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Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment

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POWERS OF ADMINISTRATIVE LAW JUDGES, AGENCIES, AND COURTS: AN ANALYTICAL AND EMPIRICAL ASSESSMENT

CHARLES E. DAYE*

In this Article, Professor Daye explores the continued evolution of the relationships among administrative law judges, administrative agencies, and courts in North Carolina. First, the Article analyzes recent amendments to the North Carolina Administrative Procedure Act and to the organic legislation creating the Office of Administrative Hearings. The most recent legislation augments the institutional role of administrative law judges, alters the process of agency decision-making, and, in novel provisions, ties the scope and standard of judicial review to the disposition the agency makes of the administrative law judge's decision. This Article assesses the purpose and prospect of these legislative efforts to achieve a satisfactory balance between the powers of agencies and the rights of affected citizens.

Second, the Article reports the results of an empirical study of administrative law cases. This study attempts to examine systematically how agencies disposed of the decisional recommendations made by administrative law judges. Additionally, the study analyzes how the courts have been resolving administrative agency decisions on judicial review. It finds that patterns of court disposition did not appear to be dependent on selected variables in the decision-making process (such as whether the agency accepted or rejected the administrative law judge's recommended decision, or whether the issues presented were ones of fact or law).

The empirical study tends to explain how citizens could have become substantially dissatisfied with the overall outcomes of their disputes with agencies. It documents that citizens challenging agency decisions in contested cases lost the vast of majority of the time they pursued cases through the system of administrative adjudication and into the courts. The study, however, does not support several hypotheses that

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might have been suggested based on intuition about the process or outcome of administrative decision-making, but provides, at best, only a weak prediction, if any, of the likely effects the recent changes in administrative procedure will have on agency decisions or judicial review for citizens who challenge agency decisions.

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I. OVERVIEW: FAIR ADMINISTRATIVE DECISION-MAKING AND ADEQUATE JUDICIAL OVERSIGHT

In today's world, administrative agencies are ubiquitous as the primary means for carrying on the business of government.¹ For nearly a half-century, since the enactment of the original judicial

1. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581-84 (1984) (analyzing the role of the contemporary federal government and pointing out the large extent to which agencies wield regulatory and adjudicatory power in executing governmental authority). The states have witnessed a similar growth of administrative agencies and their exercise of governmental regulatory and adjudicatory authority. See Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 101 (1982). Professor Bonfield notes the following:

[T]he regulatory and benefactor functions actually exercised by the states have become as pervasive as those of the federal government. The former are at least as likely to affect people in their daily lives as the latter. Most occupational licensing and public health, safety, and welfare regulation, for example, occur at the state level. Grant or benefit programs, such as unemployment insurance or welfare, are also administered primarily through state administrative processes. In addition, state agencies are primarily responsible for the administration of education, land use, and highway regulation.

Id.

review statute in 1953,² the North Carolina General Assembly has been revisiting the means by which administrative agencies operate. I previously examined the broad range of issues involved in enacting and interpreting the original Administrative Procedure Act (“APA”), and discussed extensively the fundamental objectives that legislation was attempting to achieve.³ Yet, even after the enactment of the original APA over a quarter-century ago,⁴ problems involving the relations between citizens and agencies, perhaps never easy to resolve, have continued to come to the attention of legislators with sufficient frequency and credibility to induce several additional legislative efforts. The General Assembly has continually tried to create a system that finds both a satisfactory and reasonable balance between the power of governmental agencies to act and the rights of citizens who are affected by the actions of those agencies.

This Article has two basic purposes: first, it examines legislative efforts that address the relations between citizens and agencies, and second, it reports the results of an empirical analysis of cases involving those relationships. The first part of the Article analyzes the ways in which the General Assembly has modified the evolving relationships among agencies, administrative law judges (“ALJs”), and courts by creating, in 1985 and modifying several times thereafter, a process that involves ALJs as part of the administrative decision-making system.⁵ It explores continuing problems concerning the relationships between agencies and ALJs on the one hand, and between agencies and courts on the other. These concerns led the General Assembly, between 1985 and 2000, to make several modifications to the statutes governing these relationships. The measures proved insufficient to allay continuing concerns and prompted the General Assembly to enact additional measures that became effective January 1, 2001. These new measures strengthen

2. The original judicial review statute was repealed by the original Administrative Procedure Act. Act of April 28, 1953, ch. 1094, 1953 N.C. Sess. Laws 1005, 1005-07, *repealed by* Act of Apr. 12, 1974, ch. 1331, § 2, 1973 N.C. Sess. Laws 691, 703. For further legislative history concerning the Administrative Procedure Act, see *infra* note 4.

3. Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833, 896-922 (1975). Although the discussion in the present Article is limited to judicial review, this Article updates the analysis of judicial review contained in the earlier article. See *generally id.* (discussing judicial review under the original Administrative Procedure Act).

4. Act of Apr. 12, 1974, ch. 1331, 1973 N.C. Sess. Laws 691 (codified at N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974)), *replaced by* Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 987, 987-1011 (codified as amended at N.C. GEN. STAT. §§ 150B-1 to -52 (1999 & Supp. 2000)) [hereinafter “the original APA”].

5. See *infra* Parts II-IV.

the roles of ALJs and provide for more vigorous judicial oversight. This Article analyzes the new amendments in order to assess their likely import.

The second part of this Article reports on results observed in an empirical study of administrative agency decisions that involved ALJs as part of the decision-making process.⁶ The empirical study assesses the dynamics of administrative adjudication including the behavior of ALJs, agencies, and courts when one specifies and controls for selected variables within the process. These observations serve to highlight some of the factors that fueled continued legislative attention. The empirical study also provides some insight into the possible effects the new amendments may have on the new relationships the General Assembly has mandated.

The relationship between citizens and the administrative process has been a principal legislative concern. When agency decisions affect particular identified citizens,⁷ the General Assembly has focused on two related problems—agency decision-making in contested cases and judicial review of agency decisions in those cases. In the agency decision-making area, the essential problems are determining the procedures and mechanisms agencies shall use to make decisions, establishing the substantive and procedural constraints that will govern agency decision-making, and allocating decision-making roles between agencies and ALJs.

Agencies, of course, are interested in carrying out the charges the legislature has laid before them without too much interference and certainly without the loss of their essential decision-making authority. Subject to judicial review, an agency's desired decision-making authority surely must be deemed to include controlling the decisions about the issues that arise as the agency carries out its duties, or at the very least, having a major and perhaps decisive role in making these decisions. This desire is present even when the agency's actions affect specific citizens.

But countervailing considerations are present. One prime function of administrative procedure is to assure fair decisions when particularly affected citizens have a dispute with an agency. In particular, the General Assembly has expressly attempted to assure

6. See *infra* Part V.

7. Generally, agency decision-making that affects citizens is broadly referred to as an "adjudicatory function." State administrative proceedings, however, affecting particular, identified citizens are called "contested cases." Two other major areas of concern include the rule-making function and the publication of new rules and decisions. This Article focuses its analysis solely on the agencies' adjudicatory function.

that the same person within the agency does not turn out to be investigator, prosecutor, and judge—all in the same case. The original APA that became effective in 1975 implicitly manifested this concern.⁸ The General Assembly explicitly stated this concern when it replaced the original APA with the revised APA.⁹ The revised APA provides that procedures set forth in the APA “ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.”¹⁰

In 1985, the same year it enacted the revised APA, continued concern about the possible commingling of decision-making functions within agencies led the General Assembly to establish the Office of Administrative Hearings (“OAH”).¹¹ The legislation constituted the OAH to serve as the State’s central panel of administrative law judges. As an independent, quasi-judicial agency,¹² the OAH “provide[s] a source of independent hearing officers” to conduct administrative hearings and “thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.”¹³

8. See N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974), replaced by Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 987, 987–1011 (codified as amended at N.C. GEN. STAT. §§ 150B-1 to -52 (1999 & Supp. 2000)). The concern over the concentration of power in a single entity is reflected in several APA provisions. N.C. GEN. STAT. § 150A-23(e) (1999) (stating that hearings must be conducted in an impartial manner); *id.* § 150A-32 (disqualifying the hearing officer for bias upon a proper motion); *id.* § 150A-35 (prohibiting the hearing officer and agency staff from communicating with any party about a question of law or an issue of fact). See generally Daye, *supra* note 3, at 885–91 (discussing the power of the hearing officer as well as the ban on ex parte communications).

9. Act of July 12, 1985, ch. 746, sec. 1, § 150A-1, 1985 N.C. Sess. Laws 987, 987 (codified as amended at N.C. GEN. STAT. § 150B-1(a) (1999)) (effective Jan. 1, 1986) [hereinafter “the revised APA”].

10. N.C. GEN. STAT. § 150B-1(a) (1999).

11. Act of July 12, 1985, ch. 746, § 2, 1985 N.C. Sess. Laws 987, 1011–13 (codified as amended at N.C. GEN. STAT. §§ 7A-750 to -759 (1999 & Supp. 2000)). The OAH conducts all hearings under article 3 of the revised APA. N.C. Gen. Stat. §§ 150B-22 to -37 (1999 & Supp. 2000). However, other hearing officials conduct proceedings under article 3A and under statutes of agencies that are exempt from the APA. See *infra* note 36 and accompanying text.

12. The North Carolina Constitution permits quasi-judicial agencies in the executive branch. N.C. CONST. art. IV, § 3, provides:

Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

13. N.C. GEN. STAT. § 7A-750 (1999), amended by Act of July 12, 2000, ch. 190, § 2,

Respecting the matter of judicial review, the essential goal is to develop a workable and adequate system of external constraint on agency decisions through judicial oversight when citizens aggrieved by those decisions seek review. Legislative attention to judicial review in this state started at least as early as 1953 when the General Assembly enacted a judicial review statute.¹⁴ Subsequently, judicial review provisions were incorporated into the original APA.¹⁵ Determining the relationships that should exist between agencies and courts requires achieving a delicate balance between agency autonomy and judicial oversight. Because of its dual continuing concerns about fair agency decision-making and adequate judicial oversight, the General Assembly has made a substantial adjustment in judicial review that became effective on January 1, 2001.¹⁶ In a provision that appears to be novel in administrative law jurisprudence,¹⁷ the General Assembly directly linked the scope of judicial review of contested case decisions to the agency's final disposition of the ALJ's decision.¹⁸ As set forth below, the agency's final decision remains subject to the "traditional" scope of review if the agency adopts the ALJ's decision, but the decision will be subject to *de novo* review if the agency does not adopt the decision of the ALJ.¹⁹

Fundamentally, the new legislation that became effective January 1, 2001 changes three areas of administrative law. First, it augments the institutional position and "stature" of administrative law judges by constituting them as quasi-judicial officials in the executive branch. Second, it increases the effect of ALJs' decisions on agencies without giving ALJs so much power that they effectively oust agencies of their proper decisional role. Finally, the new legislation restructures judicial review by giving courts more extensive review when agencies reject ALJs' decisions, while stopping short of

2000 N.C. Adv. Legis. Serv. 546, 546-47.

14. See Act of Apr. 28, 1953, ch. 1094, 1953 N.C. Sess. Laws 1005 (codified at N.C. GEN. STAT. §§ 143-306 to -316 (1974)), replaced by Act of Apr. 12, 1974, ch. 1331, § 2, 1973 N.C. Sess. Laws 691, 703.

15. N.C. GEN. STAT. §§ 150A-43 to -52 (Supp. 1974) (current version at N.C. GEN. STAT. §§ 150B-43 to -52 (1999 & Supp. 2000)).

16. Act of July 12, 2000, ch. 190, 2000 N.C. Adv. Legis. Serv. 546 (codified in scattered sections of N.C. GEN. STAT. chs. 6, 7A and 150B). Applicable provisions will be cited in the subsequent discussion. See *infra* Part IV.

17. Our research could find no jurisdiction or instances in which the scope and standard of judicial review are determined by the agency's disposition of the ALJ's recommendation.

18. N.C. GEN. STAT. § 150B-51(c) (Supp. 2000).

19. See *infra* Part IV.B-C.

transforming courts into “super agencies” that usurp statutory powers of agencies. These changes are analyzed in the three sections that follow.

II. AUGMENTING THE AUTHORITY AND STATUS OF ADMINISTRATIVE LAW JUDGES

In addition to the specific provisions in the recent amendments that enhance the effect of the ALJ’s decision by directly limiting the power of the agency to reject it,²⁰ several other provisions in the recent amendments appear to have either the purpose or the indirect effect of giving added authority and stature to ALJs within the system of administrative adjudication. A proposal introduced in the House of Representatives of the General Assembly would have made the ALJ’s decision binding on the parties, including the agency involved.²¹ That proposal proved too controversial to be enacted. The Joint Legislative Administrative Oversight Committee’s Counsel concluded that, under existing precedent, the courts “could easily find that the [proposed bill] would be a permissible exercise of the General Assembly’s authority” under relevant provisions of the state constitution.²² But some opponents argued that binding decisions would “probably not survive” a constitutional challenge on separation of powers grounds and, in any event, would undermine valid gubernatorial executive prerogatives.²³ Accordingly, the provisions

20. See *infra* Part III.

21. See H.R. 968, v.2, sec. 3, 1999 Gen. Assem., Reg. Sess. (N.C. 1999), available at <http://www.ncga.state.nc.us/html1999/bills/AllVersions/House/h968v2.html> (on file with the North Carolina Law Review), reprinted in MARY SHUPING, N.C. GEN. ASSEM. RESEARCH DIV., CONTESTED CASES UNDER ARTICLE 3 OF THE APA: BACKGROUND INFORMATION & OPINIONS ON THE CONSTITUTIONALITY OF OAH FINAL DECISION-MAKING AUTHORITY, PRESENTED TO THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE at 5–10 (Feb. 17, 2000) (copy on file with the author) [hereinafter BACKGROUND INFORMATION & OPINIONS]. See generally Brad Miller, *What Were We Thinking: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. REV. 1657 (2001) (discussing the legislative history of the 2000 amendments).

22. Memorandum from Karen Cochrane Brown, Committee Counsel, to the Joint Legislative Administrative Procedure Oversight Committee, *The Constitutionality of House Bill 968* (Nov. 22, 1999), reprinted in BACKGROUND INFORMATION & OPINIONS, *supra* note 21, at 14–19.

23. Advisory Opinion: Separation of Powers; House Bill 968; State Personnel Act, from the N.C. Office of Att’y Gen. to Mr. Ronald G. Penny, State Personnel Director, Office of State Personnel (July 6, 1999) (signed by Ann Reed, Senior Deputy Attorney General; Lars Nance, Special Deputy Attorney General; and Thomas F. Moffitt, Special Deputy Attorney General), reprinted in BACKGROUND INFORMATION & OPINIONS, *supra* note 21, at 11–13. In addition, Mr. Moffitt and Mary Penny Thompson opined in an individual and unofficial article that granting ALJs authority to make final agency

adopted, which are discussed below, are the result of certain compromises that increased the status and authority of ALJs without making their decisions binding.

In the new amendments, the General Assembly determined that OAH personnel are “administrative law judges” who “conduct administrative hearings”²⁴ and are not mere “hearing officers” who “preside in administrative cases.”²⁵ The new legislation clarifies that the ALJ’s role is to “decide the case” based on the preponderance of the evidence.²⁶ It also addresses the issue of agency expertise. More specifically, the new legislation provides explicitly that, in determining the preponderance of the evidence, the ALJ shall give “due regard to the *demonstrated* knowledge and expertise of the agency with respect to the facts and inferences *within the specialized knowledge* of the agency.”²⁷ This provision addresses one of the major problems of administrative law: the role agency expertise ought to play in administrative decision-making. Over a half century ago, an analyst posited that agency expertise has been oversold.²⁸ Nevertheless, it cannot be denied that in many areas, especially those involving scientific, technical, or other skills or information, agencies do, and necessarily must, develop expertise. The question is what to make of such expertise and, in particular, how it ought to be employed in adjudication, if at all, especially with respect to adjudicatory facts.

The General Assembly crafted an approach that represents a middle ground. The ALJ is not to ignore agency knowledge and expertise. Rather, the ALJ must give “due regard” to the agency’s “knowledge and expertise” when making findings of fact and inferences when the facts and inferences fall “within the specialized

decisions was not “reasonably necessary” to carry out purposes of the OAH and could not be sustained under the constitutional provision authorizing the granting of quasi-judicial powers to agencies. Thomas F. Moffitt & Mary Penny Thompson, *Finality of ALJ Hearing Decisions*, reprinted in BACKGROUND INFORMATION & OPINIONS, *supra* note 21, at 20–31.

24. N.C. GEN. STAT. § 7A-750 (Supp. 2000). These are provisions in the organic legislation instituting the OAH.

25. N.C. GEN. STAT. § 7A-750 (1999), amended by Act of July 12, 2000, ch. 190, § 2, 2000 N.C. Adv. Legis. Serv. 546, 546–47.

26. N.C. GEN. STAT. § 150B-34(a) (Supp. 2000).

27. *Id.* (emphasis added).

28. Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471 (1954) (stating that the success of expertise in areas such as industry and the physical sciences has created the impression that specialization can also be helpful in politics, philosophy, and the social sciences).

knowledge of the agency.”²⁹ But it appears that such knowledge and expertise cannot be presumed. Instead, agency knowledge and expertise must be “demonstrated.”³⁰

Furthermore, the new legislation gives additional status to the ALJ’s decision-making process by permitting an award of attorney’s fees for the ALJ’s portion of the administrative proceeding. In cases in which attorney’s fees may otherwise be awarded,³¹ the new legislation provides that courts, in their discretion, may make an award for the “attorney’s fees applicable to *the administrative review portion* of the case.”³² This provision means that attorney’s fees incurred in the hearing before an administrative law judge may now be awarded when the criteria for granting any attorney’s fees, otherwise, are met.³³ As a result of this new legislation, ALJs faced with cases arising out of the State Personnel System are now

29. N.C. GEN. STAT. § 150B-34(a) (Supp. 2000).

30. *Id.* The provision does not say, in so many words, who shall make the demonstration, but the inference that the agency must make the demonstration seems to be the only reasonable one to make. Not only does the citizen not know what the agency’s knowledge or expertise is, even if the citizen did know, she has no interest in making such a demonstration. Similarly, the ALJ cannot be thought to have any such obligation because the ALJ is presiding over an adversarial proceeding. Moreover, the limitation to “demonstrated” knowledge and expertise at least suggests that the matter of agency expertise and knowledge is not subject to administrative or official notice.

The General Assembly knows how to make a provision for official notice when it desires to do so. *See, e.g.*, N.C. GEN. STAT. § 150B-30 (1999). Section 30 authorizes the ALJ to take official notice of facts of which judicial notice may be taken and of “*facts within the specialized knowledge of the agency*” under certain specified conditions and limitations. *Id.* (emphasis added). The provision does not speak to whether the agency has expertise or not, but rather to facts within the agency’s expertise.

The language of the new provision, which amends section 34(a) of the original APA, seems to mandate that the agency prove its knowledge and expertise in a particular case. *See* N.C. GEN. STAT. § 150B-34(a) (Supp. 2000). The recent amendments also might support a claim that the agency demonstrate its knowledge and expertise by a preponderance of the evidence. As noted, section 34(a) directs the ALJ to decide the case based on a preponderance of the evidence. *Id.*

31. These new provisions regarding attorney’s fees apply only to hearings conducted under article 3 of the APA and do not apply to “certificate of need” cases. N.C. GEN. STAT. § 6-19.1 (Supp. 2000).

32. *Id.* (emphasis added).

33. *Id.* This provision sets forth the following:

[T]he court may, in its discretion, allow the prevailing party to recover reasonable attorney’s fees, including attorney’s fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

- (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) The court finds that there are no special circumstances that would make the award of attorney’s fees unjust.

