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ADMINISTRATIVE LAW IN PENNSYLVANIA: ITS PRESENT STATUS AND RECOMMENDATIONS FOR IMPROVEMENT

By

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Present Pennsylvania Administrative Agency Law

Modern statutory administrative law in Pennsylvania may be said to have had its origin in The Administrative Code of 1923.[1] That act provided for the reorganization of the executive and administrative work of the Commonwealth, revision of the various governmental agencies, and defined the powers and duties of the various executives, administrative officers, boards and departments. The validity of this act was upheld in a decision[2] which ruled that it was proper for a statute creating an executive agency to contain points of substantive law defining rules of conduct, the duty to enforce which is lodged with the agency so created. The wholesale reorganization which the Act of 1923 effected can be measured in terms of its "repealer" article[3] whereby 111 acts and parts of acts dating from 1804 to 1921 were specifically repealed along with some 50 acts which either were inconsistent with or were supplied by the provisions of the new act. Notwithstanding this vast modernization of Pennsylvania state administration, only six years elapsed before another act was placed on the statute books, namely The Administrative Code of 1929.[4] This new act, although amended from time to time, is still the law in Pennsylvania today.

Although the administrative organizational structure of the state's executive branch thus had received a complete overhaul and benefited from the progress made since the turn of the century in the field of public administration, there yet remained the need for coordinating and streamlining the practice and procedure of the various state administrative bodies. Of course, without the benefit of such a statute the law of administrative agencies in Pennsylvania continued to

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The views expressed herein are personal and are not to be construed as official or as reflecting the views of the Ordnance Corps or of the Department of the Army.

1 Act of June 7, 1923, P.L. 498, art. 1 § 1; 71 P.S. 1-32.
2 Commonwealth v. Snyder, 279 Pa. 234, 123 A. 792 (1923).
3 Act of June 7, 1932, P.L. 498, art. XXIX § 290; 71 P.S. 31-32.
4 Act of April 9, 1929, P.L. 177, art. 1 § 1; 71 P.S. 51-732.

develop by court decision.[5] But court-made law is relatively slow and the increasing problems presented by the rapidly multiplying state agencies demanded immediate regulation. Because of this situation, similarly experienced and treated by its federal[6] and numerous state[7] counterparts, Pennsylvania's legislature in 1945 passed the Administrative Agency Law[8] and the Pennsylvania Register Act[9] (the latter since repealed).[10]

Although it makes rather interesting reading and perhaps better enables one to appreciate the intent and scope of the Administrative Agency Law, no attempt will here be made to discuss the activities of the Joint State Government Commission and the Pennsylvania Bar Association whose combined efforts not only caused the law to be enacted but are presently directed to reforming that law, for this topic is covered, more extensively than the space limitations of the present paper permit, in a recent comprehensive article entitled "Administrative Procedure Reform in Pennsylvania"[11] by Professor Clark Byse of the University of Pennsylvania Law School. Instead, the balance of this paper will be devoted to an examination of some of the reforms presently being considered in Pennsylvania and in certain other jurisdictions so as to form a basis for the recommendations which conclude this analysis.

Leading Reform Proposals

It has been aptly stated that "suggestions for administrative procedure reform in Pennsylvania range from outright repeal of the Administrative Agency Law to replacing it with a statute copied almost verbatim from the Federal Administrative Procedure Act."[12] Intermediate proposals include amendment of the present law, and adoption of the Model State Administrative Procedure Act.[13] Interest in adopting, substantially unchanged, the Federal Act was displayed in the state legislature as evidenced by a bill[14] which was introduced

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5 For example, in Commonwealth v. Lewis, 282 Pa. 306, 127 A. 828 (1925), it was held that under the Administrative Code of 1923, (which provided for submission by the State Department to the Attorney General of any legal difficulty or dispute), the only questions which a department is required to submit to the Attorney General are administrative questions of legal nature affecting the harmony which should exist between two or more executive departments, doubtful legal questions not heretofore passed upon by the courts or the Attorney General which affect any state officer's performance of his official duties, and proceedings which have resulted or are likely to result in litigation in which the state has an interest.

