

COMMISSIONER OF THE NEW JERSEY  
DEPARTMENT OF BANKING AND  
INSURANCE,

*Petitioner/Appellee,*

v.

JOHN SAVADJIAN,

*Respondent/Appellant.*

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO.: \_\_\_\_\_

SAT BELOW:

Barry Moscovitz, A.L.J.  
(New Jersey Office of  
Administrative Law

Marlene Caride, Commissioner  
(Agency Head for the  
Department of Banking and  
Insurance)

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**RESPONDENT/APPELLANT JOHN SAVADJIAN'S MEMORANDUM OF LAW IN SUPPORT  
OF MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL OF THE  
COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF BANKING AND INSURANCE'S  
OCTOBER 16, 2018 ORDER OVERTURNING THE AUGUST 29, 2018 ORDER OF  
ADMINISTRATIVE LAW JUDGE BARRY MOSCOWITZ**

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**PRELIMINARY STATEMENT**

In recent months, both the New Jersey Supreme Court and this court have emphasized the role of Administrative Law Judges ("ALJ") as integral components in the adjudication of contested administrative law matters, and that they are not just "second-tier" jurists that merely "transmit evidence to agency heads." See e.g. *In Matter of Hendrickson*, \_\_\_ N.J. \_\_\_ (2018) (slip op. at 19); *Dep't of Community Affairs v. Noe*, 2018 WL 4997278 (N.J. App. Div. Oct. 16, 2018). This request for interlocutory review further addresses the role of ALJs in contested administrative disputes in connection with a fact pattern likely to repeat itself. Moreover, if this issue is not addressed now on an interlocutory basis, Respondent/ Appellant John Savadjian ("Savadjian") will be forced to defend himself in a proceeding that has been stripped of any semblance of due process and fundamental fairness. Recognizing the importance of appellate review of this issue before the currently pending administrative trial can resume, the ALJ below has suspended further proceedings in this matter before the OAL pending a resolution of this appeal.

The single issue presented here is whether Petitioner/ Appellee, the Commissioner of the Department of Banking and Insurance ("DoBI") can replace decisions of an ALJ on matters involving the credibility, authenticity, and admissibility of evidence at an administrative trial with the agency head's own

independent determinations. The DoBI Commissioner disregarded a through and reasoned decision of the ALJ below addressing the credibility, authenticity, and admissibility of evidence, and ordered the ALJ to admit into evidence that which the ALJ expressly determined to lack credibility and authenticity, thus rendering it inadmissible. While it has been held that an agency head holds discretionary authority to accept, reject, or amend an ALJ's recommendations on matters unique to the agency head's expertise, evidentiary matters have been widely held to be the exclusive province of the ALJ. If, as the Commissioner advocates, an agency head can substitute its own judgment on such uniquely judicial evidentiary matters, there appears to be little value in proceedings before the OAL at all.

The issues presented here strike at the heart of the notion of fair play that is supposed to surround any adversarial proceeding in our system of justice. If the OAL is to have any function in a legitimate system of administrative law, this Court must reaffirm the ALJ's exclusive jurisdiction on issues of the credibility, authenticity, and admissibility of evidence at an administrative trial. The matters addressed herein are of such importance to the underlying proceedings in this case, and to future of contested administrative law proceedings as a whole, that the interests of justice unquestionably require the Appellate Division's intervention at this time.

**RELEVANT PROCEDURAL AND FACTUAL HISTORY**

**A. The Administrative Action Between DoBI and Savadjian**

On or about April 10, 2014, DoBI filed its initial Order to Show Cause against Savadjian (the "OSC"), alleging violations of the New Jersey Insurance Producers' Licensing Act, N.J.S.A. 17:22A-26 *et seq.* (the "Act"). (Ra98 - Ra109). The OSC was amended on November 7, 2014, after DoBI was notified by an employee of Prudential Life Insurance Company of America ("Prudential") of the supposed existence of certain audio recordings (the "Recordings") that it received from a Prudential employee pursuant to a "consumer complaint" form. (Ra110 - Ra127).

