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Administrative Law in Illinois: Recent Trends and Developments

KENNETH GRAY*

The approach of this article will be two-pronged. As an academician, the author is interested in focusing upon the impact of theoretical developments in administrative law. This will be done principally by examining recent trends in scholarly literature which have shaped and illuminated administrative law theory. As a sitting member of an administrative review board, the author is interested in highlighting problems faced by attorneys, administrators, and claimants at the local level. By presenting a summary of recent developments in Illinois administrative practice, the author will provide the practitioner with some idea of the troublesome areas peculiar to state practice. Further, this article will explore in some detail the new Illinois Administrative Procedure Act (APA) enacted on September 22, 1975.¹

TRENDS IN ADMINISTRATIVE LAW THEORY: SCHOLARLY RECOGNITION OF DEVELOPMENTS

The successes of the consumer movement, the environmentalists, and the public interest bar have forced agency proceedings into the open.² Previously, the more generalized public interests were not represented before administrative agencies.³ There has also been a dramatic rise in public interest challenges to governmental regulatory activities. Citizen groups are vigorously defending public rights.⁴ Hence, the increased complexity in the administrative processes is due in part to the impact of interest group representation, stricter judicial scrutiny, and the imposition of highly technical standards.⁵ Further, there is among the populace a growing distrust

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¹ ILL. REV. STAT. ch. 127, §§ 1003-21 (1975); see text accompanying notes 71-86 infra.
⁵ See id. at 667. See also Jaffe, Public Interest Law—Five Years Later, 62 A.B.A.J. 982 (1976); Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J.
of governmental intrusion into the private and business lives of its citizens. This popular disgust with bureaucratic excesses has encouraged administrators to seek refuge behind more formalistic, court-like procedures.

In an article entitled *The Reformation of American Administrative Law,* Professor Stewart synthesized the recent doctrinal developments in administrative law: (1) the establishment of an increasingly strong presumption of judicial review of agency action; (2) the enlargement of the classes entitled by due process to notice and an administrative hearing on the record; (3) the enlargement of the classes entitled by statute or regulation to participate in various administrative activities; and (4) the enlargement of classes entitled by right to judicial review of agency action. In part, these developments are a response to the perceived overrepresentation of regulated and special interests in the agency decision making process. Professor Stewart terms this phenomenon the emerging interest representation model of administrative law. He concludes that such a system, whether imposed by the courts or by the legislature,

is not an acceptable general solution to the problem of delegated legislative power exercised by administrative agencies. Resource costs and other burdens would be intolerable if a judge-made system of interest representation were universally applied. When agency and judicial proceedings require well over a decade to approve or disapprove a single power facility, unrestrained use of judicial procedures for resolving disputed economic and social issues can threaten chaos.

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7. Id. at 1716; see id. at 1802-13.
8. See id. at 1713.
9. Id. at 1715-16; see id. at 1789-90.
10. Id. at 1802. "Moreover," continues Professor Stewart, "such a solution would involve
Professor Stewart does not suggest that interest representation has no place in administrative law. He does, however, advance two theses for conceptualizing administrative law in an era of extensive administrative delegation. The nominalist thesis holds that the interest representation principle should be used selectively as one of a number of approaches for resolving specific problems.\textsuperscript{11} Agencies would be classified differentially and techniques chosen accordingly.\textsuperscript{12} Professor Stewart's transitional thesis sees the present disjointed state of administrative law as an interim, passing phase.\textsuperscript{13} He concludes by urging that we prepare "ourselves to shoulder, for the indefinite future, the intellectual and social burdens of a dense complexity."\textsuperscript{14}

\begin{itemize}
\item \textit{a troubling aggrandisement of judicial power by giving the courts control over access to the decision-making process and an ultimate power of revision over policy choices.}\textsuperscript{\textit{Id.} at 1802-03.}
\item \textsuperscript{11} \textit{Id.} at 1807-08. Professor Stewart argues:
\begin{quote}
The extension of bureaucratic authority has outstripped the capacity of the traditional general-purpose political organs—the Congress and the President—to discharge such a responsibility adequately. In many cases the courts must exercise a check or it will not be exercised at all. In the end, the array of doctrinal techniques utilized by courts to expand participation rights may prove acceptable, not because we really believe in the interest representation principle, but because they represent useful judicial levers for the redress of clear failures in the operation of specific agencies. But if we are thus willing to countenance selective judicial intervention in discretionary agency policy choices, it would be preferable for the judges explicitly to set aside policy choices as unsound rather than resorting to indirect and costly procedural stratagems.
\end{quote}
\textit{Id.} at 1808-09.
\item \textsuperscript{13} \textit{Id.} at 1813:
\begin{quote}
Whether a fully-articulated model of interest representation will emerge . . . , or whether interest representation is simply an interim stage in the emergence of some totally new conception of the relation between administrative institutions, legal controls, private groups, and social and individual values, is as yet unclear. Application of the differential analysis counselled by the Nominalist Thesis to clear away the residue of traditional constructs that have outlived the theoretical understandings that gave them authority may well be an essential first step for either development. On the other hand, it is quite possible that no new encompassing theory of administrative law will emerge. The instinct for satisfying integration may remain a vain shuttlecock between no longer tenable conceptions of administrative legitimacy and the exigent difficulties of the present which have so far eluded a consistent general theory.
\end{quote}
\textit{See generally E. Freund, Administrative Powers over Property} (1928).
\item \textsuperscript{14} \textit{Id.} at 1813.
\begin{quote}
We have come to view man's opportunities as an attribute of a social milieu powerfully shaped by collective action, both "private" and governmental. Yet our received models of social choice—the elected legislature and the market—seem entirely incapable of effectively controlling the expanded machinery of government or of securing an adequate sphere for individual self-determination. Conceivably,
\end{quote}
\end{itemize}
Many would agree that this "dense complexity" is not only upon us, but growing fast. By urging that public interests be adequately represented, public interest advocates have lobbied for greater complexity in government. Those who speak out most strongly against big government may, in fact, be advancing the bureaucratic tangle. This was recognized by Professor Freedman in Crisis and Legitimacy in the Administrative Process. While modern administrative process has its origin in the aggressive pragmatism of the New Deal commitment to increased governmental intervention in the economy, present day Americans have failed to agree upon a coherent philosophy of governmental activism in economic or social matters. "The imprecision of the ideology that justifies the existence of administrative agencies reflects the basic ambivalence of our society toward the process of regulation." As a result, legislatures often enact regulations in evasive generalities, thereby exposing the agencies to conflicting political forces and powerful private interests. The New Deal model of an administrative agency emphasized reliance on the use of "experts," and on the need for agency "independence." Serious discrepancies have developed between these idealized concepts and actual performance. This has adversely affected public judgment of the usefulness of many regulatory agencies.

Professor Freedman also discusses the bureaucratization process itself. He notes that agencies pass through several developmental stages before maturity. At maturation the processes themselves become routinized with greater emphasis placed on conformity to bureaucratic norms than upon innovative achievements. It is this bureaucratic sluggishness that has contributed to the general sense of disappointment, if not crisis, in administrative law. This trend toward increased bureaucratization is experienced by the individual through contact with government employees who appear more concerned with formalistic adherence to their own rules, than with seeking a personalized response to the peculiarities of the specific circumstances. Many Americans "are strongly persuaded that the administrative bureaucracy presents a more serious threat to the interest representation model might develop into an acceptable solution to this dilemma.

