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## Administrative Law

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# Administrative Law

*Marita C. Sullivan\* and Margaret A. Marcouiller\*\**

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## I. INTRODUCTION

This Article highlights noteworthy developments in Illinois administrative law by examining some of the major decisions handed down by Illinois courts during the *Survey* period. This Article also reviews legislative enactments of the Illinois General Assembly

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passed during the *Survey* period that affect administrative law. The case law and legislation discussed clarify the role of the administrative agency and influence review of agency action.

## II. CASE LAW

### A. Agency Action

A survey of administrative law properly begins with the agency and its administrative functions. Each agency's functions are defined in an enabling act. A legislative body delegates some of its power to the agency in the enabling act and sets the parameters of agency authority to make rules and adjudicate controversies.

#### 1. Municipalities as Agencies

Municipalities sometimes act as administrative entities and sometimes as home rule units, empowered by the state constitution to exercise broader legislative authority. The distinction between home rule and administrative action is important because a home rule unit's legislative action is accorded greater deference by the courts, whereas administrative action is subject to a stricter standard of review.

The Illinois Supreme Court examined the distinction between home rule legislative and administrative action in *Landmarks Preservation Council v. Chicago*.<sup>1</sup> The plaintiffs in *Landmarks* challenged the Chicago City Council's ordinance rescinding the landmark status of the McCarthy Building.<sup>2</sup> The plaintiffs maintained that the City Council violated the Chicago Landmarks Ordinance by failing to hold a hearing prior to taking this action.<sup>3</sup>

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1. 125 Ill. 2d 164, 531 N.E.2d 9 (1988); see also *infra* Troy and Fehringer, *State and Local Government*, 21 LOY. U. CHI. L.J. 601 (1990).

2. 125 Ill. 2d at 167, 531 N.E.2d at 10. The McCarthy Building had been previously declared a landmark by the City Council at a time when it was considered a "cornerstone" of a plan to rejuvenate Chicago's North Loop. *Id.* at 170-71, 531 N.E.2d at 11. Later, it became doubtful that the McCarthy Building could be integrated into the redevelopment. *Id.* at 171, 531 N.E.2d at 11. After reviewing recommendations by various city commissions, the City Council rescinded the landmark status. *Id.* at 172, 531 N.E.2d at 12.

3. *Id.* at 169-70, 531 N.E.2d at 11 (citing CHICAGO, ILL., MUNICIPAL CODE ch. 21-76 (1989)). The plaintiffs alleged that the defendants violated a provision of the Chicago Municipal Code, which provides in part: "Any designation of an area, district, place, building, structure, work of art, or other similar object as a 'Chicago landmark' shall only be amended or rescinded in the same manner and procedure as the original designation was made." CHICAGO, ILL., MUNICIPAL CODE ch. 21-76 (1989). The original landmark designation of the McCarthy Building was made after potentially interested parties were given notice of a public hearing on the matter. *Landmarks*, 125 Ill. 2d at 170, 531 N.E.2d at 11. The record contained no evidence that a public hearing was held before the

The circuit court dismissed the complaint for failure to state a cause of action, and the plaintiffs appealed directly to the supreme court.<sup>4</sup>

The supreme court rejected the defendant's contention that the City Council was performing a reviewable administrative function when it rescinded the landmark designation.<sup>5</sup> The court did recognize that in some circumstances a municipality may be required to perform an administrative function.<sup>6</sup> Municipalities more commonly performed administrative functions prior to becoming home rule units in 1970.<sup>7</sup> Since 1970, however, municipalities have broader authority that allows them to perform legislative functions.<sup>8</sup>

The court determined that the City Council enacted the ordinance rescinding the landmark status pursuant to its legislative authority and that it was not performing an administrative function pursuant to a delegation of authority from the General Assembly.<sup>9</sup> Keeping in mind that judicial authority to review legislative action is quite limited, the court reiterated the well-established rule that legislative action is reviewable only when it allegedly violates a constitutional provision or a state or federal statute.<sup>10</sup> Because the

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rescission, although the defendants maintained that such a hearing was conducted. *Id.* at 172, 531 N.E.2d at 12.

4. *Id.* at 168, 531 N.E.2d at 10. Direct appeal was proper pursuant to Supreme Court Rule 302(b), which provides for direct appeal of cases when the public interest requires expeditious determination. *See* ILL. S. CT. R. 302(b), ILL. REV. STAT. ch. 110A, para. 302(b) (1987).

5. *Landmarks*, 125 Ill. 2d at 180, 531 N.E.2d at 16.

6. *Id.* For example, certain municipalities are required by statute to establish a zoning board of appeals, an administrative body. *Id.* (citing ILL. REV. STAT. ch. 24, para. 11-13-3 (1987)).

7. *Id.* at 180-81, 531 N.E.2d at 16. Before the Illinois Constitution of 1970 granted home rule authority, municipalities were required to look to the General Assembly to grant them limited authority to enact zoning laws. *Id.* On that basis, the court distinguished *Treadway v. City of Rockford*, 24 Ill. 2d 488, 182 N.E.2d 219 (1962), a pre-1970 Constitution case relied on by the plaintiff. *Landmarks*, 125 Ill. 2d at 181, 531 N.E.2d at 16. In *Treadway*, a municipality was properly subject to administrative review because plaintiff alleged that the city council violated the then-existing zoning enabling act. *Id.* (citing *Treadway*, 24 Ill. 2d 488, 182 N.E.2d 219 (1962)).

8. *Id.* at 178, 531 N.E.2d at 15. Article VII of the 1970 Illinois Constitution sets the parameters of home rule authority by providing:

Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.

ILL. CONST. OF 1970 art. VII, § 6(a).

9. *Landmarks*, 125 Ill. 2d at 180, 531 N.E.2d at 16.

10. *Id.* at 179, 531 N.E.2d at 15 (citing *Illinois Gasoline Dealers Ass'n v. Chicago*, 119 Ill. 2d 391, 404, 519 N.E.2d 447, 452 (1988) ("[a]n act cannot be declared invalid for

plaintiffs did not point to any statutory infringement or constitutional infirmity, the court upheld the ordinance.<sup>11</sup>

## 2. Scope of Agency Jurisdiction

Occasionally, more than one agency claims it is authorized to resolve a given dispute. Because plaintiffs sometimes may elect between administrative remedies, determining the scope of each agency's relevant jurisdiction is important.

One administrative entity challenged another's jurisdiction in *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission*.<sup>12</sup> The plaintiff ("Bellwood") maintained that the defendant ("Commission") lacked authority to review Bellwood's decision to terminate a probationary police officer.<sup>13</sup> The police officer filed a charge with the Commission against Bellwood, alleging that his discharge was motivated by racial animus.<sup>14</sup> A Commission hearing officer found in his favor and ordered Bellwood to pay back pay, damages, attorney fees and costs.<sup>15</sup> Bellwood filed for administrative review and requested an oral argument before the Commission.<sup>16</sup> The Commission adopted the order of the hearing officer with minor alterations.<sup>17</sup> Bellwood appealed, arguing that the Commission lacked jurisdiction over the dispute.<sup>18</sup>

Bellwood claimed that the police officer's proper recourse was review of Bellwood's action under the Administrative Review Law.<sup>19</sup> The Municipal Code vests authority in Bellwood to establish a Board of Fire and Police Commissioners,<sup>20</sup> and it grants the

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a failure of a house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act.")).

11. *Id.*

12. 184 Ill. App. 3d 339, 541 N.E.2d 1248 (1st Dist.), *appeal denied*, 545 N.E.2d 133 (1989).

13. *Id.* at 342, 541 N.E.2d at 1250.

14. *Id.* at 342, 541 N.E.2d at 1250-51.

15. *Id.* at 342, 541 N.E.2d at 1250.

16. *Id.* at 345, 541 N.E.2d at 1252.

17. *Id.*

18. *Id.* at 342, 541 N.E.2d at 1250. In response, the police officer argued that Bellwood waived its right to raise the issue of agency jurisdiction by failing to file a motion to dismiss his complaint and by failing to raise the issue in its statement of exceptions. *Id.* at 345-46, 541 N.E.2d at 1252. The court ruled that Bellwood had addressed the jurisdictional issue in its various pleadings and motions before the Commission. *Id.* at 346, 541 N.E.2d at 1253.