Id.

empowered, under certain circumstances, to award to the petitioner attorney's fees and witness fees against the state agency involved.³⁴

Finally, the legislation adds stature to the institutional position of administrative law judges by making them subject to the "Model Code of Judicial Conduct for State Administrative Law Judges, as adopted by the National Conference of Administrative Law Judges, Judicial Division, American Bar Association."³⁵ This provision recognizes that ALJs have a status of professionalism and standing within the legal community. It is one more signal that the institution of the ALJ is "coming of age" in the administrative law community, and indeed within the legal community at large.

These new provisions, especially when considered together with the revised decision-making authority (discussed in the next section), evince an unmistakable legislative purpose to heighten the stature of administrative law judges in this state's system of administrative adjudication. Moreover, this new legislation augments the authority of administrative law judges who now must be seen as a more integral part of the administrative decision-making process and apparatus.³⁶

III. INCREASING THE EFFECT OF ALJs' DECISIONS ON AGENCIES: REVISED POWERS OF ADMINISTRATIVE LAW JUDGES AND AGENCIES

Under the original APA enacted in 1975³⁷ and the provisions of the 1985 revised APA,³⁸ the ALJ made a *recommended* decision to the agency, that in large measure the agency was free to accept or reject.³⁹ In 1987, the General Assembly added a requirement that

34. N.C. GEN. STAT. § 150B-33(b)(11) (Supp. 2000). This legislation provides that: An administrative law judge may: . . .

(11) Order the assessment of reasonable attorneys' fees and witnesses' fees against the State agency involved in contested cases decided under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay.

Id.

35. N.C. GEN. STAT. § 7A-754 (Supp. 2000).

36. Not all decision-making is subject to process involving ALJs. The new process is applicable to agency action under article 3 of the APA. N.C. GEN. STAT. §§ 150B-22 to -37 (1999 & Supp. 2000). Special occupational licensing agencies and other selected agencies are subject to article 3A of the APA, to which the new provisions do not apply. *Id.* §§ 150B-38 to -42 (1999).

37. N.C. GEN. STAT. §§ 150A-1 to -64 (Supp. 1974), *replaced by* Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 987, 987-1011 (codified as amended at N.C. GEN. STAT. §§ 150B-1 to -52 (1999 & Supp. 2000)).

38. N.C. GEN. STAT. §§ 150B-1 to -52 (1999), *amended by* Act of July 12, 2000, ch. 190, secs. 4-12, 2000 N.C. Adv. Legis. Serv. 546, 547-52.

39. In a few instances, the ALJ's decision was binding. *See* N.C. GEN. STAT. § 150B-

“the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge’s recommended decision.”⁴⁰ In mandating that agencies state reasons for not adopting the ALJ’s recommended decision, the legislature was instructing agencies that their reasons could be reviewed. More importantly, it was asking courts to oversee the extent to which agencies, in their decision-making, were giving appropriate attention to the decisions recommended by administrative law judges. But the requirement did not seem to have much, if any, effect on agencies’ rejection rate of ALJs’ recommendations.⁴¹

Several reasons potentially explain this lack of effect. One reason might have been that the legislature did not specify the scope of review that the court should employ in reviewing whether the agency adequately set forth the reasons for rejecting the ALJ’s recommendation. Another reason might have been that the legislature did not specify to what extent, if at all, the court was to make a substantive evaluation of the reasons offered. Notwithstanding these possibilities, the ultimate explanation for a lack of efficacy in the requirement that an agency state reasons for rejecting the ALJ’s recommendation was that the courts did not engage in a “rigorous” review of these reasons.⁴² This was

36 (1999), amended by Act of July 12, 2000, ch. 190, § 7, 2000 N.C. Adv. Legis. Serv. 546, 548–49.

Other states also have provisions for the ALJ’s decision to be binding in certain contexts. See, e.g., GA. CODE ANN. § 12-2-2 (1996 & Supp. 2000) (stating that ALJs issue final decisions in certain matters before the Department of Natural Resources, Environmental Protection Division); LA. REV. STAT. ANN. § 49:992 (2) (West Supp. 2000) (designating certain adjudications in which “the administrative law judge shall issue the final decision or order, whether or not on rehearing, and the agency shall have no authority to override such decision or order”); MD. CODE ANN., HEALTH GEN. I § 10-708(k)(9) (1998) (“[T]he determination of the administrative law judge is a final decision for the purpose of judicial review of a final decision under the Administrative Procedure Act.”); MINN. STAT. ANN. § 43A.33, subd. 4 (West 1988) (stating that an ALJ’s order shall be the “final decision” in certain grievances involving state employees, but ALJs make recommended decisions to agencies generally in contested cases under the Minnesota administrative procedure provisions, as set forth in MINN. STAT. ANN. § 14.50 (West 1997)).

40. N.C. GEN. STAT. § 150B-36(b) (1999), amended by Act of July 12, 2000, ch. 190, § 7, 2000 N.C. Adv. Legis. Serv. 546, 548–49.

41. See *infra* Part V.D., APA study chart 11 (explaining that agencies rejected ALJs’ recommended decisions in 88% of the cases in which petitioners prevailed before the ALJs).

42. See, e.g., *Justice v. N.C. Dep’t of Transp.*, 121 N.C. App. 314, 319, 465 S.E.2d 554, 557 (Johnson, J., dissenting) (finding that the agency stated a specific reason in declining to adopt the ALJ’s conclusions, namely that the ALJ’s conclusions of law were inaccurate and not supported by substantial evidence in the record), *rev’d per curiam*, 343 N.C. 504, 505, 471 S.E.2d 414, 415 (1996) (reversing on grounds stated in Judge Johnson’s dissent);

attributable, at least in part, to the lack of legislative directions. Indeed, in one decision the court refused to review, despite the petitioner's request, whether the agency's stated reasons for not adopting the ALJ's decision were correct.⁴³ Still another decision applied what appeared to be the limited "substantial evidence" test to examine the agency's asserted reason for not adopting the ALJ's decision.⁴⁴ The conclusion is unavoidable that judicial review of the agencies' "respect" for the ALJs' recommended decisions did not prove effective or satisfactory.

A. ALJ and Agency Powers Regarding Findings of Fact

In order to remedy this deficiency, one provision of Session Law 2000-190 amends section 36 of the APA.⁴⁵ This provision has four aspects: (1) the agency *shall* adopt the ALJ's findings of facts, (2) *unless* the ALJ's finding is clearly contrary, (3) to the preponderance of the admissible evidence, (4) after giving due regard to the opportunity of the ALJ to evaluate the credibility of witnesses.⁴⁶ The provision plainly sets the default condition to be the adoption of the ALJ's findings of fact. The agency is now required to demonstrate not merely that the ALJ's decision is one with which the

Davis v. N.C. Dep't of Human Res., 110 N.C. App. 730, 737, 432 S.E.2d 132, 136 (1993) (upholding the agency's statement of reasons for rejecting the ALJ's recommended decision because the agency "was merely exercising its prerogative to weigh the evidence and to determine the credibility of the witnesses[,] . . . when it added an additional conclusion of law, finding [a witness's] rendition of the facts to be more consistent with the other evidence"); Ford v. N.C. Dep't of Env't, Health, & Natural Res., 107 N.C. App. 192, 199, 419 S.E.2d 204, 208 (1992) (upholding the agency's statement of reasons stating that the agency "simply viewed the record of evidence differently from the ALJ, rejected many of the ALJ's findings of fact, substituted its own, and on those grounds drew different conclusions of law—all leading to its rejection of the ALJ's recommended decision"); Webb v. N.C. Dep't of Env't, Health, & Natural Res., 102 N.C. App. 767, 770, 404 S.E.2d 29, 31 (1991) (noting that a provision requiring a statement of reasons for not adopting "does not require a point-by-point refutation of the Administrative Law Judge's findings and conclusions and the reasons stated . . . are quite specific indeed and go to the heart of the case").

43. Oates v. N.C. Dep't of Corr., 114 N.C. App. 597, 600, 442 S.E.2d 542, 544 (1994) (rejecting the petitioner's argument that on judicial review he was entitled to have the court determine whether the agency's stated reasons for not adopting the ALJ's recommended decision were correct).

44. Ritter v. Dep't of Human Res., 118 N.C. App. 564, 568, 455 S.E.2d 901, 903 (1995) (upholding the agency's "decision to adopt its own findings of fact and to reject many of the ALJ's recommended findings of fact [as being] supported by the whole record").

45. "The agency shall adopt each finding of fact contained in the administrative law judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses." N.C. GEN. STAT. § 150B-36(b) (Supp. 2000).

46. *Id.*

agency disagrees, but that the decision is *clearly* contrary, not just contrary, to the preponderance of the evidence. Moreover, in assessing whether the factual finding is clearly contrary to the evidence, the agency is instructed to give *due regard* to the fact that the ALJ saw and heard the witnesses. The legislation plainly implies that the ALJ is in the best position to evaluate credibility. One cannot know how the courts ultimately will interpret these provisions. It seems clear, at least to this writer, that the General Assembly was attempting to give the ALJs' decisions considerably more weight with agencies than they had been accorded under prior law.

A second provision of the 2001 amendments adds more rigorous requirements to the APA when an agency wishes to reject findings of fact made by the ALJ.⁴⁷ This provision requires that if an agency plans to reject a finding of fact, the agency must: (1) for each finding it rejects set forth, (2) separately and in detail, (3) the reasons for not adopting the finding, and (4) the evidence in the record that it relied upon in not adopting a finding of fact.⁴⁸ This provision also mandates that any fact not rejected as required shall be deemed accepted for purposes of judicial review.⁴⁹

A third amendment addresses instances in which the agency makes a finding of fact that was not made by the ALJ.⁵⁰ The import of this provision is that agencies cannot make different or alternative findings without the same rigors required for rejecting the ALJ's

47. The new section provides:

For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the following:

- (1) The reasons for not adopting the findings of fact.
- (2) The evidence in the record relied upon by the agency in not adopting the finding of fact contained in the administrative law judge's decision.

Any finding of fact not specifically rejected as required by this subsection shall be deemed accepted for purposes of judicial review of the final decision pursuant to Article 4 of this Chapter.

N.C. GEN. STAT. § 150B-36(b1) (Supp. 2000).

48. *Id.*

49. *Id.*

50. The new section provides:

For each finding of fact made by the agency that is not contained in the administrative law judge's decision, the agency shall set forth separately and in detail the evidence in the record relied upon by the agency in making the finding of fact. Any new finding of fact made by the agency shall be supported by a preponderance of the admissible evidence in the record. The agency shall not make any new finding of fact that is inconsistent with a finding of fact contained in the administrative law judge's decision unless the finding of fact in the administrative law judge's decision is not adopted as required by subsection (b1) of this section.

N.C. GEN. STAT. § 150B-36(b2) (Supp. 2000).

findings of fact. Similar to the case of rejecting findings, the agency must: (1) for each finding it makes set forth, (2) separately and in detail, (3) the evidence in the record that it relied upon in making a new finding of fact not made by the ALJ. In addition, (4) the agency's findings must be supported by a preponderance of evidence in the record and, (5) cannot be inconsistent with any finding of fact in the ALJ's decision, (6) except when the agency has rejected that finding of fact under the required procedure.⁵¹

B. ALJ and Agency Powers Regarding Final Agency Decisions

The amendments discussed above affect an agency's ability to make new findings of fact, as well as to reject the ALJ's findings of fact. Although it is not framed in exactly these terms, the fourth amendment to the APA addresses an agency's conclusions of law and, apparently, the agency's ultimate decision on a case's merits. Having addressed findings of fact, the only matters left to be addressed would be an agency's conclusions of law and its final decision in the contested case. As with findings of fact, the new legislation plainly sets the default condition as the adoption of the ALJ's conclusions of law and ultimate decision on the merits.

With exceptions noted and not pertinent to this discussion regarding conclusions and the decision on the merits,⁵² the fourth amendment requires that: (1) an agency shall adopt the decision of the ALJ unless (2) the agency demonstrates that the decision of the ALJ is (3) clearly contrary (4) to the preponderance of the admissible evidence in the record.⁵³ The provision then requires that: (5) the agency shall set forth its reasoning for the final decision (a) in light of the findings of fact and (b) conclusions of law in the final decision, (c) including any exercise of discretion by the agency.⁵⁴

51. *Id.*

52. The exception applies to "certificate of need" cases for health care facilities and services under sections 131E-175 to -190 (1999 & Supp. 2000).

53. N.C. GEN. STAT. § 150B-36(b3) (Supp. 2000).

54. *Id.* The text of the new amendment provides:

[T]he agency shall adopt the decision of the administrative law judge unless the agency demonstrates that the decision of the administrative law judge is clearly contrary to the preponderance of the admissible evidence in the record. If the agency does not adopt the administrative law judge's decision as its final decision, the agency shall set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency. The agency may consider only the official record prepared [by the ALJ in the case] in making a final decision.

Id.

It should be noted that there is no provision for judicial review of the agency's compliance with the particular provisions regarding the agency's findings, conclusions, or decision. Section 36(b3) clearly requires the agency to set forth its reasoning for not adopting the ALJ's decision.⁵⁵ But whether the agency complied with the required procedural steps and whether its reasoning is adequate are questions that are not subject to judicial review, independently of the review of the decision on its merits. Section 51(c) provides that when the agency does not adopt the ALJ's decision, upon conducting judicial review, "the court shall not give deference to any prior decision made in the case."⁵⁶ Thus, on judicial review, the court will make a decision *de novo* on the merits of the case. The court will not determine whether the agency properly refused to adopt the ALJ's decision except as part of its review of the decision on its merits. As a practical matter, in its ultimate determination on review of the decision, it would not be unreasonable to expect that the court would be influenced by whether the agency scrupulously complied with the procedural requirements and by the strength and persuasiveness of the reasons the agency sets forth for refusing to adopt the ALJ's decision.⁵⁷

These provisions represent a compromise between opposing points of view on the potential effects of ALJ decisions. Proponents of one view—largely representative of agencies and supporters of agency expertise or executive prerogatives—believed that the ALJ's decision was merely a *recommendation* to the agency and that the agency, as under prior law, could reject an ALJ's recommended decision with little constraint.⁵⁸ Proponents of the contrary view were largely representative of affected citizens and regulated entities, along with members of the administrative law bar whose practices included representation of regulated interests. Their view was that the ALJs should be empowered to make final decisions that would be binding on agencies.⁵⁹ However, the General Assembly chose neither

55. *Id.*

56. *Id.* § 150B-51(c) (Supp. 2000).

57. See Miller, *supra* note 21, at 1665; see also *infra* Part IV (discussing judicial review).

58. Prior law required agencies merely to set forth the reasons for rejecting the ALJ's decision. N.C. GEN. STAT. § 150B-36(b) (1999), amended by Act of July 12, 2000, ch. 190, § 7, 2000 N.C. Adv. Legis. Serv. 546, 548-49.

59. In some instances in North Carolina, ALJs do make final decisions. See, e.g., N.C. GEN. STAT. § 150B-36(c) (1999 & Supp. 2000); *id.* § 7A-759(e) (1999) (providing that in an employment discrimination decision, as a deferral agency for the Federal Equal Employment Opportunity Commission, an order entered by an administrative law judge

alternative. Instead, it crafted a middle ground that: (1) restricts the power of agencies to decline to adopt ALJs' decisions, and (2) ties the scope and standard of judicial review to whether the agency adopted or refused to adopt the ALJ's decision. It went on to provide that the "traditional" scope of review will continue to apply to cases in which an agency adopts the ALJ's decision. But *when an agency has not adopted an ALJ's decision*, the reviewing court will give the agency's decision *de novo* review.

At this point it should be noted that, even under the traditional standard of review, courts purported to accord *de novo* review to "law-based" decisions and a more limited "substantial evidence" review to "fact-based" decisions. Accordingly, an empirical analysis of court decisions on judicial review of "law-based" and "fact-based" decisions may help determine how courts are deciding cases in practice.⁶⁰ Notice further that the new judicial review regime distinguishes cases based upon whether the agency adopts or does not adopt the decision of the ALJ. As reported in Part V of this Article, an empirical study of decided cases does not support the view that the agency's adoption or rejection of the ALJ's decision materially affects the outcome of the case upon judicial review.⁶¹ It might be interesting, and possibly instructive, to assess empirically judicial review behavior regarding *de novo* review of "law-based" decisions under the traditional scope of review.⁶² But whether examining the traditional *de novo* review of "law-based" decisions will predict how the *new de novo* review will affect cases in which agencies do not adopt ALJ decisions remains to be seen.

after a contested case hearing on the merits of a deferred charge is a final agency decision that is binding on the parties). Some states have limited instances in which ALJs make final and binding decisions on agencies and parties. *See, e.g.*, CAL. BUS. & PROF. CODE § 8025.1(b) (1995) (providing that a decision by an ALJ on the status of a suspension of a shorthand reporter is a final determination); LA. REV. STAT. ANN. § 49:992 (B)(2) (West Supp. 2000) (providing that the ALJ makes the final decision in adjudications commenced by the Division of Administrative Law); MD. CODE ANN., HEALTH-GEN I § 10-708(k)(9) (1994) (providing that an ALJ's determination is a final decision when a decision made by a hospital to administer medicine involuntarily is appealed).

Research has revealed no instance of a state with a system exactly like the system adopted in North Carolina in Session Law 2000, ch. 190.

60. *See infra* Part V.C.

61. *Id.*

62. *See infra* Part V.C.2.

IV. RESTRUCTURING JUDICIAL REVIEW TO GIVE COURTS MORE EXTENSIVE REVIEW WHEN AGENCIES REJECT ALJS' DECISIONS

A. *The Premises of Judicial Review*

Judicial review is based on the fundamental premise that courts are the final arbiters of governmental determinations affecting the legal rights, duties, or privileges of specifically named persons.⁶³ The judicial review provisions of administrative procedure acts determine the relationships that exist between agencies and courts, specify the respective roles of courts and agencies in the execution of governmental business, circumscribe the persons who may invoke court process as a check on agencies' actions, and set out the procedures applicable for invoking court process.⁶⁴ The issue of proper allocation of functions and roles is difficult. Nevertheless, for purposes of analysis, one can conceptually separate the basic problems into three general areas: (1) the availability of judicial process to control agency action, (2) the ways judicial control may be sought, and (3) the nature of judicial control—the manner in which it is exercised, as well as the limitations upon it. The remainder of this discussion is organized on this conceptual framework.

63. This generalization is a substantial oversimplification of this very difficult topic and is subject to many exceptions. *See generally* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87–120 (1965) (describing the constitutional basis for agencies' exercise of judicial power, courts' exercise of administrative power, and agencies' exercise of enforcement power). The general conclusion stated derives from limitations expressed in Article III of the United States Constitution and in state constitutions. *E.g.*, N.C. CONST. art. IV, § 1, (establishing that the judicial power is vested in courts). However, the North Carolina Constitution also specifically contemplates that administrative agencies, in certain instances, may be vested with judicial powers without thus constituting them as parts of the judiciary. *State ex rel. Util. Comm'n v. Old Fort Finishing Plant*, 264 N.C. 416, 422, 142 S.E.2d 8, 12 (1964).

N.C. CONST. art. IV, § 3, provides:

Judicial powers of administrative agencies. The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

The rights in question may arise out of "open courts" provisions of state constitutions. *See, e.g.*, *Sears v. Romer*, 928 P.2d 745, 750 (Colo. Ct. App. 1996) ("Judicial review need not be a *de novo* review, and an appellate court may give deference to the findings of an administrative agency and still be in compliance with the constitutional open access guarantees.").

64. The judicial review provisions in the APA are in sections 150B-43 to -52 of the North Carolina General Statutes (1999 & Supp. 2000).