*Id.* at 1813-14.

15. 27 STAN. L. REV. 1041 (1975).

16. *Id.* at 1044. Professor Freedman characterizes this dilemma as the "strong and persisting challenge to the basic legitimacy of the administrative process" in American history. *Id.*

17. *Id.* at 1053.
civil liberties and privacy of the individual than private bureaucracies do."

After comparing the performance of the Securities and Exchange Commission with the performance of the Federal Trade Commission, Professor Freedman concludes:

Those who seek to understand the recurring sense of crisis in the administrative process must acknowledge and attend to the significant differences in the performance of particular agencies. Inquiry into the factors that account for these differences suggests that administrative agencies achieve a high standard of performance when they enjoy strong public support for the attainment of clearly-stated and fairly-manageable statutory goals, and flounder when they do not.

Differences in the quality of performance among the various federal administrative agencies are attributable, in considerable degree, to the differentiated attitudes of the American public toward the agencies' respective responsibilities.

The indiscriminately general assertion that there is a crisis in the administrative process obscures the fact that variations in performance do exist. It would be more accurate, and less destructive to the administrative process as a whole, to speak of failures in performance of particular agencies. And it would be more useful in inquiring into the factors that account for these failures to consider the possibility that there, as elsewhere, the fault may be a fundamental human failing.

This somber view is emphasized in a recent article by former NLRB Chairman Edward B. Miller. He suggests that adjudicative hearings involving labor disputes be returned to the courts. He argues:

[O]nce a law has attained respectability, acceptability, and reasonable predictability, and once fundamental interpretative questions have been resolved by administrators who live daily with the law and the problems arising thereunder, and once administrative interpretations have been subjected to a reasonable period of judicial scrutiny, I would suggest that administrative tentative decision-making eventually becomes a poor substitute for traditional decision-making by the judiciary.
To be candid, most agency hearing mechanisms turn into “junior” court systems. As Miller argues, administrative adjudications are just as time consuming as traditional court proceedings, and administrative experts (where broad policy questions are not being decided) are no more expert than federal judges.23 This trend toward greater governmental complexity, increased formality, resort to more detailed rules, and greater bureaucratization and intrusion into private affairs appears to be a fact of life. Analyzing whether this movement of society can be altered, channeled into more functional paths, or whether it will create more serious disfunctions in our society is not the purpose of this article. It is sufficient for now merely to comment on the scholarly recognition of these ongoing developments so that practitioners can be aware of the broader currents in which they must sail, and which must affect the smaller currents in their immediate waters.

**Problem Areas in Administrative Law Practice**

There are a number of areas in administrative practice which have undergone substantial change in recent years. The impact of these developments on Illinois administrative law has been profound. The remainder of this article will examine in varying degrees a number of these areas, beginning with the informal conference.

**The Use of Informal Conferences**

In *International Telephone and Telegraph Corp. v. Local 134, IBEW,*24 the United States Supreme Court held a section 10(k)25 determination by the NLRB not final for purposes of judicial review under the federal Administrative Procedure Act.26 The Court held further that this determination did not constitute an “agency process for the formulation of an order.”27 As a result, the section 10(k) proceeding involved in this case was not governed by section 5(c) of the federal APA which prohibits commingling of prosecutorial and adjudicatory functions.28 Justice Rehnquist discussed the

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27. *Id.* § 551(7).
28. *Id.* § 554(d), which provides in pertinent part:
    An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.
history of section 10(k) and concluded that Congress' intent was to establish a mechanism for promptly settling most jurisdictional disputes in the labor field. All the formal requirements of the APA need not, intimates the Court, be met in such proceedings.

This decision was warmly received by agency administrators. While the result is arguable in terms of just how much weight findings of a 10(k) proceeding do carry in later proceedings, the willingness of the court to draw the line on creeping formality somewhere in the administrative area is refreshing. After all, many administrative agencies were originally established to provide quick remedies to problems the common law courts could not solve. Today, however, we are confronted with the question of whether technical legal rules and safeguards should be applied to informal proceedings established by agencies to avoid the cost, lost time, and complexity in their adjudicative proceedings.

For example, the Illinois Secretary of State has recently instituted informal hearings or "conferences" for driver's license suspensions and revocations. The driver who receives notice of suspension or revocation may request a "conference." He is permitted to bring an attorney, and routine relief in the nature of "restrictive driving permits" for driving to or from a place of employment can be obtained without a full-fledged administrative hearing. As a rule, practitioners are unaware that many other Illinois agencies provide for similar informal hearings. Much time and expense can be saved by the strategic use of such readily available procedures. If unsure, the attorney should contact the agency directly. Experience has demonstrated that Illinois agencies try diligently to serve the public. With such a substantial growth in the use of these informal proceedings, it is imperative that the Illinois attorney cultivate the habit of personally contacting the agency administrators.

29. 419 U.S. at 339.
31. For example, a commercial trucker found driving in Illinois without a proper truck license may not be liable if he is operating as lessee of the truck under a lease that is less than 30 days in length; in that instance, the lessor is liable. What should be done where the trucker's attorney does not raise this somewhat technical defense at a hearing, yet the fact that the lease is for less than 30 days is clear on the face of the record? See RULES AND REGULATIONS OF THE SECRETARY OF STATE §§ 3-400, 3-402 (1975).
32. See Bell v. Burson, 402 U.S. 535 (1971); Perez v. Campbell, 402 U.S. 637 (1971); Pollison v. Lewis, 320 F. Supp. 1343 (N.D. Ill. 1970), vacated and remanded, 403 U.S. 902, on remand, 332 F. Supp. 777 (N.D. Ill. 1971). These decisions require a statement of the "rule or statute or constitutional provision, if any, alleged to have been violated, or otherwise involved in the proceedings" in any notice prior to a driver's license revocation hearing. See RULES AND REGULATIONS OF THE SECRETARY OF STATE §§ 2-118(5)(c)(4), 7-101(3)(g)(4) (1975). See also section 10 of the Illinois APA which provides:
Problems of Access

In Illinois administrative law practice, the distinction between substance and procedure is often difficult to delineate. These complexities result largely from the administrative institutions' approach to procedural and substantive rulemaking. As a practical matter, procedural rules are often unpublished or unavailable. Only a handful of Illinois' 130-plus agencies publish regulations or rules. Notable exceptions are the Pollution Control Board and the Office of the Secretary of State. The Pollution Control Board recommends directly contacting them for copies of their comprehensive rules. This tactic may or may not meet with success when attempted with other agencies.

Substantive law in the administrative area is not easy to come by either. Many statutes and especially the rules passed under them are incredibly complex—or made to appear so. While statutes are available (often with relatively few interpretive court decisions), agency rules interpreting the statutes usually are not. Again, one must coax these rules out of the agency concerned.

