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Administrative Law

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Administrative Law

Moshe Jacobius and Richard Linden***

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I. INTRODUCTION

The majority of the cases decided during the *Survey* year did not establish new principles of administrative law. Instead, the decisions clarified and expanded principles already established by the existing case law. This article will highlight and discuss the most important decisions handed down by Illinois courts during the *Survey* period.

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II. CASE LAW

A. *Procedural Case Law*

1. The Role of an Administrative Agency

In *Donnelly v. Edgar*,¹ the Illinois Supreme Court examined an administrative agency's role in reviewing the findings and recommendations of its hearing officers. The court held that the final decision of whether to grant restricted driving permits rests with the Secretary of State ("the Secretary") or his designee.² Moreover, the court concluded that the Secretary's decision regarding restrictive driving permits need not be circulated to give parties adversely effected an opportunity to present exceptions.³

In *Donnelly*, the plaintiff was convicted of operating a motor vehicle while under the influence of alcohol.⁴ Subsequently, the plaintiff applied for a restricted driving permit.⁵ After a hearing, the Secretary adopted the hearing officer's findings, conclusions, and recommendations and refused to issue a restricted driving permit.⁶ The plaintiff brought an administrative review action contending that the Secretary failed to comply with the Illinois Administrative Procedure Act ("the Act")⁷ by not permitting him to present exceptions to the proposed decision.⁸ The circuit court reversed the Secretary's decision and ordered the Secretary to issue the plaintiff a restricted driving permit.⁹ The court premised its decision upon the Secretary's failure to circulate his proposed decision for review and comment as required by section 1013 of the Act.¹⁰ In reversing the lower court, the Illinois Supreme Court held section 1013¹¹

1. 117 Ill. 2d 59, 509 N.E.2d 1015 (1987).

2. *Id.* at 67, 509 N.E.2d at 1018.

3. *Id.* at 66, 509 N.E.2d at 1018.

4. *Id.* at 61, 509 N.E.2d at 1016.

5. *Id.*

6. *Id.* at 61-62, 509 N.E.2d at 1016.

7. ILL. REV. STAT. ch. 127, paras. 1001-1021 (1985).

8. *Donnelly*, 117 Ill. 2d at 62, 509 N.E.2d at 1016.

9. *Id.*

10. *Id.* Section 1013 provides:

Except where otherwise expressly provided by law, when in a contested case a majority of the officials of the agency who are to render the final decision has not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and to present a brief and, if the agency so permits, oral argument, to the agency officials who are to render the decision.

ILL. REV. STAT. ch. 127, para. 1013 (1985).

11. ILL. REV. STAT. ch. 127, para. 1013 (1985).

of the Act inapplicable to the case at issue.¹² The court reasoned that a proposed decision need only be circulated if the decision is to be made by multiple decision makers.¹³ Hence, because the Secretary or his designee renders the final decision, section 1013 does not apply.¹⁴

In cases of restricted driving permits, *Donnelly* permits the Secretary of State or his designee to make the final decision without hearing the evidence in person provided that he has reviewed the findings, conclusions, and impressions of conflicting testimony communicated by the hearing officer.¹⁵ *Donnelly*, however, should be construed carefully. The court stressed that "due process is flexible, and calls for such procedural protections as the particular situation demands."¹⁶ The vast number of restrictive driving permit applications influenced the court's decision in this case.¹⁷ The court reasoned that an undue burden would be placed upon the Secretary if it required each adverse decision to be circulated for comment.¹⁸ Therefore, the court left open the possibility that other decisions made by a single decision maker could be subject to section 1013.

2. The Subpoena Power for an Administrative Investigation

The Illinois Supreme Court questioned the subpoena power of the Illinois Attorney General in *People v. McWhorter*.¹⁹ In *McWhorter*, the court held unconstitutional a subpoena issued by the Attorney General pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act.²⁰

In *McWhorter*, pursuant to the Illinois Consumer Fraud and

12. *Donnelly*, 117 Ill. 2d at 66, 509 N.E.2d at 1018.

13. *Id.*

14. *Id.* The Secretary's internal policy provided that all formal orders and recommendations are subject to review by a Formal Hearing Review Board. This provision prompted the circuit court's decision that multiple decision makers were involved. *Id.* at 63-64, 509 N.E.2d at 1017. The Illinois Supreme Court emphasized the Secretary's internal policy that "clearly states that the Secretary or his designee makes the final decision in these matters." *Id.* at 64, 509 N.E.2d at 1017.

15. *Id.* at 67, 509 N.E.2d at 1018.

16. *Id.* (citing *Scott v. Department of Commerce & Community Affairs*, 84 Ill. 2d 42, 51, 416 N.E.2d 1082, 1087 (1981)).

17. *Id.* at 66, 509 N.E.2d at 1018. The court commented on the burden on the Secretary and the long delays that would be created for applicants if parties had to be allowed to make oral arguments, submit a brief, and file exceptions to a proposed decision. *Id.*

18. *Id.*

19. 113 Ill. 2d 374, 498 N.E.2d 1154 (1986).

20. *Id.* at 384, 498 N.E.2d at 1158.

Deceptive Business Practices Act ("the Act"),²¹ the Attorney General issued a subpoena to the owner of a dog kennel.²² Compliance with the subpoena required the kennel owner to travel to the Springfield office of the Attorney General.²³ The round trip distance from the kennel owner's place of business to Springfield was approximately three hundred and fifty miles.²⁴ The *McWhorter* court held that in light of this distance, the subpoena was arbitrary and oppressive and, therefore, an unconstitutional application of the Act.²⁵ The Court commented that a less disruptive method which would not have imposed such an inconvenience could have been chosen.²⁶

It is important to note that *McWhorter* has limited application. In *McWhorter*, the Attorney General issued a subpoena in response to a single consumer's complaint regarding a lost deposit.²⁷ The court hinted that the subpoena may have been reasonable if the Attorney General had specific evidence of consumer fraud or if the case involved a substantial sum of money.²⁸

3. Alleged Bias of a Board Member

The Illinois Supreme Court in *Collura v. Board of Police Commissioners*²⁹ addressed the alleged bias of a board member who viewed inadmissible polygraph exam results. The court held that the board member need not recuse herself simply because she had viewed inadmissible evidence at a prior hearing.³⁰

In *Collura*, the Itasca Board of Police Commissioners ("the Board") discharged a police officer for sexual misconduct.³¹ The police officer brought an administrative review action and alleged that the Board viewed inadmissible polygraph results.³² The circuit and appellate courts affirmed the Board's decision discharging

21. ILL. REV. STAT. ch. 121 1/2, para. 261-272. (1985). The Act grants the Attorney General broad investigatory powers including the power to subpoena documents. *Id.*

22. *McWhorter*, 113 Ill. 2d at 376, 498 N.E.2d at 1155.

23. *Id.*

24. *Id.* at 383, 498 N.E.2d at 1158.

25. *Id.* at 384, 498 N.E.2d at 1158.

26. *Id.* at 382-83, 498 N.E.2d at 1158.

27. *Id.* at 381-82, 498 N.E.2d at 1157.

28. The court emphasized that the Attorney General issued the subpoena solely on the basis of a single consumer complaint which merely sought the return of a deposit placed on a dog. *Id.* at 381-84, 498 N.E.2d at 1155-58.

