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John Aycock McLendon Jr.

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Contested Case Hearings Under the North Carolina Administrative Procedure Act: 1985 Rewrite Contains Dual System of Administrative Adjudication

On July 12, 1985, the North Carolina General Assembly ratified House Bill 52,¹ a bill that rewrote the State's Administrative Procedure Act (APA).² After several months of heated and sometimes divisive debate,³ the compromise bill that emerged left much of the old APA intact.⁴ However, it also contained significant changes in each category of State administrative procedure: rulemaking,⁵ administrative hearings, judicial review, and publication of administrative rules.⁶

1. Act of July 12, 1985, ch. 746, 1985 N.C. Adv. Legis. Serv. 702 (rewriting N.C. GEN. STAT. §§ 150A-1 to -64, recodified as §§ 150B-1 to -64 (Supp. 1985); adding §§ 7A-750 to -758, 120-123(1a), 143A-55.3 to -55.7; amending §§ 126-37, -43, 143-135.3, 143B-18, 147-16.1; repealing §§ 126-40, 143B-29.1 to -29.5).

2. N.C. GEN. STAT. §§ 150B-1 to -64 (Supp. 1985). The new North Carolina APA, as rewritten by House Bill 52, will be referred to in this Note as the "new APA." The APA as it existed before House Bill 52 was ratified will be referred to as the "old APA." The old APA was adopted by Act of Apr. 12, 1974, ch. 1331, § 1, 1973 N.C. Sess. Laws 691, repealed in part by Act of July 22, 1983, ch. 923, § 52, 1983 N.C. Sess. Laws 1288, and rewritten by Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Adv. Legis. Serv. 702. For a thorough discussion of the old APA, see Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. REV. 833 (1975).

The APA is a procedural act only. Substantive authority to promulgate rules and to decide contested cases is granted by various organic or enabling statutes that establish and govern the agencies of State government. Procedural requirements in addition to those imposed by the APA may be established by such statutes and by agency rules found in relevant sections of the North Carolina Administrative Code. Thus, to determine the precise duties, functions, and authority of a particular agency, it is necessary to look at the APA, at any statutes that apply to that agency, and at any relevant rules promulgated by the agency.

3. For a discussion of the background and legislative history of House Bill 52, see Sanders, *Administrative Procedure*, in NORTH CAROLINA LEGISLATION 1985, at 12 (U.N.C. Inst. of Gov't, R. Joyce ed. 1985). For a history of the APA in North Carolina, a survey of state agencies' experiences under the old APA, an analysis of House Bill 52 as passed by the North Carolina House of Representatives (3d ed. May 3, 1985), and recommended changes to that version of the bill, see B. Finger, J. Betts, R. Coble & J. Nichols, *Assessing the Administrative Procedure Act: A Special Report* (N.C. Center for Public Policy Research, Inc., May 1985).

4. Sanders, *supra* note 3, at 13.

5. The basic rulemaking provisions in the new APA, N.C. GEN. STAT. §§ 150B-9 to -17 (Supp. 1985), are generally the same as those contained in the old APA. For a description of several specific changes and additions in the new APA, see Sanders, *supra* note 3, at 15.

More significantly, the general assembly attempted to augment the rulemaking provisions of the APA by establishing a new Administrative Rules Review Commission (ARRC), which would be appointed by the general assembly and would have broad power to "disallow" proposed rules that do not meet certain guidelines. N.C. GEN. STAT. §§ 143A-55.3 to -55.7 (Supp. 1985). These guidelines would require that proposed rules be "within the statutory authority of the agency . . . clear and unambiguous . . . [and] reasonably necessary to enable the administrative agency to perform a function assigned to it by statute." *Id.* § 143A-55.4(c).

The establishment of the ARRC, however, was predicated on the North Carolina Supreme Court's issuance of an advisory opinion stating that the ARRC is constitutional. Act of July 12, 1985, ch. 746, § 19, 1985 N.C. Adv. Legis. Serv. 702, 734. The supreme court, however, declined to issue such an opinion because it would place the court "directly in the stream of the legislative process." *In re* Response to Request for Advisory Opinion, 314 N.C. appendix, 335 S.E.2d 890, 891 (1985). The ARRC cannot come into existence, therefore, without further action by the general assembly.

6. These four categories of provisions appear in both the old and new APAs. The most significant changes in the latter three categories are described *infra* text accompanying notes 7-17.

The administrative hearings provisions of the new APA⁷ embody a significant change in procedures for the adjudication of contested cases.⁸ Under the old APA, either the members or the head of the agency involved or a hearing officer designated by that agency conducted contested case hearings.⁹ Under the new APA, independent hearing officers will be appointed to conduct contested case hearings involving some State agencies.¹⁰ The hearings procedures of the old APA are retained essentially intact for other State agencies.¹¹

The judicial review provisions of the new APA¹² contain changes regarding venue,¹³ presentation of new evidence,¹⁴ and scope of review.¹⁵ The provisions

7. N.C. GEN. STAT. §§ 150B-23 to -42 (Supp. 1985).

8. For the definition of "contested case" under the new APA, see *infra* note 38. In this Note the terms "administrative hearing" and "contested case hearing" are used interchangeably to denote an adjudicatory hearing. The APA also provides for a rulemaking hearing. N.C. GEN. STAT. § 150B-12 (Supp. 1985). "The public [rulemaking] hearing shall not be conducted as a contested case unless a specific statute requires that the proposed rule be adopted by adjudicatory procedures." *Id.* § 150B-12(d).

Administrative adjudication is essentially a quasi-judicial function, whereby an agency takes "action resembling a court's decision of a case." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:2, at 9 (2d ed. 1978). Rulemaking is essentially a quasi-legislative function, whereby an agency promulgates a rule in a manner "analogous to the legislature's enactment of a statute." Daye, *supra* note 2, at 849. "The touchstone for distinguishing adjudication from rulemaking is that adjudication involves a specifically named party and a determination of particularized legal issues and facts with respect to that party. Rulemaking, by contrast, involves general categories or classes of parties and facts and policies of general applicability." *Id.* at 868.

9. Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-30, 1973 N.C. Sess. Laws 691, 698.

10. This system is set forth in Article 3 of the new APA, which applies to all agencies that are covered by the new APA and are not specifically listed in Article 3A. For a list of the agencies named in Article 3A, see *infra* note 11. For the legislative history of Articles 3 and 3A, see *infra* note 42.

11. Article 3A of the new APA preserves the basic elements of the old APA concerning administrative hearings for certain agencies. Article 3A governs occupational licensing agencies, the State Banking Commission and Commissioner of Banks, the Savings and Loan and Credit Union Divisions of the Department of Commerce, and the Department and Commissioner of Insurance. N.C. GEN. STAT. § 150B-38(a) (Supp. 1985).

12. *Id.* §§ 150B-43 to -45.

13. Under the new APA, "[i]n order to obtain judicial review of a final decision . . . the party seeking review must file a petition in the superior court of Wake County or in the superior court of the county where the petitioner resides." *Id.* § 150B-45. Under the old APA, review of most final agency decisions was available only in the Superior Court of Wake County. Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-43, 1973 N.C. Sess. Laws 691, 700.