6 Federal Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. §§ 1001-1011 (Supp. 1946).

7 *Symposium on State Administrative Procedure*, 33 IOWA L. REV. 193-375 (1948); Benjamin, *Administrative Adjudication in the State of New York* (1942); etc.

8 Act of June 4, 1945, P.L. 1388; 71 P.S. 1710.1-1710.51.

9 1945 P.L. 443.

10 1947 P.L. 509.

11 97 U. OF PA. L. REV. 22-50 (1948). See also discussion by Byse of House Bill No. 879 in the LEGAL INTELLIGENCER, Phila., July 28, 1949. The Bill, which was vetoed by the Governor, would have made numerous amendments to the Administrative Agency Law per proposals of the Pennsylvania Bar Association, Dept. of Justice and of the Joint State Government Commission.

12 97 U. OF PA. L. REV. 22, 27 (1948).

13 Handbook of National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Third Annual Conference 83-86 (1943).

14 Senate Bill No. 26 (1947).

in the Senate and referred to the Committee on State Government, where it died. Adoption of legislation patterned after the Federal or Model Acts was considered and rejected by the Section on Administrative Law of the Pennsylvania Bar Association, which at the same time went on record[15] as favoring the amendatory path towards improving and extending the coverage of the state's Administrative Agency Law.

As for adopting a near verbatim copy of the Federal Administrative Procedure Act for Pennsylvania, Professor Byse has indicated some well-taken objections that the result might be the accrual of more harm than good therefrom, recommending instead that the act's specific provisions be examined in the light of Pennsylvania's particular needs to see if certain of those provisions could be adopted with advantage by the commonwealth.[16] With respect to adoption of a near verbatim copy of the Model State Administrative Procedure Act similar objection has been made, not only by Professor Byse,[17] but by the sponsor and draftsmen of the Model Act who declared that instead of such verbatim adoption interested states should use the act "as an aid to the development of administrative procedure bills."[18] It seems, however, as though no one in Pennsylvania has heretofore publicly expressed the viewpoint that the Model Act be studied, along with the Federal Act and other proposals to see if there weren't some features worthy of adapting to meet Pennsylvania's requirements. The Pennsylvania Bar Association's Section on Administrative Law specifically rejected this possibility,[19] for which reason Professor Byse didn't find it necessary even to discuss this idea in his earlier named article.[20]

Is Pennsylvania wise in paying comparatively little attention to the Federal Act, and none at all to the Model Act in considering plans for reforming its own law? What are the main problems involved? What has been the experience of other jurisdictions? To seek an answer to these questions it is proposed here to consider, by way of comparison, salient features of the present Pennsylvania Administrative Agency Law, the Federal Administrative Procedure Act and the Model State Administrative Procedure Act, so as to determine their similarities, dissimilarities and possibly whether some provisions of the latter two Acts could gainfully be utilized in amending Pennsylvania's Law.

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15 *Report of Section on Administrative Law,* 19 PA. B. A. Q. 386 (1948).
16 97 U. OF PA. L. REV. 22, 30 (1948).
17 Id at 31.
18 Stason, *The Model State Administrative Procedure Act,* 33 IOWA L. REV. 196, 208 (1948).
19 Report of Section on Administrative Law, 19 PA. B. A. Q. 386 (1948).
20 97 U. OF PA. L. REV. 22, 31 (1948).
21 A fine dissertation comparing these two acts already has been published, namely Abel, *The Double Standard in Administrative Procedure Legislations Model Act and Federal Act,* 33 IOWA L. REV. 228-251 (1948). The comparison of these two acts with each other, as made in the present paper with further regard to Pennsylvania's law, has largely been drawn from Professor Abel's analysis.

