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The West Virginia Administrative Procedure Act

CHARLES M. HARRISON**

An administrative agency is a legislative instrument born in an atmosphere suggesting a need for continuous specialization, supervision and flexibility, and preserved by the complexity of its objectives or the absence of practical and acceptable alternatives. The conditions which inspire its creation encourage a departure from tradition. The unique qualities that result and the absence of appropriate terminology to define them provide a fertile source of debate over what an agency is, or should be, and how it operates or should operate.

For organizational or supervisory purposes an agency may be conveniently assigned to an executive department,¹ but an agency is an assembly of functions corresponding to the three traditional departments of government. By virtue of this very assemblage, an agency's functions differ from those exercised by the separate departments and are therefore distinguished from their counterparts by the use of such terms as "administrative," "delegated legislative" or "rule making" and "quasi-judicial."

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¹ Although reasonable delegation of legislative power to an administrative agency in the executive department is generally sustained, a like delegation to the governor by making him a member of the Public Service Commission was held unconstitutional. *Hodges v. Public Serv. Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931). The same problem was raised in connection with another member of the executive branch (W. VA. CONST. art. VIII), the Commissioner of Agriculture, but the court disregarded the constitutional question raised in the *Hodges* case. *West Central Producers Co-op. Ass'n. v. Commissioner of Agriculture*, 124 W. Va. 81, 20 S.E.2d 797 (1942).

The West Virginia Supreme Court of Appeals has described the legislative, executive and judicial powers as follows:²

“Briefly stated, legislative power is the power of the law-making bodies to frame and enact laws. This power covers a very wide scope. Indeed, except where it is limited by the provision of the State and Federal Constitutions, that power is practically and essentially unlimited. In the Legislature rests the power to apply the police power of the State, and every other power which confers governmental authority not directly, or by necessary constitutional implication, vested in the executive or judicial departments of the State. Unquestionably, the power of regulation of public utilities, the licensing of businesses of all kinds, the regulation of such businesses, the general control thereof, including the power of revoking licenses or permits issued in connection therewith, is a legislative power. This power is subject to control by the courts only where, in the exercise thereof, there has been a violation of some State or Federal constitutional provision, limiting the Legislature in its right to perform certain acts in connection with the power it assumes to exercise. The executive power is more limited: it merely extends to the detail of carrying into effect the laws enacted by the Legislature, as they may be interpreted by the courts. Except where limited by the Constitution itself, the Legislature may stipulate what action the executive officers shall or shall not perform.”

Judicial power was a little more difficult:

“Without attempting to define it, we think this much may be said: It is the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government. The Legislature may impose duties, judicial in character, upon the courts, but having once imposed these powers it has no right to control the exercise thereof; and that, we think, constitutes judicial power.”

Administrative procedure is a battleground and combatants align

² State v. Huber, 129 W. Va. 198, 40 S.E.2d 11 (1946).

themselves according to their allegiance to a philosophy emphasizing one or another of these three functions.

One group emphasizes the agency's performance of executive functions which are ministerial in nature but with enforcement as the primary objective. Members of this group would tend to favor less flexible legislation defining the agency's responsibilities and the establishment of an administrative court as a separate tribunal. A second group leans toward the view of an administrative agency as principally a judicial body established to adjudicate and resolve disputes. In this group, one would find an emphasis on formalized rules of procedure, detachment of the agency, and strict rules of evidence. The third group relies upon the delegation of legislative powers and supports a very high degree of informality. For the legislative group, the agency is composed of legislative experts by whom both facts and law are determined with finality, unless such determination is arbitrary or capricious.

Whether an administrative procedure is workable depends on the method and the degree in which these conflicting views are reconciled. Recognition of the conflict helps to explain some of the inconsistencies sometimes apparent in administrative procedure acts and between those acts and the legislation by which an agency is established.

The need for flexibility is the principal motivation behind the establishment of an administrative agency with rule-making powers and this same need requires a high degree of informality for effectiveness and efficiency.³ The agency is more than a disinterested intermediary determining issues as between two adversaries. It is the directly interested representative of the entire public. The agency differs from a court in that it establishes law by direct and original creation.⁴ It is a body which advocates the accomplishment of legislative objectives; discovers, defines and applies the factors of public policy; creates and enforces law; performs such ministerial duties as may be assigned to it; and adjudicates the conflicting interests between adversaries. It is similar to a legislature but its discretion and actions are limited by statutory as well as constitutional

³ The expeditious and prompt exercise of its powers is a necessarily implied requirement for an agency. *Village of Bridgeport, Ohio v. Public Serv. Comm'n*, 125 W. Va. 342, 24 S.E.2d 285 (1943).

⁴ Rules adopted by agencies are law. *Rinehart v. Woodford Flying Serv.*, 122 W. Va. 392, 9 S.E.2d 521 (1940).

law⁵ It differs from the executive in that it provides its own tribunal for hearings on violations. Just as in the other departments, its actions are subject to review by appellate judiciary. But an administrative hearing is not a judicial proceeding even if it in some respects resembles a trial.⁶

Administrative agencies are established by the legislature with a delegated legislative power subject to a fairly general and broad set of standards to define the legislature's purpose and to guide the agency to its objective. The West Virginia court has explained this delegation as follows:⁷

“The police power is broad and sweeping, inherent in sovereignty and, except as restricted by constitutional authority or natural right, . . . in effect, is unlimited. The Legislature being the depository of this power, may delegate it to boards and commissions and, as a general rule, should set up standards for the guidance of such boards and commission in the use and application of the power granted.”

Courts are frequently called upon to determine whether the standards are so broad as to be unconstitutional. The real question is whether the legislation is delegation or abdication.

The rule requiring standards is interpreted in a reasonable way and varies according to subject matter.⁸ The agency may make rules and regulations which are not inconsistent with the statute under which it functions or which it implements, but may not issue a regulation clearly inconsistent with the statute being administered or clearly arbitrary.⁹ The interpretation given by an agency to the rule adopted by it will be followed unless clearly unreasonable and arbitrary.¹⁰

⁵ The rule as to the necessity of standards to uphold legislative delegation of discretionary power to an administrative body should not be applied so as to render an act unconstitutional where because of the nature of the powers delegated detailed standards cannot be set up. *Meisel v. Tri-State Airport Authority*, 135 W. Va. 528, 64 S.E.2d 32 (1951).

⁶ *State v. Huber*, *supra* note 2.

⁷ *State ex rel. Morris v. West Virginia Racing Comm'n*, 133 W. Va. 179, 55 S.E.2d 263 (1949).

⁸ *State v. Bunner*, 126 W. Va. 280, 27 S.E.2d 823 (1943); *West Central Producers Co-op. Ass'n. v. Commissioner of Agriculture*, *supra* note 1.

⁹ *Eastern Gas & Fuel Associates v. Hatcher*, 144 W. Va. 229, 107 S.E.2d 618 (1959); *Detch v. Board of Educ.*, 145 W. Va. 722, 117 S.E.2d 138 (1960).

¹⁰ *Thomas v. State Board of Health*, 72 W. Va. 776, 79 S.E. 725 (1913).