14. In a judicial review proceeding under the new APA, "any party may present evidence not contained in the record that is not repetitive." N.C. GEN. STAT. § 150B-49 (Supp. 1985). Under the old APA, agencies could hear additional evidence only on remand from a court. Courts were given discretion to remand only when satisfied that the additional evidence "could not reasonably have been presented at the hearing before the agency." Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-47, 1973 N.C. Sess. Laws 691, 700-01. The old APA was amended, however, to provide that "if the final agency decision imposes a monetary civil penalty or a monetary administrative penalty, and if the petition filed . . . so requests, the court shall hear that issue *de novo*." Act of July 22, 1983, ch. 919, sec. 1, § 150A-46.1, 1983 N.C. Sess. Laws 1267. The version of House Bill 52 passed by the House of Representatives went much further and provided that "[i]f the petition for judicial review so requests, the court shall hear the [entire] case *de novo*." House Bill 52 (3d ed. May 3, 1985), General Assembly of North Carolina, Regular Sess. 1985, sec. 1, § 150A-50, at 40. By discarding the trial *de novo* provision but allowing the admission of new evidence, the new APA represents a compromise.

15. With respect to review of agency decisions, the new APA provides that "[b]ased on the record and the evidence presented to the court, the court may affirm, reverse, or modify the decision or remand the case to the agency for further proceedings." N.C. GEN. STAT. § 150B-51 (Supp. 1985). Under the old APA, courts could reverse or modify agency decisions only if they were "[i]n

governing publication of administrative rules¹⁶ contain a significant addition to the old APA. A new North Carolina Register, similar to the Federal Register, will be published to disseminate "information relating to agency, executive, legislative or judicial actions" taken pursuant to the APA.¹⁷

Although the four areas of administrative procedure governed by the APA are interrelated, each is independently important and merits separate study. This Note analyzes the administrative hearings provisions of the new APA, beginning with a brief review of the background of the old APA and a summary of the legislative history of the new APA. The Note describes and contrasts the two systems of administrative adjudication embodied in the administrative hearings provisions of the new APA. These systems are evaluated in light of the general assembly's purpose and intent to establish uniform procedure among State agencies and to ensure a separation of functions within the administrative process. The effectiveness of the new APA's two adjudicatory systems is weighed against the traditional goals of administrative adjudication: fairness to parties and efficient resolution of controversies. The Note concludes that although the new APA does not establish uniform procedure, the general assembly's attempt to achieve a separation of administrative functions has been partly successful. The Note further concludes that only time and experience will disclose whether the compromises embodied in the new APA further the goals of administrative fairness and efficiency.

The old APA was enacted in 1974.¹⁸ Within several years, members of the general assembly became concerned that agencies were adopting rules that were both unwarranted and beyond the agencies' statutory authority.¹⁹ Beginning in

violation of constitutional provisions; . . . [i]n excess of the statutory authority or jurisdiction of the agency; . . . [m]ade upon unlawful procedure; . . . [a]ffected by other error of law; . . . [u]nsupported by substantial evidence . . . in view of the entire record as submitted; or . . . [a]rbitrary or capricious." Act of July 12, 1974, ch. 1331, sec. 1, § 150-49, 1973 N.C. Sess. Laws, 691, 701.

16. N.C. GEN. STAT. §§ 150B-58 to -64 (Supp. 1985).

17. *Id.* § 150B-63(d1). The North Carolina Register is to be published by the chief hearing officer of the Office of Administrative Hearings. *Id.* In addition, the chief hearing officer is required to publish a compilation of all rules issued pursuant to the APA (similar to the current North Carolina Administrative Code), *id.* § 150B-63(a), and descriptions of each agency's "organization, stating the process whereby the public may obtain information or make submissions or requests." *Id.* § 150B-10.

18. Act of July 12, 1974, ch. 1331, § 1, 1973 N.C. Sess. Laws 691, 691-703, *repealed in part by* Act of July 22, 1983, ch. 923, § 52, 1983 N.C. Sess. Laws 1288, and rewritten by Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Adv. Legis. Serv. 702 (codified at N.C. GEN. STAT. § 150B-1 to -64 (Supp. 1985)). For an interpretive analysis of the old APA, see Daye, *supra* note 2.

19. Sanders, *supra* note 3, at 12. Some legislators became particularly concerned that agencies were adopting rules which prescribed unauthorized criminal penalties, thereby usurping legislative power. For example, the Department of Natural Resources and Community Development's Division of State Parks adopted a rule prohibiting consumption of beer by boaters on Kerr Lake. Similarly, the Wildlife Resources Commission adopted a rule requiring that only ball-point pens be used in filling out hunting and fishing licenses. Violations of either rule constituted misdemeanors, and violators could be punished by fines, imprisonment, or both. B. Finger, J. Betts, R. Coble & J. Nichols, *supra* note 3, at 6-7. The general assembly's concern with these quasi-criminal agency rules led to the enactment of the following provision in the new APA:

The power to declare what shall constitute a crime and how it shall be punished and the power to establish standards for public conduct are vested exclusively in the General Assembly. No agency may adopt any rule imposing a criminal penalty for any act or

1977, various legislative efforts were made to review rules promulgated by agencies.²⁰ By 1983, however, the general assembly had become impatient with the progress of this review.²¹ As a result, several bills were passed that, as of July 1, 1985, effectively repealed all existing administrative rules and much of the old APA.²² This action was designed to force a reconsideration of the purposes and functions of administrative procedure and a rewrite of the North Carolina APA.²³

Underlying the old APA was the premise that an administrative agency, having both expertise and experience in its particular field, "was best qualified to make rules within its area of competence, to investigate violations of laws and its rules, and to hear and determine contested cases arising within its jurisdiction, subject to judicial review if the affected party desired it."²⁴ The stated purpose and intent of the old APA was "to establish as nearly as possible a uniform system of administrative procedure for State agencies."²⁵

The new APA contains similar language stating as its purpose the establishment of uniform procedure.²⁶ Also, however, it contains a significant additional statement that the intent of the Act is "to ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process."²⁷ Proponents of House Bill 52 were not only dissatisfied with particular rules;²⁸ they also felt that allowing the same agency to make rules, investigate alleged violations, prosecute violators, and render adjudicatory decisions was unfair to the parties subject to regulation.²⁹

The administrative hearings provisions contained in the original version of

failure to act, including the violation of any rule, unless the General Assembly authorizes a criminal sanction and specifies a criminal penalty for violation of the rule.

N.C. GEN. STAT. § 150B-9(c) (Supp. 1985).

20. Sawyer, *Administrative Procedure*, in NORTH CAROLINA LEGISLATION 1983, at 299, 300 (U.N.C. Inst. of Gov't, A. Sawyer ed. 1983).

21. *Id.* Proponents of House Bill 52 noted that as of January 1, 1985, the total volume of rules constituted more than 18,000 pages. This, they contended, was evidence of the general assembly's lack of progress in reviewing agency rules. See B. Finger, J. Betts, R. Coble & J. Nichols, *supra* note 3, at 6.

22. Act of July 20, 1983, ch. 883, 1983 N.C. Sess. Laws 1082, 1082-83 (repealing rules); Act of July 22, 1983, ch. 923, § 52, 1983 N.C. Sess. Laws 1288 (repealing the old APA except for its rulemaking provisions). Under the new APA, existing rules remain in effect until June 30, 1986. Any rule that has not been approved by the general assembly on or before that date will be repealed effective July 1, 1986. N.C. GEN. STAT. § 150B-59(c) (Supp. 1985).

23. Sanders, *supra* note 3, at 13.

24. *Id.*

25. Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-1(b), 1973 N.C. Sess. Laws 691, 692.

