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# Administrative Justice: No Longer Just a Recommendation

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# ADMINISTRATIVE JUSTICE: NO LONGER JUST A RECOMMENDATION

CHIEF ADMINISTRATIVE LAW JUDGE JULIAN MANN, III\*

*North Carolina's Administrative Procedure Act allows North Carolina citizens who challenge agency action the opportunity to adjudicate their claims before an independent administrative law judge in the Office of Administrative Hearings. On January 1, 2001, extensive revisions to North Carolina's Administrative Procedure Act became effective. This commentary furnishes a historical context and an interpretative analysis of the recent amendments.*

INTRODUCTION.....	1639
I. Historical Perspective.....	1642
II. Procedures Under the New APA.....	1649
CONCLUSION .....	1654

## INTRODUCTION

On January 1, 2001, House Bill 968 became effective to provide North Carolinians with a heightened administrative law due process remedy.<sup>1</sup> The extensive revisions to North Carolina's Administrative Procedure Act (APA) provide a more efficient and just remedy than under the previous statutory scheme. The evolution of fifteen years of APA legislative history culminated in the enactment of House Bill 968.

The predecessor APA, Chapter 150A,<sup>2</sup> invested citizens with extensive administrative and due process procedures, but with limited

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1. Act of July 12, 2000, ch. 190, secs. 1 to 14, 2000 N.C. Adv. Legis. Serv. 546, 546-52.

2. Act of Apr. 12, 1974, ch. 1331, sec. 1, 1973 N.C. Sess. Laws 691, 691-703 (current version at N.C. GEN. STAT. § 150B (1999 & Supp. 2000)) (existing from 1973 through 1985). The 1985 APA amendments repealed the predecessor APA (Chapter 150A), which required an agency hearing officer to preside over contested cases. Act of July 12, 1985, ch. 746, sec. 1, 1985 N.C. Sess. Laws 987, 999 (current version at N.C. GEN. STAT. § 150B (1999 & Supp. 2000)). The new APA (Chapter 150B) established the OAH's independent adjudicatory authority as North Carolina's central panel. *Id.* See generally

effectiveness because administrative hearings were tried before agency hearing officers.<sup>3</sup> In 1985, the General Assembly created the Office of Administrative Hearings (OAH) under the concept of a central panel, which is an independent adjudicatory tribunal.<sup>4</sup> The creation of the OAH severed adjudication from investigation and prosecution to prevent the same person within an agency from serving dual functions.<sup>5</sup> The OAH provided a forum for independent adjudication, but the revised APA did not grant the Administrative Law Judges (ALJs) sufficient final authority to ensure remedial relief because the ALJ's decision was only a recommendation to the agency.<sup>6</sup> The ultimate relief rested with the agency's final decision makers, who were charged with reviewing the ALJ's recommended decision. Cumulatively, these decision makers tended to reject unfavorable recommendations and reinstate the agency's position in the case.<sup>7</sup> In 2000, the General Assembly enhanced the authority of

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Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. REV. 833 (1975) (discussing the scope, purpose, and background of Chapter 150A).

3. Act of Apr. 12, 1974, ch. 1331, sec. 1, 1973 N.C. Sess. Laws 691, 698, amended by Act of July 12, 1985, ch. 746, sec. 1, 1985 N.C. Sess. Laws 987, 999 (current version at N.C. GEN. STAT. § 150B (1999 & Supp. 2000)).