Comparison Of Terms Used In Pennsylvania, Federal And Model State Administrative Agency Acts

Each of the three acts has a section on definition of terms. Comparing some of these definitions gives some inkling as to the different treatment given each act. For example, the term "rule" (in Pennsylvania's act it is called "regulation") has a common ground in all three acts in the requirement that the term refer only to its general application to or effect on those of the public affected by the law which the agency is charged with administering. In other words, all three acts exclude use of the term as reference to the internal management of the agency in question. Aside from this there is considerable variance in all three definitions. The Federal Act specifies that rate and wage orders, and prescriptions of accounting practices, services, etc., are to be considered as "rules". Yet this same act separately defines "orders" so as to distinguish from "rules": the meaning given to the former ("the whole or any part of the final disposition of any agency other than rule-making but including licensing")[22] apparently is intended to refer to the directive given individual litigants before the agency, following decisions in actual cases passed on by the agency; while the latter appears to have reference to general directives intended to affect all the public coming under the agency's control.

This partial duplication of meanings and explanatory terms is ambiguous and is bound to be confusing. The Model Act is an improvement over the Federal Act in this regard, for the former carries no implication that would result in confusing "orders" and "rules". Instead, the Model Act says " 'rule' includes every regulation, standard, or statement of policy or interpretation of general application and future effect. . . ."[23] Thus, the Model Act, without distinguishing "rule" from "order" or other particular terms which imply regulation, presents no cause for confusion, relying instead on general terms like "standard, or statement of policy" to form the basis for general agency action. The Pennsylvania Act utilizes rather odd language in defining "regulation" as "any rule, regulation or order in the nature of a rule or regulation, generally applicable to the public . . . but shall not be construed to include the name or facts of any adjudication giving rise to such regulation."[24] In the first place, this definition violates the well known fundamental rule that a definition shall not recite the term being defined. In addition, it gives to the word "order" the equivalency in meaning of a rule or regulation which will require interpretation, probably judicial, to determine when an "order" has that meaning and when it has the meaning given it in defining it as the equivalent of the term

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22 Federal Act § 2(d): see note 6 supra.
23 Model Act § 1(2); see caption of act, copy obtained from E. Blythe Stason, *National Conference of Commissioners of Uniform State Laws*, and reproduced at 33 IOWA L. REV. 372 (1948).
24 Pennsylvania Act § 1(e); see note 8 supra.

"adjudication".[25] Finally, fault can be found with the last provision of the definition which requires that rules aren't to be construed as including facts of any adjudication giving rise to the regulation. What possible harm can come if any rule were so construed? Instead of harm, good might result by making administration of the rule and judicial consideration easier when interpreted in the light of the rule's historical development in a manner similar to the practice of interpreting legislative intent in passing certain statutes.

No doubt all three acts lack something to be desired in their definitions of the term "rule". Perhaps, as Professor A. S. Abel has said in comparing the Model and Federal Acts, "no good definition can be formulated."[26] But if one had to choose from among the three definitions considered above, it would seem that the Model Act's is to be preferred for it is certainly less confusing than the others.

The only other term defined by the Model Act is "contested case". The Federal Act defines a similar term, namely "agency proceeding and action", whereas the Pennsylvania Act has no counterpart of either term. The remaining terms defined in the Pennsylvania law are "adjudication", "party", and "person", and identical terms are defined in the Federal law. Only the definitions of the term "adjudication" are in substantial disagreement with each other. In the Federal law, the term refers to "agency process for the formulation of an order";[27] whereas, in the Pennsylvania law the meaning given is "final order, decree, decision, determination, or ruling by an agency"[28] as a result of the agency process. In addition to defining the terms already identified, the Federal Act gives consideration to "license and licensing" and "sanction and relief."