Judicial review standards, as set forth in administrative procedure acts and as applied by courts, determine the extent to which courts control agency conduct. Concomitantly, these standards determine how citizens can challenge agency conduct without resorting to the political process to try to change agency behavior. As such, these three matters require a delicate balance and sensitive examination. The balance must be effected so that agencies are not unduly constrained in carrying on the business of government for which they have special duties and possibly special experience. At the same time, citizens must have a reasonable means to challenge agency conduct in court so that there can be meaningful and effective control of agencies, and ultimately the government, in order to protect basic rights. Of all the problems in administrative law, perhaps none is more difficult to resolve satisfactorily than determining the standards by which judicial control of administrative action is to be exercised. An exact balance is not easy to achieve.

Somewhat remarkably, the General Assembly crafted a dual system of judicial review to be implemented beginning with contested cases initiated on or after January 1, 2001. Under the new requirements, the traditional approach to judicial review is limited to instances in which the agency adopts the decision of the ALJ. Under the traditional approach, the agency's decision is given a limited scope of review. This limited scope of review is discussed next, followed by a discussion of the new method of *de novo* review of an agency decision that does not adopt the ALJ's decision.

B. Traditional Judicial Review: When the Agency Adopts the ALJ's Decision

When the agency adopts the ALJ's decision, the scope of the review will be the traditional one: limited substantial evidence review of facts and *de novo* review of questions of law. With respect to agency decisions that adopt the ALJ's decision, the current version of the APA specifies five dispositions a court may take on judicial review of an agency's decision. The court may affirm, remand for further proceedings, "reverse or modify the agency's decision, or *adopt the administrative law judge's decision.*"⁶⁵ The court's power to affirm or remand is not specifically circumscribed.⁶⁶ The court's

65. N.C. GEN. STAT. § 150B-51(b) (Supp. 2000) (emphasis added). The phrase "or adopt the administrative law judge's decision" was added in the amendments that became effective January 1, 2001. Act of July 12, 2000, ch 190, § 11, 2000 N.C. Adv. Legis. Serv. 546, 551-52.

66. *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 465-71, 276 S.E.2d 404,

power to reverse or modify an agency's decision, or adopt the ALJ's decision is limited. To reverse or modify an agency's decision, or adopt the ALJ's decision the court must find:

- (a) that the petitioner's substantial rights,
- (b) "may have been prejudiced,"
- (c) by agency "findings, inferences, conclusions, or decisions"

that are:

- (1) [i]n violation of constitutional provisions;
- (2) [i]n excess of the statutory authority or jurisdiction of the agency;
- (3) [m]ade upon unlawful procedure;
- (4) [a]ffected by other error of law;
- (5) [u]nsupported by substantial evidence admissible [under specified sections of the Act] in view of the entire record submitted; or
- (6) [a]rbitrary, capricious,⁶⁷ or an abuse of discretion.⁶⁸

Note that the quoted provision provides that the court may reverse or modify the agency's decision, *or adopt the ALJ's decision* in limited circumstances. An agency can adopt the ALJ's decision in one of two basic situations:⁶⁹ the ALJ ruled in favor of the agency⁷⁰ or the ALJ ruled against the agency and in favor of the petitioner.⁷¹ The party seeking judicial review and seeking to have the ALJ's decision adopted by the court only will do so when the ALJ's decision was favorable to the petitioner, but the agency with decision-making

410-13 (1981) (reviewing an agency's interpretation of the statutory term "common bond" for purposes of participation in the credit union).

67. The foregoing six grounds were contained in both the original and the revised APAs. N.C. GEN. STAT. § 150A-51 (Supp. 1974), *replaced by* Act of July 12, 1985, ch. 746, sec. 1, § 150A-51, 1985 N.C. Sess. Laws 987, 1007; *id.* § 150B-51(b) (1999), *amended by* Act of July 12, 2000, ch. 190, § 11, 2000 N.C. Adv. Legis. Serv. 546, 551-52.

68. N.C. GEN. STAT. § 150B-51(b) (Supp. 2000) (emphasis added). "Abuse of discretion" was added by the amendments that became effective January 1, 2001. Act of July 12, 2000, ch. 190, § 11, 2000 N.C. Adv. Legis. Serv. 546, 551-52.

69. There is at least theoretically a third possible situation—the ALJ ruled in part in favor of the agency and in part in favor of petitioner and the agency adopted the ALJ's decision. This situation is not considered here.

70. *See, e.g., Powell v. N. C. Dep't of Transp.*, 347 N.C. 614, 617-21, 499 S.E.2d 180, 181-84 (1998) (upholding the State Personnel Commission's adoption of the ALJ's decision that the employee's position was "policymaking exempt" from the protections of the State Personnel Act).

71. *See, e.g., N. C. Dep't of Transp. v. Hodge*, 347 N.C. 602, 607, 499 S.E.2d 187, 190 (1998) (rejecting the department's appeal of the State Personnel Commission's order adopting the ALJ's decision that the petitioner's position was not "policymaking exempt" from the protections of the State Personnel Act).

authority did not adopt the ALJ's decision.⁷² Conversely, in the ordinary case, when the agency adopts the ALJ's decision and that decision is favorable to the petitioner, there either cannot be a petition for judicial review or, as a practical matter, no party will seek judicial review. In cases in which there is only one agency and it has adopted the ALJ's decision as its final decision, there cannot be an appeal because, it goes without saying, an agency cannot appeal its own decision. Also, when the petitioner has prevailed because the agency adopted a decision of the ALJ favorable to the petitioner, the petitioner who prevailed will not appeal.

But other situations could arise in which the "decision-making" agency has adopted the ALJ's decision, yet a party remains who would still pursue judicial review. In some cases one agency (the decision-making agency) may be making a decision involving another agency (the second agency). Two illustrations can demonstrate how this situation could happen. The first illustration would be a case in which, for example, an individual was affected in his employment by a state department (the second agency). The individual could then seek a contested case hearing. The individual would be the petitioner and the ALJ would conduct the hearing and make a "decision." The ALJ's decision could be that the agency's action regarding the petitioner's employment was unlawful and should be reversed. The ALJ's decision would then go to the State Personnel Commission ("SPC") (the decision-making agency) for a "final decision." The SPC could then adopt the decision of the ALJ and that decision of the SPC would be binding on the department that adversely affected the petitioner's employment.⁷³ The department would then seek judicial review of the SPC's decision.⁷⁴

The second illustration of a case in which the decision-making agency adopts the ALJ's decision but there is still a party who appeals, concerns occupational and health violation matters in which more than one state agency is involved and the decision-making agency adopts the ALJ's decision. For example, the Commissioner of Labor or other designated employee of the Department of Labor may issue citations for violation of work safety rules (the second agency). The affected company may seek a contested case hearing as to the citation before an ALJ. After a hearing, the ALJ makes a decision

72. This situation is discussed in the next topic. See *infra* Part IV.C.

73. See N.C. GEN. STAT. § 126-37 (1999).

74. See, e.g., *Hodge*, 347 N.C. at 607, 499 S.E.2d at 190 (rejecting the department's appeal of the SPC's order adopting the ALJ's decision that the petitioner's position was not "policymaking exempt" from the protections of the State Personnel Act).

that then goes to the Safety Health and Review Board (the decision-making agency). If that Board adopts the ALJ's decision that no violation occurred, the Commissioner of Labor may seek judicial review.⁷⁵ But in neither case would the second agency seek to have the reviewing court adopt the ALJ's decision, rather it would seek to reverse or modify both the ALJ's decision and the decision-making agency's decision.

The discussion in this section will be limited to the more common situations in which the petitioner requests the court to reverse or modify the decision-making agency's decision when the decision-making agency has adopted the ALJ's decision.⁷⁶ The judicial review provision requires that in order to reverse or modify, the court must find that "substantial rights" may have been "prejudiced."⁷⁷ This standard indicates that court intervention into the agency process is not a matter to be taken lightly. Insubstantial and purely technical or formal rights clearly are subject to a "harmless error" construction. However, a petitioner does not have to demonstrate that substantial rights *were* prejudiced, but that the action complained of raises such a significant risk of prejudice to the petitioner that judicial review of the agency's decision is warranted.⁷⁸

When examining the substantive standards for reversal or modification, it is useful to suggest that four of the standards are "law-based" inquiries, while two of the standards are "fact-based" inquiries.⁷⁹ The distinction drawn between "law-based" and "fact-based" inquiries on judicial review is significant. The courts have developed the view that on judicial review of an "error of law"—the

75. See *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 28–29, 426 S.E.2d 282, 283–84 (1993).

76. Instances in which the petitioner seeks judicial review and urges *the court to adopt the ALJ's decision* will be cases that are subject to the provisions governing review in which the agency did not adopt the ALJ's decision. That situation will be discussed in the next topic. See *infra* Part IV.C.

77. N.C. GEN. STAT. § 150B-51(b) (Supp. 2000).

78. Contrast the nature of the demonstration necessary under the standard that agency action "may have prejudiced" substantial rights with one that requires a demonstration that agency action "has prejudiced" substantial rights. The distinction seems plainly to lie in the difference between a risk or probability as opposed to a certainty or "fact." See 2 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 663–64 (1965).

79. The following issues are "law-based": agency action in violation of the constitution, action in excess of the agency's statutory authority or jurisdiction, agency action made upon unlawful procedure, or agency decision-making that is affected by an other error of law. See *infra* notes 90–93 and accompanying text. The following issues are "fact-based": agency decision-making that is unsupported by substantial evidence, or agency action that is arbitrary, capricious, or an abuse of discretion. See *infra* notes 121–22 and accompanying text.

law-based inquiry—the court’s review is *de novo*.⁸⁰ When the courts inquire whether the evidence adequately supports a fact found or an inference drawn—the fact-based inquiry—the court is authorized to change the decision only if the decision is not supported by “substantial evidence” based on a review of the “whole record.”⁸¹

The cases do not provide a precise, self-executing, or nonjudgmental way of defining what is an “error of law.” The difficulty inheres in the nature of questions raised in judicial review proceedings. Such determinations are seldom *solely* factual, but often contain elements of both “fact” and “law.”⁸² The supposed “classical dichotomy” that exists when distinguishing between elements of fact and elements of law when determining the scope of review “is of little use as a working tool”⁸³ and has been characterized as “often not an illuminating test” that is “never self-executing.”⁸⁴ One would thus not be surprised that “[w]hat one judge regards as a question of fact another thinks is a question of law.”⁸⁵ Perhaps only an ultimate conclusion can be stated: a “question of law” is a matter that the court decides should be subject to plenary or *de novo* consideration, with the court being free to substitute its judgment for that of the agency. A “question of fact” is a matter the court concludes should be subjected to a more restricted review, with the agency’s decision

80. *E.g.*, *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 465, 276 S.E.2d 404 410 (1981) (stating that “[w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review”) (citing *State ex rel. Comm’r of Ins. v. Rate Bureau*, 300 N.C. 381, 450, 269 S.E.2d 547, 589 (1980); *Daye*, *supra* note 3, at 915); *accord Hodgkins v. N.C. Real Estate Comm’n*, 130 N.C. App. 626, 631, 504 S.E.2d 789, 793 (1998); *Amanini v. N.C. Dep’t of Human Res.*, N.C. Special Care Ctr., 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

81. *E.g.*, *Hodgkins*, 130 N.C. App. at 633–34, 504 S.E.2d at 794–95 (1998); *Employment Sec. Comm’n of N.C. v. Peace*, 122 N.C. App. 313, 317–18, 470 S.E.2d 63, 67–68 (1996).

82. The question whether, under a statutory definition, a person is an “employee,” a “farmer,” a “broker,” a “securities dealer,” a “manufacturer,” a “seller,” or a “pesticide applicator” depends on both a “fact-based” determination of what the person does (or did) as well as a “law-based” determination of the legal conclusion that follows upon determination of what a person does (or did). The general problem is by no means limited to scope of review issues. The problem of whether the question, “Was the defendant negligent?” is a question of law or fact has never been settled definitively. This is so because its resolution involves a determination of both what the defendant did as well as whether he deviated from a standard of conduct of the “reasonable person.”

83. 2 COOPER, *supra* note 78, at 665.

84. *Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

85. ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 90 (Jan. 24, 1941).

accorded a higher level of deference than is accorded to questions of law.⁸⁶

One factor that seems to be influencing decisions about the factual or legal nature of an administrative determination appears to be the court's idea of whether the agency is better suited to make a judgment upon the matter, or whether a court is at least equally well-suited to evaluate the matter. The distinction between whether a question is one of fact or of law thus becomes the cutting edge for a policy decision on the allocation of functions between agencies and courts. Accordingly, on issues that the legislature has created agencies to resolve, and when it has provided them with resources to acquire a special competence to evaluate such issues, the court generally should accord these agencies a greater degree of room to apply such special competence.⁸⁷ This judicial deference is most appropriately accorded if, *in the particular case*, it appears that special agency competence was actually involved in the determination, and was, in fact, applied in rendering the decision.⁸⁸

Also, other external factors appear to have a direct bearing on the courts' willingness to permit the agency a wider latitude in decision-making under this standard. These factors, which amount to practical solutions, include the lack of prejudice of the decision-

86. See 2 COOPER, *supra* note 78, at 666.

87. See, e.g., *Wickman v. Ariz. State Bd. of Osteopathic Exam'rs (In re Wickman)*, 674 P.2d 891, 895 (Ariz. Ct. App. 1983) ("[O]n judicial review of the decision of an administrative agency and when viewing the sufficiency of the evidence, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members."); *Cal. Hotel & Motel Ass'n v. Indus. Welfare Comm'n*, 599 P.2d 31, 38 (Cal. 1979) (in bank) (by the court) (stating that judicial review of quasi-legislative administrative decisions are limited out of deference to the "presumed expertise of the agency within its scope of authority"); *Yater v. Hancock County Bd. of Health*, 677 N.E.2d 526, 529 (Ind. Ct. App. 1997) (stating that when "conducting judicial review of the decision of an administrative body [a court] may not substitute its own opinions and conclusions for those of the board but must give deference to the expertise of the board"); *Hayes v. Yount*, 552 P.2d 1038, 1044 (Wash. 1976) (en banc) (noting that on judicial review "due deference must be given to the specialized knowledge and expertise of the administrative agency") (quoting *Dep't of Ecology v. Ballard Elk Lodge* 827, 527 P.2d 1121, 1124 (Wash. 1974)).

88. *Kort v. Carlson*, 723 P.2d 143, 149 (Colo. 1986) (en banc) (determining that one function of judicial review is ensuring that special expertise was actually brought into play). According to the Oregon Supreme Court, courts "should give deference to the administrative interpretation" on judicial review even to questions that "analytically may be designated questions of law." *Rogers Constr. Co. v. Hill*, 384 P.2d 219, 222 (Or. 1963). This is true when "the experience of administrative personnel in the particular field is of material assistance in arriving at a decision." *Id.* "The degree of deference will vary depending upon the apparent degree of reasonableness of the administrative decision and the degree to which the problem involves knowledge peculiar to an industry, business, etc." *Id.*

maker, the experience of the agency, the procedure through which the decision was derived, the thoroughness of the agency's consideration, the relationship of the agency to the parties who might be affected, and other largely intangible factors that cause the reviewing court, in a particular case, to have confidence in the agency's determination.⁸⁹

Perhaps this practical resolution of the problem is satisfactory so long as it is remembered that what is really at stake is the proper relationship between agencies and courts in the overall scheme of carrying out the government's, and ultimately, the citizens', business.

1. Judicial Review of Issues that Tend to be "Law-Based"

Under the revised APA, four judicial review issues are questions of law: (1) a violation of the constitution, (2) an action in excess of the agency's statutory authority or jurisdiction, (3) the agency's action was "[m]ade upon unlawful procedure," or (4) the decision was "[a]ffected by other error of law."⁹⁰ Although the revisions effective January 1, 2001 amended section 51, these grounds of review were not revised from those that appeared both in the original APA⁹¹ and the revised APA.⁹² There is a substantial body of interpretation confirming that courts review any of these four issues *de novo*.⁹³ Part V will set forth the results of the empirical study that assesses whether there is a difference in the courts' likely disposition of cases under the *de novo* standard of review as compared to cases in which review is based on the "substantial evidence" test.⁹⁴

a. Violation of the Constitution

If a petitioner on judicial review alleges that agency action is "in violation of constitutional provisions," the petitioner could be complaining of, at least, one of three different things. First, if the

89. *E.g.*, Ark. Dep't of Human Servs., St. Francis Div. of Children & Family Servs. v. Thompson, 959 S.W.2d 46, 48 (Ark. 1998) (noting that "administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies' ") (quoting Wright v. Ark. State Plant Bd., 842 S.W.2d 42, 45 (1992)).

90. N.C. GEN. STAT. § 150B-51(b) (1999 & Supp. 2000).

91. N.C. GEN. STAT. §§ 150A-43 to -64 (Supp. 1974), replaced by Act of July 12, 1985 ch. 746, § 1, 1985 Sess. Laws 987, 987-1011 (effective January 1, 1986) (codified as amended at N.C. GEN. STAT. §§ 150B-43 to -52 (1999 & Supp. 2000)).

92. N.C. GEN. STAT. §§ 150B-43 to -52 (1999), amended by Act of July 12, 2000, ch. 190, §§ 9-12, 2000 N.C. Adv. Legis. Serv. 546, 550-52.

93. Each specific issue, including the scope of review of that issue, will be discussed in the next four subsections. *See infra* Part IV.B.1(a)-(d).

94. *See infra* Part V.C.

complaint concerns action the agency is specifically authorized to take under a statute, the real challenge is to the statute insofar as it authorizes the action. For example, this situation would exist when the petitioner claims the statute authorizes a taking without due process of law or without just compensation or that the statute makes an unlawful delegation of legislative power.

Second, a complaint may concern action the agency has taken under a statute, pursuant to the agency's interpretation of the statute. When the petitioner alleges that the action is unconstitutional, the petitioner is not challenging the statute itself, but rather the agency's interpretation of the statute or the statute as applied by the agency. For example, this situation would be presented if the agency decided that a statute authorized the agency to regulate a certain species of activity that infringed the petitioner's free speech rights or to issue an order prohibiting the petitioner from engaging in certain lawful conduct.

Third, if the agency has, for example, imposed a penalty or revoked a permit under a general grant of power, and the complaint is that the agency has undertaken the action in an unconstitutional way or has unconstitutionally affected an interest of the petitioner, the challenge is not to the statute, but to the agency action. For instance, this situation would arise if the agency decided that it did not need to give advance notice to the petitioner before deciding to terminate a permit, or that the agency did not need to provide a hearing in advance of imposing a penalty against the petitioner.

Although each of the above instances would involve a different degree of judicial control, oversight, or intrusion into the agency process, each seems to fall within the standard authorizing a court to reverse or modify a decision on the ground that the decision of the agency violates constitutional rights. Issues that have been raised include deprivation of property without due process of law,⁹⁵ violation of equal protection,⁹⁶ or violation of specific provisions of a particular

95. See generally 2 COOPER, *supra* note 78, at 683-84 (listing condemnation of property without a fair hearing, deprivation of property by prohibiting a lawful use of it, or retroactive application of decisions). Other issues that might arise on these grounds likely include an unconstitutional taking without compensation and inadequate notice. These issues could arise because of an express statutory provision authorizing the agency action or because the agency interprets the statute to permit the action.

96. *Meads v. N.C. Dep't of Agric., Food and Drug Prot. Div., Pesticide Section*, 349 N.C. 656, 676, 509 S.E.2d 165, 178 (1998) (holding that the agency did not violate equal protection in treating aerial and ground applicators of pesticides differently when the differences were not arbitrary and were reasonable because they rested upon the "differences in licensing requirements and qualifications associated with each method").

state constitution, such as unlawful delegation of judicial power⁹⁷ or legislative power⁹⁸ to an agency.