HISTORY

To provide a uniform skeletal procedure for all state administrative agencies, the West Virginia Legislature passed an act on February 5, 1964, pursuant to item eighteen of the Governor's legislative call. As originally introduced, the act was embodied in Senate Bill 2 and House Bill 2 which were designed for the control of water resources. However, it was applicable to all agencies with the sole exception of the Board of Probation and Parole although, in some cases, it was limited in application. Due to the doubtful constitutionality of including both subjects in one act, the Administrative Procedure Act was split off and reported out of the two judiciary committees as Senate Bill 30 and House Bill 49. Differing versions of Senate Bill 30 were passed by the two houses and were then referred to a conference committee whose report was approved and adopted by both houses for an act repealing W. VA. CODE ch. 5, art. 2, 3 (Michie 1961) and establishing a new chapter 29A, effective July 1, 1964.

In its general approach, the new act follows the format of the Model State Administrative Procedure Act which has some roots in common with the Federal Administrative Procedure Act adopted June 11, 1946.¹¹ A general historical outline of the Model Act may be of some interest.

The first Model State Administrative Procedure Act was adopted by the National Conference of Commissioners on Uniform State Laws at its October, 1946, annual meeting. In 1958, the Conference appointed a Special Committee on Revision of the Model State Administrative Procedure Act¹² and the first tentative draft of the revision was produced in June, 1959, prior to the annual meeting of the Conference in August of 1959 at Miami Beach, Florida. In early 1960, the first tentative draft was circulated for comments from the members of the State Administrative Law Committee, Section of Administrative Law, American Bar Association.¹³ After additional revisions through a fourth draft, it was presented and

¹¹ A general discussion of the Revised Model Act by Frank E. Cooper may be found at 49 A.B.A.J. 29 (1963).

¹² The Special Committee was composed of E. Blythe Stason, University of Michigan Law School as chairman, John B. Boatwright of Richmond, Virginia, James J. Burke of Madison, Wisconsin, Earl Sachse of Madison, Wisconsin, and Frank E. Cooper of Detroit, Michigan, as consultant. Glen Hatch of Heber City, Utah, was either inadvertently omitted from the first draft or was subsequently appointed to the Committee.

¹³ The chairman was Frederick L. Kirgis of Denver, Colorado.

adopted by the Conference and the American Bar Association at their 1961 annual meetings in St. Louis, Missouri.

The Model Act was not intended for uniform adoption by all states. Varying statutes, constitutional provisions and judicial history make uniform adoption impractical. However, it is useful as a guide and references to it in comparison with the West Virginia act are useful for analysis. Obviously, a complete analysis of the West Virginia act is not within the scope of this article. A treatment of that nature would require a writing at least as comprehensive as the standard four-volume text by Kenneth Culp Davis.¹⁴ The purpose of this article is to outline the new act, to suggest a few problems, and to propose a few solutions, all within the natural limitations of the author.

PURPOSE AND INTENT

The intent of the new chapter 29A is to provide a means of implementing the constitutional requirements of due process of law while preserving efficiency and recognizing practical expediency.¹⁵ To accomplish this objective, it provides for a system of notification to those directly interested in agency activities with an opportunity for hearing to demand or challenge an agency's action in appropriate circumstances.

Notice is provided for agency rules and regulations by a system of filing with and publication by the Secretary of State; for orders and decisions of an agency by permitting public inspection; and for cases in which one is an interested party by written notice of hearing. Demand for agency action may be made through a petition to initiate a rules-making proceeding; through a contested case in a matter of application specifically to the petitioner; and by petition for declaratory ruling on the application of a rule or statute upon

¹⁴ DAVIS, *ADMINISTRATIVE LAW* (1958).

¹⁵ Under our system of government no citizen can be deprived of a legal right without notice and reasonable opportunity to be heard. *Green v. Bd. of Educ.*, 133 W. Va. 356, 56 S.E.2d 100 (1949). The problem is a distinction between "right" and "privilege." *Nulter v. State Road Comm'n.*, 119 W. Va. 312, 194 S.E. 270 (1937). The new act provides a "right" to a hearing in rule-making proceedings (article 3), but only prescribes procedure for hearings in contested cases (article 5) where a hearing is required elsewhere by law or constitutional right. For example, the Motor Vehicles Commissioner is subject to article 3 for rules adopted under W. VA. CODE ch. 17A, art. 2, § 9 (Michie 1961); although he may suspend a license under W. VA. CODE, ch. 17B, art. 3, § 6 (Michie 1961) without a hearing he must afford opportunity for hearing after suspension and this hearing is subject to article 5 for contested cases.

a particular set of facts. Challenge to an agency's action may be asserted by declaratory judgment on validity of a rule; by appeal to a court from an adverse order in a contested case; and by utilization of other existing means of relief in contested cases.

APPLICATION

Before any agency is subject to the act's provisions it must have statutory authority to make rules or to adjudicate contested cases. The act applies only to the extent that either or both are exercised or required to be exercised¹⁶ and reference to specific statutes by which an agency's authority is established is necessary. It should be observed though that an "agency" within the meaning of the act is not limited to one with state-wide authority. There is no geographical condition. Of course, the act is not intended to apply to cities, towns and counties because even if they fit the definition of the term agency in some respects,¹⁷ they are distinguished by their representative capacity.¹⁸ Other local organizations, however, may be well within the application of the act.¹⁹

The act does not apply to some agencies by means of definition, exempts others in a limited way by specific exclusion, and exempts certain activities by subject matter.

In the first section, "Agency" is defined as "any state board, commission, department or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches." The language of the exception was found in the first tentative draft for revision of the Model Act but was subject to

¹⁶ Would the Attorney General under W. VA. CODE ch. 14, art. 2, § 3, 6 (Michie 1961), the Superintendent of State Police under W. VA. CODE ch. 15, art. 3 § 5 (Michie 1961), or the Board of Commissioners, Department of Public Safety under W. VA. CODE ch. 15, art. 2, § 20 (Michie 1961) be considered an "agency" under the act? One exercising powers of adjudication or rule making is to that extent an administrative agency. 1 DAVIS, *op cit. supra* note 14, § 1.01 at 1.

¹⁷ *City of Huntington v. State Water Comm'n.*, 137 W. Va. 786, 73 S.E.2d 833 (1952).

¹⁸ "Like a legislature, a municipal government, by reason of its representative character, may sometimes act without providing opportunity for party participation even though an administrative body might be required for the same action to provide such opportunity." 1 DAVIS, *op. cit. supra* note 14, § 6.05 at 376.

¹⁹ For example, the County Board of Health is authorized by W. VA. CODE ch. 16, art. 2, § 2 (Michie 1961) to exercise powers under W. VA. CODE ch. 16, art. 1, § 17 (Michie 1961).

some criticism because many administrative agencies in the exercise of a delegated legislative function may be considered as much in the legislative branch as in the executive. The Model Act uses the language "other than the legislature or the courts" and avoids that problem. In West Virginia, the various statutes creating the agencies provide for appointment by the Governor. Such agencies are, therefore, considered to be within the executive department even though their responsibilities include those of the other two departments, particularly the legislature. Through this arrangement the constitutional preservation of the division of powers is not violated.²⁰ The definition, therefore, includes all agencies in the executive department, which consists of the Board of Public Works and its members with their appointees and subordinates.²¹ Agencies such as the West Virginia State Bar are not affected.

No part of the new act applies to rules or contested cases involving the following subject matter:

- (1) Public election.
- (2) Conduct of inmates of public institutions.
- (3) Conduct of students at public schools or public educational institutions.
- (4) Conduct of persons in military service.
- (5) Receipt of public assistance.

