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Recommended Citation

Comment, Judicial Review for Ohio's Civil Servants, 22 Clev. St. L. Rev. 338 (1973)

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Judicial Review for Ohio's Civil Servants

WITH THE PROLIFERATION OF ADMINISTRATIVE AGENCIES, numerous problems are naturally encountered. In spite of the tendency toward problems, one would hope that in establishing these agencies, the legislature — whether it be on the local, state, or federal level — would do its utmost to insure uniformity within a given area. A review of sections 119.12, 143.27, and 2506 of the Ohio Revised Code and the relevant case law, however, reveals the Ohio legislature's failure to insure that uniformity.

If one were to make a superficial survey of Ohio's Revised Code, he would think that Ohio has but one Administrative Procedure Act: §119.12. In fact, there are several.¹ At the outset, the Administrative Procedure Act contains several exceptions.² For example, the Act does not apply to the public utilities commission³ or the superintendent of banks⁴ or the superintendent of building and loan associations,⁵ or in some cases the superintendent of insurance.⁶ Nor does the Act apply to the administrative appeals from the Department of Taxation.⁷ Each of these administrative agencies is independent and operates outside of Ohio's Administrative Procedure Act. Since the scope of this note is limited to those problems encountered with agencies within the purview of the Act, the above agencies will not be considered.

Where can one find the rules by which an agency governs itself? When must an appeal be filed? With which court does one file? What is the scope of the judicial review?

These are some of the problems which the attorney and his client must face. But if the attorney has a client who is involved with an agency that comes within the purview of the Administrative Procedure Act, are these questions answered? Regrettably, the answer is no.⁸

Ohio Revised Code §143.27

There is one group of people particularly affected by the operation of Ohio's statutes relating to appeals from administrative

¹ OHIO REV. CODE §119 (1972); see also France, *The Administrative Appeal — Ohio's Jurisdictional Morass*, 39 OHIO BAR 1435 (1966) [hereinafter cited as France].

² OHIO REV. CODE §119 (Page 1972).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ OHIO REV. CODE §119.12 (Page 1972).

⁸ See France.

bodies: civil servants. Not only do the decisions of particular administrative agencies affect their taxes, insurance rates, and utility bills like those of every other citizen; administrative agencies affect their very jobs and livelihoods.

The basic statute affecting civil servants in Ohio is Chapter 143 of the Ohio Revised Code.⁹ This chapter of the Code regulates the functioning of government and its employees. Of special interest is the section which deals with tenure of office, suspension, and removal.¹⁰ Even a superficial reading of §143.27 begins to illuminate many of the pitfalls for the unsuspecting.

As §143.27 of the Ohio Revised Code indicates, civil servants have a right to appeal a decision of their local civil service commission.¹¹ The section specifically provides for appeals for members of municipal police and fire departments, and provides generally for judicial review of the decision of the municipal civil service commission or the State Personnel Board of Review¹² However, for almost 20 years (1935 to 1955), a question existed regarding the scope of the judicial review.

De Novo, Quasi De Novo, or In Toto?

One of the earliest cases to deal with this question was *Hawkins v. Steubenville*.¹³ In this case, the plaintiff prosecuted an appeal from an order of the city's civil service commission. The commission's order of removal, affirming the decision of the director of public safety, was appealed to the Court of Common Pleas and eventually to the Ohio Supreme Court. The Supreme Court, relying on §486-17a of the General Code,¹⁴ ruled that the scope of judicial review was limited *in toto* to affirmance or disaffirmance of the ruling of the civil service commission, and that the court was without jurisdiction to modify the commission's ruling. Justice Day, speaking for the court, said:

Where the court finds the cause to have been sufficient, it is its duty to affirm the judgment of the commission *in toto*. Where, however, it finds otherwise, it is its duty to disaffirm *in toto*. This the full extent of its jurisdiction.¹⁵

⁹ OHIO REV. CODE §143 (Page 1972).

¹⁰ OHIO REV. CODE §143-27 (Page 1972).

¹¹ At this point it should be made clear that §143.27 deals both with state civil servants who are regulated by the State Personnel Board of Review and municipal civil servants who are regulated by local civil service commissions.

¹² OHIO REV. CODE §143-27 (Page 1972).

¹³ 134 Ohio St. 468, 17 N.E.2d 641 (1938).