4. *Id.*; Julian Mann, III, *Striving for Efficiency in Administrative Litigation: North Carolina's Office of Administrative Hearings*, 15 J. NAT'L ASS'N OF ADMIN. L. JUDGES 151, 155 (1995). "[A] central panel is an autonomous, quasi-judicial, executive branch agency composed of an independent cadre of administrative law judges who hear and decide a wide range of administrative cases." *Id.* at 155. North Carolina was the thirteenth jurisdiction to create a central panel in the United States. *Id.* There are more than twenty-seven other jurisdictions in the United States operating under a central panel system of administrative law. See John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 420 (2001). See generally Edwin L. Felter, Jr., *Administrative Adjudication Total Quality Management: The Only Way to Reduce Costs and Delays Without Sacrificing Due Process*, 15 J. NAT'L ASS'N OF ADMIN. L. JUDGES 5 (1995) (discussing the prevalence of central panels); John W. Hardwicke, *The Central Hearing Agency: Theory and Implementation in Maryland*, 14 J. NAT'L ASS'N OF ADMIN. L. JUDGES 5 (1994) (discussing, in addition to Maryland's central panel implementation, the panels of states and the city of New York); Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990's*, 46 ADMIN. L. REV. 75 (1994) (discussing central panels in Maryland and Texas and the future of state central panels).

5. Act of July 12, 1985, ch. 746, sec. 2, 1985 N.C. Sess. Laws 987, 1011 (codified at N.C. GEN. STAT. § 7A-750 (1999 & Supp. 2000)).

6. See N.C. GEN. STAT. § 150B-34(a) (1999), amended by Act of July 12, 2000, ch. 190, sec. 6, 2000 N.C. Adv. Legis. Serv. 546, 547 (current version at N.C. GEN. STAT. § 150B-34(a) (Supp. 2000)).

7. MARY SHUPING, N.C. GEN. ASSEM. RESEARCH DIV., *CONTESTED CASES UNDER ARTICLE 3 OF THE APA: BACKGROUND INFORMATION & OPINIONS ON THE CONSTITUTIONALITY OF OAH FINAL DECISION-MAKING AUTHORITY*, PRESENTED TO THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE 4 (Feb. 17, 2000) (copy on file with the North Carolina Law Review).

the ALJs as independent adjudicators by increasing their decisional authority and establishing strict standards for reviewing their initial decisions.

The General Assembly amended section 7A-750,<sup>8</sup> adding expression to a previously implied purpose for the OAH.<sup>9</sup> New language was added referencing a citizen's right to due process protection as required by the Due Process Clauses of the Fifth<sup>10</sup> and Fourteenth<sup>11</sup> Amendments to the United States Constitution, as well as the Law of the Land Provision of the North Carolina Constitution.<sup>12</sup> The General Assembly emphasized this point with the addition of the following language codified in section 7A-750:

The Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases in accordance with Chapter 150B of the General Statutes and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.<sup>13</sup>

The General Assembly strengthened the due process remedy by enacting amendments to sections 150B-34(a) and 150B-36(b). The first amendment deleted the word "recommended" as a modifier in reference to the decision issued by the ALJ.<sup>14</sup> The second amendment directed the agency final decision makers to adopt the ALJ decision unless this decision was "*clearly* contrary to the

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8. N.C. GEN. STAT. § 7A-750 (1999), *amended by* Act of July 12, 2000, ch. 190, sec. 2, 2000 N.C. Adv. Legis. Serv. 546, 547 (codified at N.C. GEN. STAT. § 7A-750 (Supp. 2000)).

9. *Id.*

10. U.S. CONST. amend. V.

11. U.S. CONST. amend. XIV, § 1.

12. N.C. CONST. art. I, § 19. This provision is based on a similar provision in the Magna Carta. MAGNA CARTA art. XXIX.

13. N.C. GEN. STAT. § 7A-750 (Supp. 2000). See generally Bernard G. Segal, *The Administrative Law Judge*, 62 A.B.A. J. 1424 (1976) (discussing the need for independent ALJs); Edward A. Slavin, Jr., *ALJ Independence Undermined*, JUDGES J., Spring 1992, at 26 (discussing the intimidation of ALJs in the Interior Department by the Interior Department).