Perhaps the most difficult burden the relatively inexperienced attorney faces in trying to ascertain the substantive law in preparation of an administrative case is in overcoming the unavailability of case law or policy positions which flesh out the complicated rules and statutes. Agencies, if they keep careful records of all cases or hearings resolved by them, are generally unwilling to make the files of these determinations available, in bulk, for the purpose of developing a case based on precedent, estoppel, or prior policy determination. Moreover, if files of opinions do exist, they are seldom

§ 10(a). In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice. Such notice shall be served personally or by certified or registered mail upon such parties or their agents appointed to receive service of process and shall include:
1. a statement of the time, place and nature of the hearing;
2. a statement of the legal authority and jurisdiction under which the hearing is to be held;
3. a reference to the particular Sections of the statutes and rules involved; and
4. except where a more detailed statement is otherwise provided for by law, a short and plain statement of the matters asserted.
(b). Opportunity shall be afforded all parties to be represented by legal counsel, and to respond and present evidence and argument.
(c). Unless precluded by law, disposition may be made of any contested case by stipulation, agreed settlement, consent order or default.

33. See Introduction, in Practice Before the Pollution Control Board (1972).
34. See, e.g., Ill. Rev. Stat. ch. 95 1/2, §§ 3-400-3-421 (1975) and the rules promulgated thereunder.
35. But see Rules of the Pollution Control Board 107-109 (1975) [hereinafter cited as PCB Rules].
supported by an adequate record, or an adequate indication of the basis for the agency decision.\textsuperscript{36}

Faced with these obstacles, it is no surprise that some agencies appear to be the “captive” of special interests that can afford to become experts in the various narrow administrative fields, or that some agencies seem to develop groups of attorney-specialists who handle most of the work before those agencies. Reform is surely needed. Although sections 4, 6, 7 and 11 of the Illinois APA will go far to correct these problems, the APA must still be implemented by the state’s agencies.\textsuperscript{37}

\textsuperscript{36} Compare PCB Rule 331, supra note 35, with APA §§ 11(a)(7), 14, Ill. Rev. Stat. ch. 127, §§ 1011(a)(7), 1014 (1975), which provide:

§ 11(a). The record in a contested case shall include:
1. all pleadings (including all notices and responses thereto), motions, and rulings;
2. evidence received;
3. a statement of matters officially noticed;
4. offers of proof, objections and rulings thereon;
5. proposed findings and exceptions;
6. any decision, opinion or report by the hearing examiner;
7. all staff memoranda or data submitted to the hearing examiner or members of the agency in connection with their consideration of the case; and
8. any communication prohibited by Section 14 of this Act, but such communications shall not form the basis for any finding of fact.

(b). Oral proceedings or any part thereof shall be recorded stenographically or by such other means as to adequately insure the preservation of such testimony or oral proceedings and shall be transcribed on request of any party.

(c). Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

§ 14. A final decision or order adverse to a party (other than the agency) in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties or their agents appointed to receive service of process shall be notified either personally or by registered or certified mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

\textsuperscript{37} APA §§ 4, 6, 7, Ill. Rev. Stat. ch. 127, §§ 1004, 1006, 1007 (1975), which provide:

§ 4(a). In addition to other rule-making requirements imposed by law, each agency shall:
1. adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;
2. adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.
3. make available for public inspection all rules adopted by the agency in the discharge of its functions.

(b) Each agency shall make available for public inspection all final orders, decisions and opinions.
The Need for Access Laws in Illinois

Professor Anderson, while underestimating the effect of access laws on the adjudicative side of administrative law, nevertheless pleads the need for such laws in broad terms:

The impact of access laws on due process, then, is less at the level of adjudication of particular cases than as a general prophylactic against abuse. Allowing anyone to turn up the carpet may prevent dirt from being swept under it in the first place. A government employee may be more inclined to afford due process even to unpopular or impotent individuals. In the other direction, openness may discourage sweetheart decisions vis-a-vis preferred clientele.\(^{38}\)

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(c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as required by this Act. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

§ 6(a). Each agency shall file in the office of the Secretary of State and in the agency's principal office a certified copy of each rule adopted by it, including all rules existing on the date this Act becomes applicable to the agency other than rules already so filed. The Secretary of State and the agency shall each keep a permanent register of the rules open to public inspection. The Secretary of State may refuse to accept for filing such certified copies as are not in substantial compliance with reasonable rules prescribed by him concerning the form of documents to be filed with him.

(b). Each rule hereafter adopted is effective 10 days after filing, except that:

1. if required by statute or specified in the rule, a later date is the effective date;
2. subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the Secretary of State and in the agency's principal office, or at a stated date less than 10 days thereafter, if the agency finds that this effective date is necessary because of emergency. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take reasonable and appropriate measures to make emergency rules known to the persons who may be affected by them.

§ 7(a). The agency shall compile, index and publish all effective rules adopted by it under the provisions of this Act, and all rules existing on the date this Act becomes applicable to the agency. Compilations shall be supplemented or revised as often as necessary and at least once every 2 years. The agency shall issue a monthly bulletin setting forth the text of any rules filed during the preceding month.

(b). Bulletins and compilations shall be filed in the office of the Secretary of State in Springfield, Illinois and in the Cook County Law Library in Chicago, Illinois. The agency shall make bulletins and compilations available upon request to agencies and officials of this State without charge and to other persons at prices established by the agency to cover mailing and publication costs.

See text accompanying notes 71-86 infra. On the question of implementation, see Illinois APA § 19, ILL. REV. STAT. ch. 127, § 1019 (1975), which provides:

§ 19. The provisions of "An Act concerning administrative rules," [ILL. REV. STAT. ch. 127, § 263 et seq.] approved June 14, 1951, as now or hereafter amended, shall not apply to any agency whenever the Act creating or conferring power on such agency adopts by express reference the provisions of this Act.

Illinois does not have a freedom of information statute. Recent federal cases involving the Freedom of Information Act (FOIA) demonstrate that for the first time adjudicative decisions of the type discussed above can be made subject to public inspection. Further, the case law illustrates that courts are quite capable of exercising discretion where agency confidences must be kept.

In Vaughn v. Rosen, the District of Columbia Circuit ordered the Civil Service Commission to provide detailed justifications of its claims that certain documents were exempt from disclosure under those sections of the FOIA excluding internal memoranda from disclosure. The court of appeals further ordered the Commission to specifically itemize and index the documents or portions thereof to show which were disclosable and which were exempt. The court stated that it was attempting to discourage the Government from withholding large masses of "exempted" information. Upholding the Government would have cast an impossible burden on opposing parties and placed an unjustifiable burden on the court system. Without such an approach agencies would consistently claim the broadest possible exemption and "let the court decide."

The Vaughn decision was supplemented by National Parks and Conservation Association v. Morton. In National Parks, the District of Columbia Circuit construed narrowly the trade secrets exemption in the FOIA. The court of appeals held that exemption 4 requires disclosure unless (1) the Government's ability to obtain necessary information is impaired, or (2) substantial harm will be caused to the competitive position of the person from whom the information was obtained.

In NLRB v. Sears, Roebuck & Co. and Renegotiation Board v. Grumman Aircraft Engineering Corp., the Supreme Court explored the applicability of the FOIA to unpublished agency "opinions." In Sears, the plaintiff sought disclosure of a large num-

40. See 5 U.S.C. § 552(b)(4)(5) (1970), which provides:
(b) This section does not apply to matters that are—
. . .
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; . . .
41. 484 F.2d at 827.
42. Id. at 826.
43. 498 F.2d 765 (D.C. Cir. 1974).
44. 5 U.S.C. § 552(b)(4) (1970); see note 40 supra.
ber of advice and appeals memoranda from past years.\textsuperscript{47} The NLRB claimed the materials were exempt from disclosure as "intra-agency memoranda."\textsuperscript{48}

The Supreme Court held that advice and appeals memoranda advising the NLRB against taking action were "final opinions" and "precisely the kind of agency law in which the public is so vitally interested and which Congress sought to prevent the agency from keeping secret."\textsuperscript{49} Memoranda recommending the filing of a complaint before the NLRB were held not "final opinions" and, therefore, within the "intra-agency memoranda" exception in the FOIA.