29. 113 Ill. 2d 361, 498 N.E.2d 1148 (1986).

30. *Id.* at 371-72, 498 N.E.2d at 1152-53.

31. *Id.* at 364, 498 N.E.2d at 1149.

32. *Id.* at 368-69, 498 N.E.2d at 1151.

the police officer.³³ The Illinois Supreme Court held that polygraph results were inadmissible and remanded the matter to the Board.³⁴ On remand, the Board concluded that the evidence, absent the inadmissible polygraph results, supported the discharge.³⁵ Thus, the Board reinstated the police officer's discharge.³⁶

The police officer subsequently filed a second action for administrative review.³⁷ The officer contended that the Board denied him due process because a Board member viewed the inadmissible polygraph results at the prior hearing.³⁸ The lower courts found no bias and again affirmed the police officer's discharge.³⁹

The Illinois Supreme Court in *Collura* began its rationale with the axiom that board members are presumed to be independent.⁴⁰ In addition, the court stated that "it has been held that any prejudice from a hearing board's being exposed to evidence of a polygraph examination is cured by an admonition by the board's counsel that the evidence should be disregarded."⁴¹ The *Collura* court determined that the Board did not disregard its counsel's instruction by considering the inadmissible polygraph results in reaching its decision.⁴² Moreover, the court concluded that administrative review is the proper remedy for bias and not the appointment of a new board.⁴³ The *Collura* court, in addition to holding

33. See *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983), cert. denied, 464 U.S. 960 (1983). (The circuit and appellate courts found no error in the admission of polygraph results at the initial hearing).

34. *Id.* at 312, 450 N.E.2d at 320. In *Kaske*, the Illinois Supreme Court consolidated the actions of *Collura v. Board of Fire and Police Commissioners*, 97 Ill. App. 3d 1199, 426 N.E.2d 1285 (2d Dist. 1981) and *Kaske v. City of Rockford*, 98 Ill. App. 3d 1203, 427 N.E.2d 1053 (2d Dist. 1981). The court held the polygraph results to be less probative than prejudicial, and hence inadmissible. *Kaske*, 96 Ill. 2d at 308, 450 N.E.2d at 319.

35. *Collura*, 113 Ill. 2d at 368, 498 N.E.2d at 1151.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 364, 498 N.E.2d at 1149.

40. *Id.* at 370, 498 N.E.2d at 1152. "Without a showing to the contrary, State administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id.* (citing *Scott v. Department of Commerce & Community Affairs*, 84 Ill. 2d 42, 55, 416 N.E.2d 1082, 1089 (1981), (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941))).

41. *Collura*, 113 Ill. 2d at 371, 498 N.E.2d at 1152. (citing *Diamond v. Board of Fire & Police Commissioner*, 115 Ill. App. 3d 437, 450 N.E.2d 879 (1st Dist. 1983)) (held a denial of due process because board members were not given an admonition to disregard inadmissible polygraph results).

42. *Id.* at 371, 498 N.E.2d at 1152-53.

43. *Id.* at 372, 498 N.E.2d at 1153. Furthermore, the substitution of administrative tribunals for administrative proceedings is rare. *Id.* (citing *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 701-03 (1948)).

that the board member need not recuse herself, held the Board's decision not to be against the manifest weight of the evidence.⁴⁴

4. The Scope of an Agency's Jurisdiction

The Illinois Supreme Court in *Kane County v. Carlson*⁴⁵ examined the scope of the Illinois Public Labor Relations Act ("the Act").⁴⁶ The court construed the Act broadly and held that it applied to the Chief Judge of the Seventeenth Judicial Circuit as an employer.⁴⁷

The court noted that the Act provides a comprehensive scheme of collective bargaining for public employees and employers subject to the Act.⁴⁸ Two labor boards are vested with the responsibility of administering the Act.⁴⁹ The Act contains a provision that enables labor unions to petition to represent governmental employees.⁵⁰ Under the Act, the boards determine appropriate bargaining units, to conduct representation elections, and to investigate, hear, and determine charges of unfair labor practices.⁵¹ Once the board certifies an exclusive bargaining representative, the employer is required to bargain collectively with that representative.⁵²

The supreme court granted the Chief Judge of the Seventeenth Judicial Circuit leave to file a writ of mandamus.⁵³ The Chief

44. *Id.* at 372-73, 498 N.E.2d at 1153-54. The Illinois Supreme Court, in its analysis, reiterated the well-established axiom of administrative review; findings of fact made by an administrative agency are considered to be "prima facie true and correct." *Id.* See ILL. REV. STAT. ch. 110, para. 3-110 (1985); *Marion Power Shovel Co. v. Department of Revenue*, 42 Ill. 2d 13, 244 N.E.2d 598 (1969). A court on administrative review should not reweigh the evidence but should limit its inquiry to ascertaining whether the findings and decision of the agency are against the manifest weight of the evidence. *Collura*, 113 Ill. 2d at 372-73, 498 N.E.2d at 1153 (citing *Eastman Kodak Co. v. Fair Employment Practices Commission.*, 86 Ill. 2d 60, 426 N.E.2d 877 (1981); *Davern v. Civil Service Commission*, 47 Ill. 2d 469, 269 N.E.2d 713 (1970), *cert. denied*, 403 U.S. 918 (1971)).

45. 116 Ill. 2d 186, 507 N.E.2d 482 (1987).

46. ILL. REV. STAT. ch. 48, paras. 1601-1627 (1985).

47. *Carlson*, 116 Ill. 2d at 216, 507 N.E.2d at 494.

48. ILL. REV. STAT. ch. 48, paras. 1605(a), (b) (1985).

49. *Id.* These sections create a local board that has jurisdiction over collective bargaining matters involving "units of local government" with a population in excess of one million persons, and a state board having jurisdiction over other public employers within the meaning of the Act. *Id.*

50. *Id.* at paras. 1609, 1611.

51. *Id.*

52. *Id.* at para. 1609.

53. *Carlson*, 116 Ill. 2d at 195, 507 N.E.2d at 484. The Illinois Supreme Court consolidated two actions in *Carlson*. In the first action, the County of Kane challenged the Act's scope and argued that the Act was unconstitutional. The court never reached the merits of the County's challenge and held that the County lacked standing. *Id.* at 201, 507 N.E.2d at 487.

Judge sought to bar the board from proceeding on certain unfair labor complaints against him regarding his employment of probation officers.⁵⁴ A hearing officer of the board ordered the Chief Judge to sign a collective bargaining agreement pursuant to the Act.⁵⁵ The Chief Judge contended that the Act did not apply to the judiciary as an employer of the probation officers. He also argued that the Act was unconstitutional.⁵⁶

The *Carlson* court liberally construed the Act's scope and found the terms "State of Illinois" and "persons acting on its behalf" sufficiently broad to include the Chief Judge as a public employer under the Act.⁵⁷ In addition, the court held that the Act was constitutional as applied to the judiciary.⁵⁸

As the court emphasized, *Carlson* should not be broadly construed.⁵⁹ The court noted that particular problems, including those of a constitutional nature, are sure to arise as the broad provisions of the Act are applied to the unique workings of the judicial branch.⁶⁰ Thus, the *Carlson* court identified the two actions as preliminary attempts to gauge the scope of the Act.⁶¹

5. Failure to Join Necessary Parties

The Illinois Supreme Court has not determined whether a failure to join necessary parties in an administrative review action can be cured by an amendment to the pleading joining the necessary parties after the expiration of the thirty-five day requirement of section 3-103.⁶² The appellate courts, however, including the Ap-

54. *Id.* at 195, 507 N.E.2d at 484.