26. N.C. GEN. STAT. § 150B-1(b) (Supp. 1985).

27. The Act states:

The policy of the State is that the three powers of government, legislative, executive, and judicial, are, and should remain, separate. The intent of this Chapter is to prevent the commingling of those in any administrative agency and to ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process.

Id. § 150B-1(a).

28. See *supra* note 19 and accompanying text.

29. Sanders, *supra* note 3, at 12.

House Bill 52³⁰ reflected this new emphasis on the separation of functions within the administrative process. In a significant shift from the old APA, this version would have created a new system in which independent administrative judges would have presided over and made final decisions in contested cases.³¹ Under this proposal, an agency involved in a case would have been merely a party to the adjudication.³²

There was significant opposition to the adjudication system embodied in House Bill 52.³³ Opponents wanted to retain the system of the old APA, under which the agency that conducted the contested case would also render the final decision.³⁴ After much debate, the general assembly ratified a compromise bill rewriting the APA.³⁵

Many agencies³⁶ are partially or entirely exempt from the provisions of the new APA.³⁷ For agencies that are covered by the new APA, the administrative hearings provisions are triggered by the commencement of a contested case,

30. House Bill 52 (1st ed. Feb. 11, 1985), General Assembly of North Carolina, Regular Session 1985. The bill was introduced by Democratic Representative William T. Watkins. Other than the administrative hearings provisions, it left much of the old APA unchanged. Sanders, *supra* note 3, at 13. House Bill 52 was similar to House Bill 1784, which was passed by the House of Representatives in 1984 but failed to pass in the Senate. *Id.*; see also Crowell, *Administrative Procedure*, in NORTH CAROLINA LEGISLATION 1984, at 5 (U.N.C. Inst. of Gov't., R. Joyce ed. 1984) (describing House Bill 1784).

31. House Bill 52 (1st ed. Feb. 11, 1985), General Assembly of North Carolina, Regular Session 1985, sec. 1, § 150A-23(a), at 18, § 150A-36, at 25. The cost of conducting hearings would have been assessed against the agency involved in the case. *Id.* sec. 2, § 143B-560, at 43.

32. "In any contested case, the agency was henceforth to be simply one party to an adversary proceeding that was to be decided by an impartial judge." Sanders, *supra* note 3, at 13.

33. Much of the opposition came from within State government. Republican Governor James G. Martin objected to prohibiting agencies from conducting and deciding contested cases. Occupational licensing agencies also objected to this aspect of the bill. *Id.* at 13-14.

Some of the specific reasons for opposing House Bill 52 were concerns that the proposed system would involve the creation of a new court, in violation of N.C. CONST. art. IV, § 1, and would make negotiation and informal resolution of disputes by agencies impossible. Letter from S. Thomas Rhodes, Secretary, North Carolina Department of Natural Resources and Community Development to Representative W. Paul Pulley, Chairman, House Judiciary IV Committee (Apr. 18, 1985), reprinted in *Minutes, House Judiciary IV Comm.* (Apr. 18, 1985), General Assembly of North Carolina, Regular Session 1985.

34. See Act of Apr. 12, 1974, ch. 1331, sec. 1, §§ 150-21 to -35, 1973 N.C. Sess. Laws 691, 696-99.

35. Act of July 12, 1985, ch. 746, 1985 N.C. Adv. Legis. Serv. 702. For a chronological legislative history and analysis of House Bill 52, see Sanders, *supra* note 3, at 13-14.

36. For purposes of the new APA, the term "agency" includes:

[A]ny agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the State government of the State of North Carolina but does not include any agency in the legislative or judicial branch of the State government; and does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, or local boards of education, other local public districts, units or bodies of any kind, or private corporations created by act of the General Assembly.

N.C. GEN. STAT. § 150B-2(1) (Supp. 1985).

37. The Administrative Rules Review Commission, the Occupational Safety and Health Review Board, and the Employment Security, Industrial, and Utilities Commissions are entirely exempt from the new APA's coverage. *Id.* § 150B-1(d). One explanation for the exemption of several of the larger agencies, such as the Utilities and Industrial Commissions, is that they have well-established adjudicatory procedures of their own. Sanders, *supra* note 3, at 15. But see Daye, *supra* note 2, at 841 ("No logical basis for the exemption of the Industrial and Utilities Commissions [from the old APA] is apparent."). According to Professor Daye, "[t]he exemption of the Employment

which is defined as "any administrative proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined after an opportunity for an adjudicatory hearing. 'Contested case' includes licensing and any administrative proceeding to levy a monetary penalty."³⁸ This definition distinguishes specified adjudication from rulemaking and other administrative action. The administrative hearings provisions of the new APA govern only those proceedings that fall within the contested case definition.³⁹

The new APA contains two separate sets of administrative hearings provisions. The manner in which a contested case is commenced and conducted varies depending on which set of provisions applies. Article 3A⁴⁰ of the Act governs occupational licensing agencies and agencies that regulate financial institutions and insurance companies.⁴¹ Article 3 governs all other agencies cov-

Security Commission and the Occupational Health and Safety Review Board might have been based on their extensive federal regulatory relationship." *Id.*

The North Carolina National Guard, the Department of Correction, the Department of Transportation, the Department of Revenue, the University of North Carolina, the State Banking Commission and Commissioner of Banks, and the Savings and Loan and Credit Union Divisions of the Department of Commerce are partially exempt from the new APA's coverage. N.C. GEN. STAT. § 150B-1(d) (Supp. 1985). According to Professor Daye, "[t]he partial exemption of the Departments of Revenue and [Transportation] might have been influenced by the sheer volume of driver's and revenue licenses involved, as well as the limited utility the required procedures would have in the vast majority of cases." Daye, *supra* note 2, at 841.

38. "Contested case" means any administrative proceeding, by whatever name called, in which the legal rights, duties, or privileges of a party are required by law to be determined after an opportunity for an adjudicatory hearing. "Contested case" includes licensing and any administrative proceeding to levy a monetary penalty regardless of whether the statute authorizing such a penalty requires an adjudicatory hearing. "Contested case" does not include rule making, declaratory rulings, or the award or denial of a scholarship or grant.

N.C. GEN. STAT. § 150B-2(2) (Supp. 1985).

39. The contested case definition under the old APA has been held to require two elements: "(1) an agency proceeding, (2) that determines the rights of a party or parties." *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E.2d 843, 850 (1979). For a detailed analysis of the original contested case definition under the old APA, see Daye, *supra* note 2, at 869-72. The original definition was amended in 1976 to apply only to proceedings in which "the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." Act of May 14, 1976, ch. 983, § 61, 1975 N.C. Sess. Laws 15, 44 (emphasis added).

The requirement that parties be afforded an adjudicatory hearing "by law" may either be contained in the express provisions of an agency's enabling statute or arise from the constitutional requirement of due process. *High Rock Lake Ass'n v. Environmental Management Comm'n*, 39 N.C. App. 699, 704-05, 252 S.E.2d 109, 113 (1979); 47 Op. N.C. Att'y Gen. 164, 168 (1978); 1 F. COOPER, STATE ADMINISTRATIVE LAW 287 (1965).

By defining contested cases as only those proceedings in which an adjudicatory hearing is required by law, both the old and new APAs distinguish formal or specified adjudication from informal adjudication. Informal adjudication falls within the general category of other administrative action that is not subject to the provisions of the APA. For a detailed discussion of this distinction under a statute that contains a similar definition of contested cases, see Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285, 286-88 (1977).