In the \textit{Grumman} case, a regional office of the Renegotiation Board submitted written reports under the Renegotiation Act of 1951 deciding whether contractors made "excessive profits" in contracts with the Government.\textsuperscript{50} These regional office reports were then submitted to the Board for its decision. The Supreme Court held these reports "pre-decision" memoranda and, therefore, exempt under the "intra-agency memoranda" exception in the FOIA. The Court did not, however, alter or modify the effect of a "final opinion" determination on disclosure under the FOIA.

In \textit{Sears}, the Court held squarely that "final opinions" are public records under the FOIA. Section (4)(b) of the Illinois Administrative Procedure Act should accomplish a result in Illinois similar to that of \textit{Sears}. It provides that "each agency shall make available for public inspection all final orders, decisions and opinions."\textsuperscript{51} Presently, most agencies do not permit public inspection, nor has any agency indicated that it intends to adopt rules to comply with section (4)(b).

One impediment to quick adoption of a disclosure scheme is the difficult delineation between "pre-" and "post-decision" memoranda.\textsuperscript{52} No justification is apparent for allowing agencies to keep voluminous records of cryptic decision-making secret, save the argument that advisors must be free to render advice to their superiors.

If national trends have any effect,\textsuperscript{53} we are going to see a greater

\textsuperscript{47} 421 U.S. at 136.
\textsuperscript{49} 421 U.S. at 150.
\textsuperscript{51} Ill. Rev. Stat. ch. 127, § 1004(b) (1975); see note 37 supra.
\textsuperscript{52} For a slightly different problem of administrative secrecy, see Klein v. Fair Employment Pract. Comm'n, 31 Ill. App. 3d 473, 334 N.E.2d 370 (1975).
\textsuperscript{53} For an interesting discussion of judicial evolution of standards that must be applied to "informal" agency rulemaking despite statutory authority, see Nathanson, \textit{Probing the
need for agencies to back up their decisions, both rulemaking and adjudicative. This will include more comprehensive records supporting their decisions. The protections offered by sections 4, 5, 7, 11 and 14 of the Illinois Administrative Procedure Act will be a starting point. These provisions should be helpful to parties affected by administrative decisions. As to the rights of non-parties and the public at large to scrutinize administrative behavior, the controversial issues will develop around what information will be made public in addition to information required to be made public under section 4 of the Illinois APA. Although section 11 does not clearly place case records in the public domain, it is clear that, in light of federal developments, Illinois agencies will have to be more open in their processes.55

CONSISTENCY IN ADMINISTRATIVE DECISION-MAKING

Closely related to the problems of access discussed above is the problem of agency consistency. Among the reasons for a party's efforts to gain access to prior opinions is the need to ascertain

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*Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 COLUM. L. REV. 723 (1975).*

Nathanson foresees

an emerging pattern for judicial review of administrative determinations with respect to which there are no statutory requisites of either administrative hearing or administrative record, not even in the section 553 sense. The first step is to insist upon some explanation by the administrator of the basis of his decision. If necessary, this may be extracted from testimony by the administrator himself or his subordinates, but it is much more preferable that it should appear in the "administrative record" in the form of findings by the administrator. Once such findings are obtained, they are to be measured against the administrative record, meaning apparently the relevant government file available to the administrator and upon which he presumably based his decision.

... Presumably, the ultimate effect of these developments will be to open up the administrative decisionmaking process to more searching inquiry; to require the administrator to put more of his cards on the table; to require even informal administrative processes to serve as adequate substitutes for judicial trials, and, in so doing, to satisfy at least certain basic standards of fairness without becoming bogged down in interminable adjudicatory proceedings. This is certainly a better way of probing the mind of the administrator than by putting the administrator or his assistants on the stand in a judicial trial to find out just what was decided and why it was so decided. ...

Nevertheless, there may be good grounds for taking at least a "hard look"—to borrow one of Judge Leventhal's favorite phrases—to see whether the immediate costs of some of these recent developments may not be greater than their anticipated benefits.

*Id. at 767, 768-69; see Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739 (1976).*

54. See notes 36 & 37 supra.

55. See note 53 supra.
agency policy that has not been reduced to written rules, and the need to be aware of agency common law—precedents embodied in prior adjudicative opinions that may either be followed again or found to be distinguishable.

If section 4(b) of the Illinois APA is applied to all state agencies, files of past opinions (which set forth findings of facts and conclusions of law in accord with APA section 14) will be available for examination. What binding effect these prior opinions will have on subsequent agency action involving different parties is an open question.

One commentator notes the circumstances in which courts have authorized ad hoc departure from their own regulations, and circumstances in which they have not:

One reason courts have frequently given for invalidating an agency violation of a regulation is that the violation may upset reliance on the regulation. However, courts which have pointed to reliance as a reason for invalidating a violation have not cited evidence that the party had changed his position in the belief that the regulation would be enforced. Instead, these courts often have declared simply that the party was "entitled to rely" on the regulation.

When courts have found that the agency's purpose in promulgating a regulation was not to protect the interest of the party objecting to the violation, they have usually upheld the violation.

In the case of procedural regulations, however, courts have often found that the rules are intended primarily to serve the agency's interest in governing its internal procedure, and that the complaining party therefore has no right to enforcement of the regulation.

Federal court treatment of inconsistent agency action takes many forms. In a tax fraud case, *United States v. Lockyer,* the Tenth Circuit held an unpublished portion of an IRS audit handbook (which established the internal procedures to be followed when an agent discovers tax fraud) an internal directive of the agency. In essence, the court of appeals reasoned that the handbook standards were not designed to safeguard the taxpayer's constitutional rights;

57. See Note, Violations by Agencies of Their Own Regulations, 87 HARV. L. REV. 629 (1974) [hereinafter cited as Violations by Agencies].
58. Id. at 631-32, 34.
59. 448 F.2d 417 (10th Cir. 1971).
its purpose was simply to avoid duplication and to prevent mistakes by the agents which could result in complicating prosecutions.

In United States v. Goldstein, another tax fraud prosecution case, the court held the failure to invite the taxpayer to an administrative conference not violative of defendant's rights since the conferences were held for the benefit of the United States to avoid unfounded prosecutions. One objection to this result is that "although the IRS may have had no intention of protecting taxpayers when it promulgated the regulation, the Goldstein holding would seem incorrect since the IRS action unfairly and inexplicably denied to one citizen a procedure of obvious benefit to those who received it in accordance with the regulation."

In a draft evasion case, United States v. Wilbur, the local draft board, contrary to its unpublished practice, failed to send registrant a student deferment form upon receipt of notice that the registrant was enrolled in school. When registrant was prosecuted for failure to submit to military induction, the Ninth Circuit rejected his defense that the local board failed to comply with its unpublished practice of sending the deferment form.