14. Act of July 12, 2000, ch. 190, sec. 6, 2000 N.C. Adv. Legis. Serv. 546, 547 (current version at N.C. GEN. STAT. § 150B-34(a) (Supp. 2000)).

preponderance of the . . . evidence,” significantly strengthening the ALJ’s decision to grant remedial relief.<sup>15</sup>

## I. HISTORICAL PERSPECTIVE

The genesis of the right to an administrative hearing developed as a result of the need for compliance with the Due Process Clauses of the Fifth<sup>16</sup> and Fourteenth<sup>17</sup> Amendments to the United States Constitution. As articulated by three landmark United States Supreme Court administrative law decisions: *Goldberg v. Kelly*,<sup>18</sup> *Mathews v. Eldridge*,<sup>19</sup> and *Cleveland Board of Education v. Loudermill*,<sup>20</sup> due process requires a hearing prior to the taking of a governmentally conferred property interest. These decisions granted extensive remedial relief from state and federal bureaucratic action through an expansive interpretation of the constitutional right to an administrative hearing.<sup>21</sup> In response, North Carolina’s General Assembly enacted the APA,<sup>22</sup> which included extensive administrative law procedures, followed later by the formation of a central panel with an independent forum for contested case hearings<sup>23</sup> to protect petitioners’ property interests from alleged wrongful takings. Thus, the regulatory scheme is not just procedural, but remedial in nature—ensuring that citizens receive adequate constitutional protection from unauthorized takings of property interests.<sup>24</sup>

Given this statutory formulation, the query became whether the APA governed administrative procedures only or whether it conferred upon petitioners a procedural right to a hearing for the

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15. N.C. GEN. STAT. § 150B-36(b3) (Supp. 2000) (emphasis added).

16. U.S. CONST. amend. V.

17. U.S. CONST. amend. XIV, § 1.

18. 397 U.S. 254 (1970).

19. 424 U.S. 319 (1976).

20. 470 U.S. 532 (1985).

21. *Cleveland Bd. of Educ.*, 470 U.S. at 551; *Mathews*, 424 U.S. at 349; *Goldberg*, 397 U.S. at 269-71; see Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

22. Act of Apr. 12, 1974, ch. 1331, sec. 1, 1973 N.C. Sess. Laws 691, 691-703, amended by Act of July 12, 1985, ch. 746, sec. 1, 1985 N.C. Sess. Laws 987, 987-1011 (current version at N.C. GEN. STAT. § 150B (1999 & Supp. 2000)).

23. Act of July 12, 1985, ch. 746, sec. 2, 1985 N.C. Sess. Laws 987, 1011 (codified at N.C. GEN. STAT. § 7A-750 (1999 & Supp. 2000)).

24. See, e.g., *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm’n*, 101 N.C. App. 699, 701, 400 S.E.2d 742, 744 (1991) (holding that a contested case hearing must precede the termination of a property interest in a law enforcement certification); see also *Crump v. Bd. of Educ.*, 93 N.C. App. 168, 179, 378 S.E.2d 32, 38 (1989) (providing that an unbiased, impartial decision maker is essential to due process).

abrogation of rights defined by the APA. A unanimous North Carolina Supreme Court resolved this question in *Empire Power Co. v. N.C. Department of Environment, Health and Natural Resources*.<sup>25</sup> The court stated that North Carolina's APA offers a "person aggrieved" a procedural right to a contested case hearing as long as other statutes governing agency action do not exclude a citizen's rights to a contested case hearing in order to guard against the abrogation of a citizen's rights, duties or privileges.<sup>26</sup>

Standing to file for a contested case hearing is determined by reference to the definition of "person aggrieved" in the APA.<sup>27</sup> This definition requires that the petitioner's property interest be *substantially* affected by an agency action.<sup>28</sup> Once standing is conferred upon the petitioner, remedial relief will follow under the APA if the petitioner prevails in the litigation. Thus, the APA confers both a procedural right to a hearing and remedial relief to the successful litigant. Ultimately, the superior court, using the whole record test for judicial review, must "determine whether the petitioner is entitled to the relief sought in the petition."<sup>29</sup> The purpose of the contested case hearing is to determine the petitioner's rights, duties or privileges.<sup>30</sup>

Under the new APA amendments, the ALJ no longer recommends a decision, but issues a decision of equal weight with that of the final agency decision maker.<sup>31</sup> Under the former APA provision for the review of the ALJ decision,<sup>32</sup> the agency reviewed the official OAH's record to determine, under the law and facts, whether the petitioner was entitled to a remedy.<sup>33</sup> While the ALJ's recommended decision might have been the starting point for the final decision, the APA did not demand a serious consideration of the

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25. 337 N.C. 569, 579, 447 S.E.2d 768, 774 (1994); see *N.C. Supreme Court Clarifies OAH Appeal Rights in Empire Power Co.*, ADMIN. LAW. (N.C. Bar Ass'n Admin. L. Sec.), Feb. 1995, at 1.

