



JUSTIN P. WILSON  
*Comptroller*

JASON E. MUMPOWER  
*Chief of Staff*

January 15, 2019

## Memorandum

To: Members of the Assessment Appeals Commission  
County Assessors  
Attorney Representatives

From: Betsy Knotts, Executive Secretary  
State Board of Equalization

A blue ink signature of Betsy Knotts.

Re: Changes to the Conduct of Hearings Before the Assessment Appeals Commission

## Summary

In 2017, changes were made to the law regarding the conduct of hearings before the Assessment Appeals Commission ("AAC")<sup>1</sup>. Prior to these changes, any party to a hearing before the AAC could present new evidence that was not presented to the Administrated Law Judge ("ALJ") at the party's initial appeal hearing.

After the July 1, 2017, amendments, appeals reaching the AAC will be largely limited to the administrative record. In other words, the AAC will consider only records and evidence from the initial assessment or tax-exemption decision, and evidence, testimony, and orders from a hearing before the county board of equalization or ALJ as part of the earlier appeals.<sup>2</sup> Hearings before the AAC will be limited to providing argument based on evidence already in the administrative record, which includes exhibits such as tax assessments, applications, correspondence, photographs, and expert opinions, in addition to the transcript of any previous hearings.

The new law also updated the standard of review for the AAC. Previously, the AAC could make a new decision based on the evidence presented, even if the AAC did not find that the ALJ made any mistakes. Under the new law, the AAC will uphold the order of the ALJ unless it finds that the ALJ misapplied the law, did not follow proper procedure in conducting the hearing, acted outside his authority, or that his decision was not supported by substantial and material evidence at the hearing.

The one exception where new evidence may be considered is when "irregularities of procedure" are alleged. A procedural irregularity occurs when normal procedures are not followed, e.g., where

---

<sup>1</sup> Tenn. Code Ann. § 67-5-1506, effective July 1, 2017.

<sup>2</sup> The changes to the law will apply to any initial appeal hearing filed with the State Board of Equalization on or after July 1, 2017. Initial appeals filed before this date will be heard according to the law prior to the current law taking effect.

a county board of equalization consists of individuals who are not qualified to sit on the board, a county assessor cannot produce a copy of a record the assessor is required to keep, or a legal standard is not followed. In these cases, the AAC may accept new evidence regarding this procedural irregularity.

### **Remedial Actions the AAC Can Take**

If the AAC finds no error with the ALJ's decision, the AAC may affirm the ALJ's decision. If the AAC finds error, the AAC has two primary remedial actions it may take. First, the AAC may reverse the ALJ's decision and enter a new order in its place. The new order may modify the outcome or correct the application of law, calculations, or any other errors identified.

In some cases, the administrative record may be insufficient to correct an error at the lower proceeding because critical information is missing. In these cases, it may be appropriate to remand for further proceedings before an ALJ, the county tax assessor, or the State Board of Equalization. An order to remand should include instructions on what findings or considerations should be made. If the lack of information is part of an irregularity of procedure (discussed below), the AAC may take new evidence to supplement the administrative record.

### **When Remedial Action Should Be Taken**

Remedial action should be taken when a party has been harmed because the ALJ's findings of fact, conclusions, or decisions are "in violation of constitutional or statutory provisions; made upon unlawful procedure; arbitrary and capricious or characterized by abuse of discretion . . . or unsupported by evidence that is both substantial and material in light of the entire record".<sup>3</sup> This signifies two things. First, remedial action should only be taken when an error occurred at the initial appeal hearing before the ALJ. Second, that error must have harmed one of the parties to the hearing. Thus, if an ALJ misapplies a law but the outcome is nevertheless correct, the error is harmless, and no remedial action is necessary.

The AAC may remand an appeal or overturn the ALJ's decision if it misapplies or does not follow the Tennessee Code or Constitution. The AAC may also take action if the ALJ did not follow proper procedure at the hearing, which may take the form of not allowing a witness to testify, not admitting evidence, or convening a hearing without proper notice to all parties.

The AAC may also take remedial action where the ALJ's decision is arbitrary and capricious. A decision is arbitrary and capricious when it is unsupported by evidence that is both substantial and material in the context of the entire record.<sup>4</sup> "Substantial and material" evidence must be more than a glimmer or scintilla of evidence, but may be less than a preponderance of the evidence.<sup>5</sup> The AAC may consider evidence contrary to the ALJ's decision but should not accord the evidence greater weight than the ALJ did unless the ALJ's judgment was clearly in error.<sup>6</sup> Another

<sup>3</sup> Tenn. Code Ann. § 67-5-1506(c).

<sup>4</sup> See *City of Memphis v. Civil Serv. Comm'n of City of Memphis*, 238 S.W.3d 238, 243 (Tenn. Ct. App. 2007).