¹⁴ §486-17a of the GENERAL CODE was succeeded by today's §119.12, OHIO REV. CODE.

¹⁵ 134 Ohio St. 468 at 472, 17 N.E.2d 641 at 643 (1938).

Two years after the *Hawkins* decision, the Ohio Supreme Court was again faced with the same question. *Kearns v. Sherill*¹⁶ involved a member of the Cincinnati police force who had been removed by the defendant city manager. The city civil service commission affirmed the removal, and Kearns appealed to the Court of Common Pleas for Hamilton County. There the court reversed Kearns' removal, and the city manager then appealed. On appeal, the Court of Appeals ruled in favor of the the defendant, and the case was certified to the Supreme Court on the question of the meaning of "appeal." The Supreme Court found that the legislature did not intend the general meaning of "appeal", but had limited the court's jurisdiction to affirm or disaffirm the civil service commission's ruling.¹⁷ The Court was to determine the *sufficiency* of the cause of removal,¹⁸ and could not modify the order of the civil service commission. The word "appeal" may have implied a hearing *de novo*, but the Court found that, in reality, it was severely limited. This restrictive interpretation of an "appeal" was used by the Court of Appeals for Franklin County eight years later.¹⁹

In *In re Fortune*,²⁰ the Cuyahoga County Court of Common Pleas said:

Had the legislature intended the Court to determine the issue as though exercising original jurisdiction, certainly the power to modify the Commission's ruling would have been conferred, as well as the power to affirm or reverse . . .²¹

* * *

. . . this court is of the opinion that, inasmuch as the judicial review is restricted to a determination of one question only and not a review of the entire matter, that the case should be tried on the record taken before the Commission and that but one judgment may be rendered, *viz*: an affirmance or disaffirmance *in toto*.²²

¹⁶ 137 Ohio St. 468, 30 N.E.2d 805 (1940).

¹⁷ *Id.* at 469, 30 N.E.2d at 807.

¹⁸ See *Landrey v. Harmon*, 5 Ohio App. 217 (1916).

¹⁹ *In re Sidell*, 51 Ohio L. Abs. 105 at 110, 80 N.E.2d 203 at 206 (Ct. App. 1948). Judge Hornbeck relied on the Ohio Supreme Court decision in *Kearns v. Sherill*, 137 Ohio St. 468, 30 N.E.2d 805 (1940), which defined "appeal" according to §486-17a of the GENERAL CODE to mean a review of the sufficiency of the evidence.

²⁰ 45 Ohio Op. 449, 101 N.E.2d 174 (C.P. 1951).

²¹ *Id.* at 450, 101 N.E.2d at 176. The court was quoting from the court of appeals decision in *Kearns v. Sherill*, 63 Ohio App. 533 at 541, 27 N.E.2d 412, *aff'd*, 137 Ohio St. 468 30 N.E.2d 805 (1940).

²² *Id.* at 451, 101 N.E.2d at 177; see also, *Koellner v. Canton*, 160 Ohio St. 504, 117 N.E.2d 169 (1954), where the Supreme Court outlined its view regarding the scope of judicial review when dealing with civil service administrative rulings.

After dealing with the issue of whether judicial review was a *de novo*, *quasi de novo*, or *in toto* hearing, the Supreme Court attempted to end the controversy in *Sorge v. Sutton*.²³ In a thorough review of the area, the Court concluded that the scope of the review was to the sufficiency of the evidence which the commission used in its decision that there was sufficient cause for removal, and further stated:

If there should be a change in what to us is the obvious and intended meaning of Section 486-17a, General Code, [new §119.12, Revised Code] as it relates to an appeal to the Court of Common Pleas, the General Assembly is the agency to deal with the matter.²⁴

The legislature responded to this problem that had been troubling the courts — to say nothing of the involved attorneys and their clients — by amending §143.27 to include the words “on questions of law and fact.”²⁵

The Supreme Court in *Cupps v. Toledo*²⁶ ruled that even though a city charter provided that a civil service commission’s order was final, it was appellable under §143.27 to the Court of Common Pleas. In addition, and more importantly for present purposes, the Court ruled that because the appeal was based on §143.27 (now with the addition of “questions of law and fact”), that the hearing was virtually *de novo*.²⁷

This departure from the old rule, as a result of the 1955 amendment, was repeated in *Fugate v. Columbus*²⁸ where the Court of Common Pleas for Franklin County said:

Section 143.27, Revised Code, provides specifically for an appeal on questions of law and fact to the Court of Common Pleas by a member of a police department in case of removal.²⁹

In its present form, §143.27, Revised Code, retains the same language,³⁰ and there has been no case overruling the proposition that §143.27 provides for a hearing *de novo* in the Court of Com-

²³ 159 Ohio St. 574, 113 N.E.2d 10 (1953).