40. N.C. GEN. STAT. §§ 150B-38 to -42 (Supp. 1985).

41. The provisions of [Article 3A] shall apply to the following agencies:

(1) Occupational licensing agencies;

(2) The State Banking Commission, the Commissioner of Banks, the Savings and Loan Division of the Department of Commerce, and the Credit Union Division of the Department of Commerce; and

(3) The Department of Insurance and the Commissioner of Insurance.

Id. § 150B-38(a).

ered by the new APA.⁴²

Integral to the operation of Article 3 is the section of House Bill 52 that establishes the Office of Administrative Hearings (OAH).⁴³ The primary function of the OAH is "to provide a source of independent hearing officers to preside in administrative cases."⁴⁴ This system, sometimes called a central panel system,⁴⁵ now exists in at least eight states in addition to North Carolina.⁴⁶

42. *Id.* §§ 150B-23 to -37. As originally introduced, Article 3 of House Bill 52 contained a single set of provisions governing administrative hearings for all agencies covered by the Act. House Bill 52 (1st ed. Feb. 11, 1985), General Assembly of North Carolina, Regular Session 1985, § 1, art. 3, at 18-26. When the bill was passed by the House of Representatives, it contained a new Article 3A that removed occupational licensing agencies and the State Banking Commission and Commissioner of Banks from the provisions of Article 3. House Bill 52 (3d ed. May 3, 1985), General Assembly of North Carolina, Regular Session 1985, sec. 1, art. 3A, § 150A-38(a), at 28. The general assembly apparently included Article 3A to lessen the opposition of the occupational licensing agencies, thereby facilitating passage of the bill. See B. Finger, J. Betts, R. Coble & J. Nichols, *supra* note 3, at 12. When the bill was passed by the Senate, Article 3A had been amended to apply not only to occupational licensing agencies, the State Banking Commission and the Commissioner of Banks, but also to the Savings and Loan and Credit Union Divisions of the Department of Commerce and the Department and Commissioner of Insurance. House Bill 52 (5th ed. June 26, 1985), General Assembly of North Carolina, Regular Session 1985, sec. 1, art. 3A, § 150A-38(a), at 30. The agencies governed by Article 3A are expressly exempted from Article 3. N.C. GEN. STAT. § 150B-1(d) (Supp. 1985).

43. Act of July 12, 1985, ch. 746, sec. 2, §§ 7A-750 to -758, 1985 N.C. Adv. Legis. Serv. 702, 727-29 (codified at N.C. GEN. STAT. §§ 7A-750 to -758 (Supp. 1985)).

44. N.C. GEN. STAT. § 7A-750 (Supp. 1985) provides:

The [OAH] is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which it is created. The [OAH] is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules.

The Director of the OAH, who also serves as chief hearing officer, is appointed by the Chief Justice of the North Carolina Supreme Court for a term of four years. *Id.* §§ 7A-751, -752. House Bill 52 contained a provision requesting an advisory opinion of the North Carolina Supreme Court on the constitutionality of vesting this appointment power in the chief justice. Act of July 12, 1985, ch. 746, § 19, 1985 N.C. Adv. Legis. Serv. 702, 734. If the supreme court had declared this provision unconstitutional, the Act contained an alternative provision vesting the appointment power in the attorney general. *Id.* §§ 18.1, 19, at 733, 734. Because the supreme court declined to issue an advisory opinion, the chief justice retains the power of appointment. *In re Response to Request for Advisory Opinion*, 314 N.C. appendix, 335 S.E.2d 890 (1985). On December 23, 1985, Chief Justice Joseph Branch named Robert A. Melott, a special deputy attorney general, as the first Director of the OAH. The Chief Justice stated: "I feel that I should make it clear that by making this appointment, I do not express any opinion for myself or for any member of the Supreme Court, as to the constitutionality of the act." News & Observer (Raleigh, N.C.), Dec. 24, 1985, at 1C, col. 1. On March 19, 1986, Governor James G. Martin instituted a lawsuit in Wake County Superior Court challenging the constitutionality of the new APA provision regarding appointment of the OAH Director. News & Observer (Raleigh, N.C.), Mar. 20, 1986, at 23A, col. 4. The Governor had stated earlier that because the OAH is an agency of the executive branch, he believed that the power to appoint its director should be vested in the governor. News & Observer (Raleigh, N.C.), Mar. 18, 1986, at 1A, col. 5.

45. A central panel system is one in which a central office is established for the purpose of providing independent hearing officers to conduct contested cases for various state agencies. For a general background on central panel systems, see M. RICH & W. BRUCAR, *THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES* (1983); Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 JUDICATURE 236 (1981); Rich, *Adapting the Central Panel System: A Study of Seven States*, 65 JUDICATURE 246 (1981).

46. See CAL. GOV'T. CODE §§ 11370-70.5, 11502 (West 1980 & Supp. 1985); COLO. REV.

A contested case is commenced under Article 3 by filing a petition with the OAH.⁴⁷ If the petition is filed by a party other than an agency, it must be verified or supported by an affidavit and must set forth both a factual and a legal basis for challenging an agency action.⁴⁸ If the contested case involves the Department of Human Resources, the hearing is conducted within that agency unless a party requests that it be conducted by an OAH hearing officer.⁴⁹ If the contested case is within the State personnel system, it must be conducted in the OAH.⁵⁰ For all other agencies governed by Article 3, a contested case must be presided over by an OAH hearing officer unless a party to the proceeding waives that right, in which case the agency conducts the hearing.⁵¹

Article 3A, for the agencies it governs,⁵² essentially preserves the adjudicatory system of the old APA.⁵³ Unlike Article 3, Article 3A does not require that a petition, verified or otherwise, be filed to commence a contested case. Article 3A simply provides that "[p]rior to any agency action in a contested case, the agency shall give the parties in the case an opportunity for a hear-

STAT. §§ 24-30-1001 to -1003 (1982); FLA. STAT. § 120.65 (1985); MASS. ANN. LAWS ch. 7, § 4H (Michie Law. Co-op. Supp. 1985); MINN. STAT. ANN. §§ 14.48-50 (West Supp. 1986); N.J. STAT. ANN. § 52:14F (West Supp. 1985); TENN. CODE ANN. § 4-5-301 (1985); WASH. REV. CODE ANN. § 34.12 (Supp. 1986). The most recent version of the Model State Administrative Procedure Act, adopted by the National Conference of Commissioners on Uniform State Laws in 1981, also provides for a central panel system. See MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, §§ 4-101 to -506, 14 U.L.A. 73, 121-53 (Supp. 1985).

47. N.C. GEN. STAT. § 150B-23(a) (Supp. 1985).

48. *Id.*

49. *Id.* § 150B-32(a1), -23(a), (a1), (b)(4). Section 150B-23(a) does not apply to the Department of Human Resources. Thus, a verified petition or a petition supported by affidavit is not required to commence a contested case in that agency. For a discussion of the significance of the manner in which contested cases involving the Department of Human Resources are conducted, see *infra* notes 108-11 and accompanying text.

