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## Neither Fish Nor Fowl: The Separation of Powers and the Office of Administrative Hearings

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## NEITHER FISH NOR FOWL: THE SEPARATION OF POWERS AND THE OFFICE OF ADMINISTRATIVE HEARINGS

Ann E. Cohen & Elise Larson<sup>†</sup>

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### I. INTRODUCTION

In 1975, the Minnesota Legislature created the Office of Administrative Hearings (“OAH”) as an executive branch court. The legislature intended to create an efficient, flexible, less-expensive, and neutral forum to support—but not supplant—administrative agency decision-making.<sup>1</sup> Since that time, the legislature passed numerous statutes placing final decision-making authority in OAH’s hands, rather than

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1. Act of June 4, 1975, ch. 380, § 16, § 15.052, 1975 Minn. Laws 1285, 1293-95 (codified as amended at MINN. STAT. §§ 14.001-.69 (2018)).

having the courts or administrative agencies make those final decisions.<sup>2</sup> In doing so, the legislature created a questionable system where the powers granted to OAH invade the provinces of the executive and judicial branch established under the Minnesota Constitution.

This article explores the separation of powers concerns created where the legislature gave OAH authority to make final decisions. The article begins with a broad overview of Minnesota's separation of powers principles and the creation of OAH.<sup>3</sup> The article then discusses cases deciding claims where administrative courts interfered with judicial power and explores how OAH's authority to issue final agency decisions fits under those precedents.<sup>4</sup> Next, the article addresses separation of powers concerns created when the legislature grants OAH final agency decision-making authority within the executive branch that can trump what would otherwise have been another administrative agency's decision.<sup>5</sup> The article concludes with suggested legislative actions that could be taken to protect both OAH's authority and the three separate, yet equal, branches of government.<sup>6</sup>

## II. THE SEPARATION OF POWERS AND ADMINISTRATIVE AGENCIES

One can only understand the constitutional concerns raised when OAH acts as the final decision-maker by understanding the intersection of the separation of powers concerns and the rise of administrative agencies. "The separation of powers doctrine, as set out in the constitutions of both the United States and Minnesota has roots deep in the history of Anglo-American political philosophy."<sup>7</sup> The doctrine, as expressed by political philosophers such as John Locke and Montesquieu, "is based on the principle that when the government's power is concentrated in one of its branches, tyranny and corruption will result."<sup>8</sup> As explained in *The Federalist No. 47*:

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2. MINN. STAT. §§ 14.57-.70 (2012).

3. See *infra* Parts II, III.

4. See *infra* Part IV.

5. See *infra* Part V.

6. See *infra* Part VI.

7. *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 222 (Minn. 1979) (citing Reginald Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUTGERS L. REV. 449, 451-64 (1957)).

8. *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999); see also *Wulff*, 288 N.W.2d at 222-23 (noting that an administrative agency's constitutionality is determined by "a critical analysis of its function in conjunction with an examination of the doctrine of separation of powers.").

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. . . . In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct.<sup>9</sup>

Yet, separation of powers has never meant an “absolute division of our government’s functions.”<sup>10</sup> Said another way, the branches of government are not completely separate, but operate through “institutional interdependence.”<sup>11</sup> Even the founding fathers understood the branches could not function if totally divided.<sup>12</sup> Consequently, the separation-of-powers doctrine operates in a paradox—constitutional provisions mandate separation even though complete separation is impossible to attain.<sup>13</sup>

In Minnesota, the separation of powers doctrine was adopted in article III, section 1 of the Minnesota Constitution, which reads: “The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”<sup>14</sup> Some scholars have interpreted the constitutional language as “install[ing] a rigid separation of powers in Minnesota,” perhaps more rigid than the U.S. Constitution.<sup>15</sup> The Democratic faction of the Minnesota Constitution’s framers drafted the ratified language, and the preserved history of debates surrounding the language indicates that the Minnesota framers both modeled the provision

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9. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob Earnest Cooke ed., 1961).

10. *Holmberg*, 588 N.W.2d at 723.

11. *Id.* at 723, n.20.

12. See THE FEDERALIST NO. 47, *supra* note 9, at 325 (“[W]e must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other.”).

13. *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979) (noting that Madison’s own statement “presupposes that some functions of one branch may be performed by another branch without subverting the Constitution”).

14. MINN. CONST. art. III, § 1.

15. Philip P. Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota*, 70 MINN. L. REV. 1237, 1246, 1256 (1986) (“The Minnesota Constitution mandates a separation of powers at least as strict as that required by the federal Constitution; indeed, the Minnesota scheme appears even more rigid.”).

after the constitutions of other states and “emphasize[d] the importance of a strict separation of powers.”<sup>16</sup> Since ratification in 1857, the separation of powers provision has never been amended—even when the Minnesota Constitution was generally revised in 1974.<sup>17</sup>

Despite this static constitutional language, Minnesota’s government “has grown larger and more complicated.”<sup>18</sup> One of those complexities is “[t]he rise of the administrative agency”;<sup>19</sup> in particular, administrative agencies that resemble the type of power traditionally held by the legislative, judicial, and executive branches.<sup>20</sup> Such “blurred boundaries between government branches” have increasingly made “the separation of powers doctrine . . . harder to define.”<sup>21</sup> OAH, in particular, is an administrative agency that blurs the boundaries between the government branches.<sup>22</sup>

### III. A BRIEF LOOK AT OAH

Minnesota first adopted a version of the Minnesota Administrative Procedure Act (“MAPA”) in 1945.<sup>23</sup> Until 1975, MAPA required agencies to administer administrative hearings either through department heads or by hiring hearing examiners to develop a record of decision.<sup>24</sup> Exacerbated by increasingly complex law and authority, MAPA administration within the agencies, at a minimum, gave the appearance of “kangaroo courts” due to the “lack of procedural uniformity and expertise in conducting hearings, delays due to unavailability, and manpower shortages in the agencies from

16. *Id.* at 1256 n.82 (citing W. ANDERSON & A. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 119 (1921); FRANCIS H. SMITH, THE DEBATES AND PROCEEDINGS OF THE MINNESOTA CONSTITUTIONAL CONVENTION 185–202 (1857)).

17. *Id.* at 1256 n.82, 1257.

18. *Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999).

19. *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979).

20. *See id.*

21. *Holmberg*, 588 N.W.2d at 723.

22. *See id.* at 722–23.

23. Duane R. Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257, 257 (1981); BRUCE H. JOHNSON, A HISTORY OF MINNESOTA ADMINISTRATIVE PROCEDURES AND THE OFFICE OF ADMINISTRATIVE HEARINGS 2–15 (2011), [https://mn.gov/oah/assets/APAHistoryJohnson\\_tcm19-81576.pdf](https://mn.gov/oah/assets/APAHistoryJohnson_tcm19-81576.pdf) [<https://perma.cc/2DH9-7LM8>] (outlining administrative law origins in Minnesota and MAPA’s development between 1949 and 1975).