Savadjian contested the OSC, and, importantly, DoBI transferred the matter for adjudication to the OAL, to be conducted in a manner consistent with the Administrative Procedures Act and established law. ALJ Barry Moscovitz was appointed to preside over the contested matter. Ironically, ever since this matter was sent by DoBI to ALJ Moscovitz for adjudication at the OAL, DoBI has done everything in its power to undermine the ALJ's authority.

**B. The ALJ Requires that DoBI Authenticate Evidence at Trial in a Manner Consistent with the Rules Governing Administrative Proceedings**

Six months in advance of the hearing before the OAL, Savadjian filed a motion *in limine* that sought to exclude the Recordings and related documents from admission at the hearing on due process grounds (the "Due Process Motion"). (Ra128 - Ra129). Although the

ALJ denied the Due Process Motion, the ALJ did not disregard Savadjian's significant and well-founded challenge to the authenticity of DoBI's proposed evidence. (Ra675 - Ra676). The ALJ held:

If [DoBI] intends to offer [the relevant documents] into evidence, it is on notice that respondent may raise questions of their authenticity. "Where a genuine question of authenticity is raised, the judge may require some authentication of the questioned document." N.J.A.C. 1:1-15.6. Please be advised that I will require authentication of the documents at the hearing, not after the hearing as the rule allows.

(Ra675). The ALJ's ruling on the Due Process Motion, consistent with the authority vested in the ALJ by the letter and spirit of the Administrative Procedures Act, serves as the backdrop against which subsequent proceedings before the OAL must be evaluated.

**C. DoBI'S First Failed Attempt to Authenticate the Subject Evidence at Trial and the ALJ's Unique Observation of the Lack of Credibility of DoBI's Witnesses**

DoBI first attempted to authenticate the Recordings and related documents in the proceeding before the ALJ on December 19, 2017 by offering the testimony of a former Prudential employee named Charles Shanley. (Ra691 - Ra776). The ALJ determined that DoBI's witness lacked credibility, concluding specifically that he had no personal knowledge of the facts at issue in this case and that he could not, therefore, provide the necessary evidentiary

foundation to authenticate the proffered evidence. (See e.g. Ra771:13 - 19; Ra790 - Ra794).

The ALJ's decision as to the lack of credibility of DoBI's witness was not merely limited to one day of testimony - it was based upon the ALJ's live, personal observations of Mr. Shanley and other DoBI witnesses throughout multiple additional days of trial as well. (See Ra827 - Ra2630).

For example, the ALJ was able to observe the defensive and combative responses to direct questions and, at times, had to intervene and direct DoBI's witness to answer the questions presented by counsel without being evasive and attempting to deflect cross-examination. (See e.g. Ra1715:17 - Ra1717:15). That same witness' testimony also revealed significant flaws in connection with his investigation of Plaintiff, and the presiding ALJ was forced to admonish DoBI's counsel for presenting trial witnesses that lacked first-hand knowledge of the matters in dispute. (Ra1411:13 - Ra1412:14).

Additionally, the ALJ witnessed the testimony of a Prudential customer who stated, under oath, that DoBI's witnesses had likely forged her signature on documents that DoBI later attempted to introduce to falsely implicate Savadjian. (Ra2354:17 - Ra2355:19). This testimony undermines DoBI's entire case against Savadjian, as properly recognized by the ALJ. The ALJ presided over testimony from that same witness, indicating that the Prudential

investigator tasked with conducting an investigation into the matters at issue had a predetermined set of theories about the facts and circumstances that the investigator merely wanted her to validate, despite her resistance to doing so and articulated desire to provide more detailed information. (See e.g. Ra2316:10 - 24; Ra2354:2 - 11). In other words, the ALJ observed that DoBI's witnesses were willing to say whatever necessary to conform their testimony to the theory of DoBI's case - even if such testimony was inaccurate, incomplete, or an outright lie.