²⁴ *Id.* at 580, 113 N.E.2d at 13.

²⁵ 126 LAWS OF OHIO 91 — the amendment was passed on April 28, 1955, and was effective on August 16, 1955.

²⁶ 170 Ohio St. 144, 163 N.E.2d 384 (1959).

²⁷ *Id.* at 148, 163 N.E.2d at 387.

²⁸ 4 Ohio App.2d 147, 211 N.E.2d 885 (1963).

²⁹ *Id.* at 149, 211 N.E.2d at 886.

³⁰ OHIO REV. CODE §143.27 (Page 1972).

mon Pleas. However, in *Fugate*,³¹ the groundwork was laid for other problems relating to the civil service appeals. It should be noted that such appeals were for members of the police and fire departments only, but in most municipalities today these departments do not constitute the total work force. The question then arises as to what the appeal rights of the other municipal and state employees are.

Section 143.27, Revised Code, provides for the mechanics of both administrative appeals, and judicial review of those appeals, only for the members of the police and fire departments.³² Specifically, they can appeal a "suspension of any period of time or demotion or removal . . ."³³ and such an appeal to the courts must be taken within 30 days from the finding of the municipal civil service commission.³⁴

All other municipal and state employees receive different treatment under §143.27, Revised Code. Hence, different problems arise.

Ohio Revised Code §119.12

According to §143.27, Revised Code, public employees other than members of the police and fire departments can administratively appeal an order of their appointing authority to the civil service commission or the State Personnel Board of Review. The appealable orders include ". . . any case or reduction, suspension of more than five working days or removal . . ."³⁵ On this basis alone, police and fire department members receive preferential treatment. The members of those departments may appeal a suspension of any length of time, while all other municipal and state employees in Ohio may only appeal suspensions of more than five days. The statute continues:

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission to the court of common pleas of the county in which the employee resides in accordance with the procedure provided by section 119.12 of the Revised Code.³⁶

³¹ 4 Ohio App.2d 147 at 149, 211 N.E.2d 885 at 886 (1963).

³² OHIO REV. CODE §143.27 (Page 1972).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The author feels that the treatment other civil servants receive regarding suspensions *vis a vis* the treatment afforded police and fire departments is inherently discriminatory and against public policy. See *Anderson v. Minter*, 32 Ohio St. 2d 207, ____ N.E.2d ____ (1972); *but see*, *In re Locke*, 33 Ohio App.2d 177, ____ N.E.2d ____ (Ct.App. 1973).

³⁶ OHIO REV. CODE §143.27 (Page 1972).

These employees can appeal orders of the appointing authority with regard to "reduction, removal and suspension of more than five days," but if these orders are upheld by the local civil service commission or the State Personnel Board of Review, the employee can only appeal orders regarding "removal or reduction in pay for disciplinary reasons" to the court for review. It would seem that the legislature feels that questions involving suspensions and reductions in pay for reasons other than discipline (economy, reclassification, etc.) do not warrant judicial review. One wonders if the affected employees concur with this treatment.

Also under the aforementioned portion of §143.27, the legislature has provided for an appeal to be prosecuted in the Court of Common Pleas in the county of the *employee's residence*. This appeal is to be taken "in accordance with §119.12 of the Revised Code," as set out above. However, the Administrative Procedure Act (§119.12) provides that jurisdiction for appeals is to be vested in the Court of Common Pleas for *Franklin County*.³⁷ If an affected employee resides in Franklin County, there would appear to be no jurisdictional problems. Unfortunately, this is not always the case. Hence, the question of *where to file* an appeal becomes critical.