19. *Id.* at 345, 541 N.E. 2d at 1252. See ILL. REV. STAT. ch. 110, paras. 3-101 to -112 (1987).

20. ILL. REV. STAT. ch. 24, para. 10-2.1-1 (1987).

Board nearly exclusive authority to appoint all members of the police department and to make all rules for appointments and removal.<sup>21</sup> Further, the Municipal Code provides for specific procedures to be followed in the event that removal or discharge of an officer is sought.<sup>22</sup> Judicial review of final administrative decisions of the Bellwood Board is governed by the Administrative Review Law.<sup>23</sup>

Bellwood argued that the Commission lacked jurisdiction based on the court's earlier decision in *Board of Trustees Police Pension v. Human Rights Commission*.<sup>24</sup> In *Board of Trustees*, the court had carved out a narrow exception to the Commission's authority to decide civil rights cases.<sup>25</sup> The complainant, an insulin dependent diabetic, filed a charge of handicap discrimination with the Commission after he was denied the opportunity to participate in the Police Pension Fund.<sup>26</sup> The *Board of Trustees* court noted that the Commission has exclusive jurisdiction over claims brought pursuant to the Illinois Human Rights Act.<sup>27</sup> The Pension Board created under the Illinois Pension Code, however, has the exclusive power and duty to manage the pension fund.<sup>28</sup> Consequently, the Pension Board had jurisdiction over the claim, even though it involved a civil rights violation.<sup>29</sup> The *Board of Trustees* court thus found that the Pension Board's exclusive power and duty created an exception to the exclusivity provisions of the Human Rights Act.<sup>30</sup>

Nevertheless, the *Bellwood* court reasoned that unlike the Pension Board in *Board of Trustees*, the Bellwood Board had no exclusive authority to manage the police department.<sup>31</sup> The court found no provision in the Municipal Code that conflicted with the exclu-

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21. ILL. REV. STAT. ch. 24, paras. 10-2.1-4, 10-2.1-5 (1987). The Board's authority is exclusive unless the city council or board of trustees provides for different appointment and removal procedures by ordinance. *Id.* para. 10-2.1-4.

22. *Id.* para. 10-2.1-17.

23. *Bellwood*, 184 Ill. App. 3d at 346, 541 N.E.2d at 1253 (citing ILL. REV. STAT. ch. 110, paras. 3-101 to 3-112 (1987)).

24. *Id.* (citing *Board of Trustees v. Human Rights Comm'n*, 141 Ill. App. 3d 447, 490 N.E.2d 232 (4th Dist. 1986)).

25. *Board of Trustees*, 141 Ill. App. 3d at 454, 490 N.E.2d at 235-36.

26. *Id.* at 450, 490 N.E.2d at 233.

27. See ILL. REV. STAT. ch. 68, para. 8-102 (1987).

28. *Board of Trustees*, 141 Ill. App. 3d at 452-53, 490 N.E.2d at 234-35 (citing ILL. REV. STAT. ch. 108 1/2, paras. 3-101, 3-132 (1987)).

29. *Id.* at 453, 490 N.E.2d at 235.

30. *Id.* at 454, 490 N.E.2d at 235-36.

31. *Bellwood*, 184 Ill. App. 3d at 347, 541 N.E.2d at 1254.

sive jurisdiction of the Commission over civil rights violations.<sup>32</sup> The *Bellwood* court concluded that, although the Administrative Review Law provides for judicial review, the Human Rights Act provides a separate recourse.<sup>33</sup> *Bellwood* thus presents a situation in which a petitioner can elect between two agencies that have concurrent jurisdiction.

### 3. Agency Rulemaking Authority

*Kaufman Grain Company v. Director Department of Agriculture*<sup>34</sup> reaffirms the principle that courts may decide whether agencies have promulgated their rules improperly. It further reasserts that improper rules may not be invoked by an agency for any purpose. The litigation in *Kaufman Grain* arose out of a dispute between Kaufman and its landlord over Kaufman's assessed damage discount.<sup>35</sup> The landlord wrote to the Illinois Department of Agriculture ("Department") complaining about the assessment, and the Department held a hearing on the matter.<sup>36</sup> Relying on a policy that allowed it to adjudicate disputes between grain dealers and warehouses concerning the quality of grain, the Department reduced the damage discount.<sup>37</sup> Upon judicial review, the circuit court affirmed the Department's ruling.<sup>38</sup> Before the appellate court, Kaufman Grain argued that the Department had relied on purported rules that were not properly promulgated and that were therefore void.<sup>39</sup>

Initially, the court had little difficulty holding that the Department's policy was a "rule" within the meaning of section 3.09 of the Administrative Procedure Act ("Act").<sup>40</sup> Section 5.01 of the

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32. *Id.*

33. *Id.* at 348, 541 N.E.2d at 1254. The interpretation *Bellwood* advocated would preclude certain government employees from seeking redress under the provisions of the Human Rights Act. *Id.* As a matter of public policy, the *Bellwood* court found that interpretation unacceptable. *Id.*

34. 179 Ill. App. 3d 1040, 534 N.E.2d 1259 (4th Dist. 1988).

35. *Id.* at 1042, 534 N.E.2d at 1261.

36. *Id.*

37. *Id.* at 1044, 534 N.E.2d at 1262.

38. *Id.*

39. *Id.*

40. *Id.* at 1046, 534 N.E.2d 1264. Section 3.09 defines an agency "rule" as an: agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings issued pursuant to Section 9, (c) intra-agency memoranda or (d) the prescription of standardized forms.

Act, however, mandates that the agency conduct a public notice and comment proceeding prior to enacting a rule.<sup>41</sup> The Department admitted that it did not comply with any of the mandated procedures for adopting rules.<sup>42</sup> The court concluded that the Department lacked authority to rule on the disagreement if it did not give the public proper notice of its jurisdiction to adjudicate disputes of this type.<sup>43</sup> Thus, the court's decision in *Kaufman Grain* invalidated the Department's *de facto* rule for settling disputes between grain producers and dealers.

#### 4. Agency Investigative Procedures

On remand from the United States Supreme Court, *People v. Krull*<sup>44</sup> came before the Illinois Supreme Court for a ruling regarding the scope of a statute authorizing warrantless administrative searches. The search at issue took place in 1981 when a police officer searched a metal company pursuant to a provision of the Illinois Vehicle Code that authorized warrantless administrative searches of automobile wrecking yards.<sup>45</sup> The circuit court held the statutory provision unconstitutional, and it suppressed evidence obtained during the search.<sup>46</sup> The Illinois Supreme Court affirmed.<sup>47</sup> On a grant of certiorari, the United States Supreme Court held that the fourth amendment exclusionary rule<sup>48</sup> does not apply to evidence seized by a police officer who, in objective good faith, reasonably relied on a statute that authorized a warrantless administrative search even if the statute is later declared unconstitutional.<sup>49</sup> On remand, the Illinois Supreme Court ruled that the officer in question did not exceed the scope of the statute that was

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ILL. REV. STAT. ch. 127, para. 1003.09 (1987).

41. *Id.* para. 1005.01.

42. *Kaufman Grain*, 179 Ill. App. 3d at 1047, 534 N.E.2d at 1264.

43. *Id.* The court reversed the circuit court's decision and remanded the case for an order awarding Kaufman Grain attorney fees reasonably incurred in the litigation. *Id.* at 1048, 534 N.E.2d at 1265. The court also ordered the landlord to return the warehouse receipt or its value to Kaufman Grain. *Id.* at 1049, 534 N.E.2d at 1265-66.

44. 126 Ill. 2d 235, 534 N.E.2d 125 (1989).

45. *Id.* at 237, 126 Ill. 2d at 125. See ILL. REV. STAT. ch. 95 1/2, para. 5-401(e) (1987).

46. *Krull*, 126 Ill. 2d at 237, 534 N.E.2d at 125.

47. *Id.* at 238, 534 N.E.2d at 126. See *People v. Krull*, 107 Ill. 2d 107, 481 N.E.2d 703 (1985).

