***16 Tenn. App. 1984 EXTRA JUDICIAL STATEMENT**--Statements made to police at station after arrest implicating appellant in previous drug deals were admitted into evidence by the Administrative Law Judge at forfeiture hearing. Court found statements properly admitted if declarant is dead, beyond jurisdiction and subpoena reach, no motive to misrepresent is present and the declarant is in a position to know facts forming subject of the declaration.

William Hillis and Carolyn Hillis v. Gene Roberts, No. 82-2188-I (Tenn. Ct. App. April 26, 1984). 2 APR 514.

***16 Tenn. App. 1983 ADMISSIBILITY OF EVIDENCE**--T.C.A. §4-5-313(1) has been interpreted to mean that, if the State could have proven facts at issue under the rules of evidence, the exception to the general rule that evidence must be admissible in court does not apply, because such facts are "reasonably susceptible to proof under the rules of court."

Grantham v. Bible, (Tenn. Ct. App. March 10, 1983).

***16 Tenn. App. 1983 APPLICABILITY OF RULES OF EVIDENCE**--Neither the technicalities of the Civil Rules of Procedure nor the common-law rules of evidence necessarily apply before non-judicial bodies unless the rules of that body so require. Records of Metropolitan Health Board would be admissible in evidence in a court of law in spite of their hearsay nature.

Goodwin v. Metro Board of Health, 656 S.W.2d 313 (Tenn. Ct. App. 1983).

***16 Tenn. App. 1981 WEIGHT OF EXPERT CONCLUSIONS**--Expert evidence in nature of conclusions is to be given little weight by administrative tribunal unless it is supported by factual data. Opinions of qualified experts constitutes valid evidence and may support decision of administrative tribunal.

Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***16 Tenn. App. 1981 ADVERSE INFERENCE; FAILURE TO CALL WITNESS**--If the State had indeed made out a prima facie case with its proof in chief then it would have been incumbent upon petitioner to call available witnesses possessing peculiar knowledge essential to his cause and if not, subject himself to the inference that the testimony would be unfavorable. Though such inference would not itself amount to substantive proof sufficient to serve as a substitute for facts required to be proved by the State to make out its case.

Goldsmith v. Roberts, 622 S.W.2d 938 (Tenn. Ct. App. 1981).

***16 Tenn. App. 1981 ADVERSE INFERENCE; FAILURE TO CALL WITNESSES**--Before an adverse inference may be drawn from the failure of a party to call available witnesses, the party with the burden of proof must first meet such burden without the benefit of adverse inferences. The adverse inference may serve to contradict or detract from whatever other evidence the respondent presents, if any.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***16 Tenn. App. 1981 WEIGHT OF EXPERT EVIDENCE**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data.

Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***16 Tenn. Crim. 1991 ADMISSIBILITY OF POLICE TAPE RECORDING**--There is no expectation of privacy in the back of a police car. Consequently, the tape recording that was surreptitiously made is admissible evidence.

State v. Mathis, No. 92-A-396 (Tenn. Crim. Ct. May 1, 1991).

***16 Ch. Ct. 1984 ADMISSION OF HEARSAY**--In Grantham v. Bible, the court held that hearsay testimony in the documents may be used, if properly qualified for admission, to corroborate other testimony of the wrongful act of a Claimant, but not as the sole evidence of his or her wrongful acts.

Shelby Crook v. Thomas Young, No. 84-838-III (Davidson County Ch. Ct. September 26, 1984). 4 APR 729.

***16 Ch. Ct. 1984 RELAXED RULES; ADMISSIONS OF EVIDENCE**--Administrative Procedures Act allows admission of evidence which would not be admissible under traditional court rules, but such evidence must be the type commonly relied upon by reasonable prudent person in the conduct of their affairs.

Fairweather, et al. v. William Long, Commissioner, et al., No. 83-483-II (Davidson County Ch. Ct. April 18, 1984). 3 APR 322.

***16 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--Evidence which is not admissible in a court of law may be admissible at the discretion of an administrative law judge in an administrative hearing. Likewise, evidence

considered admissible may be excluded at the discretion of the administrative law judge on the basis of relevance and where exclusion is not prejudicial to either party and does not change the outcome of the case.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***16 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***16 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--In the present case, the State argued that the ruling of the administrative law judge (ALJ) to hold evidence of claimant's prior arrests as inadmissible was contrary to the holding of Lettner v. Plummer, which allows for the admissibility of prior bad acts (ie. arrests). The Commissioner held that rulings on the admissibility of evidence are left solely to the discretion of the ALJ. Although, under the authority of Lettner v. Plummer, evidence not traditionally admissible in court is allowed at administrative hearings, whether or not to admit this evidence rests within the discretion of the ALJ. Therefore, the ruling of the ALJ in not admitting evidence of prior arrests did not contravene the holding in Lettner v. Plummer.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***16 F.O. 1993 WEIGHT OF EXPERT EVIDENCE; PETITIONER'S PHYSICIAN**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data. In the present case, Petitioner based her Petition for Reconsideration on a letter from her treating physician. In the absence of supporting facts and rationale, the doctor's conclusory opinion cannot properly be given great weight, especially given all the other evidence in the record to the contrary. Therefore, Petition for Reconsideration not granted.

Sarah Simpson v. Department of Health, Bureau of Medicaid, FO/8-16-93. 19 APR 1. *See also* IO/7-14-93.

***16 F.O. 1984 ADVERSE INFERENCE; TESTIMONY**--Claimant's invocation of Fifth Amendment privilege against self-incrimination leaves trier of fact free to conclude that the Claimant's testimony would be unfavorable to him and favorable to opposing party.

Department of Safety v. James Campbell, IO/9-25-84. FO/10-9-84. 4 APR 719.

***16 F.O. 1984 ADVERSE INFERENCE; FAILURE TO PRODUCE**--Failure of a party to produce testimony or documentary evidence allegedly in his possession raises the inference that such testimony or documentary evidence would be adverse to the party's interest.

Robert E. Neal v. Department of Safety, IO/7-26-84. FO/8-17-84. 4 APR 592.

***16 F.O. 1984 ADVERSE INFERENCE; TESTIMONY**--Trier of fact in a civil case may conclude when a witness invokes the Fifth Amendment that his testimony would be unfavorable to him.

Eugene Culver v. Department of Safety, IO/7-12-84. FO/8-7-84. 4 APR 588.

***16 F.O. 1983 CIRCUMSTANTIAL EVIDENCE MUST BE SUBSTANTIAL**--In the absence of direct proof, the State may carry its burden of proof. However, in order to do so, the circumstantial evidence must meet the "circumstantial and material" test set out in Goldsmith v. Roberts.

Richard W. Renner v. Department of Safety, IO/9-21-83. FO/10-27-83. 2 APR 507.

***16 I.O. 1994 MOTION TO SUPPRESS; TIMELINESS**--In the present case, the Claimant first raised the question of the legality of the search during cross-examination of one of the State's witnesses and after the evidence of the search had been introduced into the record. Although the Claimant failed to raise the issue prior to the proof being taken, he did not waive his right to raise the issue in this matter. The Administrative Law Judge determined that the Claimant was not required to file a written motion or raise the issue of the search prior to the testimony being taken. Moreover, if the State considered itself prejudiced in this respect, it was entitled to request a continuance. However, since no motion for a continuance was filed by the State, the Administrative Law Judge was obligated to consider the merits of the Claimant's objection.

Department of Safety v. Michael Smith, IO/7-8-94. 8 APR 299.

***16 I.O. 1994 ADVERSE INFERENCE; FAILURE TO PRESENT EVIDENCE**--Before an adverse inference may be drawn from the failure of a party to present evidence, the party with the burden of proof must first make out a *prima facie* case without the benefit of such adverse inference. Any adverse inference would not in itself amount to substantive proof sufficient

to serve as a substitute for facts required to be proved by the State to make out its case. In the present case, even though the State called the Claimant as an adverse party witness, no adverse inference was "added in" to the State's proof to make out its *prima facie* case. Any such inference was only balanced against any evidence the Claimant did present on his own behalf.
Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***16 I.O. 1994 ADVERSE INFERENCE; FAILURE TO TESTIFY**--Once the Petitioner has established a *prima facie* case, the Respondent's failure to testify creates an adverse inference against him. In the present case, the State was entitled to the inference that the fully developed evidence would establish liability against the Respondent because the Respondent did not offer proof to the contrary.

Department of Commerce and Insurance v. Craig W. Ash and Professional School of Insurance, IO/1-20-94. 9 APR 56.

***16 I.O. 1992 ADMISSIBILITY OF SETTLEMENT AGREEMENTS**--There is a strong policy in the law to encourage agreements between litigants. Using an agreement against a party does not serve that goal. However, while Tennessee law is established that a settlement or offer of settlement in a given matter can not be used as evidence against a party in that matter, there is no clear case which provides that one party's agreement with a third party cannot be used against that party *or* in another matter.

Department of Health v. Town & Country Drugs, Inc., IO/6-29-92. 19 APR 219.

***16 I.O. 1991 ADMISSIBILITY OF COERCED STATEMENT**--Administrative law judge determined that coerced statement by one of witnesses was inadmissible. Absent the use of the coerced statement, the State was unable to prove grounds for forfeiture.

Department of Safety v. Charles Keith Belcher, IO/8-23-91. 16 APR 151.

***16 I.O. 1987 WEIGHT OF TREATING PHYSICIAN OPINION**--Although deference to the treating physician's opinion would not lead to a conclusion in favor of the Petitioner where the treating physician simply did not present sufficient testimony that the Petitioner met the criteria of the rule, it is appropriate to apply the principle where the evidence presented by the applicant and by the Bureau of Medicaid through its Medical Director's testimony is fairly evenly balanced.

William R. Holt v. Department of Health, Bureau of Medicaid, IO/9-28-87. 17 APR 231.

***16 I.O. 1987 VIDEOTAPE; INFLAMMATORY EVIDENCE**--As direct evidence, with no opposing evidence and no questioning of credibility of witness presenting testimony of same underlying facts, videotape would be inflammatory, with its prejudicial effect outweighing its probative value. May be used to impeach or to bolster credibility if questioned.

Emergency Medical Services Board v. William Ennis Troup, IO/1-16-87. 7 APR 110.

***16 I.O. 1985 CIRCUMSTANTIAL EVIDENCE**--Although facts may be proved by circumstantial evidence, and although a well-connected train of circumstances may be more convincing than positive evidence of a witness, a finding cannot be based on speculation, surmise, conjecture or a remote inference. And, if circumstances are "perfectly consistent" with direct, uncontradicted, and unimpeached testimony that a fact does not exist, then such circumstances cannot be used to establish that fact.

Department of Safety v. Spurgeon, IO/5-20-85. 5 APR 296.

***16 I.O. 1985 ADMISSIBILITY OF SETTLEMENT OFFER**--Evidence of settlement offers is irrelevant and inadmissible evidence. See Paine, Tennessee Law of Evidence, §36.

Department of Safety v. Randolph, IO/2-28-85. 5 APR 154.

***16 I.O. 1985 POLYGRAPH RESULTS ARE INADMISSIBLE**--Polygraph tests results have been judicially declared to be unreliable in law and in fact, and are unreliable in any forum; therefore they are inadmissible in civil service administrative hearings. See Memphis Bank and Trust Company v. Tennessee Farmer's Mutual Insur. Co., 619 S.W.2d 395 (Tenn. Ct. App. 1981).

Tennessee Department of Correction v. Farabee, IO/1-24-85. 5 APR 142.

***16 I.O. 1983 HEARSAY EVIDENCE; LAB REPORT**--A lab report on drugs is an out of court statement offered to prove the truth of the matter contained therein and is clearly hearsay.

Department of Safety v. John Crisp, IO/10-28-83. 2 APR 562.

17. WITNESSES

***17 6th Cir. 1985 TREATING PHYSICIANS**--The opinions of treating physicians should be given greater weight than those held by physicians hired by the Secretary of Health and Human Services who only examined the patient once. Farris v. Secretary of Health and Human Services, 773 F.2d 85, 90 (6th Cir. 1985); Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1054 (6th Cir. 1983).

***17 Tenn. App. 1994 WITNESS BIAS; NO INVALIDATION OF BOARD'S DECISION**--Any bias of witnesses at hearing before Board for Licensing Health Care Facilities would not invalidate Board's decision. Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***17 Tenn. App. 1994 WITNESS BIAS; BOARD MEMBERS**--Participation by one or more members of Board for Licensing Health Care Facilities in task force study of problems of chiropractors in hospitals did not indicate bias so as to require recusal of any member or invalidate Board's decision prohibiting hospitals from granting staff privileges to chiropractors. Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***17 Tenn. App. 1994 WITNESS' FAILURE TO TESTIFY**--The State argues that the failure of the Claimant's parents to testify indicates that their testimony would have been unfavorable according to the missing witness rule. However, this rule would only apply if the State's proof and the legal deduction made therefrom established a prima facie case against the Claimant. Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994); Runnells v. Rogers, 596 S.W.2d 87 (Tenn. 1980).

***17 Tenn. App. 1993 WITNESS CREDIBILITY**--Weight, faith and credit to be given to any witness' testimony lies in first instance with trier of fact, and credibility accorded to testimony by trier of fact will be given great weight by appellate court. Donihe and Donihe Graphics, Inc. v. Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***17 Tenn. App. 1993 CORROBORATION OF WITNESS TESTIMONY**--Corroboration of accomplices' testimony regarding use of automobile in cocaine transactions was not required in forfeiture action which sought forfeiture of automobile, as forfeiture actions merely required proof by preponderance of evidence rather than proof beyond reasonable doubt. Donihe and Donihe Graphics, Inc. v. Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***17 Tenn. App. 1992 WITNESS CREDIBILITY**--Where trier of fact believes one witness over other after taking into account factors that affect credibility, that finding will not be upset by reviewing court unless there is other real evidence to contrary. Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992).

***17 Tenn. App. 1992 INCONSISTENT TESTIMONY OF WITNESS; CREDIBILITY DETERMINATION UPHeld ON REVIEW**--Where the Claimant argued that inconsistencies in the testimony of the two officers who were on the scene detract from the weight of the one officer's testimony, the reviewing court upheld the credibility determination made by the administrative law judge. The inconsistencies were found to be but one factor out of many that make up the whole question of credibility. Therefore, where the trier of fact believes one witness over the other after taking into account the factors that affect credibility, that finding will not be upset by a reviewing court unless there is other real evidence to the contrary. Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992); State ex rel. Balsinger v. Town of Madisonville, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968).

***17 Tenn. App. 1992 WITNESS CREDIBILITY DETERMINATION TO BE MADE BY ALJ**--The credibility of the witnesses and the weight to be given their testimony is a matter for determination by the administrative law judge. Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The administrative law judge may draw reasonable and legitimate inferences from established facts. Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***17 Tenn. App. 1990 WEIGHT OF EXPERT WITNESS' OPINION**--In order to be entitled to any deference by the hearing officer, a treating physician's opinion must be based on sufficient medical data. Harris v. Heckler, 756 F.2d 431 (6th Cir. 1985). In the case at hand, no medical evidence in the record supports the doctor's opinion of chronic obstructive lung disease. Moreover, the petitioner's testimony regarding her breathing problems is not sufficient to establish that this impairment is severe. Therefore, the hearing officer did not err in finding Ms. Harville's testimony regarding the severity of her breathing problems to be less than credible. See Sias v. Secretary of Health and Human Services, 861 F.2d 475 (6th Cir. 1988).

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***17 Tenn. App. 1987 ADVERSE INFERENCE; SPOUSE AS WITNESS**--In spite of the common law marital privilege, a spouse's failure to testify can raise an inference that their testimony would have been unfavorable because this privilege only protects confidential communications between spouses.

Murray v. Wood, No. 86-287-II, 1987 WL 7966 (Tenn. Ct. App. March 18, 1987).

***17 Tenn. App. 1981 WEIGHT OF EXPERT EVIDENCE**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data.

Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***17 Tenn. App. 1981 FAILURE TO PRODUCE WITNESSES; ADVERSE INFERENCE**--If the State establishes a prima facie case with its proof in chief, it is then incumbent upon the Claimant to call available witnesses possessing peculiar knowledge essential to his cause. If he does not, the Claimant subjects himself to the inference that the testimony would be unfavorable. However, such inference would not itself amount to substantive proof sufficient to serve as a substitute for facts required to be proven by the State to make out its *prima facie* case.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***17 Tenn. App. 1974 CREDIBILITY OF WITNESSES**--In a non-jury case, the trial judge is the sole judge of the credibility of the witnesses.

Tennessee Valley Kaolin Corporation v. Perry, 576 S.W.2d 488 (Tenn. Ct. App. 1974).

***17 OAG 1985 DELIBERATIONS; PARTICIPATION OF NON-BOARD MEMBERS**--The technical secretary of the Tennessee Solid Waste Disposal Control Board should not participate in Board deliberations because of evidentiary, due process, and conflict of interest considerations. The appropriate manner of being apprised of the opinion, expertise, or information, which might be provided by such an individual is to hear from him as a sworn witness in the administrative proceedings.

Att. Gen. Op. to J. David Thomas (January 15, 1985). 5 APR 114.

***17 F.O. 1995 DETERMINATION OF WITNESS CREDIBILITY**--In determining which witness is credible and which witness is not, the administrative law judge must consider the various witnesses, source of knowledge, the witness' interest in the outcome of the hearing, their good intentions, their seeming honesty, their respective opportunities for personal knowledge of the facts of which they are testifying, and their conduct and demeanor during their testimony.

Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***17 F.O. 1995 NO ADVERSE INFERENCE FOUND IN HUSBAND'S FAILURE TO TESTIFY**--No adverse inference was drawn from Claimant's failure to call her husband as a witness. Drawing such an inference was found to be inappropriate in view of the quasi-criminal nature of forfeiture cases.

Department of Safety v. Marie N. Crump, IO/1-31-95. FO/2-10-95. 13 APR 189.

***17 F.O. 1995 WEIGHT NOT GIVEN TO TREATING PHYSICIAN'S TESTIMONY**--In most cases, considerable deference is given to the opinion of the treating physician. However, while the treating physician stated that he believed that the Petitioner needed to be in a nursing home, he admitted that he was not familiar with the criteria for Medicaid reimbursement for ICF care, and he failed to establish that the Petitioner was in need of licensed nursing care on a daily basis as those terms are defined by the Medicaid rules.

Clara Crain v. Bureau of Medicaid, IO/1-23-95. FO/2-2-95. 9 APR 71.

***17 F.O. 1994 MISSING WITNESS RULE**--The missing witness rule applies only when the State has established a *prima facie* case. Once the State establishes a *prima facie* case, then an adverse inference arises from the failure of a party to call an available witness who possesses knowledge essential to that party's cause.

Department of Safety v. Callie Harris et al., FO/11-23-94. 19 APR 156. *See also* IO/7-25-94. 8 APR 235.

***17 F.O. 1994 CONFLICTING TESTIMONY**--In a case where it was difficult to reconcile the testimony of the Respondent and the testimony of the witnesses for the State, the administrative law judge resolved the credibility issue in favor of the State's witnesses since they were all in a position to see the activities about which they testified and there was no evidence of any bias or prejudice on their part.

Department of Health v. Dianne Jordan, IO/5-27-94. FO/9-6-94. 18 APR 237.

***17 F.O. 1993 WEIGHT OF EXPERT EVIDENCE; PETITIONER'S PHYSICIAN**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data. In the present case, Petitioner based her Petition for Reconsideration on a letter from her treating physician. In the absence of supporting facts and rationale, the doctor's conclusory opinion cannot properly be given great weight, especially given all the other evidence in the record to the contrary. Therefore, Petition for Reconsideration not granted.

Sarah Simpson v. Department of Health, Bureau of Medicaid, FO/8-16-93. 19 APR 1. *See also* IO/7-14-93.

***17 P.H.O. 1987 MOTION TO QUASH SUBPOENA OF COMMISSIONER**--Motion to quash subpoena of Commissioner granted due to Commissioner's exempt status under T.C.A. §24-9-101(a).

Department of Correction v. Bijaura Ramakrishnaiah, PHO/4-27-87. 16 APR 304.

***17 I.O. 1994 WITNESS CREDIBILITY; SPOUSE**--In the present case, the Claimant's wife testified that she was unaware of any drug dealings on the part of her husband although she did know he had been in prison for drug dealings in the past. She also testified that she purchased the seized vehicle with money she had saved and from property she had sold. However, the wife offered no receipts, affidavits, or cancelled checks to establish the veracity of her testimony. Bearing in mind the Claimant's wife's interest in the outcome of the case and her failure to provide any documentation to support her testimony, the administrative law judge found that her testimony lacked credibility.

Department of Safety v. Michael Smith, IO/7-8-94. 8 APR 299.

***17 I.O. 1992 CREDIBILITY OF WITNESSES**--In a non-jury case, the trial judge is the sole judge of the credibility of the witnesses. After applying the proper legal criteria to the conflicting testimony, the judge may resolve the credibility issue in favor of either party.

Department of Health v. Brenda J. Matheny, IO/10-6-92. 9 APR 65.

***17 I.O. 1987 TREATING PHYSICIAN OPINION**--Although deference to the treating physician's opinion would not lead to a conclusion in favor of the Petitioner where the treating physician simply did not present sufficient testimony that the Petitioner met the criteria of the rule, it is appropriate to apply the principle where the evidence presented by the applicant and by the Bureau of Medicaid through its Medical Director's testimony is fairly evenly balanced.

William R. Holt v. Department of Health, Bureau of Medicaid, IO/9-28-87. 17 APR 231.

18. DE NOVO HEARINGS

***18 Tenn. App. 1981 NO PRESUMPTION OF CORRECTNESS OF LOWER TRIBUNAL**--In a de novo hearing, administrative board to which appeal is addressed does not review action of lower tribunal, is not concerned with what took place below and no presumption of correctness attaches to action of lower tribunal.

Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***18 Tenn. App. 1981 NEW EVIDENCE**--Evidence other than that offered before lower administrative body is admissible before administrative tribunal which tries matter de novo.

Big Fork Mining Company v. Tennessee Water Quality Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***18 Tenn. App. 1981 NO PRESUMPTION OF CORRECTNESS OF LOWER TRIBUNAL**--Hearing provided for by statute governing review of denial of water discharge permit is in effect a de novo hearing. T.C.A. §70-328(b). In a de novo hearing, administrative board to which appeal is addressed does not review action of lower tribunal, is not concerned with what took place below and no presumption of correctness attaches to action of lower tribunal.

Big Fork Mining Company v. Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***18 I.O. 1984 EVIDENCE FROM LOWER GRIEVANCE HEARINGS**--Fifth Step Grievances under T.C.A. §8-30-328(c) are de novo, with evidence at 4th step Grievance hearings or at all other levels being of no concern and no presumption of correctness.

Department of Transportation v. Jackson, IO/11-20-84. 3 APR 115.

***18 I.O. 1984 RE-EXAMINATION OF DEFERRALS**--The de novo nature of the contested case proceeding requires the Commission to re-examine its previous decision to defer an application so that the evidence related to that ruling will be part of the contested case record, subject to judicial review.

Care Inns v. Morristown Medical Investors, IO/11-19-84. 4 APR 849.

19. INITIAL ORDERS

***19 Tenn. 1986 INITIAL ORDER DELAY**--Statute which requires rendering of final order within 90 days after conclusion of administrative law judge's hearing was directory, rather than mandatory, and, thus, administrative law judge's failure to comply with 90-day rule did not nullify hearing or order for forfeiture of truck with altered vehicle identification number.

Garret v. State, 717 S.W.2d 290 (Tenn. 1986).

***19 Tenn. 1986 INITIAL ORDER DELAY; HARMLESS ERROR**--Administrative law judge's failure to comply with statute which requires rendering of final order within 90 days after conclusion of hearing was not error affecting merits of decision that required forfeiture of truck with altered vehicle identification number, was harmless error, and, therefore, did not permit reviewing court to reverse forfeiture.

Garret v. State, 717 S.W.2d 290 (Tenn. 1986).

***19 Tenn. 1986 DIRECTORY FILING DEADLINE OF INITIAL ORDERS**--Because T.C.A. §4-5-314(g) requires an initial order to be rendered within ninety days after the conclusion of the hearing, the statute does not necessarily render an initial order void if it is not entered within twenty-one days. The ninety day requirement in T.C.A. §4-5-314(g) is considered directory, not mandatory. Therefore, in order to reverse an agency decision on the basis of time delay, there must be a showing of prejudice. The court, in arriving at its decision, relied upon the general rule that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory and upon T.C.A. §4-5-322(i) which provides: "No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the merits of the decision complained of."

Garrett v. State, 717 S.W.2d 290, 291 (Tenn. 1986).

***19 Tenn. 1977 EVIDENCE SUPPORTING INITIAL ORDER FINDINGS**--Evidence supported determination of administrative judge that money seized by police officers had been received in consideration for or in exchange for controlled substance and was therefore subject to forfeiture under 1971 Drug Control Act.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***19 Tenn. App. 1990 ENFORCEMENT OF INITIAL ORDERS**--Whether or not the order of the administrative law judge should be judicially enforced depends upon the effect of the subsequent actions of the "agency", the Commissioner of Safety.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***19 Tenn. App. 1990 INITIAL ORDER NOT CONSIDERED AN AGENCY ACTION**--The order of the Administrative Judge was not an "agency" action until the expiration of the time for petition for review to the agency (Commissioner), and it never became an agency action because it was set aside by the agency.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***19 Tenn. App. 1989 APPEAL OF INITIAL ORDERS; STRICT ADHERENCE TO TIME LIMITS**--The Claimant was notified separately of the seizure of his vehicle and his currency, but the Claimant's attorney sent a letter to the Commissioner within the fifteen day period requesting a hearing on the truck, but failing to mention the currency. The Claimant failed to appeal the forfeiture order of November 20, 1987 which notified him that the currency had been forfeited due to the lack of a petition alleging an interest in or requesting a hearing on the currency. The order also notified the Claimant of his right to appeal the order to the chancery court within sixty days. The Claimant's interest in the currency was alleged for the first time in his complaint filed June 17, 1988. In spite of the fact that the money was initially forfeited due to a mistake made by his attorney and through no fault of his own, the Claimant eventually lost his rights to the currency because of his failure to appeal the forfeiture order within sixty days after it was issued.

Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***19 Tenn. App. 1987 INITIAL ORDER NOT VOID FOR LACK OF TIMELINESS**--Absent a showing of prejudice by the Claimants, an initial order is not void if it is not entered within twenty-one days. In the present case, no prejudice has been shown by the Claimants. Moreover, the entry of the initial order in a timely fashion did not affect the merits of the decision. The evidence here shows that the currency was received illegally in consideration for or in exchange for controlled substances and that the seizure was proper. Therefore, the currency having been properly seized by the State, the Claimant cannot now contend that he was prejudiced by the failure to render the initial order in a timely fashion.

Murray v. Wood, No. 86-287-II, 1987 WL 7966 (Tenn. Ct. App. March 18, 1987).

***19 Tenn. App. 1986 INITIAL ORDER DELAY; NO FINDING OF PREJUDICE**--The Claimant contends that he was prejudiced by the two hundred and fifty-one (251) day delay in rendering the forfeiture order because the value of the vehicle has declined significantly since it was seized. This is not the kind of prejudice that requires the reversal of an otherwise valid forfeiture order. Untimely forfeiture orders should be reversed only when the delay affects the merits of the forfeiture decision in question. Thus, in order to invalidate an otherwise valid forfeiture order, the Claimant must demonstrate that the delay in rendering the decision prejudiced or interfered with his ability to present the merits of his claim. In the present case, the Claimant has failed to demonstrate this type of prejudice. While the delay in this case is significantly longer than the delay involved in Garrett v. State, the Claimant's only claim of prejudice is based upon the diminished value of the vehicle. This is not persuasive because the Claimant has failed to demonstrate that the vehicle should not be forfeited as contraband. The Claimant cannot be prejudiced by the decrease in the value of the truck since he has been unable to demonstrate that he is entitled to its return.

Rich's Auto Sales, Inc. v. Jones, (Tenn. Ct. App., October 29, 1986).

***19 Tenn. App. 1986 DELAY IN ISSUANCE DOES NOT INVALIDATE INITIAL ORDER**--While the decision in this case was not handed down until 110 days after the hearing, this delay, without more, does not invalidate the forfeiture. The general rule in this state is that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory. This is especially true absent some showing of prejudice. Thus, in cases like the present one where no prejudice has been shown, the court can infer that the legislature intended that the ninety day provision to be directory in nature. Since the statute is directory rather than mandatory, violation of the ninety day rule does not nullify the forfeiture hearing or order. Moreover, the claimants have failed to demonstrate that the merits of their claim have been prejudiced by the hearing officer's twenty day delay in issuing its opinion. Thus, the failure of the hearing officer to adhere to the time requirements of T.C.A. §4-5-314(g) does not invalidate its decision.

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***19 Tenn. App. 1986 INITIAL ORDER DELAY; PREJUDICE**--The Claimants argue that they have been prejudiced by the delay in rendering the forfeiture decision because 1) they have been deprived of the beneficial use of the money and the vehicle that were seized and 2) the value of the vehicle has depreciated with the passage of time. This is not the kind of prejudice that requires the invalidation of the forfeiture order. It has been recognized that not all varieties of prejudice require the invalidation of an administrative order handed down after the deadline imposed by statute. In Garrett v. State, the court applied the harmless error provisions of T.C.A. §4-5-322(i) to delayed forfeiture orders. The use of this rationale indicates that the Tennessee Supreme Court intended that forfeiture orders should be reversed only when the delay in rendering a decision affected the merits of the forfeiture decision. Therefore, in order to invalidate an otherwise proper forfeiture order, the claimant must demonstrate that the delay in making a decision prejudiced or interfered with its ability to present the merits of its claim. The claimants in this case have not demonstrated this type of prejudice. Their claims of loss of beneficial use of the money and the vehicle are not persuasive because they have been unsuccessful in proving that this property was not being used in violation of Tennessee Drug Control Act.

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***19 I.O. 1995 INITIAL ORDER MUST CONSIDER PRACTICAL ALTERNATIVES**--An initial order must consider whether there are any practical alternatives to in-patient nursing home care and whether the petitioner can receive the needed services in a residential home for the aged.

Cora Evans v. Bureau of Medicaid, IO/1-20-95. 9 APR 78.

***19 I.O. 1985 DEFICIENT INITIAL ORDERS**--Failure of the Hearing Officer to make concise and explicit findings of fact in the Initial Order renders it deficient under T.C.A. §4-5-314(c).

Department of Safety v. Lowery, IO/1-28-85. 5 APR 124.

***19 I.O. 1982 AMENDED INITIAL ORDERS**--Initial Orders may be amended to change the effective date of the initial order to the effective date of the later filed amended order.

Department of Insurance v. Donald E. Dykes, IO/7-20-82. 1 APR 125.

20. FINAL ORDERS

***20 M.D. Tenn. 1987 CONTINGENT APPROVAL IF FINAL ORDER DELAY**--If a final order is not issued by the 90th day following the Department's request for a hearing, contingent payment will be made until a final order issues. Such relief shall be withheld to the extent that delays in disposing of an appeal within 90 days are the consequence of a continuance of the hearing granted at the request of the Medicaid recipient or to the extent that the administrative law judge finds that the delay is

otherwise attributable to the recipient's inaction. The contingent approval provision will not apply if a delay is the consequence of the continuance of a hearing, granted at the request of the recipient or if the administrative law judge finds that the delay is attributable to the recipient's inaction.

Doe v. Word, No. 3-84-1260 (M.D. Tenn. January 9, 1987). 7 APR 313. 16 APR 65.

***20 Tenn. App. 1994 REVERSAL OR MODIFICATIONS OF FINAL ORDERS**--Under the Administrative Procedures Act the court may reverse or modify the decisions of the administrative agency if the agency's decision was: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedures; (4) arbitrary or capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***20 Tenn. App. 1994 INVALIDATION OF FINAL ORDER; REQUIRED SHOWING**--In order to invalidate administrative agency decision, showing must be made that decision is arbitrary and capricious, characterized by abuse of authority, clearly an unwarranted exercise of authority, or unsupported by substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***20 Tenn. App. 1994 WITNESS BIAS; NO INVALIDATION OF FINAL ORDER**--Any bias of witnesses at hearing before Board for Licensing Health Care Facilities would not invalidate Board's decision.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***20 Tenn. App. 1994 FINAL ORDER; FINDINGS OF FACT**--Findings of fact contained in declaratory order of Board for Licensing Health Care Facilities did not contradict Board's decision prohibiting hospitals from granting staff privileges to chiropractors where the findings constituted recitations of evidence, statements of what the Board could do, or other factual conclusions not inconsistent with Board's decision.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***20 Tenn. App. 1994 INVALIDATION OF FINAL ORDER; REQUIREMENTS**--In order to invalidate the decision of an administrative agency, there must be a showing that the decision is arbitrary and capricious, characterized by abuse of authority, clearly and unwarranted exercise of authority, or unsupported by substantial and material evidence. Moreover, in the present case, there is insufficient evidence of bias to require recusal of any member of the Board.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***20 Tenn. App. 1991 FINAL ORDER REVIEW; TIME LIMITS**--The sixty-day time limit on petition for review of forfeiture order of Department of Safety began to run from entry of order, and not from time that the Claimant received notice thereof, so that time limit was not extended for additional three days because notice was received through mail; procedural rule providing for additional time after service by mail did not apply.

Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***20 Tenn. App. 1991 FINAL ORDER REVIEW; NO TIME EXTENSION**--The provisions of Tenn.R.Civ.P. 6.05 may not be used to extend the time for filing a petition to review a final order of the Tennessee Department of Safety. Such an order cannot be considered "notice or other paper" as provided for in the rule. Therefore, the time prescribed by statute for initiating an appeal to the Chancery Court will not be extended by Rule 6.05.

Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***20 Tenn. App. 1990 AGENCY REVIEW IN FINAL ORDER OF ALJ DECISIONS**--When an administrative law judge orders discovery of the name and testimony of a material witness, failure to comply with that order will not result in dismissal of the action, since the Commissioner has the authority to reverse procedural rulings of an administrative law judge made at a contested hearing.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***20 Tenn. App. 1990 FINAL ORDER REVIEW OF ALJ DECISIONS**--The agency is not precluded from a de novo review of law and evidence after the conclusion of the proceeding and filing of the decision of the administrative law judge. In the present case, each action of the Commissioner occurred after the decision of the administrative law judge was filed with the Commissioner. The Commissioner's action in effectively reversing all actions of the administrative law judge were within his jurisdiction and powers. Moreover, the Commissioner's action effectively vacated the actions of the administrative law judge.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***20 Tenn. App. 1990 FINAL ORDER REVIEW OF ALJ DECISIONS**--The Commissioner of Safety has authority to reverse procedural rulings of an administrative law judge made at a contested hearing. The Commissioner, in reversing the Orders of the administrative law judge and in remanding the contested case for another hearing on the merits, "not inconsistent with the findings" of the Commissioner does not violate any constitutional or statutory provisions.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***20 Tenn. App. 1990 FINAL ORDER REVIEW OF ALJ DECISIONS**--The administrative law judge, as the presiding officer and not the agency, has jurisdiction to determine all procedural questions. Whatever duties are assigned to administrative law judges as such do not place the administrative law judges in a position superior to that of the agency. The clear intent of the statutes is that the administrative law judge shall serve the agency in a manner similar to a special master, and that all actions of the administrative law judges shall be subject to review and revision by the agency.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***20 Tenn. App. 1989 AUTHORITY TO REINSTATE EMPLOYEE IN FINAL ORDER**--The Court of Appeals held that the Civil Service Commission has the authority to order an employee reinstated and award back pay. The fact that Boynton was reinstated by agreement of counsel makes no difference under the statute. The Commission, in its discretion, could direct that the reinstatement be without loss of back pay. Therefore, the award of back pay was proper under T.C.A. §8-30-328(e). In the court's opinion, the Commission's decision was not arbitrary, capricious, an abuse of discretion or a clearly unwarranted exercise of discretion. The record showed that Boynton was terminated for gross misconduct for selling drugs. The Commission found that once Boynton was exonerated of the charges against him, the cloud that caused his inability to do his job was removed, and he should be made whole. The court held that the Commission's decision was supported by the record and was clearly within the Commission's discretion.

Norris v. Boynton and Tennessee Civil Service Commission, No. 89-50-II, 1989 WL 97958 (Tenn. Ct. App. August 25, 1989).

***20 Tenn. App. 1988 AGENCY REASONING IN FINAL ORDERS**--State Board of Dispensing Opticians was not required to explain in writing its decisions as to credibility of witnesses before it.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***20 Tenn. App. 1984 FINAL ORDER REVIEW; TIME LIMITS**--The statute which imposes the sixty day limitation on the appellants in this case provides that the period runs from the date of the entry of the agency's final order.

Houseal v. Roberts, 709 S.W.2d 580 (Tenn. Ct. App. 1984).

***20 Ch. Ct. 1984 FINAL ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ASSERTIONS**--The Public Service Commission is not required to make findings of fact and conclusions of law on what a party asserts are the issues; the Commission's responsibility is to make findings and conclusions on those factors which T.C.A. §65-15-107(a) requires.

Jackson Express, Inc. v. Keith Bissell, et al., No. 83-958-III (Davidson County Ch. Ct. May 30, 1984). 4 APR 455.

***20 Ch. Ct. 1984 FINAL ORDER; DECISIONMAKING BY CONSIDERING RECORD**--Commissioners were allowed to participate in decision making only after listening to recordings and considering exhibits when they were absent from hearing.

Fairweather, et al. v. William Long, Commissioner, No. 83-483-II (Davidson County Ch. Ct. April 18, 1984). 3 APR 322.

***20 Ch. Ct. 1981 FINAL ORDER; REQUIRED CONTENTS**--A Commissioner's final decision shall include findings of fact, conclusions of law, and reasons for the ultimate decision. T.C.A. §4-5-113 "The requirement for adequate findings of fact and conclusions of is not a mere technicality, but an absolute necessity without which judicial review would be impossible."

Fox v. Neff, No. 80-776-III (Davidson County Ch. Ct. March 31, 1981). 1 APR 90.

***20 F.O. 1985 PURPOSE OF DECLARATORY ORDER**--The decision to render a Declaratory Order is discretionary with the Commission and should not be granted where, if rendered, it would not terminate the uncertainty or controversy giving rise to the proceeding.

Nissan Motor Manufacturing Corporation, U.S.A., Nissan Motor Corporation in U.S.A. v. Stones River Motors, Inc., IO/5-7-85. FO/5-17-85. 6 APR 76.

***20 F.O. 1984 SUFFICIENCY OF FINDINGS OF FACT IN FINAL ORDER**--Case remanded to Board by Court of Appeals for further findings of fact to support action taken. Resulting Supplemental Final Decision and Order includes specific

findings to support conclusion of law that County violated particular rules and law on solid waste disposal, and regarding penalties assessed.

Solid Waste Disposal Control Board v. Anderson County Landfill, FO/2-8-84. 3 APR 160.

***20 I.O. 1984 FINAL ORDER; FINDINGS OF FACT**--Case was remanded to Board by Court of Appeals for further findings of fact to support action taken. Resulting Supplemental Decision and Order includes specific findings to support conclusion of law that County violated particular rules and law on solid waste disposal, and regarding penalties assessed. See Anderson County v. Tennessee Solid Waste Disposal Board, (Tenn. Ct. App. May 25, 1983). 3 APR 141.
Solid Waste Disposal Control Board v. Anderson County Landfill, IO/2-8-84. 3 APR 160.

21. RECONSIDERATION

***21 Tenn. App. 1988 GROUNDS FOR REVERSAL OF AGENCY DECISION**--In considering a petition for review of an administrative agency's findings, this Court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the findings, inferences, conclusions, or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or 5) unsupported by evidence which is both substantial and material in the light of the entire record.
Sutton v. Civil Service Commission, No. 87-313-II, 1988 WL 23912 (Tenn. Ct. App. March 16, 1988).

***21 Tenn. App. 1983 DIRECT APPEAL**--By direct appeal to Commission on "non merit" grounds, one waives right to complain on merit grounds.
Duncan v. Civil Service Commission, (Tenn. Ct. App. December 2, 1983). 3 APR 91.

***21 Tenn. App. 1983 PETITIONS FOR RECONSIDERATION OF DEFAULT**--Petition for reconsideration of initial order with notice of default was granted to consider whether the previously entered default should be put aside. This tolls 20-day time limit for appeal.
Securities Division v. Epstein, (Tenn. Ct. App. October 13, 1983). 2 APR 536.

***21 Ch. Ct. 1984 DECISIONMAKING BY CONSIDERING RECORD**--On reconsideration, Commissioners were allowed to participate in decisionmaking only after listening to recordings and considering exhibits when they were absent from hearing.
Fairweather, et al. v. William Long, Commissioner, No. 83-483-II (Davidson County Ch. Ct. April 15, 1984). 3 APR 322.

***21 F.O. 1984 RECORD REOPENED FOR NEW EVIDENCE**--If evidence is unavailable to a party at the time of hearing or could not have been ascertained through reasonable and diligent efforts prior to the hearing, then the record should be reopened to allow presentation of the additional evidence, all evidence referred to as "newly discovered evidence" by State was in fact available prior to the hearing by use of discovery. Motion to reopen denied.
Department of Safety v. Coy A. Lewis and Jack Sloan, IO/3-29-84. FO/4-19-84. 3 APR 286.

***21 I.O. 1985 REVIEW OF INITIAL ORDER**--In reviewing Initial Orders issued by Hearing Officers under T.C.A. §4-3-2005, neither Administrative Law Judges nor the Agency (in this case the Commissioner of Safety) has the authority to conduct de novo hearings or to take additional evidence.
Department of Safety v. Lowery, IO/1-28-85. 5 APR 124.

***21 I.O. 1984 STATEMENT OF SPECIFIC GROUNDS IS REQUIRED**--T.C.A. §4-5-317(a) requires that a petition for reconsideration under the APA requires that specific grounds for relief be stated.
Department of Safety v. Clarksville Volkswagen, IO/1-6-84. 3 APR 17.

22. JUDICIAL REVIEW

***22 Tenn. 1986 SUBSTANTIVE GROUNDS FOR REVERSAL**--Only substantive errors constitute grounds for a reviewing court's reversal of an agency decision.
Garret v. State, 717 S.W.2d 290 (Tenn. 1986).

***22 Tenn. 1984 REVIEW OF AGENCY DECISIONS**--T.C.A. §4-5-322(h)(5) (Supp.1989) directs the courts reviewing an administrative agency's decision to determine whether the agency's factual determinations are supported by "evidence which is both substantial and material in light of the entire record." An agency's decision should be upheld if there exists "such relevant evidence as a reasonable mind might accept to support a rational conclusion as such as to furnish a reasonably sound basis for the action under consideration."

Southern Ry. v. State Bd. of Equalization, 682 S.W.2d 196, 199 (Tenn. 1984).

***22 Tenn. 1984 SCOPE OF REVIEW OF AGENCY & CHANCERY CONCURRENT FINDING**--The Tennessee Supreme Court's scope of review of the trial court's findings of fact concurred in by the Court of Appeals is limited to whether there is any evidence to support the findings.

Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984). 4 APR 739.

***22 Tenn. 1984 SUBSTANTIAL AND MATERIAL EVIDENCE**--In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. "Substantial and material evidence" is such relevant evidence that a reasonable mind might accept to support a rational conclusion and that would furnish a reasonably sound basis for the action under consideration.

Southern Ry. Co. v. State Bd. of Equalization, 682 S.W.2d 196 (Tenn. 1984).

***22 Tenn. 1984 SUBSTANTIAL AND MATERIAL EVIDENCE, DEFINITION OF**--Substantial and material evidence is such relevant evidence as a reasonable mind might accept to support a rational conclusion, and such as to furnish a sound basis for the action under consideration.

Sou. Ry. v. State Bd. of Equalization, 682 S.W.2d 196 (Tenn. 1984); DePriest v. Pruitt, 669 S.W.2d 669 (Tenn. Ct. App. 1984), *cert. den.*, 469 U.S. 1034, 105 S.Ct. 505, 83 L.Ed.2d 397.

***22 Tenn. 1983 COMMON LAW CERTIORARI**--Common law certiorari is available when Court reviews administrative decision in which Agency is acting in judicial or quasi-judicial capacity T.C.A. §27-8-101.

Davison v. Carr, 659 S.W.2d 361 (Tenn. 1983).

***22 Tenn. 1983 COMMON LAW CERTIORARI**--Generally, under common law certiorari, scope of review is limited to record to determine as question of law whether there is any material evidence to support the Agency's findings. However, new evidence is admissible on issue of whether administrative body exceeded its jurisdiction or acted illegally, capriciously or arbitrarily.

Davison v. Carr, 659 S.W.2d 361 (Tenn. 1983).

***22 Tenn. 1981 FAILURE TO INITIATE APPEAL; APPELLATE JURISDICTION**--In those cases where the applicable statute provides that the time for appeal shall not be extended, failure to initiate the appeal within the prescribed period deprives the appellate court of jurisdiction.

State v. Sims, 626 S.W.2d 3 (Tenn. 1981).

***22 Tenn. 1980 APPELLATE REVIEW; FINDINGS OF FACT**--The concurrent findings of fact of the administrative law judge and the trial court are conclusive on appellate review.

C.F. Industries v. Tennessee Public Service Comm'n, 599 S.W.2d 536, 540 (Tenn. 1980).

***22 Tenn. 1980 SCOPE OF REVIEW**--The scope of review in the court of appeals is no greater than that of the trial court.

Watts v. Civil Service Board for Columbia, 606 S.W.2d 274 (Tenn. 1980).

***22 Tenn. 1980 REVIEW IN CHANCERY COURT; AGENCY'S DECISION**--In the court's review, consideration must be given to the statutory recognition of the "agency's experience, technical competence, and specialized knowledge."

C. F. Indus. v. Tennessee Pub. Serv. Comm'n, 599 S.W.2d 536, 540 (Tenn. 1980).

***22 Tenn. 1977 COURT OF APPEALS REVIEW**--Review in this Court under the Uniform Administrative Procedures Act is governed by essentially the same standards as those applicable in the chancery court. See Metropolitan Gov't of Nashville & Davidson County v. Shacklett, 554 S.W.2d 601, 604 (Tenn. 1977); Humana of Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667-668 (Tenn. 1977).

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***22 Tenn. 1977 HARMLESS ERROR**--The statute also contains a "harmless error" provision, stating that no agency decision in a contested case be reversed, remanded or modified "unless for errors which affect the merits of the decision complained of."

Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664, 667 (Tenn. 1977).

***22 Tenn. 1977 JUDICIAL REVIEW UNDER THE UAPA**--Under the Uniform Administrative Procedures Act (UAPA), the trial court should review factual issues upon a standard of substantial and material evidence. The court is directed to consider the entire record, including any part detracting from the evidence supporting the findings of the administrative body. Nevertheless the trial court is not to review issues of fact de novo or to substitute its judgment for that of the agency as to the weight of evidence. The UAPA also contains a "harmless error" provision, stating that no agency decision in a contested case be reversed, remanded, or modified "unless for errors which affect the merits of the decision complained of."

Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664 (Tenn. 1977).

***22 Tenn. 1977 SCOPE OF REVIEW**--Under the Uniform Administrative Procedures Act, the trial court reviews factual issues upon a standard of substantial and material evidence. The reviewing court may not, however, substitute its judgment for that of the agency.

Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664 (Tenn. 1977); Ball v. Lawson, No. 01-A-01-9402-CH00075, 1994 WL 421417 (Tenn. Ct. App. August 12, 1994).

***22 Tenn. 1977 REVIEW IN CHANCERY COURT; STANDARD OF REVIEW**--The review in the Chancery Court is not a de novo review but is confined to the record made before the Board. The factual issues must be reviewed by the Chancellor upon a standard of substantial and material evidence.

Humana of Tenn. v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977).

***22 Tenn. 1974 WRIT OF MANDAMUS VS. STATE BOARD**--Issuance of writ of mandamus, upon petition of Coke and Chemicals company against State and Hamilton County officials requiring State Air Pollution Control Board to terminate existing exemption granted to Chattanooga-Hamilton County Air Pollution Control Board, was beyond jurisdiction of Chancery Court of Davidson County, notwithstanding venue provisions of Air Control Act, T.C.A. §§53-3417 and §§53-3418, which deal with actions brought by the state board and review of such actions.

Adams v. State ex. rel. Chattanooga Coke and Chemicals, 514 S.W.2d 424 (Tenn. 1974).

***22 Tenn. App. 1995 EXHAUSTION OF JUDICIAL REVIEW**--Citing Tennessee case law, the Court of Appeals determined that the judicial function of review of an administrative decision is exhausted when a rational basis for a decision is found.

McFadden v. Department of Health and Environment, Board of Medical Examiners, No. 01-A-01-9405-CH00230, 1995 WL 33764 (Tenn. Ct. App. January 27, 1995).

***22 Tenn. App. 1994 REVERSAL OR MODIFICATIONS OF AGENCY DECISIONS**--Under the Administrative Procedures Act the court may reverse or modify the decisions of the administrative agency if the agency's decision was: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedures; (4) arbitrary or capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***22 Tenn. App. 1994 INVALIDATION OF AGENCY DECISION; REQUIRED SHOWING**--In order to invalidate administrative agency decision, showing must be made that decision is arbitrary and capricious, characterized by abuse of authority, clearly an unwarranted exercise of authority, or unsupported by substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***22 Tenn. App. 1994 CHANCERY COURT REVIEW OF AGENCY ACTION**--Chancery Court does not engage in broad, de novo review of agency action but, rather, is restricted to the records.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***22 Tenn. App. 1994 SUBSTANTIAL AND MATERIAL EVIDENCE, DEFINITION OF**--"Substantial and material evidence" is such relevant evidence as a reasonable mind might accept to support a rational conclusion, and such as to furnish sound basis for the action under consideration.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***22 Tenn. App. 1994 REVIEW OF AGENCY DECISION**--Reviewing courts did not have power to substitute their opinions for decision of Board for Licensing Health Care Facilities where Board's decision was based upon substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***22 Tenn. App. 1994 REVIEW IN CHANCERY COURT; AGENCY'S DECISION**--The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

Imperial Manor, Inc. v. White, Commissioner Tennessee Department of Health and Board for Licensing Health Care Facilities, No. 01-A-01-9408-CH00376, 1994 WL 719804 (Tenn. Ct. App. December 30, 1994).

***22 Tenn. App. 1994 REVIEW IN CHANCERY COURT; SUBSTANTIALITY OF EVIDENCE**--In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Imperial Manor, Inc. v. White, Commissioner Tennessee Department of Health and Board for Licensing Health Care Facilities, No. 01-A-01-9408-CH00376, 1994 WL 719804 (Tenn. Ct. App. December 30, 1994).

***22 Tenn. App. 1994 REVERSAL OF AGENCY DECISION**--No agency decision in a contested case shall be reversed unless for errors which affect the merits of the case.

Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

***22 Tenn. App. 1994 JUDICIAL REVIEW DENIED**--Judicial review of an order is not available to an appellant if he failed to appear at the initial hearing which he requested and of which he had notice.

Crutcher v. Tennessee Air Pollution Control Board, No. 01A01-9312-CH-00536 (Tenn Ct. App. August 31, 1994). 16 APR 101.

***22 Tenn. App. 1994 STANDARD OF REVIEW; SUBSTANTIAL AND MATERIAL EVIDENCE**--A court must review factual issues upon a standard of substantial and material evidence. This is not a broad, de novo review; it is restricted to the record; and the agency finding may not be reversed or modified, unless arbitrary or capricious, or characterized by abuse, or clearly unwarranted exercise of discretion, and must stand if supported by substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***22 Tenn. App. 1994 NO POWER TO REVERSE AGENCY DECISION BASED UPON SUBSTANTIAL AND MATERIAL EVIDENCE**--In the present case, Chancery Court found that the administrative decision was not supported by substantial and material evidence. On appeal, the Board insisted that this finding was erroneous. The Board, as appellant, had the burden of showing error. The Court of Appeals determined that the best way for the appellant to show error would be to point out the substantial and material evidence which supported the decision of the Board. The Court of Appeals held that neither Chancery Court nor the Court of Appeals has the power to substitute its opinion for a decision of the Board which is based upon substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***22 Tenn. App. 1994 INVALIDATION OF AGENCY DECISION; REQUIREMENTS**--In order to invalidate the decision of an administrative agency, there must be a showing that the decision is arbitrary and capricious, characterized by abuse of authority, clearly and unwarranted exercise of authority, or unsupported by substantial and material evidence. Moreover, in the present case, there is insufficient evidence of bias to require recusal of any member of the Board.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***22 Tenn. App. 1994 APPELLATE REVIEW; STATUTORY CONSTRUCTION**--The construction of the statute and application of the law to the facts is a question of law. Therefore, the findings of an administrative law judge with regard to questions of statutory construction and the application of law are not binding on the reviewing court. Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994); Beare Co. v. Tennessee Department of Revenue, 858 S.W.2d 906 (Tenn. 1993).

***22 Tenn. App. 1993 AGENCY STANDING; JUDICIAL REVIEW**--The Chancery Court should have dismissed the appellees' petition because the agencies involved lacked standing under the U.A.P.A. to challenge the ALJ's final order and that therefore the Chancery Court lacked jurisdiction over the case. When the appellees failed to file a timely petition for review of the ALJ's order, it became a final order of the Board itself. The Board does not qualify as a "person who is aggrieved" as required for judicial review, pursuant to T.C.A. §4-5-322(a)(1), because the Board seeks judicial review of its own order. The legislative intent behind T.C.A. §4-5-322(a)(2) is to preclude the state from filing a petition for judicial review where the appeal would constitute in reality the agency appealing its own order. Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. November 11, 1993).

***22 Tenn. App. 1993 SUBSTANTIAL EVIDENCE**--Substantial evidence means such pertinent or relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is not sufficient that evidence create a suspicion, imagination, apprehension, inkling, intimation, hint, surmise or notion, for none of these represent a conclusion which is a reasoned judgment. Substantial must also be defined in terms of the seriousness of the issue to be decided. A reasonable person might reach a conclusion as to a trivial matter upon slight, suggestive circumstantial evidence. However, in respect to more serious matters such as the forfeiture of property because of intent to commit a criminal act of the occurrence of which no real evidence is adduced, a reasonable mind would require evidence of more substantial nature. Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***22 Tenn. App. 1992 JUDICIAL REVIEW OF ACTS OF GOVERNMENTAL OFFICIALS**--Courts are wary of unwarranted judicial intrusions into performance of ordinary governmental activities, and thus judicial review of acts of local administrative officials is generally confined to examination of evidence to determine whether there was material evidence to support conclusions that were neither arbitrary nor unlawful. Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

***22 Tenn. App. 1992 REVIEW OF WITNESS CREDIBILITY**--Where trier of fact believes one witness over other after taking into account factors that affect credibility, that finding will not be upset by reviewing court unless there is other real evidence to contrary. Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992).

***22 Tenn. App. 1992 SUBSTANTIAL AND MATERIAL EVIDENCE**--The administrative law judge's finding was predicated on the officer's statement of what the Claimant told him at the time of his arrest. The Claimant's admission to the officer is competent evidence, and while not conclusive, it does supply evidence which is both substantial and material. Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992).

***22 Tenn. App. 1992 INCONSISTENT TESTIMONY; CREDIBILITY DETERMINATION UPHELD ON REVIEW**--Where the Claimant argued that inconsistencies in the testimony of the two officers who were on the scene detract from the weight of the one officer's testimony, the reviewing court upheld the credibility determination made by the administrative law judge. The inconsistencies were found to be but one factor out of many that make up the whole question of credibility. Therefore, where the trier of fact believes one witness over the other after taking into account the factors that affect credibility, that finding will not be upset by a reviewing court unless there is other real evidence to the contrary. Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992); State ex rel. Balsinger v. Town of Madisonville, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968).

***22 Tenn. App. 1992 SCOPE OF APPELLATE REVIEW OF AGENCY DECISION; EXCEPTION FOR PROCEDURAL IRREGULARITIES**--In the present case, the Claimants have based their petition for judicial review on the authorities' failure to provide them with adequate notice of the seizure of the property or of the administrative mechanism for seeking its return. In doing so, the Claimants seek to present evidence not contained in the administrative record. As a general rule, materials not contained in the administrative record should not be considered by a court reviewing an agency's decision. Judicial review of an administrative agency's decision is generally confined to the record of the proceedings before the agency.

However, T.C.A. §4-5-322(g) (1991) provides that "[i]n cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court." The present case falls within this narrow exception recognized in the Uniform Administrative Procedures Act which allows the reviewing court to consider evidence not considered by the administrative agency, since inadequate notice is considered a procedural irregularity that can assume constitutional proportions. Therefore, the Claimants may present evidence not contained in the administrative record on review.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***22 Tenn. App. 1992 REVIEW OF EVIDENTIARY FINDINGS**--An administrative ruling upon the admissibility of evidence is subject to judicial review for violation of constitutional provisions.
Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992).

***22 Tenn. App. 1991 FINAL ORDER REVIEW**--The sixty-day time limit on petition for review of forfeiture order of Department of Safety began to run from entry of order, and not from time that the Claimant received notice thereof, so that time limit was not extended for additional three days because notice was received through mail; procedural rule providing for additional time after service by mail did not apply.
Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***22 Tenn. App. 1991 FINAL ORDER REVIEW**--The provisions of Tenn.R.Civ.P. 6.05 may not be used to extend the time for filing a petition to review a final order of the Tennessee Department of Safety. Such an order cannot be considered "notice or other paper" as provided for in the rule. Therefore, the time prescribed by statute for initiating an appeal to the Chancery Court will not be extended by Rule 6.05.
Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***22 Tenn. App. 1991 REVIEW OF EXPERT OPINION**--When other medical evidence contradicts the opinion of the treating physician, the weighing of the opinion of experts is not within the province of judicial review of administrative decisions.
Brown v. Grunow, Commissioner, Department of Human Services, No. 01-A-019010CH00356, 1991 WL 24529 (Tenn. Ct. App. February 27, 1991).

***22 Tenn. App. 1990 JUDICIAL REVIEW STANDARD**--Judicial review of decision from administrative agency is in chancery court on standard of substantial and material evidence.
Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***22 Tenn. App. 1989 APPEAL OF ORDERS**--The Claimant was notified separately of the seizure of his vehicle and his currency, but the Claimant's attorney sent a letter to the Commissioner within the fifteen day period requesting a hearing on the truck, but failing to mention the currency. The Claimant failed to appeal the forfeiture order of November 20, 1987 which notified him that the currency had been forfeited due to the lack of a petition alleging an interest in or requesting a hearing on the currency. The order also notified the Claimant of his right to appeal the order to the chancery court within sixty days. The Claimant's interest in the currency was alleged for the first time in his complaint filed June 17, 1988. In spite of the fact that the money was initially forfeited due to a mistake made by his attorney and through no fault of the his own, the Claimant eventually lost his rights to the currency because of his failure to appeal the forfeiture order within sixty days after it was issued.
Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***22 Tenn. App. 1988 HARMLESS ERROR**--State Board of Dispensing Opticians' failure to find facts with respect to certain charges against optician, of which he was found not guilty, was harmless.
Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***22 Tenn. App. 1988 EXTENT OF JUDICIAL REVIEW**--Although reviewing court was required to look over entire administrative record and to take into account whatever in the record fairly detracted from its weight, court was not required to minutely search voluminous record for evidence to support arguments in briefs.
Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***22 Tenn. App. 1988 CLAIM AGAINST AGENCY FOUND IMPROPER ON REVIEW**--Optician's claim that decision of State Board of Dispensing Opticians to suspend his license was arbitrary and capricious, absent references to the record to sustain claims, was improper.
Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***22 Tenn. App. 1988 JUDICIAL REVIEW OF RECORD**--On petition for review, the courts are required to review the entire record and to take into account whatever in the record fairly detracts from its weight. See Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981). However, it is not the burden of the court to minutely search a voluminous record for evidence to support the arguments in briefs. See Schoen v. J.C. Bradford Co., 642 S.W.2d 420 (Tenn. Ct. App. 1982).

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***22 Tenn. App. 1988 SUBSTANTIAL AND MATERIAL EVIDENCE**--What amounts to substantial evidence requires something less than a preponderance of the evidence, but more than a scintilla or glimmer. The "substantial and material evidence standard" set forth in T.C.A. §4-5-322(h)(5) requires a searching and careful inquiry that subjects the agency decision to close scrutiny.

Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988).

***22 Tenn. App. 1988 GROUNDS FOR REVERSAL OF AGENCY DECISION**--In considering a petition for review of an administrative agency's findings, this Court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the findings, inferences, conclusions, or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or 5) unsupported by evidence which is both substantial and material in the light of the entire record.

Sutton v. Civil Service Commission, No. 87-313-II, 1988 WL 23912 (Tenn. Ct. App. March 16, 1988).

***22 Tenn. App. 1987 REVIEW OF COMMISSION'S FINDING OF FACT**--The Court's review of the Civil Service Commission's findings of fact is limited to a determination of whether there exists substantial and material evidence to support the agency's findings of fact and conclusions of law. Unless the agency's findings are arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, the findings must stand. The reviewing court is required by the provisions of the Administrative Procedures Act to review the findings of fact of an administrative agency upon a standard of substantial and material evidence and to consider the entire record, including any part detracting from evidence supporting the findings of the agency. The court may not review issues of fact de novo or substitute the judgment of the Court for that of the agency as to the weight of the evidence.

Grubb v. Tennessee Civil Service Commission, 731 S.W.2d 919 (Tenn. Ct. App. 1987).

***22 Tenn. App. 1987 JUDICIAL REVIEW; IN GENERAL**--Judicial review of an administrative agency decision under the Uniform Administrative Procedures Act is confined to the record made before the agency, and at the appellate level, before the Chancery Court. Under T.C.A. §4-5-322(h), the reviewing court may reverse or modify an agency decision if it is unsupported by substantial and material evidence in the record. The Supreme Court has interpreted "substantial and material evidence" to mean such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***22 Tenn. App. 1987 STANDARD OF REVIEW; NEED FOR NURSING HOME CARE**--The evidence that the patient needs some form of institutional care does not establish the need for care in an intermediate care facility. The Courts are not permitted to take a view most favorable to the challenger of an administrative decision. The law is strictly to the contrary. If there is any substantial material evidence to support the finding of the agency, it must be affirmed. See C.F. Industries v. Tennessee Public Service Comm., 599 S.W.2d 536 (Tenn. 1980).

Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***22 Tenn. App. 1986 JUDICIAL REVIEW; IN GENERAL**--Absent findings of fact and conclusions of law by the administrative agency, there can be no judicial review. The requirement of findings of fact and conclusions of law is not a mere technicality, but an absolute necessity without which judicial review would be impossible, citing Levy v. State Bd. of Examiners, 553 S.W.2d 909 (Tenn. 1977).

Hanger v. Jones, (Tenn. Ct. App. November 13, 1986).

***22 Tenn. App. 1986 REVIEW OF CONFLICTING TESTIMONY**--The administrative law judge, after viewing the witnesses and independently asserting their credibility, determined that their explanations were not persuasive. Like the administrative law judge, the reviewing court is not required to accept the claimant's "improbable and somewhat conflicting testimony."

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***22 Tenn. App. 1985 JUDICIAL REVIEW UNDER UAPA**--The reviewing court is required by provisions of Uniform Administrative Procedure Act to review findings of fact of administrative agency upon standard of substantial and material evidence and to consider entire record, including any part detracting from evidence supporting findings of agency, but may not review issues of fact de novo or substitute judgment of court for that of agency as to weight of evidence.
Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***22 Tenn. App. 1985 REVIEWING COURT NOT BOUND BY FINDINGS BELOW**--Court reviewing appeal from chancery court of dismissal of employee by State Civil Service Commission was not bound by supposed finding of chancellor that certain testimony was not substantial and material, where no question of credibility was involved before either court, since there was no viva voce testimony in either court and question before courts was question of law as to sufficiency of evidence presented to Commission and preserved in its record.
Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***22 Tenn. App. 1985 REVERSAL OF ORDER; LACK OF SUBSTANTIAL EVIDENCE**--The decision of a state administrative tribunal is subject to reversal if it is unsupported by evidence which is both substantial and material in the light of the record. In determining the substantiality of evidence, the court must take into account whatever in the record fairly detracts from its weight, but the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
Featherston v. Wood, No. 85-277-II, 1985 WL 4551 (Tenn. Ct. App. December 18, 1985).

***22 Tenn. App. 1984 FINAL ORDER REVIEW; TIME LIMITS**--The statute which imposes the sixty day limitation on the appellants in this case provides that the period runs from the date of the entry of the agency's final order.
Houseal v. Roberts, 709 S.W.2d 580 (Tenn. Ct. App. 1984).

***22 Tenn. App. 1984 TIME DEADLINE FOR APPEAL OF ORDERS**--Appeal to Chancery Court must be filed within 60 days after the entry of an adverse administrative ruling. Here, Petition was not mailed from Memphis to Nashville until the 57th day and this was a Friday. It was marked filed by the Clerk of Davidson County Chancery Court on the next Tuesday, making it one day late. The Tennessee Supreme Court has ruled that in cases where the statute provides that the time for appeal shall not be extended, failure to initiate the appeal within the prescribed period deprives the appellate court of jurisdiction. The Appeals Court rules that an appeal from an administrative ruling falls within this rule. The Appeals Court further ruled that this is not a matter where a deadline has been missed due to "excusable neglect" as the petition was not mailed until the 57th day and also on a Friday when it is common knowledge that the mails do not run on Sunday. Appellant's attorney should have known that the appeal would probably not reach Nashville until Tuesday.
Dale and Daphney House, et al. v. Gene Roberts, et al., No. 81-1467-II (Tenn. Ct. App. April 16, 1984). 3 APR 318.

***22 Tenn. App. 1983 CHANCERY REVIEW**--In Chancery Court's common law certiorari review of Metropolitan Health Board's dismissal of employee, it was function of the Chancellor to review the record to determine if there was any material or substantial evidence to support the action of the Board, and such review was question of law and not of fact. T.C.A. §27-9-114.
Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 COURT OF APPEALS REVIEW**--Scope of review of Court of Appeals of Chancellor's common law certiorari review of decision of Metropolitan Health Board dismissing an employee was no greater than Chancellor's scope of review of the Board, and thus, neither the Chancery Court nor the Court of Appeals determined any disputed question of fact or weighed any evidence. T.C.A. §27-9-114.
Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 NO REVIEW BY DECLARATORY JUDGMENT**--Supreme Court has held that a review of the actions of boards and commissions can not be made by Declaratory Judgment.
Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 JOINDER OF APPEALS**--Court of Appeals condemns practice of joinder of an appeal with original action and simultaneous consideration of both at the trial level; such procedure is inimical to proper review in the lower certiorari court and creates even greater difficulties in the Court of Appeals. Rule App. Proc., Rule 13(d). (Appeal of administrative decision and petition for declaratory judgment in Chancery Court) Declaratory Judgment aspect of case which joined Chancery Court's appellate jurisdiction and original jurisdiction in one hearing should have been dismissed at the very outset.
Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 SCOPE OF REVIEW ON ADMISSIBILITY OF EVIDENCE**--Rules to be applied by reviewing courts to less than legally formal hearings must also be less than those required in legally formal hearings; in reviewing such hearings, Court of Appeals is to be guided by a sense of fair play and the avoidance of undue prejudice to either side of the controversy and by whether, in its opinion, the action of the hearing board in admitting or excluding evidence was unreasonable or arbitrary.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 SCOPE OF REVIEW; HEARSAY EVIDENCE**--Uncorroborated hearsay of rumor would not constitute "substantial evidence" where the scope of review is limited to a search for "substantial evidence."

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 SUBSTANTIAL AND MATERIAL EVIDENCE**--Where there was material and substantial evidence that Metropolitan Health Board employee was discharged for failing and refusing to comply with a constitutional regulation of the Agency, under Court of Appeals' scope of review, it was inappropriate and unnecessary to consider further other acts of the employee to determine whether she was fired more for the violations of other allegedly unconstitutional regulations than for violation of a constitutional regulation.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 REVIEWING COURT'S DEFERENCE TO AGENCY INTERPRETATION OF ITS OWN RULES**--Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. Limitation of courts' deference to agency's interpretation of its own rules is reached where interpretation is plainly erroneous or inconsistent with regulation itself.

Environmental Defense Fund v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 REVIEW OF ADMITTED EVIDENCE**--In reviewing evidence admitted at an administrative hearing the court should be guided by a sense of fair play and the avoidance of undue prejudice to either side and whether the admission or exclusion was unreasonable or arbitrary.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***22 Tenn. App. 1983 AGENCY & CHANCERY CONCURRENT FINDING CONSIDERED CONCLUSIVE**--A concurrent finding between an agency and the trial (ie. Chancery Court) court on any issue of fact is conclusive on Court of Appeals.

Hillcrest Convalescent Home, Inc. and Crestview Convalescent Home, Inc. v. Fowinkle, No. 82-234-II (Tenn. Ct. App. February 1, 1983). 3 APR 150.

***22 Tenn. App. 1981 JUDICIAL REVIEW STANDARD**--Correct test for reviewing decision of the Commissioner of the Department of Safety, as well as review of chancellor's finding in review of Commissioner's decision, is whether or not there was substantial or material evidence to support decision.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***22 Tenn. App. 1981 SUBSTANTIAL AND MATERIAL EVIDENCE**--Substantial and material evidence requires less than a preponderance of evidence, but at the same time the administrative law judge's findings must be supported by more than a scintilla of evidence.

Sweet v. State Technical Institute at Memphis, 617 S.W.2d 158, 161 (Tenn. Ct. App. 1981).

***22 Tenn. App. 1981 AVAILABILITY OF JUDICIAL REVIEW**--Judicial review as provided by the UAPA is available only where there is some effort by appellant to "controvert the issue" (institute a contested case proceeding) before an administrative agency.

Cunningham v. Gene Roberts, et al., (Tenn. Ct. App. June 4, 1981). 1 APR 97.

***22 Tenn. App. 1981 SUBSTANTIAL AND MATERIAL EVIDENCE**--"Substantial and material" evidence, as used in the statute governing review of administrative findings INCLUDES: inferences, conclusions or decisions and such relevant evidence as reasonable minds might accept to support rational conclusion and to furnish reasonably sound basis for action under consideration. In addition, quantum of evidence must be greater than mere scintilla or glimmer. T.C.A. §4-5-117.

Sweet v. State Technical Institute at Memphis, 617 S.W.2d 158 (Tenn. Ct. App. 1981).

***22 Ch. Ct. 1992 REVIEWING COURT'S DEFERENCE TO AGENCY**--Consideration on review must be given to the statutory recognition of the agency's experience, technical competence, and specialized knowledge.
King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992).

***22 Ch. Ct. 1992 REVERSAL ONLY FOR ERRORS WHICH AFFECT MERITS**--No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors which affect the merits of the decision.
King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992).

***22 Ch. Ct. 1992 JUDICIAL REVIEW; DUE PROCESS**--After the Commissioner overturned the initial order returning the seized vehicle to the Claimant, the Claimant appealed the Commissioner's decision, asserting that it violated due process because the Commissioner was acting as both prosecutor and judge in reviewing the administrative law judge's order. The reviewing court held that due process had not been violated by the Commissioner's review of the initial order. In the court's opinion, combining the prosecution and adjudication function in the same administrative agency did not violate due process as long as judicial review was provided.
Emert v. Department of Safety, No. 91-1358-II (Davidson County Ch. Ct. June 17, 1992).

***22 Ch. Ct. 1987 DECLARATORY RULINGS ON CONSTITUTIONALITY**--Administrative agencies do not have jurisdiction to issue declaratory rulings on the constitutionality of a statute.
Metro Government of Nashville and Davidson County v. State Board of Equalization, No. 86-456-II (Davidson County Ch. Ct. November 16, 1987).

***22 Ch. Ct. 1984 EXHAUSTION OF ADMINISTRATIVE REMEDIES**--Issuance of Writ of Mandamus to direct the Department of Transportation to issue billboard permits was not proper form of relief where Appellant had not exhausted his administrative remedy for the denial of licenses.
State of Tennessee ex. rel. E. E. Rivers, d/b/a C & S Sign Company v. Department of Transportation, No. 84-1616-II (Davidson County Ch. Ct. October 3, 1984). 4 APR 879.

***22 Ch. Ct. 1984 NO REVIEW OF EVIDENCE NOT IN RECORD**--Chancery Court, reviewing case appealed from Water Quality Control Board, would not consider evidence not in the administrative record pursuant to T.C.A. §4-5-322(g).
Gerald B. Hollis v. Tennessee Water Quality Control Board, No 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***22 Ch. Ct. 1982 RES JUDICATA**--When identical facts and issues have already been adjudicated by a court of law, Res judicata applies.
DePriest v. Commissioner Puett, et al., No. 79-1012 (Davidson County Ch. Ct. October 8, 1982). 1 APR 140.

***22 Ch. Ct. 1981 SUFFICIENCY OF FINDINGS OF FACT**--The findings of fact are inadequate if the reviewing court cannot determine what facts the commissioner relied upon in reaching his conclusions in a case.
Fox v. Neff, No. 80-776-III (Davidson County Ch. Ct. March 31, 1981). 1 APR 90.

***22 I.O. 1994 REVIEW OF CREDIBILITY DETERMINATION**--The resolution of a conflict in testimony requiring a determination of credibility is for the trial court and is binding on the reviewing court unless other real evidence compels a contrary conclusion.
Department of Commerce and Insurance v. Craig W. Ash and Professional School of Insurance, Inc., IO/1-20-94. 9 APR 56.

***22 I.O. 1984 REVIEWING COURT'S JURISDICTION**--The ultimate determination of whether a real estate license will be reissued under T.C.A. §62-13-311 rests with the judgment of the Commission, independent of a court's determination, after consideration of the facts. The fact that Chancery Court has ruled on the issue of revocation of a license does not preclude the Commission from instituting proceedings under T.C.A. §62-13-312.
Tennessee Real Estate Commission v. Sarah M. Fryer, IO/8-28-84. 4 APR 687.

***22 I.O. 1979 STANDING TO SEEK JUDICIAL REVIEW**--Test of whether "person aggrieved" under T.C.A. §4-523 (T.C.A. §4-5-322) has standing to seek judicial review is "whether [there is] injury in fact and there is no legislative intent to withhold right to judicial review." No real injury in fact shown, and reading of statute indicates legislative intent was to withhold right of judicial review from Regional Development Agency; therefore agency petition to intervene denied.
Environmental Defense Fund, et al. v. Department of Public Health, IO/2-27-79. 1 APR 32.

***22 I.O. 1976 UAPA LIMITATION OF JUDICIAL REVIEW**--Limitation of judicial review under the Uniform Administrative Procedures Act is not a usurpation of the judicial function and is a practice accepted by U.S. Supreme Court and Tennessee Courts.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***22 I.O. 1976 STANDARD OF REVIEW**--Factual issues on appeal from decision of Water Quality Control Board denying water discharge permit to strip mining company were to be reviewed upon standard of substantial and material evidence based on consideration of entire record, including any portion of findings detracting from evidence supporting findings of administrative body. T.C.A. §4-5-117(h).

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***22 I.O. 1976 QUANTUM OF EVIDENCE REQUIRED ON REVIEW**--Quantum of evidence required in review of decision of Water Quality Control Board denying water discharge permit to strip mining company upon standard of substantial and material evidence must be greater than mere scintilla or glimmer.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***22 I.O. 1976 REVIEWING COURT'S DEFERENCE TO FINDINGS OF FACT BY BOARD**--Finding of fact by circuit court that findings of Water Quality Control Board regarding application for water discharge permit were sufficient must be given great weight by Court of Appeals.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

23. CONSTITUTIONAL LAW

***23 U.S. S.Ct. 1993 EIGHTH AMENDMENT APPLICATION TO FORFEITURE ACTIONS**--Eighth Amendment's excessive fines clause applies to *in rem* civil forfeiture proceedings.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***23 U.S. S.Ct. 1976 NOTICE UNDER DUE PROCESS**--Notice is an indispensable element of due process, but it can take a variety of constitutionally acceptable forms, depending on the circumstances and the accommodation of the competing interests involved. The essential inquiry is whether the information provided is "reasonably" calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976).

***23 Tenn. 1995 DUE PROCESS REQUIREMENT OF ADEQUATE NOTICE TO ALL INTERESTED PARTIES**--One of the essential elements of due process in the confiscation and forfeiture of private property is adequate notice to all interested parties. Where the State had knowledge of the Claimant's ownership interest in the forfeited property, both federal and state due process required the Department to have made a reasonable effort to notify the Claimant of the seizure and the possible forfeiture of the property. Under the facts presented on this appeal, it was clear that the Department of Safety possessed the requisite knowledge of the Claimant's possible proprietary interest in the seized property. Such knowledge required the Department to give notice to the Claimant of the seizure and possible forfeiture of the property.

Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***23 Tenn. 1981 PRESUMPTION OF INNOCENCE; REVERSED CONVICTION**--Defendant whose conviction of misdemeanor in office was reversed and remanded for new trial after appeal, was entitled to be reinstated to his public office pending outcome of retrial since, upon reversal of conviction by appellate court and in the interim pending retrial, public officer stood only as person indicted of misdemeanor in office and not as one "duly convicted" under statute providing for removal of officer who has been duly convicted of misdemeanor while in office. When a conviction has been reversed by an appellate court, the accused stands as though he had never been tried, and if a new trial is ordered, the accused is entitled to enter upon that trial with every presumption of innocence, and his guilt must be established beyond a reasonable doubt therein.

State of Tennessee v. William Blazer, 619 S.W.2d 370 (Tenn. 1981).

***23 Tenn. 1980 DUE PROCESS; PROCEDURAL SAFEGUARDS**--Procedural due process embodies flexible standards requiring different procedural safeguards according to the circumstances of each case.

Williams v. Pittard, 604 S.W.2d 845, 849 (Tenn. 1980); Estrin v. Moss, 221 Tenn. 657, 676, 430 S.W.2d 345, 353 (1968), *cert. denied*, 393 U.S. 318 (1969).

***23 Tenn. 1976 CONSTITUTIONAL PROTECTIONS UNDER FOURTH AMENDMENT**--Rights secured by constitutional provisions relating to search and seizure protect citizens from unreasonable seizures as well as unreasonable searches, and rights to search and seize are subject to requirement of previous judicial sanction wherever possible.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***23 Tenn. 1976 DUE PROCESS; PRE-SEIZURE NOTICE**--Automobile owner was not entitled to notice prior to seizure of automobile used in violation of Drug Control Act.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***23 Tenn. App. 1994 FILING REQUIREMENT; CONSTITUTIONALITY**--T.C.A. §53-11-201(c)'s filing requirement, which affords both notice and an opportunity to be heard, was upheld in the following cases: Woodall v. Lawson, 784 S.W.2d 657, 659 (Tenn. Ct. App. 1989); Johnson v. Roberts, 638 S.W.2d 401, 403 (Tenn. Ct. App. 1982); and Everton v. Lawson, No. 01-A-01-9005-CH00181, 1990 WL 125512 (Tenn. Ct. App. August 31, 1990).
Ball v. Lawson, No. 01-A-01-9402-CH00075, 1994 WL 421417 (Tenn. Ct. App. August 12, 1994).

***23 Tenn. App. 1992 DUE PROCESS; REQUIREMENT OF NOTICE**--Procedural due process embodies flexible standards requiring different procedural safeguards according to the circumstances of each case. However, deeply engrained in the concept is the principle that the State cannot interfere with a person's significant property interests without first providing a hearing at a meaningful time and in a meaningful manner. Adequate notice is an essential due process ingredient.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***23 Tenn. App. 1992 DUE PROCESS; NOTICE REQUIREMENTS**--The right to a hearing has little reality or worth unless the affected parties are informed that the matter is pending and can choose for themselves whether to appear or default, acquiesce, or contest. Thus, in order to satisfy due process, the procedure for notice must, under all the circumstances, be reasonably calculated to apprise all interested persons of the pending action in order to afford them an opportunity to present their objections.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***23 Tenn. App. 1992 DUE PROCESS; NECESSITY OF A PRE-FORFEITURE HEARING**--Ordinarily, procedural due process requires a hearing before the State interferes with a property interest. However, a hearing may be postponed in extraordinary situations such as when the State seizes property that is subject to forfeiture. Thus, the requirements of due process are satisfied as long as persons claiming an interest in seized property are afforded an opportunity for a hearing on their claim at a meaningful time and in a meaningful manner following its seizure.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1992 DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE**--In order to determine whether a particular notice procedure comports with due process, the proper inquiry is whether the State acted reasonably in selecting a means likely to inform persons affected, not whether each property owner actually received notice. As long as the State employs reasonable means and makes reasonable efforts to notify a claimant, it has discharged its burden with respect to providing notice. The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property, (2) the means available to the State to discover the identity of persons claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1992 DUE PROCESS; CONSTRUCTIVE NOTICE**--Constructive notice is constitutionally inadequate with regard to persons whose identity is known or easily ascertainable.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1992 DUE PROCESS; NOTICE PROCEDURE**--The notice procedure used should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.
Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1992 DUE PROCESS; SCOPE OF NOTICE**--The scope of the constitutional requirement of timely and adequate notice should not depend on the State's suspicions about the source of the seized property or its belief that the likely

claimants are involved in some sort of illegal activity. Likewise, it should not be influenced by the State's legitimate desire to separate criminals from their ill-gotten gains, to lessen the economic power of organized crime or drug enterprises, or to use the seized property to support other law enforcement activities.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1992 DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE NOT FOUND**--In the present case, the officers made no effort to give notice to anyone other than claimant Brown, even though they had seized other evidence indicating that at least two other persons lived in the house where the money was found. With the names and addresses of these potential claimants already in their possession, the officers are required to expend some additional effort to provide the other residents of the house with notice of the seizure. Moreover, claimant Brown, the only resident of the house present when the money was seized, denied that he owned the money and, according to the arrest report, stated that "he did not know who the money belonged to." In light of this evidence, giving notice to claimant Brown and then relying on him to pass the notice along does not meet even the minimum requirements of procedural due process. Giving notice to a person who denies any knowledge of the ownership of property cannot be viewed as being reasonably calculated to notify potential claimants of their right to seek the property's return.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***23 Tenn. App. 1991 DUE PROCESS; ACTUAL NOTICE**--In the present case, the record reflected that law officers of Unicoi County were searching the premises of one Michael Sparks pursuant to a search warrant, and Claimant Thomas was found on the premises at that time in the van here in question. The van was searched pursuant to the search warrant. Thomas, an escapee from the Unicoi County Jail at the time, was in possession of the van. The amount of drugs found in the van was consistent with the amount a person would have for resale and not for personal use. Thomas contended that he was denied due process because he did not receive notice to the effect that a confiscation hearing was to be held on May 16, 1989. In support of his contention, he asserted that, at the time the notice was sent, he was incarcerated in the regional correctional facility in Wartburg whereas the notice of the hearing was mailed to the Unicoi County Jail. However, the Court of Appeals determined that Thomas still had notice of the hearing. In his pleadings to appeal the initial order, Thomas stated that he was aware that he was in default because he could not attend the administrative hearing on May 16, 1989. Furthermore, in his petition for reconsideration, Thomas made a similar assertion. Therefore, the Court of Appeals held that there was no denial of due process because Thomas did receive actual notice, as evidenced by his later pleadings.

Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***23 Tenn. App. 1990 DUE PROCESS; NOTICE OF SPECIFIC ALLEGATIONS**--Grievant was found to have been denied minimum due process when at each level of the grievance procedure he was faced with new or additional allegations to which he was unprepared to respond. In the court's opinion, the lack of adequate notice of the charges pending against him obviously affected the manner in which he could defend the charges before the Commission and probably resulted in the Commission's finding that he should be demoted from his position. The court held that the Commission was obligated to provide minimum due process in the form of notice of specific allegations of inefficiency to the Grievant before a hearing on the merits.

Danny Tinnel v. Department of Correction, No. 01-A-01-9002-CH-00091 (Tenn. Ct. App. October 10, 1990). 16 APR 118.

***23 Tenn. App. 1989 DUE PROCESS; NOTICE REQUIREMENTS**--The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. In the instant case, the evidence clearly shows that petitioner had notice of the provisions of Chapter 1120-2-1-.13(4) and an opportunity to respond before his "resignation." All that is required is an opportunity to respond, and petitioner cannot base his due process claim on the fact that he did not take advantage of that opportunity.

Yates v. Civil Service Commission, No. 89-187-II, 1989 WL 126716 (Tenn. Ct. App. October 25, 1989).

***23 Tenn. App. 1988 JURISDICTION TO DETERMINE CONSTITUTIONALITY OF LEGISLATION**--Administrative agencies have no jurisdiction to hear and decide issues concerning the constitutionality of the legislation empowering them to act or of the procedures they have adopted to conduct their business. *See also* Draughton v. Department of Safety, No. 84-9-II (Tenn. Ct. App. November 21, 1984).

Metropolitan Government v. State Board of Equalization, et al., No. 88-25-II (Tenn Ct. App. July 8, 1988).

***23 Tenn. App. 1987 FIFTH AMENDMENT; TAKINGS CLAUSE**--Compensation for personal property taken from innocent parties under forfeiture statute is not required by United States Constitution.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***23 Tenn. App. 1983 CONSTITUTIONAL ISSUES, RESOLUTION OF--**Constitutional issues need not be decided if a case can be resolved on non-constitutional grounds.

Bah v. Bah, 668 S.W.2d 663, 668 (Tenn. Ct. App. 1983); Watts v. Memphis Transit Management Co., 462 S.W.2d 495, 498 (Tenn. 1971).

***23 Tenn. App. 1983 SIXTH AMENDMENT; RIGHT OF CONFRONTATION--**In a civil case, one does not necessarily have the same right to face one's accuser as they would have in a criminal case. A deposition is admissible if the party's attorney attends and has the right to cross examine, even if the party was not present due to the request of opposing counsel.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***23 Tenn. App. 1983 FIRST AMENDMENT; FREEDOM OF RELIGION--**The constitutional guarantee of freedom of religion is not absolute. U.S. Const. Amends. 1, 14; Const. Art. 1, §3. There is in the state the limited power to regulate the practice of religion, but in every case the power to regulate actions must be so exercised so as not, in attaining a permissible end, to unduly infringe the protected freedom. U.S. Const. Amends. 1, 14; Const. Art. 1, §3. There is no hard-and-fast rule by which to measure constitutionally protected religious conduct; it must be decided by the facts and circumstances of the case.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***23 Tenn. App. 1983 LIMITS ON STATE ACTION--**What the state is constitutionally forbidden to do, its individual or collective representatives in the exercise of state business are forbidden to do. U.S. Const. Amends. 1, 14; Const. Art. 1, §3. In compliance with the constitutional mandate, the State has the right to reasonably restrict the religious practices of its representatives in the performance of their state duties. U.S. Const. Amends. 1, 14; Const. Art. 1, §3. The State can enact regulations applicable to its agents that tend to prevent an agent from engaging in a practice which, unless prohibited, would have the State, through its agent, while engaged in official business, show a preference for one religion over another.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***23 Tenn. App. 1983 SEPARATION OF POWERS--**A non-judicial board has no power or authority to make constitutional rulings.

Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***23 Tenn. Crim. App. 1979 STAY OF HEARING FOR CRIMINAL TRIAL--**Neither one's Fifth Amendment right against self-incrimination nor one's due process rights would be violated by allowing disciplinary proceeding before Board of Medical Examiners to proceed in advance of criminal trial for the same conduct. Court also mentioned "strong public interest in the quick resolution of allegations against errant physicians, and disciplining them if necessary" and held there was no reason Board could be constitutionally required to hold own proceedings in abeyance until termination of pending criminal action.

State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 4 APR 611.

***23 Ch. Ct. 1992 DUE PROCESS; JUDICIAL REVIEW--**After the Commissioner overturned the initial order returning the seized vehicle to the Claimant, the Claimant appealed the Commissioner's decision, asserting that it violated due process because the Commissioner was acting as both prosecutor and judge in reviewing the administrative law judge's order. The reviewing court held that due process had not been violated by the Commissioner's review of the initial order. In the court's opinion, combining the prosecution and adjudication function in the same administrative agency did not violate due process as long as judicial review was provided.

Emert v. Department of Safety, No. 91-1358-II (Davidson County Ch. Ct. June 17, 1992).

***23 Ch. Ct. 1984 EQUAL PROTECTION; VARYING APPLICATIONS OF CRITERIA--**Panel did not violate petitioner's equal protection or due process rights, or take his property without just compensation when it denied him a permit to place fill on shore of Reelfoot Lake in strict application of its own criteria, whereas it had allowed deviations from its criteria in the case of Environmental Defense Fund v. Tennessee Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

Gerald B. Hollis v. Tennessee Water Quality Control Board, No. 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***23 Ch. Ct. 1983 DUE PROCESS; COMMISSION MEMBER ACTIONS--**It is not a denial of due process for a Commissioner to ask the parties to expedite the hearing so he can catch a plane, or for the Commissioner to ask pointed questions of the witnesses, or for the Commissioner not to deliberate before reaching a decision after the close of all proof.

Southland Medical Enterprises v. Health Facilities Commission, No. 82-284-II (Davidson County Ch. Ct. March 15, 1983). 1 APR 290.

***23 Ch. Ct. 1983 DUE PROCESS; DECISIONMAKING BY CONSIDERING RECORD**--Due process does not require a final decisionmaker to hear and see witnesses, T.C.A. §4-5-120(a) therefore does not violate due process by allowing such a decisionmaker to render a decision based on the record of a hearing.

James P. Gilbert v. James C. Hunt, M.D., et al., (Davidson County Ch. Ct. January 31, 1983). 1 APR 203.

***23 OAG 1984 UNCONSTITUTIONAL STATUTES; PUBLIC OFFICIALS MAY INSTITUTE ACTION FOR DECLARATORY JUDGMENT**--For public officials with discretionary duties under a statute opinioned to be unconstitutional by the Attorney General, such officer may elect to conform his conduct to comply with the Constitution or may initiate a judicial action for declaratory judgment as to his legal responsibilities.

Att. Gen. Op. to Commissioner John L. Parish (May 8, 1984). 3 APR 399.

***23 F.O. 1995 FIFTH AMENDMENT; ADVERSE INFERENCE**--Claimant asserted his rights under the Fifth Amendment and refused to answer various questions relating to his possible illegal activities. Since this was a civil case, the administrative law judge determined that it was reasonable to conclude that the answers would have been adverse to the claimant's interests.

Department of Safety v. Tyson L. Brown, IO/4-21-95. FO/5-1-95. 9 APR 93.

***23 F.O. 1995 EIGHTH AMENDMENT; DISPROPORTIONATE FORFEITURE**--To forfeit a vehicle worth \$7,000, which according to the proof was used only for 2 minutes and quite possibly only as a private place to divide drugs, when the drug sale did not even take place inside the vehicle was considered to be clearly disproportionate, without further evidence of facilitation, as well as excessive under the Eighth Amendment. The fact that the Claimant may well have known that his passenger was using his car in some way related to the sale of drugs, and consented to such use, did not change this conclusion. First, the Administrative Law Judge determined that the knowledge and consent of such use would obviously constitute less of an offense than the actual selling of marijuana, and no evidence was presented that the Claimant profited in any way from the drug sale. Secondly, although the presence of a weapon in the trunk of the car did raise some suspicion, this fact did not rise to the level of establishing any further use of the vehicle to facilitate a drug sale. Since forfeiture was found to be disproportionate and excessive under the Eighth Amendment, the seized vehicle was returned to the Claimant.

Department of Safety v. Marie N. Crump, IO/1-31-95. FO/2-10-95. 13 APR 189.

***23 F.O. 1995 FIFTH AMENDMENT; ADVERSE INFERENCE**--After the State has proven its case, the invocation of the Fifth Amendment does not protect an individual from an adverse inference from failure to testify in a civil hearing. Considering that the Claimant in the present case had an opportunity to clarify the matter for the record, the fact that he chose to invoke his Fifth Amendment privilege and refuse to answer questions raised the inference that the answers would incriminate him.

Department of Safety v. Steve H. Carr, IO/1-27-95. FO/2-6-95. 9 APR 100.

***23 F.O. 1995 DUE PROCESS; EX PARTE COMMUNICATIONS**--The Grievant in this matter alleged that his constitutional right to due process was violated by the manner in which the Level IV grievance decision was made by the Commissioner. The Grievant asserted that it was fundamentally unfair that *ex parte* recommendations should supersede a decision based upon evidence presented at a contested case proceeding. The Administrative Law Judge held that the Commissioner's usual practice of having *ex parte* contact with wardens and other supervisory personnel after the conclusion of a Level IV hearing and of allowing such *ex parte* communications to determine the outcome of grievances did violate the Grievant's right to due process. A decision made after a Level IV grievance hearing should be based only on information gathered and/or presented at the hearing. Any extra-hearing investigation which uncovers any evidence, including evidence as to any assessment of the seriousness of or harm caused by a grievant's alleged conduct, should lead to notification of the grievant and a reconvening of the hearing in order to provide the grievant with an opportunity to respond. Consequently, the termination was reversed, and a 20-day suspension was issued. The Department was ordered to reinstate the Grievant to his previous position. The Grievant was awarded backpay (to be offset by any income earned since termination and the pending suspension) and reasonable attorney's fees as result of prevailing on appeal.

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. *Remanded* for reconsideration. 20 APR 30.

***23 F.O. 1984 DUE PROCESS; PRE-TERMINATION HEARING**--Due process requires that when a state seeks to terminate a protected interest, it must give notice and opportunity for hearing appropriate to the nature of the case. Minimum due process requires: 1) Notice of deficiencies, 2) Opportunity to examine evidence against her/him, and 3) The right to present her/his side of the story to a reasonably detached and neutral decisionmaker.

Department of Military v. Lee, IO/7-30-84. FO/9-21-84. 4 APR 605.

***23 I.O. 1995 DUE PROCESS; RIF PLAN**--The State was in compliance with an approved reduction-in-force (RIF) plan when it displaced Grievant from his position. Grievant was not denied minimum due process as a result of implementation of the RIF plan.

Department of Correction v. Ben Sells, IO/5-8-95. 9 APR 172.

***23 I.O. 1994 DUE PROCESS; OPPORTUNITY FOR HEARING**--Grievant's contention that she was not afforded minimum due process was found to be without merit after she was given a full and fair opportunity to present her side of the case prior to any disciplinary action being taken. Moreover, the Grievant was again given a full opportunity to present her case at the Level IV hearing before the Commissioner.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. 9 APR 180.

***23 I.O. 1994 DUE PROCESS; CONSTITUTIONAL PROTECTIONS**--The due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt does not apply to civil forfeiture proceedings. Rather, civil preponderance of the evidence has been upheld as the standard of proof in forfeiture proceedings. Those protections associated with criminal cases may apply to a civil forfeiture proceeding only if it is so punitive that the proceeding must reasonably be considered criminal. *See Austin v. United States*, 113 S.Ct. 2801 (1993).

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***23 I.O. 1994 FIFTH AMENDMENT; TAKING OF PROPERTY WITHOUT JUST COMPENSATION**--No violation of Article I, Section 21, of the Tennessee Constitution was found when forfeiture was ordered. Only unreasonable takings of property are unconstitutional. Forfeitures under the Tennessee Drug Control Act are not considered unreasonable because property is only forfeited when there is a connection between the property and the illegal drug activity. *See Franklin Power and Light Company v. Middle Tennessee Electric Membership Cooperative*, 434 S.W.2d 829, 833 (Tenn. 1968).

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***23 I.O. 1987 FIFTH AMENDMENT; ADVERSE INFERENCE**--Board permitted to make findings and conclusions as to alleged violations of criminal statutes, by a burden of proof of a preponderance of the evidence. Respondent may assert Fifth Amendment privilege against self-incrimination, but Board permitted to draw adverse inference from such claims, although this inference alone may not support a holding against the Respondent on any given charge.

Emergency Medical Services Board v. William Ennis Troup, IO/1-8-87. 7 APR 107.

***23 I.O. 1977 FIFTH AMENDMENT; RIGHT AGAINST SELF-INCRIMINATION AFTER GRANT OF IMMUNITY**--The right of self-incrimination under the Fifth Amendment extends to an administrative hearing in which a witness's compelled testimony might result in a criminal prosecution. Where the administrative hearing is subsequent to the grant of immunity, the Respondent may be called to testify at the hearing and compelled to answer questions concerning testimony at the federal criminal proceeding. The privilege against self-incrimination in this instance can be said only to extend to matters outside the grant of immunity upon which future criminal prosecutions could be based.

Tennessee v. Dr. Howard R. Beesley, IO/4-12-77. 1 APR 12.

***23 I.O. 1976 DUE PROCESS; PRIOR HEARING REQUIRED BEFORE ANY ASSESSMENT BECOMES FINAL**--Provision of hearing before any assessment becomes final assures compliance with procedural due process requirements and the Uniform Administrative Procedures Act.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***23 I.O. 1976 SEPARATION OF POWERS**--Art. II, §§1, 2 of Tennessee Constitution not violated by Legislature's grant to Board of quasi-judicial power to adjudicate matters arising under statutes and to impose monetary damages; judicial review is available, court action is required to force compliance with Order, and Board is guided by standards in exercising its discretion regarding damages.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***23 I.O. 1976 DUE PROCESS; SEPARATION OF POWERS; BIAS OF BOARD**--Mere participation in pre-adjudicative investigations by persons who subsequently decide case does not alone suggest bias sufficient to disqualify such persons from adjudicative process. Delineation of functions between Department of Health and Environment, Division of Water Quality Control Board, Commissioner, staff attorneys and Administrative Law Judge assures little overlap; no evidence of bias; and here board took no role in investigatory or prosecutorial stages of proceeding. Therefore, no due process violation.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***23 NOTE 1995 EIGHTH AMENDMENT; EXCESSIVE FINES CLAUSE AND FORFEITURE**--For a discussion of the Eighth Amendment's application to drug-related forfeiture, consult the article entitled *Does The Punishment Outweigh The Crime?*. This paper explores the impact of Austin v. United States and the application of the Eighth Amendment's Excessive Fines Clause to civil *in rem* forfeiture. Section II of the paper examines the development and increased use of civil forfeiture. It traces the historical origins of forfeiture as well as the modern uses of civil forfeiture by law enforcement agencies to wage the war on drugs. Section II of this paper also outlines the statutory scheme for forfeiture under the Tennessee Drug Control Act. Section III explores the United States Supreme Court's Eighth Amendment jurisprudence. Section IV examines the Supreme Court's recent decision in Austin and its impact on civil forfeiture. Section IV then reviews the treatment of civil forfeiture by the lower courts, both state and federal, after Austin. Finally, Section V ponders the question of whether the punishment outweighs the crime under the Tennessee Drug Control Act and advocates the enactment of a proposed statutory framework that would aid in gaging and remedying unconstitutional excessiveness.

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27.

***23 NOTE 1995 CONSTITUTIONAL PROTECTIONS FOR FORFEITURE CLAIMANTS**--The characterization of forfeiture as a civil *in rem* proceeding against the property, not the property owner, has not prevented Tennessee courts from recognizing that the punitive, quasi-criminal nature of forfeitures necessitates the application of some constitutional protections on the claimant's behalf. A number of constitutional rights have been applied to forfeiture actions, namely the Fourth Amendment, the Fifth Amendment, Eighth Amendment, and Due Process protections.

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27.

***23 NOTE 1986 CONSTITUTIONAL PROTECTIONS**--This paper contains a detailed discussion of constitutional protections to drug-related forfeiture under the Tennessee Drug Control Act.

Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

24. OPEN MEETINGS ACT (Sunshine Law)

***24 Tenn. 1986 PUBLIC RECORDS**--T.C.A. §10-7-503 grants access to all state, county, and municipal records not excepted by State statute or, with very limited application, by rules properly promulgated by the head of a governmental entity. This includes municipal police department investigative files. (Statutes required to make records confidential, except that rules promulgated pursuant to the Uniform Administrative Procedures Act may do so in regard to adoption proceedings or in regard to records required to be kept confidential by federal statute of federal funds or for participation in a federally funded program.) Memphis Publishing Company v. Holt, et al., 710 S.W.2d 513 (Tenn. 1986). 7 APR 41. 16 APR 280.

***24 Tenn. 1986 PUBLIC RECORDS**--Closed investigative files of the Memphis Police Department are available for inspection by the media and the public under T.C.A. §10-7-503 of the Public Records Act. T.C.A. §10-7-503 opens all state, county, and municipal records for personal inspection by any citizen of Tennessee, "unless otherwise provided by state statute." In addition, the statute grants authority to the head of a governmental entity to promulgate rules in accordance with the Tennessee Uniform Administrative Procedures Act "to maintain the confidentiality of records concerning adoption proceedings or records required to be kept confidential by federal statute or regulation as a condition for receipt of federal funds or for participation in a federally funded program." Other than these two specific limitations, the Legislature has directed the Court to broadly construe the statute "so as to give the fullest possible public access to public records." Municipal police department investigative files are not listed as an exception to public access by T.C.A. §10-7-504 nor are they described in the numerous statutes classifying described records as being confidential, and therefore, they are open to the public.

Memphis Publishing Co. v. Holt et al., 710 S.W.2d 513 (Tenn. 1986). 7 APR 41. 16 APR 280.

***24 Tenn. 1984 ATTORNEY-CLIENT PRIVILEGE**--Discussions between a public body and its attorney concerning pending litigation are not subject to the open meetings act. However, once any discussion begins among the public body members regarding what action to take based upon advice from counsel, whether it be settlement or otherwise, such discussions shall be open to the public. 4 APR 633.

Smith County Education Association v. Joe K. Anderson, (Tenn. August 20, 1984). 4 APR 633.

***24 Tenn. 1984 ATTORNEY-CLIENT PRIVILEGE**--Discussions between a public body and its attorney concerning pending litigation are not subject to the Open Meetings Act when such public body is a named party in a lawsuit.

Smith County Education Association v. Joe K. Anderson, (Tenn. August 20, 1984). 4 APR 658.

***24 Tenn. App. 1992 SUNSHINE LAW; STATUTORY CONSTRUCTION**--Sunshine Law is remedial and should be construed broadly to promote openness and accountability in government, and to protect public against closed door meetings at every stage of a government body's deliberations.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

***24 Tenn. App. 1992 SUNSHINE LAW; APPLICATION TO MEETINGS**--Sunshine Law does not apply to meetings pertaining to decisions made by single public officials.

Metropolitan Air Research Testing Authority, Inc. v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611 (Tenn. Ct. App. 1992).

***24 Tenn. App. 1984 POLICE COMMITTEE DECISION**--A Clarksville policeman still in his probation period was terminated. He alleged a violation of the Sunshine Law by the three city council members comprising the Police Committee. the Police Committee of the Clarksville City Council is a public body and subject to the sunshine law. When the Chairman of the Committee called the other two members on the phone to secure their agreement on the termination of a policeman, this amounted to a meeting in violation of the law and the decision to terminate was illegal.

Donald K. Moore v. City of Clarksville, (Tenn. Ct. App. January 30, 1984). 3 APR 29.

***24 Tenn. App. 1983 BOARD DISCUSSIONS AFTER SCHEDULED MEETING**--Nursing Home Board of Trustees held regularly scheduled meeting after adjournment, Board members were inspecting kitchen and were confronted by disgruntled employees who wished to air a grievance against Plaintiff Board members not with employees in conference room. This meeting was not of the type contemplated by Sunshine Law and therefore did not violate Public Meetings Act, T.C.A. §8-44-105.

Tyler v. Henry County Nursing Home Board of Trustees, (Tenn. Ct. App. January 4, 1983). 1 APR 153.

1.00 DEPARTMENT OF AGRICULTURE

1.15 MOTOR FUELS QUALITY INSPECTION

F.O. 1995 UNINTENTIONAL VIOLATION--Although the State conclusively proved that the Respondent conveyed motor fuel with a lower Octane index than certified on the fuel pump and less than the minimum Octane index required by law for mid-grade unleaded gasoline, the administrative law judge expressly found the first-time violation to be unknowing and unintentional. In spite of this finding of an unintentional violation, an administrative fine was assessed against the Respondent in order to ensure that motor fuels were labeled appropriately and in order to protect public health, safety, and welfare.

Department of Agriculture v. Hooper Oil Company, Inc. d/b/a Hooper Quick Stop #1, IO/5-10-95. FO/5-22-95. 13 APR 210.

I.O. 1995 NO CIVIL PENALTIES AGAINST APPLICANTS--Action assessing civil penalty against Respondent for violations of the Retail Food Store Inspection Act was dismissed after the State failed to establish that the Respondent was subject to *any* civil penalty as an applicant for a retail food store permit. Provisions relative to correction of violations by a permittee were not applicable to the Respondent since at the time of the inspection uncovering the violations, the Respondent had only applied for a permit. The State had no authority to impose civil penalties for any failure of the Respondent to correct violations found to exist prior to the issuance of a permit to the Respondent. According to the administrative law judge, the State's remedy in these situations would be limited to withholding approval of the applicant's permit until the facility was in compliance with the pertinent provisions.

In re: Manoocher Jashfar d/b/a K Express Quick Mart, IO/5-11-95. 9 APR 8.

I.O. 1994 FIELD TESTS--It is not uncommon for a gasoline sample to pass a field test and yet fail the laboratory analysis. The Department does not take any enforcement action or assess any civil penalty unless a sample fails a laboratory test. In the present case, the gasoline sample passed the field test, yet failed the laboratory analysis. Therefore, the Administrative Law Judge determined that it was appropriate for the Department to assess a civil penalty, based upon the failed laboratory test, for selling petroleum products to the public that were below the standard specification requirements.

In re: Jack F. Mullis, d/b/a Dixieland Texaco and Upper Cumberland Oil Company, Inc., IO/1-27-94. 13 APR 218.

2.00 **DEPARTMENT OF AUDIT**

NO CASES REPORTED

3.00 **DEPARTMENT OF FINANCIAL INSTITUTIONS**

- 3.01 Premium Finance Company
- 3.05 Insurance

3.01 **PREMIUM FINANCE COMPANY**

Ch. Ct. 1984 CERTIORARI, COMMON LAW; STOCK APPRAISAL--Dissenting shareholders, who opposed a bank merger and elected to receive the value of their stock, challenged the action of the Commissioner of Financial Institutions, which caused their stock to be appraised at a value they thought was too low. Chancery Court held that it had subject matter jurisdiction to issue a common law writ of certiorari. Even though the Commissioner of Financial Institutions did not hold a hearing or issue an order, he did perform the judicial or quasi-judicial function of appraising the value of shareholder's stock, which was a "final determination." Therefore, a writ of certiorari could issue, and under the common law writ, the Court could receive new evidence on the issue of whether the Commission acted illegally, arbitrarily or capriciously. Lewis v. Adams, et al., No. 84-707-I (Davidson County Ch. Ct. June 12, 1984). 4 APR 521.

F.O. 1985 INTEREST, COMPUTATION--Computation of interest under a premium finance agreement from the effective date of the insurance contract is lawful under T.C.A. §56-37-108. Department of Financial Institutions v. Borg-Warner Insurance Finance Corporation, IO/5-15-85. FO/5-29-85. 6 APR 78.

3.05 **INSURANCE**

I.O. 1993 ISSUANCE TO SOCIALLY DEPENDANT--The issuance of credit health and accident insurance to borrowers whose income is from unemployment, social security-retirement, or social security-disability benefits violates Rule 0780-1-4-.04(5).

In re: Cleveland Loan and Finance Corporation; Cash Loans, Inc.; and Cash Loans of Nashville, Inc., IO/12-23-93. 8 APR 223.

I.O. 1993 AGENCY AUTHORITY--Although Rule 0780-1-4-.04(5) was promulgated by the Commissioner of the Department of Commerce and Insurance, it was issued under the authority of Title 45, and therefore, the Commissioner of the Department of Financial Institutions is authorized to enforce the rule.

In re: Cleveland Loan and Finance Corporation; Cash Loans, Inc.; and Cash Loans of Nashville, Inc., IO/12-23-93. 8 APR 223.

I.O. 1993 RULE REQUIRES NO FORMAL AGREEMENT--There is no need for a formal agreement between the State and a qualified Applicant concerning Rule 0780-1-4-.04(5), which conditions the issuance of a Certificate of Registration on the Applicant's future behavior, so long as there is an understanding that a violation of the rule is grounds for revocation or suspension of the certificate.

In re: Cleveland Loan and Finance Corporation; Cash Loans, Inc.; and Cash Loans of Nashville, Inc., IO/12-23-93. 8 APR 223.

4.00 **DEPARTMENT OF ENVIRONMENT & CONSERVATION** (See also 17.00, Department of Health, which previously had authority over most of the following areas.)

- 4.01 Oil & Gas Board
- 4.02 Drinking Water
- 4.04 Hazardous Waste
- 4.05 Subsurface Sewage Disposal System
- 4.06 Water and Sewer
- 4.07 Radiological Health
- 4.09 Air Pollution Control Board
- 4.27 Division of Solid Waste Management/Solid Waste Disposal Control Board
- 4.29 Board of Water and Wastewater Operations
- 4.30 Water Quality Control Board
- 4.31 Board of Reclamation Review
- 4.32 Water Well Drillers
- 4.33 Environmental Sanitation
- 4.40 Utility Management
- 4.41 Wastewater Financing Board
- 4.44 Underground Storage
- 4.45 Dry Cleaners Board

4.01 **OIL & GAS BOARD**

Tenn. 1984 DEFERRAL; BOARD EXPERTISE--After determining that 4.045 acres within defendant's drilling unit belonged to plaintiffs, it was a simple matter for the Chancellor to determine that this constituted 2.02% of defendant's oil well. The math involved did not require the expertise of the Oil & Gas Board and thus did not require deferral of this case to the Board. A claim that is first brought before the chancery court should be deferred to the administrative agency if 1) the deferral will be conducive toward uniformity of decision between courts and the agency, and 2) if the deferral will make possible the utilization of agency expertise.

Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984). 4 APR 739.

Tenn. 1984 JURISDICTION, CONCURRENT; UNIT PARTICIPATION--The Oil and Gas Board has the jurisdiction to determine the Unit Participation in a particular oil well, T.C.A. §60-1-202 (a)(4)(I) and (M), but does not have exclusive jurisdiction. Such jurisdiction can also be exercised by the Chancery Court.

Freels v. Northrup, 678 S.W.2d 55 (Tenn. 1984). 4 APR 739.

4.02 **DRINKING WATER** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.04 **HAZARDOUS WASTE** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.05 **SUBSURFACE SEWAGE DISPOSAL SYSTEM** (See also 17.00, Health Department, which previously had authority over this area.)

F.O. 1995 SEWAGE DISPOSAL; INAPPLICABLE EXEMPTION--A subsurface sewage disposal system installed by the Petitioner did not meet applicable regulatory requirements. Although the Petitioner argued that the system would meet the regulatory standards if it was located only hundreds of yards away in an exempted county, the exemption were held not to apply to the Petitioner in spite of the proximity to exempt counties. Furthermore, it was concluded that the Petitioner was not entitled to a variance since the media used was not substantially the equivalent of that specified by regulation.

Gary L. Morgan v. Department of Environment and Conservation, Division of Ground Water Protection, IO/4-24-95. FO/5-4-95. 13 APR 224.

4.06 **WATER AND SEWER** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.07 **RADIOLOGICAL HEALTH** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.09 **AIR POLLUTION CONTROL BOARD** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.27 **DIVISION OF SOLID WASTE MANAGEMENT** (See also 17.00, Health Department, which previously had authority over this area.)