50. N.C. GEN. STAT. § 150B-23(a) (Supp. 1985). The State Personnel System is established and governed by Chapter 126 of the North Carolina General Statutes. *Id.* §§ 126-1 to -79 (1981 & Supp. 1985). For specific provisions making hearings under that chapter subject to Article 3 of the APA, see *id.* §§ 126-37, -43 (Supp. 1985). One category of personnel hearings is subject to a special provision in Article 3. If the contested case involves "[a] local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes applies," then the decision of the hearing officer is advisory only, unless the hearing officer determines that prohibited discrimination has occurred or federal standards require a binding decision, in which case the hearing officer's decision is final. *Id.* § 150B-23(a).

51. *Id.* Under the old APA, either the agency or a hearing officer designated by the agency conducted the contested case and made the final decision. Act of Apr. 12, 1974, ch. 1331, sec. 1, §§ 150-21 to -35, 1973 N.C. Sess. Laws 691, 696-99. Under House Bill 52, as originally introduced, independent administrative judges were to preside over and make final decisions in contested cases. House Bill 52 (1st ed. Feb. 11, 1985), § 150A-23(a), at 18, § 150A-36, at 25-26. Under the bill as amended by the Senate, the agency involved in the case was to conduct the hearing and make the final decision, unless a party requested an OAH hearing officer. House Bill 52 (5th ed. June 26, 1985), § 150-32(a), (a1), at 25-26, General Assembly of North Carolina, Regular Session 1985. In cases conducted by an OAH hearing officer, the hearing officer would make a recommended decision and the final decision would be made by the agency. *Id.* § 150A-34, -36, at 28-29. The compromise contained in the new APA was forged by the conference committee. See House Bill 52 Conference Report (July 12, 1985), General Assembly of North Carolina, Regular Session 1985. For a description of how recommended and final decisions are made under the new APA, see *infra* text accompanying notes 57-66.

52. See *supra* notes 40-41 and accompanying text.

53. Act of Apr. 12, 1975, ch. 1331, sec. 1, § 150-21 to -35, 1973 N.C. Sess. Laws 691, 696-99. For one significant change in Article 3A from the old APA, see *infra* note 56.

ing.”⁵⁴ The Article 3A provision that most clearly distinguishes it from Article 3 is the requirement that hearings “be conducted by a majority of the agency” with one or more members of the agency presiding.⁵⁵ The party opposing the agency is not afforded the choice of an independent hearing officer. A hearing officer from the OAH may be appointed only if a majority of the members of the agency is unable to hear a contested case or elects not to do so.⁵⁶

Whether the agency or an OAH hearing officer conducts the hearing, the agency virtually always makes the final decision.⁵⁷ Under both Articles 3 and 3A, when an OAH hearing officer conducts the hearing, the officer must make a proposal for decision containing findings of fact and conclusions of law.⁵⁸ Once such a proposal for decision has been made, Articles 3 and 3A mandate different procedures for the remainder of the adjudicatory process.

Under Article 3, a copy of the proposal for decision must be delivered to each party,⁵⁹ and each party must be given “an opportunity to file exceptions and proposed findings of fact and to present written arguments”⁶⁰ to the hearing officer. After considering the parties’ filings or written arguments, the hearing officer must make a recommended decision to the agency.⁶¹ The agency makes the final decision.⁶² There is no provision for parties to present oral or written arguments to the agency.

Under Article 3A, in the exceptional case in which an OAH hearing officer is used, the hearing officer’s proposal for decision must be served on the par-

54. N.C. GEN. STAT. § 150B-38(b) (Supp. 1985). There is a further requirement with respect to proceedings involving occupational licenses. “Before the commencement of proceedings for the suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of . . . an occupational license . . . the licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the . . . occupational license.” *Id.* § 150B-3(b).

55. *Id.* § 150B-40(b).

56. “When a majority of an agency is unable or elects not to hear a contested case, the agency shall apply to the chief hearing officer of the [OAH] for the designation of a hearing officer to preside at the hearing of a contested case under this Article.” *Id.* § 150B-40(e). In contrast, under the old APA, an agency could choose to have contested cases conducted by “one or more members of the agency,” instead of the majority required under the new APA, “or one or more hearing officers designated and authorized by the agency to handle contested cases.” Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-30(a), 1973 N.C. Sess. Laws 691, 698 (emphasis added).

57. N.C. GEN. STAT. §§ 150B-36, -42 (Supp. 1985). Pursuant to Article 3, however, in hearings involving “[a] local government employee, applicant for employment, or former employee to whom Chapter 126 of the General Statutes [concerning the State Personnel System] applies,” if the hearing officer determines that prohibited discrimination is involved or federal statutes so require, the decision of the hearing officer is final. *Id.* § 150B-23(a).

58. *Id.* §§ 150B-34(a)(1), -40(e). Proposals for decision must also be made in cases under Article 3 in which an agency employee, other than an agency official who will make the final decision, serves as the hearing officer. An agency employee may serve as a hearing officer when a party waives the right to have an OAH hearing officer or, in a case involving the Department of Human Resources, does not request an OAH hearing officer. *See id.* § 150B-23(a), (b)(4), -32(a1).

59. *Id.* § 150B-34(a)(2).

60. *Id.* § 150B-34(a)(3).

61. *Id.* § 150B-34(b). The recommended decision must contain findings of fact and conclusions of law, which become part of the official record required by § 150B-37(a).

62. *Id.* § 150B-36. The decision must include findings of fact and conclusions of law, must be made on the whole record “or such portion as may be cited by any party,” and must be supported by substantial evidence. *Id.*

ties.⁶³ Then, each party must be given "an opportunity . . . to file exceptions and proposed findings of fact and to present oral and written arguments to the agency."⁶⁴ The typical situation under Article 3A, however, is one in which the agency itself conducts the hearing.⁶⁵ In either case the agency makes the final decision.⁶⁶

The administrative hearings provisions in the new APA should be measured against the Act's stated purpose: "to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies."⁶⁷ The old APA contained a similar statement of purpose.⁶⁸ The large number of exemptions in both acts,⁶⁹ however, dispels the notion that North Carolina administrative procedures are now or ever have been uniform among the various State agencies. Moreover, the new APA's dual sets of provisions governing administrative hearings result in less, rather than more, uniformity. Thus, the new APA fails to advance the purpose of achieving a uniform system of adjudicatory procedures.

In addition to the statement of purpose, the new APA contains a statement of policy and legislative intent that did not appear in the old APA. Based on a policy of separation of powers among the legislative, executive, and judicial branches of government,⁷⁰ the expressed intent of the general assembly in the new APA "is to prevent the commingling of those powers in any administrative agency and to ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process."⁷¹ This statement of intent prompts an initial question whether the new APA in fact separates the function of administrative adjudication from the other functions of administrative agencies. The more important question, however, is whether the adjudicatory procedures established by the new APA result in greater fairness to parties and greater efficiency in the resolution of controversies.⁷²

63. *Id.* § 150B-40(e).

64. *Id.*

65. See *supra* notes 55-56 and accompanying text.

66. N.C. GEN. STAT. § 150B-42(a) (Supp. 1985). As with Article 3, decisions in cases arising under Article 3A must include findings of fact and conclusions of law, must be made on the whole record "or such portion thereof as may be cited by any party," and must be supported by substantial evidence. *Id.* Article 3A also contains the following requirement not found in Article 3: "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them." *Id.*

67. *Id.* § 150B-1(b).

68. "The purpose and intent of this Chapter shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies." Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-1(b), 1973 N.C. Sess. Laws 691, 692.