Throughout the proceedings before the OAL, to date, the ALJ has been forced to repeatedly and incredulously express concerns with DoBI's lack of integrity on dispositive matters, and to highlight problems with the credibility of the witnesses that DoBI has offered in an attempt to implicate Savadjian. (Ra2420:11 - Ra2421:17). Based upon the ALJ's unique credibility observations and the authenticity and admissibility conclusions flowing therefrom over a multi-day trial, the ALJ ordered that DoBI's chosen witness - Mr. Shanley - could not authenticate the proffered evidence (the "Initial Evidentiary Order"). (See e.g. Ra771:13 - 19; Ra790 - Ra794).

**D. DoBI Appeals the Initial Evidentiary Order and the Acting DoBI Commissioner Remands the Matter Back to the OAL**

In response to the Initial Evidentiary Order, DoBI filed an interlocutory appeal with the then-acting DoBI Commissioner. On

February 27, 2017, the then-Acting DoBI Commissioner modified the Initial Evidentiary Order and remanded the matter back to the OAL for a further evidentiary hearing (the "Acting Commissioner's Order"). (Ra797 - Ra824). The direction from the Acting DoBI Commissioner to the ALJ on remand was to provide a more thorough opportunity for DoBI to develop the record before making an admissibility determination in connection with the proffered evidence. (Ra823 - Ra824).

**E. DoBI's Second Failed Attempt to Authenticate Evidence**

On August 29, 2017, in response to the Acting Commissioner's Order, DoBI again attempted to authenticate evidence at the hearing before the ALJ. For the second time since these proceedings began, DoBI was unable to provide any credible evidence showing that the Recordings and related documents are authentic.

In response to the testimony provided by DoBI's witness, the ALJ remarked that DoBI's witness was not credible because, among other reasons, the ALJ observed that DoBI's witness had been coached to say certain phrases in a specific matter in a transparent effort to overcome DoBI's earlier credibility and evidentiary problems. (See e.g. Ra68, Ra76 - Ra77). There can be no substitute for such compelling credibility determinations by the ALJ who sat a few feet from DoBI's witness as he testified.

**F. The ALJ'S August 29, 2018 Decision and Order**

Following the hearing on August 29, 2017 and extensive post-hearing briefing by all parties, on August 29, 2018, the ALJ below issued a thirty-seven (37) page decision detailing the ALJ's determinations of credibility and the evidentiary conclusions that flow therefrom (the "August 29 Order"). (Ra61 - Ra97).

The evidentiary conclusions set forth by the ALJ in the August 29 Order did not bear upon the application or interpretation of the Act. (*Id.*). Instead, the conclusions contained in the August 29 Order rested exclusively upon the ALJ's determinations of credibility and related matters pertaining to the authentication and admissibility of evidence. (*Id.*). In the August 29 Order, the ALJ made specific findings of fact as to the inability of DoBI's witness to authenticate the subject evidence based upon a lack of personal knowledge and the witness' general lack of credibility. (See e.g. Ra68, Ra76 - Ra77). Overruling those conclusions by the ALJ is tantamount to saying that it was unnecessary for live testimony in the first place.

The ALJ conducted a detailed legal analysis supporting the decision to bar Mr. Shanley from authenticating the subject evidence. (Ra77 - Ra96). Rejecting DoBI's witness as not credible and incapable of authenticating DoBI's proffered evidence, the ALJ unequivocally held that "until DoBI provides a witness who can authenticate these documents and provide a residuum of legal and

competent evidence ... these documents will remain inadmissible and will not be admitted into evidence." (Ra96 - Ra97). The ALJ further acknowledged that "DoBI wants to sidestep the requirement of authentication as a precondition to their admissibility." (Ra77).

In the August 29 Order, the ALJ cited to established New Jersey law that provides the finder of fact in an administrative proceeding alone with "the inherent power to reject [] testimony if the judge finds that no trier of fact could reasonably believe that the witness perceived the matter." (Ra78). The ALJ wrote:

This remand is more than a reconsideration of whether evidence proffered at a hearing should be admitted into evidence as a business record. It is an infringement on the role and responsibility of the administrative law judge to determine what should be admitted into evidence at his or her discretion. Should we disregard the discretion of the ALJ to make such determinations, we would disregard the power and authority of the OAL to be an independent arbiter of agency determinations.