F.O. 1994 BUFFER ZONE STANDARDS--The Buffer Zone Standards of Rule 1200-1-7-.04(3)(a) do not apply to the permit modification currently required for Northwest Tennessee's facility.
In the Matter of Coalition Stop!, Inc., FO/10-4-94. 18 APR 221.

F.O. 1994 LOCATING FACILITIES IN WETLANDS--The prohibition on locating facilities in wetlands in Rule 1200-1-7-.04(2)(p) is not applicable to permit modification currently required for Northwest Tennessee's facility.
In the Matter of Coalition Stop!, Inc., FO/10-4-94. 18 APR 221.

4.29 **BOARD OF WATER AND WASTEWATER OPERATIONS** (See also 17.00, Health Department, which previously had authority over this area.)

No reported cases.

4.30 **WATER QUALITY CONTROL BOARD** (See also 17.00, Health Department, which previously had authority over this area.)

1. In General.
2. Discharge Permits

1. IN GENERAL

***1 Tenn. 1986 FEDERAL PREEMPTION**--Federal legislation is preemptive of both federal common law and state law in the area of control of pollution in interstate waters and environmental agency of one state may not take official action against holder of valid discharge permits issued by another state, pursuant to authority granted by federal legislation, except as authorized by the federal statutes.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

2. DISCHARGE PERMITS

***2 Tenn. 1986 DISCHARGE PERMIT; INTERSTATE WATERS**--Under federal statutes, one seeking to discharge effluent into interstate waters need seek a permit only in the state where the discharge originates, and not in other states which may be affected by the discharge.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

***2 Tenn. 1986 DISCHARGE PERMIT; OUT-OF-STATE COMPANY**--Papermill located in North Carolina holding valid discharge permit from North Carolina, issued pursuant to the Federal Water Pollution Control Act, was not required to seek a discharge permit from the state of Tennessee even though the stream into which its discharge emptied flowed into the borders of Tennessee.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

***2 Tenn. 1986 DISCHARGE PERMITS; STATE JURISDICTION**--Under the Federal Water Pollution Control Act each state operates within the sphere of its own jurisdiction, and may not issue discharge permits for or control points of discharge lying within the jurisdiction of other states.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

***2 Tenn. 1986 STATE DISCHARGE PERMIT PROGRAMS**--Under the Federal Water Pollution Control Act state permit programs must take cognizance of the flow of waters into other jurisdictions and one condition of approval of a state program administered by the Environmental Protection Agency is that the state program must insure that the public and any other state whose waters may be affected by the issuance of a permit receives notice of application for the permit, be provided an opportunity for public hearing before a ruling on any such application and be provided the opportunity to submit written recommendations to the state ruling on the application.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

***2 Tenn. 1986 DISCHARGE PERMITS; AMENABILITY TO SUIT IN STATE**--North Carolina paper mill which had duly authorized permit from North Carolina, issued pursuant to the Federal Water Pollution Control Act to discharge effluent into river at a point within the borders of North Carolina could not be sued by Tennessee, pursuant to Tennessee statutes or the federal common law, for pollution of the river below the point of discharge which flowed into the borders of Tennessee.

Word, Commissioner, Department of Health and Environment, and the Wildlife Resources Agency v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986).

4.31 **BOARD OF RECLAMATION REVIEW** (See also 17.00, Health Department, which previously had authority over this area.)

No cases reported.

4.32 **WATER WELL DRILLERS**

(See also 17.00, Health Department, which previously had authority over this area.)

No cases reported.

4.33 **ENVIRONMENTAL SANITATION** (See also 17.00, Health Department, which previously had authority over this area.)

No cases reported.

4.40 **UTILITY MANAGEMENT** (See also 17.00, Health Department, which previously had authority over this area.)

No cases reported.

4.43 **WASTEWATER FINANCING BOARD**

No cases reported.

4.44 **UNDERGROUND STORAGE** (See also 17.00, Health Department, which previously had authority over this area.)

No cases reported

4.45 **DRY CLEANERS BOARD**

No cases reported.

5.00 **DEPARTMENT OF CORRECTION**

OAG 1987 EMPLOYEE RIGHTS; POLYGRAPH EXAMINATION--Chapter 739 of the Public Acts of 1986 provides that 1) any person may refuse to take a polygraph examination, 2) an employee may not be disciplined for refusing to take a polygraph examination, 3) an employer may not base any personnel action *solely* on the results of such an examination, and 4) an employee may not be disciplined *solely* on the basis of failing a polygraph examination. 1987 Op. Tenn. Att'y Gen. No. 87-05 (January 12, 1987). 16 APR 271.

6.00 **DEPARTMENT OF ECONOMIC & COMMUNITY DEVELOPMENT**

NO CASES REPORTED

7.00 **DEPARTMENT OF EDUCATION**

- 7.01 State Board of Education
 - 7.02 Revocation of Teaching Certificate
 - 7.03 Special Education
 - 7.04 Compulsory School Attendance
-

7.01 **STATE BOARD OF EDUCATION**

- 1. In General
 - 2. Procedure
-

1. IN GENERAL

***1 Tenn. 1984 GOOD FAITH NEGOTIATIONS REQUIRED**--Because of its unilateral action in terminating payment of monthly insurance premiums and its refusal to continue deductions of professional dues from teacher's salaries during negotiations, the Smith County Board of Education did not negotiate in good faith with the SCEA (Smith County Education Association) and thereby violated T.C.A. §49-5-611.

Smith County Education Association v. Anderson, 626 S.W.2d 328 (Tenn. 1984). 4 APR 633.

***1 OAG 1986 TRAINING PROGRAM**--Hearing officers appointed pursuant to T.C.A. §49-10-601 are not required to participate in the training program provided in Chapter 738, 1986 Tenn. Pub. Acts.
Att. Gen. Op. to Robert McElrath (September 24, 1986). 6 APR 346.

***1 OAG 1983 STANDARDS FOR CONSTRUCTION OF SCHOOLS**--The State Board of Education must establish and comply with minimum standards for construction, remodeling, renovating or equipping school buildings. Therefore, the Board may require a county to comply with those standards in the renovation of a 40-year old school building.

Att. Gen. Op. to Doug Goddard (September 12, 1983). 2 APR 490.

2. PROCEDURE

***2 Tenn. 1984 JURY TRIALS**--A party to an action brought under the Educational Professional Negotiations Act, T.C.A. §49-5-601, is entitled to a jury trial only for disputed issues of material fact. However, the issue of whether the Smith County Board of Education negotiated in good faith is a question of law for the Chancellor, and therefore, the party is not entitled to a jury trial in the present case.

Smith County Education Association v. Anderson, 626 S.W.2d 328 (Tenn. 1984). 4 APR 633.

***2 OAG 1984 TIME DEADLINE; MEETINGS**--The provision in Chapter 6 of the Public Acts of the First Extraordinary Session of the 93rd General Assembly, §3, which sets forth the days the Board of Education "shall" meet, is only directory, not mandatory. However, Board should attempt to meet on the days described or as close to them as possible. Citing inter alia, Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

Att. Gen. Op. to William C. Koch, Jr. (May 8, 1984). 3 APR 403.

***2 I.O. 1983 JOB TERMINATIONS; PROCEDURES**--Procedures to follow, in selecting positions to be discontinued or when terminating a job to accomplish a reduction in force, are controlled by Tennessee Department of Education Rule 0520-2-3-.02. However, such a rule is directory only, not mandatory. Thus, a failure to follow this procedure is not grounds for reversal of the RIF (reduction in force) decision of the chief administrative officer.

Morristown Area Vocational Technical School v. Lewis, IO/3-1-83. 1 APR 258.

7.02 **REVOCATION OF TEACHING CERTIFICATES**

F.O. 1984 BREACH OF CONTRACT--Suspension of teacher's certificate was ordered where the teacher breached his employment contract by failing to report to work at the start of 1983-1984 school year. It was no excuse that he thought that he had not been re-employed for that year and was unaware of Tennessee's Continuing Contract Law which provides that a teacher who does not receive Notice of Nonrenewal of his employment contract prior to April 15 is automatically renewed for the following school year.

Montgomery County Board of Education v. George Leonard, FO/2-9-84. 3 APR 172.

7.03 **SPECIAL EDUCATION**

Ch. Ct. 1984 HANDICAPPED STUDENTS; LOCAL COSTS--Chancery Court reversed the decision of the Commissioner of Education which ordered that Polk County was responsible for one-half of the costs necessary for a severely handicapped student's individualized care at Tennessee School for the Deaf. The Chancellor determined that state law only required a local school district to make an effort to provide necessary educational services for a handicapped child to maximum extent practicable and at least equal to the effort expended on behalf of each non-handicapped child.

Michael Farner and Polk County Board of Education v. Department of Education, No. 83-1159-III (Davidson County Ch. Ct. June 11, 1984). 4 APR 514.

Ch. Ct. 1984 HANDICAPPED STUDENTS; STATE COSTS--Once a local school district reaches its maximum reasonable contribution to the education of a handicapped child, the remaining costs are the responsibility of the State under T.C.A. §49-10-103(g).

Michael Farner and Polk County Board of Education v. Department of Education, No. 83-1159-III (Davidson County Ch. Ct. June 11, 1984). 4 APR 514.

I.O. 1983 TITLE I APPLICATION--The Washington County Department of Education submitted application for financial assistance under Title I Law to Tennessee Department of Education for approval. Later, an amendment of this application was submitted for approval. The amendment contained significant changes, including the removal of the Petitioner as Title I director. The Petitioner filed a complaint seeking to reverse the decision of the Department of Education which approved the amendment on the grounds that the Respondent, Washington County Board of Education, did not comply with the applicable law requiring an annual assessment of educational needs. The Administrative Law Judge held that annual assessment before submission of application or amended application is not required and annual assessment made after submitting amended application for approval was sufficient.

Nicholas Lividitis v. Washington County Department of Education, IO/2-23-83. 1 APR 239.

7.04 **COMPULSORY SCHOOL ATTENDANCE**

NO CASES REPORTED

8.00 DEPARTMENT OF EMPLOYMENT SECURITY

Tenn. App. 1983 ESTOPPEL; JOB REINSTATEMENT--When a party applies for and obtains retirement from the State as well as receives retirement benefits based upon the party's statement of incapacity to serve, the party is estopped from seeking reinstatement to the position from which the party was retired.

Johnson v. Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

Tenn. App. 1981 DISMISSAL; AUTHORITY--The appointing authority may not delegate the authority to dismiss a regular employee to anyone else in the Department.

Johnson v. Tennessee Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

Tenn. App. 1981 DISMISSAL; NOTICE--Unedited general work records (personnel records) do not constitute due notice of reasons for dismissal. See State Board of Regents of University v. Gray, 561 S.W.2d 140 (Tenn. 1978) for definition of proper notice.

Johnson v. Tennessee Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

Ch. Ct. 1984 MEDICAL PROOF--Defines "competent medical proof" that must be submitted from a doctor pursuant to T.C.A. §50-7-303(1), employment security.

Donna Rae Baker v. Thomas Young, Commissioner Tennessee Department of Employment Security, No. 83-306-III (Davidson County Ch. Ct. October 30, 1984). 4 APR 835.

9.00 DEPARTMENT OF FINANCE & ADMINISTRATION

9.01 BUREAU OF TENNCARE (See also 17.01, for cases heard through the Department of Health, before Medicaid/TennCare was transferred to Department of Finance and Administration.)

F.O. 1995 REIMBURSEMENT FOR ACUTE PSYCHIATRIC IN-PATIENT CARE PARTIALLY DENIED--TennCare will only pay for acute in-patient psychiatric care under certain circumstances. The Petitioner's condition did not meet the continued stay criteria after she was stabilized. According to the Bureau's definition, payment for acute in-patient psychiatric care is made only for a condition which has a sudden onset and a short, severe course, with the understanding that the in-patient facility will work aggressively and expeditiously toward moving the patient to a less restricted environment. Although the Petitioner was entitled to reimbursement for the first sixty days to ensure that she was stabilized after her attempted suicide, after the sixty day period, she received the maximum benefit from acute hospitalization. Consequently, reimbursement for the period following the sixty days was denied.

In The Matter of Margaret J. Dudbridge, IO/6-15-95. FO/6-27-95. 19 APR 108.

F.O. 1995 DETERMINATION OF ELIGIBILITY FOR ICF CARE--In determining whether an individual is eligible for an Intermediate Care Facility care, no consideration can be given to the fact that the Petitioner cannot afford RHA (residential home for the aged) care in determining whether, as a practical matter, the individual needs in-patient nursing care daily. Where the Petitioner's needs can be met at a lower level of care (such as at an RHA), Medicaid (TennCare) reimbursement for ICF care must be denied.

Pauline Hill v. Department of Finance and Administration, Bureau of TennCare, IO/6-8-95. FO/6-20-95. 19 APR 129.

F.O. 1995 NO SPECIAL MEDICAL TREATMENTS OR MONITORING REQUIRED--The facts did not establish that the Petitioner requires, or did require, twenty-four hour in-patient nursing services. The administrative law judge found that the Petitioner was not receiving any special medical treatments or monitoring, and did not receive those services while in the nursing home. The Petitioner was also found to be alert and oriented as well as living independently, requiring only minor assistance with bathing and set-up of medications. The services the Petitioner received in the nursing home were limited to the administration of medication and minor assistance with activities of daily living. Consequently, TennCare benefits were denied.

Alma Harrison v. Department of Finance and Administration, Bureau of TennCare, IO/3-22-95. FO/4-3-95. 19 APR 116.

F.O. 1995 DENTAL EXTRACTIONS--The Petitioner was a forty-six year old individual who requested Medicaid reimbursement for dental extractions. The petitioner's condition was such that the absence of the requested services would not endanger his life nor result in severe bodily dysfunction. In light of the lack of severity, the regulations did not permit Medicaid coverage of the services sought, and reimbursement was denied.

In the Matter of James Webb, IO/2-27-95. FO/3-9-95. 15 APR 262.

F.O. 1995 NEEDS COULD BE MET AT LOWER LEVEL OF CARE--In the present case, the Petitioner appealed the denial of his Preadmission Evaluation Application (PAE) for Medicaid reimbursement for Intermediate Care Facility (ICF) care. After consideration of the record, the administrative law judge determined that the Petitioner's PAE should be denied. While the record supported that the Petitioner undoubtedly needed the assistance of some responsible adult on a daily basis, maybe even the assistance of a licensed nurse on some occasions, the record did not establish that the assistance could only be rendered on an in-patient basis by licensed personnel. The fact that the Petitioner was capable of self-administering some drugs when they were distributed to him supported the conclusion that the necessity for daily assistance from licensed personnel in an in-patient setting had not been met.

In the Matter of Remer Haws, IO/2-23-95. FO/3-6-95. 19 APR 135.

I.O. 1995 LIMITED MONITORING AND SUPERVISION NEEDED--The subject of this hearing was the Petitioner's appeal of the denial by the Bureau of TennCare of her Preadmission Evaluation (PAE) application for Medicaid reimbursement for Intermediate Care Facility (ICF) care. Although the State conceded that the Petitioner met all eligibility criteria listed under Rule 1200-13-1-.10(3) for PAE approval, the State established that she did not need in-patient nursing care daily. Due to the Petitioner's mental condition, she clearly needed assistance in monitoring and administering her medications. In addition, due to her diabetic condition, she required someone to supervise and prepare her meals and to monitor her diet. However, the administrative law judge determined that such assistance did not need to be provided by licensed personnel in an ICF unit. Although the Petitioner could no longer live independently and needed the assistance of some responsible adult, and perhaps

licensed personnel to a limited extent, she was found not to require the services of licensed personnel on a daily basis. While this type of assistance on a daily basis might be in the Petitioner's "best interest" as suggested by her psychologist, such services were not authorized for Medicaid reimbursement. Therefore, Medicaid coverage for ICF care was denied.

In the Matter of Lutye Murphy and Humboldt Nursing Home, IO/6-30-95. 19 APR 163.

I.O. 1995 LICENSED CARE NOT REQUIRED--Medicaid coverage for ICF (Intermediate Care Facility) was denied where primary services being offered to Petitioner were giving her medications and observing her for any side-effects of the medications, including those which could result from any alcohol abuse relapse. These were considered services for which a licensed nurse was not required.

Elma Head v. Department of Finance and Administration, Bureau of TennCare, IO/6-29-95. 14 APR 17.

I.O. 1995 DECERTIFICATION FOUND IMPROPER--Where the facts established that the psychiatric services the Petitioner needed could only be provided at an acute level of inpatient care, which provided a structured and carefully monitored separation from his dysfunctional mother, the administrative law judge determined that the Petitioner's decertification was improper and ordered Medicaid reimbursement for specified time periods.

In the Matter of Christopher Martin, IO/6-27-95. 14 APR 1.

I.O. 1995 LEVEL OF SUPERVISION NOT RISING TO LEVEL OF NEEDING IN-PATIENT CARE DAILY--Although Petitioner's medical condition clearly required a more intensive level of supervision than she received at the residential home, she did not meet the strict medical criteria for Medicaid reimbursement at an ICF (Intermediate Care Facility) facility.

In the Matter of Lela Huson, IO/6-23-95. 19 APR 22.

10.00 **DEPARTMENT OF GENERAL SERVICES**

NO CASES REPORTED

11.00 DEPARTMENT OF HUMAN SERVICES

1. In General
2. Procedure
3. Evidence
4. Disability or Impairment

1. IN GENERAL

***1 Tenn. App. 1992 MEDICAID BENEFITS TO MEDICALLY NEEDY**--The Department of Human Services provides an optional category of medicaid benefits to persons who are aged, blind or disabled according to the standards of the Federal Supplemental Security Income program (SSI) but who have assets or income which exceed the limits permitted by the SSI program. 42 U.S.C., §1396d(a). Persons in this category are referred to as "medically needy" medicaid recipients. A state participating in the medicaid program is under no obligation to provide coverage for the medically needy. However, if it does so, it must comply with federal law governing the medically needy program. Schweiker v. Hogan, 457 U.S. 369, 102 S.Ct 2597, 73 L.Ed.2d 227 (1982).

Gross v. Department of Human Services, No. 01-A01-9111CH00423, 1992 WL 151439 (Tenn. Ct. App. July 2, 1992).

***1 Tenn. App. 1992 MEDICAID BENEFITS TO MEDICALLY NEEDY; FEDERAL LAW REQUIREMENTS**--Federal law requires that in determining the eligibility of a person applying for medically needy medicaid on the basis of disability, a state must use the same definition of disability as used in the SSI program. 42 C.F.R. §435.540. The definition of disability in the SSI program is very stringent and the state has no discretion to deviate from that standard.

Gross v. Department of Human Services, No. 01-A01-9111CH00423, 1992 WL 151439 (Tenn. Ct. App. July 2, 1992).

***1 Tenn. App. 1991 IMPROVEMENT IN MEDICAL CONDITION**--Payments of petitioner's disability compensation were discontinued after there had been an improvement in the petitioner's medical condition, related to his ability to work, such that he was able to engage in substantial gainful activity. The original determination of disability plaintiff's condition had sufficiently improved that he was no longer entitled to benefits under federal Medicaid guidelines.

Brown v. Grunow, Commissioner, Department of Human Services, No. 01-A-019010CH00356, 1991 WL 24529 (Tenn. Ct. App. February 27, 1991).

***1 Tenn. App. 1986 MEDICAID ELIGIBILITY; CONSIDERATION OF INCURRED MEDICAL EXPENSES**--The Department of Human Services erred in not considering the amount of the petitioner's incurred medical expenses in determining her eligibility for medicaid. Section 1396a(a)(17) of 42 U.S.C. provides in pertinent part that the state medicaid plan must include "reasonable standards" for determining eligibility for medicare and provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or for any other type of remedial care recognized under state law. The Department did not take into account the \$23,768.16 medical expense incurred by the petitioner. The Department argued that this medical expense is not to be taken into account because the Secretary has not excepted any medical expense and that, therefore, medical expenses incurred by the petitioner may not be taken into account. However, in the court's opinion, the Secretary, by his non-action, determined that the cost of medical expenses shall not be excepted. The court held that until and unless the Secretary excepts the cost incurred for medical care, all medical expense incurred is to be taken into account in determining eligibility.

Holt v. Department of Human Services, No. 85-240-II, 1986 WL 2881 (Tenn. Ct. App. March 5, 1986).

2. PROCEDURE

***2 Tenn. App. 1994 REVERSAL OF AGENCY DECISION**--No agency decision in a contested case shall be reversed unless for errors which affect the merits of the case.

Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

3. EVIDENCE

***3 Tenn. App. 1994 DISABILITY; BURDEN OF PROOF**--The burden of establishing disability is on the individual seeking benefits, and any impairments must be demonstrated by medically acceptable clinical laboratory diagnostic techniques. In addition to the fact of impairment as defined by the Social Security Act and the regulations thereunder, the individual must prove that such impairment is severe enough to preclude him from engaging in any substantial gainful employment activity. Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

***3 Tenn. App. 1992 EXISTENCE OF DISABILITY; BURDEN OF PROOF**--In the instant case the Department of Human Services determined that petitioner was not working; that his left-hand impairment is a severe impairment; that this impairment did not meet or equal a listed impairment in Appendix 1 of 20 C.F.R., Part 404, Subpart P, §§416.925, 416.926; and that this impairment precluded petitioner from doing past relevant work. The Department of Human Services found, however, that petitioner had the residual functional capacity to do other work. In considering petitioner's age, education, work experience, and residual functional capacity, The Department of Human Services determined that the injury to his left hand would not preclude Mr. Gross from being able to perform a limited range of light work. The petitioner has the ultimate burden to establish an entitlement to benefits by proving the existence of a disability. Listenbee v. Secretary of Health and Human Services, 846 F.2d 345, 349 (6th Cir. 1988). Here, the petitioner has not shown the existence of a disability within the meaning of 20 C.F.R., §416.905(a). The Court of Appeals determined that there was substantial material evidence in the record to support the finding that the petitioner is not disabled so as to be eligible for medicaid benefits. Gross v. Department of Human Services, No. 01-A01-9111CH00423, 1992 WL 151439 (Tenn. Ct. App. July 2, 1992).

***3 Tenn. App. 1991 DETERMINATION OF DISABILITY; BURDEN OF PROOF**--Although a prior determination of compensable disability raises a presumption of continuance of the disability, the presumption is rebuttable. In the present case, the court found that there was substantial and material evidence to support a finding contrary to the presumption. Relying on federal case law, the court held that a prior determination of disability does not shift the burden of proof. Evidence of improved condition leaves the ultimate burden upon the applicant to prove continued qualifying disability despite the improvement. See Haynes v. Secretary of Health and Human Services, 734 F.2d 284 (6th Cir. 1984) and Harmon v. Secretary of Health and Human Services, 749 F.2d 357 (6th Cir. 1984). Brown v. Grunow, Commissioner, Department of Human Services, No. 01-A-019010CH00356, 1991 WL 24529 (Tenn. Ct. App. February 27, 1991).

***3 Tenn. App. 1991 EXPERT OPINION**--When other medical evidence contradicts the opinion of the treating physician, the weighing of the opinion of experts is not within the province of judicial review of administrative decisions. Brown v. Grunow, Commissioner, Department of Human Services, No. 01-A-019010CH00356, 1991 WL 24529 (Tenn. Ct. App. February 27, 1991).

***3 Tenn. App. 1990 DENIAL OF DISABILITY BENEFITS**--Denial of medical disability benefits was not made in violation of constitutional or statutory provisions, in excess of statutory authority, upon unlawful procedures, nor arbitrary or capricious. The court found that substantial and material evidence existed in the record to support the decision of Department of Human Services. Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***3 Tenn. App. 1990 DISABILITY BENEFITS; BURDEN OF PROOF**--The burden of establishing disability is on the petitioner, and impairments must be demonstrated by medically acceptable clinical and laboratory diagnostic techniques. See Wright v. Schweiker, 556 F.Supp. 468 (M.D. Tenn. 1983). Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***3 Tenn. App. 1990 WEIGHT OF EXPERT OPINION**--The hearing officer is not bound by a consulting physician's conclusory statement that the petitioner has a mental impairment which limits some of her work related activities. The ultimate determination of disability rests with the hearing officer and not with the treating or consulting physician. See Duncan v. Secretary of Health and Human Services, 801 F.2d 847 (6th Cir. 1986). Therefore, the court found that the hearing officer did not err in finding that the petitioner retained the capacity to work and that her generalized anxiety disorder could be resolved within 12 months with mental health treatment. Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***3 Tenn. App. 1990 WEIGHT OF EXPERT OPINION**--In order to be entitled to any deference by the hearing officer, a treating physician's opinion must be based on sufficient medical data. Harris v. Heckler, 756 F.2d 431 (6th Cir. 1985). In the case at hand, no medical evidence in the record supports the doctor's opinion of chronic obstructive lung disease. Moreover, the petitioner's testimony regarding her breathing problems is not sufficient to establish that this impairment is severe. Therefore, the hearing officer did not err in finding Ms. Harville's testimony regarding the severity of her breathing problems to be less than credible. See Sias v. Secretary of Health and Human Services, 861 F.2d 475 (6th Cir. 1988). Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

4. DISABILITY OR IMPAIRMENT

***4 Tenn. App. 1994 DISABILITY DETERMINATION**--"Disability," as used in the SSI program, is defined in federal regulations as: the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, the person must have a severe impairment, which makes him unable to do his previous work or any other substantial gainful activity which exists in the national economy. To determine whether the person is able to do any other work, the judge considers the person's residual functional capacity and age, education, and work experience.

Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

***4 Tenn. App. 1994 DEPARTMENT DETERMINATION OF DISABILITY**--While the burden of proof is on the claimant, the Department of Human Services had the responsibility to determine whether the medical evidence showed that these impairments disabled the claimant to the extent required by SSI regulations. Pursuant to 20 C.F.R. s 416.929(b), DHS may not find the claimant disabled based on her described symptoms alone, including pain; rather, there must be objective medical evidence which shows that the claimant has a medical or psychological condition which could reasonably be expected to produce these symptoms.

Adams v. Grunow, Department of Human Services, No. 01A01-9405-CH-00218, 1994 WL 592112 (Tenn. Ct. App. October 26, 1994).

***4 Tenn. App. 1992 MEDICAID BENEFITS TO MEDICALLY NEEDY; DEFINITION OF DISABILITY**--In the instant case there is substantial and material evidence in the record that the petitioner did not meet the SSI program definition of disability. The state has no discretion to deviate from the standard. "Disability" as used in the SSI program is defined in federal regulations as: "[T]he inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. To meet this definition, you must have a severe impairment, which makes you unable to do your previous work or any other substantial gainful activity which exists in the national economy. To determine whether you are able to do any other work, we consider your residual functional capacity and your age, education and work experience." 20 C.F.R. §416.905(a). In applying for medically needy benefits, petitioner complained of an injury to his hand which resulted in the four fingers on his left hand being non functional. The Department of Human Services had the responsibility to determine whether the medical evidence showed that this impairment disabled petitioner to the extent required by the SSI regulations. The Department of Human Services may not find a person disabled based on their described symptoms alone. There must be medical evidence which shows that the petitioner has a medical condition which could reasonably produce those symptoms. 20 C.F.R. §416.929.

Gross v. Department of Human Services, No. 01-A01-9111CH00423, 1992 WL 151439 (Tenn. Ct. App. July 2, 1992).

***4 Tenn. App. 1992 EVALUATION OF DISABILITY; FEDERAL LAW REQUIREMENTS**--The Tennessee Department of Human Services must use the sequential steps set out in 20 C.F.R. §416.920 to evaluate disability. Pursuant to this regulation, the Tennessee Department of Human Services must determine the following:

- 1) Is the claimant working and engaged in substantial gainful activity? If so, the application will be denied regardless of medical findings.
- 2) Does the claimant have a severe impairment? If not, the application will be denied.
- 3) Does the claimant's impairment meet or equal a listed impairment in Appendix 1, 20 C.F.R., Part 404, Subpart (P)? If so, the claimant is automatically considered disabled if the durational requirement is met.

- 4) Does the claimant's impairment prevent the claimant from doing past relevant work? If the claimant has a residual functional capacity to still do the same kind of work as in the past, the application will be denied.
- 5) Does the claimant's impairment prevent the claimant from doing other work? If, considering the claimant's residual functional capacity, age, education and work experience, the claimant is capable of doing other work, the application will be denied. 20 C.F.R., §416.920.

Gross v. Department of Human Services, No. 01-A01-9111CH00423, 1992 WL 151439 (Tenn. Ct. App. July 2, 1992).

***4 Tenn. App. 1990 DISABILITY, DEFINITION OF--**The Social Security Act defines disability under the Social Security Disability and SSI programs as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or which can be expected to last for a continuous period of not less than 12 months. A person is unable to engage in substantial gainful activity only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. Department of Human Services is required to determine whether the medical evidence showed that any of the petitioner's impairments, either singly or in combination, disabled her to the extent required by the SSI regulations. The Department may not find a person disabled based on their described symptoms alone, as medical evidence must be available which shows that the claimant has a medical condition which could reasonably produce those symptoms.

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***4 Tenn. App. 1990 EVALUATION OF DISABILITY--**The sequential steps which Department of Human Services is required to follow in evaluating disability are set out in 20 C.F.R. §416.920. Department of Human Services must determine:

1. Is the petitioner working and engaged in substantial gainful activity? If so, the application will be denied regardless of medical findings.
2. Does the petitioner have a severe impairment? If not, the application will be denied.
3. Does the petitioner's impairment meet or equal a listed impairment in Appendix 1, 20 C.F.R. Part 404, Subpart P? If so, the petitioner is automatically considered disabled if the durational requirement is met.
4. Does the petitioner's impairment prevent him from doing past relevant work? If the petitioner has the residual functional capacity to still do the same kind of work as in the past, the application will be denied.
5. Does the petitioner's impairment prevent him from doing other work? If, considering the petitioner's residual functional capacity, age, education and work experience, he is capable of doing other work, the application will be denied.

In the instant case, the Department determined that the petitioner was not working; that her mental impairment was severe; and that this impairment did not meet or equal a listed impairment. However, the Department found that the petitioner's mental impairment did not prevent her from doing her past relevant work and that she has the residual functional capacity to do other work. Further, the Department found that the petitioner's impairments due to her anxiety, stomach and breathing problems are not severe and would resolve within 12 months. After evaluating the petitioner's mental retardation and nervous condition, the hearing officer determined that she would not be precluded from performing vocationally relevant work. This finding was based on the fact that currently the petitioner relates well, does housework, cooks, shops and drives to visit her relatives; that her mental capacity has not precluded her from working in the past; and that her alleged nervous condition would resolve within 12 months with treatment.

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***4 Tenn. App. 1990 EVALUATION OF SEVERE IMPAIRMENT; PAST WORK EXPERIENCE--**The fact that an individual has worked in the past cannot relieve the Secretary from the obligation of evaluating whether the individual may nevertheless have a severe impairment(s). See Mowery v. Heckler, 771 F.2d 966 (6th Cir. 1985).

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***4 Tenn. App. 1990 NON-SEVERE IMPAIRMENT**--An impairment is considered non-severe "only if, regardless of the petitioner's age, education or work experience, the impairment would not affect the petitioner's ability to work." See Salmi v. Secretary of Health and Human Services, 774 F.2d 685 (6th Cir. 1985).

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

***4 Tenn. App. 1990 EVALUATION OF DISABILITY; COMBINED EFFECT OF IMPAIRMENTS**--Department of Human Services is required to consider the combined effect of all of a claimant's impairments in evaluating a claimant's eligibility for Medicaid, regardless of the severity of any single impairment by itself.

Harville v. Grunow, Commissioner, Tennessee Department of Human Services, No. 142, 1990 WL 131425 (Tenn. Ct. App. September 14, 1990).

12.00 **DEPARTMENT OF COMMERCE AND INSURANCE**

12.01	Insurance Agents
12.02	Mergers of Insurance Companies
12.03	Reserved
12.04	Licensing Proceedings
12.05	Registration Statement
12.06	Broker-Dealers, Agents & Investment Advisers
12.07	Board of Barber Examiners
12.08	Board of Building Code Appeals
12.09	Board of Cosmetology
12.10	Board of Examiners for Architects & Engineers
12.11	Board of Land Survey Examiners
12.12	Board of Pharmacy
12.13	Collection Service Board
12.14	Board for Licensing Contractors
12.15	Auctioneer Commission
12.16	Board for Licensing Hearing Aid Dispensers
12.17	Tennessee Motor Vehicle Commission
12.18	Real Estate Commission
12.19	Board of Accountancy
12.20	Elevator Safety Board
12.21	Board of Funeral Directors and Embalmers
12.22	Private Employment Agency Board
12.23	Boxing
12.24	Racing
12.25	Hearings on Insurance Companies
12.26	Polygraph Examiners
12.29	Home Improvement Contractors
12.30	Security Guards
12.31	Burial Services
12.32	Private Investigators
12.33	Fire Prevention and Investigation
12.34	Alarm System Contractors

12.01 **INSURANCE AGENTS**

1. In General
2. Suspension or Revocation of License

1. IN GENERAL

***1 OAG 1984 UNAUTHORIZED COMMISSIONS**--T.C.A. §56-6-126 (Supp. 1983) prohibits an insurance agent from paying anyone, directly or indirectly, "any commissions or other valuable consideration for services in connection with the sale of insurance in this state..." unless such person is licensed to sell insurance. An insurance agency lessee renting space from a bank located in the bank lobby was found not to violate T.C.A. §56-6-126 (Supp. 1983) when it entered into a percentage-of-sales lease with the unlicensed lessor bank since the lessor bank provided its insurance agency tenant only with those services incidental to the landlord-tenant relationship.

1984 Op. Tenn. Att'y Gen. No. 84-338 (December 18, 1984). 6 APR 1.

***1 OAG 1984 UNAUTHORIZED COMMISSIONS**--Lessor bank's selling or renting of envelope space (space in bank envelopes containing material mailed to bank customers) or customer lists to a lessee insurance agency violates T.C.A. §56-6-

126 only if the envelope space and customer lists were not offered under the same terms to other independent insurance agencies within the state.

1984 Op. Tenn. Att'y Gen. No. 84-338 (December 18, 1984). 6 APR 1.

***1 F.O. 1995 FELONY VS. MISDEMEANOR AS ADDITIONAL GROUND FOR DISCIPLINE**--Four federal misdemeanor violations did not serve as bases for disciplining the Respondent under the provisions of T.C.A. §56-6-155(a)(12). This statute authorizes the Commissioner of the Department of Commerce and Insurance to suspend, revoke, or refuse to issue or renew an insurance agent's license in Tennessee where an individual has been convicted of a felony. The State argued that four federal misdemeanor violations (each punishable by imprisonment for more than one year) should be considered "felonies" under Tennessee law, thereby subjecting the Respondent to additional causes for discipline under T.C.A. §56-6-155(a)(12). The Administrative Law Judge disagreed and adhered to federal law in defining the Respondent's actions as misdemeanors. Recognizing that it would be illogical to define the Respondent's federal violations as felonies under Tennessee criminal law, the Administrative Law Judge stressed the plain reading of the statute which addressed only felonies under either Tennessee or federal law.

In the Matter of: John N. Coppedge, IO/1-4-95. FO/1-17-95. 13 APR 231.

2. SUSPENSION OR REVOCATION OF LICENSE

***2 F.O. 1994 REVOCATION OF LICENSE AFTER MISAPPROPRIATION OF FUNDS**--An individual holding an insurance license has ample opportunity to have other companies' and other individuals' money pass through their hands. In the administrative law judge's opinion, where the Grievant used unauthorized funds to relieve her financial situation once, she would be inclined to do so again. When it is undisputed that the Grievant has previously misappropriated funds, the revocation of her license is appropriate.

Department of Commerce and Insurance v. Melba Jean Arnold, IO/8-11-94. FO/12-22-94. 13 APR 240.

***2 F.O. 1994 GROUNDS FOR PERMANENT REVOCATION OF LICENSE**--The State carried its burden of proof in showing that the Respondent misappropriated funds and engaged in dishonest practices in violation of T.C.A. §56-6-155(a). Because of the severity of the Respondent's actions, the pattern over a period of time, the financial harm to his victims, and the tremendous financial hardships that could result from a lack of health insurance coverage, the Respondent's actions justified a permanent revocation of his insurance agent license.

In the Matter of: Stephen Burrus Deaton, IO/11-8-94. FO/11-18-94. 13 APR 247.

***2 F.O. 1983 LICENSE SUSPENSION FOR MISREPRESENTATION**--Insurance agent's submission of insurance policy applications for fictitious people in order to obtain commissions resulted in a six (6) month license suspension because it constituted a violation of T.C.A. §56-6-129(6) which deals with the misrepresentation of the terms of any actual or proposed insurance contract.

Tennessee Department of Commerce & Insurance v. Carrigan, IO/8-19-83. FO/10-24-83. 2 APR 429.

***2 I.O. 1994 REVOCATION OF LICENSE AFTER CRIMINAL CONVICTION**--The procuring and maintaining of an insurance agency license is a privilege, not a right. Whatever the circumstances of the Respondent's prior criminal conviction may or may not have been, the administrative law judge is not in a position to ignore such a conviction and allow the Respondent to continue in a fiduciary capacity dealing with the public and insurance companies. Such a conviction, even if the Respondent pleaded nolo contendere rather than guilty, indicates that the Respondent fails to possess the traits of character and judgment required of one dealing in a fiduciary capacity.

Department of Commerce and Insurance v. Terral John Belisle, IO/8-19-94. 13 APR 257.

12.02 **MERGERS OF INSURANCE COMPANIES**

NO CASES REPORTED

12.03 **Reserved**

12.04 **LICENSING PROCEEDINGS**

NO CASES REPORTED

12.05 **REGISTRATION STATEMENT**

1. In General
2. Procedure

1. IN GENERAL

***1 6th Cir. 1974 INVESTMENT CONTRACTS**--The Court determined that defendants, who sold warehouse receipts of small quantities of Scotch whiskey, were not simply selling warehouse receipts akin to commodity futures but "investment contracts" within ambit of Securities Act. The Court's decision turned upon the defendant's use of the following assertions: 1) doubling money in four years was virtually guaranteed, 2) the defendants would select whiskey and casks, handle all necessary arrangements for the warehousing and insuring of the whiskey, and would find buyers or buy whiskey back themselves. Glen-Arden Commodities, Inc. v. Constantino, 493 F.2d 1027 (6th Cir. 1974).

***1 Tenn. App. 1987 FALSE STATEMENTS**--Respondent's answer of "no," in response to a question on application asking if he had ever been subject of a major legal proceeding, constituted a materially false statement in violation of T.C.A. §48-16-112(a)(2)(A) after it was discovered that the Respondent had been named as a defendant in an action against his former employer and others. Such conduct warranted a 6-month suspension of registration. Securities Division v. Fugitt, No. 6-29-83.55 (Tenn Ct. App. February 18, 1987). IO/10-12-83. FO/12-19-83. 2 APR 649.

2. PROCEDURE

***2 F.O. 1984 APPLICATION; EFFECTIVE DATE**--An application is automatically effective 30 days after filing if no denial order is in effect and no proceeding under T.C.A. §48-2-112 is pending. However, an application is not deemed properly filed until it has been properly completed. Securities Division v. Joel F. Schlosberg, IO/5-30-84. FO/6-20-84. 4 APR 441.

***2 F.O. 1983 TIMELY COMPLAINT**--The Respondent filed a Motion to Dismiss the complaint against him (regarding the denial of his application for registration as a securities agent) on the ground that the complaint was not timely filed. The Respondent argued that the complaint was based on a fact known to the Securities Division at the time of the effective date of the application, and therefore, the complaint had to be filed within 30 days of the effective date of the application, rather than when it was actually filed. Denying the Respondent's motion, the Administrative Law Judge held that the complaint was timely filed because it was not based on facts known to Securities Division at the time of the effective date of the application. It was ultimately determined that, although the Securities Division was aware that the Respondent had been involved in a lawsuit, they did not know of the precise nature of that suit until they received the responsive pleadings. Securities Division v. Fugitt, IO/10-12-83. FO/12-19-83. 2 APR 649.

12.06 **BROKER-DEALERS, AGENTS & INVESTMENT ADVISERS**

1. In General
 2. Procedure
 3. Fraud
 4. Investment Contracts
-

1. IN GENERAL

***1 Tenn. 1965 CONSTRUCTION; REMEDIAL ACT**--Securities Acts, which prohibit unfettered sale of stocks, bonds, or other securities, are remedial in character and designed to prevent frauds and impositions upon public. Consequently, these acts should be liberally construed in order to effect their remedial purpose.

DeWees v. State, 300 S.W.2d 241 (Tenn. 1965).

2. PROCEDURE

***2 F.O. 1983 PETITIONS FOR RECONSIDERATION OF DEFAULT**--Petition for reconsideration of initial order with notice of default was granted to consider whether the previously entered default should be put aside. This tolls 20-day time limit for appeal.

Securities Division v. Epstein, FO/10-13-83. 2 APR 536.

***2 P.H.O. 1987 DISCOVERY**--The Administrative Law Judge in a contested securities case does not have the authority to regulate a contemporaneous private investigation conducted by the Securities Division pursuant to T.C.A. §48-2-118(a) even though the private investigation concerns the same issues that are the subject of the contested case hearing.

Securities Division v. Banco et al., PHO/3-3-87. 7 APR 282.

3. FRAUD

***3 Tenn. App. 1977 RELIANCE**--In order to obtain a remedy for misrepresentation, the plaintiff must prove reliance. Reliance is established upon proof that the misrepresentation was a substantial factor affecting the plaintiff's course of conduct. T.C.A. §48-1644. Repealed in 1980.

Diversified Equities, Inc. v. Warren, 617 S.W.2d 171 (Tenn. Ct. App. 1977).

4. INVESTMENT CONTRACTS

***4 I.O. 1983 REGISTRATION OF INVESTMENT CONTRACTS**--An "investment contract" is a security, as defined in T.C.A. §48-2-101(12), and T.C.A. §48-2-104 requires the registration of all investment contracts. The sale of rabbits for breeding purposes in order to generate profits from the sale of rabbit meat and pelts constitutes the sale of an "investment contract" and, as such, must be registered under Tennessee law.

Securities Division v. United Fur Brokers, IO/8-22-83. 2 APR 441.

12.07 **BOARD OF BARBER EXAMINERS**

NO CASES REPORTED

12.08 **BOARD OF BUILDING CODE APPEALS**

OAG 1983 RULEMAKING; CONSTRUCTION SAFETY--State Fire Marshall can promulgate rules establishing building construction safety standards. These rules were held to apply to a forty-year-old school building undergoing renovation. Att. Gen. Op. to Doug Goddard (September 12, 1983). 2 APR 490.

12.09 **BOARD OF COSMETOLOGY**

OAG 1983 LICENSE REQUIRED--Every licensed instructor of cosmetology, whether active or inactive, must fulfill the requirements of T.C.A. §62-4-111(c)(2) in order to retain their license.
1983 Op. Tenn. Att'y Gen. No. 83-376 (November 8, 1983). 5 APR 16.

12.10 **BOARD OF EXAMINERS FOR ARCHITECTS & ENGINEERS**

NO CASES REPORTED

12.11 **BOARD OF LAND SURVEY EXAMINERS**

NO CASES REPORTED

12.12 **BOARD OF PHARMACY**

OAG 1986 PHYSICIAN'S ASSISTANTS, RESPONSIBILITY FOR--The Board of Pharmacy has no direct jurisdiction over physician's assistants. However, a pharmacist, who has knowingly filled prescriptions issued by a physician's assistant who is operating illegally, might be guilty of improper conduct and subject to sanctions by the Board of Pharmacy under T.C.A. §63-10-209(a).

1986 Op. Tenn. Att'y Gen. No. 86-75 (April 28, 1986). 7 APR 58.

OAG 1986 PHYSICIAN'S ASSISTANTS, REGULATION OF--Regulation of physician's assistants is the responsibility of the Board of Medical Examiners. The Board of Pharmacy ordinarily will not concern itself with the physician's assistant's actual practice.

1986 Op. Tenn. Att'y Gen. No. 86-75 (April 28, 1986). 7 APR 58.

F.O. 1983 RECORDS MAINTENANCE--By being unable to account for the disposal of controlled substances, the Respondent was found guilty of failing to maintain, on a current basis, a complete and accurate record of the substances, received, sold, delivered or otherwise disposed of by him in violation of 21 U.S.C. §827(a)(3) and T.C.A. §52-1420. Respondent was also found guilty of violating T.C.A. §62-10-209(4).

Board of Pharmacy v. L. Gordon Price, D. Ph., FO/10-19-83. 2 APR 550.

P.H.O. 1977 FEDERAL IMMUNITY, SCOPE OF--Immunity granted under 12 U.S.C. §884 is co-extensive with the self-incrimination constitutional privilege and only affords protection from criminal prosecution. Unless the administrative hearing can be characterized as criminal in nature, no protection would exist from suspension or revocation of the Respondent's license to practice pharmacy. The Administrative Law Judge determined that the exercise of the State's police power in conducting a quasi-judicial hearing to consider suspension or revocation of a license can in no way be construed as creating a "criminal case" upon which such immunity constitutionally attaches.

State of Tennessee v. Dr. Howard R. Beesley, PHO/4-12-77. 1 APR 12.

12.13 **COLLECTION SERVICE BOARD**

NO CASES REPORTED

12.14 **BOARD FOR LICENSING CONTRACTORS**

NO CASES REPORTED

12.15 **AUCTIONEER COMMISSION**

OAG 1987 AUCTION, BROAD DEFINITION--It does not appear that the definition of "auction" was intended to be restrictive in the sense of not including auctions in which the owner reserves the right to confirm the bids.
1987 Op. Tenn Att'y Gen. No. 87-08 (January 13, 1987). 7 APR 66.

OAG 1985 EDUCATIONAL REQUIREMENTS--The educational requirement established by T.C.A. §62-19-111 for licensing auctioneers is not capable of being waived because it is a mandatory requirement imposed by the Tennessee Legislature upon all applicants seeking an auctioneer's license.
1985 Op Tenn. Att'y Gen. No. 84-183 (May 29, 1985). 6 APR 388.

F.O. 1983 LICENSES--Respondent's failure to obtain a current auctioneering firm license or to associate himself with a licensed auctioneering firm violated T.C.A. §62-19-111(i). A letter of warning was issued, a copy of which was placed in a permanent file.

Auctioneer Commission v. Michael L. Panter, FO/6-6-83. 2 APR 406.

12.16 **BOARD FOR LICENSING HEARING AID DISPENSERS**

NO CASES REPORTED

12.17 TENNESSEE MOTOR VEHICLE COMMISSION

Tenn. 1983 BIAS OF COMMISSION; COMPOSITION--The Motor Vehicle Commission cannot be said to be unconstitutionally composed or biased as a matter of law because one of its members happens to own a dealership in the relevant market area being considered for an additional franchise. Only dealer members who have a substantial pecuniary interest in proceedings should be disqualified from a decision on an application for a new licensed dealership. General Motors Corporation v. Capital Chevrolet Company, 645 S.W.2d 230 (Tenn. 1983).

Tenn. 1983 PROCEDURES; CONFORMITY WITH UAPA--An amended statute, which broadened the powers of the Commission and provided that a manufacturer could be denied a license or have his license revoked if he granted a competitive franchise in the relevant market area previously granted to another dealer, was not unconstitutionally vague as creating a nebulous procedure for handling such claims; the procedures prescribed were those contained in the Uniform Administrative Procedures Act. General Motors Corporation v. Capital Chevrolet Company, 645 S.W.2d 230 (Tenn. 1983).

OAG 1986 LICENSE; SAME LINE-MAKE AT OTHER LOCATION--A motor vehicle dealer who has a permanent and established place of business may sell the same line-make of automobile at other locations, provided that all licensing requirements have been satisfied for all locations. 1986 Op. Tenn. Att'y Gen. No. 86-163 (September 24, 1986). 6 APR 349.

F.O. 1983 NEW FRANCHISE--Before the commission can deny a manufacturer the right to grant a new competitive franchise, the franchise must be within the relevant market area of some existing dealer. Where there is no intrusion into the service area of any existing dealer, the Commission held it had no authority to grant or deny the manufacturer's right to appoint an initial dealer in a new area. Patty Brothers Datsun, Inc. v. Nissan Motor Corporation in U.S.A., FO/1-17-83. 1 APR 168.

12.18 REAL ESTATE COMMISSION

Tenn. App. 1963 JURISDICTION--Where the issue was whether the Real Estate Commission had jurisdiction to revoke a broker's license when the broker engaged in fraudulent conduct at a time when he was not acting in his capacity as a real estate broker, the court construed T.C.A. §62-13-312(b) to give the Real Estate Commission authority to revoke a broker's license even in those cases where the broker was not acting in his capacity as a real estate broker.

Tennessee Real Estate Commission v. Godwin, 378 S.W.2d 439 (Tenn. Ct. App. 1963).

OAG 1985 CHAIN REFERRAL SALES PLAN--Designating purchases as an "off-site lead generator" and compensating such persons for referrals does not violate T.C.A. §47-18-101 *et seq.*, so long as the opportunity is not offered to purchasers before or at the time of their purchase.

1985 Op. Tenn. Att'y Gen. No. 85-133 (April 23, 1985). 7 APR 60.

P.H.O. 1984 JURISDICTION--The ultimate determination of whether a real estate license will be reissued under T.C.A. §62-13-311 rests with the judgment of the Commission, independent of a court's determination, after consideration of the facts. The fact that Chancery Court has ruled on the issue of revocation of a license does not preclude the Commission from instituting proceedings under T.C.A. §62-13-312.

Tennessee Real Estate Commission v. Sarah M. Fryer, PHO/8-28-84. 4 APR 687.

12.19 **BOARD OF ACCOUNTANCY**

Ch. Ct. 1984 NO LACHES AGAINST STATE--Petitioner appealed January 1983 action by State Board of Accountancy revoking his certificate of public accountancy for violating T.C.A. §62-1-107(8) by inducing clients to make unsecured loans in 1972, 1974 and 1975, on the grounds of laches, among others. Laches cannot be asserted against the state or its instrumentalities. *See State of Tennessee v. Bomar*, 365 S.W.2d 295 (Tenn. 1962).

William F. Jordan v. Tennessee State Board of Accountancy, No. 83-834-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 246.

12.20 **ELEVATOR SAFETY BOARD**

OAG 1983 RULE INTERPRETATION--The Tennessee Elevator Safety Board may interpret its own rules in determining whether a residential-type elevator in a public building must be permitted pursuant to T.C.A. §53-2603. Att. Gen. Op. to Don Dills (September 19, 1983). 2 APR 503.

12.21 **BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

OAG 1986 LIMITATION OF LICENSE--A cemetery company may sell only "cemetery merchandise and services." It may not sell "funeral merchandise and services." Therefore, it follows that a cemetery company may not sell a vault. A cemetery company employee who sold a vault would violate T.C.A. §62-5-103, a criminal statute. The Board of Funeral Directors may ask the State Attorney General to apply to the Chancery Court for an injunction against such practice by a cemetery company. Att. Gen. Op. to John N. Ford (May 23, 1986). 6 APR 323.

12.22 **PRIVATE EMPLOYMENT AGENCY BOARD**

NO CASES REPORTED

12.23 **BOXING**

NO CASES REPORTED

12.24 **RACING**

NO CASES REPORTED

12.25 **HEARINGS ON INSURANCE COMPANIES**

F.O. 1994 JURISDICTION--The Commissioner retains jurisdiction over a corporation with a vision service plan even though it has dissolved and its Certificate of Authority has been cancelled. The Commissioner may properly exercise jurisdiction over the dispute as to the fees to be paid to the Petitioner even after the dissolution of Tennessee Vision Services, Inc. Joseph Dzik, O.D. v. Tennessee Vision Services, Inc., IO/11-1-94. FO/11-14-94. 8 APR 1.

F.O. 1994 SUBJECT MATTER OF CIVIL LAWSUIT--A matter that is the subject of a civil lawsuit is not properly before the Commissioner for determination. Joseph Dzik, O.D. v. Tennessee Vision Services, Inc., IO/11-1-94. FO/11-14-94. 8 APR 1.

I.O. 1995 FAILURE TO HOLD THIRD PARTY ADMINISTRATOR'S LICENSE; CIVIL PENALTY--Respondent found to have violated T.C.A. §56-6-410 by failing to obtain a Third Party Administrator's license. Having found that under T.C.A. §56-6-410(a) only a single fine can be imposed against the Respondent for its continuing failure to hold a TPA license, the administrative law judge determined that the maximum fine of \$500 should be assessed against the Respondent due to the length and seriousness of the violation. Department of Commerce and Insurance v. Heritage Insurance Managers, Inc., IO/6-8-95. Appealed 6-19-95. 8 APR 105.

I.O. 1995 FAILURE TO HOLD THIRD PARTY ADMINISTRATOR'S LICENSE; CIVIL PENALTY--Absent an express legislative intent to impose multiple fines for repeated or continuing violations, T.C.A. §56-6-410(a) authorizes only a single fine for failure to hold a Third Party Administrator's license, not multiple penalties for every year of such failure. Consequently, a repeated violation of the statute for any length of time would be limited to a single fine. Department of Commerce and Insurance v. Heritage Insurance Managers, Inc., IO/6-8-95. Appealed 6-19-95. 8 APR 105.

I.O. 1993 EXPERIENCE MODIFICATION RATING, EVASION OF--If a corporation was created in order to evade the experience modification rating assigned to a pre-existing but terminated corporation, the corporation should be assigned the same experience modification rating previously assigned to the former corporation. An employer cannot create a new corporation for the sole purpose of avoiding the pre-existing corporation's experience modification rating. Although it is lawful for a corporation to operate and lease employees to the pre-existing corporation, this agreement cannot be used to evade the experience modification process. Therefore, the Administrative Law Judge determined that the same experience modification rating assigned to the former corporation should be assigned to its successor. National Council on Compensation Insurance v. CFI, Inc. et al., IO/8-18-93. 13 APR 263.

I.O. 1992 BURDEN OF PROOF--It is the burden of the Petitioner to prove by a preponderance of the evidence that its proposed rate increases meet the standards set by law for approval. National Council on Compensation Insurance v. Department of Commerce and Insurance, IO/9-16-92. 13 APR 271.

12.26 **POLYGRAPH EXAMINERS**NO CASES REPORTED

12.29 **HOME IMPROVEMENT CONTRACTORS**NO CASES REPORTED

12.30 **SECURITY GUARDS**NO CASES REPORTED

12.31 **BURIAL SERVICES**NO CASES REPORTED

12.32 **PRIVATPE INVESTIGATORS**NO CASES REPORTED

12.33 **FIRE PREVENTION AND INVESTIGATION**NO CASES REPORTED

12.34 **ALARM SYSTEM CONTRACTORS**NO CASES REPORTED

13.00 **DEPARTMENT OF LABOR**

- 13.01 Board of Examiners for Mines
 - 13.02 Prevailing Wage Commission
 - 13.03 Reserved
 - 13.04 Occupational Safety & Health Review Commission
-

13.01 **BOARD OF EXAMINERS FOR MINES**

NO CASES REPORTED

13.02 **PREVAILING WAGE COMMISSION**

NO CASES REPORTED

13.03 **RESERVED**

NO CASES REPORTED

13.04 **OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION**

I.O. 1987 TIME DEADLINES--Respondent's motion to dismiss, based on Commissioner's failure to timely file complaint, was denied because the time deadline in rule is directory, not mandatory, and no prejudice to the Respondent was shown. Department of Labor v. Winters Battery Company, IO/4-28-87. 7 APR 94.

I.O. 1984 RECOGNIZED HAZARDS--An employer must keep the work site free from "recognized hazards," defined as hazards known to the employer or recognized as such within industry. In the present case, proof was insufficient to show that the use of hand signals, rather than lights or telephone, by the work crew was inadequate and thus created a recognized hazard. Tennessee Department of Labor v. Turnkey Operations, Inc., IO/10-25-84. FO/11-6-84. 4 APR 820.

14.00 **LEGAL DEPARTMENT**

NO CASES REPORTED

15.00 DEPARTMENT OF MENTAL HEALTH & MENTAL RETARDATION

15.01 LICENSURE OF MENTAL HEALTH FACILITIES

OAG 1983 LICENSE REQUIRED; ALL MENTAL HEALTH SERVICES--T.C.A. §33-2-501 et. seq. requires a license for the provision of all mental health or mental retardation services, even when clients resided in independently owned apartments.

1983 Op. Tenn. Att'y Gen. No. 83-228 (June 16, 1983). 7 APR 63.

F.O. 1984 REPEATED VIOLATIONS--After three years of license requirement violations, which included admitting inappropriate residents, building safety problems, record-keeping problems, and staff deficiencies, it was apparent that the owner was not meeting the needs of residents promptly or adequately. Therefore, both a regular and a professional license were denied.

Department of Mental Health and Mental Retardation v. Bernice Soloman/Summitt House, IO/6-25-84. FO/7-17-84. 4 APR 564.

F.O. 1984 BURDEN OF PROOF, OWNER--The burden is on the owner to prove that the denial of license was not justified. In the present case, the owner did not meet burden; violations included: 1) not timely complying with the plan of compliance, 2) "drinking problems" of staff members, 3) untimely life safety renovations, 4) inadequate housekeeping, and 5) failure to correct noted deficiencies. The license was therefore denied. However, because of the owner's showing of significant recent improvements, the denial order would be stayed if the facility met certain conditions and passed reinspection in 30 days. (DMHMR at fault also for failure to initiate license revocation when deficiencies first became apparent.)

Knoxville Association for Blind Boarding Home v. Department of Mental Health and Mental Retardation, FO/5-29-84. 3 APR 430.

16.00 **DEPARTMENT OF PERSONNEL**

NO CASES REPORTED

17.00

DEPARTMENT OF HEALTH & ENVIRONMENT

(See also 4.00, Department of Environment and Conservation, to which all environmental agencies and functions were transferred in 1991; and 9.00, Department of Finance and Administration, to which Medicaid/TennCare was transferred in 1995.)

- 17.01 Medicaid Recipient
 - 17.02 Medicaid Vendor
 - 17.03 Women, Infants and Children
 - 17.04 Hazardous Waste Remedial Action Fund
 - 17.05 Subsurface Sewage Disposal System
 - 17.06 Water and Sewer
 - 17.07 Radiological Health
 - 17.08 Medical Laboratories or Personnel
 - 17.09 Air Pollution Control Board
 - 17.10 Anatomical Board of Commissioners
 - 17.11 Board of Chiropractic Examiners
 - 17.12 Board of Dental Examiners
 - 17.13 Board of Dispensing Opticians
 - 17.14 Board of Examiners for Nursing Home Administrators
 - 17.15 Board of Examiners in Psychology
 - 17.16 Board of Examiners of Speech Pathology and
Audiology
 - 17.17 Board for Licensing Health Care Facilities
 - 17.18 Board of Medical Examiners
 - 17.19 Board of Nursing
 - 17.20 Board of Optometry
 - 17.21 Board of Osteopathic Examination
 - 17.22 Board of Physical Therapy Examiners
 - 17.23 Board of Registration in Podiatry
 - 17.24 Board of Trustees for Tuberculosis Control/CDC
 - 17.25 Board of Veterinary Medical Examiners
 - 17.26 Licensing Board for the Healing Arts
 - 17.27 Solid Waste Disposal Control Board
 - 17.28 Board of Examiners for Registered Professional
Environmentalists
 - 17.29 Board of Water and Wastewater Operations
 - 17.30 Water Quality Control Board
 - 17.31 Board of Reclamation Review
 - 17.32 Board of Ground Water Resources (Water Well Drillers)
 - 17.33 Environmental Sanitation
 - 17.34 Emergency Medical Services Board
 - 17.35 Crippled Children
 - 17.36 Hotel
 - 17.37 Panel on Health Care Facility Penalties
 - 17.38 Abuse Registry
 - 17.39 Board of Certification for Professional Counselors and Marital and Family Therapists
 - 17.40 Board of Social Worker Certification and Licensure
 - 17.42 Board for Licensing Hearing Aid Dispensers
 - 17.43 Board of Electrolysis Examiners
 - 17.47 Respiratory Care Practitioners
-

17.01 **MEDICAID RECIPIENT** (***) See also 9.00, for cases heard through the department of finance and administration, to which Medicaid/TennCare was transferred in 1995.)

1. In General
2. Interpretation of Rules
3. Evidence
4. Reimbursement for ICF (Intermediate Care Facility) or Nursing Home Care
5. --Mental or Physical Impairment/Disability
6. --In Need of In-patient Nursing Care Daily
7. --Practical Alternatives and Other Considerations
8. Reimbursement for Skilled Nursing Facility (SNF) Care
9. PASSAR Cases

1. IN GENERAL

***1 M.D. Tenn. 1987 CONTINGENT APPROVAL IF FINAL ORDER DELAY**--If a final order is not issued by the 90th day following the Department's request for a hearing, contingent payment will be made until a final order issues. Such relief shall be withheld to the extent that delays in disposing of an appeal within 90 days are the consequence of a continuance of the hearing granted at the request of the Medicaid recipient or to the extent that the administrative law judge finds that the delay is otherwise attributable to the recipient's inaction. The contingent approval provision will not apply if a delay is the consequence of the continuance of a hearing, granted at the request of the recipient or if the administrative law judge finds that the delay is attributable to the recipient's inaction.

Doe v. Word, No. 3-84-1260 (M.D. Tenn. January 9, 1987). 7 APR 313. 16 APR 65.

***1 M.D. Tenn. 1987 DOE CASES; PROCEDURAL MATTERS**--The case of Doe v. Word is noteworthy in several respects. Certain sections of the case contain important information regarding 1) parties entitled to notice, 2) processing the PAE application, 3) contents of notices of denial, 4) administrative appeals, and 5) access to the PAE system.

Doe v. Word, No. 3-84-1260 (M.D. Tenn. January 9, 1987). 7 APR 313. 16 APR 65.

***1 Tenn. App. 1987 STANDARD OF REVIEW; NEED FOR NURSING HOME CARE**--The evidence that the patient needs some form of institutional care does not establish the need for care in an intermediate care facility. The Courts are not permitted to take a view most favorable to the challenger of an administrative decision. The law is strictly to the contrary. If there is any substantial material evidence to support the finding of the agency, it must be affirmed. See C.F. Industries v. Tennessee Public Service Comm., 599 S.W.2d 536 (Tenn. 1980).

Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***1 OAG 1986 MAILING OF MEDICAID CARDS**--While there is no specific prohibition against bulk mailing of Medicaid cards, it may 1) cause delays in the provision of services and in the receipt of notices of agency action to Medicaid recipients, 2) infringe upon recipients' right to privacy under Medicaid regulations, and 3) create problems of compliance with state law in some institutions.

1986 Op. Tenn. Att'y Gen. No. 86-93 (June 13, 1986). 7 APR 52.

***1 OAG 1985 REPRESENTATION OF RECIPIENTS**--A non-attorney who represents a Medicaid recipient or applicant pursuant to 42 C.F.R. §431.206(b) would not be subject to a penalty for the unlawful practice of law because the federal regulation in question preempts the Tennessee law in hearings held under §431.206(b) (regarding hearings concerning denials of service, claims for service that are not acted upon with reasonable promptness, or terminations, suspensions, or reductions of Medicaid eligibility or services.) (42 C.F.R. §§431.220 and 431.201).

Att. Gen. Op. to William N. Bates (September 11, 1985).

***1 OAG 1983 PAYMENT**--Under T.C.A. §14-23-115 (now T.C.A. §71-5-115), only parents or spouses may be required to reimburse the State for payments to Medicaid recipients. Neither the children nor the guardians of Medicaid recipients may be charged for such payments.

1983 Op. Tenn. Att'y Gen. No. 83-297 (August 31, 1983). 5 APR 13.

***1 F.O. 1995 DISMISSAL FOR FAILURE TO PROSECUTE**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where the Petitioner failed to comply with the administrative law judge's oral instructions and order directing the Petitioner to choose a hearing date so that the case could be re-set and heard, the case was dismissed with prejudice.

In The Matter of Angela Harris, IO/4-20-95. FO/5-1-95. 8 APR 333.

***1 F.O. 1995 DISMISSAL FOR FAILURE TO PROSECUTE**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where the Petitioner failed to comply with the administrative law judge's oral instructions and order directing the Petitioner to choose a hearing date so that the case could be re-set and heard, the case was dismissed with prejudice.

In The Matter of Matthew Baugh, IO/4-20-95. FO/5-1-95. 8 APR 339.

***1 F.O. 1995 DENTAL EXTRACTIONS**--The Petitioner was a forty-six year old individual who requested Medicaid reimbursement for dental extractions. The petitioner's condition was such that the absence of the requested services would not endanger his life nor result in severe bodily dysfunction. In light of the lack of severity, the regulations did not permit Medicaid coverage of the services sought, and reimbursement was denied.

In the Matter of James Webb, IO/2-27-95. FO/3-9-95. 15 APR 262.

***1 F.O. 1994 MEDICAID DOES NOT PROVIDE INDEFINITE REIMBURSEMENT FOR CHEMICAL ADDICTION**--Medicaid does not provide reimbursement indefinitely to an individual receiving treatment for a chemical addiction since Medicaid does not require that an individual be maintained in an environment that is safe from noxious chemicals and influences that could trigger relapse.

Bureau of Medicaid v. Malcom Branham, IO/12-6-94. FO/12-16-94. 19 APR 38.

***1 F.O. 1994 CONTINUING STAY CRITERION NOT MET**--The Respondent did not meet the continuing stay criterion at the time of the Respondent's decertification because his medical condition was not of such an intensity that it continued to require 24-hour medical and nursing services that could only be appropriately provided at an acute level of hospital care. The Respondent was initially certified for admission and continued stay for 10 days for alcohol and substance abuse detoxification and treatment. The Respondent completed his detoxification within three days. The record was devoid of any reference to the necessity of licensed medical intervention after this detoxification. The Respondent then participated in a variety of individual and group therapy services. There was no evidence on the record, however, that these services could not have been provided to the Respondent in a less intensive setting or that his medical condition continued to require 24-hour medical and nursing services.

Bureau of Medicaid v. Malcom Branham, IO/12-6-94. FO/12-16-94. 19 APR 38.

***1 F.O. 1994 CRITERIA FOR ADMISSION AND CONTINUING STAY NOT MET**--In order to obtain Medicaid reimbursement for admission to treatment services for substance abuse at an acute level of hospital care, the patient's medical condition must require 24-hour medical service and the condition must of an intensity that services can only be provided at an acute level of hospital care. The continuing stay criteria include the same requirement of 24-hour medical service and severity of condition. At the time of his admission, the Petitioner's condition did not meet the severity requirements of the Medicaid rule since he had already undergone detoxification prior to his admission. In addition, the services he received at the hospital could have been obtained at a lower level of care. Therefore, Petitioner's failure to meet the criteria for admission and continuing stay disqualified him from certification for Medicaid reimbursement for the services he received.

James Lamb v. Bureau of Medicaid, IO/12-6-94. FO/12-16-94. 19 APR 47.

***1 F.O. 1994 RHA PLACEMENT; JURISDICTION TO DETERMINE**--The only entity with jurisdiction to determine that appropriateness of RHA (residential home for the aged) placement is the Board for Licensing Health Care Facilities.

Loretta Hollars v. Bureau of Medicaid, FO/10-31-94. 18 APR 339. *See also* IO/8-19-93. 18 APR 339.

***1 F.O. 1994 CONTINUING STAY CRITERIA NOT MET**--Where Petitioner's detoxification was resolved five days before her admission to the hospital, decertification of the Petitioner for Medicaid reimbursement for in-patient alcohol abuse treatment was upheld. From the date of the resolution of her detoxification up until her decertification, the Petitioner's psychiatric and medical conditions appeared to be stable and required no specialized therapy. Although Petitioner did receive therapy services that were necessary for her recovery, there was no evidence that these services could not have been provided in a less intensive setting or that the Petitioner's medical condition continued to require 24-hour medical and nursing services or

that these needed services could be appropriately provided only at an acute level of hospital care. Because the Petitioner was required to meet all three continuing stay criteria in order to qualify for Medicaid reimbursement, the Petitioner's failure to meet the criterion referring to the severity of the Petitioner's medical condition disqualified her for Medicaid reimbursement. Angeline Harrell v. Bureau of Medicaid, IO/10-10-94. FO/10-20-94. 19 APR 57.

***1 F.O. 1994 NURSING SERVICES; DEFINITION**--The definition of in-patient nursing care does not specify that nursing services must be performed by a licensed nurse.

Edna R. Sheridon v. Department of Health, FO/10-7-94. 18 APR 257. *See also* IO/7-12-94. 18 APR 257.

***1 F.O. 1994 COSMETIC SURGERY; REIMBURSEMENT**--In the present case, Medicaid would not pay for cosmetic breast surgery. Although in some cases extenuating circumstances would render such surgery medically necessary, these circumstances were not found to exist in the present case. The Petitioner failed to meet the burden of proof since the requested medical procedure was not confirmed by her physician and since there was no evidence that the Petitioner was experiencing extreme psychological dysfunction as a result of her breast deformity.

Sara Heady v. Department of Health, Bureau of Medicaid, FO/7-15-94. 18 APR 248. *See also* IO/4-28-94. 16 APR 159.

***1 F.O. 1994 ADMISSIONS OF NON-AMBULATORY PATIENTS**--Homes for the aged are not permitted to admit persons who are not ambulatory.

Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***1 F.O. 1993 OUT-OF-STATE SERVICES**--Medicaid is not required to provide all services in the exact manner and form requested by recipients. Rather, Medicaid is allowed to limit its expenditures to those authorized under the Medicaid Act and rules. The United States Supreme Court has stated that "Medicaid programs do not guarantee that each recipient will receive that level or health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of in-patient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered,--not 'adequate health care'." Alexander v. Choate, 469 U.S. 287, 303 (1985). Medicaid has promulgated valid regulations to limit its payment of out-of-state medical assistance. In the present case, the State established that the requested services could be provided safely and competently in the State of Tennessee, without duplication of testing or delay. The Administrative Law Judge determined that the stress the Petitioner would have to endure by virtue of not having her operation in North Carolina was not a legally justifiable reason to allow her to have her operation outside of Tennessee.

Mary Townsend v. Bureau of Medicaid, IO/9-30-93. FO/10-11-93. 19 APR 292.

***1 F.O. 1984 TRANSPORTATION OF RECIPIENTS**--According to Rule 1200-13-1-.03(1)(y) and Bailey v. Tennessee Department of Public Health, et al, the State is only required to provide or arrange for the necessary transportation of Medicaid recipients to medical care. The State is not required to reimburse recipients for non-emergency transportation. Therefore, the Petitioner was denied reimbursement when he drove family members who were Medicaid recipients to medical care, since they knew of the transportation alternatives yet never requested assistance from the State and already had adequate transportation resources themselves.

Department of Health and Environment v. Roger Elkins, IO/10-9-84. FO/11-19-84. Appealed to Chancery Court, pending as of March, 1985. 4 APR 747.

***1 F.O. 1983 OUT-OF-STATE SERVICES**--Appropriate mental health care and treatment for a 17-year-old Medicaid recipient was available in Tennessee. Therefore, under Rule 1200-13-1-.02(4), which sets standards for out-of-state medical assistance, recipient's request for out-of-state care was denied.

Department of Public Health v. Mrs. Sharon Hamaker, IO/4-29-83. FO/6-5-83. 1 APR 348.

***1 I.O. 1995 DISMISSAL WITH PREJUDICE**--Where the Petitioner bears the burden of proof and yet fails to appear and carry that burden, dismissal with prejudice, absent any good cause shown, is allowed on all issues as to which the Petitioner bears the burden of proof.

Michael Argo v. Department of Health, IO/6-13-95. 9 APR 1.

***1 I.O. 1994 DECERTIFICATION SINCE TREATMENT COULD BE PROVIDED AT LOWER LEVEL OF CARE**--After Respondent's short period of detoxification in the hospital, he demonstrated no further withdrawal symptoms or suffered any other medical reasons which would justify his continued hospitalization. The treatment that he received during the balance of his time in the hospital was of a routine, therapeutic nature and could easily have been provided to him at a lower level of care. Therefore, the administrative law judge determined that the Department appropriately decertified the Respondent for Medicaid reimbursement for the his stay at the hospital after his detoxification.

Department of Health v. Glen Wade Stricklin, IO/9-29-94. 19 APR 87.

***1 I.O. 1994 COSMETIC SURGERY; REIMBURSEMENT**--Although Medicaid does not pay for cosmetic surgery, exceptions are made when extenuating circumstances exist which would render the surgery medically necessary. For example, Medicaid will pay for the replacement of a breast removed for cancer or for the repair of a cleft lip because both of these conditions are "well-established causes of extreme emotional and psychological dysfunctions to the patients experiencing these problems." In the present case, the Petitioner suffered from a sunken area near her hip where a tumor was formerly removed. The tissue was removed all the way to the bone and gave the Petitioner constant pain. It was determined that the corrective surgery to contour the tissue was more than merely cosmetic and was medically necessary in order to relieve the pain the Petitioner was experiencing as a result of the tissue loss.

Sara Heady v. Department of Health, Bureau of Medicaid, IO/4-28-94. 16 APR 159. *See also* FO/7-15-94. 18 APR 248.

***1 I.O. 1994 CONTINUED STAY CRITERIA NOT MET**--Respondent's condition did not meet the continued stay criteria after a certain date. Payment should only be made for a condition which has a sudden onset and short severe course, with the understanding that the in-patient facility will work aggressively and expeditiously toward moving the patient to a less restricted environment. Reimbursement for six days after Respondent's admission was justifiable to stabilize Respondent because of the threats he made to his mother. However, the hospital records did not show any significant problems or special psychiatric care after that date.

Bureau of Medicaid v. Barry Lee Cassetty, IO/4-14-94. 19 APR 94.

***1 I.O. 1993 DELAY IN DISCHARGE**--The Bureau of Medicaid's definition of acute psychiatric in-patient care makes it clear that payment is made only for a condition which has a sudden onset and a short severe course, with the understanding that the in-patient facility will work aggressively and expeditiously toward moving the patient to a less restricted environment. Although the hospital made commendable efforts to get the Respondent into a long-term treatment program, the delay in discharge that these efforts caused does not justify Medicaid reimbursement.

Bureau of Medicaid v. Kipling Scroggs, IO/5-13-93. 19 APR 199.

***1 NOTE 1995 LEGAL ISSUES IN PAE CONTESTED CASE HEARINGS**--For a discussion of current issues arising in hearings involving Medicaid recipients, consult the article entitled *Legal Issues in PAE Contested Case Hearings*. This article discusses the Uniform Administrative Procedures Act and addresses specific issues arising in PAE cases.

Ann M. Young, *Legal Issues in PAE Contested Case Hearings* (1995). 19 APR 94.

2. INTERPRETATION OF RULES

***2 Tenn. 1984 AGENCY INTERPRETATION OF RULES**--An agency's interpretation of its own rules is generally given deference and controlling weight, unless plainly erroneous or inconsistent with the regulation.

Jackson Express v. Tennessee Public Service Commission, 679 S.W.2d 942, 945 (Tenn. 1984).

***2 Ch. Ct. 1980 AGENCY POLICY**--An agency's statement of policy is a "rule" under the Uniform Administrative Procedures Act and must be properly promulgated. *See State Board of Regents v. Gray*, 561 S.W.2d 140, 143 (Tenn. 1978).

Tennessee State Employees Association Incorporated v. Darrel D. Atkins, No. 81-1564-II (Davidson County Ch. Ct. December 1, 1980).

***2 F.O. 1994 PERSONAL SERVICES, INTERPRETATION OF**--Under a neutral and reasonable reading of Rules 1200-8-11-.01(9) and 1200-8-11-.09(2), "personal services" do not include active observation or examination for symptoms other than those which might be easily noticed in the course of assisting a resident with their activities of daily living.

Ellen Simpson v. Bureau of Medicaid, IO/2-23-94. FO/8-18-94. 17 APR 301.

***2 F.O. 1994 AGENCY POLICY**--Any statement of policy that falls under the definition of "rule" under the Uniform Administrative Procedures Act (UAPA) must be properly promulgated pursuant to the requirements of the UAPA in order to be valid. Only where parties have actually been informed in advance of a non-UAPA-promulgated policy and where parties have dealt in good faith at arm's length in reliance on such a policy, can such a policy be enforced.

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***2 F.O. 1993 MEDICAID BULLETINS**--A Medicaid bulletin stating which drugs were Medicaid-reimbursable should not be void under T.C.A. §4-5-216 because of: 1) the functional difficulties the Bureau would incur if it had to promulgate a rule

under the Uniform Administrative Procedures Act every time it changed its policy and 2) the need for discretion in order for the Bureau to function, especially in those situations where new drugs need to be made available to patients quickly.

Traci Stills v. Bureau of Medicaid, FO/9-1-93. 16 APR 86.

***2 F.O. 1993 DEFERENCE TO COMMISSIONER'S INTERPRETATION OF RULES**--The rules as interpreted by the Department through its Commissioner should be given deference unless plainly erroneous.

Sarah Simpson v. Department of Health, Bureau of Medicaid, FO/8-16-93. 19 APR 1. *See also* IO/7-14-93. 19 APR 1.

***2 I.O. 1994 INTERPRETATION OF RULES TO AVOID ABSURDITY**--The administrative law judge concluded that the Petitioner's condition met Medicaid requirements because she needed daily nursing care, daily medications, observation, assessment, monitoring of her pulse and blood pressure, and assistance in moving her wheelchair. This care could only be provided on an in-patient basis at an ICF facility. To require the Petitioner to endure a crisis, which would probably occur according to the evidence, by going to a residential home and back to the hospital would be absurd. Such an absurd interpretation of the rules applicable to this case must be avoided. Otherwise, it would raise the burden of proof that the Petitioner bears in this case from a "preponderance of the evidence" to a higher level.

Willie Lucille Fly v. Bureau of Medicaid, IO/8-4-94. 18 APR 192.

***2 I.O. 1994 AGENCY RULES, COMPLIANCE**--In the absence of a finding that the rules are clearly contrary to State statutes, or otherwise invalidated by a State or Federal court of competent jurisdiction, the Commissioner is bound to comply with the plain language of the Department's duly promulgated rules.

Arlene Sommer v. Bureau of Medicaid, IO/1-11-94. 19 APR 272.

***2 I.O. 1994 STATUTORY INTERPRETATION**--In construing a statute or regulation, an absurd result must be avoided by a reasonable construction. Under a reasonable construction of the definition found at Rule 1200-13-1-.10(1)(b), if needed nursing services are such that "as a practical matter, they can only be rendered on an in-patient basis" or its substantial equivalent, then the requirements of the rule have been met. Twenty-four hour private duty nurses were found to be the substantial equivalent of in-patient nursing care.

Lottie Disney v. Bureau of Medicaid, IO/1-6-94. 18 APR 273. *Reversed by* FO/10-7-94. 18 APR 273.

***2 I.O. 1993 MEDICAID BULLETINS**--A Medicaid Bulletin has never been adopted as a regulation pursuant to the Administrative Procedures Act. Its probative value is nonexistent since it is considered as merely a "flyer," rather than a binding rule. Moreover, T.C.A. §4-5-216 provides that any agency rule not adopted in compliance with the rule-making procedures of T.C.A. §4-5-201 is void and of no effect, thereby "not ... effective against any person or party nor ... invoked by the agency for any purpose." As long as the Petitioner has met all lawful criteria for Medicaid reimbursement, he cannot be denied reimbursement if the bulletin serves as the sole basis for denial.

Department of Health v. Alice Bowling, IO/9-3-93. 19 APR 227.

***2 I.O. 1993 MEDICAID BULLETINS**--A "rule" found in a State Medicaid Manual Transmittal," as it has apparently not been promulgated pursuant to the Administrative Procedures Act, may not be legally invoked by the bureau.

Loretta Hollars v. Bureau of Medicaid, IO/8-19-93. 18 APR 339.

***2 I.O. 1993 MEDICAID BULLETINS**--Where a Medicaid bulletin sets forth criteria of prior approval before Medicaid reimbursement but has not been adopted pursuant to procedures set forth in the Uniform Administrative Procedures Act, the bulletin has no legal effect since T.C.A. §4-5-216 provides that any agency rule not adopted in compliance with the Uniform Administrative Procedures Act is void. Therefore, a Petitioner can not be considered ineligible for Medicaid reimbursement under the policy set forth in the bulletin when he is otherwise qualified for reimbursement under the approved Medicaid rules and regulations.

Bureau of Medicaid v. Traci Stills, IO/4-22-93. *Reversed by* FO/9-1-93. 16 APR 86.

3. EVIDENCE

***3 6th Cir. 1985 TREATING PHYSICIAN OPINION**--The opinions of treating physicians should be given greater weight than those held by physicians hired by the Secretary of Health and Human Services who only examined the patient once.

Farris v. Secretary of Health and Human Services, 773 F.2d 85, 90 (6th Cir. 1985); Lashley v. Secretary of Health and Human Services, 708 F.2d 1048, 1054 (6th Cir. 1983).

***3 Tenn. App. 1992 ALJ DISCRETION; EVIDENCE RULES**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence. In the present case, the court found that the Administrative Law Judge did not abuse his discretion in applying the Rules of Evidence to exclude a deposition. Rivers v. Tennessee Board of Dentistry, No. 01A01-9111-CH-00409 (Tenn. Ct. App. June 30, 1992). 16 APR 5.

***3 Tenn. App. 1987 BURDEN OF PROOF; NEED FOR NURSING HOME CARE**--In present case, the appellant asserted that the decision of the agency should be reversed because there is no substantial material evidence that the Medicare benefits should not be allowed. The Court of Appeals held that it is not the burden of Medicaid to show that benefits should not be allowed. Rather, it is the burden of the applicant/recipient to show that benefits should be allowed. Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***3 Tenn. App. 1981 WEIGHT OF EXPERT EVIDENCE**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data. Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***3 F.O. 1995 WEIGHT NOT GIVEN TO TREATING PHYSICIAN'S TESTIMONY**--In most cases, considerable deference is given to the opinion of the treating physician. However, while the treating physician stated that he believed that the Petitioner needed to be in a nursing home, he admitted that he was not familiar with the criteria for Medicaid reimbursement for ICF care, and he failed to establish that the Petitioner was in need of licensed nursing care on a daily basis as those terms are defined by the Medicaid rules. Clara Crain v. Bureau of Medicaid, IO/1-23-95. FO/2-2-95. 9 APR 71.

***3 F.O. 1995 BURDEN OF PROOF; BOARD**--The Board was assigned the burden of proof in this case based upon its having initially approved reimbursement for in-patient care and then ordering decertification of the recipient. Ashley Fielder v. Bureau of Medicaid, IO/1-6-95. FO/1-17-95. 9 APR 31.

***3 F.O. 1994 PETITIONER'S BURDEN OF PROOF LIMITED TO MEDICAL CRITERIA**--The Petitioner must prove that she meets the medical criterion set out in the Department rules. The appropriateness of an individual as a resident of an RHA (residential home for the aged) is not relevant to the determination of eligibility for Medicaid reimbursement for long term care. It is not proper to conclude that because an individual may not be appropriate as an RHA resident that, therefore, they do not meet medical criterion. Loretta Hollars v. Bureau of Medicaid, FO/10-31-94. 18 APR 339. *See also* IO/8-19-93. 18 APR 339.

***3 F.O. 1994 AVAILABILITY OF LOWER LEVEL CARE; STATE'S BURDEN OF PROOF**--The State is not required to prove the availability of care at a lower or alternative level. Rule 1200-13-1-.10(b) does not create a new burden for the State to disprove that a substantial equivalent of in-patient nursing care is not necessary. Lottie Disney v. Bureau of Medicaid, FO/10-7-94. 18 APR 273. *See also* IO/1-6-94. 18 APR 273.

***3 F.O. 1994 REQUIREMENT OF PROOF**--While the Petitioner raised the possibility that the drugs she was taking could pose a danger, there was no medical proof offered that this was a real possibility or even a reasonable likelihood. The State did offer medical testimony that this possibility could be met at a lower level of care than ICF. Therefore, the Petitioner did not prove that she met the requirements for Medicaid reimbursement. Gracie Cobb v. Bureau of Medicaid, IO/8-19-94. FO/8-29-94. 17 APR 155.

***3 F.O. 1994 BURDEN OF PROOF; RECIPIENT**--To require one to prove how bad their condition is by going to a less supervised setting than a nursing home and actually getting worse is an absurd interpretation of Rule 1200-13-1-.10. Such an absurd construction must be avoided by a reasonable construction. *See* State v. Harrison, 692 S.W.2d 29, 31 (Tenn. Crim. App. 1985). Charles Church v. Bureau of Medicaid, IO/8-18-94. FO/8-29-94. 18 APR 208; Vinnie Kingrey v. Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***3 F.O. 1994 RECIPIENT'S BURDEN OF PROOF**--Although the Petitioner's condition appeared to have stabilized in the nursing home and it was possible that she could enter a group home and maintain such stability, the Administrative Law Judge held that, given the Petitioner's medical history as well as evidence to the contrary, to require the Petitioner to prove this

possibility to a certainty by entering a group home and becoming worse would go beyond the burden required of her in this case.

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***3 F.O. 1994 BURDEN OF PROOF; ABSENCE OF PRACTICAL ALTERNATIVES**--Given the preponderance of the evidence that the services the Petitioner needs cannot be provided in a residential home for the aged, the only practical alternative discussed in this case, it must be concluded that the Petitioner has proven that she meets the requirements of Rule 1200-13-1-.10(3)(d) in that she "needs in-patient nursing care daily" as defined by Rule 1200-13-1-.10(1)(b).

Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***3 F.O. 1994 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--Normally, a great deal of deference is given to the opinion of a treating physician. However, there was no evidence in the present case that the treating physician was familiar with the Medicaid criteria for ICF care. Therefore, his opinion was not given as much weight as the opinion of the Director of Nursing for the nursing home where the Petitioner was currently living.

Bureau of Medicaid v. Charles Lowrey, IO/3-30-94. FO/4-11-94. 17 APR 147.

***3 F.O. 1993 WEIGHT OF EXPERT EVIDENCE; PETITIONER'S PHYSICIAN**--Expert evidence in the nature of conclusions is to be given little weight by an administrative tribunal unless it is supported by factual data. In the present case, Petitioner based her Petition for Reconsideration on a letter from her treating physician. In the absence of supporting facts and rationale, the doctor's conclusory opinion cannot properly be given great weight, especially given all the other evidence in the record to the contrary. Therefore, Petition for Reconsideration not granted.

Sarah Simpson v. Department of Health, Bureau of Medicaid, FO/8-16-93. 19 APR 1. *See also* IO/7-14-93. 19 APR 1.

***3 F.O. 1992 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--The opinion of a treating physician is entitled to greater weight than those of other physicians who have not had an opportunity to work with, observe, and treat the Respondent on a long-term basis.

Bureau of Medicaid v. Jeremy Letner, IO/6-14-92. FO/7-24-92. 19 APR 261.

***3 I.O. 1994 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--The Administrative Law Judge held that the Petitioner's needs could be met at a lower level of care. While the Petitioner's treating physician testified that her needs could only adequately be met in a nursing home setting, there was no evidence, in the judge's estimation, that her doctor understood the Medicaid rules and their requirements with regard to what lower level care facilities can accommodate. The Administrative Law Judge reiterated that under current Medicaid regulations, the fact that non-skilled lower level services are not readily available or affordable cannot be taken into account in determining whether a patient meets Medicaid criteria for skilled nursing home care.

Edna R. Sheridon v. Department of Health, IO/7-12-94. 18 APR 257. *See also* FO/10-7-94. 18 APR 257.

***3 I.O. 1993 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--When the medical testimony of record establishes that the services required by the Claimant can be rendered at a lower level of care, it is not necessary to determine, as a matter of law, the exact weight to be given to the opinion of the treating physician.

Earl Ratcliff v. Bureau of Medicaid, IO/11-23-93. 19 APR 312. *Reversed* by FO/7-15-94. 19 APR 319.

***3 I.O. 1993 MEDICAL IMPROVEMENT STANDARD**--The medical improvement standard applicable to social security cases is grounded in the consideration that a disability, once shown, is presumed to have continued. While it is quite appropriate to presume that a disability, once established, will continue, this is not necessarily the case with regard to the need for nursing home services. Nursing home services can be required for a temporary condition which will eventually resolve with medical care.

Earl Ratcliff v. Bureau of Medicaid, IO/11-23-93. 19 APR 312. *Reversed* by FO/7-15-94. 19 APR 319.

***3 I.O. 1993 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--It is well established that a statutory right to a hearing includes the right to have a treating physician's opinion given great weight. Moreover, when there is a conflict of opinion as to the necessity of surgery, a treating physician's opinion carries greater weight than a non-treating, Medicaid physician's opinion.

Bureau of Medicaid v. Patricia Breeden, IO/4-22-93. 19 APR 326. *Reversed* by FO/7-21-93. 19 APR 333.

***3 I.O. 1992 BURDEN OF PROOF, IMPAIRMENT**--Evidence of an impairment must be substantiated by professional medical testimony, not lay person opinion.

Joe C. Sartin v. Bureau of Medicaid, IO/7-15-92. 17 APR 200.

***3 I.O. 1987 TREATING PHYSICIAN; WEIGHT OF TESTIMONY**--In Medicaid cases where the Petitioner's and the Department's evidence is fairly evenly balanced, it is appropriate to apply principles from Social Security disability case law since the issues in both areas of law are often similar. In the present case, the Administrative Law Judge, adopting a principle from Security disability case law, determined that the opinions of treating physicians should be given greater weight than those held by other physicians who had only examined the Petitioner once.
William R. Holt v. Bureau of Medicaid, IO/9-28-87. 7 APR 333. 17 APR 231.

***3 I.O. 1987 TREATING PHYSICIAN OPINION**--Although deference to the treating physician's opinion would not lead to a conclusion in favor of the Petitioner where the treating physician simply did not present sufficient testimony that the Petitioner met the criteria of the rule, it is appropriate to apply the principle where the evidence presented by the applicant and by the Bureau of Medicaid through its Medical Director's testimony is fairly evenly balanced.
William R. Holt v. Department of Health, Bureau of Medicaid, IO/9-28-87. 17 APR 231.

4. REIMBURSEMENT FOR ICF (INTERMEDIATE CARE FACILITY) OR NURSING HOME CARE

***4 Tenn. App. 1987 STANDARD OF REVIEW; NEED FOR NURSING HOME CARE**--The evidence that the patient needs some form of institutional care does not establish the need for care in an intermediate care facility. The Courts are not permitted to take a view most favorable to the challenger of an administrative decision. The law is strictly to the contrary. If there is any substantial material evidence to support the finding of the agency, it must be affirmed. See C.F. Industries v. Tennessee Public Service Comm., 599 S.W.2d 536 (Tenn. 1980).
Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***4 Tenn. App. 1987 BURDEN OF PROOF; NEED FOR NURSING HOME CARE**--In present case, the appellant asserted that the decision of the agency should be reversed because there is no substantial material evidence that the Medicare benefits should not be allowed. The Court of Appeals held that it is not the burden of Medicaid to show that benefits should not be allowed. Rather, it is the burden of the applicant/recipient to show that benefits should be allowed.
Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***4 OAG 1989 NEEDS MET AT LOWER LEVEL OF CARE**--If an individual's needs can be met at a level of care lower than that of an Intermediate Care Facility (ICF), then the legal prerequisites of Rule 1200-13-1-.10(1)(b) & (3)(d) are not met, and the Department may deny Medicaid reimbursement for any ICF services to rendered to the individual.
 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***4 OAG 1989 ABILITY TO PAY**--Under federal and state Medicaid law, an individual's inability to pay for services at a level below that of Intermediate Care Facility (ICF) does not entitle the individual to Medicare payment of ICF services rendered.
 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***4 OAG 1989 LOCAL AVAILABILITY OF SERVICES**--Local availability of services at a level of care below that of Intermediate Care Facility (ICF) services is not determinative on the question of whether an individual qualifies for Medicaid payment for ICF services.
 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***4 F.O. 1994 INJECTIONS OF MEDICATION**--The Petitioner required daily injections of insulin, which she was unable to self-administer due to visual incompetence. The Department Rules for Homes for the Aged prohibit daily nursing/medical care in group homes, and the rules for group homes also provide that "under no circumstances shall an employee administer medication by injection or inhalation to a resident unless licensed to do so." [Rule 1200-8-11-.09(2)] Thus, placement of an individual who requires daily services from home health nurses in a group home is improper. The Petitioner was found to have met her burden of proof by establishing that she needs in-patient nursing care which can only be provided in an Intermediate Care Facility.
Rubye Alsup v. Bureau of Medicaid, IO/2-18-94. FO/7-20-94. 17 APR 291.

***4 NOTE 1995 LEGAL ISSUES IN PAE CONTESTED CASE HEARINGS**--For a discussion of current issues arising in hearings involving Medicaid recipients, consult the article entitled *Legal Issues in PAE Contested Case Hearings*. This article discusses the Uniform Administrative Procedures Act and addresses specific issues arising in PAE cases. Ann M. Young, *Legal Issues in PAE Contested Case Hearings* (1995). 19 APR 94.

5. MENTAL OR PHYSICAL IMPAIRMENT/DISABILITY

***5 F.O. 1995 REIMBURSEMENT FOR ACUTE PSYCHIATRIC IN-PATIENT CARE PARTIALLY DENIED**--TennCare will only pay for acute in-patient psychiatric care under certain circumstances. The Petitioner's condition did not meet the continued stay criteria after she was stabilized. According to the Bureau's definition, payment for acute in-patient psychiatric care is made only for a condition which has a sudden onset and a short, severe course, with the understanding that the in-patient facility will work aggressively and expeditiously toward moving the patient to a less restricted environment. Although the Petitioner was entitled to reimbursement for the first sixty days to ensure that she was stabilized after her attempted suicide, after the sixty day period, she received the maximum benefit from acute hospitalization. Consequently, reimbursement for the period following the sixty days was denied. In The Matter of Margaret J. Dudbridge, IO/6-15-95. FO/6-27-95. 19 APR 108.

***5 F.O. 1995 PROOF OF MENTAL DISABILITY**--The Administrative Law Judge (ALJ) erred in finding that the Petitioner needed in-patient nursing care daily as defined in the Medicaid regulations since there was no medical evidence to support such a finding. The ALJ erred in finding that the Petitioner's state of mind and behavior were the only reasons why she qualified for Medicaid reimbursement. The record did not reveal evidence of any mental or physical condition requiring 24-hour nursing home care during the time in question. This finding was inconsistent with the recent decision in Loretta Hollars v. Department of Health where the Commissioner held that proof of mental disability must be from qualified medical experts with appropriate education and experience. Lena Baker v. Department of Health, FO/6-8-95. 16 APR 210. *See also* IO/7-11-94. 18 APR 120.

***5 F.O. 1994 PROOF OF MENTAL DISABILITY**--Proof of mental disability must be from qualified medical experts, with appropriate education and experience. Loretta Hollars v. Bureau of Medicaid, FO/10-31-94. 18 APR 339. *See also* IO/8-19-93. 18 APR 339.

***5 F.O. 1994 COMBINATION OF SERIOUS MEDICAL CONDITIONS**--The combined physical and mental disorders that the Petitioner suffers cannot, as a practical matter, be managed with any degree of skill or safety in a residential home for the aged ... "irrespective of the availability of such a residential home." Specifically, the Petitioner's short term memory loss makes self-administration (with or without reminders) of several potent drugs unlikely; further, her swallowing difficulties have not completely resolved. Therefore, Petitioner is approved for Medicaid reimbursement based on the finding that she cannot receive needed services in a residential home for the aged. Kingrey v. Department of Health, Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***5 F.O. 1994 ALZHEIMER'S DISEASE**--The rules governing group homes provide that a patient must be mentally able to find a way to a place of safety in an emergency and that a home may not care for a resident with a mental condition that clearly endangers himself or others. The Petitioner in the present case suffered from Alzheimer's Disease. The proof established that the Petitioner could not find his way about at various times and would wander off. Without a great deal of encouragement, the Petitioner would not eat. Relying on testimony from the doctor and nurse attending the Petitioner, the Administrative Law Judge determined that the Petitioner's needs could not appropriately or safely be met at a group home. Given the Petitioner's level of functioning, his inability to locate his own room, his inability to remember (and considerable skill in disguising it), his refusals to eat or bathe, and his general functioning on a slightly better than psychotic level, the Petitioner met his burden of proof that he satisfied the criteria for Medicaid reimbursement and that, as a practical matter, he needed in-patient nursing care daily. Winford Hagan v. Bureau of Medicaid, IO/5-19-94. FO/5-31-94. 18 APR 153.

***5 F.O. 1994 OBSERVATION FOR SUICIDE**--The Petitioner has proven that the nursing services she requires can only be rendered on an in-patient basis when nursing observation is necessary to monitor the Petitioner's unpredictable physical and mental attacks as well as assess and actively prevent any fulfillment of her suicidal threats. Clara Davis v. Bureau of Medicaid, IO/2-25-94. FO/3-7-94. 17 APR 339.

***5 F.O. 1994 MENTAL DISABILITY**--A mental disability that renders an individual "incapable of self-execution of needed nursing care" would not render the same individual physically incapable of executing the task. Rather, such a mental disability

would have the effect of making an individual only mentally incapable of executing the task. Even though an individual may forget how or when to execute a task, he is still physically able to execute it.
Mae Tipton v. Bureau of Medicaid, IO/9-23-93. FO/3-3-94. 16 APR 165.

***5 I.O. 1995 DECERTIFICATION FOUND IMPROPER**--Where the facts established that the psychiatric services the Petitioner needed could only be provided at an acute level of inpatient care, which provided a structured and carefully monitored separation from his dysfunctional mother, the administrative law judge determined that the Petitioner's decertification was improper and ordered Medicaid reimbursement for specified time periods.
In the Matter of Christopher Martin, IO/6-27-95. 14 APR 1.

***5 I.O. 1993 IMPAIRMENT, PROOF OF**--While the Petitioner proved that there was a possibility he may not take his medication as required, the proof preponderated that he is perfectly capable of doing so himself with minimal assistance. The only real evidence to the contrary was from the Petitioner's daughter, a lay person. However, there was no medical evidence, which is given greater evidentiary weight, that the Petitioner had any sort of impairment which would have required in-patient nursing care daily.
Joe C. Sartin v. Bureau of Medicaid, IO/7-15-93. 17 APR 200.

***5 I.O. 1987 MENTAL DISABILITY**--The Administrative Law Judge determined that requirements at subsections (1)(e) and (1)(k) for "total disorientation" did not warrant denial of Medicaid reimbursement in a case where an applicant's mental impairment made him dependent upon medication to maintain orientation and upon in-patient nursing care to take necessary medication because of his condition.
Bonnie L. Stagner v. Bureau of Medicaid, IO/9-24-87. 7 APR 325.

6. IN NEED OF IN-PATIENT NURSING CARE DAILY

***6 F.O. 1995 PROOF OF MENTAL DISABILITY**--The Administrative Law Judge (ALJ) erred in finding that the Petitioner needed in-patient nursing care daily as defined in the Medicaid regulations since there was no medical evidence to support such a finding. The ALJ erred in finding that the Petitioner's state of mind and behavior were the only reasons why she qualified for Medicaid reimbursement. The record did not reveal evidence of any mental or physical condition requiring 24-hour nursing home care during the time in question. This finding was inconsistent with the recent decision in Loretta Hollars v. Department of Health where the Commissioner held that proof of mental disability must be from qualified medical experts with appropriate education and experience.
Lena Baker v. Department of Health, FO/6-8-95. 16 APR 210. *See also* IO/7-11-94. 18 APR 120.

***6 F.O. 1995 NO SPECIAL MEDICAL TREATMENTS OR MONITORING REQUIRED**--The facts did not establish that the Petitioner requires, or did require, twenty-four hour in-patient nursing services. The administrative law judge found that the Petitioner was not receiving any special medical treatments or monitoring, and did not receive those services while in the nursing home. The Petitioner was also found to be alert and oriented as well as living independently, requiring only minor assistance with bathing and set-up of medications. The services the Petitioner received in the nursing home were limited to the administration of medication and minor assistance with activities of daily living. Consequently, TennCare benefits were denied.
Alma Harrison v. Department of Finance and Administration, Bureau of TennCare, IO/3-22-95. FO/4-3-95. 19 APR 116.

***6 F.O. 1995 RECALCITRANT BEHAVIOR**--In view of the fact that the Petitioner's needs were as much a result of his own recalcitrant behavior as his medical condition and that the Petitioner's condition would deteriorate dramatically in a setting other than one offering in-patient nursing care daily, Medicaid reimbursement was granted. Even though a more compliant patient suffering from the exact same medical condition would probably not need in-patient nursing care daily, the Commissioner found that the combination of the Petitioner's potentially serious medical problems coupled with his own refusal to even acknowledge these problems necessitated continual professional nursing care and observation. In light of this, the determination that this particular Petitioner's needs could only be met on an in-patient basis was exclusive to him because of his recalcitrant personality and unique social needs. Moreover, the Commissioner noted that if the Petitioner were removed from the nursing home and the type of specific monitoring that is available there, his health, even his life, would be put in jeopardy since nothing less than daily in-patient nursing care could provide the necessary assessment and appropriate intervention this patient required.
Department of Health v. Croley F. Wilson, FO/3-7-95. 16 APR 215.

***6 F.O. 1994 NURSING SERVICES; DEFINITION--**The definition of in-patient nursing care does not specify that nursing services must be performed by a licensed nurse.

Edna R. Sheridan v. Department of Health, FO/10-7-94. 18 APR 257. *See also* IO/7-12-94. 18 APR 257.

***6 F.O. 1994 MONITORING REQUIRED--**Petitioner found to need in-patient nursing care daily by virtue of the fact that her condition required monitoring and that she was already receiving routine nursing services at the nursing home. Petitioner's needs could not be met at a lower level of care after testimony showed that a residential home for the aged would not allow techs and that it was not safe for the Petitioner to be by herself.

Edna R. Sheridan v. Department of Health, FO/10-7-94. 18 APR 257. *See also* IO/7-12-94. 18 APR 257.

***6 F.O. 1994 CONTINUAL PROFESSIONAL MONITORING REQUIRED--**The monitoring the Petitioner required in effect constituted "continual professional medical/nursing observation and/or care." Residents who required such observation and care were not to be accepted or kept in a home for the aged under Rule 1200-8-11-.03(2)(t). The evidence was undisputed that, when he was without such observation and care, his health suffered greatly and resulted in hospitalizations. The Petitioner's condition had only been stable in a nursing home where such monitoring was available. The evidence showed that if he left the nursing home, his condition would deteriorate to the point that he would again require hospitalization and end up back in the nursing home. In conclusion, based upon the Petitioner's condition and medical history, it was determined that the services he needed could not successfully be provided in a residential home for the aged (RHA), the only even arguably practical lower level alternative to nursing home care. Therefore, it followed that the Petitioner, by showing that he could not be cared for in an RHA, met his burden of proving that he met the requirements of Rule 1200-13-1-.10(3)(d), in that he "needs in-patient nursing care daily" as defined by Rule 1200-13-1-.10(1)(b).

Charles Church v. Bureau of Medicaid, IO/8-18-94. FO/8-29-94. 18 APR 208.

***6 F.O. 1994 UNUSUAL CIRCUMSTANCES--**While unskilled services according to the Medicaid rules would "under ordinary or usual circumstances" be able to be rendered by a Medicaid recipient or other unlicensed person, such services under circumstances that are out of the ordinary or unusual might need to be provided by licensed persons, possibly in an in-patient setting. For example, in the unusual circumstance of a recipient being incontinent and/or non-ambulatory, services could only as a practical matter be provided on an in-patient basis.

Ellen Simpson v. Bureau of Medicaid, IO/2-23-94. FO/8-18-94. 17 APR 301.

***6 F.O. 1994 CONTINUAL OBSERVATION/CARE--**Continual professional observation or care does not constitute monitoring on a 24-hour basis such as is done in an intensive care ward in a hospital. Such an interpretation of Rule 1200-8-11-.03(2)(t) disregards intermediate levels of care that are available below the level of intensive care.

Ellen Simpson v. Bureau of Medicaid, IO/2-23-94. FO/8-18-94. 17 APR 301.

***6 F.O. 1994 COMBINATION OF SERIOUS MEDICAL CONDITIONS--**The combined physical and mental disorders that the Petitioner suffers cannot, as a practical matter, be managed with any degree of skill or safety in a residential home for the aged ... "irrespective of the availability of such a residential home." Specifically, the Petitioner's short term memory loss makes self-administration (with or without reminders) of several potent drugs unlikely; further, her swallowing difficulties have not completely resolved. Therefore, Petitioner is approved for Medicaid reimbursement based on the finding that she cannot receive needed services in a residential home for the aged.

Kingrey v. Department of Health, Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***6 F.O. 1994 RISK OF RELAPSE--**The preponderance of the evidence in the present case was that if the Petitioner was moved from the nursing home to a less supervised setting, then she would suffer a recurrence of the problems that led to her being placed in the nursing home in the first place. The end result would be that she would eventually return to the nursing home. To require the Petitioner to prove this, by having her go to a less supervised setting and actually get worse, would be an absurd interpretation of Rule 1200-12-1-.10 (3)(d) and (1)(b).

Vinne Kingrey v. Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***6 F.O. 1994 REVERSION IN LESS SUPERVISED SETTING--**Petitioner's mental condition, where reversion in a less supervised setting was established, suggested that her needs in this regard could not be met in a residential home for the aged. The evidence showed that if the Petitioner was moved from the nursing home to a less supervised setting, she would suffer a recurrence of the problems that led her to being placed in a nursing home in the first place and which would possibly lead to her return to the nursing home. To require the Petitioner to prove this possibility by going to a less supervised setting would be an absurd interpretation of Rule 1200-13-1-.10(1)(b) & (3)(d). Given such a probability, it was concluded that the Petitioner could not be adequately cared for in such a setting as a practical matter, irrespective of the availability of such a residential home. No other alternatives for the Petitioner were discussed at the hearing by either party. In the absence of any practical

alternative for the Petitioner, the Administrative Law Judge held that, as a practical matter, the nursing services she needed could only be provided on an in-patient basis in a nursing home.

Vinnie Kingrey v. Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***6 F.O. 1994 INJECTIONS OF MEDICATION**--The Petitioner required daily injections of insulin, which she was unable to self-administer due to visual incompetence. The Department Rules for Homes for the Aged prohibit daily nursing/medical care in group homes, and the rules for group homes also provide that "under no circumstances shall an employee administer medication by injection or inhalation to a resident unless licensed to do so." [Rule 1200-8-11-.09(2)] Thus, placement of an individual who requires daily services from home health nurses in a group home is improper. The Petitioner was found to have met her burden of proof by establishing that she needs in-patient nursing care which can only be provided in an Intermediate Care Facility.

Rubye Alsup v. Bureau of Medicaid, IO/2-18-94. FO/7-20-94. 17 APR 291.

***6 F.O. 1994 MONITORING**--Whereas an individual with no known tendency to become addicted to or to overdose on drugs might be adequately cared for with reminders, persons who are known to have a problem with addiction or overdosing require continual nursing observation which can, as a practical matter, only be provided on an in-patient basis. In the present case, the Petitioner met the requirements for in-patient nursing care after establishing that she required the kind of "continual professional medical nursing observation" that is not permitted in a residential home for the aged (RHA) and which can only be provided on an in-patient basis.

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***6 F.O. 1994 PATIENTS WHO CLEARLY DISTURB OTHER RESIDENTS**--A patient who displayed a tendency to wail and scream and who would "clearly disturb" other residents if placed in a residential home for the aged (RHA) was not considered an appropriate candidate for an RHA under Rule 1200-8-11-.09(4).

Flossie Demonbreun v. Bureau of Medicaid, IO/3-7-94. 8 APR 148. FO/7-15-94. 16 APR 20. 18 APR 37.

***6 F.O. 1994 REFERENCE TO SPECIFIC LOWER LEVEL FACILITY IS RELEVANT**--The existence of any practical alternatives to in-patient care was considered relevant to the determination made under Rule 1200-13-1-.10(1)(b). The issue of what services can and are provided at specific alternative facilities, as opposed to actual availability of those facilities, was also relevant to the determination of whether in-patient nursing care was needed. Reference to any specific lower level facility was considered relevant since decisions should be made with regard to the very "practical matter" of whether the petitioner's needs could be met at any real practical, existing alternative to a nursing home.

Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***6 F.O. 1994 NEEDS CANNOT BE MET AT HOME FOR THE AGED**--When 1) a Petitioner presents evidence that her needs cannot be met at a home for the aged, 2) such evidence is un rebutted by the Bureau, and 3) there is no indication in the record of any other appropriate lower level of care, then such a Petitioner has met her burden of proving that "as a practical matter" needed nursing services can only be rendered on an in-patient basis.

Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***6 F.O. 1994 ABSENCE OF PRACTICAL ALTERNATIVES**--Given the preponderance of the evidence that the services the Petitioner needs cannot be provided in a residential home for the aged, the only practical alternative discussed in this case, it must be concluded that the Petitioner has proven that she meets the requirements of Rule 1200-13-1-.10(3)(d) in that she "needs in-patient nursing care daily" as defined by Rule 1200-13-1-.10(1)(b).

Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***6 F.O. 1994 COMBINATION OF MEDICAL CONDITIONS**--The combination of serious problems suffered by the Petitioner made her case more serious than if she had any one or two separately, and her mental state, along with the need to take so many medications, compounded the situation. In light of this, the testimony of her nurses and doctor, to the effect that a move from the nursing home would result in serious deterioration in her ability to function, could not be discounted, notwithstanding some uncertainties in their testimony. The dangers involved in the Petitioner's combination of conditions and in any move to another location outweighed the possibility that she could have her needs met at a lower level of care. Given these conditions, she required continual observation and care and could not function adequately at a lower level of care. Because of the number and complexity of her medical conditions, the Petitioner needed the type of monitoring that required daily in-patient nursing care. In view of these facts, the Administrative Law Judge determined that the Petitioner's nursing services were not such that they could be rendered at a lower level of care.

Grace McCullar v. Bureau of Medicaid, IO/2-18-94. FO/7-7-94. 17 APR 325.

***6 F.O. 1994 SUPERVISION WITH MEDICATIONS; NURSING SERVICES**--The necessity of supervision with medications does not, in and of itself, meet the requirement of *nursing* care because such assistance can be performed at a lower level of care than ICF (Intermediate Care Facility, e.g., a residential home).
Department of Health v. Mildred L. Nelson, IO/1-29-93. FO/6-23-94. 18 APR 263.

***6 F.O. 1994 ALZHEIMER'S DISEASE**--The rules governing group homes provide that a patient must be mentally able to find a way to a place of safety in an emergency and that a home may not care for a resident with a mental condition that clearly endangers himself or others. The Petitioner in the present case suffered from Alzheimer's Disease. The proof established that the Petitioner could not find his way about at various times and would wander off. Without a great deal of encouragement, the Petitioner would not eat. Relying on testimony from the doctor and nurse attending the Petitioner, the Administrative Law Judge determined that the Petitioner's needs could not appropriately or safely be met at a group home. Given the Petitioner's level of functioning, his inability to locate his own room, his inability to remember (and considerable skill in disguising it), his refusals to eat or bathe, and his general functioning on a slightly better than psychotic level, the Petitioner met his burden of proof that he satisfied the criteria for Medicaid reimbursement and that, as a practical matter, he needed in-patient nursing care daily.
Winford Hagan v. Bureau of Medicaid, IO/5-19-94. FO/5-31-94. 18 APR 153.