69. See *supra* note 37.

70. See *supra* note 27. For a thorough discussion of this policy, see Orth, "Forever Separate and Distinct": Separation of Powers in North Carolina, 62 N.C.L. REV. 1 (1983).

71. N.C. GEN. STAT. § 150B-1(a) (Supp. 1985).

72. Consideration of this question requires the balancing of competing factors:

The reasons for creating administrative agencies include efficiency, speed, volume, flexibility and informality. Weighed against these are fairness considerations—equitable treatment of persons in like circumstances, notice, opportunity to participate, regularized process, articulated reasons for agency action and overall "rationality" in agency process.

The primary reason for requiring the separation of adjudication from the other functions of administrative agencies is to ensure that those who preside over hearings and make final decisions in contested cases are impartial.⁷³ The threshold issue is whether the constitutional requirement of due process mandates this separation of functions. The United States Supreme Court addressed this issue in *Withrow v. Larkin*⁷⁴ and held that due process does not require a strict separation of functions within administrative agencies.⁷⁵ Nevertheless, a separation of functions may be necessary to achieve true impartiality.⁷⁶

Assuming that some degree of separation of functions is necessary, the question becomes how such a separation should be achieved. There are two basic methods that can be used: external separation and internal separation.⁷⁷ Either method can be used to varying degrees.

The theory of external separation of functions, with regard to administrative hearings, is to remove the adjudication function from agencies and to give adjudicatory authority to hearing officers employed by an independent central panel.⁷⁸ The theory of internal separation of functions is to retain the investigation, advocacy, and adjudication functions within each agency, while requiring

The inherent clash of such objectives can only be minimized by careful balancing in particular instances.

Daye, *supra* note 2, at 845.

73. For a general discussion of separation functions in the administrative process, see 1 F. COOPER, *supra* note 39, 16-26; 3 K. DAVIS, *supra* note 8, at 340-70; B. SCHWARTZ, ADMINISTRATIVE LAW §§ 6.20-23, at 329-39 (2d ed. 1984).

74. 421 U.S. 35 (1975).

75. The Court stated: "[F]or the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings . . . does not violate due process of law." *Id.* at 56. However, the Court also noted that the fact that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high." *Id.* at 58.

76. As one commentator has observed, "The combination of functions may not be subject to due process attack; but it 'creates an intolerably high risk of unfairness' and leaves the litigant with an uneasy feeling." B. SCHWARTZ, *supra* note 73, § 6.22, at 333 (quoting *Gashgai v. Board of Registration in Medicine*, 390 A.2d 1080, 1082 (Me. 1978)).

77. For a description of "complete separation" and "internal separation," see *id.* § 6.22-23, at 333-39. This Note uses the term "external separation," rather than "complete separation," because external separation is not always "complete."

78. See *id.* § 6.22, at 333-36; Levinson, *supra* note 45, at 244. Application of the external separation of powers theory may result in what has been described as the independent judicial model of administrative adjudication. *Id.* "The ultimate development in the independent judicial direction is the Maine Administrative Court, which is, within its limited range of jurisdiction, a judicial tribunal." *Id.* "The Maine Administrative Court . . . has jurisdiction in licensee discipline cases or where an agency refuses to issue or renew a license. The licensing agency appears as a party before the Administrative Court. The court conducts the hearing and renders a decision subject only to review by a higher court." *Id.* at 239; see ME. REV. STAT. ANN. tit. 4, §§ 1151-1158 (1979 & Supp. 1985); *id.* tit. 5, § 10051; see also Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389 (general discussion of the judicial model).

For background on the central panel systems now used in at least eight other states in addition to North Carolina, see authorities cited *supra* note 45. The degree to which a central panel system approximates the independent judicial model of adjudication depends on the extent to which the use of central panel hearing officers is mandatory. Levinson, *supra* note 45, at 244.

that each function be performed by a different person or group of persons.⁷⁹ The Federal Administrative Procedure Act (Federal APA)⁸⁰ provides for internal separation of functions.⁸¹ The new North Carolina APA and the Model State Administrative Procedure Act (Model State APA)⁸² combine elements of both theories.

Under the Federal APA, formal hearings may be conducted by "(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges."⁸³ Although administrative law judges are appointed by each agency,⁸⁴ specific provisions of the Federal APA insulate their pay and their job stability from control by other agency officials.⁸⁵ Moreover, other agency employees who are involved in investigating or prosecuting a case are forbidden to supervise, direct, or advise the administrative law judge presiding over the case.⁸⁶

The Model State APA includes two alternative provisions for the designation of officials to preside over adjudications. Under the first alternative, the agency head, one or more members of the agency, one or more administrative law judges, or one or more other persons designated by the agency may serve as presiding officer.⁸⁷ This provision is similar to a section of the old North Carolina APA.⁸⁸ The second alternative under the Model State APA is the same as

79. B. SCHWARTZ, *supra* note 73, § 6.22, at 336.

80. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 5362, 7521 (1982).

81. B. SCHWARTZ, *supra* note 73, §§ 6.23-24, at 336-42.

82. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, 14 U.L.A. 76 (Supp. 1985).

83. 5 U.S.C. § 556(b)(1)-(3) (1982). This provision applies to formal adjudication, which is defined as "adjudication required by statute to be determined on the record after the opportunity for an agency hearing." *Id.* § 554(a).

84. *Id.* § 3105.

85. "Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings. . . ." *Id.* § 5372. "An action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." *Id.* § 7521(a).

86. The applicable provision states:

The employee who presides at the reception of evidence . . . may not . . . be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review

Id. § 554(d), (d)(2).

87. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, § 4-202(a), 14 U.L.A. 76, 128 (Supp. 1985). The provision reads:

The agency head, one or more members of the agency head, one or more administrative law judges assigned by the office of administrative hearings in accordance with Section 4-301 [, or, unless prohibited by law, one or more other persons designated by the agency head], in the discretion of the agency head, may be the presiding officer.

Id. The second alternative is obtained by omitting the bracketed language.

88. The old North Carolina APA contained the following provision concerning designation of hearing officers by all agencies it covered: "An agency, one or more members of the agency, a person or group of persons designated by statute or one or more hearing officers designated and authorized by the agency to handle contested cases, shall be hearing officers in contested cases." Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-30, 1973 N.C. Sess. Laws 691, 698. The common element in the Model

the first, except that the option to choose one or more other persons designated by the agency head to act as presiding officers is omitted.⁸⁹ The provision in Article 3A of the new North Carolina APA designating officials to preside over adjudication is comparable to the Model State APA's second alternative.⁹⁰ In contrast, Article 3 of the new APA requires use of independent hearing officers from the OAH except under particular circumstances.⁹¹ Because Article 3 essentially removes the adjudication function from agencies, it follows the theory of external separation to the greatest degree of all the approaches described above.⁹²

In addition to the provisions that determine who may conduct hearings, the North Carolina APA, the Model State APA, and the Federal APA contain other provisions designed to ensure impartiality in the adjudication process. Most important are provisions allowing disqualification of hearing officers for bias,⁹³ proscribing *ex parte* communication,⁹⁴ and requiring that final decisions

State APA provisions and the old North Carolina APA provisions is the broad discretion agencies have in designating hearing officers. However, although the Model State APA provides for an office of administrative hearings to provide a source of administrative law judges, the old North Carolina APA contained no similar provision.

89. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, § 4-202, 14 U.L.A. 76, 128 (Supp. 1985). This alternative is obtained by omitting the bracketed language of the provision quoted *supra* note 87.