48. The exclusionary rule is a remedial measure which excludes evidence at trial that has been obtained in violation of the privileges guaranteed by the Constitution. See *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

49. *Krull*, 480 U.S. at 349-50.



then in effect.<sup>50</sup>

It is important to note that the 1989 Illinois Supreme Court decision in *Krull* has limited application. In interpreting a statute that is no longer in effect, the court in *Krull* stressed the limited nature of its holding.<sup>51</sup>

The court considered agency subpoena power in *Naguit v. Selcke*.<sup>52</sup> After reviewing prescription records compiled by the Illinois Department of Alcohol and Substance Abuse, the Department of Professional Regulation ("Department")<sup>53</sup> initiated an investigation into whether a Dr. Naguit was improperly prescribing controlled substances to his patients.<sup>54</sup> The Department issued a subpoena directing the doctor to produce patient records, test results and medication records for fifteen named patients.<sup>55</sup> The doctor complied, but afterwards, he complained that the subpoena's issuance was improper.<sup>56</sup>

After passage of the Medical Practice Act of 1987<sup>57</sup> changed the law governing licensing and regulation of physicians, the Department issued a second subpoena that complied with the requirements of the new law.<sup>58</sup> There was no dispute that under the new law, the Department was entitled to the materials sought under the original subpoena.<sup>59</sup> This time, the doctor refused to comply and challenged the legality of the Department's actions.<sup>60</sup>

The doctor argued that the improperly issued first subpoena "tainted" the second, rendering it improper as well.<sup>61</sup> The doctor maintained that the second subpoena was tainted because the finding of probable cause upon which it was based depended on the contents of the records secured by the original subpoena.<sup>62</sup> The

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50. *Krull*, 126 Ill. 2d at 245, 534 N.E.2d at 129.

51. *Id.* at 248, 534 N.E.2d at 130.

52. 184 Ill. App. 3d 80, 539 N.E.2d 1353 (5th Dist. 1989).

53. The Department of Professional Regulation is now called the Department of Registration and Education. See ILL. ANN. STAT. ch. 111, para. 4400-2 (Smith-Hurd Supp. 1989). See also *infra* note 248 and accompanying text (additional discussion of this change).

54. *Naguit*, 184 Ill. App. 3d at 81, 539 N.E.2d at 1354.

55. *Id.*

56. *Id.*

57. See ILL. REV. STAT. ch. 111, paras. 4400-1 to 4478-1 (1987). See *infra* notes 247-51 and accompanying text (discussion of the most recent changes to the Medical Practice Act).

58. *Naguit*, 184 Ill. App. 3d at 82, 539 N.E.2d at 1355.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 83, 539 N.E.2d at 1355.

circuit court agreed and issued an order enjoining the Department from using the records in bringing disciplinary action against the doctor.<sup>63</sup>

On appeal, the appellate court reversed, concluding that the doctor failed to plead and prove a clear and ascertainable right in need of protection, a prerequisite to obtaining a preliminary injunction.<sup>64</sup> The court determined that the doctor's argument was a variation of the exclusionary rule<sup>65</sup> which does not apply in administrative proceedings.<sup>66</sup> The court further reasoned that even if the rule applied, it would not aid the doctor because the evidence indicated that the records obtained pursuant to the first subpoena played no part in the second subpoena's procurement.<sup>67</sup> Therefore, the court held that the doctor had failed to make the requisite showing of a likelihood of success on the merits.<sup>68</sup>

### B. Agency Hearings

The plaintiff in an administrative proceeding has a right to present his or her case to an impartial hearing officer. Two cases decided during the *Survey* period clarify the hearing officer's role.

#### 1. Role of the Hearing Officer

In *DeBarnard v. State Board of Education*,<sup>69</sup> DeBarnard received a hearing after she was terminated from her position as a tenured high school teacher pursuant to the School Code.<sup>70</sup> She appealed the hearing officer's decision in part on the ground that she had been denied a fair hearing due to a pre-hearing, ex parte communication between the Board and the hearing officer.<sup>71</sup>

DeBarnard learned that the School Board had sent a book of

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63. *Id.* at 82, 539 N.E.2d at 1355.

64. *Id.* To obtain a preliminary injunction, a plaintiff must "plead and prove the following: (1) a clear and ascertainable right in need of protection; (2) an irreparable injury if the injunction is not granted; (3) an inadequate remedy at law; and (4) a likelihood of success on the merits." *Id.* (citing *Meerbrey v. Marshall Field & Co.*, 169 Ill. App. 3d 1014, 1016, 524 N.E.2d 228, 229 (1st Dist. 1988)).

65. See *supra* note 48 for an explanation of the exclusionary rule.

66. *Naguit*, 184 Ill. App. 3d 83, 539 N.E.2d at 1355 (citing *Distaola v. Department of Regis. & Educ.*, 72 Ill. App. 3d 977, 982, 391 N.E.2d 489, 492 (1st Dist. 1979)).

67. *Id.*

68. *Id.* at 83, 539 N.E.2d at 1356. See *supra* note 64 for a list of the elements necessary for a preliminary injunction.

69. 172 Ill. App. 3d 938, 527 N.E.2d 616 (2d Dist. 1988).

70. *Id.* at 939-40, 527 N.E.2d at 616 (citing ILL. REV. STAT. ch. 122, para. 24-12 (1987)).

71. *Id.* at 940, 527 N.E.2d at 616.

evidentiary materials to the hearing officer three days before the hearing began.<sup>72</sup> She then moved for a mistrial, arguing that it was improper for the School Board to communicate with the hearing officer *ex parte*.<sup>73</sup> Her motion was denied.<sup>74</sup> The hearing officer's opinion stated that DeBarnard could resign within thirty days or consider herself fired.<sup>75</sup> Rather than resign, she filed for administrative review. The circuit court held that the hearing officer's decision was not contrary to the manifest weight of the evidence.<sup>76</sup> On appeal, DeBarnard argued that the hearing officer's consideration of the evidence, prior to the hearing, biased him against her in violation of her due process right to a fair and impartial hearing.<sup>77</sup>

The appellate court took note of several cases cited by the School Board which held that an adjudicator's familiarity with the subject matter of a hearing alone does not deprive a party of the right to a fair hearing.<sup>78</sup> These cases were decided in the context of school board dismissals in which the adjudicator obtained information by virtue of its other role as investigator.<sup>79</sup>

The court concluded that there was even less chance of bias against DeBarnard than in the cases relied on by the School Board because a hearing officer performs a single, adjudicative function.<sup>80</sup> Furthermore, DeBarnard could not show that the hearing officer's pre-hearing consideration of the book resulted in any actual prejudice to her.<sup>81</sup> Therefore, the court affirmed the circuit court's decision.<sup>82</sup>

In *Moon Lake Convalescent Center v. Margolis*,<sup>83</sup> the court had to determine whether the Director of the Department of Public Health ("Department") properly delegated adjudicatory authority to an independent contractor. After a hearing on the nursing home's violations of minimum care standards, the hearing officer

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72. *Id.* at 945, 527 N.E.2d at 620.

73. *Id.*

74. *Id.*

75. *Id.* at 942, 527 N.E.2d at 618.

76. *Id.* at 943, 527 N.E.2d at 619.

77. *Id.* at 945, 527 N.E.2d at 620.

78. *Id.* at 945-46, 527 N.E.2d at 620-21 (citing *Fender v. School Dist. No. 25*, 37 Ill. App. 3d 736, 744, 347 N.E.2d 270, 277 (1st Dist. 1976) ("Absent facts demonstrating that a board's prehearing involvement foreclosed fair consideration of evidence presented at the hearing, a due process violation is not shown.")).

79. *Id.* at 946, 527 N.E.2d at 621.