***6 F.O. 1994 CHANGE IN CONDITION REQUIRING NEW PAE**--The facts did not establish that the Petitioner required 24-hour in-patient nursing services at the time the PAE was denied. All the assistance that the Petitioner needed could be rendered at a lower level of care. Based upon the evidence presented at the hearing, the Petitioner did not meet the requirement for Medicaid reimbursement during the relevant time period in the case. At the time of the hearing, the Petitioner's condition was deteriorating at a rate where it appeared likely that the Petitioner could soon meet Medicaid requirements, but this would require a new PAE reflecting the Petitioner's change in condition before Medicaid reimbursement could be provided.
Kenneth Lee v. Bureau of Medicaid, IO/4-7-94. FO/4-18-94. 19 APR 123. *Appealed to Davidson County Chancery Court.*

***6 F.O. 1994 RISK OF RELAPSE**--As a practical matter, the Petitioner need not suffer a complete relapse in order to qualify for benefits. In the present case, where the Petitioner was a 79-year-old individual with serious and unpredictable mental health problems, the Administrative Law Judge determined that, since it was absurd to require the Petitioner to leave the nursing home, and possibly risk a relapse, in order to qualify to live in the nursing home, the Petitioner met her burden of proof that she was entitled to Intermediate Care Facility reimbursement.
Shirley Cook v. Bureau of Medicaid, IO/2-4-94. FO/4-14-94. 18 APR 9.

***6 F.O. 1994 INJECTIONS OF MEDICATION; PLACEBO**--Like daily injections of medication, which require in-patient nursing care, daily injections of a placebo that have a profound psychological effect on the patient were found to be medically necessary and to require in-patient nursing care daily. Although the Respondent's placebo medications and monitoring were largely of a nature that they did not require care provided by a licensed nurse, it was uncontested that daily injections of any kind must be given by a licensed nurse on an in-patient basis. The Administrative Law Judge found that the placebo was necessary for the Respondent because, without it, her stomach pains would return. Therefore, the Administrative Law Judge determined that the Respondent needed and should receive in-patient nursing care daily since she met all the criteria for Medicaid reimbursement.
Bureau of Medicaid v. Juanita Bell, IO/3-16-94. FO/3-28-94. 18 APR 127.

***6 F.O. 1994 OBSERVATION FOR SUICIDE**--The Petitioner has proven that the nursing services she requires can only be rendered on an in-patient basis when nursing observation is necessary to monitor the Petitioner's unpredictable physical and mental attacks as well as assess and actively prevent any fulfillment of her suicidal threats.
Clara Davis v. Bureau of Medicaid, IO/2-25-94. FO/3-7-94. 17 APR 339.

***6 F.O. 1994 MENTAL DISABILITY**--A mental disability that renders an individual "incapable of self-execution of needed nursing care" would not render the same individual physically incapable of executing the task. Rather, such a mental disability would have the effect of making an individual only mentally incapable of executing the task. Even though an individual may forget how or when to execute a task, he is still physically able to execute it.
Mae Tipton v. Bureau of Medicaid, IO/9-23-93. FO/3-3-94. 16 APR 165.

***6 I.O. 1995 LIMITED MONITORING AND SUPERVISION NEEDED**--The subject of this hearing was the Petitioner's appeal of the denial by the Bureau of TennCare of her Preadmission Evaluation (PAE) application for Medicaid reimbursement for Intermediate Care Facility (ICF) care. Although the State conceded that the Petitioner met all eligibility criteria listed under Rule 1200-13-1-.10(3) for PAE approval, the State established that she did not need in-patient nursing care daily. Due to

the Petitioner's mental condition, she clearly needed assistance in monitoring and administering her medications. In addition, due to her diabetic condition, she required someone to supervise and prepare her meals and to monitor her diet. However, the administrative law judge determined that such assistance did not need to be provided by licensed personnel in an ICF unit. Although the Petitioner could no longer live independently and needed the assistance of some responsible adult, and perhaps licensed personnel to a limited extent, she was found not to require the services of licensed personnel on a daily basis. While this type of assistance on a daily basis might be in the Petitioner's "best interest" as suggested by her psychologist, such services were not authorized for Medicaid reimbursement. Therefore, Medicaid coverage for ICF care was denied.

In the Matter of Lutye Murphy and Humboldt Nursing Home, IO/6-30-95. 19 APR 163.

***6 I.O. 1995 LICENSED CARE NOT REQUIRED--**Medicaid coverage for ICF (Intermediate Care Facility) was denied where primary services being offered to Petitioner were giving her medications and observing her for any side-effects of the medications, including those which could result from any alcohol abuse relapse. These were considered services for which a licensed nurse was not required.

Elma Head v. Department of Finance and Administration, Bureau of TennCare, IO/6-29-95. 14 APR 17.

***6 I.O. 1995 LEVEL OF SUPERVISION NOT RISING TO LEVEL OF NEEDING IN-PATIENT CARE DAILY--**Although Petitioner's medical condition clearly required a more intensive level of supervision than she received at the residential home, she did not meet the strict medical criteria for Medicaid reimbursement at an ICF (Intermediate Care Facility) facility.

In the Matter of Lela Huson, IO/6-23-95. 19 APR 22.

***6 I.O. 1995 NEED FOR COMPREHENSIVE MONITORING--**The Petitioner in the present case proved that she could not receive the nursing services she needs at a home for the aged. First, the Petitioner's inability to ambulate sufficiently well to self-preserve in the event of an emergency was stressed. Secondly, the Petitioner's need for comprehensive monitoring could not be met in a home for the aged. Furthermore, the combined physical and mental problems of the Petitioner could not be managed with any degree of safety in such a setting. The Administrative Law Judge concluded that the Petitioner required monitoring of the sort that unlicensed personnel could not adequately provide. Therefore, the only practical alternative for the Petitioner, in view of her overall condition, was an in-patient nursing home.

Cora Evans v. Bureau of Medicaid, IO/1-20-95. 9 APR 78.

***6 I.O. 1995 OVERALL CONDITION EVALUATED--**Whether an individual is in need of skilled care as opposed to custodial care depends on his overall condition. Even though many specific services may be routine and seemingly unskilled, in the aggregate, they are considered treatment of a medical condition. Although, taken singly, one's ailments might not seem to require skilled nursing care, taken together, they may amount to a chronic medical condition which requires monitoring and care by skilled personnel in order to preserve health and prevent any further injury. Therefore, when a very aged Petitioner has such an extensive combination of ailments which leave her teetering on the brink of complete infirmity, the Petitioner needs in-patient nursing care daily to maintain any level of psychological and physical stability.

Cora Evans v. Bureau of Medicaid, IO/1-20-95. 9 APR 78.

***6 I.O. 1987 MENTAL DISABILITY--**The Administrative Law Judge determined that requirements at subsections (1)(e) and (1)(k) for "total disorientation" did not warrant denial of Medicaid reimbursement in a case where an applicant's mental impairment made him dependent upon medication to maintain orientation and upon in-patient nursing care to take necessary medication because of his condition.

Bonnie L. Stagner v. Bureau of Medicaid, IO/9-24-87. 7 APR 325.

7. PRACTICAL ALTERNATIVES AND OTHER CONSIDERATIONS

***7 Tenn. App. 1987 NURSING NEEDS MET AT A LOWER LEVEL OF CARE--**Since group homes, which existed in the Nashville area, could provide unskilled services and could be supplemented by periodic visits from home health agencies, the Petitioner was found to have failed to meet her burden, because, as a practical matter, her nursing needs could be met at a lower level of care than at an ICF on an in-patient basis

Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***7 Tenn. App. 1987 NURSING NEEDS MET AT A LOWER LEVEL OF CARE; DOCTOR'S TESTIMONY--**Medicaid Rule No. 1200-13-1-.01(1)b states: "Nursing Services must be such that as a practical matter they can only be rendered on an in-patient basis...." In the present case, a doctor testified that the periodic skilled nursing services that the

Petitioner needed and the daily unskilled nursing care (including such things as assistance in bathing, ambulation, cooking, toileting, and assistance in other daily activities) that the Petitioner needed could be provided to the Petitioner at a lower level of care than at an Intermediate Care Facility (ICF). The doctor testified that these services, skilled and unskilled, were in fact rendered at group homes that existed in the Nashville area when group home services were supplemented by periodic visits from home health care agencies. Therefore, the Court of Appeals held that the Petitioner failed to satisfy this part of the medical criteria because of the fact that, as a practical matter, her nursing care needs (both skilled and unskilled) could be met at a lower level care than at an ICF on an in-patient basis.

Wheeler v. Department of Health and Environment, Bureau of Medicaid, No. 86-263-II, 1987 WL 5172 (Tenn. Ct. App. January 7, 1987). 16 APR 44.

***7 OAG 1989 AFFORDABILITY AND AVAILABILITY OF LOWER LEVEL CARE**--Issues of affordability and availability of lower level residential facilities, to the effect that inability to pay for lower level services, and lack of local availability of services, are not determinative of whether an individual qualifies for Medicaid reimbursement for ICF services. 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***7 OAG 1989 NEEDS MET AT LOWER LEVEL OF CARE**--If an individual's needs can be met at a level of care lower than that of an Intermediate Care Facility (ICF), then the legal prerequisites of Rule 1200-13-1-.10(1)(b) & (3)(d) are not met, and the Department may deny Medicaid reimbursement for any ICF services to rendered to the individual. 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***7 OAG 1989 ABILITY TO PAY**--Under federal and state Medicaid law, an individual's inability to pay for services at a level below that of Intermediate Care Facility (ICF) does not entitle the individual to Medicare payment of ICF services rendered. 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***7 OAG 1989 LOCAL AVAILABILITY OF SERVICES**--Local availability of services at a level of care below that of Intermediate Care Facility (ICF) services is not determinative on the question of whether an individual qualifies for Medicaid payment for ICF services. 1989 Op. Tenn. Att'y Gen. No. 89-06 (January 23, 1989). 16 APR 91.

***7 F.O. 1995 DETERMINATION OF ELIGIBILITY FOR ICF CARE**--In determining whether an individual is eligible for an Intermediate Care Facility care, no consideration can be given to the fact that the Petitioner cannot afford RHA (residential home for the aged) care in determining whether, as a practical matter, the individual needs in-patient nursing care daily. Where the Petitioner's needs can be met at a lower level of care (such as at an RHA), Medicaid (TennCare) reimbursement for ICF care must be denied.

Pauline Hill v. Department of Finance and Administration, Bureau of TennCare, IO/6-8-95. FO/6-20-95. 19 APR 129.

***7 F.O. 1995 NEEDS COULD BE MET AT LOWER LEVEL OF CARE**--In the present case, the Petitioner appealed the denial of his Preadmission Evaluation Application (PAE) for Medicaid reimbursement for Intermediate Care Facility (ICF) care. After consideration of the record, the administrative law judge determined that the Petitioner's PAE should be denied. While the record supported that the Petitioner undoubtedly needed the assistance of some responsible adult on a daily basis, maybe even the assistance of a licensed nurse on some occasions, the record did not establish that the assistance could only be rendered on an in-patient basis by licensed personnel. The fact that the Petitioner was capable of self-administering some drugs when they were distributed to him supported the conclusion that the necessity for daily assistance from licensed personnel in an in-patient setting had not been met.

In the Matter of Remer Haws, IO/2-23-95. FO/3-6-95. 19 APR 135.

***7 F.O. 1995 AVAILABILITY OF RESIDENTIAL HOME IS NOT A CONSIDERATION**--Administrative Law Judge erred in finding that the State was liable for nursing home reimbursement because the nursing home could not find a residential home for the aged to place the patient until March 9. Ordering the State to pay for reimbursement for nursing home care for a patient who does not meet criteria because a residential home for the aged had not been found is inconsistent with the Commissioner's Order in Manners v. Department of Health. 16 APR 53.

Lena Baker v. Department of Health, FO/2-22-95. 16 APR 210. *See also* IO/7-11-94. 18 APR 120.

***7 F.O. 1995 AFFORDABILITY NOT A CONSIDERATION IN GRANTING MEDICAID REIMBURSEMENT**--The record established that the Petitioner could not currently afford an assisted living facility, and it was argued that this fact required that she be retained in an in-patient facility. However, the Administrative Law Judge held that affordability was not a relevant consideration in deciding whether Medicaid reimbursement should be given for ICF care.

Department of Health v. Alice Renner, IO/1-27-95. FO/2-6-95. 19 APR 141.

***7 F.O. 1995 NO NEED FOR LICENSED NURSING CARE**--The record supports the Department's determination that the Petitioner does not meet the criteria for ICF care as set out in the rules of the Department. While the Petitioner undoubtedly needs the assistance of some responsible adult to live outside a nursing home setting, and perhaps a licensed nurse to a limited extent, the assistance the Petitioner requires is not that of licensed personnel on a daily basis. None of the services currently being offered to the Petitioner could not be received in a setting outside the nursing home. Therefore, Medicaid reimbursement for the ICF care given to the Petitioner was denied.

Clara Crain v. Bureau of Medicaid, IO/1-23-95. FO/2-2-95. 9 APR 71.

***7 F.O. 1994 PETITIONER'S BURDEN OF PROOF LIMITED TO MEDICAL CRITERIA**--The Petitioner must prove that she meets the medical criterion set out in the Department rules. The appropriateness of an individual as a resident of an RHA (residential home for the aged) is not relevant to the determination of eligibility for Medicaid reimbursement for long term care. It is not proper to conclude that because an individual may not be appropriate as an RHA resident that, therefore, they do not meet medical criterion.

Loretta Hollars v. Bureau of Medicaid, FO/10-31-94. 18 APR 339. *See also* IO/8-19-93. 18 APR 350.

***7 F.O. 1994 RHA PLACEMENT AND ELIGIBILITY FOR MEDICAID REIMBURSEMENT**--Whether one can be admitted to a residential home for the aged (RHA) is not relevant to whether one qualifies for Medicaid reimbursement. The appropriateness of RHA placement for an individual is not relevant to the determination of eligibility for Medicaid reimbursement for nursing home care.

Hollars v. Department of Health, FO/10-31-94. 18 APR 339.

***7 F.O. 1994 AVAILABILITY OF LOWER LEVEL CARE; STATE'S BURDEN OF PROOF**--The State is not required to prove the availability of care at a lower or alternative level. Rule 1200-13-1-.10(b) does not create a new burden for the State to disprove that a substantial equivalent of in-patient nursing care is not necessary.

Lottie Disney v. Bureau of Medicaid, FO/10-7-94. 18 APR 273. *See also* IO/1-6-94. 18 APR 273.

***7 F.O. 1994 ABSENCE OF PRACTICAL ALTERNATIVES**--The monitoring the Petitioner required in effect constituted "continual professional medical/nursing observation and/or care." Residents who required such observation and care were not to be accepted or kept in a home for the aged under Rule 1200-8-11-.03(2)(t). The evidence was undisputed that, when he was without such observation and care, his health suffered greatly and resulted in hospitalizations. The Petitioner's condition had only been stable in a nursing home where such monitoring was available. The evidence showed that if he left the nursing home, his condition would deteriorate to the point that he would again require hospitalization and end up back in the nursing home. In conclusion, based upon the Petitioner's condition and medical history, it was determined that the services he needed could not successfully be provided in a residential home for the aged (RHA), the only even arguably practical lower level alternative to nursing home care. Therefore, it followed that the Petitioner, by showing that he could not be cared for in an RHA, met his burden of proving that he met the requirements of Rule 1200-13-1-.10(3)(d), in that he "needs in-patient nursing care daily" as defined by Rule 1200-13-1-.10(1)(b).

Charles Church v. Bureau of Medicaid, IO/8-18-94. FO/8-29-94. 18 APR 208.

***7 F.O. 1994 HOME FOR THE AGED; PERSONAL SERVICES, MEDICAL/NURSING**--"Personal services" that may be rendered by such "Homes" under Department Rules do not include active observation or examination for symptoms other than what might be easily noticed in assisting a resident with their activities of daily living. The Administrative Law Judge determined that, while many symptoms would be noticeable as a result of such care, it would appear that bleeding gums, especially in a person who wears dentures, would probably not be so noticeable. Therefore, a person who needs observation for such symptoms requires nursing services which, as a practical matter, can only be provided in a nursing home on an in-patient basis.

Ellen Simpson v. Bureau of Medicaid, IO/2-23-94. FO/8-18-94. 17 APR 301.

***7 F.O. 1994 HOME FOR THE AGED MUST BE ALLOWED TO RENDER THE NEEDED SERVICE**--Residential or boarding homes for the aged and assisted living facilities are alternatives often suggested by the Bureau of Medicaid as a basis for concluding that nursing services are not "such that as a practical matter they can only be rendered on an in-patient basis." The services needed by the Petitioner must be such that a "Home for the Aged" is allowed to render them under the Department Rules for such homes, in order to deny approval for ICF care to a recipient.

Ellen Simpson v. Bureau of Medicaid, IO/2-23-94. FO/8-18-94. 17 APR 301.

***7 F.O. 1994 NURSING HOME AS THE ONLY PRACTICAL ALTERNATIVE**--Petitioner's mental condition, where reversion in a less supervised setting was established, suggested that her needs in this regard could not be met in a residential home for the aged. The evidence showed that if the Petitioner was moved from the nursing home to a less supervised setting, she would suffer a recurrence of the problems that led her to being placed in a nursing home in the first place and which would possibly lead to her return to the nursing home. To require the Petitioner to prove this possibility by going to a less supervised setting would be an absurd interpretation of Rule 1200-13-1-.10(1)(b) & (3)(d). Given such a probability, it was concluded that the Petitioner could not be adequately cared for in such a setting as a practical matter, irrespective of the availability of such a residential home. No other alternatives for the Petitioner were discussed at the hearing by either party. In the absence of any practical alternative for the Petitioner, the Administrative Law Judge held that, as a practical matter, the nursing services she needed could only be provided on an in-patient basis in a nursing home.
Vinnie Kingrey v. Bureau of Medicaid, IO/3-28-94. FO/8-2-94. 18 APR 134.

***7 F.O. 1994 ADMISSIONS OF NON-AMBULATORY PATIENTS**--Homes for the aged are not permitted to admit persons who are not ambulatory.
Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***7 F.O. 1994 ABSENCE OF PRACTICAL ALTERNATIVES**--Given the preponderance of the evidence that the services the Petitioner needs cannot be provided in a residential home for the aged, the only practical alternative discussed in this case, it must be concluded that the Petitioner has proven that she meets the requirements of Rule 1200-13-1-.10(3)(d) in that she "needs in-patient nursing care daily" as defined by Rule 1200-13-1-.10(1)(b).
Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***7 F.O. 1994 PRACTICAL ALTERNATIVES RELEVANT**--Neither Wheeler, Kent, nor Manners remotely suggested that evidence of whether there are any practical, existing alternatives to nursing home care in a given case was irrelevant. To the contrary, all of the decisions specifically considered the issue of whether needed services could be provided in such an alternative. Therefore, it was concluded that such evidence was relevant under Rule 1200-13-1-.10(1)(b).
Carrie Ballew v. Bureau of Medicaid, IO/6-24-94. 19 APR 67. FO/7-13-94. 18 APR 164.

***7 F.O. 1994 PRACTICAL MATTER DETERMINATION; FACTORS TO CONSIDER**--In making a practical matter determination, consideration must be given to the patient's condition and to the availability and feasibility of using more economical alternative facilities and services. However, in making that determination, the availability of Medicare payment for these services may not be a factor.
Flossie Demonbreun v. Department of Health, Bureau of Medicaid, FO/6-13-94. FO/6-20-94 (*amended*). 16 APR 20.

***7 F.O. 1994 HOMES FOR THE AGED; PERSONAL SERVICES, MEDICAL/NURSING**--The Petitioner established a need for daily nursing care and observation since she required daily blood pressure readings, needed her pulse taken before receiving her medication, and needed to be observed for signs of congestive heart failure. Rule 1200-8-11-.01 provides that personal services which can be provided in Homes for the Aged do not include nursing or medical care, which are not to be provided. Therefore, the Petitioner met her burden of showing that she needed, as a practical matter, in-patient nursing care daily since the Department's rules specify that a resident who requires continual medical care or nursing observation shall not be accepted or kept in a residential home and no other practical alternative was suggested.
Thelma Fagan v. Bureau of Medicaid, IO/2-17-94. FO/6-8-94. 18 APR 1.

***7 F.O. 1994 LIMITATION OF HOME FOR THE AGED AS PRACTICAL ALTERNATIVE**--The Petitioner's condition required continual nursing observation and/or care to 1) assess and address her constant anxiety, physical complaints, and requests for more medication and 2) actively prevent any overdosage and any negative physical consequences of her anxiety, nervousness, and depression. The Department of Health's rules for "Homes for the Aged" prohibit "continual professional nursing/medical care or observation." [See Rule 1200-8-11-.03(2)(t)]. The preponderance of the evidence and law is that the services needed by the Petitioner can not be provided in a residential home for the aged, the only practical alternative to a nursing home discussed in this case. Therefore, the Administrative Law Judge determined that the Petitioner met the requirements of Rule 1200-13-1-.10(3)(d) in that she "need[s] in-patient nursing care daily."
Frances B. Neese v. Bureau of Medicaid, IO/3-3-94. FO/3-14-94. 18 APR 21.

***7 F.O. 1994 PRACTICAL MATTER DETERMINATION; LOWER LEVEL OF CARE**--In making a 'practical matter' determination, consideration must be given to the patient's condition and to the availability and feasibility of using more economical alternative facilities and services. However, in making that determination, the availability of Medicare payment for these services may not be a factor. A petitioner will be found to have failed to satisfy the requirement of in-patient nursing care

daily when, as a practical matter, his needs can be met *at a lower level of care* than at an in-patient care facility on an in-patient basis.

Attie Lee Clemons v. Bureau of Medicaid, IO/10-7-93. FO/3-7-94. 16 APR 178.

***7 F.O. 1993 AVAILABILITY AND AFFORDABILITY OF ALTERNATIVE CARE**--Availability and affordability of lower level alternative placements are not relevant considerations in making determinations whether Medicaid recipients need in-patient nursing care daily as defined in Rule 1200-13-1-.10(1)(b). See Edna Manners v. Tennessee Department of Health and Environment, FO/8-31-88. 16 APR 53; Department of Health, Bureau of Medicaid v. Charles Welch, IO/4-23-93. 17 APR 185.

Sarah Simpson v. Department of Health, Bureau of Medicaid, IO/7-14-93. FO/8-16-93. 19 APR 1; Mervie Vickery v. Department of Health, Bureau of Medicaid, IO/10-18-93. 17 APR 179.

***7 F.O. 1988 AVAILABILITY AND AFFORDABILITY OF ALTERNATIVE CARE**--Availability and affordability of lower level alternative placements are not relevant considerations in making determinations whether Medicaid recipients need in-patient nursing care daily as defined in Rule 1200-13-1-.10(1)(b).

Edna Manners v. Tennessee Department of Health and Environment, FO/8-31-88. 16 APR 53.

***7 F.O. 1988 AVAILABILITY AND AFFORDABILITY OF ALTERNATIVE CARE**--Affordability and availability of lower level care are not relevant criteria for deciding PAE cases.

Edna Manners v. Tennessee Department of Health and Environment, FO/8-31-88. 16 APR 53; Cecil Kent v. Tennessee Department of Health, FO/8-27-87. 7 APR 344. 16 APR 60.

***7 F.O. 1987 PRACTICAL MATTER DETERMINATION; FACTORS TO CONSIDER**--In making a practical matter determination, consideration must be given to the patient's condition and to the availability and feasibility of using more economical alternative facilities and services. However, in making that determination, the availability of Medicare payment for those services may not be a factor. In making practical matter determinations, if the care needed can be given at a residential home for the aged (RHA), Intermediate Care Facility (ICF) reimbursement must be denied.

Cecil Kent v. Bureau of Medicaid, FO/8-27-87. 7 APR 344. 16 APR 53.

***7 F.O. 1987 NEEDS CAN BE MET AT A LOWER LEVEL OF CARE**--If an individual's medical needs can be met at a lower level of care (such as a residential home for the aged), then he does not meet criterion (3)(d) of Rule 1200-13-1-.10 of the Medicaid rules for reimbursement for intermediate care facility services, defined at subsection (1)(b) as follows: "Nursing services must be such that as a practical matter they can only be rendered on an in-patient basis or it is the general medical practice that they be rendered on an in-patient basis." The question of whether the individual's needs will be met because of the availability or affordability of alternative care brings in to play social problems and considerations which the Tennessee Medicaid program is neither designed, nor funded, to envelop. Therefore, whether an individual satisfies this criterion is a matter to be determined solely by reference to the individual's medical condition, not his financial circumstances.

Cecil Kent v. Tennessee Department of Health, FO/8-27-87. 7 APR 344. 16 APR 53.

***7 I.O. 1995 ORDER MUST CONSIDER PRACTICAL ALTERNATIVES**--An order must consider whether there are any practical alternatives to in-patient nursing home care and whether the petitioner can receive the needed services in a residential home for the aged.

Cora Evans v. Bureau of Medicaid, IO/1-20-95. 9 APR 78.

***7 I.O. 1994 LOWER LEVEL OF CARE; NECESSITY**--A distinction must be drawn between what is beneficial to the Petitioner and what is necessary for the Petitioner. Medicaid is not required to provide all services in the exact manner and form requested by recipients and is allowed to limit its expenditures to those authorized under the Medicaid Act and rules. While in-patient nursing care services might be more preferable and beneficial to the Petitioner, it is not absolutely necessary, as a practical matter, that such nursing services be rendered to her on an in-patient basis as Rule 3(d) requires.

Ruby Young v. Bureau of Medicaid, IO/2-18-94. 17 APR 161.

***7 I.O. 1993 AVAILABILITY AND AFFORDABILITY OF ALTERNATIVE CARE**--The fact that the Petitioner cannot afford to pay for the services of a boarding home or assisted living facility, which provide the level of care she needs, may not be considered in this matter. The affordability and availability of an alternative lower level of care are not relevant considerations under the law.

Winnie Cunningham v. Bureau of Medicaid, IO/10-18-93. 17 APR 173.

***7 I.O. 1993 OUT-PATIENT SETTINGS**--If the Petitioner's needs can be met in out-patient settings, then in-patient nursing home care is not needed "as a practical matter" and must be denied. An individual whose needs could be met at a residential home for the aged [as defined at Rule 1200-8-11-.01] would appear, by definition, to not meet the requirement that he or she need "daily in-patient nursing care" in order to receive ICF Medicaid reimbursement.

Loretta Hollars v. Department of Health, Bureau of Medicaid, IO/8-19-93. 18 APR 339.

***7 I.O. 1993 PRACTICAL MATTER DETERMINATION**--In making a 'practical matter' determination with regard to reimbursement for skilled nursing home care, consideration must be given to the patient's condition and to the availability and feasibility of using more economical alternative facilities and services. However, in making that determination, the availability of Medicare payment for these services may not be a factor. Reimbursement for nursing home care to a Medicaid recipient whose needs can be met in a group home is often denied. Where the petitioner failed to satisfy this part of the medical criteria because, as a practical matter, her nursing care needs (both skilled and unskilled) could be met *at a lower level of care* than at an in-patient care facility on an inpatient basis.

Glennie Polk v. Bureau of Medicaid, IO/3-25-93. 17 APR 192.

8. REIMBURSEMENT FOR SKILLED NURSING FACILITY (SNF) CARE

***8 F.O. 1994 NEED FOR DAILY MONITORING DUE TO MULTIPLICITY OF MEDICAL PROBLEMS**--The multiplicity of medical problems confronting the Petitioner, the varying status of his ailments, and the need for daily examination and treatment necessitated a level of skilled nursing care.

Edgar O'Neal Davis v. Department of Health, Bureau of Medicaid, IO/11-1-93. FO/5-11-94. 17 APR 206.

***8 F.O. 1993 STABLE CONDITION AND SKILLED MONITORING NOT REQUIRED**--Based upon the stability of her condition at the time of the petition for reimbursement and the fact that skilled monitoring of her condition was not required, the care the Petitioner asserted she needed did not rise to the level of skilled care. In spite of the fact that the treating physician advocated more aggressive treatments, Medicaid reimbursement was denied.

Euple D. Vinson v. Department of Health, Bureau of Medicaid, FO/12-15-93. 17 APR 214.

***8 F.O. 1993 STABLE CONDITION AND SKILLED MONITORING NOT REQUIRED**--Based upon the stability of her condition and the fact that skilled monitoring of her condition was not required, Petitioner was not entitled to Medicaid reimbursement for Skilled Nursing Facility care, but only for reimbursement at the ICF (Intermediate Care Facility) level of care.

Alice Havens v. Department of Health, Bureau of Medicaid, IO/11-23-93. FO/12-3-93. 17 APR 225.

***8 I.O. 1987 EXTENSIVE MONITORING REQUIRED DUE TO COMPLEXITY OF CONDITION** the Petitioner required daily monitoring to prevent the deterioration of his complicated medical condition, skilled nursing services were found to be required on a daily basis and reimbursement for Petitioner's skilled care facility services were approved. Although no one of the Petitioner's medical problems would be sufficient by itself to necessitate a skilled level of care, the number and complexity of the Petitioner's problems and the fact that he needed to be monitored closely to ensure treatment for one condition was not adversely affecting his other medical problems called for skilled care by nurses who would be capable of determining which factors would affect the Petitioner's condition and prevent the deterioration of his condition.

William R. Holt v. Department of Health, Bureau of Medicaid, IO/9-28-87. 17 APR 231.

9. PASSAR CASES

***9 F.O. 1993 REIMBURSEMENT GRANTED**--State failed to carry its burden of proof that the Respondent was in need of active treatment or in need of "specialized services" for his mental disability over and above the care he is receiving at the nursing home where he presently lives.

Dennis Gaskins v. Department of Health, Bureau of Medicaid, IO/12-14-93. FO/12-28-93. 17 APR 276.

***9 F.O. 1993 REIMBURSEMENT GRANTED**--Even though there was some possibility that she had dementia, the Petitioner did not have a primary diagnosis of dementia. Therefore, the Petitioner was not exempted from screening for the need for active treatment under the rule. Where it was shown that the Petitioner could not receive adequate medical treatment for her medical conditions at any of the specialized settings available to address her mental retardation, Petitioner was found not to be in need of active treatment for her mental disability.

Linda Hassler v. Department of Health, Bureau of Medicaid, IO/5-17-93. FO/5-27-93. 17 APR 253.

***9 F.O. 1993 REIMBURSEMENT DENIED**--Petitioner did not meet Medicaid criteria for Level I (intermediate care) benefits where the proof clearly established that she was in need of active treatment for mental illness. Therefore, reimbursement for the contested period was denied.

Estelle Franklin v. Department of Health, Bureau of Medicaid, IO/3-30-93. FO/4-12-93. 17 APR 245.

***9 F.O. 1992 REIMBURSEMENT DENIED**--Based on the fact that the Petitioner's condition was closely related to mental retardation and she was in need of active treatment, Petitioner was not entitled to Medicaid reimbursement for care received during the contested period.

Donna McClure v. Department of Health, Bureau of Medicaid, IO/2-12-92. FO/5-14-92. 17 APR 283.

***9 I.O. 1990 REIMBURSEMENT GRANTED**--Where Petitioner was found to need access to a health care facility more for her health problems than for her mental retardation, Petitioner was found not to be in need of active treatment for her mental disability. The administrative law judge concluded that a Petitioner with mild retardation and serious health problems is not automatically in need of "active treatment" for retardation. Consequently, after not being found to be in need of active treatment for her mental disability, Petitioner qualified for intermediate Medicaid benefits.

Mary Hamilton v. Department of Health, Bureau of Medicaid, IO/11-16-90. 19 APR 151.

- 17.02 **MEDICAID VENDOR** (**See also 9.00, for cases heard through the department of finance and administration, to which Medicaid/TennCare was transferred in 1995.)
1. In General
 2. Overpayments

1. IN GENERAL

***1 F.O. 1995 DISPROPORTIONAL SHARE ADJUSTMENT COMPUTATION; NEW INFORMATION**--Petitioner's request for inclusion of additional days in Medicaid disproportional share adjustment computation (MDSA) was denied because information submitted earlier was considered the best information available. The Medicaid rules provide that when the annual redetermination for MDSA is made, it will be made on the best information available. MDSA payments will only be recalculated if the original report used was incomplete. These recalculations will not be made on new information submitted, but only to correct an error. Furthermore, no new information will be accepted following the annual cut-off date. Sweetwater Hospital Association v. Department of Health, Bureau of TennCare (Medicaid), FO/6-8-95. 16 APR 204.

***1 F.O. 1995 MEDICAID RECOUPMENT FOR FAILURE TO PROVIDE DOCUMENTATION**--Department's petition to recoup \$23,453.49 from the Respondent was granted due to Respondent's failure to provide proper documentation regarding specific patients and the level of care provided for these patients. Respondent was ordered to refund the contested Medicaid payments after it was determined that the Respondent failed to comply with Medicaid policies and procedures. In The Matter of Jerald W. White, M.D., IO/5-23-95. FO/6-2-95. 13 APR 284.

***1 F.O. 1992 SANCTIONS; MEDICAID VIOLATIONS**--The respondent billed Medicaid for and received reimbursement for filling a prescription for a brand name while dispensing a generic drug of lesser value. A clause in his Medicaid provider agreement requires the respondent to follow the laws of the State. Consequently, the respondent is guilty of violating the Medicaid provider agreement as well as T.C.A. §71-5-118(3). However, the statutory and regulatory scheme envisions punishment commensurate with the nature and extent of the unnecessary or inappropriate care for which reimbursement was sought. It would be inappropriate to impose a lengthy suspension or to terminate the respondent from the Medicaid program since he is already on probation, his license has been suspended and Medicaid patients that rely on the respondent's services might be adversely affected by such an action. Department of Health v. Roy Lee and City Drug Company, IO/3-27-92. FO/4-6-92. 19 APR 253.

***1 I.O. 1994 NO OBLIGATION TO PAY FOR SERVICES WHERE NO FEDERAL REIMBURSEMENT**--The State is not required to pay for any services for which there is no Federal Financial Participation. During the period in dispute, the Federal Government was refusing to reimburse the State of Tennessee for special education programs. As a result, the State was not obligated to make the payments requested by the Petitioner. See Harris v. McRay, 100 S.Ct. 2671 (1980). Vanderbilt Child and Adolescent Psychiatric Hospital, Ltd. v. Department of Health, IO/6-2-94. 13 APR 290.

***1 I.O. 1993 CLERICAL ERROR ON PAE**--There is no provision in the law to allow for Petitioner's claim of clerical oversight regarding physician's signature date on a Preadmission Evaluation. Re: Lewis County Manor, Inc., IO/3-22-93.

***1 I.O. 1988 EXCLUSION FROM MEDICAID**--Federal law requires mandatory exclusion of a provider from the Medicare program for a conviction of a program-related offense. Upon notification, the Bureau of Medicaid must exclude the provider from the Medicaid program for the same time period and on the same date as the Medicare program exclusion. This Medicaid exclusion is effective immediately and is not stayed by the filing of an administrative appeal of the Medicare exclusion. Bureau of Medicaid v. Jerry Collins, IO/6-20-88. 16 APR 256.

2. OVERPAYMENTS

***2 Tenn. App. 1991 OVERCHARGES; CORRECTIVE ACTION; ESTOPPEL**--In the present case, Bristol Nursing Home, Inc. (BNH) has appealed from the judgment of the Chancery Court affirming an administrative decision of the Tennessee Department of Health and Environment, Bureau of Medicaid, in two contested cases regarding a refund of overcharges and proper criteria for computing charges for care of indigent patients. BNH insists that the Chancery Court erred

in failing to hold that, by previous acquiescence in the billings from BNH without the documentation which it now requires, the Agency is estopped from taking corrective action under state and federal law. However, the Court of Appeals held that estoppel does not apply against the State. The State's long-standing and expressly documented approval of BNH's cost allocation system does not amount to an estoppel and a waiver of the State's right to now challenge and disallow those charges. See Memphis Shoppers News, Inc. v. Woods, 584 S.W.2d 196 (Tenn. 1979); Bledsoe County v. McReynolds, 703 S.W. 123 (Tenn.1985); State v. Williams, 207 Tenn. 685, 343 S.W.2d 857 (1961).

Bristol Nursing Home, Inc. v. Department of Health, Bureau of Medicaid, No. 01-A-01-9106-CH-00239, 1991 WL 244469 (Tenn. Ct. App. November 22, 1991).

***2 Tenn. App. 1984 AUDITS BY STATISTICAL SAMPLES**--Audit by statistical sample (statistical averaging) rather than by individual claim-by-claim review is proper in determining Medicaid overpayments to providers. The Respondent offered no proof to counter that of the State's nor to show it to be unreliable. Therefore, the State's proof stands, and the Respondent is ordered to reimburse overpayments.

Department of Public Health v. Malone and Hyde Drug Distributors, IO/9-12-83. 2 APR 493. *aff'd* No. 83-1745-II (Davidson County Ch. Ct. April 24, 1984). 5 APR 178; *aff'd* (Tenn. Ct. App. November 30, 1984). 5 APR 92.

***2 Tenn. App. 1983 RECOVERY OF MEDICAID OVERPAYMENTS; COST BASIS OF PAYMENTS**--The State may recoup overpayments to nursing homes when the original payments were made on the basis of rent portion of the homes' cost rather than on the proper basis of the actual cost to an organization that was found to be related to the provider with the power to control it. Leaseholder of homes had power to revoke leases and repurchase all stock on 30 days notice; therefore, it had power to control, even though there was no actual control. Power to control by related organization is the deciding factor, not actual exercise of control.

Hillcrest Convalescent Home, Inc. and Crestview Convalescent Home, Inc. v. Fowinkle, (Tenn. Ct. App. February 1, 1983). 3 APR 150.

***2 I.O. 1994 RECOVERY OF MEDICAID OVERPAYMENTS**--In a hearing where the Department seeks to recover the amount allegedly overpaid to a Medicaid provider, the error rate in the non-Medicaid charges should be considered when accurately determining the amount of the Medicaid overpayment.

Bureau of Medicaid v. Vanderbilt University Hospital, IO/1-7-94. 19 APR 192.

17.03 **WOMEN, INFANTS AND CHILDREN**

F.O. 1983 SALE OF NON-APPROVED FOOD ITEMS--A Grocer was found to have violated a contractual provision of WIC merchant agreement and WIC rules by selling non-WIC approved food items to WIC recipients; no intent to defraud was found; he was suspended 30 days, to be stayed if other conditions met; he was ordered to repay WIC the program cost of non-compliance purchases and to receive training on WIC program; and he was placed on 1 year probation.
Department of Public Health v. Mrs. Mary Alice Hornbeak, IO/6-27-83. FO/7-18-83. 2 APR 396.

17.04 **HAZARDOUS WASTE REMEDIAL ACTION FUND** (See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.05 **SUBSURFACE SEWAGE DISPOSAL SYSTEM** (See also 4.00, Environment & Conservation)

F.O. 1984 GROUNDS FOR DENIAL OF PERMIT--Department of Health and Environment's denial of subsurface sewage disposal system (septic tank) permit was proper because the owner failed to show by a preponderance of the evidence that the land was suitable for a conventional septic tank under T.C.A. §68-13-403(d), Rule 1200-1-6-.03(5)(a), and Table I of Chapter 1200-1-6 (regarding fill material, types of soils, water tables).

Department of Health and Environment v. Christopher Scott Jones, IO/11-2-84. FO/11-11-84. 4 APR 843.

17.06

WATER AND SEWER

(See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.07 **RADIOLOGICAL HEALTH** (See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.08 **MEDICAL LABORATORIES OR PERSONNEL**

NO CASES REPORTED

17.09 **AIR POLLUTION CONTROL BOARD** (See also 4.00, Dept. of Environment & Conservation)

1. In General
2. Procedure
3. Agency Authority

1. IN GENERAL

***1 OAG 1983 CERTIFICATES OF EXEMPTION**--Once a political subdivision has been granted a certificate of exemption under T.C.A. §68-25-115, new programs or responsibilities relinquished by the Environmental Protection Agency to the State can be passed on to the local program if a new certificate of exemption is applied for and granted.

Att. Gen. Op. to Commissioner James E. Word (December 6, 1983). 5 APR 104.

***1 OAG 1983 LOCAL REGULATIONS**--Under T.C.A. §68-25-115(a) and §68-25-108(a)(4)(F), the regulations of the local program, enacted via ordinance or resolution, must not be less stringent than the Tennessee Air Pollution Control Board's regulations.

Att. Gen. Op. to Commissioner James E. Word (December 6, 1983). 5 APR 104.

***1 OAG 1983 LOCAL REGULATIONS; EFFECTIVENESS**--Under T.C.A. §68-25-115(b), local regulations enacted by ordinance or resolution which adopt the Board's regulations by reference are not effective until approved by the Board as not being less stringent than state regulations. Local regulations enacted by ordinance or resolution explicitly setting forth the standards do not specifically require Board review prior to becoming effective. As a practical matter, however, such review is mandated.

Att. Gen. Op. to Commissioner James E. Word (December 6, 1983). 5 APR 104.

2. PROCEDURE

***2 Tenn. 1974 VENUE; MUNICIPAL CORPORATIONS**--Actions against municipal governments and their officials are local in nature, and venue in such instances must be in the county where municipal corporation or county government has its situs. Venue in local actions is not a matter which can be waived, and the only county in which proper proceedings can be had is the county where the local government is located.

Adams v. State ex. rel. Chattanooga Coke and Chemicals, 514 S.W.2d 424 (Tenn. 1974).

***2 Tenn. 1974 WRIT OF MANDAMUS; DAVIDSON COUNTY CHANCERY COURT**--Issuance of writ of mandamus, upon petition of coke and chemicals company against State and Hamilton County officials, requiring State Air Pollution Control Board to terminate existing exemption granted to Chattanooga-Hamilton County Air Pollution Control Board, was beyond jurisdiction of Chancery Court of Davidson County, notwithstanding venue provisions of Air Control Act, T.C.A. §§53-3417 and §§53-3418, which deal with actions brought by the State Board and review of such actions.

Adams v. State ex. rel. Chattanooga Coke and Chemicals, 514 S.W.2d 424 (Tenn. 1974).

3. AGENCY AUTHORITY

***3 Tenn. App. 1976 AGENCY AUTHORITY; ENFORCEMENT METHODS**--County air pollution control board did not have express or implied authority to require a company, which was found to have violated a county air pollution control regulation, to post a \$10,000 bond or else cease and desist all operations; rather, the only the methods of enforcement allowed by Tennessee Air Quality Act that were applicable to the instant case were a fine, action to abate a nuisance, or action for injunction. Statutory provision permitting "regulations not less stringent than standards adopted by the state" did not so empower board; the "less stringent" requirement clearly pertains to "standards" and not to penalties or enforcement methods.

Gen. Portland v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910 (Tenn. Ct. App. 1976).

***3 Tenn. App. 1976 AGENCY AUTHORITY; INHERENT, COMMON LAW**--Administrative agency such as County Air Pollution Control Board has no inherent or common-law power and, being a creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute, and any action which is not authorized by statute is null and void.

In the absence of statutory authority, administrative agencies may not enforce their own determinations. Administrative determinations are enforceable only by method and in manner conferred by statute and by no other means, and exercise of any authority outside provisions of statute is of no consequence.

Gen. Portland v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910 (Tenn. Ct. App. 1976).

17.10 **ANATOMICAL BOARD OF COMMISSIONERS**

NO CASES REPORTED

17.11 **BOARD OF CHIROPRACTIC EXAMINERS**

NO CASES REPORTED

17.12 **BOARD OF DENTAL EXAMINERS**

P.H.O. 1988 ADMISSIBILITY OF CONVICTION--T.C.A. §63-5-124(a)(16) provides that "conviction of a felony, conviction of any offense under state or federal drug laws, or conviction of any offense involving moral turpitude" is grounds for discipline against the holder of the license to practice dentistry by the Board of Dentistry. The statute expressly allows for discipline for a conviction of federal drug law. However, since the reference is limited to federal drug laws and there is no express reference to federal laws in general, the provision for discipline for a "conviction of a felony" refers only to a conviction of a felony under Tennessee law, not any other jurisdiction. Respondent's move to exclude any evidence of federal felony conviction not under federal drug law is granted since a conviction in federal court does not constitute misconduct under a Board rule when it does not involve federal drug laws. Nevertheless, the State will be permitted to introduce the federal conviction in question as an admission against interest in regard to one of the charges listed in the Notice of Charges, *if* the Dental Board construes T.C.A. §63-5-124(a)(B) to mean that the making of any false or misleading statements or representations, whether or not "in the practice of dentistry" is grounds for discipline.

In re: Taylor W. Hill, PHO/4-28-88. 17 APR 28. 19 APR 185.

P.H.O. 1988 BANKRUPTCY; CIVIL PENALTIES FOR ACTIONS PRIOR TO DISCHARGE--Administrative agencies may issue civil penalties for actions occurring prior to a respondent's discharge in bankruptcy if the State shows misconduct in the nature of inexcusable delays or delays caused by anything other than the respondent's financial inability to pay debts owed.

In re: Taylor W. Hill, PHO/4-28-88. 17 APR 28. 19 APR 185.

17.13 **BOARD OF DISPENSING OPTICIANS**

1. In General
 2. Procedure
 3. Judicial Review
 4. License Suspension
-

1. IN GENERAL

***1 Tenn. 1966 DEFINITION OF PRACTICE OF DISPENSING OPTICIANS**--Under T.C.A. §63-14-102, relating to licensing of opticians and defining the practice of dispensing opticians as the "preparation, adaptation and dispensing" of lenses, etc., the purpose of the legislature was to make a guideline for the Board to follow in granting a license. Under such definition, the legislature intended that if any of such elements, preparation, adaptation, and/or dispensing, was brought about by one not qualified to do these different things, then there was a violation of the act. If a person or corporation would have to engage in all three of such elements before he or it could be charged with violating the Act or was required to have a license under the Act, the Act would be meaningless.

Tennessee Board of Dispensing Opticians v. Eyewear Corporation, 400 S.W.2d 734 (Tenn. 1966).

2. PROCEDURE

***2 Tenn. App. 1988 AGENCY REASONING**--State Board of Dispensing Opticians was not required to explain in writing its decisions as to credibility of witnesses before it.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***2 Tenn. App. 1988 COMPLAINT OF ALLEGED ERROR**--Optician could not complain of alleged error by State Board of Dispensing Opticians that was favorable to him.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

3. JUDICIAL REVIEW

***3 Tenn. App. 1988 HARMLESS ERROR**--State Board of Dispensing Opticians' failure to find facts with respect to certain charges against optician, of which he was found not guilty, was harmless.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***3 Tenn. App. 1988 EXTENT OF JUDICIAL REVIEW**--Although reviewing court was required to look over entire administrative record and to take into account whatever in the record fairly detracted from its weight, court was not required to minutely search voluminous record for evidence to support arguments in briefs.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***3 Tenn. App. 1988 JUDICIAL REVIEW OF RECORD**--On petition for review, the courts are required to review the entire record and to take into account whatever in the record fairly detracts from its weight. *See* Big Fork Mining Company v. Tennessee Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981). However, it is not the burden of the court to minutely search a voluminous record for evidence to support the arguments in briefs. *See* Schoen v. J.C. Bradford Co., 642 S.W.2d 420 (Tenn. Ct. App. 1982).

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

4. SUSPENSION OF LICENSE

***4 Tenn. App. 1988 CLAIM AGAINST AGENCY FOUND IMPROPER**--Optician's claim that decision of State Board of Dispensing Opticians to suspend his license was arbitrary and capricious, absent references to the record to sustain claims, was improper.

Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***4 Tenn. App. 1988 GROUND FOR SUSPENSION OF LICENSE**--Optician's acts of performing an eye examination, treating a patient's eyes with drops, dispensing eye glasses without a prescription and incompetently preparing eyeglasses for a patient were within the scope of provisions of statute and rule forbidding immoral, unprofessional or dishonorable conduct and engaging in the diagnosis of, or prescribing treatment for, human eyes and warranted suspension of optician's license.
Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

***4 Tenn. App. 1988 LICENSE SUSPENSION; TIME PERIOD**--State Board of Dispensing Opticians was authorized to suspend opticians' licenses only for specified periods of time.
Wright v. Board of Dispensing Opticians, 759 S.W.2d 929 (Tenn. Ct. App. 1988).

17.14 **BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS**

1. In General
2. Inspections

1. IN GENERAL

***1 Tenn. 1993 SUSPENSION OF ADMISSIONS TO NURSING HOMES**--Commissioner of Health's suspension of admissions to nursing home participating in Medicaid program was justified where detrimental conditions and inadequate patient care had been discovered through prior inspections and through complaints received, and facility had refused to allow inspection; witnesses testified to residents' poor personal hygiene, inadequate infection control, substandard treatment of sores, residents left nude in extremely hot rooms, residents whose bodies were smeared with dried fecal material, and inadequate medical assistance.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***1 Tenn. App. 1994 CIVIL PENALTY FOR WILLFUL NEGLECT; NURSING HOME**-- Administrative decision imposing civil penalty on nursing home was reversed by the Chancery Court of Davidson County, and the Department of Health appealed. The Court of Appeals held that: (1) "willfully" within statute providing penalty for willful abuse or neglect of patient modifies term "neglected" as well as "abused," and (2) substantial and material evidence would not support finding of willful neglect in the present case.

Claiborne and Hughes Convalescent Center, Inc. v. Department of Health, 881 S.W.2d 671 (Tenn. Ct. App. 1994).

***1 Tenn. App. 1994 WILLFUL NEGLECT, DEFINITION OF**--Within statute providing that nursing home residents "must not be willfully abused or neglected" and providing for Type B civil monetary penalty for violation, word "willfully" modifies "neglected" as well as "abused," but with meaning appropriate to each word; "abuse" implies overt act or deed, which is presumed to be intentional unless shown to be inadvertent or accidental, and result of deed is presumed to be intentional unless shown otherwise, while "neglect" is failure to perform a deed, and neither the omission or its result is presumed to be intentional unless intent is shown or the circumstances are such as to imply intent.

Claiborne and Hughes Convalescent Center, Inc. v. Department of Health, 881 S.W.2d 671 (Tenn. Ct. App. 1994).

***1 Tenn. App. 1994 WILLFUL NEGLECT NOT SUPPORTED BY EVIDENCE**----Administrative decision to impose penalty on nursing home for willful neglect of patient was not supported by substantial and material evidence despite presence of maggots and necrotic tissue and alleged laxity in record keeping, where physicians indicated that presence of rotting flesh and maggots was not preventable under the circumstances and no circumstance was shown to evidence negligence in record keeping which directly impacted the care of the subject patient or which was of such obvious seriousness that all nursing homes and the public could have notice such negligence would invoke a Class B penalty.

Claiborne and Hughes Convalescent Center, Inc. v. Department of Health, 881 S.W.2d 671 (Tenn. Ct. App. 1994).

2. INSPECTIONS

***2 Tenn. 1993 UNANNOUNCED INSPECTIONS OF NURSING HOMES**--Operator of nursing home participating in Medicaid program sought review of decision of Board for Licensing Health Care Facilities, challenging suspension of admissions to home. The Supreme Court held that: (1) Department had authority to conduct unannounced inspections of home, and (2) Commissioner of Health's suspension of admissions to home was justified.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***2 Tenn. 1993 INSPECTIONS OF NURSING HOMES IN MEDICAID PROGRAM; AGENCY AUTHORITY**--Under both state and federal law, Department of Health and Environment has authority to conduct as many inspections of nursing homes participating in Medicaid program as it deems necessary to safeguard public's interest in ensuring proper care and treatment of elderly persons therein and to ascertain facility's compliance with state and federal law.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***2 Tenn. 1993 UNANNOUNCED INSPECTIONS; PRIOR DISCOVERY OF DEFICIENCIES**--Department of Health and Environment had authority to conduct unannounced inspections of nursing home participating in Medicaid program,

particularly as prior state and federal inspections had uncovered significant deficiencies related to patient care, and Department had received new complaints after federal inspection.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***2 Tenn. 1993 UNANNOUNCED INSPECTIONS; LIMITATIONS**--State's authority to inspect nursing homes participating in Medicaid program is not limited to those instances where there has been specific complaint, nor is state required to reveal in advance of inspection what inspectors are looking for.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***2 Tenn. 1993 WARRANTLESS INSPECTIONS OF NURSING HOMES; FOURTH AMENDMENT**--Warrantless inspections by Department of Health and Environment of nursing home participating in Medicaid program did not violate search and seizure provisions of Fourth Amendment; by contracting to receive Medicaid funds, nursing home voluntarily consented to reasonable, warrantless inspections, and record contained no evidence that inspections were conducted in unreasonable manner.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

***2 Tenn. 1993 WARRANTLESS INSPECTIONS; CONSENT**--By contracting to receive Medicaid funds, Clay County Manor voluntarily consented to reasonable, warrantless inspections.

Clay County Manor, Inc. v. Department of Health and Environment, 849 S.W.2d 755 (Tenn. 1993).

17.15 **BOARD OF EXAMINERS IN PSYCHOLOGY**

NO CASES REPORTED

17.16 **BOARD OF EXAMINERS OF SPEECH PATHOLOGY & AUDIOLOGY**

NO CASES REPORTED

17.17 **BOARD FOR LICENSING HEALTH CARE FACILITIES**

1. In General
 2. Procedure
 3. Evidence
 4. Judicial Review
-

1. IN GENERAL

***1 Tenn. App. 1994 BARRIERS FOR ADMISSION; AIDS**--Board filed its final order and found, inter alia, that petitioner, Imperial Manor, had unlawfully created barriers for admission of an AIDS patient that were peculiar for that patient and not others, in violation of rules 1200-8-6-.02(21) and 1200-8-6-.01(4) and in violation of Imperial Manor's own internal policy.

Imperial Manor, Inc. v. White, Commissioner Tennessee Department of Health and Board for Licensing Health Care Facilities, No. 01-A-01-9408-CH00376, 1994 WL 719804 (Tenn. Ct. App. December 30, 1994).

***1 Tenn. App. 1994 CHIROPRACTORS; GRANTING OF PRIVILEGES**--Decision of Board for Licensing Health Care Facilities prohibiting hospitals from granting staff privileges to licensed chiropractors was supported by evidence that hospitalized patients often cannot tolerate chiropractic manipulation, that high percentage of petitioning chiropractor's admissions to hospital were deemed inappropriate, that chiropractors receive little training and experience in hospital protocol and practice resulting in inability to communicate with hospital staff, that differences in medical and chiropractic terminology lead to confusion, and by evidence of experiences in other states, notwithstanding evidence that hospitalized patients would benefit from availability of both medical and chiropractic treatment.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***1 Tenn. App. 1994 CHIROPRACTORS; GRANTING OF PRIVILEGES**--Decision of Board for Licensing Health Care Facilities prohibiting hospitals from granting medical staff privileges to chiropractors did not deny chiropractor any federally protected right to practice chiropractic medicine where no showing was made that chiropractic cannot be practiced without access to medically oriented hospital.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***1 OAG 1987 TRANSFER OF PATIENTS**--The Board for Health Care Facilities has the authority to adopt rules and regulations governing transfer of patients between hospitals as it affects the public interest and the maintenance of proper standards for the efficient care of patients.

1987 Op. Tenn. Att'y Gen. No. 87-09 (January 20, 1987). 7 APR 349.

***1 OAG 1983 PHYSICIAN STAFF PRIVILEGES, REQUIREMENT**--Rules 1200-8-10-.10(12) and 1200-8-10-.11(11), requiring all physicians of an ambulatory surgical treatment center to have staff privileges at a local hospital, violate Art. I, §8 of Tennessee Constitution and 5th and 14th Amendments to U.S. Constitution.

1983 Op. Tenn. Att'y Gen. No. 83-197 (May 16, 1983). 5 APR 3.

2. PROCEDURE

***2 Tenn. App. 1994 BOARD'S FINDINGS OF FACT**--Findings of fact contained in declaratory order of Board for Licensing Health Care Facilities did not contradict Board's decision prohibiting hospitals from granting staff privileges to chiropractors where the findings constituted recitations of evidence, statements of what the Board could do, or other factual conclusions not inconsistent with Board's decision.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***2 Tenn. App. 1994 BIAS; BOARD MEMBERS**--Participation by one or more members of Board for Licensing Health Care Facilities in task force study of problems of chiropractors in hospitals did not indicate bias so as to require recusal of any member or invalidate Board's decision prohibiting hospitals from granting staff privileges to chiropractors.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***2 Tenn. App. 1994 VOIR DIRE OF BOARD MEMBERS--**Members of Board for Licensing Health Care Facilities are not subject to voir dire by party to agency hearing.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***2 Tenn. App. 1994 DISCRETION OF ALJ--**In the present case, the petitioner challenged the decision of the Administrative Law Judge to quash a *subpoena duces tecum* to the Tennessee Medical Association to produce all documents made, sent or received from January 1, 1980, to January 1, 1990. The Administrative Law Judge determined that the subpoena would impose an undue burden and substantial expense, that most of the materials were readily available elsewhere, and that the materials were not sufficiently relevant to the proceedings to justify the burden and expense. The Court of Appeals held that such a determination rested within the sound discretion of the Administrative Law Judge and insufficient grounds are shown for disturbing this discretionary decision.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

3. EVIDENCE

***3 Tenn. App. 1994 WITNESS BIAS; NO INVALIDATION OF BOARD'S DECISION--**Any bias of witnesses at hearing before Board for Licensing Health Care Facilities would not invalidate Board's decision.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***3 Tenn. App. 1994 SUBPOENA DUCES TECUM; MOTION TO QUASH--**It was within administrative law judge's sound discretion to quash subpoena duces tecum which sought production of documents issued over ten-year period on grounds that subpoena would impose undue burden and expense, materials sought were not sufficiently relevant to justify burden and expense, and materials sought were readily available elsewhere.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

4. JUDICIAL REVIEW

***4 Tenn. App. 1994 REVIEW IN CHANCERY COURT; AGENCY'S DECISION--**The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

1. In violation of constitutional or statutory provisions;
2. In excess of the statutory authority of the agency;
3. Made upon unlawful procedure;
4. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
5. Unsupported by evidence which is both substantial and material in the light of the entire record.

Imperial Manor, Inc. v. White, Commissioner Tennessee Department of Health and Board for Licensing Health Care Facilities, No. 01-A-01-9408-CH00376, 1994 WL 719804 (Tenn. Ct. App. December 30, 1994).

***4 Tenn. App. 1994 REVIEW IN CHANCERY COURT; SUBSTANTIALITY OF EVIDENCE--**In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
Imperial Manor, Inc. v. White, Commissioner Tennessee Department of Health and Board for Licensing Health Care Facilities, No. 01-A-01-9408-CH00376, 1994 WL 719804 (Tenn. Ct. App. December 30, 1994).

***4 Tenn. App. 1994 CHANCERY COURT REVIEW OF AGENCY ACTION--**Chancery Court does not engage in broad, de novo review of agency action but, rather, is restricted to the records.
Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***4 Tenn. App. 1994 SUBSTANTIAL AND MATERIAL EVIDENCE, DEFINITION OF**--"Substantial and material evidence" is such relevant evidence as a reasonable mind might accept to support a rational conclusion, and such as to furnish sound basis for the action under consideration.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***4 Tenn. App. 1994 REVIEW OF AGENCY DECISION**--Reviewing courts did not have power to substitute their opinions for decision of Board for Licensing Health Care Facilities where Board's decision was based upon substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***4 Tenn. App. 1994 INVALIDATION OF AGENCY DECISION; REQUIRED SHOWING**--In order to invalidate administrative agency decision, showing must be made that decision is arbitrary and capricious, characterized by abuse of authority, clearly an unwarranted exercise of authority, or unsupported by substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities, 886 S.W.2d 246 (Tenn. Ct. App. 1994).

***4 Tenn. App. 1994 STANDARD OF REVIEW; SUBSTANTIAL AND MATERIAL EVIDENCE**--A court must review factual issues upon a standard of substantial and material evidence. This is not a broad, de novo review; it is restricted to the record; and the agency finding may not be reversed or modified, unless arbitrary or capricious, or characterized by abuse, or clearly unwarranted exercise of discretion, and must stand if supported by substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***4 Tenn. App. 1994 NO POWER TO REVERSE AGENCY DECISION BASED UPON SUBSTANTIAL AND MATERIAL EVIDENCE**--In the present case, Chancery Court found that the administrative decision was not supported by substantial and material evidence. On appeal, the Board insisted that this finding was erroneous. The Board, as appellant, had the burden of showing error. The Court of Appeals determined that the best way for the appellant to show error would be to point out the substantial and material evidence which supported the decision of the Board. The Court of Appeals held that neither Chancery Court nor the Court of Appeals has the power to substitute its opinion for a decision of the Board which is based upon substantial and material evidence.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

***4 Tenn. App. 1994 INVALIDATION OF AGENCY DECISION; REQUIREMENTS**--In order to invalidate the decision of an administrative agency, there must be a showing that the decision is arbitrary and capricious, characterized by abuse of authority, clearly and unwarranted exercise of authority, or unsupported by substantial and material evidence. Moreover, in the present case, there is insufficient evidence of bias to require recusal of any member of the Board.

Ogrodowczyk v. Tennessee Board for Licensing Health Care Facilities and State of Tennessee Department of Health and Environment, No. 01A01-9401-CH-00001, 1994 WL 279759 (Tenn. Ct. App. June 24, 1994).

17.18 **BOARD OF MEDICAL EXAMINERS**

1. In General
 2. Procedure
 3. Statutory Interpretation
 4. Judicial Review
-

1. IN GENERAL

***1 Tenn. App. 1995 DISCIPLINARY ACTIONS; UNAUTHORIZED ACTS OF STAFF**--The Board of Medical Examiners fined a Sumner County surgeon \$1000 for two purchases of phendimetrazine without prior approval of the Board. The surgeon argued that the purchases were not his acts because they were made without his knowledge or consent. The Court of Appeals held that the surgeon was not liable to discipline by the Board for the unauthorized acts of his staff under the circumstances of this case. The Court of Appeals noted that the surgeon was charged with the violation of a specific rule; he was not charged with the failure to supervise his employees or with negligently running his office--offenses that might violate other sections of the code or the regulations. In the court's opinion, where the regulations provide a penalty for specific acts, the acts must be committed under circumstances that make them the acts of the one punished. The Court of Appeals determined that this is not such a case. The Court of Appeals reversed the agency decision because there was no material evidence that the acts of ordering or possessing the drug were the acts of the surgeon. Stewart v. Department of Health, Board of Medical Examiners, No. 01-A-01-9408-CH00377, 1995 WL 40307 (Tenn. Ct. App. February 1, 1995).

***1 Tenn. App. 1995 LICENSE BY RECIPROCITY**--The Board has the power to grant a license by reciprocity from states requiring the same or higher standards of medical examination, or by national board endorsement, in lieu of an examination. T.C.A. §63-6-211. The Board has discretion to determine whether an applicant has met the standards for admission by reciprocity. T.C.A. §63-6-211. The statute does not require the Board to accept the certificate in lieu of an examination; the Board is authorized but not required to do so. This is not to say that the Board is authorized to act unlawfully, arbitrarily, or capriciously, by clearly unwarranted exercise of discretion. In the present case, the Court of Appeals held that the Board verbalized adequate findings of fact to support its decision to deny the application for a license. McFadden v. Department of Health and Environment, Board of Medical Examiners, No. 01-A-01-9405-CH00230, 1995 WL 33764 (Tenn. Ct. App. January 27, 1995).

***1 Tenn. App. 1994 SUSPENSION OF LICENSE, CHALLENGE OF**--Physician challenged Board of Medical Examiners' suspension of his license. Court of Appeals held that: (1) there was substantial evidence supporting Board's conclusion that physician had prescribed excessive amounts of stimulants to obese patients, without valid medical reason, and (2) statute physician was found to have violated was not unconstitutionally vague. Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***1 OAG 1986 PHYSICIAN'S ASSISTANTS, REGULATION OF**--Regulation of physician's assistants is the responsibility of the Board of Medical Examiners. 1986 Op. Tenn. Att'y Gen. No. 86-75 (April 28, 1986). 7 APR 58.

2. PROCEDURE

***2 Tenn. Crim. App. 1979 INJUNCTION OF BOARD HEARING; CRIMINAL COURT**--Although the criminal trial court had jurisdiction to enjoin a Board of Medical Examiners hearing on charges of unlawfully prescribing and dispensing controlled substances when the respondent was indicted on the same or similar charges, it is the obligation of the respondent to offer sufficient proof to show injunctive relief was warranted. The Court held that possible prejudicial pretrial publicity did not warrant enjoining the Board hearing in abeyance until criminal charges heard, as the trial court has means to protect the rights of the Respondent. In consideration of the strong public interest in the quick resolution of allegations against errant physicians, there is no reason to hold that the Board was or could be constitutionally required to hold its proceedings in abeyance until the criminal prosecution could be terminated. State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 1 APR 44.

***2 Tenn. Crim. App. 1979 SELF-INCRIMINATION; STAY OF HEARING**--Neither one's 5th Amendment right against self-incrimination nor one's due process rights would be violated by allowing disciplinary proceeding before Board of Medical Examiners to proceed in advance of criminal trial for the same conduct.
State of Tennessee v. Drew P. McFarland, III, No. 3745 & 3745A (Tenn. Crim. App. August 8, 1979). 4 APR 611.

3. STATUTORY INTERPRETATION

***3 Tenn. App. 1994 STATUTE; NOT VOID FOR VAGUENESS**--Statute prohibiting dispensing, prescribing or distribution of controlled substances for other than legitimate medical purposes, or not in good faith to relieve pain and suffering or cure ailment, physical infirmity or disease, was sufficiently clear to inform physician, claiming statute was void for vagueness, that he was prohibited from giving stimulants to obese patients for long periods of time, to help them feel better rather than to achieve weight loss.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***3 Tenn. App. 1994 VIOLATION OF STATUTORY STANDARD ESTABLISHED WITHOUT PRESENTATION OF EXPERT TESTIMONY**--State Board of Medical Examiners could conclude that physician had violated statute governing practice of medicine, even though state had not produced expert testimony to establish standard physician had violated; one provision of statute alleged to have been violated involved overprescription of controlled drugs, for improper purposes, which Board could decide without expert assistance.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

***3 Tenn. App. 1994 STATUTORY VAGUENESS; CONSTITUTIONAL TEST**--Statute is too vague to pass constitutional test when men of common intelligence must necessarily guess at its meaning and differ as to its application.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

4. JUDICIAL REVIEW

***4 Tenn. App. 1995 EXHAUSTION OF JUDICIAL REVIEW**--Citing Tennessee case law, the Court of Appeals determined that the judicial function of review of an administrative decision is exhausted when a rational basis for a decision is found.

McFadden v. Department of Health and Environment, Board of Medical Examiners, No. 01-A-01-9405-CH00230, 1995 WL 33764 (Tenn. Ct. App. January 27, 1995).

***4 Tenn. App. 1994 REVERSAL OR MODIFICATIONS OF AGENCY DECISIONS**--Under the Administrative Procedures Act the court may reverse or modify the decisions of the administrative agency if the agency's decision was: (1) in violation of constitutional or statutory provisions; (2) in excess of the statutory authority of the agency; (3) made upon unlawful procedures; (4) arbitrary or capricious as characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5) unsupported by evidence which is both substantial and material in the light of the entire record.

Williams v. Department of Health and Environment and the Board of Medical Examiners, 880 S.W.2d 955 (Tenn. Ct. App. 1994). 16 APR 103.

17.19 **BOARD OF NURSING**

NO CASES REPORTED

17.20 **BOARD OF OPTOMETRY**

NO CASES REPORTED

17.21 **BOARD OF OSTEOPATHIC EXAMINATION**

NO CASES REPORTED

17.22 **BOARD OF PHYSICAL THERAPY EXAMINERS**

NO CASES REPORTED

17.23 **BOARD OF REGISTRATION IN PODIATRY**

NO CASES REPORTED

17.24 **BOARD OF TRUSTEES FOR TUBERCULOSIS CONTROL/CDC**

NO CASES REPORTED

17.25 **BOARD OF VETERINARY MEDICAL EXAMINERS**

NO CASES REPORTED

17.26 **LICENSING BOARD FOR THE HEALING ARTS**

I.O. 1984 NOTICE, OPPORTUNITY TO SHOW COMPLIANCE--T.C.A. §4-5-320(c) does not require opportunity to show compliance with lawful requirements prior to filing of charges, but rather requires opportunity to show compliance at a hearing under Uniform Administrative Procedures Act prior to any agency action which might adversely affect licensee (except in summary suspensions); therefore, motion to dismiss for failure to comply with §4-5-320(c) denied.

Department of Health and Environment v. Henry N. Peters, O.D., IO/4-12-84. 3 APR 307.

P.H.O. 1983 DISCOVERY; OTHER PATIENTS--State denied right to discover information about "other patients" of Respondent who were not part of the charges in the case, because questions on such other patients lacked subject matter relevancy in that they were not reasonably likely to produce or lead to production of evidence relevant to allegations in charges. However, the State may continue investigation and later amend charges if other violations are found.

Department of Health and Environment v. Henry N. Peters, O.D., PHO/11-9-83. 2 APR 584.

17.27 **SOLID WASTE DISPOSAL CONTROL BOARD** (See also 4.00, Environment & Conservation)

1. In General
2. Procedure
3. Rules and Rulemaking

1. IN GENERAL

***1 Tenn. App. 1992 STANDING; RELEVANT INQUIRY**--When plaintiff's standing is brought into issue, relevant inquiry is whether plaintiff has shown injury to himself that is likely to be redressed by favorable decision.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***1 Tenn. App. 1992 STANDING; CHALLENGE TO AGENCY ACTIONS**--Person challenging actions of administrative agency must satisfy requirements of standing to sue.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***1 Ch. Ct. 1984 ON v. OFF-SITE FACILITIES FEE RATES**--There was substantial and material evidence to uphold the Board's conclusion that Petitioner failed to carry burden of proving that Rule 1200-1-11-.08 is invalid. The rule sets different fee rates for on and off-site hazardous waste facilities, but since off-site facilities handle greater volume and variety of waste (from other sources), they present a greater risk of public harm, therefore requiring greater expenditures by state to regulate them and validating higher fee schedule.

Resource Recycling Technologies, Inc. v. Fowinkle, No 83-1523-II (Davidson County Ch. Ct. October 23, 1984). 4 APR 817.

***1 F.O. 1986 FEE ASSESSMENT**--Fee schedule established in Rule 1200-1-11-.08 was found not to be a retroactive application of the law, in that fees are assessed for current activities. There is nothing improper in using activities of a prior year in assessing fee for current year.

Earth Industrial Waste Management v. Department of Health and Environment, FO/3-2-84. 3 APR 252.

***1 F.O. 1984 ON v. OFF-SITE FACILITIES**--Board found valid reasons for distinguishing between on-and off-site facilities, based on the magnitude and variety of activities conducted, and this distinction is in accordance with Hazardous Waste Management Act at T.C.A. §68-46-104, §68-46-110.

Department of Health and Environment v. Earth Industrial Waste Management, FO/3-2-84. Appealed to Davidson County Chancery Court, pending as of March, 1985. 3 APR 252.

***1 I.O. 1984 DAMAGE ASSESSMENT**--County was ordered to pay damages for Department's investigation expenses, and civil penalties per days of violation of rules relating to proper operation of landfill (Rules 1200-1-7-.06(3)(a) 6, 7 and 18), T.C.A. §68-31-104, §68-31-117.

Solid Waste Disposal Control Board v. Anderson County Landfill, IO/2-8-84. Appealed to Davidson County Chancery Court, pending as of March, 1985. 3 APR 160.

2. PROCEDURE

***2 Tenn. App. 1983 LETTERS CONSTITUTED PETITION FOR HEARING**--Letters from County to Board, asking that the deadline for closing landfill be extended amounted to a petition for a contested case hearing. However, failure to hold a hearing on the petition was not fatal to the Board's later assessment of penalty and damages, because a later hearing was held, in which the issues raised in the request for an extension were considered. However, the case was remanded to the Board to enter further findings to support action taken, as there were no findings of fact made by the Board regarding: allowable extension, factors listed in T.C.A. §68-31-117(c) on penalty, what regulations the county violated, or what conduct was deemed a violation. See Solid Waste Disposal Control Board v. Anderson County Landfill, FO/2-8-84. Appealed to and pending in Davidson County Ch. Ct. (March, 1985). 3 APR 160.

Anderson County v. Tennessee Solid Waste Disposal Board, No. 82-423-II (Tenn. Ct. App. May 25, 1983). 3 APR 141.

***2 OAG 1985 DELIBERATIONS; PARTICIPATION OF NON-BOARD MEMBER**--The technical secretary of the Tennessee Solid Waste Disposal Control Board should not participate in Board deliberations because of evidentiary, due process, and conflict of interest considerations. The appropriate manner of being apprised of the opinion, expertise, or information, which might be provided by such an individual is to hear from him as a sworn witness in the administrative proceedings.

Att. Gen. Op. to J. David Thomas (January 15, 1985). 5 APR 114.

***2 I.O. 1984 ORDERS, FINDINGS OF FACT**--Case was remanded to Board by Court of Appeals for further findings of fact to support action taken. Resulting Supplemental Decision and Order includes specific findings to support conclusion of law that County violated particular rules and law on solid waste disposal, and regarding penalties assessed. See Anderson County v. Tennessee Solid Waste Disposal Board, No. 82-423-II (Tenn. Ct. App. May 25, 1983). 3 APR 141.

Solid Waste Disposal Control Board v. Anderson County Landfill, IO/2-8-84. 3 APR 160.

***2 I.O. 1983 MOTION TO DISMISS, LACK OF KNOWLEDGE** Assertion of lack of knowledge or intent to violate laws is a defense pertaining to merits of case and a question that can only be decided after hearing on the matter, therefore is not a ground for dismissal of case.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***2 I.O. 1983 TIME DEADLINE TO HOLD HEARING**--Statutory provisions relating to mode or time of acting are not mandatory, but directory only; therefore, failure to hold hearing within 60 days specified at T.C.A. §68-31-113(e) does not mandate dismissal of case, where no prejudice shown. However, failure of the Respondent to assert right to hearing within the time limit constituted affirmative waiver of deadlines imposed by statute.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

***2 I.O. 1983 EVIDENCE ILLEGALLY OBTAINED**--Assertion that Respondent's property was subjected to unreasonable search and seizure was not a proper basis for dismissal where evidence that was not received illegally might be introduced at hearing.

Solid Waste Disposal Control Board v. James Hedrick, et al., IO/11-26-83. 2 APR 598.

3. RULES AND RULEMAKING

***3 Tenn. App. 1992 RULE-MAKING REQUIREMENTS; SUBSTANTIAL COMPLIANCE**--Organization challenged order of Solid Waste Disposal Board adopting rule regulating commercial hazardous waste management facilities. The Court of Appeals held that Board substantially complied with rule-making requirements, and its order was to be affirmed, despite its failure to republish rule as altered following original publication and public hearings.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING**--It would be unreasonable and inefficient to require agency to publish exact text of proposed rule in order to obtain public reaction thereto and then require republication and rehearing for every alteration made in proposed rule before final adoption.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 STANDING TO COMPLAIN ABOUT RULE-MAKING**--Organization that was informed of proposed rule making by Solid Waste Disposal Board and that participated fully in proceedings before Board did not have standing to complain that it was aggrieved that others did not have equal opportunity to participate, by virtue of lack of a second publication before adoption of final draft of rule.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING; NOTICE REQUIREMENTS**--Solid Waste Disposal Board substantially complied with rule-making notice requirements before adopting rule regulating commercial hazardous waste management facilities, and its action had to be affirmed, though Board declined to repeat publication of rule for alterations made following initial publication and public hearings.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 RULE-MAKING; NOTICE**--Administrative rule making does not require that specific terms of rule be determined in advance and be finally adopted without modifications; it is sufficient if statutory publication is adequate to inform public of subject matter of rule to be considered and that public have adequate opportunity to present and support its view as to what rule should be made regarding that subject matter.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 Tenn. App. 1992 PUBLICATION OF RULE**--Interested parties are not entitled to new publication of rule, as modified after original notice and hearing, in order to validate consideration of additional factual information nor to an opportunity of rebuttal so long as finished product is within bounds of original publication.

Tennessee Environmental Council v. Solid Waste Disposal Control Board, Division of Solid Waste Management, Tennessee Department of Health and Environment, 852 S.W.2d 893 (Tenn. Ct. App. 1992).

***3 F.O. 1984 RULE OVERBREADTH**--Rules implementing Hazardous Waste Management Act found not to be overly board.

Department of Health and Environment v. Earth Industrial Waste Management, FO/3-2-84. Appealed to Davidson County Chancery Court, pending as of March, 1985. 3 APR 252.

17.28

BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL ENVIRONMENTALISTS (See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.29 **BOARD OF WATER AND WASTEWATER OPERATIONS** (See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.30 **WATER QUALITY CONTROL BOARD** (See also 4.00, Environment & Conservation)

1. In General
2. Procedure
3. Evidence
4. Judicial Review
5. Penalties
6. Defenses
7. Agency Authority
8. Constitutional Law

1. IN GENERAL

***1 Tenn. 1977 FISH COUNTING PROCEDURES RESOLUTION IS NOT A PROPER RULE**--Water Quality Control Board's resolution endorsing American Fisheries Society procedures for counting fish, which instructed its field personnel to employ certain procedure in estimating number of fish killed in a stream and their value and which determined that the estimates thus obtained would be admissible, was not a "rule or regulation" within meaning of statute that provides that "Before any rule or regulation of any state board shall become effective such rule or regulation shall be approved as to legality by the Attorney General, printed by said agency and filed with the Secretary of State."
Chastain v. Water Quality Control Board, 55 S.W.2d 113 (Tenn. 1977).

***1 Tenn. App. 1983 CLASSIFICATION OF WATERS; CRITERIA FOR USES**--When Tennessee Water Quality Control Board has classified state waters according to their potential uses and has adopted criteria which, presumably, make the waters safe for such uses, use of the water is "impaired" to extent that those criteria are violated. Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***1 Tenn. App. 1983 CRITERIA FOR USES; VIOLATION**--Tennessee Water Quality Control Board's decision that proposed dam would not result in any violation of its criteria for any of assigned uses above or below dam, interpreting its regulations to allow such deviations from its criteria as "will not be of such magnitude and duration as to significantly impair uses so as to violate standards," was not plainly erroneous. Nor was the interpretation inconsistent with Board Rules, notwithstanding that pH and temperatures which would result in affected waters were a significant departure from allowable criteria.
Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983)

***1 Tenn. App. 1983 LEVELS OF WATER**--Even though minimum level of waters as a result of the construction of proposed dam may be higher, if level does not "appreciably" impair usefulness of water, no violation of hardness or mineral compound criteria set forth in regulations exists.
Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***1 OAG 1983 HERBICIDE USE**--The prohibited use of herbicides by the Obion-Forked Deer Basin Authority for stream bank maintenance purposes could violate the Water Quality Control Act of 1977, T.C.A. §69-3-101 et seq., depending upon an analysis of the proposed work and its potential impact on the waters of Tennessee.
Att. Gen. Op. to Rep. Don Dills (December 14, 1983). 6 APR 15.

***1 F.O. 1984 VIOLATIONS, GENERALLY**--Company violated Water Pollution Control law by: 1) altering physical, chemical, radiological, biological or bacteriological properties of creek; 2) increasing waste in excess of that allowed by permit; 3) discharge of waste into water or location from which movement into waters likely, (§69-3-108); 4) causing harm and potential harm to fish and aquatic life; 5) impairing uses established for creek (§69-3-114(a)); 6) failing to maintain wastewater treatment system in violation of permit (§69-3-115(B)); and 7) exceeding effluent limits under permit (§69-3-115(A)). Company also made business decision to violate permit and law and realized economic benefit. Company was found liable for civil penalty of \$30,000.00, damages of \$270.82 for state's investigation, and ordered to cease discharging until treatment system fully operational and permit limits can be met.
John J. Craig Company, FO/5-1-84. 3 APR 370.

2. PROCEDURE

***2 Tenn. App. 1981 HEARINGS, DE NOVO**--Hearing provided for by statute governing the review of denial of water discharge permits is in effect a de novo hearing. T.C.A. §70-328(b). In a de novo hearing, the administrative board to which the appeal is addressed does not review the action of the lower tribunal, is not concerned with what took place below, and no presumption of correctness attaches to the action of the lower tribunal.

Big Fork Mining Company v. Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***2 OAG 1984 TIME DEADLINE FOR COMMENCEMENT OF HEARING**--Commencement of review of denial of water discharge permit before State Water Quality Control Board within 60 days from receipt of written petition was sufficient absent showing of prejudice not apparent in record; there was no requirement that such hearing be completed with 60 days.

Att. Gen. Op. to James Word (June 27, 1984). 4 APR 574.

***2 I.O. 1984 PARTIES, NECESSARY**--Person named in a citizens' complaint is a necessary party to the hearing and must be properly notified.

Department of Health and Environment v. The United States Department of Energy, IO/4-6-84. 3 APR 314.

***2 I.O. 1983 TIME DEADLINE FOR COMMENCEMENT OF HEARING**--Commencement of review of denial of water discharge permit before State Water Quality Control Board within 60 days from receipt of written petition was sufficient absent showing of prejudice not apparent in record; there was no requirement that such hearing be completed with 60 days.

Solid Waste Disposal Control v. James Hedrick et al., IO/11-26-83. 3 APR 598.

***2 I.O. 1976 ORDERS AND DAMAGE ASSESSMENTS ARE SEPARATE ACTIONS**--Commissioner's orders under T.C.A. §70-331(a) (now §69-3-109) and damage assessments under §70-338 (now §69-3-116) are independent and separate actions and order need not precede assessment for damages.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

3. EVIDENCE

***3 Tenn. 1977 FISH-COUNTING PROCEDURE RESULTS**--Even if the Board's resolution, which instructed field personnel to employ American Fishery Society procedures in estimating fish killed in a stream and their value and which determined that estimates thus obtained would be admissible, was an invalid rule because it was not approved by the Attorney General and filed with the Secretary of State, the fact that certain evidence had been assembled pursuant to that procedure would not have affected value, competence or admissibility of such evidence at hearing before the Board on appeal from assessment of damages for an alleged fish kill.

Chastain v. Water Quality Control Board, 555 S.W.2d 113 (Tenn. 1977).

***3 Tenn. App. 1981 SURVEYS**--Permit hearing panel of the Board, on review of denial of water discharge permit by the division of water control, properly considered results of a survey of creek waters made after the division had denied the permit, where the survey had been planned for some time by the Board and was not conducted specifically for action by the Board on the denial at issue.

Big Fork Mining Company v. Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***3 Tenn. App. 1981 BURDEN OF PROOF; WATER DISCHARGE PERMITS**--In a hearing before the Board regarding an application for a water discharge permit, the burden of proof was properly placed on the strip mining company applicant.

Big Fork Mining Company v. Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***3 Ch. Ct. 1984 EXPERT EVIDENCE; STANDING ALONE**--Despite the failure of the State's expert witness to quantify damages to fish, aquatic life, recreation and wildlife at Reelfoot Lake, the testimony of an expert who had studied Reelfoot Lake for 12 years as a biologist and limnologist, standing alone, is substantial and material evidence to support the panel's decision to deny the permit. The panel is entitled to give more credence to him than to petitioner's witness.

Gerald B. Hollis v. Water Quality Control Board, No. 83-1352-I (Davidson County Ch. Ct., February 28, 1984). 3 APR 240.

4. JUDICIAL REVIEW

***4 Tenn. App. 1983 DEFERENCE TO AGENCY INTERPRETATION OF ITS OWN RULES**--Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. Limitation of courts' deference to agency's interpretation of its own rules is reached where interpretation is plainly erroneous or inconsistent with regulation itself.

Environmental Defense Fund v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***4 Tenn. App. 1981 SUBSTITUTION OF JUDGMENT**--Where Court of Appeals was satisfied that Water Quality Control Board fairly considered conflicting interests involved regarding strip mining company's application for water discharge permit and reached proper result based upon law and evidence before it, Court of Appeals declined to substitute its judgment for that of Board.

Big Fork Mining Company v. Water Quality Control Board, 620 S.W.2d 515 (Tenn. Ct. App. 1981).

***4 Ch. Ct. 1984 NO REVIEW OF EVIDENCE NOT IN RECORD**--Chancery Court, reviewing case appealed from Water Quality Control Board, would not consider evidence not in the administrative record pursuant to T.C.A. §4-5-322(g).

Gerald B. Hollis v. Tennessee Water Quality Control Board, No 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***4 Ch. Ct. 1983 STAY TO PERMIT INTERLOCUTORY REVIEW**--Administrative Law Judge may grant stay pending outcome of petition for interlocutory review filed in Chancery Court; stay lifted when Chancery Court dismissed petition (on grounds that adequate remedy afforded by review of final agency decision).

Water Quality Control Board v. M.C. Coal Company, Inc., No. 82-153-II (Davidson County Ch. Ct. May 28, 1983). IO/4-29-83. IO/5-17-83. 3 APR 438.

***4 P.H.O. 1979 STANDING, DEFINITION OF "PERSON AGGRIEVED"**--Test of whether "person aggrieved" under T.C.A. §4-5-23 (T.C.A. §4-5-322) has standing to seek judicial review is "whether [there is] injury in fact and there is no legislative intent to withhold right to judicial review." No real injury in fact shown, and reading of statute indicates legislative intent was to withhold right of judicial review from Regional Development Agency; therefore agency petition to intervene denied.

Environmental Defense Fund, et al. v. Department of Public Health, PHO/2-27-79. 1 APR 32.

***4 P.H.O. 1979 STANDING TO INTERVENE**--Guidelines of Administrative Procedures Division establish that standing to intervene and standing to seek judicial review under APA synonymous; therefore, as no injury in fact shown, and no legislative intent to authorize such standing, Regional Development Agency's petition to intervene denied.

Environmental Defense Fund, et al. v. Department of Public Health, PHO/2-27-79. 1 APR 32.

***4 I.O. 1976 SUBSTANTIAL EVIDENCE REQUIRED IN REVIEW OF DISCHARGE PERMIT**--Quantum of evidence required in review of decision of Water Quality Control Board denying water discharge permit to strip mining company upon standard of substantial and material evidence must be greater than mere scintilla or glimmer.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***4 I.O. 1976 SUFFICIENCY OF EVIDENCE IN REVIEW OF DISCHARGE PERMIT**--Recited evidence and other evidence in record of hearing before permit hearing panel of Water Quality Control Board on review of denial of water discharge permit to strip mining company was more than sufficient to meet substantial and material evidence test.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***4 I.O. 1976 WEIGHT OF COURT FINDINGS ON APPEAL**--A determination by the circuit court that the findings of the Water Quality Control Board regarding application for water discharge permit were sufficient must be given great weight by Court of Appeals.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***4 I.O. 1976 STANDARD OF REVIEW**--Factual issues on appeal from decision of Water Quality Control Board denying water discharge permit to strip mining company were to be reviewed upon standard of substantial and material evidence based on consideration of entire record, including any portion of findings detracting from evidence supporting findings of administrative body. T.C.A. §4-5-117(h). Recited evidence and other evidence in record of hearing before permit hearing panel of board on review of denial of water discharge permit to strip mining company were more than sufficient to meet substantial and material evidence test.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

5. PENALTIES

***5 Ch. Ct. 1984 MINING TRESPASS CASES**--There are two rules of compensation of damages in cases of mining trespass that are recognized by the Courts, sometimes designated as the mild and harsh rules. The mild rule is applied where the wrong was innocently done, by mistake or inadvertence. The harsh rule is applied where the facts show the trespass to have been malicious, or with full knowledge of the title of the injured party, and in willful disregard of his rights. The former rule charges the defendant with the value of the coal, ore, or rock mined in situs, usually measured by the royalty charged in the particular locality. The latter rule charges the defendant the value of the same after severance, without compensation for mining and preparing for market.

Fowinkle v. Carl Kilby, et al., No. 77-1073-I (Davidson County Ch. Ct. April 3, 1984). 3 APR 309.

***5 I.O. 1976 DAMAGES AGAINST GOVERNMENTAL ENTITY**--Tennessee Water Quality Control Act includes "municipalities and political subdivisions" in those "persons" who are subject to damages assessments for pollution or violation of Act.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

6. DEFENSES

***6 F.O. 1984 UNAVOIDABLE ACCIDENT**--The "unavoidable accident" defense, as provided at T.C.A. §69-3-114, is a complete defense to any liability for civil penalties or damages under the Water Pollution Control Law. (However, in this case the Board requested the city to voluntarily pay the agency's investigative expenses and some portion of fish kill damages).

City of Memphis, FO/9-22-84. 3 APR 138.

***6 I.O. 1976 POLITICAL SUBDIVISION NOT IMMUNE**--Political subdivisions are not immune from suit by the state for damages pursuant to a valid statute.

Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-1976. 3 APR 257.

7. AGENCY AUTHORITY

***7 6th Cir. 1983 TVA PERMIT, AUTHORITY TO REQUIRE**--Tennessee could not subject a federal agency, here the TVA, to the requirements of its discharge permit program where the pollution complained of does not result from the discharge of pollutants from a point source. Here the dam, a nonpoint source, did not impound the water but only diverted it to a hydroelectric plant.

United States ex rel. TVA v. Water Quality Control Board, 717 F.2d 992 (6th Cir. 1983).

***7 Tenn. 1986 OUT-OF-STATE DISCHARGE**--Board does not have authority under its statute or federal law to impose civil penalties or to seek an injunction against a holder of a permit from another state, who discharges effluent into waters coming into Tennessee, from a point outside the state. The supreme court reversed Davidson County chancery court and court of appeals rulings allowing action to be brought.

State of Tennessee v. Champion International Corporation, 709 S.W.2d 569 (Tenn. 1986). 7 APR 12.

***7 Tenn. App. 1992 AGENCY POWER**--Administrative agencies have only those powers given them by the legislature. See Wayne County v. Tennessee Solid Waste Disposal Control Board, 756 S.W.2d 274, 282 (Tenn. Ct. App.1988).

Sierra Club v. Department of Health and Environment, Division of Water Pollution Control, and CBL of Nashville, Inc., No. 01-A-01-9203CH00131, 1992 WL 288870 (Tenn. Ct. App. October 16, 1992).

***7 Tenn. App. 1983 COST OF TREATMENT**--Whether there will be higher cost of treatment of waters, as a result of the construction of proposed dam, is within expertise of Tennessee Water Quality Control Board, and should not be reversed by court unless it is clearly erroneous.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 DAMS; ANTI-DEGRADATION STATEMENT**--In determining whether permit should be issued allowing Tennessee Valley Authority to complete dam and impound waters of river, the finding of the Board, that waters of river currently met but did not exceed levels set out in Board's criteria for each assigned use, was supported by substantial evidence in record. Therefore, the Board's anti-degradation statement, which by its terms applied to waters whose existing

quality was better than established standards, or to high quality waters that constitute an outstanding national resource, was inapplicable.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 DAMS; CONDITION OF POLLUTION**--The completion of the Columbia dam and subsequent impounding of Duck River waters was not found to be such an activity as would cause a condition of pollution. The Board, in construing its own administrative rules and regulations, decided there was not sufficient degradation of water as to warrant denial of the permit.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W. 2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 DAM PERMIT**--In determining whether permit should be issued allowing Tennessee Valley Authority to complete a dam and impound waters of a river, the findings of the Board in regard to present and predicted condition of water, were adequate to support the conclusions drawn that excursions beyond allowable limits would not significantly impair uses and that the proposed dam would not significantly impair uses.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 DAM PERMIT; PROOF**--The Board's findings that evidence was insufficient to show frequency of deviations in pH levels below proposed dam and that data was not sufficient to predict with certainty how significant deviations in dissolved oxygen levels below dam would be, did not place burden on protestants to prove extent of expected deviations where, in each of findings, the Board said that proof did not show any significant departures from criteria rather than that proof showed significant departures but did not specify by how much.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 DAM PERMIT; IMPAIRMENT OF USES OF WATER**--Tennessee Water Quality Control Board, in determining whether permit should be issued to allow Tennessee Valley Authority to complete dam and impound waters of river, was within its power in holding that use of waters for aquatic life is not impaired where losses and gains balance out.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Tenn. App. 1983 SIGNIFICANT IMPAIRMENT**--Determination of what is "significant" impairment of water uses as result of construction of proposed dam is determination that addresses itself to expertise of Tennessee Water Quality Control Board.

Environmental Defense Fund, Inc. et al. v. Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

***7 Ch. Ct. 1984 DEVIATIONS, DISCRETION IN ALLOWING**--Even though panel allowed deviations from its own criteria in case of Environmental Defense Fund, Inc. et al. v. Tennessee Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983), it has discretion to decide whether to allow deviations or to apply criteria strictly, as it did in this case.

Gerald B. Hollis v. Water Quality Control Board, No. 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***7 Ch. Ct. 1984 FILL MATERIAL PERMIT; DENIAL**--There was substantial and material evidence to support Permit Hearing Panel's denial of permit to place fill material on shore of Reelfoot Lake because such activity would violate "other pollutants" standard under water quality law, by being detrimental to fish or aquatic life, recreation, and livestock watering and wildlife.

Gerald B. Hollis v. Water Quality Control Board, No. 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***7 I.O. 1976 POWER TO ASSESS DAMAGES**--Under T.C.A §70-338 (§69-3-116), legislature clearly intended Board to have power to assess damages to compensate for loss of wildlife, fish or aquatic life, for investigative and enforcement expenses and for any other actual damages.

Division of Water Quality Control, Inc. et al. v. Greeneville Water Light Company, IO/3-26-76. 3 APR 257.

8. CONSTITUTIONAL LAW

***8 Ch. Ct. 1984 EQUAL PROTECTION: VARYING APPLICATIONS OF CRITERIA**--Panel did not violate petitioner's equal protection or due process rights or take his property without just compensation when it denied him a permit to place fill on the shore of Reelfoot Lake in strict application of its own criteria, whereas it had allowed deviations from its criteria in case of Environmental Defense Fund, Inc. et al. v. Tennessee Water Quality Control Board, 660 S.W.2d 776 (Tenn. Ct. App. 1983).

Gerald B. Hollis v. Water Quality Control Board, No. 83-1352-I (Davidson County Ch. Ct. February 28, 1984). 3 APR 240.

***8 I.O. 1976 APPROPRIATION OF PUBLIC FUNDS--**T.C.A. §70-341 (now §69-3-119) does not violate Art. II, §24 of Tennessee Constitution. There is no inhibition on power to appropriate public funds for expenses of state departments. Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***8 I.O. 1976 PRIOR HEARING, ASSESSMENT--**Provision of hearing before any assessment becomes final assures compliance with procedural due process requirements and UNIFORM ADMINISTRATIVE PROCEDURES ACT. Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***8 I.O. 1976 SEPARATION OF FUNCTION, INVESTIGATION AND DECISIONMAKING--**Mere participation in pre-adjudicative investigations by persons who subsequently decide case does not alone suggest bias sufficient to disqualify such persons from adjudicative process. Delineation of functions between Department of Public Health, Division of Water Quality Control Board, Commissioner, staff attorneys and Administrative Law Judge assures little overlap; no evidence of bias; and here Board took no role in investigatory or prosecutorial stages of proceeding. Therefore, no due process violation. *See Withrow v. Larkin*, 95 S.Ct. 1456 (1975). Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***8 I.O. 1976 SEPARATION OF POWERS--**Art. II, §§1, 2 of Tennessee Constitution was not violated by legislature's grant to Board of quasi-judicial power to adjudicate matters arising under statutes and to impose monetary damages; judicial review is available, court action is required to force compliance with Order, and Board is guided by standards in exercising its discretion regarding damages. Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

***8 I.O. 1976 FINES VS. PENALTIES; RIGHT TO JURY TRIAL** Neither Art. VI, §14 nor Art. I, §8 of the Tennessee Constitution gives the Respondent the right to trial by jury. The fish kill assessment ordered by Board is not a fine. It is civil and compensatory in nature, and not intended to be criminal or penal in effect. No jury trial existed at common law for such state damage assessments. Division of Water Quality Control v. Greeneville Water and Light Company, IO/3-26-76. 3 APR 257.

17.31 **BOARD OF RECLAMATION REVIEW** (See also 4.00, Environment & Conservation)

Tenn. 1984 BOND FORFEITURE--Even though the amount of money required to reclaim a particular tract of mined land is less than the amount of the bond, the entire bond may be forfeited for violation of T.C.A. §59-8-211. Since the Act is penal in nature, the State need not prove actual damages to recover the full amount of the bond.
State of Tennessee v. Gulf American Fire & Casualty Company, (Tenn. November 5, 1984). 5 APR 51.

OAG 1984 TIME DEADLINE; DIRECTORY & MANDATORY--Time deadlines set forth in T.C.A. §59-8-313(c), -313(e), and -321(g)(8) are directory; however, those in T.C.A. §59-8-318(c) and -321(g)(1) are mandatory, since a penalty for failure to timely act is specified in one (-318(c)) and the words "in no case shall" are used in the other (-321(g)(1)). Determinations of how parties' rights are affected by failure to meet directory deadlines must be determined on a case-by-case basis. The Board should dismiss an action solely for failure to meet directory time deadlines only where it can be shown that unreasonable prejudice to substantial rights would result.
Att. Gen. Op. to James E. Word, Commissioner of Department of Health and Environment (June 27, 1984). 4 APR 574.

F.O. 1983 TIME DEADLINE; SUBMISSION OF PENALTY AMOUNT--Petition to appeal the assessment of a penalty was dismissed because the Petitioner waived the right to contest the violation or the penalty by failing to forward the proposed amount of penalty to the Commissioner within 30 days of notification of the violation and penalty as required under T.C.A. §59-8-318(c).
Brooks and Long Coal Company v. Department of Health and Environment, IO/11-1-83. FO/11-22-83. 2 APR 590.

F.O. 1983 TIME DEADLINE; APPEAL OF ASSESSMENT--Motion for Summary Judgment by Department was granted because the company failed to timely appeal the assessment, and, therefore, under T.C.A. §59-8-318(a) the assessment became final and must be paid by the company.
White Oak Coal Company v. Department of Public Health, IO/3-10-83. FO/3-25-83. 1 APR 280.

17.32 **BOARD OF GROUND WATER RESOURCES (Water Well Drillers)**

(See also 4.32, Environment & Conservation)

F.O. 1984 WATER WELL DRILLER'S LICENSE--The Respondent was guilty of willfully violating the Water Well Act by drilling wells without a valid license and other dishonest practices. T.C.A. §69-11-105(a) requires the Commissioner of the Department of Health and Environment to refuse to issue a license if such grounds occurred.

Department of Health and Environment v. William R. Crowder, IO/5-6-84. FO/6-6-84. 3 APR 413.

17.33

ENVIRONMENTAL SANITATION

(See also 4.00, Environment & Conservation)

NO CASES REPORTED

17.34 **EMERGENCY MEDICAL SERVICES BOARD**

I.O. 1987 VIDEOTAPE EVIDENCE--As direct evidence, with no opposing evidence and no questioning of the credibility of witnesses presenting testimony of same underlying facts, videotape would be inflammatory, with its prejudicial effect outweighing its probative value. It may, however, be used to impeach or to bolster credibility if questioned.
Emergency Medical Services Board v. William Ennis Troup, IO/1-16-87. 7 APR 110.

I.O. 1987 FINDINGS OF CRIMINAL VIOLATIONS--The Board is permitted to make findings and conclusions as to alleged violations of criminal statutes by a burden of proof of a preponderance of the evidence. The Respondent may assert the 5th Amendment privilege against self-incrimination, but the Board is permitted to draw an adverse inference from such an assertion, although this inference alone may not support a holding against the Respondent on any given charge.
Emergency Medical Services Board v. William Ennis Troup, IO/1-8-87. 7 APR 10.

17.35 **CRIPPLED CHILDREN**

F.O. 1984 ELIGIBILITY--Applications for coverage are granted or denied according to priorities of conditions and prognosis as set forth at Rule 1200-11-3-.01(b). Under Rule 1200-11-3-.04(1), services are provided when the funding of program permits, according to priorities and under Rule 1200-11-3-.01(1)(b)3, the Department determines which priority levels are available to otherwise eligible applicants based on availability of funds.

Jeffrey Long v. Department of Public Health, IO/4-4-83. FO/4-14-84. 3 APR 4.

F.O. 1984 FAILURE TO PROMULGATE RULES--Interpretations issued by the Crippled Children's Advisory Committee, setting forth new examples of low priority conditions identical in effect to examples listed in Rule 1200-11-3-.01, should have been filed as rules under Administrative Procedures Act. Failure to so promulgate rules renders them void and of no effect under T.C.A. §4-5-216. Denial of services based on interpretations were, therefore, overturned, and the request for services granted.

Jeffrey Long v. Department of Public Health, IO/4-4-83. FO/4-14-84. 3 APR 4.

17.36 **HOTEL**

F.O. 1995 PERMIT NOT SUSPENDED DUE TO STATE'S FAILURE TO NOTIFY OF POLICY--A suspension of a permit was not enforced where the State failed to clearly notify Respondent in writing what violations needed to be corrected. The record established that the Respondent tried to comply with the State regulations as best he could. However, he was prevented from doing so by the State's own conduct. Therefore, any suspension of his permit would be inappropriate under the facts presented.

In re: Creative Foods, Inc. d/b/a Wilma's Restaurant, IO/1-3-95. FO/1-13-95. 8 APR 140.

F.O. 1995 POLICY INTERPRETATION--A policy interpretation does not have the force of law. It only represents the agency's view of what the law means. The agency is not even legally bound by its own interpretive rulings. Therefore, the administrative law judge can disagree with the agency's requirement and substitute his own judgment, especially in circumstances where there is a substantive modification in the rules.

In re: Creative Foods, Inc. d/b/a Wilma's Restaurant, IO/1-3-95. FO/1-13-95. 8 APR 140.

I.O. 1994 APPLICATION FOR FUTURE PERMITS NOT PROHIBITED--Even after the Respondent's prior permit was revoked, nothing in the law would prohibit the Respondent from applying for a permit in the future to operate a food service establishment should he demonstrate, to the Commissioner's satisfaction, that he would be able to operate a business in the future that maintains compliance with the safety and sanitation regulations.

Department of Health v. Bryce Cook d/b/a Cook's Cafeteria, IO/9-22-94. 13 APR 297.

17.37 **PANEL ON HEALTH CARE FACILITY PENALTIES**

No cases reported.

17.38 **ABUSE REGISTRY**

1. In General
 2. Abuse
 3. Defenses
-

1. IN GENERAL

***1 F.O. 1995 BURDEN OF PROOF**--The State has the burden of proving by a preponderance of the evidence that the Respondent abused or intentionally neglected an elderly or vulnerable individual. Upon carrying this burden, the Department of Health then includes the Respondent's name on the registry of persons who have abused or intentionally neglected elderly or vulnerable individuals.

In The Matter of Alma Carver, IO/6-14-95. FO/6-27-95. 9 APR 39.

***1 F.O. 1994 CONFLICTING TESTIMONY**--In a case where it was difficult to reconcile the testimony of the Respondent and the testimony of the witnesses for the State, the administrative law judge resolved the credibility issue in favor of the State's witnesses since they were all in a position to see the activities about which they testified and there was no evidence of any bias or prejudice on their part.

Department of Health v. Dianne Jordan, IO/5-27-94. FO/9-6-94. 18 APR 237.

2. ABUSE

***2 F.O. 1995 DEFINITION OF ABUSE**--Abuse or neglect is defined as the infliction of physical pain, injury, or mental anguish. To constitute abuse or neglect, there must be a knowing inappropriate intent on the part of one causing harm to another.

In The Matter of Alma Carver, IO/6-14-95. FO/6-27-95. 9 APR 39.

***2 F.O. 1995 SEXUAL MOLESTATION**--Respondent was found to have abused the subject resident in view of the fact that he became publicly affectionate and demonstrative with the resident to such a degree that it caused the resident to exhibit unusual and even violent behavior. Even though the resident was not physically harmed, the Respondent's sexual molestation of the resident caused the resident mental anguish, as evidenced by the resident's increasingly irritable and unusual behavior. This mental anguish was held to rise to the level of the kind of abuse that would place the Respondent's name on the Registry.

In the Matter of David Dean McGill, IO/6-2-95. FO/6-12-95. 13 APR 305.

***2 I.O. 1994 ABILITY TO RETREAT**--Where the Respondent was in a position to retreat from a resident's combative behavior and, rather than retreating, struck the resident, the Respondent was found to have engaged in abusive conduct. In the present case, it was dispositive that the Respondent had received training in the handling of combative residents and that such training included retreating from the combative residents and obtaining assistance from other staff members.

Department of Health v. Jewell McCaleb, IO/3-16-94. 13 APR 311.

***2 I.O. 1994 ABUSIVE CONDUCT; FACTORS TO CONSIDER**--Where the Respondent's act was 1) an isolated one, 2) not the result of any harmful intention, and 3) did not injure the resident or cause the resident any pain or mental anguish, the Respondent is not found to have engaged in abusive conduct as it is defined in the law and past cases. Moreover, factors, such as admission of the act soon after it occurred and a request for training in how to avoid such behavior in the future, suggest that such acts are not likely to reoccur and call for the use of a more lenient standard that was applied in former cases where the acts were considered reflexive.

Department of Health v. Pat Hoffman, IO/3-11-94. Reversed on appeal to Commissioner's Designee. 13 APR 319.

***2 I.O. 1992 DEFINITION OF ABUSE OR NEGLECT**--For purposes of the Registry of Persons who have Abused or Intentionally Neglected Elderly or Vulnerable Individuals (abuse registry) pursuant to T.C.A. §68-11-1001, it is appropriate to use the definition for "abuse or neglect" from the Adult Protection Act, T.C.A. §71-6-102, as follows: "the infliction of physical, pain, injury, or mental anguish, or the deprivation of services by a caretaker which are necessary to maintain the health and welfare of an adult..."

Department of Health v. Respondent, IO/8-25-92. 13 APR 335.

3. DEFENSES

***3 F.O. 1995 SELF-DEFENSE**--In the present case, the issue was whether the Respondent acted in self-defense or whether her striking the resident was an overreaction such that it amounted to abuse. The Respondent testified that the slapping incident was a reflexive response to a combative resident. The administrative law judge (ALJ) found that the evidence showed that the Respondent was trying to disengage and protect herself from a combative resident with whom she had never worked. The ALJ held that the Respondent's actions were reflexive and in self-defense even though they resulted in the resident being struck in the Respondent's attempt to disengage herself. According to the ALJ, the Respondent's actions did not amount to willful or unlawful use of force undertaken with an intent to harm a resident. Given 1) the combative nature of the particular resident, 2) the fact that the Respondent never worked with her before, and 3) the instantaneous reaction exhibited by the Respondent in her attempt to disengage herself from the resident's grasp while being herself slapped in the face, the Respondent acted in a reflexive, not abusive, manner to being hit and was not motivated by a malicious intention.
In The Matter of Alma Carver, IO/6-14-95. FO/6-27-95. 9 APR 39.

***3 F.O. 1991 ABUSIVE CONDUCT; DEFENSIVE REFLEX**--In a situation where the Respondent slapped a patient in the face after first being hit by the patient, the Respondent was found to have been acting in self-defense in an attempt to get away from the patient who was known to have a history of violence against employees and other patients.
Department of Health v. Respondent, IO/1-30-91. FO/4-14-91.

***3 I.O. 1994 EXCESSIVE FORCE; NO JUSTIFICATIONS**--In the present case, the Respondent had received training on resident abuse and was aware of the permissible clinical alternatives afforded her in managing the resident's behavior. Therefore, the Respondent's harsh and forceful actions toward one resident could not be justified because of her desire to calm another agitated resident and prevent disruption in the unit. As a result, the Respondent's name was placed on the abuse registry.
In re: Phyllis Riddle/Respondent, IO/6-21-94. 13 APR 345.

***3 I.O. 1991 ABUSIVE CONDUCT; DEFENSIVE REFLEX**--A Respondent who slapped a patient after having been pinched was found not to have engaged in abuse since the slap was more of a reflexive action than an intentional one. The following standard was defined: When an incident appears to be an isolated act, and not the result of harmful intention, a Respondent should not be found to have engaged in "abuse" and should not have his name placed on the abuse registry. The use of this standard was found to be especially appropriate in those situations where 1) the action at issue did not injure a patient or cause significant pain or mental anguish to the patient and 2) the action was followed by behavior indicating that such act would not likely reoccur.
Department of Health v. Respondent, IO/6-28-91.

***3 I.O. 1991 ABUSIVE CONDUCT; DEFENSIVE REFLEX**--In a situation where the patient was known to be combative and had previously struck the Respondent, the Respondent's slap was found to be more of a reflexive action than intentional abuse
Department of Health v. Respondent, IO/2-19-91.

***3 I.O. 1990 ABUSIVE CONDUCT; DEFENSIVE REFLEX**--The Respondent "somewhat forcefully" slapped the upper part of the left hand of an elderly female resident, who, herself, had formerly struck the Respondent in her groin area. The Respondent's slapping of the resident's hand was described as being reflex-like and done "without thinking about it." On this basis, the Respondent was found not to have engaged in abusive conduct.
Department of Health v. Respondent, IO/10-22-90.

***3 I.O. 1990 ABUSIVE CONDUCT; DEFENSIVE REFLEX**--A Respondent who had slapped or patted a patient on the leg to stop the patient from kicking as he was being placed in bed was found not to have "abused" the patient. The Respondent's act was described as being a "defensive reflex" rather than an abusive act.
Department of Health v. Respondent, IO/9-17-90.

17.39 **BOARD OF CERTIFICATION FOR PROFESSIONAL COUNSELORS AND MARITAL AND
FAMILY THERAPISTS**

No cases reported.

17.40 **BOARD OF SOCIAL WORKER CERTIFICATION AND LICENSURE**

No cases reported.

17.42 **BOARD FOR LICENSING HEARING AID DISPENSERS**

No cases reported.

17.43 **BOARD OF ELECTROLYSIS EXAMINERS**

Tenn. App. 1993 AGENCY STANDING; JUDICIAL REVIEW--The Chancery Court should have dismissed the appellees' petition because the agencies involved lacked standing under the U.A.P.A. to challenge the ALJ's final order and that therefore the Chancery Court lacked jurisdiction over the case. When the appellees failed to file a timely petition for review of the ALJ's order, it became a final order of the Board itself. The Board does not qualify as a "person who is aggrieved" as required for judicial review, pursuant to T.C.A. §4-5-322(a)(1), because the Board seeks judicial review of its own order. The legislative intent behind T.C.A. §4-5-322(a)(2) is to preclude the state from filing a petition for judicial review where the appeal would constitute in reality the agency appealing its own order.

Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. February 3, 1993).

Tenn. App. 1993 AGENCY STANDING; INDEPENDENCE FROM THE BOARD--The Division and the Department are sufficiently independent of the Board and sufficiently aggrieved within the meaning of the statute to have standing in the Chancery Court. The legislative intent behind T.C.A. §4-5-322(a)(2) is to preclude a subordinate agency from challenging a decision of its superior agency. See East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Comm., 626 S.W.2d 272 (Tenn. Ct. App. 1981). In the present case, the Division and the Department are independent of the Board because they are superior agencies. Therefore, although the statute precludes the Board from challenging its own decision, the Division and the Department have standing, and the Chancery Court's exercise of jurisdiction below was proper.

Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. February 3, 1993).