These exceptions are identical to the Virginia provision with one difference that the Virginia act excludes "the conducting of public elections" and may be somewhat narrower.²² It should be noted, however, that the exclusion in the West Virginia act is only for "rules and contested cases," therefore, leaving the possibility open that these items are subject to the declaratory rulings on statutes provided for in article 4, section 1 of the act. This result was probably unintended.

Certain specified agencies are excluded from all provisions except the one requiring their rules to be filed with the Secretary of State under article 2, section 1, but a filing of rules for a period of sixty days is required for those agencies instead of the thirty days otherwise required. The excluded agencies are:

- (1) Board of Probation and Parole.

²⁰ W. VA. CONST. art. V, § 9.

²¹ W. VA. CONST. art. VII, § 1.

²² VA. CODE tit. 9, ch. 1.1, § 9-6.2 (Michie 1950).

- (2) Public Service Commission.
- (3) Board of Public Works.
- (4) West Virginia Board of Education.
- (5) Board of Governors of West Virginia University.

As the act was first introduced (House Bill 2 and Senate Bill 2), the Board of Probation and Parole was completely excluded by excluding it from the definition of "agency." The Public Service Commission was exempt from the contested cases procedure in sections 1, 3 and 4 of article 5 of the original act along with the Workmen's Compensation Fund and the Department of Employment Security because the administrative and review procedures in contested cases had been fully provided by law. The Public Service Commission was, however, subject to section 2 of article 5 (Rules of Evidence) and to the other articles of the proposed act. The more complete exemption of the Public Service Commission from the act as finally adopted is undoubtedly a recognition that its statutory provisions, procedural rules and customary practices, with over fifty years of usage and frequent court review, required no additional procedural amplification. The remaining three agencies were not mentioned as exempt from any part of the original bills, but those and the other agencies listed are of such nature that the application of the new act would be either inappropriate or unnecessary. The exemption of the Board of Public Works applies to it as a Board, and not to individual duties of its membership.

Another group of agencies are exempt only from the contested cases provisions of article 5. These are:

- (1) Workmen's Compensation Fund.
- (2) Department of Employment Security.
- (3) State Tax Commissioner.
- (4) State Road Commissioner and Commission.
- (5) Teachers' Retirement Board.

These agencies remain subject to all other provisions of the act.

RULE MAKING AND CONTESTED CASES

The definitions of "rule" and "contested case" are the following as contained in Section 1 of the act:

"'Contested case' means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be deter-

mined after an agency hearing, but shall not include cases in which an agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination and shall not include rule making.”

“‘Rule’ includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations relating solely to the internal management of the agency, nor regulations of which notice is customarily given to the public by markers or signs, nor mere instructions.”

There is considerable confusion and disagreement generally over what matters should be considered rule making and what matters should be considered contested cases. Generally, rule making is the legislative function and contested case the adjudicatory function between two adversaries. This distinction becomes less clear when applied to specific subjects. However, there is at least some history of the term in West Virginia from the adoption of chapter 5, article 2, section 3, requiring the administrative agencies to file their rules with the Secretary of State. This section, adopted in 1955 and amended in 1963, is superseded and repealed by the new act:

A “rule” within the meaning of the act must be of “general application and future effect.” The 1959 draft of the revised Model Act used the expression “of general *or particular applicability* and future effect.” The draftsmen added a comment that the definition was being broadened to include rules applicable to a single party. The final version of the Model Act omitted the change with an explanation which is pertinent to the West Virginia act:

“Attention should be called to the fact that rules, like statutory provisions, may be of ‘general applicability’ even though they may be of immediate concern to only a single person or corporation, provided the form is general and others who may qualify in the future will fall within its provisions.”

The definition of “contested case” excludes “cases in which an

agency issues a license, permit or certificate after an examination to test the knowledge or ability of the applicant where the controversy concerns whether the examination was fair or whether the applicant passed the examination. . . ." That section is comparable to the Virginia act. Under the West Virginia act it appears that the actual examination or the issuance of a license, permit, or certificate based on the knowledge or ability of an applicant is a contested case if a hearing is required. But a controversy over fairness or whether the applicant passed is not a contested case.

A significant factor in determining whether a particular matter is a contested case within the meaning of the act and, therefore, subject to its prescribed procedures is whether a hearing is required. But a hearing is not defined and questions may arise as to whether a specific activity is a hearing.

Perhaps an example will illustrate the problem. Under the West Virginia Code, the Insurance Commissioner may license an applicant as an insurance agent if satisfied that the applicant is "trustworthy and competent."²³ Competence is a matter of ability or knowledge and, probably, a written examination to determine competence is not a "hearing." We may also assume that whatever means used by the Commissioner to determine "trustworthiness" is not a "hearing." If a license is refused, the applicant could demand and obtain a hearing under the provisions of the Code.²⁴ If the hearing is on an adverse determination of competence and the applicant contends the examination was unfair or that he passed, the hearing is not subject to the new administrative procedure act. But if the hearing is based on an adverse determination of trustworthiness, the contested case article of the new act applies.

The contested case article of the new act does not provide a right to a hearing but it provides the procedure for a hearing where a hearing is required by other provisions of law or by constitutional right.

CONTESTED CASES AND DECLARATORY RULINGS AS RULE MAKING

Contested cases or declaratory rulings may under some circumstances produce the equivalent of a rule. For example, let's assume

²³ W. VA. CODE, ch. 33, art. 12, §§ 2, 5 (Michie 1961).

²⁴ W. VA. CODE, ch. 33, art. 2, § 13 (Michie 1961).

that an appropriate regulation or rule has been properly issued in compliance with all provisions of law and is in effect, and to enforce those regulations or investigate compliance, the agency is authorized to hold hearings.

Let us further assume that in a hearing to determine compliance with an agency regulation the principal issue is one of interpretation of the regulation. When that interpretation is finally settled the agency would probably apply it to all cases arising under the rule.

The same problem arises in another manner. A declaratory ruling by an agency may be issued under article 4, section 1 of the act, but it is binding only upon the agency and specific petitioner. The actual result may be that the declaratory ruling will be followed in other similar circumstances.

In both of these instances, the agency action falls within the technical definition of a "rule." If this definition were so technically construed, a rule-making proceeding would be necessary before an order could be applied generally even though it were a simple matter of interpretation.

Therefore, no case except a rule-making proceeding could ever be used as a precedent for agency action thus leading to the result that laws and regulations may be applied inconsistently. It is not an answer to claim that no two cases are ever exactly alike in the factual circumstances because there may easily be enough similarity in the material facts to require the same ruling for consistency. But if the act should be so applied, the inefficiency thereby produced would completely nullify the objectives of due process and fairness.

An essential ingredient in a procedural act is fairness and the objective must be to promote just results of administrative action. Fairness and justice require consistent application of agency regulatory authority among and between all persons similarly situated. The agency must, therefore, be in the position of following the precedents established by it in contested cases whenever appropriate, but a contested case should not be used for rule-making purposes through the medium of *stare decisis*. By requiring that orders be made available for public inspection the act clearly contemplates that they shall have precedent value.²⁵

²⁵ "The mere act of preparation of an opinion tends to bring into play the doctrine of *stare decisis*, for setting forth reasons for a result invites reference to past cases similarly decided." Davis, *The Doctrine of Precedent as Applied*

PUBLIC RECORD SYSTEM

Article 2 of the new act provides a public record system for both rules and contested case orders. To effectuate the public record requirements for rules, the following must be accomplished by the Secretary of State:

- (1) Establish in his office a permanent register for all rules.
- (2) Adopt filing rules for the size, format and numbering system for all rules filed.
- (3) File the filing rules in the permanent register for thirty days before they become effective.
- (4) Maintain the permanent register open to public inspection during regular office hours.