(Ra96 - Ra97). It was the proper view of the ALJ in the August 29 Order that we might as well dispense with the charade of having an OAL trial altogether if the DoBI Commissioner is simply permitted to supplant such credibility determinations as those contained in the August 29 Order with independent conclusions that ignore the established record.

**G. The DoBI Commissioner's October 16, 2018 Order**

On October 16, 2018, the DoBI Commissioner issued a decision reversing the ALJ's August 29 Order, holding that, notwithstanding the ALJ's reasoned credibility determinations and the unambiguous law establishing the ALJ as the arbiter of such evidentiary matters, DoBI had, in fact, already authenticated evidence at the hearing. (the "Commissioner's Order"). (Ra1 - Ra59). In the Commissioner's Order, the DoBI Commissioner erroneously held that the Commissioner alone has the power to determine all legal issues presented in a hearing before the OAL, including credibility and evidentiary decisions. (Ra31 - Ra34). Thus, the Commissioner did not evaluate the ALJ's findings of fact and well-reasoned determinations as to the credibility of witnesses that testified at the contested hearing presided over by the ALJ. (Ra1 - Ra59). The ALJ's determinations of credibility, findings of fact, and conclusions of evidentiary law were simply ignored, and supplanted with the views of the DoBI Commissioner. (Ra1 - Ra59).

**LEGAL ARGUMENT**

**POINT I**

**THE INTERESTS OF JUSTICE REQUIRE THAT SAVADJIAN'S REQUEST FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL BE GRANTED [Ra1 - Ra59]**

The interests of justice necessitate interlocutory review of the Commissioner's Order by the Appellate Division at this time so that Savadjian is afforded the due process that litigants are

supposed to be provided through OAL proceedings. Forcing Savadjian to resume the administrative trial in this matter without a conclusive determination on the single legal issue presented here would be offensive to Savadjian's basic right to defend himself. In recognition of this obvious fact, the ALJ below has suspended the OAL proceeding from which this request emanates, pending the outcome of this request for interlocutory appeal. If the Appellate Division fails to intervene, a significant injustice will occur.

A request for leave for interlocutory review should be granted where resolution of the underlying issue will resolve fundamental procedural issues and prevent the parties "from embarking on an improper or unnecessary course of litigation." See *Brundage v. Estate of Carambio*, 195 N.J. 575 (2008) (citing *Dinizo v. Butler*, 315 N.J. Super. 317, 319 (App. Div. 1988)). Thus, where appellate intervention would prevent a lower court from conducting proceedings in a manner inconsistent with fundamental principles of fairness and due process, interlocutory review is appropriate. See e.g. *Romano v. Maglio*, 41 N.J. Super. 561 (App. Div. 1956). That is the precisely the situation presented in this case. The Commissioner's Order requires the ALJ below to ignore well-reasoned and specifically defined concerns about the credibility, authenticity, and admissibility of evidence.

Interlocutory review is necessary here to correct the DoBI Commissioner's misapplication of established law putting the ALJ

in the position as the gatekeeper of evidence in hearings before the OAL, and to ensure that those adjudicatory functions entrusted to ALJs are not usurped by an agency head acting with clear conflicts of interest. The DoBI Commissioner has clearly ruled in favor of her own agency to mask deficiencies in DoBI's investigation and collection, preservation, and presentation of evidence. That outcome is counter to the due process that proceedings before the OAL is supposed to afford Savadjian, which Savadjian is supposed to be able to challenge the evidence sought to be used against him by the State agency.

In the Commissioner's Order, the DoBI Commissioner improperly substituted the impartial judgment of the ALJ on matters within the particular judicial expertise of the ALJ - the credibility, authenticity, and admissibility of evidence - with her own subjective views in support of her own agency. If interlocutory review of the Commissioner's Order is not granted and the Commissioner's Order remains the law of the case, there is no sense in even continuing the fallacy of trying this case before a neutral ALJ. The Commissioner has shown her hand - she will not rule in favor of Savadjian.

In the interests of justice, and to ensure that the proceedings below are conducted in a manner consistent with principles of due process and fundamental fairness, interlocutory review is appropriate, and Savadjian's motion should be granted.