90. Article 3A of the new APA provides for contested case hearings to be conducted by a majority of agency members, N.C. GEN. STAT. § 150B-40(b) (Supp. 1985), unless the majority is unable or elects not to do so, in which case an OAH hearing officer must be used. *Id.* § 150B-40(e).

91. *Id.* § 150B-23(a). The only exceptions to the requirement of OAH hearing officers under Article 3 are cases in which a party waives the right to an OAH hearing officer, *id.*, or cases in which the Department of Human Resources is involved. In cases involving the Department of Human Resources, the agency may designate a hearing officer unless a party requests an OAH hearing officer. *Id.* §§ 150B-23(a1), -32(al).

92. As originally introduced, House Bill 52 would have established a complete external separation of adjudication from other administrative functions. House Bill 52 (1st ed. Feb. 11, 1985), General Assembly of North Carolina, Regular Session 1985, § 1, art. 3, at 18-26. Under the bill's administrative hearings provisions, administrative judges employed by the OAH would have conducted hearings and made final decisions in contested cases. *Id.* § 150A-23(a), at 18, § 150A-36, at 25.

93. See 5 U.S.C. § 556(b)(3) (1982); MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, §§ 4-202(b), -202(c), 14 U.L.A. 76, 128 (Supp. 1985). Article 3 of the new North Carolina APA states:

On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a hearing officer, the agency shall determine the matter as a part of the record in the case, and this determination shall be subject to judicial review at the conclusion of the proceeding.

N.C. GEN. STAT. § 150B-32(b) (Supp. 1985). A substantially similar provision is contained in Article 3A. *Id.* § 150B-40(b). For a discussion of the comparable provision in the old APA, see Daye, *supra* note 2, at 885-87.

94. See 5 U.S.C. §§ 554(d), 557(d)(1) (1982); MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, § 4-213, 14 U.L.A. 76, 137 (Supp. 1985). Article 3 of the new North Carolina APA contains the following provision:

Unless required for disposition of an *ex parte* matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case or a hearing officer shall not communicate, directly or indirectly, in connection with any issue of fact, or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate.

N.C. GEN. STAT. § 150B-35 (Supp. 1985). Article 3A contains a substantially similar provision. *Id.* § 150B-40(d). One problematic aspect of this provision in both Articles 3 and 3A is that it prohibits *ex parte* communication in connection with issues of fact or questions of law "with any person or

be based on evidence contained in the record.⁹⁵ There are a number of other provisions in these acts that are designed to ensure fair procedures generally.⁹⁶

A critical question is whether such "fairness" provisions alone are sufficient to achieve impartiality without the use of independent hearing officers. One alternative short of requiring a completely independent, mandatory central panel system is to require a strict internal separation of functions.⁹⁷ By requiring the use of independent hearing officers in many cases, Article 3 of the new North Carolina APA indicates that the general assembly believed some degree of external separation of functions was necessary.⁹⁸

Within the issue of separation of functions, and closely related to the factor of impartiality, is the question of how much technical expertise and program experience is necessary on the part of the individuals who conduct and decide contested cases. Opponents of central panel systems argue that independent hearing officers lack the expertise and experience needed to conduct contested cases and to make recommended decisions.⁹⁹ It may be that a degree of expertise is required in some cases, particularly those that are complex or involve technical data and concepts.¹⁰⁰ Lack of expertise in such cases could result in inefficiency and questionable decisions.

There is a strong argument, however, that the greater a decisionmaker's degree of expertise, the greater the danger that preconceived notions and bias will enter into decisions.¹⁰¹ Proponents of this view argue that the best judge is

party or his representative." *Id.* §§ 150B-35, -40(d) (emphasis added). The similar provision in the old APA, concerning questions of law, prohibited *ex parte* communication with "any party or his representative," but not with other persons. Act of Apr. 12, 1974, ch. 1331, sec. 1, § 150-33, 1973 N.C. Sess. Laws 691, 698-99. According to Professor Daye, this distinction in the old APA followed the accepted practice of allowing decisionmakers to communicate on questions of law with such nonparties as the attorney general, outside experts, or law professors. Daye, *supra* note 2, at 891 & n.267. Under the new APA decisionmakers apparently may not communicate on questions of law, even with other hearing officers or with the chief hearing officer in the OAH. It seems unlikely that the general assembly intended this result.

95. See 5 U.S.C. §§ 556 (d), (e), 557(c) (1982); N.C. GEN. STAT. §§ 150B-36, -42(a) (Supp. 1985); MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, §§ 4-215(c), (d), -221, 14 U.L.A. 76, 138-39, 143-44 (Supp. 1985). Provisions in the new North Carolina APA requiring the preparation of an official record and specifying its contents are found at N.C. GEN. STAT. §§ 150B-37(a), -42(b) (Supp. 1985).

96. General fairness provisions in the new North Carolina APA include those pertaining to notice, N.C. GEN. STAT. §§ 150B-23(b), (c), -38(b), (c) (Supp. 1985); intervention, *id.* §§ 150B-23(d), -38(f); open hearings, *id.* §§ 150B-23(e), -38(e); venue, *id.* §§ 150B-24, -38(e); discovery, *id.* §§ 150B-28, -39(a), (b); and rules of evidence, *id.* §§ 150B-29, -41(a), (b).

97. For a description of such a provision in the federal APA, see *supra* note 86. The Model State APA contains a detailed provision requiring an internal separation of functions. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, § 4-214, 14 U.L.A. 76, 138 (Supp. 1985). Although the new North Carolina APA contains a statement of intent that agency functions be kept separate, see *supra* text accompanying note 71, it does not contain anything similar to the provision in the Model State APA.

98. Because final decisions are still made by agencies, however, Article 3 of the new APA does not approach a complete external separation of adjudication from other agency functions.

99. See M. RICH & W. BRUCAR, *supra* note 45, at 45; Rich, *supra* note 45, at 253. This argument was made at a public hearing on House Bill 52 held by the Senate Judiciary I Committee. Minutes, Senate Judiciary I Comm. Public Hearing on House Bill 52 (June 12, 1985), General Assembly of North Carolina, Regular Session 1985.

100. See M. RICH & W. BRUCAR, *supra* note 45, at 45; Rich, *supra* note 45, at 253.

101. See M. RICH & W. BRUCAR, *supra* note 45, at 45; Rich, *supra* note 45, at 253. According

a generalist, one who is not an expert in the field but who is able to use the expertise of others to make informed, impartial decisions.¹⁰²

Under Article 3 of the new APA the chief hearing officer, in assigning hearing officers to contested cases, is required to "attempt to use personnel having expertise in the subject to be dealt with in the hearing."¹⁰³ If hearing officers are appointed to the OAH with a view toward maintaining that office's expertise in the various fields of state regulation, there should be sufficient expertise available for the more complex and technical cases. One problem with assigning a particular hearing officer to similar cases involving the same agency is that familiarity and frequent contact with an agency may negate the benefits derived from having independent hearing officers.¹⁰⁴ The best way to avoid this problem is to appoint individual hearing officers with expertise in several areas and to rotate their assignments among various agencies.¹⁰⁵ The ultimate goal should be to train the hearing officers so that each one can conduct most, if not all, types of cases.