24. Harves, *supra* note 23, at 257–58; JOHNSON, *supra* note 23, at 15.

which the employee [decisionmaker] was drawn.”<sup>25</sup> Further, there were concerns that informal rulemaking went unexamined under a system where agencies controlled the MAPA process.<sup>26</sup> The culmination of these concerns led the Minnesota Legislature to adopt the Act of June 4, 1975, creating OAH and re-codifying MAPA in chapter 14 of the Minnesota Statutes (“Chapter 14”).<sup>27</sup>

Under Chapter 14, the Minnesota Legislature adopted a “central panel system,”<sup>28</sup> creating an efficient, flexible, and less expensive forum for decision-making<sup>29</sup> and addressing concerns about agency impartiality, consistency, and accountability in hearings and rulemaking.<sup>30</sup> Chapter 14 establishes OAH as an executive branch agency.<sup>31</sup> Under the new system, OAH serves as a place where an aggrieved party can resolve administrative disputes involving an executive branch agency, board, or commission (“agency”) with the help of a neutral arbiter.<sup>32</sup> OAH handles a wide variety of cases, including utility rates, electric and natural gas transmission routes, “child care and foster care license regulation, veteran’s preferences, occupational safety and health, professional licenses, nursing home rates and regulatory compliance, environmental permits, human rights, personnel disputes involving government employees, fair campaign practices complaints, municipal boundary adjustment matters, and other challenges to state and local government action.”<sup>33</sup> OAH also reviews the need for and reasonableness of all rules proposed by state agencies.<sup>34</sup>

25. Harves, *supra* note 23, at 258; *see also* Raymond Krause, *Minnesota’s OAH: 30 Years of Innovation in Administrative Review*, BENCH & B. MINN., Feb. 2006, at 17, 17–18 (describing Minnesota’s administrative process before 1975).

26. Harves, *supra* note 23, at 258; *see also* Krause, *supra* note 25, at 17–18 (describing concerns regarding Minnesota’s rulemaking procedures before 1975).

27. *See* Act of June 4, 1975, ch. 380, § 16, § 15.052, 1975 Minn. Laws 1285, 1293–95 (codified as amended at MINN. STAT. §§ 14.001–.69 (2018)).

28. Malcom Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246, 247 (1981) (examining the Minnesota system as a “central panel system”); *see also* JOHNSON, *supra* note 23, at 17 (noting Minnesota was “the country’s fifth independent central panel”).

29. Harves, *supra* note 23, at 260–61, 263–64 (discussing administrative flexibility, cost reductions, and faster processing resulting from the Minnesota central panel system).

30. JOHNSON, *supra* note 23, at 17.

31. *Id.*

32. MINN. STAT. § 14.50 (2018); *see also* JOHNSON, *supra* note 23, at 17 (labeling central panel systems as “independent” and describing how Minnesota’s central panel was created to ensure independence).

33. *About Us*, MINN. OFF. ADMIN. HEARINGS, <https://mn.gov/oah/about-us/overall/> [<https://perma.cc/9SCN-GT97>].

34. MINN. STAT. §§ 14.14, subdiv. 2, 14.26, subdiv. 3, 14.50 (2018).

From its creation, the legislature intended OAH to be independent from the governor and other executive branch agencies.<sup>35</sup> The legislature placed OAH under the direction of the Chief Administrative Law Judge (“ALJ”) “who, in turn, was authorized to appoint a sufficient number of other [ALJs] to conduct business.”<sup>36</sup> Although the governor appoints the Chief ALJ, the appointment requires the advice and consent of the Minnesota Senate, and the Chief ALJ serves a six-year term—two years longer than the governor’s term.<sup>37</sup> The legislature aimed to ensure OAH’s independence and developed a structure to insulate the Chief ALJ “from any undue political pressure in terms of assigning certain persons to hear specific cases, and from pressure to be sure decisions were rendered in a certain fashion with predetermined results.”<sup>38</sup> The legislature also specifically sheltered ALJs appointed by the Chief ALJ from political influence,<sup>39</sup> and required that all ALJs “must be free of any political or economic association that would impair their ability to function in a fair and impartial manner.”<sup>40</sup> Significantly, the legislature classified ALJs as “employees in the state civil service and therefore subject to all of the protections associated with that status.”<sup>41</sup>

In light of the independence Chapter 14 affords OAH from the executive branch, ALJs generally do not render final decisions for another executive branch agency. Instead, an ALJ’s role is to create the factual record<sup>42</sup> through a relatively informal and expedited proceeding,<sup>43</sup> and

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35. Bruce H. Johnson, *Strengthening Professionalism Within an Administrative Hearing Office: The Minnesota Experience*, 53 ADMIN. L. REV. 445, 448–49 (2001); see also Harves, *supra* note 23, at 259 (“The structure of [OAH] makes it an independent state agency.”); Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 ADMIN. L. REV. 75, 80 (1994) (noting Minnesota’s central panel is “housed in [a] completely independent agency] in the executive branch.”).

36. Johnson, *supra* note 35, at 448.

37. MINN. STAT. § 14.48, subdiv. 2.

38. Harves, *supra* note 23, at 259.

39. Johnson, *supra* note 35, at 449.

40. MINN. STAT. § 14.48, subdiv. 3(b).

41. Johnson, *supra* note 35, at 449; see also MINN. STAT. § 14.48, subdiv. 3(a) (“All administrative law judges and compensation judges shall be in the classified service except that the chief administrative law judge shall be in the unclassified service, but may be removed only for cause.”).

42. MINN. STAT. § 14.50 (establishing an OAH is charged with providing procedural due process, establishing a record, and issuing a recommendation). The dispute could be over a specific matter. For example, a denied or revoked permit, a proposed rule, or amendment to a rule. Regardless, OAH’s role is to establish a record. *Id.*

43. See MINN. R. 1400.7300 (2019) (simplifying the rules of evidence for OAH’s contested-case hearings).

make a recommendation to the executive branch agency with jurisdiction to make the final decision (“jurisdictional agency”).<sup>44</sup> Based on that record and recommendation, the jurisdictional agency then decides the matter, issues the final order, must defend that order on appeal, and must be politically accountable for its decision.<sup>45</sup> The jurisdictional agency is not required to agree with the ALJ’s decision and, instead, makes an independent decision based on the jurisdictional agency’s interpretation of the facts in the record and its application of the law to those facts.<sup>46</sup> However, the jurisdictional agency must defend its order on appeal and be politically accountable for its decision.<sup>47</sup> This decision represents the executive branch’s final action, which the Minnesota Court of Appeals can review under its writ of certiorari jurisdiction, if a complaining party appeals.<sup>48</sup> The court will uphold the jurisdictional agency’s decision where it is supported by “substantial evidence” in the record, and notably, this standard of review is not heightened where the jurisdictional agency’s final decision differs from the ALJ’s recommendation.<sup>49</sup>

But this model has broken down. Now, parts of Chapter 14 and other state laws<sup>50</sup> make OAH the final arbiter of issues affecting executive branch agencies, rather than allowing the agencies to make the final call.<sup>51</sup>

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44. This article uses the term “jurisdictional agency” to refer to the agency that has statutory authority and control over a particular area. For example, under section 93.481 of the Minnesota Statutes, the Minnesota Department of Natural Resources would be the jurisdictional agency with regard to regulation of mining operations.

45. MINN. STAT. § 14.50.

46. MINN. STAT. § 14.15, subdiv. 3.

47. *See id.*

48. *See* MINN. R. CIV. APP. P. 115 (2018). It is worth remembering that, at one point, it was an open question whether the executive branch could decide its own disputes. In *Breimhorst v. Beckman*, the Minnesota Supreme Court considered the question of whether the Minnesota Legislature’s delegation of adjudicatory powers to the Industrial Commissioner violated the separation of powers. 227 Minn. 409, 35 N.W.2d 719, 733–34 (1949). The court held that it did not “as long as the commission’s awards and determinations are not only subject to review by certiorari[] but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.” *Id.* at 734.

49. *See, e.g., In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

50. *See, e.g.,* MINN. STAT. § 13.085 (providing that OAH may issue an order, including imposing penalties, if it finds that a government entity has violated the Minnesota Data Practices Act). “A party aggrieved” by this decision can, however, appeal to the Minnesota Court of Appeals, although not under Chapter 14. MINN. STAT. § 13.085, subdiv. 5(d) (2018).