Each agency must file all rules in effect July 1, 1964, with the Secretary of State on or before January 1, 1965. Such rules as are not so filed become void after January 1, 1965. Rules adopted subsequent to July 1, 1964, are subject to the procedures prescribed for rule making before they become effective. The rules to be filed must be compiled, indexed, certified and filed in duplicate in the form prescribed by the Secretary of State. Although the form of certificate and the executing official are not designated by statute, the Secretary of State could provide this as part of his filing rules as to format.

Attention should be called to the fact that the Secretary of State, even should that office be an agency as defined by the act, is not subject to the rule-making requirements of article 3 for filing rules since there is a specific provision for the promulgation of filing rules. It should also be noted that if rules have already been filed with the Secretary of State under chapter 5, article 2, section 3 of the West Virginia Code and the filing is in accord with the new act's requirements and the Secretary of State's rules, a new filing after July 1, 1964, should not be necessary merely because the present statute is repealed by the new act. Such duplication in filing would be useless, but if there should be any doubt on the matter a filing rule

to Administrative Decisions, 59 W. VA. L. REV. 111, 126 (1957). Agencies' practices resemble those of the courts not only in following precedents but also in deviating from stare decisis. The reasons for deviations are about the same: changes in conditions, objectives, attitudes, understanding, personnel, programs, pressures, political climate, as well as, even in absence of changes in such factors, sheer inability to avoid inconsistencies in dealing with complex subject matter." 2 DAVIS, *op. cit. supra* note 14, § 17.07 at 528.

by the Secretary of State, who has the responsibility to "accept" rules for filing, should clarify the question.

For contested cases, an agency is required to either publish or otherwise make available to public inspection its final orders, decisions and opinions in contested cases "except those required for good cause to be held confidential and not cited as precedents."

The section also requires all matters of official record to be made available for public inspection "save as otherwise required by statute." From these two parts together, it may be argued that the "good cause" referred to previously means as "required by statute." An agency is authorized to adopt rules for the public inspection of its contested case files.

RULE MAKING

Rule-making, under the provisions of the new act, is essentially the legislative activity of an agency.²⁶

Each agency subject to the act is required to adopt rules of practice and procedure and to supplement the rules with descriptive statements. Notice of a rule-making proceeding for either procedural or substantive rules must be given to any person who has requested notice and has paid a fee of one dollar for a calendar year.²⁷ Each agency is authorized to adopt by "rule" a form for such requests but although the act refers to the form as a "rule," it is little more than an instruction which should be considered exempt by the definition of "rule" from the rule-making procedure.

It should be noted that the fee of one dollar applies to all rules of each agency although the party requesting notice may be interested only in one division of rules. For example, no reason appears as to why the Insurance Commissioner could not permit a subscription by a casualty company to notice of rule making for casualty insurance only if the casualty company so requested. However, if the casualty company wanted notice of all rules, such as those governing

²⁶ Agency regulations established pursuant to legislative authority have the legal effect of law. *State v. Bunner*, *supra* note 8. As to safety rules of employers approved by Commissioner of Labor or Chief of the Department of Mines under W. VA. CODE ch. 23, art. 4, § 2 having the effect of law, see *Carrico v. State Compensation Comm'r.*, 127 W. Va. 463, 33 S.E.2d 284 (1945).

²⁷ A party to an agency hearing may waive defects in a notice by appearance and participation. *State ex rel. Spiker v. West Virginia Racing Comm'n.*, 135 W. Va. 512, 63 S.E.2d 831 (1951).

fraternals, hospital insurance corporations, etc., it could only be required to pay one dollar for all and not one dollar for each.

Notice of rule making must be given not less than thirty nor more than sixty days prior to a date specified in the notice for a hearing on the proposed rule. Although the word "hearing" is not used, the act leaves no doubt that a hearing is intended.

It is significant that in the process of rule making an agency is not limited to the facts, evidence and arguments put into the hearing record by those who voluntarily appear in response to a mailed or published notice. Since rule making is a legislative activity, an agency must acquire its information from any source available to it as would a legislature.

The provision governing notice generally is found in article 7, section 2, and provides for either personal delivery or delivery by mailing with an affidavit as proof of service, but the rule-making procedure requires notice by mail only. It may seem that personal delivery would not be sufficient in view of this specific requirement, but the act provides that no rule shall be valid unless adopted in "substantial compliance" with the notice section. The words "substantial compliance" can be construed to mean that where a person has actual notice of rule making, there has been a substantial compliance and he cannot complain that notice was not mailed to him as required.

Technically, under the act, an agency will have no way of knowing who or how many persons it may expect at a rule-making hearing or what positions they expect to take. However, under its rule-making powers provided for in article 3, section 1, it could and should require notice back from the various persons concerned a reasonable time prior to the date specified in the notice if there is to be some appearance. If nothing more, this would enable the agency to allot the time necessary and locate space suitable for the number to be heard. This may require shifting the place of hearing a short and reasonable distance to more adequate facilities, but there would be a substantial compliance if persons arriving at the place specified in the notice are given prompt notification of the new location and are given adequate time to get there.

After the opportunity for hearing, the proposed rule may be adopted in its original form, or it may be amended and adopted so long as the amendment does not alter the main purpose of the

original proposal. Upon adoption, the act requires only filing of the rule for the required period with the Secretary of State for it to take effect. However, it would seem that in all fairness to the participants at a hearing, the agency should somehow notify the participants of its final action either before or at the time of filing.

With the exception of the agencies heretofore mentioned as exempt from all provisions of the act except as to filing their rules, two certified copies of any rule adopted after July 1, 1964, must be filed with the Secretary of State for thirty consecutive days before becoming effective. Those excepted agencies must file their rules in the same manner but for a period of sixty days.

In case of an emergency, an agency, except one for which sixty days' filing period is required, may adopt a rule to become effective immediately. An emergency rule is defined as one "necessary for the immediate preservation of the public peace, health, safety or welfare," and when adopted it must be supported by a finding of an emergency with the reasons for such finding. Notice of emergency rules must be given to such persons as have requested notice of rule making, but the notice must be given "forthwith" and consequently the emergency rule may be in actual effect before notice is received. The act, however, seems to contemplate that an emergency rule will be filed with the Secretary of State even though the filing period of thirty days is not a prerequisite. The only basis for this assumption is: (1) that the whole intent of section 5 is only for immediate effectiveness; and, (2) that the requirement of a statement of reasons to be "filed" with the rule contemplates filing as referred to elsewhere in the act, that is, with the Secretary of State. An emergency rule can remain in effect only for a period of ninety days within which period rule-making proceedings may be initiated to make the rule permanent.

Rule-making proceedings may be initiated either by the agency upon its own motion or upon petition of any interested person. However, there is no requirement for an agency to start the rule-making procedures of notice and hearing upon petition. An agency is authorized to prescribe rules for such petitions including their form, and the procedure for submission, consideration and disposition. Unless the agency provides otherwise by rule, a petitioner is not by this act authorized to force a rule-making procedure by filing a petition. This would be discretionary.