55. *Id.* at 195-96, 507 N.E.2d at 484-85.

56. *Id.* at 201, 507 N.E.2d at 487.

57. *Id.* at 202, 507 N.E.2d at 487. Section 1603 defines a public employer under the Act as: "the State of Illinois; any political subdivision of the State . . . and any person acting within the scope of his or her authority, express or implied, on behalf of such entities in dealing with its employees." ILL. REV. STAT. ch. 48, para. 1603(o) (1985).

58. *Carlson*, 116 Ill. 2d at 216, 507 N.E.2d at 494. The judge unsuccessfully argued that the Act violated the separation of powers doctrine of the Illinois Constitution by subjecting the judiciary to executive control. *Id.* at 204, 507 N.E.2d at 488. In addition, the *Carlson* court dismissed the judge's assertion that the Act violated the Equal Protection Clause by its exclusion of educational employees from the Act's scope. *Id.* at 211, 507 N.E.2d at 491-92. See also ILL. REV. STAT. ch. 48, para. 1603(n) (1985).

59. *Carlson*, 116 Ill. 2d at 210, 507 N.E.2d at 491.

60. *Id.*

61. *Id.*

62. Section 3-103 provides in relevant part that "[e]very action to review a final administrative decision shall be commenced by the filing of complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby." ILL. REV. STAT. ch. 110, para. 3-103 (1985).

pellate Court for the Fourth District in *Bradshaw v. Barnes*,⁶³ allow a party to cure the defect by amending the pleading after the expiration of the thirty-five day period.⁶⁴

The Administrative Review Act requires that "all persons, other than the plaintiff, who were parties of record . . . shall be made defendants."⁶⁵ In *Bradshaw*, the plaintiff brought an administrative review action challenging an Illinois Department of Employment Security Board's ("the Board") decision denying him unemployment benefits.⁶⁶ The plaintiff named the Board's chairman as a defendant, but failed to name the Board's director and his former employer.⁶⁷ The circuit court granted the Board's motion to dismiss for the failure to join necessary parties.⁶⁸ Furthermore, the circuit court denied plaintiff's motion to amend his complaint to add the necessary parties.⁶⁹

The Illinois Appellate Court for the Fourth District reversed and permitted the plaintiff to amend his complaint.⁷⁰ It reasoned that the liberal amendment rules of section 2-616(d)⁷¹ apply to administrative review.⁷² The court also noted, however, that a lack of diligence may be grounds for a court to deny a party's motion to amend.⁷³

63. 145 Ill. App. 3d 866, 496 N.E.2d 276 (4th Dist. 1986).

64. *Id.* at 873, 496 N.E.2d at 281. For other cases allowing amendments to cure a failure to join necessary parties after the expiration of the thirty-five day period, see *Masoud v. Board of Education*, 97 Ill. App. 3d 65, 422 N.E.2d 236 (3d Dist. 1981); *Norris v. City of Aurora*, 64 Ill. App. 3d 748, 381 N.E.2d 996 (2d Dist. 1978); *Springfield-Sangamon County Regional Plan Commission v. Fair Employment Practices Commission*, 45 Ill. App. 3d 116, 359 N.E.2d 174 (4th Dist. 1976), *rev'd on other grounds*, 71 Ill. 2d 61, 373 N.E.2d 1307 (1978); *Dendor v. Board of Fire & Police Commissioners*, 11 Ill. App. 3d 582, 297 N.E.2d 316 (1st Dist. 1973).

65. ILL. REV. STAT. ch. 110, para. 3-107 (1985). The joinder of all necessary parties is a prerequisite for the circuit court to conduct an administrative review. *Cuny v. Annunzio*, 411 Ill. 613, 104 N.E.2d 780 (1952); *Department of Communications v. Secretary of State Merit Commission*, 131 Ill. App. 3d 877, 476 N.E.2d 482 (4th Dist. 1985).

66. *Bradshaw*, 145 Ill. App. 3d at 868, 496 N.E.2d at 277.

67. *Id.*

68. *Id.*

69. *Id.* at 868, 496 N.E.2d at 278.

70. *Id.* at 873, 496 N.E.2d at 281.

71. ILL. REV. STAT. ch. 110, para. 2-616(a) (1985) provides in pertinent part: "[a]t any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, . . ."

72. *Bradshaw*, 145 Ill. App. 3d at 872, 496 N.E.2d at 280.

73. *Id.* at 872-73, 496 N.E.2d at 280. The court concluded that diligence is one factor to be considered when deciding whether an amendment is "just and reasonable" under section 2-616. *Id.* See also *supra* note 71.

6. Forum Non Conveniens in Administrative Review

The Illinois Appellate Court for the First District in *Lefton Iron & Metal Company v. Illinois Commerce Commission*⁷⁴ considered venue transfers in administrative review. The *Lefton* court held that the doctrine of forum non conveniens is not applicable to administrative review.⁷⁵

In *Lefton*, the plaintiff filed an action for administrative review in the circuit court of Cook County.⁷⁶ One of the defendants filed a motion to change venue from Cook County to Sangamon County.⁷⁷ The circuit court granted the motion to transfer venue based upon forum non conveniens.⁷⁸

In reversing the lower court's decision, the appellate court noted that the factors that caused the Illinois Supreme Court in *Torres v. Walsh*⁷⁹ to sanction intrastate transfers based upon forum non conveniens are not present during administrative review.⁸⁰ The court stressed that in administrative review, the circuit court acts as a reviewing court and merely reviews the record before it.⁸¹ The court noted that juries are not present during administrative review and, thus, there is no need to discourage the parties from competing for a favorable jury.⁸² In addition, access to proof is not a problem during administrative review because the record is available to each party.⁸³

7. Direct Administrative Review to the Appellate Court

The Illinois Appellate Court for the Fifth District in *Benton Police Department v. Human Rights Commission*⁸⁴ and in *Hardees v. Human Rights Commission*,⁸⁵ considered significant procedural issues regarding direct administrative review to the appellate court. In *Benton*, the court concluded that the thirty-five day requirement

74. 146 Ill. App. 3d 799, 497 N.E.2d 394 (1st Dist. 1986).

75. *Id.* at 804, 497 N.E.2d at 398.

76. *Id.* at 800, 497 N.E.2d at 395.

77. *Id.* at 800, 497 N.E.2d at 396.

78. *Id.*

79. 98 Ill. 2d 338, 456 N.E.2d 601 (1983). The factors to be considered in deciding whether a case should be transferred include: the availability of an alternative forum; the access to sources of proof; the accessibility of witnesses; the relative advantages and obstacles to obtaining a fair trial; and the convenience of the parties. *Id.* at 351, 456 N.E.2d at 607.

80. *Lefton*, 146 Ill. App. 3d at 802-03, 497 N.E.2d at 397.

81. *Id.*

82. *Id.* at 803, 497 N.E.2d at 397.