These cases are alarming. An agency should not be permitted to depart from regulations or policies without articulating its reasons for doing so. If it is not required to do this,

there can be no assurance that its departure is not capricious or based on an inadequate or discriminatory ground, or, if the departure does have a rational basis, that persons similarly situated will be able to obtain similar treatment. The agency can articulate the basis for its departure in two ways.

The agency can formally change the rule to provide for different treatment under specific circumstances. Alternatively, the agency can simply explain what the circumstances are which led it to make the exception.

In general, any requirement to publish and disseminate agency rules and opinions will make courts more inclined to hold agencies to those rules and prior policy decisions. As in the past, an agency might still apply an informal rule or policy rather than a written rule to avoid detection of departure. But with better information on past agency practices, and with easier access to rules, the litigants would be in a better position to point out agency departures to the court.

61. For the applicable statute see I.R.C. § 7122.
62. Violations by Agencies, supra note 57, at 636.
63. 427 F.2d 947 (9th Cir.), cert. denied, 400 U.S. 945 (1970).
64. Violations by Agencies, supra note 57, at 642-43.
It is “open to a court in such situations, or in situations in which the agency applies no general practice at all, to invalidate agency actions taken in the absence of suitable standards, principles, and rules, and thus to force agencies to confine their discretion.”

Two recent cases suggest that courts may be more concerned with consistency when substantive issues are involved. In *Atchinson, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, the Supreme Court remanded an Interstate Commerce Commission order for further proceedings because the ICC had not stated any reasons for departing from its rule developed in prior cases. The ICC had approved, after hearings, the railroads’ imposition of separate charges for in-transit grain inspection, a service previously included in the standard rates. The Court found that the ICC had not justified departure from its longstanding “rule” that such separate charges are unlawful unless the railroads can satisfy their burden of proving that such an additional charge is justified in light of the total costs charged, and the cost of the individual service viewed separately.

In *Berwyn Savings and Loan Association v. Illinois Savings and Loan Board*, the Illinois Appellate Court took a much tougher stance against agency departure from its rules than the federal court experience. In *Berwyn Savings*, the rules of the Illinois Savings and Loan Board provided in article X, section 2(b):

An application for approval of the maintenance of a facility shall be filed with the Commissioner *simultaneous* with the filing of:

\[ (2) \] the application for approval by the Commissioner of a by-

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67. *Id.* at 807-08:

An agency may articulate the basis of its order by reference to other decisions. . . . For adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. . . . They generally provide a guide to action that the agency may be expected to take in future cases. . . .

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency’s duty to explain its departure from prior norms. . . . Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.

law amendment providing for a change in the location of an association's business office

Co-defendant Clyde was granted authority to change its location in 1970. Eighteen months later, Clyde filed an application to maintain a facility at its prior location. This application was approved with the requisite findings by the commissioner. However, the application for this facility had not been filed simultaneously with the prior application to change locations. Plaintiffs successfully challenged this departure from the rules of the Illinois Savings and Loan Board. The appellate court voided the commissioner's approval of the second application: "'Having once established rules and regulations pursuant to statutory authority, an administrative agency is bound by those rules and regulations and may not violate them.' Here, the action of the Commissioner and Board clearly violated the Commissioner's rules. . ." Hence, if an attorney can locate the rules of an Illinois administrative agency, he can generally hold that agency to a strict application of the established standards.

**The Illinois Administrative Procedure Act: The Mechanics of a Hearing**

**Rules of Evidence**

Section 12 of the Illinois APA applies the Illinois common law rules of evidence to administrative hearings. However, the APA also

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69. RULES OF THE ILLINOIS SAVINGS AND LOAN BOARD, art. X, § 2(b).
70. 29 Ill. App. 3d at 970, 331 N.E.2d at 258.
71. § 12. In contested cases:

(a). Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

The rules of evidence and privilege as applied in civil cases in the Circuit Courts of this State shall be followed. However, evidence not admissible under such rules of evidence may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced, any part of the evidence may be received in written form.

(b). Subject to the evidentiary requirements of subsection (a) of this Section, a party may conduct cross-examination required for a full and fair disclosure of the facts.

(c). Notice may be taken of matters of which the Circuit Courts of this State may take judicial notice. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence.

ILL. REV. STAT. ch. 127, § 1012 (1975).
provides that evidence not admissible in the civil courts may be admitted "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." At present, practice varies from agency to agency on this question. Rule 320(c) of the Illinois Pollution Control Board provides that if the disputed evidence is arguably admissible under substantive law, it should be admitted. Most hearing officers will admit into evidence any and all disputed evidence. It behooves the practitioner to take advantage of this generous liberality at the agency level. There is still, of course, no substitute for preparation of an administrative case based on the Illinois rules of evidence.

**Discovery in the Administrative Context**

The Illinois APA has no provision for administrative discovery. At the federal level, parties in an administrative hearing are not entitled to pre-trial discovery as a matter of constitutional right. Several scholarly articles have advocated broad provisions for discovery in the agency context. But in Illinois the practitioner must search for the rules of the particular agency. For example, rule 313 of the Illinois Pollution Control Board permits full party discovery. In these contexts the agencies usually adopt the Illinois Supreme Court discovery rules in some form. On the other hand, rule 2-118(6) of the Secretary of State hedges on administrative discovery. It is

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72. APA § 12(a), ILL. REV. STAT. ch. 127, § 1012(a) (1975).
73. PCB Rule 320(c), supra note 35. See also note 32 supra.
75. Berger, Discovery in Administrative Proceedings: Why Agencies Should Catch up with the Courts, 46 A.B.A.J. 74 (1960); see Kaufman, Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques against Delay?—A Judge's View, 12 AD. L. BULL. 103 (1959-60). For an excellent study of administrative discovery in the labor context, see Note, Backdooring the NLRB: Use and Abuse of the Amended FOIA for Administrative Discovery, 8 Loy. Cu. L.J. 145 (1976) [hereinafter cited as NLRB Discovery]. See also NLRB v. Safeway Steel Scaffolds Co. of Georgia, 383 F.2d 273 (5th Cir.), cert. denied, 390 U.S. 955 (1968); NLRB v. Coca-Cola Bottling Co., 403 F.2d 994 (5th Cir. 1969).
76. PCB Rule 313, supra note 35.
77. RULES AND REGULATIONS OF THE SECRETARY OF STATE § 2-118(6)(d),(e),(h) (1975) provide:

§ 6 Evidentiary Rules to be Followed in Hearing.

(d) Upon timely request made, a party shall furnish to other parties a list of the names and addresses of prospective witnesses, or furnish written answers to a written demand for a bill of particulars.

(e) Any party or his representative shall have the right, upon timely motion, to inspect any relevant documents in the possession of or under the control of any other party and to interview parties or persons having knowledge of relevant facts. Interview of persons and inspection of documents shall be at times and places reasonable for the person and for the custodian of the documents.
likely that contested questions of local administrative law discovery will go unresolved for years to come since the appellate courts rarely treat these discovery issues. In this light, the practitioner appearing before an Illinois administrative agency should make every effort to seek the widest possible latitude for discovery in his or her case.

The Function of Review Boards in Illinois

In Illinois the hearing officers generally do not make or recommend final administrative decisions. This is the function of the administrative review board. Section 13 of the Illinois APA requires these boards to submit drafts of their proposed decisions to the parties for their comments. This bifurcation of the administrative process by the introduction of review boards is becoming more common and is supported by sound policy reasons, including the need for delegation of authority to review boards by agency heads or by small boards or commissions faced with the need to supervise an overwhelming caseload. Illinois is in accord with this development. Some have questioned this splitting of functions; review boards do create a number of problems, including those associated with all intra-agency decision-making. One of the most prevalent problems is that of ex parte communication.