The part of the act which the average lawyer will find most helpful is that which requires publication of rules of each agency in pamphlet form and quarterly bulletins of rules filed in the preceding quarter.²⁸ The first pamphlets will contain the agency rules in effect January 1, 1964, and the first quarterly bulletin will contain rules filed during the first quarter of 1965 but will, of course, exclude those in effect January 1. These publications will be available without charge to state agencies and at a fee to cover cost of publication to others. The Secretary of State may omit publication of any rule which is "unduly cumbersome, expensive, or otherwise inexpedient if such rules are made available in printed or processed form on application to the adopting agency. . . ." In case of an omission for these reasons, the Secretary of State's publication must contain a statement of the subject matter and instructions for acquiring copies.

DECLARATORY RULINGS AND JUDGMENTS

Although there is no procedure provided for appeal from a rule-making proceeding, a remedy is provided by way of declaratory relief. If the issue is as to the applicability of a rule or statute, an interested person may petition the agency for a declaratory ruling under rules of procedure adopted by the agency. No procedure for appeal from an adverse ruling is provided, but the validity of the rule as construed may be questioned by declaratory judgment proceeding.

If the issue on a rule raises the question of validity, any person except the agency may petition the Circuit Court of Kanawha County for a declaratory judgment if "the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs."

Although an agency must be made party to a proceeding for declaratory judgment, declaratory judgment may be sought regardless of whether the plaintiff has first requested a ruling on validity from the agency. Consequently, the court will not have had the benefit of a hearing and consideration thereon by the agency which is supposed to have some expertise in the field. Only as a party to the declaratory judgment proceeding is the agency in a position to assist in the final determination. The expertise of the agency in its field and the desire of a court to have the complete benefit

²⁸ These publications should be of particular help since courts don't take judicial notice of agency regulations. *State v. Bunner*, *supra* note 8.

of that expertise and consideration of the agency underly the doctrine of primary jurisdiction.

There may be other interested persons who were not parties to the declaratory judgment proceeding but who have relied upon the validity of the rule and who have reason to support its validity. The act is silent on the question of parties to a declaratory judgment proceeding except for the agency itself.²⁹ This omission should be regarded as serious since the rules adopted by administrative agencies often affect relationships not subject to agency jurisdiction.³⁰ In this circumstance it may not be sufficient for the agency to be the sole party on a question of validity.

We may properly assume that a court would require the existence of a justiciable controversy before accepting a petition.³¹ But suppose the agency should agree on the invalidity of the rule. The court could dismiss the proceeding because of the absence of a justiciable controversy in which case the agency would have to start a rule-making proceeding to withdraw the rule.

If the issue of validity of a rule depends upon its interpretation or its application in a particular factual situation, relief by way of declaratory ruling from the agency should be considered a prerequisite to judicial determination.³² This provides the court with the benefit of the agency's ruling on interpretation and finding of fact, and it complies with the usual prerequisite of exhaustion of administrative remedies.³³

²⁹ The court has already hinted at the "apparent need" for those who have an interest which would be affected by the declaration to be made parties to the proceeding aside from statutory requirement. *Crank v. McLaughlin*, 125 W. Va. 126, 23 S.E.2d 56 (1942).

³⁰ For example, rules may be applied in negligence actions: *Frampton v. Consolidated Bus Lines*, 134 W. Va. 815, 62 S.E.2d 126 (1950); *Rinehart v. Woodford Flying Serv.*, *supra* note 4; or result in criminal prosecution for violation; *State v. Bunner*, *supra* note 8.

³¹ If the act contemplates the determination of administrative as distinguished from judicial questions, it is unconstitutional. *City of Huntington v. State Water Comm'n.*, 135 W. Va. 568, 64 S.E.2d 225 (1951).

³² Testimony of an agency official on the meaning of a rule is not permitted where the regulations are not ambiguous because in this situation construction is for the courts. *Rinehart v. Woodford Flying Serv.*, *supra* note 4. What about cases of ambiguity? But unbroken administrative interpretation of long standing by an agency charged with its application will be adopted by a court unless manifestly wrong. *State ex rel. Ballard v. Vest*, 136 W. Va. 80, 65 S.E.2d 649 (1945).

³³ Where an adequate administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted

The grounds for a declaration of a rule's invalidity are:

- (1) It violates constitutional provisions.
- (2) It exceeds the agency's statutory authority.
- (3) It exceeds the agency's jurisdiction.
- (4) It was adopted without compliance with the rule-making procedures.
- (5) It is arbitrary or capricious.
- (6) If an emergency rule, emergency action was not justified.

Within thirty days after a declaratory judgment on one of those grounds, the agency either:

- (1) Shall acquiesce therein and modify or rescind the rule as required by the judgment; or
- (2) May notify the plaintiff of its intention to appeal to the Supreme Court of Appeals.

The modification or rescission upon acquiescence would be only to the extent required by the judgment and, because of the thirty-day time limit, would not be subject to the rule-making procedures. However, filing within the thirty-day period in the office of the Secretary of State would seem necessarily implied by the whole statutory scheme. If an appeal is taken by the agency, the thirty-day period for acquiescence, modification or rescission runs from refusal of the appeal application, dismissal of appeal, or affirmance by the court.

The new act does not provide procedure for an appeal after declaratory judgment sustaining the rule, in which case the plaintiffs could appeal as provided for civil appeals generally. The provision for appeals in this act applies only to the agency.

CONTESTED CASES

The type of case in which the larger number of lawyers will become involved under the new act will be the contested case for which the procedure prescribed is analogous to court practice but slightly less formal. It will be in the area of contested cases that the agency rules of procedure must be most significant because the statutory requirements are more substantive than procedural.

before the courts will act. *Daurelle v. Traders Fed. Sav. and Loan Ass'n.*, 143 W. Va. 674, 104 S.E.2d 320 (1958). But if the administrative remedy is useless, the rule isn't applied. *Carter v. Bluefield*, 132 W. Va. 881, 54 S.E.2d 747 (1949).

No detailed set of procedural rules can be established as applicable to all agencies but it might be expected that agency rules will in some way cover the procedures represented in the following outline:

I. Commencement of contested case by petition of an interested party.

A. Form of petition including:

- (1) Name and address of petitioner.
- (2) Designation of other parties respondent, if any.
- (3) Interest of petitioner.
- (4) Statement of facts.
- (5) Statement of jurisdiction.
- (6) Designation of applicable rules or statutes.
- (7) Relief requested.
- (8) Form for proof of service, if required.
- (9) Execution by verification or otherwise.

B. Service of petition.

C. Filing of petition including address of agency.

II. Commencement of contested case by agency

A. Form of order

- (1) Designation of parties respondent.
- (2) Statement of facts.
- (3) Designation of applicable rules or statute.
- (4) Purpose of proceeding.
- (5) Appearance or answer required.

III. Answer of respondent

A. Form of answer to petition or commission order

- (1) Name and address of respondent.
- (2) Allegation of facts with denials, additional facts, etc.
- (3) Statement of other applicable rules or statutes.
- (4) Statement of objections, if any, to petition or order.
- (5) Designation of other interested persons.
- (6) Form for proof of service if required.
- (7) Execution and verification, if any.

B. Service of answer

C. Time and place of filing

IV. Intervention by other interested persons

A. Petition to intervene

- (1) Name and address of intervenor.
- (2) Interest of intervenor.
- (3) Purpose of intervention.
- (4) Proof of service of petition to intervene if required.
- (5) Execution by verification or otherwise.