80. *Id.*

81. *Id.*

82. *Id.*

83. 180 Ill. App. 3d 245, 535 N.E.2d 956 (1st Dist.), *appeal denied*, 545 N.E.2d 114 (1989).

decided to impose penalties and to revoke Moon Lake's license.<sup>84</sup> Moon Lake argued that the hearing officer's acts were void because he was not an employee of the Department.<sup>85</sup>

Moon Lake maintained that because the hearing officer's status was that of independent contractor, he did not satisfy the statutory requirements for a hearing officer set forth in section 3-704 of the Nursing Home Care Reform Act of 1979.<sup>86</sup> That section requires the hearing officer to be "the Director or a duly qualified employee of the Department designated in writing by the Director . . . ."<sup>87</sup> Section 1-110, a general definitional provision, defines "Director" as the "Director of Public Health or his designee."<sup>88</sup> Moon Lake maintained that if anyone can be a "designee," the phrase "duly qualified employee" becomes meaningless.<sup>89</sup> The circuit court agreed and reversed the hearing officer's decision.<sup>90</sup>

The appellate court rejected Moon Lake's statutory construction argument, citing precedent and legislative intent.<sup>91</sup> Similarly, in a case involving interpretation of the Illinois Banking Act, *Heritage Bank & Trust Co. v. Harris*,<sup>92</sup> the plaintiff argued that the words "another bank" should be read "another state bank" or the word "another" became superfluous.<sup>93</sup> The *Heritage Bank* court ruled that legislative intent must be discerned from the statute's clear language, and the *Moon Lake* court agreed.<sup>94</sup> Accordingly, the *Moon Lake* court held that the legislature did not intend to place eligibility requirements on hearing officers; inclusion of "or his designee" merely demonstrates an awareness that the Director cannot perform every agency function.<sup>95</sup> Finally, the court noted that after the circuit court's decision in *Moon Lake*, the legislature amended the Act so that any "person" designated by the Director

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84. *Id.* at 248, 535 N.E.2d at 958.

85. *Id.* at 251, 535 N.E.2d at 960.

86. *Id.* at 252-53, 535 N.E.2d at 961 (citing ILL. REV. STAT. ch. 111 1/2, para. 4153-704 (1987)).

87. ILL. REV. STAT. ch. 111 1/2, para. 4153-704 (1987).

88. *Id.* para. 4151-110. *See infra* note 96 (indicating that this definition was later amended).

89. *Moon Lake*, 180 Ill. App. 3d at 253, 535 N.E.2d at 962.

90. *Id.* at 248, 535 N.E.2d at 958.

91. *Id.* at 253-254, 535 N.E.2d at 960-62.

92. 132 Ill. App. 3d 969, 478 N.E.2d 526 (1st Dist. 1985).

93. *Id.* at 976-77, 478 N.E.2d at 532 (citing ILL. REV. STAT. ch. 17, para. 68(4)(h) (1987)).

94. *Id.* at 977, 478 N.E.2d at 532.

95. *Moon Lake*, 180 Ill. App. 3d at 254, 535 N.E.2d at 962.

can now be a hearing officer.<sup>96</sup> This amendment, the court reasoned, reflected the legislature's initial intent.<sup>97</sup>

## 2. Hearsay Evidence and Agency Proceedings

Although some evidentiary requirements may be relaxed in an administrative proceeding, the fundamental rules of evidence, including the hearsay rule and its exceptions, still apply.<sup>98</sup> In *Eastman v. Department of Public Aid*,<sup>99</sup> Eastman, a public aid recipient, contended that an adverse ruling was based on improperly admitted hearsay evidence.<sup>100</sup> Evidence against Eastman included computer printouts prepared by the Department of Public Aid ("Department") that showed that, due to a computer error, a double allotment of food stamps was sent to Eastman.<sup>101</sup> There was no significant evidence against Eastman other than the printouts.<sup>102</sup> Eastman objected to admission of the printouts as hearsay and as lacking foundation.<sup>103</sup> The circuit court affirmed the decision against Eastman, holding that the printouts were public records admissible under the public records exception to the hearsay rule.<sup>104</sup>

The appellate court reversed and, as a threshold matter, it noted that the hearsay rule applies in an administrative proceeding because it "is a fundamental and not a technical rule."<sup>105</sup> Under a well-established exception to the hearsay rule, however, public records are admissible if there is foundation to indicate their trustworthiness.<sup>106</sup> Although these computer printouts constituted public records, the Department failed to offer any foundation testi-

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96. *Id.* See 1988 Ill. Laws, P.A. 85-1183, amending ILL. REV. STAT. ch. 111 1/2, para. 4153-704(a) (1987).

97. *Moon Lake*, 180 Ill. App. 3d at 254, 535 N.E.2d at 962. After determining that the hearing officer was duly authorized, the court found substantial evidence to support his ruling that the nursing home had committed acts of negligence warranting revocation of the home's license. *Id.* at 262, 535 N.E.2d at 967.

98. See *Jamison v. Weaver*, 30 Ill. App. 3d 389, 396, 332 N.E.2d 563, 568 (1st Dist. 1975).

99. 178 Ill. App. 3d 993, 534 N.E.2d 458 (2d Dist. 1989).

100. *Id.* at 994, 534 N.E.2d at 459.

101. *Id.* at 995, 534 N.E.2d at 460.

102. *Id.*

103. *Id.*

104. *Id.* at 995-96, 534 N.E.2d at 460. See FED. R. EVID. 803(8).

105. 178 Ill. App. 3d at 996, 534 N.E.2d at 460-62 (citing *Jamison*, 30 Ill. App. 3d at 396, 332 N.E.2d at 568).

106. *Id.* at 998, 534 N.E.2d at 461. Foundation evidence would include testimony that "the electronic computing technology is recognized as standard, [and that] the entries are made in the regular course of business reasonably near the time of the happening of the event recorded . . . ." *Id.*

mony to justify their admission.<sup>107</sup> In fact, the evidence showed that one of the printouts contained clearly erroneous information.<sup>108</sup> Therefore, the court held that the foundation requirement was not met and ruled that it was substantial error to admit the printouts.<sup>109</sup>

### 3. Consolidation of Agency Proceedings

*Sapstein Brothers Pharmacy, Inc. v. Department of Registration and Education*<sup>110</sup> reaffirms an agency's right to consolidate actions when there are common issues of law or fact. In *Sapstein*, the Illinois Department of Registration and Education<sup>111</sup> ("Department") filed a complaint against two registered pharmacists, charging them with violations in connection with controlled substances shortages and overages.<sup>112</sup> At the hearing, the pharmacists moved for severance.<sup>113</sup> The hearing officer denied the motion, finding that the cases involved the same issues, a common core of facts, and that the pharmacists did not show that they would be prejudiced by consolidation.<sup>114</sup>

After the hearing officer denied the severance motion, the Department called four witnesses and the pharmacists' attorneys cross-examined each witness.<sup>115</sup> The Board of Pharmacy found that the pharmacists failed to keep proper records and that they were guilty of "gross immorality."<sup>116</sup> Both pharmacists had their licenses suspended.<sup>117</sup> They sought administrative review, and the circuit court found that the motions for severance should have been granted because the pharmacists had antagonistic defenses.<sup>118</sup>

The appellate court reversed and reinstated the Department's suspension decision.<sup>119</sup> The court reiterated that the applicable

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107. *Id.*

108. *Id.* at 998, 534 N.E.2d at 462. Eastman's social security number was listed incorrectly on one of the printouts. *Id.*

109. *Id.*

110. 177 Ill. App. 3d 349, 532 N.E.2d at 340 (1st Dist 1988).

111. The Department of Registration and Education is now called the Department of Professional Regulation. See ILL. REV. STAT. ch. 111, para. 4400-2 (1989). See also *infra* note 248 and accompanying text.

112. *Sapstein*, 177 Ill. App. 3d at 351, 532 N.E.2d at 341.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 351, 532 N.E.2d at 342.