**POINT II**

**THE COMMISSIONER'S ORDER IMPERMISSIBLY USURPS  
THE POWER OF THE ALJ AS THE EXCLUSIVE  
GATEKEEPER OF EVIDENCE [Ra1 - Ra59]**

It is the responsibility of the ALJ to observe trial presentations and evaluate both the credibility of witnesses, as well as the authenticity and admissibility of evidence. Acknowledging the ALJ's clearly defined role in our jurisprudence, this Court recently held in *Dep't of Community Affairs v. Noe*, 2018 WL 4997278 (N.J. App. Div. Oct. 16, 2018) that "ALJs are not mere conduits for transmitting evidence to the agency head, and they should not be considered 'second tier payers or hold an inferior status as factfinders.'" *Id.*, (citing *In Matter of Hendrickson*, \_\_\_\_ N.J. \_\_\_\_, (2018) (slip op. at 19)). The Commissioner's Order, however, attempts to take all power of adjudication away from the ALJ and turn the OAL into the "mere conduit for transmitting evidence" that this Court has expressly held it is not. DoBI's attempt to usurp the ALJ's authority is not consistent with established law and should be reversed immediately before a grave injustice is allowed to occur.

The OAL serves an important function in our judicial system. A hearing before the OAL, presided over by an ALJ, is a necessary prerequisite for actions by administrative agencies where the "fact-finding involves certain person or persons whose rights will be directly affected and whether subject matter at issue is

susceptible to receipt of evidence." *Cunningham v. Dep't of Civil Service*, 69 N.J. 13 (1975). Thus, the OAL provides parties with a true adversary proceeding, based upon the notions of constitutional due process and fundamental fairness, where particularized rights or interests will be affected by an administrative determination. *Public Interest Research Group of New Jersey Inc. v. Dep't of Environmental Protection*, 152 N.J. Super 191 (App. Div. 1977).

New Jersey law is clear, the ALJ presiding over hearings before the OAL is tasked with performing the exclusive gatekeeper functions of the trial court, such as being the sole arbiter on matters of credibility, authenticity, and admissibility of evidence. See e.g. *Messick v. Bd. of Review*, 420 N.J. Super. 321, 326 (App. Div. 2011) (holding that an agency head may "not reject the findings [of the ALJ] 'as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record.'").

Unlike an ALJ, an agency head is not uniquely qualified to resolve purely legal questions unrelated to its field of expertise. See e.g. *Brambila v. Board of Review*, 124 N.J. 425, 437 (1991) (finding that the Department of Labor possesses expertise only in interpreting the Federal Unemployment Tax Act, while the

Immigration and Naturalization Service was an expert with respect to the Immigration Reform and Control Act); *Mayflower Sec. Co. Inc. v. Bureau of Securities in Division of Consumer Affairs of Dept. of Law and Public Safety*, 64 N.J. 85, 93 (1973) (finding that expertise relating to the subject regulations was different from an independent judge's determination as to credibility); *Baylor v. New Jersey Dep't of Human Servs.*, 235 N.J. Super. 22, 26-27 (App. Div. 1989); *Grancagnola v. Planning Bd.*, 221 N.J. Super. 71, 75 (App. Div. 1987). An agency head's expertise is limited to the particular statutes or regulations over which it governs, and nothing more. See e.g. *Greenwood v. State Police Training Ctr.*, 127 N.J. 500, 513 (1992) ("Agencies, however, have no superior ability to resolve purely legal questions[.]"); *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965) (deferring to an agency's expertise only "where such expertise is a pertinent factor."). Therefore, an agency head's jurisdiction to overrule an ALJ in administrative law matters is limited to issues involving the specific statutes and rules governing the particular agency head's area of regulation. *Ibid.*