83. *Id.*

84. 147 Ill. App. 3d 7, 497 N.E.2d 876 (5th Dist. 1986).

85. 155 Ill. App. 3d 173, 507 N.E.2d 1300 (5th Dist. 1987).

of section 3-103⁸⁶ of the Illinois Administrative Procedure Act, rather than the thirty day appeal period contained in Illinois Supreme Court Rule 303(a),⁸⁷ is the applicable time limitation for direct administrative review to the appellate court.⁸⁸

In *Benton*, a police officer filed a charge with the Illinois Human Rights Commission ("the Commission") alleging that the City of Benton discriminated against him based on physical and mental handicaps.⁸⁹ The Commission found that the City committed the alleged discrimination.⁹⁰ Thirty-five days after the Commission's decision, the City filed for direct review by the appellate court.⁹¹ The Commission argued that the City failed to file within the thirty day requirement of Illinois Supreme Court Rule 303(a)(3).⁹²

The *Benton* court held that the City's petition for administrative review filed on the thirty-fifth day was timely.⁹³ The court concluded that the supreme court intended to defer to the legislature in setting the time for commencing direct administrative review actions.⁹⁴ Therefore, the court held that the thirty-five day period of section 3-103⁹⁵ applies to direct administrative review.⁹⁶

In *Hardees*, the Illinois Appellate Court for the Fifth District held that the thirty-five day time period for direct administrative review is not satisfied by the erroneous filing of a complaint in the

86. ILL. REV. STAT. ch. 110, para. 3-103 (1985). See also *supra* note 62 and accompanying text.

87. ILL. S. CT. R. 303(a), ILL. REV. STAT. ch. 110A, para. 303(a) (1985).

88. *Benton*, 147 Ill. App. 3d at 13-14, 497 N.E.2d at 880.

89. *Id.* at 8, 497 N.E.2d at 877.

90. *Id.*

91. *Id.* On January 1, 1986, Public Act 84-717 took effect and amended section 8-111 of the Illinois Human Rights Act. ILL. REV. STAT. ch. 68, para. 8-111 (Supp. 1986). As a result, subparagraph 8-111 (a)(3) reads in pertinent part: "[p]roceeding for judicial review shall be commenced in the appellate court for the district wherein the civil rights violation . . . was committed." *Id.* at para. 8-11 (a)(3). Other agency decisions that must be brought under direct administrative review to the appellate court include: Illinois Pollution Control Board, ILL. REV. STAT. CH. 111 1/2, para. 1041 (1985); Illinois Board of Elections, ILL. REV. STAT. ch. 46, para. 9-22(1) (1985); Illinois Educational Labor Relations Board, ILL. REV. STAT. ch. 48, para. 1716(a) (1985); The Illinois Public Labor Relations Board, ILL. REV. STAT. ch. 48, para. 1611(e) (1985); Illinois Commerce Commission, ILL. REV. STAT. ch. 111 2/3, para. 10-201(a) (1985).

92. *Benton*, 147 Ill. App. 3d at 9, 497 N.E.2d at 878. Illinois Supreme Court Rule 303 provides that "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from . . ." ILL. S. CT. R. 303(a), ILL. REV. STAT. ch. 110A, para. 303(a) (1985).

93. *Benton*, 147 Ill. App. 3d at 14, 497 N.E.2d at 881.

94. *Id.* at 13, 497 N.E.2d at 880.

95. See *supra* note 62 and accompanying text.

96. *Benton*, 147 Ill. App. 3d at 13-14, 497 N.E.2d at 881.

circuit court.⁹⁷ Moreover, the court held that a change of venue cannot cure the defect.⁹⁸

In *Hardees*, the Illinois Human Rights Commission issued its decision on December 16, 1985.⁹⁹ The plaintiff filed for administrative review with the circuit court on January 17, 1986.¹⁰⁰ The Illinois Administrative Review Act, however, required that the action be filed in the appellate court.¹⁰¹ The thirty-five day period of section 3-103¹⁰² expired on January 20, 1987.¹⁰³ The plaintiff sought to cure the defect by moving for a change of venue to the appellate court.¹⁰⁴ The Fifth District affirmed the circuit court's order dismissing the plaintiff's action for his failure to file a timely petition within the thirty-five days in the appellate court.¹⁰⁵

Moreover, the *Hardees* court applied the new provision of section 8-111¹⁰⁶ retrospectively, despite the harsh results.¹⁰⁷ In addition, the court denied the transfer on account of venue on two grounds.¹⁰⁸ First, the court noted that the venue statute contemplates only vertical transfers and not horizontal transfers.¹⁰⁹ Second, the court reasoned that because the plaintiff filed the action in the circuit court, the court lacked jurisdiction to effectuate a transfer.¹¹⁰

Hardees and *Benton* dictate that the procedural requirements pertaining to direct review be followed strictly. The complaint must be filed in the appellate court within thirty-five days from the date on which the decision is served on the adversely affected party.¹¹¹ Furthermore, a venue transfer to the appellate court can-

97. *Hardees*, 155 Ill. App. 3d at 180, 507 N.E.2d at 1305-06.

98. *Id.* at 179, 507 N.E.2d at 1305.

99. *Id.* at 175, 507 N.E.2d at 1302.

100. *Id.*

101. See *supra* note 91 and accompanying text.

102. See *supra* note 62 and accompanying text.

103. *Hardees*, 155 Ill. App. 3d at 175, 507 N.E.2d at 1302.

104. *Id.* at 176, 507 N.E.2d at 1303.

105. *Id.* at 180, 507 N.E.2d at 1306. The court relied upon *Benton*, 147 Ill. App. 3d at 7, 497 N.E.2d at 876, in finding the thirty-five day period of section 3-103 applicable. *Hardees*, 155 Ill. App. 3d at 180, 507 N.E.2d at 1305-06.

106. See *supra* note 91 and accompanying text.

107. *Hardees*, 155 Ill. App. 3d at 177, 507 N.E.2d at 1303. Section 8-111 became effective January 1, 1986. The plaintiff's cause of action accrued on December 16, 1985. The court stressed that the plaintiff still had nineteen days in which to file after the amendment's effective date. *Id.* By applying the amendment retroactively, the court denied the plaintiff an opportunity to have his case heard on the merits.

108. *Id.* at 179, 507 N.E.2d at 1304-05.

109. *Id.*

110. *Id.* at 179, 507 N.E.2d at 1305.

111. See *supra* note 62 and accompanying text.

not be used to cure an erroneous filing of a complaint in the circuit court.