This situation arose in the case of *In re Removal of Zeigler*.³⁸ Zeigler was a state highway department employee who had been laid off for reasons of economy. He appealed to the State Personnel Board of Review which affirmed the layoff. Zeigler then filed an appeal of his layoff in the Court of Common Pleas of Wyandot County, where he resided. The State Personnel Board of Review filed a motion to dismiss on the grounds that in accordance with §119.12 Zeigler had to file his appeal in the Franklin County Court of Common Pleas. The Court of Common Pleas for Wyandot County granted the motion to dismiss, and Zeigler appealed. In affirming the dismissal of the lower court, the Court of Appeals held that:

. . . an appeal from the board from a lay off order is exclusively to the Court of Common Pleas of Franklin County and that the order of the Common Pleas Court of Wyandot County in dismissing the appeal must be affirmed . . .³⁹

The court went on in *Zeigler* to find that the determinant of the forum for prosecution of the appeal was whether or not the employee had "control" over the action which precipitated the ap-

³⁷ OHIO REV. CODE §119.12 (Page 1972).

³⁸ 1 Ohio App.2d 336, 204 N.E.2d 692, *aff'd*, 4 Ohio St. 2d 46, 212 N.E.2d 419 (1965).

³⁹ 1 Ohio App.2d 336 at 339, 204 N.E.2d 692 at 694. The court also relied on *State ex rel. Oliver v. State Civil Service Comm'n*, 168 Ohio St. 445, 155 N.E.2d 897 (1959), and *State ex rel. Kendrick v. Mascheter*, 176 Ohio St. 232 199 N.E.2d 13 (1964) providing that such appeals were within the purview of §119.12, OHIO REVISED CODE.

pointing authority's order.⁴⁰ The court said that actions of "transfer or lay off" were appealable to the Court of Common Pleas in Franklin County in accordance with §119.12, Ohio Revised Code, and that "employee-controlled" actions such as discipline for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, or insubordination, are appealable to the Court of Common Pleas in the county of the employee's residence in accordance with §143.27 of the Revised Code.⁴¹ These "employee-controlled" actions on which the Court relied in making its distinctions are used in the Code as grounds for reduction, removal, and suspension under §143.27 and not §119.12⁴² Since this decision was affirmed by the Supreme Court without comment,⁴³ one might properly conclude that the Court was affirming not only the result, but also the underlying rationale, under this particular set of facts. The Supreme Court failed to answer the question as to where the employee should appeal a transfer for incompetency in a particular position or job, or a transfer for insubordination because of a personality conflict between the employee and his supervisor.

One possible solution to this problem would be to disregard the distinction formulated in *Zeigler* and to provide that all such appeals are to be filed in the Court of Common Pleas in the county of the employee's residence. This proposal will be discussed in greater detail below.

Additional Remedies — Chapter 2506

Not only does the employee of a municipality have §143.27 and §119.12 at his disposal; he also has another chapter of the Code, 2506.⁴⁴ Under this chapter,

Every final order, adjudication or decision of any official, tribunal, authority, board, bureau, commission, department, or other division of any political subdivision of the state may be revied *by the common pleas court in which the principal office of the political subdivision is located* . . .⁴⁵
(Emphasis added)

⁴⁰ 1 Ohio App.2d 336 at 339, 204 N.E.2d 692 at 694 (1965).

⁴¹ Quotation marks added. The court reasoned that since §119.12 was enacted subsequent to §143.27, §119.12 was controlling in the event of inconsistencies. The court felt this was in accord with accepted principles of statutory construction.

⁴² OHIO REV. CODE §143.27 (Page 1972).

⁴³ Cases cited note 38 *supra*.

⁴⁴ OHIO REV. CODE §2506.1 (Page 1972); *see also* Vinopal, *A Survey of Ohio's Administrative Case Law — 1968*, 42 OHIO BAR 979 (1969). He may also have chapter 2505 at his disposal. *See In re Locke*, 33 Ohio App.2d 177 at 187, _____ N.E.2d _____ at _____ (Ct.App. 1973).

⁴⁵ OHIO REV. CODE §2506.01 (Page 1972).