(h) A party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request or for the admission of genuineness of any relevant documents described in the request. Copies of the documents shall be served with the request unless copies have already been furnished.

Compare id. § 7-101(3)(j); see id. § 2-118. See also Benton, Administrative Subpoena Enforcement, 41 Texas L. Rev. 874 (1963).

78. Section 13 of the Illinois APA provides:

§ 13. 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. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the persons who conducted the hearing or one who has read the record.


81. Miller, supra note 21, at 1137-41.

82. See, e.g., Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954); note 65 supra. See also Illinois APA § 15, ILL. REV. STAT. ch. 127, § 1015 (1975):

§ 15. Except in the disposition of matters which they are authorized by law to
The author’s experience sitting on an Illinois review board leads to a few observations. First, attorneys for aggrieved parties should make certain that their evidence gets into the record at the first opportunity. Unless the statute provides for de novo review, or the agency liberally permits rehearings, cases can be easily lost on this account. Of course, it is critical to know what facts are relevant under the applicable law. Second, arguments based on secondary factual inferences (deductive inferences) must be set forth clearly in the record. Review boards are free to draw their own secondary inferences. Third, all legal arguments must be made at the hearing level. While it is often assumed that legal arguments can first be raised on judicial review, this is not necessarily true. These admonitions with respect to making a complete record early in the hearings naturally lead to the next section, the scope of agency review.

The Scope of Judicial Review of Administrative Action in Illinois

In Kerr v. Police Board of Chicago, the Illinois Supreme Court recently rejected the suggestion that it adopt the “substantial evidence” test for court review of administrative agency determinations in place of the “manifest weight of the evidence” test used in Illinois. The supreme court upheld the reversal of a police board dismissal of an officer, after an administrative hearing, on the ground that the police board findings were against the “manifest weight of the evidence.” The supreme court’s opinion is not clear as to how far a reviewing court can go in rejecting the credibility of a witness’ testimony which was believed, in whole or in part, by the

See generally Auerbach, Scope of Authority of Federal Administrative Agencies to Delegate Decision Making to Hearing Examiners, 48 Minn. L. Rev. 823 (1964).

See NLRB v. Universal Camera Corp., 340 U.S. 474, on remand, 190 F.2d 429 (2d Cir. 1951), which generally controls in this area.

See text accompanying notes 87-106 infra.


89. 59 Ill. 2d at 142, 319 N.E.2d at 479.
 agency board. One can argue that since the circuit court in *Kerr* exercised just such a rejection, a reviewing court in Illinois will have substantial leeway in substituting its judgment for that of the adjudicatory board.

However, the *Kerr* opinion lacks a careful analysis of the scope of review. Must a court limit its review (1) to independently reassessing testimony that is inherently improbable, or (2) must the court independently draw its own secondary inferences, or (3) may the reviewing court freely substitute its own judgment on credibility questions, including deciding which of two conflicting stories are true? The supreme court simply notes that the testimony of various witnesses was in conflict, and that the testimony of one witness named Konrad, upon whom the board relied, was also disbelieved in part by the board itself, and was contradicted by a number of other disinterested witnesses. Therefore, the board's opinion was against the "manifest weight of the evidence." Generally, then, the Illinois courts have more freedom in reviewing administrative decisions than their federal counterparts.

Three recent police board dismissal cases further illuminate the problem of scope of review. In *Crowell v. Police Board of Chicago,* the Police Board of Chicago dismissed Crowell after a hearing. Crowell was accused of mistreating and accepting a bribe from an arrestee, and for obstructing the investigation by suborning perjury. Crowell denied the allegations at the hearing, but the police board dismissed him. The board particularly disbelieved his explanations of a note, written in his own hand, stating that Crowell was not the arresting officer. Although the court stated that the evidence against Crowell seemed convincing, it rested its upholding of the dismissal on the following grounds: (1) "The existence of conflicting testimony is not a sufficient basis to reverse an administrative decision as it is the province of the agency to resolve any conflict presented by the evidence and to determine the credibility of the witnesses. . . . The factual finding of the Board was not against the manifest weight of the evidence," and (2) by statute, a police officer can be removed only for "cause." The board found "cause" to exist, and the court did not disagree. Determining whether "cause" exists is really a mixed question, a matter of drawing a legal conclu-

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90. *Id.* at 145-46, 319 N.E.2d at 481; see *id.* at 142-43, 319 N.E.2d at 479-80.
93. *Id.* at 555, 336 N.E.2d at 576.
sion from a set of facts. This is the type of question appellate courts frequently feel competent to decide for themselves, but the court in this case concluded: “a police board has considerable latitude in determining what constitutes cause for removal. . . . A Board’s decision as to the existence of cause will not be reversed as long as its finding is related to the requirements of the service and not so trivial as to be unreasonable.”

In Caliendo v. Goodrich, Caliendo, while off-duty, got into an altercation in Florida, and was acquitted of criminal charges in a Florida court. The police board case against him was a weak one, his testimony in his own defense being the only substantial testimony before the board. His conduct, while questionable, did not appear unacceptable. The appellate court reversed the lower court and held the dismissal improper because “cause” did not exist. Citing Crowell, the court held “while the findings of an administrative agency on questions of fact are prima facie true and correct . . ., this is not so as to its findings of cause. A board’s finding that there is sufficient cause for discharge is subject to judicial review.”

The court concluded that the record of the hearing did not disclose evidentiary support for the agency’s finding.

In Petraitis v. Board of Fire & Police Commissioners, the patrolman was accused of sleeping on duty and arranging for the procurement of an illegal drug. Testimony at the hearing was in sharp conflict. The police board dismissed the patrolman. The circuit court reversed; the appellate then reversed the circuit court, reinstating the board’s dismissal. The appellate court thought that the board, as the trier of fact, had the duty and right to determine the credibility of the witnesses before it. Once it accepted the factual charges against Petraitis, the appellate court believed these acts clearly constituted “cause” for discharge under the statute.

These cases indicate that although the appellate courts may be somewhat unwilling to inject themselves into factual or credibility controversies despite Kerr, those courts may feel less restrained in offering their own opinion as to how mixed questions should be answered—for example, the question of “cause.”

One of the problems with a standard like “cause” in a statute is,
of course, that it really provides no standard at all. An argument can be made in virtually every case that the standard has not been met; thus, ultimately a court will have to exercise some judgment or discretion to decide each particular case. The problem of standards was addressed recently by the Illinois Supreme Court. Section 33(c) of the Illinois Environmental Protection Act established four factors which the Pollution Control Board “shall take into consideration” in making its orders and determinations with respect to the “unreasonableness” of an alleged air-pollution interference with the enjoyment of life or property. In Incinerator, Inc. v. Pollution Control Board, the supreme court held that while the Pollution Control Board had not been as specific as it might have been in making written findings as to each of the section 33(c) criteria, there was substantial compliance with the law; “and in view of all the evidence and the fact that the Board appears to have properly determined the issue of reasonableness in light of the Section 33(c) factors,” a remand was not necessary. The board was upheld, but the court stated: “We would expect that decisions of the Board rendered after the date of this opinion will be more specific in this regard.”