119. *Id.* at 353, 532 N.E.2d at 342.

standard for severance is not the criminal standard.<sup>120</sup> Under the administrative standard, a hearing officer may join cases in the "interest of efficient disposition where the matters contain common issues of law or fact."<sup>121</sup> A hearing officer's decision on a request for severance is discretionary and may be challenged only for abuse.<sup>122</sup> The court noted that separate hearings would not change the result because the same witnesses would appear, and the same cross-examination would be heard at both hearings.<sup>123</sup> Therefore, the court held that the hearing officer did not abuse his discretion in consolidating the actions.<sup>124</sup>

#### 4. Impermissible Agency Sanctions

In *Coleman v. Illinois Racing Board*,<sup>125</sup> the Illinois Supreme Court held that an administrative agency may not deny reinstatement of a license based solely on past conduct of which the agency was aware when it issued a prior sanction. The Illinois Racing Board suspended a racetrack groom's license for two years, after an electric goading device and a small amount of marijuana were found in his quarters at a racetrack.<sup>126</sup> After the groom completed his suspension, he applied for reinstatement.<sup>127</sup> Ruling that the Illinois Horse Racing Act granted the Racing Board discretionary power, the Board permanently suspended the groom's license and barred him from ever entering a racetrack in Illinois.<sup>128</sup> The circuit court upheld the decision of the Racing Board.<sup>129</sup> The appellate court reversed and ordered the Racing Board to reinstate the groom.<sup>130</sup>

The supreme court determined that the Racing Board could not correct an excessively lenient suspension by imposing a lifetime

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120. *Id.* at 352, 532 N.E.2d at 342 (citing *Distaola v. Department of Regis. & Educ.*, 72 Ill. App. 3d 977, 980, 391 N.E.2d 489, 491 (1st Dist. 1979)). A defendant seeking severance in a criminal trial must show antagonism of defenses involved and must demonstrate how joint trial would be prejudicial. *People v. Lee*, 87 Ill. 2d 182, 187, 429 N.E.2d 461, 463 (1981).

121. *Sapstein*, 177 Ill. App. 3d at 351, 532 N.E.2d at 342 (citing ILL. ADMIN. CODE tit. 68, § 110.40 (Supp. 1986)).

122. *Id.*

123. *Id.* at 352, 532 N.E.2d at 342.

124. *Id.* The court further found that the plaintiffs would not have succeeded under the criminal standard because their defenses were in no way antagonistic. *Id.*

125. 124 Ill. 2d 218, 225, 529 N.E.2d 520, 524 (1988).

126. *Id.* at 219, 529 N.E.2d at 521.

127. *Id.* at 220, 529 N.E.2d at 522.

128. *Id.* (citing ILL. REV. STAT. ch. 8, para. 37-15(c) (1987)).

129. *Id.* at 219, 529 N.E.2d at 521.

130. *Id.*

suspension for conduct that had already been punished.<sup>131</sup> The court did not question an agency's power to deny reinstatement if reapplication reveals new evidence of misconduct.<sup>132</sup> The court, however, found no legitimate new evidence; therefore, it reversed the Racing Board's decision.<sup>133</sup>

### C. Administrative Review

Under section 3-101 of the Illinois Administrative Review Law,<sup>134</sup> only "final" administrative decisions are subject to judicial review. If the Administrative Review Law applies, a plaintiff has thirty-five days from the date of a final decision or order to file for administrative review.<sup>135</sup> Questions sometimes arise regarding the effect of requests for agency rehearing or other agency review upon the finality of an administrative order.

#### 1. Exhaustion of Remedies and Finality of Orders

In *Condell Hospital v. Health Facilities Planning Board*,<sup>136</sup> the Illinois Supreme Court concluded that the finality of an order as it applies to one set of plaintiffs was not affected by a another party's separate request for rehearing. In so holding, the court stated that it was necessary to provide each party in an administrative proceeding "with a clear route from the administrative agency to the circuit court."<sup>137</sup>

In *Condell Hospital*, the Illinois Health Facilities Planning Board ("Board") granted the defendant hospital a permit to construct a new facility.<sup>138</sup> Numerous area hospitals filed petitions with the Board for rehearing;<sup>139</sup> an area health planning organization ("AHPO") also filed.<sup>140</sup> The Board denied the area hospitals' applications for rehearing.<sup>141</sup> The Board informed the area hospitals, however, of the possibility of their intervention in AHPO's

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131. *Id.* at 225, 529 N.E.2d at 524 (citing *Burton v. Civil Serv. Comm'n*, 76 Ill. 2d 522, 527-28, 394 N.E.2d 1168, 1170 (1979)).

132. *Id.*

133. *Id.* The court took care to point out that it would not determine whether it would have been proper for the Board to issue a lifetime suspension when the groom was first punished. *Id.* at 222, 529 N.E.2d at 523.

134. ILL. REV. STAT. ch. 110, para. 3-101 (1987).

135. *Id.* para. 3-103.

136. 124 Ill. 2d 341, 530 N.E.2d 217 (1988).

137. *Id.* at 368, 530 N.E.2d at 229.

138. *Id.* at 347, 530 N.E.2d at 220.

139. *Id.* at 348, 530 N.E.2d at 221.

140. *Id.* at 349, 530 N.E.2d at 221.

141. *Id.* at 351, 530 N.E.2d at 222.



rehearing.<sup>142</sup> Subsequently, AHPO withdrew its separate application.<sup>143</sup>

The area hospitals filed a complaint for review in the circuit court.<sup>144</sup> Meanwhile, the hearing officer dismissed the matter after the application for rehearing filed by AHPO was withdrawn.<sup>145</sup> The area hospitals filed their complaint for judicial review within thirty-five days of the Board's denial of their application for rehearing.<sup>146</sup> This was, however, almost three months before the Board resolved the matter as to AHPO's rehearing.<sup>147</sup>

The defendant hospital argued that the filing of the area hospital's complaint for administrative review was premature; therefore, their complaint should be dismissed as untimely.<sup>148</sup> The circuit court granted the defendant's motion to dismiss,<sup>149</sup> but the appellate court reversed.<sup>150</sup>

The supreme court affirmed, holding that the Board's decision became final and subject to judicial review insofar as the area hospitals were concerned when the Board denied their motion for reconsideration.<sup>151</sup> Initially, the court noted that there was no question that had the AHPO chosen not to seek reconsideration, the order denying the rehearing of the area hospital's application would have been a final order.<sup>152</sup> At issue was whether the finality of that order as applied to the area hospitals should be affected by the separate application for rehearing filed by AHPO.<sup>153</sup> Interpreting section 3-103 of the Administrative Review Law,<sup>154</sup> the court reasoned that "final orders remain final for those parties who do not apply for reconsideration, or whose applications are no longer pending."<sup>155</sup> The area hospitals' intervention in the AHPO rehearing would constitute a separate proceeding and would not have affected their right to challenge the denial of their application for

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142. *Id.*

143. *Id.* at 352, 530 N.E.2d at 222.

144. *Id.* at 353, 530 N.E.2d at 223.

145. *Id.* at 354-55, 530 N.E.2d at 223-224.

146. *Id.* at 353, 530 N.E.2d at 223.

147. *Id.*

148. *Id.* at 357, 530 N.E.2d at 225.

149. *Id.*

150. *Id.* See *Condell Hosp. v. Health Facilities Planning Bd.*, 161 Ill. App. 3d 907, 515 N.E.2d 750 (1st Dist. 1987).

151. *Condell Hospital*, 124 Ill. 2d at 368, 530 N.E.2d at 229.

152. *Id.* at 365, 530 N.E.2d at 228.

153. *Id.* at 366, 530 N.E.2d at 228.