In cases of such constitutional challenge, the court generally possesses a plenary power to substitute its judgment for that of the agency, at least to the extent that factual determinations are not involved.⁹⁹ When factual determinations are involved as a predicate to the resolution of the constitutional issue, a question of the fact/law distinction may be implicated.¹⁰⁰

b. In Excess of Statutory Authority or Jurisdiction

The second situation for judicial reversal or modification that is governed by *de novo* review concerns decisions that are “in excess of statutory authority or jurisdiction of the agency.”¹⁰¹ This statutory formulation has been viewed as a “codification of long established common law principles.”¹⁰² Actions challenged as *ultra vires*, as beyond geographic¹⁰³ or subject matter jurisdiction,¹⁰⁴ as imposing

97. N.C. Private Protective Serv. Bd. v. Gray, Inc., 87 N.C. App. 143, 146–47, 360 S.E.2d 135, 137–38 (1987) (holding that empowering the agency “to assess a civil penalty of up to \$2,000.00 in lieu of revocation or suspension of a license is not an unconstitutional attempt to [bestow] a judicial power on a state agency” because the power was “reasonably necessary” to the purposes for which the agency was created and contained appropriate guidelines for the exercise of the discretion).

98. *Bring v. N.C. State Bar*, 126 N.C. App. 655, 658, 486 S.E.2d 236, 238 (1997) (“The constitutional power to establish the qualifications for admission to the Bar of this State rests in the Legislature,” but the Legislature could properly “delegate a limited portion of its power as to some specific subject matter [because] it prescrib[ed] the standards under which the agency was to exercise the delegated authority.”) (quoting *In re Williss*, 288 N.C. 1, 14–15, 215 S.E.2d 771, 779 (1975)).

99. See generally 2 COOPER, *supra* note 78, at 680–89 (discussing the various grounds upon which a court may substitute its judgment for that of the agency).

100. This problem is briefly discussed *infra* notes 200–02 and accompanying text.

101. N.C. GEN. STAT. § 150B-51(b) (1999 & Supp. 2000).

102. 2 COOPER, *supra* note 78, at 690. Often when a petitioner complains that the agency is acting in excess of authority or jurisdiction it will be alleged that such agency action violates the petitioner’s constitutional rights. 2 *id.* at 687. In substance, such an allegation is no more than an assertion that one has a constitutional right that agencies act within their statutory powers or their statutorily prescribed jurisdiction before they can constitutionally affect one’s interest. This claim, while perhaps arguably sound, risks confusing the real issue, which is one of statutory construction, and not constitutional interpretation. Moreover, it adds nothing to the petitioner’s claim because agency action in excess of authority or jurisdiction will be set aside on judicial review regardless of whether the petitioner also alleges a constitutional violation. 2 *id.*

103. For example, an agency with statewide jurisdiction over corporations operating in North Carolina attempts to regulate a corporation not operating in the state, or an agency of the state with geographic jurisdiction limited to specified counties attempts to act outside those counties.

104. For example, an agency empowered to regulate manufacturers of pesticides attempts to regulate an entity that does not manufacture pesticides.

requirements not authorized by statute,¹⁰⁵ as refusing to impose requirements statutorily required,¹⁰⁶ or as not falling within time limitations prescribed by statute, have been set aside by courts as being in excess of authority or in excess of jurisdiction.¹⁰⁷

The extent to which the court should substitute its judgment for the agency's when a statutory authority or jurisdiction issue is raised may present a problem. As a general rule, courts are regarded as possessing power freely to substitute their judgment for that of an agency when the question is one of statutory interpretation.¹⁰⁸ This power is always involved in resolving authority and jurisdiction issues. But courts, particularly federal courts, historically have accorded "weight," "deference," or "respect" to many agency determinations that interpret statutes.¹⁰⁹

In 1984, the United States Supreme Court announced the *Chevron*¹¹⁰ rule, which has restricted the role of federal courts in the interpretation of statutes. Under the federal standard after *Chevron*, federal courts make two inquiries when a question arises as to an agency's interpretation of a statute. The first is whether Congress has addressed the precise question at issue.¹¹¹ If it has, there is no further inquiry to be made.¹¹² The second inquiry is reached only if the court determines that Congress has not directly addressed the precise question at issue.¹¹³ In making the second inquiry, the court does not impose its own interpretation of the statute, but determines whether

105. For example, an agency denies a license on a ground not specified in the agency's enabling legislation.

106. For example, an agency might issue a license without making a finding of fact that is a prerequisite to the issuance of the license.

107. See generally 2 COOPER, *supra* note 78, at 690-701 (analyzing the issues arising under claims that agencies' actions exceeded statutory authority).

108. 2 *see id.* at 665.

109. The classic statement on the subject is contained in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944):

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*

Id. at 140 (emphasis added).

110. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

111. *Id.* at 842.

112. *Id.*

113. *Id.* at 843.

the “agency’s answer is based on a permissible construction of the statute.”¹¹⁴

State courts have not gone that far, although they say they do accord some “deference” to an agency’s interpretation of a statute.¹¹⁵ Under the APA, North Carolina courts state that some deference may be given even to an agency’s interpretation of statutes, while alternatively announcing that review of an “error of law” is *de novo*.¹¹⁶ Courts might be inclined to accord greater deference to an agency’s interpretation of a statutory term when the meaning of the

114. *Id.* at 843. See generally 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 3.1–3.6, at 107–31 (3d ed. 1994) (devoting a full chapter to a discussion of the complications of *Chevron*). In another context, it has been pointed out that *Chevron* has generated a voluminous amount of attention:

To illustrate the significance of *Chevron*, one need only note the fact that a Westlaw® check of the unofficial citation, in December 1998, found a total of 7,686 references (with over 350 in the United States Supreme Court) including dissenting opinions and all other mentions of the case in federal judicial decisions at all levels. This means that in its fourteen year history, *Chevron* has been mentioned *annually* nearly 500 times.

CHARLES E. DAYE, ET AL., HOUSING AND COMMUNITY DEVELOPMENT 103 (3d ed. 1999).

115. *E.g.*, Arkansas Dep’t of Human Servs., St. Francis Div. of Children & Family Servs. v. Thompson, 959 S.W.2d 46, 48 (Ark. 1998) (“Administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies.”); Yamaha Corp. of Am. v. State Bd. of Equalization, 960 P.2d 1031, 1033 (Cal. 1998) (“Agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts.”); Sears v. Romer, 928 P.2d 745, 749–50 (Colo. Ct. App. 1996) (“A reviewing court should generally give deference to the construction of statutes by administrative officials.”); County of Cook v. Ill. Local Labor Relations Bd., 639 N.E.2d 187, 191 (Ill. App. Ct. 1994) (“Courts give substantial weight and deference to the interpretation of a statute by the agency charged with the administration and enforcement of that statute.”); Belanger v. Warren Consol. Sch. Dist., Bd. of Educ., 443 N.W.2d 372, 379 (Mich. 1989) (“Judicial review of agency decisions must be undertaken with considerable sensitivity in order that the courts offer due deference to administrative expertise.”); Triano v. Div. of State Lottery, 703 A.2d 333, 337 (N.J. Super. Ct. App. Div. 1997) (stating that due deference is usually accorded to administrative expertise upon judicial review). *Contra* Tex/Con Oil & Gas Co. v. Batchelor, 634 So. 2d 902, 907 (La. Ct. App. 1993) (“Questions of law are to be determined upon judicial review with little or no deference to the decision of the administrative body.”).

116. *E.g.*, *In re Appeal of N.C. Sav. & Loan League*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981). The court stated that:

Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. “The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (alteration in original).

term is dependent upon a context in which the agency's experience is particularly relevant. Statutes that incorporate scientific, medical, or specialized professional terms, or that use terms of art from a field of specialized knowledge are candidates for according greater deference to an agency's interpretation of such terms. Such deference should be given even when the terms are technically "questions of law" because they are used in statutory formulations.¹¹⁷ The special deference is less applicable to common terms or legal terms for which agency expertise holds no special relevance.

c. Made Upon Unlawful Procedure

The "made upon unlawful procedure" provision authorizes a court to reverse or modify an agency's action if it is not in accordance with the procedural requirements specified in the APA, or with those required under another statute governing agency procedure. Little need be said about this standard except to emphasize that "substantial rights" which "may have been prejudiced" by the procedural error must exist.¹¹⁸

d. Affected by Other Error of Law

The "affected by other error of law" standard authorizes a court to reverse or modify an agency's decision when it is "affected" by an "error of law" that is not otherwise covered in the specific listed grounds for reversal or modification.¹¹⁹ The term "affected" means that an agency decision is properly subject to reversal or modification only when an error of law has materially influenced the decision

117. This increased deference could be seen as a "tendency" over a series of cases within a jurisdiction. *See, e.g.,* Chesapeake Microfilm, Inc. v. N.C. Dep't of Env't, Health & Natural Res., 111 N.C. App. 737, 744-45, 434 S.E.2d 218, 221-22 (1993) (holding that although a court may substitute its own judgment and employ de novo review of an agency's interpretation of a statutory term, the agency's interpretation of a civil penalty statute, in particular the phrase "degree and extent of harm," is traditionally accorded some deference by appellate courts, although those interpretations are not binding); *Best v. N.C. State Bd. of Dental Exam'rs*, 108 N.C. App. 158, 162-63, 423 S.E.2d 330, 332-33 (1992) (stating that even though courts are the final interpreters of statutory terms, the state board's interpretation of the term "lawfully qualified nurse" in a statute the agency was created to administer traditionally is accorded some deference). This trend also is found in cases in which the agency interprets a regulation it administers. *See Britt v. N.C. Sheriff's Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) (stating that some deference should be accorded to the agency's interpretation of "conviction" because this term was found in a regulation that the agency was entitled to administer).

118. *See supra* notes 65-68, 77-78 and accompanying text (regarding the phrases "substantial rights" and "may have been prejudiced").

119. N.C. GEN. STAT. § 150B-51(b)(4) (Supp. 2000).

reached. As such, the term appears to be a reverse way of emphasizing the harmless error construction that applies to the entire section.¹²⁰

2. Judicial Review of Issues that Tend to be “Fact-Based”

Under the revised APA, two grounds for judicial review are fact-based: “unsupported by substantial evidence,” and “arbitrary or capricious.”¹²¹ A third ground—“abuse of discretion”—was added in the amendments that became effective January 1, 2001.¹²²

a. Unsupported by Substantial Evidence

The unsupported by the substantial evidence standard is concerned with agency decisions in which disputed “adjudicative facts” are determined. “Adjudicative facts” are facts about the parties. Generally, they answer the questions of “who did what, where, when, how, why, with what motive or intent.”¹²³ The practical distinction of adjudicative facts from other disputed facts for purposes of the APA generally is that adjudicative facts are those disputed facts that were the subject of the evidentiary hearing in a contested case proceeding.¹²⁴ Under the standard, the court is authorized to reverse or modify the decision if the case involves adjudicative facts and the findings, inferences, conclusions, or the decision as a whole is unsupported by substantial evidence¹²⁵ in view of the “whole record” that was admissible under the Act.¹²⁶

Thus, this provision addresses four aspects of evidence: (1) what is the “kind” of evidence to which the court’s consideration is limited (or conversely what may not be considered); (2) what “quantum” of such evidence must be found; (3) where must such evidence be found; and (4) what method of evaluating evidence must be employed.

120. See *supra* notes 65–68, 77–78 and accompanying text (regarding the phrases “substantial rights” and “may have been prejudiced”).

121. N.C. GEN. STAT. § 150B-51(b)(5)–(6) (1999 & Supp. 2000).

122. *Id.* § 150B-51(b)(6) (Supp. 2000).

123. 2 DAVIS & PIERCE, JR., *supra* note 114, § 10.5, at 141.

124. 2 *id.* at 141–42.

125. See N.C. GEN. STAT. § 150B-51(b)(5) (Supp. 2000).

126. This requirement refers to the official record prepared by the ALJ that was before the agency or that is submitted to the court by the parties in a judicial review proceeding. See N.C. GEN. STAT. § 150B-37 (Supp. 2000) (setting forth the requirements for the content and preparation of the official record in hearings conducted by the ALJ under article 3 of the APA); *id.* § 150B-51 (Supp. 2000) (stating the rules for judicial review of the entire record); see also *id.* § 150B-29 (Supp. 2000) (governing admissible evidence); *id.* § 150B-30 (1999) (governing official notice); *id.* § 150B-31 (1999) (governing stipulations).

As to the *kind of evidence*, the court is limited to sustaining a decision on the basis of evidence admissible before the agency under specified sections of the Act.¹²⁷ With certain exceptions, the Act provides that “the rules of evidence as applied in the trial division of the General Court of Justice shall be followed.”¹²⁸ The Act affirmatively requires exclusion of “irrelevant, immaterial, and unduly repetitious evidence.”¹²⁹

Going beyond the mandatory exclusion requirement, determining the kind of evidence necessary to sustain a decision becomes much more difficult. However, the current APA, unlike its predecessor judicial review statute, does not require the exclusion of “incompetent” evidence, nor does it require “competent” evidence to sustain an agency decision.¹³⁰ I have argued elsewhere that the full scale evidentiary limitations governing jury trials are not applicable on judicial review.¹³¹ I suggested that the requirement that “the rules of evidence *as applied* in the trial division”¹³² must mean, at an irreducible minimum, that agency decisions must be based on evidence that a trial judge sitting without a jury would be entitled to *rely upon* in reaching a decision, as opposed to entitled to admit during the course of trial.¹³³ Finally, it must be noted that the APA permits admission of the “most reliable and substantial evidence

127. See *id.* § 150B-29(a) (Supp. 2000) (governing admissible evidence); *id.* § 150B-30 (1999) (governing official notice); *id.* § 150B-31 (1999) (governing stipulations).

128. *Id.* § 150B-29(a) (Supp. 2000).

129. *Id.*

130. Compare N.C. GEN. STAT. § 143-318 (1974) (stating that “incompetent” evidence shall be excluded), replaced by Act of April 12, 1974, ch. 1331, § 2, 1973 N.C. Sess. Laws 691, 703, with N.C. GEN. STAT. § 150B-29 (Supp. 2000) (excluding “irrelevant, immaterial, and unduly repetitious evidence”).

131. Daye, *supra* note 3, at 917–18.

132. N.C. GEN. STAT. § 150B-29(a) (Supp. 2000).

133. Daye, *supra* note 3, at 917–18. The real difference between the rules in civil jury trials and in trials without a jury is that a trial judge will not be readily reversed for the admission of evidence that ought to have been excluded. The rule is that notwithstanding a failure to exclude evidence that was not properly admissible, a rebuttable presumption exists that excludable evidence was disregarded. See *Bizzell v. Bizzell*, 247 N.C. 590, 605–06, 101 S.E.2d 668, 679 (1958); see also *General Metals, Inc. v. Truitt Mfg. Co.*, 259 N.C. 709, 712, 131 S.E.2d 360, 362 (1963) (stating that when no evidence appears to the contrary, appellate courts may assume that the trial judge disregarded any incompetent evidence that appears in the record); *Chappell v. Winslow*, 258 N.C. 617, 624, 129 S.E.2d 101, 106 (1963) (holding that there is a rebuttable presumption that a court sitting without a jury acts only on the basis of competent evidence). Although the harmless error rule should be applied, it is doubtful that agency decisions as a general matter should be clothed with a similar presumption.

available” when evidence under the trial court rules is not reasonably available.¹³⁴

As with all rules governing receipt of and reliance upon evidence, the real concern is that only evidence that has some probative value should affect the decision or sway the mind of the factfinder. Given this concern, one is tempted to depart the verbal thicket, and announce that when a judge reviews an agency decision with respect to the *kind of evidence* appearing in the record, the question is, after all is said and done, whether the record contains at least some *probative evidence* (as opposed to simply “competent” evidence) that can justify the agency’s factual finding.¹³⁵

A finding that the record contains some of the right kind of evidence sufficiently probative, standing alone, to justify the findings is only the first step, however. The next inquiry is whether a sufficient *quantum* of evidence supports the findings, in view of *other evidence appearing in the record*, to make the findings reasonable. The APA provides that the evidence should be substantial *in view of*

134. N.C. GEN. STAT. § 150B-29(a) (Supp. 2000) (governing admissible evidence in ALJ-conducted hearings); *id.* § 150B-41 (1999) (governing admissible evidence in hearings generally conducted by certain specified agencies without the use of ALJs); *cf.* G. & C. Merriam Co. v. Syndicate Publ’g Co., 207 F. 515, 518 (2d Cir. 1913) (quoting then District Judge Learned Hand, who had been confronted with an offer of hearsay, not apparently within any exception to the exclusionary requirements for such proof: “If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that.”).

135. This, the writer thinks, is not a formulation of the “residuum rule.” The N.C. APA takes two important steps away from that rule: (1) it does not require the exclusion of “incompetent” evidence, and (2) when evidence admissible under trial court rules is not reasonably available, it permits admission of the most reliable and substantial evidence available.

The residuum rule, first announced by the New York Court of Appeals in *Carroll v. Knickerbocker Ice Co.*, 113 N.E. 507, 509 (N.Y. 1916), assumes that only legally “competent” evidence is probative or reliable. The APA, however, makes no such assumption, but recognizes: (1) that evidence which does not satisfy jury trial admissibility rules, depending upon the circumstances, may be probative, and (2) that evidence of a relatively low probative value may nevertheless tend to support a fact when evidence of greater probity is not available. *See* N.C. GEN. STAT. § 150B-29(a) (Supp. 2000). Application of the residuum rule on judicial review would lead to the anomalous result that an agency’s decision would be reversed, without looking at the reasonableness of the decision in view of all evidence in the record, but merely because the agency had admitted and based findings upon evidence that did not meet jury trial rules, which, of course, it was authorized to do under the Act. *See id.* § 150B-29 (Supp. 2000) (governing admissible evidence in ALJ-conducted hearings); *id.* § 150B-41 (1999) (governing admissible evidence in hearings generally conducted by certain specified agencies without the use of ALJs). Accordingly, the kind of evidence inquiry under the APA is simply a threshold inquiry that will permit reversal where *no* probative or reliable evidence supports a decision. Such a decision would have to be unreasonable, without regard to the whole record standard of review, because the record would contain no evidence tending to support a finding of fact.

the whole record.¹³⁶ Accordingly, the judge must review all of the matters that comprise the record.¹³⁷

With respect to evaluation of the record to determine whether the evidence is substantial, it is clear that the court may not substitute its judgment for the agency's, but must limit itself to the "reasonableness" of the administrative findings by weighing all of the evidence in the record.¹³⁸ The North Carolina Supreme Court has pointed out that under the "whole record test," the reviewing court is not authorized to replace the agency's judgment when there are two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.¹³⁹

The substantial evidence rule has been criticized as being unworkable because courts are better able to understand and apply the "clear error" standard, which appellate courts apply on review of trial court findings.¹⁴⁰ But Justice Frankfurter appears to have been right in his classic statement: "The precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. *There are no talismanic words that can avoid the process of judgment.*"¹⁴¹

However, some guides to the exercise of judgment can be found. Prior to the APA, the North Carolina Supreme Court held that the reviewing court exceeded its scope of review when it substituted its evaluation of the evidence for that of the agency and found additional facts the agency had been requested to find but had refused.¹⁴² This holding means that an agency decision that is reasonable from the standpoint of the evidence cannot be reversed under the substantial evidence standard, although the court might have found differently if

136. N.C. GEN. STAT. § 150B-51(b)(5) (Supp. 2000).

137. *Id.* § 150B-37 (Supp. 2000) (governing the record in ALJ-conducted hearings); *id.* § 150B-42 (Supp. 2000) (governing the record in hearings generally conducted by certain specified agencies without the use of ALJs).