The board’s comprehensiveness saved them in this case. The court’s insistence on (1) adequate explanations of the application of standards to a particular case, and (2) more detailed standards in the statutes, provide an interesting contrast to the police board cases.

Another recent decision serves as a reminder that an agency’s legal interpretation of its own rules, explained or not, is not necessarily binding on the courts. In Heifner v. Board of Education, the tenured teacher’s written contract, which incorporated by reference board of education rules, contained a provision that the contract could be terminated whenever the teacher failed to carry out board rules; however, the board’s “professional growth rule” provided only that a teacher’s salary could be frozen for failure to comply with the rule. Heifner had failed to secure a master’s degree within the allotted time, a violation of paragraph 1 of the professional growth rule. The board argued that paragraph 5 (the salary freeze provision) only applied to later paragraphs, and not to paragraph 1. The court rejected this interpretation of the rule, substituting its own view (essentially construing the rule against the party that drafted it),

100. ILL. REV. STAT. ch. 111 ½, § 1033 (1975).
102. Id. at 299, 319 N.E.2d at 798.
103. Id. See also Baker v. Illinois Pollution Control Board, 32 Ill. App. 3d 690, 336 N.E.2d 325 (1975).
104. 32 Ill. App. 3d 83, 335 N.E.2d 600 (1975).

Finally, in Illinois Coal Operators Association v. Pollution Control Board,\footnote{59 Ill. 2d 305, 319 N.E.2d 782 (1974).} the Illinois Supreme Court recently restated the standards for evaluating the validity of an agency passed rule. Under challenge was rule 102 of the Pollution Control Board's rules and regulations—the noise pollution rule.\footnote{PCB Rule 102, supra note 35.} The court rejected the challenge to the rule stating:

Administrative action taken under statutory authority will not be set aside unless it has been clearly arbitrary, unreasonable or capricious. . . . The Board adopted its regulations only after their having been proposed by the qualified group which composed the Task Force on Noise and its consultants and only after 16 public hearings had been held by the Board extending for a period of almost a year. We cannot say that the rules which resulted from this study are clearly arbitrary, unreasonable or capricious.\footnote{59 Ill. 2d at 310, 319 N.E.2d at 785.}

**THE EFFECT OF TIME DEADLINES IN THE ILLINOIS ADMINISTRATIVE PROCESS**

As with the practice of law before courts, the attorney is faced with numerous time deadlines that must be met in the administrative field. This is true whether he represents a private party, or the agency itself. In addition to those deadlines established in the Illinois Administrative Review Act (ARA),\footnote{IL. REV. STAT. ch. 110, §§ 264-79 (1975).} the attorney must be concerned about deadlines set up by the rules of an individual agency. As pointed out before, these are not always easy to ascertain. In fact, it is sometimes a difficult question to determine whether the ARA applies at all to an agency decision. In some cases this determination may be crucial to deciding, for example, whether a party must exhaust his administrative remedies.\footnote{See text accompanying notes 124-31 infra.}

The courts tend to be draconian in this area—a missed deadline, no matter how innocently missed, often has fatal consequences. In a recent case, Consolidated Packaging Corp. v. Illinois Fair Employment Practices Commission,\footnote{31 Ill. App. 3d 863, 335 N.E.2d 131 (1975).} the plaintiff's complaint for administrative review (which had to be filed within thirty-five days of service of the decision on the affected party)\footnote{ARA § 4, IL. REV. STAT. ch. 110, § 267 (1975):} was submitted to a
deputy court clerk on the last day of filing. The clerk said it could not be accepted because all the other clerks had left early. The court dismissed the complaint suggesting that the party could have taken the complaint to the clerks' supervisor to be time-stamped, but failed to do so.

Pre-Hearing and Rehearing Deadlines

Upon becoming an aggrieved party because of agency action or inaction, the party may have only a limited time to request a hearing or other agency review. Under the Illinois ARA, a complaint for administrative review must be filed within thirty-five days of the service of the agency decision on the affected party.113 Parties tempted to first seek a rehearing before the agency must be careful. If an agency rule or a statute authorizes rehearings, the party must apply for a rehearing, and be denied relief by the agency, before he can appeal to the courts under the ARA.114 He must be careful to apply for a rehearing within the time allotted by the agency rule or statute; the party then has thirty-five days from denial of relief to

§ 4. Every action to review a final administrative decision shall be commenced by the filing of a 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. The method of service of the decision shall be as provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served either when personally delivered or when deposited in the United States mail, in a sealed envelope or package, with postage prepaid, addressed to the party affected thereby at his last known residence or place of business.

The form of the summons and the issuance of alias and pluries writs shall be according to rules of the Supreme Court.

See id. § 2, ILL. REV. STAT. ch. 110, § 265 (1975):

§ 2. This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.

Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter.

113. See id.
114. See id. See also RULES AND REGULATIONS OF THE SECRETARY OF STATE § 2-118(10) (1975).
If there is no provision in an agency rule or statute for a rehearing, a request for reconsideration, followed by a thirty-five day wait will be fatal to an appeal. The courts have said that agencies have no inherent powers to reconsider cases, absent rule or statutory authority. In Oliver v. Civil Service Commission of Chicago,\textsuperscript{115} the plaintiff petitioned the commission to "correct its order," and delayed his appeal to the court beyond thirty-five days; it proved fatal.\textsuperscript{116} When in doubt, the safest course of action is both to appeal immediately to the courts and to petition the agency for a rehearing.

\textit{Continuances}

Agencies have been known to be caught by deadlines too. In Szkirpan v. Board of Education,\textsuperscript{117} the board was bound by statute to render a decision within eighty days of service of the hearing notice, excluding delays resulting from continuances requested by the teacher.\textsuperscript{118} In this case, the board, in attempting to reach a settlement with the teacher, exceeded the statutory time limits; therefore, its dismissal order was reversed by the court.\textsuperscript{119} Hence, it is apparent that attorneys for either party must be aware of these statutes.

\textit{Remands}

While not specifically a matter involving time deadlines, this is a convenient place to treat remands. When a case is remanded to an administrative agency, it has been held that the remanding order is interlocutory; that is, not immediately appealable.\textsuperscript{120} In Clark v. State Department of Labor,\textsuperscript{121} the court pointed out that the trial court could remand for the purpose of having additional evidence taken by the agency, but that the trial court itself could not hear the additional evidence.\textsuperscript{122} The Clark case is also noteworthy be-
cause the court held that a statute allowing only nine days to appeal a decision by a deputy of the Department of Labor denying unemployment compensation was mandatory and could not excuse the plaintiff's failure to timely appeal due to extraordinary circumstances. This case can be usefully compared with the exhaustion cases, where the Illinois Supreme Court chose to be innovative.