Comparison Of Provisions For Adoption, Publication And Effective Dates of Rules

Aside from the definition of terms, a significant difference is to be noted between the Pennsylvania Act on one hand, and the Model and Federal Acts on the other, in the matter of adoption of rules, their publication and effective dates. Regarding adoption, both the Model[29] and Federal[30] Acts offer the public an opportunity to participate in the proceedings either at an oral hearing or by written briefs. Pennsylvania's law makes no such provision. The Joint State Government Commission thought this was wrong and proposed that public hearings be held,[31] although provision was made for waiving such hearings

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25 Pennsylvania Act § 1(a); see note 8 supra.
26 Abel, *The Double Standard in Administrative Procedure Legislation: Model Act and Federal Act*, 33 IOWA L. REV. 228, 231 (1948).
27 Federal Act § 2(d); see note 6 supra.
28 Pennsylvania Act § 1(a); see note 8 supra.
29 Model Act § 2(3); see note 23 supra.
30 Federal Act § 4(b); see note 6 supra.
31 Joint State Government Commission, Report to the General Assembly of the Commonwealth of Pennsylvania on Uniform Practice and Procedure Before Departments, Boards and Commissions of the Commonwealth (1943).

on certification by the Governor that an emergency existed.[32] The General Assembly, however, did not follow this recommendation. Professor Byse is of the opinion that public hearings should not be made mandatory for a number of reasons, but that desirable encouragement to public participation could be given by providing that "each agency shall, *to the extent and in the manner it deems desirable,* afford interested persons opportunity to participate in the process of making, amending, or repealing regulations".[33] (Italics his own.) One cannot help but question whether this flexible provision might not be found to be a convenient excuse for agencies to exclude *all* public participation. Public hearings, as a rule, are wholesome and beneficial in forming regulations and are definitely in conformity with the democratic process of government. So long as we provide, as do the Model and Federal Acts, means by which the need for such hearings can be circumvented if an emergency cause for haste should arise, why not get full benefit of public participation in all rule-making activities by providing for public hearings as a general rule, rather than as an exception thereto?

In the rule-adopting process there is another provision specifically set forth in the Model Act[34] and in the Federal Act[35] which Pennsylvania might do well to incorporate in its own law, namely that by which an agency's requirements for practice and procedure are published and made available to all. As it is, the section on Regulation Procedure[36] in the Pennsylvania Act could be construed so that rules of practice and procedure of an agency must be published and made available within thirty days after adoption, or else be considered invalid. But there is reason to question the wisdom of having this section, which obviously was intended principally to apply to regulations promulgated by the agency for carrying out an agency function affecting the public, also to apply to procedural matters before the agency. The fault to be found here is *not* in the failure of the agency to hold hearings on the rules of procedure before promulgating same—for such rules are primarily and appropriately internal housekeeping rules of the agency and, generally speaking, the public has little vested interests therein which would give it the right to interfere therewith—but instead the fault lies in not making those rules public *before* anyone is to be held accountable for failure to act in accordance therewith. Why permit an agency to delay publishing those rules as much as thirty days after adoption and at the same time hold the public responsible for compliance with those rules? How much better it would be to follow the system of the Federal Act which specifically provides that "no person shall in any manner be required to resort to organization or procedure not so published"[37] (in the Federal Register).

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32 Id at 17.
33 97 U. OF PA. L. REV. 22, 34 (1948).
34 Model Act § 2(1) and (2): see note 23 supra.
35 Federal Act, § 3(a)(2).
36 Pennsylvania Act, § 21; see note 8 supra.
37 Federal Act, § 3(a)(3); see note 6 supra.

While on the point of publication of rules, it is interesting to note some pertinent comments recently made by Professor Abel of the Law School of West Virginia University:

> ". . . almost no state makes even rudimentary provision for systematic publication of administrative materials; . . . the states need a statute which will do for them what the Federal Register Act and the Federal Rules have already done for the federal administrative process."[38]

Ironically enough, this statement does apply to Pennsylvania today. Ironically, it must be said for Pennsylvania that it did have only a few years ago a statute[39] which provided for an annual publication known as the Pennsylvania Register. The register act required that all administrative agency regulations be published in the Pennsylvania Register within forty-five days after their adoption. Two years later, however, in 1947, the act was repealed so that today there prevails the above described provision[40] that no regulation shall have any effect unless printed and made available within thirty days after adoption.