<sup>5</sup> See *Dickson v. City of Memphis Civil Serv. Comm'n*, 194 S.W.3d 457, 464 (Tenn. Ct. App. 2005); see also *Bacardi v. Tenn. Bd. of Registration in Podiatry*, 124 S.W.3d 553, 560 (Tenn. Ct. App. 2003).

<sup>6</sup> See *Pace v. Garbage Disposal Dist.*, 390 S.W.2d 461, 465 (Tenn. 1965).



formulation of “substantial and material” is “such relevant evidence as a reasonable mind might accept to support a rational conclusion and to furnish a reasonably sound basis for the decision under consideration.”<sup>7</sup>

Finally, an ALJ’s decision is arbitrary and capricious even if there is substantial and material evidence in support if the decision is caused by a clear error in judgment.<sup>8</sup> More broadly, an administrative decision is arbitrary and capricious if it is not based on any course of reasoning or exercise of judgment or disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.<sup>9</sup>

When an ALJ’s decision demonstrates one or more of the above errors, to the detriment of one of the parties, the AAC should take remedial action.

### **What May be Considered at the Hearing**

The full administrative record can be considered at the hearing, including all notices, correspondence, records, and any other documents generated or provided during the initial property tax assessment or exemption application. The administrative record also includes notices, exhibits, correspondence, pleadings, expert reports, and orders from proceedings before both the county board of equalization and the subsequent hearing before the ALJ. Additionally, the administrative record will include the transcript of both hearings. This collection of evidence and transcripts should provide a full account of the earlier proceedings and should provide sufficient information to determine if the ALJ’s decision should be upheld or if remedial action should be taken. If critical information is missing from the record such that the AAC cannot determine whether the ALJ’s decision should be upheld or reversed, the AAC should review the record for an irregularity of procedure.

### **What Constitutes a Procedural Irregularity**

The AAC should not consider evidence outside the administrative record unless a party alleges an irregularity of procedure. An irregularity of procedure can be any number of things but broadly takes two forms. First, a procedural irregularity may be a failure to follow procedural requirements of statutes or rules.<sup>10</sup> Second, a procedural irregularity may be an absence of necessary information, such as transcripts or recordings from a previous hearing, or the absence of a record.<sup>11</sup>

When a procedural irregularity is alleged, the AAC must determine if the irregularity is fatal to the case at hand. If the procedural irregularity is ultimately harmless or irrelevant, there is no need to reopen the administrative record.<sup>12</sup> If remedial action is warranted, the AAC may accept testimony and evidence regarding the procedural irregularity.

<sup>7</sup> *Penny v. City of Memphis*, 276 S.W.3d 410, 417 (Tenn. Ct. App. 2008).

<sup>8</sup> *City of Memphis v. Civil Service Com’n of City of Memphis*, 238 S.W. 3d 238, 243 (Tenn. Ct. App. 2007).

<sup>9</sup> *Smith v. White*, 538 S.W.3d 1, 10 (Tenn. Ct. App. 2017).

<sup>10</sup> *Office of Pub. Util. Counsel v. Pub. Util. Comm’n*, 185 S.W.3d 555, 576 (Tex. App. 2006).

<sup>11</sup> *See Humana of Tenn. v. Tenn. Health Facilities Comm’n*, 551 S.W.2d 664, 668 (1977); *see also Pet v. Dep’t of Health Servs.*, 638 A.2d 6, 11 (Conn. 1994).

<sup>12</sup> *City of Corpus Christi v. Pub. Util. Comm’n of Tex.*, 51 S.W.3d 231, 262, 264 (Tex. App. 2001); *see also Office of Pub. Util. Counsel v. Pub. Util. Comm’n*, 185 S.W.3d 555, 576 (Tex. App. 2006).

## Conclusion

The primary purpose of the revision to Tenn. Code Ann. § 67-5-1506 was to change the function of the AAC to more closely resemble that of an appellate court. Previously, a hearing before the AAC was a second or third opportunity for an appellant to make his case. An appellant could present new evidence or arguments not previously advanced after already having had one or more opportunities to do so. Limiting the evidence before the AAC to the administrative record will make the hearing and appeal process more efficient, while still offering appellants full opportunity to present their best case to the ALJ at their initial appeal hearing. As such, the hearing process is more efficient, and appellants retain access to due process. The changes will also allow the AAC, Executive Secretary, and counsel to the AAC to better prepare for hearings by having the full record of the case available to review beforehand.

The language of Tenn. Code Ann. § 67-5-1506 tracks the contested-case chapter of the Uniform Administrative Procedures Act, which is codified as Tenn. Code Ann. § 4-5-301 *et. seq.*<sup>13</sup> Guidance as to interpretation of the statute may also be drawn from that chapter.

---

<sup>13</sup> Particularly, Tenn. Code Ann. § 4-5-322.