

5 U.S.C. 556(d).

OHA interpreted the term "burden of proof" to mean the "burden of going forward to establish a prima facie case." In adopting this interpretation, OHA relied primarily on a supplemental opinion in a single case holding that the "burden of proof" in § 7(c) of the APA is the burden of going forward with proof, and not the ultimate burden of persuasion. 43 FR 34381 (August 3, 1978), quoting *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1976).

However, this interpretation by OHA has proven to be incorrect by the U.S. Supreme Court's decision in *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). That case involved the use of the Department of Labor's "true doubt" rule as it applied to adjudications under the Black Lung Benefits Act (BLBA), 83 Stat. 792, as amended, 30 U.S.C. 901 *et seq.* (1988), and the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.* (1984). The "true doubt" rule allowed the benefit claimant to prevail when the evidence was equally balanced, or in equipoise. Thus, the rule essentially placed the burden of persuasion upon the party opposing the benefits instead of the proponent of the rule, the benefit claimant. In determining whether or not the "true doubt" rule violates the APA, the Court determined first, whether the burden of proof established in § 7(c) applies to adjudications under the LHWCA and the BLBA, and second, the meaning of the term "burden of proof."

In holding that the APA was applicable to hearings under the LHWCA and BLBA (and that these statutes do not "provide otherwise"), the Supreme Court noted that it does not lightly presume exemptions from the APA. 512 U.S. at 271, citing *Brownwell v. Tom We Shung*, 352 U.S. 180, 185 (1956). And, although the LHWCA provides that the agency's hearings "shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure \* \* \*", 33 U.S.C. 923(a), the Court found this provision insufficient to exempt the LHWCA from § 7(c) of the APA. *Id.*; See also *Maier Terminals Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993) (holding that § 12 of the APA, 5 U.S.C. 559, allows only express statutory language to supersede the APA), *aff'd*, 512 U.S. 267 (1994).

With regard to the meaning of the term "burden of proof," the Court, after a lengthy discussion of the APA and its legislative history, held that: "These principles lead us to conclude that the drafters of [§ 7(c)] of the APA used the term 'burden of proof' to mean the burden of persuasion." *Id.* at 276. In other words, when an agency is a proponent of a rule or order, the burden of proof referred to in § 7(c) of the APA means the burden of going forward to establish a prima facie case and the burden of persuasion. *Id.* at 279. This holding by the Court requires that in situations governed by the APA where OSM is the proponent of a rule or order, the agency has both the burden of going forward to

establish a prima facie case and the ultimate burden of persuasion.

The Senate Committee report on the APA explains that:

Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.

S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), reprinted in S. Doc. 248 at 208; Accord, H.R. Rep. 1980, 79th Cong., 2d Sess. 34 (1946), reprinted in S. Doc. 248 at 270.

As the Court in *Greenwich Collieries* held: That Congress intended to impose a burden of production does not mean that Congress did not also intend to impose a burden of persuasion. Moreover, these passages are subject to a natural interpretation compatible with congressional intent to impose a burden of persuasion on the party seeking an order. 512 U.S. 267, 279 (1994).

The Court in *Greenwich Collieries* was not oblivious to the repercussions of their holding, nor were they unaware of their previous statements on this issue. The Court noted that "We recognize that we have previously asserted the contrary conclusion as to the meaning of burden of proof in § 7(c) of the APA." *Id.* at 276. However, the Court also noted that the APA was a statute designed "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other." *Id.* at 280-281, (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950)). The Court's opinion manifests an appreciation for the situation that many administrative agencies, including OHA, find themselves in today. That is, when the burden of proof was thought to mean only the burden of going forward to establish a prima facie case, it left each agency free to decide who shall bear the ultimate burden of persuasion. *Greenwich Collieries* at 281. Such a chaotic and arbitrary system is exactly what Congress was trying to prevent in establishing the uniform procedures under the APA. That is why, in the words of the Supreme Court, "[Agencies] cannot allocate the burden of persuasion in a manner that conflicts with the APA." *Id.*

Moreover, the Court expressly rejected the analysis of *EDF v. EPA* regarding the legislative history of § 7(c) of the APA, which OHA has relied upon in shifting the burden of persuasion to the regulated party in several of its regulations. After noting the Department of Labor's reliance on *NLRB v. Transportation Management*, 462 U.S. 393 (1983), and on Judge Leventhal's analysis in the *EDF v. EPA* case, the Court held that "We find this legislative history unavailing." *Greenwich Collieries* at 278.

In those proceedings where SMCRA does not expressly<sup>2</sup> provide a burden of proof distinct from that set forth in the APA, OHA has improperly relieved OSM of the burden of persuasion when OSM is the proponent of a rule or order. This is in direct conflict with

<sup>2</sup> See *Maier Terminals*, 992 F.2d 1277, 1281 n.3 (3rd Cir. 1993), *aff'd*, 512 U.S. 267.

*Greenwich Collieries*, which states that "The Department cannot allocate the burden of persuasion in a manner that conflicts with the APA." 512 U.S. at 281. Since the ultimate burden of persuasion under § 7(c) of the APA requires the agency as a proponent of a rule or order to prove its case by a preponderance of the evidence, *Steadman v. SEC*, 450 U.S. 91 (1981), OHA must revise its regulations concerning the burden of proof to require OSM, as the proponent of a rule or order, to prove its case by a preponderance of the evidence.

#### B. Administrative History

##### 1. Office of Hearings and Appeals

Commenters have recommended changes in the burdens of proof assigned in OHA regulations since the first rules were published in 1978. These early comments objected to inconsistencies between the burden of proof allocation in § 7(c) of the APA, 5 U.S.C. 556(d), and 43 CFR 4.1171 and 4.1194 which assign the ultimate burden of persuasion to the applicant seeking review of enforcement actions. OHA, however, refused to place the ultimate burden of persuasion in these regulations on the agency. In response to recommended changes in § 4.1171, OHA stated that:

\* \* \* The comment was rejected. Section 556(d) of the APA \* \* \* was analyzed by Judge Leventhal in his supplemental opinion on petition for rehearing in *Environmental Defense Fund v. EPA*, 548 F.2d 998, 1012 (D.C. Cir. 1976). He concluded at 1013 that the burden of proof referred to in section 556 "is the burden of going forward with proof, and not the ultimate burden of persuasion." In addition, the legislative history clearly states that an applicant for review has the ultimate burden of proof in proceedings to review notices and orders. S. Rep. No. 128, 95th Cong. 1st Sess. 93 (1977).

43 FR 34381 (August 3, 1978).

The Supreme Court decision in *Greenwich Collieries* now provides a clear statement of law which requires OHA to revisit and revise these regulations. The two primary justifications that OHA has used in the past to shift the burden of persuasion from the agency to the permittee has been the *EDF v. EPA* case, quoted supra, and the argument that SMCRA's legislative history supports this result. However, the central holding of the *EDF v. EPA* case, that the burden of proof in § 7(c) of the APA means only the burden of going forward with a prima facie case, was expressly rejected in *Greenwich Collieries*. 512 U.S. at 279. This rationale, therefore, can no longer be accepted.

The second rationale, OHA's reliance on SMCRA's "legislative history," is also unavailing. First, the isolated passage OHA relied upon conflicts with the language of SMCRA. In this case, SMCRA requires compliance with § 7(c) of the APA because it does not provide for a distinct burden of proof. Moreover, in many instances the statute expressly cross-references the APA. As the Supreme Court has made very clear, legislative history may not be used to override the plain language of a statute. *Ratzlaf v. United States*, 114 S.Ct. 655, 662 (1994) (One does not resort to legislative