26. *Empire*, 337 N.C. at 588, 447 S.E.2d at 779 (rejecting the assertion that the organic statute exclusively conferred standing to file a contested case).

27. N.C. GEN. STAT. § 150B-2(6) (1999).

28. *Id.*

29. *Id.* § 150B-51(c).

30. *Id.* § 150B-22.

31. See *id.* § 150B-34.

32. *Id.* § 150B-36(a) to (b) (1999), amended by Act of July 12, 2000, ch. 190, sec. 7, 2000 N.C. Adv. Legis. Serv. 546, 548 (codified at N.C. GEN. STAT. § 150B-36(a) to (b) (Supp. 2000)).

33. If the agency failed to make a final decision within the required time, however, the agency was considered to have adopted the ALJ's recommended decision. N.C. GEN. STAT. § 150B-44 (1999), amended by Act of July 12, 2000, ch. 190, sec. 9, 2000 N.C. Adv. Legis. Serv. 546, 550 (codified at N.C. GEN. STAT. § 150B-44 (Supp. 2000)).

ALJ's recommended decision under any explicit standard of review. The agency exercised considerable discretion in its use of ALJ decisions. The final agency decision maker was held only to a de minimus standard of review if it did not accept the ALJ's recommended decision; that is, the agency was limited only by the requirement that it state specific reasons why it did not adopt the recommended decision.<sup>34</sup> After the agency issued its final decision, the agency was required to send a copy of the decision to each of the parties and to serve a copy upon the OAH.<sup>35</sup>

In enacting the recent amendments, the General Assembly articulated a meaningful standard of review. This new provision requires the agency to support in the record why the findings and decision of the ALJ are contrary to the preponderance of the evidence.<sup>36</sup> Under the new amendments, each ALJ finding not specifically rejected by the final decision maker now becomes a judicially determined fact in the agency's final decision and subsequently on judicial review.<sup>37</sup> An ALJ's findings of fact, once given no judicial consideration,<sup>38</sup> are now accorded conclusive effect if not specifically rejected by the final decision maker.<sup>39</sup>

The amendments to section 150B-36 highlight the importance of the ALJ's role as fact-finder. The ALJ hears the evidence, observes witness demeanor, writes a decision containing findings of fact and conclusions of law, and grants remedial relief subject to affirmation by the superior court.<sup>40</sup> An ALJ decision requires serious review under very specific standards before the final decision maker may reject it.<sup>41</sup> Section 150B-36 as now written demonstrates the new equality of the ALJ decision with that of the final decision.<sup>42</sup>

In 1991, the Legislative Research Commission, as part of a broader study, first inquired into the issue of increasing the decisional

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34. The agency is not required to refute point by point the ALJ's findings and conclusions. *Webb v. N.C. Dep't of Env't, Health & Natural Res.*, 102 N.C. App. 767, 770, 404 S.E.2d 29, 31 (1991). Judicial interpretation of "specific reasons" never arose to a standard of review. *Id.*

35. N.C. GEN. STAT. § 150B-36(b) (1999), amended by Act of July 12, 2000, ch. 190, sec. 7, 2000 N.C. Adv. Legis. Serv. 546, 548 (codified at N.C. GEN. STAT. § 150B-36 (b3) (Supp. 2000)).

36. *Id.* § 150B-36(b3).

37. *Id.* § 150B-36(b1).