Tenn. App. 1993 AGENCY JURISDICTION TO IMPOSE CIVIL PENALTIES--The Chancery Court erred in reversing the Administrative Law Judge's conclusion that the Board was without authority to impose civil penalties on persons practicing electrolysis without a license. The Board has no jurisdiction to impose civil penalties upon this Respondent. The Board is not a board attached to the division, as required by T.C.A. §63-1-134 for a board to exercise the power to promulgate civil penalty regulations. The terms of T.C.A. §63-1-101 and §63-1-102, as well as the terminology "attached to the division of health related boards," limited the applicability of §63-1-134 to the 17 boards enumerated in T.C.A. §68-1-101. The Board has no jurisdiction for civil penalty purposes over any person not licensed by it. An administrative agency has only those powers "based expressly upon a statutory grant of authority" or which "arise therefrom by necessary implication." See Wayne County v. Solid Waste Disposal Board, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988). The Court of Appeals reasoned that a board's power to fine or penalize individuals not licensed by the board is not a power lightly bestowed by the General Assembly. With regard to the true health-related boards, the General Assembly felt obliged to enact in T.C.A. §63-1-134 an express grant of such powers as to individuals not licensed by said boards.

Tennessee Department of Health, Division of Health-Related Boards, Board of Electrolysis Examiners v. Odle, No. 01A01-9207-CH-00267, 1993 WL 21976 (Tenn. Ct. App. February 3, 1993).

17.47 **RESPIRATORY CARE PRACTITIONERS**

No cases reported.

18.00 DEPARTMENT OF REVENUE

Ch. Ct. 1983 PRIVATE BUSINESS DECISION--Revenue Rule 1320-4-07(3) was held to be legally invalid, and Capital Distributing's appeal seeking the State's interference into a private business decision, for reasons other than those representing legitimate State interests, was dismissed.

Capital Distributing Company v. Martha Olsen, No. 83-1245-II (Davidson County Ch. Ct. December 14, 1983). 2 APR 658.

OAG 1986 LEGAL OPINIONS ARE NOT DISCLOSABLE--Internal tax opinions, rendered to the Commissioner from the Department's legal office, are not disclosable under T.C.A. §4-5-218. However, policy determinations by Department, which are used for future administrative action, are available to the public.

1986 Op. Tenn. Att'y Gen No. 86-177 (October 15, 1986). 7 APR 49.

OAG 1984 DISCRETION OF HEARING OFFICER--At a hearing regarding the confiscation of a coin-operated amusement device for failure to have a tax stamp affixed pursuant to T.C.A. §67-4-504, the hearing officer has the discretion 1) to order the return of the device if he finds the owner to be in substantial compliance with the law, 2) to require the owner to pay the penalty and interest, or 3) to order forfeiture of the machine for failure to affix a tax stamp.

1984 Op. Tenn. Att'y Gen. No 84-344 (December 26, 1984). 5 APR 231.

19.00 **DEPARTMENT OF SAFETY**

- 19.01 Drug Confiscation
 - 19.02 Arson Confiscation
 - 19.03 Stolen Vehicle
 - 19.04 Driver's License
-

19.01 **DRUG CONFISCATION**

- 1. In General**
- 2. Procedure**
- 3. --Notice
- 4. --Filing
- 5. --Standing
- 6. --Judicial Review
- 7. Evidence**
- 8. --Burden of Proof
- 9. --Presumptions and Inferences
- 10. --Admissibility of Evidence
- 11. --Weight and Sufficiency of Evidence
- 12. --Adverse Inference
- 13. --Circumstantial Evidence
- 14. Property Subject to Forfeiture**
- 15. --Controlled Substances
- 16. --Equipment
- 17. --Containers
- 18. --Conveyances
- 19. --Facilitation
- 20. --Used to Transport
- 21. --Used for Receipt of drugs
- 22. --Everything of Value
- 23. --Money
- 24. --Proceeds
- 25. --Property exchanged for drugs
- 26. Defenses to Forfeiture**
- 27. --Innocent Ownership
- 28. --Ownership
- 29. --Co-ownership
- 30. --Lack of Knowledge or Consent
- 31. --Bona Fide Security Interest
- 32. --Security Interest
- 33. --Lack of Knowledge or Consent
- 34. --Simple Possession Exception
- 35. --Casual Exchange Exception
- 36. Non-Statutory Defenses
- 37. Constitutional Protections**
- 38. --Fourth Amendment
- 39. --Fifth Amendment
- 40. --Eighth Amendment
- 41. --Due Process

1. IN GENERAL

***1 Tenn. 1995 FORFEITURE MUST FALL WITHIN SPIRIT OF THE LAW**--Before a confiscation statute may be used to deprive a person of his property, the facts must fall both within the spirit and the letter of the confiscation law under which the sovereign proposes to act.

Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***1 Tenn. 1986 STATUTORY INTERPRETATION; LEGISLATIVE INTENT**--Forfeiture statutes are to be strictly construed because forfeitures are not favored in law. However, the court will not construe any statute, including a confiscation statute, so strictly as to result in a negation of the intentions of the legislators who passed the law.

Garrett v. State, 717 S.W.2d 290 (Tenn. 1986).

***1 Tenn. 1986 NATURE OF FORFEITURE PROCEEDINGS; QUASI CRIMINAL**--Forfeiture proceedings are quasi criminal in nature.

Garrett v. Department of Safety, 717 S.W.2d 290 (Tenn. 1986).

***1 Tenn. App. 1993 FORFEITURE STATUTES; STRICT CONSTRUCTION**--Forfeitures are not favored by the law. When a statute does provide for a forfeiture, statutes are to be strictly construed.

Hays v. Montague, 860 S.W.2d 403 (Tenn. Ct. App. 1993), Williams v. City of Knoxville, 220 Tenn. 257, 416 S.W.2d 758 (1967); Biggs v. State, 207 Tenn. 603, 341 S.W.2d 737 (1960).

***1 Tenn. App. 1993 FORFEITURE STATUTES; STRICT CONSTRUCTION**--Before a confiscation statute may be used to deprive a person of his property the facts must fall both within the spirit and the letter of the confiscation law under which the sovereign proposes to act.

Hays v. Montague, 860 S.W.2d 403, 406 (Tenn. Ct. App. 1993), Biggs v. State, 207 Tenn. 603, 608, 341 S.W.2d 737 (1960).

***1 Tenn. App. 1992 ADMINISTRATIVE PROCEEDINGS; RULE OF FAIRNESS**--In a case where the Commissioner argued that the Claimant's objections were waived by failure to comply with Rule 12 T.R.Cr.P., the court held that this rule was inapplicable to administrative proceedings since a rule of fairness prevailed in administrative proceedings. Therefore, if the seizing authority was surprised by the objections of the Claimant, it had a right to a continuance to further prepare its case. However, since this right was not asserted, it was deemed waived.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***1 Tenn. App. 1992 FORFEITURES, PRESUMPTION AGAINST**--Forfeitures are not favored in the law, and statutes that impose forfeitures must be strictly construed. *See* Goldsmith v. Roberts, 622 S.W.2d 438, 440 (Tenn. Ct. App. 1981).

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***1 Tenn. App. 1990 NATURE OF FORFEITURE HEARING**--Even though a criminal prosecution is subject to more formal procedure than an administrative forfeiture proceeding, there should be equivalent attention to the needs of the tribunal and the rights of the litigants.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***1 Tenn. App. 1989 FORFEITURES, STRICT CONSTRUCTION OF**--Tennessee courts have held that statutes pertaining to forfeitures must be strictly construed.

Hooton v. Nacarato GMC Truck, Inc., 772 S.W.2d 41 (Tenn. Ct. App. 1989).

***1 Tenn. App. 1989 REQUIREMENT OF STATUTORY CLAIM**--Attorney's letter referring to seizure of automobile did not constitute a statutory claim for seized cash, particularly where no bond or pauper's oath was filed as required by statute.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***1 Tenn. App. 1989 APPEAL OF FORFEITURE ORDERS; STRICT ADHERENCE TO TIME LIMITS**--The Claimant was notified separately of the seizure of his vehicle and his currency, but the Claimant's attorney sent a letter to the Commissioner within the fifteen day period requesting a hearing on the truck, but failing to mention the currency. The Claimant failed to appeal the forfeiture order of November 20, 1987 which notified him that the currency had been forfeited

due to the lack of a petition alleging an interest in or requesting a hearing on the currency. The order also notified the Claimant of his right to appeal the order to the chancery court within sixty days. The Claimant's interest in the currency was alleged for the first time in his complaint filed June 17, 1988. In spite of the fact that the money was initially forfeited due to a mistake made by his attorney and through no fault of his own, the Claimant eventually lost his rights to the currency because of his failure to appeal the forfeiture order within sixty days after it was issued.

Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***1 Tenn. App. 1981 NATURE OF FORFEITURE PROCEEDINGS; QUASI CRIMINAL**--Forfeiture proceedings are quasi criminal in nature.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***1 Tenn. App. 1981 STRICT CONSTRUCTION OF FORFEITURE STATUTES**--Forfeitures are not favored in law and statutes that impose forfeitures must be strictly construed.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***1 F.O. 1994 ADMINISTRATIVE RULINGS ON VALIDITY OF STATUTES**--Where the Claimant moved to dismiss the forfeiture hearing on the grounds that the forfeiture procedure was unconstitutional and in violation of Due Process, the Administrative Law Judge ruled that he was without authority to rule on the validity of a statute.

Department of Safety v. John M. Woodacre, IO/12-7-94. FO/12-19-94. 8 APR 260.

***1 I.O. 1995 ALJ RULINGS MADE AT HEARINGS**--Various legal issues concerning the search of the claimant's residence and the admissibility of evidence were raised during the hearing. However, these issues were not pursued by either party and briefs were not filed by the parties with regard to these issues. Therefore, the administrative law judge decided that all rulings made at the hearing would stand.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***1 I.O. 1995 DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANT**--Claimant's request for disclosure of the identity of a confidential informant was denied. Relying on recent caselaw, the administrative law judge determined that the identity of the informant might arguably be disclosable given that the events of which he had only direct knowledge were relied upon by the State at the hearing. However, in the absence of any request by the claimant for further proceedings at which the use of the informant as a witness might in any way aid the claimant in this case, the request for the disclosure of the informant's identity was denied.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***1 I.O. 1994 CRIMINAL LAW PROTECTIONS**--Those protections associated with criminal cases may apply to a civil forfeiture proceeding only if it is so punitive that the proceeding must reasonably be considered criminal. See Austin v. United States, 113 S.Ct. 2801 (1993).

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***1 I.O. 1994 CONSTITUTIONAL ISSUES; POWER TO HEAR**--Administrative Law Judges do not lack jurisdiction to hear issues of constitutionality. Following recent case law, the Administrative Law Judge determined that, since administrative agencies have the authority to consider the constitutionality of a statute, an administrative law judge sitting for an agency possesses the same authority, especially in regard to legal issues. See L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292, 298 (Tenn. 1991).

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***1 I.O. 1994 RIGHT TO JURY TRIAL**--Citing state and federal case law, the Administrative Law Judge determined that, where a right is created by statute and committed to an administrative forum, jury trial is not required. Furthermore, where the State is a party in the case and the case involves the public right to combat illegal drug trafficking through the forfeiture procedure, no right to jury trial exists. The Administrative Law Judge recognized only one possible exception to this rule in cases where the forfeiture action is so punitive that it must reasonably be considered criminal.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***1 NOTE 1995 REVIEW OF DRUG-RELATED FORFEITURE UNDER TDCA**--This paper and law review article contain a detailed discussion of the Tennessee Drug Control Act (TDCA).

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27. See also, Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

2. PROCEDURE--IN GENERAL

***2 Tenn. 1986 FORFEITURE ORDER DELAY**--Statute which requires rendering of final order within 90 days after conclusion of administrative law judge's hearing was directory, rather than mandatory, and, thus, administrative law judge's failure to comply with 90-day rule did not nullify hearing or order for forfeiture of truck with altered vehicle identification number.

Garrett v. State, 717 S.W.2d 290 (Tenn. 1986).

***2 Tenn. App. 1991 FINAL ORDER REVIEW; NO TIME EXTENSION**--The provisions of Tenn.R.Civ.P. 6.05 may not be used to extend the time for filing a petition to review a final order of the Tennessee Department of Safety. Such an order cannot be considered "notice or other paper" as provided for in the rule. Therefore, the time prescribed by statute for initiating an appeal to the Chancery Court will not be extended by Rule 6.05.

Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***2 Tenn. App. 1991 FINAL ORDER REVIEW; TIME LIMITS**--The sixty-day time limit on petition for review of forfeiture order of Department of Safety began to run from entry of order, and not from time that the Claimant received notice thereof, so that time limit was not extended for additional three days because notice was received through mail; procedural rule providing for additional time after service by mail did not apply.

Cheairs v. Lawson, 815 S.W.2d 533 (Tenn. Ct. App. 1991).

***2 Tenn. App. 1990 AGENCY REVIEW OF ALJ DECISIONS**--When an administrative law judge orders discovery of the name and testimony of a material witness, failure to comply with that order will not result in dismissal of the action, since the Commissioner has the authority to reverse procedural rulings of an administrative law judge made at a contested hearing.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1990 AGENCY REVIEW OF ALJ DECISIONS**--The agency is not precluded from a de novo review of law and evidence after the conclusion of the proceeding and filing of the decision of the administrative law judge. In the present case, each action of the Commissioner occurred after the decision of the administrative law judge was filed with the Commissioner. The Commissioner's action in effectively reversing all actions of the administrative law judge were within his jurisdiction and powers. Moreover, the Commissioner's action effectively vacated the actions of the administrative law judge.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1990 AGENCY REVIEW OF ALJ DECISIONS**--The Commissioner of Safety has authority to reverse procedural rulings of an administrative law judge made at a contested hearing. The Commissioner, in reversing the Orders of the administrative law judge and in remanding the contested case for another hearing on the merits, "not inconsistent with the findings" of the Commissioner does not violate any constitutional or statutory provisions.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1990 AGENCY REVIEW OF ALJ DECISIONS**--The administrative law judge, as the presiding officer and not the agency, has jurisdiction to determine all procedural questions. Whatever duties are assigned to administrative law judges as such do not place the administrative law judges in a position superior to that of the agency. The clear intent of the statutes is that the administrative law judge shall serve the agency in a manner similar to a special master, and that all actions of the administrative law judges shall be subject to review and revision by the agency.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1990 AGENCY ACTION**--The order of the Administrative Judge was not an "agency" action until the expiration of the time for petition for review to the agency (Commissioner), and it never became an agency action because it was set aside by the agency.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1990 ENFORCEMENT; INITIAL ORDERS**--Whether or not the order of the administrative law judge should be judicially enforced depends upon the effect of the subsequent actions of the "agency", the Commissioner of Safety.

Scales v. Department of Safety, No. 01-A-01-9003-CH00118, 1990 WL 120718 (Tenn. Ct. App. August 22, 1990).

***2 Tenn. App. 1989 STORAGE FEES**--Absent some proof to the contrary, a presumption exists that the costs assessed to the Claimant for the storage of his seized property were reasonable. The burden of proof is on the Claimant to prove that the storage costs were either excessive or unreasonable.

Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***2 Tenn. App. 1987 INITIAL ORDER; VOID FOR LACK OF TIMELINESS**--Absent a showing of prejudice by the Claimants, an initial order is not void if it is not entered within twenty-one days. In the present case, no prejudice has been shown by the Claimants. Moreover, the entry of the initial order in a timely fashion did not affect the merits of the decision. The evidence here shows that the currency was received illegally in consideration for or in exchange for controlled substances and that the seizure was proper. Therefore, the currency having been properly seized by the State, the Claimant cannot now contend that he was prejudiced by the failure to render the initial order in a timely fashion.

Murray v. Wood, No. 86-287-II, 1987 WL 7966 (Tenn. Ct. App. March 18, 1987).

***2 Tenn. App. 1986 DELAY IN ISSUANCE DOES NOT INVALIDATE FORFEITURE ORDER**--While the decision in this case was not handed down until 110 days after the hearing, this delay, without more, does not invalidate the forfeiture. The general rule in this state is that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory. This is especially true absent some showing of prejudice. Thus, in cases like the present one where no prejudice has been shown, the court can infer that the legislature intended that the ninety day provision to be directory in nature. Since the statute is directory rather than mandatory, violation of the ninety day rule does not nullify the forfeiture hearing or order. Moreover, the claimants have failed to demonstrate that the merits of their claim have been prejudiced by the hearing officer's twenty day delay in issuing its opinion. Thus, the failure of the hearing officer to adhere to the time requirements of T.C.A. §4-5-314(g) does not invalidate its decision.

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***2 Tenn. App. 1984 FINAL ORDER REVIEW; TIME LIMITS**--The statute which imposes the sixty day limitation on the appellants in this case provides that the period runs from the date of the entry of the agency's final order.

Houseal v. Roberts, 709 S.W.2d 580 (Tenn. Ct. App. 1984).

***2 Ch. Ct. 1992 JURISDICTION OF AGENCY AFTER UNLAWFUL SEIZURE**--The fact that a seizure is unlawful does not affect the jurisdiction of the Commissioner of Safety to proceed in a forfeiture action.

Hardison v. Lawson, No. 91-2430-II (Davidson County Ch. Ct. February 14, 1992). 15 APR 332.

***2 Ch. Ct. 1992 DESIGNATES OF COMMISSIONER AUTHORIZED TO EFFECTUATE SEIZURES**--Officers who are designates of the Commissioner are authorized to effectuate seizures under the Tennessee Drug Control Act even if the ordinance creating the department in which the officers worked was invalid.

Hardison v. Lawson, No. 91-2430-II (Davidson County Ch. Ct. February 14, 1992). 15 APR 332.

***2 Ch. Ct. 1984 TIME DEADLINE FOR ISSUANCE OF INITIAL ORDER**--Chancellor reverses Administrative Law Judge and Commissioner and rules that the provisions of T.C.A. §4-5-315(g) regarding an opinion he rendered in 90 days invalid and will be enforced. Forfeiture reversed, no harmless error.

Department of Safety v. Ray Garrett, Jr., No. 84-1000-II (Davidson County Ch. Ct. October 22, 1984). 4 APR 812. IO/2-27-84.

***2 OAG 1990 TOWING AND STORAGE FEES**--When vehicles are seized pursuant to T.C.A. §53-11-201 but released after a judicial determination ordering the return of the vehicle, claimants are not required to pay towing or storage fees associated with the seizure. However, such fees may be imposed when the vehicle is released after a favorable compromise or settlement.

1990 Op. Tenn. Att'y Gen. No. 90-17 (February 2, 1990). 15 APR 289.

***2 OAG 1986 TIME DEADLINE FOR SCHEDULING A HEARING**--Chapter 738, Public Acts of 1986 amended T.C.A. §53-11-201(d). Pursuant to this amendment, the Commissioner of Safety is no longer required to schedule a hearing within fifteen days of the day on which a claim for return of confiscated property is filed. However, due process requires that the hearing be held within a reasonable time.

1986 Op. Tenn. Att'y Gen. No. 86-127 (July 21, 1986). 6 APR 395.

***2 F.O. 1995 THIRD PARTY MONEY; LACK OF PROPER CLAIM**--Any party petitioning for the return of seized property must file a claim and prove an ownership interest in the seized property that was acquired in good faith. In the present case, the claimant asserted the seized money belonged to his mother. However, the claimant's mother did not file a claim for

the money. Moreover, the claimant, who was his mother's guardian and had power of attorney, did not file a claim on his mother's behalf. Rather, he filed a claim for the money asserting that he was the rightful owner of all the money. In the administrative law judge's opinion, no proper claim was filed for the money by the claimant's mother, and the money was forfeited as drug proceeds since the claimant, also that statutory wrongdoer, was the one who asserted ownership of the money. Department of Safety v. Dana P. Gregory, IO/5-25-95. FO/6-5-95. 9 APR 193.

***2 F.O. 1995 SEIZED PROPERTY SETTLEMENT**--Claimant was found not to have a contractual defense to the Civil Settlement of Seized Property agreement. Where claimant entered an agreement with the Sheriff's Department to forfeit \$2,500 to the State in exchange for the return of \$8,000, the claimant did not prove that the contract he signed resulted from duress or fraud, especially where the facts showed that the claimant was not pressured into signing the agreement and where the settlement worked to the claimant's advantage. In light of these facts, the Civil Settlement of Seized Property agreement was held valid and reinstated.

Department of Safety v. Albert E. Miller, IO/5-10-95. FO/5-22-95. 9 APR 202.

***2 F.O. 1995 CLAIM FILED BY MINOR**--A minor must file a claim for seized property either by his guardian or by an adult as next friend of the minor.

Department of Safety v. Harley D. Ellis and James D. Ellis, IO/4-6-95. FO/5-18-95. 8 APR 288.

***2 F.O. 1995 FAILURE TO APPEAR**--Since the officers of the seizing agency failed to appear for the hearing, despite having received notice, the State failed to present any evidence to support the forfeiture of the seized property. Consequently, the property was returned to the claimant.

Department of Safety v. Harley D. Ellis and James D. Ellis, IO/4-6-95. FO/5-18-95. 8 APR 288.

***2 F.O. 1995 ALJ DISCRETION; MOTIONS**--Rulings on motions are within the complete discretion of the administrative law judge. A judicial determination to take a motion under advisement is appropriate where the circumstances indicate a need to elicit testimony which will enlighten the trier of fact as to the totality of the evidence material to the case and the respective positions of the parties, or where legal research would be instructive. Where one party is unrepresented by counsel, there is an additional motivation on the judge's part to obtain a comprehensive understanding of the facts of the case and complete the judicial record prior to reaching conclusions of law. In the present case, the administrative law judge decided to take the State's motion for directed verdict under advisement and proceeded to hear the proof in the case.

Department of Safety v. Eric W. Risner, IO/5-5-95. FO/5-15-95. 8 APR 252.

***2 F.O. 1995 DEFAULT OF BOND**--State's motion that the bond be defaulted was denied. Claimant executed a bond upon the seizure of his vehicle by the first seizing agency. In exchange for posting this bond, the claimant regained possession of his vehicle pending the first forfeiture hearing, which was continued at the request of the claimant. In the interim, the vehicle was seized again by a second seizing agency and was ordered forfeited to this seizing agency. Because the claimant could not deliver the subject vehicle to the first forfeiture hearing when it was convened, the State moved to have the bond defaulted for the claimant's failure to produce the vehicle. The State argued that the \$10,375 bond should be forfeited in lieu of the vehicle. Relying on statutory and case law, the administrative law judge denied the State's motion since the State, as express beneficiary under the bond, had been made whole by the forfeiture of the vehicle to the second seizing agency. In the judge's opinion, no bond forfeiture could be triggered once the vehicle was already in the possession of the State, albeit a different seizing agency than the one that negotiated the bond. The fact that the claimant is rendered incapable of returning the vehicle to the possession of the first seizing agency (even by virtue of his illegal activity) did not negate the fact that the vehicle was currently in permanent possession of the State. Moreover, the statute providing for the posting of a bond expressly requires that the benefit of that bond flow to the State, not to the seizing agency.

Department of Safety v. Young Sok Chang and Sangtae Chang, IO/4-20-95. FO/5-1-95. 8 APR 309.

***2 F.O. 1995 MOTION TO DISMISS**--Claimant's motion to dismiss granted where no officer's from the seizing agency appeared to present the State's case. Since the State failed to present any evidence supporting forfeiture of the seized vehicle, the State was ordered to return the vehicle to the Claimant.

Department of Safety v. Peggy Lint, IO/4-10-95. FO/4-20-95. 8 APR 344.

***2 F.O. 1995 MOTION TO DISMISS**--Under the Tennessee Rules of Civil Procedure, Rule 41.02 provides authority to dismiss an action with prejudice for failure to prosecute where a party initially desiring to prosecute a matter subsequently fails to proceed with the case or fails to comply with an order of the court. Where there was no good cause shown for the absence of the State's witness, the claimant's motion to dismiss the case was granted, and the State was ordered to return the seized money to the Claimant.

Department of Safety v. James Leonard Jones, IO/4-10-95. FO/4-20-95. 8 APR 350.

***2 F.O. 1995 FAILURE TO APPEAR**--Since the State bears the burden of establishing that the seizure of the property was valid, Claimant's motion for return of the seized property due to the failure of the State to prosecute was granted. After having been properly notified yet having failed to appear on two separate occasions to present a case justifying seizure, fundamental fairness and due process required that the seized property be returned to the Claimant.

Department of Safety v. Wiley Adamson, IO/12-22-94. FO/1-3-95. 8 APR 320.

***2 F.O. 1991 ARREST POWERS NOT PREREQUISITE TO SEIZURE**--Property seized under the Tennessee Drug Control Act is under the exclusive jurisdiction of the Commissioner of Safety, and the Commissioner may designate agents to effectuate these seizures. No arrest or arrest powers are required under the Tennessee Drug Control Act to effectuate a seizure of property. Seizure of property may be made without an arrest if the agent of the Commissioner has reason to believe that the property was used or intended to be used in violation of the Tennessee Drug Control Act. Consequently, arrest powers are not a prerequisite to the seizure.

Randle H. Adams v. Department of Safety, FO/7-22-91. 15 APR 320.

***2 F.O. 1987 FAILURE TO TIMELY FILE A COST BOND**--Although failure to timely file a claim and petition for hearing has been treated as a requirement that is jurisdictional in nature, under Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982), failure to file a cost bond is treated as a curable defect. A claimant will therefore be permitted to execute a cost bond or file an affidavit indicating inability to pay, if appropriate.

Department of Safety v. Raymond Dean Martin, FO/11-12-87. 16 APR 239.

***2 F.O. 1987 DISCOVERY; INTERROGATORIES**--In forfeiture proceedings, Claimant is required to respond to interrogatories concerning income, financial background, prior arrest record, and seizure record as long as: 1) the information is relevant to the issue of forfeiture and not privileged, 2) the information sought is reasonably calculated to lead to the discovery of admissible evidence, and 3) the Department of Safety's need is not outweighed by the burden to Claimant.

Department of Safety v. Raymond Dean Martin, FO/11-12-87. 16 APR 239.

***2 F.O. 1986 RES JUDICATA**--When it was determined that the parties to the criminal court proceeding and the forfeiture proceeding were essentially identical, the issues to be addressed were identical, the Respondent had an opportunity to fully and fairly litigate these issues in criminal court, and the Respondent was convicted in criminal court on four counts of possession of controlled substances for the purpose of resale, *after* the judge had ruled that the search of the Respondent's residence was constitutional, a motion for partial summary judgment was granted. It was determined that the judgment of the criminal court would be dispositive of the facts in support of that judgment, and thus the Respondent would be precluded from raising the search issue or contesting the facts established in Criminal Court, to the effect that the drugs found at the Respondent's residence were possessed by the Respondent for the purpose of resale.

Department of Safety v. Robert Meadows, IO/9-30-86. FO/10-10-86. 6 APR 351.

***2 F.O. 1984 TIME DEADLINE; STATE**--Failure of the state to comply with the time limits stated in T.C.A. §53-11-201, *et seq.* will lead to dismissal on motion by the claimant.

Department of Safety v. Darryl Balthrop, IO/5-15-84. FO/6-4-84. 3 APR 411.

***2 F.O. 1984 NO CONTINUANCE FOR WITNESS'S FAILURE TO APPEAR**--Counsel for the State asked for a continuance on the grounds that his prosecuting witness was not at the hearing. Administrative Law Judge determined that the witness knew of the fact that he would be in another court on that date and failed to ask Administrative Law Judge for a continuance. Respondent and attorney traveled to Nashville expecting to have a hearing as the prosecuting witness failed to ask for a continuance in advance and as the amount involved was only \$100.00, Administrative Law Judge refused to grant a continuance and the state had to dismiss its case.

Department of Safety v. Yvonne Marable, IO/4-12-84. FO/5-30-84. 3 APR 316.

***2 I.O. 1995 ALJ RULINGS MADE AT HEARINGS**--Various legal issues concerning the search of the claimant's residence and the admissibility of evidence were raised during the hearing. However, these issues were not pursued by either party and briefs were not filed by the parties with regard to these issues. Therefore, the administrative law judge decided that all rulings made at the hearing would stand.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***2 I.O. 1994 MOTION TO SUPPRESS; TIMELINESS**--In the present case, the Claimant first raised the question of the legality of the search during cross-examination of one of the State's witnesses and after the evidence of the search had been introduced into the record. Although the Claimant failed to raise the issue prior to the proof being taken, he did not waive his

right to raise the issue in this matter. The Administrative Law Judge determined that the Claimant was not required to file a written motion or raise the issue of the search prior to the testimony being taken. Moreover, if the State considered itself prejudiced in this respect, it was entitled to request a continuance. However, since no motion for a continuance was filed by the State, the Administrative Law Judge was obligated to consider the merits of the Claimant's objection.

Department of Safety v. Michael Smith, IO/7-8-94. 8 APR 299.

***2 I.O. 1994 MOTION TO SUPPRESS BECAUSE LACK OF PROBABLE CAUSE**--Citing federal case law, the Administrative Law Judge determined that the police officer's stated reason for entering the vehicle and searching the glove compartment (to verify registration information he had obtained when he ran a check of the license plate) did not constitute probable cause for entry and search inside the vehicle, especially where no stolen vehicle report existed. Since the search of the seized vehicle was unlawful because no probable cause existed to justify the search, Claimant's motion to suppress was granted and all evidence found pursuant to the search was excluded from consideration. As there was no evidence to be considered in the record of any drugs found in the seized vehicle, there was no proof that the seized vehicle was used in any manner that would subject it to forfeiture. The Administrative Law Judge added that even if the Claimant's motion to suppress was not granted, the evidence would still not support forfeiture of the vehicle. The 6.6 grams of marijuana found in the vehicle was considered an amount clearly consistent with personal use. Moreover, there was no evidence to suggest that the vehicle was used in any manner to facilitate the purchase of drugs or even that the drugs had been transported in the seized vehicle.

Department of Safety v. Larry Hartsfield, IO/4-28-94. 9 APR 209.

***2 I.O. 1994 BOND; FAILURE TO RETURN SEIZED VEHICLE TO SEIZING AGENCY**--The plain reading of T.C.A. §53-11-201(g), as well as the Commissioner's order which releases the vehicle to the individual who posts the appropriate bond, indicates that the vehicle must be returned to the seizing agency at the time of the hearing, *not* after the Final Order is entered. In the present case, a Claimant had filed a bond and gained immediate possession of the seized vehicle but did not return the vehicle to the seizing agency at the hearing location. However, the Claimant was granted leniency because he acted upon the advice of his lawyer who contended that the vehicle should not be returned to the seizing agency until a Final Order, which is dispositive of a forfeiture proceeding, has been entered. The Administrative Law Judge determined that, due to the good faith misunderstanding on the part of the Claimant and his lawyer, the bond would not be forfeited for failure to comply with the statute.

Department of Safety v. Larry Hartsfield, IO/4-28-94. 9 APR 209.

***2 I.O. 1994 CONSTITUTIONAL ISSUES; POWER TO HEAR**--Administrative Law Judges do not lack jurisdiction to hear issues of constitutionality. Following recent case law, the Administrative Law Judge determined that, since administrative agencies have the authority to consider the constitutionality of a statute, an administrative law judge sitting for an agency possesses the same authority, especially in regard to legal issues. See L.L. Bean, Inc. v. Bracey, 817 S.W.2d 292, 298 (Tenn. 1991).

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***2 I.O. 1994 RIGHT TO JURY TRIAL**--Citing state and federal case law, the Administrative Law Judge determined that, where a right is created by statute and committed to an administrative forum, jury trial is not required. Furthermore, where the State is a party in the case and the case involves the public right to combat illegal drug trafficking through the forfeiture procedure, no right to jury trial exists. The Administrative Law Judge recognized only one possible exception to this rule in cases where the forfeiture action is so punitive that it must reasonably be considered criminal.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***2 I.O. 1994 SEIZED VEHICLE MUST BE PRESENT AT HEARING**--In the present case, the seized vehicle, which was bonded out, was not physically present in Nashville when the seizing agency demanded its return. The attorney for the Claimant contended that a vehicle that had been bonded out by a Claimant should not have to be returned to the seizing agency until a Final Order has been entered. The plain reading of T.C.A. §53-11-201(g), as well as the Commissioner's order which releases the vehicle to the individual who posts the appropriate bond, indicates that the vehicle must be returned to the seizing agency at the time of the hearing, *not* after the Final Order is entered. Consequently, the attorney was ordered to direct his client to return the vehicle to the seizing agency as soon as possible. It was further ordered that, due to the good faith misunderstanding on the part of the Claimant and his attorney, the bond would not be forfeited for failure to have the vehicle present at the hearing when a forfeiture was ordered.

Department of Safety v. Letha Davis, IO/4-12-94. 9 APR 218.

***2 I.O. 1993 PAUPER'S OATH**--When a challenge to Claimant's pauper status is made by the State, it is appropriate to consider Claimant's financial status as of the date of the hearing.

Department of Safety v. Teena D. Mays, IO/11-24-93. 9 APR 225.

***2 I.O. 1993 LIENHOLDERS AS CLAIMANTS**--Taking all the provisions of T.C.A. §53-11-451 into consideration, lienholders, secured parties, and holders of security interests are "claimants" under the statute.
Department of Safety v. George Michael Riddle, IO/9-13-93. 9 APR 235.

***2 I.O. 1993 RETURN OF COST BONDS; LIENHOLDERS**--T.C.A. §53-11-201(e) should be construed to include any and all claimants, insofar as costs are concerned. Since a lienholder is considered a claimant for the purposes of T.C.A. §53-11-451, the lienholder is also considered a party under T.C.A. §53-11-201(e). Therefore, the right of any lienholder to the return of a cost bond is not tied to the fate of the owner of the vehicle. Even if the claimant-owner does not prevail, the lienholder still should not be required to pay any costs for the following reasons: 1) it would be unfair to treat lienholders differently from other claimants in regard to the return of cost bonds when they are treated the same as other claimants in regard to the filing of cost bonds, 2) when a claimant prevails by having whatever interest it has in the vehicle returned to it, it should not have to bear any cost that any other prevailing claimant would not have to bear, and 3) since there are often multiple claimants in confiscation cases, there may be more than one prevailing party. In this case, both the State and the lienholder prevailed in having their contentions and interests in the merits of the case upheld, and the fact that the State prevailed does not negate the fact that the bank also prevailed. Therefore, if a ruling in a case such as this is favorable to a lienholder claimant, such claimant shall not be required to pay any costs and is entitled to have its cost bond returned.
Department of Safety v. George Michael Riddle, IO/9-13-93. 9 APR 235.

***2 I.O. 1993 BANKRUPTCY; AUTOMATIC STAY APPLICATION TO FORFEITURE PROCEEDINGS**--Even though a forfeiture proceeding is a "proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" under 11 U.S.C. § 362(b)(4) and (5), a forfeiture proceeding is not exempt from the automatic stay provision. The automatic stay of the federal bankruptcy law does apply to a forfeiture proceeding filing for the following reasons: 1) the seized vehicle, in the present case, was not seized prior to the filing of a bankruptcy petition but was already an asset of the bankruptcy estate when it was seized and 2) the police power exceptions do not operate in cases under 11 U.S.C. § 362(a)(3) which prohibits "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate."
Department of Safety v. Mohamad Asgari, IO/6-25-93. 9 APR 248.

***2 I.O. 1993 JURISDICTION FOR DISPOSITION OF SEIZED PROPERTY**--At the time the seizure notice was filed, the seized weapons came under the sole jurisdiction of the Commissioner of Safety, and the Criminal Court Judge properly could no longer control the disposition of the seized property.
Department of Safety v. Lauderback & Lauderback, Attorneys at Law (Donald Lewis), IO/1-6-93. 9 APR 255.

***2 I.O. 1992 PERPETRATOR AS PARTY**--Although Claimant's wife was in possession of the vehicle and was the alleged "perpetrator" during the seizure of Claimant's car, these facts alone do not support her designation as a "party" for purposes of admission of evidence in this forfeiture proceeding. Moreover, calling her a "party" does not make her a party under the law. Therefore, certain statements of claimant's wife are not considered as admissions of a perpetrator/party-opponent.
Department of Safety v. Roy Scott Vandergriff, IO/12-17-92. 9 APR 261.

***2 I.O. 1992 NO FREE CONTINUANCE FOR FAILURE TO APPEAR**--There is no "free" continuance on the first setting of a case for hearing. A party who does not appear, or whose witness does not appear, may be granted some leniency at the first setting of a case. However, when it is determined that a party, agency, or officer *did* receive actual notice, all relevant factors will then be taken into account, such as whether the officer or claimant had good cause for failing to appear.
Department of Safety v. Mark A. Eller, IO/3-9-92. 9 APR 281.

***2 F.O. 1987 DISCOVERY; INTERROGATORIES**--In forfeiture proceedings, Claimant is required to respond to interrogatories concerning income, financial background, prior arrest record, and seizure record as long as: 1) the information is relevant to the issue of forfeiture and not privileged, 2) the information sought is reasonably calculated to lead to the discovery of admissible evidence, and 3) the Department of Safety's need is not outweighed by the burden to Claimant.
Department of Safety v. J.C. Pulley, FO/3-16-87. 16 APR 273.

3. NOTICE

***3 M.D. Tenn. 1972 NOTICE; REASONABLE EFFORTS REQUIRED**--The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property, (2) the means

available to the State to discover the identity of persons claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding.
Fell v. Armour, 355 F.Supp. 1319, 1329 (M.D. Tenn. 1972).

***3 Tenn. 1995 REQUIREMENT OF ADEQUATE NOTICE TO ALL INTERESTED PARTIES**--One of the essential elements of due process in the confiscation and forfeiture of private property is adequate notice to all interested parties. Where the State had knowledge of the Claimant's ownership interest in the forfeited property, both federal and state due process required the Department to have made a reasonable effort to notify the Claimant of the seizure and the possible forfeiture of the property. Under the facts presented on this appeal, it was clear that the Department of Safety possessed the requisite knowledge of the Claimant's possible proprietary interest in the seized property. Such knowledge required the Department to give notice to the Claimant of the seizure and possible forfeiture of the property.
Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***3 Tenn. 1976 NO ENTITLEMENT TO PRE-SEIZURE NOTICE**--Automobile owner was not entitled to notice prior to seizure of automobile used in violation of Drug Control Act.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***3 Tenn. App. 1993 NOTICE NOT DEFECTIVE**--Notice of seizure which indicated that individual was owner of automobile was not defective, even though in actuality company was owner of automobile, where individual was sole owner of company, individual accepted notice in question, and requested hearing pursuant to that notice.
Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***3 Tenn. App. 1993 DEFECTIVE NOTICE, ABSENCE OF**--The notice of seizure in this matter was not defective because it indicated that the Claimant, Tom Donihe, is the owner of the vehicle, whereas the company, Donihe Graphics, Inc., is the actual owner of the vehicle. It is undisputed that the Claimant is the sole owner of Donihe Graphics. It must also be noted that the Claimant accepted the notice in question and pursuant to that notice filed the request for a hearing on behalf of himself and Donihe Graphics, Inc. Thus, the notice fulfilled the function it was intended to fulfill since it notified the primary, if not the only human being, who would have had any real interest in filing a claim in this matter. Therefore, it can not be considered defective under the facts of this case.
Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***3 Tenn. App. 1992 DUE PROCESS**--The State cannot interfere with a person's significant property interests without first providing a hearing at a meaningful time and in a meaningful manner. Adequate notice is an essential due process ingredient.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***3 Tenn. App. 1992 NOTICE REQUIREMENTS**--The right to a hearing has little reality or worth unless the affected parties are informed that the matter is pending and can choose for themselves whether to appear or default, acquiesce, or contest. The procedure for notice must, under all the circumstances, be reasonably calculated to apprise all interested persons of the pending action in order to afford them an opportunity to present their objections.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***3 Tenn. App. 1992 REASONABLE EFFORTS TO PROVIDE NOTICE ARE REQUIRED**--The record in this case shows that the State had two appearances on behalf of the Claimant. The first attorney making an appearance on the Claimant's behalf notified the seizing agency that henceforth all notices should be given to the Claimant's second attorney. Despite that knowledge, the State did not notify the Claimant's second attorney, even after the first attorney to whom notice had been given said he would not attend the hearing because he had not heard from the Claimant. In the court's judgment, the State failed to take the reasonable steps necessary to give the Claimant notice of the hearing. The court found that State was required to make a reasonable effort to provide the Claimant's second attorney with notice even though he had not made an appearance on behalf of the Claimant. Therefore, where one attorney has made a formal appearance and then in his withdrawal designates another attorney as the Claimant's representative, that fact gives the State information that it cannot ignore in according the Claimant his due process rights.
Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***3 Tenn. App. 1992 REASONABLE EFFORTS TO PROVIDE NOTICE ARE REQUIRED**--The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property,

(2) the means available to the State to discover the identity of persons claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding. It follows, therefore, that the notice procedure used in cases of this sort should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992); Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992); Fell v. Armour, 355 F.Supp. 1319, 1329 (Tenn. 1972).

***3 Tenn. App. 1992 REASONABLE EFFORTS TO PROVIDE NOTICE NOT FOUND--**In the present case, the officers made no effort to give notice to anyone other than claimant Brown, even though they had seized other evidence indicating that at least two other persons lived in the house where the money was found. With the names and addresses of these potential claimants already in their possession, the officers are required to expend some additional effort to provide the other residents of the house with notice of the seizure. Moreover, claimant Brown, the only resident of the house present when the money was seized, denied that he owned the money and, according to the arrest report, stated that "he did not know who the money belonged to." In light of this evidence, giving notice to claimant Brown and then relying on him to pass the notice along does not meet even the minimum notice requirements. Giving notice to a person who denies any knowledge of the ownership of property cannot be viewed as being reasonably calculated to notify potential claimants of their right to seek the property's return.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***3 Tenn. App. 1992 NOTICE PROCEDURE--**The notice procedure used should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***3 Tenn. App. 1992 SCOPE OF NOTICE--**The scope of the constitutional requirement of timely and adequate notice should not depend on the State's suspicions about the source of the seized property or its belief that the likely claimants are involved in some sort of illegal activity. Likewise, it should not be influenced by the State's legitimate desire to separate criminals from their ill-gotten gains, to lessen the economic power of organized crime or drug enterprises, or to use the seized property to support other law enforcement activities.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***3 Tenn. App. 1991 ACTUAL NOTICE--**In the present case, the record reflected that law officers of Unicoi County were searching the premises of one Michael Sparks pursuant to a search warrant, and Claimant Thomas was found on the premises at that time in the van here in question. The van was searched pursuant to the search warrant. Thomas, an escapee from the Unicoi County Jail at the time, was in possession of the van. The amount of drugs found in the van was consistent with the amount a person would have for resale and not for personal use. Thomas contended that he was denied due process because he did not receive notice to the effect that a confiscation hearing was to be held on May 16, 1989. In support of his contention, he asserted that, at the time the notice was sent, he was incarcerated in the regional correctional facility in Wartburg whereas the notice of the hearing was mailed to the Unicoi County Jail. However, the Court of Appeals determined that Thomas still had notice of the hearing. In his pleadings to appeal the initial order, Thomas stated that he was aware that he was in default because he could not attend the administrative hearing on May 16, 1989. Furthermore, in his petition for reconsideration, Thomas made a similar assertion. Therefore, the Court of Appeals held that there was no denial of due process because Thomas did receive actual notice, as evidenced by his later pleadings.

Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***3 Tenn. App. 1989 NOTICE; DEFECTS--**Notice of seizure containing wrong statute number did not prejudice claimants. Failure of claimants to timely claim money seized in connection with arrest for drug offense was not excused by notice of seizure form which contained former number rather than present number of statute pertaining to filing of claims to seized property.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***3 Tenn. App. 1989 NOTICE; ESTOPPEL--**A claimant is estopped from claiming right to written notice by her failure to assert ownership of cash at scene of seizure. Claimant's right to written notice of seizure of cash was waived by her action in acquiescing to companion's representation to seizing officer that the money belonged to him and by her failure to assert ownership at scene of seizure.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***3 Tenn. App. 1989 REQUIREMENT OF STATUTORY CLAIM FOR RECEIPT OF NOTICE**--Attorney's letter referring to seizure of automobile did not constitute a statutory claim for seized cash, particularly where no bond or pauper's oath was filed as required by statute. Commissioner of Safety was not required to search records of property on hand for any property seized from a claimant who had contacted an attorney about claims to certain property without asserting a claim to other property for purposes of determining to whom to send forfeiture notice. Therefore, claimants were not excused from seeking judicial relief within time allowed by statute on the basis that they had not received notice.
Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***3 Tenn. App. 1989 FAILURE TO TIMELY CLAIM EXCUSED BY INADEQUACY OF NOTICE**--Failure to timely claim the money, in exceptional circumstances, is excused by the inadequacy of the notice of seizure. However, where there is no showing that either of the claimants was prejudiced by the printed form containing the former number rather than the present number of the statute, there is no excuse for failure to make a timely claim. By failing to make timely claim for the money, the Claimant has lost the right to contest the forfeiture of the money.
Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***3 Ch. Ct. 1991 LACK OF SEIZURE NOTICE DOES NOT EXCUSE UNTIMELY FILING**--If the Claimant wished to dispute the seizure of his vehicle, he was obligated to file a request for a hearing within 21 days after notice of the seizure. The court held that it was immaterial that the Claimant never received notification of the seizure since the Claimant, as evidenced by his untimely request for a hearing, was aware of the steps necessary to file a claim and yet failed to complete those steps in a timely manner.
Strong v. Department of Safety, No. 91-804-III (Davidson County Ch. Ct. October 7, 1991). 15 APR 291.

***3 F.O. 1995 NO DEFECTIVE NOTICE FOUND**--Where the claimant switched the license tag from one car to another without changing the registration with the State, the seizure notice containing the wrong vehicle identification was not considered prejudicial to the claimant. The error on the first seizure notice receipt, which was later corrected with subsequent notice, was held to be harmless error as it did not prejudice the rights of the Claimant. Consequently, the claimant was held to have received adequate notice of the seizure, and the State properly followed Tennessee law and procedure in notifying the claimant.
Department of Safety v. Lillian Graham, FO/3-4-95. 16 APR 221.

***3 F.O. 1994 SEIZURE NOTICE NOT TIMELY**--Where the Claimant moved to dismiss the forfeiture hearing on the ground that the seizure notice was not timely served, the motion was denied because the Claimant had actual notice of the seizure and could have filed a claim. It was also noted that no statutory time frame existed with regard to the issuance of a seizure notice.
Department of Safety v. John M. Woodacre, IO/12-7-94. FO/12-19-94. 8 APR 260.

***3 I.O. 1994 DEFECTIVE NOTICE CONSIDERED HARMLESS ERROR**--Where the Claimant switched the license tag from one car to another without changing the registration with the State, the seizure notice containing the wrong vehicle identification was not considered prejudicial to the Claimant. The error on the first seizure notice receipt, which was later corrected with subsequent notice, was held to be harmless error as it did not prejudice the rights of the Claimant. Had the Claimant properly registered her vehicle with the State, this error would not have occurred. Moreover, even though the first seizure notice was in error, the Claimant was well aware which vehicle was seized since the seizure notice provided the date as well as the reasons for the seizure. Consequently, the Claimant was held to have received adequate notice of the seizure.
Department of Safety v. Lillian Graham, IO/11-1-94. 9 APR 289. *See also* 16 APR 221.

***3 I.O. 1994 DEFECTIVE NOTICE NOT A BASIS FOR DISMISSAL OF FORFEITURE**--Claimant's assertion that defective notice rendered the entire forfeiture untenable was rejected by the administrative law judge. While it was clear that the notice received by the Claimant was defective, any such error was considered harmless since she nevertheless filed a claim within the appropriate time. Defective notice, without prejudice and without more, is not a basis for the dismissal of a forfeiture.
Department of Safety v. Carolyn Atencio, IO/7-26-94. 8 APR 279.

***3 I.O. 1994 OWNERSHIP; DENIAL OF**--The fact that the Claimant has previously denied ownership of the seized money does not estopp him from now claiming the money or deprive him of standing to do so. Although, under Woodall v. Lawson, 784 S.W.2d 657 (Tenn. App. 1989), an individual waives the right to written notice of seizure when he denies ownership of seized property, this denial does not mean that the individual waives the right to later file a timely claim for the property.
Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***3 I.O. 1993 FAILURE TO NOTIFY OF UNDERLYING BASIS OF SEIZURE NOT PREJUDICIAL**--Claimant moved to dismiss on the grounds that he was not notified of the underlying basis for seizure of his money. Specifically, the box on the seizure form indicating that the seizure was narcotics-related had not been checked by the seizing officer. Claimant's motion to dismiss was denied for the following reasons: 1) Seizure Notice is a generic form which clearly indicates that the seizure in question is drug-related, 2) Claimant's petition for a hearing indicated an awareness that the basis for seizure was cocaine found on the Claimant's person, and 3) Claimant was in no way prejudiced by the officer's failure to check one box on a seizure form. Department of Safety v. Timothy Crutcher, IO/9-13-93. 9 APR 300.

***3 I.O. 1992 WRONG MAILING ADDRESS; REASONABLE EFFORT TO NOTIFY**--Under T.C.A. §53-11-201(a)(1)(c), the Department of Safety is required to make a reasonable effort to notify an owner or lienholder. The Department of Safety was found to have made a reasonable effort to notify a lienholder of seizure of the vehicle when it mailed notice to lienholder's Chattanooga branch address, rather than to the Nashville address listed on the vehicle's title. Mailing notice to the Chattanooga address was found to be reasonable since the Department of Safety's records indicated the Chattanooga address to be a valid branch address and since Chattanooga was where the lien was first entered into. The lienholder was considered officially notified when the Chattanooga branch received notice of the seizure from the Department of Safety. Department of Safety v. Roy Scott Vandergriff, IO/12-17-92. 9 APR 261.

***3 I.O. 1988 ADEQUACY OF NOTICE**--As long as it is undisputed that a Claimant had knowledge that the vehicle in question had been seized, then the State had given adequate notice to the Claimant and had made sufficient effort to notify the owner. Department of Safety v. Raymond Leonard Carroll, Jr., IO/5-19-88.

***3 I.O. 1985 ACTUAL NOTICE**--Claimant's Motion to Dismiss, based on State's failure to send him a copy of the seizure notice in the Cheatham County Workhouse, was denied inasmuch as a timely claim and request for hearing was filed by an attorney on behalf of Claimant. He received actual notice and was represented by an attorney at the hearing. Department of Safety v. 1978 Ford Bronco, IO/7-17-85. 6 APR 114.

4. FILING

***4 Tenn. 1995 FILING; BURDEN ON OWNER OF PROPERTY**--Once a seizure is made, the burden falls upon the owner, or someone with a legal interest in the property, to file for its return. Failure to make a claim within the statutorily prescribed time will result in a summary forfeiture. Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***4 Tenn. App. 1994 TIMELY FILING; NO EXCEPTIONS**--In the present case, the Commissioner notified the Claimant that the request for a hearing was untimely, having been filed one day after the statutorily required time limit. The Claimant then petitioned the Davidson County Chancery Court for relief, and the Chancellor ruled the Commissioner had no discretion under the drug control statute to waive or extend the statutory filing limit time, and since the claimant acted outside the time limit no relief would be afforded. The Court of Appeals held that the obvious intent of the drug control statute is that claims are to be considered only if timely received by the Commissioner and the Court of Appeals had no authority to grant exceptions. Bonner v. State, No. 01A01-9404-CH-00197, 1994 WL 503894 (Tenn. Ct. App. September 16, 1994).

***4 Tenn. App. 1994 FILING REQUIREMENT; CONSTITUTIONALITY**--T.C.A. §53-11-201(c)'s filing requirement, which affords both notice and an opportunity to be heard, was upheld in the following cases: Woodall v. Lawson, 784 S.W.2d 657, 659 (Tenn. Ct. App. 1989); Johnson v. Roberts, 638 S.W.2d 401, 403 (Tenn. Ct. App. 1982); and Everton v. Lawson, No. 01-A-01-9005-CH00181, 1990 WL 125512 (Tenn. Ct. App. August 31, 1990). Ball v. Lawson, No. 01-A-01-9402-CH00075, 1994 WL 421417 (Tenn. Ct. App. August 12, 1994).

***4 Tenn. App. 1991 TIMELY FILING; NO SHOWING OF PREJUDICE**--Where the Claimant alleged the following procedural errors: (a) the final order of the Commissioner failed to state when the order was entered and effective; (b) the final order did not include a statement outlining the available procedures and time limits for seeking judicial review of the final order; (c) the trial court failed to grant a default judgment, although some ninety-seven days allegedly had elapsed from the time the claimant was served with summons until the motion for default was filed; (d) the trial court erred in not granting a declaratory judgment in his favor because claimant had not answered or responded to the suit. Citing Garrett v. State Dept. of Safety, 717 S.W.2d 290 (Tenn. 1986), the Court of Appeals recognized that the general rule in this state is that statutory provisions relating to the time of doing an act to which the statute applies are directory rather than mandatory. The court held

that this is especially true absent some showing of prejudice. Thus, in cases like the present one where no prejudice has been shown, less than strict adherence to time limits does not nullify an order.

Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***4 Tenn. App. 1990 FILING BY MAIL**--T.C.A. §53-11-201(c) does not provide for filing by mail or filing by presumed delivery. There is no authority to the effect that a statutory requirement for timely filing is satisfied by deposit in mail at a time when timely delivery is reasonably anticipated.

Everton v. Lawson, No. 01-A-01-9005-CH00181, 1990 WL 125512 (Tenn. Ct. App. August 31, 1990).

***4 Tenn. App. 1989 HEARING, SCHEDULING OF**--The Commissioner is required to schedule a hearing only when the claim AND a cost bond or pauper's oath are timely filed.

Woodall v. Lawson, 784 S.W.2d 657, 659 (Tenn. Ct. App. 1989); Johnson v. Roberts, 638 S.W.2d 401, 403 (Tenn. Ct. App. 1982).

***4 Tenn. App. 1989 FAILURE TO TIMELY CLAIM; CONSEQUENCES**--By failing to timely file for the seized money, the Claimant lost the right to contest the forfeiture of the money.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***4 Tenn. App. 1989 NO PREJUDICE; INCORRECT STATUTE NUMBER**--Failure of claimants to timely claim money seized in connection with arrest for drug offense was not excused by notice of seizure form which contained former number rather than present number of statute pertaining to filing of claims for seized property. Claimants were not prejudiced by incorrect statute number.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***4 Tenn. App. 1989 APPEAL OF FORFEITURE ORDERS; FAILURE TO TIMELY FILE**--The Claimant was notified separately of the seizure of his vehicle and his currency, but the Claimant's attorney sent a letter to the Commissioner within the fifteen day period requesting a hearing on the truck, but failing to mention the currency. The Claimant failed to appeal the forfeiture order of November 20, 1987 which notified him that the currency had been forfeited due to the lack of a petition alleging an interest in or requesting a hearing on the currency. The order also notified the Claimant of his right to appeal the order to the chancery court within sixty days. The Claimant's interest in the currency was alleged for the first time in his complaint filed June 17, 1988. In spite of the fact that the money was initially forfeited due to a mistake made by his attorney and through no fault of the his own, the Claimant eventually lost his rights to the currency because of his failure to appeal the forfeiture order within sixty days after it was issued.

Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***4 Tenn. App. 1984 NO EXCUSE FOR UNTIMELY FILING OF CLAIM**--Owners of forfeited money could not be excused for failing to initiate their appeal within time prescribed by statute merely because they did not anticipate delay in delivery of their petition for review through the mail.

Houseal v. Roberts, 709 S.W.2d 580 (Tenn. Ct. App. 1984).

***4 Tenn. App. 1982 BURDEN UPON OWNER TO FILE PETITION FOR RETURN OF PROPERTY**--The Tennessee statute clearly puts the burden upon the owner of the seized goods to request a hearing within fifteen (15) days of notification of seizure. Upon completion of these two requirements, the Commissioner of Safety is then required to set a date for a hearing within fifteen (15) days. Plaintiffs did not comply with the statutory requirements. The Commissioner of Safety properly denied untimely requests for a hearing.

Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982).

***4 Tenn. App. 1982 UNTIMELY REQUESTS FOR HEARING DENIED**--Where requests for hearing seeking return of currency seized at time of defendants' arrests for possession of a controlled substance were not filed within 15 days, after defendants received notice at time the money was seized and signed receipts containing language directing the action to be taken by an aggrieved party, subsequent untimely requests for hearing were properly denied.

Johnson v. Roberts, 638 S.W.2d 401 (Tenn. Ct. App. 1982).

***4 Ch. Ct. 1991 LACK OF SEIZURE NOTICE DOES NOT EXCUSE UNTIMELY FILING**--If the Claimant wished to dispute the seizure of his vehicle, he was obligated to file a request for a hearing within 21 days after notice of the seizure. The court held that it was immaterial that the Claimant never received notification of the seizure since the Claimant, as evidenced by his untimely request for a hearing, was aware of the steps necessary to file a claim and yet failed to complete those steps in a timely manner.

Strong v. Department of Safety, No. 91-804-III (Davidson County Ch. Ct. October 7, 1991). 15 APR 291.

***4 F.O. 1995 THIRD PARTY MONEY; LACK OF PROPER CLAIM**--Any party petitioning for the return of seized property must file a claim and prove an ownership interest in the seized property that was acquired in good faith. In the present case, the claimant asserted the seized money belonged to his mother. However, the claimant's mother did not file a claim for the money. Moreover, the claimant, who was his mother's guardian and had power of attorney, did not file a claim on his mother's behalf. Rather, he filed a claim for the money asserting that he was the rightful owner of all the money. In the administrative law judge's opinion, no proper claim was filed for the money by the claimant's mother, and the money was forfeited as drug proceeds since the claimant, also that statutory wrongdoer, was the one who asserted ownership of the money. Department of Safety v. Dana P. Gregory, IO/5-25-95. FO/6-5-95. 9 APR 193.

***4 F.O. 1995 CLAIM FILED BY MINOR**--A minor must file a claim for seized property either by his guardian or by an adult as next friend of the minor. Department of Safety v. Harley D. Ellis and James D. Ellis, IO/4-6-95. FO/5-18-95. 8 APR 288.

***4 F.O. 1987 FIFTEEN DAY FILING NOTICE**--When computing the fifteen (15) day period within which a claimant must file a petition for a hearing with the Department of Safety pursuant to T.C.A. §53-11-201(c), the fifteenth day cannot fall on a weekend or holiday, but must be carried over to the next working day. Department of Safety v. Gary Bruce Pinkley, IO/3-31-87. FO/8-6-87. 7 APR 288.

***4 I.O. 1995 FAILURE TO FILE CLAIM FOR SEIZED PROPERTY**--Where claimant contended that he gave the seized vehicle to his grandson and where the grandson did not file a claim within thirty days of receipt of the notice of seizure, any ownership interest of the grandson in the vehicle was forfeited to the State. Department of Safety v. Jesse P. Martin, IO/6-30-95. 19 APR 176.

***4 I.O. 1995 TIMELY FILING REQUIRED AFTER NOTICE OF SEIZURE**--A petition for a hearing seeking the return of seized property must be filed within thirty days of a claimant's receipt of the Notice of Seizure. The petition must also specifically identify the seized property and state the claimant's interest in it. The statute requiring timely filing of the hearing petition has been strictly construed by judges. In the present case, the petition was received 47 days after the claimant received the seizure notice with regard to the confiscated money. The claimant was aware of the seizure and the need to file a timely petition as evidenced by the two petitions she filed earlier seeking the return of other property. Since no proper petition was filed for the seized money, the money was forfeited to the State. Department of Safety v. Deborah K. Burns, IO/6-28-95. 14 APR 24.

***4 I.O. 1994 NO TIMELY FILING MADE AFTER RECEIPT OF SEIZURE NOTICE**--Since the Claimant lienholder did not file a claim for the lien after having received notice of the seizure, the lien was not recognized in the forfeiture of the seized vehicle. Department of Safety v. Anthony R. Onks, IO/10-25-94. 9 APR 309.

***4 I.O. 1994 CLAIM FILED AS GUARANTOR FOR LOANS NOT RECOGNIZED**--A claim filed as a guarantor for loans made for the purchase of a seized vehicle will not be recognized in a forfeiture proceeding. Only claims filed as an owner or lienholder will be recognized. Department of Safety v. Anthony R. Onks, IO/10-25-94. 9 APR 309.

***4 I.O. 1994 DEFECTIVE SEIZURE NOTICE NOT GROUNDS TO EXCUSE UNTIMELY FILING**--Where the Claimant contended that the seizure notice was so outdated, inaccurate, and confusing that it did not constitute adequate notice, the administrative law judge determined that it was not necessary to resolve those issues before addressing the merits of the forfeiture. Even if it was conceded that the seizure notice form could be confusing to some claimants under the circumstances, there was no proof that the Claimant was actually confused or misunderstood the pertinent elements of the notice. Therefore, Claimant's untimely filing was not excused for lack of notice. Department of Safety v. William K. Gardner, IO/8-24-94. 8 APR 269.

***4 I.O. 1994 OWNERSHIP; DENIAL OF**--The fact that the Claimant has previously denied ownership of the seized money does not estopp him from now claiming the money or deprive him of standing to do so. Although, under Woodall v. Lawson, 784 S.W.2d 657 (Tenn. App. 1989), an individual waives the right to written notice of seizure when he denies ownership of seized property, this denial does not mean that the individual waives the right to later file a timely claim for the property. Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***4 I.O. 1993 TIMELY FILING; NO INDICATION OF WHEN NOTICE OCCURRED--**While it would appear that Claimant's claim for the seized property was not timely filed, there is nothing in the record to indicate when the Claimant first received notice of the seizure. Therefore, Claimant's filing may well have been timely. In the present case, since the State made no argument that the Claimant's claim was not timely filed, the Administrative Law Judge can only conclude that his claim was timely filed. However, there is a presumption that the Claimant's claim for the seized property was timely filed absent any proof regarding when the Claimant first received notice of the seizure.

Department of Safety v. Sharla Dillon and Edward Blevins, IO/10-4-93. 9 APR 316.

***4 I.O. 1993 LENIENCY WHERE ATTORNEY IS AT FAULT--**An administrative agency should be lenient towards an innocent client who is subject to default because of an attorney's act or failure to act when the client is not responsible for the attorney's failure. When the client has done all he reasonably can do to file a timely claim and relies on counsel, any further omissions are the responsibility of the attorney, not the client.

Department of Safety v. James Bradley, IO/4-27-93. 8 APR 325.

***4 I.O. 1993 TIMELY FILING; NO NOTICE DUE TO CLERICAL ERROR--**Although the lienholder's petition for a hearing was not filed within 21 days of the notice of the seizure being sent to the vehicle owners, the State's motion to dismiss the claim of the lienholder was denied. Even though the State did all it could reasonably be expected to do in determining ownership of the seized vehicle, the proper lienholder was not initially identified due to clerical error. Since the lienholder had no knowledge or way to know of the seizure within 21 days and did file a claim immediately upon notification, the petition was found to have been timely filed.

Department of Safety v. Paul D. Grantland and General Motors Acceptance Corporation, IO/4-13-93. 9 APR 325.

***4 I.O. 1993 TREATED AS IF TIMELY FILED--**Were the claim untimely it would have been proper for the Commissioner to refuse to set a hearing and to return the cost bond for such hearing. This was not done. The Department, by setting the matter for hearing and by taking a cost bond for the hearing posted by the Claimant, has acted as if the claim was timely filed. Therefore, Claimant's letter constitutes a timely claim.

Department of Safety v. Iris Nicholson, IO/2-1-93. 9 APR 332.

5. STANDING

***5 Tenn. 1977 PROPER PARTY IF NOTIFIED OR IN POSSESSION OF SEIZED PROPERTY--**In forfeiture proceedings, the threshold issue is whether a claimant is a "proper party." The party given notice of the seizure and by whom the property was possessed is a proper party to make a claim.

State v. LeMay (Tenn. March 28, 1977). 15 APR 325.

***5 Tenn. 1977 POSSESSION CONFERS STANDING--**Mere possession of the property at the time of seizure is sufficient to confer standing to challenge a forfeiture in a hearing.

State v. LeMay (Tenn. March 28, 1977). 15 APR 325.

***5 Tenn. App. 1989 PROPERTY MUST BE SPECIFICALLY CLAIMED IN THE PETITION--**At a forfeiture hearing, the claimant may only contest seized property that was specifically claimed in the petition. The claimant has no standing to contest the seizure of property for which no claim was made.

Woodall v. Lawson, 784 S.W.2d 657 (Tenn. Ct. App. 1989).

***5 Tenn. App. 1986 STANDING WITH REGARD TO FORFEITED PROPERTY; MUNICIPALITY STANDING--**When its officers seize contraband, Metro does not acquire a vested, proprietary interest which it may pursue as an interested party through administrative and judicial channels. Rather, a municipal government acts as an agency of the State when it undertakes to act under State authority to enforce State laws. It is only when the Commissioner of Safety has determined that the property should be forfeited that the state, county, or municipal drug enforcement fund acquires an interest in the property or its proceeds. Therefore, Metro has no standing to challenge the forfeiture order.

Taylor v. Department of Safety, (Tenn. Ct. App. August 20, 1986).

***5 F.O. 1995 PERSON ASSERTING INTEREST OF OWNER--**Motion to dismiss petition of claimant for lack of standing was denied. T.C.A. §53-11-201(f)(1) provides that a claim for seized property shall be allowed if asserted by an owner or other person asserting the interest of the owner. Although the titled owner of the seized vehicle was the claimant's girlfriend, the administrative law judge determined that the facts indicated that the claimant and his girlfriend considered themselves co-owners. In the alternative, the fact that the claimant discussed the pending hearing with his girlfriend and the

fact that she approved his appearing and representing her interest at the hearing, established standing for the claimant under T.C.A. §53-11-201(f)(1).

Department of Safety v. Charles E. Craig, IO/2-23-95. FO/3-6-95. 9 APR 339.

***5 F.O. 1994 PROPER PARTY TO MAKE A CLAIM; PRESENCE**--Even if it was determined that the claimants at issue are not the owners of the seized money, the claimants could still be proper parties to file a claim because they were on the premises at the time of seizure and could reasonably be considered in possession of the money.

Department of Safety v. Callie Harris et al., FO/11-23-94. 19 APR 156. *See also* IO/7-25-94. 8 APR 235.

***5 I.O. 1994 OWNERSHIP; DENIAL OF**--The fact that the Claimant has previously denied ownership of the seized money does not estop him from now claiming the money or deprive him of standing to do so. Although, under Woodall v. Lawson, 784 S.W.2d 657 (Tenn. App. 1989), an individual waives the right to written notice of seizure when he denies ownership of seized property, this denial does not mean that the individual waives the right to later file a timely claim for the property.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***5 I.O. 1994 PROPER PARTY**--Standing involves the determination of whether an individual is a proper party to make a claim for seized property. An owner or an individual who in possession of seized property is a property party to make a claim. Under the facts of the present case, even if it was determined that the Claimants are not owners, they could still be proper parties to file a claim because they were on the premises at the time of the seizure and could reasonably be considered in possession of the hidden money.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***5 I.O. 1994 STANDING AS TO AMOUNT OF CLAIM**--Relying on Woodall v. Lawson, 748 S.W.2d 657 (Tenn. Ct. App. 1989), the State moved to dismiss for lack of standing, contending that the Claimant lacked standing to pursue the recovery of \$2,545 when only \$35 was claimed at the time of the seizure. State's motion to dismiss was not granted after the facts of Woodall v. Lawson were distinguished from the present case. The Claimant's signature of the seizure notice merely acknowledged *receipt* of the seizure notice, not the form's accuracy in designating ownership of the items seized. Moreover, the Claimant filed a timely claim which clearly set forth her claim for the \$2,545 which was seized.

Department of Safety v. Bertha Mae Walker, IO/4-28-94. 9 APR 347.

***5 I.O. 1993 LIENHOLDERS AS CLAIMANTS**--Taking all the provisions of T.C.A. §53-11-451 into consideration, lienholders, secured parties, and holders of security interests are "claimants" under the statute.

Department of Safety v. George Michael Riddle, IO/9-13-93. 9 APR 235.

***5 I.O. 1993 PART-TIME RESIDENCE AT PLACE OF SEIZURE**--Claimant was found to have standing to assert a claim for the return of \$40,000 when it was found, by a preponderance of the evidence, that he lived on a part-time basis at the residence where the money was seized. Claimant was considered to live at the residence on a part-time basis when he proved that he paid rent at some point in the past and he keeps a big screen TV and bed (in which he occasionally sleeps) at the residence. The claimant was not denied standing even though he holds no written lease for this part-time residence, he uses another residence as his mailing address, and he left no papers bearing his name at the part-time residence.

Department of Safety v. Freddie Lee Jones, IO/6-10-93. 10 APR 1.

***5 I.O. 1993 INTEREST IN SEIZED PROPERTY**--Only persons who have an interest in property at the time that it is seized have standing to file a petition for return of this property. This interest can be ownership, a lien, or actual possession of the property at the time of the seizure. However, for the purposes of determining who has standing to file a petition for the return of seized property, an "interest" in the property can not be transferred or assigned after the property had been seized.

Department of Safety v. Lauderback & Lauderback, Attorneys at Law (Donald Lewis), IO/1-6-93. 9 APR 255.

***5 I.O. 1992 THRESHOLD ISSUE**--The issue of standing is a threshold issue. If the claimant lacks standing to proceed, then the case may be dismissed without requiring the State to prove its *prima facie* case.

Department of Safety v. Billie Brock, IO/6-17-92. 10 APR 69.

***5 I.O. 1992 TITLE**--The fact that a vehicle is titled in Claimant's name gives the Claimant standing to assert a claim for return of the vehicle unless the State presents evidence to refute Claimant's ownership of the vehicle.

Department of Safety v. Wanda Gail Drummond, IO/4-14-92. 10 APR 77.

***5 I.O. 1980 BONA FIDE SECURITY INTEREST**--Innocent owners and lienholders must first establish a bona fide security interest in the seized property before they have standing to establish the statutory burden of proving lack of knowledge or consent of the illegal use of the vehicle.
One 1974 Grand Prix v. Department of Safety, IO/1-25-80; One 1969 Ford v. Department of Safety IO/7-11-78.

6. JUDICIAL REVIEW

***6 Tenn. 1986 FORFEITURE ORDER DELAY; HARMLESS ERROR**--Administrative law judge's failure to comply with statute which requires rendering of final order within 90 days after conclusion of hearing was not error affecting merits of decision that required forfeiture of truck with altered vehicle identification number, was harmless error, and, therefore, did not permit reviewing court to reverse forfeiture.
Garrett v. State, 717 S.W.2d 290 (Tenn. 1986).

***6 Tenn. 1986 SUBSTANTIVE GROUNDS FOR REVERSAL**--Only substantive errors constitute grounds for a reviewing court's reversal of an agency decision.
Garrett v. State, 717 S.W.2d 290 (Tenn. 1986).

***6 Tenn. 1984 SUBSTANTIAL AND MATERIAL EVIDENCE; AGENCY REVIEW**--In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. "Substantial and material evidence" is such relevant evidence that a reasonable mind might accept to support a rational conclusion and that would furnish a reasonably sound basis for the action under consideration.
Southern Ry. Co. v. State Bd. of Equalization, 682 S.W.2d 196 (Tenn. 1984).

***6 Tenn. 1984 REVIEW OF AGENCY DECISIONS**--T.C.A. §4-5-322(h)(5) (Supp.1989) directs the courts reviewing an administrative agency's decision to determine whether the agency's factual determinations are supported by "evidence which is both substantial and material in light of the entire record." An agency's decision should be upheld if there exists "such relevant evidence as a reasonable mind might accept to support a rational conclusion as such as to furnish a reasonably sound basis for the action under consideration."
Southern Ry. v. State Bd. of Equalization, 682 S.W.2d 196, 199 (Tenn. 1984).

***6 Tenn. 1980 FINDINGS OF FACT**--The concurrent findings of fact of the administrative law judge and the trial court are conclusive on appellate review.
C.F. Industries v. Tennessee Public Service Comm'n, 599 S.W.2d 536, 540 (Tenn. 1980).

***6 Tenn. 1980 SCOPE OF REVIEW**--The scope of review in the court of appeals is no greater than that of the trial court.
Watts v. Civil Service Board for Columbia, 606 S.W.2d 274 (Tenn. 1980).

***6 Tenn. 1977 COURT OF APPEALS REVIEW**--Review in this Court under the Uniform Administrative Procedures Act is governed by essentially the same standards as those applicable in the chancery court. See Metropolitan Gov't of Nashville & Davidson County v. Shacklett, 554 S.W.2d 601, 604 (Tenn. 1977); Humana of Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667-668 (Tenn. 1977).
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***6 Tenn. 1977 REVIEW UNDER THE UAPA**--Under the Uniform Administrative Procedures Act (UAPA), the trial court should review factual issues upon a standard of substantial and material evidence. The court is directed to consider the entire record, including any part detracting from the evidence supporting the findings of the administrative body. Nevertheless the trial court is not to review issues of fact de novo or to substitute its judgment for that of the agency as to the weight of evidence. The UAPA also contains a "harmless error" provision, stating that no agency decision in a contested case be reversed, remanded, or modified "unless for errors which affect the merits of the decision complained of."
Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664 (Tenn. 1977).

***6 Tenn. App. 1994 SCOPE OF REVIEW**--Under the Uniform Administrative Procedures Act, the trial court reviews factual issues upon a standard of substantial and material evidence. The reviewing court may not, however, substitute its judgment for that of the agency.
Ball v. Lawson, No. 01-A-01-9402-CH00075, 1994 WL 421417 (Tenn. Ct. App. August 12, 1994), citing Humana of Tennessee v. Tennessee Health Facilities Commission, 551 S.W.2d 664 (Tenn. 1977).

***6 Tenn. App. 1994 STATUTORY CONSTRUCTION**--The construction of the statute and application of the law to the facts is a question of law. Therefore, the findings of an administrative law judge with regard to questions of statutory construction and the application of law are not binding on the reviewing court.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994); Beare Co. v. Tennessee Department of Revenue, 858 S.W.2d 906 (Tenn. 1993).

***6 Tenn. App. 1993 CREDIBILITY OF WITNESSES**--Weight, faith and credit to be given to any witness' testimony lies in first instance with trier of fact, and credibility accorded to testimony by trier of fact will be given great weight by appellate court.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***6 Tenn. App. 1992 CREDIBILITY OF WITNESSES**--Where trier of fact believes one witness over other after taking into account factors that affect credibility, that finding will not be upset by reviewing court unless there is other real evidence to contrary.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***6 Tenn. App. 1992 INCONSISTENT TESTIMONY; CREDIBILITY DETERMINATION UPHELD ON REVIEW**--Where the Claimant argued that inconsistencies in the testimony of the two officers who were on the scene detract from the weight of the one officer's testimony, the reviewing court upheld the credibility determination made by the administrative law judge. The inconsistencies were found to be but one factor out of many that make up the whole question of credibility. Therefore, where the trier of fact believes one witness over the other after taking into account the factors that affect credibility, that finding will not be upset by a reviewing court unless there is other real evidence to the contrary.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338; State ex rel. Balsinger v. Town of Madisonville, 222 Tenn. 272, 282, 435 S.W.2d 803, 807 (1968).

***6 Tenn. App. 1992 RELIEF ON APPEAL; DEFAULT JUDGMENTS**--Assuming the Commissioner's order is not void, a Claimant is not entitled to relief from the default judgment when he has not shown that he has a meritorious defense to the forfeiture. However, if the Commissioner's order is void, then it may be attacked directly on appeal, and the claimant does not have to show a meritorious defense to get the order set aside. No showing of a meritorious defense is necessary to support a motion to vacate a void judgment by default.

Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***6 Tenn. App. 1992 SCOPE OF APPELLATE REVIEW OF AGENCY DECISION; EXCEPTION FOR PROCEDURAL IRREGULARITIES**--In the present case, the Claimants have based their petition for judicial review on the authorities' failure to provide them with adequate notice of the seizure of the property or of the administrative mechanism for seeking its return. In doing so, the Claimants seek to present evidence not contained in the administrative record. As a general rule, materials not contained in the administrative record should not be considered by a court reviewing an agency's decision. Judicial review of an administrative agency's decision is generally confined to the record of the proceedings before the agency. However, T.C.A. §4-5-322(g) (1991) provides that "[i]n cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court." The present case falls within this narrow exception recognized in the Uniform Administrative Procedures Act which allows the reviewing court to consider evidence not considered by the administrative agency, since inadequate notice is considered a procedural irregularity that can assume constitutional proportions. Therefore, the Claimants may present evidence not contained in the administrative record on review.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***6 Tenn. App. 1992 REVIEW OF EVIDENTIARY FINDINGS**--An administrative ruling upon the admissibility of evidence is subject to judicial review for violation of constitutional provisions.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***6 Tenn. App. 1988 SUBSTANTIAL AND MATERIAL EVIDENCE; AGENCY REVIEW**--What amounts to substantial evidence requires something less than a preponderance of the evidence, but more than a scintilla or glimmer. The "substantial and material evidence standard" set forth in T.C.A. §4-5-322(h)(5) requires a searching and careful inquiry that subjects the agency decision to close scrutiny.

Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988).

***6 Tenn. App. 1986 CONFLICTING TESTIMONY**--The administrative law judge, after viewing the witnesses and independently asserting their credibility, determined that their explanations were not persuasive. Like the administrative law judge, the reviewing court is not required to accept the claimant's "improbable and somewhat conflicting testimony."
Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***6 Tenn. App. 1986 STRICT COMPLIANCE UNDER FORFEITURE STATUTES**--Because forfeitures are not favored in the law, the state is required to proceed within the letter and spirit of the law when property is seized and declared to be contraband. Therefore, there is no undue burden on the State in requiring strict compliance with the rules when deprivation of property without reimbursement is at issue.
Miller v. Jones, No. 86-87-II, 1986 WL 10134 (Tenn. Ct. App. September 19, 1986).

***6 Tenn. App. 1985 REVERSAL; LACK OF SUBSTANTIAL EVIDENCE**--The decision of a state administrative tribunal is subject to reversal if it is unsupported by evidence which is both substantial and material in the light of the record. In determining the substantiality of evidence, the court must take into account whatever in the record fairly detracts from its weight, but the court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
Featherston v. Wood, No. 85-277-II, 1985 WL 4551 (Tenn. Ct. App. December 18, 1985).

***6 Tenn. App. 1981 REVIEW STANDARD**--Correct test for reviewing decision of the Commissioner of the Department of Safety, as well as review of chancellor's finding in review of Commissioner's decision, is whether or not there was substantial or material evidence to support decision.
Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***6 Tenn. App. 1981 SUBSTANTIAL AND MATERIAL EVIDENCE; ALJ REVIEW**--Substantial and material evidence requires less than a preponderance of evidence, but at the same time the administrative law judge's findings must be supported by more than a scintilla of evidence.
Sweet v. State Technical Institute at Memphis, 617 S.W.2d 158, 161 (Tenn. Ct. App. 1981).

***6 Ch. Ct. 1992 REVIEWING COURT'S DEFERENCE TO AGENCY**--Consideration on review must be given to the statutory recognition of the agency's experience, technical competence, and specialized knowledge.
King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992). 15 APR 334.

***6 Ch. Ct. 1992 REVERSAL ONLY FOR ERRORS WHICH AFFECT MERITS**--No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors which affect the merits of the decision.
King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992). 15 APR 334.

***6 Ch. Ct. 1992 JUDICIAL REVIEW; DUE PROCESS**--After the Commissioner overturned the initial order returning the seized vehicle to the Claimant, the Claimant appealed the Commissioner's decision, asserting that it violated due process because the Commissioner was acting as both prosecutor and judge in reviewing the administrative law judge's order. The reviewing court held that due process had not been violated by the Commissioner's review of the initial order. In the court's opinion, combining the prosecution and adjudication function in the same administrative agency did not violate due process as long as judicial review was provided.
Emert v. Department of Safety, No. 91-1358-II (Davidson County Ch. Ct. June 17, 1992). 16 APR 3.

7. EVIDENCE -- IN GENERAL

***7 Tenn. App. 1993 SUBSTANTIAL EVIDENCE**--Substantial evidence means such pertinent or relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is not sufficient that evidence create a suspicion, imagination, apprehension, inkling, intimation, hint, surmise or notion, for none of these represent a conclusion which is a reasoned judgment. Substantial must also be defined in terms of the seriousness of the issue to be decided. A reasonable person might reach a conclusion as to a trivial matter upon slight, suggestive circumstantial evidence. However, in respect to more serious matters such as the forfeiture of property because of intent to commit a criminal act of the occurrence of which no real evidence is adduced, a reasonable mind would require evidence of more substantial nature.
Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***7 Tenn. App. 1993 NO SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The Claimant's statement that he did not know whether he transported marijuana from Texas is not substantive evidence that he did or intended to transport marijuana

from Texas. The circumstances do raise an inference that Claimant took the trip to enable an unknown party to attach to his truck a container of an unknown substance which container was removed from the truck by an unknown person. However, this is not substantive evidence that Claimant did or intended to transport a controlled substance.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***7 Tenn. App. 1993 NO SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The presence on the Claimant's premises of ragweed which he apparently thought was marijuana might evidence an intent to possess marijuana, but it is not substantial evidence of transportation or intent to transport marijuana in a recently acquired vehicle. In the present case, there is no substantial evidence that the seized vehicle was used or intended for use in transportation of a controlled substance except for the presence found in his home of a minuscule amount of marijuana and a quantity of ragweed which he thought was marijuana.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***7 Tenn. App. 1993 NO SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The original information received by the officer as to the intentions of the Claimant is not shown to originate from a reliable source, hence it is not competent evidence of probable cause, and is certainly not competent substantial and material evidence of an intent to unlawfully transport illegal drugs in the seized truck. The unusual behavior of the Claimant and his explanation thereof is certainly sufficient to justify a suspicion of surreptitious illegal activity; but it is not substantial and material evidence of the illegal transportation of marijuana in the seized truck or the intent to do so.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***7 Tenn. App. 1992 SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--Officer's testimony that vehicle owner told officer that owner used vehicle to bring marijuana seeds from California to Tennessee was substantial and material evidence in proceeding for forfeiture of vehicle, notwithstanding inconsistencies in testimony of officers on scene.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***7 Tenn. App. 1992 SUBSTANTIAL AND MATERIAL EVIDENCE**--The administrative law judge's finding was predicated on the officer's statement of what the Claimant told him at the time of his arrest. The Claimant's admission to the officer is competent evidence, and while not conclusive, it does supply evidence which is both substantial and material.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***7 Tenn. App. 1992 LACK OF SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The evidence did not support the conclusion that the Claimant was either engaged in the sale of drugs at the time or was preparing to get into the business of dealing in drugs. There was also no substantial and material evidence that would support the finding that the money seized was illegal drug proceeds. The conflicting statements made by the Claimants, the denominations of the money, the way it was packaged, and the fact that a drug dog reacted to the bag in which the money was found were not considered to constitute enough evidence to find, by a more probable conclusion, that the money was composed of illegal drug proceeds.

Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992). 15 APR 294.

***7 Tenn. App. 1984 EXTRA JUDICIAL STATEMENTS**--Confession made to police at station after arrest implicating Appellant in previous drug deals was admitted into evidence by Administrative Law Judge at forfeiture hearing. Court found confession properly admitted if declarant is dead, beyond jurisdiction and subpoena reach, no motive to misrepresent is present and the declarant is in a position to know facts forming subject of the declaration.

William Hillis and Carolyn Hillis v. Gene Roberts, No. 82-2188-I (Tenn. Ct. App. April 26, 1984). 2 APR 514.

***7 F.O. 1995 MONEY FROM A THIRD PARTY**--Where claimant contended that the seized money constituted money his mother had given him earlier in a check, failure to present the check or his mother's testimony resulted in the forfeiture of the money after the administrative law judge questioned his credibility.

Department of Safety v. Samuel Brenner, IO/4-5-95. FO/4-17-95. 10 APR 84.

***7 I.O. 1995 DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANT**--Claimant's request for disclosure of the identity of a confidential informant was denied. Relying on recent caselaw, the administrative law judge determined that the identity of the informant might arguably be disclosable given that the events of which he had only direct knowledge were relied upon by the State at the hearing. However, in the absence of any request by the claimant for further proceedings at which the use of the informant as a witness might in any way aid the claimant in this case, the request for the disclosure of the informant's identity was denied.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169.

***7 I.O. 1993 CHAIN OF CUSTODY**--All that is necessary to establish a proper chain of custody in this case is competent evidence to indicate that the substance received from the Claimant was in fact the substance that the police officer ultimately delivered to the crime laboratory for analysis. While it is true that the police officers did not search the informant before or after his meeting with the claimant, as is customarily the case in this type of operation, the informant testified that the substance given to him by the Claimant was what he delivered to the police officer. Absent some evidence to the contrary, this testimony alone establishes a sufficient chain of custody for the drugs in question.

Department of Safety v. Tracey Bernard Mathis, IO/1-11-93. 10 APR 89.

***7 I.O. 1992 ATTENDANT CIRCUMSTANCES**--The trier of fact may consider common experience and the realities of normal life and may base its conclusions on all attendant circumstances.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

8. BURDEN OF PROOF

***8 Tenn. 1977 BURDEN OF PROOF; STATE**--The State has the burden of proving by a preponderance of the evidence that the property is subject to forfeiture.

Lettner v. Plummer, 559 S.W.2d 785, 787 (Tenn. 1977).

***8 Tenn. 1977 BURDEN OF PROOF NOT SATISFIED**--The finding of cash with a large quantity of controlled substances does not alone satisfy the State's burden of proof.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***8 Tenn. 1977 BURDEN OF PROOF; AGENCY SHOWING**--In proceeding to forfeit funds under 1971 Drug Control Act, burden of proof rests upon Commissioner of Safety, who must establish by preponderance of evidence, or as more probable conclusion, that property to be forfeited was received in consideration for or in exchange for controlled substance.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***8 Tenn. App. 1994 FAILURE TO MEET BURDEN OF PROOF; STATE**--Although the authorities had ample time to investigate the claim that the money belonged to the Claimant, the State made no investigation whatsoever concerning the source of the money. Although the State has the burden of proving its right to seize the funds, the State made no attempt to investigate the Claimant's claim that she borrowed the money from her employer's credit union. Since no drugs or drug paraphernalia were found in the residence, there was simply not enough evidence to connect the \$3,500.00 to the drug transactions. The Claimant is not a known drug dealer, and from a review of the record, apparently had no connection whatsoever with the drug transaction. From a review of the entire record, there is no substantial and material evidence to support the forfeiture.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994).

***8 Tenn. App. 1993 CORROBORATION OF TESTIMONY NOT REQUIRED**--Corroboration of accomplices' testimony regarding use of automobile in cocaine transactions was not required in forfeiture action which sought forfeiture of automobile, as forfeiture actions merely required proof by preponderance of evidence rather than proof beyond reasonable doubt.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***8 Tenn. App. 1993 BURDEN OF PROOF; STATE**--At the forfeiture hearing, the State shall have the burden of proving by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture under the provisions of the Tennessee Drug Control Act. Failure to carry the burden of proof shall operate as a bar to any forfeiture.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***8 Tenn. App. 1993 BURDEN OF PROOF; INNOCENT OWNER**--T.C.A. §53-11-409(a)(4)(B) places the burden of proving lack of knowledge or consent on the one claiming it.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***8 Tenn. App. 1992 PREPONDERANCE OF THE EVIDENCE STANDARD NOT MET**--The evidence did not preponderate in favor of a ruling that the \$20,000.00 was proceeds from the illicit sale of drugs or that it was otherwise subject to forfeiture under the law. At most, only a suspicion was raised. The statements of the two officers only established that 1) the \$20,000.00 was wrapped in a suspicious and unusual manner, 2) at some point, some or all of the money had come in

contact with drugs or with someone who had handled drugs, and 3) the Claimants made some conflicting statements about their circumstances and where the money came from. However, no drugs were found. No prior drug record on the part of either Claimant was produced. No drug paraphernalia was found. No testimony was produced that any actual sales had taken place. Therefore, even assuming suspicious behavior on the part of the Claimants, the above evidence was not found sufficient to sustain a ruling in the State's favor.

Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992). 15 APR 294.

***8 Tenn. App. 1992 PREPONDERANCE OF THE EVIDENCE STANDARD NOT MET**--The State did not prove by a preponderance of the evidence that the property seized was used in such a manner as to make it subject to forfeiture, because the State did not present any substantial or material evidence to establish such preponderance. There was no evidence in the record to support the State's contention that the Claimants have ever engaged in illegal drug traffic. Without such evidence, the court was unwilling to impute criminal activity to the Claimants based upon the sniff of a dog, arrangement of money, or inconsistencies in the Claimants' statements.

Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***8 Tenn. App. 1992 EXCLUSIONARY RULE'S EFFECT ON STATE'S BURDEN**--Without the excluded evidence, the State has not carried its burden of proving by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture. Absent any independent evidence unconnected to the illegal search, such failure operates as a bar to any forfeiture.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***8 Tenn. App. 1992 BURDEN OF PROOF; INNOCENT OWNER; KNOWLEDGE**--An innocent owner seeking to reclaim the seized vehicle need only prove a lack of actual knowledge that the vehicle was being used illegally. The stricter standard of a lack of knowledge or reason to believe does not apply to forfeiture proceedings.

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***8 Tenn. App. 1992 BURDEN OF PROOF; INNOCENT OWNER**--Once the State establishes a *prima facie* case that the seized vehicle is subject to forfeiture, in order to establish a claim as an innocent owner, the Claimants must show that 1) they have an interest acquired in good faith and 2) they had no knowledge that the automobile would be used in violation of the Drug Control Act and did not consent to such use.

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***8 Tenn. App. 1990 EXCLUSIONARY RULE; STATE'S BURDEN OF PROOF**--The sufficiency of the search warrant is a relevant issue in a forfeiture proceeding. A search warrant's legality is irrelevant in determining whether or not a forfeiture proceeding should be instituted. However, it is relevant in determining whether the State has established grounds for forfeiture. The exclusionary rule is just as applicable to forfeiture proceedings as it is to criminal proceedings. Thus, the State may not use evidence obtained under an invalid search warrant to establish that the seized property was being possessed or used in violation of the Tennessee Drug Control Act.

Claybrooks v. Department of Safety, No. 89-150-II, 1990 WL 8641 (Tenn. Ct. App. February 7, 1990). 15 APR 274.

***8 Tenn. App. 1989 STORAGE FEES; CLAIMANT'S BURDEN OF PROOF**--Absent some proof to the contrary, a presumption exists that the costs assessed to the Claimant for the storage of his seized property were reasonable. The burden of proof is on the Claimant to prove that the storage costs were either excessive or unreasonable.

Hull v. Lawson, No. 89-206-II, 1989 WL 130601 (Tenn. Ct. App. November 3, 1989).

***8 Tenn. App. 1981 PREPONDERANCE OF THE EVIDENCE; STATE'S BURDEN OF PROOF**--In a proceeding to forfeit funds under the Drug Control Act, the burden of proof rests upon the state, which must establish by a preponderance of the evidence, or as the more probable conclusion, that the money to be forfeited was received in consideration for or in exchange for a controlled substance.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***8 OAG 1986 PRIMA FACIE CASE; BURDEN ON THE STATE**--In a State of Tennessee forfeiture proceeding, as opposed to a federal proceeding, the burden of proving a *prima facie* justification for the confiscation of property rests on the State. Despite the deletion by Chapter 738, Public Acts of 1986, of the language in T.C.A. §53-11-201(d) that placed the burden of proof on the State, the State retains the burden of proof in confiscation proceedings. However, the State is not required to establish that no exception or exemption provided by the Act applies in a particular case.

1986 Op. Tenn. Att'y Gen. No. 86-127 (July 21, 1986).

***8 F.O. 1995 SUSPICIOUS CIRCUMSTANCES ALONE DO NOT SUPPORT FORFEITURE**--The claimant was arrested at the airport after the police found that her airline ticket purchase was typical of drug couriers with regard to its destination. A search was conducted, and \$2,855 seized along with some marijuana. The administrative law judge determined that the State failed to prove that the seized money originated from the sale of drugs or was intended to be used to purchase drugs. The suspicious circumstances surrounding the claimant's ticket purchase provided grounds for inquiry into the situation, but these circumstances alone did not prove drug sale activity. In the administrative law judge's opinion, the amount of marijuana seized from the claimant's suitcase did not add significantly to the circumstantial nature of the State's evidence; rather, the amount suggested that it was for personal use. Therefore, the seized money was returned to the claimant.
Department of Safety v. Maria Antonia Rios, IO/2-23-95. FO/3-6-95. 10 APR 108.

***8 F.O. 1995 BURDEN OF PROOF; INNOCENT OWNER**--The Claimant claimed a security interest in the vehicle. After the State established that the vehicle was subject to forfeiture for transporting drugs, the burden of proof fell upon the Claimant to establish that he had a security interest in the vehicle and had neither knowledge nor consented to the illegal use of the vehicle. The Claimant failed to establish any security interest in the seized vehicle, thus rendering moot his knowledge or consent burden.
Department of Safety v. Karen L. Kovek and James E. Pailin, IO/2-8-95. FO/2-21-95. 10 APR 115.

***8 F.O. 1995 BURDEN OF PROOF; INNOCENT OWNER**--Once the State establishes a *prima facie* case that the seized vehicle is subject to forfeiture, the Claimant must show that she has an interest acquired in good faith and that she neither had knowledge or nor consented to the illegal use of the vehicle.
Department of Safety v. Sharon L. Hansel, IO/1-10-95. FO/1-20-95. 9 APR 23.

***8 F.O. 1994 SPECULATION DOES NOT SUPPORT FORFEITURE**--The State failed to prove that the seized vehicle was used to facilitate a passenger's drug purchase from an undercover officer. While it is true that the Claimant drove his passenger to the site of the drug deal and dropped him off, there was no proof, apart from the speculation of the officer, as to whether or not the Claimant even knew that his passenger's intention was to purchase drugs at the location in question. The State could not prove that the Claimant intended to facilitate his passenger's purchase of drugs since no drugs were found on the Claimant or in his vehicle at the time it was seized. The only connection between the Claimant and the illegal drug transaction was that the Claimant had given his passenger a ride to the location of the purchase. The Claimant testified that he had no idea that his passenger intended to buy drugs, and the testifying officer could only provide speculation to the contrary. This speculation on the part of the officer was not considered sufficient to support a forfeiture of the seized vehicle.
Department of Safety v. William A. Key, IO/11-4-94. FO/11-14-94. 10 APR 122.

***8 F.O. 1993 INTENT TO TRANSPORT DRUGS; STATE'S BURDEN OF PROOF**--The fact that drugs are found in or on a vehicle, by itself, may in some circumstances meet the burden of proof as to the intended use of the vehicle to transport drugs. However, in the present case, this fact combined with the location of the vehicle at the time of the seizure (parked inside a hangar) and the testimony of the Claimant that the vehicle had never been used to transport drugs did not support a forfeiture. While the credibility of the testimony of the Claimant may seriously be questioned, the State produced no evidence to contradict it. Therefore, the State did not meet its burden of showing that the Claimant drove to a specific location with the intent to transport drugs.
Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***8 F.O. 1993 INTENT TO RECEIVE DRUGS; STATE'S BURDEN OF PROOF**--The State has the burden of proof to show that the Claimant drove to a specific location with the intent to receive drugs. The statements of the Claimant alone will not support a forfeiture.
Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***8 F.O. 1984 TRANSPORTATION AND FACILITATION**--The state has burden to prove aircraft used to transport or in any matter facilitate the transfer for the purpose of sale or receipt of a controlled substance. Claimants have burden to prove lack of knowledge of such illegal use. Both parties carried burden and aircraft was ordered returned to Petitioners.
Department of Safety v. Coy A. Lewis and Jack Sloan, IO/8-30-83. FO/4-19-84. 2 APR 461.

***8 F.O. 1983 LIENHOLDER**--To claim a lienhold exemption the claimant must establish a bona fide security interest in the vehicle and lack of knowledge of its illegal use by a preponderance of the evidence.
Department of Safety v. Louis Packard, IO/7-21-83. FO/10-10-83. 2 APR 422.

***8 F.O. 1983 LACK OF ACTUAL KNOWLEDGE; BURDEN OF PROOF**--Claimant who claims an exception to forfeiture in legally seized property must prove by a preponderance of the evidence a lack of knowledge of illegal activities or the forfeiture will be sustained.

Department of Safety v. Lisa Cooper, IO/3-24-83. FO/4-13-83. 1 APR 285.

***8 I.O. 1994 ABORTED DRUG SALE**--Although no sale of marijuana occurred after the Claimant grew suspicious and aborted the drug deal, the State carried its burden of proof that the Claimant clearly intended to use his vehicle to facilitate the drug sale with an informant and undercover police officer. However, the State did not meet its burden with regard to the forfeiture of \$105 since there was no direct connection between the seized money and a drug sale. A potential transaction that never materialized could not be speculated as grounds for the forfeiture of the money.

Department of Safety v. Kenneth S. Doshi, IO/9-14-94. 10 APR 122.

***8 I.O. 1994 NO PROOF OF DRUG EXCHANGE**--Where an arresting officer witnessed, from 100 yards away, what appeared to be an illegal drug transaction, a quick glance at night, without proof that drugs were actually exchanged, was not enough to support forfeiture of the seized vehicle.

Department of Safety v. Gregory A. Caplinger, IO/8-24-94. 10 APR 131.

***8 I.O. 1994 STATE'S FAILURE TO SUSTAIN BURDEN OF PROOF**--Where the amount of drugs seized was so small that it could not be scraped up to be tested and where there was no proof of sales activity by the Claimant, it was determined that the State had not met its burden of proof to sustain a forfeiture of the seized vehicle.

Department of Safety v. Michael Scott, IO/8-10-94. 10 APR 138.

***8 I.O. 1994 FACTORS TO CONSIDER**--Among the factors which may be considered in determining whether the State has met its burden are:

1. Whether the money was found in close proximity to the illegal drugs;
2. Whether marked money was found with the other money;
3. Whether the Claimant was unemployed;
4. Whether there is evidence or records of a large-scale drug operation;
5. Whether the Claimant is associated with known traffickers or users;
6. The quantity of the money involved;
7. The quantity of the drugs involved;
8. The packaging of the drugs; and
9. The prior records of those involved.

Department of Safety v. Michael Wertenberg, IO/8-5-94. 10 APR 146.

***8 I.O. 1994 STATE'S FAILURE TO MEET BURDEN OF PROOF**--Although large amounts of hidden money and guns were discovered as well as an electronic transmission detection device, the State did not establish that the money seized was sufficiently related to drug sales to render it forfeitable. Considering that only a very small amount of marijuana was found and that there was no proof of sales activity other than the Claimant's ten-year-old drug conviction, the Administrative Law Judge determined that the drug dog's "indications" and the conflicting statements by the Claimants as to its source and ownership were not sufficient to establish a case for forfeiture. Therefore, the Claimant's motion to dismiss was granted, and the money was returned to the Claimant.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***8 I.O. 1994 CAUSAL LINK REQUIRED**--The Administrative Law Judge determined that there was no proof on the record to establish a causal link between several items seized from the Claimant on four different occasions and the sale of drugs proven on one occasion. The State offered proof of only one isolated transaction that connected the Claimant to the sale of drugs. However, three weeks passed after this drug transaction before any attempt was made by the police to search the

Claimant or his dwelling. When the Claimant's car and apartment were searched, the police did not produce any evidence which showed that the Claimant was involved in drug sales. Since no drugs or drug paraphernalia were found in the Claimant's possession, in his vehicle, or in his apartment and since he was never searched immediately after the single drug transaction, no evidence existed to support the State's claim that the \$2,242.00 in cash, the jewelry, the pager, or the mobile telephone had been received in exchange for drugs or purchased with drug proceeds or that the pager and telephone were used to facilitate a drug transaction. The single drug sale attributed to the Claimant was too far removed in time to provide a basis for forfeiting the items seized from the Claimant. The enumerated items were ordered to be returned to the Claimant.

Department of Safety v. William M. Boyd, IO/5-17-94. 10 APR 152.

***8 I.O. 1994 BURDEN OF PROOF**--The due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt does not apply to civil forfeiture proceedings. Rather, civil preponderance of the evidence has been upheld as the standard of proof in forfeiture proceedings.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***8 I.O. 1993 STATE STANDARD**--The standard the State must meet in forfeiture proceedings requires that it prove the property is forfeitable under the law by a "preponderance of the evidence."

Department of Safety v. James A. Ruble, IO/11-4-93. 10 APR 159.

***8 I.O. 1993 INTENT TO RECEIVE DRUGS; BURDEN ON STATE**--The State has the burden of proof to show that the Claimant drove to a specific location with the intent to receive drugs. See Moody v. Department of Safety, FO/8-31-93.

Department of Safety v. James A. Ruble, IO/11-4-93. 10 APR 159.

***8 I.O. 1993 STATE HAS THE BURDEN TO PROVE INTENT**--The State has the burden of proof to show that the Claimant drove to the location with the intent to receive drugs. Where the State did not prove that the Claimant drove to a specific location with the intent to receive illegal drugs or with the knowledge that there would be illegal drugs in the package he accepted, no forfeiture can be supported since the State has not met its burden of proof.

Department of Safety v. James A. Ruble, IO/11-4-93. 10 APR 159.

***8 I.O. 1993 CONNECTION BETWEEN MONEY AND DRUGS REQUIRED**--The State does not carry its burden of proof to support a forfeiture if there is no evidence presented that the seized money was connected to the sale of a controlled substance. The State is not required to trace money or proceeds to specific drug sales, but there must be some proven nexus to connect the seized property with drug sale activity. In the present case, since the testifying agent had no knowledge of how or where the money was found in the Claimant's residence, the finding of cash with a large quantity of controlled substances did not alone satisfy the burden of proof.

Department of Safety v. Able Eugene Hamon, IO/7-9-93. 10 APR 174.

***8 I.O. 1993 BURDEN OF PROOF; DRUG PROCEEDS**--Among the factors which may be considered in determining whether the State has met its burden of proof with regard to the forfeiture of seized currency are:

1. Whether the money was found in close proximity to the illegal controlled substance;
2. Whether marked money was found with the other money;
3. Whether the Claimant was unemployed and there is no legitimate source for the money;
4. Whether there is evidence or records of a large scale drug operation;
5. Whether Claimant is associated with known traffickers or users;
6. Whether Claimant has a prior record of drug law violations;
7. The quantity of the money involved;
8. The packaging of the drugs; and

9. The prior records of those involved in the drug transaction.
Department of Safety v. Corey Lamont Sparkman, IO/4-14-93. 10 APR 183.

***8 I.O. 1993 LACK OF ACTUAL KNOWLEDGE; BURDEN OF PROOF; INNOCENT OWNER**--The burden of proof is on the individual claiming to be the innocent owner of the seized vehicle to establish that the vehicle was used in violation of the drug laws without his knowledge or consent.

Department of Safety v. Kathy Jean Douglas, IO/3-22-93. 10 APR 190.

***8 I.O. 1993 PREPONDERANCE OF THE EVIDENCE STANDARD**--The possibility that some indefinite amount of money may be used at some unspecified point in the future to purchase an undefined amount of drugs did not satisfy the State's burden of proof that the money should be seized because it was "intended to be furnished in exchange for a controlled substance." Since the State was unable to distinguish which part of the money was possibly intended for use to buy drugs, forfeiture of the entire sum was not warranted. The possibility that money was intended to be used to buy drugs did not meet the standard of proof (preponderance of the evidence) required to support a forfeiture. This was especially true when the alleged possible future buyer was a small user who might, at most, spend a very small portion of the money at issue on drugs.

Department of Safety v. Ricky D. Zehringer, IO/2-5-93. 10 APR 197.

***8 I.O. 1992 FAILURE TO APPEAR**--T.C.A. §53-11-201(a) states that whenever a claim is filed by an owner or other person asserting the interest of the owner, for any property seized, the claim shall not be allowed unless and until the Claimant proves that he 1) has an interest in such property acquired in good faith and 2) had at no time any knowledge or reason to believe that it was being or would be used in violation of the drug laws. By failing to appear at the hearing, the Claimant fails to establish any interest in the seized vehicle.

Department of Safety v. Teresa and James King, IO/10-16-92. 10 APR 218.

***8 I.O. 1992 CLAIMANT'S FAILURE TO APPEAR**--Failure to appear subjects the vehicle to forfeiture since the Claimant can not carry his burden of proof.

Department of Safety v. Billie Brock, IO/6-17-92. 10 APR 69.

***8 I.O. 1992 CONNECTION BETWEEN PROPERTY AND DRUGS REQUIRED**--The mere presence of relatively large sums of money found at the same time as controlled substances does not satisfy the State's burden of proof because no connection was shown between the money and any drug transaction. Even more so, the mere wearing of jewelry does not meet the State's burden. To hold otherwise would render all property owned by any claimant subject to forfeiture upon the showing that the claimant had been involved in a drug deal.

Department of Safety v. Robert S. Brennan, IO/5-15-92. 10 APR 225.

***8 I.O. 1992 STATE HAS THE BURDEN TO PROVE INTENT**--The plain reading of T.C.A. §53-11-451(a)(4) makes it evident that before a party can be in violation of the statute, there must be an intent on the part of the individual to facilitate activities in violation of the Tennessee Drug Control Act. Absence of intent on the part of an individual protects such an individual from the confiscation provisions of the statute. For example, if it is determined that the Claimant was not aware of the presence of drugs in her purse, no intent to violate the statute can be found to exist.

Department of Safety v. Wanda Gail Drummond, IO/4-14-92. 10 APR 77.

***8 I.O. 1992 BURDEN OF PROOF**--Where the proof shows the possession of a small amount of drugs in the vehicle but no evidence of any sales activity connected to the vehicle, the State's burden of proof is not satisfied under the authority of Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989). The mere possibility that the drugs could have been sold or might be sold in the future does not meet the State's burden of proof by a preponderance of the evidence.

Department of Safety v. Louise Hale, IO/3-19-92. 10 APR 232.

***8 I.O. 1983 FAILURE TO SUSTAIN BURDEN; INNOCENT OWNER**--Owner did not carry her burden of proving that she, at no time, had knowledge or reason to believe that her vehicle was being used in violation of narcotic and drug laws when she had previously been warned by the police that her friend was using her car to transport drugs for resale.

Department of Safety v. Bradley, IO/9-6-83. 2 APR 480.

9. PRESUMPTIONS AND INFERENCES

***9 Tenn. 1977 PROXIMITY OF CASH TO DRUGS; INFERENCE OF DRUG SALE ACTIVITY**--While the finding of cash with a large quantity of controlled substances does not alone satisfy the burden of proof, there are, in the present case, numerous additional circumstances from which inferences favorable to the contentions of the State could be drawn.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***9 Tenn. 1977 INFERENCES FROM CIRCUMSTANTIAL EVIDENCE**--Any fact may be established by direct testimony, circumstantial evidence, or both. The trier of fact may draw reasonable and legitimate inferences from established facts.
Lettner v. Plummer, 559 S.W.2d 785, 787 (Tenn. 1977).

***9 Tenn. 1977 INFERENCES FROM ADDITIONAL CIRCUMSTANCES TO SUPPORT FORFEITURE**--Inferences from additional circumstances can be drawn in favor of the Commissioner's contentions regarding forfeiture.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***9 Tenn. App. 1994 DRUG PROCEEDS, INFERENCE OF**--Although the cash was seized from the Claimant's wallet at the time of his arrest, it was not marked to indicate that it had been used in the drug transaction on the date of his arrest or the one that occurred the day before. However, the record contained uncontroverted evidence that the Claimant was known as a drug dealer and had been for some time. The Claimant testified concerning various types of odd jobs that he had held since his release on parole in 1989, but he could not pinpoint his work activities for the time immediately preceding his arrest, and it is clear that in order for the Claimant to sell cocaine he must acquire it, which, of course, requires funds. In view of the close proximity of the funds to the actual narcotics transactions, and the continuing nature of his operation as a drug dealer, there could arise an inference that the money was used to continue his dealing in drugs.
Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994).

***9 Tenn. App. 1993 INFERENCE BUT NO SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The Claimant's statement that he did not know whether he transported marijuana from Texas is not substantive evidence that he did or intended to transport marijuana from Texas. The circumstances do raise an inference that Claimant took the trip to enable an unknown party to attach to his truck a container of an unknown substance which container was removed from the truck by an unknown person. However, this is not substantive evidence that Claimant did or intended to transport a controlled substance.
Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***9 Tenn. App. 1981 INFERENCE OF DRUG SALE NOT FOUND**--Evidence that automobile owner, at time of police officer's investigation into accident in which owner was involved, possessed nine tablets of methaqualones and \$873 in cash, was unemployed, and was familiar with members of the vice squad was insufficient to sustain forfeiture of automobile and currency on inference that owner possessed the tablets for resale.
Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***9 F.O. 1995 INFERENCE OF FACILITATION OF DRUG SALE**--Given the large quantity of marijuana and the appearance of the marijuana as having been cut from a larger bale, it was inferred that the marijuana had been received for purposes of resale and that the seized vehicle was being used to facilitate the sale of marijuana.
Department of Safety v. Marcus Lashon Jones, IO/6-19-95. FO/6-29-95. 19 APR 15.

***9 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Given the relatively large amounts of cash possessed by the claimant who was otherwise unemployed, the lack of any credible explanation by the claimant for its possession, and the claimant's failure to pursue his claim for return of the property, a presumption emerged that the seized money constituted drug proceeds and subject to forfeiture.
Department of Safety v. Jon H. Davis, IO/5-22-95. FO/6-1-95. 10 APR 239.

***9 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Given the quantity of drugs seized, the packaging of the drugs, the quantity of money seized, the presence of a gun at the time of seizure, and the claimant's previous record relating to illegal drug activity, the administrative law judge determined that the money seized represented drug proceeds and was subject to forfeiture.
Department of Safety v. Marquise Waller, IO/4-6-95. FO/4-17-95. 10 APR 245.

***9 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Forfeiture of the seized vehicle was ordered after the claimant and his companions were found to be drug dealers transporting marijuana for resale based upon the discovery of two bags of marijuana in the vehicle, the notepad of purported drug transactions, the pagers, the guns, and the unemployed status of the

claimant and his companions. Likewise, the lack of employment in conjunction with the other evidence raised a presumption that the source of the seized money was from illegal drug sales.

Department of Safety v. William P. Airhart, IO/3-8-95. FO/3-20-95. 10 APR 252.

***9 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--The quantity of money seized created a presumption that it was linked to drug sale activity. Since the amount of money was evenly divisible by \$20 and crack cocaine sells for \$20 a rock, the money was forfeited as drug proceeds.

Department of Safety v. Robert D. Parker, IO/3-8-95. FO/3-20-95. 10 APR 260.

***9 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--The facts of this case clearly established that the claimant was involved in the purchase and sale of cocaine since he had no other credible means to support himself or to explain the source of the seized money. Given the circumstances at the time of the money's seizure, the administrative law judge determined that the claimant's income was derived from drug sales. The main factors weighing in this finding were 1) the claimant's unemployed status, 2) the lack of a credible explanation for the amount or source of the seized money, 3) the claimant's own admission that he was the person behind the instant purchase, and 4) the claimant's statement that he was intending to sell cocaine. Consequently, the seized money was forfeited as proceeds of drug sale activity.

Department of Safety v. Gary Don Ray, IO/3-8-95. FO/3-20-95. 10 APR 267.

***9 F.O. 1995 PRESUMPTION THAT DRUGS PURCHASED FOR RESALE**--Although Claimant contended that she purchased the large amount of marijuana, not intending to sell it, but to realize savings over making numerous buys, the more probable finding was that the marijuana was purchased for the purpose of resale, judging from the amount purchased and its value.

Department of Safety v. Karen L. Kovek and James E. Pailin, IO/2-8-95. FO/2-21-95. 10 APR 115.