The need for some publication like the Pennsylvania Register has long been recognized, but even those in favor of some such publication may object to re-adopting the Register because it is an expensive proposition, and may tend to become cumbersome.[41] A study of Pennsylvania's experience would seem to indicate that if not an actual revival of the Register, something akin thereto is bound to be found necessary. This observer's feeling in this matter is that Pennsylvania could do worse than to adopt the Model Act's provision on this point. The Model Act's Section 4 provides for this much-needed type of publication, yet as Professor Abel has remarked, keeps the organ "within the limits of the states' more modest budgets—by confining to an existing state functionary—the secretary of state . . .—the duty of preparing a compilation and index of administrative rules in being at the act's effective date and publishing it plus a monthly bulletin thereafter of rules newly filed by the agencies in conformity with a mandate that every agency file with such official a certified copy of each rule as adopted."[42]

Another expense-saving feature of the Model Act is a provision that the Secretary of State may in his discretion omit from the register rules whose publication would be unduly cumbersome and expensive, *if* such rules are printed and made available on application to the agency involved, *and if* the register contains a notice stating the general subject matter of the rules so omitted

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38 33 IOWA L. REV. 228, 251 (1948).
39 Pennsylvania Register Act, Pa. Laws 1945, No. 443, repealed by 1947 P.L. 509; 71 P.S. 1710.101-1710.111.
40 Pennsylvania Act, § 21, see note 8 supra.
41 97 U. OF PA. L. REV. 22, 36 (1948).
42 33 IOWA L. REV. 228, 244 (1948).

and information as to how copies thereof may be obtained.[43] This seems to be a sensible and adequate compromise between the Federal Register with its burden of expense and cumbersomeness and the present Pennsylvania system which provides for no such compilation, and is a phase of the Model Act which seems worthy of adoption *in toto* by Pennsylvania.

Other Provisions Of Model And Federal Acts Recommended For Inclusion In Pennsylvania's Law

The remaining points of comparison of the three acts which have been singled out for brief discussion here are those of "declaratory type decisions" and "informal disposition of cases". Of the first named point there are two distinct types of decisions to be considered, one being declaratory judgments and the other being declaratory rulings; the former will be taken up first.

Declaratory judgments are provided for in both the Model Act[44] and the Federal Act,[45] but not in the Pennsylvania Act. The Section on Administrative Law of the Pennsylvania Bar Association has consistently favored adoption of a declaratory judgment law for review of decisions by Pennsylvania's administrative agencies.[46] The Joint State Government Commission in its 1943 Report to the General Assembly sought power for itself to void administrative rules or regulations if it felt that those rules were contrary to an Act of Assembly.[47] It is doubtful whether the Joint Commission has the judicial experience necessary to pass on the diverse and technical regulations of administrative agencies, and this suggestion is one which should not be entertained too seriously. Clearly such decisions should be made only in a court of law and in accordance with time-tested experiences and practices in declaratory judgment proceedings.

The matter of declaratory rulings by agencies is a phase of state administrative law apparently not touched on by the Pennsylvania Law. Such declaratory rulings are, however, provided for by both the Model Act[48] and the Federal Act;[49] although the former is more complete in explanation and scope, both serve the same good purpose of enabling an agency to issue such a ruling whereby to terminate a controversy or remove uncertainty concerning the applicability of a given rule or statute to particular parties or objects. It seems likely that such rulings would eliminate confusion, needless hearings, and make for

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43 Model Act § 4(3); see note 23 supra.
44 Model Act, § 6; see note 23 supra.
45 Federal Act, § 10(b); see note 6 supra.
46 Section's 1942 draft of Administrative Agency Law, § 305, 48 PA. B. A. REP. 243 (1942); also see 19 PA. B. A. Q. 386, 387 (1948) for report on Section's efforts to get such a bill adopted into law.
47 Joint State Government Commission, Report to the General Assembly of the Commonwealth of Pennsylvania on Uniform Practice and Procedure Before Departments, Boards and Commissions of the Commonwealth (1943), at 5, 7 and 17.
48 Model Act § 7; see note 23 supra.
49 Federal Act § 5(d); see note 6 supra.

general agency enforcement efficiency, and in the light of this observation, the Pennsylvania Act could be benefited by including a provision for declaratory rulings.