**RECENT ILLINOIS DEVELOPMENTS IN EXHAUSTION, MANDAMUS, AND ADMINISTRATIVE SANCTIONS**

One of the most talked-about cases in Illinois administrative law in recent years is *Illinois Bell Telephone Co. v. Allphin.* Shortly after the Department of Revenue issued a notice of tax liability in 1973, Illinois Bell filed a complaint in Circuit Court of Cook County seeking both a declaratory judgment that certain of its revenues were exempt from the Messages Tax Act, and an injunction. The complaint was later amended to bring the total tax liability in question to over $100 million. The complaint was filed, and a temporary injunction issued within the twenty day period provided by stat-

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123. The appellate court explained:

In the instant case, an agent of the post office officially notified the Department of Labor that the reason for plaintiff's separation from work was "conduct unbecoming a postal employee tending to bring the Postal Service into disrepute." This finding of cause was binding on the Department under the federal statute. 42 U.S.C. § 1367(a)(4). Without a hearing a deputy of the Division of Unemployment Compensation found that plaintiff was ineligible for benefits, and a notice of the finding dated February 1, 1963, was mailed to him. Prominent on the face of the notice was the admonition: "APPEAL RIGHTS: IF YOU DISAGREE WITH THIS DETERMINATION, you may file an appeal, in person or by mail. Your request must be RECEIVED in this office . . . within nine (9) days from the date of this notice. DO NOT WAIT FOR YOUR REGULAR REPORT DAY."

Plaintiff received the notice within three days and sent it to the probation officer who had been assigned to him following his sentence for violation of the narcotics law. The probation officer did not personally receive it until February 14th, because of his absence from the city and hospitalization due to illness. On February 20, 1963, nineteen days after the date of the notice, plaintiff, accompanied by his probation officer, filed an appeal in person. . . .

The referee found that the record dates were not in error and that therefore he was without jurisdiction to hear the appeal on its merits, as the deputy's determination had become final. Plaintiff appealed to the Board of Review and submitted a written memorandum. The Board affirmed the referee's decision and plaintiff then filed this suit for administrative review.

71 Ill. App. 3d at 369-70, 219 N.E.2d at 145-46.

124. 60 Ill. 2d 350, 326 N.E.2d 737 (1975).

125. ILL. REV. STAT. ch. 120, § 467.1-.15 (1975).
during which Illinois Bell could have filed a protest and requested a hearing before the Department of Revenue. Illinois Bell had clearly failed to exhaust its administrative remedies, but claimed that it had brought a suit in equity to enjoin the imposition of an illegal, unauthorized, and invalid tax. In this case, argued the plaintiff, it did not have to exhaust its administrative remedies under the doctrine of Owens-Illinois Glass Co. v. McKibbin, a case decided prior to the passage of the ARA.

In 1974, however, the Illinois Supreme Court decided Calderwood Corp. v. Mahin. In Calderwood, the taxpayer received a notice of tax liability from the department under the Retailers' Occupation Tax Act. Without filing a notice of protest with the department, but within the twenty day period, Calderwood instituted suit in circuit court seeking to overturn a tax assessment of approximately $1,400. The supreme court decided that Calderwood had not exhausted his administrative remedies and that relief was not barred because the twenty day period to protest the department assessment had long passed. The supreme court held that Owens did not apply because it was not a case involving a decision of the Department of Revenue, the judicial review of which was governed by the ARA.

The supreme court in Illinois Bell distinguished Calderwood on the ground that in Illinois Bell, the company had relied on the temporary injunction, which had in effect tolled the running of the twenty day period to protest to the Department of Revenue, and the department knew of Illinois Bell's reliance. The supreme court conceded that there was no authority that the injunction tolled the twenty day period, but rested its decision on Illinois Bell's reliance on the injunction.

Although the department's assessment in Illinois Bell was not a final administrative decision, the case was not remanded for further administrative procedures (or dismissed to permit Illinois Bell to file a protest with the department). Illinois Bell, said the court, had relied on the Owens doctrine. While the supreme court then proceeded to overrule Owens, it did so prospectively, permitting Illinois Bell to continue its suit at the circuit court level under the Owens theory.

Reliance on an erroneous court order has not always been looked
on with such magnanimity. In any event, the exhaustion doctrine has been circumscribed significantly in Illinois. To avoid exhaustion difficulties, Illinois Bell should have filed its protest with the department immediately, and if it felt a court suit was necessary, it could have filed it simultaneously. It seems unlikely that the cost in terms of time or money to exhaust the department procedures justified the risk taken.

In keeping with the strict application of the exhaustion doctrine under the Illinois ARA, the courts have severely limited the use of mandamus. In Varnes v. Lentz, a judge, in a dispute with the State Employees' Retirement Board, was denied a pension while sitting on the bench. More than thirty-five days after the board's final determination, the judge filed a suit for mandamus. The board rules made no provisions for rehearings; the court held that the only proper way to review the board's decision was a suit for administrative review under the ARA. Unfortunately, the thirty-five day period for filing suit under the Act had passed. The appellate court found this to be an insuperable jurisdictional bar to maintaining a suit. In People ex rel. Boddington v. Robinson, the appellate court explained that mandamus would issue to compel a department to render a decision, but that once a decision is rendered, the aggrieved party may only proceed under the ARA.

However, in Chicago v. Illinois Fair Employment Practices Commission, the appellate court held that section 267 of the ARA was inapplicable where an agency order was void (here, an order awarding attorney's fees); it could be attacked at any time, directly or collaterally. And in People ex rel. Kreda v. Fitzgerald, the appellate court reaffirmed the position that where a statute or ordinance was being attacked as invalid on its face, a suit for mandamus was proper. Prior resort to the provisions of the ARA was unnecessary.

There are several recent Illinois decisions upholding the constitutionality and propriety of administrative fines. In City of Waukegan v. Pollution Control Board, the Illinois Supreme Court held that

133. 34 Ill. App. 3d 913, 341 N.E.2d 1 (1976).
136. 57 Ill. 2d 170, 311 N.E.2d 146 (1974).
the Pollution Control Board may constitutionally impose monetary civil penalties. In People v. Richman, the appellate court upheld the Department of Revenue's authority to assess a penalty recoverable in a civil suit. Bresler Ice Cream Co. v. Illinois Pollution Control Board found a $1,500 fine "unreasonable" for a minor violation of the Environmental Protection Act even though Bresler had stipulated to the violation. Further, the supreme court decided in Metropolitan Sanitary District v. Pollution Control Board that a monetary penalty imposed by the Board on another governmental agency was totally unwarranted. These cases may indicate a willingness on the part of the courts to freely substitute their judgment for that of an agency permitted to impose fines. But in Bulk Terminals Co. v. Environmental Protection Agency, the appellate court held a fine imposed by the City of Chicago precluded a second fine by the Pollution Control Board for the same conduct.

CONCLUSION

Both significant developments in administrative law theory and the passage of the Illinois Administrative Procedure Act have had a profound and immediate impact on Illinois administrative practice. By alerting the reader to these recent developments in doctrinal scholarship, and by scanning some of the critical and troublesome areas peculiar to Illinois law, the author hopes that both student and practitioner have been aided. The effect of recent developments in federal administrative law on Illinois practice must be recognized. When facing an administrative law question at the local level, experience has demonstrated that the analogous federal model often proves determinative. Of course, this rule is not without exceptions. But with over 150 administrative agencies now func-


140. 62 Ill. 2d 38, 338 N.E.2d 392 (1975).
141. 29 Ill. App. 3d 978, 331 N.E.2d 260 (1975); see note 137 supra.
143. See, e.g., text accompanying notes 87-108 supra.
tioning in Illinois, courts, practitioners, and academicians are turning to the federal system for a role model." It is in this light that the author has attempted to present the recent trends and developments in Illinois administrative law.

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