***9 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--Where the Claimant is not gainfully employed in any business other than drug trafficking, there is a presumption that the seized money constitutes drug proceeds.

Department of Safety v. Marguerite Carroll, IO/12-6-94. FO/12-16-94. 10 APR 274.

***9 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--Although there was no direct evidence presented at the hearing to establish that any of the \$643 was the proceeds of any particular drug sale, the preponderance of the evidence showed that the Claimant was involved in drug sale activity and that the money seized was the proceeds of such activity. The cocaine and drug scales found on his person, along with the large sum of money in denominations characteristic of drug sale activity, supported this conclusion. While it was possible that some of the money may have had a legitimate source and purpose, any such money was so co-mingled with the money considered drug proceeds as to make the entire amount forfeitable under the law.

Department of Safety v. James Cox, IO/10-31-94. 10 APR 284. IO/11-2-94. 10 APR 292. FO/11-10-94.

***9 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--The conclusion that the money seized from the Claimant constituted drug proceeds was supported by the following factors: 1) a large amount of drugs were seized along with the money; 2) drug scales were seized at the same time; 3) the Claimant was unemployed at the time of his arrest; and 4) Claimant's explanations as to the legitimate source of the money were not considered credible.

Department of Safety v. Danny Teague, IO/10-28-94. FO/11-7-94. 10 APR 300.

***9 F.O. 1984 AMOUNT OF DRUGS**--It may be inferred from the amount of controlled substance seized that it was possessed for resale. This is a rebuttable presumption and is based on all the surrounding factors.

Department of Safety v. Roger D. Gooslin, IO/10-9-84. FO/11-22-84. 4 APR 751.

***9 F.O. 1984 FAILURE TO TESTIFY**--Claimant's invocation of Fifth Amendment privilege against self-incrimination leaves trier of fact free to conclude that the Claimant's testimony would be unfavorable to him and favorable to opposing party.

Department of Safety v. James Campbell, IO/9-25-84. FO/10-9-84. 4 APR 719.

***9 F.O. 1984 PRESUMPTION BASED ON INVOCATION OF FIFTH AMENDMENT**--Trier of fact in a civil case may conclude when a witness invokes the Fifth Amendment that his testimony would be unfavorable to him.

Eugene Culver v. Department of Safety, IO/7-12-84. FO/8-7-84. 4 APR 588.

***9 I.O. 1995 CO-MINGLED WITH MARKED MONEY**--The State carried its burden the proving that the seized money was proceeds from a drug sale since the money was found in close proximity to marijuana obviously packaged for sale and the money was intermingled with marked money used by the police to purchase marijuana.

Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***9 I.O. 1994 NO INFERENCE OF DRUG MONEY**--In the present case, the proof did not establish that the seized money was used in violation of the statute. It was clear from the record that the money was not used to purchase drugs since the Claimant had the money after the purchase. Moreover, there was no proof from which one could infer that the money was intended to be later used to purchase drugs. Since there was also no proof that the seized money constituted drug money and since there was no proof of any prior drug dealing by the Claimant, the money was ordered returned to the Claimant. The fact that the Claimant possessed a pager was not sufficient proof that he was a drug dealer.

Department of Safety v. Roger Sexton, IO/8-10-94. 10 APR 316.

***9 I.O. 1994 PRESUMPTION OF DRUG DEALING**--The amount of drugs and their packaging, along with the presence of an electronic paging device, constituted convincing evidence that the Claimant was engaged in selling drugs.

Department of Safety v. Teryl Ward, IO/6-30-94. 10 APR 324.

***9 I.O. 1994 INTENT TO SELL; INFERENCE OF**--Since the State offered no proof of any sale or sales activity on the part of the Claimant even though drugs were found in the Claimant's possession, the seized currency was ordered returned to the Claimant. The Administrative Law Judge determined that no intent to sell can be inferred from the amount of drugs seized. Therefore, there was no basis to infer the seized money was the proceeds of a drug sale.

Department of Safety v. Larry D. Ware, IO/6-22-94. 10 APR 332.

***9 I.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--In the present case, the Claimant's only known source of income derived from the sale of drugs. Absent any explanation from the Claimant and in light of the close proximity of the seized money to marked undercover drug money in the Claimant's possession, the Administrative Law Judge determined that the seized money constituted drug proceeds in violation of the Tennessee Drug Control Act.

Department of Safety v. Darrell Ferris, IO/6-13-94. 10 APR 339.

***9 I.O. 1994 INTENT TO SELL**--The fact that the Claimant possessed a beeper was highly relevant to the issue of whether the Claimant possessed cocaine with the intent to sell. The beeper was forfeited after it was determined that the Claimant possessed the beeper for the purpose of facilitating his involvement in drug trafficking.

Department of Safety v. Brent A. Blye, IO/6-6-94. 10 APR 346.

***9 I.O. 1994 PRESUMPTION OF DRUG DEALING**--A presumption existed that the Claimant was involved in the sale of drugs since the amount of cocaine seized was more than would normally be possessed by an individual for personal use. Moreover, the discovery of three gold rings in an envelope inside the Claimant's wallet suggest that these rings had been received in exchange for drugs, as opposed to being personal jewelry that the Claimant would be wearing. The loaded pistol found on the floorboard of the Claimant's vehicle was forfeited as equipment since it was presumably used by the Claimant to protect himself during his drug transactions.

Department of Safety v. Myles Jerry Hayes, IO/5-23-94. 11 APR 1.

***9 I.O. 1993 LARGE SUMS OF MONEY**--While the finding of large sums of money alone, or with controlled substances, would not, by itself, support a forfeiture of such money absent additional circumstances, inferences may be drawn from the circumstantial evidence to support the forfeiture of money. The money need not be traced to specific sales.

Department of Safety v. Page G. Stuart, et al., IO/12-22-93. 11 APR 9.

***9 I.O. 1993 UNEMPLOYED WITH LARGE AMOUNT OF DRUGS**--Where Claimant was 1) unemployed for considerable period of time and 2) found with a large amount of marijuana (in this case, \$10,000 worth), it was deduced, from these facts, that the Claimant's money was traceable to drug proceeds. Even if the money was not drug proceeds, it is still subject to forfeiture when it is considered travel money being used in facilitation of the sale or transportation of illegal drugs.

Department of Safety v. Steven Dyer, IO/11-15-93. 11 APR 46.

***9 I.O. 1993 AMOUNT AND PACKAGING OF DRUGS**--The 8.8 grams of cocaine found on the Claimant's person suggest that he was engaged in the sale of cocaine. Such an amount, in three different packages, indicates that the cocaine found was intended for sale rather than merely personal use.

Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***9 I.O. 1993 PACKAGING OF DRUGS**--The packaging of the marijuana, combined with the amount in each bag and the U.S. currency located on the Claimant's person, clearly indicates involvement in drug trafficking. It is common knowledge that such packaging is often used by street dealers.

Department of Safety v. Foster Norwood, IO/7-8-93. 11 APR 84.

***9 I.O. 1993 PACKAGING OF DRUGS**--Since marijuana is customarily bought and sold on the street in plastic baggies in one-quarter ounce amounts, the presence of the four baggies containing one-quarter ounce each, coupled with the quantity of empty baggies contained in the same paper bag, supports the State's theory that the Claimant was actively engaged in the sale of marijuana. Absent any evidence to the contrary, the Administrative Law Judge finds the State's theory to be reasonable and adopts it.

Department of Safety v. Michael Mabrey, IO/7-8-93. 11 APR 91.

***9 I.O. 1993 SMALL AMOUNT OF DRUGS, NO CRIMINAL RECORD**--A forfeiture can not be sustained where 1) only very small amounts of drugs were found in the residence, 2) there was no evidence of drug sales by the claimant, and 3) the claimant had no criminal record and has been employed for several years.

Department of Safety v. Freddie Lee Jones, IO/6-10-93. 10 APR 1.

***9 I.O. 1993 INCOMPATIBILITY OF SEVERAL DRUGS**--Drugs are presumed to be for sale when several of the drugs are 1) not compatible with each other or 2) not commonly abused together by the same person due to their conflicting chemical properties.

Department of Safety v. Roy E. Crain, IO/5-24-93. 11 APR 97.

***9 I.O. 1993 LONG DISTANCE TRANSPORTATION AND DRUG REPUTATION**--The fact that the marijuana had been transported several hundred miles by an individual with a prior history of violations of another state's drug control act and was given to an individual in Tennessee with a reputation of prior drug law violations supports the presumption that the marijuana was not intended for personal use but was contraband intended to be sold in violation of the Tennessee Drug Control Act.

Department of Safety v. Kathy Jean Douglas, IO/3-22-93. 10 APR 190.

***9 I.O. 1993 POSSESSION OF BEEPER**--The fact that the Claimant possessed a beeper was highly relevant to the issue of whether he possessed the cocaine with the intent to sell.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

***9 I.O. 1992 CARRYING CASH**--Carrying a large sum of cash is strong evidence of the cash's relationship to illegal drug transactions even without the presence of drugs or drug paraphernalia.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

***9 I.O. 1992 INFERENCE OF CRIMINAL ACTIVITY**--The reputation of an area for criminal activity may be relied on to support an inference of criminal activity, and so may varying and conflicting accounts given by the claimant.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

***9 I.O. 1992 PRESUMPTION OF INTENTION TO PURCHASE DRUGS**--The money in question that was found on the Claimant's person had been co-mingled with the money that was used to make the illegal drug purchase. In the absence of any other explanation, this co-mingling raises the presumption that the money found on the Claimant's person constituted something of value intended to be furnished in exchange for drugs in violation of T.C.A. §53-11-451(a)(6)(A).

Department of Safety v. Jerry Mathis, IO/8-6-92. 11 APR 77.

***9 I.O. 1992 PRESUMPTION OF DRUG OWNERSHIP**--Where drugs are found in a vehicle, there is a rebuttable presumption that the drugs belong to the owner of the vehicle. The only way to convincingly rebut this presumption is for a passenger in the vehicle to testify that 1) he put the drugs in the vehicle and 2) the drugs did not belong to the owner of the vehicle.

Department of Safety v. Jack Pierson, IO/5-5-92. 11 APR 114.

***9 I.O. 1992 PRESUMPTION OF DRUG PROCEEDS**--The claimant established no legitimate source for the seized money. The claimant's attempted sale of marijuana to the police officer, his possession of the marijuana at the time of arrest, and his past record are convincing that he is in the business of trafficking in marijuana and that the seized money he was carrying came from his sales.

Department of Safety v. David T. Atkins, IO/4-23-92. 15 APR 267.

***9 I.O. 1992 ABSENCE OF EXPLANATION**--The close proximity of the marijuana to the large sum of seized money raises a presumption that the money represents something of value furnished or intended to be furnished in a transaction in

violation of T.C.A. §53-11-451(a)(6)(A). In the absence of any reasonable explanation concerning the legitimate source of or the intended use of the money, such a presumption must prevail.

Department of Safety v. Jane L. Chafin, IO/4-22-92. 11 APR 123.

***9 I.O. 1992 LARGE AMOUNT OF DRUGS AND LOCATION OF VEHICLE**--It can be concluded by a preponderance of the evidence that the defendant drove the vehicle to Middle Tennessee for the intended purpose of transacting the drug deal, thus making the vehicle subject to forfeiture, when 1) the defendant resides in East Tennessee and was convicted of buying a large amount of drugs in Middle Tennessee (Franklin) and 2) on the date of the drug deal, the defendant's vehicle was found to be in Middle Tennessee (Lebanon), and 3) an adverse inference can be imputed when the defendant fails to testify.

Department of Safety v. Titus Allen Reed, IO/4-15-92. 11 APR 130.

10. ADMISSIBILITY OF EVIDENCE

***10 Tenn. 1977 TESTIMONY OF INVESTIGATING OFFICERS; ADMISSIBILITY**--Contrary to contention that testimony adduced in proceeding to forfeit funds under 1971 Drug Control Act was inadmissible hearsay, testimony of investigating officers as to reputation of four persons found on premises where funds were confiscated by police was based on investigating officers' personal knowledge, not upon hearsay or rumor. The court held that such testimony was admissible in forfeiture proceeding even if hearsay.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***10 Tenn. App. 1992 ADMISSIBILITY OF DRUG DOG SNIFF**--Dog-tracking evidence, standing alone, is insufficient to support a conviction. Although, the behavior of an animal, alone, is insufficient to support a finding of criminality, it is corroborative. Therefore, this type of evidence is admissible to support the weight of other evidence.

Fullenwinder v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***10 Tenn. App. 1986 HEARSAY**--The claimants argue that the administrative law judge's decision should be set aside because it relies upon Richardson's out-of-court statements made at the time he was arrested. Richardson told the officers that he was delivering cocaine for Campbell. This is without merit for two reasons. First, there is overwhelming evidence of Campbell's possession of cocaine independent of Richardson's testimony. Second, Richardson's testimony, even if hearsay, was admissible pursuant to T.C.A. §4-5-313(1) if it possessed probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. Therefore, Richardson's statement was certainly admissible to show probable cause for stopping Campbell's automobile.

Campbell v. State, No. 85-205-II, 1986 WL 10690 (Tenn. Ct. App. October 1, 1986).

***10 Tenn. Crim. 1991 ADMISSIBILITY OF POLICE TAPE RECORDING**--There is no expectation of privacy in the back of a police car. Consequently, the tape recording that was surreptitiously made is admissible evidence.

State v. Mathis, No. 92-A-396 (Tenn. Crim. Ct. May 1, 1991).

***10 F.O. 1995 DISPUTED TOXICOLOGY REPORT**--Claimant lodged an objection to a toxicology report offered into evidence by the State on the basis that the report contained an inaccurate measurement of the weight of the seized marijuana. Since the claimant did not dispute the identity of the material tested as marijuana, the administrative law judge ruled that the toxicology report was admissible as evidence. The administrative law judge reasoned that, apart from the disputed weight of the marijuana tested, the report was otherwise competent evidence. By not disputing that the substance tested was marijuana or that the test was performed competently, the claimant implicitly agreed that the report was accurate in all respects except as to the weight of the material tested. According to the administrative law judge, the fact that the claimant disputed the amount and weight of the marijuana as listed on the report did not detract from the competency and relevancy of the report, but merely from the evidentiary weight that this report should be given.

Department of Safety v. Eric W. Risner, IO/5-5-95. FO/5-15-95. 8 APR 252.

***10 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--Evidence which is not admissible in a court of law may be admissible at the discretion of an administrative law judge in an administrative hearing. Likewise, evidence considered admissible may be excluded at the discretion of the administrative law judge on the basis of relevance and where exclusion is not prejudicial to either party and does not change the outcome of the case.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***10 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--While the Tennessee Rules of Evidence apply to administrative proceedings, the Administrative Law Judge may suspend the application of the rules upon a finding that it is

necessary to ascertain facts not reasonably susceptible to proof under the rules of evidence if the evidence is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Consequently, the Administrative Law Judge is given discretion in determining whether or not to apply the Rules of Evidence.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***10 F.O. 1995 ALJ DISCRETION; ADMISSIBILITY OF EVIDENCE**--In the present case, the State argued that the ruling of the administrative law judge (ALJ) to hold evidence of claimant's prior arrests as inadmissible was contrary to the holding of Lettner v. Plummer, which allows for the admissibility of prior bad acts (ie. arrests). The Commissioner held that rulings on the admissibility of evidence are left solely to the discretion of the ALJ. Although, under the authority of Lettner v. Plummer, evidence not traditionally admissible in court is allowed at administrative hearings, whether or not to admit this evidence rests within the discretion of the ALJ. Therefore, the ruling of the ALJ in not admitting evidence of prior arrests did not contravene the holding in Lettner v. Plummer.

Department of Safety v. Gary S. Stotts, FO/3-16-95. 16 APR 231.

***10 I.O. 1994 ADMISSIBILITY OF EVIDENCE**--Evidence not admissible in court under T.C.A. §4-5-313(a) is admissible at the discretion of the judge. See Rivers v. Board of Dentistry, No. 1A01-9111-CH-00409 (Tenn. Ct. App. June 30, 1992). 16 APR 5.

Department of Safety v. Gary S. Stotts, IO/11-17-94. 16 APR 231.

***10 I.O. 1994 ADMISSIBILITY OF COERCED STATEMENT**--Administrative law judge determined that coerced statement by one of witnesses was inadmissible. Absent the use of the coerced statement, the State was unable to prove grounds for forfeiture.

Department of Safety v. Charles Keith Belcher, IO/8-23-91. 16 APR 151.

***10 I.O. 1985 MIRANDA WARNINGS WAIVER**--Claimant was arrested and advised of his Miranda rights. He indicated that he understood them. During police booking, he was asked if any of the money seized was drug related. He replied that part of it (\$360.00) was. The Administrative Law Judge held it an admissible statement over attorney's objection that Claimant was never asked whether he "wished to give up his right to remain silent," as this is not a requirement of Miranda.

Department of Safety v. Rodney K. Williams, IO/3-13-85. 5 APR 173.

11. WEIGHT AND SUFFICIENCY OF EVIDENCE

***11 Tenn. 1977 WITNESS CREDIBILITY AND WEIGHT OF TESTIMONY**--The credibility of the witnesses and the weight to be given their testimony was, of course, primarily a matter for determination by the hearing officer. Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The trier of fact may draw reasonable and legitimate inferences from established facts.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***11 Tenn. App. 1993 CREDIBILITY OF WITNESSES**--Weight, faith and credit to be given to any witness' testimony lies in first instance with trier of fact, and credibility accorded to testimony by trier of fact will be given great weight by appellate court.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***11 Tenn. App. 1993 CREDIBILITY OF WITNESSES**--The administrative law judge, as the trier of fact, had the opportunity to observe the manner and demeanor of all of the witnesses as they testified from the witness stand. The weight, faith and credit to be given to any witness' testimony lies in the first instance with the trier of fact and the credibility accorded will be given great weight by the appellate court. Although there are possible inconsistencies, the administrative law judge's determination of the witnesses' credibility and accreditation of their testimony will be given great weight by the reviewing court.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***11 Tenn. App. 1992 INCONSISTENT TESTIMONY**--Officer's testimony that vehicle owner told officer that owner used vehicle to bring marijuana seeds from California to Tennessee was substantial and material evidence in proceeding for forfeiture of vehicle, notwithstanding inconsistencies in testimony of officers on the scene.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***11 Tenn. App. 1992 CREDIBILITY DETERMINATION TO BE MADE BY ALJ**--The credibility of the witnesses and the weight to be given their testimony is a matter for determination by the administrative law judge. Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The administrative law judge may draw reasonable and legitimate inferences from established facts.

Fullenwinder v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***11 Tenn. App. 1992 DRUG DOG SNIFF**--Dog-tracking evidence, standing alone, is insufficient to support a conviction. Although, the behavior of an animal, alone, is insufficient to support a finding of criminality, it is corroborative. Therefore, this type of evidence is admissible to support the weight of other evidence.

Fullenwinder v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992).

***11 F.O. 1995 CONFLICTING TESTIMONY**--In an administrative hearing, the administrative law judge makes the sole determination as to credibility. Any resolution of a conflict in testimony requiring a determination of the credibility is for the trial court and is binding on the reviewing court unless other real evidence compels a contrary conclusion.

Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***11 F.O. 1995 DETERMINATION OF CREDIBILITY**--In determining which witness is credible and which witness is not, the administrative law judge must consider the various witnesses, source of knowledge, the witness' interest in the outcome of the hearing, their good intentions, their seeming honesty, their respective opportunities for personal knowledge of the facts of which they are testifying, and their conduct and demeanor during their testimony.

Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***11 F.O. 1995 DEFERENCE TO ALJ DETERMINATION OF CREDIBILITY**--The State argued that the claimant son's knowledge of his father's reputation and record as a drug dealer coupled with the overpowering smell of marijuana in the vehicle at the time of seizure undermined the claimant son's assertion of innocent ownership. The Commissioner deferred to the administrative law judge's determination of the claimant's credibility and noted that nothing in the record undermined this determination on the credibility of the claimant. In view of the administrative law judge's determination on the claimant's credibility and after considering the record in the case, the Commissioner ruled that the claimant had met his burden of showing innocent ownership and was entitled to the return of the seized vehicle.

Department of Safety v. Mark E. Chouinard, FO/4-6-95. 16 APR 194.

***11 I.O. 1994 RESOLUTION OF CREDIBILITY OF OPPOSING WITNESSES**--Where it was impossible to reconcile the testimony of the State's witnesses with the testimony of the Claimant, the administrative law judge resolved the issue of credibility in favor of the State's witnesses. After observing the manner and demeanor of all the witnesses and specifically bearing in mind the interest each witness, especially the Claimant, would have in the outcome, the judge resolved the issue of credibility in favor of the State and accepted their testimony as accurate. The State's testimony, once accepted, made it clear that the Claimant was using the seized vehicle to transport large quantities of narcotics for illegal purposes.

Department of Safety v. Julio Villarce, IO/8-12-94. 11 APR 138.

***11 I.O. 1994 CREDIBILITY; SPOUSE**--In the present case, the Claimant's wife testified that she was unaware of any drug dealings on the part of her husband although she did know he had been in prison for drug dealings in the past. She also testified that she purchased the seized vehicle with money she had saved and from property she had sold. However, the wife offered no receipts, affidavits, or cancelled checks to establish the veracity of her testimony. Bearing in mind the Claimant's wife's interest in the outcome of the case and her failure to provide any documentation to support her testimony, the administrative law judge found that her testimony lacked credibility.

Department of Safety v. Michael Smith, IO/7-8-94. 8 APR 299.

***11 I.O. 1994 CREDIBILITY**--The claimant's probable involvement in drug sales on the date of the seizure raises questions about his credibility, even without consideration of his claim of a Fifth Amendment privilege in regard to various questions. When such a claim is taken into account, it supports the conclusions made in the initial order.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***11 I.O. 1992 WEIGHT OF EVIDENCE; CREDIBILITY OF WITNESSES**--In a non-jury case, the trial judge is the sole judge of the credibility of the witnesses. After applying the proper legal criteria to the conflicting testimony, the judge may resolve the credibility issue in favor of either party.

Department of Health v. Brenda J. Matheny, IO/10-6-92. 9 APR 65.

***11 I.O. 1992 INTEREST IN SEIZED PROPERTY**--Given the claimant's self-interest in the seized currency, his statements should be given little probative value.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

***11 I.O. 1988 OFFICER'S TESTIMONY**--Although officer's personal knowledge of Claimant's history of drug dealing is admissible in forfeiture proceedings, it is not enough alone to support a forfeiture since such evidence is merely suggestive and not clear evidence of drug dealing on the occasion in question.

Billy McMullin v. Department of Safety, IO/3-3-88. 17 APR 68.

12. ADVERSE INFERENCE

***12 Tenn. 1949 FAILURE TO CALL WITNESS, ADVERSE INFERENCE**--If the State makes out a *prima facie* case with its proof in chief, then it is incumbent upon the Claimant to call available witnesses possessing peculiar knowledge essential to his cause. If the Claimant fails to do this, he subjects himself to the inference that the witness' testimony would have been unfavorable.

National Life and Accident Insurance Company v. Eddings, 221 S.W.2d 695, 698 (Tenn. 1949).

***12 Tenn. App. 1994 FAILURE TO TESTIFY**--The State argues that the failure of the Claimant's parents to testify indicates that their testimony would have been unfavorable according to the missing witness rule. However, this rule would only apply if the State's proof and the legal deduction made therefrom established a *prima facie* case against the Claimant.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994); Runnells v. Rogers, 596 S.W.2d 87 (Tenn. 1980).

***12 Tenn. App. 1981 BURDEN OF PROOF**--If the State establishes a *prima facie* case with its proof in chief, it is then incumbent upon the Claimant to call available witnesses possessing peculiar knowledge essential to his cause. If he does not, the Claimant subjects himself to the inference that the testimony would be unfavorable. However, such inference would not itself amount to substantive proof sufficient to serve as a substitute for facts required to be proven by the State to make out its *prima facie* case.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***12 Tenn. App. 1981 REQUIREMENT OF PRIMA FACIE CASE**--No adverse inference can be drawn based upon Claimant's failure to testify until after the State makes out a *prima facie* case with other proof.

Goldsmith v. Roberts, 622 S.W.2d 438, 440 (Tenn. Ct. App. 1981).

***12 F.O. 1995 ADVERSE INFERENCE; CIVIL CASE**--Claimant asserted his rights under the Fifth Amendment and refused to answer various questions relating to his possible illegal activities. Since this was a civil case, the administrative law judge determined that it was reasonable to conclude that the answers would have been adverse to the claimant's interests.

Department of Safety v. Tyson L. Brown, IO/4-21-95. FO/5-1-95. 9 APR 93.

***12 F.O. 1995 FAILURE TO TESTIFY; ADVERSE INFERENCE**--In view of the pending criminal charges against the Claimant at the time of the hearing, his failure to testify is understandable. To hold the Claimant's failure to testify against him would also be inappropriate in light of the quasi-criminal nature of forfeiture cases. See U.S. v. Real Property Known and Numbered as Rural Route 1, Box 137-B, Cutler, Ohio, 24 F.3d 845, 851 (6th Cir. 1994).

Department of Safety v. Terry Houston, IO/2-13-95. FO/2-23-95. 11 APR 145.

***12 F.O. 1995 NO ADVERSE INFERENCE FOUND IN HUSBAND'S FAILURE TO TESTIFY**--No adverse inference was drawn from Claimant's failure to call her husband as a witness. Drawing such an inference was found to be inappropriate in view of the quasi-criminal nature of forfeiture cases.

Department of Safety v. Marie N. Crump, IO/1-31-95. FO/2-10-95. 13 APR 189.

***12 F.O. 1995 INVOCATION OF FIFTH AMENDMENT NOT BAR ADVERSE INFERENCE**--After the State has proven its case, the invocation of the Fifth Amendment does not protect an individual from an adverse inference from failure to testify in a civil hearing. Considering that the Claimant in the present case had an opportunity to clarify the matter for the record, the fact that he chose to invoke his Fifth Amendment privilege and refuse to answer questions raised the inference that the answers would incriminate him.

Department of Safety v. Steve H. Carr, IO/1-27-95. FO/2-6-95. 9 APR 100.

***12 F.O. 1994 MISSING WITNESS RULE**--The missing witness rule applies only when the State has established a *prima facie* case. Once the State establishes a *prima facie* case, then an adverse inference arises from the failure of a party to call an available witness who possesses knowledge essential to that party's cause. In the present case, if the State met its burden of proof, then it would be obligatory for the claimant to have all witnesses with knowledge of his case to testify on his behalf. If these witnesses did not testify, then an adverse inference would arise from this lack of testimony. Therefore, the threshold determination with regard to the application of the missing witness rule is whether the State, as petitioner, has made out a *prima facie* case. In the case at issue, since the State did not make a *prima facie* case, the missing witness rule did not apply. Department of Safety v. Callie Harris et al., FO/11-23-94. 19 APR 156. *See also* IO/7-25-94. 8 APR 235.

***12 F.O. 1984 FIFTH AMENDMENT**--Claimant's invocation of Fifth Amendment privilege against self-incrimination leaves trier of fact free to conclude that the Claimant's testimony would be unfavorable to him and favorable to opposing party. Department of Safety v. James Campbell, IO/9-25-84. FO/10-9-84. 4 APR 719.

***12 F.O. 1984 FAILURE TO PRODUCE**--Failure of a party to produce testimony or documentary evidence allegedly in his possession raises the inference that such testimony or documentary evidence would be adverse to the party's interest. Robert E. Neal v. Department of Safety, IO/7-26-84. FO/8-17-84. 4 APR 592.

***12 F.O. 1984 PRESUMPTION**--Trier of fact in a civil case may conclude when a witness invokes the Fifth Amendment that his testimony would be unfavorable to him. Eugene Culver v. Department of Safety, IO/7-12-84. FO/8-7-84. 4 APR 588.

***12 F.O. 1984 DECLINING TO OFFER PROOF**--State carried its burden of proof that \$234.00 was furnished in exchange for a controlled substance in violation of T.C.A. §53-11-409(a)(6)(A) when state established a *prima facie* case. Respondent is subjected to the inference that evidence offered on his behalf would be unfavorable if he declined to offer any proof. Department of Safety v. Edwin Holt, IO/5-1-84. FO/6-8-84. 3 APR 377.

***12 I.O. 1994 REQUIREMENT OF PRIMA FACIE CASE**--Before an adverse inference may be drawn from the failure of a party to present evidence, the party with the burden of proof must first make out a *prima facie* case without the benefit of such adverse inference. Any adverse inference would not in itself amount to substantive proof sufficient to serve as a substitute for facts required to be proved by the State to make out its case. In the present case, even though the State called the Claimant as an adverse party witness, no adverse inference was "added in" to the State's proof to make out its *prima facie* case. Any such inference was only balanced against any evidence the Claimant did present on his own behalf. Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***12 I.O. 1993 NO ADVERSE INFERENCE FROM FAILURE TO PRESENT PROOF**--No adverse inference may be drawn from the failure of the Claimant to testify or present proof, as such inference can only be used to detract from a party's proof. However, since Claimant did not present any proof, there is nothing from which his failure to testify can be used to detract. Department of Safety v. Myron Young, IO/8-20-93. 11 APR 154.

***12 I.O. 1993 CO-MINGLING OF SEIZED MONEY AND DRUG MONEY**--While it is possible that some money in the Claimant's possession was legitimate money, Claimant's drug money and legitimate money were co-mingled to the extent that it became impossible to for them to be completely distinguished. Nevertheless, it was quite clear that a major portion of the seized money represented proceeds from drug sales. Additionally, in light of Claimant's invocation of the Fifth Amendment and refusal to answer questions regarding what he intended to do with the money, all the money was found to constitute drug proceeds. Department of Safety v. David Van McCloud and Samantha Cook, IO/8-19-93. 11 APR 162.

***12 I.O. 1993 USE OF ADVERSE INFERENCE**--The State may not use an adverse inference to meet its burden of establishing a *prima facie* case. No presumption from adverse inference is sufficient to supply independent evidence of a fact which is wholly unproven by other evidence. Department of Safety v. Alfred Cole, IO/2-16-93. 11 APR 171.

***12 I.O. 1992 CIRCUMSTANTIAL EVIDENCE PLUS ADVERSE INFERENCE**--The large amount of marijuana found with the Claimant, its packaging, and the large amount of money found on the Claimant strongly suggest that the Claimant was selling drugs and that the money was from the sale of drugs. The various denomination of the bills, its packaging, and its proximity to the drugs, strongly suggests that the money came from the sale of drugs. The Claimant's failure to testify on his

own behalf to clear up these inconsistencies or to produce witnesses who could corroborate a legitimate source for the money raises an unfavorable inference and discounts Claimant's proof.

Department of Safety v. John Perkins and Peggy's Auto Sales, IO/11-24-92. 11 APR 177.

***12 I.O. 1992 CO-OWNERSHIP; INVOCATION OF FIFTH AMENDMENT**--The fact that Claimant pled the Fifth Amendment when asked whether he had his own set of keys is further evidence that he co-owned the car, as an adverse inference is drawn from his refusal to answer this question.

Department of Safety v. Preston Crowder and Vanderbilt University Employees Credit Union, IO/4-14-92. 11 APR 185.

***12 I.O. 1988 REQUIREMENT OF PRIMA FACIE CASE**--In a quasi-criminal matter, involving a civil penalty for conduct which is criminal in nature, a party may refuse on grounds of self-incrimination to be sworn and to testify. However, an adverse inference may be drawn from such failure to testify, provided the State presents a *prima facie* case without such inference. It would be improper to allow the State to combine such adverse inferences to the rest of its proof for purposes of making a *prima facie* case.

Billy McMullin v. Department of Safety, IO/3-3-88. 17 APR 68.

13. CIRCUMSTANTIAL EVIDENCE

***13 Tenn. 1977 NOT NECESSARY TO TRACE MONEY TO SPECIFIC PRIOR SALES**--"Any fact may be established by direct testimony, circumstantial evidence or a combination thereof. The trier of fact may draw reasonable and legitimate inferences from established facts. In a forfeiture case such as this, the burden of proof rests upon the Commissioner, who must establish by a preponderance of the evidence, or as the more probable conclusion, that cash such as that found in the present case was received in consideration for or in exchange for a controlled substance." Therefore, it is not necessary to trace money to "specific prior sales" for the money to be forfeitable as drug proceeds.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***13 Tenn. 1977 GROUNDS FOR FORFEITURE**--Circumstantial evidence may establish the necessary facts to prove grounds for forfeiture, and legitimate inferences may be drawn from established facts. Funds seized do not need to be traced to a particular drug transaction.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***13 Tenn. 1977 PROXIMITY OF CASH TO DRUGS**--While the finding of cash with a large quantity of controlled substances does not alone satisfy the burden of proof, there are, in the present case, numerous additional circumstances from which inferences favorable to the contentions of the State could be drawn.

Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***13 Tenn. 1977 INFERENCES FROM CIRCUMSTANTIAL EVIDENCE**--Any fact may be established by direct testimony, circumstantial evidence, or both. The trier of fact may draw reasonable and legitimate inferences from established facts.

Lettner v. Plummer, 559 S.W.2d 785, 787 (Tenn. 1977).

***13 Tenn. App. 1981 CIRCUMSTANTIAL EVIDENCE TO PROVE CONNECTION**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection.

Goldsmith v. Roberts, 622 S.W.2d 438 (Tenn. Ct. App. 1981).

***13 F.O. 1995 SUFFICIENT CIRCUMSTANTIAL EVIDENCE TO SUPPORT FORFEITURE**--In view of the his lack of credibility with regard to the source of the seized money, his criminal history of selling drugs, his record of unemployment, and the fact that he tried to flee when stopped by police, claimant's money and vehicle were forfeited. The administrative law judge determined that this circumstantial evidence was sufficient under the law to support forfeiture despite claimant's arguments that the "highly questionable" proof did not warrant forfeiture of either the vehicle or the money.

Department of Safety v. Terry Ronald Hill, IO/5-9-95. FO/5-19-95. 11 APR 195.

***13 F.O. 1994 CIRCUMSTANTIAL EVIDENCE; PROVEN NEXUS REQUIRED**--The State is not required to trace money or proceeds to specific drug sales, but there must be some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. In the present case, the State's proof was not considered sufficient to establish that the seized money constituted proceeds from illegal drug sale activity, especially given the fact that a

very small amount of marijuana was seized. The State's proof with respect to drug sale activity was limited to one claimant's one drug conviction, the presence of guns, a drug dog's "indication," and the claimants' conflicting statements. Without additional proof of sales activity, the drug dog sniff and the conflicting statements by the claimants as to the seized money's source and ownership were not considered sufficient to establish a case for forfeiture.

Department of Safety v. Callie Harris et al., FO/11-23-94. 19 APR 156. *See also* IO/7-25-94. 8 APR 235.

***13 F.O. 1984 RECORDS OF DRUG TRANSACTIONS**--Written records seized by police were determined to be records of various drug transactions, and these records, along with amount of money and drugs found was sufficient to warrant forfeiture of money seized.

Department of Safety v. Paulette Davis, IO/3-10-84. FO/3-24-84. 3 APR 278.

***13 F.O. 1983 CIRCUMSTANTIAL EVIDENCE MUST BE SUBSTANTIAL AND MATERIAL**--In the absence of direct proof the State may carry its burden of proof, but in order to do so the circumstantial evidence must meet the "substantial and material" test set out in Goldsmith v. Roberts, 622 SW 2d 438 (Tenn. Ct. App. 1981).

Richard W. Renner v. Department of Safety, IO/9-21-83. FO/10-27-83. 2 APR 507.

***13 I.O. 1995 CO-MINGLED WITH MARKED MONEY**--The State carried its burden the proving that the seized money was proceeds from a drug sale since the money was found in close proximity to marijuana obviously packaged for sale and the money was intermingled with marked money used by the police to purchase marijuana.

Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***13 I.O. 1995 PROXIMITY TO DRUGS AND INTERMINGLED WITH MARKED MONEY**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. In the present case, the seized money was found in the immediate proximity of marijuana obviously packaged for sale, and the money was intermingled with marked money used by the police to purchase marijuana. Therefore, forfeiture of the money was ordered.

Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***13 I.O. 1994 INTENT TO SELL**--The fact that the Claimant possessed a beeper was highly relevant to the issue of whether the Claimant possessed cocaine with the intent to sell. The beeper was forfeited after it was determined that the Claimant possessed the beeper for the purpose of facilitating his involvement in drug trafficking.

Department of Safety v. Brent A. Blye, IO/6-6-94. 10 APR 346.

***13 I.O. 1994 PRESENCE OF SCALES AND PACKAGING OF DRUGS; PROCEEDS**--Although there was no direct evidence presented at the hearing to establish that the \$143 was the proceeds of any particular sale, the preponderance of the evidence presented at the hearing established that the Claimant was involved in the sale of marijuana. The scales found with the marijuana and the packaging of the marijuana itself (in several separate baggies rather than just one) support this conclusion.

Department of Safety v. Michael Love, IO/4-11-94. 11 APR 202.

***13 I.O. 1994 UNEMPLOYED WITH LARGE AMOUNT OF DRUGS AND MONEY**--Given the amount of cocaine (72 rocks of cocaine packaged in \$20 amounts), the denominations (\$20 bills) and amount of currency seized (over \$1,000), and the Claimant's lack of other employment, the Administrative Law Judge determined that the Claimant was in the business of selling of cocaine and using his car for his business, and that the money seized was drug proceeds.

Department of Safety v. Christopher L. Hoosier, IO/3-22-94. 11 APR 210.

***13 I.O. 1994 VEHICLE; TOO LITTLE LEGITIMATE INCOME TO PURCHASE**--While there was no proof that the seized vehicle was used to transport or facilitate the sale of drugs, the vehicle was found forfeitable as proceeds from the illegal sale of marijuana. The Claimant's admitted drug sales activity and income during 1992 and 1993, combined with the large expenditures of cash for luxury items during the last six months of 1991, established a *prima facie* case that the Claimant was selling marijuana during that time and making the cash purchases with proceeds from the sales. The Administrative Law Judge determined that the Claimant was spending his legitimate income on daily living expenses, but using the income from the drug sales during that period to make cash purchases of luxury items, one of which was the seized vehicle.

Department of Safety v. Steven Mikels, IO/3-7-94. 11 APR 217.

***13 I.O. 1994 DIRECT OBSERVATION OF SALE IS UNNECESSARY**--The fact that the officers did not directly observe the Claimant engage in drug transactions is not determinative where the State has established by a preponderance of

the evidence that the currency seized was received in exchange for controlled substances. Funds may be forfeited without being traced to specific prior sales of controlled substances.

Department of Safety v. Fidel Garcia Mungia, IO/1-4-94. 11 APR 228.

***13 I.O. 1993 CIRCUMSTANTIAL EVIDENCE TO PROVE CONNECTION**--While the finding of large sums of money alone, or with controlled substances, would not, by itself, support a forfeiture of such money absent additional circumstances, inferences may be drawn from the circumstantial evidence to support the forfeiture of money. The money need not be traced to specific sales.

Department of Safety v. Page G. Stuart, et al., IO/12-22-93. 11 APR 9.

***13 I.O. 1993 ELEMENTS CREATING A CIRCUMSTANTIAL CASE**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. The packaging of the cocaine in small portions, the presence of a loaded handgun, the suspicious activity at such a late hour in an area noted for drug sales, and the unusually large amount of cash which the Perpetrator/Driver of the vehicle was carrying at the time, all combine to create a circumstantial case, absent any reasonable explanation as to the money's source.

Department of Safety v. Jo A. Vinson, IO/11-19-93. 11 APR 236.

***13 I.O. 1993 CIRCUMSTANCES OF SEIZURE**--Additional factors surrounding the seizure may be considered in forfeiture proceedings. If these circumstances cut in favor of the position of the seizing agency, then the seized property may be forfeited without being traced directly to a specific illegal transaction.

Department of Safety v. Foster Norwood, IO/7-8-93. 11 APR 84.

***13 I.O. 1992 CIRCUMSTANTIAL EVIDENCE PLUS ADVERSE INFERENCE**--The large amount of marijuana found with the Claimant, its packaging, and the large amount of money found on the Claimant strongly suggest that the Claimant was selling drugs and that the money was from the sale of drugs. The various denomination of the bills, its packaging, and its proximity to the drugs, strongly suggests that the money came from the sale of drugs. The Claimant's failure to testify on his own behalf to clear up these inconsistencies or to produce witnesses who could corroborate a legitimate source for the money raises an unfavorable inference and discounts Claimant's proof.

Department of Safety v. John Perkins and Peggy's Auto Sales, IO/11-24-92. 11 APR 177.

***13 I.O. 1992 STATE MAY RELY SOLELY UPON CIRCUMSTANTIAL EVIDENCE**--The fact that no controlled substances were found is not fatal to the State's case. If it were, the plain meaning of T.C.A. §53-11-451(a)(6)(A) would be distorted and have no effect. The State may solely rely on circumstantial evidence to prove its case and does not have to trace the seized drug proceeds to a particular transaction.

Department of Safety v. Erasmo Perez, IO/8-11-92. 10 APR 97.

14. PROPERTY SUBJECT TO FORFEITURE

***14 NOTE 1995 FORFEITABLE PROPERTY**--Discussion regarding the scope of property subject to forfeiture under the Tennessee Drug Control Act. Under T.C.A. §53-11-451, there are several categories of forfeitable property: 1) illegal drugs such as marijuana or cocaine; 2) equipment, products or raw materials used in manufacturing or processing drugs; 3) property used as a container for drugs; 4) books, records, research, and data used in drug trafficking; 5) drug paraphernalia; 6) cash or securities used to purchase drugs or facilitate a drug sale; 7) anything of value used to purchase drugs or constituting proceeds from a drug sale; and 8) conveyances used to transport or facilitate the transportation, sale, or receipt of drugs. Although the overall scope of property under the Tennessee Drug Control Act is broad, each subsection is designed to cover specific types of forfeitable property. *Equipment* covers property used to conduct drug sales as well as property used to manufacture drugs. *Container* reaches property used to store drugs. *Conveyance* includes cars, boats, planes, and any other mode of transportation for drugs. *Everything of value* reaches drug money, drug proceeds, and other property commonly exchanged for drugs, including even such personal effects as jewelry. Specifically, forfeiture of money has ranged from \$105 to over half a million. Depending on the nature of the property, administrative law judges are left to determine, on a case-by-case basis, whether the degree of the property's involvement in the prohibited statutory activity is sufficient to trigger a forfeiture.

Zelimira Juric, Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act (1995). 8 APR 27.

***14 NOTE 1986 FORFEITABLE PROPERTY**--Discussion regarding the scope of property subject to forfeiture under the Tennessee Drug Control Act.

Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

15. CONTROLLED SUBSTANCES

***15 F.O. 1995 PRESUMPTION THAT DRUGS PURCHASED FOR RESALE**--Although Claimant contended that she purchased the large amount of marijuana, not intending to sell it, but to realize savings over making numerous buys, the more probable finding was that the marijuana was purchased for the purpose of resale, judging from the amount purchased and its value.

Department of Safety v. Karen L. Kovek and James E. Pailin, IO/2-8-95. FO/2-21-95. 10 APR 115.

***15 I.O. 1994 INTENT TO SELL**--The fact that the Claimant possessed a beeper was highly relevant to the issue of whether the Claimant possessed cocaine with the intent to sell.

Department of Safety v. Brent A. Blye, IO/6-6-94. 10 APR 346.

16. EQUIPMENT

***16 F.O. 1994 BEEPER**--A beeper seized from the Claimant was forfeited after it was determined that the arrangements for the drug transaction had initially been made by contacting the Claimant through the pager he had in his possession at the time of his arrest.

Department of Safety v. William Darrell Johnson, IO/11-28-94. FO/12-29-94. 11 APR 243.

***16 F.O. 1994 BEEPERS**--A beeper seized from the Claimant was forfeited after it had been used to facilitate the sale of drugs. Furthermore, the administrative law judge determined that, under the circumstances, other beepers that were seized from the Claimant were also subject to forfeiture because of the strong possibility that they were purchased with money made from the sale of cocaine.

Department of Safety v. Gail Manier, IO/11-28-94. FO/12-8-94. 11 APR 249.

***16 I.O. 1994 DRUG SCALES**--Hand-held scales seized from within a vehicle were considered "equipment" used or intended to be used in delivering drugs and forfeited under T.C.A. §53-11-451(a)(2).

Department of Safety v. Garry Buck and Jackie Hamlet, IO/6-24-94. 11 APR 256.

***16 I.O. 1994 BEEPER**--The fact that the Claimant possessed a beeper was highly relevant to the issue of whether the Claimant possessed cocaine with the intent to sell. The beeper was forfeited after it was determined that the Claimant possessed the beeper for the purpose of facilitating his involvement in drug trafficking.

Department of Safety v. Brent A. Blye, IO/6-6-94. 10 APR 346.

***16 I.O. 1994 LOADED PISTOL**--The loaded pistol found on the floorboard of the Claimant's vehicle was forfeited as equipment since it was presumably used by the Claimant to protect himself during his drug transactions.

Department of Safety v. Myles Jerry Hayes, IO/5-23-94. 11 APR 1.

***16 I.O. 1994 PAGER**--Given the evidence of drug sales the night of the seizure, the preponderance of the evidence was that, whatever its innocent uses may have been, the pager was more likely used to facilitate actual or intended drug sales.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***16 I.O. 1994 MOWER AND SHOTGUN**--A riding lawn mower was subject to forfeiture under T.C.A. §53-11-451(a)(2) since it was used to clear a path to the marijuana. A shotgun was subject to forfeiture also as equipment used in the manufacture of marijuana since the Claimant used the shotgun in the traps set to protect the marijuana. The Administrative Law Judge determined these uses to be sufficiently associated with the marijuana's maintenance and manufacture to subject both the riding lawnmower and the shotgun to forfeiture. In the alternative, both the riding lawnmower and the shotgun were also found to be forfeitable as drug proceeds under T.C.A. §53-11-451(a)(6)(A).

Department of Safety v. Loretta Overstreet and David Overstreet, IO/3-14-94. 11 APR 264.

***16 I.O. 1994 CELLULAR TELEPHONE**--Where the State has proven that a mobile telephone was used by the Claimant to arrange drug sales, the telephone is subject to forfeiture as a piece of equipment used to deliver a controlled substance.

Department of Safety v. Brian Scales, IO/3-7-94. 11 APR 272.

***16 I.O. 1993 PAGER AND CELLULAR PHONE**--Claimant's electronic paging device and cellular telephone are forfeitable as equipment used to facilitate drug transactions under T.C.A. §53-11-451.
Department of Safety v. William Henry Council, Jr., IO/11-5-93. 11 APR 281.

***16 I.O. 1993 REFRIGERATOR**--Where a refrigerator is used to store drugs, that refrigerator is subject to forfeiture as "equipment" under T.C.A. §53-11-451(a)(2) and (3).
Department of Safety v. Steven Todd Coale, IO/10-7-93. 11 APR 289.

***16 I.O. 1993 PAGER**--Even if the seized pager had innocent intended uses, the pager was found, according to all evidence presented, to be subject to forfeiture since it was probably used to facilitate an intended or actual drug transaction and delivery.
Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***34 I.O. 1993 VEHICLE USED TO MANUFACTURE DRUGS**--The vehicle was subject to forfeiture as "equipment" under T.C.A. §53-11-451(a)(2) when it was used to facilitate the manufacture of drugs by transporting the marijuana to a barn where the marijuana was later stripped and processed.
Department of Safety v. Anthony Carter, IO/5-28-93. 13 APR 129.

***16 I.O. 1992 CELLULAR PHONE**--Since the cellular phone was used by Claimant in order to conduct his drug transactions, it is forfeitable as "equipment" under T.C.A. §53-11-451(a)(2).
Department of Safety v. Jack Davis, Jr., IO/12-16-92. 11 APR 295.

***16 I.O. 1992 TELEPHONE & ANSWERING MACHINE**--A cordless telephone and answering machine are forfeitable as "equipment" under T.C.A. §53-11-451(a)(2) when the State has proven by a preponderance of the evidence that both devices were used in arranging drug transactions involving the Claimant.
Department of Safety v. Steven M. Reece and Kim Knoll, IO/7-6-92. 11 APR 307.

17. CONTAINERS

***17 F.O. 1995 VEHICLE AS CONTAINER USED TO STORE DRUGS**--Where the claimant used the seized vehicle to store and sell drugs after his home had been raided by the police, the seized vehicle was forfeited to the State on the ground that it was used to facilitate the receipt and sale of drugs.
Department of Safety v. William Moore, IO/5-22-95. FO/6-9-95. 11 APR 317.

***17 F.O. 1995 VEHICLE AS STORAGE CONTAINER FOR DRUGS**--Seized vehicle forfeited on the ground that it served as a container for drugs. The State proved that the claimant, who lived with his mother, stored marijuana in the vehicle's glove compartment to avoid his mother's anger and was observed retrieving the marijuana from the glove compartment in order to sell it, on one occasion, to an undercover police officer.
Department of Safety v. Eric W. Risner, IO/5-5-95. FO/5-15-95. 8 APR 252.

***17 I.O. 1994 CONTAINER FOR DRUGS**--In the present case, the Claimant denied selling or delivering drugs in his vehicle, which was not capable of being driven due to disrepair. Nevertheless, the Claimant's vehicle was forfeitable under the Tennessee Drug Control Act. The Administrative Law Judge determined that the vehicle constituted and was used as a "container" for drugs after drugs were found in the broken down vehicle during a police search of the Claimant's house.
Department of Safety v. Garry Buck and Jackie Hamlet, IO/6-24-94. 11 APR 256.

18. CONVEYANCES -- IN GENERAL

***18 Tenn. App. 1990 NO SIMULTANEITY REQUIRED TO SUSTAIN FORFEITURE**--In the present case, the Claimant's vehicle was searched and found not to contain contraband. However, drugs were later recovered inside the Claimant's home. In spite of the time disparity, the court held that evidence existed to support the State's allegations that the automobile was used as a conveyance for contraband. The court emphasized that no known authority requires the seizure of a vehicle to be simultaneous with the discovery of illegal drugs. The court concluded that, in light of the record, the vehicle was unquestionably used to transport the illegal drugs in the possession of the Claimant.
Hicks v. Jones, No. 89-419-II, 1990 WL 58722 (Tenn. Ct. App. May 9, 1990).

***18 F.O. 1995 TRACTOR**--Peterbilt Tractor forfeited on the ground that it was used to transport drugs intended for sale to other truckdrivers.

Department of Safety v. Billy Duane Powell, IO/5-25-95. FO/6-5-95. 8 APR 244.

***18 F.O. 1994 TRACTOR**--The statutory wrongdoer drove the Peterbilt tractor truck into a weight station where a Public Service Commission officer, while inspecting the truck and log book, noticed marijuana seeds and residue in the cab of the truck. A search of the truck revealed 3.5 grams of marijuana which the wrongdoer admitted he purchased while he was driving the truck. The Peterbilt Tractor was subject to forfeiture on the ground that it was used to facilitate the sale of drugs. However, it was ordered that the forfeiture be subject to the valid ownership interest held in the vehicle by the trucking company.

Department of Safety v. Randy Alan Rudnick, IO/11-2-94. FO/11-14-94. 11 APR 323.

***18 F.O. 1993 PRESENCE OF DRUGS INSIDE VEHICLE**--Changes in the misdemeanor possession statute allow the mere presence of an illegal drug in a vehicle to render the vehicle forfeitable as a conveyance used or intended to be used to transport a drug in violation of the Drug Control Act. The fact that a small amount of marijuana is stored in a vehicle may subject that vehicle to forfeiture even in the absence of evidence that the vehicle was used to drive the Claimant to the location of the drug purchase.

Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***18 I.O. 1994 AMOUNT OF DRUGS NOT SUSTAIN FORFEITURE**--Where the amount of drugs seized was so small that it could not be scraped up to be tested and where there was no proof of sales activity by the Claimant, it was determined that the State had not met its burden of proof to sustain a forfeiture of the seized vehicle.

Department of Safety v. Michael Scott, IO/8-10-94. 10 APR 138.

***18 I.O. 1994 VEHICLE; TOO LITTLE LEGITIMATE INCOME TO PURCHASE**--While there was no proof that the seized vehicle was used to transport or facilitate the sale of drugs, the vehicle was found forfeitable as proceeds from the illegal sale of marijuana. The Claimant's admitted drug sales activity and income during 1992 and 1993, combined with the large expenditures of cash for luxury items during the last six months of 1991, established a *prima facie* case that the Claimant was selling marijuana during that time and making the cash purchases with proceeds from the sales. The Administrative Law Judge determined that the Claimant was spending his legitimate income on daily living expenses, but using the income from the drug sales during that period to make cash purchases of luxury items, one of which was the seized vehicle.

Department of Safety v. Steven Mikels, IO/3-7-94. 11 APR 217.

19. FACILITATION

***19 6th Cir. 1992 REQUIREMENT OF SUBSTANTIAL CONNECTION**--To "facilitate" commission of drug offense so as to warrant forfeiture, property in question must bear sufficient nexus or substantial connection to underlying drug activity.

U.S. v. Smith, 966 F.2d 1045 (6th Cir. 1992).

***19 Tenn. 1989 MEETING WITH PROSPECTIVE DRUG PURCHASER**--Forfeiture was upheld when the vehicle was used by the Claimant to go to a meeting with a prospective purchaser even though no drugs were found in the vehicle or sold on that occasion. The court determined that the phrase "in any manner to facilitate" evidenced an intent to broaden the applicability of the forfeiture remedy.

Hughes v. Department of Safety, 776 S.W.2d 111 (Tenn. 1989).

***19 Tenn. App. 1992 TRANSPORTATION OF MARIJUANA SEEDS**--The evidence is convincing that the Claimant used the seized vehicle to transport marijuana seeds from California to Nashville and since arriving in Nashville, has transformed the marijuana seeds into 52 growing marijuana plants and 128.8 grams of processed marijuana. This is, of course, entirely too much marijuana for individual and personal consumption. One can hardly escape the conclusion that the marijuana crop was being grown for resale. When the seized automobile was used to transport the marijuana seeds from California to Nashville and when these marijuana seeds were turned into a thriving and potentially highly profitable marijuana crop, one that gave every indication of having been carefully tended by the Claimant, the seized vehicle clearly falls within the confiscation provisions of the Tennessee Drug Control Act. The seized vehicle has been used to facilitate the transportation of contraband narcotics which were subsequently planted and were to be harvested for resale.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***19 Tenn. App. 1989 IN ANY MANNER TO FACILITATE**--The language, "in any manner to facilitate," in T.C.A. §53-11-409(a)(4) allows the State to seize any vehicle used to facilitate the transport, sale, or receipt of a controlled substance, regardless of the purpose for which the owner of the vehicle possessed the substance. Therefore, the State is allowed to seize an automobile used in travelling to and from the place of purchase of a small amount of marijuana for the vehicle owner's personal use.

Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***19 Tenn. App. 1989 FACILITATION OF DRUG SALE**--T.C.A. §53-11-409(a)(4)(C) does not, however, exempt from forfeiture a vehicle that has been used to facilitate the illegal sale or receipt of a controlled substance. Thus, the use of a vehicle to drive to the point where an illegal sale is made and the further use to transport the controlled substance away from the point of sale will subject the vehicle to confiscation regardless of the purpose for which the controlled substance was purchased.

Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***19 Tenn. App. 1985 FACILITATION; TRANSPORTATION OF DRUG PROCEEDS**--In the present case, although the vehicle did not transport drugs, the vehicle did facilitate in some manner the transportation of drugs for the purpose of sale. The delivery of proceeds from a drug transaction to the actual supplier of the drugs is an integral part of a drug sale. In this particular drug transaction, the facts show that the sale consisted of three (3) parties: the buyer, the Claimant, and the supplier. For the transaction to be completed, the supplier had to receive the money that the Claimant owed him. The vehicle was used to transport this admitted drug money to the supplier in order to conclude the sale. Looking at the totality of the circumstances, it is evident that the vehicle was an integral component part of the drug transaction and thus, would fall within the provision of T.C.A. 53-11-451(a)(4). Therefore, a sufficient nexus and substantial connection exists between the drug transaction and the seized vehicle to make the vehicle subject to forfeiture.

Featherston v. Wood, No. 85-277-II, 1985 WL 4551 (Tenn. Ct. App. December 18, 1985).

***19 Ch. Ct. 1991 DRUGS PURCHASED AT WORK**--A vehicle driven by claimant to work, where claimant later purchased drugs, was subject to forfeiture even when the vehicle was seized while claimant was on his way home from work since the vehicle was used to "transport and facilitate" the receipt of controlled substances.

Jacks v. Department of Safety, No. 90-2912-II (Davidson County Ch. Ct. March 13, 1991). 16 APR 1.

***19 Ch. Ct. 1985 DELIVERING PROCEEDS OF THE TRANSACTION**--An antecedent relationship must exist between the use of the vehicle and the sale of drugs to constitute facilitation under T.C.A. §53-11-409. A sufficient nexus must be shown between the use of the vehicle and drug transaction. The mere use of a vehicle to deliver the proceeds of a drug transaction to the supplier does not constitute facilitation.

Department of Safety v. Alvin Featherstone, No. 84-2108-I (Davidson County Ch. Ct. August 21, 1985). 6 APR 35.

***19 F.O. 1995 FACILITATION OF DRUG SALE**--Where the claimant drove the seized vehicle to the location where he purchased drugs, this use alone rendered the vehicle subject to forfeiture.

Department of Safety v. Steve Weber, IO/4-6-95. FO/4-17-95. 19 APR 299.

***19 F.O. 1995 FACILITATION OF DRUG DEAL ARRANGEMENTS**--Since the Claimant used the seized vehicle to carry out arrangements, made through a police informant, for the purchase of a large amount of marijuana, the vehicle was subject to forfeiture.

Department of Safety v. Karen L. Kovek and James E. Pailin, IO/2-8-95. FO/2-21-95. 10 APR 115.

***19 F.O. 1994 SPECULATION DOES NOT SUPPORT FORFEITURE**--The State failed to prove that the seized vehicle was used to facilitate a passenger's drug purchase from an undercover officer. While it is true that the Claimant drove his passenger to the site of the drug deal and dropped him off, there was no proof, apart from the speculation of the officer, as to whether or not the Claimant even knew that his passenger's intention was to purchase drugs at the location in question. The State could not prove that the Claimant intended to facilitate his passenger's purchase of drugs since no drugs were found on the Claimant or in his vehicle at the time it was seized. The only connection between the Claimant and the illegal drug transaction was that the Claimant had given his passenger a ride to the location of the purchase. The Claimant testified that he had no idea that his passenger intended to buy drugs, and the testifying officer could only provide speculation to the contrary. This speculation on the part of the officer was not considered sufficient to support a forfeiture of the seized vehicle.

Department of Safety v. William A. Key, IO/11-4-94. FO/11-14-94. 10 APR 122.

***19 F.O. 1984 BURDEN OF PROOF**--The state has burden to prove aircraft used to transport or in any matter facilitate the transfer for the purpose of sale or receipt of a controlled substance. Claimants have burden to prove lack of knowledge of such illegal use. Both parties carried burden and aircraft was ordered returned to Petitioners.

Department of Safety v. Coy A. Lewis and Jack Sloan, IO/8-30-83. FO/4-19-84. 2 APR 461.

***19 I.O. 1994 ABORTED DRUG SALE**--Although no sale of marijuana occurred after the Claimant grew suspicious and aborted the drug deal, the State carried its burden of proof that the Claimant clearly intended to use his vehicle to facilitate the drug sale with an informant and undercover police officer.

Department of Safety v. Kenneth S. Doshi, IO/9-14-94. 10 APR 122.

***19 I.O. 1993 ASSISTED PASSENGER PURCHASING DRUGS**--In the present case, the seized vehicle was used by the Claimant to aid and assist his passenger in purchasing drugs. Such activity constitutes facilitation under the Tennessee Drug Control Act.

Department of Safety v. Robert L. Williams, Jr., IO/11-23-93. 11 APR 330.

***19 I.O. 1993 DRUG TRANSACTION OUTSIDE OF THE VEHICLE**--The concept of facilitation is broad enough to include the receipt of a controlled substance for sale out of a vehicle or the exchange of proceeds in the vehicle. Therefore, once the proceeds from the cocaine sale found their way into the vehicle, this constituted facilitation of the drug transaction and subjected the vehicle to forfeiture.

Department of Safety v. Nelson K. Foster, IO/11-17-93. 11 APR 337.

***19 I.O. 1993 FACILITATION BEFORE THE TRANSACTION**--Where a Claimant 1) used the seized vehicle to locate the informant, 2) had a conversation with the informant while they were both sitting in their vehicles, and 3) then had the informant follow him back to the Claimant's home where the illegal drug transaction actually took place, the vehicle is subject to forfeiture. Such use of a vehicle constitutes facilitation since the use of the vehicle makes it easier for the Claimant to conclude his illegal drug transaction.

Department of Safety v. Charles Hughes, IO/9-15-93. 11 APR 342.

***19 I.O. 1993 SKI BOAT USED AS COLLATERAL FOR DRUG SALE**--When Claimant used a ski boat as collateral in order to facilitate a drug sale and signed a promissory note to that effect, the intended facilitation was found to support a forfeiture of the ski boat even though there was no actual physical use of the boat.

Department of Safety v. Ricky L. Rounsaville, IO/8-23-93. 12 APR 1.

***19 I.O. 1993 DRUGS PURCHASED OR STOLEN AT WORK**--Where the Claimant has purchased or stolen drugs at his place of employment, the vehicle he used to drive to work is considered to "facilitate" the drug transaction and is subject to forfeiture, even though the Claimant did not sell or intend to sell drugs.

Department of Safety v. Andrea King, IO/4-22-93. 12 APR 11.

***19 I.O. 1993 SETTING UP A FUTURE TRANSACTION**--Where the Claimant transported drugs in the seized vehicle for the purpose of setting up a possible future drug transaction, the Administrative Law Judge determined that the facilitation of a future sale made the vehicle subject to forfeiture. Despite the fact that no money was ever exchanged, the Claimant's intention to arrange a future drug transaction and his use of the vehicle in doing so was enough to support a forfeiture.

Department of Safety v. Tracey Bernard Mathis, IO/1-11-93. 10 APR 89.

***19 I.O. 1992 MIDDLEMAN**--The simple possession exception under Hughes v. State does not apply when a clear drug sale is facilitated, even if the Claimant is only a "middleman" who merely carried money and drugs to and from the parties to the actual drug deal. Since vehicle transportation facilitated the sale of the drugs in some way, the vehicle is subject to forfeiture even though its only connection to the drugs was as a means of transportation.

Department of Safety v. Randle H. Adams, IO/4-14-92. 12 APR 17.

20. USED TO TRANSPORT

***20 Tenn. App. 1993 INFERENCE BUT NO SUBSTANTIAL EVIDENCE OF DRUG ACTIVITY**--The Claimant's statement that he did not know whether he transported marijuana from Texas is not substantive evidence that he did or intended to transport marijuana from Texas. The circumstances do raise an inference that Claimant took the trip to enable an unknown party to attach to his truck a container of an unknown substance which container was removed from the truck by an unknown person. However, this is not substantive evidence that Claimant did or intended to transport a controlled substance.

Tinnel v. Department of Safety, No. 01-A-01-9211-CH00454, 1993 WL 54604 (Tenn. Ct. App. March 3, 1993).

***20 Tenn. App. 1992 TRANSPORTATION OF MARIJUANA SEEDS**--The evidence is convincing that the Claimant used the seized vehicle to transport marijuana seeds from California to Nashville and since arriving in Nashville, has transformed the marijuana seeds into 52 growing marijuana plants and 128.8 grams of processed marijuana. This is, of course, entirely too much marijuana for individual and personal consumption. One can hardly escape the conclusion that the marijuana crop was being grown for resale. When the seized automobile was used to transport the marijuana seeds from California to Nashville and when these marijuana seeds were turned into a thriving and potentially highly profitable marijuana crop, one that gave every indication of having been carefully tended by the Claimant, the seized vehicle clearly falls within the confiscation provisions of the Tennessee Drug Control Act. The seized vehicle has been used to facilitate the transportation of contraband narcotics which were subsequently planted and were to be harvested for resale.

Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***20 Tenn. App. 1990 DRUGS LATER DISCOVERED**--In the present case, the Claimant's vehicle was searched and found not to contain contraband. However, drugs were later recovered inside the Claimant's home. In spite of the time disparity, the court held that evidence existed to support the State's allegations that the automobile was used as a conveyance for contraband. The court emphasized that no known authority requires the seizure of a vehicle to be simultaneous with the discovery of illegal drugs. The court concluded that, in light of the record, the vehicle was unquestionably used to transport the illegal drugs in the possession of the Claimant.

Hicks v. Jones, No. 89-419-II, 1990 WL 58722 (Tenn. Ct. App. May 9, 1990).

***20 Tenn. App. 1989 TRANSPORTATION OF ANY AMOUNT OF DRUGS**--The transportation of any amount of illegal drugs comes within the letter of a statute requiring the forfeiture of a vehicle used to transport controlled substances.

Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***20 Tenn. App. 1989 TRANSPORTATION AND SIMPLE POSSESSION**--Relying on federal decisions which require the forfeiture of a vehicle for the intentional transportation of an illegal substance, no matter how small the amount, the court held that the transportation of any amount of illegal drugs comes within the letter of T.C.A. §53-11-409(a)(4). However, the court also recognized that T.C.A. §53-11-409(a)(4)(C) could prevent the forfeiture of a vehicle when the operator is found guilty of simple possession of a small amount of a controlled substance and the vehicle's only connection with the substance is as a means of transportation. Therefore, a forfeiture would not occur when the vehicle is used only to transport the illegal drug.

Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***20 Tenn. App. 1985 FACILITATION OF TRANSPORTATION**--T.C.A. §53-11-409(a) does not refer to facilitating the sale of controlled substances. Rather, it refers only to facilitating the transportation of controlled substances. Although the statute describes the transportation as being for the purpose of sale or receipt, the phrase, "for the purpose of sale or receipt," modifies only the word "transportation." The statute does not include sale as an object of the infinitive, "to facilitate".

Featherston v. Wood, No. 85-277-II, 1985 WL 4551 (Tenn. Ct. App. December 18, 1985).

***20 Tenn. App. 1985 TRANSPORTATION OF DRUG PROCEEDS**--In the present case, although the vehicle did not transport drugs, the vehicle did facilitate in some manner the transportation of drugs for the purpose of sale. The delivery of proceeds from a drug transaction to the actual supplier of the drugs is an integral part of a drug sale. In this particular drug transaction, the facts show that the sale consisted of three (3) parties: the buyer, the Claimant, and the supplier. For the transaction to be completed, the supplier had to receive the money that the Claimant owed him. The vehicle was used to transport this admitted drug money to the supplier in order to conclude the sale. Looking at the totality of the circumstances, it is evident that the vehicle was an integral component part of the drug transaction and thus, would fall within the provision of T.C.A. 53-11-451(a)(4). Therefore, a sufficient nexus and substantial connection exists between the drug transaction and the seized vehicle to make the vehicle subject to forfeiture.

Featherston v. Wood, No. 85-277-II, 1985 WL 4551 (Tenn. Ct. App. December 18, 1985).

***20 Ch. Ct. 1991 DRUGS PURCHASED AT WORK**--A vehicle driven by claimant to work, where claimant later purchased drugs, was subject to forfeiture even when the vehicle was seized while claimant was on his way home from work since the vehicle was used to "transport and facilitate" the receipt of controlled substances.

Jacks v. Department of Safety, No. 90-2912-II (Davidson County Ch. Ct. March 13, 1991). 16 APR 1.

***20 F.O. 1995 TRANSPORT TO SITE OF DRUG PURCHASE**--In the present case, the claimant drove his car over to where an undercover officer was standing and purchased \$40 worth of cocaine from the officer. The car was forfeited on the ground that it was used to transport cocaine for resale.

Department of Safety v. Jay Jeskie, IO/2-23-95. FO/3-6-95. 12 APR 27.

***20 F.O. 1995 TRANSPORTATION TO LOCATION OF DRUG SALE**--The evidence was uncontroverted that the Claimant drove the seized vehicle to the drug house and proceeded to make a purchase of marijuana. While the Claimant never had an opportunity to drive the vehicle away from the drug house, the vehicle was still subject to forfeiture under the reasoning of Hughes v. State.

Department of Safety v. Robert E. Fields, IO/1-12-95. FO/1-23-95. 12 APR 32.

***20 F.O. 1993 INTENT TO TRANSPORT DRUGS; STATE'S BURDEN OF PROOF**--The fact that drugs are found in or on a vehicle, by itself, may in some circumstances meet the burden of proof as to the intended use of the vehicle to transport drugs. However, in the present case, this fact combined with the location of the vehicle at the time of the seizure (parked inside a hangar) and the testimony of the Claimant that the vehicle had never been used to transport drugs did not support a forfeiture. While the credibility of the testimony of the Claimant may seriously be questioned, the State produced no evidence to contradict it. Therefore, the State did not meet its burden of showing that the Claimant drove to a specific location with the intent to transport drugs.

Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***20 F.O. 1984 BURDEN OF PROOF**--The state has burden to prove aircraft used to transport or in any matter facilitate the transfer for the purpose of sale or receipt of a controlled substance. Claimants have burden to prove lack of knowledge of such illegal use. Both parties carried burden and aircraft was ordered returned to Petitioners.

Department of Safety v. Coy A. Lewis and Jack Sloan, IO/8-30-83. FO/4-19-84. 2 APR 461.

***20 I.O. 1994 TRANSPORTATION OF DRUGS**--Where the Claimant has admitted using the seized vehicle to obtain drugs in one state and to transport them back to Tennessee, the seized vehicle is forfeitable pursuant to Hughes v. Department of Safety, 776 S.W.2d 111 (Tenn. 1989). Under Hughes, the use of a vehicle to drive to a point where a sale of controlled substances was made and to transport the controlled substance away is sufficient to subject the vehicle to confiscation under a forfeiture statute, regardless of the purpose for which the controlled substance was purchased.

Department of Safety v. Brian Neil Thompson, IO/3-2-94. 12 APR 38.

***20 I.O. 1992 MIDDLEMAN**--The simple possession exception under Hughes v. State does not apply when a clear drug sale is facilitated, even if the Claimant is only a "middleman" who merely carried money and drugs to and from the parties to the actual drug deal. Since vehicle transportation facilitated the sale of the drugs in some way, the vehicle is subject to forfeiture even though its only connection to the drugs was as a means of transportation.

Department of Safety v. Randle H. Adams, IO/4-14-92. 12 APR 17.

21. USED FOR RECEIPT OF DRUGS

***21 F.O. 1993 INTENT TO RECEIVE DRUGS; STATE'S BURDEN OF PROOF**--The State has the burden of proof to show that the Claimant drove to a specific location with the intent to receive drugs. The statements of the Claimant alone will not support a forfeiture.

Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***21 I.O. 1994 DRUG SALE NOT CONSUMMATED**--On the night of the seizure, the Claimant drove to a location where he planned to purchase marijuana. The fact that the drug deal was not consummated did not negate the fact that the Claimant drove his vehicle to that location with the intent of using his vehicle to facilitate the receipt of the one-quarter pound of marijuana from the undercover officer and the informant. Regardless of whether or not the transaction was actually consummated, the requisite intent was demonstrated under the statute, and the seized vehicle was forfeited.

Department of Safety v. Lester Tillman, IO/4-25-94. 12 APR 45.

***21 I.O. 1993 DRUG TRANSACTION OUTSIDE OF THE VEHICLE**--The concept of facilitation is broad enough to include the receipt of a controlled substance for sale out of a vehicle or the exchange of proceeds in the vehicle. Therefore, once the proceeds from the cocaine sale found their way into the vehicle, this constituted facilitation of the drug transaction and subjected the vehicle to forfeiture.

Department of Safety v. Nelson K. Foster, IO/11-17-93. 11 APR 337.

22. EVERYTHING OF VALUE -- IN GENERAL

***22 F.O. 1995 PROPERTY PURCHASED WITH DRUG PROCEEDS OR TRADED FOR DRUGS**--Commemorative coins, a knife collection, a cellular phone, and various weapons were forfeited as property purchased with drug proceeds or traded for drugs after the claimant failed to prove a legitimate source for these items of property.
Department of Safety v. Brady L. Wood, IO/3-14-95. FO/3-24-95. IO/4-25-94. 12 APR 51.

***22 I.O. 1994 PRESUMPTION OF DRUG DEALING**--A presumption existed that the Claimant was involved in the sale of drugs since the amount of cocaine seized was more than would normally be possessed by an individual for personal use. Moreover, the discovery of three gold rings in an envelope inside the Claimant's wallet suggest that these rings had been received in exchange for drugs, as opposed to being personal jewelry that the Claimant would be wearing.
Department of Safety v. Myles Jerry Hayes, IO/5-23-94. 11 APR 1.

***22 I.O. 1994 JEWELRY AS PROCEEDS**--Even though there was evidence that the Claimant worked in a pawn shop and there was a possibility that the seized jewelry came from the pawn shop, the fact that the jewelry was found with a large amount of marijuana led to the conclusion that the jewelry was also either drug proceeds or intended to be exchanged for drugs. The Administrative Law Judge also noted that none of the jewelry was actually worn by the Claimant, which might indicate some other source than drug proceeds.
Department of Safety v. Michael Love, IO/4-11-94. 11 APR 202.

***22 I.O. 1993 JEWELRY NOT PURCHASED WITH DRUG PROCEEDS**--Claimant's watch found not subject to forfeiture since 1) it was not of particularly great value so as to suggest it was purchased with drug proceeds and 2) there was evidence presented by the Claimant that it came from an innocent source.
Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***22 I.O. 1992 LARGE SUMS OF MONEY OR JEWELRY**--The mere presence of relatively large sums of money found at the same time as controlled substances does not satisfy the State's burden of proof because no connection was shown between the money and any drug transaction. Even more so, the mere wearing of jewelry does not meet the State's burden. To hold otherwise would render all property owned by any claimant subject to forfeiture upon the showing that the claimant had been involved in a drug deal.
Department of Safety v. Robert S. Brennan, IO/5-15-92. 10 APR 225.

23. MONEY

***23 Tenn. 1977 PROXIMITY OF CASH TO DRUGS; INFERENCE OF DRUG SALE ACTIVITY**--While the finding of cash with a large quantity of controlled substances does not alone satisfy the burden of proof, there are, in the present case, numerous additional circumstances from which inferences favorable to the contentions of the State could be drawn.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***23 Tenn. 1977 ALJ FINDING; SUPPORTING EVIDENCE**--Evidence supported determination of administrative judge that money seized by police officers had been received in consideration for or in exchange for controlled substance and was therefore subject to forfeiture under 1971 Drug Control Act.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***23 Tenn. 1977 CONNECTION BETWEEN MONEY AND PRIOR DRUG SALES**--Funds may be forfeited under 1971 Drug Control Act without being traced to specific prior sales of controlled substances.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***23 Tenn. App. 1994 STOLEN MONEY**--In the present case, the Claimant appealed the forfeiture of cash seized and confiscated incident to his arrest. The lower court found that the seized money was stolen from the Claimant's father. The Court of Appeals concluded that the Claimant's application for judicial review was properly dismissed for failure to state a claim for which relief can be granted, T.R.C.P. Rule 12.02(6), in that the claim for return of seized money was not timely filed with the agency and the Claimant had no claim or interest in the seized money since it was obtained by theft, citing Insurance Co. of No. Am. v. Cliff Pettit Motors, Inc., 513 Tenn. 785 (Tenn. 1974) (A thief obtains no recognizable interest in the property stolen).
Lively v. State, No. 01-A-01-9404-CH00201, 1994 WL 603840 (Tenn. Ct. App. November 4, 1994).

***23 Tenn. App. 1994 NO EVIDENCE TO LINK SOURCE OF MONEY TO DRUGS**--Although the authorities had ample time to investigate the claim that the money belonged to the Claimant, the State made no investigation whatsoever concerning the source of the money. Although the State has the burden of proving its right to seize the funds, the State made no attempt to investigate the Claimant's claim that she borrowed the money from her employer's credit union. Since no drugs or drug paraphernalia were found in the residence, there was simply not enough evidence to connect the \$3,500.00 to the drug transactions. The Claimant is not a known drug dealer, and from a review of the record, apparently had no connection whatsoever with the drug transaction. From a review of the entire record, there is no substantial and material evidence to support the forfeiture.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994).

***23 Tenn. App. 1994 DRUG PROCEEDS, INFERENCE OF**--Although the cash was seized from the Claimant's wallet at the time of his arrest, it was not marked to indicate that it had been used in the drug transaction on the date of his arrest or the one that occurred the day before. However, the record contained uncontroverted evidence that the Claimant was known as a drug dealer and had been for some time. The Claimant testified concerning various types of odd jobs that he had held since his release on parole in 1989, but he could not pinpoint his work activities for the time immediately preceding his arrest, and it is clear that in order for the Claimant to sell cocaine he must acquire it, which, of course, requires funds. In view of the close proximity of the funds to the actual narcotics transactions, and the continuing nature of his operation as a drug dealer, there could arise an inference that the money was used to continue his dealing in drugs.

Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994).

***23 Tenn. App. 1980 NOT ALL MONEY OF DRUG DEALERS IS FORFEITABLE**--Money is property which is not per se contraband, and the forfeiture statute does not authorize the confiscation of all funds found in the possession of a person shown to have sold illegal drugs.

Hines v. Commissioner of Safety, (Tenn. Ct. App. December 8, 1980).

***23 Ch. Ct. 1992 EVIDENCE OF RECENT DRUG ACTIVITY REQUIRED**--The Tennessee Drug Control Act requires that the seized money must be traceable to a drug sale. The seized money need not be traced back to a specific sale; however, there must be some evidence of fairly recent drug activity to support a forfeiture.

King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992). 15 APR 334.

***23 F.O. 1995 MONEY FROM A THIRD PARTY**--Where claimant contended that the seized money constituted money his mother had given him earlier in a check, failure to present the check or his mother's testimony resulted in the forfeiture of the money after the administrative law judge questioned his credibility.

Department of Safety v. Samuel Brenner, IO/4-5-95. FO/4-17-95. 10 APR 84.

***23 F.O. 1995 MONEY RETURNED AFTER LEGITIMATE SOURCE PROVEN**--Money seized from the Claimant was also returned after the Claimant proved that the money constituted a weekly advance from his insulation business.

Department of Safety v. Doug Wolff, IO/2-17-95. FO/2-27-95. 12 APR 59.

***23 F.O. 1995 LEGITIMATE SOURCE OF MONEY; NO LINK TO DRUG SALES**--The Claimant was obviously involved in the sale of drugs and was presumably so involved at the time the search warrant was executed at his residence. The Claimant was in the basement with numerous bags which had been cut in a manner consistent with the packaging of drugs for resale. On his person, the Claimant had two small bags containing a total of 1.5 grams of marijuana and \$257. The most probable conclusion to be drawn from this set of circumstances was that at the time the officers arrived to execute the search warrant, the Claimant was involved in the packaging and selling of drugs. Therefore, the money found on his person was the result of drug transactions. However, no link was established between the Claimant's drug activity and \$2,000 located in the humidifier in the bedroom of the Claimant's house. No drugs were discovered in the house. Moreover, while it was difficult to determine how much money the Claimant was earning from legitimate sources, the Claimant did establish that he worked construction on a regular basis and that this was the source of regular income. As a result of this showing, the money in the humidifier was found to have derived from legitimate sources and was being kept in the humidifier by the Claimant for reasons not related to his drug activity. Based upon these facts, \$257 was forfeited to the State while \$2,000 was returned to the Claimant.

Department of Safety v. Larry L. Miller, IO/2-10-95. FO/2-21-95. 12 APR 66.

***23 F.O. 1994 WORKERS' COMPENSATION BENEFITS USED IN DRUG DEALING**--Where the proof established that the Claimant was using his workers' compensation proceeds in his drug business, all the money was subject to forfeiture. The quantity of the drugs, the mysterious ledger, and the general lack of credibility supported forfeiture of all the seized money. The Administrative Law Judge determined that the issue was not whether the money was originally from a workers'

compensation settlement. Rather, the issue was whether the money, however acquired originally, was used in the Claimant's drug business.

Department of Safety v. David Dixon, IO/11-4-94. FO/11-14-94. 12 APR 73.

***23 F.O. 1984 CO-MINGLING OF INNOCENT MONEY AND DRUG MONEY**--Where large amount of cocaine, drug paraphernalia and weapons were found in residence and in two vehicles leaving residence and where marked vice squad money was found as part of larger quantity of money, evidence warranted a finding that the entire amount was derived from drug sale and therefore subject to forfeiture.

Department of Safety v. James Campbell, et al., IO/9-25-84. FO/10-9-84. 4 APR 719.

***23 F.O. 1984 RECORDS OF DRUG TRANSACTIONS; CONNECTION TO SEIZED MONEY**--Written records seized by police were determined to be records of various drug transactions, and these records, along with amount of money and drugs found was sufficient to warrant forfeiture of money seized.

Department of Safety v. Paulette Davis, IO/3-10-84. FO/3-24-84. 3 APR 278.

***23 F.O. 1983 CONNECTION BETWEEN MONEY AND DRUG SALE ACTIVITY REQUIRED**--Special agent for T.B.I. sent two informants into the home of a suspected drug dealer wired and with marked money. They bought drugs with the marked money and the agent recorded the conversation. Based on this information, they secured a search warrant and arrest warrants and proceeded to the suspect's home. They searched the house and arrested the suspect. T.B.I. took their marked money back and also seized some jewelry and other currency. The Administrative Law Judge returned the jewelry and other currency as there was no proof of any connection between the money and jewelry and any illegal transaction.

Department of Safety v. Orion Prince, IO/4-22-83. FO/5-2-83. 1 APR 342.

***23 I.O. 1995 CO-MINGLED WITH MARKED MONEY**--The State carried its burden the proving that the seized money was proceeds from a drug sale since the money was found in close proximity to marijuana obviously packaged for sale and the money was intermingled with marked money used by the police to purchase marijuana.

Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***23 I.O. 1995 PROXIMITY TO DRUGS AND INTERMINGLED WITH MARKED MONEY**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. In the present case, the seized money was found in the immediate proximity of marijuana obviously packaged for sale, and the money was intermingled with marked money used by the police to purchase marijuana. Therefore, forfeiture of the money was ordered.

Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***23 I.O. 1994 ABORTED DRUG SALE**--The State did not meet its burden with regard to the forfeiture of \$105 since there was no direct connection between the seized money and a drug sale. A potential transaction that never materialized could not be speculated as grounds for the forfeiture of the money.

Department of Safety v. Kenneth S. Doshi, IO/9-14-94. 10 APR 122.

***23 I.O. 1994 LEGITIMATE SOURCE FOR MONEY ESTABLISHED**--Where the Claimant, a salesman, knew the exact amount and denominations of money contained in a metal box seized by officers, the money was ordered returned to the Claimant after he proved that the money was derived from the sale of Ginsu knives, not drugs.

Department of Safety v. James A. Lemon, IO/8-17-94. 12 APR 80.

***23 I.O. 1994 NO INFERENCE OF DRUG MONEY**--In the present case, the proof did not establish that the seized money was used in violation of the statute. It was clear from the record that the money was not used to purchase drugs since the Claimant had the money after the purchase. Moreover, there was no proof from which one could infer that the money was intended to be later used to purchase drugs. Since there was also no proof that the seized money constituted drug money and since there was no proof of any prior drug dealing by the Claimant, the money was ordered returned to the Claimant. The fact that the Claimant possessed a pager was not sufficient proof that he was a drug dealer.

Department of Safety v. Roger Sexton, IO/8-10-94. 10 APR 316.

***23 I.O. 1994 MONEY NOT SUFFICIENTLY RELATED TO DRUG SALES**--Although large amounts of hidden money and guns were discovered as well as an electronic transmission detection device, the State did not establish that the money seized was sufficiently related to drug sales to render it forfeitable. Considering that only a very small amount of marijuana was found and that there was no proof of sales activity other than the Claimant's ten-year-old drug conviction, the Administrative Law Judge determined that the drug dog's "indications" and the conflicting statements by the Claimants as to its

source and ownership were not sufficient to establish a case for forfeiture. Therefore, the Claimant's motion to dismiss was granted, and the money was returned to the Claimant.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***23 I.O. 1994 INNOCENT MONEY; CO-MINGLING**--Given the evidence of drug sales the night of the seizure, even if some of the money seized was completely "innocent," this innocent money was so co-mingled with the money used for the drug sale as to make it impossible to distinguish and, therefore, rendered all the money subject to forfeiture.

Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***23 I.O. 1993 LARGE SUMS OF MONEY**--While the finding of large sums of money alone, or with controlled substances, would not, by itself, support a forfeiture of such money absent additional circumstances, inferences may be drawn from the circumstantial evidence to support the forfeiture of money. The money need not be traced to specific sales.

Department of Safety v. Page G. Stuart, et al., IO/12-22-93. 11 APR 9.

***23 I.O. 1993 CIRCUMSTANTIAL EVIDENCE CONNECTING SEIZED MONEY TO DRUG SALES**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. The packaging of the cocaine in small portions, the presence of a loaded handgun, the suspicious activity at such a late hour in an area noted for drug sales, and the unusually large amount of cash which the Perpetrator/Driver of the vehicle was carrying at the time, all combine to create a circumstantial case, absent any reasonable explanation as to the money's source.

Department of Safety v. Jo A. Vinson, IO/11-19-93. 11 APR 236.

***23 I.O. 1993 TRAVEL MONEY**--Where Claimant was 1) unemployed for considerable period of time and 2) found with a large amount of marijuana (in this case, \$10,000 worth), it was deduced, from these facts, that the Claimant's money was traceable to drug proceeds. Even if the money was not drug proceeds, it is still subject to forfeiture when it is considered travel money being used in facilitation of the sale or transportation of illegal drugs.

Department of Safety v. Steven Dyer, IO/11-15-93. 11 APR 46.

***23 I.O. 1993 NO RECEIPT AND NO CORROBORATION**--Although the Claimant asserts that the seized money was previously given to the perpetrator by her to make a perfectly legal transaction, her claim fails for the following reasons: 1) Claimant offered no receipt or other proof of such a transaction between her and the perpetrator, 2) Claimant did not offer the testimony of the perpetrator to support her contention, 3) the amount of currency seized from the perpetrator was considerably less than the amount the Claimant allegedly gave him, and 4) it is obviously impossible for the Claimant to establish that the U.S. currency seized from the perpetrator is a portion of the same U.S. currency she allegedly had previously given him.

Department of Safety v. Willie Ann Marr, IO/10-18-93. 12 APR 88.

***23 I.O. 1993 CO-MINGLING OF INNOCENT MONEY AND DRUG MONEY**--In the present case, drugs were found in the Claimant's home along with some marked money used by police to purchase drugs from Claimant. Since both the drugs and the marked money were found mixed with the seized money, the seized money was determined to be proceeds from the sale of illegal drugs and subject to forfeiture.

Department of Safety v. Mary Carolyn Davis, IO/10-7-93. 12 APR 95.

***23 I.O. 1993 MARKED MONEY FROM PRIOR PURCHASE**--State failed to establish seized money was subject to forfeiture when no evidence was offered that linked Claimant to certain drug sales of which the police were aware. Upon being stopped by police, Claimant was found with the seized money and a small amount of cocaine. This small amount, .2 grams, was found to be indicative of possession for personal use and not of an amount that can be presumed to be possessed for resale. Furthermore, no other drugs were found in the Claimant's possession, nor were any drugs found during the search of the residence Claimant was visiting or his vehicle. The only connection between Claimant and the drug sales was some marked money the police found and were able to identify as the same bills used in a prior purchase of cocaine. This marked money is subject to forfeiture. However, the mere fact that the Claimant had this money in his possession, with no other evidence linking him to the drug sales, does not automatically taint the rest of the money in his possession to such an extent that it also becomes forfeitable.

Department of Safety v. Timothy Crutcher, IO/9-13-93. 9 APR 300.

***23 I.O. 1993 CO-MINGLING**--Even if some of the money at issue was completely "innocent" money, any such innocent money that is co-mingled with money used or intended to be used in violating the drug laws as to make it impossible to distinguish, renders all the money subject to forfeiture under T.C.A. §53-11-451(a)(6)(A).

Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***23 I.O. 1993 CO-MINGLING** --While it is possible that some money in the Claimant's possession was legitimate money, Claimant's drug money and legitimate money were co-mingled to the extent that it became impossible to for them to be completely distinguished. Nevertheless, it was quite clear that a major portion of the seized money represented proceeds from drug sales. Additionally, in light of Claimant's invocation of the Fifth Amendment and refusal to answer questions regarding what he intended to do with the money, all the money was found to constitute drug proceeds.

Department of Safety v. David Van McCloud and Samantha Cook, IO/8-19-93. 11 APR 162.

***23 I.O. 1993 CONNECTION BETWEEN MONEY AND DRUGS REQUIRED**--The State does not carry its burden of proof to support a forfeiture if there is no evidence presented that the seized money was connected to the sale of a controlled substance. The State is not required to trace money or proceeds to specific drug sales, but there must be some proven nexus to connect the seized property with drug sale activity. In the present case, since the testifying agent had no knowledge of how or where the money was found in the Claimant's residence, the finding of cash with a large quantity of controlled substances did not alone satisfy the burden of proof.

Department of Safety v. Able Eugene Hamon, IO/7-9-93. 10 APR 174.

***23 I.O. 1993 FACTORS TO CONSIDER; FORFEITURE OF MONEY** --Among the factors to be considered, in determining a case in which the money cannot be directly traced to a specific sale, is 1) whether or not the money was found in close proximity to an illegal controlled substance, 2) whether the money was with other money, and 3) what type of packaging was involved.

Department of Safety v. Foster Norwood, IO/7-8-93. 11 APR 84.

***23 I.O. 1993 PACKAGING OF DRUGS LINK MONEY TO DRUG SALE ACTIVITY**--The packaging of the marijuana, combined with the amount in each bag and the U.S. currency located on the Claimant's person, clearly indicates involvement in drug trafficking. It is common knowledge that such packaging is often used by street dealers.

Department of Safety v. Foster Norwood, IO/7-8-93. 11 APR 84.

***23 I.O. 1993 CIRCUMSTANTIAL EVIDENCE**--Additional factors surrounding the seizure may be considered in forfeiture proceedings. If these circumstances cut in favor of the position of the seizing agency, then the seized property may be forfeited without being traced directly to a specific illegal transaction.

Department of Safety v. Foster Norwood, IO/7-8-93. 11 APR 84.

***23 I.O. 1993 FACTORS TO CONSIDER; FORFEITURE OF MONEY**--Among the factors which may be considered in determining whether the State has met its burden of proof with regard to the forfeiture of seized currency are:

1. Whether the money was found in close proximity to the illegal controlled substance;
2. Whether marked money was found with the other money;
3. Whether the Claimant was unemployed and there is no legitimate source for the money;
4. Whether there is evidence or records of a large scale drug operation;
5. Whether Claimant is associated with known traffickers or users;
6. Whether Claimant has a prior record of drug law violations;
7. The quantity of the money involved;
8. The packaging of the drugs; and
9. The prior records of those involved in the drug transaction.

Department of Safety v. Corey Lamont Sparkman, IO/4-14-93. 10 APR 183.

***23 I.O. 1993 CONNECTION BETWEEN MONEY AND DRUGS; FUTURE DRUG SALE**--The possibility that some indefinite amount of money may be used at some unspecified point in the future to purchase an undefined amount of drugs did not satisfy the State's burden of proof that the money should be seized because it was "intended to be furnished in exchange for a controlled substance." Since the State was unable to distinguish which part of the money was possibly intended for use to buy drugs, forfeiture of the entire sum was not warranted. The possibility that money was intended to be used to buy drugs did not meet the standard of proof (preponderance of the evidence) required to support a forfeiture. This was especially true when the alleged possible future buyer was a small user who might, at most, spend a very small portion of the money at issue on drugs.

Department of Safety v. Ricky D. Zehringer, IO/2-5-93. 10 APR 197.

***23 I.O. 1993 MONEY; INNOCENT SOURCE**--The discovery of a small amount of marijuana found in the house, indicating personal use, along with credible testimony as to an innocent source for the money found, leads to the conclusion that the money is not subject to forfeiture.

Department of Safety v. Jonna Murphy and Monroe Hargrove, IO/1-12-93. 12 APR 103.

***23 I.O. 1992 CO-MINGLED AND NO LEGITIMATE SOURCE**--Where 1) \$540 of money known to be drug sale proceeds was mixed with \$157, whose source was not known, 2) there were large amounts of drugs yet to be sold, and 3) there was no valid explanation as to the source of the money, all the money in question was subject to forfeiture.

Department of Safety v. Harry G. Noland, IO/12-16-92. 12 APR 109.

***23 I.O. 1992 CO-MINGLING; PRESUMPTION**--The money in question that was found on the Claimant's person had been co-mingled with the money that was used to make the illegal drug purchase. In the absence of any other explanation, this co-mingling raises the presumption that the money found on the Claimant's person constituted something of value intended to be furnished in exchange for drugs in violation of T.C.A. §53-11-451(a)(6)(A).

Department of Safety v. Jerry Mathis, IO/8-6-92. 11 APR 77.

***23 I.O. 1992 LARGE SUMS OF MONEY OR JEWELRY**--The mere presence of relatively large sums of money found at the same time as controlled substances does not satisfy the State's burden of proof because no connection was shown between the money and any drug transaction. Even more so, the mere wearing of jewelry does not meet the State's burden. To hold otherwise would render all property owned by any claimant subject to forfeiture upon the showing that the claimant had been involved in a drug deal.

Department of Safety v. Robert S. Brennan, IO/5-15-92. 10 APR 225.

***23 I.O. 1992 PRESUMPTION OF DRUG PROCEEDS**--The claimant established no legitimate source for the seized money. The claimant's attempted sale of marijuana to the police officer, his possession of the marijuana at the time of arrest, and his past record are convincing that he is in the business of trafficking in marijuana and that the seized money he was carrying came from his sales.

Department of Safety v. David T. Atkins, IO/4-23-92. 15 APR 267.

***23 I.O. 1992 ABSENCE OF EXPLANATION**--The close proximity of the marijuana to the large sum of seized money raises a presumption that the money represents something of value furnished or intended to be furnished in a transaction in violation of T.C.A. §53-11-451(a)(6)(A). In the absence of any reasonable explanation concerning the legitimate source of or the intended use of the money, such a presumption must prevail.

Department of Safety v. Jane L. Chafin, IO/4-22-92. 11 APR 123.

***23 I.O. 1992 LOTTERY TICKET**--Proceeds from a lottery pay-off found forfeitable as proceeds under T.C.A. §53-11-451(a)(6)(a) because the money used to purchase the lottery ticket was presumed to come from proceeds of Claimant's drug dealings. In addition, it was proven that Claimant was selling large amounts of cocaine during the period in which the lottery ticket was purchased.

Department of Safety v. Preston Crowder and Vanderbilt University Employees Credit Union, IO/4-14-92. 11 APR 185.

***23 I.O. 1983 VALID PRESCRIPTIONS**--Where all but 30 pills (controlled substances) were accounted for by valid prescriptions and no substantial proof is offered to show the drugs were not for personal use and uncontroverted testimony corroborated by witnesses show that money was gifts and other legitimate sources, the money is not subject to seizure.

Department of Safety v. Willie P. Green, IO/2-23-83. 1 APR 245.

24. PROCEEDS

***24 Tenn. 1977 PROXIMITY OF CASH TO DRUGS; INFERENCE OF DRUG SALE ACTIVITY**--While the finding of cash with a large quantity of controlled substances does not alone satisfy the burden of proof, there are, in the present case, numerous additional circumstances from which inferences favorable to the contentions of the State could be drawn.
Lettner v. Plummer, 559 S.W.2d 785 (Tenn. 1977).

***24 Tenn. App. 1994 DRUG PROCEEDS, INFERENCE OF**--Although the cash was seized from the Claimant's wallet at the time of his arrest, it was not marked to indicate that it had been used in the drug transaction on the date of his arrest or the one that occurred the day before. However, the record contained uncontroverted evidence that the Claimant was known as a drug dealer and had been for some time. The Claimant testified concerning various types of odd jobs that he had held since his release on parole in 1989, but he could not pinpoint his work activities for the time immediately preceding his arrest, and it is clear that in order for the Claimant to sell cocaine he must acquire it, which, of course, requires funds. In view of the close proximity of the funds to the actual narcotics transactions, and the continuing nature of his operation as a drug dealer, there could arise an inference that the money was used to continue his dealing in drugs.
Reece v. Lawson, No. 01A01-9310-CH-00439, 1994 WL 171056 (Tenn. Ct. App. May 6, 1994).

***24 Tenn. App. 1992 NO EVIDENCE TO CONNECT SEIZED MONEY TO DRUG PROCEEDS**--The evidence did not preponderate in favor of a ruling that the \$20,000.00 was proceeds from the illicit sale of drugs or that it was otherwise subject to forfeiture under the law. At most, only a suspicion was raised. The statements of the two officers only established that 1) the \$20,000.00 was wrapped in a suspicious and unusual manner, 2) at some point, some or all of the money had come in contact with drugs or with someone who had handled drugs, and 3) the Claimants made some conflicting statements about their circumstances and where the money came from. However, no drugs were found. No prior drug record on the part of either Claimant was produced. No drug paraphernalia was found. No testimony was produced that any actual sales had taken place. Therefore, even assuming suspicious behavior on the part of the Claimants, the above evidence was not found sufficient to sustain a ruling in the State's favor.
Fullenwider v. Lawson, No. 90-2374-I, 01-A-019202CH00066, 1992 WL 319464 (Tenn. Ct. App. November 6, 1992). 15 APR 294.

***24 Ch. Ct. 1992 LINK BETWEEN SEIZED MONEY AND DRUG PROCEEDS REQUIRED**--Seized money need not be traced back to a specific sale, but there must be some evidence of fairly recent drug activity to support a forfeiture. While the State established that the Claimant was once involved in drug trafficking, it did not prove that the seized \$4,000 was traceable to drug proceeds. The record showed that the Claimant acquired the money from the sale of a car. Moreover, this car was obtained by trading an older car that the Claimant had purchased prior to dealing drugs.
King v. Lawson, No. 91-2511-I (Davidson County Ch. Ct. October 5, 1992). 15 APR 334.

***24 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Given the relatively large amounts of cash possessed by the claimant who was otherwise unemployed, the lack of any credible explanation by the claimant for its possession, and the claimant's failure to pursue his claim for return of the property, a presumption emerged that the seized money constituted drug proceeds and subject to forfeiture.
Department of Safety v. Jon H. Davis, IO/5-22-95. FO/6-1-95. 10 APR 239.

***24 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Given the quantity of drugs seized, the packaging of the drugs, the quantity of money seized, the presence of a gun at the time of seizure, and the claimant's previous record relating to illegal drug activity, the administrative law judge determined that the money seized represented drug proceeds and was subject to forfeiture.
Department of Safety v. Marquise Waller, IO/4-6-95. FO/4-17-95. 10 APR 245.

***24 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--Forfeiture of the seized vehicle was ordered after the claimant and his companions were found to be drug dealers transporting marijuana for resale based upon the discovery of two bags of marijuana in the vehicle, the notepad of purported drug transactions, the pagers, the guns, and the unemployed status of the claimant and his companions. Likewise, the lack of employment in conjunction with the other evidence raised a presumption that the source of the seized money was from illegal drug sales.
Department of Safety v. William P. Airhart, IO/3-8-95. FO/3-20-95. 10 APR 252.

***24 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--The facts of this case clearly established that the claimant was involved in the purchase and sale of cocaine since he had no other credible means to support himself or to explain the source of the seized money. Given the circumstances at the time of the money's seizure, the administrative law judge determined that the claimant's income was derived from drug sales. The main factors weighing in this finding were 1) the claimant's unemployed

status, 2) the lack of a credible explanation for the amount or source of the seized money, 3) the claimant's own admission that he was the person behind the instant purchase, and 4) the claimant's statement that he was intending to sell cocaine. Consequently, the seized money was forfeited as proceeds of drug sale activity.
Department of Safety v. Gary Don Ray, IO/3-8-95. FO/3-20-95. 10 APR 267.

***24 F.O. 1995 PRESUMPTION OF DRUG PROCEEDS**--The quantity of money seized created a presumption that it was linked to drug sale activity. Since the amount of money was evenly divisible by \$20 and crack cocaine sells for \$20 a rock, the money was forfeited as drug proceeds.
Department of Safety v. Robert D. Parker, IO/3-8-95. FO/3-20-95. 10 APR 260.

***24 F.O. 1995 CROP NOT READY FOR SALE**--Where money was seized after the Claimant's drying marijuana crop was discovered upon a search of the Claimant's home, the seized money was returned to the Claimant after it was determined that the raid caught the Claimant just before he was ready to sell his crop. On the record, the money could not be forfeited as drug proceeds if the drug crop was still not in a condition to be sold.
Department of Safety v. Franklin Morgan, IO/5-27-94. FO/1-9-95.

***24 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--Where the Claimant is not gainfully employed in any business other than drug trafficking, there is a presumption that the seized money constitutes drug proceeds.
Department of Safety v. Marguerite Carroll, IO/12-6-94. FO/12-16-94. 10 APR 274.

***24 F.O. 1994 DRUG PROCEEDS; FACTORS TO CONSIDER**--The State proved that the Claimant was the possessor of the marijuana found in an officer's patrol car and that the money seized from him should be forfeited after presenting evidence that: 1) the marijuana was found where the Claimant had been sitting in the patrol car; 2) the Claimant had a reputation as a drug dealer in the community; 3) the Claimant had been associating with other known drug dealers at the time of his arrest; 4) the packaging of marijuana was indicative of resale amounts rather than personal use; 5) the Claimant was carrying large sums of cash in highly unusual places on his body; and 6) the Claimant's credibility was in question due to the inconsistency of his statements as to the source of the money at the hearing and at the time of his arrest.
Department of Safety v. Ricky H. Bell, IO/11-30-94. FO/12-12-94. 12 APR 116.

***24 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--Although there was no direct evidence presented at the hearing to establish that any of the \$643 was the proceeds of any particular drug sale, the preponderance of the evidence showed that the Claimant was involved in drug sale activity and that the money seized was the proceeds of such activity. The cocaine and drug scales found on his person, along with the large sum of money in denominations characteristic of drug sale activity, supported this conclusion. While it was possible that some of the money may have had a legitimate source and purpose, any such money was so co-mingled with the money considered drug proceeds as to make the entire amount forfeitable under the law.
Department of Safety v. James Cox, IO/10-31-94. 10 APR 284. IO/11-2-94. 10 APR 292. FO/11-10-94.

***24 F.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--The conclusion that the money seized from the Claimant constituted drug proceeds was supported by the following factors: 1) a large amount of drugs were seized along with the money; 2) drug scales were seized at the same time; 3) the Claimant was unemployed at the time of his arrest; and 4) Claimant's explanations as to the legitimate source of the money were not considered credible.
Department of Safety v. Danny Teague, IO/10-28-94. FO/11-7-94. 10 APR 300.

***24 I.O. 1995 CO-MINGLED WITH MARKED MONEY**--The State carried its burden the proving that the seized money was proceeds from a drug sale since the money was found in close proximity to marijuana obviously packaged for sale and the money was intermingled with marked money used by the police to purchase marijuana.
Department of Safety v. Agnes Mitchell and Joanna Fields, IO/2-27-95. 10 APR 309.

***24 I.O. 1994 NO INFERENCE OF DRUG PROCEEDS**--Since the State offered no proof of any sale or sales activity on the part of the Claimant even though drugs were found in the Claimant's possession, the seized currency was ordered returned to the Claimant. The Administrative Law Judge determined that no intent to sell can be inferred from the amount of drugs seized. Therefore, there was no basis to infer the seized money was the proceeds of a drug sale.
Department of Safety v. Larry D. Ware, IO/6-22-94. 10 APR 332.

***24 I.O. 1994 PRESUMPTION OF DRUG PROCEEDS**--In the present case, the Claimant's only known source of income derived from the sale of drugs. Absent any explanation from the Claimant and in light of the close proximity of the seized

money to marked undercover drug money in the Claimant's possession, the Administrative Law Judge determined that the seized money constituted drug proceeds in violation of the Tennessee Drug Control Act.

Department of Safety v. Darrell Ferris, IO/6-13-94. 10 APR 339.

***24 I.O. 1994 PRESENCE OF SCALES AND PACKAGING OF DRUGS; PROCEEDS**--Although there was no direct evidence presented at the hearing to establish that the \$143 was the proceeds of any particular sale, the preponderance of the evidence presented at the hearing established that the Claimant was involved in the sale of marijuana. The scales found with the marijuana and the packaging of the marijuana itself (in several separate baggies rather than just one) support this conclusion.

Department of Safety v. Michael Love, IO/4-11-94. 11 APR 202.

***24 I.O. 1994 JEWELRY AS PROCEEDS**--Even though there was evidence that the Claimant worked in a pawn shop and there was a possibility that the seized jewelry came from the pawn shop, the fact that the jewelry was found with a large amount of marijuana led to the conclusion that the jewelry was also either drug proceeds or intended to be exchanged for drugs. The Administrative Law Judge also noted that none of the jewelry was actually worn by the Claimant, which might indicate some other source than drug proceeds.

Department of Safety v. Michael Love, IO/4-11-94. 11 APR 202.

***24 I.O. 1994 UNEMPLOYED WITH LARGE AMOUNT OF DRUGS AND MONEY**--Given the amount of cocaine (72 rocks of cocaine packaged in \$20 amounts), the denominations (\$20 bills) and amount of currency seized (over \$1,000), and the Claimant's lack of other employment, the Administrative Law Judge determined that the Claimant was in the business of selling of cocaine and using his car for his business, and that the money seized was drug proceeds.

Department of Safety v. Christopher L. Hoosier, IO/3-22-94. 11 APR 210.

***24 I.O. 1994 MOWER AND SHOTGUN**--A riding lawn mower was subject to forfeiture under T.C.A. §53-11-451(a)(2) since it was used to clear a path to the marijuana. A shotgun was subject to forfeiture also as equipment used in the manufacture of marijuana since the Claimant used the shotgun in the traps set to protect the marijuana. The Administrative Law Judge determined these uses to be sufficiently associated with the marijuana's maintenance and manufacture to subject both the riding lawnmower and the shotgun to forfeiture. In the alternative, both the riding lawnmower and the shotgun were also found to be forfeitable as drug proceeds under T.C.A. §53-11-451(a)(6)(A).

Department of Safety v. Loretta Overstreet and David Overstreet, IO/3-14-94. 11 APR 264.

***24 I.O. 1994 VEHICLE; TOO LITTLE LEGITIMATE INCOME TO PURCHASE**--While there was no proof that the seized vehicle was used to transport or facilitate the sale of drugs, the vehicle was found forfeitable as proceeds from the illegal sale of marijuana. The Claimant's admitted drug sales activity and income during 1992 and 1993, combined with the large expenditures of cash for luxury items during the last six months of 1991, established a *prima facie* case that the Claimant was selling marijuana during that time and making the cash purchases with proceeds from the sales. The Administrative Law Judge determined that the Claimant was spending his legitimate income on daily living expenses, but using the income from the drug sales during that period to make cash purchases of luxury items, one of which was the seized vehicle.

Department of Safety v. Steven Mikels, IO/3-7-94. 11 APR 217.

***24 I.O. 1994 DIRECT OBSERVATION OF SALE IS UNNECESSARY**--The fact that the officers did not directly observe the Claimant engage in drug transactions is not determinative where the State has established by a preponderance of the evidence that the currency seized was received in exchange for controlled substances. Funds may be forfeited without being traced to specific prior sales of controlled substances.

Department of Safety v. Fidel Garcia Mungia, IO/1-4-94. 11 APR 228.

***24 I.O. 1993 CIRCUMSTANTIAL EVIDENCE CONNECTING SEIZED MONEY TO DRUG SALES**--The State is not required to trace money or proceeds to specific drug sales, so long as there is some proven nexus to connect the seized property with sales activity. Circumstantial evidence can be used to make this connection. The packaging of the cocaine in small portions, the presence of a loaded handgun, the suspicious activity at such a late hour in an area noted for drug sales, and the unusually large amount of cash which the Perpetrator/Driver of the vehicle was carrying at the time, all combine to create a circumstantial case, absent any reasonable explanation as to the money's source.

Department of Safety v. Jo A. Vinson, IO/11-19-93. 11 APR 236.

***24 I.O. 1993 UNEMPLOYED WITH LARGE AMOUNT OF DRUGS**--Where Claimant was 1) unemployed for considerable period of time and 2) found with a large amount of marijuana (in this case, \$10,000 worth), it was deduced, from

these facts, that the Claimant's money was traceable to drug proceeds. Even if the money was not drug proceeds, it is still subject to forfeiture when it is considered travel money being used in facilitation of the sale or transportation of illegal drugs. Department of Safety v. Steven Dyer, IO/11-15-93. 11 APR 46.

***24 I.O. 1993 WEAPONS**--Weapons seized during a drug arrest are not subject to forfeiture where 1) the State did not argue that the seized weapons were used to facilitate a drug transaction or that they were proceeds traceable to such an exchange and 2) the weapons were legal weapons and not subject to seizure under the laws of Tennessee.

Department of Safety v. James A. Ruble, IO/11-4-93. 10 APR 159.

***24 I.O. 1993 CO-MINGLING OF INNOCENT MONEY AND DRUG MONEY**--In the present case, drugs were found in the Claimant's home along with some marked money used by police to purchase drugs from Claimant. Since both the drugs and the marked money were found mixed with the seized money, the seized money was determined to be proceeds from the sale of illegal drugs and subject to forfeiture.

Department of Safety v. Mary Carolyn Davis, IO/10-7-93. 12 APR 95.

***24 I.O. 1993 JEWELRY NOT PURCHASED WITH DRUG PROCEEDS**--Claimant's watch found not subject to forfeiture since 1) it was not of particularly great value so as to suggest it was purchased with drug proceeds and 2) there was evidence presented by the Claimant that it came from an innocent source.

Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***24 I.O. 1993 CO-MINGLING OF SEIZED MONEY AND DRUG PROCEEDS**--While it is possible that some money in the Claimant's possession was legitimate money, Claimant's drug money and legitimate money were co-mingled to the extent that it became impossible for them to be completely distinguished. Nevertheless, it was quite clear that a major portion of the seized money represented proceeds from drug sales. Additionally, in light of Claimant's invocation of the Fifth Amendment and refusal to answer questions regarding what he intended to do with the money, all the money was found to constitute drug proceeds.

Department of Safety v. David Van McCloud and Samantha Cook, IO/8-19-93. 11 APR 162.

***24 I.O. 1993 FACTORS TO CONSIDER; FORFEITURE OF PROCEEDS**--Among the factors which may be considered in determining whether the State has met its burden of proof with regard to the forfeiture of seized currency are:

1. Whether the money was found in close proximity to the illegal controlled substance;
2. Whether marked money was found with the other money;
3. Whether the Claimant was unemployed and there is no legitimate source for the money;
4. Whether there is evidence or records of a large scale drug operation;
5. Whether Claimant is associated with known traffickers or users;
6. Whether Claimant has a prior record of drug law violations;
7. The quantity of the money involved;
8. The packaging of the drugs; and
9. The prior records of those involved in the drug transaction.

Department of Safety v. Corey Lamont Sparkman, IO/4-14-93. 10 APR 183.