The review power of the courts of common pleas is substantial in that the court may hear evidence in addition to the transcript of the administrative agency's hearing⁴⁶ and the court can find:

. . . that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence of the whole record⁴⁷

The court is also empowered to:

. . . affirm, reverse, vacate or modify the order, adjudication or decision or remand the cause to the officer or body . . . with instructions to enter an order consisted with the findings or the opinion of the court⁴⁸

Even with these broad powers of admitting evidence and rendering decisions, the Supreme Court has found that the court's hearing is not a trial *de novo*; rather, it is only authorized to determine the legal justification for the agency's order.⁴⁹

The first question which arises is whether this additional remedy in the Code applies to municipal employees. This question was before the Supreme Court in *State ex rel. Steyer v. Szabo*.⁵⁰ In this case, both the plaintiff and the defendant were members of the Parma Police Department, and both had taken the examination for the position of Chief of Police. The plaintiff received a lower score. After some requested corrections were made by the civil service commission, the plaintiff's score was still lower, and the defendant was appointed to fill the position. As a result, Steyer instituted a *quo warranto* suit in the court of appeals seeking a decree determining that the defendant held the position unlawfully and that Steyer should have received the appointment. In the court of appeals, the defendant asked for and was granted summary judgment, and Steyer appealed to the Supreme Court. In a *per curiam* decision, the court held that "the respondent civil service commission is a commission within the meaning of . . . 2506." Since the court found that the plaintiff had an adequate appeal at law under Chapter 2506, Ohio Revised Code, a proceeding in *quo warranto* could not be substituted for an appeal to the Court of Common Pleas as provided for in that section of the Code.

⁴⁶ OHIO REV. CODE §2506.03 (Page 1972).

⁴⁷ OHIO REV. CODE §2506.04 (Page 1972).

⁴⁸ *Id.*

⁴⁹ *Manning v. Straka*, 117 Ohio App. 55, 189 N.E.2d 651 (1962); *Williamson v. Township Trustees*, 18 Ohio App.2d 188, 247 N.E.2d 789 (1969); see also, *In re Locke*, 33 Ohio App.2d 177, _____ N.E.2d _____ (Ct. App. 1973).

⁵⁰ 174 Ohio St. 109, 186 N.E.2d 839 (1962).

⁵¹ *Id.* at 110, 186 N.E.2d at 840.

A year later, 1963, the same question was presented to the court by a different route, in the case of the *State ex rel. Fagain v. Stork*.⁵² This case differed from *Steyer* in that *Fagain* sought to overturn the Columbus Civil Service Commission's order of dismissal by writ of mandamus. Again in a *per curiam* decision, the Ohio Supreme Court held that §2506 provided an adequate remedy in law, and that writ of mandamus was precluded.⁵³ However, this case did not end attempts by public employees to seek judicial review by way of the writ of mandamus. In *State ex rel Conant v. Jones*,⁵⁴ the plaintiff was suspended from the city police force, and on appeal to the city's civil service commission, the commission refused to take jurisdiction since, under its rules, it would only hear suspensions of more than 30 days. Upon the commission's refusal, the plaintiff sought a writ of mandamus. The court of appeals dismissed the suit. In affirming the court of appeals' dismissal, the Supreme Court held that the plaintiff had an adequate remedy under §2506, Ohio Revised Code, and cited *Fagain*.⁵⁵

In *State ex rel. Marshall v. Civil Service Comm'n*,⁵⁶ the Supreme Court followed the precedent it had established in *Fagain* and *Conant* in holding that an action in mandamus was inappropriate in light of §2506. In *Marshall*, a member of the municipal fire department was denied admission to a promotional examination. The denial was transmitted through the Director of Personnel, and Marshall claimed in his mandamus action that the denial was not a "final" order. However, the Supreme Court found that the commission had "spoken through" the Director of Personnel and that the denial was a "final" order.⁵⁷ Since the order had been determined to be final, the court reasoned that Marshall had clear and adequate remedy under the provisions of §2506 and therefore that the petitioner was not entitled to a writ of mandamus, since such a writ can ". . . not be used when there is a plain and adequate remedy in the ordinary course of the law."⁵⁸

One very important question that has yet to be answered is whether a municipal employee has an election of remedies. Can he select to file an appeal under §143.27, §119.12, or §2506, or all three?

⁵² 174 Ohio St. 330, 189 N.E.2d 69 (1963).

⁵³ *Id.* at 331, 189 N.E.2d at 71. The Supreme Court remanded a similar decision regarding the right to an action in mandamus in the face of appeal rights under §119.12, OHIO REV. CODE, in *State ex rel. Oliver v. State Civil Service Comm'n*, 168 Ohio St. 445, 155 N.E.2d 897 (1959).