B. Substantive Issues

1. Utility Rates

The Illinois Supreme Court in *Independent Voters v. Illinois Commerce Commission*¹¹² and in *People ex rel. Hartigan v. Illinois Commerce Commission*,¹¹³ considered consumer rights regarding utility rates. In *Independent Voters*, the court held that utility customers are not entitled to refunds during the pendency of an appeal for a rate increase that is invalidated subsequently by the courts.¹¹⁴

In *Independent Voters*, a citizens group ("the Voter's Group") contested a 1971 Illinois Bell rate increase approved by the Illinois Commerce Commission.¹¹⁵ The Illinois Supreme Court ultimately invalidated portions of Illinois Bell's rate increase.¹¹⁶ The issue concerned whether utility customers should be entitled to a refund for charges collected from the time the Commission approved the rate increase until the time the court invalidated the increase.¹¹⁷ The court rejected the Voter's Group contention that the utility collected unlawful revenues.¹¹⁸ The court relied upon *Mandel Brothers, Inc. v. Chicago Tunnel Terminal Company*,¹¹⁹ and reasoned that an award of reparations during the pendency of an appeal would conflict with the Public Utilities Act.¹²⁰ The court concluded that the act provided a built-in mechanism for relief and that further relief would be contrary to legislative intent.¹²¹ Furthermore, because the rates collected were in accordance with the rates approved by the Commission, the utility "received no unlawful charges of which it should be 'disgorged' under restitution prin-

112. 117 Ill. 2d 90, 510 N.E.2d 850 (1987).

113. 117 Ill. 2d 120, 510 N.E.2d 865 (1987).

114. *Independent Voters*, 117 Ill. 2d at 106, 510 N.E.2d at 858.

115. *Id.* at 93, 510 N.E.2d at 852.

116. *Id.* The Commission improperly permitted Illinois Bell to include certain operating expenses in its 1971 rate order. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 55 Ill. 2d 461, 303 N.E.2d 364 (1973).

117. *Independent Voters*, 117 Ill. 2d at 94, 510 N.E.2d at 852-53.

118. *Id.* at 98-99, 510 N.E.2d at 855.

119. 2 Ill. 2d 205, 117 N.E.2d 774 (1954).

120. *Independent Voters*, 117 Ill. 2d at 99, 510 N.E.2d at 855. The Act provides, in pertinent part: "[t]he pendency of an appeal shall not of itself stay or suspend the operation of the rule, regulation, order or decision of the Commission, but during the pendency of the appeal the circuit court, or the Supreme Court, . . . in its discretion may stay or suspend, in whole or in part, the operation of the Commission's order . . ." ILL. REV. STAT. ch. 111 2/3, para. 10-204(a) (1985).

121. *Independent Voters*, 117 Ill. 2d at 97, 510 N.E.2d at 854.

principles."¹²² Nevertheless, the court ordered the utility to refund charges collected subsequent to the court's decision that invalidated portions of the rate increase.¹²³

In *People ex rel. Hartigan v. Illinois Commerce Commission*, the Illinois Supreme Court invalidated a Commonwealth Edison rate increase approved by the Illinois Commerce Commission ("the Commission") because the utility company failed to meet its burden of proof in demonstrating the reasonableness of its construction costs.¹²⁴ Moreover, consistent with *Independent Voters*, the court authorized the utility company to charge the increased rates until the time the Commission, on remand, set the proper rates.¹²⁵

In *Hartigan*, Commonwealth Edison requested the Commission to include in its rate base the costs of constructing a nuclear power plant.¹²⁶ The Commission approved a portion of these costs, which prompted twelve intervenors to file suit in the circuit court seeking to have the rate increase declared invalid.¹²⁷ The lower court held that the utility failed to comply with the Public Utilities Act¹²⁸ in conducting its audit, and remanded the matter to the Commission for new ratemaking proceedings.¹²⁹ In addition, the lower court instructed the Commission to disallow all or part of certain expenses.¹³⁰ The Illinois Supreme Court granted leave for a direct

122. *Id.* at 98-99, 507 N.E.2d at 855. The court reasoned that Bell was required by statute to collect the rate increase and, therefore, Bell was not unjustly enriched. *Id.*

123. *Id.* at 105, 510 N.E.2d at 858. The amount to be refunded represents the difference collected under the original rate order and the amount that would have been collected under the new rate order determined by the Commission on remand for the period in question. *Id.*

124. *Hartigan*, 117 Ill. 2d at 136, 510 N.E.2d at 871.

125. *Id.* at 148, 510 N.E.2d at 877.

126. *Id.* at 127-28, 510 N.E.2d at 867-68.

127. *Id.* at 128-29, 510 N.E.2d at 867.

128. ILL. REV. STAT. ch. 111 2/3, para. 9-213 (1985). It is important to note that the *Hartigan* court refers to section 30.1 of the Public Utilities Act in the 1985 Supplement, but section 30.1 was renumbered to section 9-213 in the 1985 Illinois Revised Statutes. *Id.*

129. *Hartigan*, 117 Ill. 2d at 127, 510 N.E.2d at 867.

130. *Id.* at 129-30, 510 N.E.2d at 868-69. The circuit court found that the Commission had placed improperly the burden of showing reasonableness on the intervenors. In addition, the court concluded that Edison's audit report did not conform to "generally accepted auditing standards" as required pursuant to section 9-213 of the Public Utilities Act. ILL. REV. STAT. ch. 111 2/3, para. 9-213 (1985). Consequently, the court disallowed the costs associated with the delay in obtaining an operating license for Byron 1 and ordered the Commission to exclude a portion of the common plant costs of Byron 1 and 2. The nuclear power plants at issue are commonly referred to as Byron 1 and 2. Finally, the court held that none of the construction costs of Byron 1 could be included in the rate base. *Hartigan*, 117 Ill. 2d at 130, 510 N.E.2d at 868-69.

appeal pursuant to Supreme Court Rule 302(b).¹³¹

As the *Hartigan* court noted, the Public Utilities Act provides a comprehensive scheme for determining whether the costs of newly constructed power plants can be included in a utility company's rate base.¹³² The *Hartigan* court agreed with the circuit court and held that the Commission improperly allocated the burden of proof.¹³³ Instead of requiring the utility to demonstrate the reasonableness of its construction costs, the Commission improperly placed the burden of proof upon the intervenors.¹³⁴ The court stressed the fact that the Commission must take an active role as an investigator and regulator of the utilities; it may not rely upon intervening parties to contest rate increases.¹³⁵ In addition, the Public Utility Act dictates that the utility make an affirmative showing of reasonableness to instill a sense of confidence in consumers who are required to pay for the rate increase.¹³⁶

Further, the court held that the utility failed to demonstrate the reasonableness of the construction costs and that the audit failed to conform to generally accepted auditing standards.¹³⁷ For these reasons, the court remanded the case to the Commission for further ratemaking proceedings consistent with the opinion.¹³⁸

The *Hartigan* court defined the judiciary's role when reviewing

131. *Hartigan*, 117 Ill. 2d 127, 510 N.E.2d at 867. Illinois Supreme Court rule 302(b) provides in part: "[a]fter the filing of the notice of appeal to the Appellate Court in a case in which the public interest requires prompt adjudication by the Supreme Court, the Supreme Court or a justice thereof may order that the appeal be taken directly to it." ILL. S. CT. R. 302(b), ILL. REV. STAT. ch. 110A, para. 302(b) (1985).

132. ILL. REV. STAT. ch. 111 2/3, para. 9-213 (1985). The Act provides, in relevant part, that "the cost of new electric utility generating plants and significant additions to electric utility generating plants shall not be included in the rate base of any utility unless such cost is reasonable." *Id.* The Act also requires that the utility conduct an audit to determine reasonableness. *Id.*

133. *Hartigan*, 117 Ill. 2d at 136, 510 N.E.2d at 870. *Hartigan* rejected the historic presumption of reasonableness. See *City of Chicago v. Illinois Commerce Commission*, 133 Ill. App. 3d 435, 478 N.E.2d 1369 (1st Dist. 1985). The court concluded that when the Illinois legislature enacted section 30.1 (now section 9-213) and required reasonableness to be shown through an independent audit, it rejected the historical presumption of reasonableness. *Hartigan*, 117 Ill. 2d at 136, 510 N.E.2d at 870.