51. *See, e.g.,* MINN. STAT. §§ 200.04, subdiv. 3; 216A.037, subdiv. 4; 442A.04.



The Minnesota Legislature, perhaps hostile to the “administrative state,”<sup>52</sup> or perhaps hostile to a particular governor, may start to favor such arrangements.<sup>53</sup> These statutes are the subject of this article.

#### IV. ADMINISTRATIVE COURTS VERSUS THE JUDICIAL BRANCH

The Minnesota Supreme Court has had the opportunity to delve into the constitutional intersection of administrative courts and the judicial branch on a few occasions. In some occasions, but not all, the court has held that assigning power to an administrative court to decide disputes was unconstitutional under separation-of-power principles because the administrative court improperly acted as a judicial-branch court.<sup>54</sup>

The court first faced the constitutionality of an administrative court in *Breimhorst v. Beckman*.<sup>55</sup> There, the court addressed whether the Workman’s Compensation Act (“WCA”) violated the Minnesota Constitution by encroaching on judicial power.<sup>56</sup> Under the WCA, an injured employee could only bring an employment injury claim before an executive-branch commission rather than in district court.<sup>57</sup> An injured employee claimed, in part, that the WCA’s mandate that injured employees use the executive-branch commission rather than the court system violated the separation of powers.<sup>58</sup> The court disagreed, holding that vesting the executive-branch commission with quasi-judicial powers did not violate the “state constitutional provisions for the division of the

52. See, e.g., Josh Blackman, *Is Trump Restoring the Separation of Powers*, NAT’L REV. (Nov. 20, 2017, 3:52 PM), <https://www.nationalreview.com/2017/11/donald-trump-separation-powers-solid-job/> [<https://perma.cc/PL5B-KNSL>]. It would appear that those who are suspicious of agency actions would rather have judges decide the matters based on their own interpretation of the law, rather than defer to agency interpretation.

53. See, e.g., Frickey, *supra* note 15, at 1237. There are also statutes that attempt to wrest executive powers to take rules back from the executive and place those powers with legislative committees, or at least give legislative committees the authority to delay a rule that the executive attempts to adopt. As many have already commented on the unconstitutional nature of such provisions, and because such provisions are not directly related to OAH, this article will not address these provisions.

54. Such conflicts may, in fact, result from administrative courts publicly presenting that the administrative office performs a judicial function. See, e.g., Johnson, *supra* note 35, at 473 (“[S]trengthening professionalism necessarily involves taking steps that show the public that [OAH’s] judges possess the *requisite judicial qualities* and that they do *conduct themselves* in the ways that the public expects *judges* to behave.” (emphasis added)).

55. 35 N.W.2d 719 (Minn. 1949).

56. *Id.* at 732.

57. *Id.* at 724, 732.

58. *Id.* at 733-34.

powers of government or for the vesting of judicial power in the courts.”<sup>59</sup> The court reasoned that “as long as the commission’s awards and determinations are not only subject to review by certiorari, but lack judicial finality in not being enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court,” the commission did not unlawfully encroach upon the judicial branch.<sup>60</sup>

Thirty years later, the court walked back this broad pronouncement, concluding *Breinhorst* “mark[ed] the outside limit of allowable quasi-judicial power in Minnesota.”<sup>61</sup> In *Wulff*, the court considered whether the legislature could, without infringing on the judicial power, “constitutionally establish the Tax Court, an administrative agency, as the sole arbitrator of tax disputes.”<sup>62</sup> The court expressed serious concerns with the tax court structure, both because the tax court did not fulfill a pressing social need and “[u]nlike decisions of most administrative agencies . . . which require judicial enforcement, Tax Court decisions, upon filing, automatically become orders of the court.”<sup>63</sup> Despite these concerns, the court held the tax court did not violate the separation of powers.<sup>64</sup> The court based its holding on several factors. First, the subject matter: Minnesota courts had consistently concluded taxation was “primarily a legislative function,” distinguishing taxation from other administrative adjudications and allowing for “more latitude in permitting such a delegation.”<sup>65</sup> Second, under the statute, “the taxpayer always has the option to file in district court. . . . perhaps the saving feature of this statutory scheme.”<sup>66</sup> Finally, the court observed that “any transfer to the Tax Court is discretionary with the district court” and all tax court decisions are subject to the “ultimate check on administrative power in the form of review as of right in” the Minnesota Supreme Court.<sup>67</sup> For these reasons, the court determined the legislature did not “usurp judicial functions nor deprive taxpayers of constitutional rights” with the creation of the Tax Court.<sup>68</sup>

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59. *Id.* at 734.

60. *Id.*

61. *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn. 1979).

62. *Id.* at 222.

63. *Id.* at 223-24.

64. *Id.* at 225.

65. *Id.* at 224 (quoting *State v. Erickson*, 221 Minn. 218, 225, 3 N.W.2d 231, 235 (1942)).

66. *Id.* at 225.

67. *Id.*

68. *Id.*

The court distinguished *Wulff* in the late 1990s with *Holmberg v. Holmberg*.<sup>69</sup> The issue raised in *Holmberg* was whether Minnesota's administrative child-support process "violate[s] the separation of powers doctrine by impinging upon the original jurisdiction of the district court, by creating a tribunal which is not inferior to the district court, and by permitting child support officers to engage in the practice of law."<sup>70</sup> The court described the "flexible review standard" for whether an administrative court unlawfully encroaches on the judiciary.<sup>71</sup> The court summarized the standard as follows:

While supreme court decisions following *Breinhorst* have relied, in part, on public policy to affirm legislatively created administrative schemes, they have also been shaped by the existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal.<sup>72</sup>

Applying these criteria, the court determined the administrative child-support process violated the separation of powers on three separate grounds.<sup>73</sup> First, the court concluded the process impinged on the judiciary's original jurisdiction as the legislature had "delegated to an executive agency the [judicial branch's] inherent equitable power" violating article VI, section 1 of the Minnesota Constitution.<sup>74</sup> Second, the court found the system violated article VI, section 3 of the Minnesota Constitution, because the system gave ALJs "the power to modify district court decisions,"<sup>75</sup> making ALJs "on par' with, if not 'superior' to the district courts [the Minnesota Constitution] established."<sup>76</sup> Third, the

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69. 588 N.W.2d 720, 726 (Minn. 1999).

70. *Id.* at 721.

71. *Id.* at 725.

72. *Id.* (citations omitted).

73. *Id.* at 726.

74. *Id.* at 725-26. The court also addressed the improper delegation of judicial authority within the judicial branch in *State v. Harris*, 667 N.W.2d 911 (Minn. 2003). There, the court found a statute allowing a chief district judge to appoint non-elected judicial officers to any district court matter violated article VI, section 1 of the Minnesota Constitution because the constitution mandates that non-elected judicial officers "be inferior in jurisdiction to the district court." *Id.* at 917-20.

75. *Holmberg*, 588 N.W.2d at 726.