138. *Meads v. N.C. Dep't of Agric., Food & Drug Div., Pesticide Section*, 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998) (stating that if substantial evidence exists in the whole record to support the agency's decision, then the court must uphold it).

139. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) ("The 'whole record' test does not allow the reviewing court to replace the [agency's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*.").

140. *See* 2 COOPER, *supra* note 78, at 724-29 (discussing the problems associated with the substantial evidence rule).

141. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951) (emphasis added).

142. *Clark Equip. Co. v. Johnson*, 261 N.C. 269, 273, 134 S.E.2d 327, 330 (1964).

it had evaluated the evidence as an initial matter. Similarly, the North Carolina Supreme Court has reiterated that substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁴³

As I explained some years ago,¹⁴⁴ putting the requirements of right kind, substantial evidence, and whole record together can perhaps best be done by illustration. In the course of a proceeding, the existence or the nonexistence of fact *X* must be found by the agency. Witness *A*, who has no first hand knowledge of fact *X*, is offered to testify about what *B* said to witness *A* regarding fact *X*. Plainly, witness *A*'s testimony is hearsay, but, depending on the circumstances, witness *A* may be permitted to testify to *B*'s statement if *A*'s testimony falls within one of the exceptions to the hearsay exclusionary rule. For purposes of admission before the agency, depending upon the circumstances, *A*'s testimony may be admissible as the right kind of evidence if it possesses some probative worth.

Suppose further that *B*'s statement tends to support the existence of fact *X*. During the course of the proceeding, witness *C* is produced and testifies that he bribed *B* to induce *B* to make the statement to *A*. *C* produces his cancelled check payable to *B* as well as *B*'s letter thanking *C* for the payment and asserting that the statement requested has been made to *A*. The agency finds the existence of fact *X*, crediting *A*'s testimony but none of *C*'s.

On judicial review, if one looks only at the part of the record containing *A*'s testimony, the agency decision finding the existence of fact *X* is much more likely to appear to be supported by substantial evidence, then it appears when *C*'s testimony is examined as well. Furthermore, in other parts of the record suppose there is testimony authenticating *B*'s letter, as well as *C*'s cancelled check. Upon weighing all the evidence, the agency's finding of the existence of fact *X* begins to appear unreasonable.

Suppose further, however, that still other parts of the record contain the testimony of witness *D*, a psychiatrist, to the effect that *C* is a pathological liar,¹⁴⁵ the testimony of witness *E*, a handwriting expert, that *C* is a master forger who has faked the alleged letter from *B*,¹⁴⁶ and the testimony of witness *F*, a banker, that *B* paid part of the

143. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 348 N.C. 452, 460, 500 S.E.2d 693, 700 (1998); *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 470-71, 202 S.E.2d 129, 137 (1974).

144. *Daye*, *supra* note 3, at 920-21.

145. This evidence would tend to explain why *C* might make these assertions.

146. This evidence would tend to explain why the letter could have been authenticated

note he co-signed at the bank for *C*.¹⁴⁷ The agency's finding of the existence of fact *X* now begins to appear reasonable.

In sum, the substantial evidence test is one that requires a weighing and balancing of evidence supporting the decision and evidence detracting from it. Clearly, upon finding that the decision appears reasonable, the reviewing court has concluded its work, even though the judge as an initial matter could or even would have found otherwise.

b. Arbitrary, Capricious, or an Abuse of Discretion

The "arbitrary or capricious" standard derives from the original APA¹⁴⁸ and was carried forward in the revised APA.¹⁴⁹ The phrase "abuse of discretion" was added by the amendments that became effective January 1, 2001.¹⁵⁰ The phrase "arbitrary or capricious," when applied to contested cases, seems to function as a catchall. It could operate to mask the real reason the court deems intrusion into the administrative process to be warranted. As such, it might encourage less careful reasoning by the courts. Moreover, most decisions that properly may be classified as "arbitrary or capricious" will be included under one of the specific and discrete standards discussed above.¹⁵¹ What meaning will be accorded to the phrase "abuse of discretion" remains to be seen. The phrase appears to add little and may be subject to the considerations that are suggested below for "arbitrary or capricious."

I have urged that courts reviewing contested cases should use the "arbitrary or capricious" standard only in those rare instances in which reversal or modification is necessary because substantial rights may have been prejudiced, but cannot be justified under the more specific and discrete criteria authorizing judicial intrusion.¹⁵² This same reasoning seems to apply to the "abuse of discretion" standard. Moreover, the North Carolina appellate courts have uniformly stated that the "whole record" test should apply when the reviewing court

as *B*'s.

147. This evidence would tend to provide an explanation of *C*'s payment to *B* on grounds other than bribery.

148. N.C. GEN. STAT. § 150A-51(6) (Supp. 1974), *replaced by* Act of July 12, 1985, ch. 746, sec. 1, § 150A-51, 1985 N.C. Sess. Laws 987, 1007.

149. N.C. GEN. STAT. § 150B-51(b)(6) (1999), *amended by* Act of July 12, 2000, ch. 190, § 11, 2000 N.C. Adv. Legis. Serv. 546, 551.

150. N.C. GEN. STAT. § 150B-51(b) (Supp. 2000).

151. For example, cases not supported by substantial evidence, or in excess of statutory authority can be broadly described as arbitrary and capricious.

152. Daye, *supra* note 3, at 921.

considers an agency decision under the “arbitrary or capricious” standard.¹⁵³ This, in turn, means that “arbitrary or capricious” is treated as a “fact-based” inquiry. As such, the court’s authority is more circumscribed than it is under the “law-based” inquiries, as to which, the court on judicial review undertakes *de novo* consideration.¹⁵⁴

C. *The “New” De Novo Review: When the Agency Does Not Adopt the ALJ’s Decision*

The amendments that became effective on January 1, 2001 made remarkable changes to the standards and scope of judicial review. The most remarkable change is that now the scope of judicial review is dependent upon the agency’s adoption or rejection of the ALJ’s decision. Other states have provisions for *de novo* judicial review of agency decisions,¹⁵⁵ but research has disclosed no other statute that bases the standard and scope of judicial review on the agency’s disposition of the ALJ’s decision.

1. No Substantial or Partial Adoptions?

Because this is an original approach to judicial review of agency decisions, it is not perfectly clear what the General Assembly intended by the phrase “does not adopt” the ALJ’s decision.¹⁵⁶ One question that stands out is whether there is any room between “adopting” and “not adopting” the ALJ’s decision. This issue arises

153. N.C. Dep’t Transp. v. Hodge, 347 N.C. 602, 612, 499 S.E.2d 187, 193 (1998) (stating that the “whole record” test should be applied when the court considers whether an agency decision is arbitrary and capricious); Dew v. State *ex rel.* N.C. Dep’t of Motor Vehicles, 127 N.C. App. 309, 310, 488 S.E.2d 836, 837 (1997) (stating that when the plaintiff questions whether an agency decision was arbitrary or capricious, the “whole record” test must be applied); *In re McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993) (holding that if the appellant questions whether the agency decision was arbitrary or capricious, then the reviewing court must apply the “whole record” test); Walker v. N.C. Dep’t of Human Res., 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990) (stating that the court must employ the “whole record” test when the issue is whether the agency decision is supported by evidence, or is arbitrary or capricious).

154. See *supra* notes 80–89 and accompanying text.

155. See, e.g., ALA. CODE § 41-22-20(i)–(k) (2001); MONT. CODE ANN. § 2-4-702(a) (1999); OKLA. STAT. ANN. tit. 75, § 318 (West 1987); UTAH CODE ANN. § 63-46B-15(1)(a) (Supp. 2000).

156. The amendment provides the following:

In reviewing a final decision in a contested case in which an administrative law judge made a decision . . . and *the agency does not adopt the administrative law judge’s decision*, the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law.

N.C. GEN. STAT. § 150B-51(c) (Supp. 2000) (emphasis added).

because agency decisions will contain, as discussed above, findings of fact, conclusions of law, and the disposition on the merits.¹⁵⁷ In addition, the merits can present multiple issues and several consequences.

For example, an environmental or licensing decision can find a violation of a permit or a license and impose penalties ranging from monetary civil penalties to revocation of the permit. Suppose the ALJ recommends a civil penalty but not a revocation. If the agency adopts the decision not to revoke the permit, but increases the civil penalty, does the court review the decision *de novo*? In other words, has the agency “adopted” or “not adopted” the ALJ’s decision?

Or, for example, a decision can terminate employment, suspend employment, effect a demotion, or implement a salary diminution. Suppose the ALJ recommends back pay for a period between defective notice of termination and the actual last day on the job, but approves the termination on its merits. If the agency concurs in the termination but does not adopt the back pay part of the decision, what should the court review *de novo*?

Given that the General Assembly specifically anticipated and set forth a detailed procedure for an agency to make new findings of fact, to reject the ALJ’s findings of fact, to make conclusions of law and a final decision, it seems reasonable that any new findings of fact, rejection of findings of fact, or refusal to adopt the particular result set forth in the ALJ’s decision, would be within the phrase “does not adopt the administrative law judge’s decision.”¹⁵⁸ This reading would mean that under the provisions there is no concept of “substantial adoption” of the ALJ’s decision. Rather, every aspect of the ALJ’s decision must be adopted, or the agency’s decision must be regarded as one that “does not adopt the administrative law judge’s decision.”¹⁵⁹

Similarly, there does not appear to be any basis for the concept that an agency has partially adopted the ALJ’s decision. This inference means that if the agency does not adopt any aspect of the ALJ’s decision, then the agency’s entire decision is subject to *de novo* review. Given the detail with which the General Assembly examined the relations between agencies and ALJs, it would have been easy enough to include “not adopted in substantial part” or “not adopted in part.” The statute contains no such language. The inference is

157. See *supra* notes 45–54 and accompanying text.

158. N.C. GEN. STAT. § 150B-51(c) (Supp. 2000).

159. *Id.*

compelling that the language means what it clearly seems to say: either an agency has adopted an ALJ's decision or it has not. Any change the agency makes in the ALJ's decision as to facts, conclusions, or the merits, surely must permit the strong argument that the agency did not adopt the ALJ's decision. Moreover, given the ineffectiveness of the requirement that agencies state reasons for not adopting the ALJ's decision, it is reasonable to argue that the General Assembly did not want to introduce gradations of rejection or adoption apart from the very detailed and specific means it set forth regarding the disposition of factual findings and the decision on the merits.¹⁶⁰

2. Judicial Review of Agency Decisions De Novo

When an agency has not adopted the ALJ's decision, the General Assembly specifies exactly what it means by de novo review. In short, the reviewing court shall *not* give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision.¹⁶¹

Presumably, this provision makes clear that unlike the de novo review of questions of law under the traditional standard of review, in which the court might in some cases give "some deference" even to questions of law, such deference is not to be given to any aspect of *any* prior decision in the case. This broad scope would include the agency's final decision and the ALJ's decision that the agency rejected.

In addition, the General Assembly made clear that de novo review is not limited just to findings of fact or conclusions of law, but includes the merits of the decision under review. The amendment states, "The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record."¹⁶² Although the court is not to give deference to prior decisions in the case, including the ALJ's decision that the agency rejected, the court, nevertheless, is empowered to adopt the ALJ's decision under the recent amendments.¹⁶³

160. *See supra* notes 45–54 and accompanying text.

161. N.C. GEN. STAT. § 150B-51(c) (Supp. 2000) (emphasis added).

162. *Id.*

163. The amended statute provides that:

The court reviewing a final decision under this subsection may adopt the administrative law judge's decision; may adopt, reverse, or modify the agency's decision; may remand the case to the agency for further explanations under

All of the new provisions, taken together, have clearly restructured the relations among ALJs, agencies, and courts. In addition to increasing the power of ALJs by mandating greater effect for their decisions, the General Assembly has instructed courts to substitute their judgments freely in cases in which agencies reject the ALJs' decisions. Agencies, therefore, must give ALJs' decisions greater regard, or risk having the courts assess their decisions without the limited scope of review.

V. AN EMPIRICAL ANALYSIS OF ALJ DECISIONS AND JUDICIAL REVIEW

As noted at the outset of this Article, the General Assembly has been attempting to create a fair and workable system of administrative adjudication. It has been trying to effect precisely the right balance between the power of governmental agencies to act and the rights of citizens who are affected by decisions of those agencies to challenge those decisions. In the preceding Parts of this Article, I have examined solutions to perceived issues and problems by attempting to discern the legislative purpose based on an analysis of the textual and policy grounds as revealed in statutory provisions and amendments to those statutes. Part V reports the results observed in a systematic empirical study of agency resolutions of contested cases. This study was divided into two distinct parts. First, I examined the pattern of decision-making in the OAH to discern how often petitioners prevailed before ALJs and how often the ALJ's decision was adopted as the agency's final decision.¹⁶⁴ Second, I analyzed cases that were subject to judicial review by the North Carolina Court of Appeals to determine empirical trends in judicial decision-making.¹⁶⁵

Without such a study, only anecdotes exist to explain what might have been motivating the dissatisfaction with the system that prompted the most recent amendments. The empirical assessment probes into what aspects of administrative adjudication were demanding legislative attention before the most recent amendments

[sections of the APA governing the agency's decision process] . . . or reverse or modify the final decision for the agency's failure to provide the explanations; and may take any other action allowed by law.

Id. § 105B-51(c) (Supp. 2000). The provisions governing the agency's decision process include those addressing the agency's reasons for not adopting the ALJ's finding of facts, *Id.* § 150B-36(b1) (Supp. 2000), the agency's reasons for adopting new findings of facts, *id.* § 150B-36(b2) (Supp. 2000), and the agency's reasons for not adopting the decision of the ALJ, *id.* § 150B-36(b3) (Supp. 2000).

164. *See infra* Part V.B. and OAH charts 1-5.

165. *See infra* Part V.C. and APA study charts 1-13.

by examining cases in which citizens challenged agencies' decisions by seeking judicial review.

The results of the empirical analysis of selected cases clearly demonstrate that citizens might rationally have come to an expression such as the following: "If you think fighting city hall is tough, then you haven't seen anything until you try state agencies." First, agencies prevailed and petitioners lost before ALJs in over three-quarters of cases.¹⁶⁶ Second, of the cases in which petitioners prevailed before ALJs (by securing a favorable recommended decision), the agencies rejected nearly half of those recommendations.¹⁶⁷ Third, if petitioners sought judicial review, the superior court upheld the agencies' decisions in over half of the cases in which the agency rejected the ALJ's recommended decision that favored the petitioners.¹⁶⁸ Surprisingly, very similar results could be observed even if one controlled for selected variables that might be thought to affect the outcome of judicial review, such as whether the issue on appeal involved factual findings (with a limited scope of review) or conclusions of law (with a *de novo* standard of review).¹⁶⁹

In sum, the empirical study reported below demonstrates that petitioners, as a class, could have come to the reasoned conclusion that the prospect of prevailing in a challenge to an adverse agency ruling was exceptionally limited. They might have believed the deck was stacked against them. Citizens who had this experience from their difficulties in the adjudicatory process would then be motivated to seek legislative action to address the perceived imbalance.

A. *Purposes and Limitations of the Study*

One can undertake various forms of empirical research designed to investigate specified phenomena or behavior.¹⁷⁰ One purpose of this study is to discover what actually has happened historically, revealed by answering, for example, questions such as: What is the rate at which ALJs make recommended decisions in favor of petitioners and agencies, respectively? What is the agency rate of adoption or rejection of the ALJs' recommended decisions? What is

166. See OAH chart 1.

167. See OAH chart 4.

168. See APA study chart 6A.

169. See APA study chart 7 & 8.

170. See generally Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (employing empirical methodology to examine judicial review of federal administrative action). This work is the only study found that investigated administrative law issues involving judicial review.

the rate at which courts affirm, remand, reverse, or modify agency decisions?

This part of the study collected and analyzed data on the outcome of contested cases in which the ALJ made a recommended decision, recording whether the decision was in favor of the petitioner or the agency. Also, the study collected and analyzed data on the number of cases in which the agency accepted or rejected the recommended decision, controlling for whether the decision favored the petitioner or the agency.¹⁷¹

A second purpose of the study is to gain insight into the effect that controlling for selected variables might have on attempting to inform one's observations about the potential meaning of the historical observations. In the summer of 1999, I concluded that it would be an instructive exercise to try to discern whether any patterns of judicial conduct—deference or intrusion—existed with respect to agency decisions that were subject to judicial review. Prior to the amendments that became effective January 1, 2001, with certain exceptions,¹⁷² ALJs made *recommended* decisions to agencies.¹⁷³ The recommended decisions did not have binding effect, and could be accepted or rejected by the agency.¹⁷⁴ I decided to examine whether judicial conduct on review of agency decisions exhibited discernable differences based on whether the agency adopted or rejected the ALJ's decision by asking two questions: Do judicial review outcomes have the same pattern when the agency has adopted the ALJ's recommended decision (that is, both the ALJ and

171. Of course, the only substantial issue was the rate of adoption of the ALJ's recommended decision that favored the petitioner because the agency invariably would adopt a decision against the petitioner that upheld the agency's decision.

172. N.C. GEN. STAT. § 150B-36(c) (1999) (describing several types of "final" decisions made by ALJs), *amended by* Act of July 12, 2000, ch. 190, § 7, 2000 N.C. Adv. Legis. Serv. 546, 549; *see also, e.g.*, N.C. GEN. STAT. § 7A-759 (a), (b1), (e) (1999) (stating that in an employment discrimination decision, as a deferral agency for the Federal Equal Employment Opportunity Commission, an order entered by an administrative law judge after a hearing on the merits of a deferred charge constitutes a final agency decision that is binding on the parties).

173. N.C. GEN. STAT. § 150B-34(a) (1999), *amended by* Act of July 12, 2000, ch. 190, § 6, 2000 N.C. Adv. Legis. Serv. 546, 547-48 (deleting the recommended decision provision).

174. As discussed above, under prior law if the agency did not adopt the ALJ's recommended decision as the agency's final decision, the agency was only required to "state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision." N.C. GEN. STAT. § 150B-36(b) (1999), *amended by* Act of July 12, 2000, ch. 190, § 7, 2000 N.C. Adv. Legis. Serv. 546, 548 (holding agencies to the more rigorous requirement of stating the reasons for its final decision, instead of merely stating why the ALJ's decision was incorrect).

the agency agreed) as they do when the agency has rejected the ALJ's decision (that is, the ALJ and the agency disagreed)? If one controls for instances in which the agency adopted the ALJ's recommended decision and when it did not adopt the ALJ's recommended decision, are there any patterns of judicial review outcomes when courts look at "law-based" issues—as to which the review is *de novo*—than when the issues are "fact-based," when the substantial evidence test constrains judicial review?¹⁷⁵ Accordingly, this study examined various types of ALJ decisions to track whether the judicial review differed: (1) if the agency agreed and adopted the ALJ's recommended decision; or (2) if the agency disagreed and rejected the ALJ's recommended decision. Within each of these two categories, the study coded data for: (a) whether the decision was "primarily" for the petitioner; or (b) whether it was "primarily" for the agency; and (c) whether the decision was "primarily fact-based"; or (d) whether it was "primarily law-based."

Third, and somewhat serendipitously, an additional purpose of the study developed after the enactment of the 2001 amendments. In view of the fact that judicial review of decisions in which the agency did not adopt the ALJ's decision will be conducted *de novo*, the study can be seen as potentially setting up expectations or a mildly predictive model of future behavior of courts conducting judicial review under the new regime. But the likely overall difference in the pre-amendment and post-amendment environment in which judicial review will be conducted, confounds determination of the predictive value of the analysis.