134. *Hartigan*, 117 Ill. 2d at 135-36, 510 N.E.2d at 871. The court stressed that the burden of reasonableness is significant. *Id.* The court noted that any participation by groups or person in rate making proceedings before the Commission is strictly voluntary. It is possible that no party will seek to intervene, or that those parties who do intervene will lack the financial resources to challenge the reasonableness. *Id.*

135. *Id.* at 135, 510 N.E.2d at 871.

136. *Id.* at 133, 510 N.E.2d at 870.

137. *Id.* at 147, 510 N.E.2d at 876-77.

138. *Id.* at 149, 510 N.E.2d at 877.

the Commission's findings.¹³⁹ Ratemaking is a legislative function and courts generally are limited to ascertaining whether the Commission's findings of fact are against the manifest weight of the evidence.¹⁴⁰ Courts may not set new rates. Instead, courts have three options: they can affirm the Commission's order, reverse the order, or remand the case to the Commission to receive new or additional evidence.¹⁴¹ Lastly, the court held that the utility could continue to charge the rate approved by the Commission subject to reparations consistent with *Independent Voters of Illinois*.¹⁴²

2. Pollution and Hazardous Waste

The Illinois Supreme Court decided two cases involving pollution and hazardous waste. In *Environmental Protection Agency v. Pollution Control Board*,¹⁴³ the court ruled on the applicable standard of review for an Illinois Pollution Control Board's ("the Board") decision reviewing the Illinois Environmental Protection Agency's ("the IEPA") determination of grants for hazardous waste permits.¹⁴⁴ The court held that the Board was not bound to apply the manifest weight of the evidence test to the IEPA's decision.¹⁴⁵

Waste Management Incorporated ("WMI") applied to the IEPA for hazardous waste operating permits.¹⁴⁶ WMI sought to open a new hazardous-waste-disposal trench at an existing site.¹⁴⁷ In addition, WMI applied for five hundred and ninety-nine supplemental permits to dispose of certain hazardous-waste products.¹⁴⁸ The IEPA denied each of these applications and WMI appealed its decision to the Board.¹⁴⁹ The Board reversed the IEPA's decision and granted the permits.¹⁵⁰ The IEPA appealed the Board's deci-

139. *Id.* at 141-42, 510 N.E.2d at 874.

140. *Id.* at 142, 510 N.E.2d at 874. For a discussion of the manifest weight test, see *supra* note 44 and accompanying text.

141. *Hartigan*, 117 Ill. 2d at 142, 510 N.E.2d at 874.

142. *Id.* at 148, 510 N.E.2d at 877. See also *supra* notes 114-23 and accompanying text.

143. 115 Ill. 2d 65, 503 N.E.2d 343 (1986).

144. *Id.* at 67, 503 N.E.2d at 344.

145. *Id.* at 70, 503 N.E.2d at 345. See also *supra* note 44 and accompanying text.

146. *Environmental Protection Agency*, 115 Ill. 2d at 67, 503 N.E.2d at 344.

147. *Id.*

148. *Id.*

149. *Id.* Section 1040 of the Illinois Environmental Protection Act vests the Board with the authority to review decisions of the Agency. ILL. REV. STAT. ch. 111 1/2, para. 1040 (1985).

150. *Environmental Protection Agency*, 115 Ill. 2d at 67, 503 N.E.2d at 344.

sion directly to the appellate court.¹⁵¹ The IEPA asserted that the Board erred by failing to apply the manifest weight of the evidence test to the IEPA's decision denying the permits.¹⁵² The appellate court affirmed the Board's decision.¹⁵³

The court recognized that the Board's principal function is to adopt regulations setting forth the requirements of the permit system.¹⁵⁴ Subsequently, the IEPA must determine whether specific applicants have satisfied the requirements delineated by the Board.¹⁵⁵ The IEPA maintained that by not applying the manifest weight of the evidence test, the Board undermined its authority by assuming permit-granting authority.¹⁵⁶

The court found one statutory exception to the Board's quasi-legislative role.¹⁵⁷ This exception applies when the IEPA denies a permit.¹⁵⁸ The IEPA's decision fits squarely within this exception.¹⁵⁹ Thus, the court reasoned that the Board was justified in determining whether a permit should be granted.¹⁶⁰

The court rejected the IEPA's argument that the manifest weight of the evidence test applied principally because the Act does not require the IEPA to conduct hearings.¹⁶¹ Hence, none of the due process procedural safeguards, such as cross-examination, are afforded, and the applicant cannot challenge the sufficiency of the evidence upon which the IEPA relied.¹⁶² Therefore, the Board was not limited to the manifest weight of the evidence test.¹⁶³

The Illinois Supreme Court affirmed the lower court's deci-

151. *Id.* The Act allows the Agency to appeal the Board's decision directly to the appellate court. ILL. REV. STAT. ch. 111 1/2, para. 1041(a) (1985).

152. *Environmental Protection Agency*, 115 Ill. 2d at 67, 503 N.E.2d at 344. For a discussion of the manifest weight of the evidence test, see *supra* note 44 and accompanying text.

153. *Environmental Protection Agency v. Pollution Control Board*, 138 Ill. App. 3d 550, 486 N.E.2d 293 (3d Dist. 1985).

154. ILL. REV. STAT. ch. 111 1/2, paras. 1005(b), 1039 (1985).

155. *Id.* at para. 1039.

156. *Environmental Protection Agency*, 115 Ill. 2d at 67, 503 N.E.2d at 344.

157. *Id.* at 69, 503 N.E.2d at 344.

158. ILL. REV. STAT. ch. 111 1/2, paras. 1005(d), 1040 (1985).

159. *Environmental Protection Agency*, 115 Ill. 2d at 69, 503 N.E.2d at 345.

160. *Id.*

161. *Id.* at 70, 503 N.E.2d at 345. Consequently, the procedural safeguards of due process are missing. The agency cited cases pertaining to local governing bodies' decisions regarding the approval or rejection of site locations. That part of the Act, however, requires the local governing bodies to conduct public hearings that must be transcribed, thereby providing a record for the Board to review. *Id.* See also ILL. REV. STAT. ch. 111 1/2, paras. 1039.2, 1040.1 (1985).

162. *Environmental Protection Agency*, 115 Ill. 2d at 69, 503 N.E.2d at 345.