76. *Otto v. Wright Cty.*, 910 N.W.2d 446, 455 (Minn. 2018). In *Otto*, the state auditor challenged a state law permitting counties to choose their auditor. *Id.* The state auditor, citing *Holmberg*, argued the statute violated the separation of powers because it transferred "the executive department's authority to control and conduct audits from a constitutional officer to counties and private entities." *Id.* at 454-55. The court disagreed,

process “infring[ed] on the court’s exclusive power to supervise the practice of law” by permitting non-lawyer, child-support officers to engage in the practice of law.<sup>77</sup> The court further concluded that appellate review did not save the process from infringing on judicial powers because many participants in the process lacked “the resources to mount an appeal” under the “mandatory, albeit piecemeal, process.”<sup>78</sup>

Interestingly, despite OAH’s existence in its current form for more than forty years, the Minnesota Supreme Court has yet to analyze whether OAH’s quasi-judicial decision-making—in any form—violates the separation of powers because it encroaches on judicial power. But the Minnesota Court of Appeals engaged in this inquiry in *Riley v. Jankowski*.<sup>79</sup> Specifically, the court considered whether a statute permitting OAH to impose civil penalties for unfair campaign practices violated the separation of powers by unlawfully infringing on the judicial branch.<sup>80</sup> In *Riley*, a political candidate filed a complaint with OAH alleging relators disseminated false campaign material.<sup>81</sup> An OAH panel held a two-day evidentiary hearing and issued an order finding relators disseminated false campaign material.<sup>82</sup> The panel further ordered the relators to pay a civil fine.<sup>83</sup> Relators appealed, arguing the OAH hearing process was invalid because, rather than deciding issues relating to an administrative agency,

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distinguishing *Holmberg* on the ground that the state auditor retained “substantial and substantive responsibilities in connection with county audits.” *Id.* at 455.

77. *Holmberg*, 588 N.W.2d at 726. As discussed briefly *infra* Part V.B, the court engaged on the intersection between administrative courts and the judiciary’s authority to supervise the practice of law in *Mack v. City of Minneapolis*, 333 N.W.2d 744 (Minn. 1983). There, a statute allowed an administrative agency to set attorney fees in workers’ compensation cases. *Mack*, 333 N.W.2d at 750. In that case, the court held the statute did not violate the separation of powers, reasoning the judiciary still had the authority to review all attorney fee decisions and states around the country uniformly used this practice. *Id.* at 752–53. Twelve years later, the legislature amended the statute to create a “maximum permissible fee” and limited the power of the court to evaluate the appropriateness to the fee award. *Irwin v. Surdyk’s Liquor*, 599 N.W.2d 132, 139 (Minn. 1999). The *Irwin* court held “[l]egislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on the judiciary’s inherent power to oversee attorneys and attorney fees by depriving this court of a final, independent review of attorney fees.” *Id.* at 141–42. The court reasoned that it has an “inherent power to oversee attorneys and attorney fees” and delegating attorney fee regulation to the executive branch violated the separation of powers. *Id.*

78. *Holmberg*, 588 N.W.2d at 726.

79. 713 N.W.2d 379, 382–83 (Minn. Ct. App. 2006).

80. *Id.* at 382.

81. *Id.* at 385.

82. *Id.*

83. *Id.*

OAH considered individual complaints, determined factually whether statutory provisions were violated, and issued a final decision, which to relators, were all inherently judicial functions.<sup>84</sup> Among other arguments, relators asserted that the OAH process violated the separation of powers because the OAH was not inferior to the district court, but rather on par with district courts in deciding whether the statute was violated.<sup>85</sup> The Minnesota Court of Appeals disagreed, contending that, under *Breimhorst*, the process did not violate the separation of powers because the final administrative decision was reviewable by writ of certiorari.<sup>86</sup> Furthermore, relators failed to “demonstrate[] that an order from an ALJ panel is enforceable by execution or other process in the absence of a binding judgment entered thereon by a duly established court.”<sup>87</sup> The court distinguished *Holmberg*, stating that “[u]nlike the ALJs in *Holmberg*, [OAH] cannot modify a district court decision; their decisions are not granted the same deference as a district court order on appeal; and they do not take the place of the district court in criminal proceedings.”<sup>88</sup>

The Minnesota Court of Appeal’s reliance on *Breimhorst*, rather than *Holmberg*, to analyze whether the unfair campaign practices statute’s OAH process violated the separation of powers presents an interesting dilemma. The Minnesota Supreme Court explicitly stated in *Wulff* that *Breimhorst* marked the “outside limit of allowable quasi-judicial power in Minnesota.”<sup>89</sup> And, as laid out above, the Minnesota Supreme Court expressed numerous factors which are relevant to the inquiry in *Holmberg*, rather than the two *Breimhorst* factors the court relied on in *Riley*, including “the existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal.”<sup>90</sup>

Considering the *Holmberg* factors, the Minnesota Court of Appeals, too, simply dismissed the separation of powers concerns presented in *Riley*.<sup>91</sup> For example, *Holmberg* suggests that courts consider “voluntariness of entry into the administrative system” in determining

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84. *Id.* at 387.

85. *Id.* at 392.

86. *Id.*

87. *Id.*

88. *Id.* at 395.

89. *Id.* at 388 (quoting *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223 (Minn.1979)).

90. *Holmberg v. Holmberg*, 588 N.W.2d 720, 725 (Minn. 1999).

91. *Id.*

whether an administrative process violates the separation of powers.<sup>92</sup> In fact, the *Wulff* court expressed that the tax court likely would have violated the separation of powers, but-for the taxpayer's option to file in district court.<sup>93</sup> Yet, when the *Riley* relator argued that OAH violated the separation of powers because the system was involuntary, the Minnesota Court of Appeals dismissed the argument on the ground that "involuntary participation in an administrative process does not indicate a separation-of-powers violation when a decision rendered in the administrative process is subject to judicial review."<sup>94</sup> Such analysis completely disregards the court's reasoning in *Holmberg*, which rejected an administrative court system that provided for judicial review.<sup>95</sup>

Another unanalyzed element in *Riley* that amounted to a saving grace in *Wulff* was the "piecemeal" versus "comprehensive" system.<sup>96</sup> In *Breimhorst*, the Minnesota Supreme Court noted, in part, that it was the comprehensive nature of the system that created fewer separation of powers concerns.<sup>97</sup> In contrast, the process in *Holmberg* did not pass constitutional muster, in part, because the piecemeal system dealt with only one portion of the custody and child support process.<sup>98</sup> In *Riley*, the Minnesota Court of Appeals cited *Breimhorst* as authority to distinguish OAH's authority regarding unfair campaign practices.<sup>99</sup> But such an

92. *Id.*

93. *Wulff*, 288 N.W.2d at 225 ("It is crucial to note that the taxpayer always has the option to file in district court. This is perhaps the saving feature of this statutory scheme." (citation omitted)).

94. *Riley v. Jankowski*, 713 N.W.2d 379, 394 (Minn. Ct. App. 2006) (citing *Meath v. Harmful Substance Comp. Bd.*, 550 N.W.2d 275, 284 (Minn. 1996) (Anderson, J., concurring)).

95. *Holmberg*, 588 N.W.2d at 726 (concluding appellate review did not save the process from infringing on judicial powers).

96. *Riley*, 713 N.W.2d at 391 (quoting *Holmberg*, 588 N.W.2d at 724-25); *Wulff*, 288 N.W.2d at 225 ("[W]e find no violation . . . since an individual with a tax dispute does not go remediless. A remedy is provided by the tax court, subject to and including judicial review.").

97. *Breimhorst v. Beckmann*, 277 Minn. 409, 433, 35 N.W.2d 719, 734 (Minn. 1949) (holding the Workmen's Compensation Commission did not violate the separation of powers "as long as the commission's awards and determinations [were] not only subject to review by certiorari, but lack[ed] judicial finality in not being enforceable by execution or other process in the absence of binding judgment entered thereon by a duly established court").

98. *Holmberg*, 588 N.W.2d at 726.