Fourth, the study sheds significant light on an external phenomenon. It demonstrates the low rate at which petitioners challenging agency action reasonably could expect to succeed at any level of the administrative process after an agency's action gave rise to a contested case. This factor, indeed, may have been, and very likely was, the most powerful force generating constituent pressure on

175. It would also be informative to examine the views of the judges who conduct substantial amounts of judicial review. But that is beyond the scope of the present study.

The prior version of the APA made Wake County, where most agencies have their headquarters in the capital city of Raleigh, the venue for most judicial review, except in limited cases. N.C. GEN. STAT. § 150A-45 (Supp. 1974), *amended by* Act of July 12, 1985, ch 746, sec. 1, § 150A-51, 1985 N.C. Sess. Laws 978, 1006. Thus, the superior court bench in Wake County heard more judicial review matters than judges in other counties and judicial districts. The APA as revised in 1985 extended the venue, by providing that venue be Wake County *or* the petitioner's county of residence. N.C. GEN. STAT. § 150B-45 (1999) (emphasis added).

members of the General Assembly to take some measures to effect a better balance to the system.

Research of this kind is subject to certain inherent limits. These limitations are discussed in the Appendix to this Article in which I set forth the methodology employed in attempting to make the analysis posited. But two major limitations are worthy of note at this point. First, the data do not account for the merits of the cases that are examined. Whether petitioners had non-meritorious cases or whether agencies' decisions were correct on facts and law are not in any way reflected or evaluated in the study reported here. That is to say, for example, that the finding that generally petitioners do not prevail at any level of the post-contested-case system does not permit any insight or criticism about why the phenomenon exists. Second, this study does not attempt to discover how many cases were settled informally between agencies and potential petitioners. There exists, therefore, no way to know whether the addition of such settled cases to the cases that reached disposition as contested cases before ALJs would change the observations about the cases studied.¹⁷⁶

176. Although a full description of the methodology for this study is contained in the Appendix, this footnote sets forth a quick overview. What can analysis of cases tell us? Is the number of cases too small to show meaningful patterns? I leave that to the reader. However, I do point out that this study is not based on statistical sampling methodologies. There can be questions about what the cases represent. There may be factors that could bias the results one observes, such as resources available to petitioners, the nature or magnitude of the interests at stake in the dispute, access to legal representation, adventitious factors that affected whether a petitioner who sought judicial review in superior court, but did not proceed to the court of appeals, or even the criteria the study used to determine whether a case would be included. These are surely important factors. But aside from these factors that might properly cause one to temper the conclusions one draws, there are no biases in the selection of the cases for the study because all of the cases in existence that met the study parameters are included in the analysis.

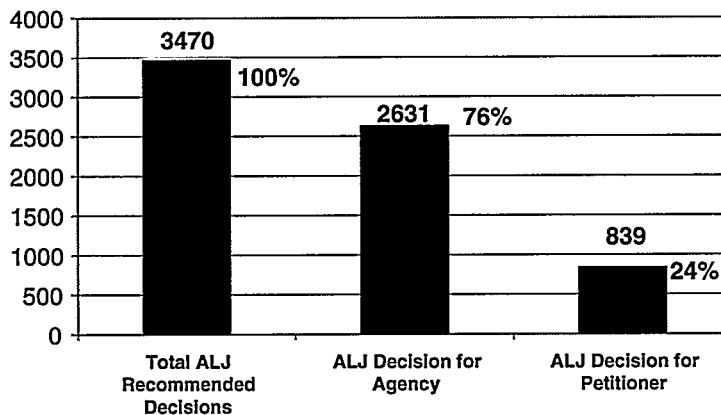
One other factor is worthy of note. All of the cases raised legal issues of importance to the petitioners and the respondents involved. Each case presented facts and law that determined the merits of the particular case before the ALJ, the agency, the superior court, the court of appeals, and the supreme court. This study does not intend to denigrate the merits of any case. On the contrary, the author believes that the merits do matter when assessing outcomes such as those analyzed in the cases. Nevertheless, impressions of the parties, satisfactions derived after participation, the sense of having had a day in court, and the sense that the process was fair, though clearly related to the merits of the case in some objective way, may be central factors motivating a reexamination of the administrative process in North Carolina and complaints to the General Assembly. That is to say, impressions matter, distinct from the merits.

Finally, there may well be enough cases to gain insight, however limited, into what in fact is happening in administrative hearings and what the courts are doing when conducting judicial review of cases.

B. *The Volume and Pattern of OAH Decisions*

Since its inception in 1985 through 1999, the Office of Administrative Hearings (“OAH”) has conducted 3,470 administrative hearings in which an ALJ made a recommended decision to the applicable agency. Of those total decisions, the ALJs’ recommendations favored the agency in 2,631 cases, or 76% of the time. In other words, agencies prevailed before the OAH in just over three-fourths of the cases heard by ALJs, while petitioners prevailed in 839 or 24% of the cases. (See OAH chart 1.)

OAH CHART 1: Total Adoptions of Recommended Decisions with Proportion for Agency and Petitioner; Inception Through 1999



Source: Data supplied by the Office of Administrative Hearings

Of the *total* cases heard in the OAH, the petitioners sought judicial review in a much higher percentage of cases in which the ALJ made a recommendation favorable to petitioners (and the agency rejected the recommendation) than the cases in which the ALJ’s recommendation favored the agency (and the agency adopted the recommendation).¹⁷⁷ In the total volume of cases heard in the OAH, ALJs rendered decisions in favor of agencies 76% of the time. But, as set forth below in APA study chart 11,¹⁷⁸ in the eighty-four cases analyzed in this study in which the petitioner sought judicial review, the ALJ made a recommendation in favor of the petitioner 71% of the time. One can only speculate as to what might explain the differences. Such speculation might include that the ALJ’s

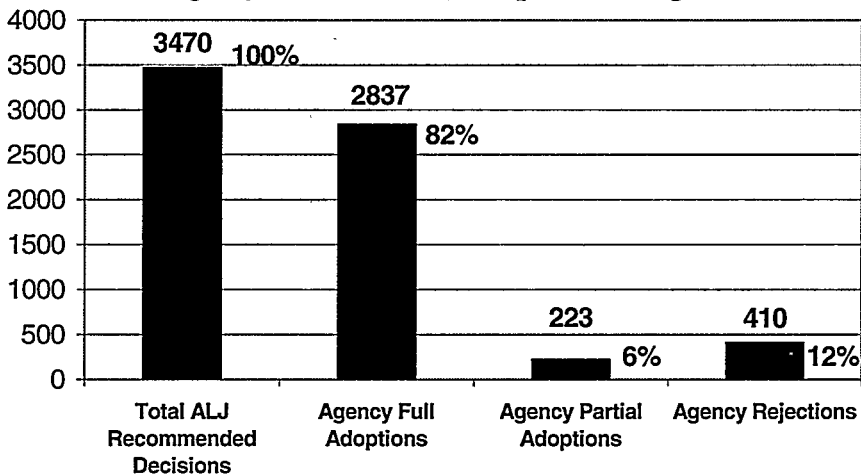
177. The cases heard on judicial review are the subject of the study discussed in the next section of this Article. See *infra* Part V.C.

178. See *infra* Part V.D.

recommended decision favorable to the petitioner emboldened the petitioner to seek judicial review, or conversely, the unfavorable decision discouraged the seeking of judicial review. Moreover, the petitioners who sought judicial review, as a class, may have had greater resources than those who did not seek judicial review. For instance, the petitioners who got favorable decisions may have had greater interests at stake, or were represented by legal counsel. The study, however, does not provide a basis to gain insight into these differences.

When analyzing the rate at which the agencies adopted the ALJs' recommended decisions, one must keep in mind that 76% of the cases favored the agency. Thus, of the 3,470 total cases decided by the OAH, the agencies adopted 2,837, or 82% of the cases. Agencies partially adopted another 223, or 6% of the cases decided. The agencies rejected 410 cases, or 12% of the total cases decided. (See OAH chart 2.)

OAH CHART 2: Total OAH Decisions with Proportion for Agency and Petitioner; Inception Through 1999



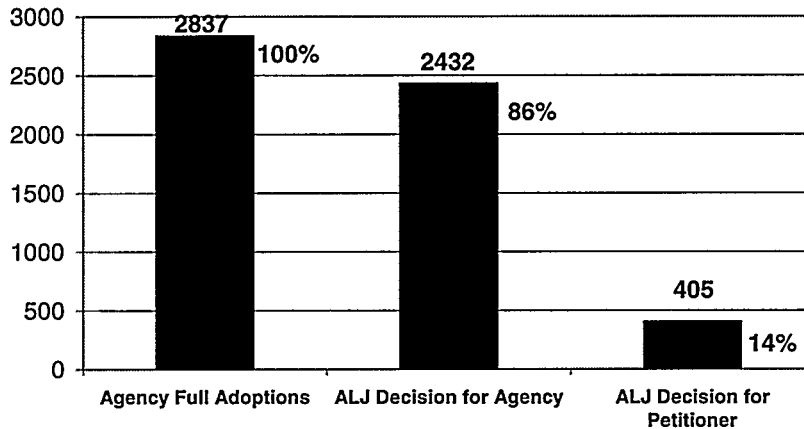
Source: Data supplied by the Office of Administrative Hearings

With proportions such as these, the question naturally arises concerning what problem might have generated enough heat that the General Assembly was hearing loud complaints about the futility of citizens going through the ALJ hearing process.

Recall that agencies, without much restraint from the courts, could and did reject recommended decisions with which they disagreed. Therein lies an insight. Of the 2,837 ALJ recommended

decisions that agencies adopted, 2,432, or 86%, of the cases *avored* the *agencies*. The agencies adopted 405, or only 14%, of the ALJ's recommended decisions that *avored* the *petitioner*. Thus, the small proportion of decisions that favored the petitioners in the OAH is one part of the picture. (See OAH chart 3.)

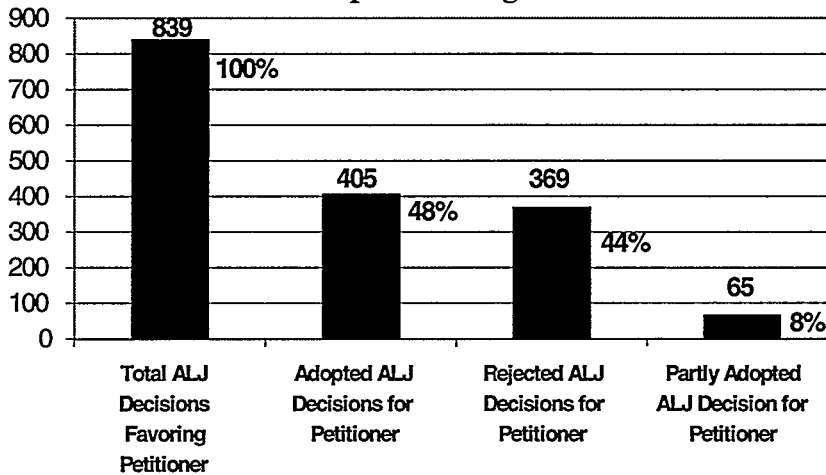
OAH CHART 3: Total Agency Adoptions of Recommended Decisions with Proportion for Agency and Petitioner; Inception Through 1999



Source: Data supplied by the Office of Administrative Hearings

Consider this phenomenon further. The ALJ made a recommended decision favoring the petitioner in a total of 839 cases. The agencies adopted 405, or 48%, of the cases. Agencies partly adopted sixty-five, or 8% of the cases. Agencies rejected nearly as many cases, 369, or 44% of the total decisional volume in which ALJs made recommendations favoring petitioners. (See OAH chart 4.)

OAH CHART 4: Number of ALJ Recommended Decisions For Petitioner with Agency Disposition; Inception Through 1999

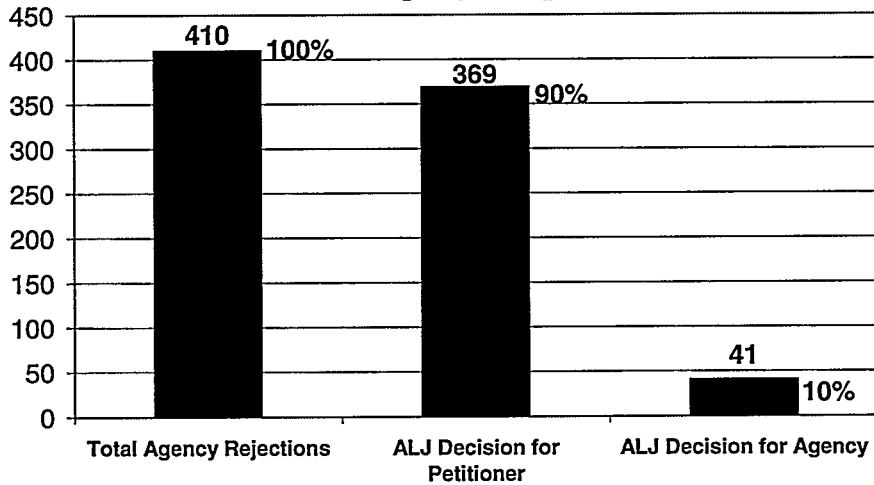


Source: Data supplied by the Office of Administrative Hearings

Finally, the last piece of the puzzle can be brought into view. As could be expected, the most numerous subset of decisions that agencies reject are those favoring petitioners. The agencies rejected 410 of 3,470 cases, or 12% of the total cases decided in the OAH. (See OAH chart 2.) But of the 410 cases rejected, 369, or 90%, favored petitioners. (See OAH chart 5.) The conclusion is that when citizens have disputes with agencies, their only alternative is to go through the process of an OAH hearing¹⁷⁹ if they desire to seek judicial review, but can expect to prevail in only 24% of the cases (839 of 3,470 cases). (See OAH chart 1.) Even in the cases in which petitioners prevail before the OAH, the outcome is uncertain as agencies reject the ALJs' recommended decisions in nearly half (44%) of the cases overall (410 of 859 cases), and 90% of the cases in which petitioners had prevailed (369 of 410 cases). (See OAH chart 5.)

179. Under the exhaustion doctrine, petitioners go through the process of an OAH hearing if they desire to seek judicial review. N.C. GEN. STAT. § 150B-43 (1999) (stating that an aggrieved person may obtain judicial review only if he has exhausted all available administrative remedies).

OAH CHART 5: Total Agency Rejections with Proportion for Petitioner and Agency; Inception Through 1999



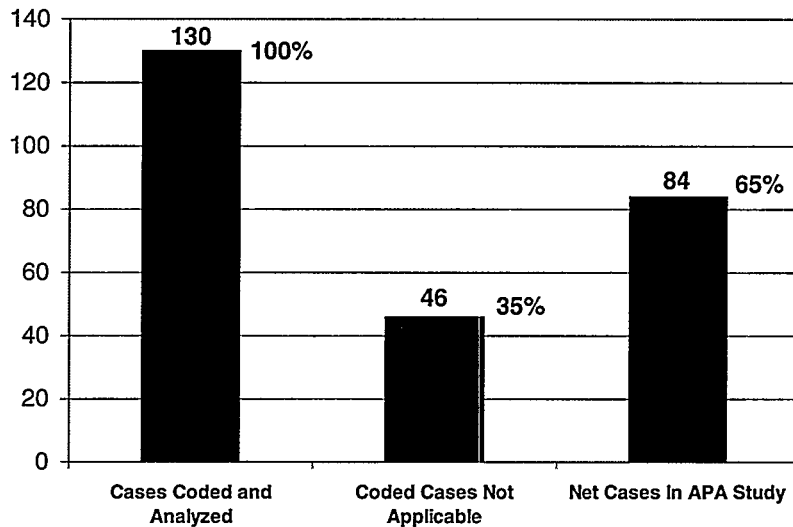
Source: Data supplied by the Office of Administrative Hearings

C. Analysis of the Outcomes on Judicial Review of Agency Decisions

The study analyzed 130 cases that were subject to judicial review after the creation of the OAH and that reached the court of appeals. Forty-six of those cases did not fit the basic parameters of the study.¹⁸⁰ In order to qualify for the study, a case needed to meet three key requirements. First, the case had to be subject to an administrative hearing before an ALJ. Second, the ALJ needed the authority to make a recommended decision that the agency could choose to adopt. Third, the initial judicial review on the merits of the case needed to be held in the North Carolina Superior Court. On this basis, of the 130 cases analyzed, eighty-four cases, just under two-thirds (65%), met the study requirements and parameters. (See APA study chart 1.)

180. See Appendix for further description.

APA STUDY CHART 1: Net Cases Analyzed in Study

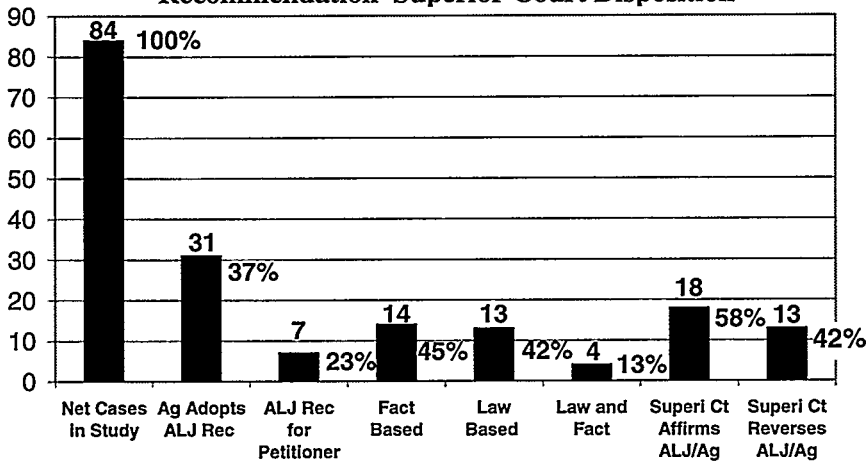


1. Judicial Review When the Agency *Adopts* the ALJ's Recommended Decisions

Of the eighty-four cases studied, the agency adopted the ALJ's recommended decision on the "key issue"¹⁸¹ in thirty-one, or 37%, of the cases. Of the thirty-one cases the agency adopted, only seven, or 23%, of the cases were favorable to the petitioner on the key issue. The thirty-one cases the agency adopted were about evenly divided between fact-based (fourteen) and law-based (thirteen) issues. Over all, the superior court affirmed a little better than half of the thirty-one cases (58%) and reversed slightly less than half (42%). (See APA study chart 2A.)

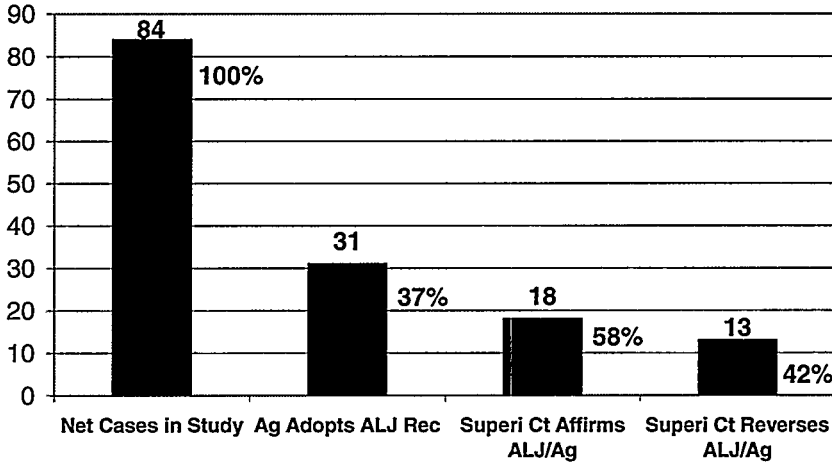
181. See Appendix for full description of the "key issue."