154. ILL. REV. STAT. ch. 110, para. 3-103 (1987).

155. *Condell Hospital*, 124 Ill. 2d at 366, 530 N.E.2d at 229.

rehearing.<sup>156</sup>

The court also determined that the area hospitals did not fail to exhaust their administrative remedies by not intervening in the area health planning organization's rehearing.<sup>157</sup> The multiple remedy exception to the exhaustion doctrine permits a party to forego administrative remedies that are "parallel or duplicative."<sup>158</sup> This proceeding would have been largely duplicative of its previous motion for rehearing.<sup>159</sup>

The court recognized that its *Condell Hospital* decision could result in multiple and inconsistent administrative rulings.<sup>160</sup> It cautioned, however, that if an administrative decision is not final until all parties have exhausted their administrative remedies, no one party could ever be certain of when to seek judicial review.<sup>161</sup>

The first district issued an important decision interpreting the exhaustion of remedies requirement<sup>162</sup> in *Castaneda v. Human Rights Commission*.<sup>163</sup> In *Castaneda*, the petitioner filed a civil rights violation charge with the Illinois Department of Human Rights.<sup>164</sup> Following a hearing on the matter, an Illinois Human Rights Commission administrative law judge found no evidence of discrimination and recommended that the charge be dismissed.<sup>165</sup> A three-member panel of the Commission adopted the hearing officer's recommendation.<sup>166</sup> The petitioner appealed to the appellate court without first seeking a rehearing before the entire Commission.<sup>167</sup>

The court dismissed the case sua sponte after concluding that the petitioner had failed to exhaust his administrative remedies because he could have sought review before the entire Commis-

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156. *Id.*

157. *Id.* at 368, 530 N.E.2d at 229. Generally, requiring the exhaustion of remedies before judicial review promotes judicial economy and allows the agency to utilize its expertise without interference. *Illinois Bell Tel. Co. v. Allphin*, 60 Ill. 2d 350, 358, 326 N.E.2d 737, 741-42 (1975).

158. *Condell Hospital*, 124 Ill. 2d at 368, 530 N.E.2d at 729 (citing *Fredman Bros. Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202, 214, 486 N.E.2d 893, 897 (1985)).

159. *Id.*

160. *Id.*

161. *Id.* at 368, 530 N.E.2d at 229-30.

162. For a discussion of the exhaustion of remedies doctrine, see *supra* note 157.

163. 175 Ill. App. 3d 1085, 530 N.E.2d 1005 (1st Dist. 1988), *aff'd*, 132 Ill. 2d 304, 547 N.E.2d 437 (1989).

164. *Castaneda*, 175 Ill. App. 3d at 1086, 530 N.E.2d at 1006.

165. *Id.*

166. *Id.*

167. *Id.*

sion.<sup>168</sup> To comply with the exhaustion of remedies mandate, the petitioner was required to seek further review before the Commission.<sup>169</sup> The court explained that the exhaustion of remedies requirement cannot be sidestepped because the relief "may be, or even probably will be, denied by the agency."<sup>170</sup>

## 2. Complaint for Administrative Review

The plaintiff in *Burns v. Edgar*<sup>171</sup> did not file a complaint for administrative review of the decision revoking his driving privileges. Instead, he filed a petition in circuit court for a preliminary injunction pending a final determination of an administrative review proceeding.<sup>172</sup> The circuit court granted the preliminary injunction.<sup>173</sup> Meanwhile, the Illinois Secretary of State denied the plaintiff's request to rescind the revocation order. Subsequently, both parties filed briefs before the trial court in the injunction proceeding.<sup>174</sup> The circuit court that issued the preliminary injunction then reversed the decision of the Secretary as against the manifest weight of the evidence.<sup>175</sup>

On appeal, the court stated that the Administrative Review Law confers jurisdiction on a circuit court to review any action of the Secretary "canceling, suspending, revoking, or denying a license."<sup>176</sup> To obtain such review, however, the plaintiff must file a complaint for administrative review within thirty-five days of being served with the administrative decision.<sup>177</sup> Because the plaintiff

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168. *Id.* at 1088, 530 N.E.2d at 1007.

169. *Id.*

170. *Id.* at 1087-88, 530 N.E.2d at 1007 (citing *Northwestern Univ. v. City of Evanston*, 74 Ill. 2d 80, 89, 383 N.E.2d 964, 967 (1978)). After the *Survey* period ended, the Illinois Supreme Court affirmed the appellate court decision in *Castaneda*. See *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 547 N.E.2d 437 (1989). The supreme court held that petitioners seeking review of decisions by three-member panels of the Human Rights Commission must seek an *en bloc* rehearing before the Commission in order to exhaust their administrative remedies and render the agency decision final and reviewable. *Id.* at 321-22, 547 N.E.2d at 445. The court distinguished *Castaneda* from *Condell Hospital* by noting that *Condell Hospital* was not a case in which "the party seeking review was the same party entitled to the rehearing." *Id.* at 324, 547 N.E.2d at 446. See *supra* notes 136-61 and accompanying text for discussion of *Condell Hospital*.

171. 178 Ill. App. 3d 708, 709, 533 N.E.2d 570, 571 (4th Dist.), *appeal denied*, 541 N.E.2d 1104 (1989).

172. *Id.* at 710, 533 N.E.2d at 571.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 711, 533 N.E.2d at 572 (citing ILL. REV. STAT. ch. 95 1/2, para. 6-421 (1987)).

177. *Id.* (citing ILL. REV. STAT. ch. 110, para. 3-103 (1987)).

never complied with this jurisdictional requirement, the court that issued the injunction did not have subject matter jurisdiction to review the revocation decision in the course of the injunction proceeding.<sup>178</sup>

### 3. Jurisdiction When Plaintiff Seeks Only a Stay and Remand

In *Dubin v. Personnel Board*,<sup>179</sup> Dubin was discharged by the City of Chicago Personnel Board ("Board") because he did not comply with the City's residency requirement. In response, he filed an action in the circuit court, requesting an equitable order staying the Board's decision.<sup>180</sup> In his petition to the court, Dubin contended that the Board's findings of fact were insufficient and that additional factfinding was needed before administrative review would be proper.<sup>181</sup> The trial court issued the stay and remanded the matter to the Board for further findings of fact.<sup>182</sup> The Board appealed the stay order.<sup>183</sup>

At issue before the supreme court was whether the circuit court had jurisdiction to issue the stay remedy.<sup>184</sup> Initially, the court recognized that a party may seek judicial review of an agency decision either by way of common law or statutory review.<sup>185</sup> The remedies provided under each system of review are largely identical.<sup>186</sup> When an enabling act specifically invokes the Administrative Review Law, the plaintiff is limited to bringing an action seeking full judicial review, and a court may not redress the parties grievances through other types of actions.<sup>187</sup> The court found that the Ad-

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178. *Id.*

179. 128 Ill. 2d 490, 492-93, 539 N.E.2d 1243, 1244 (1989).

180. *Id.* at 493, 539 N.E.2d at 1244.

181. *Id.*

182. *Id.* at 492, 539 N.E.2d at 1243.

183. *Id.* The appellate court found that the stay order was not a final order; therefore, it lacked appellate jurisdiction to hear the case. *Id.* at 494, 539 N.E.2d at 1244. One appellate court justice noted that a split of authority exists among the appellate districts regarding the appealability of stay orders entered under the Administrative Review Law. *Id.* The supreme court found that it had no reason to resolve this split on the appealability issue because the trial court had no jurisdiction to enter the order in the first place. *Id.* at 495, 539 N.E.2d at 1245.

184. *Id.* In the supreme court, the Board maintained that the circuit court had lacked jurisdiction because Dubin did not file a complaint. *Id.* The supreme court found that the circuit court lacked jurisdiction for the reason discussed above. *Id.*

185. *Id.* at 497, 539 N.E.2d at 1246.

186. *Id.* at 498, 539 N.E.2d at 1246. "[T]he differences which once existed between the common law and statutory methods of reviewing administrative decisions have been all but lost . . . ." *Id.*

187. *Id.* (citing *Christian Action Ministry v. Department of Local Gov't Affairs*, 74 Ill. 2d 51, 59-60, 383 N.E.2d 958, 961 (1978)).

ministrative Review Law was inapplicable, but common law review through a writ of certiorari provided the same nature and scope of judicial review.<sup>188</sup> Because the court's jurisdiction to review an agency decision is no greater than when statutory procedures apply, the court found that an action for judicial review of the Board's discharge order was the sole method for Dubin to obtain the relief he sought.<sup>189</sup> The court reasoned that if it were to reach any other conclusion, a party could potentially litigate every alleged error committed during an administrative proceeding separately.<sup>190</sup>

#### 4. Timeliness of Appeal

The question of when an appeal is timely filed is a persistent topic of debate among practitioners in the area. Resolutions of timeliness questions were among the more significant developments of the *Survey* period.