99. *Riley*, 713 N.W.2d at 395 ("[W]e conclude that the process is much more similar to the process in *Breimhorst*, which the supreme court concluded did not violate the separation-of-powers doctrine, than to the process that the supreme court invalidated in *Holmberg*.").

analysis is inconsistent with the case law for two reasons. First, the process in *Riley* was admittedly piecemeal, as a criminal process also existed to punish the same conduct.<sup>100</sup> Second, and more importantly, *Breimhorst*'s analysis was directly called into question in *Wulff*.<sup>101</sup> Thus, it is questionable for the Minnesota Court of Appeals to affirm the process in *Riley* on the ground that it is “much more similar to the process in *Breimhorst*.”<sup>102</sup>

Consequently, the only case law addressing the constitutionality of an OAH process where OAH acts as a final decision-maker is questionable at best. However, the legislature is not without options. The legislature could take steps to ensure the constitutional powers remain separated, while still allowing OAH to act as a final decision-maker. The *Breimhorst* court suggested that a comprehensive and permissive administrative process that avoids matters within the traditional province of the judiciary is far more likely to pass constitutional muster than a mandatory, piecemeal administrative processes that meddles in subjects traditionally controlled by the judicial branch.<sup>103</sup>

Having discussed the case law regarding administrative courts and separation of powers from a judicial branch perspective, this article next delves into the muddier realm of inter-executive branch conflict created when OAH—or another independent administrative court—acts as the final decision-maker.

## V. OAH VERSUS THE EXECUTIVE BRANCH

Although the line is murky, as discussed above, Minnesota courts have cabined administrative courts away from certain district court functions based on the Minnesota Constitution's provisions regarding establishment of the courts. But this is only half the story. The other half of the story is how OAH and other administrative courts function within the executive branch.

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100. *See id.*

101. *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 223–24 (Minn.1979) (“Unlike decisions of most administrative agencies, such as the one reviewed in *Breimhorst*, which require judicial enforcement, Tax Court decisions, upon filing, automatically become orders of the court. It is precisely this type of impingement by other branches of government on the judiciary that concerns us. In view of the aforementioned, we are reticent to approve such a legislative scheme.”).

102. *Riley*, 713 N.W.2d at 395.

103. *See Breimhorst v. Beckmann*, 277 Minn. 409, 433, 35 N.W.2d 719, 734 (Minn. 1949).

*A. Constitutional Powers of the Executive Branch*

The Minnesota Constitution and the U.S. Constitution have similar provisions governing the branches of government, including the powers granted to the executive. Article II of the U.S. Constitution states that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>104</sup> Under Article II, the president is given the authority and responsibility to “take Care that the Laws be faithfully executed.”<sup>105</sup> Minnesota’s Constitution is firmer in its division of the powers of government into three branches, stating “[n]o person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”<sup>106</sup> But the executive’s authority found in Minnesota’s Constitution is just the same as the U.S. Constitution: the governor “shall take care that the laws be faithfully executed.”<sup>107</sup>

With the rise of the administrative state, federal courts confronted the fact that the executive could not always run the show alone and, as a result, gulped and swallowed on the theory that the president could not carry out the executive power without the assistance of subordinates.<sup>108</sup> The federal courts concluded that delegation of authority is inconsequential so long as the executive could control the subordinate officers, i.e., remove them from office.<sup>109</sup> A few years later, however, the Supreme Court conceded that Congress can, under certain circumstances, create independent agencies run by officers appointed by the president whom the president *cannot* remove, *except* upon good cause.<sup>110</sup>

The independent-agency concept seemed to be settled law, but apparently there are limits. In *Free Enter. Fund v. Public Co. Accounting Oversight Board*,<sup>111</sup> the Supreme Court struck down a statute that required “for cause” dismissal, but that also prevented the *president* from determining whether such “good cause” existed. The Supreme Court concluded the statute was infirm because it resulted in a “Board that is not accountable to the President, and a President who is not responsible for

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104. U.S. CONST. art. II, § 1.

105. *Id.* § 3.

106. MINN. CONST. art. III, § 1.

107. *Id.* art. V, § 3.

108. *Myers v. United States*, 272 U.S. 52, 117 (1926) (citing precedent where federal courts have reaffirmed the view of assistance by subordinates).

109. *Id.* (invalidating act preventing the president from removing executive officers).

110. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935).

111. 561 U.S. 477, 492 (2010).



the Board.”<sup>112</sup> And in 2018, an en banc panel of the D.C. Circuit was pressed to rescue a Dodd-Frank Wall Street Reform and Consumer Protection Act provision providing the Consumer Financial Protection Bureau’s director with a five-year term in office, subject to removal by the president only for “inefficiency, neglect of duty, or malfeasance in office.”<sup>113</sup> A panel decision that creatively held that such a director position was unconstitutional because the agency head was a single person, not a board necessitated the rescue.<sup>114</sup> Now the Fifth Circuit has entered into the fray by striking down the independence of the Federal Housing Finance Agency (“FHFA”) (in partial reliance on the D.C. Circuit panel decision in *PHH Corp. v. Consumer Financial Protection Bureau*) on the theory that the FHFA was simply too independent to be constitutional.<sup>115</sup>

On the state side, there are fewer cases that explore incursions into executive power. This may be because, as recognized by the Minnesota Supreme Court:

Once they recognize even the general location of their limits, Legislature and executive are alike careful not to come even near an encroachment on each other’s domain. And if one takes place, it is likely to be suffered in silence in order to avoid open conflict. Especially is that so when the usurper is the legislative power. The executive is ordinarily too dependent upon the Legislature for appropriations, and too desirous of generosity therein, to risk the disfavor of the money distributors by resisting their invasions of executive domain. In consequence, the executive policy of nonresistance may be patient and endure much . . . .<sup>116</sup>

There are, of course, limits to what the legislature can do to constitutional officers. “Independent core functions” of constitutional officers cannot be abolished.<sup>117</sup> But short of gutting the core functions, Minnesota courts recognize that the power of the legislature under “Article V of the [Minnesota] Constitution to ‘prescribe[]’ the ‘duties’ of executive

112. *Id.* at 495.

113. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 76–77 (D.C. Cir. 2018) (en banc).

114. *Id.* at 110. The overturned panel decision was authored by D.C. Circuit Judge Brett Kavanaugh, as was the underlying decision affirmed by the Supreme Court in *Free Enterprise Fund*. As Brett Kavanaugh now sits on the U.S. Supreme Court, he may be in a position to push forward his view of executive authority.

115. *Collins v. Mnuchin*, 896 F.3d 640, 666 (5th Cir. 2018).

116. *State v. Chase*, 175 Minn. 259, 268, 220 N.W. 951, 955 (Minn. 1928) (holding the Constitution puts the power to govern the University with the regents and a law giving administration and finance agencies authority over the University was therefore invalid).

117. *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986).

officers” includes the power to change those duties from time to time, at least until an agency (such as OAH) runs afoul of powers given the courts.<sup>118</sup>

OAH is, as previously noted, an independent agency by design.<sup>119</sup> The Chief ALJ is appointed by the governor, has a six-year term, and can only be dismissed “for cause.”<sup>120</sup> Federal case law<sup>121</sup> suggests that an agency head who is not subject to executive authority could raise a constitutional question, but this arrangement seems fairly safe under Minnesota separation of powers jurisprudence.<sup>122</sup> But constitutional questions may arise when the legislature grants OAH the authority to make final decisions in lieu of the agency that has jurisdiction over the programmatic matter at issue,<sup>123</sup> making OAH a “super-agency” over others within the executive branch, outside the control of the executive.

To be clear, OAH is not now a “super-agency” except in a very few areas. However, where the legislature has given OAH “super-agency” powers, those grants might be seen as steps down the road to a troubling incursion into the role of the executive under the constitution. Even short of such unconstitutional usurpation, the OAH “super-agency” statutes create confusing administrative law conundrums, as described below.