***24 I.O. 1992 CIRCUMSTANTIAL EVIDENCE CONNECTING SEIZED MONEY TO DRUG PROCEEDS**--The large amount of marijuana found with the Claimant, its packaging, and the large amount of money found on the Claimant strongly suggest that the Claimant was selling drugs and that the money was from the sale of drugs. The various denomination of the bills, its packaging, and its proximity to the drugs, strongly suggests that the money came from the sale of drugs. The

Claimant's failure to testify on his own behalf to clear up these inconsistencies or to produce witnesses who could corroborate a legitimate source for the money raises an unfavorable inference and discounts Claimant's proof.

Department of Safety v. John Perkins and Peggy's Auto Sales, IO/11-24-92. 11 APR 177.

***24 I.O. 1992 PRESUMPTION OF DRUG PROCEEDS**--The claimant established no legitimate source for the seized money. The claimant's attempted sale of marijuana to the police officer, his possession of the marijuana at the time of arrest, and his past record are convincing that he is in the business of trafficking in marijuana and that the seized money he was carrying came from his sales.

Department of Safety v. David T. Atkins, IO/4-23-92. 15 APR 267.

***24 I.O. 1992 LOTTERY TICKET PURCHASED WITH DRUG PROCEEDS**--Proceeds from a lottery pay-off found forfeitable as proceeds under T.C.A. §53-11-451(a)(6)(a) because the money used to purchase the lottery ticket was presumed to come from proceeds of Claimant's drug dealings. In addition, it was proven that Claimant was selling large amounts of cocaine during the period in which the lottery ticket was purchased.

Department of Safety v. Preston Crowder and Vanderbilt University Employees Credit Union, IO/4-14-92. 11 APR 185.

25. PROPERTY EXCHANGED FOR DRUGS

***25 F.O. 1995 PROPERTY PURCHASED WITH DRUG PROCEEDS OR TRADED FOR DRUGS**--Commemorative coins, a knife collection, a cellular phone, and various weapons were forfeited as property purchased with drug proceeds or traded for drugs after the claimant failed to prove a legitimate source for these items of property.

Department of Safety v. Brady L. Wood, IO/3-14-95. FO/3-24-95. 12 APR 51.

***25 F.O. 1983 CONNECTION BETWEEN JEWELRY AND DRUG SALE ACTIVITY REQUIRED**--Special agent for T.B.I. sent two informants into the home of a suspected drug dealer wired and with marked money. They bought drugs with the marked money and the agent recorded the conversation. Based on this information, they secured a search warrant and arrest warrants and proceeded to the suspect's home. They searched the house and arrested the suspect. T.B.I. took their marked money back and also seized some jewelry and other currency. The Administrative Law Judge returned the jewelry and other currency as there was no proof of any connection between the money and jewelry and any illegal transaction.

Department of Safety v. Orion Prince, IO/4-22-83. FO/5-2-83. 1 APR 342.

***25 I.O. 1993 JEWELRY USED AS SECURITY**--Where the State has proven that the Claimant's gold jewelry was used as security to facilitate the sale of drugs, the seized jewelry is forfeitable.

Department of Safety v. William Henry Council, Jr., IO/11-5-93. 11 APR 281.

***25 I.O. 1993 SKI BOAT USED AS COLLATERAL FOR DRUG SALE**--When Claimant used a ski boat as collateral in order to facilitate a drug sale and signed a promissory note to that effect, the intended facilitation was found to support a forfeiture of the ski boat even though there was no actual physical use of the boat.

Department of Safety v. Ricky L. Rounsaville, IO/8-23-93. 12 APR 1.

26. STATUTORY DEFENSES

***26 NOTE 1995 DEFENSES TO FORFEITURE**--Once the State has established a *prima facie* case of illegal use of the property, the burden shifts to the claimant to: 1) prove no violation occurred under the statute or 2) establish the requirements for a statutory exemption. If the claimant carries his burden, the State may rebut the claimant's evidence. Defenses based on the language of the statute which challenge the basis for forfeiture apply to all property. However, particular statutory exceptions apply only to forfeitures of certain property. For example, the simple possession and casual exchange exceptions apply exclusively to forfeitures of conveyances whereas the innocent owner or lienholder defenses cover forfeitures of money, proceeds and other valuable property as well as forfeitures of conveyances.

Zelimira Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27.

***26 NOTE 1986 DEFENSES TO FORFEITURE**--This paper contains a detailed discussion of defenses under the Tennessee Drug Control Act.

Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

27. INNOCENT OWNERSHIP -- IN GENERAL

***27 Tenn. App. 1993 BURDEN OF PROOF**--Owner of automobile could not avoid forfeiture of automobile used in cocaine transactions by alleging that state had not proven that he had knowledge of or had consented to cocaine transactions committed in automobile, as forfeiture statute placed burden of proving lack of knowledge or consent on person claiming it, and owner of automobile presented no such evidence.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***27 Tenn. App. 1993 BURDEN OF PROOF**--T.C.A. §53-11-409(a)(4)(B) places the burden of proving lack of knowledge or consent on the one claiming it.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***27 Tenn. App. 1993 NON-FORFEITED INTEREST RETURNED**--T.C.A. §53-11-451(a)(6)(B) does not dictate total forfeiture of the seized property. The statute allows the forfeiture of the property interest of the wrongdoer/perpetrator and those who knew or should have known of the criminal use of the property. However, the statute provides protection to innocent owners to the extent of their property interest. When a vehicle is co-owned and there is no dispute that one of the owners is an innocent owner, such innocent owner's interest in the vehicle must be returned to her either by 1) paying the innocent owner fair consideration for her interest in the vehicle or 2) permitting the innocent owner to compensate the governmental entity for the forfeited interest of the wrongdoer.

Harris v. Lawson, No.01A01-9306-CH-00250, 1993 WL 542893 (Tenn. Ct. App. December 30, 1993). 16 APR 127.

***27 F.O. 1995 BURDEN OF PROOF; INNOCENT OWNER**--The Claimant claimed a security interest in the vehicle. After the State established that the vehicle was subject to forfeiture for transporting drugs, the burden of proof fell upon the Claimant to establish that he had a security interest in the vehicle and had neither knowledge nor consented to the illegal use of the vehicle. The Claimant failed to establish any security interest in the seized vehicle, thus rendering moot his knowledge or consent burden.

Department of Safety v. Karen L. Kovek and James E. Pailin, IO/2-8-95. FO/2-21-95. 10 APR 115.

***27 F.O. 1995 BURDEN OF PROOF; INNOCENT OWNER**--Once the State establishes a *prima facie* case that the seized vehicle is subject to forfeiture, the Claimant must show that she has an interest acquired in good faith and that she neither had knowledge or nor consented to the illegal use of the vehicle.

Department of Safety v. Sharon L. Hansel, IO/1-10-95. FO/1-20-95. 9 APR 23.

***27 F.O. 1994 STIPULATION OF INNOCENT OWNERSHIP**--The statutory wrongdoer drove the Peterbilt tractor truck into a weight station where a Public Service Commission officer, while inspecting the truck and log book, noticed marijuana seeds and residue in the cab of the truck. A search of the truck revealed 3.5 grams of marijuana which the wrongdoer admitted he purchased while he was driving the truck. The Department of Safety stipulated the innocent ownership of the Peterbilt Corporation, and the tractor truck was returned to Peterbilt.

Department of Safety v. Randy Alan Rudnick, IO/11-2-94. FO/11-14-94. 11 APR 323.

***27 I.O. 1994 CLAIM FILED AS GUARANTOR FOR LOANS NOT RECOGNIZED**--A claim filed as a guarantor for loans made for the purchase of a seized vehicle will not be recognized in a forfeiture proceeding. Only claims filed as an owner or lienholder will be recognized.

Department of Safety v. Anthony R. Onks, IO/10-25-94. 9 APR 309.

***27 I.O. 1994 DEFAULT; INNOCENT OWNER**--T.C.A. §53-11-201(f)(1)(A) provides that whenever a claim for any seized property is filed by an owner or other person asserting the interest of the owner, the Commissioner shall not allow the claim unless and until the Claimant proves that he has an interest in such property which he acquired in good faith. In the present case, since the Claimant did not appear at the hearing and, as a result, his ownership interest was not proven, the Claimant's petition for the return of the vehicle was not allowed.

Department of Safety v. Douglas E. Arnwine, IO/3-23-94. 12 APR 125.

***27 I.O. 1994 NON-FORFEITED INTEREST RETURNED**--When a vehicle is co-owned and there is no dispute that one of the owners is an innocent owner, such innocent owner's interest in the vehicle must be returned to her either by 1) paying the innocent owner fair consideration for her interest in the vehicle or 2) permitting the innocent owner to compensate the governmental entity for the forfeited interest of the wrongdoer, citing Harris v. Lawson. 16 APR 127.

Department of Safety v. Sandra K. Arms, IO/1-13-94. 12 APR 129.

***27 I.O. 1993 LACK OF ACTUAL KNOWLEDGE; BURDEN OF PROOF**--The burden of proof is on the individual claiming to be the innocent owner of the seized vehicle to establish that the vehicle was used in violation of the drug laws without his knowledge or consent.

Department of Safety v. Kathy Jean Douglas, IO/3-22-93. 10 APR 190.

28. OWNERSHIP

***28 Tenn. App. 1993 OWNERSHIP; DETERMINATION OF**--The question of innocent ownership also involves the question of ownership itself. In determining ownership, the intent of the parties, as manifested not only by their declarations at the hearing but also by their previous actions and the incidents of ownership in each individual, is a key consideration.

Worthy v. Department of Safety, No. 92-2202-I, 1993 WL 404145 (Tenn. Ct. App. October 8, 1993).

***28 Tenn. App. 1993 OWNERSHIP INTEREST; TEMPORARY USE**--There is nothing in the facts to indicate that the wrongdoer had an ownership interest in the vehicle. Although the Claimant allowed the wrongdoer to use the van for a short period of time, no inferences can be drawn from those facts alone. The Claimant obviously made the decisions and exercised ultimate control over the vehicle. She also paid for the van and directed the use of the vehicle. The evidence is uncontroverted that the wrongdoer's possession of the van was by permission of the Claimant. Moreover, nothing is found in this record to indicate that the wrongdoer acted in any capacity except as agent of the Claimant in conveying the Claimant's payments to the dealer, in formalizing the purchase, and in holding custody of the van for the Claimant. Therefore, no evidence exists to support the State's contention that the wrongdoer held any interest in the van.

Worthy v. Department of Safety, No. 92-2202-I, 1993 WL 404145 (Tenn. Ct. App. October 8, 1993).

***28 Tenn. App. 1988 INTENTIONS AND ACTIONS OUTWEIGH TITLE**--Regardless in whose name a vehicle is titled, it is the intentions and actions of the parties that will determine the ownership of the vehicle.

Smith v. Smith, 650 S.W.2d 54, 56 (Tenn. Ct. App. 1988).

***28 Tenn. App. 1983 OWNERSHIP, DETERMINATION OF**--The intention of the parties is the governing factor in deciding ownership of an automobile.

Smith v. Smith, 650 S.W.2d 54, 56 (Tenn. Ct. App. 1983).

***28 Ch. Ct. 1989 OWNERSHIP; INTENT OF THE PARTIES**--The Tennessee courts have consistently ruled that the intent of the parties determine the ownership of a vehicle seized under the Tennessee Drug Control Act. They have additionally ruled that the illegal activities of one co-owner of a vehicle, even if unknown to the other co-owner, will defeat the innocent co-owner's claim for the return of the seized vehicle.

Cole v. Tennessee Department of Safety, No. 89-278-I (Davidson County Ch. Ct. June 26, 1989). 15 APR 322; Mack v. Tennessee Department of Safety, No. 86-1613-II (Davidson County Ch. Ct. January 27, 1987). 15 APR 343.

***28 Ch. Ct. 1989 OWNERSHIP THROUGH BUSINESS**--Ownership interest can be found in an individual in spite of the fact that a vehicle was titled in the name of a business if the vehicle was being provided to family members for non-business purposes. In this case, the owner of the business was merely purchasing vehicles through the company and providing them to his family members for non-business purposes, rather than furnishing vehicles to his employees for legitimate business purposes.

Platco, Inc. v. Robert D. Lawson, No. 89-631-II (Davidson County Ch. Ct., November 8, 1989). 15 APR 282.

***28 F.O. 1995 FACTORS INDICATING OWNERSHIP**--Relying on statutory law to determine whether co-ownership of a seized vehicle exists, the administrative law judge cited the following indicia of ownership under T.C.A. §40-33-204(d):

- 1) How the parties involved regarded the ownership of the property in question;
- 2) The intentions of the parties relative to ownership of the property;
- 3) Who was responsible for originally purchasing the property;
- 4) Who pays any insurance, license, or fees required to possess or operate the property;

- 5) Who maintains and repairs the property;
- 6) Who uses or operates the property
- 7) Who has access to use of the property;
- 8) Who acts as if they have a proprietary interest in the property.

Department of Safety v. Linda Dover and Ricky W. Dover, IO/5-5-95. FO/5-15-95. 12 APR 143.

***28 F.O. 1995 FAMILY CAR**--The colloquial use of words like "my" and "hers" in regard to a car do not necessarily lead to a conclusion that such words clearly define ownership. Likewise, the use of such words do not determine ownership. The Claimants in this case purchased the vehicle, titled it in their names, paid for all expenses, and held the keys to it. Although the Claimant's daughter was the primary user of the vehicle, this was not considered determinative since there was no other evidence that the daughter owned the vehicle besides the fact that she was its primary user and customarily referred to the vehicle as hers. Therefore, the Claimants were held to be the sole owners of the seized vehicle.

Department of Safety v. Jerry and Marjorie Killough, IO/2-15-95. FO/2-27-95. 12 APR 154.

***28 F.O. 1994 FAMILY CAR**--Despite the fact that the Claimant's son told the police officer at the time of his arrest that the seized vehicle was owned by him, the record established that the Claimant was the sole owner of the vehicle. She and her husband purchased the vehicle, titled it in her name, and paid for the vehicle in monthly installments out of her paycheck. The Claimant also paid for the insurance, repairs, and gasoline. As is common in a family with teenage children, the vehicle was considered a family car. Even though the Claimant's son had a key to the vehicle, he needed to have his parent's permission before he could use the vehicle.

Department of Safety v. Cassandra Robison and Wayne Anthony Robison, IO/11-29-94. FO/12-9-94. 12 APR 154.

***28 F.O. 1994 EQUITABLE OWNERSHIP BEFORE DIVORCE**--The Claimant proved that she held an equitable interest in the seized vehicle after she established that she was given the right to use the vehicle pending the finalization of her divorce, at which time her husband intended to title the vehicle in her name.

Department of Safety v. Jennifer Lee Frost, IO/11-14-94. FO/11-28-94. 12 APR 162.

***28 I.O. 1995 RETENTION OF INTEREST IN SEIZED VEHICLE**--Where claimant father argued that he retained an interest in the vehicle seized from his son, the administrative law judge determined that the son was the sole owner of the vehicle and that his father had no interest in the vehicle. The proof failed to support the claimant's assertion that he retained an interest in the vehicle. Not only had the son purchased the vehicle from his father, but the son maintained absolute custody and control over the vehicle. Moreover, the son did not require permission from his father to use the vehicle. Even though the claimant father retained the title to the vehicle, the totality of the evidence, in the administrative law judge's opinion, weighed in favor of the son as the sole owner of the vehicle, not his father.

Department of Safety v. Max E. Salas and Ron Salas, IO/4-7-95. 12 APR 171.

***28 I.O. 1994 OWNERSHIP; CLAIM FOR SOMEONE ELSE'S MONEY**--The Administrative Law Judge rejected Claimant's assertion that the seized money which belonged to his mother should be returned after it was determined that the Claimant had no ownership interest in the money and that the Claimant's mother did not file a claim for the money on her own behalf.

Department of Safety v. Brent A. Blye, IO/6-6-94. 10 APR 346.

***28 I.O. 1994 DETERMINATION OF OWNERSHIP**--In determining ownership, the linchpin is the intention of the parties. Intent must often be gleaned from circumstantial evidence which includes determining which party pays for repairs, insurance and other incidents of ownership. Mere title to the vehicle, absent any proof that the Claimant paid for the vehicle or for maintenance on the vehicle, does not constitute ownership, especially in the present case where the Claimant was financially unable to pay. In the present case, the Claimant possessed only naked title to the seized vehicle. She presented no proof, other than her testimony, that she selected, bought, or paid for the vehicle. There was also no proof of who insured the vehicle or who paid for the gas or repairs. In fact, the bills for the vehicle were only in the statutory wrongdoer's name. No proof was introduced that the Claimant paid for anything. In fact, the proof was that she was financially unable to do so since her yearly income was only \$800.

Department of Safety v. Denise Robinson, IO/5-3-94. 12 APR 180.

***28 I.O. 1992 FACTORS TO CONSIDER**--The following factors are considered in determining whether the Claimant or the driver had an ownership interest in the seized vehicle:

1. Who purchased the vehicle?
2. In whose name was the title of the vehicle?
3. Who was the regular driver of the vehicle?
4. Who paid for insurance, gas, repairs, and improvements for the seized vehicle?
5. Who exercised ultimate control over the vehicle and directed the use of the vehicle?
6. Whether Claimant and driver were family members and considered the vehicle a family car?

Department of Safety v. Meochia F. Teague, IO/9-23-92. 12 APR 187.

***28 I.O. 1992 TITLE AS EVIDENCE**--The titled registration in the Claimant's name is not in itself indisputable evidence of ownership especially when 1) the vehicle is insured under a family policy and 2) used, as well as considered, a family vehicle.
Department of Safety v. Lisa Malicoat, IO/8-10-92. 12 APR 196.

***28 I.O. 1992 TITLE AS EVIDENCE**--Title is *prima facie* evidence of ownership of a vehicle barring any other indicia of ownership.

Department of Safety v. Robert J. Blaszczyk, IO/5-18-92. 12 APR 203.

29. CO-OWNERSHIP

***29 Tenn. App. 1993 CO-OWNERSHIP, DETERMINATION OF**--The Claimant and her husband were determined to be co-owners of the car based upon the facts that: 1) both parties retained keys to the automobile, 2) there had been no property settlement agreed upon in the pending divorce proceedings at the time of the seizure, 3) both parties had filed separate petitions for return of the automobile, and 4) both parties acted as if they had some type of proprietary interest in the vehicle.
Harris v. Lawson, No. 01A01-9306-CH-00250, 1993 WL 542893 (Tenn. Ct. App. December 30, 1993). 16 APR 127.

***29 Tenn. App. 1993 CO-OWNERSHIP; STATUTORY CONSTRUCTION**--The construction of a forfeiture statute as it applies to a vehicle with two owners, where the State had conceded one to be an innocent owner, must balance two legislative intentions: (1) the prompt disposition of property subject to forfeiture under the statute and (2) the protection of innocent owners to the extent of their property interest. Although the term "owner" as used in the statute is ambiguous because it does not contemplate the forfeiture of co-owned conveyances, it is logical to construe that the legislature intended that term to apply to owners to the extent of their interest in property subject to forfeiture. This construction would allow the State to condemn the property interests of wrongdoers while preserving the interests of innocent owners. This construction of the statute is also consistent with the treatment accorded to innocent holders of a bona fide security interests in forfeited property. Furthermore, by recognizing individual ownership interests, this construction reaffirms the principle that claimants who contest forfeiture have standing only to the extent of their interests in the property. Based upon this construction of the forfeiture statute, total forfeiture of property in the co-ownership context is not allowed before a determination of the nature and respective extent of the individual interest held by each co-owner is made. After the determination of the extent of each co-owner's interest, the property must be disposed of in a manner that recognizes the interest of the innocent co-owner, either by payment of fair consideration for her interest, or by permitting her to compensate the governmental entity for the forfeited interest of the wrongdoer.

Harris v. Lawson, No. 01A01-9306-CH-00250, 1993 WL 542893 (Tenn. Ct. App. December 30, 1993). 16 APR 127.

***29 Tenn. App. 1993 CO-OWNERSHIP; FORFEITURE TO EXTENT OF PROPERTY INTEREST**--Total forfeiture of property in the co-ownership context is not allowed before a determination of the nature and respective extent of the individual interest held by each co-owner is made. After the determination of the extent of each co-owner's interest, the property must be disposed of in a manner that recognizes the interest of the innocent co-owner, either by payment of fair consideration for her interest, or by permitting her to compensate the governmental entity for the forfeited interest of the wrongdoer.

Harris v. Lawson, No. 01A01-9306-CH-00250, 1993 WL 542893 (Tenn. Ct. App. December 30, 1993). 16 APR 127.

***29 Tenn. App. 1992 PARENT AND CHILD**--Even where a Claimant's son was the primary driver of the vehicle and the vehicle was at the son's disposal when not needed in the family business, the son had no co-ownership interest when the

Claimant father 1) paid for the vehicle, the auto insurance, and gasoline, 2) exercised the ultimate control over the vehicle, 3) made all of the final decisions regarding the vehicle, and 4) directed the use of the vehicle.

Farley v. Commissioner of Safety, No. 90-3725-I, 01-A-019201CH00004, 1992 WL 151446 (Tenn. Ct. App. July 4, 1992). 16 APR 135.

***29 Tenn. App. 1992 FAMILY RELATIONSHIP**--Where there was an immediate family relationship between Claimant and driver of the seized vehicle, the Court of Appeals gave the most weight to the issue of whether the Claimant exercised ultimate control over the vehicle and directed its use. Once ultimate control is established, if the use of the vehicle was not authorized by Claimant as owner of the vehicle, he is not held accountable for the driver's actions.

Farley v. Commissioner of Safety, No. 90-3725-I, 01-A-019201CH00004, 1992 WL 151446 (Tenn. Ct. App. July 4, 1992). 16 APR 135.

***29 Tenn. App. 1992 CO-OWNERSHIP; FAMILY BUSINESS**--The seized vehicle was used in the course of the family business for necessary pickups and deliveries. Both Claimant Farley and Larry son, Scott Farley, testified that the vehicle was owned by the Claimant. Both testified that the Claimant maintained control over the vehicle and on various occasions had taken the vehicle away from the younger Farley as a disciplinary measure. Although Larry Scott Farley was the primary driver of the vehicle and it was at his disposal when not needed in the family business, the Court of Appeals did not draw any inferences from those facts alone. Claimant Farley obviously made the decisions and exercised the ultimate control over the vehicle. He paid for it, paid for the insurance, furnished the gasoline, and directed the use of the vehicle. Therefore, the Court of Appeals recognized father and son as co-owners of the vehicle.

Farley v. Department of Safety, No. 01-A-019201CH00004, 1992 WL 151446 (Tenn. Ct. App. July 2, 1992). 16 APR 135.

***29 Ch. Ct. 1992 FAMILY CAR; CO-OWNERSHIP FOUND**--Although the Claimant titled the car in his name and paid insurance premiums on the car, the intention of the father and son established that the car was co-owned. The Claimant's son drove the car exclusively for three years while he attended school out of town. Even though the Claimant testified that the vehicle was considered a family car, the court held that the facts supported the Commissioner's finding that the car was co-owned by both the Claimant and his son.

Emert v. Department of Safety, No. 91-1358-II (Davidson County Ch. Ct. June 17, 1992). 16 APR 3.

***29 Ch. Ct. 1989 COMPANY-OWNED VEHICLE**--A finding that a company owner's stepson was the owner of the vehicle was upheld by court. The company had purchased the vehicle after the company president, the Claimant, had married his stepson's mother. Although the vehicle was titled in the company's name, the evidence showed that, instead of being used for business, the vehicle was available for the stepson's personal use. The stepson indicated that the vehicle was his and was seen driving it on numerous occasions. In spite of the Claimant's contentions that the vehicle was titled in the company's name and that all expenses were paid by Platco, Inc., the court upheld the forfeiture after finding that none of Platco's employees drove the vehicle and that the Claimant could not state a business purpose for the vehicle.

Platco, Inc. v. Lawson, No. 89-631-II (Davidson County Ch. Ct. November 8, 1989). 15 APR 282.

***29 Ch. Ct. 1989 NO CONSIDERATION OF KNOWLEDGE OR CONSENT AFTER CO-OWNERSHIP ESTABLISHED**--The illegal activities of one co-owner of a vehicle, even if unknown to the other co-owner, will defeat the innocent co-owner's claim for the return of the seized vehicle. Once co-ownership is established, the absence of knowledge or consent are not considered in the determination of forfeiture and any exemption from it.

Cole v. Tennessee Department of Safety, No. 89-278-I (Davidson County Ch. Ct. June 26, 1989). 15 APR 322.

***29 Ch. Ct. 1989 FAMILY CAR**--Regarding the vehicle as a "family car" is one of the indicators of co-ownership.

Cole v. Tennessee Department of Safety, No. 89-278-I (Davidson County Ch. Ct. June 26, 1989). 15 APR 322.

***29 Ch. Ct. 1987 HUSBAND AND WIFE; FAMILY CAR**--The seized vehicle was titled in the Claimant's wife's name. However, the vehicle was used by both the Claimant and his wife as their family car. However, it was the Claimant who paid for the vehicle's insurance, license, gasoline, maintenance, and repairs. Moreover, he provided for over half the purchase price of the vehicle. It was later discovered that the vehicle was titled in the wife's name because the Claimant did not have a driver's license when the vehicle was purchased. Finally, the court noted that the Claimant joined his wife in seeking the return of the vehicle and in appealing the order to the court. Based on these facts, the court concluded that the Claimant co-owned the vehicle with his wife.

Mack v. Tennessee Department of Safety, No. 86-1613-II (Davidson County Ch. Ct. January 27, 1987). 15 APR 343.

***29 F.O. 1995 MOTHER AND SON**--Although the claimant mother argued that she was the sole owner of the vehicle, the State proved that the statutory wrongdoer son was also an owner in light of the fact that he was the primary user of the seized

vehicle, his personal possessions were in the vehicle at the time of seizure, and he had made substantial alterations to the vehicle to suit his purposes. These activities and modifications evidenced a clear proprietary interest in the vehicle, as opposed to his being merely permitted to borrow the vehicle from his parents for occasional use and especially in light of the fact that he did not drive any of his parents' other vehicles. Upon finding co-ownership, the administrative law judge determined that an equal ownership interest existed between the two parties. Consequently, under Harris v. Lawson, the claimant mother was permitted to either compensate the seizing agency for her son's forfeited one-half interest in the vehicle or be paid the fair market value of her one-half interest in the vehicle. It was also ordered that the division of the respective interests of the co-owners be subject to the valid lien held on the vehicle by the bank.

Department of Safety v. Linda Dover and Ricky W. Dover, IO/5-5-95. FO/5-15-95. 12 APR 143.

***29 F.O. 1995 VEHICLE USED FOR FAMILY BUSINESS**--The proof in this case showed that the vehicle was purchased for use in a family landscaping business. The Claimant's son retained possession of the vehicle, using it for business as well as personally. In fact, at the time the seizure, the Claimant's son told officers that the vehicle belonged to him, and, in fact, he treated it as if it were his own, as evidenced by the security system and stereo he installed at his own expense. The Administrative Law Judge concluded that the landscaping business was a partnership and that the vehicle was co-owned by the Claimant and her son. The Claimant held a 60% ownership interest while her son held a 40% ownership interest in the vehicle. This ownership interest calculation reflected the percentage of profits each partner received from the landscaping business and the fact that the payments made on the vehicle were from income received in the landscaping business. According to Harris v. Lawson, 40% ownership interest of the wrongdoer was forfeited while the 60% interest held by the Claimant was recognized and in effect returned to her, either by payment of fair consideration for her interest or by permitting her to compensate the State for the forfeited interest of her son.

Department of Safety v. Sharon L. Hansel, IO/1-10-95. FO/1-20-95. 9 APR 23.

***29 F.O. 1994 PARENT AND CHILD**--Where the Claimant is found to be an equal co-owner of the seized vehicle with his son, the Claimant, after having established that he is an innocent owner, is entitled to the protection of the law to the extent of his property interest in the vehicle under Harris v. Lawson. The vehicle is forfeited to the State subject to the proviso that the seized vehicle be disposed of in a manner that recognizes the 50% interest of the Claimant. This is accomplished either by payment of fair consideration for the Claimant's interest or by permitting the Claimant to compensate the State for the forfeited interest of the wrongdoer son.

Department of Safety v. Joseph Maxey, IO/3-11-94. FO/3-21-94. 12 APR 209.

***29 F.O. 1994 PARENT AND CHILD**--Occasional use of the seized vehicle by the child does not rise to the level of establishing that he is the co-owner of the vehicle along with his parent. The Claimant sometimes allowed his son to use the vehicle as parents commonly do, but the vehicle did not belong to the son nor was it used by him on a daily basis. Moreover, no evidence exists to suggest that the father intended the vehicle to belong to his son nor is there evidence that the son considered the vehicle as his own.

Department of Safety v. Wayne Roddy, IO/1-25-94. 12 APR 234. FO/2-4-94. 19 APR 304.

***29 I.O. 1994 PARENT AND CHILD**--Liberal access to the car does not imply co-ownership of the vehicle. The fact that the child is the primary user of the car does not imply legal ownership. Where the parent proves ultimate control over the vehicle with evidence that the child could only use the vehicle with the parent's permission, co-ownership does not exist.

Department of Safety v. Barbara Miller, IO/3-25-94. 12 APR 219.

***29 I.O. 1994 FATHER AND SON**--Claimant failed to prove that he had a "bona fide security interest" in the seized vehicle when no written agreement existed which set forth the terms of the oral agreement. The mere fact that the Claimant was shown on the title as the lienholder did not create a valid lien or security interest. In prior decisions, Administrative Law Judges have consistently held that the term "security interest" must meet the requirements of the Uniform Commercial Code. A security interest is not enforceable unless the secured party has possession of a collateral or a signed security agreement exists. Since the Claimant had neither signed a security agreement nor retained possession of the seized vehicle to the exclusion of the wrongdoer, he was not considered a lienholder. However, the Administrative Law Judge did determine that the Claimant proved he was a co-owner of the seized vehicle, and as such, the Claimant's one-half interest in the vehicle was recognized, pursuant to Harris v. Lawson. 16 APR 127.

Department of Safety v. Carlos E. Phillips, IO/2-22-94. 12 APR 226.

***29 I.O. 1994 RETURN OF OWNERSHIP INTEREST**--If the State can show that a vehicle was co-owned by a person using the vehicle in violation of the drug control act, the interest of the wrongdoer is forfeited, but the interest of the innocent owner is returned to the innocent owner. This can be accomplished either by payment of fair consideration for the Claimant's interest or by permitting the Claimant to compensate the State for the forfeited interest of the wrongdoer.

Harris v. Lawson, IO/2-8-94.

***29 I.O. 1994 CO-OWNERSHIP; NON-FORFEITED INTEREST RETURNED**--When a vehicle is co-owned and there is no dispute that one of the owners is an innocent owner, such innocent owner's interest in the vehicle must be returned to her either by 1) paying the innocent owner fair consideration for her interest in the vehicle or 2) permitting the innocent owner to compensate the governmental entity for the forfeited interest of the wrongdoer, citing Harris v. Lawson. 16 APR 127.
Department of Safety v. Sandra K. Arms, IO/1-13-94. 12 APR 129.

***29 I.O. 1993 CONTROL**--The issue of ownership and co-ownership is essentially decided by who exercises ultimate control of the vehicle.
Department of Safety v. Bob and Mary Wooten, IO/12-14-93. 12 APR 242.

***29 I.O. 1993 HUSBAND AND WIFE**--Although the Claimant made all payments on the vehicle out of her separate checking account and the perpetrator/husband is listed as co-signer in only one place on the loan papers, the preponderance of the evidence taken as a whole supports the finding that the perpetrator was considered by both parties to be a co-owner of the vehicle for the following reasons: 1) the perpetrator's name is on both the car note and the title, 2) both perpetrator and his wife used the seized vehicle as collateral for a loan they made jointly, and 3) the perpetrator used the car freely without the permission of the Claimant.
Department of Safety v. Yolanda L. Howard, IO/10-7-93. 12 APR 250.

***29 I.O. 1993 USE OF THE VEHICLE**--Use of the vehicle does not, by itself, imply any legal ownership rights in the vehicle. The basic inquiry in ownership issues is who exercises ultimate control. "Although Larry Scott Farley [son] was the primary driver of the vehicle, and it was at his disposal when not needed in the family business, we do not think any inferences can be drawn from those facts alone. Larry Gene Farley [the father] obviously make the decisions and exercised ultimate control over the vehicle. He paid for the insurance, furnished the gasoline, and directed the use of the vehicle." See Farley v. Commissioner of Safety, No. 90-3725-I, 01-A-019201CH00004, 1992 WL 151446 (Tenn. Ct. App. July 2, 1992). 16 APR 135.
Department of Safety v. Sharla Dillon and Edward Blevins, IO/10-4-93. 9 APR 316.

***29 I.O. 1993 PARENT AND CHILD**--There is quite obviously a difference in the intention of individuals as to who owns a vehicle when the individuals are husband and wife as opposed to parent and child. While the seized vehicle was obviously the vehicle the Claimant provided to both of her children to drive as they wished, there is no question that she is the ultimate owner of the vehicle. Not only did the Claimant purchase the vehicle, but the lien is in her name and she has the ultimate responsibility for the payment of the loan used to purchase the vehicle. In addition, only the Claimant had the authority to sell the vehicle. Unlimited access to the seized vehicle and the responsibility to put gas in the car when using it do not rise to the level of co-ownership.
Department of Safety v. Patricia B. Rye, IO/10-4-93. 12 APR 260.

***29 I.O. 1993 PARENT AND CHILD**--Where a Claimant's son was the primary driver of the vehicle, the son was found to have no co-ownership interest since the Claimant 1) exercised ultimate control over the vehicle by directing its use, 2) paid for the vehicle, 3) paid for the vehicle's insurance, 4) paid for gasoline, and 5) put the vehicle's title in his own name. Even though the son was the primary driver, the intention between the parties was that the father was the sole owner of the car.
Department of Safety v. Douglas B. Lewis, IO/5-12-93. 12 APR 267.

***29 I.O. 1993 PARENT AND CHILD**--Father's references to the seized car as his son's and son's references to the car in the possessive do not necessarily indicate intention as to actual ownership when there is evidence to the contrary.
Department of Safety v. Douglas B. Lewis, IO/5-12-93. 12 APR 267.

***29 I.O. 1993 TRANSFER OF RIGHTS**--Although there was never a stated intention on the part of the Claimant to relinquish any ownership in his vehicle to the perpetrator, the Claimant, by his actions, effectively transferred co-ownership rights. Once the Claimant "loaned" his truck to the perpetrator and allowed him to make all decisions regarding the vehicle and exercise ultimate control over the vehicle, the Claimant transferred co-ownership rights to the perpetrator.
Department of Safety v. Ronald Frey, IO/3-15-93. 12 APR 290.

***29 I.O. 1993 ILLEGAL USE BY BOYFRIEND**--The Claimant was found to be the sole owner of the vehicle for the following reasons: 1) her testimony was sincere and no evidence was presented to impeach her credibility, 2) the man who was arrested for possession of the cocaine was only her boyfriend, not her husband, 3) she required her boyfriend to get her implicit permission whenever he wished to use the vehicle, 4) although her boyfriend purchased the gas for the vehicle, she provided the money for the gas, and 5) her boyfriend provided no money for the car's maintenance.

Department of Safety v. Lisa M. Brawley, IO/2-4-93. 12 APR 297. IO/3-8-93. 12 APR 309.

***29 I.O. 1993 COMPANY-OWNED VEHICLE**--Where 1) a company owns a vehicle that was used to facilitate the sale of drugs and 2) the person who used the vehicle in violation of the drug laws can be shown to have exercised control of the company, that person is found to be at least a co-owner of the vehicle.

Department of Safety v. Tina Suggs Watwood and Elbert Ladale Suggs, IO/2-16-93. 12 APR 318.

***29 I.O. 1992 HUSBAND AND WIFE**--The following evidence was considered to determine the existence of co-ownership between husband and wife:

1. The title of registration was in both husband and wife's name.
2. Both husband and wife had free access to the vehicle.
3. Both husband and wife had their own set of keys to the vehicle.
4. The vehicle was characterized by both husband and wife as a family vehicle.

Department of Safety v. Paige Cooke and Brandon Easley, IO/12-30-92. 12 APR 332.

***29 I.O. 1992 PARENT AND CHILD**--Even though a vehicle is titled in the name of the mother, the daughter is considered a co-owner of the vehicle when 1) the vehicle was in the possession of the daughter when it was seized, and 2) the daughter is the primary person who uses the vehicle and pays for the gas and maintenance.

Department of Safety v. Vickie R. Lentz, IO/12-16-92. 12 APR 338.

***29 I.O. 1992 OWNED BY COMPANY CONTROLLED BY CLAIMANT**--The lienholder's claim is denied on the basis that the Claimant is a co-owner of the company holding the lien on the vehicle. Moreover, Claimant had ultimate control over the vehicle and used it as his own personal automobile.

Department of Safety v. Jack Davis, Jr., IO/12-16-92. 11 APR 295.

***29 I.O. 1992 FACTORS TO CONSIDER**--The following factors are considered in determining whether the Claimant or the driver had an ownership interest in the seized vehicle:

1. Who purchased the vehicle?
2. In whose name was the title of the vehicle?
3. Who was the regular driver of the vehicle?
4. Who paid for insurance, gas, repairs, and improvements for the seized vehicle?
5. Who exercised ultimate control over the vehicle and directed the use of the vehicle?
6. Whether Claimant and driver were family members and considered the vehicle a family car?

Department of Safety v. Meochia F. Teague, IO/9-23-92. 12 APR 187.

***29 I.O. 1992 PARENT AND CHILD**--Son's assertion that the car was really his is only one factor in deciding who is the owner of the car. A more important factor to be considered is what ownership interests the actual owner delegates to others, especially in determinations of co-ownership. While co-ownership is easily assumed in the case of husband and wife, the presumption that a son is co-owner of a car in which the parent is the titled owner is not so readily accepted. The State's contention that the son's intentions and actions indicate that the seized truck was his vehicle is not controlling since it is the owner's actions that determine if there is co-ownership. For the son to be considered a co-owner, there would need to be some

indication on the father's part that the car was also his son's car and not just that the car could be used by his son with regularity and ease as a family vehicle.

Department of Safety v. Michael Selph, IO/6-9-92. 12 APR 349.

***29 I.O. 1992 PARENT AND CHILD**--Where the father purchased a vehicle for his son and the vehicle was seized when the son used it in violation of the drug laws, the Administrative Law Judge found the father had no ownership interest in the vehicle at the time of the seizure regardless of both parties' intention that the son retain possession and title to the vehicle only on a temporary basis.

Department of Safety v. Robert J. Blaszczyk, IO/5-18-92. 12 APR 203.

***29 I.O. 1992 PROOF; SUBSTANTIAL ALTERATIONS TO VEHICLE**--Proof of ownership can be established when a party has made substantial alterations to the vehicle at his own expense. In this case, the perpetrator, who used the vehicle in violation of the drug laws, was found to be a co-owner by virtue of having installed a stereo system at his own expense.

Department of Safety v. Santita Sutton, IO/4-21-92. 13 APR 1.

***29 I.O. 1992 FACTORS DETERMINING**--The following factors were considered determinative as to co-ownership:

1. The vehicle was used as a family vehicle.
2. The Claimant was never restricted from using the vehicle.
3. The keys to the vehicle were always accessible to the Claimant.
4. The fact that Claimant pled the 5th Amendment when asked whether he had his own set of keys is further evidence that he co-owned the car, as an adverse inference is drawn from his refusal to answer this question.

Department of Safety v. Preston Crowder and Vanderbilt University Employees Credit Union, IO/4-14-92. 11 APR 185.

30. LACK OF KNOWLEDGE OR CONSENT

***30 Tenn. App. 1993 BURDEN OF PROOF; INNOCENT OWNER**--T.C.A. §53-11-409(a)(4)(B) places the burden of proving lack of knowledge or consent on the one claiming it.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***30 Tenn. App. 1993 BURDEN OF PROOF ON INNOCENT OWNER**--Owner of automobile could not avoid forfeiture of automobile used in cocaine transactions by alleging that state had not proven that he had knowledge of or had consented to cocaine transactions committed in automobile, as forfeiture statute placed burden of proving lack of knowledge or consent on person claiming it, and owner of automobile presented no such evidence.

Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***30 Tenn. App. 1992 LACK OF CONSENT; FAMILY RELATIONSHIP**--Where there was an immediate family relationship between Claimant and driver of the seized vehicle, the Court of Appeals gave the most weight to the issue of whether the Claimant exercised ultimate control over the vehicle and directed its use. Once ultimate control is established, if the use of the vehicle was not authorized by Claimant as owner of the vehicle, he is not held accountable for the driver's actions.

Farley v. Commissioner of Safety, No. 90-3725-I, 01-A-019201CH00004, 1992 WL 151446 (Tenn. Ct. App. July 4, 1992). 16 APR 135.

***30 Tenn. App. 1992 BURDEN OF PROOF; KNOWLEDGE**--Once the State establishes a *prima facie* case that the seized vehicle is subject to forfeiture, in order to establish a claim as an innocent owner, the Claimants must show that 1) they have an interest acquired in good faith and 2) they had no knowledge that the automobile would be used in violation of the Drug Control Act and did not consent to such use.

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***30 Tenn. App. 1992 ACTUAL KNOWLEDGE**--Under T.C.A. §53-11-451(a)(4)(B), the Claimant must establish lack of actual, as opposed to constructive, knowledge or consent. For an owner to successfully recover seized property under T.C.A.

§53-11-451(a)(4), he must only prove lack of *actual* knowledge that the vehicle was being used illegally. The nature of the inquiry is whether the owner had *actual* knowledge of the driver's illegal activity rather than whether the owner knew or should have known of the driver's illegal activity.

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***30 Tenn. App. 1992 BURDEN OF PROOF; INNOCENT OWNER; KNOWLEDGE**--An innocent owner seeking to reclaim the seized vehicle need only prove a lack of actual knowledge that the vehicle was being used illegally. The stricter standard of a lack of knowledge or reason to believe does not apply to forfeiture proceedings.

Turner v. State, No. 90-1665-I, 01-A-019108CH00303, 1992 WL 12132 (Tenn. Ct. App. January 29, 1992). 16 APR 139.

***30 Tenn. App. 1988 PRIOR VIOLATIONS**--The willingness of a father to continue to allow the use of his vehicle by his son on occasions of necessity, after the son's illegal use of the vehicle in violation of drug laws, has no probative value, relevance or materiality on the present determination of the father's innocent ownership. Although the Claimant father had notice of his son's prior violations of drug laws, the son's prior behavior had no bearing on the issue of whether the father received any knowledge or had any reason to believe that the car was being used or would be used in violation of drug laws. Even though the father was aware of his son's prior violations, he reasonably believed his son had been rehabilitated and was no longer involved in drugs. There was no evidence of any occurrence after the son's rehabilitation to place the father on notice or inquiry as to any illegal activity. Furthermore, the son had his own car and only used his father's car on occasions of necessity. Under T.C.A. §53-11-409, the Claimant is not required to prove that a particular person *might* violate drug laws. Rather, he only has to prove that he had no knowledge the vehicle in question was being or would be used to violate drug laws. Catignani v. Department of Safety, No. 87-320-II, 1988 WL 22851 (Tenn. Ct. App. March 9, 1988). 16 APR 263.

***30 Ch. Ct. 1989 NO CONSIDERATION OF KNOWLEDGE OR CONSENT AFTER CO-OWNERSHIP ESTABLISHED**--The illegal activities of one co-owner of a vehicle, even if unknown to the other co-owner, will defeat the innocent co-owner's claim for the return of the seized vehicle. Once co-ownership is established, the absence of knowledge or consent are not considered in the determination of forfeiture and any exemption from it.

Cole v. Tennessee Department of Safety, No. 89-278-I (Davidson County Ch. Ct. June 26, 1989). 15 APR 322.

***30 F.O. 1995 PRIOR KNOWLEDGE**--Despite the fact that the claimant did know that her husband smoked marijuana in the past, she successfully asserted innocent ownership of the seized vehicle since there was nothing to indicate that she had any knowledge of the marijuana her husband had placed in the glove compartment when the car was stopped by police.

Department of Safety v. Sheryl Atkins, IO/2-27-95. FO/5-8-95.

***30 F.O. 1995 PRIOR KNOWLEDGE**--The State argued that the claimant son's knowledge of his father's reputation and record as a drug dealer coupled with the overpowering smell of marijuana in the vehicle at the time of seizure undermined the claimant son's assertion of innocent ownership. The Commissioner deferred to the administrative law judge's determination of the claimant's credibility and noted that nothing in the record undermined this determination on the credibility of the claimant. In view of the administrative law judge's determination on the claimant's credibility and after considering the record in the case, the Commissioner ruled that the claimant had met his burden of showing innocent ownership and was entitled to the return of the seized vehicle.

Department of Safety v. Mark E. Chouinard, FO/4-6-95. 16 APR 194.

***30 F.O. 1995 PRIOR KNOWLEDGE**--The claimant was found to have known that her son was using the seized vehicle in violation of the drug laws on the basis that the claimant knew that her son had a drug problem as evidenced by her stipulation as to her son's two prior arrests and the drug-related forfeiture involving an automobile driven by her son. Coupled with this knowledge of his drug record, the fact that the claimant did nothing to prevent her son from gaining to the subject automobile weighed heavily against her assertion of innocent ownership.

Department of Safety v. Lillian Graham, FO/3-4-95. 16 APR 221.

***30 F.O. 1995 NO KNOWLEDGE THAT PASSENGER CARRYING DRUGS**--The seized vehicle was returned to the Claimant based upon the finding that the Claimant neither consented to nor had knowledge of the illegal use of the vehicle. After considering the record in this case, the administrative law judge determined that the Claimant sustained his burden of proving innocent ownership based on the fact that he did not know that his passenger was carrying marijuana.

Department of Safety v. Doug Wolff, IO/2-17-95. FO/2-27-95. 12 APR 59.

***30 F.O. 1994 PRIOR VIOLATIONS**--Although the Claimant's son had been arrested and pled guilty a year before for simple possession of marijuana, this previous offense did not involve 1) the sale of marijuana or the intent to sell marijuana or 2) the use of the seized vehicle. Therefore, there is insufficient evidence to charge the Claimant with knowledge that the

vehicle would be used for an illegal purpose in the present case when it was a year after the son's previous arrest for simple possession.

Department of Safety v. Wayne Roddy, IO/1-25-94. FO/2-4-94. 19 APR 304.

***30 F.O. 1986 PRIOR OFFENSES**--Son of car owner had previously been arrested for selling drugs from seized vehicle. Where father had searched car on several occasions after son's first arrest, and had no reason to suspect that son had resumed selling drugs, father was without knowledge that vehicle was used in violation of Tenn. Drug Control Act and the vehicle was returned.

Department of Safety v. L.D. Fuller, IO/1-21-86. FO/2-3-86. 6 APR 278.

***30 F.O. 1983 BURDEN OF PROOF**--Claimant who claims an exception to forfeiture in legally seized property must prove by a preponderance of the evidence a lack of knowledge of illegal activities or the forfeiture will be sustained.

Department of Safety v. Lisa Cooper, IO/3-24-83. FO/4-13-83. 1 APR 285.

***30 I.O. 1994 SON AND FATHER**--The present case is anomalous in that it switches the often seen positions of parent and child in forfeiture actions. The proof established that the father was using his son's truck as transportation for a quantity of marijuana too large for personal use. However, the Claimant son had no knowledge of the use of his vehicle to transport resale amounts of marijuana. The Claimant son, having met his burden of showing innocent ownership, was entitled to return of the seized truck.

Department of Safety v. Mark E. Chouinard, IO/11-7-94. 13 APR 8. *See also* 16 APR 194.

***30 I.O. 1994 KNOWLEDGE OF PRIOR CONVICTIONS; CONSENT**--The Claimant and her husband knew that their son was involved in narcotics. Prior to the seizure, their son had been arrested two times for drug-related offenses, with one of those arrests resulting in the forfeiture of a car owned by the Claimant. Even with the knowledge of her son's drug problem, the only measure the Claimant and her husband took to keep him from using the car was to tell him not to drive. Although the Claimant argued that her son took the keys and drove the car without her permission, her argument was rejected since there was no evidence that her son's access to the car keys or the car was restrained in any way in light of the fact that the car keys were kept on a rack where any family member could gain access to them.

Department of Safety v. Lillian Graham, IO/11-1-94. 9 APR 289. *See also* 16 APR 221.

***30 I.O. 1994 PAST KNOWLEDGE AND CONSENT; FUTURE SALES**--The proof showed that on two occasions the seized vehicle was used, with the Claimant's permission, to transport cocaine for sale. In fact, the Claimant pled guilty to the sales. Therefore, based on the Claimant's past knowledge and consent, the vehicle was forfeited regardless of whether or not the driver had permission to use it for the third sale.

Department of Safety v. David Hipp, IO/4-5-94. 13 APR 15.

***30 I.O. 1993 CONSENT**--When the Claimant has knowledge of a drug transaction, his failure to say or do anything, in certain circumstances, constitutes consent.

Department of Safety v. Paul White, IO/12-23-93. 13 APR 21.

***30 I.O. 1993 PREVIOUS ILLEGAL USE**--Although they had knowledge of the perpetrator's previous illegal use of the seized vehicle, the Claimants were not charged with knowledge of illegal use of the vehicle since there was no indication that the Claimants knew the perpetrator was using the vehicle for an illegal purpose at the time of seizure.

Department of Safety v. Bob and Mary Wooten, IO/12-14-93. 12 APR 242.

***30 I.O. 1993 LACK OF ACTUAL KNOWLEDGE; STANDARD**--Knowledge and reason to believe are two different standards under T.C.A. §53-11-201(f)(1)(B). The standard to be used is whether or not the Claimant had *actual* knowledge that the seized vehicle was being used illegally. *See also* Department of Safety v. Anthony R. Jefferson, IO/3-9-92.

Department of Safety v. Tank Auto Sales, IO/10-18-93. 13 APR 37.

***30 I.O. 1993 KNOWLEDGE WITHOUT CONSENT**--As long as the Claimant has knowledge of the illegal use of the vehicle, the vehicle is subject to forfeiture, notwithstanding the fact that the Claimant is unable to prevent that use. Claimant testified that the perpetrator continued to use her vehicle in violation of drug laws without her permission and even threatened her with physical violence when she tried to prevent his use of the vehicle. However, inability to control or prevent the use of the vehicle is not a defense under T.C.A. §53-11-451. The statute does not provide an exception to forfeiture for an owner who is unable to prevent the illegal use of her vehicle when she is aware that the person in possession of the vehicle is using it to sell drugs.

Department of Safety v. Henrietta Gun and Century Finance, IO/7-27-93. 13 APR 28.

***30 I.O. 1993 BURDEN OF PROOF**--The burden of proof is on the individual claiming to be the innocent owner of the seized vehicle to establish that the vehicle was used in violation of the drug laws without his knowledge or consent.
Department of Safety v. Kathy Jean Douglas, IO/3-22-93. 10 APR 190.

***30 I.O. 1993 ACTUAL KNOWLEDGE**--Although the claimant's co-owning wife probably should have known that her brother was selling drugs in the seized vehicle, there is absolutely no proof in the record that the wife had *actual* knowledge that her brother was selling drugs in the seized vehicle on the date of the seizure.
Department of Safety v. William A. Box, IO/3-19-93. 13 APR 45.

***30 I.O. 1992 ACTUAL VS. CONSTRUCTIVE**--It is appropriate to interpret T.C.A. §53-11-451(a)(6)(B) in the same way as T.C.A. §53-11-451(a)(4)(B) to require actual, as opposed to constructive, knowledge or consent.
Department of Safety v. James M. Lewis, IO/7-22-92. 13 APR 54.

***30 I.O. 1992 ACTUAL KNOWLEDGE; BURDEN OF PROOF ON INNOCENT OWNER**--T.C.A. §53-11-451(a)(6) places the burden of proof on the party claiming to be an "innocent owner" to prove lack of actual knowledge.
Department of Safety v. Billie Brock, IO/6-17-92. 10 APR 69.

***30 I.O. 1992 LACK OF ACTUAL KNOWLEDGE; STANDARD**--Knowledge and reason to believe are two different standards under T.C.A. §53-11-201(f)(1)(B). The standard to be used is whether or not the Claimant had *actual* knowledge that the seized vehicle was being used illegally.
Department of Safety v. Anthony R. Jefferson, IO/3-9-92. 13 APR 63.

***30 I.O. 1983 PRIOR WARNINGS BY POLICE**--Owner did not carry her burden of proving that she, at no time, had knowledge or reason to believe that her vehicle was being used in violation of narcotic and drug laws when she had previously been warned by the police that her friend was using her car to transport drugs for resale.
Department of Safety v. Bradley, IO/9-6-83. 2 APR 480.

***30 I.O. 1983 PRIOR PARTICIPATION**--Petitioner failed to show by a preponderance of the evidence that she was unaware that the car was being used to transport drugs for sale. Petitioner's presence on one occasion when drugs were sold after having been transported in her car suggests that she was aware of Mr. Reynolds' drug selling activity and it can be reasonably inferred that she knew or consented to the use of her car by Mr. Reynolds.
Department of Safety v. Pamela Meyers and Kenny McGrew, IO/3-7-83. 1 APR 273.

31. BONA FIDE SECURITY INTEREST -- IN GENERAL

***31 Tenn. App. 1978 PROCEDURAL DUE PROCESS; LIENHOLDERS**--An expanded level of procedural due process protection exists for innocent lienholders of confiscated property.
Merchants Bank v. State Wildlife Resources Agency, 567 S.W.2d 476, 479 (Tenn. Ct. App. 1978).

***31 I.O. 1994 NO RECOGNITION OF LIEN**--Since the Claimant lienholder did not file a claim for the lien after having received notice of the seizure, the lien was not recognized in the forfeiture of the seized vehicle.
Department of Safety v. Anthony R. Onks, IO/10-25-94. 9 APR 309.

***31 I.O. 1994 CLAIM FILED AS GUARANTOR FOR LOANS NOT RECOGNIZED**--A claim filed as a guarantor for loans made for the purchase of a seized vehicle will not be recognized in a forfeiture proceeding. Only claims filed as an owner or lienholder will be recognized.
Department of Safety v. Anthony R. Onks, IO/10-25-94. 9 APR 309.

***31 I.O. 1994 DEFAULT; INNOCENT LIENHOLDER**--T.C.A. §53-11-201(f)(1)(A) provides that whenever a claim for any seized property is filed by an owner or other person asserting the interest of the owner, the Commissioner shall not allow the claim unless and until the Claimant proves that he has an interest in such property which he acquired in good faith. In the present case, since the Claimant did not appear at the hearing and, as a result, his ownership interest was not proven, the Claimant's petition for the return of the vehicle was not allowed.
Department of Safety v. Douglas E. Arnwine, IO/3-23-94. 12 APR 125.

***31 I.O. 1993 LIENHOLDERS AS CLAIMANTS**--Taking all the provisions of T.C.A. §53-11-451 into consideration, lienholders, secured parties, and holders of security interests are "claimants" under the statute.
Department of Safety v. George Michael Riddle, IO/9-13-93. 9 APR 235.

***31 I.O. 1992 OWNED BY COMPANY CONTROLLED BY CLAIMANT**--The lienholder's claim is denied on the basis that the Claimant is a co-owner of the company holding the lien on the vehicle. Moreover, Claimant had ultimate control over the vehicle and used it as his own personal automobile.
Department of Safety v. Jack Davis, Jr., IO/12-16-92. 11 APR 295.

***31 I.O. 1992 DUTY TO VERIFY BUYER'S RECORD**--State's argument that a lienholder has a duty to verify whether a buyer had a previous criminal record is irrelevant since there is no such requirement in the law.
Department of Safety v. John Perkins and Peggy's Auto Sales, IO/11-24-92. 11 APR 177.

32. SECURITY INTEREST

***32 M.D. Tenn. 1979 NECESSITY OF PERFECTION BEFORE SEIZURE**--Government's interest in airplane used in drug traffic vested upon commission of the illegal act and, since lender's secured interest was not perfected before that act, lender's interest must yield, regardless of whether lender knew of criminal activity or did everything that could reasonably be expected to prevent it.
U.S. v. One 1951 Douglas DC-6 Aircraft, 525 F.Supp. 13 (M.D. Tenn. 1979).

***32 Tenn. 1978 THE INTENT OF THE PARTIES CONTROLS**--The intent of the parties is always controlling and is to be ascertained from the whole transaction, not merely from the language employed.
U.S. Fidelity & Guaranty Company v. Thompson & Green Machinery Company, Inc., 568 S.W.2d 821 (Tenn. 1978).

***32 F.O. 1983 RECORDING OF LIEN**--It is not necessary for lienholder to have properly recorded his lien in order to establish its validity. He can establish his claim by proof at the hearing and protect his interest.
Department of Safety v. Clifton South, IO/5-12-83. FO/6-1-83. 2 APR 353.

***32 I.O. 1994 PERFECTION NOT REQUIRED; RECEIPTS OF REPAYMENT ARE EVIDENCE**--Bona fide security interests under T.C.A. §53-11-451(a)(4) do not require perfection. Very informal security agreements have been upheld, especially when there is evidence of repayment. As long as receipts exist indicating timely repayment, a bona fide security interest may be found to exist.
Department of Safety v. Morris Bartolotta, IO/12-6-94. 20 APR 30. *See also* FO/3-8-94. 19 APR 349.

***32 I.O. 1994 THE AGREEMENT MUST MERELY HAVE THE PRACTICAL EFFECT OF CREATING A SECURITY INTEREST**--A security interest can be created even if the agreement contains no words granting or creating a security interest. The practical effect of an agreement, rather than its wording, determines whether an agreement is intended as a security interest. As the United States Bankruptcy Court for the Eastern District of Tennessee stated, "an agreement creating a security interest can be in any form -- sale, consignment, lease, bailment -- or whatever the parties can imagine. The agreement need not say that it is granting a security interest. The practical effect of the agreement determines whether it was intended to create a security interest." In re: Village Import Enterprises, Inc., 126 B.R. 307, 308-309 (Bankruptcy E.D. Tenn. 1991). In the present case, the "lease" of the seized vehicle between the Claimant and the Perpetrator had the practical effect of creating a security interest to be held by the Claimant. This conclusion was based upon the use of the word "lease" in the agreement, indicating that the intended sale was not to be complete until completion of all payments, and supported by the intent of the parties. The parties' intent to create a security interest in the vehicle was manifested by the fact that 1) the Claimant believed he had a right to retrieve the vehicle if the Perpetrator did not make the payments and 2) the Claimant referred to the Perpetrator in the "lease" as being responsible for the maintenance, insurance, and plates, thereby indicating that some interest was being retained.
Department of Safety v. Morris Bartolotta, IO/12-6-94. 20 APR 30. *See also* FO/3-8-94. 19 APR 349.

***32 I.O. 1994 INDICATION OF LIEN ON TITLE IS INSUFFICIENT**--Claimant lienholders must first establish a bona fide security interest in the seized property before they have standing to establish the lack of knowledge or consent to illegal use. Bona fide security interests do not require perfection, but they must be evidenced by a valid security agreement. In the present case, the Claimant lienholder did not establish a valid security interest in the seized vehicle since a mere signature on the title evidencing a lineal interest was not considered sufficient to establish a bona fide security interest.
Department of Safety v. Lynn Wesley Harrison (Daniel Oliver); IO/5-29-94.

***32 I.O. 1994 NO WRITTEN AGREEMENT--**Claimant failed to prove that he had a "bona fide security interest" in the seized vehicle when no written agreement existed which set forth the terms of the oral agreement. The mere fact that the Claimant was shown on the title as the lienholder did not create a valid lien or security interest. In prior decisions, Administrative Law Judges have consistently held that the term "security interest" must meet the requirements of the Uniform Commercial Code. A security interest is not enforceable unless the secured party has possession of a collateral or a signed security agreement exists. Since the Claimant had neither signed a security agreement nor retained possession of the seized vehicle to the exclusion of the wrongdoer, he was not considered a lienholder. However, the Administrative Law Judge did determine that the Claimant proved he was a co-owner of the seized vehicle, and as such, the Claimant's one-half interest in the vehicle was recognized, pursuant to Harris v. Lawson. 16 APR 127.
Department of Safety v. Carlos E. Phillips, IO/2-22-94. 12 APR 226.

***32 I.O. 1993 TITLE NEED NOT BE PERFECTED--**While the law does not require perfection of title in a statement to establish a claim, a security interest must be evidenced by a valid security agreement.
Department of Safety v. James R. Johnson, IO/3-11-93. 13 APR 72.

***32 I.O. 1993 VERBAL AGREEMENT NOT SUFFICIENT--**Minimum requirements for a valid security agreement have been defined as a writing signed by the debtor which indicates that the creditor-Claimant has a security interest that he acquired for value in the property and containing a description of the property. A verbal agreement does not establish a valid security interest. Since no signed writing was ever executed or offered by the Claimant to support his oral testimony, the Claimant failed to establish his lineal interest in the seized vehicle.
Department of Safety v. James R. Johnson, IO/3-11-93. 13 APR 72.

***32 I.O. 1992 MERE NOTATION OF LIEN ON TITLE IS INSUFFICIENT--**As with the innocent owner exemption, lienholders must first establish a "bona fide security interest" in the seized property before they have standing to establish the statutory burden of proving lack of knowledge or consent to the illegal use of the vehicle. Bona fide security interests under the statute do not require "perfection." However, it is required that the security interest be evidenced by a valid security agreement. The mere notation of a lien interest on the title will not be sufficient to create a valid security agreement.
Department of Safety v. Lynn Wesley Harrison, IO/5-29-92. 13 APR 78.

***32 I.O. 1992 ORAL AGREEMENT DOES NOT QUALIFY--**When a Claimant argues that he has a lien against a seized vehicle and that any forfeiture should be subject to this lien, the Claimant must establish a "bona fide security interest" in the seized vehicle. It has been a long standing interpretation of T.C.A. §53-11-451(a)(4)(d) by the Administrative Law Judges that a "bona fide security interest" must meet all of the requirements contained in T.C.A. Title 47, Chapter 9 for the making of a valid security agreement under the Uniform Commercial Code. In light of this interpretation, an oral agreement between the Claimant and the driver of the vehicle meets none of the requirements for the creation of a valid security agreement under the Uniform Commercial Code.
Department of Safety v. Mary H. Farr and William T. Miller, IO/3-26-92. 13 APR 85.

33. LACK OF KNOWLEDGE OR CONSENT

***33 F.O. 1983 LIENHOLDER--**To claim a lienhold exemption the claimant must establish a bona fide security interest in the vehicle and lack of knowledge of its illegal use by a preponderance of the evidence.
Department of Safety v. Louis Packard, IO/7-21-83. FO/10-10-83. 2 APR 422.

***33 I.O. 1993 RETURN OF THE VEHICLE TO ILLEGAL USER--**Lienholder failed to carry its burden of proof that it is a holder *in good faith* of a security interest in the seized vehicle and that the forfeiture of the seized vehicle should be subject to its lien. The purpose of the statutory exemption is to protect an innocent lienholder when a vehicle has been seized and when that lienholder has *no* knowledge of the illegal activity prior to seizure. The lienholder initially acquired its security interest in good faith and without knowledge of the illegal manner in which the vehicle was used by the Claimant. However, after the vehicle was returned to the lienholder, the lienholder returned the vehicle to the Claimant, thus placing the vehicle back into the same situation that led to its original seizure. By doing so, the lienholder was placed on notice and charged with actual knowledge of the possibility that the vehicle again would be used in an illegal manner. By returning the vehicle into a precarious situation with full knowledge of the potential for its future seizure, the lienholder cannot claim that it both acquired and *maintained* its security interest in the seized vehicle without any knowledge of its illegal use. The lienholder has a continuing obligation to preserve the seized vehicle as proper collateral for its loan to the Claimant and cannot rely on the State for protection/as an insurer for its own business risks and judgment errors.

Department of Safety v. Henrietta Gun and Century Finance, IO/8-5-93. 13 APR 28.

34. SIMPLE POSSESSION EXCEPTION

***34 Tenn. App. 1993 FACILITATION OF DRUG SALE**--Owner of automobile was not entitled to avoid forfeiture of automobile used in cocaine transactions based upon statutory exception to forfeiture of vehicles for simple possession of cocaine, where evidence supported findings of administrative law judge that automobile was used to facilitate sale of cocaine.
Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***34 Tenn. App. 1993 MEANS OF TRANSPORTATION**--Under Hughes v. State, T.C.A. §53-11-409(a)(4)(C) could prevent the forfeiture of a vehicle when the operator is found guilty of simple possession of a small amount of a controlled substance and the vehicle's only connection with the substance is as a means of transportation. Arguably, then, forfeiture would not occur when the vehicle is used only to transport the illegal drug. However, T.C.A. §53-11-409(a)(4)(C) does not exempt from forfeiture a vehicle that has been used to facilitate the illegal sale or receipt of a controlled substance.
Donihe v. Tennessee Department of Safety, 865 S.W.2d 903 (Tenn. Ct. App. 1993).

***34 Tenn. App. 1992 MARIJUANA SEEDS**--Vehicle owner's use of vehicle to transport marijuana seeds from California into Tennessee, which seeds were transformed into 52 growing plants and 128.8 grams of processed marijuana, rendered vehicle subject to forfeiture, even if the statute did still provide exception preventing forfeiture of vehicle when operator was found guilty of simple possession of small amount of controlled substance and vehicle's only connection with substance was as means of transportation.
Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***34 Tenn. App. 1992 SIMPLE POSSESSION EXCEPTION, INAPPLICABILITY**--Even though the statute might prevent the forfeiture of a vehicle when the operator is found guilty of simple possession of a small amount of a controlled substance and the vehicle's only connection with the substance is as a means of transportation, the transportation of marijuana seeds into Tennessee for the purpose of growing a large crop of marijuana does not fit within the statutory exception, especially in light of evidence of the intention to later harvest the crop for resale.
Hill v. Lawson, 851 S.W.2d 822 (Tenn. Ct. App. 1992). 15 APR 338.

***34 Tenn. App. 1989 TRIP TO PURCHASE DRUGS**--In spite of the fact that the owner of the truck did not possess the marijuana for purposes of resale, the vehicle used in trip to purchase marijuana for vehicle owner's personal use was subject to forfeiture, regardless of quantity of illegal substance involved or purpose for which controlled substance was purchased.
Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***34 Tenn. App. 1989 MEANS OF TRANSPORTATION CONNECTION AND SIMPLE POSSESSION**--Relying on federal decisions which require the forfeiture of a vehicle for the intentional transportation of an illegal substance, no matter how small the amount, the court held that the transportation of any amount of illegal drugs comes within the letter of T.C.A. §53-11-409(a)(4). However, the court also recognized that T.C.A. §53-11-409(a)(4)(C) could prevent the forfeiture of a vehicle when the operator is found guilty of simple possession of a small amount of a controlled substance and the vehicle's only connection with the substance is as a means of transportation. Therefore, a forfeiture would not occur when the vehicle is used only to transport the illegal drug.
Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989).

***34 Tenn. App. 1989 TRANSPORTATION FROM DRUG SALE**--The use of the vehicle to drive to the point where an illegal sale is made and/or the use of the vehicle to transport the controlled substance away from the point of sale will subject the vehicle to confiscation regardless of the purpose for which the controlled substance was purchased.
Hughes v. Tennessee Department of Safety, 776 S.W.2d 111 (Tenn. Ct. App. 1989)

***34 Tenn. App. 1989 FACILITATION OF DRUG SALE**--T.C.A. §53-11-451(a)(4)(c) provides that a conveyance is not subject to forfeiture for a violation of T.C.A. §39-17-418, simple possession of a controlled substance. However, the exception does not exempt from forfeiture a vehicle that has been used to facilitate an illegal sale or receipt of a controlled substance, notwithstanding that the claimant is guilty of possession only and did not possess drugs for resale. Nevertheless, the exception could prevent the forfeiture of a vehicle when the operator is found guilty of simple possession of a small amount of controlled substance and the vehicle's only connection with the substance is as a means of transportation.
Hughes v. State, 776 S.W.2d 111, 115 (Tenn. Ct. App. 1989).

***34 Ch. Ct. 1991 TRANSPORTATION TO SITE OF DRUG PURCHASE**--A vehicle driven by a Claimant to work, where the Claimant purchased drugs, and then later seized when the claimant was on his way home from work, was subject to forfeiture.

Jacks v. Department of Safety, No. 90-2912-II (Davidson County Ch. Ct. March 13, 1991). 16 APR 1.

***34 F.O. 1995 FACTORS INDICATING DRUGS NOT POSSESSED FOR PERSONAL USE**--Personal use was not found where 1) the claimant had three separate packages of large doses of cocaine, 2) claimant was stopped in an area that is known for drug sales, 3) claimant possessed a beeper, a device often used to arrange drug deals, 4) there was nothing, such as a pipe, found in the seized vehicle to indicate personal use, 5) the claimant did not appear to be under the influence of drugs or merely driving the car around for recreational drug use, 6) the claimant was arrested fifteen (15) miles from his home, and 7) the claimant had a previous record of selling cocaine and was already on probation for the sale of cocaine.

Department of Safety v. Fountain White, IO/3-15-95. FO/3-27-95. 13 APR 93.

***34 F.O. 1993 PRESENCE OF DRUGS INSIDE VEHICLE**--Changes in the misdemeanor possession statute allow the mere presence of an illegal drug in a vehicle to render the vehicle forfeitable as a conveyance used or intended to be used to transport a drug in violation of the Drug Control Act. The fact that a small amount of marijuana is stored in a vehicle may subject that vehicle to forfeiture even in the absence of evidence that the vehicle was used to drive the Claimant to the location of the drug purchase.

Department of Safety v. Jeffrey D. Moody, FO/8-31-93. 15 APR 329.

***34 I.O. 1994 PERSONAL USE; DETERMINATION OF**--The fact that the Claimant was first stopped because his car was weaving on the highway bolsters the Claimant's contention that he possessed marijuana only for personal use since this behavior tends to show that the Claimant may very well have been smoking the marijuana on the night of the seizure. Considering the small amount of marijuana seized and the Claimant's behavior during the night of the arrest, the Administrative Law Judge determined that the seized money was not traceable to any drug transaction and ordered it to be returned to the Claimant.

Department of Safety v. David Simmons, IO/7-11-94. 13 APR 99.

***34 I.O. 1994 NO MISDEMEANOR EXCEPTION**--There is no longer a misdemeanor exception to the Tennessee Drug Control Act. Under the current statute, if a vehicle is transporting any amount of narcotics, either for sale or for personal use, it is subject to forfeiture.

Department of Safety v. Melissa Joy Stinnett, IO/1-26-94. 13 APR 106; Department of Safety v. Herman D. Hetzler, IO/10-18-93. 13 APR 115.

***34 I.O. 1993 PERSONAL USE**--Where only a minute (.2 grams) amount of marijuana was found in the seized vehicle along with a pipe, the Administrative Law Judge found that the marijuana was possessed solely for personal use. This small amount of marijuana did not subject the vehicle to forfeiture in the absence of evidence supporting a drug sale or explaining how the marijuana was obtained and especially when there was uncertainty about whether the vehicle played any role in obtaining the marijuana.

Department of Safety v. Patricia B. Rye, IO/10-4-93. 12 APR 260.

***34 I.O. 1993 PERSONAL USE**--The clear meaning of T.C.A. §53-11-451 permits forfeiture of vehicles when they are used, in any manner, in the sale of drugs, pursuant to Hughes v. State Department of Safety, 776 S.W.2d 111 (Tenn. Ct. App. 1989). The statute applies to vehicles that are used merely transport a person to a location where he can purchase drugs for personal use. However, there is no reported case law that upholds the forfeiture of a vehicle where 1) drugs were never transported in the vehicle, 2) no drugs were purchased by the owner of the vehicle at any time, and 3) the only connection established between the vehicle and drugs was that the owner drove to a location where he was provided with drugs that he personally consumed on the premises. Consequently, the fact that a small amount of marijuana was stored in the vehicle would not subject the vehicle to forfeiture in the absence of evidence that the vehicle was used to drive the Claimant to the location of the drug purchase. To forfeit the Claimant's motorcycle under the facts presented in this case would stretch the interpretation of T.C.A. §53-11-451 beyond the bounds of a reasonable interpretation of the statute or any reported Tennessee case law.

Department of Safety v. Jeffrey D. Moody, IO/6-14-93. 13 APR 122. *See also* 15 APR 329.

***34 I.O. 1993 MANUFACTURE OF DRUGS**--In the present case, the amount and intended use of the marijuana was irrelevant since the vehicle at issue was used to transport marijuana from the growing field to the barn where it was to be stripped and processed. The vehicle was subject to forfeiture as "equipment" under T.C.A. §53-11-451(a)(2). The simple possession exception to forfeiture did not apply when a vehicle was used to facilitate the manufacture of drugs in violation of T.C.A. §53-11-451(a)(4). The Administrative Law Judge held that the simple possession exception to forfeiture did not apply

when a vehicle was used to facilitate the manufacturing, compounding, processing, delivering, importing, or exporting of any controlled substance in violation of T.C.A. §53-11-451(a)(2).

Department of Safety v. Anthony Carter, IO/5-28-93. 13 APR 129.

***34 I.O. 1993 PURCHASE OF DRUGS AT WORK**--A vehicle is subject to forfeiture when the state can show, by a preponderance of the evidence, that the vehicle was used to facilitate the illegal sale and receipt of a controlled substance. Where a Claimant *purchases* drugs at work, for personal use or otherwise, the vehicle he drove to work is subject to forfeiture, pursuant to Hughes v. State. This is true even though the claimant may be charged only with simple possession of drugs not for resale.

Department of Safety v. Grady Shane Murphy, IO/2-8-93. 13 APR 137.

***34 I.O. 1993 PERSONAL USE; SMALL AMOUNT OF DRUGS**--The discovery of a small amount of marijuana found in the house, indicating personal use, along with credible testimony as to an innocent source for the money found, leads to the conclusion that the money is not subject to forfeiture.

Department of Safety v. Jonna Murphy and Monroe Hargrove, IO/1-12-93. 12 APR 103.

***34 I.O. 1992 MIDDLEMAN**--The simple possession exception under Hughes v. State does not apply when a clear drug sale is facilitated, even if the Claimant is only a "middleman" who merely carried money and drugs to and from the parties to the actual drug deal. Since vehicle transportation facilitated the sale of the drugs in some way, the vehicle is subject to forfeiture even though its only connection to the drugs was as a means of transportation.

Department of Safety v. Randle H. Adams, IO/4-14-92. 12 APR 17.

***34 I.O. 1992 BURDEN OF PROOF**--Where the proof shows the possession of a small amount of drugs in the vehicle but no evidence of any sales activity connected to the vehicle, the State's burden of proof is not satisfied under the authority of Hughes v. State, 776 S.W.2d 111 (Tenn. Ct. App. 1989). The mere possibility that the drugs could have been sold or might be sold in the future does not meet the State's burden of proof by a preponderance of the evidence.

Department of Safety v. Louise Hale, IO/3-19-92. 10 APR 232.

***34 I.O. 1984 SALE OF MINISCULE AMOUNT OF DRUGS**--A person who sells less than one half (½) ounce of marijuana violates T.C.A. §39-6-417(a)(1)(f) and is punished under subsection (b). The statutes do not transform the sale of less than ½ ounce into simple possession, but rather punishes the offense in the same manner. A conveyance is subject to forfeiture for the sale of any amount of marijuana.

Department of Safety v. Gerald E. James, IO/7-5-84. 4 APR 585.

35. CASUAL EXCHANGE EXCEPTION

***35 F.O. 1985 UNDERCOVER OFFICER**--Where undercover agent asked Claimant for marijuana and Claimant gave agent some marijuana from his own bag (which was in the seized vehicle) in exchange for \$2.00, "casual exchange" defined in T.C.A. §39-6-417(a)(2) applied and vehicle was not subject to forfeiture.

Department of Safety v. Michael Robinson, IO/12-12-83. FO/1-4-85. 3 APR 1.

***35 I.O. 1992 UNDERCOVER OFFICER**--Where no drug sale occurred between Claimant and an undercover officer and Claimant did not acquire drugs illegally, Claimant's vehicle was not subject to forfeiture under T.C.A. §53-11-409 because Claimant used vehicle only in violation of T.C.A. §39-17-418, casual exchange of a controlled substance.

Department of Safety v. Johnny Albertson, IO/11-20-92. 13 APR 147.

36. NON-STATUTORY DEFENSES

***36 F.O. 1995 SEIZED PROPERTY SETTLEMENT; DURESS; FRAUD**--Claimant was found not to have a contractual defense to the Civil Settlement of Seized Property agreement. Where claimant entered an agreement with the Sheriff's Department to forfeit \$2,500 to the State in exchange for the return of \$8,000, the claimant did not prove that the contract he signed resulted from duress or fraud, especially where the facts showed that the claimant was not pressured into signing the agreement and where the settlement worked to the claimant's advantage. In light of these facts, the Civil Settlement of Seized Property agreement was held valid, and the property was forfeited according to the terms of the agreement.

Department of Safety v. Albert E. Miller, IO/5-10-95. FO/5-22-95. 9 APR 202.

***36 F.O. 1983 ENTRAPMENT; CLAIMANT CONTACT**--Where claimant initiated contacts with undercover agents concerning the purchase of marijuana and was a willing participant in the transaction, claim of entrapment was without merit and money paid by claimant to undercover agents for marijuana was forfeited to state.
Department of Safety v. Earl Thrower, et al., IO/2-7-83. FO/5-2-83. 1 APR 227.

***36 I.O. 1983 ENTRAPMENT; POLICE CONTACTS**--Claimant was contacted three times by undercover agent desiring to buy marijuana. Although Claimant declined twice, on the third request he drove his van with marijuana in it to a meeting with police, where sale took place. No entrapment was found, and the seized vehicle was forfeited.
Department of Safety v. Terry Creel, IO/7-6-83. 2 APR 408.

37. CONSTITUTIONAL PROTECTIONS--IN GENERAL

***37 I.O. 1994 CONSTITUTIONAL PROTECTIONS**--The due process requirement that guilt in a criminal proceeding be proved beyond a reasonable doubt does not apply to civil forfeiture proceedings. Rather, civil preponderance of the evidence has been upheld as the standard of proof in forfeiture proceedings. Those protections associated with criminal cases may apply to a civil forfeiture proceeding only if it is so punitive that the proceeding must reasonably be considered criminal. See Austin v. United States, 113 S.Ct. 2801 (1993).
Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***37 I.O. 1994 TAKING OF PROPERTY WITHOUT JUST COMPENSATION**--No violation of Article I, Section 21, of the Tennessee Constitution was found when forfeiture was ordered. Only unreasonable takings of property are unconstitutional. Forfeitures under the Tennessee Drug Control Act are not considered unreasonable because property is only forfeited when there is a connection between the property and the illegal drug activity. See Franklin Power and Light Company v. Middle Tennessee Electric Membership Cooperative, 434 S.W.2d 829, 833 (Tenn. 1968).
Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***37 NOTE 1995 CONSTITUTIONAL PROTECTIONS FOR FORFEITURE CLAIMANTS**--The characterization of forfeiture as a civil *in rem* proceeding against the property, not the property owner, has not prevented Tennessee courts from recognizing that the punitive, quasi-criminal nature of forfeitures necessitates the application of some constitutional protections on the claimant's behalf. A number of constitutional rights have been applied to forfeiture actions, namely the Fourth Amendment, the Fifth Amendment, Eighth Amendment, and Due Process protections.
Zelimira Juric, Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act (1995). 8 APR 27.

***37 NOTE 1986 CONSTITUTIONAL PROTECTIONS**--This paper contains a detailed discussion of constitutional protections to drug-related forfeiture under the Tennessee Drug Control Act.
Laska & Holmgren, *Forfeitures under the Tennessee Drug Control Act*, 16 MEMPHIS STATE UNIVERSITY LAW REVIEW 431 (1986).

38. FOURTH AMENDMENT

***38 U.S. S.Ct. 1965 EXCLUSIONARY RULE; APPLICABILITY TO FORFEITURE PROCEEDINGS**--The exclusionary rule is applicable to civil proceedings involving a confiscation or forfeiture which is a penalty for a criminal activity.
One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965).

***38 Tenn. 1986 SEIZURE AND FORFEITURE; VIOLATION OF CONSTITUTIONAL RIGHTS**--Contraband possessed in violation of the State's drug control statutes is subject to seizure and forfeiture even if the conduct of the police officers violates constitutional rights of those in possession.
State v. Jennette, 706 S.W.2d 614 (Tenn. 1986).

***38 Tenn. 1976 CONSTITUTIONAL PROTECTIONS UNDER FOURTH AMENDMENT**--Rights secured by constitutional provisions relating to search and seizure protect citizens from unreasonable seizures as well as unreasonable searches, and rights to search and seize are subject to requirement of previous judicial sanction wherever possible.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***38 Tenn. 1976 AUTOMOBILE; FOURTH AMENDMENT PROTECTIONS**--Constitutional protection against unreasonable searches and seizures extends to citizen's automobile and to property sought to be forfeited to the state.
Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***38 Tenn. 1976 WARRANTLESS SEARCHES AND SEIZURES; PRESUMPTIVELY UNREASONABLE**--Search or seizure without warrant is presumptively unreasonable and invalid; right to search or seize without warrant is exception, and exists only under exceptional circumstances.

Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***38 Tenn. 1976 MOBILITY OF AUTOMOBILE**--When probable cause exists, automobile which has been moving along public street or highway and is halted may be searched or seized without warrant because of impracticality of obtaining warrant before vehicle may be moved out of the jurisdiction. The same rule does not apply to authorize search or seizure of vehicle without warrant after vehicle has completed its journey and is at rest on private premises.

Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***38 Tenn. 1976 EXIGENT CIRCUMSTANCES**--Drug Control Act (which allows Commissioner of Safety or his authorized representative to seize property subject to forfeiture if Commissioner or his representative has probable cause to believe that property was used or is intended to be used in violation of statute) may be constitutionally applied when construed as authorizing seizure without warrant, upon probable cause, only when exigent circumstances exist justifying summary seizure.

Fuqua v. Armour, 543 S.W.2d 64 (Tenn. 1976).

***38 Tenn. 1976 JURISDICTION; WARRANTLESS SEIZURE**--Seizure of automobile by officers, assertedly under authority of forfeiture statute, but in violation of constitutional rights, did not preclude subsequent forfeiture nor affect jurisdiction of court to decree forfeiture. The fact that a seizure was unlawful does not affect jurisdiction to proceed in a forfeiture action provided that grounds for forfeiture are established with evidence that was not illegally obtained.

Fuqua v. Armour, 543 S.W.2d 64, 68 (Tenn. 1976).

***38 Tenn. App. 1992 WARRANTLESS SEARCH; ABSENCE OF EXIGENT CIRCUMSTANCES**--In the court's judgment, there was no reason to fear destruction of evidence. There was no evidence that the informant stated that drugs were seen on the premises or that an actual threat was made to destroy evidence. Only the surmise of the officer that evidence was to be found on the premises and the surmise of the informant that there was a danger of destruction existed in the present case. Therefore, the court found that there was insufficient evidence as a matter of law to show such exigent circumstances as would validate the warrantless entry and search of the Claimant's premises. All evidence obtained by the officers as a result of the warrantless search of the premises of claimant was illegally obtained and inadmissible at the forfeiture hearing.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***38 Tenn. App. 1992 LACK OF PROBABLE CAUSE**--Police officers had no legitimate reason to approach vehicle parked legally on private property and rap on its window to cause occupant to open door or to demand occupant's driver's license, where there was no complaint of owner of parking lot as to presence of occupant and his vehicle and police were not seeking perpetrator of particular crime with information of description of vehicle connected with that crime. The fact that drugs had previously been discovered in other vehicles in same parking lot was not probable cause justifying actions of officers.

Williams v. Tennessee Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992).

***38 Tenn. App. 1992 INVALID STOP**--Actions of police officers in approaching parked vehicle in private parking lot, rapping on its window to cause occupant to open door and demanding occupant's driver's license was not valid "investigative stop," where vehicle was already stopped and rightfully parked on private property and there was nothing suspicious about it. The nonviolent argument taking place in parked vehicle was not breach of peace and was not reason to intervene.

Williams v. Tennessee Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992).

***38 Tenn. App. 1992 INVALID SEARCH**--Police officers' modus operandi in making search of parking lot for occupied vehicles which they hoped to search for drugs by simple means of knocking on window and demanding driver's license was unconstitutional.

Williams v. Tennessee Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992).

***38 Tenn. App. 1992 REASONABLE SUSPICION**--Every vehicle that enters high crime area is not fair game to inquisitive police officers, but only those vehicles and occupants as to which or whom investigating officers have reasonable suspicion supported by specific and articulable facts that law has been or is being violated by occupants or by use of vehicle.

Williams v. Tennessee Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992).

***38 Tenn. App. 1992 EXCLUSIONARY RULE--**Fruits of invalid stop and search were inadmissible as fruits of poisonous tree in civil forfeiture proceeding.

Williams v. Tennessee Department of Safety, 854 S.W.2d 102 (Tenn. Ct. App. 1992).

***38 Tenn. App. 1992 EXCLUSIONARY RULE, CONSEQUENCES OF--**Without the excluded evidence, the State has not carried its burden of proving by a preponderance of the evidence that the seized property was of a nature making its possession illegal or was used in a manner making it subject to forfeiture. Absent any independent evidence unconnected to the illegal search, such failure operates as a bar to any forfeiture.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***38 Tenn. App. 1992 WARRANTLESS SEARCH AND SEIZURE; REASONABLENESS--**A search or seizure without a warrant is presumptively unreasonable and invalid since the right to search or seize without a warrant is exceptional and exists only under exceptional circumstances. The reasonableness of a warrantless search and seizure cannot be judged in hindsight, but must be viewed in the light of circumstances at the time the search was made.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***38 Tenn. App. 1992 WARRANT EXCEPTION; BURDEN OF PROOF--**Invasion of privacy without a search warrant is permissible in the presence of some "grave emergency" or in exceptional circumstances, but the burden is upon those who made the search without a warrant to establish the exceptional circumstances. A warrantless entry by criminal law enforcement officers is legal where there is a compelling need for official action and no time to secure a search warrant. For example, a warrantless search will be sustained when circumstances are such as to lead a person of reasonable caution in the officer's position to conclude that evidence of crime would probably be found on the premises and that it probably would be destroyed within the time necessary to obtain a warrant. However, officers are not free to create exigent circumstances to justify a warrantless intrusion.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***38 Tenn. App. 1992 WARRANTLESS ARREST--**The warrantless arrest of the Claimant was not deemed justified by the evidence in the present case. Although an officer may, without a warrant, arrest a person, a warrantless arrest by an officer is not justified by the fact that the officer had information leading him to believe that an offense was being committed. It did not appear from the officer's testimony in the present case that they arrested the Claimant on the basis of evidence which provided probable or reasonable cause for the arrest. While the officers sought to justify the seizure of the person of the Claimant by contending that they witnessed him in the act of destroying evidence, in actuality, the evidence of the disposal of drugs was found *after*, not before, the arrest and handcuffing the Claimant. Since a search cannot be justified by what it produces, it follows that an arrest cannot be justified by the fruit of an illegal search. Therefore, the arrest of the Claimant was found illegal.

Basden v. Lawson, No. 91-232-II, 01-A-019111CH00435, 1992 WL 58501 (Tenn. Ct. App. March 27, 1992). 15 APR 308.

***38 Tenn. App. 1990 EXCLUSIONARY RULE; STATE'S BURDEN OF PROOF--**The sufficiency of the search warrant is a relevant issue in a forfeiture proceeding. A search warrant's legality is irrelevant in determining whether or not a forfeiture proceeding should be instituted. However, it is relevant in determining whether the State has established grounds for forfeiture. The exclusionary rule is just as applicable to forfeiture proceedings as it is to criminal proceedings. Thus, the State may not use evidence obtained under an invalid search warrant to establish that the seized property was being possessed or used in violation of the Tennessee Drug Control Act.

Claybrooks v. Department of Safety, No. 89-150-II, 1990 WL 8641 (Tenn. Ct. App. February 7, 1990). 15 APR 274.

***38 Tenn. App. 1990 ILLEGAL SEIZURE--**Even if the seizure were found to be illegal, the State would still have the right to establish that the money at issue is subject to forfeiture with independent evidence.

Claybrooks v. State, No. 89-150-II, 1990 WL 8641 (Tenn Ct. App. February 7, 1990). 15 APR 274.

***38 Ch. Ct. 1992 JURISDICTION OF AGENCY AFTER UNLAWFUL SEIZURE--**The fact that a seizure is unlawful does not affect the jurisdiction of the Commissioner of Safety to proceed in a forfeiture action.

Hardison v. Lawson, No. 91-2430-II (Davidson County Ch. Ct. February 14, 1992). 15 APR 332.

***38 Ch. Ct. 1991 UNLAWFUL SEIZURE DOES NOT PREVENT FORFEITURE--**The Commissioner of Safety has exclusive jurisdiction to make a forfeiture determination and is not bound by the suppression order entered in a criminal proceeding. A finding of unlawful seizure in a criminal case does not prevent forfeiture under the Drug Control Act.

Reece v. Department of Safety, No. 90-3922-II (Davidson County Ch. Ct. September 11, 1991). 15 APR 284.

***38 F.O. 1995 INFORMANT'S TIP AS BASIS FOR SEARCH WARRANT**--The search warrant based on an informant's tip was declared invalid for lack of probable cause. Therefore, Claimant's motion to suppress the evidence obtained through the invalid search warrant was granted. Without the evidence secured by the search warrant, the State's case against the Claimant failed for lack of proof, and the seized money was returned to the Claimant.

Department of Safety v. Gary R. Graham, IO/2-1-95. FO/2-13-95. 13 APR 153.

***38 F.O. 1995 WARRANTLESS SEARCH AFTER LAWFUL ARREST**--A warrantless search does not violate the Fourth Amendment if it was conducted after a lawful arrest which was based on the sound discretion of the arresting officer.

Department of Safety v. Randolph Gordon, IO/12-22-94. FO/1-3-95. 13 APR 160.

***38 F.O. 1984 IN REM ACTION**--Following Fuqua v. Armour, 543 S.W. 2d 64 (Tenn. 1976), a car was ordered forfeited to state upon showing that it was used to transport drugs for resale, even though seizure without warrant was illegal due to lack of exigent circumstances.

Department of Safety v. Barbara Peplies, IO/3-5-84. FO/8-20-84. 3 APR 266. Department of Safety v. Anthony Wayne Brown, IO/2-24-83. FO/5-30-83. 3 APR 235.

***38 I.O. 1994 LEGALITY OF SEARCH**--A search warrant is not required for a search incident to arrest. Citing Tennessee case law, the Administrative Law Judge determined that where the individual perpetrator has been properly placed under arrest, the search of the crime scene for weapons and evidence is lawful. The facts of the present case supported the search of a house gutter even in the absence of a search warrant. The Claimant fled from officers in his car and later on foot. The officers were found to have probable cause to arrest the Claimant. Once the Claimant was arrested and a substantial sum of money was found on the Claimant's person, the officers had sufficient legal justification to inspect the area where the Claimant was last seen running and where he was finally handcuffed. The ensuing search of the area produced a plastic bag of cocaine whose packaging was indicative of drugs intended for street resale.

Department of Safety v. Callie Harris, et. al., IO/7-25-94. 8 APR 235.

***38 I.O. 1994 RELINQUISHMENT OF EXPECTATION OF PRIVACY; DISCLAIMER OF OWNERSHIP**--A disclaimer of ownership effects an apparent abandonment of any reasonable expectation of privacy in the seized vehicle and constitutes a waiver to any plausible objection lodged against the officer's discovery of cocaine in the glove compartment in the car during their attempt to discover the owner of the car. Citing federal case law, the Administrative Law Judge held that after the Claimant informed the police that the car did not belong to him, he relinquished any reasonable expectations of privacy in the vehicle or its contents. Therefore, the cocaine discovered was not the fruit of an illegal search, and forfeiture of the vehicle was ordered.

Department of Safety v. Ardell Brown, Jr., IO/6-13-94. 13 APR 169.

***38 I.O. 1994 LACK OF PROBABLE CAUSE**--Citing federal case law, the Administrative Law Judge determined that the police officer's stated reason for entering the vehicle and searching the glove compartment (to verify registration information he had obtained when he ran a check of the license plate) did not constitute probable cause for entry and search inside the vehicle, especially where no stolen vehicle report existed. Since the search of the seized vehicle was unlawful because no probable cause existed to justify the search, Claimant's motion to suppress was granted and all evidence found pursuant to the search was excluded from consideration. As there was no evidence to be considered in the record of any drugs found in the seized vehicle, there was no proof that the seized vehicle was used in any manner that would subject it to forfeiture. The Administrative Law Judge added that even if the Claimant's motion to suppress was not granted, the evidence would still not support forfeiture of the vehicle. The 6.6 grams of marijuana found in the vehicle was considered an amount clearly consistent with personal use. Moreover, there was no evidence to suggest that the vehicle was used in any manner to facilitate the purchase of drugs or even that the drugs had been transported in the seized vehicle.

Department of Safety v. Larry Hartsfield, IO/4-28-94. 9 APR 209.

***38 I.O. 1993 EXCLUSIONARY RULE**--The exclusionary rule is applicable to State forfeiture proceedings when evidence is obtained under a defective search warrant.

Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***38 I.O. 1993 VIOLATION OF FOURTH AMENDMENT**--If the stop and arrest of the Claimant do not violate the Fourth Amendment, the currency is clearly subject to forfeiture. However, if the stop and arrest do violate the Fourth Amendment, there is no admissible proof to meet the State's burden.

Department of Safety v. Myron Young, IO/8-20-93. 11 APR 154.

***38 I.O. 1993 MOTION TO SUPPRESS**--There is no requirement in a civil forfeiture hearing that motion to suppress evidence be filed prior to a hearing since a rule of fairness prevails in administrative proceedings. Had the State been prejudiced by the motion being raised at the hearing, the State might have been granted a continuance to prepare to address the motion. However, no such prejudice was shown nor any continuance requested.
Department of Safety v. John Wesley Goss, IO/8-20-93. 11 APR 53.

***38 I.O. 1993 ILLEGAL SEIZURE; JURISDICTION**--The question of how the vehicle was seized is irrelevant to the jurisdiction of the State to conduct a forfeiture hearing. Even if the seizure is illegal, it does not, in and of itself, prevent seized property from being forfeited, provided there is sufficient admissible evidence presented to meet the necessary and requisite burden of proof.
Department of Safety v. Able Eugene Hamon, IO/7-9-93. 10 APR 174.

***38 I.O. 1993 ILLEGAL SEIZURE; JURISDICTION**--The fact that the money was seized illegally does not affect jurisdiction over that money in a forfeiture case. While the illegality of the seizure does not affect the department's ability to conduct a forfeiture hearing, it does render any evidence developed in the illegal search and seizure inadmissible as proof in the State's case for forfeiture. In the present case, no independent evidence was presented other than that obtained as a result of the invalid search and seizure at the bank. Therefore, the property was returned to the Claimant.
Department of Safety v. Larry D. Tharpe, IO/2-4-93. 13 APR 179.

39. FIFTH AMENDMENT

***39 F.O. 1995 ADVERSE INFERENCE; INVOCATION OF FIFTH AMENDMENT**--Claimant asserted his rights under the Fifth Amendment and refused to answer various questions relating to his possible illegal activities. Since this was a civil case, the administrative law judge determined that it was reasonable to conclude that the answers would have been adverse to the claimant's interests.
Department of Safety v. Tyson L. Brown, IO/4-21-95. FO/5-1-95. 9 APR 93.

***39 F.O. 1995 INVOCATION OF FIFTH AMENDMENT NOT A BAR TO ADVERSE INFERENCE**--After the State has proven its case, the invocation of the Fifth Amendment does not protect an individual from an adverse inference from failure to testify in a civil hearing. Considering that the Claimant in the present case had an opportunity to clarify the matter for the record, the fact that he chose to invoke his Fifth Amendment privilege and refuse to answer questions raised the inference that the answers would incriminate him.
Department of Safety v. Steve H. Carr, IO/1-27-95. FO/2-6-95. 9 APR 100.

***39 F.O. 1984 INVOCATION OF FIFTH AMENDMENT NOT A BAR TO ADVERSE INFERENCE**--Claimant's invocation of Fifth Amendment privilege against self-incrimination leaves trier of fact free to conclude that the Claimant's testimony would be unfavorable to him and favorable to opposing party.
Department of Safety v. James Campbell, IO/9-25-84. FO/10-9-84. 4 APR 719.

***39 F.O. 1984 PRESUMPTION**--Trier of fact in a civil case may conclude when a witness invokes the Fifth Amendment that his testimony would be unfavorable to him.
Eugene Culver v. Department of Safety, IO/7-12-84. FO/8-7-84. 4 APR 588.

***39 I.O. 1994 CREDIBILITY; FIFTH AMENDMENT**--The claimant's probable involvement in drug sales on the date of the seizure raises questions about his credibility, even without consideration of his claim of a Fifth Amendment privilege in regard to various questions. When such a claim is taken into account, it supports the conclusions made in the initial order.
Department of Safety v. John Wesley Goss, IO/4-14-94. 8 APR 8.

***39 I.O. 1993 INVOCATION OF FIFTH AMENDMENT NOT A BAR TO ADVERSE INFERENCE**--While it is possible that some money in the Claimant's possession was legitimate money, Claimant's drug money and legitimate money were co-mingled to the extent that it became impossible to for them to be completely distinguished. Nevertheless, it was quite clear that a major portion of the seized money represented proceeds from drug sales. Additionally, in light of Claimant's invocation of the Fifth Amendment and refusal to answer questions regarding what he intended to do with the money, all the money was found to constitute drug proceeds.
Department of Safety v. David Van McCloud and Samantha Cook, IO/8-19-93. 11 APR 162.

***39 I.O. 1992 CO-OWNERSHIP; INVOCATION OF FIFTH AMENDMENT**--The fact that Claimant pled the Fifth Amendment when asked whether he had his own set of keys is further evidence that he co-owned the car, as an adverse inference is drawn from his refusal to answer this question.

Department of Safety v. Preston Crowder and Vanderbilt University Employees Credit Union, IO/4-14-92. 11 APR 185.

***39 I.O. 1985 MIRANDA WARNINGS WAIVER**--Claimant was arrested and advised of his Miranda rights. He indicated that he understood them. During police booking, he was asked if any of the money seized was drug related. He replied that part of it (\$360.00) was. The Administrative Law Judge held it an admissible statement over attorney's objection that Claimant was never asked whether he "wished to give up his right to remain silent," as this is not a requirement of Miranda.

Department of Safety v. Rodney K. Williams, IO/3-13-85. 5 APR 173.

40. EIGHTH AMENDMENT

***40 U.S. S.Ct. 1993 EIGHTH AMENDMENT APPLICATION TO FORFEITURE ACTIONS**--Eighth Amendment's excessive fines clause applies to *in rem* civil forfeiture proceedings.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***40 U.S. S.Ct. 1993 APPLICABILITY OF EXCESSIVE FINES CLAUSE**--Civil or criminal nature of *in rem* forfeiture is irrelevant to applicability of excessive fines clause; rather, determinative question is whether or not the forfeiture is punishment.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***40 U.S. S.Ct. 1993 APPLICABILITY OF EXCESSIVE FINES CLAUSE**--Forfeiture may serve remedial purpose and still be subject to excessive fines clause, but it is necessary that forfeiture can only be explained as serving in part to punish.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***40 U.S. S.Ct. 1993 CIVIL FORFEITURE AS PUNISHMENT**--Civil forfeiture of property used or intended to be used in drug offenses is "payment to a sovereign as punishment for some offense" and, therefore, is subject to excessive fines clause, even if forfeiture serves some remedial purpose.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***40 U.S. S.Ct. 1993 DEFERENCE TO LOWER COURT DETERMINATION OF EXCESSIVENESS**--After Supreme Court held that excessive fines clause applied to civil forfeiture, prudence dictated that lower courts be allowed to consider in first instance whether forfeiture was excessive.

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 61 USLW 4811 (1993).

***40 F.O. 1995 DISPROPORTIONATE FORFEITURE WHEN LIMITED USE**--In the present case, there was no proof to establish that the seized vehicle was used to transport any marijuana. Rather, the car was only used to store and separate the \$60 worth of marijuana that was sold to the confidential informant from the other 44.1 grams that was later found on the informant. Although technically such minimal use would normally be viewed as facilitation of a drug sale, the Administrative Law Judge held that using a car for a scant 2 minutes as a private place to sit and divide a portion of marijuana would not subject the vehicle to forfeiture under the reasoning of Austin v. United States, 113 S.Ct. 2801 (1993). Even if the vehicle was used to facilitate the drug sale, forfeiting it for such minimal use under the statute would violate the Excessive Fines Clause of the Eighth Amendment. Since forfeiture was found to be disproportionate and excessive under the Eighth Amendment, the seized vehicle was returned to the Claimant.

Department of Safety v. Marie N. Crump, IO/1-31-95. FO/2-10-95. 13 APR 189.

***40 F.O. 1995 DISPROPORTIONATE FORFEITURE WHEN LIMITED USE**--To forfeit a vehicle worth \$7,000, which according to the proof was used only for 2 minutes and quite possibly only as a private place to divide drugs, when the drug sale did not even take place inside the vehicle was considered to be clearly disproportionate, without further evidence of facilitation, as well as excessive under the Eighth Amendment. The fact that the Claimant may well have known that his passenger was using his car in some way related to the sale of drugs, and consented to such use, did not change this conclusion. First, the Administrative Law Judge determined that the knowledge and consent of such use would obviously constitute less of an offense than the actual selling of marijuana, and no evidence was presented that the Claimant profited in any way from the drug sale. Secondly, although the presence of a weapon in the trunk of the car did raise some suspicion, this fact did not rise to the level of establishing any further use of the vehicle to facilitate a drug sale. Since forfeiture was found to be disproportionate and excessive under the Eighth Amendment, the seized vehicle was returned to the Claimant.

Department of Safety v. Marie N. Crump, IO/1-31-95. FO/2-10-95. 13 APR 189.

***40 I.O. 1994 EXCESSIVE FORFEITURES**--Citing federal case law, the Administrative Law Judge determined that the relevant inquiry for an excessive forfeiture under the Tennessee Drug Control Act is whether the confiscated property has a close enough relationship to the offense. In the present case, the seized vehicle was closely related to the drug trafficking to render it forfeitable. The vehicle was the prime instrumentality used by the Claimant to secure and transport the drugs. Even though the actual monetary value of the drugs was small in comparison to the actual monetary value of the vehicle, the use of the vehicle to facilitate the drug transaction was sufficient to connect it to the offense and render it forfeitable. In light of this evidence, the Eighth Amendment's prohibition against excessive forfeitures did not apply.

Department of Safety v. Daniel A. Morgan, IO/6-20-94. 13 APR 197.

***40 I.O. 1993 EIGHTH AMENDMENT APPLICATION**--The Eighth Amendment does not apply to the facts of this case. The application of T.C.A. §53-11-451 does not violate the Eighth Amendment since the use of the forfeited vehicle was sufficiently connected to the drug-related offense. In the present case, the vehicle was directly used to transport and facilitate the purchase of cocaine.

Department of Safety v. Janet Taylor, IO/11-23-93. 13 APR 204.

***40 NOTE 1995 EIGHTH AMENDMENT; EXCESSIVE FINES CLAUSE AND FORFEITURE**--For a discussion of the Eighth Amendment's application to drug-related forfeiture, consult the article entitled *Does The Punishment Outweigh The Crime?*. This paper explores the impact of Austin v. United States and the application of the Eighth Amendment's Excessive Fines Clause to civil *in rem* forfeiture. Section II of the paper examines the development and increased use of civil forfeiture. It traces the historical origins of forfeiture as well as the modern uses of civil forfeiture by law enforcement agencies to wage the war on drugs. Section II of this paper also outlines the statutory scheme for forfeiture under the Tennessee Drug Control Act. Section III explores the United States Supreme Court's Eighth Amendment jurisprudence. Section IV examines the Supreme Court's recent decision in Austin and its impact on civil forfeiture. Section IV then reviews the treatment of civil forfeiture by the lower courts, both state and federal, after Austin. Finally, Section V ponders the question of whether the punishment outweighs the crime under the Tennessee Drug Control Act and advocates the enactment of a proposed statutory framework that would aid in gaging and remedying unconstitutional excessiveness.

Zelimir Juric, *Does The Punishment Outweigh The Crime?: An Eighth Amendment Analysis of Civil Forfeiture Under the Tennessee Drug Control Act* (1995). 8 APR 27.

41. DUE PROCESS

***41 Tenn. 1995 REQUIREMENT OF ADEQUATE NOTICE TO ALL INTERESTED PARTIES**--One of the essential elements of due process in the confiscation and forfeiture of private property is adequate notice to all interested parties. Where the State had knowledge of the Claimant's ownership interest in the forfeited property, both federal and state due process required the Department to have made a reasonable effort to notify the Claimant of the seizure and the possible forfeiture of the property. Under the facts presented on this appeal, it was clear that the Department of Safety possessed the requisite knowledge of the Claimant's possible proprietary interest in the seized property. Such knowledge required the Department to give notice to the Claimant of the seizure and possible forfeiture of the property.

Redd v. Department of Safety, No. 0S01-9312-CH-00183, 1995 WL 78008 (Tenn. January 27, 1995). 16 APR 187.

***41 Tenn. 1980 PROCEDURAL DUE PROCESS; PROCEDURAL SAFEGUARDS**--Procedural due process embodies flexible standards requiring different procedural safeguards according to the circumstances of each case.

Williams v. Pittard, 604 S.W.2d 845, 849 (Tenn. 1980); Estrin v. Moss, 221 Tenn. 657, 676, 430 S.W.2d 345, 353 (1968), *cert. denied*, 393 U.S. 318 (1969).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE**--Procedural due process embodies flexible standards requiring different procedural safeguards according to the circumstances of each case. However, deeply engrained in the concept is the principle that the State cannot interfere with a person's significant property interests without first providing a hearing at a meaningful time and in a meaningful manner. Adequate notice is an essential due process ingredient.

Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE REQUIREMENTS**--The right to a hearing has little reality or worth unless the affected parties are informed that the matter is pending and can choose for themselves whether to appear or default, acquiesce, or contest. Thus, in order to satisfy due process, the procedure for notice must, under all the

circumstances, be reasonably calculated to apprise all interested persons of the pending action in order to afford them an opportunity to present their objections.

Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE ARE REQUIRED**--The record in this case shows that the State had two appearances on behalf of the Claimant. The first attorney making an appearance on the Claimant's behalf notified the seizing agency that henceforth all notices should be given to the Claimant's second attorney. Despite that knowledge, the State did not notify the Claimant's second attorney, even after the first attorney to whom notice had been given said he would not attend the hearing because he had not heard from the Claimant. In the court's judgment, the State failed to take the reasonable steps necessary to give the Claimant notice of the hearing. The court found that State was required to make a reasonable effort to provide the Claimant's second attorney with notice even though he had not made an appearance on behalf of the Claimant. Therefore, where one attorney has made a formal appearance and then in his withdrawal designates another attorney as the Claimant's representative, that fact gives the State information that it cannot ignore in according the Claimant his due process rights.

Rasheed v. Department of Safety, No. 91-183-II, 01-A-019203CH00078, 1992 WL 210484 (Tenn. Ct. App. September 2, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NECESSITY OF A PRE-FORFEITURE HEARING**--Ordinarily, procedural due process requires a hearing before the State interferes with a property interest. However, a hearing may be postponed in extraordinary situations such as when the State seizes property that is subject to forfeiture. Thus, the requirements of due process are satisfied as long as persons claiming an interest in seized property are afforded an opportunity for a hearing on their claim at a meaningful time and in a meaningful manner following its seizure.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; NOTICE**--The notice procedure used should, to the extent reasonably practicable, be designed to maximize notice to potential claimants in order to provide them with a reasonable opportunity to be heard.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; CONSTRUCTIVE NOTICE**--Constructive notice is constitutionally inadequate with regard to persons whose identity is known or easily ascertainable.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; REASONABLENESS INQUIRY**--In order to determine whether a particular notice procedure comports with due process, the proper inquiry is whether the State acted reasonably in selecting a means likely to inform persons affected, not whether each property owner actually received notice. As long as the State employs reasonable means and makes reasonable efforts to notify a claimant, it has discharged its burden with respect to providing notice. The reasonableness of the State's efforts to give notice depends on several factors, including: (1) the State's knowledge of the ownership of the property, (2) the means available to the State to discover the identity of persons claiming an interest in the property, and (3) the practical difficulty of giving notice of the type that will actually inform the affected parties of the pending proceeding.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; REASONABLE EFFORTS TO PROVIDE NOTICE NOT FOUND**--In the present case, the officers made no effort to give notice to anyone other than claimant Brown, even though they had seized other evidence indicating that at least two other persons lived in the house where the money was found. With the names and addresses of these potential claimants already in their possession, the officers are required to expend some additional effort to provide the other residents of the house with notice of the seizure. Moreover, claimant Brown, the only resident of the house present when the money was seized, denied that he owned the money and, according to the arrest report, stated that "he did not know who the money belonged to." In light of this evidence, giving notice to claimant Brown and then relying on him to pass the notice along does not meet even the minimum requirements of procedural due process. Giving notice to a person who denies any knowledge of the ownership of property cannot be viewed as being reasonably calculated to notify potential claimants of their right to seek the property's return.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1992 PROCEDURAL DUE PROCESS; SCOPE OF NOTICE**--The scope of the constitutional requirement of timely and adequate notice should not depend on the State's suspicions about the source of the seized property

or its belief that the likely claimants are involved in some sort of illegal activity. Likewise, it should not be influenced by the State's legitimate desire to separate criminals from their ill-gotten gains, to lessen the economic power of organized crime or drug enterprises, or to use the seized property to support other law enforcement activities.

Brown v. Department of Safety, No. 89-2705-III, 01-A-01-9102-CH00043, 1992 WL 63444 (Tenn. Ct. App. April 1, 1992).

***41 Tenn. App. 1991 PROCEDURAL DUE PROCESS; ACTUAL NOTICE**--In the present case, the record reflected that law officers of Unicoi County were searching the premises of one Michael Sparks pursuant to a search warrant, and Claimant Thomas was found on the premises at that time in the van here in question. The van was searched pursuant to the search warrant. Thomas, an escapee from the Unicoi County Jail at the time, was in possession of the van. The amount of drugs found in the van was consistent with the amount a person would have for resale and not for personal use. Thomas contended that he was denied due process because he did not receive notice to the effect that a confiscation hearing was to be held on May 16, 1989. In support of his contention, he asserted that, at the time the notice was sent, he was incarcerated in the regional correctional facility in Wartburg whereas the notice of the hearing was mailed to the Unicoi County Jail. However, the Court of Appeals determined that Thomas still had notice of the hearing. In his pleadings to appeal the initial order, Thomas stated that he was aware that he was in default because he could not attend the administrative hearing on May 16, 1989. Furthermore, in his petition for reconsideration, Thomas made a similar assertion. Therefore, the Court of Appeals held that there was no denial of due process because Thomas did receive actual notice, as evidenced by his later pleadings.

Thomas v. Department of Safety, No. 01-A-019011CH00412, 1991 WL 111428 (Tenn. Ct. App. June 26, 1991).

***41 Tenn. App. 1978 PROCEDURAL DUE PROCESS; LIENHOLDERS**--An expanded level of procedural due process protection exists for innocent lienholders of confiscated property.

Merchants Bank v. State Wildlife Resources Agency, 567 S.W.2d 476, 479 (Tenn. Ct. App. 1978).