In *Kozel v. State Board of Elections*,<sup>191</sup> the Illinois Supreme Court ruled that the electoral board's issuance of an amended decision did not extend the time in which a petitioner could file for review; consequently, the appeal was dismissed as untimely. Kenneth Kozel (the candidate) and Douglas Olivero (the objector) were both running for resident circuit judge of LaSalle County.<sup>192</sup> The objector challenged the candidate's nomination petition.<sup>193</sup> The State Board of Elections, sitting as an electoral board, rejected the objections and declared that the nomination papers were sufficient.<sup>194</sup> The electoral board then mistakenly held that the candidate's name should not be certified for inclusion on the ballot.<sup>195</sup> Four days later, the electoral board issued an amended decision that stated the candidate's name should be on the ballot.<sup>196</sup> The objector filed a petition for judicial review fourteen days after the initial decision and nine days after the amended decision stated

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188. *Id.*

189. *Id.* at 499, 539 N.E.2d at 1247.

190. *Id.* The court reversed the judgments of the appellate and circuit courts and remanded to the circuit court with directions to dismiss the petition. *Id.*

191. 126 Ill. 2d 58, 69, 533 N.E.2d 796, 801 (1988).

192. *Id.* at 60, 533 N.E.2d at 797.

193. *Id.* The candidate had submitted nominating petitions containing some 963 signatures in support of his candidacy; the objector challenged 528 of the signatures. Five hundred signatures are required by statute. *Id.* See ILL. REV. STAT. ch. 46, para. 7-10(h) (1987).

194. *Kozel*, 126 Ill. 2d at 63, 533 N.E.2d at 798.

195. *Id.* at 63, 533 N.E.2d at 799.

196. *Id.*

that the candidate should be certified.<sup>197</sup>

Because the Election Code requires that a party seeking review file a petition within ten days after the electoral board decision, the candidate moved to dismiss the appeal for lack of subject matter jurisdiction.<sup>198</sup> The objector maintained that he was challenging the corrected decision, which was nine days old when he filed for review.<sup>199</sup> The circuit court denied the candidate's motion to dismiss the appeal and affirmed the electoral board's decision to certify the candidate.<sup>200</sup> Both the candidate and objector appealed.<sup>201</sup> The appellate court affirmed both circuit court rulings.<sup>202</sup>

The supreme court ruled that the part of the electoral board's decision ordering the candidate's name not be certified was "surplusage" because the electoral board was without power to pass on the certification issue.<sup>203</sup> The court noted that the electoral board's function is limited to consideration of objections to a candidate's nomination papers.<sup>204</sup> Certification of names for inclusion on the ballot, the court ruled, rests with the State Board of Elections acting in its own capacity.<sup>205</sup> The court did not agree that the initial decision was unenforceable because the electoral board exceeded its authority.<sup>206</sup> Instead, the court stated that the electoral board's decision was "complete and effective" once it ruled on the adequacy of the candidate's nomination petition.<sup>207</sup> Because the objector could have filed for review after the first decision, issuance of the corrected decision did not extend the time in which the objector could file for review.<sup>208</sup>

Statutes and rules governing timeliness of appeal sometimes conflict, or seem to conflict, making it difficult to determine the proper period for filing. The Appellate Court for the First District issued two opinions during the *Survey* period that bear on this issue.

In *Peoples Gas Light and Coke Co. v. Illinois Commerce Com-*

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197. *Id.*

198. *Id.* at 67, 533 N.E.2d at 801 (citing ILL. REV. STAT. ch. 46, para. 10-10.1 (1987)).

199. *Id.* at 64, 533 N.E.2d at 799.

200. *Id.* at 63-64, 533 N.E.2d at 799.

201. *Id.* The candidate appealed only the denial of his motion to dismiss. *Id.*

202. *Id.* See *Kozel v. State Bd. of Elections*, 168 Ill. App. 3d 501, 522 N.E.2d 908 (4th Dist.), *dismissed*, 126 Ill. 2d 58, 533 N.E.2d 796 (1988).

203. *Kozel*, 126 Ill. 2d at 68, 533 N.E.2d at 801.

204. *Id.*

205. *Id.* (citing ILL. REV. STAT. ch. 46, para. 7-14 (1987)).

206. *Id.* at 69, 533 N.E.2d at 801.

207. *Id.*

208. *Id.* at 69-70, 533 N.E.2d at 802.

mission,<sup>209</sup> the court held that Section 201(a) of the Illinois Public Utilities Act<sup>210</sup> preempts Illinois Supreme Court Rule 303(a)<sup>211</sup> regarding the timing of petitions to the appellate court for direct review of an agency action.<sup>212</sup> Peoples Gas filed for review of a Illinois Commerce Commission ("ICC") order that denied the gas company the right to bill a customer for estimated consumption, the second time the gas meter measuring consumption malfunctioned and under-registered the gas supplied.<sup>213</sup> The gas company appealed directly to the appellate court.<sup>214</sup>

*Peoples Gas* presented a conflict between Rule 303(a), which requires commencement of a direct appeal within thirty days after an order is entered,<sup>215</sup> and section 10-201(a) of the Illinois Public Utilities Act, which requires commencement within thirty days after an order is served.<sup>216</sup> The ICC argued that the appeal was untimely because the filing period for review under Rule 303(a) had expired before the gas company filed for review.<sup>217</sup>

The court did not agree that Rule 303(a) should govern.<sup>218</sup> The court noted that it is within the legislature's authority to fix the time period for administrative review.<sup>219</sup> Moreover, the court noted that supreme court rules applicable to direct review reflect the court's intent to defer to statutory filing deadlines.<sup>220</sup> The court held that the statute preempted the rule; consequently, the gas company's petition was timely filed and the court proceeded to review the I.C.C.'s order.<sup>221</sup>

By contrast, the court in *County of Cook, Cermak Health Services v. Illinois Local Labor Relations Board*<sup>222</sup> held that Illinois

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209. 175 Ill. App. 3d 39, 529 N.E.2d 671 (1st Dist. 1988).

210. ILL. REV. STAT. ch. 111 2/3, para. 10-201(a) (1987).

211. ILL. S. CT. R. 303(a), ILL. REV. STAT. ch. 110A, para. 303(a) (1987).

212. 175 Ill. App. 3d at 45, 529 N.E.2d at 676.

213. *Id.* at 43, 529 N.E.2d at 674.

214. *Id.*

215. ILL. S. CT. R. 303(a), ILL. REV. STAT. ch. 110A, para. 303(a) (1987).

216. ILL. REV. STAT. ch. 111 2/3, para. 10-201(a) (1987).

217. 175 Ill. App. 3d at 45, 529 N.E.2d at 675.

218. *Id.* at 45, 529 N.E.2d at 675-76.

219. *Id.* (citing *City of Benton Police Dep't v. Human Rights Comm'n*, 147 Ill. App. 3d 7, 13, 497 N.E.2d 876, 881 (5th Dist. 1986), *appeal denied*, 118 Ill. 2d 541, 520 N.E.2d 383 (1988)).

220. *Id.* at 45, 529 N.E.2d at 676.

221. *Id.*

222. 189 Ill. App. 3d 1057, 545 N.E.2d 934, *withdrawn rereported*, 551 N.E.2d 229 *supp. op.* (1st Dist. 1989), *reh'g denied*, 1990 Ill. App. Lexis 211 (1st Dist.), *appeal granted*, No. 69644 (Apr. 4, 1990).