### B. OAH as a “Super-Agency”

The legislature has given OAH “super-agency” powers in a number of different areas. OAH can, for example, determine whether an agency has violated the Minnesota Data Practices Act and impose civil penalties.<sup>124</sup> OAH can decide whether an agency has enforced, or attempted to enforce, a guidance document, fact sheet, or the like as an “unpromulgated rule.”<sup>125</sup> OAH can award fees and expenses to be paid by

118. *Otto v. Wright Cty.*, 910 N.W.2d 446, 455 (Minn. 2018) (citing *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999)).

119. *Harves*, *supra* note 23, at 259.

120. MINN. STAT. § 14.48, subdiv. 3 (2018).

121. *Buckley v. Valeo*, 424 U.S. 1, 18 (1976), *distinguished by* *McCormell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

122. *Quam v. State*, 391 N.W.2d 803, 809 (Minn. 1986).

123. This article refers to the agency with authority over the program as the “jurisdictional agency.”

124. MINN. STAT. § 13.085.

125. *Id.* § 14.385. Courts refer to administrative agencies’ enforcement of a policy or guidance document that the agency has not formally adopted as a rule as adoption of an “unpromulgated rule.”; *see, e.g., In re Rate Appeal of Benedictine Health Ctr.*, 728 N.W.2d 497, 507 (Minn. 2007); *St. Otto’s Home v. Dep’t of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989). *See generally* GEORGE BECK & MEHMET KONAR-STEENBERG,

a state agency upon an application of a party alleging that “the position of the state was not substantially justified” in a contested-case hearing.<sup>126</sup> OAH also can decide whether a proposed agency rule is constitutional or within the agency’s statutory authority if the agency attempts to adopt the rule using the truncated “good cause” rulemaking procedures.<sup>127</sup>

In 1983, the Minnesota Supreme Court heard *Mack v. City of Minneapolis*, a case that put into question whether the act of the legislature imposing limits and allowing an administrative agency to set attorney fees violated the separations of power guaranteed by article III, section 1 of the Minnesota Constitution.<sup>128</sup> The Minnesota Supreme Court easily batted away this challenge on the ground that it could ultimately review all attorney fees decisions.<sup>129</sup> But *Mack* was followed by *Quam v. State*.<sup>130</sup> *Quam* was another attorney-fees question, this time arising out of the complicated scenario where a fee award by an ALJ under rules adopted by OAH was set aside by the Workers Compensation Court of Appeals (“WCCA”), another administrative body, on the grounds that OAH lacked authority to adopt the rule OAH relied upon to award attorney’s fees.<sup>131</sup> The Minnesota Supreme Court decided that, despite the fact that the legislature made WCCA the “sole, exclusive, and final authority for the hearing and determination of all questions of law and fact arising under the workers’ compensation laws,”<sup>132</sup> the statutory grant of jurisdiction to WCCA could not include the power to “adjudicate the adherence of agency rules to their statutory parameters.”<sup>133</sup> The court concluded that “[t]his function is solely within the judicial province and cannot be assumed by an agency tribunal without violating constitutional principles of separation of powers.”<sup>134</sup> The court later concluded that statutory limits on attorney’s fees are unconstitutional because such limits encroach upon the powers of the judiciary.<sup>135</sup>

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MINNESOTA ADMINISTRATIVE PROCEDURE § 16.4.2 (3d ed. 2014). Courts generally will not defer to or enforce an agency’s “unpromulgated rule.”

126. MINN. STAT §§ 15.471–.474 (2018).

127. *Id.* § 14.388.

128. 333 N.W.2d 744 (Minn. 1983).

129. *Id.*

130. 391 N.W.2d 803 (Minn. 1986).

131. *Id.* at 809.

132. MINN. STAT. § 175A.01, subdiv. 2 (1984).

133. *Quam*, 391 N.W.2d at 809.

134. *Id.*

135. *Irwin v. Surdyk’s Liquor*, 599 N.W.2d 132, 142 (Minn. 1999). For greater discussion of *Irwin*, see *supra* note 77.

So now the question arises, if WCCA cannot hold that an OAH rule is invalid because that is a judicial function, can OAH adjudicate similar questions of rulemaking authority involving another state agency? Can OAH issue an order to that agency, or penalize that agency? If OAH can decide questions of authority relating to another state agency or force it to act in a manner that it deems contrary to its authorities, can that agency appeal the OAH decision as it would if a court ruled against it?

### *C. Appealing OAH Decisions*

OAH has, of course, extensive powers with regard to rulemaking. Under Chapter 14, agencies must establish the need for and reasonableness of a rule.<sup>136</sup> Before an agency can adopt a rule, it must obtain OAH's affirmation that the need for and reasonableness of a rule has been established.<sup>137</sup> Under the rules that govern its rulemaking procedures, OAH may disapprove a rule if it finds that the rule is not "rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule," or "exceeds, conflicts with, does not comply with, or grants the agency discretion beyond what is allowed by, its enabling statute or other applicable law," or "is unconstitutional or illegal."<sup>138</sup> If an agency disagrees with OAH's determination, it must:

[S]ubmit the proposed rule to the Legislative Coordinating Commission and to the house of representatives and senate policy committees with primary jurisdiction over state governmental operations for advice and comment. The agency may not adopt the rule until it has received and considered the advice of the commission and committees. However, the agency is not required to wait for advice for more than 60 days after the commission and committees have received the agency's submission.<sup>139</sup>

After receiving this "advice," the agency can adopt the rule regardless of OAH's opinion of its legality, much as an agency is authorized to do in a contested case.<sup>140</sup> Thus, although heavily and questionably eroded by the "laying" required at the legislature, the jurisdictional agency retains the

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136. MINN. STAT. § 14.14, subdiv. 2 (2018).

137. *Id.* at § 14.15, subdivs. 3, 4.

138. MINN. R. 1400.2100 (2019).

139. MINN. STAT. § 14.15, subdiv. 4; *see supra* text accompanying note 53 (stating that a number of scholarly articles assert that this "laying" or "lodging" procedure is unconstitutional).

140. MINN. STAT. § 14.62.

final authority over the rule. Persons who might agree with OAH's opinion (or any "advice" from legislators), can facially challenge the rule at the Minnesota Court of Appeals after the agency adopts it.<sup>141</sup> These facial challenges are limited to a "narrow area of responsibility, lest [the court] substitute its judgment for that of the agency."<sup>142</sup>

Section 14.388 of the Minnesota Statutes is different, providing that an agency can adopt a rule without following the "normal" notice and comment rulemaking process (either with or without hearing) if the agency finds "that the rulemaking provisions of this chapter are unnecessary, impracticable, or contrary to the public interest."<sup>143</sup> However, even for a "good cause" rule, OAH must "approve[] the rule as to its legality."<sup>144</sup> Chapter 14 also provides that OAH "shall determine whether the agency has provided adequate justification for its use of this section."<sup>145</sup> The only "appeal" the legislature provides from this type of OAH decision is this: "If a rule has been disapproved by an administrative law judge, the agency may ask the chief administrative law judge to review the rule."<sup>146</sup> Therefore, Chapter 14 arguably makes OAH a super-agency over the final decision about the legality of a "good cause" rule, in lieu of the jurisdictional agency. If the ALJ disapproves an agency rule adopted pursuant to this process, the only review provided in the statute is to the Chief ALJ.<sup>147</sup> And, as the Minnesota Pollution Control Agency ("MPCA") discovered in a 2017 matter, that decision was the end of the process, unless the agency had the right to appeal OAH's determination to the court of appeals.