The matter of informal disposition of cases, which also appears to have been given no specific consideration by the drafters of the Pennsylvania Agency Law, is expressly provided for in the Model Act[50] and to a less specific degree in the Federal Act.[51] The Model Act's provision clearly calls for settlements "out of court", so to speak, by saying any contested case may be disposed of by "stipulation, agreed settlement, consent order, or default." The Model Act is not quite so informal, stipulating that the agencies are required to receive offers "of settlement or proposals of adjustment." As mentioned in the explanation to this subsection in the Federal Act: "Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."[52] Perhaps if Pennsylvania were to incorporate such a provision in its Administrative Agency Law, fewer matters would be found to require formal agency hearing or judicial review. Surely such a proviso could cause no harm, and yet it might cause considerable benefit by way of reducing time-consuming agency hearings.

Conclusions

As probably has been obvious the author's prime purpose in comparing selected features of the Pennsylvania, Model and Federal Acts has been to shed some light on relative weaknesses in the Pennsylvania Law which, at least to his mind, could be improved by substituting therefor analogous provisions of the other two acts. No implications are thereby to be gathered that the Pennsylvania law as it now stands is inferior to the other two acts, for in some particulars the opposite is in fact true. Describing the three in broad generalities, it might be said that Pennsylvania's statute is couched in the more general language which may give both the agencies and the reviewing courts desirable latitude in interpreting the act's scope and intent. For example, from this standpoint, the section on Judicial Review in the Pennsylvania Agency Law, permitting as it does the following of existing rules of court, is quite adequate, if not preferable to comparable provisions in the Model and Federal Acts which set forth rather narrow and untested rules for conducting such review.

With regard to the question of detailed treatment, however, my preference leans to the Federal Act which is by far the most comprehensive of the three laws (albeit that it has four less sections than the Model Act). However, the

[50] Model Act, § 8; see note 23 supra.
[51] Federal Act, § 5(b); see note 6 supra.
[52] Administrative Procedure Act, Legislative History, 79th Cong. 2d Sess., Senate Doc. No. 248 (1946), 24.

Federal Act reflects its history of last-minute rush to overcome unreconciled differences and enact it into law, and has ambiguities and contradictions which should not be copied verbatim by Pennsylvania or any other state that wants to use the federal draft as a model. Instead, a comprehensive codification is favored in revising the Pennsylvania Agency Law, but only if the result is to be a thorough, well planned work, fully deliberated upon by experts in the field and the interested public.

As to specific provisions of the Model and Federal Acts which it is recommended that Pennsylvania should adopt, there are a few that it is desired to stress. First, the Model or Federal Act's methods of adopting rules which call for a public pre-adoption hearing. Second, the Model Act's plan of publishing the rules in a public register except in certain cases where the Secretary of State finds it would be too expensive and cumbersome, and in such cases, provide for the publishing of notice of the omission. Third, adoption of declaratory judgment provisions which grace both the Model and Federal Acts. Fourth and fifth, again in the latter two statutes only, provisions for declaratory rulings by agencies, and for informal disposition of cases.

As a final word on the subject of recommendations for improvement of Pennsylvania's Administrative Agency Law, it is hoped that the foregoing has shown good reason why the Federal and Model Acts should not be overlooked when suggestions for reform are sought. While I'd be loath to recommend adoption by Pennsylvania of either of the latter two acts *in toto*, I'd just as strongly urge that both have good building material which could be salvaged to good advantage for the proposed "rebuilding" of the Administrative Agency Law of Pennsylvania.