Supreme Court Rule 303(a),<sup>223</sup> and not section 3-103 of the Administrative Review Law,<sup>224</sup> set the proper filing period for direct review.<sup>225</sup> In *Cermak*, the petitioner provided health care services to persons incarcerated in Cook County.<sup>226</sup> The petitioner established new job criteria for certain emergency medical technicians.<sup>227</sup> The union representing the technicians accused the petitioner of committing an unfair labor practice by not bargaining over imposition of the new criteria before adopting them.<sup>228</sup> An Illinois Labor Relations Board hearing officer recommended that the petitioner be ordered to cease and desist from imposing the new criteria unless it first bargained in good faith with the union.<sup>229</sup> Subsequently, the Labor Board issued a cease and desist order and directed the petitioner to rescind the new criteria and to reinstate the displaced technicians with backpay.<sup>230</sup> The petitioner filed for direct review in the appellate court thirty-two days after the Labor Board's order was entered.<sup>231</sup>

The court initially noted that the Illinois Public Labor Relations Act invokes the Administrative Review Law to govern review of agency action.<sup>232</sup> Relying on *Peoples Gas*,<sup>233</sup> the petitioner argued that the thirty-five day limit of section 3-103 of the Administrative Review Law should therefore control.<sup>234</sup> The *Cermak* court, nevertheless, found *Peoples Gas* "inapposite."<sup>235</sup> Unlike the statute in *Peoples Gas*, the Illinois Public Labor Relations Act does not expressly state a time within which direct appellate review must be commenced.<sup>236</sup> Illinois Supreme Court Rule 335(h),<sup>237</sup> however, establishes that the thirty-day filing requirement of Rule 303 is applicable to direct review of agency decisions.<sup>238</sup> Therefore, this

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223. See *supra* note 215 and accompanying text for a description of the Rule's provisions.

224. See *supra* note 135 and accompanying text for mention of the section's filing provisions.

225. *Cermak*, 189 Ill. App. 3d at 1063, 551 N.E.2d at 234.

226. *Id.* at 1058, 551 N.E.2d at 230.

227. *Id.*

228. *Id.*

229. *Id.* at 1058, 551 N.E.2d at 230-31.

230. *Id.* at 1058, 551 N.E.2d at 231.

231. *Id.*

232. *Id.* at 1059, 551 N.E.2d at 231 (citing ILL. REV. STAT. ch. 48, para. 1611(e) (1987)).

233. See *supra* notes 209-21 and accompanying text for a discussion of *Peoples Gas*.

234. *Cermak*, 189 Ill. App. 3d at 1062, 551 N.E.2d at 233.

235. *Id.*

236. *Id.* at 1063, 551 N.E.2d at 233.

237. ILL. S. CT. R. 335(h), ILL. REV. STAT. ch. 110A, para. 335(h) (1987).

238. *Cermak*, 189 Ill. App. 3d at 1060, 551 N.E.2d at 232.



case did not present the type of conflict present in *Peoples Gas*.<sup>239</sup> The court concluded that although section 3-103 governs a petition for review in the circuit court, Rule 303(a) governs direct review in the appellate court.<sup>240</sup> Because the petition for direct review was not filed within thirty days of final judgment, the court dismissed the action for lack of jurisdiction.<sup>241</sup>

### III. LEGISLATION

During the *Survey* period, the Illinois General Assembly enacted legislation that has special significance for those who practice administrative law.

#### A. Open Meetings

The Illinois General Assembly amended portions of the Open Meetings Act.<sup>242</sup> One new provision requires that all final action taken at an open session be preceded by a recital informing the public of the business being conducted.<sup>243</sup> Another provision requires that public bodies meet no less than semi-annually to review minutes of any closed sessions and to determine whether the need for confidentiality persists, or whether the minutes of the closed sessions can be made public.<sup>244</sup>

#### B. Public Aid Review

The Illinois General Assembly amended provisions of the Public Aid Code to revise the makeup of the review Committee, effective January 9, 1989.<sup>245</sup> The amendment allows for participation on the Committee by persons who are not officers, agents or employees of the local government unit.<sup>246</sup>

#### C. Medical Practice Licensing

The Illinois General Assembly amended licensing provisions of

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239. *Id.* at 1060, 551 N.E.2d at 233.

240. *Id.* at 1060, 551 N.E.2d at 233-34 (rejecting *City of Benton Police Dep't v. Human Rights Comm'n*, 147 Ill. App. 3d 7, 11, 497 N.E.2d 876, 879 (5th Dist. 1986)).

241. *Id.* at 1060, 551 N.E.2d at 234.

242. *See* ILL. ANN. STAT. ch. 102, paras. 41-46 (Smith-Hurd Supp. 1989). The Open Meetings Act is intended to ensure that meetings of public bodies are open to the public except when open meetings would result in disclosure of confidential or privileged information or cause significant disruption. *See* ILL. REV. STAT. ch. 102, para. 41 (1987).

243. ILL. ANN. STAT. ch. 102, para. 42 (Smith-Hurd Supp. 1989).

244. *Id.* para. 42.06.

245. ILL. ANN. STAT. ch. 23, para. 11-8 (Smith-Hurd Supp. 1989).

246. *Id.*

the Medical Practice Act of 1987, effective January 1, 1989.<sup>247</sup> The licensing entity, formerly the Department of Registration and Education, is now called the Department of Professional Regulation.<sup>248</sup> Other changes set new criteria for licensure of visiting physicians and of physicians who graduated before 1985.<sup>249</sup> Additions to section 11 of the Act set minimum standards of professional education for licensure of physicians who graduated before 1985.<sup>250</sup> Under a new provision of section 18, the Department may issue a temporary license to a visiting physician if that physician has received an invitation or appointment from an approved school or hospital.<sup>251</sup>

#### IV. CONCLUSION

The Illinois Supreme Court issued a number of decisions during the *Survey* period that clarify established principles of administrative law. *Landmarks Preservation Council v. Chicago*,<sup>252</sup> provides a working definition of agency action and reminds practitioners that the starting point for administrative review must be an administrative action. Moreover, *Landmarks* provides fundamental guidance to attorneys representing home rule units that carry out both administrative and legislative functions. The court also made clear, in *Dubin v. Personnel Board*,<sup>253</sup> that nothing short of a complaint for administrative review confers jurisdiction on courts reviewing agency action. Additionally, after *Condell Hospital v. Health Facilities Planning Board*,<sup>254</sup> and *Castaneda v. Illinois Human Rights Commission*,<sup>255</sup> the law is well-settled regarding exhaustion of rem-

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247. ILL. ANN. STAT. ch. 111, paras. 4400-2, 4400-11, 4400-18, 4400-19 (Smith-Hurd Supp. 1989).

248. *Id.* para. 4400-2.

249. *Id.* paras. 4400-11, 4400-18, 4400-19.

250. *Id.* para. 4400-11. During the *Survey* period, the Illinois Supreme Court upheld the constitutionality of section 11 of the 1987 Act. *See Potts v. Illinois Dep't of Regis. & Educ.*, 128 Ill. 2d 322, 538 N.E.2d 1140 (1989), *cert. denied*, 110 S. Ct. 540 (1989). In *Potts*, the court held that section 11(B), which provides that only graduates of chiropractic colleges may be granted a limited license to treat persons without drugs or surgery, does not violate due process or equal protection rights of naprapaths, rather it is rationally related to the legitimate government objective of protecting the public from unqualified medical practitioners. 128 Ill. 2d at 333-35, 538 N.E.2d at 1145-46.

251. ILL. ANN. STAT. ch. 111, para. 4400-18(B) (Smith-Hurd Supp. 1989).

252. 125 Ill. 2d 164, 531 N.E.2d 9 (1989). *See supra* notes 1-11 and accompanying text.

253. 128 Ill. 2d 490, 539 N.E.2d 1243 (1989). *See supra* notes 179-90 and accompanying text.

254. 124 Ill. 2d 341, 530 N.E. 2d 217 (1988). *See supra* notes 136-61 and accompanying text.

255. 175 Ill. App. 3d 1085, 530 N.E. 2d 1005 (1st Dist. 1988), *aff'd*, 132 Ill. 2d 304, 547 N.E.2d 437 (1989). *See supra* notes 162-70 and accompanying text.

edies and finality of orders.

Furthermore, the Illinois Appellate Court districts issued significant decisions on the issue of timeliness of appeal. *People's Gas v. Illinois Commerce Commission*,<sup>256</sup> and *County of Cook, Cermak Health Services v. Local Labor Relations Board*<sup>257</sup> are especially important to practitioners of administrative law because they seek to clarify the confusing interplay between limitation periods in statutes and supreme court rules.

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256. 175 Ill. App. 3d 39, 529 N.E.2d 671 (1st Dist 1989). See *supra* notes 209-21 and accompanying text.

257. 189 Ill. App. 3d 1057, 545 N.E.2d 934 (1st Dist. 1989). See *supra* notes 222-41 and accompanying text.