⁵⁴ 176 Ohio St. 147, 197 N.E.2d 897 (1964).

⁵⁵ *Id.*

⁵⁶ 14 Ohio St. 2d 226, 237 N.E.2d 392 (1968).

⁵⁷ *Id.* at 231, 237 N.E.2d at 395.

⁵⁸ OHIO REV. CODE §2731.05 (Page 1972).

Summary and Recommendations

What we have seen is a number of legislative attempts to provide judicial review of administrative orders that affect civil servants.

Two main points should be stressed. First, under the present statutes and case law, members of municipal police and fire departments receive preferential treatment. At one time this may have been appropriate, given the needs of the public's safety. However, with greater public reliance on government to perform previously private services, the distinctive aspects of the police and fire departments begin to diminish. Not that these two departments are not vital to the community's safety; in an urban society, however, such services as garbage collection, water filtration, and hospital services also affect the public safety and welfare. One wonders if a mechanic in the police garage is considered in a maintenance pool or if he is a "member of the police . . . department."⁵⁹ If the latter, is there really any compelling public policy reason in modern urban society why he should be afforded preferential treatment over his brother mechanic who works in the streets department?⁶⁰

Second, under the present state of the law, there are possible problems of jurisdiction, and questions regarding the identity of the statute(s) under which an appeal from the decision of a civil service commission can be filed. There may be a possibility of "forum-shopping" under the current situation and this, along with other problems, could and should be cause for concern.

With the present statutes, the following example is possible. A civil servant is an employee for the city of Cleveland and lives in Mentor, Ohio. She is a "Clerk I" in the city water department. After her promotion to Clerk II, it is discovered that she is unable to handle the new job and because her old job is now filled, it is necessary to transfer her to another department. The employee dislikes working in the new department for valid reasons, and seeks to appeal the transfer order to the city civil service commission. After unsuccessfully appealing to the civil service commission, she seeks judicial review of the commission's decision.

Under §143.27, Ohio Revised Code, she can appeal to the Court of Common Pleas for Lake County since that is the county of her residence. In addition, under §119.12, Revised Code, she can appeal in the Court of Common Pleas for Franklin County. Moreover, if she appeals under Ch. 2506, Revised Code, she would have to file her appeal in the Court of Common Pleas for Cuyahoga County, the county in which the city of Cleveland is located.

⁵⁹ OHIO REV. CODE §143.27 (Page 1972).

⁶⁰ The author is unaware of any case deciding that particular question.

To compound this already confusing situation, the Franklin County Court might dismiss the action on the basis of *Zeigler*. The court could do this on the grounds that her transfer was for incompetency and therefore "employee-controlled." Also, the court in Cuyahoga and Lake counties could dismiss her action because it was a transfer, and under the rule of *Zeigler*, the appeal should have been filed in Franklin County. Our hypothetical civil servant could have three actions pending concurrently, or she could have all of them dismissed involuntarily. Should she pursue all three? Or one? Or two? Which one(s)? Certainly, the legislature owes better treatment to the government's employees.

The legislature should make every effort to reform, not merely add to, the existing laws as they relate to judicial review of administrative orders affecting government employees. In doing this, the legislature should treat all civil servants as equals and do its utmost to avoid discrimination and insure uniformity. Such reform should also provide for the same appeals procedure, including questions of jurisdiction, regardless of the substance of the appeal, or who is prosecuting it. One answer would be to have all appeals originate in the court of common pleas in the county of the employee's residence. Regardless of where the appeal is to be taken it will be a hardship on one of the parties. But it is submitted that the State or one of its subdivisions is better able to handle the expense of transportation, etc., than is an individual employee. This proposal would also avoid problems concerning forum shopping, and would avoid one court's shouldering of the burden of all appeals in the state. In addition, this suggestion would avoid such questionable distinctions as those between "employee-controlled" actions and "transfer and layoff" actions which, as has been shown, may in fact be indistinguishable, given the proper circumstances.

The legislature ought to act to correct these problems. If it fails to do so, the growth of government will cause these problems to occur with increasing frequency. As a result, the problems outlined in this note will only be exacerbated.

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