APA STUDY CHART 2A: Agency Adopted ALJ Recommendation—Superior Court Disposition



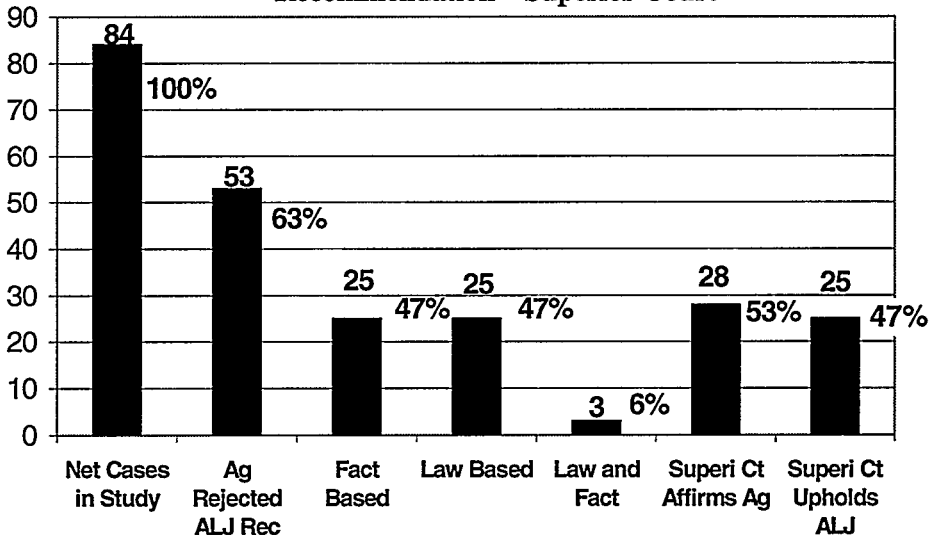
One might have hypothesized that the cases would show a different pattern of dispositions when both the ALJ and the agency agreed on the result, with the court giving greater credence to that outcome than in the cases in which the ALJ and the agency disagreed—that is the agency rejected the ALJ’s recommendation. One’s theory might be that when a “disinterested” decision-maker (the ALJ) and a potentially interested entity (the agency) agreed with the outcome, the greater the likelihood that the court would affirm this decision. This study does not confirm or support that hypothesis. When the ALJ and the agency agreed on the result (that is, the thirty-one cases in which the agency adopted the ALJ’s recommended decision), the superior court affirmed the ALJ and the agency in 58% of the cases and reversed them in 42% of the cases. (See APA study chart 2B.)

APA STUDY CHART 2B: Agency Adopted ALJ Recommendation—Superior Court Disposition



The agency rejected the ALJ’s recommendation in fifty-three of the eighty-four cases studied. Of the fifty-three cases in which the ALJ and the agency *disagreed*—that is, the ALJ recommended one way and the agency refused to adopt the recommended decision and decided the case another way—dispositions in superior court follow a similar pattern. The superior court affirmed the agency in 53% of the cases and reversed the agency (thus upholding the ALJ) in 47% of the cases. (See APA study chart 6A.)

APA STUDY CHART 6A: Agency Rejected ALJ Recommendation—Superior Court



The observation is that no distinct pattern exists of a materially higher reversal rate when the ALJ and the agency disagreed than when the ALJ and agency agreed. It is unlikely that the 5% differential in upholding the agencies (58% when the ALJ and agency *agreed* versus 53% when they *disagreed*) can be seen as predicting superior court dispositions if the only variable known is whether the ALJ and the agency agreed on the result or not. Therefore, the study does not support the conclusion that the superior court's disposition on judicial review is in any way dependent upon the agency's disposition regarding the ALJ's recommended decision.

It is worthy of note, that under the revisions of the APA that became effective on January 1, 2001, the General Assembly has determined that if the agency did not adopt the ALJ's decision, then review in superior court is to be *de novo*.¹⁸² Thus, under the revised scope and standard of judicial review, a major procedural and decisional consequence will be mandated dependent on precisely the question of whether the agency does or does not adopt the ALJ's decision. But, the current pattern of decision-making provides no basis to predict how dispositions will be made under the new regime.

a. Superior Court Disposition When the Key Issue is a Question of Law or a Question of Fact

Under the traditional scope of review, courts review questions of law *de novo*.¹⁸³ Review of questions of fact is under the rubric of "substantial evidence on the whole record."¹⁸⁴ Intuitively, one might regard *de novo* review as more likely to result in a reversal because a court needs merely to disagree with the agency's conclusions and is, at least in theory, free to substitute its judgment for the agency's. Conversely, one might think a court would not reverse a finding of fact or substitute its judgment if the agency's conclusion was "reasonable," even if the court disagreed with the matter, and would have reached a different finding if it were considering the matter initially.

The findings of the study are counterintuitive to this suggestion. When the agency adopted the ALJ's recommended decision, the superior court affirmed and reversed fact-based decisions at an equal

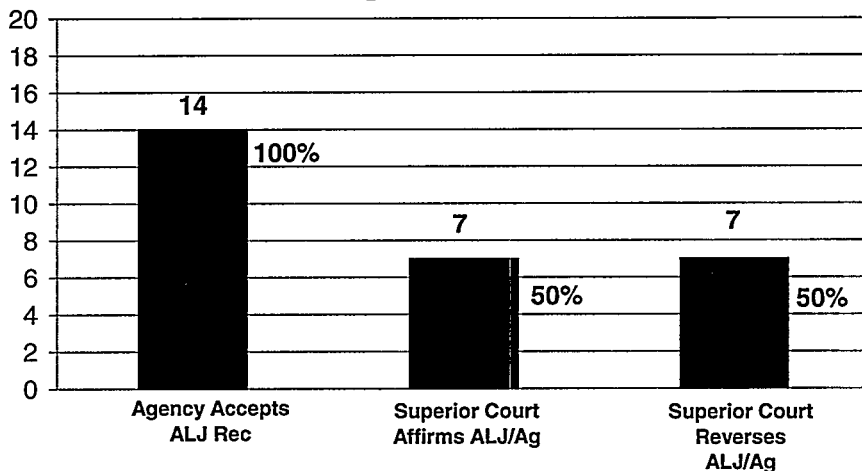
182. N.C. GEN. STAT. § 150B-51(c) (Supp. 2000).

183. *See, e.g.,* Staton v. Brame, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999) (stating that courts review questions of law *de novo*).

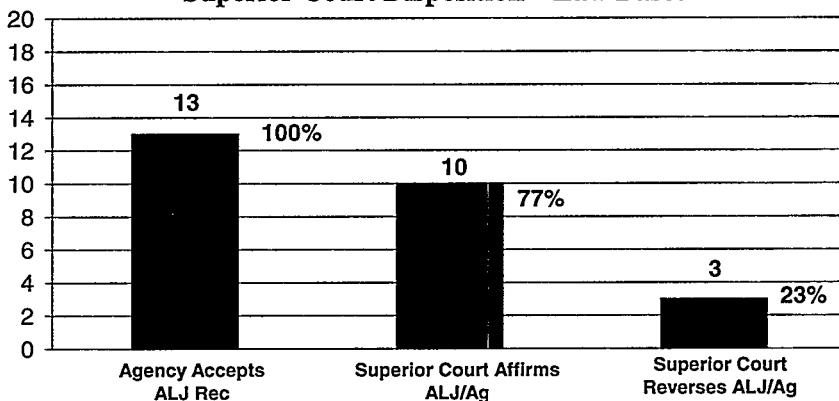
184. *Williams v. Burlington Indus., Inc.*, 318 N.C. 441, 448, 349 S.E.2d 842, 847 (1986) (holding that the whole record test is the preferred method for reviewing questions of fact).

rate (50% were affirmed and 50% were reversed). (See APA Study chart 3.) Even more strikingly, when the agency adopted the ALJ's recommended decision the superior court affirmed 77% of the cases that were law-based, while reversing only 23%. (See APA study chart 4.)

APA STUDY CHART 3: Agency Adopted ALJ Recommendation; Superior Court Disposition—Fact Based



APA STUDY CHART 4: Agency Adopted ALJ Result; Superior Court Disposition—Law Based

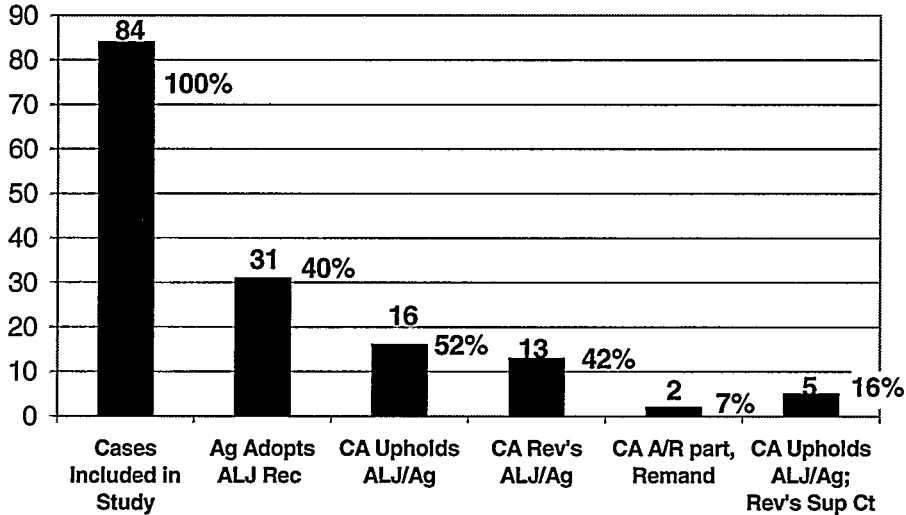


b. Court of Appeals Disposition When the Agency Adopts the ALJ's Recommended Decision

When the agency adopted the ALJ's recommended decision, the court of appeals upheld the agency and ALJ (who, by definition, had agreed on the outcome) in 52% of the cases, while reversing 42% of

the cases. Of the sixteen cases upholding the ALJ and the agency, the court of appeals reversed the superior court in five cases. It affirmed or reversed in part, or remanded only two cases. (See APA study chart 5.)

**APA STUDY CHART 5: Agency Adopted Recommendation—
Court of Appeals Disposition**

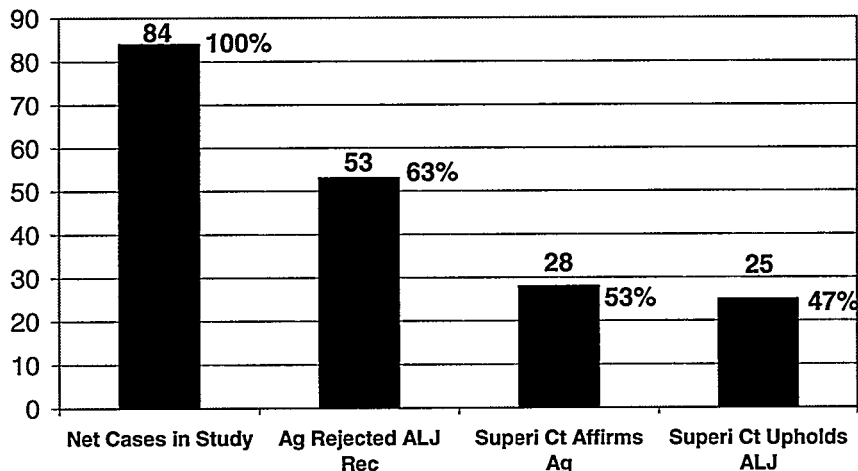


2. Judicial Review When the Agency Does Not Adopt the ALJ's Recommended Decision

Of the eighty-four cases in the study, the agency did not adopt the ALJ's recommended decision ("rejected") on the key issue in 53 cases (or 63% of the time). Remarkably, the key issue involved in twenty-five, or 47%, of the cases was a fact-based issue and in twenty-five, or 47%, the key issue was law-based. (See APA study chart 6A.)

The superior court decided 53% of the cases in favor of the agency's disposition and 47% of the cases in favor of the ALJ's recommended disposition that the agency had rejected. (See APA study chart 6B.)

APA STUDY CHART 6B: Agency Rejected ALJ Recommendation—Superior Court Disposition



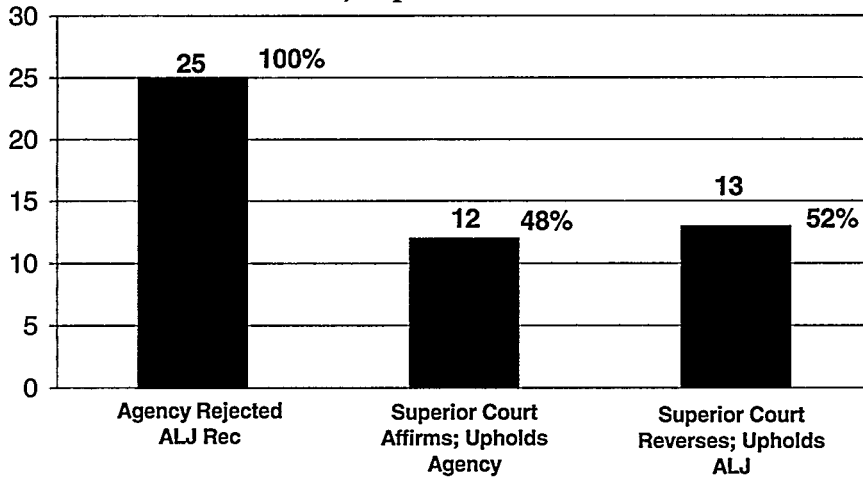
This result demonstrates that the superior court affirms the agency, even when it has rejected the ALJ's recommendation, about half the time. The superior court similarly reverses the agency, thus affirming the ALJ, about half the time.

The finding that when the agency rejected the ALJ's recommendation the superior court upheld the agency and the ALJ with approximately the same frequency (the agency, 53% of the time versus the ALJ, 47% of the time) is difficult to interpret. One might have hypothesized a higher agency reversal rate (that is upholding the ALJ) when the ALJ and the agency disagreed. But the study does not support the hypothesis that the courts are giving decisive weight to the ALJs as disinterested, neutral decision-makers. Conversely, the study does not support the view that the superior courts are giving weight to agencies' outcomes either, as well they might if one accepts the notion that agencies, at least in theory, have greater expertise.

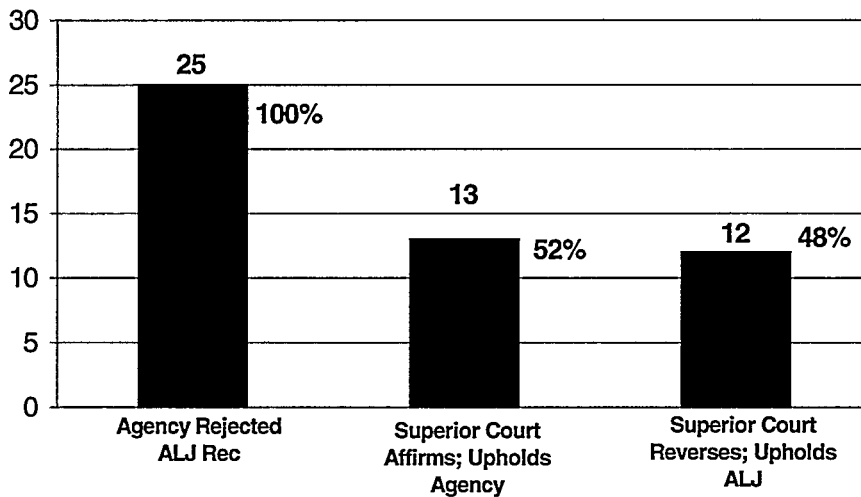
a. Superior Court Disposition Depending on Whether the Key Issue is a Question of Law or a Question of Fact

In the cases in which the agency has rejected the ALJ's recommended decision, one can similarly seek to determine if any patterns exist based on whether the key issue was fact-based or law-based. As in the cases in which agencies adopted the ALJs' recommended decisions, the cases do not confirm the hypothesis that law-based cases might be reversed at a greater frequency than fact-based cases. (See APA study chart 7 & 8.)

APA STUDY CHART 7: Agency Rejected ALJ Recommendation; Superior Court Review—Fact Based



APA STUDY CHART 8: Agency Rejected ALJ Recommendation; Superior Court Review—Law Based



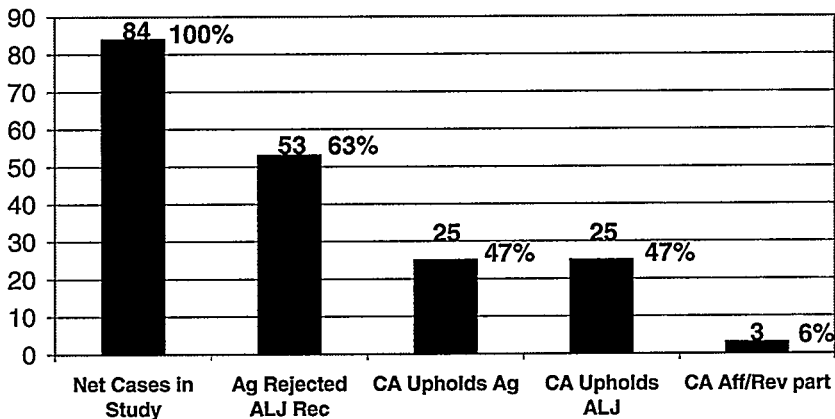
As can be seen, when the issues are fact-based, the superior court affirms the decision, thus upholding the agency's rejection of the ALJ's recommended decision, 48% of the time, while reversing the agency, and thus upholding the ALJ, in 52% of these cases. Four percentage points is the margin of difference.

When the issues are law-based, the results are similar. Of the cases in which the agency rejected the ALJ's recommended decision, the superior court affirmed the agency in 52% of the cases, and reversed the agency, thus upholding the ALJ, in 48% of the cases. If any insight is to be gained here, it is the counterintuitive conclusion that the rate of affirmance is marginally *higher* in law-based cases than in fact-based ones. But the four percentage point differential would not yield any reliable prediction of the likely outcome of superior court judicial review of agency decisions based on whether the key issue in the case was fact-based or law-based.

b. Court of Appeals Disposition When the Agency Did Not Adopt the ALJ's Recommended Decision

When agencies rejected ALJs' recommended decisions, remarkably, the court of appeals disposition was divided equally between upholding the agency and upholding the ALJ, with each disposition being made in 47% of the cases. In the remaining 6% of the cases (three cases), the court of appeals affirmed in part and reversed in part. (See APA study chart 9.)

APA STUDY CHART 9: Agency Rejected ALJ Recommendation; Court of Appeals Disposition

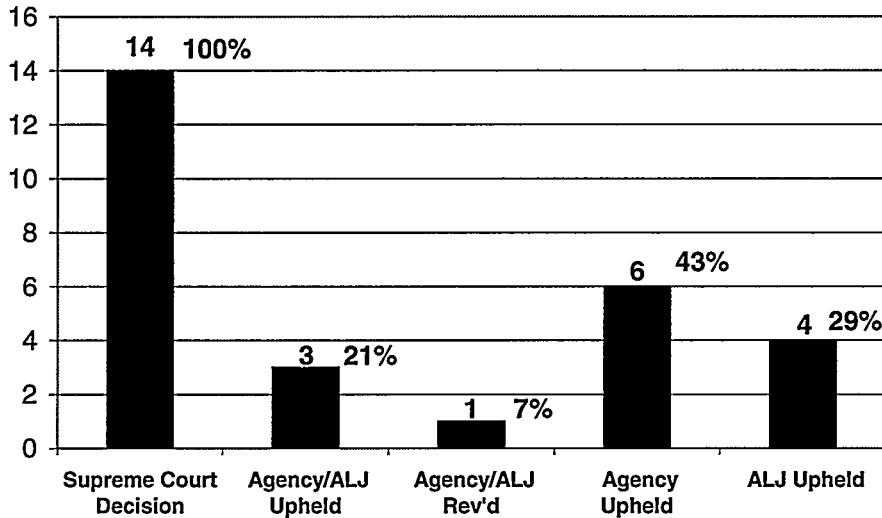


3. Judicial Review in the Supreme Court

Only fourteen, or 17%, of the eighty-four cases studied reached a disposition in the North Carolina Supreme Court. Of those cases,

the only insight the data seem to permit is that agencies were upheld 43% of the time when they rejected the recommended decisions of ALJs. In contrast, ALJs were upheld 29% of the time in those cases. (See APA study chart 10.)