New Jersey law directs that the ALJ is better suited than an agency head who is not present at the hearing to evaluate the credibility and authenticity of proffered evidence prior to its admission. *Clowes v. Terminix Int'l, Inc.*, 109 N.J. 575, 587-88 (1988) (holding that an agency head must give deference to an ALJ's

findings of fact); *H.K. v. Dep't of Human Servs.*, 184 N.J. 367, 384 (2005) (holding the ALJ was best suited to make evidentiary decisions, and not the agency head); *City of Passaic v. New Jersey Div. of State Police*, 332 N.J. Super. 94, 100 (App. Div. 2000) (acknowledging that it is the "ALJ's role and obligation to determine the relevance and admissibility in the administrative action of the testimony and documents."); *Cavalieri v. Bd. of Trs. of PERS*, 368 N.J. Super. 527, 534 (App. Div. 2004) (holding that the ALJ, and not the agency head, is responsible for evaluating the record and making factual findings); *Coughlin v. Bd. of Trustees, Police & Firemen's Ret. Sys.*, 2011 WL 850114 (N.J. App. Div. Mar. 14, 2011) ("when an agency strays from the factual findings of an ALJ, we need not accord the agency the level of deference that we ordinarily recognize in reviewing final administrative decisions."); *Asdal Builders, LLC v. New Jersey Dep't of Env'tl. Prot.*, 2012 WL 2368755 (N.J. App. Div. June 25, 2012) (finding that the ALJ is in the best position to evaluate the sufficiency of evidence); *Office of Children's Servs. v. E.T.*, 2007 WL 4270340 (N.J. App. Div. Dec. 7, 2007) (finding that the ALJ did not abuse his discretion in excluding evidence); *M.R. v. Div. of Developmental Disabilities*, 2009 WL 169742, at \*1 (N.J. App. Div. Jan. 27, 2009) (finding that it is within the ALJ's discretion to exclude evidence, and that a reviewing court "should defer to such evidentiary rulings."); *Dep't of Children & Families, Div. of*

*Youth & Family Servs. v. V.D.*, 2013 WL 1163981 (N.J. App. Div. Mar. 22, 2013) ("Consequently, we are not required to defer to the agency head's decision on credibility findings, if at odds with the ALJ's."); *In re Certificates of Benjamin Norton by the N.J. State Bd. of Exam'rs*, 2016 WL 6122859 at \*3 (N.J. App. Div., Oct. 20, 2016) (Affirming ALJ's decision that documentary evidence was inadmissible where evidence was not properly authenticated at trial).

The Commissioner's Order does not just disregard well-settled New Jersey law, it turns the OAL proceedings in this case into an outright sham. The Commissioner's Order ignores the separate and independent functions of the OAL and the Commissioner and, instead, crowns the DoBI Commissioner as the definitive legal authority on matters concerning the Act, witness credibility, and the authenticity and admissibility of evidence. (See Ra31 - Ra34). The relegation of the ALJ's role to that of a mere feckless servant of the Commissioner represented by the Commissioner's Order is contrary to established law and any notion of justice. To allow the Commissioner's Order to cast aside the well-founded legal determinations as to the credibility, authenticity, and admissibility of evidence of the ALJ below would reduce the role of the ALJ to the "mere conduit for transmitting evidence to the agency head" that the Appellate Division has expressly rejected.

See *Dep't of Community Affairs v. Noe*, 2018 WL 4997278 (N.J. App. Div. Oct. 16, 2018).

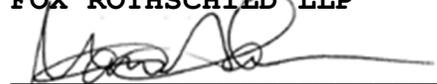
As the ALJ below so eloquently cautioned DoBI before its Commissioner chose to ignore the weight of the authorities in this case: “[s]hould we disregard the discretion of the ALJ to make such [evidentiary] determinations, we would disregard the power and authority of the OAL to be an independent arbiter of agency determinations.” (Ra96 - Ra97).

The ALJ serves an important function in our system of administrative law. This Court cannot allow DoBI to eviscerate the ALJ’s role as the gatekeeper of evidence to nothing. Accordingly, Savadjian’s request for interlocutory review should be granted, and the Commissioner’s Order should be reversed as *ultra vires* of the authority of the DoBI Commissioner.

**CONCLUSION**

For the reasons set forth herein, Savadjian respectfully requests that the Appellate Division grant his request for leave to file an interlocutory appeal, and further requests that the Appellate Division reverse the Commissioner’s Order.

Respectfully submitted  
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Dated: November 5, 2018