163. *Id.* at 70, 503 N.E.2d at 345.

sion.¹⁶⁴ The court noted the Board's finding that the "the preponderance of professional testimony, especially by those who conducted independent studies, indicate[d] that the site's characteristics [were] not such that it [was] inherently unmanageable" ¹⁶⁵

In *Central Illinois Public Service Company v. Pollution Control Board*,¹⁶⁶ the Illinois Supreme Court held that the Illinois Pollution Control Board ("the Board") is not required to promulgate standards and procedures as a prerequisite for considering a petition for site-specific standards.¹⁶⁷ In 1968, Central Illinois Public Service Company ("CIPS") constructed a pond on the site of its power station to collect plant waste.¹⁶⁸ After the storage capacity of the pond was nearly depleted, CIPS petitioned the Illinois Environmental Protection Agency (the "Agency") for a permit to construct a second pond.¹⁶⁹ The Agency denied the permit because the contamination level of the pond exceeded the maximum permissible levels.¹⁷⁰ The Board affirmed the Agency's determination.¹⁷¹ CIPS then requested site-specific water-quality standards which would allow it to exceed the general standards promulgated by the Board.¹⁷² The Board denied the request.¹⁷³ CIPS appealed the Board's finding directly to the appellate court.¹⁷⁴ The Illinois Appellate Court for the Fourth District held that the Board acted arbitrarily and capriciously in denying the petition without first adopting standards or procedures.¹⁷⁵ The appellate court remanded the matter to the Board to promulgate the necessary standards and procedures.¹⁷⁶

164. *Id.* at 71, 503 N.E.2d at 346.

165. *Id.*

166. 116 Ill. 2d 397, 507 N.E.2d 819 (1987).

167. *Id.* at 407, 507 N.E.2d at 823. The Board is authorized to adopt regulations of general applicability in defining the maximum permissible contamination levels in water supplies. ILL. REV. STAT. ch. 111 1/2, para. 1027 (1985). In addition, the Board may provide an adjusted standard for persons who can demonstrate that the adjustment is consistent with the Environmental Protection Act. ILL. REV. STAT. ch. 111 1/2, para. 1028.1 (1985).

168. *Central Illinois Public Serv. Co.*, 116 Ill. 2d at 402, 507 N.E.2d at 821.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* Section 1041(a) of the Act permits direct review to the appellate court. ILL. REV. STAT. ch. 111 1/2, para. 1041 (a) (1985).

175. *Central Illinois Public Serv. Co. v. Pollution Control Bd.*, 142 Ill. App. 3d 43, 491 N.E.2d 176 (4th Dist. 1986).

176. *Id.*

The Illinois Supreme Court reversed the lower court and held that promulgating standards and procedures is not a prerequisite for the Board to consider petitions.¹⁷⁷ The court based its rationale on practical considerations such as the legislative intent of the Environmental Protection Act.¹⁷⁸ Establishing standards and procedures as a prerequisite would require the Board to promulgate procedures and levels of justification each time a party petitioned for site-specific regulations.¹⁷⁹ This process would be especially burdensome considering the different standards that would be required depending on the character of the land involved.¹⁸⁰ Moreover, the court indicated that the legislative history of the Act suggested the appropriateness of determining the merits of each case separately.¹⁸¹

Finally, the court considered whether the Board's findings were arbitrary and capricious.¹⁸² CIPS argued that, under the language of the Act, water pollution cannot occur "unless actual harm to humans or crops will occur as a result of the contamination . . . [and] that there is no pollution if any harmful effects can be avoided by not using the water."¹⁸³ Conversely, the Board interpreted the Act to regard water as a resource, and determined that pollution occurs whenever contamination is likely to render the water unsuitable.¹⁸⁴ The Board thus contended that it was not required to show that actual harm will occur, only that harm would occur if the contaminated water were to be used.¹⁸⁵ The court accepted the Board's interpretation of the Act and held that the

177. *Id.* at 407, 507 N.E.2d at 823.

178. *Id.* at 406-07, 507 N.E.2d at 822-23. The court commented that the legislature intended to confer additional power upon the Board by permitting it to adopt site-specific regulations. *Id.* If the Board were first required to adopt standards and procedures of justification, its power would be limited, which is contrary to legislative intent. *Id.*

179. *Id.* at 404, 507 N.E.2d at 822.

180. *Id.*

181. *Id.* at 406-07, 507 N.E.2d at 822-23. The Legislature enacted section 28.1 to provide the Board with streamlined procedures for site-specific regulations. *Id.*

182. *Id.* at 412, 507 N.E.2d at 825-26.

183. *Id.* at 409, 507 N.E.2d at 824. The Act provides that "[water] pollution is such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animal, birds, fish or other aquatic life." ILL. REV. STAT. ch. 111 1/2, para. 1003(n) (1985).

184. *Central Illinois Public Serv. Co.*, 116 Ill. 2d at 409, 507 N.E.2d at 824.

185. *Id.* An agency charged with the administration of an Act, is entitled to deference to its interpretation of the statute. *Id.* (citing *Masa v. Dept. of Registration & Educ.*, 116 Ill. 2d 376, 507 N.E.2d 814 (1987); *Illinois Consol. Tel. Co. v. Illinois Commerce Commn.*, 95 Ill. 2d 142, 447 N.E.2d 295 (1983)).

Board's findings were not arbitrary and capricious.¹⁸⁶

Central Illinois Public Service Company's importance is magnified by the courts's reluctance to interfere with the Board's expertise when the public interest is at stake. The court emphasized that the Board is much better equipped to determine the dangerous effects of a pollutant and to balance the public good against the individual hardship.¹⁸⁷

3. License Revocations

In *Masa v. Department of Registration and Education*,¹⁸⁸ the Illinois Supreme Court upheld an Illinois Department of Registration and Education (the "DRE") decision to revoke a veterinarian's license for malpractice.¹⁸⁹ In *Masa*, the DRE charged a veterinarian with committing gross malpractice in performing surgery on a dog and sought the suspension or revocation of the doctor's license.¹⁹⁰ After an administrative hearing, the DRE adopted the Veterinary Examining Committee's recommendation that the doctor committed gross malpractice and revoked his license.¹⁹¹ The doctor then filed a complaint for administrative review in the circuit court alleging that the DRE's decision was against the manifest weight of the evidence.¹⁹² Both the circuit and the appellate courts found that the DRE's finding of gross malpractice was against the manifest weight of the evidence.¹⁹³

The Illinois Supreme Court found ample evidence in the record to sustain the DRE's finding of gross negligence.¹⁹⁴ Two veterinarians testified that the doctor removed a healthy organ from the dog.¹⁹⁵ This unnecessary removal, coupled with the dog's existing lung problems, caused the dog's death.¹⁹⁶ Two veterinarians also testified on behalf of the doctor.¹⁹⁷ Nonetheless, the doctor unsuccessfully asserted that gross negligence is characterized by wilful

186. *Id.* at 412, 507 N.E.2d at 825-26.

187. *Id.*

188. 116 Ill. 2d 376, 507 N.E.2d 814 (1987).

189. *Id.* at 388, 507 N.E.2d at 819.

190. *Id.* at 378-79, 507 N.E.2d at 814-15.

191. *Id.* at 379, 507 N.E.2d at 815.

192. *Id.* For a discussion of the manifest weight of the evidence test, see *supra* note 44 and accompanying text.

193. *Id.*

194. *Id.* at 387, 507 N.E.2d at 818.

195. *Id.* at 381-82, 507 N.E.2d at 815.

196. *Id.*

197. *Id.* at 382, 507 N.E.2d at 816.

and wanton action or recklessness.¹⁹⁸ The court concluded that the DRE was required only to demonstrate great negligence in the performance of the doctor's veterinary practice.¹⁹⁹ Further, the court expressed its reluctance to tamper with the DRE's decision and deferred to its expertise and experience in upholding the revocation of the doctor's license.²⁰⁰ *Masa* confirms the wide deference that the Illinois Supreme Court currently is giving to agency decisions. This is particularly evident when the public health or safety is involved or when a matter requires an agency's technical expertise.