APA STUDY CHART 10: Supreme Court Disposition



D. The Bottom Line: Petitioners Normally Do Not Prevail in the Administrative Process

If there is any observation that one can make as a result of the study, the observation is that it is very difficult for petitioners to prevail in the administrative process. This may well have fueled the concerns legislators were hearing that eventually lead to the amendments that became effective on January 1, 2001.

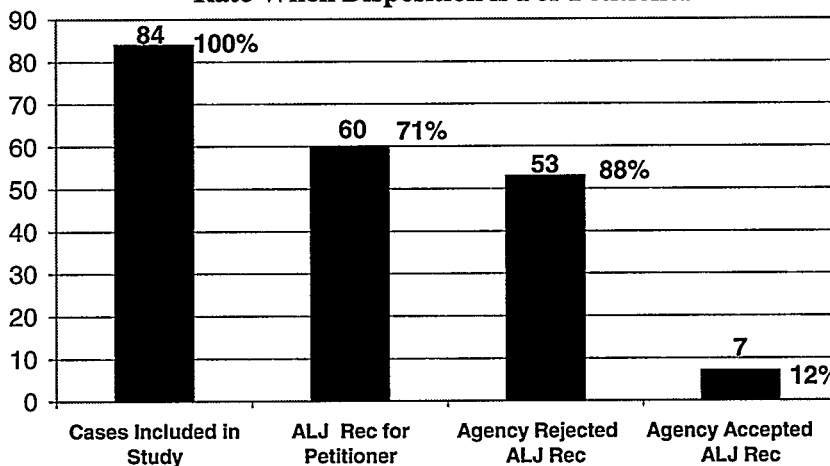
First, most petitioners lose before the ALJ. Only 24% of cases disposed of in the OAH are decided in favor of petitioners. (See OAH chart 1.) However, that is just part of the story. Of the total volume of cases that reached disposition in the OAH (3,470), only 130 advanced to the court of appeals. Eighty-four of these 130 cases are included in this study under the conditions that limited the types of cases analyzed.¹⁸⁵ Therefore, of the total OAH dispositions (3,470

185. Some cases could have ended in superior court without appeal to the court of appeals and are not included in the study. But in light of the fact that cases can be appealed as of right from superior court to the court of appeals, one can speculate that there was not a particularly significant diminution of cases. Petitioners might have been

cases), only eighty-four, or 2.4%, of the cases are analyzed in this study. But these cases are *not* a sample. They represent the entire universe of applicable cases that were disposed of in the court of appeals. Quite literally, the cases studied are all the cases that exist.

In contrast to the pattern of cases disposed of in the OAH, in which petitioners prevailed only 24% of the time, of the cases that reached decision in the court of appeals and thus are included in this study, the *petitioners prevailed* before the OAH 71% of the time. But the agencies *rejected* the ALJ's recommendation in 88% of those cases. Put differently, the agencies adopted the ALJ's key recommendation in only seven, or 12%, of the sixty cases in which the ALJ's recommendation favored the petitioner. (See APA study chart 11.)

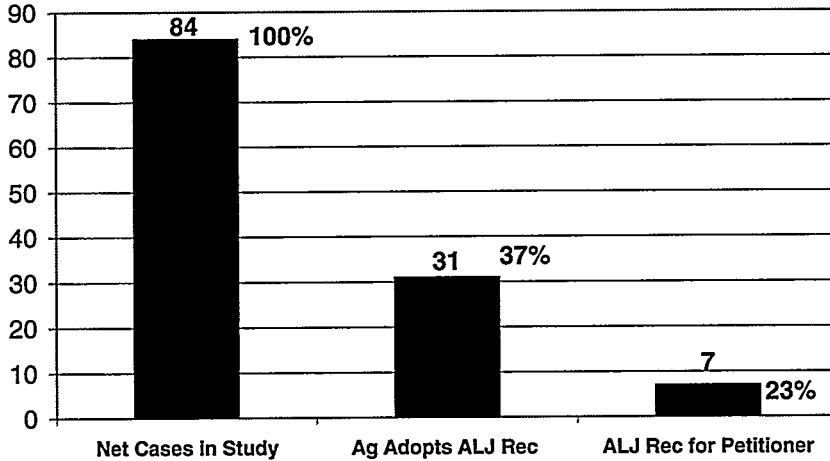
**APA STUDY CHART 11: Agency Rejection/Adoption
Rate When Disposition is For Petitioner**



From a different perspective, the petitioner's chance of success appears even less likely. This study included eighty-four cases. The agencies adopted the ALJs' recommended decisions in thirty-one, or 37%, of the cases. *Of those thirty-one cases, only seven, or 23%, favored petitioners.* (See APA study chart 12.)

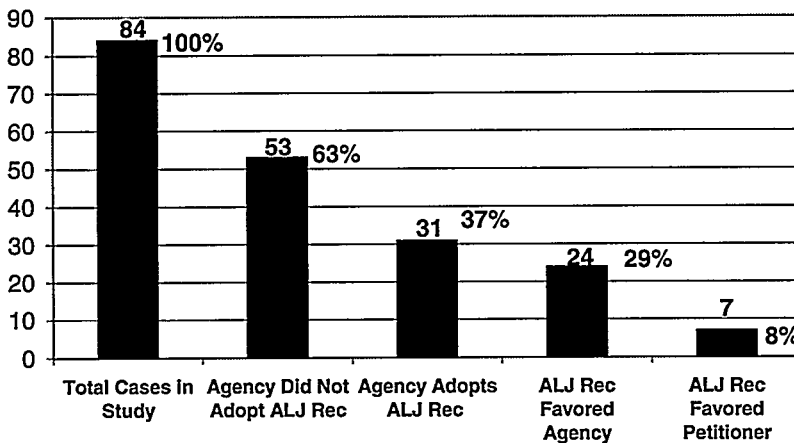
deterred if the court sustained the agency. In contrast, the agency might not have appealed an adverse decision in superior court. These are all imponderable matters.

APA STUDY CHART 12: Agency Rejection/Adoption Rate When Disposition is for Petitioner



Finally, consider the total picture. Of the eighty-four cases studied, the agencies rejected the ALJs' recommended decisions in 63% of the cases. The agencies adopted the ALJs' recommended decisions in thirty-one, or 37%, of the cases. But, of the thirty-one cases in which the agencies adopted the ALJs' recommended decisions, twenty-four, or 29% of the total cases, favored the agency. This analysis demonstrates that of the eighty-four cases studied, petitioners prevailed before both the ALJ *and* the agency only seven times, or a somewhat small 8% of the cases. (See APA study chart 13.)

APA STUDY CHART 13: Agency Adoption/Rejection Rates; With Proportion for Petitioner Shown



Exactly why petitioners do not prevail at a greater rate cannot be determined. Any number of hypotheses might be advanced. One hypothesis is that the North Carolina agencies correctly found facts and properly applied the law when they had disputed matters to resolve. Another possibility is that the OAH dispositions demonstrate bias in favor of agencies. Perhaps the courts do not properly keep agencies in check by applying rigorous judicial review. It is also possible that petitioners did not have adequate resources to effectively pursue their cases in the OAH and on judicial review. There are undoubtedly other possible hypotheses. Regrettably, nothing in the study reported here confirms or refutes any of these possible theories.

Nevertheless, it would not necessarily amount to unwarranted speculation to suggest that this study demonstrates that nearly all of the petitioners may have left the administrative process with a feeling of futility about the efficacy, if indeed not also about the fundamental fairness, of the administrative process. This is the process that empowers agencies to affect the rights and property of citizens. This is the process that requires petitioners to participate in a hearing in the OAH, where they lose 76% of the time, before they may even seek judicial review. This sense of futility could only have been compounded when the case reached judicial review. The data do not show that petitioners seeking judicial review had a sufficient likelihood of prevailing to give petitioners, as a class, who were disappointed with the outcome before the agency, any feeling that they had been heard effectively in court. Accordingly, they might have come away from the entire process thinking that the deck was stacked against them from the outset.

One could also reason that some of these petitioners had enough energy and influence to make a case to their legislative representatives. Whether the General Assembly's latest attempt to adjust the administrative process in the recent amendments will prove effective at ameliorating what might have generated something of an outcry remains to be seen.

APPENDIX

Description of the APA Study Empirical Analysis and Methodology

To conduct this empirical analysis of judicial review of administrative agency decisions in North Carolina, I researched all opinions that were subject to judicial review in the North Carolina Court of Appeals, in which the court issued a published opinion that involved the North Carolina Administrative Procedure Act.¹⁸⁶ I then identified all cases that arose after the creation of the Office of Administrative Hearings in 1985¹⁸⁷ and included all decisions through the end of the year 1999. The first cases to reach decision in the court of appeals were decided in 1988.

The first level of judicial review is in superior court.¹⁸⁸ But superior courts do not have published decisions. The legislation that created the OAH was enacted in the same year that the APA was amended to set the venue for judicial review in the county in which the petitioner resided, as well as in Wake County.¹⁸⁹ That means that judicial review decisions may be rendered in any of North Carolina's one hundred counties. Research of all superior court decisions, therefore, would prove to be extremely daunting, if not impossible as a practical matter. Thus, researching the cases in the court of appeals was dictated by practical reality.

Every case included in the study contained a statement of the procedure involved in the proceeding, whether an ALJ had made a recommended decision, whether the agency had adopted the recommendation or not, and the disposition in the superior court on judicial review. Of the cases that met the criteria stated above, only cases in which the ALJ was making a *recommended* decision are included. The limited number of cases in which the ALJ had final decision-making authority that was binding are not included in the study.¹⁹⁰

186. A complete file of all cases, with notations of the coding decisions, is maintained in the office of the author.

187. See N.C. GEN. STAT. §§ 7A-750 to -759 (1999 & Supp. 2000).

188. *Id.* § 150B-45 (1999).

189. *Id.* § 150B-45 (Supp. 1974), amended by Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws. 987, 1006 (stating that a petitioner may seek judicial review in either Wake County or the superior court of the county where the petitioner resides).

190. See *id.* § 150B-36(c) (Supp. 2000); see also *id.* § 7A-759(e) (1999) (stating that ALJs shall have final authority in certain employment discrimination cases).

In addition, the study included only those cases arising in agencies that are subject to the APA. Thus, no cases are included involving agencies that are exempt entirely from the APA¹⁹¹ or from agencies that are either exempt from the contested case provisions¹⁹² or exempt from provisions requiring the use of an ALJ to make a recommended decision.¹⁹³ Also, no cases are included involving a procedural issue, such as a record insufficient to permit judicial review when that issue was not dispositive of a key issue on the merits of the dispute.¹⁹⁴

In a few cases that were not included in the study, collateral issues, such as attorney's fees, were the focus of judicial review.¹⁹⁵ Other cases were not included in the analysis because the cases, or a step in a proceeding in the cases, did not involve a final disposition on the merits.¹⁹⁶

Some cases do not have initial judicial review in superior court. Examples of these are cases involving certificates of need for a health care facility. These cases go from the agency directly to the court of appeals,¹⁹⁷ although ALJs do make recommended decisions in such cases.¹⁹⁸ None of these cases are included in the study. Additionally, cases that reached the court of appeals in which the court did not finally dispose of the case or did not resolve the case on its merits are excluded from the empirical analysis.

A case can involve an agency as the "petitioner" against another agency. These cases are included in the study. An example of this situation can be found in a case in which the Secretary of Labor seeks judicial review of a decision of the Safety Health and Review Board that adopted an ALJ's recommendation to dismiss the citation of a

191. *Id.* § 150B-1(c) (Supp. 2000).

192. *Id.* § 150B-1(e) (Supp. 2000).

193. *Id.* §§ 150B-38 to -42 (Supp. 2000) (covering hearings conducted by article 3A occupational licensing agencies and certain other specified agencies).

194. *See, e.g.*, *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 388-89, 511 S.E.2d 340, 341-42 (1999) (vacating and remanding the superior court's order due to the fact that there was insufficient evidence to determine whether the proper scope of review was undertaken).

195. *See, e.g.*, *Walker v. N.C. Coastal Res. Comm'n*, 124 N.C. App. 1, 1-12, 476 S.E.2d 138, 138-45 (1996) (adjudicating an issue related to the awarding of costs and counsel fees).

196. For example, cases remanded for further proceedings of a preliminary nature were not included in the analysis. *See, e.g.*, *Midway Grading Co., Inc. v. N.C. Dep't of Env't, Health & Natural Res., Div. of Land Res.*, 123 N.C. App. 501, 504-06, 473 S.E.2d 20, 21-23 (1996) (remanding the case to the superior court because the agency's service of process did not comply with the North Carolina Rules of Civil Procedure).

197. N.C. GEN. STAT. § 131E-188(b) (1999).

198. *Id.* § 131E-188(a) (1999).

company that arose from the electrocution of a plant employee by an arc welder.¹⁹⁹

Once I made a decision that the case met the procedural and analytical parameters I established, I then coded the cases to yield a count of selected issues I wanted to examine.

Cases were coded in one series of codes to count whether the “agency accepted the result the ALJ recommended.” The legend on the charts produced from these data states this criterion as: Ag Adopts ALJ Result. (See APA study chart 2A.)

Second, cases were coded to count those in which the “agency rejected the result the ALJ recommended.” The legend on the charts produced from these data states this criterion as: Ag Rejected ALJ Result. (See APA study chart 6A.)

Next, with respect to cases coded as being within either of the two criterion groups, cases within each group were coded to yield a count as to whether the ALJ made a recommended decision on the “key issue”²⁰⁰ in favor of the “petitioner.”²⁰¹ Following the result code, the cases were coded according to the key issue being decided. This codification took three forms: “primarily” fact-based, “primarily” law-based, or involving multiple issues of law and fact. The legends on the charts produced for these data states: “Key Issues Fact Based,” “Key Issues Law Based,” and as involving “Law and Fact.” (See APA study charts 2A & 6A.)

A few cases involved both fact-based issues and law-based issues. These cases required a judgment call as to which was the primary issue.²⁰² In a few cases, the fact-based issues and the law-based issues

199. *Brooks v. BCF Piping, Inc.*, 109 N.C. App. 26, 28–29, 426 S.E.2d 282, 283–84 (1993) (stating that the Commissioner of Labor sought judicial review of the Safety Health & Review Board’s decision to adopt the ALJ’s recommended judgment).

200. “Key issue” was operationally defined, in the sense that I made a judgment about the nature of the case. For example, if a suspension of a license and a civil penalty were involved, and the petitioner got the penalty reduced but the suspension was imposed, the “key issue” would be classified as the suspension. If the petitioner was appealing a civil penalty and the penalty was *substantially reduced*, then the case was coded as one in which the petitioner prevailed on the “key issue.” In cases of multiple issues, I made a judgment call as to which issue would very likely be regarded as “most essential” to the petitioner. For example, if both back pay and a position were involved and petitioner got some back pay but the termination was upheld, the case was coded as one in which the petitioner did not prevail.

201. The designation of petitioner was determined based on the posture of the parties before the ALJ.

202. For example, in *Yates Constr. Co., Inc. v. Comm’r of Labor*, 126 N.C. App. 147, 484 S.E.2d 430 (1997), an employer was found in violation of safety standards and appealed. *Id.* at 149–50, 484 S.E.2d at 431–32. The employer alleged that the agency had not properly interpreted “upper-landing surface” language in the statute, a law-based

seemed to play equally important roles or could not be disentangled to yield a discrete basis for the court's decision. I coded those cases as having multiple issues of law and fact.

Generally, when the final reviewing court conducted a whole record test to determine whether the prior decision was either unsupported by the evidence or arbitrary and capricious, I coded that as a primarily fact-based decision. When the final reviewing court conducted *de novo* review to determine whether the decision contained errors of law, I coded that as a primarily law-based decision.

Next, the cases within a criterion group were coded as to the result in the superior court on judicial review. The results were coded first on cases in which the agency adopted the ALJ's recommended decision, as affirmed, reversed, or modified. The legend on the charts produced from these data states: "Superi Ct Affirms ALJ/Ag;" or "Superi Ct Rev's ALJ/Ag." (See APA study charts 2A, 3, 4, & 5.) Following this step, the cases next were coded to count dispositions in the court of appeals. The legend on the charts produced from these data states: "CA Upholds ALJ/Ag;" "CA Rev's ALJ/Ag;" "CA A/R part, remand;" and "CA Upholds ALJ/Ag; Rev's Sup Ct." (See APA study chart 5.)

With respect to cases in which the agency did not adopt the ALJ's recommended decision, the cases were also coded to count which cases were affirmed, reversed, or modified. The legend on the charts produced from these data states: "Superi Ct Affirms Ag;" "Superi Ct Rev's; Upholds ALJ." (See APA study chart 6A.) Following this step, the cases were coded to count dispositions in the court of appeals. The legend on the charts produced from these data states: "CA Upholds Ag;" "CA Upholds ALJ;" "CA Modified Ag;" "CA Aff/Rev part." (See APA study chart 9.)

The few cases that reached the North Carolina Supreme Court are coded by result in APA study chart 10. For those in which the agency adopted the ALJ's recommended decision, the cases are coded by that result. The legend on the charts states: "Agency/ALJ Upheld" or "Agency/ALJ Rev'd." For the cases in which the agency

issue. *Id.* at 150–51, 484 S.E.2d at 432. Additionally, the employer alleged that even if the agency interpreted the statute correctly, the employer was not in "serious violation," a fact-based issue. *Id.* at 152, 484 S.E.2d at 433–34. The court of appeals addressed each allegation, but did not find significant merit in the employer's law-based allegation. *See id.* at 150–52, 484 S.E.2d at 432–33. The decision, which ultimately was against the employer, seemed primarily determined on the fact-based issue, and thus I coded it as such. *See id.* at 152–54, 484 S.E.2d at 433–34.

rejected the ALJ's recommended decision, the decisions are similarly coded by result. The legend on the chart states: "Agency Upheld," "ALJ Upheld," and whether the case was "Modified" or "Remanded."

APA study chart 11 displays instances in which the eighty-four cases coded were cases in which the ALJ's recommendation favored the petitioner on the key issue, "ALJ Rec for Petitioner," and it then sets forth the proportion of these cases in which the agency did not adopt the ALJ's recommendation ("Agency Rejected ALJ Rec") and the cases in which the agency adopted the ALJ's recommendation on the key issue ("Agency Accepted ALJ Rec").

APA study chart 12 sets forth the proportion of the cases coded in which the agency adopted the ALJ's recommended decision and shows what proportion of those, on the key issue, favored the agency ("Ag Adopts ALJ Rec"), and which favored the petitioner ("ALJ Rec for Petitioner").

APA study chart 13 sets forth the overall pattern that can be observed in the cases coded. It puts together the data displayed in the two previous charts. Of the eighty-four cases coded, the agency rejected the ALJ's recommendation in 63% of the cases ("Agency Did Not Adopt ALJ Rec"). The agency adopted the ALJ's recommended decision in 37% of the eighty-four cases, but 29% of the adopted cases favored the agency ("ALJ Rec Favored Agency") and only 8% of the cases studied that the agency adopted favored the petitioner ("ALJ Rec Favored Petitioner").