The 2017 MPCA case began when the Minnesota Legislature enacted legislation instructing MPCA to adopt a particular rule, with permissive language allowing MPCA to adopt the rule using "good cause" exempt rulemaking.<sup>148</sup> Following the truncated "good cause" notice process, MPCA submitted the proposed rule to OAH for review.<sup>149</sup> Unfortunately for MPCA (or perhaps the legislature), the assigned ALJ, affirmed by the Chief ALJ, determined that the proposed rule was in conflict with the federal Clean Water Act and state authority that required

141. *Id.* § 14.44.

142. *See* *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984) (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)).

143. MINN. STAT. § 14.388, subdiv. 1. This is referred to as "good cause" rulemaking.

144. *Id.* § 14.386 (a)(3).

145. *Id.* § 14.388, subdiv. 1(4).

146. *Id.* § 14.388, subdiv. 3.

147. *Id.*

148. Act of May 30, 2017, ch. 93, § 160, 2017 Minn. Laws 97-98.

149. *See* *Adopted Exempt Permanent Rule of the Minn. Pollution Control Agency Governing Mun. Effluent Limitations*, OAH 19-9003-34654 (2017), 2017 WL 5662794.

the MPCA to do what is necessary to keep its delegation to implement the Clean Water Act. Thus, OAH concluded that the MPCA had failed to establish the “legality” of the proposed rule.<sup>150</sup> Based on this reasoning, OAH declined to approve the rule.<sup>151</sup>

Although MPCA arguably could have “started over” following the “normal” rulemaking process,<sup>152</sup> MPCA instead sought and obtained a writ of certiorari *against OAH*.<sup>153</sup> This created an administrative law conundrum: May one agency within the executive branch appeal the decision of another agency within the executive branch—albeit one that operates independently of the governor—without express statutory law allowing such an appeal?

The cases provide no clear answer to this question. In 1989, the Minnesota Racing Commission (“Racing Commission”) held a contested case regarding discipline of a horse trainer and her employee for administering prohibited drugs to their horses.<sup>154</sup> The assigned ALJ recommended against discipline of the trainer and her employee.<sup>155</sup> The Racing Commission accepted this recommendation with regard to the employee (Haymes), but not with regard to the employer.<sup>156</sup> Haymes then attempted to recover attorney fees against the Racing Commission under the Minnesota Equal Access to Justice Act (“MEAJA”).<sup>157</sup> Under MEAJA, in a contested case where the tribunal determines that the state’s position is not “substantially justified,” the “court or administrative law judge shall

150. “However well-intentioned, the amendment conflicts with existing federal and state laws and regulations and is illegal.” *Id.* at \*10.

151. *Id.*

152. *E.g.*, MINN. STAT. § 14.22. This would, of course, have likely resulted in the same determination of illegality. But if the regular rulemaking process was followed, the agency could adopt the rule after following the “laying” process dictated by section 14.26, subpart 3(c), of the Minnesota Rules.

153. The Minnesota Attorney General represented both sides—MPCA and OAH—in the appeal. This in itself poses an interesting question, but would likely pass muster. The Attorney General can bring an action against an agency’s former director who was represented by the Attorney General because the Attorney General is representing the state agency, and not its former director. *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987). The Attorney General can also represent both a department and its commissioner in a contested case if separation of functions is maintained. *Elim Homes, Inc. v. Minn. Dep’t Human Servs.*, 575 N.W.2d 845, 849 (Minn. Ct. App. 1998).

154. *In re Haymes*, 444 N.W.2d 257, 257 (Minn. 1989).

155. *Id.*

156. *Id.* at 258.

157. Currently codified as MINN. STAT. §§ 15.471–.474 (2018), albeit without the “MEAJA” title.

award fees and other expenses to the party.”<sup>158</sup> For contested cases, the authority appears to be a grant of a super-power to OAH. While the substance of the decision rests with the agency, OAH decides the question of the fee award.

In *Haymes*, the Racing Commission did not agree with OAH’s fee award and appealed to the Minnesota Court of Appeals under that court’s discretionary review jurisdiction.<sup>159</sup> The matter reached the Minnesota Supreme Court solely on the issue of whether the court of appeals had jurisdiction to entertain the Racing Commission’s petition for discretionary review.<sup>160</sup>

In arguing for its right to appeal, the Racing Commission cited *Breimhorst* and *Wulff* to assert that “under the separation of powers clause of our state constitution, judicial review must be provided for administrative agency decisions involving the exercise of quasi-judicial powers.”<sup>161</sup> The Minnesota Supreme Court determined that, where no right of discretionary review had been provided by statute or appellate rules, the Racing Commission was “an aggrieved party [which] has the common law right to petition for a writ of certiorari pursuant to Minn. R. Civ. App. P. 120 and Minn. Stat. § 606.01 (1986).”<sup>162</sup> The Minnesota Supreme Court further concluded that OAH’s award of attorney fees was a “quasi-judicial decision.”<sup>163</sup> This reasoning seems questionable on a number of grounds. First, it is not clear that state agencies have “common law rights.” The power of a state agency is bound by its statutory authority,<sup>164</sup> although courts also sometimes find wiggle room by citing to “the incidental powers necessary to accomplish the duties conferred on [the agency].”<sup>165</sup> Second, it is not clear that an attorney fees decision made by a state agency upon application under MEAJA is a “quasi-judicial

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158. MINN. STAT. § 15.472(a).

159. *In re Haymes*, 427 N.W.2d 248 (Minn. Ct. App. 1988); see MINN. R. CIV. APP. P. 105.

160. *In re Haymes*, 444 N.W.2d 257, 258 (Minn. 1989).

161. *Id.*

162. *Id.* at 259.

163. *Id.* Ironically, despite these findings, the Racing Commission lost the case because it had failed to obtain a writ of certiorari, but instead had brought a “petition for discretionary review.” *Id.*

164. *Waller v. Powers Dep’t Store*, 343 N.W.2d 655, 657 (Minn. 1984) (“Neither agencies nor courts may under the guise of statutory interpretation enlarge the agency’s powers beyond that which was contemplated by the legislative body.”).

165. See, e.g., *In re Qwest’s Wholesale Serv. Quality Standards*, 678 N.W.2d 58, 67 (Minn. Ct. App. 2004) (Minge, J., concurring).

determination.”<sup>166</sup> The Minnesota Supreme Court has “recognize[d] that the assessment of penalties and sanctions by an administrative agency is not a factual finding but the exercise of a discretionary grant of power.”<sup>167</sup>

Although *Haymes* appears to authorize a state agency to appeal OAH’s determination of attorney fees, a quasi-judicial determination, allowing a state agency to appeal an OAH rulemaking decision (i.e., the MPCA “good cause” rulemaking) seems a harder stretch. Rulemaking seems to be the classic “quasi-legislative action” that affects the rights of the public generally and is not specific to any particular set of facts.<sup>168</sup> And is one agency within the executive branch “aggrieved” when another agency is given the authority to make a final decision? If the legislature made OAH the “superior tribunal” within the executive branch for a particular decision—for example, deciding the legality of a “good cause” rule—it seems wrong to find that another agency within the executive branch can be aggrieved by its decision. The Minnesota Supreme Court held that an administrative agency does not have standing to appeal a decision made by another agency or board sitting as a superior tribunal.<sup>169</sup> Other statutes, notably section 271.06 of the Minnesota Statutes,<sup>170</sup> expressly permit agencies to make appeals from administrative tribunal decisions. The Minnesota Supreme Court has recognized these express provisions as key factors in whether an agency can pursue an appeal.<sup>171</sup> Should the courts be allowed to create a different path, as under *Haymes*?