B. Service of petition to intervene, if any.

C. Time and place of filing.

V. Prehearing conference, definition of issues, consideration of informal disposition without hearing

VI. Notice of hearing as required by statute

VII. Representation of parties and how designated³⁴

VIII. Filing of motions, with form and service

IX. Filing of briefs and service

X. Service of order or decision

XI. Rehearing, time limitation, form, service, grounds³⁵

It will be easily seen that this outline provides for matters leading up, and subsequent, to a hearing and with any step it is always possible to dispose of the matter without formal hearing. Although under the act such party must be afforded an opportunity for a hearing, the act permits informal disposition by "stipulation, agreed settlement, consent order, or default." If the subject is not thus disposed of voluntarily, there must be at least ten days' written notice from the agency with the date, time and place of hearing and a statement of matters asserted or issues involved.³⁶ A hearing in a contested case may be held in any county selected by the

³⁴ As originally introduced House Bill 2 and Senate Bill 2 provided for representation by attorneys admitted to practice before circuit courts. The omission from the final act is not material in light of *West Virginia v. Earley*, 144 W. Va. 504, 104 S.E.2d 420 (1958). A general discussion of the subject is found at 48 A.B.A.J. 715 (1962).

³⁵ If a rehearing is authorized or granted, it should be based on some new fact. *Mustard v. City of Bluefield*, 130 W. Va. 763, 45 S.E.2d 326 (1947).

³⁶ This ten days' notice provision requires rapid action where statutes provide that a hearing must be held within a certain period, for example, twenty days on suspended drivers' licenses under W. VA. CODE ch. 17B, art. 3, § 6 (Michie 1961).

agency unless otherwise provided by statute. Notice of hearing may be served by personal delivery, or mailing to the last known address of the party or agency, "unless a different method is otherwise expressly permitted or prescribed. . . ."³⁷ Presumably the "different method" referred to would be a statutory method.

The official record of a contested case must contain reported testimony and exhibits, and agency staff memoranda and data used in consideration of the case. Since the record is thus composed of evidence and factual data, argument may be permitted and considered by the agency, but there is no requirement that it be made a part of the record if received or considered. All of the testimony, evidence, and rulings on admissibility must be reported by stenographic notes and characters or mechanical means, but it is unnecessary that the report be transcribed unless required for purposes of rehearing or judicial review. Of course, an agency in a complex case may require a transcript to aid in its decision and it must provide a transcript upon request of any party and at his expense. But if the transcript is not made, the reporter's notes or recording, or both, must be preserved as part of the record.

Detailed procedures are provided in the new act for issuance of subpoenas and subpoenas duces tecum and detailed explanation is unnecessary here. Suffice it to say that the procedure applies only where the agency has the power under some other act and there are provisions for five days' notice and for relief upon application to the circuit court of jurisdiction at either the location of the hearing or the place of service, or to the judge of either.

The act permits the taking and use of depositions "as in Civil actions in the circuit courts." It is not intended that the same procedure be followed but the same circumstances should govern. Each agency should adopt rules providing for notice, the time when they may be taken, and the filing of depositions. It should also provide procedures by which it can rule on objections to specific questions asked or objections to taking of a deposition.

The agency is required to conduct hearings "in an impartial manner" but it must be recognized that the agency itself under its statu-

³⁷ Notice of hearing may be waived by appearance and participation in a hearing. *State ex rel. Spiker v. West Virginia Racing Comm'n.*, *supra* note 27. But mere advice that one will be afforded an opportunity to be heard if requested is not compliance with act requiring notice and opportunity to be heard. *State ex rel. Gordon Memorial Hosp., Inc. v. West Virginia State Bd. of Examiners*, 136 W. Va. 88, 66 S.E.2d 1 (1951).

tory powers and obligations is a representative of the entire public including the adversaries before it. The impartiality required is as between the adversaries and should not be construed as restricting the agency in the exercise of its public responsibility. The control of a hearing is the responsibility of its properly authorized members or hearing examiners. The final order or decision is the agency's responsibility and in its final decision it must take into consideration its paramount public duty as applied in the individual dispute.

EVIDENCE IN CONTESTED CASES

It is difficult enough to know what the rules of evidence are in circuit courts and how they are now applied in agency cases, but it requires the use of a crystal ball to determine how they will be applied in the future under the new act.³⁸ It is doubtful that there will be any effect from the evidence requirements of the new act because what appears to be a strict rule is followed by a provision which in effect grants a substantial degree of discretion as to whether to follow the strict rules of evidence. Another apparently mandatory provision can, as a practical matter, serve only as a guide. This is all capped by the fact that agency members are often persons not trained in the law or in the rules of evidence.

The first sentence of the evidence section provides: "In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded." The use of the word "shall" appears to make this a mandatory provision for violation of which a party would be entitled to a reversal upon appeal. It is to be hoped that no such result is intended because evidence in violation of the prohibition should not affect the agency's decision anyway, and, if it should, there would be other grounds for reversal without this mandatory provision. In any event if there should be a ruling to exclude evidence falling within this prohibition, a party may vouch the record and get it before the agency anyway. As a practical matter, this apparently mandatory provision can be no more than a guide for agency actions.

Various state statutes now provide that specified agencies are not bound by the technical rules of evidence. Under the new act, those agencies to which the contested case article applies will be

³⁸ A most thorough discussion of the admissibility of evidence in administrative proceedings under the two model state codes and the effect of judicial review is an article by Maurice H. Merrill entitled *Hearing and Believing: What Shall We Tell The Administrative Agencies?*, 45 MINN. L. REV. 525 (1980).

required to follow the rules of evidence applied in civil actions in the circuit courts. However, an escape clause is provided: "When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." The section is not intended necessarily to provide a specie of the "best evidence" rule but perhaps what may be called a "better evidence" rule. In other words, whether technical rules of evidence will be required for a specific fact will depend upon such circumstances as the availability and convenience of the evidence, the necessity and significance of the evidence in supporting or tending to prove the fact, the reliability of alternatives, and the value of the fact in the final determination of the case. But what a reasonably prudent man would rely upon is an open question.

The evidence section also provides that an agency is bound by the rules of privilege recognized by law. Presumably the privileges would be those recognized before courts of record rather than those before a Justice of the Peace. Included would be the privilege against self-incrimination, but where statutes so provide a witness could still be required to testify where immunity to criminal prosecution is available. Privilege is of such a peculiar character that a party should not be permitted to vouch the record where the privilege is claimed.

Objections to evidentiary offers may be made and noted in the record and a party may vouch the records as any excluded evidence. Presumably the vouching of the record would be as provided in Rule 43 (c) of the West Virginia Rules of Civil Procedure for trials without a jury and the evidence excluded would be placed on the record before the hearing examiner who will probably render the decision. This requires a presumption that excluded evidence was not considered even if in the record upon which a decision is made.

The evidence section makes it clear that factual information or evidence, only if made a part of the record, shall be considered in the determination of the contested case. In connection with this limitation the Model Act provides: "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Although this provision is not contained in the West Virginia act, as a practical matter an agency

will use its general experience and expertise in the evaluation of evidence, and it is not expected that an agency would be prohibited from using, for evaluation purposes, the general factual information acquired by it in the performance of its duties. The limitation as to what an agency may consider under the West Virginia act has an ethical objective, in accordance with well-recognized constitutional principles,³⁹ in preventing receipt or development of particular information intended by the agency or a party specifically for determination of a pending case without all parties having some notice thereof. But the section does not imply an intent to isolate an agency from its general responsibilities in the evaluation of evidence in a particular case.

