# Exhaustion of Administrative Remedies

# Learning Objectives for this Module

## Learn why failing to exhaust administrative remedies before going to court is a fatal error.

## Learn when APA exhaustion applies and its limits.

## Learn that if the APA does apply, common law exhaustion is much stricter.

## Learn what issue exhaustion is and when it might be waived by the court.

# Reading Assignment

## Chapter 6, 241-261.

# Issues to be addressed

## Key Questions

### Does the plaintiff have to go through the agency process before going to court?

### Does the plaintiff have to present the same issues to the agency as will be challenged later in court?

### Failing to exhaust agency remedies is a source of significant malpractice

#### Some of the Katrina levee cases were dismissed because the plaintiffs did not exhaust their remedies before filing suit.

## Is Exhaustion Required by Statute or Regulation?

### The key question under the APA is whether the enabling act or an agency regulation requires exhaustion

#### If exhaustion is not required, then the party may go to court directly

#### However, if there is an agency process available, and you lose in court, you may have waived your agency appeal

### APA - 5 U.S.C. § 704

#### . . . Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

#### Under § 704, can the agency enforce an order and still require exhaustion of agency appeals process?

#### Why would this be logically inconsistent?

#### (There is also common law exhaustion for non-APA cases, as discussed later.)

## Example: HUD Regulations

### HUD regulations allow, but do not require that an administrative appeal be filed

### The granting of the appeal is discretionary with the secretary

### The ruling of the ALJ becomes final in 30 days and is not stayed by a request for a hearing

### Must you request an administrative appeal before going to court?

#### Remember 704

## Common Law Exhaustion: Portela-Gonzalez, 109 F.3d 74 (1st Cir. 1997)

### Plaintiff is fired from a civilian Navy job

#### The APA does not apply by statute

### Plaintiff appeals through 3 levels, but skips last level.

#### Firing is in force during appeal

### Under the APA, she could go to court, but under common law exhaustion she has to go through the entire agency process even though the agency action has not been stayed.

#### She does not have a final ruling if there is agency process left.

#### Just knowing that you are going to lose through the agency process is not enough

### Equitable Exceptions to Common Law Exhaustion

#### Will requiring exhaustion prevent the court from properly reviewing the action?

#### Will the plaintiff suffer irreparable harm?

#### Can the agency process provide the requested relief?

#### Is the agency so biased or prejudiced that it cannot give a fair review? (This, as we have learned, is nearly impossible to prove.)

## What if You Screw Up Your Administrative Appeal?

### Assume that a person tried to exhaust the administrative appeals, but makes a procedural error such as missing a deadline, and the appeal is dismissed by the agency

### Since there is no further process available at the agency, has he exhausted the agency remedies?

### Has he gotten a final judgment from the agency on the merits?

### Can you go to court without a final ruling from the agency?

### Can you get to the Supreme Court in an Article III case if you screw up the appeal to the Circuit Court?

## Administrative Issue Exhaustion

### Must each issue that will be appealed to the courts be raised at the agency level?

### What about in a regular trial: If you do not present an issue to the trial court - other than a jurisdictional issue - can you raise it at the first time on appeal?

### What if you raise some issues with the agency, but not others - can you then appeal the ones you raised?

## Sims v. Apfel, 530 U.S. 103 (2000)

### Social Security disability benefits

### The court held that the general rule is that plaintiffs who are subject to exhaustion of remedies must also present the issues they want to appeal to the agency

### In the specific case, the court found that the special nature of SS mitigated against preclusion. While the proceeds are formal adjudications, they are in actuality informal, and applicants seldom have counsel.

### Thus the court can waive issue exhaustion if you can argue a compelling reason that it would be unfair in your client’s case.

## Issue Exhaustion in Rulemaking

### How would you argue for issue exhaustion in rulemaking?

### When do parties have a chance to object to provisions in a rulemaking?

### Should they be required to make their objections during the comment period if they plan to challenge the rule later in court?

### Is this analogous to an administrative appeal of an order?

### What if the party did not raise the issue in a comment, but someone else did?

# Evaluation Questions

## What is exhaustion of remedies?

### What are the APA requirements for exhaustion of remedies?

### What does *Portela-Gonzalez* (the civilian employee of the Coast Guard who was contesting her firing) tell us about common law exhaustion as compared to APA exhaustion?

### Put exhaustion of remedies into the larger administrative law context: Why is failing to exhaust your remedies (if required and not within an exception) a fatal error that the court cannot correct on equitable grounds, i.e., why does it mean standing fails?

### What are the exceptions to exhaustion of remedies?

#### Why might you choose to go through the agency appeals process even if you could go directly to court under an exception, or because exhaustion is not required for your case?

## What is administrative issue exhaustion?

### If you are given a fact situation, how would you analyze it to determine whether the court might waive issue exhaustion and what your argument should be? How would the *Matthews* analysis fit in your argument? Jurisprudentially, how do you argue that it is OK to waive the failure to present all the issues, given that exhaustion itself cannot be waived?

## What is the futility doctrine and what do you have to do to successfully invoke it?