166. *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999) (“[T]he three indicia of quasi-judicial actions can be summarized as follows: (1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim.”).

167. *In re Haugen*, 278 N.W.2d 75, 80 n.10 (Minn. 1979).

168. *See Interstate Power Co. v. Nobles Cty. Bd. of Comm’rs*, 617 N.W.2d 566, 574 (Minn. 2000); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981); *Anderson v. Cty. of Lyon*, 784 N.W.2d 77, 81 (Minn. Ct. App. 2010).

169. *City of St. Paul v. LaClair*, 479 N.W.2d 369, 371 (Minn. 1992); *Minn. State Bd. of Health v. Governor’s Certificate of Need Appeal Bd.*, 304 Minn. 209, 216–17, 230 N.W.2d 176, 181 (1975).

170. MINN. STAT. § 271.06 (2018) (permitting “any political subdivision of the state, directly or indirectly, interested therein or affected thereby, or by the attorney general in behalf of the state” to appeal a tax court decision).

171. *Minn. Water Res. Bd. v. Traverse Cty.*, 287 Minn. 130, 134, 177 N.W.2d 44, 47 (1970) (“[R]ight of appeal depends largely on whether express provision is made in the particular statute involved.”).



*D. OAH Defense of “Final Agency Decisions”*

Other problems arise when OAH makes the final decision for the executive branch. An ALJ—as would be the case for any judge—has no special expertise in the subject matter. Under longstanding Minnesota precedent, when an expert agency makes a decision, a court will give appropriate deference.<sup>172</sup> When OAH makes the final decision, is it entitled to the same deference? At least for Minnesota Government Data Practices Act (MGDPA) unpromulgated rule cases<sup>173</sup> heard before OAH, the answer is no and yes. In *Webster v. Hennepin County*,<sup>174</sup> the Minnesota Supreme Court declared that it would not defer to the ALJ’s conclusions in making a final decision under section 13.085 of the Minnesota Statutes, but then applied the statutory substantial evidence standard under section 14.69 of the Minnesota Statutes, which accords essentially the same deference.<sup>175</sup> While deference to an ALJ decision on a MGDPA issue may not seem that odd, the question is certainly more difficult where the subject matter of the dispute is specialized (say, a science-based water quality standard or the appropriate accounting method for a nursing home). In those cases, it does seem questionable to rely on a single non-expert judge to make that decision rather than an agency. Similarly, where a jurisdictional agency is operating pursuant to delegated authority from the federal government, it seems problematic to have another agency make the decision.<sup>176</sup>

Another practical problem that arises when OAH makes the final decision involves OAH’s ability to defend its decision. Given OAH’s “judicial” function, appearing in the appeal to defend its decision seems akin to a district court judge appearing at the court of appeals to defend a decision, rather than a litigant.<sup>177</sup> Moreover, would OAH be able to mount a full-throated defense of its decision given that it may lack expertise in the

172. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (1977) (“We also adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies’ expertise and their special knowledge in the field of their technical training, education, and experience.”).

173. See *supra* text accompanying note 125.

174. 910 N.W.2d 420, 429 (Minn. 2018).

175. MINN. STAT. § 13.085, subdiv. 5(d) (“A party aggrieved by a final decision on a complaint filed under this section is entitled to judicial review as provided in sections 14.63 to 14.69.”); *Webster*, 910 N.W.2d at 429.

176. For example, the Minnesota Pollution Control Agency is delegated the authority to issue permits and establish water quality standards required by the federal Clean Water Act. See MINN. STAT. § 115.03, subdiv. 5. Can OAH make the final decision on a rule proposing a new water quality standard if it does not hold this delegation?

177. See *Johnson*, *supra* note 35, at 473.

matter?<sup>178</sup> Even where OAH makes a decision favorable to an agency, generally the agency—not OAH—defends the decision on appeal.<sup>179</sup> However, OAH’s entry into the case may involve intervention or a separate appeal.<sup>180</sup>

Unfortunately for this article, the Minnesota Court of Appeals did not rule on the 2017 MPCA “good cause” rulemaking matter due to legislative action that mooted the appeal before making a decision.<sup>181</sup> Nevertheless, the MPCA matter illustrates that, by making OAH a super-agency within the executive branch, troubling complexities of administrative law result.

## VI. CONCLUSION

Given the confusion that results when OAH is given final decision authority, the wisdom of providing such authority to OAH must be questioned. Where the authority of administrative courts strays into the area designated to the judiciary, the courts have stated that they will abstain from interference based on several factors. Those factors include the “existence of adequate judicial checks on administrative actors, the function delegated, ALJ decision appealability, voluntariness of entry into the administrative system, and whether the legislative delegation is comprehensive or piecemeal.”<sup>182</sup> Yet, in spite of these limitations, the legislature continues to push the limits of the separation of powers doctrine by continuing to give OAH authority that encroaches upon the express province of the judiciary.

Courts seem more at sea as to how to deal with statutes that give OAH administrative super-power over other jurisdictional agencies within the executive branch. These statutes create a host of legal issues not easily

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178. *See, e.g.*, Petition of Brenda Loewen, No. 1-1800-14925-2, 2002 WL 31303618, at \*3 (Minn. Off. Admin. Hearings Aug. 1, 2002). The Department of Human Services (“DHS”) argued that if OAH issued an order prohibiting DHS from enforcing a statute (as included in its disputed manual), that action “would violate the separation of powers clause of the Minnesota Constitution.” *Id.* If OAH ordered DHS to cease enforcing its statute, and DHS did not, would an action in district court be the result? *See id.* Would the district court reconsider the question in order to maintain “judicial control” over the executive branch agencies? *See id.*

179. *See, e.g.*, Waste Mgmt. of Minn., Inc. v. Minn. Pollution Control Agency, No. A14-0122, 2014 WL 3892576, at \*1 (Minn. Ct. App. Aug. 11, 2014) (demonstrating how the Minnesota Pollution Control Agency appeared by a “related appeal” created by the filing of a separate writ against it).

180. *Id.*

181. Act of May 30, 2017, ch. 93, § 160, 2017 Minn. Laws 97-98.

182. *Holmberg v. Holmberg*, 588 N.W.2d 720, 725 (Minn. 1999).

untangled. Beyond these issues, the stakes increase significantly - particularly for the jurisdictional agency, but also for the opposing party - if an OAH decision becomes the final decision. If one of the legislature's objectives in creating OAH as an administrative court was to simplify the process for decision-making, some of that simplicity may be lost. Making OAH the decision maker moves OAH closer to resembling a district court with all the associated burdens and costs. Finally, it is worth bearing in mind that OAH is not under political control by the governor. If the legislature transfers across-the-board broad powers to an executive agency not under the governor's control, are constitutional questions raised, as they have been in federal decisions?

Because of the problems created when OAH is given judicial-like powers and broad authority over other executive branch agencies, the legislature should think twice when granting such powers. For matters encroaching on the judiciary, simple changes to the process are more likely to pass constitutional muster. These changes include making the system comprehensive, permissive, and governed by clear judicial oversight. These changes are preferable over mandatory administrative processes that only address a small portion of an administrative or legal scheme and delve into areas traditionally controlled by the judicial branch. For cases where OAH must resolve disputes involving other agencies within the executive branch, the better model is likely the one that is used for other OAH decisions under Chapter 14. Using this model, the opinion of the ALJ is only advisory, and the state agency must make the final call, subject to review by certiorari at the Minnesota Court of Appeals. If there is a particular reason to grant OAH the ultimate power to decide a matter, the grant of that power must be done with thoughtful safeguards, including clear authority that enables a state agency to appeal the OAH decision.

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