Every party has the right of cross-examination of witnesses but, although not expressly stated, the cross-examination would be subject to the rules of evidence including the requirement that unduly repetitious evidence be excluded. Therefore, where numerous parties are involved, the agency would have the right, perhaps the obligation, to limit cross-examination by each party to that designed to adduce evidence not previously elicited by cross-examination. In the Model Act, it is expressed as: "cross-examinations required for a full and true disclosure of the facts," but this difference in wording does not lead to a different interpretation.

A difference in wording exists between the West Virginia act and the Model Act on the judicial notice of "judicially cognizable facts" authorized by both. The Model Act goes further: ". . . notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." If this difference is given some particular significance, it could cause some question as to whether the agency could use the facts which come to its attention in the discharge of the responsibilities assigned to it by the legislature. It is probable, however, that the difference in wording is not particularly significant in that those matters which are judicially cognizable to an agency are, because of its specialized, limited and technical interest, somewhat different than those facts judicially cognizable by a court. In this connection, it is significant that although rules of evidence as applied in civil cases in the circuit courts are to be followed, there is no similar limitation of facts judicially cognizable in circuit courts.

³⁹ *Morgan v. United States*, 304 U. S. 1 (1938). *Ohio Bell Telephone Co. v. Public Utilities Comm'r. of Ohio*, 301 U. S. 292 (1937).

It should be recognized, however, that those facts which are usable by an agency in the evaluation of evidence, and those facts which should be matters of record as judicially cognizable, are not necessarily the same, although both emanate from the agency's specialized knowledge and technical competence. A fact used in evaluation may be of some influence on the final decision, but only if it tends materially and directly to prove or disprove a material fact in issue should it be treated as a judicially cognizable fact. When notice is taken of a judicially cognizable fact, parties are to be notified and afforded an opportunity to controvert the fact. The result is that notice of judicially cognizable facts becomes a matter of record.

If a party disputes the accuracy of a transcript, he may serve a motion upon the other parties and the agency, which must then determine the correct version. This would not be expected to endear lawyers to court reporters. How is the difference to be settled? Perhaps everyone in attendance, including the reporter, will take the stand subject to cross-examination.

CONTESTED CASES: FINAL ORDER

Upon reaching a final decision in a cause, an agency must provide a written order or decision, or it must state the decision upon the record. It must also support the decision by findings of fact and conclusions of law. The Model Act requires that these be separately stated and although there is no such requirement in the West Virginia act, separate statements of fact and conclusions of law would avoid any confusion that might otherwise exist. Prior to a final decision, parties may submit proposed findings and conclusions and the final order must include a ruling on each. This may be quite burdensome for the agency where numerous parties and complex issues are involved.

A relatively simple method of expressing a finding would be to express it in the language of a statute governing the issue. The new act requires, however, that if this is done the findings of fact "must be accompanied by a concise and explicit statement of the underlying facts supporting the findings." The comment of the committee on the comparable section of the Model Act is pertinent:

"The desire is to find the proper middle course between a detailed reciting of the evidence on the one hand and the bare

statement of the conclusions of fact or the 'ultimate' facts on the other. The phrase 'underlying facts supporting the finding' seems about right."

For notice of the final decision the West Virginia act provides:

"A copy of the order or decision and accompanying findings and conclusions shall be served upon each party and his attorney of record, if any, in person or by registered or certified mail."

The Model Act is substantially different:

"Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record."

These differences point up these practical interpretations of the West Virginia act:

- (1) The order and decision with findings and conclusions must be served without specific request.
- (2) Service must be upon the party *and* upon his attorney if he has one in the cause.
- (3) Unless the record is to be transcribed and all or part of it served, the order, findings and conclusions would have to be in written form to permit service although the act *seems* to permit them to be "stated in the record."

CONTESTED CASES: JUDICIAL REVIEW

Judicial review of contested cases is provided for a party adversely affected by a *final* decision upon filing a petition within thirty days after the date upon which such party received notice of the final order or decision.

Appeal from actions of non-judicial bodies is sustained on the following basis:

"Apparently the law is settled in favor of the use of the appeal method, on the theory that duly constituted administrative boards and commissions do sometimes exercise quasi-judicial power, and that, on that theory, there can be brought into play what is called judicial power. If there is an abuse of power; or if the power conferred by the Legislature be exceeded; or there is arbitrary or fraudulent exercise thereof; or any pro-

vision of the Constitution or the statute laws of the State is violated, a judicial question arises upon which the courts may pass judgment. But unless these administrative agencies are at fault in the respects noted above, their power to perform their functions, delegated to them by the Legislature, cannot be controlled by the courts; and, this being true, courts will not assume to exercise administrative power, even though the Legislature may mistakenly authorize them to do so."⁴⁰

It is to be noted that the appeal provision for contested cases appears to provide an appeal as a matter of right from every agency decision. Where a party is adversely affected by the final order or decision he is "entitled to judicial review" under the act. If strictly construed there would be few agency decisions that did not reach the courts eventually and the courts may find themselves in the position of a super agency.⁴¹ In addition, there is nothing in the act which permits a court to "dismiss" an appeal.

The act provides that the petition must state whether the appeal is taken on questions of law or on fact or both. It is at least implied from this that the points to be raised on appeal must be specified since a general statement would serve no purpose. If the points are specified and if as specified they show no grounds for an appeal, the court could deny or dismiss the appeal as not presenting a judicial question. But should this section be so construed as to grant an absolute right of appeal in every contested case, it would cripple the agencies by postponement of the effectiveness of their decisions.

The petition for appeal may be filed in:

- (1) Circuit Court of Kanawha County; or,
- (2) Circuit Court of County in which the petitioner or any of them resides; or,
- (3) Circuit Court of County in which the petitioner or any of them does business;

or with the judge thereof in vacation. This will inevitably lead to a bit of "court shopping" and will possibly produce a request by agencies to increase their travel expense budgets. One must wonder what will happen when several appeals from the same case are filed

⁴⁰ State v. Huber, *supra* note 2.

⁴¹ The court has avoided this problem by refusal to substitute its discretion for that of an agency lawfully exercised. *Danielly v. City of Princeton*, 113 W. Va. 252, 167 S.E. 620 (1933).

in several circuits, particularly if the issues presented by the several appeals are different. The obvious purpose is the avoidance of too many trips to Charleston, but it may produce an extraordinary number of trips by agency representatives or the Attorney General's staff.⁴² If several appeals are taken from the same case at the same time, consolidation in one circuit would defeat the purpose of this provision.

The Model Act provides a right of appeal to a "person" and provides a prerequisite of exhaustion of all administrative remedies. The West Virginia act provides a right of appeal to a "party" and although it does not add the Model Act's prerequisite, the use of the word "party" implies that exhaustion of administrative remedies is required before an appeal may be prosecuted.

The question of when an agency order or decision becomes final for appeal purposes is not clear from the act and supplementary rules by each agency may be required to clarify this point. If the agency rules provide a right to petition for rehearing, it would seem that the order does not become final and the appeal period start to run until either expiration of the time limit for rehearing or disposition of a petition for rehearing. Otherwise, if there are several parties to a contested case, some may petition for rehearing at the same time that others have petitioned for appeal.

Another problem may arise where an appeal is filed before a transcript is produced. If there should be some contention of error or omission in the transcript, appeal proceedings would be delayed while the agency rules on the true version under article 5, section 2(e). An agency rule should provide a time limitation for motions to correct transcripts.