4. The Right to Housing

The Illinois Appellate Court for the Second District in *Rackow v. Illinois Human Rights Commission*²⁰¹ held that a Human Rights Commission finding that certain apartment owners and its managers (referred to collectively as the "Owners") violated the Illinois Human Rights Act ("the Act") by refusing to rent an apartment to a prospective tenant because the tenant had children.²⁰² Furthermore, the court upheld the Act's constitutionality in prohibiting discriminatory practices in housing facilities against people with children.²⁰³

In *Rackow*, a prospective tenant completed an application to rent a two bedroom apartment.²⁰⁴ The apartment complex maintained a policy whereby no children were permitted to live in the one bedroom apartment units and only one child could live in its two bedroom units.²⁰⁵ On his application, the tenant indicated his status as divorced with no children.²⁰⁶ The apartment owner subsequently learned that the tenant was separated and had eight chil-

198. *Id.* at 387, 507 N.E.2d at 818. The court commented that by enacting the Veterinary Medicine and Surgery Practice Act, the State Legislature intended to insure that only qualified individuals would be able to practice in Illinois. By allowing removal for only wanton or willful conduct, veterinarians who exhibit a "glaringly obvious deviation from an acceptable standard of care" would be permitted to practice. *Id.* This is clearly contrary to the intent of the General Assembly. *Id.*

199. *Id.* at 387, 507 N.E.2d at 819. The court declined to require recklessness. The court noted that gross negligence is commonly understood to encompass "very gross negligence, . . . [b]ut it is something less than the willful, wanton and reckless conduct." *Id.* (citing BLACK'S LAW DICTIONARY 932 (5th ed. 1979)).

200. *Id.* at 388, 507 N.E.2d at 819.

201. 152 Ill. App. 3d 1046, 504 N.E.2d 1344 (2d dist. 1987).

202. *Id.* at 1061, 504 N.E.2d at 1355.

203. *Id.* at 1060, 504 N.E.2d at 1354.

204. *Id.* at 1050, 504 N.E.2d at 1347.

205. *Id.*

206. *Id.* at 1050-51, 504 N.E.2d at 1348.

dren; but none of the children lived with the tenant.²⁰⁷ The tenant's ex-wife retained custody of the children and the tenant had visiting rights.²⁰⁸ The tenant informed the apartment owner that he might have two or three of the youngest children for a weekend each month and that occasionally a couple of the children might stay with him during the summer.²⁰⁹

At a hearing before the Illinois Human Rights Commission, the tenant testified that the apartment manager stated that he could not rent an apartment because children over five years of age were not permitted in the complex.²¹⁰ The apartment manager testified that the denial of the application was based on the tenant's falsification of his rental application in which he indicated that he was divorced and had no children.²¹¹ Conversely, the owner testified that the denial occurred because of the aforementioned complex policy regarding children.²¹²

Section 3-104 of the Act²¹³ makes it a civil rights violation for an "owner or agent of any housing accommodation to:" (1) require as a condition precedent to a rental that the prospective tenant not have children under the age of fourteen; or (2) have in the lease agreement a condition which would terminate the lease on account of a tenant having children under the age of fourteen.²¹⁴

The Commission found that the complex violated section 3-104²¹⁵ because its owner refused to rent an apartment to a tenant who had children.²¹⁶ The owner then filed for administrative review.²¹⁷ On administrative review, the owner contended that there was insufficient evidence to find a civil rights violation.²¹⁸ The trial and the appellate courts found no merit to this assertion, especially in light of the uncontested fact that the complex had an oral policy under which children were restricted or banned from living in the complex.²¹⁹

Moreover, the Illinois Appellate Court for the Second District

207. *Id.* at 1051, 504 N.E.2d at 1348.

208. *Id.*

209. *Id.* at 1050, 504 N.E.2d at 1347.

210. *Id.* at 1052, 504 N.E.2d at 1348.

211. *Id.* at 1053, 504 N.E.2d at 1349.

212. *Id.*

213. ILL. REV. STAT. ch. 68, para. 3-104 (1985).

214. *Id.*

215. *See supra* notes 213-14 and accompanying text.

216. *Rackow*, 152 Ill. App. 3d at 1055, 504 N.E.2d at 1350.

217. *Id.*

218. *Id.* at 1360, 504 N.E.2d at 1354-55.

219. *Id.* at 1061, 504 N.E.2d at 1355.

held that section 3-104²²⁰ was constitutional.²²¹ The court held also that the statute did not violate the due process clause for vagueness.²²² The court observed that there is a strong presumption of constitutionality, and indicated that the burden of proof rests with the challenging party to demonstrate the invalidity of the statute.²²³ Moreover, the court used the rational basis test rather than strict scrutiny in accessing the statute's constitutionality.²²⁴ The court easily found a rational basis for the statute based upon the state's interest in preventing discrimination and in promoting the family unit.²²⁵ Finally, the court rejected the argument that the owners' property interest gave them the right to use the property in whatever way they saw fit.²²⁶ The court commented that the owners failed to show that their property rights outweighed the public interest in assuring fair and equal housing.²²⁷ Hence, the Illinois Appellate Court for the Second District held that the plaintiff violated section 3-104²²⁸ and, more importantly, upheld the Act's constitutionality. It is important to note that the Illinois Supreme Court has not considered the Act's constitutionality. *Rackow*, however, sends a strong message to landlords that Illinois courts will not tolerate discrimination against children in housing.

III. CONCLUSION

During the *Survey* year, the Illinois Supreme Court and Illinois appellate courts handed down decisions in administrative law that will have a lasting impact. The supreme court clarified and expanded existing principles of administrative law. In addition, the court defined the rights of consumers regarding utility rates and addressed environmental issues.

220. See *supra* notes 213-14 and accompanying text.

221. *Rackow*, 152 Ill. App. 3d at 1058, 504 N.E.2d at 1352.

222. *Id.* A statute is unconstitutionally vague if its terms are so indefinite that persons of common intelligence necessarily must guess at its meaning and differ as to its application. *Id.* at 1057, 504 N.E.2d at 1352 (citing *Fagiano v. Police Bd. of the City of Chicago*, 98 Ill. 2d 277, 282, 456 N.E.2d 27, 29 (1983)).

223. *Id.* (citing *Bernier v. Burris*, 113 Ill. 2d 219, 227, 497 N.E.2d 763, 767 (1986)).

224. *Id.* at 1058, 504 N.E.2d at 1353. A court should subject a statute to strict scrutiny when a fundamental constitutional right is at stake, otherwise only rational basis is required. *Harris v. Manor Healthcare Corporation*, 111 Ill. 2d 350, 489 N.E.2d 1374 (1986) (held under the rational-basis test, the issue is whether the statute bears a rational relationship to a legitimate government interest).

225. *Rackow*, 152 Ill. App. 3d at 1059, 504 N.E.2d at 1353.

226. *Id.* at 1060, 504 N.E.2d at 1354.

227. *Id.*

228. See *supra* notes 213-14 and accompanying text.