***41 Ch. Ct. 1992 JUDICIAL REVIEW; DUE PROCESS**--After the Commissioner overturned the initial order returning the seized vehicle to the Claimant, the Claimant appealed the Commissioner's decision, asserting that it violated due process because the Commissioner was acting as both prosecutor and judge in reviewing the administrative law judge's order. The reviewing court held that due process had not been violated by the Commissioner's review of the initial order. In the court's opinion, combining the prosecution and adjudication function in the same administrative agency did not violate due process as long as judicial review was provided.

Emert v. Department of Safety, No. 91-1358-II (Davidson County Ch. Ct. June 17, 1992). 16 APR 3.

19.02 **ARSON CONFISCATION**

NO CASES REPORTED

19.03 **STOLEN VEHICLE**

1. In General
 2. Procedure
 3. VIN Numbers
-

1. IN GENERAL

***1 Tenn. App. 1987 NO EXEMPTION FOR VEHICLES ISSUED CERTIFICATE OF TITLE**--Statute allowing forfeiture to State of vehicles whose identification numbers or marks have been changed does not exempt vehicles to which State has issued certificate of title.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***1 Tenn. App. 1987 COMPENSATION FOR FORFEITURE NOT CONSTITUTIONALLY REQUIRED**--Compensation for personal property taken from innocent parties under forfeiture statute is not required by United States Constitution.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***1 Tenn. App. 1987 COMPENSATION; LEGISLATIVE INTENT**--Provisions for remission or compensation in forfeiture statute are matters of legislative grace.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***1 Tenn. App. 1987 STATUTORY APPLICATION; DEFERENCE TO LEGISLATURE**--Although the application of this statutory scheme may seem harsh and unfair, it undoubtedly has a real tendency to effectuate the legislative purpose. Given that fact, the court is powerless to negate the impact of the statute, even though it may feel that its operation is inequitable. Any change, therefore, must be sought through the legislative process.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***1 OAG 1985 OWNER'S INNOCENCE**--T.C.A. §55-5-108 is not unconstitutional for its potential failure to provide as a defense to forfeiture the innocence of the owner of the seized property.

1985 Op. Tenn. Att'y Gen. No. 85-168 (May 20, 1985). 5 APR 194.

2. PROCEDURE

***2 Tenn. App. 1987 LENDER INDUCEMENT; ESTOPPEL**--Lender was not induced to loan money to automobile buyer in reliance on State's certificate of title, and thus State was not estopped from seeking forfeiture of automobile as "contraband" due to removal of original vehicle identification number and replacement with number from vehicle declared total loss by its owner's insurance company; lender loaned money five days before certificate of title was issued.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***2 Tenn. App. 1987 LENDER INDUCEMENT; ESTOPPEL**--Even if lender was induced to loan money to automobile buyer in reliance on State's certificate of title, State was not estopped from seeking forfeiture of automobile whose original vehicle identification number had been replaced with that from vehicle declared total loss by its owner's insurance company; language on certificate of title neither expressed nor implied any warranty or guarantee that certificate was absolute proof of ownership, and even cursory inspection of dash of automobile by lender would have disclosed that vehicle identification number plate was not one originally installed on dash; physical inspection of automobile to be used as collateral for loan was not an unreasonable burden for lender.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***2 Tenn. App. 1987 BURDEN OF PROOF; STATE**--Motor vehicle forfeiture statute requires State to prove only that identification number or mark has been changed or rendered unidentifiable, not that vehicle has been rendered unidentifiable.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***2 Tenn. App. 1987 JUDICIAL REVIEW**--Judicial review of an administrative agency decision under the Uniform Administrative Procedures Act is confined to the record made before the agency, and at the appellate level, before the Chancery Court. Under T.C.A. §4-5-322(h), the reviewing court may reverse or modify an agency decision if it is unsupported by substantial and material evidence in the record. The Supreme Court has interpreted "substantial and material evidence" to mean such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***2 Tenn. App. 1986 INITIAL ORDER DELAY; NO FINDING OF PREJUDICE**--The Claimant contends that he was prejudiced by the two hundred and fifty-one (251) day delay in rendering the forfeiture order because the value of the vehicle has declined significantly since it was seized. This is not the kind of prejudice that requires the reversal of an otherwise valid forfeiture order. Untimely forfeiture orders should be reversed only when the delay affects the merits of the forfeiture decision in question. Thus, in order to invalidate an otherwise valid forfeiture order, the Claimant must demonstrate that the delay in rendering the decision prejudiced or interfered with his ability to present the merits of his claim. In the present case, the Claimant has failed to demonstrate this type of prejudice. While the delay in this case is significantly longer than the delay involved in Garrett v. State, the Claimant's only claim of prejudice is based upon the diminished value of the vehicle. This is not persuasive because the Claimant has failed to demonstrate that the vehicle should not be forfeited as contraband. The Claimant cannot be prejudiced by the decrease in the value of the truck since he has been unable to demonstrate that he is entitled to its return.

Rich's Auto Sales, Inc. v. Jones, (Tenn. Ct. App., October 29, 1986).

***2 F.O. 1984 BURDEN OF PROOF**--Under T.C.A. §55-5-108(b)(1) and T.C.A. §55-5-108(b)(5), the burden of proof is on the Claimant to establish by preponderance of the evidence the original vehicle identification number and the vehicle or part involved, or it is forfeited to the state.

Department of Safety v. Clarksville Volkswagen Auto Dealers, IO/12-9-83. FO/2-7-84. 2 APR 645.

3. VIN NUMBERS

***3 Tenn. App. 1987 VIN; EXCHANGED NUMBERS**--Substantial evidence supported finding that body and transmission of automobile were "contraband" subject to forfeiture under statute, where there was proof that, *inter alia*, plate bearing vehicle identification number had been removed from dash of automobile and replaced with plate from another vehicle that had been declared total loss by its owner's insurance company, and that owner of other vehicle told investigator that his vehicle was blue with blue interior while automobile was red with beige interior and was originally white.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***3 Tenn. App. 1987 VIN; AUTOMOBILE PARTS**--Claimant failed to show that parts of automobile frame came from other legally acquired automobiles so as to prevent forfeiture of automobile's transmission and body as "contraband" due to replacement of original vehicle identification number with that from another vehicle declared total loss by its owner's insurance company; if parts used to rebuild automobile were legally acquired, its owner could have protected his interest by obtaining permit for restoration, but did not, and claimant failed to establish original identification number on parts in question and its right, title or interest in that property.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***3 Tenn. App. 1987 NO CHANGE IN VIN PROVEN**--State failed to show that engine number of automobile was removed, defaced, covered, altered, destroyed or otherwise rendered unidentifiable, and thus could not obtain engine by forfeiture as "contraband" under statute, even though remaining parts of automobile were subject to forfeiture due to replacement of original vehicle identification number with that from another vehicle declared total loss by its owner's insurance company.

First Tennessee Bank National Association v. Jones, 732 S.W.2d 281 (Tenn. Ct. App. 1987).

***3 F.O. 1984 VIN; ORIGINAL NUMBERS**--Where claimant merely removed PVIN plate from door and replaced it after repairing door with screws instead of manufacturer's pop rivets, vehicle, although contraband, was returned to claimant as he had proved good title and that I.D. numbers currently on vehicle are originals. Department of Safety v. James M. Gray, Jr., IO/1-26-84. FO/2-16-84. 3 APR 217.

19.04 **DRIVER'S LICENSE**

1. In General
 2. Procedure
 3. Financial Responsibility
 4. Constitutional Law
-

1. IN GENERAL

***1 Tenn. App. 1988 BREATH-ALCOHOL TEST, REFUSAL OF**--Driver sought judicial review of suspension of her license for refusal to submit to a breath-alcohol test. The Court of Appeals held that: (1) a highway patrolman was not *per se* disqualified from acting as hearing officer on the suspension of the driver's license, and (2) the driver was not prejudiced by the police officer's failure to appear personally before the notary and swear to the form indicating that the driver had refused to submit to the test.

Hookanson v. Jones, 757 S.W.2d 347 (Tenn. Ct. App. 1988).

***1 Tenn. Crim. App. 1984 ARREST**--There must be a legal arrest before one can be requested to take a blood alcohol test. An arrest without a warrant for a misdemeanor that did not occur in the police officer's presence is illegal.

State of Tennessee v. Wheeler, No. 135 (Tenn. Crim. App. June 22, 1984). 6 APR 53.

***1 OAG 1984 PERSONS SUBJECT TO PROSECUTION**--The driver of a motorized bicycle may be subject to prosecution for driving while under the influence of an intoxicant pursuant to T.C.A. §55-10-401.

1984 Op. Tenn. Att'y Gen. No. 84-343 (December 21, 1984). 5 APR 201.

***1 OAG 1984 ARREST**--A warrantless arrest for driving while intoxicated pursuant to T.C.A. §40-7-103(6) must be made at the scene of the accident.

1984 Op. Tenn. Att'y Gen. Op. No. 84-342 (December 21, 1984). 5 APR 198.

***1 I.O. 1985 ARREST**--The subjective belief of the officer as to the time of the arrest is not controlling, citing State v. Evetts, 670 S.W.2d 640 (Tenn. Ct. App. 1984), and there was sufficient evidence presented from which it might be concluded that Petitioner was arrested when he was detained by the officer, under his control, not free to leave.

Department of Safety v. Southern, IO/12-13-85. 6 APR 253.

***1 I.O. 1985 CHANGING ONE'S MIND**--It is not a "refusal" if one changes his/her mind about taking breath test, i.e. initially refuses test and then later agrees to take test, provided that one changes his/her mind timely and at a location such that police are not substantially inconvenienced in administering test. Department of Safety v. Davidson, IO/12-13-85. 6 APR 262.

***1 I.O. 1985 REASONABLE GROUNDS**--Evidence demonstrating that arresting officer had reasonable grounds to believe person operating vehicle under the influence must be introduced at implied consent hearing. It is not enough for officer to testify that he had reasonable grounds - they must be enumerated and made part of the hearing officer's findings of fact.

Department of Safety v. Earlene Sue Matanic, IO/2-28-85. 5 APR 159.

***1 I.O. 1985 BREATH TEST REFUSALS**--Under T.C.A. §55-10-406(a)(2), the officer who advises a person that refusing to submit to a test to determine alcohol or drug content of blood will result in suspension of his or her operator's license does not have to be the same officer who arrests such person, so long as the advice is properly given.

Department of Safety v. James T. Bland, IO/2-13-85. 5 APR 148.

2. PROCEDURE

***2 Tenn. App. 1988 PATROLMAN AS HEARING OFFICER**--The highway patrolman was not *per se* disqualified from serving as hearing officer for purposes of ruling on suspension of driver's license for failure to submit to breath-alcohol test. The highway patrolman sitting as a hearing officer neither investigates or prefers charges against the licensee. The hearing officer sits not as a law enforcement officer charged with discovering or preventing crime, but as an adjudicator at a civil revocation proceeding where the petitioner is entitled to counsel; the scope of the hearing is limited to the issue of whether the

petitioner refused to submit to a test to determine the alcoholic content of her blood after having been placed under arrest and requested to do so by a law enforcement officer. There is also an adequate review of the hearing officer's determination available through the administrative and/or judicial system.

Hookanson v. Jones, 757 S.W.2d 347 (Tenn. Ct. App. 1988).

***2 Tenn. App. 1988 PERSONAL APPEARANCE BEFORE NOTARY**--The Petitioner was not prejudiced by police officer's failure to appear personally before notary and swear to form indicating that driver had refused to submit to breath-alcohol test, although better practice would have been for officer to have form properly notarized. Swearing to the report was a formality, not a mandatory requirement. The court stressed that the statute relates to the mode of doing the act and, in the absence of a showing of prejudice, the requirements are directory and not mandatory.

Hookanson v. Jones, 757 S.W.2d 347 (Tenn. Ct. App. 1988).

***2 I.O. 1986 NOTICE**--"Notice", under T.C.A. §4-5-307(b)(2), must include specific factual allegations and specific reference to rules and statute sections allegedly violated, unless the agency is actually "unable to state the matter in detail at the time the notice is served", in which case, "the initial notice may be limited to a statement of the issues involved. In this case, agency could have easily indicated which rule and statute section were allegedly violated, and the particular incidents upon which the proposed suspension is based.

Department of Safety v. Monique Zoller, IO/10-3-86. 7 APR 114.

***2 I.O. 1985 INITIAL ORDERS**--Initial Orders in cases arising under T.C.A. §55-10-406 regarding suspension of driver's license for refusal to submit to breath alcohol tests for all aspects of the order must contain findings of fact, including "concise and explicit statement(s) of the underlying facts of record to support the findings," See T.C.A. §4-5-314(c). Such findings are required on the following five issues: (1) whether the arresting officer had reasonable grounds to believe that the person arrested was driving under the influence of an intoxicant; (2) whether the person was placed under arrest; (3) whether the person arrested was asked to submit to a test to determine the alcoholic (or drug) content of his/her blood; (4) whether the person arrested was advised that refusal to take the test would result in suspension of his/her operator's license; and (5) whether the person thereafter refused to take the test. These findings must be based upon "objective facts." See also Draughon v. Plummer, No. 84-9-II (Tenn. Ct. App. November 21, 1984). 5 APR 70.

Department of Safety v. Bland, IO/2-2-85. 5 APR 148.

***2 I.O. 1985 REVIEW OF INITIAL ORDER**--In reviewing Initial Orders issued by Hearing Officers under T.C.A. §4-3-2005, neither administrative judges nor the agency (in this case the Commissioner of Safety) has the authority to conduct de novo hearings or to take additional evidence.

Department of Safety v. Lowery, IO/1-28-85. 5 APR 124.

3. FINANCIAL RESPONSIBILITY

***3 I.O. 1987 NEGLIGENCE OF MINOR**--T.C.A. §55-7-104(d) provides that "any negligence by a minor while driving a motor vehicle shall be imputed to the person who signed the application for a permit or license, which person shall be jointly and severally liable with such minor for any damages occasioned by such negligence except [when proof of financial responsibility has been filed]." Therefore, reasonable possibility of judgment against mother who owned car in which son caused accident, and who signed son's application for license, must be found, and her license must be revoked under financial responsibility law.

Department of Safety v. Deanna Collins, IO/2-10-87. 7 APR 117.

***3 I.O. 1985 OPERATION BY NON-OWNER**--In a case involving the operation of a vehicle by someone other than the owner, in order to find a "reasonable possibility of a judgment" against the owner, evidence would first have to be found indicating fault on the part of the driver. Then, evidence sufficient to attribute liability to the owner must be found, which evidence must generally "fit" one of three categories: 1) negligent entrustment, 2) family purpose doctrine, or 3) use by an agent or employee of the owner on the owner's business. In this case, no such evidence presented sufficient to attribute liability to owner; thus, it was recommended that Initial Order revoking driver's license and motorcycle registration of Petitioner, be reversed.

Department of Safety v. Veronica Wilder, IO/8-22-85. 6 APR 206.

***3 I.O. 1985 NEGLIGENT ENTRUSTMENT**--In a case involving an accident that occurred while a borrower of the vehicle was driving it for his own benefit, more than permission must be found on the part of the owner [although lack of permission would mandate dismissal of action against the owner under T.C.A. §55-12-106(6)]. Some evidence of negligent entrustment

must be found as well. The owner cannot be held liable in the absence of negligence in entrusting his vehicle to the hands of a person incompetent to handle it, and the driver's negligence cannot be imputed to the owner. A lack of substantial and material evidence tending to prove negligence, or a reasonable possibility thereof, on the part of the owner in lending his car to his friend warranted reversal of the Initial Order.

Department of Safety v. Spurgeon, IO/5-20-85. 5 APR 296.

4. CONSTITUTIONAL LAW

***4 Tenn. App. 1988 DUE PROCESS**--The Petitioner's due process rights were not violated by having a Tennessee Highway Patrolman conduct a hearing pursuant to T.C.A. §55-10-406(c) to determine if the Petitioner refused to take a breath-alcohol test after being placed under arrest for driving under the influence.

Hookanson v. Jones, 757 S.W.2d 347 (Tenn. Ct. App. 1988).

***4 Tenn. App. 1984 CONSTITUTIONALITY**--Tennessee's implied consent law is constitutional and does not permit illegal seizing and general warrants.

Draughon v. Plummer, No. 84-9-II (Tenn. Ct. App. November 21, 1984). 5 APR 70.

***4 Tenn. App. 1984 RIGHT TO COUNSEL**--A decision concerning whether to submit to a breath or blood alcohol test is not constitutionally protected in the same way the privilege against self-incrimination is. Therefore, a person need not be afforded counsel when requested to submit to a test to determine the level of his intoxication.

Draughon v. Plummer, No. 84-9-II (Tenn. Ct. App. November 21, 1984). 5 APR 70.

***4 OAG 1985 CONSTITUTIONALITY**--Amended T.C.A. §55-10-406, which allows blood alcohol tests on unconscious individuals without their consent is constitutional.

1985 Op. Tenn. Att'y Gen. No. 85-075 (March 11, 1985). 5 APR 169.

20.00 **DEPARTMENT OF STATE**

- 20.01 Solicitations of Charitable Funds
- 20.02 Bingo Permits
- 20.03 Corporations
- 20.04 Elections

20.01 **SOLICITATION OF CHARITABLE FUNDS**

NO CASES REPORTED

20.02 **BINGO PERMITS**

Ch. Ct. 1986 VIDEO BINGO--Application for Bingo Supplier's license to distribute video bingo machine was properly denied by secretary of state. Video bingo machine operated by depositing coins into a slot. Four bingo cards then appear on a screen. The players can shuffle the numbers on the cards until satisfied with the way the card or cards look. One to four cards can be played at the same time and as many as eight coins can be played on each card. The machine randomly selects thirty-six numbers and reveals them automatically, marking the cards on the screen. The first card to bingo or to mark four or five numbers in a row is the winner. The amount of winnings is determined by how quickly bingo is achieved. Chancellor ruled that such machine was not "bingo, raffle, or other similar game of chance", and was therefore not exempted from prohibitive gambling statutes by T.C.A. §39-6-609.

William K. Cornelison v. Gentry Crowell, Secretary of State, No. 86-91-III (Davidson County Ch. Ct. June 24, 1986). 6 APR 328.

OAG 1985 BLACKJACK TABLES--The use of "twenty-one" or "blackjack" tables on which a patron purchases for \$10.00 chips "worth" \$2,000.00, the patron being allowed to play as long as he or she has chips remaining, and the chips being worthless and not exchangeable for money or other things of value at the conclusion of play, violates the Tennessee gaming laws at T.C.A. §39-6-601 et seq.

1985 Op. Tenn. Att'y Gen. Op. No 85-037 (February 14, 1985). 5 APR 151.

20.03 **CORPORATIONS**

OAG 1987 REVOCATION AND REINSTATEMENT OF CHARTER/USE OF CORPORATE FUNDS IN ELECTIONS--A corporation whose charter has been revoked is no longer a corporation under Tennessee law and therefore is not subject to the restrictions of T.C.A. §2-19-132 and §2-19-133, regarding the use of corporate funds in elections. If, however, such an entity makes political contributions, that may be grounds for refusal to reinstate the corporate charter under T.C.A. §48-1-1308(g).

1987 Op. Tenn. Att'y Gen. No. 87-16 (January 27, 1987). 7 APR 296.

20.04 **ELECTIONS**

Ch. Ct. 1984 LEGISLATIVE PRIVILEGE--The speech and debate privilege of Art. 2, §13 is a privilege which can only be invoked by individual Senators to prevent compulsory testimony by them or their orders concerning their legislative actions. The privilege extends only to legislative activities and not political activities.

Joe Haynes v. David Collins, et al., No 84-1278-III (Davidson County Ch. Ct. July 2, 1984). 4 APR 582.

Ch. Ct. 1984 DISCOVERY PROTECTIVE ORDER, GOVERNMENT OFFICIALS--Government officials cannot be examined in judicial proceedings concerning the mental processes they use in making decisions. Protective order seeking to prevent the deposition of the Secretary of State granted until Plaintiff can show information sought is not obtainable through a source other than oral deposition, such as written interrogatories.

Lyndon H. LaRoache and Van Hall v. Gentry Crowell, Secretary of State, No. 84-810-III (Davidson County Ch. Ct. June 13, 1984). 4 APR 552.

21.00 **DEPARTMENT OF TOURIST DEVELOPMENT**

NO CASES REPORTED

22.00 DEPARTMENT OF TRANSPORTATION

- 22.01 Revocation of Billboard Permits
- 22.02 Tennessee Aeronautics Commission

22.01 REVOCATION OF BILLBOARD PERMITS

Ch. Ct. 1984 EXHAUSTION OF ADMINISTRATIVE REMEDIES--Issuance of Writ of Mandamus to direct the Department of Transportation to issue billboard permits was not proper form of relief where appellant had not exhausted his administrative remedy for the denial of licenses.

State of Tennessee ex. rel. E. E. Rivers, d/b/a C & S Sign Company v. Department of Transportation, No. 84-1616-II (Davidson County Ch. Ct. October 3, 1984). 4 APR 879.

F.O. 1995 SIGN NOT SUBJECT TO REMOVAL--In the present case, the sign was within 660 feet of the Interstate 40 right-of-way, visible from the interstate, and also within 1000 feet of a sign which was already permitted. The Administrative Law Judge determined that the Respondent's sign was not subject to the Department of Transportation's law controlling outdoor advertising and therefore not subject to removal for failure to act in accordance with the law. Relying on an earlier final order from the Department of Transportation concerning a similar fact situation, the Administrative Law Judge found no violation of the law since the sign was exclusively directed to motorists on a nearby road and its brief visibility from Interstate 40 was only incidental and not intended to attract interstate motorists. *See Department of Transportation v. Charles W. Whittemore d/b/a Pacific Eastern Corporation*, FO/2-15-84. 4 APR 876.

Department of Transportation v. Naegele Outdoor Advertising, IO/6-24-94. FO/2-14-95. 14 APR 29.

F.O. 1994 ILLEGAL TREE CUTTING; REBUTTING THE PRESUMPTION--The State established that illegal tree cutting occurred on the State's right-of-way adjacent to the KBK billboard and that KBK did not have a vegetation control permit to authorize such cutting. This raised a presumption that KBK was responsible for the unauthorized removal, cutting or trimming of the vegetation. The burden of establishing that KBK was not responsible for this unauthorized cutting then shifted to KBK. KBK succeeded in proving that it did not illegally cut the trees in the State's right-of-way nor was KBK responsible for such illegal tree cutting. KBK, while denying responsibility for the cutting, provided three plausible explanations for third parties who would have had both motive and opportunity to perform the illegal cutting. The State offered no testimony to rebut KBK's proof as to these three possible scenarios, any of which could have been the source of the illegal cutting that occurred. Therefore, KBK successfully rebutted the presumption raised in T.C.A. §54-21-120(b), and the permit and tags currently held by KBK were not revoked.

Department of Transportation v. KBK Outdoor Advertising, IO/11-23-94. FO/12-5-94. 14 APR 37.

F.O. 1984 VISIBILITY; LIMITED--Rule requiring signs to be 500 feet apart was not followed by Commissioner where sign was only visible for a split second from the road in question, and where the sign was erected on a road which intersected it.

Department of Transportation v. Charles W. Whittemore, FO/8-13-84. 4 APR 876.

F.O. 1984 ON-PREMISES; REMOTENESS--Sign was not "on-premises" pursuant to 1680-2-3-.07 where it was remote from the activity for which it advertises. Here, the sign was 102 feet from the parking lot adjoining a service station and market.

Department of Transportation v. Borum & Stratton Company, IO/2-9-84. FO/3-5-84. 4 APR 895.

F.O. 1983 AGRICULTURAL ZONING--In a comprehensively zoned county, property cannot qualify for un-zoned commercial or industrial use. A sign located in an area zoned agriculture cannot be permitted pursuant to Department of Transportation Rule 1600-2-3-.03.

Department of Transportation v. L. G. White and D's Wrecker Services, IO/11-8-83. FO/11-29-83. 4 APR 882.

F.O. 1983 OWNERSHIP INTEREST--Individual who was occupant of land, but had no ownership interest therein, was properly dismissed as a party to action alleging illegal erection of billboard.

Department of Transportation v. L. G. White and D's Wrecker Services, IO/11-8-83. FO/11-29-83. 4 APR 882.

F.O. 1983 ELIGIBILITY FOR PERMIT--Permit application by one who held only an easement for railroad purposes was properly denied where application was not accompanied by a lease or any permission by property owner to erect sign.

Department of Transportation v. Chattanooga Choo-Choo Advertising Company, IO/8-19-83. FO/9-6-83. 4 APR 886.

F.O. 1983 ON-PREMISES; DEFINED--Sign need not be permitted if "on-premises" pursuant to T.C.A. §54-21-103. To be considered "on-premises" sign must (1) be on premises and (2) have as its purpose the identification of the activity. Rule 1680-2-301.

Department of Transportation v. Cross Beams Mission, IO/3-2-83. FO/3-5-83. 4 APR 889.

I.O. 1988 DEAD ZONE POLICY--The unwritten dead zone policy of the Department of Transportation is void for the following reasons: 1) it is not a statement of pre-existing statutory policy, 2) it is more restrictive in some respects than the statute itself when it does not take rebuttable presumptions into account, and 3) it is an unwritten policy not properly promulgated pursuant to T.C.A. §4-5-202 or Uniform Administrative Procedures Act, and 4) it is not formally adopted as a rule or regulation of some state agency.

Fleming Properties, Inc. and Naegele Outdoor Advertising, IO/9-21-88. 17 APR 84.

22.02 **TENNESSEE AERONAUTICS COMMISSION**

NO CASES REPORTED

23.00 **DEPARTMENT OF TREASURY**

Tenn. 1988 AFFIRMATIVE ELECTION--It is the Grievant's obligation to be informed as to his retirement rights and benefits, and it was his duty to make an affirmative election when he became eligible to exercise his option.

Mathews v. Burkeens, 763 S.W.2d 739 (Tenn. 1988).

24.00 **DEPARTMENT OF VETERANS AFFAIRS**

NO CASES REPORTED

25.00 HEALTH FACILITIES COMMISSION

1. In General
 2. Procedure
 3. Evidence
 4. Judicial Review
 5. Ambulatory Services
 6. Standards for Issuing Certificate of Need
-

1. IN GENERAL

***1 OAG 1985 NO TRANSFERS OF CERTIFICATE OF NEED--** T.C.A. §68-11-101 et seq. and rules promulgated thereunder do not allow for certificates of need for construction of health care facilities to be transferred from one entity to another prior to construction and operation.

1985 Op. Tenn. Att'y Gen. No. 85-154 (May 7, 1985). 7 APR 37.

***1 Ch. Ct. 1985 CONSOLIDATION; DUE PROCESS--**An applicant's due process right to a fair hearing was violated when the Commission refused to consolidate the applicant's Certificate of Need with two mutually exclusive pending Certificate of Need Applications. Construction was based upon Rule 0720-2-.030(5), which was repealed on November 14, 1983.

Chilhowee Retirement Village v. Care Inn of Maryville Colonial Hills Nursing Home Center and Health Facilities Commission, No. 84-1745-I (Davidson County Ch. Ct. May 21, 1985). 6 APR 91.

***1 Ch. Ct. 1984 AIR AMBULANCE CRITERIA--**The Commission is not required to adopt criteria addressing certificates of need for air ambulance service, in that the statute and regulations are sufficiently detailed for the Commission to thoroughly consider any type of service.

Methodist Hospital of Memphis v. Health Facilities Commission, No. 83-1390-II (Davidson County Ch. Ct. June 4, 1984). 4 APR 469.

***1 I.O. 1993 LACK OF PROGRESS--**Proceedings may be instituted to revoke a Certificate of Need when there is lack of substantial and timely progress, pursuant to Jackson Express, Inc. v. Tenn. Public Service Commission, 679 S.W.2d 942, 945 (Tenn. 1984). Failures of progress are determined to include: 1) failure to secure financing when it is available, 2) failure to go forward in an expeditious manner to develop sewage treatment plans, 3) and failure to answer repeated calls from the Health Facilities Commission for information, and 4) presentation of inaccurate and misleading information to the Health Facilities Commission.

In re: Roan Mountain Health Care Associates, IO/9-20-93. 14 APR 49.

***1 I.O. 1991 LACK OF PROGRESS--**Under T.C.A. §68-11-110, the Tennessee Health Facilities Commission has the authority to revoke a Certificate of Need when the applicant does not demonstrate substantial and timely progress in implementing the project. Surgery Center's failure to proceed with the contested case hearing or to otherwise initiate its project constitutes a lack of substantial and timely progress. Denial and revocation of an outstanding Certificate of Need is an appropriate administrative action, because a granted, but unimplemented, Certificate of Need is taken into account when the Tennessee Health Facilities Commission considers subsequent applications. An outstanding Certificate of Need which the applicant never implements may result in the denial of a subsequent application. (NOTE: It was over 7 years since Surgery Center's original CON was granted and over 4 years since the granting of the change of site CON and the initiation of the contested case hearing.)

In re: Surgery Center of Memphis, Inc., IO/1-15-91. 16 APR 145.

***1 I.O. 1984 CERTIFICATE OF NEED; NO NEED TO AMEND--**Hospital's reduction in cost at the contested case level does not result in the need to amend the certificate of need. It is sufficient to go back through the review cycle.

Health Facilities Commission v. Peninsula Psychiatric Hospital, et al., IO/6-1-84. 4 APR 466.

2. PROCEDURE

***2 Tenn. 1966 INTERVENTION--**T.C.A. §4-5-310 and T.C.A. §68-11-109 are not in conflict. Where the former provides for a general right to intervene while the latter provides for a specific 30-day time frame in which to file a petition for a

contested case hearing, it is well settled in Tennessee that a special provision of a particular statute controls a general provision of another statute. The specific jurisdiction on a 30-day time frame must control the right to intervene. The right to intervene would still exist, but is would not be available to one who participated in the proceedings and tried, but failed to file a petition for a contested case hearing in a timely manner. Therefore, a Petitioner in a contested case hearing, who files late under the provisions of T.C.A. §68-11-109 and consequently has his petition dismissed, can not file a motion to intervene in the same matter under T.C.A. §4-5-310. To allow such intervention would effectively circumvent T.C.A. §68-11-109 in its 30-day limitation for filing a contested case hearing and render it meaningless.

Strider v. United Family Life Insurance Company, 403 S.W.2d 765, 768 (Tenn. 1966).

***2 Ch. Ct. 1983 LACK OF STANDING**--Petitioner, an attorney living in the hospital's service area, filed a petition for public hearing concerning hospital's certificate of need. Under the 1973 statute, any person who has filed an objection to the certificate of need may, within 15 days of its determination, petition for a public hearing. Petitioner did not object to the certificate of need, but rather questioned the hospital's financing plan. Petitioner did not have standing to petition for a public hearing under this statute. The 1973 Tennessee Health Facilities Act has been replaced by the 1979 Tennessee Health Planning and Resource Development Act.

Johnson v. Health Facilities Commission, No. 79-1076-I (Davidson County Ch. Ct. November 28, 1983). 2 APR 621.

***2 Ch. Ct. 1983 TIME DEADLINE FOR A PROMPT HEARING**--T.C.A. §68-11-106 (1)(2) imposes a ministerial, non-discretionary duty upon the Commission to commence a contested case hearing under the Uniform Administrative Procedures Act within 45 days of receiving petition.

Appalachia Health Care Facilities v. Frank Brogden, No. 83-1436-III (Davidson County Ch. Ct. September 8, 1983). 2 APR 485.

***2 OAG 1984 CERTIFICATE OF NEED; DEFERRAL**--Certificate of need application may be deferred for purpose of obtaining clarification of required information or because of a competing application. No stated time limit on deferral. 1984 Op. Tenn. Att'y Gen. No. 84-062 (February 15, 1984). 7 APR 1.

***2 F.O. 1984 RECONSIDERATION**--Upon reconsideration, Petitioner amended request for 87 bed dually-certified nursing home (which commission denied) to a request for a 60 bed dually-certified nursing home. The commission repealed their final order denying Certificate of Need and approved the 60 bed home.

Health Facilities Commission v. Appalachian Health Care, FO/4-25-84.

***2 I.O. 1993 FILING DEADLINE**--The clear and unambiguous language of both T.C.A. §68-11-109(a)(1) and the Health Facilities Commission Rule 0720-6-.02(2) can only be read to require the petition for a contested case hearing to be filed 30 days from the date of the Commission's written decision, not from the date the Petitioner receives the Commission's written decision.

Re: Medical University Center McFarland Hospital, IO/1-21-93.

***2 I.O. 1992 OBJECTION; GOOD CAUSE FOR FAILURE TO FILE**--T.C.A. §68-11-109(a)(1) requires the filing of an objection prior to the granting of a Certificate of Need or a showing of good cause when there is a failure to file such an objection. Good cause consists of a "justifiable excuse for neglecting to file an objection until after the Commission rendered its decision." If the Petitioner was not prevented or excused from filing, then there is no good cause shown. Unilateral misunderstanding does not establish good cause within the meaning of the statute.

In re: Baptist Health System of East Tennessee & Brakebill Nursing Homes, Inc., IO/2-4-92.

***2 I.O. 1986 COMMENCEMENT OF HEARING; WAIVER**--The requirement of T.C.A. §68-11-106 that the Health Facilities Commission shall commence a hearing within 45 days of receipt of a petition for a hearing can be waived by the parties. Despite the ruling in State ex rel. Appalachian Health Care Facilities, Inc. v. Brogden that the statute imposes a "ministerial, non-discretionary duty" on the Commission to commence the hearing within 45 days, the party's failure to inform the Commission of its desire to have a hearing within this time frame, even though the party was aware of the delay in the setting of the hearing, was deemed to constitute a waiver of that statutory provision.

Health Facilities Commission v. Memorial Hospital, Chattanooga, IO/2-10-86. 6 APR 281.

***2 I.O. 1984 APPLICATION; DEFERRAL**--To compete for a certificate of need a letter of interest must be filed within 20 days after publication day of the original applicant and a completed application must be filed within 60 days of a competing application's review cycle.

Care Inns v. Morristown Medical Investors, IO/11-19-84. 4 APR 849.

***2 I.O. 1984 HEARING DE NOVO**--The de novo nature of the contested case proceeding requires the Commission to re-examine its previous decision to defer an application, so that the evidence related to that ruling will be part of the contested case record, subject to judicial review.

Care Inns v. Morristown Medical Investors, IO/11-19-84. 4 APR 849.

***2 I.O. 1984 CERTIFICATE OF NEED; NEW APPLICATION REQUIRED**--The scope of a contested case hearing involving a certificate of need is circumscribed by the limitations and parameters of that certificate and the application. A material change in the application so as to require an additional certificate of need is a separate question and requires a separate hearing.

Health Facilities Commission v. Germantown Hospital Corporation, et al., IO/10-29-84. 4 APR 690.

***2 I.O. 1984 DISCOVERY; TRADE SECRETS**--There is no absolute privilege for trade secrets and similar confidential information. If information sought is shown to be relevant and necessary, the Administrative Law Judge may order proper safeguards for the disclosure.

Peninsula Psychiatric Hospital v. Rivendell Children & Youth Center, IO/10-27-84. 4 APR 685.

***2 I.O. 1984 DISMISSAL OF ONE PARTY MAKES IT AN UNCONTESTED PROCEEDING**--When one of two party-applicants is dismissed for lack of standing, the case will be tried as an uncontested proceeding.

Care Inns v. Morristown Medical Investors, IO/10-19-84. 4 APR 849.

***2 I.O. 1984 STANDING; REQUIREMENTS**--A person who files directly with the Commission a prior objection to the granting of a certificate of need has standing to appeal without a showing of interest, injury or good cause.

Health Facilities Commission v. Peninsula Psychiatric Hospital, et al., IO/6-1-84. 4 APR 468.

***2 I.O. 1984 HEARING DE NOVO; WEIGHT OF APPEALED DECISION, PRESUMPTIONS**--Burden of proof in a de novo contested case hearing is on the appellant. On appeal there is no presumption of correctness regarding the previous decision of the Commissioner. If the initial order is reviewed by the Commission, the appellant must receive six votes to prevail.

Health Facilities Commission v. Peninsula Psychiatric Hospital, et al., IO/6-1-84. 4 APR 460.

***2 I.O. 1983 TIME DEADLINES; NOTICE OF APPEAL AND FAILURE TO COMMENCE HEARING**--Failure of the Commission to provide notice of the appeal and provide an opportunity to commence the hearing within 45 days mandates dismissal of the appeal. Statutory provisions which relate to the mode or time of doing the act which the statute applies are generally considered directory only, absent some showing of prejudice. In this case, applicant would have been prejudiced in that applicant had in reliance on their Certificate of Need already constructed facilities.

Park Rest Health Center v. Harbut Hills Academy Nursing Home, IO/10-24-83. 2 APR 556.

3. EVIDENCE

***3 F.O. 1984 HEARING DE NOVO, NEW EVIDENCE**--1987 bed-need projections were not available at the time an application for certificate of need was filed, but became available prior to the hearing date. At de novo trial, new evidence is admissible if relevant, material and properly presented by counsel.

Lakeview Nursing Home v. Health Facilities Commission, IO/1-30-84. FO/4-30-84. 3 APR 38.

***3 I.O. 1984 BURDEN OF PROOF**--In appealing an order granting or denying a certificate of need, the appellant has the burden to prove by a preponderance or greater weight of the evidence that the Commission should grant or deny the certificate being appealed.

Peninsula Psychiatric Hospital v. Rivendell Children and Youth Center, IO/6-6-84. 4 APR 519.

***3 I.O. 1984 EXPERT TESTIMONY LIMITED**--Expert witness limited to testifying on general formula for determining need for free-standing surgical center in a given locality and may not testify as to need in Chattanooga, because at the time expert's deposition was taken he had no information on Chattanooga and could not give an opinion. Petitioner must have reasonable opportunity to discover facts known and opinions held by expert.

Baroness Erlanger Medical Center v. Chattanooga Surgical, IO/1-25-84. 3 APR 23.

4. JUDICIAL REVIEW

***4 Ch. Ct. 1983 INCONSISTENCY BY THE COMMISSION**--The Commission denied Southland's request for a certificate of need and two months later granted another nursing home's application for the same service area. The Court will not speculate in finding this action arbitrary when the record of the second nursing home's application is not before them. Special needs and circumstances may be present.

Southland Medical Enterprises, Inc. v. Health Facilities Commission, No. 82-284-II (Davidson County Ch. Ct. March 15, 1983). 1 APR 290.

***4 Ch. Ct. 1983 SUBSTANTIAL & MATERIAL**--The record shows projected need of 2,342 nursing home beds in Davidson County by 1988. There are currently 2,129 and 476 approved, but not built. Evidence in the records show Southland could not maintain sufficient occupancy to make the project economically feasible. This is sufficient evidence to uphold the commission decision.

Southland Medical Enterprises, Inc. v. Health Facilities Commission, No. 82-284-II (Davidson County Ch. Ct. March 15, 1983). 1 APR 290.

5. AMBULATORY SERVICES

***5 F.O. 1984 DEFINITION OF AMBULATORY OR OUTPATIENT SURGERY**--"Ambulatory surgery" or "outpatient surgery" describes a surgical procedure performed on an outpatient basis in which the patient is admitted, operated on and released in the same day.

St. Mary's Medical Center v. Knoxville Outpatient Surgery Center, IO/10-16-84. FO/11-11-84. 4 APR 768.

***5 F.O. 1984 ADVANTAGES**--(1) convenience of scheduling, (2) in and out of facility same day, (3) non-institutional atmosphere and (4) lower cost.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-15-84. FO/3-22-84. 3 APR 179.

***5 F.O. 1984 DEFINITIONS: NEED, SUPPLY, DEMAND**--Need: projected number of surgical cases in a population which could be, but will not be, performed on an outpatient basis. Supply: maximum number of surgical cases in a population which should be performed on an outpatient basis. Demand: number of surgical cases that will be performed on an outpatient basis.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-15-84. FO/3-22-84. 3 APR 179.

***5 F.O. 1984 FACILITIES; COSTS**--Potential costs at free-standing facility may be 18 to 30% less than hospital-based program.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***5 F.O. 1984 INCREASED UTILIZATION**--Factors contributing to increased utilization: (1) search for cost-effective, quality alternative to hospital care, (2) more sophisticated consumerism and (3) growing physician awareness.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***5 F.O. 1984 TYPES OF MODELS**--Five types: (1) freestanding, independent, not connected or associated with hospital, (2) freestanding unit associated with hospital, but not physically connected, (3) freestanding associated and physically connected to hospital, (4) owned and physically integrated with hospital, but not part of inpatient surgical suite, and (5) owned and physically integrated with hospital and inpatient surgical suite.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***5 I.O. 1984 MEDICAL CARE AT FREE-STANDING FACILITIES**--Free-standing ambulatory surgery centers independent of hospitals have encountered no significant adverse medical problems and have achieved medical results equal to or better than hospital outpatient surgery departments.

Surgery Center of Nashville v. Health Facilities Commission, IO/6-20-84. 4 APR 560.

6. STANDARDS FOR ISSUING CERTIFICATE OF NEED

***6 Ch. Ct. 1984 ECONOMIC FEASIBILITY, HELICOPTER SERVICE**--While hospital services do not always generate income necessary to pay for themselves and must be subsidized from other revenue sources within the hospital, such a practice

cannot be warranted where services are not essential and of limited benefit. Non-life threatening ambulance transfers can be more economically performed by motor vehicle rather than helicopter.

Methodist Hospital v. Health Facilities Commission, No. 83-1390-II (Davidson County Ch. Ct. June 4, 1984). 4 APR 469.

***6 Ch. Ct. 1984 CON FOR HELICOPTER AMBULANCE**--Certificate of need was denied to Memphis Hospital based on the fact that Memphis Police Department has two fully equipped helicopter ambulances which already adequately serviced the area's emergency transportation needs.

Methodist Hospital of Memphis v. Health Facilities Commission, No 83-1390-II (Davidson County Ch. Ct. June 4, 1984). 4 APR 469.

***6 Ch. Ct. 1983 PROJECTED NEED FORMULA; RELIANCE ON**--The Commission did not act arbitrarily in relying on projected need formulas absent some evidence to the contrary.

Southland Medical Enterprises, Inc. v. Health Facilities Commission, No. 82-284-II (Davidson County Ch. Ct. March 15, 1983). 1 APR 290.

***6 F.O. 1984 CERTIFICATE OF NEED**--Consideration of whether service is 1) necessary to provide required health care in the area to be served, 2) can be economically accomplished and maintained, and 3) will contribute to the orderly development of adequate and effective health care services is required.

Health Facilities Commission v. Smith County Hospital, IO/11-17-84. FO/11-19-84. 4 APR 777.

***6 F.O. 1984 MOBILE CT SERVICE**--Mobile CT units can be considered in facilities which cannot support fixed units, but can demonstrate a need for CT scanning service in the area. T.C.A. §68-11-106(g)(1)(H) requires that a person proposing to purchase a CT scanner and to provide services to inpatients of a Tennessee hospital obtain a certificate of need prior to obtaining the unit. However, there has never been formal action by the commission to require certification. Customarily, no certificate of need is required.

Smith County Hospital v. Health Facilities Commission, IO/10-17-84. FO/11-19-84.

***6 F.O. 1984 AMBULATORY SURGERY CENTER, HOSPITAL COMPETITION**--If hospitals are to perform outpatient surgery, they must be prepared to compete with free-standing outpatient surgery centers and other hospitals performing similar services.

St. Mary's Medical Center v. Knoxville Outpatient Surgery Center, IO/10-16-84. FO/11-13-84. 4 APR 768.

***6 F.O. 1984 AMBULATORY SURGERY, DUPLICATION OF SERVICE**--The lower price for outpatient surgery or a free-standing outpatient facility prevents duplication. Duplicating services of a facility that has reached or is close to capacity will not be deemed as a duplication of health care services.

St. Mary's Medical Center v. Knoxville Outpatient Surgery Center, IO/10-16-84. FO/11-13-84. 4 APR 768.

***6 F.O. 1984 AMBULATORY SURGERY CENTER, COMPETITION; SELECTION**--The existence of free-standing facilities would create an element of competition, giving the consumer a choice in the selection of medical delivery systems, based on cost and convenience.

Surgery Center of Memphis v. Health Facilities Commission, IO/6-20-84. FO/7-9-84. 4 APR 560.

***6 F.O. 1984 MOBILE CT SCANNER; CRITERIA**--At facilities which cannot support fixed units, the standards set for fixed units will be used as guide post for determining Certificate of Need for mobile units, but are not a requirement. Federal policy on CT scanner were rescinded November 30, 1982, because they were too rigid and inflexible and did not take into account recent advances in technology. The state plan has not been changed. It is now questionable as to whether its provisions should be applied rigidly.

Jesse Holman Jones Hospital v. Health Facilities Commission, IO/5-17-84. FO/6-12-84. 3 APR 417.

***6 F.O. 1984 OVERBEDDING**--Overbedding a county by a minimal number of beds (for example, 12) would not have a negative impact on existing providers.

Appalachian Health Care Facilities, d/b/a Lakeview Nursing Home v. Health Facilities Commission, FO/4-25-84. 3 APR 333.

***6 F.O. 1984 COMPETITION ENCOURAGED**--Competition between free-standing ambulatory surgical centers and hospital-affiliated ambulatory surgical centers should be encouraged by the commission.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***6 F.O. 1984 AMBULATORY SURGERY CENTER; INCREASING THE DEMAND--**To increase demand for ambulatory outpatient surgery, it is necessary to make available more free-standing ambulatory surgery centers to compete and provide an alternative to hospital affiliated ambulatory surgical centers.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***6 F.O. 1984 AMBULATORY SURGERY; NEED--**Studies have shown that 20% to 40% of all surgical procedures can be performed in an outpatient setting.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***6 F.O. 1984 AMBULATORY SURGERY; NEED METHODOLOGIES--**There is no approved methodology addressing need for outpatient surgical facilities in the Health Systems Plan or State Health Plan.

Nashville Outpatient Surgery Center v. Health Facilities Commission, IO/2-14-84. FO/3-22-84. 3 APR 179.

***6 I.O. 1986 OSTEOPATHIC FACILITIES--**Federal law requires only that the need and availability of osteopathic services and facilities be considered when the state planning agency is determining whether to grant a certificate of need. Osteopathic facilities and practitioners cannot be discriminated against by the state planning agency. A viable alternative to the addition of new beds at an osteopathic hospital that is operating at near 100% capacity in a seriously overbedded county is for the osteopaths to admit patients at the under-utilized county hospital. No new "osteopathic" beds could be added until it was demonstrated that the osteopaths had unsuccessfully tried to practice at the county hospital.

Health Facilities Commission v. Medical Center of Manchester, IO/7-16-86. 6 APR 377.

***6 I.O. 1984 AMBULATORY SURGERY; FEDERAL UTILIZATION RATE--**The federal standard for utilization rates for ambulatory primary care center is 3.5 primary care encounters per patient per year.

Health Facilities Commission v. East Hickman Medical Corporation, IO/8-10-84. 4 APR 622.

***6 I.O. 1984 CERTIFICATE OF NEED--**Factors to be considered are: 1) need, 2) economic feasibility and 3) orderly development of health care services.

Health Facilities Commission v. East Hickman Medical Corporation, IO/8-10-84. 4 APR 622.

***6 I.O. 1984 COMPETITION--**Tennessee State Health Plan 1982-1986 and National Health Planning Act give priority to actions which strengthen the effect of competition on the supply of health service.

Health Facilities Commission v. East Hickman Medical Corporation, IO/8-10-84. 4 APR 622.

***6 I.O. 1984 FEE, SLIDING SCALE--**Tennessee State Health Plan of 1982-1986 defines accepted access to primary care as being within 30 minutes driving time. However, if no existing facilities have a sliding scale fee, it would be proper to issue a certificate of need to one that has a sliding scale.

Health Facilities Commission v. East Hickman Medical Corporation, IO/8-10-84. 4 APR 622.

***6 I.O. 1984 BED-NEED RATIO EXCEEDED--**If all certificates of need projects are constructed and in operation and existing facilities are completely utilized, the commission may exceed the bed-need ratio for a county. The commission may consider over- or under-bedding of contiguous counties. Latest statistical bed-need statistics are properly admitted evidence if data was available for inspection and the reliability can be tested through cross examination.

Health Facilities Commission v. Lakeview Nursing Home, IO/1-30-84. 3 APR 51.

26.00 **CIVIL SERVICE COMMISSION**

1. In General
 2. Procedure
 3. Evidence
 4. Judicial Review
 5. Resignation
 6. Progressive Discipline
 7. Suspension
 8. Termination
 9. Termination for the Good of the Service
 10. Reinstatement
 11. Backpay and Attorney's Fees
 12. Special Leave
 13. Employee Reduction in Force
 14. Discrimination
 15. Constitutional Law
-

1. IN GENERAL

***1 Tenn. App. 1990 NO RIGHT TO APPEAL TERMINATION DURING PROBATIONARY PERIOD**--Rules of State Department of Personnel are clear that, during probationary period, employee may be separated from service without right of appeal or hearing.

Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***1 Tenn. App. 1990 NO INTEREST IN CONTINUED EMPLOYMENT DURING PROBATIONARY PERIOD**--After prison employee was promoted from protected position, but while she was still on probation for new position, employee did not have property interest in continued employment that would entitle her to due process protection of Federal Constitution.

Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***1 Tenn. App. 1987 NO EXCUSE FOR VIOLATION OF RULE WHEN GRIEVANCE PROCEDURES AVAILABLE**--The Court of Appeals found that Ms. Grubb was well aware of the personnel rule which provides that an employee who fails to report for duty within two business days after the expiration of any authorized leave of absence shall be considered as having resigned not in good standing. This rule was brought to Ms. Grubb's attention at least twice before her resignation became effective. Although Ms. Grubb contended that there were circumstances over which she had no control which excused her from the application of the rule, the court found that the record was clear that she made a conscious decision to not comply with the rule instead of utilizing accepted grievance procedures. In the court's opinion, her mere dissatisfaction, unhappiness, and inconvenience because of her working conditions did not constitute sufficient justification for violation of the personnel rule when there were accepted grievance procedures available.

Grubb v. Tennessee Civil Service Commission, 731 S.W.2d 919 (Tenn. Ct. App. 1987).

***1 Tenn. App. 1985 DIFFERENT DISPOSITIONS FOR GRIEVANTS IN CONSOLIDATED HEARING**--When the cases of five grievances were consolidated and three terminations were upheld and two reversed, the court will not consider the propriety of action taken towards the two grievances whose cases were not appealed.

Fairweather, et al v. Long, et al., (Tenn. Ct. App. February 18, 1985). 5 APR 213.

***1 Tenn. App. 1983 ALCOHOLIC EMPLOYEE**--Alcoholic who becomes acutely ill from excessive drinking, submits himself to medical treatment and so notifies employer, from time of notice to employer and for duration of treatment is entitled to all consideration accorded to other sick employees, but has no right to expect his employer to treat him as sick until he, himself, acts like sick man and seeks treatment.

Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***1 Tenn. App. 1983 ALCOHOLIC EMPLOYEE**--Knowing in advance his own weakness for liquor, alcoholic is under duty to obtain services of friend or relative to "watch over him" to see that, immediately upon beginning of drinking episode, he is placed under treatment and that such fact is reported to the employer.

Duncan v. Tennessee Civil Service Commission

***1 Ch. Ct. 1984 INCONSISTENT JUDGMENTS**--It is within the Commission's sound discretion to order different Fairweather, et al. v. Long, No. 83-483-II (Davidson County Ch. Ct. April 18, 1984). 3 APR 322.

--Employee-representative who is not licensed to practice law and who represents a Grievant without compensation in fifth-step grievance proceeding before Civil Service Commission is 1985 Op. Tenn. Att'y Gen. No. 85-166 (May 17, 1985). 5 APR 189.

***1 OAG 1985 UNAUTHORIZED PRACTICE OF LAW**

before the Civil Service Commission. If such person gave legal representation, he would be in violation of T.C.A. §23-3-103, regarding the unlawful practice of law.

***1 OAG 1985 PRIORITY IN CONSIDERATION**--Priority in consideration requires that any eligible applicant be 1985 Op. Tenn. Att'y Gen. No. 85-073 (March 11, 1985). 5 APR 164.

***1 OAG 1985 RECLASSIFICATION**

"their" reorganized job with change of title and responsibilities, so long as they meet the minimum qualifications for the new class. The degree in change in responsibility between the old and new class only has an indirect effect on whether an 1985 Op. Tenn. Att'y Gen. No. 85-073 (March 11, 1985). 5 APR 164.

***1 OAG 1984 SPECIAL SCHOOLS**

schools from civil service protections. Further, T.C.A. §8-30-208 tends to create the impression that employees of the special schools are to be considered "classified" employees. However, there are several statutes which when read together, clearly 1984 Op. Tenn. Att'y Gen. No. 84-258 (September 12, 1984). 5 APR 47.

***1 OAG 1984 RIGHT TO WORK; STATE EMPLOYEES**

state's right-to-work law. T.C.A. §50-1-201 *et seq.* 1984 Op. Tenn. Att'y Gen. No. 84-188 (June 22, 1984). 5 APR 35.

***1 F.O. 1995 POLICY ANALYSIS TO DETERMINE APPROPRIATE DISCIPLINE**--It is necessary to carefully analyze the wording of the Department policy to determine what portion of the policy was violated as well as what disciplinary action is appropriate.

Department of Correction v. Willie Jones, IO/12-12-94. FO/2-24-95. *Appealed* 1-19-95. 19 APR 242.

***1 F.O. 1988 LEGAL CHARACTERIZATION OF CONDUCT**--An appointing authority's legal (or other) characterization of a Grievant's conduct may be a relevant consideration in determining the appropriateness of the discipline imposed for such conduct. However, such a characterization is not a necessary step. The Commission may impose any discipline deemed appropriate for the proven conduct of the Grievant. Furthermore, if the appointing authority gives an incorrect legal characterization of the Grievant's conduct, this also does not prevent the Commission from imposing discipline, if appropriate, for the Grievant's proven conduct.

Department of Correction v. Carrie Green, FO/7-6-88. 17 APR 24.

***1 F.O. 1984 FALSE STATEMENT ON APPLICATION**--Making false statement of material fact on employment application constitutes personal conduct detrimental to State service.

Jones v. Department of Mental Health, IO/11-1-84. FO/11-14-84. 4 APR 840.

***1 I.O. 1993 DEPARTMENT OF CORRECTION; SPECIAL CONSIDERATIONS**--Correctional institutions are unique places "fraught with serious security dangers." The position of a correctional officer has been recognized as a sensitive one. Therefore, it is reasonable to expect that the Department of Correction, even more than most departments, needs its officers to respect its attendance and leave policies, because being absent without prior authorization puts an undue strain on the system.

Department of Correction v. Gregory Scott, IO/8-20-93. 14 APR 65.

***1 I.O. 1992 DEPARTMENT OF CORRECTION; HIRING CRITERIA**--The Department is found to have the authority to require that employees hired and employed as Correctional Officers meet and maintain medical and psychological qualifications for the job, especially when these conditions directly affects the employee's ability to retain his position.
Christopher Wright v. Department of Correction, IO/7-31-92. 14 APR 74.

***1 I.O. 1992 CONDUCT UNBECOMING AN EMPLOYEE; RACIAL INSULTS**--Due to the special situation in a prison--the racial make-up of the inmate population and the possibility of riots upon any hint of racial discrimination--racial insults, or other matters of that type, are extremely serious, especially when coming from a shift commander.
William Brundage v. Department of Correction, IO/4-24-92. 14 APR 84.

***1 I.O. 1984 GARNISHMENTS**--An employee may be discharged after a garnishment by a third creditor. Rules of the Tennessee Department of Personnel, Chapter 1120-7-2-.09.
Department of Mental Health v. Foy, IO/6-7-84. 4 APR 491.

2. PROCEDURE

***2 Tenn. App. 1983 NOTICE OF DISMISSAL**--The appointing authority may not delegate the authority to dismiss a regular employee to anyone else in the Department. Unedited, general work records (for example, personnel record) do not constitute due notice of reasons for dismissal.
Johnson v. Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

***2 Tenn. App. 1983 ESTOPPEL DUE TO RECEIVING RETIREMENT BENEFITS**--When a party applies for and obtains retirement from employment by the state and receives retirement benefits based upon the party's statement of incapacity to serve, party is estopped from seeking reinstatement to the position from which party was retired.
Johnson v. Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

***2 Tenn. App. 1983 WAIVER OF RIGHT TO COMPLAIN**--Under a statute limiting civil service employees, on direct appeal to Civil Service Commission, to a complaint of discharge for "non merit grounds," an employee by taking such direct appeal waived his right to complain of merits of charge that he was wrongfully absent.
Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***2 Ch. Ct. 1984 FINAL ORDER; CONTENTS**--In exercising its discretion to award back pay, the Commission must include in its order findings of fact and conclusions of law as to that issue, in addition to all other issues, as required by T.C.A. §8-30-327(b), §4-5-414(i).
Arnold v. Anderson, et al., No. 83-774-III (Davidson County Ch. Ct. February 24, 1984). 3 APR 228.

***2 OAG 1984 DE NOVO HEARINGS; BURDEN OF PROOF**--The Civil Service Commission conducts a de novo hearing at a Level V Grievance Proceeding. Relevant evidence not considered by an agency in taking a job action may be considered; the State agency holds the burden of proof pursuant to common law, and administrative recommendations at Level IV hearings are not relevant.
Att. Gen. Op. to Ernest Pellegrin (October 12, 1984). 4 APR 763.

***2 F.O. 1987 RES JUDICATA/COLLATERAL ESTOPPEL; STAY OF PROCEEDINGS**--Grievant's federal court judgment granting reinstatement held to have res judicata/collateral estoppel effect. Department is precluded, or estopped, from relitigating causes for Grievant's termination before the Civil Service Commission pending the resolution of the Department's appeal to the Sixth Circuit Court of Appeals. However, Administrative Law Judges must exercise judicial discretion and stay any proceedings which depend upon a judgment with a pending appeal unless strong reasons are found to justify proceeding.
Department of Correction v. James Baxter, IO/4-30-87. FO/5-11-87. 16 APR 244.

***2 P.H.O. 1987 MOTION TO QUASH SUBPOENA OF COMMISSIONER**--Motion to quash subpoena of Commissioner granted due to Commissioner's exempt status under T.C.A. §24-9-101(a).
Department of Correction v. Bijaura Ramakrishnaiah, PHO/4-27-87. 16 APR 304.

***2 P.H.O. 1987 VOLUNTARY NONSUIT**--Department is not permitted to take voluntary nonsuit, even with prejudice, because Department is not considered a "petitioner," even though it bears the burden of proof at a civil service hearing. Once a

grievance has been filed and reaches Step 5 of the Grievance Procedure (Civil Service Commission), it is the Grievant who 1) has initiated the proceedings, and 2) by virtue of such initiation, is the "petitioner." As Petitioner, the Grievant has the right to have his grievance heard. Even assuming the Department could be considered a "petitioner" under Tennessee Rules of Civil Procedure 41, the Department would still have no right to a voluntary dismissal because the right to nonsuit is restricted by the Grievant's right to a hearing which has become vested during the pendency of the case. Furthermore, the Department's offer to reinstate the Grievant to a different position in the same personnel classification, under which he was formerly employed, is not sufficient to allow the Department to take a voluntary dismissal, even one with prejudice, since the Grievant does not return to the status quo which existed prior to his termination. Motion for nonsuit denied so as not to deprive Grievant of his right to a hearing on any matter not settled by mutual agreement.

Robert Croteau v. Department of Correction, PHO/3-6-87. 16 APR 306. *See also* 17 APR 123.

***2 F.O. 1986 NOTICE OF TERMINATION**--Failure to give employee ten (10) days notice of impending termination with written reasons violated T.C.A. §8-30-326 and Civil Service Rule 1120-2-2-.13(5) and termination was not effective.

Harold Hunter v. Department of Correction, IO/6-10-85. 6 APR 130. FO/5-14-86. 6 APR 314.

***2 F.O. 1986 NOTICE OF TERMINATION**--Grievant's dismissal was in violation of T.C.A. §8-30-326 because the department failed to give 10 days notice as required by statute, therefore Grievant was reinstated. Grievant's actions do not entitle him to full backpay, but he should receive 10 days backpay because of the department's failure to give the 10 days required notice.

Harold Hunter v. Department of Correction, IO/6-10-85. 6 APR 130. FO/5-14-86. 6 APR 314.

***2 I.O. 1995 EFFECT OF CRIMINAL CONVICTION**--Grievant, who was convicted and sentenced for the crimes which served as the grounds for his termination, was precluded from contesting the acts for which he was dismissed since he had already been convicted of these acts under higher standard of proof in criminal court.

In the Matter of Robert Pugh, IO/6-26-95. 19 APR 32.

***2 I.O. 1995 LACHES**--Motion to dismiss Grievant's appeal of his three-day suspension granted after Grievant failed to submit all relevant documentation within thirty days of the receipt of the decision pursuant to a Department of Personnel rule. Although this thirty-day time limit could have been extended by written agreement between the manager involved and the Grievant, the Grievant made not attempt to comply or apply for an extension. Given the fact that 1) the Grievant has a pattern for delay, 2) there exists no good excuse for failing to submit the required documents, 3) and the Department has been prejudiced because of the Grievant's delay, the case was dismissed for failure to comply with the Department of Personnel rule and for laches.

Department of Environment and Conservation v. Danny Card, IO/6-8-95. Appealed 6-19-95. 8 APR 293.

***2 I.O. 1994 DISMISSAL FOR FAILURE TO PROSECUTE**--Rule 41 of the Tennessee Rules of Civil Procedure provides for dismissal of a claim for failure to prosecute. Where the Grievant permitted a case to stagnate and grow stale, involuntary dismissal was justified. The Grievant, by her conduct, evidenced a disinterest in prosecuting this matter and did not offer the Administrative Law Judge any excuses for the lengthy passage of time, any explanation for her inaction in the matter, any explanation for her failure to remain involved in the case, nor any indication of her desire to have the matter set for hearing. Therefore, in view of the fact that this matter was pending for six years, the Grievant's request for a hearing was dismissed for failure to prosecute.

Anita Johnson v. Department of Mental and Mental Retardation, IO/9-30-94. 9 APR 18.

***2 I.O. 1993 PRECLUSIVE EFFECT; UNEMPLOYMENT COMPENSATION PROCEEDING**--An unemployment compensation proceeding wherein the State failed to prove misconduct is not given preclusive effect in a termination hearing for the following reasons: 1) inmates were not allowed to testify in a live proceeding in the present case for obvious security reasons, 2) issues of misconduct vary from case to case, and 3) further issues involving the good of the service are implicated.

Roger Slaven and David Duncan v. Department of Correction, IO/8-10-93. 14 APR 93.

***2 I.O. 1992 STATUTE OF LIMITATIONS**--Any statutes of limitation concerning an action to recover damages for a personal injury under Title VII or T.C.A. §4-21-101, the Tennessee Human Rights Act, clearly do not apply to disciplinary actions of employees before the Civil Service Commission.

Clarence Seiber v. Department of Correction, IO/3-2-92. 14 APR 103.

***2 I.O. 1986 LACHES**--Where the Grievant was terminated in 1979, and Civil Service Commission stayed the hearing of the appeal pending the outcome of a complaint filed by the Grievant with the EEOC and the Tennessee Human Rights Commission, where the complaints were withdrawn in 1982 and the Grievant took no steps to renew her appeal until 1985;

where the Department established that it would have serious difficulty in preparing a defense to the Grievant's allegations in the case due to the passage of time, laches were invoked against the Grievant and her appeal was dismissed.
Dorothy Moss v. Department of Health and Environment, IO/5-2-86. 6 APR 266.

***2 I.O. 1985 SETTling WITH THE STATE**--Grievant can waive his right to a Fifth Step Hearing before the Civil Service Commission if he agrees with the State to settle his case and the State fulfills its obligations under the settlement agreement.

Edward Earl Clayton v. Department of Correction, IO/10-17-85. 6 APR 250.

***2 I.O. 1984 FIFTH STEP HEARINGS ARE DE NOVO**--Fifth step grievances under T.C.A. §8-30-328(c) are de novo. There is no presumption as to the correctness of decisions made at prior levels of the grievance procedure.

Department of Transportation v. Jackson, IO/11-20-84. 3 APR 115.

***2 I.O. 1983 WAIVER OF NOTICE PERIOD**--When an employee timely pursues a T.C.A. §8-30-327 appeal (Civil Service), when a T.C.A §8-30-328 appeal (grievance) should have been pursued, the (10) ten work days for filing the grievance with the supervisor must be waived. This policy remains in effect until employees are fully acquainted with these two routes of appeal.

Wilkerson v. Department of Correction, IO/6-16-83. 3 APR 88.

3. EVIDENCE

***3 Tenn. App. 1985 HEARSAY; ADMISSIBILITY**--Statements taken from two students at Taft Youth Center by TBI agents were admissible against Grievances under T.C.A. §4-5-313(1) (Supp. 1974) where the two students were no longer at Taft but were at a correctional facility in Georgia.

Fairweather, et al. v. William Long, Department of Correction, et al., (Tenn. Ct. App. February 18, 1985). 5 APR 213.

***3 Tenn. App. 1985 HEARSAY; ADMISSIBILITY**--It is proper to admit the hearsay statements made by students to TBI investigators when the declarants were not readily available and the statements were of a type commonly relied upon by reasonably prudent people in conducting their affairs.

Fairweather, et al. v. William Long, Department of Corrections, et al., (Tenn. Ct. App. February 18, 1985). 5 APR 213.

***3 Tenn. App. 1984 PRIOR DISCIPLINARY ACTIONS; ADMISSIBILITY**--Prior disciplinary action against appellants was admitted to prove that discipline imposed for current offense was appropriate. Prior disciplinary action not admissible to prove appellant committed any act.

Memphis and Shelby County Health Department and Dr. Konigsberg v. Bailey, Shelby County Civil Service Merit Board (Tenn. Ct. App. December 6, 1984). 6 APR 334.

***3 Ch. Ct. 1987 NEW EVIDENCE**--Petitioner argued that a letter dated after his termination should not be introduced into evidence as it was not a basis for his termination. However, since the hearing before the Administrative Law Judge was a de novo proceeding, new evidence could be presented to show why the Petitioner's termination was appropriate.

Harvey Felts v. Tennessee Civil Service Commission, No. 86-324-II (Davidson County Ch. Ct. January 20, 1987). 16 APR 285.

***3 Ch. Ct. 1984 HEARSAY; ADMISSIBILITY**--Administrative Procedures Act allows admission of evidence which would not be admissible under traditional court rules, but such evidence must be the type commonly relied upon by a reasonable, prudent person in the conduct of their affairs.

Fairweather, et al. v. William Long, Commissioner, et al., No. 83-483-II (Davidson County Ch. Ct. April 18, 1984). 3 APR 322.

***3 F.O. 1988 NEGLIGENCE, PROOF OF**--In disciplinary hearings that do not involve actions for damages, it is not necessary to prove injury in order to establish "negligence" in performance of duties if it is shown that the conduct in question falls below a particular standard that is reasonably expected or constitutes "failure to use such care as a reasonably prudent and careful person would use under similar circumstances." Grievant's contention that a civil service case is analogous to a civil action for damages, in that the lost salary constitutes the damages, is found to be without merit.

Department of Correction v. Carrie Green, FO/7-6-88. 17 APR 24.

***3 I.O. 1985 ADMISSION OBTAINED BY POLYGRAPH**--The use of a lie detector in the process of interrogation does not render a subsequent confession involuntary or inadmissible.
Frederick Brown v. Department of Mental Health, IO/5-7-85.

***3 I.O. 1985 POLYGRAPH RESULTS ARE INADMISSIBLE**--Polygraph tests results have been judicially declared to be unreliable in law and in fact, and are unreliable in any forum; therefore they are inadmissible in civil service administrative hearings. *See* Memphis Bank and Trust Company v. Tennessee Farmer's Mutual Insurance Company, 619 S.W.2d 395, 396-7 (Tenn. Ct. App. 1981).
Department of Correction v. Farabee, IO/1-24-85. 5 APR 142.

***3 I.O. 1984 BURDEN OF PROOF**--The burden of proof, where not specified by statute, is on the party asserting the affirmative of an issue. Where non-merit factors are affirmatively alleged, the employee is required to present her/his case first and prove a prima facie case. In other grievances, the agency is normally required to go first.
Department of Transportation v. Jackson, IO/11-20-84. 3 APR 115.

***3 I.O. 1984 BURDEN OF PROOF; NON-MERIT ISSUES**--Respondents have burden to prove by a preponderance of the evidence or as a more probable conclusion that employer action was due to political consideration in violation of T.C.A. §8-30-221. However, State still has burden of going forward and presenting evidence in defense of their action.
Department of Transportation v. Jackson, IO/11-20-84. 3 APR 115.

4. JUDICIAL REVIEW

***4 Tenn. App. 1994 JUDICIAL REVIEW DENIED**--Judicial review of an order is not available to an appellant if he failed to appear at the initial hearing which he requested and of which he had notice.
Crutcher v. Tennessee Air Pollution Control Board, No. 01A01-9312-CH-00536 (Tenn Ct. App. August 31, 1994).

***4 Tenn. App. 1988 GROUNDS FOR REVERSAL OF AGENCY DECISION**--In considering a petition for review of an administrative agency's findings, this Court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the findings, inferences, conclusions, or decisions are: 1) in violation of constitutional or statutory provisions; 2) in excess of the statutory authority of the agency; 3) made upon unlawful procedure; 4) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or 5) unsupported by evidence which is both substantial and material in the light of the entire record.
Sutton v. Civil Service Commission, No. 87-313-II, 1988 WL 23912 (Tenn. Ct. App. March 16, 1988).

***4 Tenn. App. 1987 REVIEW OF COMMISSION'S FINDING OF FACT**--The Court's review of the Civil Service Commission's findings of fact is limited to a determination of whether there exists substantial and material evidence to support the agency's findings of fact and conclusions of law. Unless the agency's findings are arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, the findings must stand. The reviewing court is required by the provisions of the Administrative Procedures Act to review the findings of fact of an administrative agency upon a standard of substantial and material evidence and to consider the entire record, including any part detracting from evidence supporting the findings of the agency. The court may not review issues of fact de novo or substitute the judgment of the Court for that of the agency as to the weight of the evidence.
Grubb v. Tennessee Civil Service Commission, 731 S.W.2d 919 (Tenn. Ct. App. 1987).

***4 Tenn. App. 1985 REVIEWING COURT NOT BOUND BY FINDINGS BELOW**--Court reviewing appeal from chancery court of dismissal of employee by State Civil Service Commission was not bound by supposed finding of chancellor that certain testimony was not substantial and material, where no question of credibility was involved before either court, since there was no viva voce testimony in either court and question before courts was question of law as to sufficiency of evidence presented to Commission and preserved in its record.
Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***4 Tenn. App. 1985 REVIEW UNDER UAPA**--The reviewing court is required by provisions of Uniform Administrative Procedure Act to review findings of fact of administrative agency upon standard of substantial and material evidence and to consider entire record, including any part detracting from evidence supporting findings of agency, but may not review issues of fact de novo or substitute judgment of court for that of agency as to weight of evidence.
Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

5. RESIGNATIONS

***5 Tenn. App. 1989 RESIGNATION BY FAILING TO COMPLY WITH MANDATORY PROCEDURES**--While the facts support the petitioner's argument that he did not "resign" in the true sense of the word because he did not make a "formal renouncement or relinquishment", Chapter 1120-2-1-.13(4) unambiguously provides that an employee who fails to report to duty within two days after the expiration of a leave of absence "is considered as having resigned not in good standing." The court determined that the petitioner was on notice of this regulation and that the evidence "substantially and materially" supported the Commission's conclusion that the petitioner did indeed resign by failing to comply with mandatory procedures. Yates v. Civil Service Commission, No. 89-187-II, 1989 WL 126716 (Tenn. Ct. App. October 25, 1989).

***5 Tenn. App. 1987 RESIGNATION WITHOUT GOOD STANDING**--The Court of Appeals held that employee was not entitled to additional sick leave, that employee made conscious decision not to comply with rule, which deemed her as having resigned for failure to report for duty within two business days after expiration of authorized leave, that dissatisfaction, unhappiness, and inconvenience due to working conditions did not justify violation of rule, and that employee resigned without good standing. Grubb v. Tennessee Civil Service Commission, 731 S.W.2d 919 (Tenn. Ct. App. 1987).

***5 Tenn. App. 1984 CONSTRUCTIVE RESIGNATION**--Civil Service Rule 1120-20-1304 does not apply to an employee whose requested leave is denied, but who is nevertheless absent for three consecutive days to observe a religious holiday, because it was not the employee's intention to resign. DePriest v. Puett, et al., 669 S.W.2d 669 (Tenn. Ct. App. 1984). 3 APR 71.

***5 I.O. 1993 INVOLUNTARY RESIGNATION**--In Christie v. United States, 518 F.2d 584 (Ct. Cl. 1975), the court held that "the element of voluntariness is vitiated only when the resignation is submitted under duress brought on by government action." *Id* at 587. The court applied the following tri-part test for such duress:

1. That one side involuntarily accepted the terms of another;
2. That circumstances permitted no other alternative; and
3. That said circumstances were the result of coercive acts of the opposite party.

There is a presumption that employee resignations are voluntary. "This presumption will prevail unless the [Grievant] comes forward with sufficient evidence to establish that the resignation was involuntarily extracted." *Id* at 587-88. The court employs an objective test to measure duress, rather than relying on the Grievant's subjective evaluation of the situation. As the court in Christie determined, "Duress is not measured by the employee's subjective evaluation of the situation ... merely because the [Grievant] was faced with an inherently unpleasant situation ... does not obviate the voluntariness of her resignation." *Id* at 587-88. In the present case, the Grievant was pressured to resign by her superiors. However, this pressure was not found to rise to the level of coercion, and the Administrative Law Judge determined that the conditions under which the Grievant resigned were mostly of her own making, as nothing unfair was done by the State. Moreover, Grievant failed to prove that her state of mind was such that she lacked the ability to know what she was doing. Grievant knew she was resigning when she signed the letter of resignation and was in sufficient control of herself at the time. Therefore, Grievant cannot claim that the resignation was involuntary, and her appeal is dismissed.

Alongee Hilliard v. Mental Health and Mental Retardation, IO/10-26-93. 14 APR 121.

6. PROGRESSIVE DISCIPLINE

***6 F.O. 1995 POLICY ANALYSIS TO DETERMINE APPROPRIATE DISCIPLINE**--It is necessary to carefully analyze the wording of the Department policy to determine what portion of the policy was violated as well as what disciplinary action is appropriate.

Department of Correction v. Willie Jones, IO/12-12-94. FO/2-24-95. *Appealed* 1-19-95. 19 APR 242.

***6 F.O. 1995 ACTIONS CONSIDERED IN LIGHT OF ACTUAL PRACTICE**--The Department failed to prove that the Grievant acquired certain items without authorization. Although the authorizations that the Grievant did have were verbal when written authorization was officially required, the Grievant's actions were not inconsistent with actual practice. The

Administrative Law Judge determined that the Grievant's actions should be considered in light of actual practice. In the judge's opinion, severe discipline, short of termination, was appropriate under the progressive discipline law. The progressive discipline law, at T.C.A. §8-30-330, provides that when corrective action is necessary, disciplinary action is to be administered beginning at the lowest appropriate step for each area of misconduct or at the step appropriate to the infraction or performance. Based upon these considerations, the Grievant's termination was reversed. Given the Grievant's special responsibilities as a law enforcement officer and as an officer specifically in charge of surplus property, a 30-day suspension, the maximum allowed under the law, was considered appropriate. In addition, based on his conduct, which evidenced a lack of competence in his position, the Grievant was reinstated with a demotion of one step. The Grievant was awarded his reasonable attorney's fees, based on his success in overturning his termination. However, the Grievant's reinstatement was without backpay or benefits due to the seriousness of his infractions and given his position of responsibility.
Department of Safety v. Larry Gladden, IO/11-18-94. FO/2-24-95. 14 APR 129.

***6 F.O. 1995 PROGRESSIVE DISCIPLINE; STEPS TAKEN**--T.C.A. §8-30-330 provides that when corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction. Subsequent infractions may result in more severe discipline. The purpose of corrective disciplinary action is to impress upon an employee that improper conduct should not be repeated. Prior to receiving the subject suspensions, the Grievant received three written reprimands and one written communication for failure to maintain a harmonious working relationship with fellow employees. She also received one verbal warning for rudeness and disruption of a meeting. As these warnings have not been effective, her supervisors have reasonably assessed more severe disciplinary penalties in an effort to alter her conduct. Two suspensions assessed in the Grievant's case were deemed proper and reasonable under the circumstances.
Tennessee Department of Mental Health and Mental Retardation v. Brenda Barnes, IO/11-8-94. FO/2-24-95. 14 APR 148.

***6 F.O. 1995 TERMINATION AS APPROPRIATE SANCTION; PROGRESSIVE DISCIPLINE**--Termination was not considered disproportionate where the Grievant struck an inmate in retaliation. After consideration of the entire record and Grievant's prior disciplinary problems involving assault, termination was considered the appropriate sanction. The administrative law judge recognized that the relationship between inmates and correctional officers who must monitor and control them is, by its very nature, a difficult one. Therefore, a correctional officer must accordingly act in a professional manner at all times and refrain from the temptation to take matters into his own hands and physically retaliate against an inmate who provokes him. Otherwise, an officer who crosses that line places himself, and all employees at the institution, at great risk of inmate reprisals. Even aside from the security risks raised when an officer attacks an inmate who poses no immediate danger, the administrative law judge acknowledged that the State itself is put at risk of civil liability from such actions. See Hudson v. McMillian, 112 S.Ct. 995 (1992).
Department of Correction v. Russell Coleman, IO/2-7-94. FO/2-17-95. 19 APR 234.

***6 F.O. 1987 PROGRESSIVE DISCIPLINE; FAILURE TO FOLLOW**--Commission reinstated Grievant even after finding that she had engaged in a pattern of habitual tardiness for a period of over a year, because Department had not followed progressive disciplinary steps of oral warning, written warning, and suspension prior to termination. Although the rules leave open the possibility of not following the progressive discipline steps in appropriate situations, the Commission's action suggests that, in most cases, a department should follow the steps in the progressive discipline rules for the purpose of adequately notifying employees of their wrongdoing and giving them a chance to correct it prior to imposing the extreme penalty of termination. Termination of Grievant for mere tardiness is inappropriate. Termination reduced to 30-day suspension because Department did not follow progressive discipline rules.
Martha Lawson v. Tennessee Department of Correction, IO/3-9-87. FO/3-9-87. 16 APR 310.

***6 F.O. 1986 PROGRESSIVE DISCIPLINE; ABANDONMENT OF POST**--Employee found not guilty of abandoning her post where employee's supervisor made no attempt to stop the employee from leaving the workplace after the employee had informed the supervisor she would be leaving.
Johnnie B. Kelley v. Department of Correction, IO/7-9-86. FO/7-22-86. 16 APR 321.

***6 I.O. 1994 PROGRESSIVE DISCIPLINE; CONDUCT UNBECOMING A STATE EMPLOYEE**--Grievant's five-day suspension for conduct unbecoming a State employee was reduced to written warning after being found excessive under the circumstances for several reasons. First, the Grievant's conduct, which consisted of working for another employer for pay during State working hours, was approved by the Grievant's own supervisor before any work was done. The Grievant therefore had every reason to believe that conduct approved by his supervisor would be within State regulations. Secondly, since there was no specific policy covering the situation, the Grievant had no reason to believe his conduct constituted a disciplinary offense. Thirdly, the Grievant was never actually notified that his conduct violated any State policy; rather, in light of his supervisor's approval, he received the opposite impression. The Administrative Law Judge determined that the State could not hold the Grievant to a stricter standard of conduct when the Grievant was not put on notice of the rule he was violating and

when even the officials determining the suspension had themselves disobeyed their own rules and policies. Furthermore, a suspension was not warranted where 1) the State was not harmed by the Grievant's actions as his job requirements for the State were fulfilled and 2) the Grievant never acted with a knowing or improper intent but in full compliance with his supervisor. Lincoln B. Steele v. Department of Human Services, IO/3-7-94. 14 APR 156.

***6 I.O. 1993 NO ENTITLEMENT TO PROGRESSIVE DISCIPLINE**--The intent of the law and rules regarding progressive discipline is to insure that employees are given adequate opportunity to correct any problems with their performance prior to more serious discipline being imposed. There are fact situations under which an employee would not be entitled to progressive discipline, as when the conduct complained of is so serious that anything less than dismissal would be inappropriate or when it is clear from the facts that progressive discipline would not be effective because the Grievant has demonstrated that previous discipline has had no effect or is unlikely to have an effect. Tennessee Wildlife Resources Agency v. Cynthia Bryant, IO/6-14-93. 14 APR 165.

***6 I.O. 1993 REQUIREMENT OF LOWEST LEVEL OF PROGRESSIVE DISCIPLINE BEFORE TERMINATION**--Termination of Grievant found unjustified since the Grievant could hardly be expected to understand the seriousness of any of her supposed violations if she was never even given the lowest possible discipline possible for any of them. Tennessee Wildlife Resources Agency v. Cynthia Bryant, IO/6-14-93. 14 APR 165.

***6 I.O. 1992 PROGRESSIVE DISCIPLINE; INSUBORDINATION**--Before insubordination can occur, an employee must be given clear notice of what the "assignment" at issue is and that he is expected to perform the assignment. The department has not established insubordination when the Grievant is neither clearly directed to accomplish certain tasks nor denied permission to leave after refusing to undertake certain tasks. Department of Employment Security v. Mary Rivers, IO/10-29-92. 14 APR 181.

***6 I.O. 1992 PURPOSE OF PROGRESSIVE DISCIPLINE**--The purpose of progressive discipline is to alter an employee's behavior and make that person a good employee without the drastic step of dismissing him/her from employment. However, when an employee refuses to change her shortcomings and previous discipline has virtually no effect on her behavior, then the only alternative is to dismiss that employee. The Grievant's previous record makes it clear that she is not amenable to constructive criticism and any discipline would be unlikely to correct her behavior or performance. The good of the service requires that she be terminated. Department of Correction v. Jo Ann Gunter, IO/4-8-92. 14 APR 194.

***6 I.O. 1983 CAUSE FOR DISCIPLINE WHEN CONDUCT IMPAIRS PUBLIC SERVICE**--Legal cause for disciplinary action exists if the facts disclose that employee's conduct impairs the efficiency of public service. There must be a real and substantial relation between employee's conduct and efficient operation of public service. Smith v. Department of Correction, IO/2-17-83. 3 APR 130.

***6 I.O. 1983 PROGRESSIVE DISCIPLINE; OFFENSE COMMITTED IN ANOTHER POSITION**--Civil Service statute and rules do not expressly or impliedly prohibit disciplinary action being taken against an employee for acts the employee committed in another position in the state service. Smith v. Department of Correction, IO/2-17-83. 3 APR 130.

***6 I.O. 1983 PROGRESSIVE DISCIPLINE; SAME OFFENSE**--Appointing authority cannot discipline an employee twice for the same offense without a showing of new facts, which were unavailable when the employee was first disciplined. Smith v. Department of Correction, IO/2-17-83. 3 APR 130.

7. SUSPENSION

***7 F.O. 1995 UNINTENTIONAL INSUBORDINATION**--Disciplinary one (1) day suspension imposed on Grievant for "negligence in the performance of duties" was overturned and a written reprimand was ordered to be placed in Grievant's personnel file where no intentional insubordination was found and Grievant had no history of serious disciplinary problems. Department of Youth Development v. Thelma James, IO/4-18-95. FO/4-28-95. 14 APR 206.

***7 F.O. 1995 FALSIFICATION OF EMPLOYMENT APPLICATION**--A ten (10) day suspension was imposed against Grievant for alleged falsification of his employment application in violation of Department's personnel rule. In view of the Grievant's consistently good job performance, the nature of the charges against him, and the fact that he did not actively try to

conceal his criminal history, suspension issued against the Grievant was considered unduly severe and reduced to a one (1) day suspension.

Department of Mental Health and Mental Retardation v. Floyd Bradley, IO/4-3-95. FO/4-13-95. 14 APR 213.

***7 F.O. 1995 SUSPENSION APPROPRIATE CONSIDERING NATURE OF VIOLATION AND EMPLOYMENT RECORD**--While the violation may have been relatively minor with no significant damage done, any relationship of a non-professional nature between officers and inmates was prohibited and therefore the Grievant was subject to discipline. However, in light of the Grievant's good employment record with the Department prior to this incident, as well as the relatively minor violation involved, termination was considered too harsh of a sanction to be imposed. A five-day suspension was considered more appropriate given the gravity of the Grievant's violation. The Grievant was reinstated to his former position with full backpay and benefits, minus the five-suspension. The backpay award was offset by any wages the Grievant received from other employment since the effective date of his termination. Moreover, as the Grievant was not exonerated in this matter, he was not awarded attorney's fees. See Department of Correction v. Boynton, No. 89-50-II (Tenn. Ct. App. August 25, 1989).

Department of Correction v. Willie Jones, IO/12-12-94. FO/2-24-95. *Appealed* 1-19-95. 19 APR 242.

***7 F.O. 1995 SUSPENSION APPROPRIATE WHEN ACTIONS CONSIDERED IN LIGHT OF ACTUAL PRACTICE**--The Department failed to prove that the Grievant acquired certain items without authorization. Although the authorizations that the Grievant did have were verbal when written authorization was officially required, the Grievant's actions were not inconsistent with actual practice. The Administrative Law Judge determined that the Grievant's actions should be considered in light of actual practice. In the judge's opinion, severe discipline, short of termination, was appropriate under the progressive discipline law. The progressive discipline law, at T.C.A. §8-30-330, provides that when corrective action is necessary, disciplinary action is to be administered beginning at the lowest appropriate step for each area of misconduct or at the step appropriate to the infraction or performance. Based upon these considerations, the Grievant's termination was reversed. Given the Grievant's special responsibilities as a law enforcement officer and as an officer specifically in charge of surplus property, a 30-day suspension, the maximum allowed under the law, was considered appropriate. In addition, based on his conduct, which evidenced a lack of competence in his position, the Grievant was reinstated with a demotion of one step. The Grievant was awarded his reasonable attorney's fees, based on his success in overturning his termination. However, the Grievant's reinstatement was without backpay or benefits due to the seriousness of his infractions and given his position of responsibility.

Department of Safety v. Larry Gladden, IO/11-18-94. FO/2-24-95. 14 APR 129.

***7 F.O. 1995 SUSPENSION APPROPRIATE UNDER PROGRESSIVE DISCIPLINE**--T.C.A. §8-30-330 provides that when corrective action is necessary, the supervisor must administer disciplinary action beginning at the step appropriate to the infraction. Subsequent infractions may result in more severe discipline. The purpose of corrective disciplinary action is to impress upon an employee that improper conduct should not be repeated. Prior to receiving the subject suspensions, the Grievant received three written reprimands and one written communication for failure to maintain a harmonious working relationship with fellow employees. She also received one verbal warning for rudeness and disruption of a meeting. As these warnings have not been effective, her supervisors have reasonably assessed more severe disciplinary penalties in an effort to alter her conduct. Two suspensions assessed in the Grievant's case were deemed proper and reasonable under the circumstances.

Tennessee Department of Mental Health and Mental Retardation v. Brenda Barnes, IO/11-8-94. FO/2-24-95. 14 APR 148.

***7 F.O. 1995 ILLNESS IS NO EXCUSE FOR MISCONDUCT**--Grievant's contention that she cannot control her conduct was not considered a mitigating factor in assessing the propriety of the suspensions levied against her. An ill employee is still not entitled to be excused from misconduct. See Duncan v. Civil Service Commission, 675 S.W.2d 734 (Tenn. Ct. App. 1983). Tennessee Department of Mental Health and Mental Retardation v. Brenda Barnes, IO/11-8-94. FO/2-24-95. 14 APR 148.

***7 F.O. 1995 SUSPENSION APPROPRIATE WHERE DENIAL OF PROCEDURAL DUE PROCESS**--Where there was a finding that the Grievant was denied procedural due process, the termination was reversed, and a 20-day suspension was issued. The Department was ordered to reinstate the Grievant to his previous position. The Grievant was awarded backpay (to be offset by any income earned since termination and the pending suspension) and reasonable attorney's fees as result of prevailing on appeal.

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. *Remanded* for reconsideration. 20 APR 30.

***7 F.O. 1994 SUSPENSION WHEN TERMINATION TOO SEVERE A SANCTION**--When the Administrative Law Judge looked beyond the charges to the underlying conduct which led to the charges, he found that the Grievant was primarily a

victim of harassment and unfortunate circumstances. In addition, her ability to perform her job was not impaired as a result of the publicity surrounding her criminal charges because no one was aware of the criminal charges until the Department conducted its investigation. Furthermore, although the Grievant did fail to report the charges filed against her or the conviction she received, failure to inform her supervisors was the only conduct engaged in by the Grievant which would justify disciplinary sanction. Consequently, termination was too severe a sanction for this violation. When all the factors were considered, a thirty-day suspension was held to be appropriate in this case. Grievant's reinstatement to her former position was ordered with full backpay, minus the thirty-day suspension. The backpay award was offset by any wages the Grievant received from other employment since the effective date of her termination. Attorney's fees were also denied under Department of Correction v. Boynton since the Grievant did not prevail in all aspects of her appeal. Joyce LaFave Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***7 F.O. 1987 SUSPENSION APPROPRIATE WHERE PROGRESSIVE DISCIPLINE NOT FOLLOWED--** Commission reinstated Grievant even after finding that she had engaged in a pattern of habitual tardiness for a period of over a year, because Department had not followed progressive disciplinary steps of oral warning, written warning, and suspension prior to termination. Although the rules leave open the possibility of not following the progressive discipline steps in appropriate situations, the Commission's action suggests that, in most cases, a department should follow the steps in the progressive discipline rules for the purpose of adequately notifying employees of their wrongdoing and giving them a chance to correct it prior to imposing the extreme penalty of termination. Termination of Grievant for mere tardiness is inappropriate. Termination reduced to 30-day suspension because Department did not follow progressive discipline rules. Martha Lawson v. Tennessee Department of Correction, IO/3-9-87. FO/3-9-87. 16 APR 310.

***7 I.O. 1995 SUSPENSION APPROPRIATE WHERE HARSHNESS OF DISCIPLINE EXCEEDS SERIOUSNESS OF MISCONDUCT--**Termination was reversed after it was determined that, while the Grievant did engage in improper conduct, the discipline was too harsh under the circumstances. After consideration of the record, a thirty (30) day suspension was imposed. No attorney's fees were awarded because the Grievant was not considered a successfully appealing employee in light of the fact that he did not prevail on all aspects of his appeal and was found to have engaged in conduct unbecoming a State employee. In The Matter of Henry Herron, IO/5-16-95. 14 APR 225.

***7 I.O. 1995 SUSPENSION LED TO TERMINATION--**The two-day suspension issued to the Grievant, which ultimately became a termination, was viewed as a one job action and was considered appropriate and fully justified under the circumstances. When the entire record was reviewed, the Grievant's job performance during his entire employment period with the Department was unsatisfactory. Despite numerous attempts to assist him, the Grievant demonstrated no inclination to improve his performance. Although the Department's management team shared some responsibility for allowing the situation between the Grievant and his supervisors to worsen as well as for failing to set out clear lines of authority and responsibility, this did not excuse the unsatisfactory job performance of the Grievant even though these factors tended to complicate the situation and perhaps even exacerbated the Grievant's problems. Department of Correction v. Bill Martin, IO/1-23-95. 14 APR 233.

***7 I.O. 1994 SUSPENSION APPROPRIATE WHERE DISCIPLINARY TERMINATION NOT APPROPRIATE--** This case presented a situation in which the Grievant was not guilty of having violated the fraternization rule with a student who later became her husband. However, the Grievant was found guilty of violating the spirit of the "reporting clause" of the rule as she realized that she had inadvertently put herself and her agency in an embarrassing situation by allowing a student into her home. Rather than disclosing this fact, the Grievant attempted to cover up an embarrassing situation. Therefore, she is subject to reasonable discipline. The disciplinary termination imposed on the Grievant was inappropriate and voided. Instead of the termination, suspension was ordered for 30 days with a loss of all backpay and benefits during the period of suspension. Furthermore, the Grievant was ordered to pay her own attorney's fees. Department of Youth Development v. Gaile Thompson, IO/8-9-94. 14 APR 241.

***7 I.O. 1994 SUSPENSION SET ASIDE--**An employee can not be disciplined for violating a policy that does not exist. The State failed to carry its burden of proof, and the Grievant was entitled to have his three-day suspension set aside. The Grievant was also awarded backpay, attorney's fees, and expungement of his disciplinary record. L.D. Moore v. Department of Transportation, IO/8-5-94. 14 APR 251.

***7 I.O. 1994 BEST EFFORTS; SUSPENSION OVERTURNED--**A disciplinary two-day suspension was overturned after the Administrative Law Judge determined that the failure of a fire drill was not the fault of the Grievant under the circumstances. To expect the Grievant to evacuate 160 inmates within four minutes was unreasonable and overlooked the realities of the situation. Since the Grievant followed proper procedure and did the best he could under the time constraints,

the Administrative Law Judge determined that his failure to complete the fire drill in four minutes constituted the limits of human endeavor, not conduct unbecoming a State employee. The Grievant's suspension was ordered voided and backpay as well as attorney's fees were awarded.

Department of Correction v. Ronnie Taylor, IO/6-10-94. 14 APR 260.

***7 I.O. 1994 SUSPENSION APPROPRIATE FOR GOOD OF THE SERVICE**--Following Reece v. Civil Service Commission, the Administrative Law Judge determined that whenever an agency makes a decision that an action needs to be taken for the good of the service, there must be sufficient reason for the determination. In the present case, the Grievant was terminated because of his physical abuse of a patient. The Administrative Law Judge found that the Grievant, through no fault of his own, was placed in a difficult situation and did his best to follow the Department's rules under the circumstances. In light of the circumstances, the Grievant had no choice but to resort to physical force in order to restrain the patient. Therefore, the Administrative Law Judge held that the Grievant acted reasonably under the circumstances and ordered the termination to be changed to a two-day suspension.

Department of Mental Health and Mental Retardation v. Anthony Labon, IO/6-7-94. 14 APR 268.

***7 I.O. 1994 SUSPENSION APPROPRIATE WHERE PENALTY TOO SEVERE**--Where the Department met its burden of proving that the Grievant violated established policy by improperly using State equipment to change her own insurance coverage and engaged in conduct unbecoming an employee, termination was not upheld after consideration of the Grievant's otherwise good employment record that contained no other disciplinary actions. The Administrative Law Judge determined that termination was too severe a penalty, set aside the termination, and ordered a 10 day suspension. However, the Grievant was found not to be entitled to attorney's fees since the Department prevailed in its allegations that she violated Department policy.

Department of Finance and Administration v. Bobbie Morgan, IO/3-30-94. 14 APR 279.

***7 I.O. 1994 SUSPENSION APPROPRIATE WHERE CONDUCT UNBECOMING A STATE EMPLOYEE**--Grievant's five-day suspension for conduct unbecoming a State employee was reduced to written warning after being found excessive under the circumstances for several reasons. First, the Grievant's conduct, which consisted of working for another employer for pay during State working hours, was approved by the Grievant's own supervisor before any work was done. The Grievant therefore had every reason to believe that conduct approved by his supervisor would be within State regulations. Secondly, since there was no specific policy covering the situation, the Grievant had no reason to believe his conduct constituted a disciplinary offense. Thirdly, the Grievant was never actually notified that his conduct violated any State policy; rather, in light of his supervisor's approval, he received the opposite impression. The Administrative Law Judge determined that the State could not hold the Grievant to a stricter standard of conduct when the Grievant was not put on notice of the rule he was violating and when even the officials determining the suspension had themselves disobeyed their own rules and policies. Furthermore, a suspension was not warranted where 1) the State was not harmed by the Grievant's actions as his job requirements for the State were fulfilled and 2) the Grievant never acted with a knowing or improper intent but in full compliance with his supervisor.

Lincoln B. Steele v. Department of Human Services, IO/3-7-94. 14 APR 156.

***7 I.O. 1993 SUSPENSION; DETERMINATIVE FACTORS**--State employees, such as Correctional Officers and other law enforcement officers, occupy highly sensitive positions which require those who hold these positions to avoid even the appearance of impropriety. The determinative factor to be considered in reviewing a disciplinary action against an individual employed as a correctional officer by the Department of Correction is the right of the State to maintain an efficient, effective correctional institution for the protection of the public. Where the Grievant made statements which damage the morale and undermine the authority of correctional officers due to the fact that these statements were overheard by fellow officers and inmates alike, suspension was considered appropriate.

Department of Correction v. Eddie Wallace Thompson, IO/5-19-93. 14 APR 288.

***7 I.O. 1993 EXCESSIVENESS OF SUSPENSION**--Ten day suspension found to be excessive because of mitigating circumstances which showed that Grievant acted more under a misjudgment than with any knowing or improper intent. The Administrative Law Judge considered the following factors:

1. Grievant's own supervisor approved and even participated in the plan for which Grievant was punished, and the Grievant had a right to expect that any act his supervisor approves of is within State guide lines.
2. Five State employees willingly participated in Grievant's

plan without realizing they could be committing a disciplinary offense.

3. There was no existing, specific policy which covered the Grievant's actions.
4. Grievant caused no harm through his actions.
5. Grievant never had any previous discipline.

Keith Ridings v. Department of Revenue, IO/4-26-93. 14 APR 295.

8. TERMINATION

***8 Tenn. App. 1992 REVERSAL OF TERMINATION DECISION**--Employee challenged her discharge by Department of Mental Health and Mental Retardation pursuant to mandatory termination rule of Department. The Civil Service Commission reversed administrative order upholding discharge. The Court of Appeals held that Commission had statutory authority to reverse decision of Department to discharge employee under regulation.

Department of Mental Health and Mental Retardation v. Allison, 833 S.W.2d 82 (Tenn. Ct. App. 1992).

***8 Tenn. App. 1992 REVERSAL OF TERMINATION DECISION; AUTHORITY**--Civil Service Commission had statutory authority to reverse decision of Department of Mental Health and Retardation to discharge employee pursuant to its mandatory termination regulation for striking patient.

Department of Mental Health and Mental Retardation v. Allison, 833 S.W.2d 82 (Tenn. Ct. App. 1992).

***8 Tenn. App. 1990 TERMINATION DURING PROBATIONARY PERIOD**--Rules of State Department of Personnel are clear that, during probationary period, employee may be separated from service without right of appeal or hearing.

Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***8 Tenn. App. 1990 RIGHT TO APPEAL TERMINATION DURING PROBATIONARY PERIOD**--Employee of State Department of Correction appealed administrative judge's finding that termination of employment was valid. The Court of Appeals held that: (1) after employee's promotion, and while she was still on probation for new position, employee could be separated from service without right of appeal or hearing and (2) record did not support conclusion that State misled employee into thinking she could pursue grievance over new job without putting right to previous position in jeopardy.

Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***8 Tenn. 1989 NO BASIS FOR DISCHARGE AFTER APPROVED USE OF SICK LEAVE**--Habitual absence or tardiness cannot be a basis for discharge when state employee is exercising approved sick leave privileges.

Sutton v. Civil Service Commission, 779 S.W.2d 788 (Tenn. 1989).

***8 Tenn. 1989 HABITUAL ABSENCE AS BASIS FOR DISCHARGE**--Habitual absence or tardiness cannot be a basis for discharge when state employee is exercising approved sick leave privileges.

Sutton v. Civil Service Commission, 779 S.W.2d 788 (Tenn. 1989).

***8 Tenn. 1989 UNJUSTIFIED DISCHARGE**--In the absence of substantial and material evidence that state employee habitually made unauthorized or unapproved use of his sick leave privileges, evidence of one unapproved absence in six months for a little over a half hour was not sufficient to justify his discharge on ground of "habitual pattern of failure to report for duty."

Sutton v. Civil Service Commission, 779 S.W.2d 788 (Tenn. 1989).

***8 Tenn. 1989 APPROVED USE OF SICK LEAVE NOT GROUNDS FOR DISCHARGE**--When state employee is exercising sick leave with approval of his superiors and the authenticity and necessity for the sick leave are not challenged, occasions for such leave should not be considered as part of an "habitual pattern of failure to report for duty" under civil service rules and regulations providing examples of cases when discipline may be imposed.

Sutton v. Civil Service Commission, 779 S.W.2d 788 (Tenn. 1989).

***8 Tenn. App. 1985 DISCHARGE WITHOUT PROOF OF MISCONDUCT**--Evidence showed sufficient reason under T.C.A. §8-30-326 for dismissal of correctional officer at prison for good of service, even though employee was discharged without proof of misconduct, after employee's arrest on charge of manufacturing marijuana, where employee's arrest received considerable public publicity through radio and news of arrest and charges against employee was readily available to inmates and employees.

Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***8 Tenn. App. 1983 DENIAL OF SPECIAL LEAVE; GROUNDS FOR DISCHARGE**--If denial of special leave is a legitimate and valid exercise of discretion, then failure to report for duty is a valid ground for discharge.

Cogdill v. Civil Service Commission, (Tenn. Ct. App. June, 1983). 3 APR 98.

***8 Tenn. App. 1983 TERMINATION FOR ALCOHOLIC BEHAVIOR**--Where information was received by superiors of civil service employee after unreasonably long period of waiting and wondering and investigating why employee was absent, it would be found that employee was terminated for behavior associated with alcoholism but that he failed to carry his burden of showing that he was terminated for being an alcoholic.

Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***8 Tenn. App. 1983 TERMINATION FOR ABSENTEEISM**--Mere accumulation of annual leave or sick leave entitlement does not authorize employee to be absent from duty at will and without prior arrangement with superiors, and thus employee discharged for absence without permission and without request for permission was subject to being penalized though he was entitled to annual leave or sick leave for period greater than total days absent.

Duncan v. Tennessee Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983).

***8 Ch. Ct. 1986 EXERCISE OF FIFTH AMENDMENT RIGHTS NOT GROUND FOR TERMINATION**--Public employee can not be terminated solely for exercising his Fifth Amendment right to remain silent.

Kilby v. Silvey, No. 85-235-II (Davidson County Ch Ct. December 6, 1986). 17 APR 95.

***8 F.O. 1995 NO DISCRIMINATORY MOTIVE BEHIND TERMINATION**--Decision to terminate Grievant was upheld and found proper where his record exhibited a pattern of insubordination to the legitimate requests of supervisors. Although Grievant argued that his termination was racially motivated, there was no evidence on the record to indicate any discriminatory motive or that the Grievant was denied an opportunity to explain or appeal any disciplinary determination.

Chukwuten Odigwe v. Department of Mental Health and Mental Retardation, IO/4-21-95. FO/5-1-95. 14 APR 303.

***8 F.O. 1995 TERMINATION AS APPROPRIATE SANCTION**--Termination was not considered disproportionate where the Grievant struck an inmate in retaliation. After consideration of the entire record and Grievant's prior disciplinary problems involving assault, termination was considered the appropriate sanction. The administrative law judge recognized that the relationship between inmates and correctional officers who must monitor and control them is, by its very nature, a difficult one. Therefore, a correctional officer must accordingly act in a professional manner at all times and refrain from the temptation to take matters into his own hands and physically retaliate against an inmate who provokes him. Otherwise, an officer who crosses that line places himself, and all employees at the institution, at great risk of inmate reprisals. Even aside from the security risks raised when an officer attacks an inmate who poses no immediate danger, the administrative law judge acknowledged that the State itself is put at risk of civil liability from such actions. See Hudson v. McMillian, 112 S.Ct. 995 (1992).

Department of Correction v. Russell Coleman, IO/2-7-94. FO/2-17-95. 19 APR 234.

***8 F.O. 1995 TERMINATION NOT UPHELD WHERE DENIAL OF PROCEDURAL DUE PROCESS**--The Grievant in this matter alleged that his constitutional right to due process was violated by the manner in which the Level IV grievance decision was made by the Commissioner. The Administrative Law Judge held that the decision made after a Level IV grievance hearing should have been based only on information gathered and/or presented at the hearing. Furthermore, any extra-hearing investigation which uncovered any evidence, including evidence as to any assessment of the seriousness of or harm caused by a grievant's alleged conduct, should have been brought to the attention of the Grievant and should have led to a reconvening of the hearing in order to provide the grievant with an opportunity to respond. Consequently, the termination was reversed, and a 20-day suspension was issued. The Department was ordered to reinstate the Grievant to his previous position. The Grievant was awarded backpay (to be offset by any income earned since termination and the pending suspension) and reasonable attorney's fees as result of prevailing on appeal.

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. Remanded for reconsideration. 20 APR 30.

***8 F.O. 1994 PUBLICITY SURROUNDING CRIMINAL CHARGES**--It would be grossly unfair to terminate an employee due to notoriety regarding criminal charges when the only reason anyone knew about the charges was because of the Department's own actions.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***8 F.O. 1994 TERMINATION WHERE OTHER EMPLOYEES NOT TERMINATED**--Although the Respondent was the only person terminated for mishandling funds when others had also failed to comply with procedures, termination of the Respondent was upheld. The Administrative Law Judge determined that, absent a claim of some sort of discrimination (which was not asserted by the Respondent in the present case), termination was justified on objective grounds. While the Respondent's actions were little worse than those of other employees who were not fired, the fact that the other employees were not also fired did not constitute a tenable defense.

Shelby State Community College v. Angela L. Delaney; IO/4-29-94. 15 APR 28. FO/10-24-94. 18 APR 228.

***8 F.O. 1986 NOTICE OF TERMINATION**--Failure to give employee ten (10) days notice of impending termination with written reasons violated T.C.A. §8-30-326 and Civil Service Rule 1120-2-2-.13(5) and termination was not effective.

Harold Hunter v. Department of Correction, IO/6-10-85. 6 APR 130. FO/5-14-86. 6 APR 314.

***8 F.O. 1985 TERMINATION FOR EXCESSIVE SICK LEAVE**--Notwithstanding T.C.A. §8-50-101, an employee who is habitually ill may be properly terminated according to regulations, where such habitual illness and absenteeism causes a hardship for the employer. Although §8-50-101(a) is cited in the Order, T.C.A. §8-50-101(b)(1) appears to be the Section that is intended to be cited by the Commission in its Order -- T.C.A. §8-50-101(b)(1) provides inter alia that an appointing authority may not deny sick leave to an employee who has a doctor's statement.

Anthony Sutton v. Department of Mental Health, FO/7-25-85. 6 APR 153.

***8 I.O. 1995 TERMINATION FOR THREATS OF VIOLENCE**--Grievant was terminated after threatening violence toward his supervisor and intimidating his co-workers. In spite of the fact that the Grievant did not intend to carry out his threats, his reputation created a real impression that he meant to do harm, and his supervisor and co-workers were reasonable in their belief that he would harm them. The resulting incident caused considerable fear and concern, loss of productivity in the office, and embarrassment for the Department. According to the administrative law judge, at some point a supervisor's responsibility to support and rehabilitate an employee gives way to the right of co-workers and clients to expect a congenial, efficient workplace. In this case, the Grievant's supervisors reasonably concluded that this point had been reached. As a result, just cause existed for the Grievant's termination, and the termination decision was upheld.

In The Matter of Samuel K. Hinton, IO/6-15-95. 14 APR 318.

***8 I.O. 1995 REVERSAL OF TERMINATION DECISION; DENIAL OF SPECIAL LEAVE**--This case involves the Grievant's termination from State service based on the denial of further special leave without pay after a period of previously approved special leave. The resolution of this case turned on the determination of whether it was proper to deny further leave to the Grievant and terminate him from State service without allowing him an opportunity to return to work at the conclusion of authorized leave and whether the Grievant made a reasonable effort to report back to work after receiving notice of the denial of further leave. The administrative law judge ruled that 1) the Department should have afforded the Grievant an opportunity to return to work prior to terminating him from State service, 2) the Grievant made a reasonable effort to return to work after receiving notice of denial of further leave, 3) the termination of the Grievant should be reversed, and 4) the Grievant should be reinstated to his former position with no break in his status as a State employee for purposes of insurance.

Department of Youth Development v. Steve Davis, IO/5-22-95. 14 APR 326.

***8 I.O. 1995 WARNING OF TERMINATION**--A Department must give some warning of termination prior to instituting it. At the end of any authorized special leave without pay, an employee who has exhausted all other types of leave should logically be in the same position he would have been in had he been denied the special leave in the first place--that is, one of having either to return to work or lose the job. Consequently, the Department should afford an employee an opportunity to return to work prior to terminating him from State service.

Department of Youth Development v. Steve Davis, IO/5-22-95. 14 APR 326.

***8 I.O. 1995 JOB ABANDONMENT**--Termination reversed and Grievant reinstated to his position after it was determined that abandonment of employment did not occur. Department failed to prove job abandonment as contemplated by the statutory definition where it was determined that unusual circumstances existed which caused the Grievant's absence and prevented his return to the job. Grievant was reinstated to his position with full backpay, benefits, and attorney's fees, including restoration of the sick leave the Grievant used.

Department of Safety v. John J. Whitson, IO/5-17-95. 14 APR 342.

***8 I.O. 1995 REVERSAL OF TERMINATION DECISION; HARSHNESS OF DISCIPLINE EXCEEDS SERIOUSNESS OF MISCONDUCT--**Termination was reversed after it was determined that, while the Grievant did engage in improper conduct, the discipline was too harsh under the circumstances. After consideration of the record, a thirty (30) day suspension was imposed. No attorney's fees were awarded because the Grievant was not considered a successfully appealing employee in light of the fact that he did not prevail on all aspects of his appeal and was found to have engaged in conduct unbecoming a State employee.

In The Matter of Henry Herron, IO/5-16-95. 14 APR 225.

***8 I.O. 1995 TERMINATION REVERSED; CONDITIONAL REINSTATEMENT--**Although the Department proved that the Grievant violated certain civil service rules and regulations, termination of the Grievant was reversed. Due to the fact that the Grievant approached the Department and notified them of his substance abuse problem and given the fact that his personnel records showed no past disciplinary problems, the Department was ordered to reinstate Grievant to his previous position pending his passage of a drug test and according to certain enumerated conditions.

In The Matter of Daniel C. Ransom, IO/5-11-95. 15 APR 1.

***8 I.O. 1995 TERMINATION DECISION UPHELD; SICKNESS AS NO EXCUSE FROM MISCONDUCT--**Termination for failure to maintain satisfactory and harmonious working relationships and for insubordination upheld despite Grievant's contention that her conduct was caused by a hormonal imbalance and effect of medication. According to the administrative law judge, even if medical confirmation existed for the Grievant's behavior, it would not be sufficient to invalidate the termination. Although an employee who is ill is entitled to all the considerations accorded to other sick employees, the employee is not entitled to be excused from misconduct.

In The Matter of Dorothy Brown, IO/4-5-95. 15 APR 8.