The appeal before the court must be heard upon the record before the agency, and there is no provision for introducing new evidence not submitted to the agency unless the evidence is relevant to alleged irregularities in procedure before the agency.

The appeal section provides that the court "may affirm . . . or remand the case for further proceedings." This seems to be discretionary without standards to guide the court's review. However, the next sentence which does provide standards appears mandatory:

⁴² The opposite purpose was the basis for passage of W. VA. CODE ch. 14, art. 2, § 2 (Michie 1961) requiring suits against state officers to be brought in Kanawha County. *Spurdone v. Shaw*, 114 W. Va. 191, 171 S.E. 411 (1933).

"It shall reverse, vacate, or modify the order or decision if" The Model Act uses "may" in both sentences.

The standards of review under the apparently mandatory provisions are:⁴³

- (1) In violation of constitutional or statutory provisions;⁴⁴ or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious, or characterized by abuse of discretion.

Except for item (5), these all involve errors of law and in a given situation more than one standard would probably be applicable.

The mandatory provision, particularly as used with "modify," raises an interesting constitutional problem. If the court modifies an agency's order or decision, it is in effect issuing an order for the agency. It is clear that a court will not accept original jurisdiction to issue an administrative order, nor will it do so upon appeal with trial de novo.⁴⁵ Either vacating or modifying the agency decision or order would have the effect of an administrative action.

⁴³ Under present law orders of administrative agencies are not disturbed upon appeal except where they have gone beyond their statutory powers, exercised unconstitutional powers or based their action on a mistake of law. *West Central Producers Co-op. Ass'n. v. Commissioner of Agriculture*, *supra* note 1. Questions of agency jurisdiction fairly arising on the record may be considered by the court on its own motion. *Blosser v. State Compensation Comm'r.*, 132 W. Va. 112, 51 S.E.2d 71 (1948).

⁴⁴ Since determination of constitutionality is judicial and an agency does not possess power to rule on the question, it may be raised for the first time on appeal. *West Central Producers Co-op. Ass'n. v. Commissioner of Agriculture*, *supra* note 1.

⁴⁵ Where an act vests in a court with jurisdiction to do anything which an agency is required to do, such jurisdiction involves the exercise of administrative or legislative functions and is unconstitutional under article V of the West Virginia Constitution. *State ex rel. Richardson v. County Court* 138 W. Va. 885, 78 S.E.2d 569 (1953); *City of Huntington v. State Water Comm'n.*, *supra* note 31; *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943); *Staud v. Sill & See* 114 W. Va. 203, 171 S.E. 428 (1933); *Hodges v. Public Serv. Comm'n.*, *supra* note 1. The effect of the *Hodges* case is discussed in two West Virginia Law Review articles: *Davis, Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. Va. L.Q. 270 (1938), and *Donley, The Hodges Case and Beyond, A Reply to Professor Davis*, 45 W. Va. L.Q. 291 (1939).

Apart from the constitutional question there is good justification for a refusal to vacate or modify an agency's order because an agency, by virtue of its ruling on a particular issue, may have found a ruling on other issues unnecessary. A remand of the case to the agency for further proceedings consistent with the court's order would provide the necessary opportunity.

Appeals are taken upon questions of law or fact or both, but the court may consider errors neither assigned nor argued. The standard for the court's adverse decision on a question of fact would be that the agency's action is: "Clearly wrong in view of the reliable, probative and substantial evidence on the whole record." The comparable provision of the Model Act uses the word "erroneous" instead of "wrong," but, otherwise, is the same. The committee comment to the Model Act with reference to its provision said: "This standard of review does not permit the court to 'weigh' the evidence, or to substitute its judgment on discretionary matters, but it does permit setting aside 'clearly' erroneous decisions." The West Virginia court has used various expressions with reference to findings of fact, some of which are cited in the footnote.⁴⁶ The new act may produce a more uniform expression for reviewing findings of fact but the standard will perhaps remain the same. Expressions for standards of review are frequently excellent subjects for philosophy, theory, and intellectual debate, but the expressions do not necessarily produce a practical difference in application.

In addition to the appeal provisions in the new act, other means of review, redress or relief provided by law are retained,⁴⁷ and

⁴⁶ Whether finding is clearly wrong or against the preponderance of the evidence—*City of Huntington v. State Water Comm'n.*, *supra* note 31, not supported by the evidence, *English Moving & Storage Co. v. Public Serv. Comm'n.*, 143 W. Va. 146, 100 S.E.2d 407 (1957); a finding that is plainly wrong, *Walk v. State Compensation Comm'r.*; 134 W. Va. 223, 58 S.E.2d 791 (1950); findings are not disturbed if such findings are supported by substantial evidence or are based upon conflicting evidence, *City of Huntington v. State Water Comm'n.*, *supra* note 17; but where a finding of fact by an agency has no material relation to the issue of fact determinative of the question involved, the rule limiting appellate courts jurisdiction to disturb agency finding of fact does not apply. *Chesapeake & O. R.R. Co. v. Public Serv. Comm'n.*, 139 W. Va. 161, 81 S.E.2d 700 (1953).

⁴⁷ Writ of certiorari presently fills the void where no specific appeal procedure is provided, *State ex rel. Baer v. City of Beckley*, 133 W. Va. 459, 57 S.E.2d 263 (1949). Review by certiorari is confined to the record before the agency and to judicial and quasi-judicial acts. *Danielly v. City of Princeton*, *supra* note 39. Prohibition may be used to control quasi-judicial actions if the agency in so acting usurps or abuses its power, is without jurisdiction to take such action, or having jurisdiction exceeds its legitimate powers, *State*

further opportunity for appeal to the Supreme Court of Appeals as in other civil actions is provided in article 6.

REPEAL OF INCONSISTENT ACTS

The act contains the usual provision for repeal of all acts or parts of acts inconsistent with the new act. This will provide many opportunities for debate over those acts which now provide:

- (1) for an agency rules of procedure;
- (2) for an agency not to be bound by technical rules of pleading and evidence; and
- (3) for specific methods of appeal.

CONCLUSION

The West Virginia Administrative Procedure Act raises a number of substantial procedural problems, but only experience will provide the answers. If the answers by courts and agencies tend to restrict agency operations quite narrowly, it may have the effect of frustrating the accomplishment of the objectives assigned by the legislature to the agencies. On the other hand, its interpretation should not be so loose and broad as to permit arbitrary action or to endanger due process of law. It is hoped that a proper balance will be found.

ex rel. Gordon Memorial Hosp., Inc. v. West Virginia State Bd. of Examiners, supra note 37, *United States Steel Corp. v. Stokes*, 138 W. Va. 506, 76 S.E.2d 474 (1953). Mandamus may be used to require an agency to act, *Village of Bridgeport, Ohio v. Public Serv. Comm'n.*, *supra* note 3, but will not lie to control the action of officers or tribunals in the exercise of their discretion in the absence of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of law upon their part, *Carter v. Bluefield*, *supra* note 33. See Davis, *Mandamus to Review Administrative Action in West Virginia*, 60 W. VA. L. REV. 1 (1957). With the statutory appeal procedure provided by the new act and the requirement that a party exhaust his administrative remedies, including appeal, federal courts will probably refuse relief until appeal is completed, *Wilson v. West Virginia Bd. of Embalmers and Funeral Directors*, 168 F. Supp. 753 (S. D. W. Va. 1959).