In addition to impartiality and expertise, the other factor that determines the fairness and efficiency of the hearings process is the difficulty, time, and expense involved in contested case proceedings. The most significant feature of the new APA in this regard is Article 3's requirement of a verified petition or a petition supported by an affidavit to commence a contested case.¹⁰⁶ The obvious effect of this provision is to necessitate the retention of counsel when a party seeks to challenge an agency. Further, the use of independent hearing officers may make contested case hearings more adversarial. Such changes can only result in a more costly and time-consuming process.¹⁰⁷

Several provisions of Article 3, however, may alleviate these problems in one category of cases. Because contested cases in the Department of Human

to one commentator, "When a judge possesses true expertise in a subject matter, a significant danger exists that conclusions may be reached on perceptions or information outside the record. This would be a manifestation of bias, and special efforts to avoid any resulting unfairness would be indicated." *Id.* (quoting Kestin, *Reform of the Administrative Process*, 92 N.J. LAW. 35 (1980)).

102. See M. RICH & W. BRUCAR, *supra* note 45, at 45-46; Rich, *supra* note 45, at 253. In the words of one commentator,

Most of the time the best judge is the individual who possesses the capacity by way of insight, temperament and knowledge to make fair and constructive use of the expertise of others. A judge should not usually be the source of the information, technical or otherwise, upon which a result is based.

Id. (quoting Kestin, *supra* note 101).

103. N.C. GEN. STAT. § 150B-23(a) (Supp. 1985). A related provision states that "[t]he Director [chief hearing officer] may, with the approval of the Chief Justice, designate certain hearing officers as having the experience and expertise to preside at specific types of contested cases and assign only these designated hearing officers to preside at those cases." *Id.* § 7A-753.

104. See Harves, *Making Administrative Proceedings More Efficient and Effective: How the ALJ Central Panel System Works in Minnesota*, 65 JUDICATURE 257, 261 (1981).

105. See *id.*

106. N.C. GEN. STAT. § 150B-23(a) (Supp. 1985); see *supra* text accompanying notes 47-48.

107. Because parties to a contested case under Article 3 can waive the right to an OAH hearing officer, the further result may be that individual litigants might seek to use political pressure to increase their chances for a favorable decision. Conversely, agency officials may be tempted to compromise their cases to avoid the use of independent hearing officers.

Resources are exempt from the requirement of a verified petition¹⁰⁸ and are conducted by Department personnel unless a party requests an OAH hearing officer,¹⁰⁹ they should be less costly and time-consuming.¹¹⁰ However, a party can request that independent hearing officers conduct cases involving the Department of Human Resources.¹¹¹

The Model State APA contains several provisions that can reduce the time and expense involved in contested case proceedings. One such provision allows an officer conducting a hearing to require that the parties attend a prehearing conference.¹¹² Such a conference can facilitate the settlement of cases or the conversion of formal adjudication into less formal proceedings.¹¹³ Although the new North Carolina APA allows for the agreed settlement of cases,¹¹⁴ it does not prescribe a specific procedure to encourage settlement. The Model State APA also provides procedures for less formal adjudications, including "Conference Adjudicative Hearing[s]"¹¹⁵ and "Summary Adjudicative Proceedings."¹¹⁶ The new North Carolina APA contains no such provisions.

The new APA falls short of the general assembly's stated purpose of achieving uniform procedures among State agencies. The legislative intent of ensuring the separation of functions within the administrative process is partially achieved by combining elements of both internal and external separation. The intended separation of functions probably could have been achieved without a limited central panel system if the Act had included a provision requiring a strict internal separation of functions.

108. N.C. GEN. STAT. § 150B-23(a), (al) (Supp. 1985).

109. *Id.* §§ 150B-23(a), (al), (b)(4), -32(al).

110. This result is particularly important because a substantial portion of all contested cases involving State agencies are in the Department of Human Resources. See B. Finger, J. Betts, R. Coble & J. Nichols, *supra* note 3, at 30, 55.

111. This choice, however, may produce the result described *supra* note 107.

112. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, § 4-204, 14 U.L.A. 76, 129-30 (Supp. 1985). This section also sets out the requirements for notice of a prehearing conference, *id.* § 4-204, at 129-30, and the procedure for conducting a prehearing conference. *Id.* § 4-205, at 131.

113. See *id.* § 4-204, at 130 comment. Formal adjudication under the Model State APA, *id.* §§ 4-201 to -221, at 127-44, is comparable to contested case proceedings under Articles 3 and 3A of the new North Carolina APA. See *supra* note 39 and accompanying text.

114. Article 3 states that "[e]xcept as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default, or other method agreed upon by the parties." N.C. GEN. STAT. § 150B-31(b) (Supp. 1985). Article 3A contains a similar provision. *Id.* § 150B-41(c).

115. MODEL STATE ADMIN. PROCEDURE ACT, 1981 ACT, §§ 4-401 to -403, 14 U.L.A. 76, 146-48 (Supp. 1985). "[T]he conference adjudicative hearing is a 'peeled down' version of the formal adjudicative hearing. [It] does not have a pre-hearing conference, discovery, or testimony of anyone other than the parties." *Id.* § 4-402, at 147 comment. However, a prehearing conference prior to a formal hearing can be converted into either a conference adjudicative hearing or summary adjudicative proceeding. *Id.* § 1-107, at 84.

116. *Id.* §§ 4-502 to -503, at 149-50. The use of summary adjudicative proceedings is allowed within limited categories of cases in which "the protection of the public interest does not require the agency to give notice and an opportunity to participate to persons other than the parties." *Id.* § 4-502(2), at 149. Specific provision is made for administrative review of summary adjudicative proceedings, upon request of a party or upon motion of the agency involved. *Id.* §§ 4-504 to -506, at 151-52. In addition, the use of emergency adjudicative proceedings is allowed, but only "in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." *Id.* § 4-501(a), at 148.

It is not yet clear whether the compromises embodied in the new APA will result in greater fairness and efficiency in administrative adjudication. The best argument in favor of a central panel system is that it will foster a public perception of fairness. Whether the system established by Article 3 of the new APA will actually produce better and more objective decisions, however, will depend on the caliber of the OAH hearing officers and the degree of deference agencies afford their recommended decisions.¹¹⁷ The efficiency of the system could be improved by the addition of less formal adjudication procedures for appropriate cases. Further, the overall efficiency that might be achieved from a central panel system is probably diminished or even eliminated by the exemption of most cases involving the agencies covered by Article 3A.¹¹⁸

Because the administrative hearings provisions of the new APA include many of the viable alternatives discussed above, the opportunity exists to evaluate the effectiveness of each alternative. More importantly, if needed improvements to the Act are made, and less effective procedures discarded, a fairer, more efficient, and more uniform system of administrative procedures will be achieved.

JOHN AYCOCK MCLENDON, JR.

117. Article 3 of the new APA requires that "[i]f the agency does not adopt the hearing officer's recommended decision as its final decision in a contested case conducted by a hearing officer, the agency shall include in its decision or order the specific reasons why the hearing officer's recommended decision is not adopted." N.C. GEN. STAT. § 150B-36 (Supp. 1985). In addition, all final decisions must be supported by substantial evidence, based on the record. *Id.* These requirements, read together, seem to establish at least a moderate presumption in favor of hearing officers' recommended decisions. The leading case on this issue under the federal APA establishes that agencies must give at least some weight to the initial decisions of administrative law judges. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

118. See B. Finger, J. Betts, R. Coble & J. Nichols, *supra* note 3, at iii, 45.