***8 I.O. 1995 TERMINATION UPHELD; DRIVING UNDER THE INFLUENCE; ADA--**Termination of the Grievant was upheld after the State demonstrated that Grievant engaged in conduct unbecoming a State employee and was terminated for the good of the service after he persisted in driving State vehicles while under the influence of alcohol, even after a driver's license suspension and jail term. The Administrative Law Judge rejected Grievant's contentions that he should be considered disabled under the Americans With Disabilities Act (ADA) and that this should preclude his termination. In the Administrative Law Judge's opinion, the Grievant did not meet his burden of demonstrating that he was disabled. In the alternative, the Administrative Law Judge held that reasonable accommodation under the ADA is only available to recovering alcoholics, which was not true of the Grievant during his tenure with the Department. Moreover, even if the Grievant were considered a recovering alcoholic, the Administrative Law Judge determined that the Grievant should still be held to the same standards of job performance and behavior as non-alcoholics since reasonable accommodation did not require the employer to overlook unacceptable behavior on the part of the employee, even if that behavior resulted from alcoholism. See Duncan v. Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983). Finally, even if reasonable accommodation were available, the ADA was not intended to accommodate violations of the law.

Mark Himmelberger v. Department of Revenue, IO/1-26-95. 15 APR 18.

***8 I.O. 1995 SUSPENSION LED TO TERMINATION--**The two-day suspension issued to the Grievant, which ultimately became a termination, was viewed as a one job action and was considered appropriate and fully justified under the circumstances. When the entire record was reviewed, the Grievant's job performance during his entire employment period with the Department was unsatisfactory. Despite numerous attempts to assist him, the Grievant demonstrated no inclination to improve his performance. Although the Department's management team shared some responsibility for allowing the situation between the Grievant and his supervisors to worsen as well as for failing to set out clear lines of authority and responsibility, this did not excuse the unsatisfactory job performance of the Grievant even though these factors tended to complicate the situation and perhaps even exacerbated the Grievant's problems.

Department of Correction v. Bill Martin, IO/1-23-95. 14 APR 233.

***8 I.O. 1994 TERMINATION SET ASIDE; PENALTY TOO SEVERE--**Where the Department met its burden of proving that the Grievant violated established policy by improperly using State equipment to change her own insurance coverage and engaged in conduct unbecoming an employee, termination was not upheld after consideration of the Grievant's otherwise good employment record that contained no other disciplinary actions. The Administrative Law Judge determined that termination was too severe a penalty, set aside the termination, and ordered a 10 day suspension. However, the Grievant was found not to be entitled to attorney's fees since the Department prevailed in its allegations that she violated Department policy.

Department of Finance and Administration v. Bobbie Morgan, IO/3-30-94. 14 APR 279.

***8 I.O. 1994 TERMINATION UPHELD; SOCIAL RELATIONSHIPS WITH INMATES ARE PROHIBITED--** Relationships between Department of Correction employees and inmates are to be only of a professional nature. Social relationships are prohibited, and any exchange of correspondence for other than official purposes is considered to be a violation under the policy. The rationale behind this policy prohibiting trade or barter with inmates is to preserve the employee's ability to deal with inmates on an appropriate level. Once an officer has compromised his position by violating the policy, inmates may become aware of this, and the officer's ability to perform his duty is seriously compromised by the possibility of blackmail or other threats. Termination is an appropriate disciplinary action for violation of this policy.

Department of Correction v. Harry G. Duffey, IO/2-16-94. 15 APR 36.

***8 I.O. 1993 TERMINATION UPHELD; NO DRIVER'S LICENSE--**The Department of Correction can terminate an employee for failure to possess a valid driver's license. There is a valid rationale behind the Department of Correction's requirement that all correctional officers have a valid driver's license. First of all, many post assignments involve the use of motor vehicles. Secondly, no correctional officer has a permanent, fixed post, and every officer is expected to be able to work at any post which he or she may be assigned. Any officer, on any shift, may be called upon to undertake a task which requires driving a motor vehicle. Finally and most importantly, it is obvious that, should the employee be called upon to undertake such a task, he would be driving a motor vehicle as a correctional officer on State business in violation of State law. "As a result of losing his driver's license, the Grievant also lost his ability to perform all the functions he might be called upon to perform as part of his job. Although the frequency of being called upon to drive might not be great, the Department must be able to count on all employees to perform all duties of their jobs at any given time." Such a situation cannot be tolerated.

Department of Correction v. George S. Johnson, IO/8-23-93. 15 APR 42.

***8 I.O. 1993 TERMINATION UPHELD; INAPPROPRIATE BEHAVIOR CAUSED BY MEDICAL PROBLEMS--** Inappropriate behavior is not necessarily excused even when it is caused by medical problems. In the present case, the Department of Correction has made a genuine effort to assist the Grievant in overcoming his problems and retaining his position. However, the Department cannot be expected to keep up its efforts indefinitely.

Department of Correction v. Gregory Scott, IO/8-20-93. 14 APR 65.

***8 I.O. 1993 UNJUSTIFIED TERMINATION--**Termination of Grievant found unjustified since the Grievant could hardly be expected to understand the seriousness of any of her supposed violations if she was never even given the lowest possible discipline possible for any of them.

Tennessee Wildlife Resources Agency v. Cynthia Bryant, IO/6-14-93. 14 APR 165.

***8 I.O. 1986 LACHES; APPEAL OF TERMINATION--**Where the Grievant was terminated in 1979, and Civil Service Commission stayed the hearing of the appeal pending the outcome of a complaint filed by the Grievant with the EEOC and the Tennessee Human Rights Commission, where the complaints were withdrawn in 1982 and the Grievant took no steps to renew her appeal until 1985; where the Department established that it would have serious difficulty in preparing a defense to the Grievant's allegations in the case due to the passage of time, laches were invoked against the Grievant and her appeal was dismissed.

Dorothy Moss v. Department of Health and Environment, IO/5-2-86. 6 APR 266.

***8 I.O. 1984 EFFECT OF GARNISHMENTS ON DECISION TO DISCHARGE--**An employee may be discharged after a garnishment by a third creditor. Rules of the Tennessee Department of Personnel, Chapter 1120-7-2-.09.

Department of Mental Health v. Foy, IO/6-7-84. 4 APR 491.

9. TERMINATION FOR THE GOOD OF THE SERVICE

***9 Tenn. App. 1992 GOOD OF SERVICE STANDARD NOT VAGUE--**The statutory standard for termination, "for the good of the service", is not too vague to be enforced and does not violate the due process provisions of the Tennessee Constitution since a person of ordinary intelligence would be able to decide if any particular action might result in termination "for the good of the service".

James v. Department of Correction, No. 01-A-01-9110-CH00376, 1992 WL 69646 (Tenn. Ct. App. April 8, 1992).

***9 Tenn. App. 1992 DISMISSAL FOR GOOD OF THE SERVICE; EFFECT OF CRIMINAL CHARGES--**In the present case, the Court of Appeals recognized that, in supervising inmates in a correctional institution, an employee's reputation is vital to his or her usefulness. The court determined that the hiring authority was justified in concluding that the grievant's ability to do his job was adversely affected because news of the charges was available to the inmate population. Although the grievant sought to distinguish this case by stressing that his arrest did not attract media attention in the area, the court gave

greater weight to the fact that grievant's arrest was common knowledge in the prison based on the warden's testimony that rumors and gossip about the charges were circulating among the staff and the inmate population and that the prisoners considered that child molesters were particularly debased. As a result, the court found that substantial and material evidence existed in the record to supporting a conclusion that the charges against the grievant adversely affected his job performance.

James v. Department of Correction, No. 01-A-01-9110-CH00376, 1992 WL 69646 (Tenn. Ct. App. April 8, 1992).

***9 Tenn. App. 1989 DISMISSAL FOR GOOD OF THE SERVICE; EFFECT OF CRIMINAL CHARGES**--In a case where a dormitory superintendent at the Taft Youth Center was charged with selling hashish, the court reversed an award of back pay covering the time from the petitioner's termination to the time he was acquitted of the charge. Holding that the key factor in back pay disputes is whether the employee's discharge was justified, the court found justification for the discharge in evidence that the charges against the employee had adversely affected his ability to do his job.

Norris v. Boynton, No. 89-50-II (Tenn. Ct. App. August 25, 1989).

***9 Tenn. App. 1985 GOOD OF THE SERVICE DISCHARGE; RATIONALE**--Public payroll cannot be made haven for those who with or without fault have become unable to perform duties for which they were employed, and "the good of the service" under T.C.A. §8-30-326 regarding dismissals may in proper cases justify or require discharge of public employees when their efficiency or their usefulness in their positions has been seriously impaired by their own fault, by fault of others, or by blameless misfortune.

Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***9 Tenn. App. 1985 GOOD OF THE SERVICE DISCHARGE; FACTORS TO CONSIDER**--The Court of Appeals recognized that public employees whose reputation is vital to their usefulness have a duty to actively respond to any adverse publicity, particularly prosecution for crime, and to take reasonable steps to salvage and rehabilitate their reputation and usefulness. In the court's opinion, if this was considered a reasonable duty, then the failure to perform it could amount to a form of passive misconduct contributing to the disability which requires discharge. The court stressed the right of the State to maintain an efficient, effective correction institution for the protection of the public as opposed to the right of the individual employee to retain his position until he has been proven guilty of misconduct. It was the view of the court that the first consideration must prevail over the second. According to the court, the interest of the public required this sacrifice of public employees when their usefulness has been seriously impaired.

Reece v. Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***9 Tenn. App. 1985 DISMISSAL FOR GOOD OF THE SERVICE; EFFECT OF CRIMINAL CHARGES**--The dismissal of a sergeant at the Bledsoe County Regional Prison who was charged with growing marijuana was upheld. He agreed to pre-trial diversion, and upon successful completion of that program the charges against him were dismissed and his record expunged. Nevertheless, the court held that his dismissal was for "the good of the service" where the charges against him were widely reported in the county where he worked and there was substantial evidence that his usefulness as a supervisor of guards had been so impaired as to justify his termination. The court reasoned that an employee's usefulness may be impaired by "their own fault, by the fault of others, or by blameless misfortune."

Reece v. Tennessee Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985).

***9 Tenn. App. 1985 GOOD OF SERVICE; SCOPE OF APPLICATION**--Grievant, a supervisor and a correctional sergeant at Bledsoe Regional Prison, was terminated pursuant to T.C.A. §8-30-26, "for the good of the service" following his arrest for a marijuana related offense which arrest received extensive adverse publicity and which offense was disposed of in the Bledsoe County General Sessions Court by way of pre-trial diversion. Later, pursuant to the diversion agreement, the public records of the offense were expunged. Grievant was terminated because his usefulness and effectiveness as a guard and supervisor had been seriously impaired because of the adverse publicity and because his case disposition did not resolve question of guilt or innocence. Civil Service Commission affirmed the termination. Chancellor reversed. Court of Appeals affirmed Civil Service Commission, holding that it is proper to terminate public employees "for the good of the service" when their usefulness has been seriously impaired regardless what or who caused this impairment and regardless of fact that they are terminated without any proof of misconduct.

Reece v. Tennessee Civil Service Commission, 699 S.W.2d 808 (Tenn. Ct. App. 1985). 6 APR 209.

***9 Tenn. App. 1985 DUTY TO MITIGATE**--A strong argument can be made for the proposition that public employees, whose reputation is vital to their usefulness, have a duty to actively respond to any adverse publicity (particularly prosecution for crime) and to take reasonable steps to salvage and rehabilitate their reputation and usefulness. If this is a reasonable duty, then the failure to perform it may amount to a form of passive misconduct contributing to the disability which requires discharge...The determinative factor is which of two considerations predominates: 1) the right of the State to maintain an efficient, effective correction institution for the protection of the public, or 2) the right of the individual employee to retain his

position until he has been proven guilty of misconduct. It is the view of this court that the first consideration must prevail over the second...the interest of the public requires this sacrifice of public employees when their usefulness has been seriously impaired with or without fault.

Reece v. Tennessee Civil Service Commission, 699 S.W.2d 808, 813 (Tenn. Ct. App. 1985).

***9 F.O. 1995 DUI ARREST AND PROBATION VIOLATION**--The Grievant was terminated for his DUI arrest and probation violation. The discipline imposed by the Department was upheld. Termination was considered proper where the Grievant was proven guilty of misconduct. Moreover, the Grievant's ability to perform his duties in a prison setting was compromised by his arrest and probation violation, especially when other employees and even inmates were aware of it. Considering that it is extremely difficult to supervise inmates in a prison setting without their respect, termination was proper. The Grievant had already lost the respect of the inmates he supervised by virtue of his arrest and probation violation, and therefore, could no longer function in the necessary manner required by his job.

Department of Correction v. Phil Sybrant, IO/2-13-95. FO/2-23-95. 15 APR 52.

***9 F.O. 1994 TERMINATION; FACTORS TO CONSIDER**--In determining whether termination was appropriate in this case, the Administrative Law Judge held that three separate questions must be answered. First, did the Grievant's actual conduct rise to the level of conduct unbecoming a state employee, seriously disrupt the operation of the agency, or endanger the lives and property of others, to the extent that it justified her termination? Secondly, was her ability to perform her duties so compromised by the notoriety surrounding the events that termination became necessary? And finally, did her failure to report her criminal charges and conviction, in violation of Department policy, justify her termination?

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***9 F.O. 1994 NOT GUILTY OF CRIMINAL OFFENSE**--Even though a state employee is never found guilty of a criminal offense for which he has been charged, the employee may be terminated by the State for the good of the service if it can be established that the publicity surrounding the incident was such that the employee's ability to perform the job was impaired to the point that the employee could no longer function effectively in the position.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***9 F.O. 1994 PUBLICITY SURROUNDING CRIMINAL CHARGES**--It would be grossly unfair to terminate an employee due to notoriety regarding criminal charges when the only reason anyone knew about the charges was because of the Department's own actions.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***9 F.O. 1984 FALSE STATEMENT ON APPLICATION**--Making false statement of material fact on employment application constitutes personal conduct detrimental to State service.

Jones v. Department of Mental Health, IO/11-1-84. FO/11-14-84. 4 APR 840.

***9 I.O. 1995 TERMINATION WHERE CRIMINAL CONVICTION IMPAIRED OFFICIAL POSITION**--Termination was upheld as proper where Grievant, who was a state trooper, had been convicted of criminal misconduct related to his official position. Where criminal misconduct so seriously impairs an employee's usefulness, dismissal for the good of the service is warranted.

In the Matter of Robert Pugh, IO/6-26-95. 19 APR 32.

***9 I.O. 1995 EXTENSIVE DISCIPLINARY HISTORY**--Although the Department did not prove that the Grievant was negligent in the performance of his duties, termination of the Grievant was justified after a finding that the Grievant did engage in conduct unbecoming a State employee. Given the extensive disciplinary history of the Grievant which ranged from three oral warnings to three written reprimands to one previous suspension, termination was considered an appropriate remedy.

Department of Mental Health and Mental Retardation v. Jeffrey Gray, IO/3-22-95. 15 APR 59.

***9 I.O. 1994 REASONABLE ACTIONS UNDER THE CIRCUMSTANCES**--Following Reece v. Civil Service Commission, the Administrative Law Judge determined that whenever an agency makes a decision that an action needs to be taken for the good of the service, there must be sufficient reason for the determination. In the present case, the Grievant was terminated because of his physical abuse of a patient. The Administrative Law Judge found that the Grievant, through no fault of his own, was placed in a difficult situation and did his best to follow the Department's rules under the circumstances. In light of the circumstances, the Grievant had no choice but to resort to physical force in order to restrain the patient. Therefore, the Administrative Law Judge held that the Grievant acted reasonably under the circumstances and ordered the termination to be changed to a two-day suspension.

Department of Mental Health and Mental Retardation v. Anthony Labon, IO/6-7-94. 14 APR 268.

***9 I.O. 1993 ARRESTED EMPLOYEE**--The "good of the service" may, in proper cases, justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by "their own fault, by the fault of others, or by blameless misfortune." In the present case, although the Grievant may be less effective as compared to other employees in some areas, he is neither unable to perform his job nor seriously impaired in his usefulness or efficiency when all factors are taken into consideration.

Frank Mahon v. Department of Human Services, IO/11-2-93. 15 APR 67. *Reversed in Chancery* 20 APR 1. *See also* 20 APR 9.

***9 I.O. 1993 INABILITY TO FUNCTION ADEQUATELY**--Whenever an agency makes a decision that an action needs to be taken for "the good of the service," there must be a sufficient reason for the determination. When determining whether an employee's effectiveness has been so compromised that he would be unable to function adequately in his position, all factors must be considered and balanced.

Department of Correction v. Perry Sanders, IO/6-25-93. 15 APR 103.

***9 I.O. 1993 NOT PROVEN GUILTY**--The termination for the good of the service will be upheld when a Grievant is arrested, especially if that arrest affects his public duties. Furthermore, termination will be upheld even if Grievant was not proven guilty of the charges against him as long as negative publicity surrounding the arrest impairs his ability to perform his duties. In the present case, the charges against the Grievant undermined his credibility in the community as an arson investigator and adversely affected his working relationship with law enforcement officials. In light of this, there was sufficient reason to consider that the good of the service would be served by the termination of the Grievant's employment with the Department of Commerce and Insurance.

Department of Commerce and Insurance v. Luke L. Bright, IO/2-23-93. 15 APR 117.

***9 I.O. 1992 MEDICAL CONDITION**--Employee's medical condition does not act as a barrier to his termination or hinder the Department of Corrections' rights under Tennessee law to dismiss respondent for failure to qualify physically for the position of Correctional officer. Even in the case of a blameless misfortune on the part of an employee, the dismissal of such an employee is justified, citing Reece v. Tennessee Civil Service Commission for the following proposition: "the good of the service" may in proper cases justify or require the discharge of public employees when their efficiency or usefulness in their positions has been seriously impaired by their own fault, by the fault of others, or by blameless misfortune.

Christopher Wright v. Department of Correction, IO/7-31-92. 14 APR 74.

***9 I.O. 1992 FAILURE OF PROGRESSIVE DISCIPLINE**--The purpose of progressive discipline is to alter an employee's behavior and make that person a good employee without the drastic step of dismissing him/her from employment. However, when an employee refuses to change her shortcomings and previous discipline has virtually no effect on her behavior, then the only alternative is to dismiss that employee. The Grievant's previous record makes it clear that she is not amenable to constructive criticism and any discipline would be unlikely to correct her behavior or performance. The good of the service requires that she be terminated.

Department of Correction v. Jo Ann Gunter, IO/4-8-92. 14 APR 194.

***9 I.O. 1988 TERMINATION FOR ARREST; REINSTATEMENT AFTER ACQUITTAL**--Department held to be justified in its termination of an employee upon his arrest since it was reasonable to expect information about the arrest to hamper the employee's job performance and to negatively reflect on the Department in general. Regardless of the gravity of the criminal charge (even if Respondent was charged with indecent exposure as was the case), the right of the State to maintain an efficient, effective correctional institution for the protection of the public prevails over the right of the individual, especially when news of the criminal charges would seriously impair Respondent's efficiency and usefulness in his position given the inflammatory nature of the charges and their obvious negative effect. The Department's failure to specifically follow certain procedures in terminating Grievant was not found to negate their authority to terminate him. However, after Grievant's acquittal of the criminal charges against him, reinstatement is appropriate.

Department of Correction v. Robert Croteau, IO/7-1-88. 17 APR 123. *See also* 16 APR 306.

10. REINSTATEMENT

***10 Tenn. App. 1990 RIGHT TO RETURN TO PREVIOUS POSITION**--Record did not support conclusion that State misled employee into thinking that she could choose to pursue her grievance over loss of job to which she had just been promoted without putting right to return to previous position in jeopardy.

Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***10 Tenn. App. 1989 AUTHORITY TO REINSTATE EMPLOYEE**--The Court of Appeals held that the Civil Service Commission has the authority to order an employee reinstated and award back pay. The fact that Boynton was reinstated by agreement of counsel makes no difference under the statute. The Commission, in its discretion, could direct that the reinstatement be without loss of back pay. Therefore, the award of back pay was proper under T.C.A. §8-30-328(e). In the court's opinion, the Commission's decision was not arbitrary, capricious, an abuse of discretion or a clearly unwarranted exercise of discretion. The record showed that Boynton was terminated for gross misconduct for selling drugs. The Commission found that once Boynton was exonerated of the charges against him, the cloud that caused his inability to do his job was removed, and he should be made whole. The court held that the Commission's decision was supported by the record and was clearly within the Commission's discretion.

Norris v. Boynton and Tennessee Civil Service Commission, No. 89-50-II, 1989 WL 97958 (Tenn. Ct. App. August 25, 1989).

***10 Tenn. App. 1983 ESTOPPEL FROM SEEKING REINSTATEMENT**--When a party applies for and obtains retirement from employment by the state and receives retirement benefits based upon the party's statement of incapacity to serve, party is estopped from seeking reinstatement to the position from which party was retired.

Johnson v. Department of Employment Security, (Tenn. Ct. App. April 5, 1983). 3 APR 104.

***10 F.O. 1995 DEMOTION**--Based on his special responsibilities as a law enforcement officer and his conduct which evidenced a lack of competence in his position, the Grievant was reinstated with a demotion of one step.

Department of Safety v. Larry Gladden, IO/11-18-94. FO/2-24-95. 14 APR 129.

***10 F.O. 1987 REINSTATEMENT AFTER FAILURE TO FOLLOW PROGRESSIVE DISCIPLINE**--Commission reinstated Grievant even after finding that she had engaged in a pattern of habitual tardiness for a period of over a year, because Department had not followed progressive disciplinary steps of oral warning, written warning, and suspension prior to termination.

Martha Lawson v. Tennessee Department of Correction, IO/3-9-87. FO/3-9-87. 16 APR 310.

***10 I.O. 1995 CONDITIONAL REINSTATEMENT**--Although the Department proved that the Grievant violated certain civil service rules and regulations, termination of the Grievant was reversed. Due to the fact that the Grievant approached the Department and notified them of his substance abuse problem and given the fact that his personnel records showed no past disciplinary problems, the Department was ordered to reinstate Grievant to his previous position pending his passage of a drug test and according to certain enumerated conditions.

In The Matter of Daniel C. Ransom, IO/5-11-95. 15 APR 1.

***10 I.O. 1994 PROPRIETY OF DISCIPLINARY TERMINATION**--This case presented a situation in which the Grievant was not guilty of having violated the fraternization rule with a student who later became her husband. However, the Grievant was found guilty of violating the spirit of the "reporting clause" of the rule as she realized that she had inadvertently put herself and her agency in an embarrassing situation by allowing a student into her home. Rather than disclosing this fact, the Grievant attempted to cover up an embarrassing situation. Therefore, she is subject to reasonable discipline. The disciplinary termination imposed on the Grievant was inappropriate and voided. Instead of the termination, suspension was ordered for 30 days with a loss of all backpay and benefits during the period of suspension. Furthermore, the Grievant was ordered to pay her own attorney's fees.

Department of Youth Development v. Gaile Thompson, IO/8-9-94. 14 APR 241.

***10 I.O. 1988 OFFER OF REINSTATEMENT**--Although Grievant may be denied backpay if there is proof that a clear, definite, and reasonable offer of reinstatement was denied, the Department should not be permitted to foreclose the possibility of any future reinstatement of the Grievant since the first offer of reinstatement was denied.

Tennessee Department of Corrections v. Robert Croteau, IO/7-1-88. 17 APR 123. *See also* 16 APR 306.

***10 I.O. 1988 REINSTATEMENT TO NOT NECESSARILY THE SAME POSITION**--The law favors the right of the State to maintain an efficient, effective institution over certain individual rights. Therefore, the Department has the right, when reinstating the employee (especially after the employee is cleared of criminal charges) to place him in a position that best serves the need of the institution and causes the least disruption, as long as the employee is placed in the same position classification with the same salary. Moreover, T.C.A. §8-30-328(h) (re: post-hearing reinstatement) suggests the employee should be reinstated to a position in which he was employed at the time of his termination, unless there is some reasonable, demonstrable cause justifying exception to this rule. These duties need not be the exact same duties the Grievant previously held if the legitimate needs of the institution or subsequent changes in staffing would make this impossible. However, the Grievant should not be placed in an unreasonable situation in which he could not reasonably be expected to succeed.

Tennessee Department of Corrections v. Robert Croteau, IO/7-1-88. 17 APR 123. *See also* 16 APR 306.

***10 I.O. 1988 TERMINATION FOR ARREST; REINSTATEMENT AFTER ACQUITTAL**--Department held to be justified in its termination of an employee upon his arrest since it was reasonable to expect information about the arrest to hamper the employee's job performance and to negatively reflect on the Department in general. Regardless of the gravity of the criminal charge (even if Respondent was charged with indecent exposure as was the case), the right of the State to maintain an efficient, effective correctional institution for the protection of the public prevails over the right of the individual, especially when news of the criminal charges would seriously impair Respondent's efficiency and usefulness in his position given the inflammatory nature of the charges and their obvious negative effect. The Department's failure to specifically follow certain procedures in terminating Grievant was not found to negate their authority to terminate him. However, after Grievant's acquittal of the criminal charges against him, reinstatement is appropriate.

Tennessee Department of Corrections v. Robert Croteau, IO/7-1-88. 17 APR 123. *See also* 16 APR 306.

11. BACKPAY AND ATTORNEY'S FEES

***11 Tenn. App. 1992 NO BACKPAY AWARD BECAUSE CRIMINAL CHARGES DROPPED**--Employee, who was terminated as a correctional officer after being indicted for aggravated rape of his five-year-old son, was not entitled to back pay because the criminal charges against him were subsequently retired.

James v. Department of Correction, No. 01-A-01-9110-CH00376, 1992 WL 69646 (Tenn. Ct. App. April 8, 1992).

***11 Tenn. App. 1989 BACKPAY AWARD; NECESSITY OF DETERMINATION IN FAVOR OF EMPLOYEE**--For an employee to be awarded back pay, the employee's grievance must be decided favorably to the employee. Since the award of back pay and attorney's fees can only follow a favorable decision for the employee, no backpay or attorney's fees may be awarded after the Commission has found that the employee was properly terminated.

Norris v. Boynton and Tennessee Civil Service Commission, No. 89-50-II, 1989 WL 97958 (Tenn. Ct. App. August 25, 1989).

***11 Tenn. App. 1989 BACKPAY AWARD; NECESSITY OF DETERMINATION IN FAVOR OF EMPLOYEE**--In the instant case, the employee-respondent's grievance is that he was wrongfully terminated. The chancellor, in affirming the decision of the Commission, stated in his memorandum opinion that the reinstatement of the respondent by the Agreed Order was the same as if the Commission had found in favor of the respondent and then reinstated him. The Court of Appeals disagreed with this interpretation. In the court's opinion, the Agreed Order specifically reserved the question of back pay and attorney's fees, and the record was uncontroverted that the reason for utilizing an Agreed Order for returning respondent to his employment was to give respondent the benefit of immediate re-employment, rather than being subjected to await his turn on a re-employment list. Therefore, the respondent's grievance before the Commission (i.e., his alleged wrongful termination) was not found in respondent's favor. Under these circumstances, the determination by the Commission that he was rightfully terminated is not a decision in favor of the employee and therefore the Commission was without authority under T.C.A. §8-30-328(e) to award back pay and attorney's fees.

Norris v. Boynton and Tennessee Civil Service Commission, No. 89-50-II, 1989 WL 97958 (Tenn. Ct. App. August 25, 1989).

***11 Ch. Ct. 1984 FINAL ORDER; CONTENTS RE: BACKPAY** --In exercising its discretion to award back pay, the Commission must include in its order findings of fact and conclusions of law as to that issue, in addition to all other issues, as required by T.C.A. §8-30-327(b), §4-5-414(i).

Arnold v. Anderson, et al., No. 83-774-III (Davidson County Ch. Ct. February 24, 1984). 3 APR 228.

***11 F.O. 1995 BACKPAY DENIED WHILE ATTORNEY'S FEES AWARDED**--The Grievant was awarded his reasonable attorney's fees, based on his success in overturning his termination. However, the Grievant's reinstatement was without backpay or benefits due to the seriousness of his infractions and given his position of responsibility.

Department of Safety v. Larry Gladden, IO/11-18-94. FO/2-24-95. 14 APR 129.

***11 F.O. 1995 BACKPAY SET-OFF AND DENIAL OF ATTORNEY'S FEES**--The Grievant was reinstated to his former position with full backpay and benefits, minus the five-suspension. The backpay award was offset by any wages the Grievant received from other employment since the effective date of his termination. Moreover, as the Grievant was not exonerated in this matter, he was not awarded attorney's fees. *See* Department of Correction v. Boynton, No. 89-50-II (Tenn. Ct. App. August 25, 1989).

Department of Correction v. Willie Jones, IO/12-12-94. FO/2-24-95. *Appealed* 1-19-95. 19 APR 242.

***11 F.O. 1995 ATTORNEY'S FEES AWARDED AND BACKPAY OFFSET BY INCOME EARNED SINCE TERMINATION**--Where termination was reversed after a finding that the Grievant was denied procedural due process, the Department was ordered to reinstate the Grievant to his previous position. The Grievant was awarded backpay (to be offset by any income earned since termination and the pending suspension) and reasonable attorney's fees as result of prevailing on appeal.

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. *Remanded* for reconsideration. 20 APR 30.

***11 F.O. 1995 UNEMPLOYMENT COMPENSATION; SET-OFF**--Grievant's income deduction (backpay offset by income earned since termination) shall not include any unemployment compensation received, in the absence of an agreement with the State that there will be no attempt on the part of the Department of Employment Security to recoup such unemployment compensation benefits from the backpay ware in this case. See Griggs v. Sands, 526 S.W.2d 441, 449 (Tenn. 1975).

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. *Remanded* for reconsideration. 20 APR 30.

***11 F.O. 1994 BACKPAY SET-OFF**--Grievant's reinstatement to her former position was ordered with full backpay, minus the thirty-day suspension. The backpay award was offset by any wages the Grievant received from other employment since the effective date of her termination.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***11 F.O. 1994 DENIAL OF ATTORNEY'S FEES**--Attorney's fees were denied under Department of Correction v. Boynton where the Grievant did not prevail in all aspects of her appeal.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***11 F.O. 1986 PARTIAL BACKPAY AWARD WHEN NO NOTICE OF TERMINATION**--Grievant's dismissal was in violation of T.C.A. §8-30-326 because the department failed to give 10 days notice as required by statute, therefore Grievant was reinstated. Grievant's actions do not entitle him to full backpay, but he should receive 10 days backpay because of the department's failure to give the 10 days required notice.

Harold Hunter v. Department of Correction, IO/6-10-85. 6 APR 130. FO/5-14-86. 6 APR 314.

***11 I.O. 1995 AWARD WHERE NO JOB ABANDONMENT FOUND**--Termination reversed and Grievant reinstated to his position after it was determined that abandonment of employment did not occur. Department failed to prove job abandonment as contemplated by the statutory definition where it was determined that unusual circumstances existed which caused the Grievant's absence and prevented his return to the job. Grievant was reinstated to his position with full backpay, benefits, and attorney's fees, including restoration of the sick leave the Grievant used.

Department of Safety v. John J. Whitson, IO/5-17-95. 14 APR 342.

***11 I.O. 1995 AWARD WHERE HARSHNESS OF DISCIPLINE EXCEEDED SERIOUSNESS OF MISCONDUCT**--Termination was reversed after it was determined that, while the Grievant did engage in improper conduct, the discipline was too harsh under the circumstances. After consideration of the record, a thirty (30) day suspension was imposed. No attorney's fees were awarded because the Grievant was not considered a successfully appealing employee in light of the fact that he did not prevail on all aspects of his appeal and was found to have engaged in conduct unbecoming a State employee.

In The Matter of Henry Herron, IO/5-16-95. 14 APR 225.

***11 I.O. 1994 DENIAL OF ATTORNEY'S FEES**--The Grievant was found not to be entitled to attorney's fees since the Department prevailed in its allegations that she violated Department policy.

Department of Finance and Administration v. Bobbie Morgan, IO/3-30-94. 14 APR 279.

***11 I.O. 1994 DUTY TO MITIGATE**--An employee who has been wrongfully discharged is entitled to receive his actual loss of wages, but has a duty to minimize the loss by seeking other employment. An employee is not required to go to heroic lengths in attempting to mitigate his damages, but is only required to take reasonable measures.

Department of Mental Health and Mental Retardation v. Charles Emesibe, IO/1-31-94. 15 APR 127.

***11 I.O. 1994 BACKPAY SET-OFF**--Once a set-off is claimed, the Department, after having wrongfully discharged the Grievant, has the burden of establishing the right to a set-off. The burden is on the employer (the Department) to establish that the employee (the Grievant) has failed to exercise reasonable diligence in mitigating his damages and therefore should be denied backpay and benefits.

Department of Mental Health and Mental Retardation v. Charles Emesibe, IO/1-31-94. 15 APR 127.

***11 I.O. 1994 BACKPAY SET-OFF CALCULATION**--Grievant's failure to supply sufficient information to calculate the correct set-off amount against the backpay gross pay figure does not dictate that backpay should be denied.

Department of Mental Health and Mental Retardation v. Charles Emesibe, IO/1-31-94. 15 APR 127.

***11 I.O. 1993 DETERMINING FACTOR IS WHETHER DISCHARGE WAS JUSTIFIED**--The key factor in backpay disputes is whether or not the Grievant's discharge was justified at the time it occurred. If the original termination of the Grievant is found to be proper, Tennessee law allows backpay reimbursement to the Grievant only if the Civil Service Commission, or an Administrative Law Judge sitting in its stead, rules in favor of the Grievant.

Department of Correction v. Linda Johnson, IO/11-19-93. 15 APR 136.

***11 I.O. 1993 UNEMPLOYMENT BENEFITS**--Grievant's income deduction shall not include any unemployment benefits received, in the absence of an agreement with the State that there will be no attempt on the part of the Department of Employment Security to recoup such unemployment compensation benefits from the backpay award in a case.

Frank Mahon v. Department of Human Services, IO/11-2-93. 15 APR 67. *Reversed in Chancery* 20 APR 1. *See also* 20 APR 9.

***11 I.O. 1993 RULING IN FAVOR OF APPEALING EMPLOYEE REQUIRED**--T.C.A. §8-30-328(e) determines that backpay shall be awarded "when the commission rules in favor of an appealing employee." Subsection (f) of the same statute provides that attorney's fees may be awarded "to a successfully appealing employee." For an employee to be awarded backpay, the employee's grievance must be decided in favor of the employee. In the present case, the fact that the situation arose through no fault of the Grievant's own, weighs in favor of the Grievant being awarded full backpay, attorney's fees, and benefits commensurate with his being restored to his former position.

Department of Correction v. Perry Sanders, IO/6-25-93. 15 APR 103.

12. SPECIAL LEAVE

***12 Tenn. App. 1984 RELIGIOUS DAYS**--The employer need not provide special leave if employee at the time employment was accepted was aware of the provisions for annual, sick and special leave, and at the time of employment did not seek an understanding with employer about the need for leave on special days of (religious) rest and nevertheless chose to use up all accumulated annual and sick leave.

DePriest v. Puett, et al., 669 S.W.2d 669 (Tenn. Ct. App. 1984). 3 APR 71.

***12 Tenn. App. 1983 DENIAL OF LEAVE; BURDEN OF PROOF**--Burden is upon employee to show that denial of special leave was arbitrary or capricious.

Cogdill v. Civil Service Commission, (Tenn. Ct. App. June 2, 1983). 3 APR 98.

***12 Tenn. App. 1983 GROUNDS FOR DISCHARGE**--If denial of special leave is a legitimate and valid exercise of discretion, then failure to report for duty is a valid ground for discharge.

Cogdill v. Civil Service Commission, (Tenn. Ct. App. June 2, 1983). 3 APR 98.

***12 Tenn. App. 1983 PREVIOUS LEAVE AS GROUNDS FOR REFUSAL OF SUBSEQUENT LEAVE**--A previous leave in itself is valid ground for refusal of a subsequent leave within a short period of time.

Cogdill v. Civil Service Commission, (Tenn. Ct. App. June 2, 1983). 3 APR 98.

***12 I.O. 1995 EXHAUSTION OF LEAVE; WARNING OF TERMINATION**--A Department must give some warning of termination prior to instituting it. At the end of any authorized special leave without pay, an employee who has exhausted all other types of leave should logically be in the same position he would have been in had he been denied the special leave in the first place--that is, one of having either to return to work or lose the job. Consequently, the Department should afford an employee an opportunity to return to work prior to terminating him from State service.

Department of Youth Development v. Steve Davis, IO/5-22-95. 14 APR 326.

***12 I.O. 1995 DENIAL OF SPECIAL LEAVE**--This case involves the Grievant's termination from State service based on the denial of further special leave without pay after a period of previously approved special leave. The resolution of this case turned on the determination of whether it was proper to deny further leave to the Grievant and terminate him from State service without allowing him an opportunity to return to work at the conclusion of authorized leave and whether the Grievant made a

reasonable effort to report back to work after receiving notice of the denial of further leave. The administrative law judge ruled that 1) the Department should have afforded the Grievant an opportunity to return to work prior to terminating him from State service, 2) the Grievant made a reasonable effort to return to work after receiving notice of denial of further leave, 3) the termination of the Grievant should be reversed, and 4) the Grievant should be reinstated to his former position with no break in his status as a State employee for purposes of insurance.

Department of Youth Development v. Steve Davis, IO/5-22-95. 14 APR 326.

13. EMPLOYEE REDUCTIONS IN FORCE

***13 Ch. Ct. 1984 RIF GUIDELINES ARE NOT "RULES" UNDER UAPA**--RIF guidelines are not rules which are required to be promulgated under the Uniform Administrative Procedures Act.

Huffman v. Civil Service Commission, No. 81-2471-I (Davidson County Ch. Ct. January 5, 1984). 3 APR 12.

***13 Ch. Ct. 1984 RETREATING AND BUMPING RIGHTS**--Employees may not bump or retreat across departmental lines.

Huffman v. Civil Service Commission and TBI, No. 81-2471-I (Davidson County Ch. Ct. January 5, 1984). 3 APR 12.

***13 Ch. Ct. 1983 RETREATING RIGHTS**--Administrative Law Judge held that guidelines providing for certain "retreating" rights for laid off employees due to a reduction-in-force do not take away all the discretion of the appointing authority. The case was remanded, but the above rule was not overturned. Court of Appeals ruled transfer already in effect, a given set of facts may be ample grounds for termination by abolishment of job for lack of fund. Another set of facts may be ample grounds for refusal of retreating and bumping rights. The facts which support the two named actions may or may not support a discharge from a new assignment given and accepted under the retreat and bumping rights.

Lollar v. Civil Service Commission, No. 81-2059-II (Davidson County Ch. Ct. February 8, 1983). 1 APR 232. Appealed to Court of Appeals and remanded on November 9, 1983. 2 APR 570.

***13 OAG 1986 SALARIES**--The salary of an employee who is transferred to a position of lower rank due to a reduction-in-force may be reduced to a level within the salary range for the lower class, or upon request of the appointing authority, the Commissioner of Personnel may approve payment at a salary above the permissible rate in the lesser position.

1986 Op. Tenn. Att'y Gen. No. 86.107 (June 13, 1986). 6 APR 343.

***13 OAG 1985 RECALL**--A laid-off employee must be considered for a position until he/she accepts position or requests removal from the register.

1985 Op. Tenn. Att'y Gen. No. 85-073 (March 11, 1985). 5 APR 164.

***13 OAG 1984 VETERANS**--Tennessee Code Annotated, §8-30-321 does not prohibit the laying off of a veteran as long as non-veterans are working in the same department. However, that code section does provide for certain preferences to be given to veterans during reductions in forces.

1984 Op. Tenn. Att'y Gen. No. 84-003 (January 4, 1984). 5 APR 18.

***13 I.O. 1995 RIF COMPLIANCE; DUE PROCESS**--The State was in compliance with an approved reduction-in-force (RIF) plan when it displaced Grievant from his position. Grievant was not denied minimum due process as a result of implementation of the RIF plan.

Department of Correction v. Ben Sells, IO/5-8-95. 9 APR 172.

***13 I.O. 1985 RE-CREATION OF POSITION**--The Civil Service Commission does not have the authority to order an agency to create a new position for a Grievant, or to recreate a position that was abolished pursuant to a reorganization.

Sarah Mathews v. Department of Agriculture, IO/5-31-85. 6 APR 100.

***13 I.O. 1985 DEPARTMENTAL REORGANIZATION**--When it is established through pre-hearing motions and pleadings that the Grievant's transfer and new job assignment was the result of a departmental reorganization, and the Grievant is unable to demonstrate to the Commission any remedy which it has authority to impose, there is no genuine issue as to any material fact and the State is entitled to a judgment in its favor as a matter of law pursuant to a motion for summary judgment under Rule 56 of the Tennessee Rules of Civil Procedure.

Sarah Mathews v. Department of Agriculture, IO/5-31-85. 6 APR 100.

***13 I.O. 1985 TRANSFERS PURSUANT TO REORGANIZATION NOT GRIEVABLE**--The transfer of an employee pursuant to a structural reorganization of a department, the abolishment of positions, or a reduction in force, is authorized under T.C.A. §8-30-318 and is not a grievable matter that can be appealed to the Civil Service Commission.
Sarah Mathews v. Department of Agriculture, IO/5-31-85. 6 APR 100.

14. DISCRIMINATION

***14 U.S. S.Ct. 1985 UNINTENTIONAL DISCRIMINATION**--A finding that discrimination was intentional is not required.
Alexander v. Choate, 469 U.S. 287, 105 S.Ct. 712, 718 (1985).

***14 5th Cir. 1986 TERMINATION; EFFECT OF PROBATION**--The fact that the petitioner was on probation at the time of her termination is not relevant in a discrimination context, since the complex statutory scheme prohibiting employment decisions based on an individual's sex can not be avoided by classifying employees as probationary.
Smith v. Texas Department of Water Resources, 799 F.2d 1026 (5th Cir. 1986).

***14 Tenn. App. 1983 HANDICAP; ALCOHOLISM AND OTHER ILLNESSES**--Compulsive and excessive use of alcohol is an illness or disease commonly known as alcoholism. One afflicted with alcoholism is not entitled to be excused from misconduct to any extent beyond the indulgence of fault or failure extended to employees afflicted with other illnesses.
Duncan v. Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983). 3 APR 91.

***14 Tenn. App. 1983 HANDICAP; ALCOHOLISM; NOTIFICATION OF EMPLOYER**--An alcoholic employee, who submits to medical treatment and so notifies the employer of this treatment, is entitled to all the consideration accorded to other sick employees.
Duncan v. Civil Service Commission, 674 S.W.2d 734 (Tenn. Ct. App. 1983). 3 APR 91.

***14 F.O. 1987 HANDICAP; REASSIGNMENT**--Initial order required Department to reassign Grievant to another position not involving significant telephone work as "reasonable accommodation" to Grievant's handicap of being hearing-impaired. Because there appeared to be no requirement that reassignment be at the same level of pay, grievant's reassignment was to be a demotion to a clerical job which the evidence showed she could perform satisfactorily.
Ethel Lee White v. Tennessee Department of Employment Security, IO/4-7-87. FO/5-28-87. 16 APR 342.

***14 F.O. 1985 DISCRIMINATION BASED ON HANDICAP PROHIBITED**--Under both federal law (Section 504 of the Rehabilitation Act of 1973 and regulations promulgated pursuant thereto) and Governor Lamar Alexander's Executive Order No. 8 of October 15, 1979, discrimination on the basis of handicap is prohibited, but if a handicapped person is simply not qualified to perform the job, whether because of handicap-related or non-handicap-related reasons, or cannot with reasonable accommodation (that does not cause undue hardship to the employer) satisfactorily perform the job, he has no "right" to such job. In this case, the Petitioner established that he was handicapped, but the Department showed that it made reasonable accommodations for the Petitioner's handicaps, and that it had valid reasons for terminating him, based on his inability to perform his job in an adequate manner.
Darrell J. Dice v. Department of Human Services, IO/8-16-85. FO/11-21-85. 6 APR 184.

***14 I.O. 1992 HANDICAP; REASONABLE ACCOMMODATION**--If an individual has a handicap and is otherwise capable of performing a job, an employer has a responsibility to make reasonable accommodation for the handicap unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business. However, even if the State employer proves such a handicap exists, the State employer does not have to make such an accommodation if it is unreasonable or would create considerable hardship.
Department of Human Services v. Beviaum Brown, IO/12-7-92. 15 APR 145.

***14 I.O. 1985 HANDICAP; REASONABLE ACCOMMODATION**--State agencies that receive federal funding (such as Tennessee Department of Human Services) are subject to federal guidelines concerning employment of handicapped individuals. As such, they are required to provide reasonable accommodations for handicapped individuals who are "otherwise qualified" or "qualified in spite of their handicap" for a position. Likewise, Tennessee employers are required to take affirmative action to place handicapped individuals in State positions. A handicapped employee or applicant must receive this affirmative action unless they do not possess certain bona fide occupational qualifications for the job.
Penley v. Department of Human Services, IO/4-16-85. 5 APR 243.

***14 I.O. 1984 DISCRIMINATING ACTS**--Rarely is a single action sufficient to show discrimination. The norm is to prove discrimination through a series of either coordinated or independent conscious acts.
Department of Transportation v. Jackson, IO/11-20-84. 3 APR 115.

15. CONSTITUTIONAL LAW ISSUES

***15 8th Cir. FOURTH AMENDMENT; SEARCH OF EMPLOYEE VEHICLES AT CORRECTIONAL INSTITUTIONS**--Security considerations make it reasonable to search employee's vehicles on the institution grounds outside fenced, secured areas if it can be shown that inmates have unsupervised access to the unsecured grounds. Such search may be conducted without cause, but must be done uniformly or by systematic random selection of employees' vehicles.
McDonald v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

***15 Tenn. App. 1990 PROCEDURAL DUE PROCESS; NOTICE OF SPECIFIC ALLEGATIONS**--Grievant was found to have been denied minimum due process when at each level of the grievance procedure he was faced with new or additional allegations to which he was unprepared to respond. In the court's opinion, the lack of adequate notice of the charges pending against him obviously affected the manner in which he could defend the charges before the Commission and probably resulted in the Commission's finding that he should be demoted from his position. The court held that the Commission was obligated to provide minimum due process in the form of notice of specific allegations of inefficiency to the Grievant before a hearing on the merits.
Danny Tinnel v. Department of Correction, No. 01-A-O1-9002-CH-00091 (Tenn. Ct. App. October 10, 1990). 16 APR 118.

***15 Tenn. App. 1990 DUE PROCESS; NO INTEREST IN CONTINUED EMPLOYMENT DURING PROBATIONARY PERIOD**--After prison employee was promoted from protected position, but while she was still on probation for new position, employee did not have property interest in continued employment that would entitle her to due process protection of Federal Constitution.
Christians v. Department of Correction, 790 S.W.2d 535 (Tenn. Ct. App. 1990).

***15 Tenn. App. 1989 PROCEDURAL DUE PROCESS REQUIREMENTS**--The essential requirements of due process are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. In the instant case, the evidence clearly shows that petitioner had notice of the provisions of Chapter 1120-2-1-.13(4) and an opportunity to respond before his "resignation." All that is required is an opportunity to respond, and petitioner cannot base his due process claim on the fact that he did not take advantage of that opportunity.
Yates v. Civil Service Commission, No. 89-187-II, 1989 WL 126716 (Tenn. Ct. App. October 25, 1989).

***15 Tenn. App. 1984 RELIGIOUS ACCOMMODATION**--Civil Service is not required to apply reasonable accommodation standard.
DePriest v. Puett, et al., 669 S.W.2d 669 (Tenn Ct. App. 1984). 3 APR 71.

***15 Tenn. App. 1983 RESTRICTING RELIGIOUS PRACTICES**--The State has the right to reasonably restrict the religious practices of its representatives in the performance of their state duties.
Goodwin v. Metro Board of Health, 656 S.W.2d 383 (Tenn. Ct. App. 1983).

***15 Ch. Ct. 1987 PROCEDURAL DUE PROCESS; PRETERMINATION HEARING**--Petitioner's right to pretermination hearing was violated because he was not given notice of the specific charges against him prior to the hearing. While there was a denial of due process, the Petitioner was not entitled to relief for deprivation of due process since it was established that the Petitioner would have been discharged even if a proper pretermination hearing complying with due process were conducted.
Harvey Felts v. Tennessee Civil Service Commission, No. 86-324-II (Davidson County Ch. Ct. January 20, 1987). 16 APR 285.

***15 Ch. Ct. 1986 FIFTH AMENDMENT; SELF INCRIMINATION**--Public employee can not be required to give an incriminating statement without first being informed that the statement can not or will not be used in any criminal proceedings against him.

Kilby v. Silvey, No. 85-235-II (Davidson County Ch. Ct. December 6, 1986). 17 APR 95.

***15 Ch. Ct. 1986 EXERCISE OF FIFTH AMENDMENT RIGHTS NOT GROUND FOR TERMINATION**--Public employee can not be terminated solely for exercising his Fifth Amendment right to remain silent.

Kilby v. Silvey, No. 85-235-II (Davidson County Ch. Ct. December 6, 1986). 17 APR 95.

***15 Ch. Ct. 1986 FIFTH AMENDMENT; VALID CLAIM**--To advance a valid claim for the right to remain silent under the Fifth Amendment, a public employee must cooperate with the instructions of his supervisor in the course of an investigation of that employee's conduct. The public employee must cooperate in the investigation up to the point just short of actually making any self-incriminating statements. The Fifth Amendment privilege to remain silent does not extend to failing to respond to requests for statements, failure to attend meetings, or other insubordinate behavior.

Kilby v. Silvey, No. 85-235-II (Davidson County Ch. Ct. December 6, 1986). 17 APR 95.

***15 F.O. 1995 PROCEDURAL DUE PROCESS; EX PARTE COMMUNICATIONS**--The Grievant in this matter alleged that his constitutional right to due process was violated by the manner in which the Level IV grievance decision was made by the Commissioner. The Grievant asserted that it was fundamentally unfair that *ex parte* recommendations should supersede a decision based upon evidence presented at a contested case proceeding. The Administrative Law Judge held that the Commissioner's usual practice of having *ex parte* contact with wardens and other supervisory personnel after the conclusion of a Level IV hearing and of allowing such *ex parte* communications to determine the outcome of grievances did violate the Grievant's right to due process. A decision made after a Level IV grievance hearing should be based only on information gathered and/or presented at the hearing. Any extra-hearing investigation which uncovers any evidence, including evidence as to any assessment of the seriousness of or harm caused by a grievant's alleged conduct, should lead to notification of the grievant and a reconvening of the hearing in order to provide the grievant with an opportunity to respond. Consequently, the termination was reversed, and a 20-day suspension was issued. The Department was ordered to reinstate the Grievant to his previous position. The Grievant was awarded backpay (to be offset by any income earned since termination and the pending suspension) and reasonable attorney's fees as result of prevailing on appeal.

Department of Correction v. Edmond D. Wiggins, IO/6-17-94. FO/1-9-95. 9 APR 108. *Remanded* for reconsideration. 20 APR 30.

***15 F.O. 1994 MINIMUM DUE PROCESS WHERE GRIEVANT GIVEN OPPORTUNITY TO PRESENT HER CASE**--Grievant's contention that she was not afforded minimum due process was found to be without merit after she was given a full and fair opportunity to present her side of the case prior to any disciplinary action being taken. Moreover, the Grievant was again given a full opportunity to present her case at the Level IV hearing before the Commissioner.

Joyce LaFaye Cotton v. Department of Youth Development, IO/10-24-94. FO/11-3-94. 9 APR 180.

***15 F.O. 1988 DUE PROCESS; LEAVE WITH PAY**--There is no violation of Respondent's due process rights when Respondent is placed on administrative leave with pay. Respondent's right to due process is not triggered when there is no deprivation of Respondent's property interest in lost benefits or salary. Even were a due process violation to be found, Respondent's termination would be upheld where 1) Department showed Respondent was terminated for valid reasons rather than because of any due process violation and 2) Respondent would have been terminated even with the optimal level of due process.

Department of Correction v. Edward M. Scruggs, IO/6-9-88. FO/9-13-88. 17 APR 35.

***15 F.O. 1985 PROCEDURAL DUE PROCESS; PRE-TERMINATION HEARING**--Grievant's due process rights were violated because she was not provided with an opportunity for a hearing at a meaningful time, by virtue of the institution's policy of referring to one to request a hearing and have a hearing held within 24 hours of notice. However, State proved that Grievant would have been discharged even if she had been given proper opportunity for a hearing, by showing just cause for the termination. Therefore, neither reinstatement nor back pay proper in this case.

Emma Beasley v. Department of Mental Health and Mental Retardation, IO/7-9-85. FO/11-21-85. 6 APR 136.

***15 F.O. 1985 PROCEDURAL DUE PROCESS; PRE-TERMINATION HEARING**--Petitioner denied opportunity for pre-termination hearing at meaningful time (no notice of charges until hearing) or in a meaningful manner (hearing held before same person who conducted investigation and recommended termination); therefore, Petitioner's right to due process of law was violated. However, Department proved that Petitioner would have been discharged even with proper opportunity for a hearing, by showing valid reasons for the termination; thus, neither reinstatement nor back pay proper in this case.

Darrell J. Dice v. Department of Human Services, IO/8-16-85. FO/11-21-85. 6 APR 184.

***15 F.O. 1984 PROCEDURAL DUE PROCESS; PRE-TERMINATION HEARING**--Due process requires that when the State seeks to terminate a protected interest, it must give "notice and opportunity for hearing appropriate to the nature of the case. Minimum due process requires: 1) notice of the deficiencies, 2) the opportunity to examine evidence against her/him and 3) the right to present her/his side of the story to a reasonably detached and neutral decisionmaker.

Department of Military v. Lee, IO/7-30-84. FO/9-21-84. 4 APR 605.

***15 I.O. 1995 DUE PROCESS**--The State was in compliance with an approved reduction-in-force (RIF) plan when it displaced Grievant from his position. Grievant was not denied minimum due process as a result of implementation of the RIF plan.

Department of Correction v. Ben Sells, IO/5-8-95. 9 APR 172.

***15 I.O. 1985 FIRST AMENDMENT; PUBLIC EMPLOYEES**--Public employees' right of free speech must be balanced against the interest of the State in promoting the efficiency of public service. Also, the type of public service work an employee chooses determines the right of free speech he has and can exercise. There is a difference between the rights of a school teacher and a law enforcement officer, citing Watts v. Civil Service Board of Columbia Tennessee, 606 S.W.2d 274 (Tenn. 1980).

Department of Correction v. Ron Bell, IO/5-6-85. 5 APR 263.

***15 I.O. 1985 FIRST AMENDMENT; PUBLIC EMPLOYEES**--Government employees do not shed their First Amendment rights, however, the scope of their right to speak freely is not as broad as a private citizen. Also, a public employee does not have the right to strike, and termination for such a strike does not infringe on their First amendment rights.

Department of Correction v. Ron Bell, IO/5-6-85. 5 APR 263.

27.00 STATE BUILDING COMMISSION

NO CASES REPORTED

28.00 PUBLIC SERVICE COMMISSION

Tenn. App. 1983 CONCURRENT FINDINGS, AGENCY AND TRIAL COURT--A concurrent finding between an agency and the trial court (for example, Chancery Court) on any issue of fact is conclusive on Court of Appeals, pursuant to C.F. Industries v. Tennessee Public Service Commission, 599 S.W.2d 536 (Tenn. 1980).
Hillcrest Convalescent Home, Inc. and Crestview Convalescent Home, Inc. v. Fowinkle, No. 82-234-II (Tenn. Ct. App. February 1, 1983). 3 APR 150.

Ch. Ct. 1984 ORDERS--The Public Service Commission is not required to make findings of fact and conclusions of law on what a party asserts are the issues; the Commission's responsibility is to make findings and conclusions on those factors which T.C.A. §65-15-107(a) requires.
Jackson Express, Inc. v. Keith Bissell, et al., No. 83-958-III (Davidson County Ch. Ct. May 30, 1984). 4 APR 455.

OAG 1984 EX PARTE COMMUNICATIONS--The submission of letters concerning compromise of a pending rate case by counsel for the utility and the Public Service Commission staff during a recess of the deliberative session did not constitute ex parte communications by either side where each side was informed of the content of the other's letter and had opportunity to respond.
 Att. Gen. Op. to Henry Walker (March 14, 1984). 3 APR 270.

OAG 1983 SEPARATION OF FUNCTIONS--T.C.A §4-5-303(b) prohibits an employee of the Public Service Commission Accounting Division, subject to the authority and direction of the Director of that Division, from assisting or advising the Commissioners in a contested case in which the Accounting Division participates as investigation and witness.
 Att. Gen. Op. to Henry Walker (October 18, 1983). 2 APR 547.

29.00 **STATE BOARD OF EQUALIZATION**

OAG 1987 UNAUTHORIZED PRACTICE OF LAW--Representation of a taxpayer before the State Board of Equalization (including filing of an administrative appeal to the Board) constitutes unauthorized practice of law if such representation is performed by a person other than the taxpayer himself or a person not licensed to practice in Tennessee. Such representation would violate both T.C.A. §23-3-103(b) and Tennessee Supreme Court Rules 6, 7, and 9 which regulate admission, licensing, and disciplinary enforcement of attorneys. Under T.C.A. §23-3-101(a), this decision applies equally to any unauthorized practice of law before "any body, board, committee, or commission constituted by law or having authority to settle controversies."

1987 Op. Tenn. Att'y Gen. No. 87-58 (April 2, 1987). 16 APR 276.

30.00 **TENNESSEE BOARD OF REGENTS**

30.02

I.O. 1994 DISCRIMINATION--Under student disciplinary rules, expulsion is allowed for certain offenses. In the present case, the Administrative Law Judge determined that expulsion was the appropriate discipline for the Respondent's conduct. However, the Respondent argued that, because of her mental condition, she was protected under the Americans with Disabilities Act of 1990 and that the expulsion was an act of discrimination. The Administrative Law Judge decided that the Act did not apply since the Respondent presented a risk to others and since no reasonable accommodation by the school would ensure that the Respondent's problems would remain in check. Citing federal case law, the Administrative Law Judge reasoned that, even if the Act did apply, the school was not obligated to substantially modify standards of conduct if those standards are reasonable. The Administrative Law Judge stressed that the Respondent's conduct, not her condition, was at issue in the present case. In light of this, the Respondent was not found to be exempt from reasonable rules of conduct or reasonable disciplinary sanctions.

Roane State Community College v. Nichole Hulbert, IO/6-16-94. 15 APR 157.

I.O. 1992 GROSS MISCONDUCT--While the Tennessee Department of Personnel Rules do not apply directly to the Respondent, it is obvious that the Board of Regents recognizes the parallel circumstances existing between a Board of Regents employee and a State of Tennessee employee as the Board has mirrored the State's policy on gross misconduct in establishing its own policy on gross misconduct. In the absence of other authority, it appears reasonable to be guided by the Department of Personnel's definition of those actions that would constitute gross misconduct.

Tennessee State University v. Michael Phillips, IO/12-16-92. 15 APR 166.

31.00 **COMMISSION ON AGING**

NO CASES REPORTED

32.00 **TENNESSEE HOUSING DEVELOPMENT AGENCY**

I.O. 1994 TERMINATION OF RENTAL ASSISTANCE--Termination of rental assistance upheld for Respondent's knowing failure to report accurate annual income information. The Respondent was found to have participated in fraud after violating the family obligation under 24 C.F.R. 882.118(a)(1) to provide accurate qualifying information.
In the Matter of: Linda Carter, IO/9-29-94. 15 APR 178.

33.00 **ALCOHOLIC BEVERAGE COMMISSION**

- 33.01 Liquor by the Drink
 - 33.02 Retail Package Store
 - 33.03 Wholesaler
 - 33.04 Non-resident Liquor Seller
 - 33.05 Employee Permits
 - 33.06 Disciplinary Action
 - 33.07 Confiscation
-

33.01 **LIQUOR BY THE DRINK**

- 1. In General
 - 2. Restaurants
 - 3. Non-profit Associations
-

1. IN GENERAL

***1 Tenn. 1956 LIQUOR LICENSE**--The sale of alcoholic beverages is a privilege. One does not obtain any property rights in a liquor license. T.C.A. §57-4-301.

Safier v. Atkins, 288 S.W.2d 441 (Tenn. 1956)

***1 OAG 1985 WHOLESALER OR LICENSEE**--It is not legal for an individual who owns stock in a corporation which holds a Tennessee license to sell alcoholic beverages at wholesale to have any kind of ownership interest in a corporation licensed to serve liquor by the drink. The term "retailer" and "retail sale" as defined in T.C.A. §57-3-101 do not include liquor by the drink licensees.

1985 Op. Tenn. Att'y Gen. No. 85-094 (March 29, 1985). 5 APR 239.

***1 OAG 1984 FIREARMS**--An owner or person in control of a premises licensed to sell alcoholic beverages, or his agent or employee, who is not otherwise permitted to carry a weapon with the intent to go armed pursuant to T.C.A. §39-6-1702, may not lawfully carry a firearm for that purpose while on the premises.

1984 Op. Tenn. Att'y Gen. No. 84-163 (May 15, 1984). 5 APR 32.

***1 OAG 1984 PASSENGER BOATS**--A commercial passenger boat licensed pursuant to T.C.A. §57-4-101 is authorized to sell alcoholic beverages by-the-drink outside of jurisdictions which have approved such sales by local referendum, except that no such sales may be made while the boat is docked in a county which has not, by local referendum, approved both the sale of liquor-by-the-package and liquor-by-the-drink. So long as the boat is not docked in a county which has not, by local referendum, approved both the sale of liquor-by-the-drink and liquor-by-the-package, the operator may sell alcoholic beverages by-the-drink in any county, including those which have approved the sale of liquor-by-the-package but not liquor-by-the-drink.

1984 Op. Tenn. Att'y Gen. No. 84-146 (May 2, 1984). 5 APR 28.

***1 OAG 1983 REGULATION; CITY VS. STATE**--A city may not, by ordinance, validly restrict the hours of sale of beer for consumption on the premises contrary to the hours mandated by state law, in those facilities licensed under state statute for the sale of liquor-by-the-drink.

Att. Gen. Op. to Carl Koella, Jr. (August 26, 1983). 2 APR 450.

***1 OAG 1983 MIXING BARS**--While brown-bagging is legal in Tennessee, mixing bars are not; therefore, a municipal ordinance which attempts to regulate mixing bars is invalid.

1983 Op. Tenn. Att'y Gen. No. 83-258 (July 15, 1983). 2 APR 420.

***1 OAG 1983 CONTESTS**--A liquor manufacturer may sponsor a contest in Tennessee if the contest does not require any consideration from the participants and if liquor itself is not a prize.

1983 Op. Tenn. Att'y Gen. No. 83-250 (July 11, 1983). 2 APR 416.

***1 OAG 1983 REBATES**--Liquor and wine manufacturers and importers may offer rebates or refunds to Tennessee consumers by direct mail.

1983 Op. Tenn. Att'y Gen. No. 83-255 (July 11, 1983). 2 APR 418.

***1 OAG 1982 RADIO & TV ADVERTISING**--Alcoholic Beverage Commission Rule 0100-1-.01 (3)(a), prohibiting radio or television advertising of the availability of alcoholic beverages by liquor by-the-drink licensees, is a valid, constitutional restriction on commercial speech.

Att. Gen. Op. to Elyon Davis (January 19, 1982). 1 APR 114.

***1 OAG 1977 BROWN-BAGGING**--"Brown-bagging" is legal in Tennessee, and there is no state law prohibiting the consumption of alcoholic beverages at establishments possessing an on-premise beer permit but not a liquor by-the-drink license.

Att. Gen. Op. to Gary Gerbitz (June 14, 1977). 1 APR 19.

***1 F.O. 1983 APPLICATION FEE**--One may not pay an application fee from the proceeds of a loan from a licensee, under T.C.A. §57-3-210(a).

Alcoholic Beverage Commission v. ROF's Liquors, Inc., No. 2 Liquors, No. 7 Liquors, IO/4-22-83. FO/5-6-83. 1 APR 330.

2. RESTAURANTS

***2 F.O. 1984 DEFINED**--The Alcoholic Beverage Commission identified eight factors relevant to the determination of whether an establishment is a "restaurant" under T.C.A. §57-4-102(h)(1).

Alcoholic Beverage Commission v. Bud's Hixon Restaurant and Lounge, IO/10-1-84. FO/10-11-84.

***2 I.O. 1994 DETERMINATION OF PRINCIPAL BUSINESS OF ESTABLISHMENT**--When food sales account for fifty-one percent (51%) or more of the establishment's gross sales, *prima facie* evidence exists that the serving of meals is the principal business conducted by the establishment. However, when food sales account for less than fifty-one percent, the principal business of the establishment is determined through the consideration of several factors:

1. The percentage of gross sales obtained from food;
2. Any history of operation as a restaurant without the serving of alcohol;
3. The presence of income-producing activities other than the service of food, the percentage of income derived from such activities, and the priority given to such activities as advertising etc.;
4. The percentage of space allotted to the service of food as opposed to that allotted to the serving of alcohol or other activities;
5. The number and percentage of personnel employed in preparation and serving of food;
6. The diversity of food offered and the times offered;
7. The ratio of investment in equipment and fixtures required in the preparation and serving of food versus the investment in equipment and fixtures for the serving of alcohol or other income-producing activities; and
8. Any other factors indicating an intent to operate as a restaurant and to have as the principal business the serving of meals.

Alcoholic Beverage Commission v. Sam Gibson d/b/a Tu La Fe Restaurant, IO/7-14-94. 15 APR 186.

***2 I.O. 1994 REVOCATION OF LIQUOR-BY-THE-DRINK LICENSE; PRINCIPAL BUSINESS NOT FOUND TO BE FOOD SALES**--Respondent's liquor-by-the-drink license was revoked for the failure of the facility to meet and maintain the requirements of a restaurant after it was determined that the Respondent's food sales accounted for less than 51% of gross

sales. Several factors were considered in determining the principal business of the establishment. See In the Matter of: The Application of the Library Midtown Restaurant, IO/1-24-80.
Alcoholic Beverage Commission v. Sam G. Gibson d/b/a Tu La Fe Restaurant, IO/7-14-94. 15 APR 186.

***2 I.O. 1992 PRINCIPAL BUSINESS**--The intent of T.C.A. §57-4-102 is to ensure, by placing stringent requirements upon obtaining a restaurant liquor-by-the-drink license, that the serving and/or selling of alcoholic beverages will not be the principal business or objective of the establishment--but merely incidental to and complimentary to the serving and selling of food.
Alcohol Beverage Commission v. D&S Business Ventures, Inc., IO/3-6-92. 15 APR 196.

***2 I.O. 1992 SALES OF FOOD REQUIRED**--There must not only be equipment, supplies, and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business, but also actual and substantial sales of food. It is the actual rather than potential or simulated service which is required.
Alcohol Beverage Commission v. D&S Business Ventures, Inc., IO/3-6-92. 15 APR 196.

***2 I.O. 1992 PRINCIPAL BUSINESS; DETERMINATION OF**--When "food sales account for 51%" or more of the establishment's gross sales, prima facie evidence exists that the serving of meals is the principal business conducted by the establishment. However, when food sales account for less than 51%, the court must determine the principal business of the establishment by considering the following factors:

1. The percentage of gross sales obtained from food;
2. Any history of operation as a restaurant without the serving of alcohol;
3. The presence of income-producing activities other than the service of food, the percentage of income derived from such activities, and the priority given to such activities as advertising, etc.;
4. The percentage of space allotted to the service of food as opposed to that allotted to the serving of alcohol or other activities;
5. The number and percentage of personnel employed in preparation and serving of food;
6. The diversity of food offered and the times offered;
7. The ratio of investment in equipment and fixtures required in the preparation and serving of food versus the investment in equipment and fixtures for the serving of alcohol or other income-producing activities; and
8. Any other factors indicating an intent to operate as a restaurant and to have as the principal business the serving of meals.

Alcohol Beverage Commission v. D&S Business Ventures, Inc., IO/3-6-92. 15 APR 196.

3. NON-PROFIT ASSOCIATIONS

***3 Tenn. App. 1984 DUES-PAYING MEMBERSHIP**--Not-for-profit club denied license for failing to meet the requirements of T.C.A. §57-4-102(a) as it did not have 100 members regularly paying dues. The issuance of temporary memberships by employees of the landlord upon payment of a fee and filing of an application, absent some review and approval by the club does not meet this requirement. Club must be organized and operated for non-profit purposes only and not to enhance restaurant business of original corporation and landlord of club.
Alcoholic Beverage Commission v. Old Jonesborough Society for Social Enlightenment, Inc., No. 83-444-III (Tenn. Ct. App. July 20, 1984). 6 APR 25. No. 83-807-II (Davidson County Ch. Ct. November 1, 1983). 1 APR 311. IO/4-8-83.

***3 OAG 1979 TWO YEAR REQUIREMENT**--A bare corporate charter may indicate that a club has been in existence for the two (2) year requirement of T.C.A. §57-4-102 (formerly T.C.A. §57-153(3)). There are no specific elements which must be shown to establish a two (2) year existence.
Att. Gen. Op. to Elyon Davis (November 14, 1979). 1 APR 72.

***3 OAG 1979 DEFINED**--An organization other than a corporation may be a non-profit association for the purposes of T.C.A. §57-153(3).

Att. Gen. Op. to Thomas Gutherie, Jr. (October 17, 1979). 1 APR 24.

***3 OAG 1978 PRIVATE CLUB MEMBERSHIPS**--A private club need not have maintained a membership of 100 persons for two (2) years to become eligible to sell liquor-by-the-drink. The club need only have 100 members at the time of the application and throughout the period it holds a license.

Att. Gen. Op. to Thomas Gutherie, Jr. (October 17, 1978). 1 APR 24.

***3 OAG 1975 TWO YEAR REQUIREMENT**--A club originally chartered as a corporation for-profit, which has neither made a profit nor distributed earnings to shareholders, is not a non-profit association for purposes of T.C.A. §57-4-102 and must attain non-profit status two years prior to its application for license to sell liquor-by-the-drink.

1975 Op. Tenn. Att'y Gen. No. 75-31 (September 12, 1975). 1 APR 1.

***3 F.O. 1985 CONTROLLED BY FOR-PROFIT CORPORATION**--Applicant, Social Club 500, failed to prove it operated exclusively not-for-profit as it was controlled by Camelot, Inc., the original corporation and landlord of the golf country club. Dues for 100 members were paid by a trailer park owned by the landlord and the funds were transferred into an account controlled by the landlord. Applicant operated under the name of the landlord in violation of Rule 0100-1-.05(8)(9).

Alcoholic Beverage Commission v. Social Club 500, IO/5-31-85. FO/8-14-85. 6 APR 103.

***3 F.O. 1984 TWO YEAR REQUIREMENT**--License denied to non-profit club for failing to meet requirements of T.C.A. §57-4-102(a). Non-profit club, having surrendered license for violations, changed name and location to name and location of for-profit club in attempt to utilize its previous period of existence to satisfy the two (2) year statutory requirement.

Alcoholic Beverage Commission v. Cowboys, Inc., IO/6-6-84. FO/7-16-84. 4 APR 481.

***3 F.O. 1983 BURDEN OF PROOF**--Applicant has burden of proof to show by a preponderance of the evidence that it meets the statutory criteria set forth in T.C.A. §57-4-102(a). Where the club exercised no control over admission to membership and annual dues were so small as to be indistinguishable from a cover charge, the Commission found that the club did not have members within the meaning of the statute. The club was also found to be operating for profit.

Alcoholic Beverage Commission v. East Tennessee Building Corporation, IO/10-14-83. FO/11-15-83. 2 APR 537.

***3 I.O. 1983 LEGISLATIVE INTENT**--Repeated usage of the words "organized", "operated" and "existing" in the first sentence of T.C.A. §57-4-102(a), strongly evidences a legislative intent that the Alcoholic Beverage Commission look to the realities of the applicants' situation. Where DHW, Inc. (landlords/management contractor) and its individual stockholders organized and operated Cheer Haus as an adjunct to their for-profit business with no proof of any corporate activity beyond two (2) yearly meetings and a single social event, applicant did not meet its burden of proving by a preponderance of the evidence that it meets the criteria of T.C.A. §57-4-102(a).

Alcoholic Beverage Commission v. Cheer Haus, Inc., IO/2-25-83. 1 APR 251.

33.02 **RETAIL PACKAGE STORE**

1. In General
2. Licenses

1. IN GENERAL

***1 OAG 1981 ELECTION DAY SALES**--Repeal of State law prohibiting the sale of alcoholic beverages on election days also bars a city or municipality, by local ordinance, from prohibiting such retail sales. The regulation of such retail sales is governed by State law; however, local governments may regulate the sale of beer in establishments which have received a beer permit from the city.

Att. Gen. Op. to Lawrence Ray Whitley (September 2, 1981). 1 APR 107.

***1 F.O. 1987 MOTION TO DISMISS; STANDARD**--When a respondent moves to dismiss at the conclusion of a petitioner's case in an administrative proceeding before an administrative law judge, the standard to apply is whether the petitioner has made out his or her case by a preponderance of the evidence. If the petitioner's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the petitioner on the merits, or the judge, in his discretion, may decline to render judgment until the close of evidence; but the action should be dismissed if, on the facts found under the applicable law, the petitioner has shown no right to relief.

Alcoholic Beverage Commission v. Grannie White Liquors, FO/4-23-76. 16 APR 313.

***1 F.O. 1976 LOCATION RESTRICTIONS**--The Alcoholic Beverage Commission found that the Metro Government acted capriciously, arbitrarily, and illegally in refusing Petitioner a certificate of good moral character because city code restricts the location of package liquor stores to inner city and Petitioner wished to be located elsewhere. The Commission allowed a reasonable number of stores to locate outside of inner city.

Alcoholic Beverage Commission v. Belle Meade Liquors, FO/4-23-76. 1 APR 4.

2. LICENSES

***2 OAG 1984 LANDLORD; MULTIPLE LEASES TO LICENSEES**--T.C.A. §57-3-406 does not prohibit a landlord from owning and leasing two or more properties to multiple retail licensees, so long as the landlord's interest is disclosed and approved pursuant to T.C.A. §57-3-104(c)(2) and §57-3-210(f). T.C.A. §57-3-406(a) does prohibit any retail licensee, including a landlord who is a retail licensee, from leasing other premises for use as a retail package store. An individual who leases premises to a retail package store licensee may be denied his or her own retail license based upon the existence of such prior indirect interest. *See also* Alcoholic Beverage Commission v. Bradley Package Store, IO/4-22-85. FO/8-8-85. 6 APR 162, 163.

1984 Op. Tenn. Att'y Gen. No. 84-301 (November 8, 1984). 5 APR 60.

***2 OAG 1984 LANDLORD AS LICENSEE**--T.C.A. §57-3-210(f) does not require a landlord in a percentage lease arrangement to be the retail package store licensee so long as the disclosure requirements of T.C.A. §57-3-104(c)(2) and §57-3-210(f) are satisfied. The Alcoholic Beverage Commission has the authority to make a factual finding that a landlord, rather than a licensed applicant, would be the person in control of the retail license. In such a case, the ABC could deny the license or could require the landlord to be the licensee.

1984 Op. Tenn. Att'y Gen. No. 84-301 (November 8, 1984). 5 APR 60.

***2 OAG 1982 AGE OF CORPORATE SHAREHOLDERS**--Retail liquor license may be issued to a corporation, otherwise qualified, which has as a shareholder a person under the age of eighteen (18) years, which is the age of majority.

Att. Gen. Op. to Elyon Davis (January 11, 1982). 1 APR 110.

***2 OAG 1979 HUSBAND AND WIFE**--Retailer's license may be issued to the husband of a woman who holds a retailer's license so that the husband may operate a retail liquor store in the same municipality as the wife, so long as the husband has no interest, direct or indirect, in the business operated by the wife.

Att. Gen. Op. to ABC (July 25, 1979). 1 APR 41.

***2 OAG 1979 NO STATE OFFICERS OR EMPLOYEES MAY HOLD A LICENSE**--No state officer or employee may hold a license authorizing the wholesale or retail sale of alcoholic beverages. This includes a member of the Board of Optometry.

Att. Gen. Op. to Don Hood (March 22, 1979). 1 APR 21.

***2 OAG 1978 OWNERSHIP INTEREST LIMITED TO ONE STORE**--Majority shareholder of a corporation that possesses a retail liquor license may not lease real property and building to son's corporation for purposes of operating another retail liquor store.

Att. Gen. Op. to Thomas E. Guthrie, Jr. (October 23, 1978). 1 APR 27.

***2 F.O. 1995 LICENSED RETAILER**--The State failed to carry its burden of proof that the liquor license issued to the Respondent should be subject to revocation for violation of T.C.A. §57-3-406(a) which prohibits the operation of more than one retail business for those licensed under T.C.A. §57-3-204. The Administrative Law Judge held that T.C.A. §57-3-406(a) only applies to licensed retailers. No evidence was presented that suggested any licensed retailer had an interest in two retail liquor stores. Mr. Lucchesi had, at minimum, an indirect interest in two retail liquor stores, but he was not a licensed retailer. The only licensed retailer involved in this case, the Respondent, did not have an interest in more than one liquor store.

In re: Nikki's Liquor Store, IO/10-20-94. 15 APR 205. FO/3-16-95. 16 APR 202.

***2 F.O. 1995 MISLEADING INFORMATION REGARDING OWNERSHIP INTEREST IN LIQUOR STORE**--Respondent's license was revoked for failure to notify the Alcohol Beverage Commission (ABC) of the change in ownership of the property upon which Nikki's Liquor Store was located within 10 days of her gaining knowledge of this transaction. The fact that ABC was not notified of the ownership and operational status of Nikki's Liquor Store was in violation of T.C.A. §57-3-104(2). Respondent further misled the ABC when she failed to disclose a loan from a third party and stated that the money used to reopen the business had come from her retirement fund and from her husband. This was clearly the type of arrangement that ABC statutes and regulations were designed to prevent. One of the fundamental requirements of these statutes and regulations is to have the names of all persons with any ownership interest in a liquor store on record with the ABC. This filing requirement is critical to ABC's ability to regulate the liquor industry. The involvement of the third party in the ownership and operation of the liquor store should have been divulged to the ABC, and failure to do so places the Respondent in direct violation of T.C.A. §57-3-104(2). However, there was nothing in the record to suggest that the Respondent had any problems in the past with the ABC. Therefore, nothing in the initial order was held to operate as a bar to the Respondent receiving another retail liquor license in the future should she seek to re-apply.

In re: Nikki's Liquor Store, IO/10-20-94. 15 APR 205. FO/3-16-95. 16 APR 202.

***2 I.O. 1985 REVIEWABILITY OF CERTIFICATE OF COMPLIANCE ISSUANCE**--A certificate of compliance issued by the local governing authority to an applicant applying for a retail liquor license binds the Alcoholic Beverage Commission; it is not reviewable by the Commission, thus preventing the Commission from going behind it to determine whether or not the local governing authority was correct in issuing it.

Alcoholic Beverage Commission v. Burl M. Canter, IO/5-16-85. 5 APR 183.

33.03 **WHOLESALE**

OAG 1978 NO STATE OFFICERS OR EMPLOYEES MAY HOLD A LICENSE--No State officer or employee may hold a license authorizing the wholesale or retail sale of alcoholic beverages. This includes a member of the Board of Optometry. Att. Gen. Op. to Don Hood (March 22, 1978). 1 APR 21.

33.04 **NON-RESIDENT LIQUOR SELLER**

NO CASES REPORTED

33.05 **EMPLOYEE PERMITS**

OAG 1985 RELATIVES OF COMMISSION EMPLOYEES--T.C.A. §57-1-108 prohibits any listed relative of an employee of the Alcoholic Beverage Commission to be employed by a distillery, wholesale dealer or retail dealer, including liquor-by-the-drink and package store licensees. The requirement for an employee's permit at T.C.A. §57-3-204(c) and §57-7-203(h)(3) is directed primarily towards the personal qualifications of the employee of the licensee rather than as a basis for examining any family relationship under T.C.A. §57-1-108. While T.C.A. §57-1-108 does not specify the remedy for its violation, it appears clear that the Commission is precluded from either appointing or continuing the employment of an individual who has the prohibited relationship.

1985 Op. Tenn. Att'y Gen. No. 85-198 (June 19, 1985). 6 APR 390.

F.O. 1985 SERVING TO INTOXICATED PERSON--Restaurant that served customer ten drinks in one hour, resulting in customer's death, found to have served or furnished alcoholic beverages to a person who was visibly intoxicated in violation of T.C.A. §57-4-203, resulting in the suspension of the restaurant's liquor license for a period of 21 days.

Alcoholic Beverage Commission v. Overton Pub. Inc., d/b/a East End Grill, IO/5-16-85. 5 APR 290. FO/8-14-85. 6 APR 168.

33.06 **DISCIPLINARY ACTION**

1. In General
 2. Ownership Interest
 3. Taxes
-

1. IN GENERAL

***1 OAG 1979 PRIVATE CLUB IN DRY COUNTY**--A private club in a dry county which has not conducted a local option election is subject to all state liquor laws, and is also subject to local ordinances and laws of a municipality and/or county which do not conflict with state law.

1979 Op. Tenn. Att'y Gen. No. 79-201 (June 5, 1979). 1 APR 38.

***1 F.O. 1985 KNOWLEDGE OF AGE**--Liquor store charged with selling alcoholic beverages to persons known to be minors on six occasions; the state proved offenses in three of the six incidents charged. Suspension of thirty days per incident assessed, plus probation of three years with certain conditions, because of neglect and careless behavior and attitudes of liquor store personnel.

Alcoholic Beverage Commission v. Lizz's Package Store, IO/9-24-85. FO/12-5-85. 6 APR 228.

***1 F.O. 1985 MITIGATING SUSPENSION**--When licensee has not been serving liquor by-the-drink for a period of time just prior to and up to the time of a hearing on a disciplinary action, it is permissible to count these days towards fulfillment of a suspension period.

Alcoholic Beverage Commission v. Ernest & Thelma Randolph d/b/a Dac's Restaurant, IO/2-1-85. 5 APR 144. FO/2-7-85. 6 APR 57.

***1 F.O. 1984 BRIBERY**--Licensee, found guilty of offering a thing of value to an Alcoholic Beverage Commission employee in violation of T.C.A. §57-1-109, was fined one thousand dollars (\$1,000.00) pursuant to T.C.A. §57-1-201(b)(1). The facts of the case did not justify revocation of license pursuant to T.C.A. §57-1-110.

Alcoholic Beverage Commission v. Sam G. Gibbons and R. B. McCullough, Jr., d/b/a The Seahorse Club Restaurant and Lounge, IO/7-17-84. FO/9-18-84. 4 APR 600.

***1 F.O. 1984 FINE IN LIEU OF SUSPENSION**--The Commission has the authority to impose a fine in lieu of a suspension or revocation when it deems such appropriate. T.C.A. §57-1-201. When licensee paid all delinquent taxes, penalties and interest for violation of T.C.A. §57-4-304, fines were imposed under Alcoholic Beverage Commission Rule #0100-5-.03(6).

Alcoholic Beverage Commission v. Bad Bob's, Inc., d/b/a Bad Bob's Restaurant and Lounge, IO/6-12-84. FO/8-21-84. 4 APR 549.

***1 F.O. 1984 NON-PROFIT; REVOCATION OF LICENSE**--Non-profit club license revoked due to club not operating exclusively for non-profit purposes; having no members as contemplated by statute; and a member or officer receiving compensation from the sale of alcoholic beverages above and beyond approved salary.

Alcoholic Beverage Commission v. Contemporary Music Association, IO/4-30-84. FO/7-12-84. 3 APR 344.

***1 F.O. 1983 DANCING**--Licensee violated T.C.A. §57-4-204(c)(2)(B) when dancers got off the stages and danced among the patrons. Penalty was fine or suspension at the option of the licensee.

Alcoholic Beverage Commission v. Garfield's Restaurant, Inc., FO/11-15-83. 2 APR 592.

***1 I.O. 1983 KNOWLEDGE OF AGE**--By including the phrase "known to be a minor", Tennessee has made knowledge an essential element of T.C.A. §57-3-406(d). In those cases where a person's appearance as to maturity might reasonably lead a seller to assume the person to be of legal age and not inquire as to age, an offense has not been committed under the statute. Where minors appeared to be of age, no violation was found; where minor did not appear to be close to legal age, a violation was found.

Alcoholic Beverage Commission v. B & B Package Store, Inc., IO/1-18-83. 1 APR 190.

2. OWNERSHIP INTEREST

***2 Tenn. App. 1985 SILENT PARTNER**--Non-licensee acting as agent for retail liquor licensees in arranging a "silent" partner, designated by the Commissioner, to share in profits to assure issuance of license without such partner appearing on application, was held grounds for revocation of license under T.C.A. §57-1-109-110, §57-3-104(c)(2), §57-3-210(b)(1) and (f). The power of appointment of a partner without showing that the Commissioner King had a proprietary interest in the store did not violate T.C.A. §57-3-105.

Alcoholic Beverage Commission v. Inglewood Warehouse Liquors, (Tenn. Ct. App. March 8, 1985). 6 APR 64. IO/1-17-84. 1 APR 126.

***2 F.O. 1984 CORPORATION A "SHAM"**--Where an individual so dominates the affairs of a corporation for personal gain as to render the corporation a "sham", the Alcoholic Beverage Commission may "pierce the corporate veil" and find that the corporate license should be revoked on the basis of the conviction of a felony involving moral turpitude.

Alcoholic Beverage Commission v. Belle Meade Liquors, FO/6-7-84. 4 APR 496.

***2 F.O. 1983 FINANCIAL INTEREST**--Licensee violated T.C.A. §57-3-106(a) by execution of loans that provided the initial capital for retail liquor stores. Large loan may be incentive to be directly involved in business to protect investment. Consultant contract between two licensees with 15 year term and 30% of net profit as payment also presents possibility of temptation to operate retail liquor stores to protect one's interest.

Alcoholic Beverage Commission v. ROF's Liquors, Inc., No. 2 Liquors, No. 7 Liquors, IO/4-22-83. FO/5-6-83. 1 APR 330.

3. TAXES

***3 Ch. Ct. 1983 REVOCATION DISCRETIONARY**--There must be monthly written reports before there can be a mandatory revocation under T.C.A. §57-1-207. Alcoholic Beverage Commission finding that it had mandatory duty to revoke under T.C.A. §57-1-207(b) reversed, held revocation is discretionary pursuant to T.C.A. §57-3-303(e). *See also* Capital Distributing Company v. Alcoholic Beverage Commission, FO/4-15-82. 2 APR 369.

Capital Distributing Company v. Alcoholic Beverage Commission, No. 82-1147-III (Davidson County Ch. Ct. May 19, 1983). 1 APR 118.

***3 OAG 1985 PAYMENT UNDER PROTEST**--The principal (taxpayer) may pay the balance of an assessment under protest and file a claim with the Claims Commission for the amount paid under protest. The amount of the voluntary payment may not be contested.

1984 Op. Tenn. Att'y Gen. No. 84-134 (April 23, 1985). 5 APR 256.

***3 F.O. 1986 STANDARD PENALTY**--No standard penalty exists under the statute or the rules for failure to timely pay liquor-by-the-drink sales tax or file reports. Each case should be treated on an individual basis as the law clearly leaves it to the discretion of the Commission whether to impose an additional penalty or fine or to suspend or revoke the license as it sees fit. State asked for standard three day suspension or \$300.00 fine for each month taxes and report were late. Licensee was fined \$100.00.

Alcoholic Beverage Commission v. Grady's Good Times Good Food Restaurant, IO/4-16-86. FO/6-10-86. 6 APR 339.

***3 F.O. 1985 TACIT APPROVAL OF VIOLATION**--Where Department of Revenue "tacitly approved" of licensee's failure to pay liquor by the drink taxes on time, and payments were regularly made at the same time every month, charges were dismissed and no penalty assessed against licensee although licensee was technically guilty of violations.

Alcoholic Beverage Commission v. Memphis Pizza Inns, Inc., IO/3-15-85. FO/5-9-85. 5 APR 278.

***3 F.O. 1985 MITIGATING PENALTY**--It is proper to mitigate the penalties for tax violations when the violator serves a worthy service to the public and a stiff penalty would jeopardize the stability of the violator, so long as the penalty which is assessed would deter future violations.

Alcoholic Beverage Commission v. Benchmark Hotels, Inc., IO/3-7-85. FO/4-4-85. 5 APR 234.

***3 F.O. 1984 TAX REPORTS**--License suspended for violation of T.C.A. §57-4-304, failing to file liquor-by-the-drink tax reports and pay taxes for five (5) months. Fine would not have had sufficient deterrent effect on licensee.

Alcoholic Beverage Commission v. V.F.W. Post #1970, IO/12-6-83. FO/1-9-84. 2 APR 630.

***3 F.O. 1982 REVOCATION MANDATORY**--Where wholesale licensee's name appears on delinquent tax reports of the Department of Revenue as many as three (3) times in any calendar year, Commission held it is the mandatory duty of the

Commission to revoke the license under T.C.A. §57-1-207(b). Chapter 474 of Public Acts of 1981 does not give Alcoholic Beverage Commission discretion to impose a fine as an alternative to mandatory revocation. License may be revoked for failure to pay tax, T.C.A. §57-3-303(e), and failure to forward to five (5) municipalities monthly inspection fee. T.C.A. §57-3-404(1)(a). Financial difficulties of Capital Distributing were caused by use of liquor company's money to pay bills of computer company in violation of T.C.A. §57-3-404.

Alcoholic Beverage Commission v. Capital Distributing Company, FO/4-15-82. 2 APR 269. Reversed in part: Capital Distributing Company v. Alcoholic Beverage Commission, No. 82-1147-III (Davidson County Ch. Ct. May 19, 1983). 1 APR 118.

33.07 **CONFISCATION**

1. In General
 2. Procedure
 3. Constitutional Law
-

1. IN GENERAL

***1 OAG 1979 INTERSTATE IMPORTATION**--Alcoholic beverages may not legally be transported to Tennessee from Canada by an individual. Other importation must be in accordance with statutory requirements of the local option law. Att. Gen. Op. to W. R. "Spot" Lowe, Jr. (May 3, 1979). 1 APR 36.

***1 F.O. 1986 STATUTORY CRITERIA**--Failure to observe the conditions as set out in T.C.A §57-9-202(a)(1) is fatal and no confiscation takes place. Title remains in those having title at the time of the seizure by the sheriff or other officers. As copy of seizure notice was not given to lienholder, title remained in Ms. Johnson's name, and Dekalb County Bank was free to exercise rights as to the seized vehicle pursuant to their lien instrument.

Alcoholic Beverage Commission v. 1983 Pontiac, Claimant, Dekalb County Bank and Trust Company, IO/3-31-86. 7 APR 251. FO/6-6-86. 7 APR 260.

***1 F.O. 1984 CLAIMANT'S DUTY TO KNOW**--A Claimant is under no duty to inquire into someone's criminal background pursuant to T.C.A. §57-9-202(d)(3) absent a contractual obligation or legally binding understanding giving rise to an enforceable right to the vehicle.

Alcoholic Beverage Commission v. Earnestine Taylor, IO/9-7-84. FO/10-18-84. 4 APR 808.

***1 I.O. 1986 CLAIMANT'S DUTY TO KNOW**--The requirement that the lienholder make inquiry of the proper state or federal officials with reference to the bootlegging reputation of the borrower at the time of the loan, applies only when there has been compliance with the confiscation statute in the first instance.

Alcoholic Beverage Commission v. 1983 Pontiac, Claimant, Dekalb County Bank and Trust Company, IO/3-31-86. 7 APR 251.

***1 I.O. 1985 LIENHOLDER'S DUTY TO INQUIRE**--Claim of lienholder, Fentress County Bank, denied when Bank failed to make inquiry of law enforcement officials concerning car owner's reputation for violation of liquor laws. Such inquiry is mandatory pursuant to T.C.A. §57-9-202(g) and case law.

Alcoholic Beverage Commission v. Lincoln Town Car claimed by Fentress County Bank and Boyce Brannon, IO/8-23-85. 6 APR 177.

2. PROCEDURE

***2 F.O. 1984 ALCOHOLIC CONTENT**--The state failed to meet its burden in proving violation of T.C.A. §57-9-201(a) in that no evidence was introduced to prove that the alcoholic beverages seized were more than 5% alcohol.

Alcoholic Beverage Commission v. 1974 Ford Pickup Truck, Claimants James Brown and Erin Bank and Trust Company, IO/5-11-84. FO/7-16-84. 3 APR 409.

3. CONSTITUTIONAL LAW

***3 I.O. 1994 8TH AMENDMENT; FORFEITURES**--The application of the forfeiture statute, T.C.A. §57-9-201, does not violate the 8th Amendment of the United States Constitution by being excessive. Although the 8th Amendment does apply to *in rem* forfeiture matters, it does not apply to confiscated property that has a close connection to the offense. An *in rem* forfeiture only violates the 8th Amendment if it applies to property that can not properly be regarded as an instrumentality of the offense. As long as the seized property has a close relationship to the targeted offense and its use is closely connected to the statutory violation, forfeiture does not constitute an excessive fine in violation of the 8th Amendment.

Alcoholic Beverage Commission v. Hubert Moree, IO/1-5-94. 15 APR 215.

***3 I.O. 1992 EXCLUSIONARY RULE**--The exclusionary rule is applicable to state forfeiture proceedings when evidence is obtained under a defective search warrant. If no evidence, apart from that obtained under a defective search warrant, is presented at a hearing, then sufficient evidence does not exist to support a forfeiture. In the present case, the case against the Claimant was dismissed, and seized property was returned to claimant.

Alcoholic Beverage Commission v. Sanford James Ramsey, IO/12-21-92. 15 APR 222.

34.00 **HUMAN RIGHTS COMMISSION**

1. In General
 2. Procedure
 3. Age Discrimination
 4. Race Discrimination
 5. Sex Discrimination
 6. Religious Discrimination
-

1. IN GENERAL

***1 Tenn. 1988 AUTHORITY OF HUMAN RIGHTS COMMISSION**--Tennessee Supreme Court found no merit in challenge to certain sections of Human Rights law based on separation of powers, trial by jury, and trial by jury provisions of Tennessee Constitution, and affirmed validity of statutes.

Plasti-Line, Inc. v. Tenn. Human Rights Comm., 746 S.W.2d 691 (Tenn. 1988). 7 APR 299.

***1 OAG 1984 FEDERAL HOUSING LAW; ENFORCEMENT**--The Tennessee Human Rights Commission is the State agency authorized to enforce the policies of anti-discrimination in housing contained in Title VIII, Federal Civil Rights Act of 1968.

Att. Gen. Op. to Michael D. Murphy (June 27, 1984). 4 APR 572.

***1 OAG 1984 TEMPORARY DISABILITIES**--Disabilities of limited duration and the status of being an ex-convict do not constitute a handicap under T.C.A. §8-50-103. An employer can limit its hiring to handicapped persons only as such a policy would not violate T.C.A. §8-50-103.

1984 Op. Tenn. Att'y Gen. No. 84-186 (June 22, 1984). 5 APR 42.

***1 OAG 1984 HUMAN RIGHTS COMMISSION; MEMBERS**--Art. II, §10 of the Tennessee Constitution would prohibit a member of the General Assembly from serving on the Human Rights Commission. Art. II, §26 would prohibit a State government official on the Commission from serving as hearing examiner. Further, T.C.A. §4-21-103 forbids partisan appointment of Commissioners. Individual conflicts of interest should be considered on an ad hoc basis. 1984 Op. Tenn. Att'y Gen. No. 84-007 (January 5, 1984). 5 APR 24.

***1 I.O. 1993 TEST FOR DISCRIMINATION**--The United States Supreme Court has established a three-part test for a finding of discrimination:

1. The plaintiff has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence;
2. If the plaintiff sufficiently establishes a *prima facie* case, the burden shifts to the respondent to "articulate some legitimate, nondiscriminatory reason" for its action; and
3. If the respondent satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the reason asserted by the respondent is in fact mere pretext.

Roderick and Cheryl Givens v. David and Tina Sturm, IO/5-20-93. 15 APR 228.

***1 I.O. 1993 PRIMA FACIE DISCRIMINATION**--To establish a *prima facie* case of discrimination, Petitioners must prove that:

1. They are members of a protected class;
2. They applied for and were qualified to rent the property

at issue;

3. They were rejected by the Respondent; and
4. After the rejection, the property remained available.

Roderick and Cheryl Givens v. David and Tina Sturm, IO/5-20-93. 15 APR 228.

***1 I.O. 1992 APPLICABILITY OF FEDERAL LAW**--Given that one of the purposes of the Tennessee Human Rights Law is to provide for execution in Tennessee of the policies of the Federal Civil Rights Acts, it is appropriate to look to federal cases construing federal law in regard to religious discrimination. See Bruce v. Western Auto Supply Co., 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984).

Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

***1 I.O. 1992 DAMAGES**--Once a claimant in a discrimination case establishes a *prima facie* case and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or failure to mitigate shifts to the defendant. The Defendant satisfies his burden only if he proves 1) there were substantially equivalent positions which were available and 2) the Claimant failed to use reasonable care and diligence in seeking such positions. A Claimant is not held to the highest standard of diligence and does not bear an onerous burden. The reasonableness of the effort to find substantially equivalent employment is to be evaluated in light of the individual characteristics of the Claimant and the job market.

Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

***1 I.O. 1992 BACKPAY**--A backpay award should include any raises a Claimant would have received, plus sick leave, vacation, pension benefits, and other fringe benefits that would have been received but for the discrimination. Furthermore, despite parties' agreement to the contrary regarding the unemployment compensation, a backpay award should not be reduced by the amount of income and social security taxes which would have been deducted from wages or by unemployment benefits received.

Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

***1 I.O. 1992 DAMAGES**--Damages for humiliation and embarrassment can not be awarded absent proof of actual injury.

Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

2. PROCEDURE

***2 I.O. 1988 LACHES**--Where prejudice is shown that is, in part, occasioned by a Complainant's own inaction or delay, a dismissal based on laches may be in order.

Lorraine Brassell v. Methodist Hospital, IO/6-22-88. 17 APR 98.

***2 I.O. 1984 BURDEN OF PROOF; DISPARATE TREATMENT**--Burden is on Respondent to prove *prima facie* case. Burden shifts to Defendant to prove a legitimate non-discriminating reason for action. Burden shifts back to show reasons proffered not true reasons and discrimination intentional.

Poore v. CF Air Freight, Inc., IO/9-13-84.

***2 I.O. 1984 TIME DEADLINE IS DIRECTORY**--The time limits set in T.C.A. §4-21-115 and §4-21-117 are directory rather than mandatory.

DeVaughn v. Quaker Oats Company, IO/8-30-84. 4 APR 693.

3. AGE DISCRIMINATION

***3 I.O. 1988 EVIDENCE OF AGE DISCRIMINATION**--No evidence of age discrimination proved by Petitioner, despite her showing that 1) she was in the protected age group and 2) she was replaced by a younger person. Unsatisfactory performance, rather than age, was found to be a determinative factor in termination. This Initial Order contains summary of case law on age discrimination.

Lorraine Brassell v. Methodist Hospital, IO/6-22-88. 17 APR 98.

***3 I.O. 1984 INVOLUNTARY RETIREMENT**--T.C.A. §4-21-126(b) prohibits involuntary retirement pursuant to a bona fide employee benefit plan. When provision allowing involuntary retirement predates statute, but involuntary retirement occurs after statute adopted, the provision is unenforceable.

Little v. Consolidated Aluminum Corporation, IO/1-31-84. 3 APR 64.

4. RACE DISCRIMINATION

***4 I.O. 1993 TEST FOR RACIAL DISCRIMINATION**--The United States Supreme Court has established a three-part test for a finding of racial discrimination:

1. The plaintiff has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence;
2. If the plaintiff sufficiently establishes a *prima facie* case, the burden shifts to the respondent to "articulate some legitimate, nondiscriminatory reason" for its action; and
3. If the respondent satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the reason asserted by the respondent is in fact mere pretext.

Roderick and Cheryl Givens v. David and Tina Sturm, IO/5-20-93. 15 APR 228.

***4 I.O. 1993 PRIMA FACIE RACIAL DISCRIMINATION**--To establish a *prima facie* case of racial discrimination, Petitioners must prove that:

1. They are members of a protected class;
2. They applied for and were qualified to rent the property at issue;
3. They were rejected by the Respondent; and
4. After the rejection, the property remained available.

Roderick and Cheryl Givens v. David and Tina Sturm, IO/5-20-93. 15 APR 228.

***4 I.O. 1984 DISPARATE IMPACT**--A facially neutral policy that causes a disparate impact on a person or group entitled to equal opportunity is forbidden even when the discriminating is unintentional. There is no disparate impact when the affected person can readily comply with the policy and non-compliance is a matter of individual preference.

Sebree v. Cheatham County Highway Department, IO/5-7-84. 3 APR 380.

5. SEX DISCRIMINATION

***5 F.O. 1983 ARBITRATION**--Arbitration under collective bargaining grievance procedure does not bar Title VII right unless Respondent voluntarily and with adequate knowledge releases Title VII rights. Respondent has burden to prove by preponderance of evidence that adverse action of employer was based on illegal sex discrimination.

Neal v. 3-M Company of Chattanooga, IO/9-6-83. FO/9-26-83. 2 APR 470.

***5 F.O. 1983 LEGITIMATE REASON REBUTS PRIMA FACIE CASE**--Misconduct was found to be legitimate business reason for discharge. After Respondent established a *prima facie* case defendant rebutted by showing by the preponderance of the evidence that they had a legitimate, non-discriminatory business reason for the adverse action against Respondent.

Moore v. United Parcel Service, IO/6-6-83. FO/6-27-83. 2 APR 382.

***5 I.O. 1988 PREGNANCY DISCRIMINATION**--Where the Petitioner was terminated because of her pregnancy, this "direct evidence of discrimination" establishes a *prima facie* case of discrimination on the basis of sex and pregnancy. The Respondent then can show that its reasons for termination amounted to a "bona fide occupational qualification reasonably necessary to its operation" warranting a ruling in its favor. The bona fide occupational exception in sex discrimination cases is interpreted narrowly. Pregnancy must be treated the same as any other disability, such as a broken leg, for example. Patricia M. Collett v. Harriman City Hospital, IO/7-22-88. 17 APR 1.

***5 I.O. 1988 SEXUAL HARASSMENT; HOSTILE/ABUSIVE ENVIRONMENT**--Federal case law in the Sixth Circuit has held that in order to find sexual harassment of the "hostile/abusive environment" variety, it must be shown that the work environment would interfere with a reasonable person's work performance and seriously affect the psychological well-being of such a reasonable person under similar circumstances. Patricia M. Collett v. Harriman City Hospital, IO/7-22-88. 17 APR 1.

***5 I.O. 1984 VALIDITY OF QUALIFICATIONS**--Respondent did not prove that Defendant business reasons based on qualifications are a pretext by showing she was as qualified as the person hired. Court will not second guess employees judgment as to whether education or experience better qualifies an applicant. Poore v. CF Air Freight, IO/9-13-84. 4 APR 700.

***5 I.O. 1984 PREGNANCY DISCRIMINATION**--Tennessee Human Rights Commission Rule 1500-1-11(2) adopts and incorporates the United States Equal Employment Opportunity Commission guidelines on sex discrimination by requiring that pregnancy-related disability be treated as would any other temporary disability under any health or temporary disability insurance or sick leave plan. Durbin v. Williams, d/b/a Metal Products Company, IO/6-13-84. 4 APR 555.

6. RELIGIOUS DISCRIMINATION

***6 I.O. 1992 APPLICABILITY OF FEDERAL LAW**--Given that one of the purposes of the Tennessee Human Rights Law is to provide for execution in Tennessee of the policies of the Federal Civil Rights Acts, it is appropriate to look to federal cases construing federal law in regard to religious discrimination. *See* Bruce v. Western Auto Supply Co., 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

***6 I.O. 1992 BURDEN OF PROOF**--Citing federal case law, the Administrative Law Judge determined that a *prima facie* case of religious discrimination is established when a Complainant shows that 1) he holds a sincere religious belief that conflicts with an employment requirement, 2) he has informed the employer about the conflict, and 3) he was discharged or disciplined for failing to comply with the conflicting employment requirement. Once the employee establishes a *prima facie* case, the burden shifts to the employer to prove that it can not reasonably accommodate the employee without incurring undue hardship. The reasonableness of an employer's attempt at accommodation must be determined on a case-by-case analysis. An employer must show that he has taken some initial steps to reach a reasonable accommodation of the particular religious belief at issue. In addition, an employer must make a "good faith effort" to accommodate the employee's religious beliefs. Furthermore, the employee must also make an effort to cooperate with the employer's attempt at accommodation. Title VII entitles an employee only to a reasonable accommodation, not an absolute one. An employee is not entitled to an accommodation of his preference. Rather, an employer has met his obligation when he demonstrates that he has offered a reasonable accommodation to the employee. Moreover, an employer is not required to take any action that would result in a deprivation of other employees' shift preferences. Shirley Jones Williams v. Shelby County Sheriff's Department, IO/11-5-92. 15 APR 239.

35.00 **ADMINISTRATIVE PROCEDURES**

NO CASES REPORTED

36.00 **TENNESSEE HIGHER EDUCATION COMMISSION**

NO CASES REPORTED

37.00 **TENNESSEE WILDLIFE RESOURCE AGENCY**

NO CASES REPORTED

38.00 **REGISTRY OF ELECTION FINANCE**

NO CASES REPORTED

39.00 **DEPARTMENT OF YOUTH DEVELOPMENT**

NO CASES REPORTED

40.00 **DEPARTMENT OF MILITARY**

NO CASES REPORTED

41.00 **BOARD OF PAROLES**

NO CASES REPORTED

42.00 **TENNESSEE BUREAU OF INVESTIGATION**

NO CASES REPORTED

DIGEST SUPPLEMENT

No. 1 - July, 1995

I. NEW CASES & ORDERS:

Ch. Ct. 1995 DEFERENCE TO TREATING PHYSICIAN OPINION--The opinion of the treating physician must be accorded deference. Reliance on the opinion of the treating physician is particularly appropriate where the severity of the petitioner's condition fluctuates. The Chancery Court found that the administrative law judge erred when the judge disregarded the treating physician's opinion because it was favorable to the petitioner. In light of this, the Chancery Court reversed the decision to deny Medicaid reimbursement.

Hershel Abshire v. Bureau of Medicaid, No. 94-2353-II (Davidson County Ch. Ct. April 26, 1995). 20 APR 17. (§17.01)

Ch. Ct. 1995 DEFERENCE TO TREATING PHYSICIAN OPINION--The opinion of the treating physician must be accorded deference. Reliance on the opinion of the treating physician is particularly appropriate where the severity of the petitioner's condition fluctuates. The Chancery Court ruled that the Commissioner's designee cannot disregard the treating physician's opinion because it is favorable to the petitioner.

Grace McCullar v. Bureau of Medicaid, No. 94-2696-I (Davidson County Ch. Ct. June 26, 1995). 20 APR 22. *See also* IO/2-18-94. FO/7-7-94. 17 APR 325. (§17.01)

Ch. Ct. 1995 NEEDS COULD NOT BE MET IN RESIDENTIAL HOME--The Chancery Court ruled that certain findings of the Commissioner's designee were not supported by the record. The Chancery Court determined that the record supported the administrative law judge's finding in the Initial Order that no proof was offered concerning the level of care available to residents of residential or group homes. In light of this, the Chancery Court found that no proof existed in the record to support the finding of the Commissioner's designee that the petitioner's needs for nursing care could be met in a residential or group home supplemented with TennCare-paid periodic visits from home health agency licensed nursing personnel and with TennCare-paid out-patient medical care services. Therefore, since the decision of the Commissioner's designee was not based on substantial and material evidence in light of the entire record, Medicaid reimbursement was granted.

Grace McCullar v. Bureau of Medicaid, No. 94-2696-I (Davidson County Ch. Ct. June 26, 1995). 20 APR 22. *See also* IO/2-18-94. FO/7-7-94. 17 APR 325. (§17.01)

I.O. 1995 FAILURE TO FILE CLAIM FOR SEIZED PROPERTY--Where claimant contended that he gave the seized vehicle to his grandson and where the grandson did not file a claim within thirty days of receipt of the notice of seizure, any ownership interest of the grandson in the vehicle was forfeited to the State.

Department of Safety v. Jesse P. Martin, IO/6-30-95. 19 APR 176. (§19.01)

I.O. 1995 ALJ RULINGS MADE AT HEARINGS--Various legal issues concerning the search of the claimant's residence and the admissibility of evidence were raised during the hearing. However, these issues were not pursued by either party and briefs were not filed by the parties with regard to these issues. Therefore, the administrative law judge decided that all rulings made at the hearing would stand.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169. (§19.01)

I.O. 1995 DISCLOSURE OF IDENTITY OF CONFIDENTIAL INFORMANT--Claimant's request for disclosure of the identity of a confidential informant was denied. Relying on recent caselaw, the administrative law judge determined that the identity of the informant might arguably be disclosable given that the events of which he had only direct knowledge were relied upon by the State at the hearing. However, in the absence of any request by the claimant for further proceedings at which the use of the informant as a witness might in any way aid the claimant in this case, the request for the disclosure of the informant's identity was denied.

Department of Safety v. Stanley Lane, IO/6-30-95. 19 APR 169. (§19.01)

I.O. 1995 TIMELY FILING REQUIRED AFTER NOTICE OF SEIZURE--A petition for a hearing seeking the return of seized property must be filed within thirty days of a claimant's receipt of the Notice of Seizure. The petition must also specifically identify the seized property and state the claimant's interest in it. The statute requiring timely filing of the hearing petition has been strictly construed by judges. In the present case, the petition was received 47 days after the claimant received the seizure notice with regard to the confiscated money. The claimant was aware of the seizure and the need to file a timely petition as evidenced by the two petitions she filed earlier seeking the return of other property. Since no proper petition was filed for the seized money, the money was forfeited to the State.

Department of Safety v. Deborah K. Burns, IO/6-28-95. 14 APR 24. (§19.01)

I.O. 1995 INFERENCE OF FACILITATION OF DRUG SALE--Given the large quantity of marijuana and the appearance of the marijuana as having been cut from a larger bale, it was inferred that the marijuana had been received for purposes of resale and that the seized vehicle was being used to facilitate the sale of marijuana.

Department of Safety v. Marcus Lashon Jones, IO/6-19-95. FO/6-29-95. 19 APR 15. (§19.01)

I.O. 1995 EFFECT OF CRIMINAL CONVICTION--Grievant, who was convicted and sentenced for the crimes which served as the grounds for his termination, was precluded from contesting the acts for which he was dismissed since he had already been convicted of these acts under higher standard of proof in criminal court.

In the Matter of Robert Pugh, IO/6-26-95. 19 APR 32. (§26.00)

I.O. 1995 TERMINATION WHERE CRIMINAL CONVICTION IMPAIRED OFFICIAL POSITION--Termination was upheld as proper where Grievant, who was a state trooper, had been convicted of criminal misconduct related to his official position. Where criminal misconduct so seriously impairs an employee's usefulness, dismissal for the good of the service is warranted.

In the Matter of Robert Pugh, IO/6-26-95. 19 APR 32. (§26.00)

II. INITIAL ORDERS BECOMING FINAL ORDERS:

In the Matter of Lela Huson, IO/6-23-95. FO/7-3-95. 19 APR 22. (§9.01)

In The Matter of Matthew Baugh, IO/4-20-95. FO/5-1-95. 8 APR 339. (§9.01)

Department of Safety v. Marcus Lashon Jones, IO/6-19-95. FO/6-29-95. 19 APR 15. (§19.01)

Department of Safety v. Jon H. Davis, IO/5-22-95. FO/6-1-95. 10 APR 239. (§19.01)

Department of Safety v. Young Sok Chang and Sangtae Chang, IO/4-20-95. FO/5-1-95. 8 APR 309. (§19.01)