38. *Id.* § 150B-36(b), amended by Act of July 12, 2000, ch. 190, sec. 7, 2000 N.C. Adv. Legis. Serv. 546, 548 (codified at N.C. GEN. STAT. § 150B-36 (b1) (Supp. 2000)).

39. *Id.* § 150B-36(b1).

40. *See id.* § 150B-36.

41. *Id.* § 150B-36(b3).

42. *Id.* § 150B-36.

authority of the ALJs in the OAH.<sup>43</sup> Presumably, the decisional aspect of the legislative inquiry was based upon the inordinate length of the APA bifurcated process between recommended and final decision-making as well as a possible dissatisfaction with the agency's tendency to reject the ALJ's recommended decision.<sup>44</sup> In 1991, however, empirical data was unavailable to compare the historical treatment of ALJ decisions with those of the final agency decision makers. As part of its primary charge, the Legislative Research Commission recommended several revisions to the APA rulemaking and hearings process, but made no attempt to modify the decisional authority of the ALJs.<sup>45</sup>

Before the General Assembly proposed a decisional modification to the APA process, it needed statistical information to evaluate the dynamics of the interaction between the recommended and final decision makers. Because section 150B-36 required the agency to serve the OAH with a copy of all final decisions, a convenient source of information existed to make this statistical comparison between the ALJs' recommended decisions and the final agencies' decisions.<sup>46</sup> The OAH began collecting this data prior to 1990.<sup>47</sup> Subsequent analysis of this data yielded unsettling results.

Comparative statistics demonstrated that state agencies prevailed against the citizen/petitioner in approximately seventy-five percent of the petitions that reached hearing at the OAH.<sup>48</sup> Conversely, twenty-five percent of the hearings were decided in favor of the citizen/petitioner.<sup>49</sup> Overwhelmingly, the final decision maker upheld the ALJ when the ALJ's recommended decision was favorable to the initial agency.<sup>50</sup> This statistical analysis depicted a skewed system

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43. LEGISLATIVE RESEARCH COMMISSION, *ADMINISTRATIVE PROCEDURE ACT: REPORT TO THE 1991 GENERAL ASSEMBLY OF NORTH CAROLINA*, 1991 Sess., at 3 (1991).

44. SHUPING, *supra* note 7, at 4.

45. *Id.*

46. N.C. GEN. STAT. § 150B-36(b) (1999), *amended by* Act of July 12, 2000, ch. 190, sec. 7, 2000 N.C. Adv. Legis. Serv. 546, 548 (codified at N.C. GEN. STAT. § 150B-36 (b3) (Supp. 2000)).

47. At various times, this data was provided to the North Carolina Bar Association, various legislative committees, the Government Performance Audit Committee (GPAC), and later to the newly established General Assembly APA Oversight Committee. The question that arose was whether it was necessary to give the average citizen a more meaningful remedy under the APA. Despite this query, no major APA legislative initiatives were proposed.

48. SHUPING, *supra* note 7, at 4.

49. *Id.*

50. *Id.*



favoring agency outcomes.<sup>51</sup> Confronted with these statistics, certain legislators became concerned that the playing field was not level for both sides.<sup>52</sup> Suggestions for reform centered on the following two primary objectives: first, to find a solution to the inherent delay in the bifurcated system of administrative decision-making, and second, to put in place a meaningful standard of review between the ALJ and the final decision maker, with a more neutral initial appellate review of the final decision in the superior court.

Several legislative initiatives were introduced between 1992 and 1999, demonstrating the General Assembly's willingness to address the two primary objectives. In the 1997 Session of the General Assembly, Senator Fletcher Hartsell<sup>53</sup> on the Senate floor offered an amendment to the Clean Water Responsibility Act (House Bill 515).<sup>54</sup> This amendment, known as the Hartsell Amendment, reflected almost exactly the legislation that Senator William Martin<sup>55</sup> earlier devised based upon the 1992 Government Performance Audit Committee's (GPAC) study recommendations for the OAH.<sup>56</sup> Although Senator Martin's efforts to modify the OAH system achieved little success, frustrated by the adamant opposition of agency representatives, his efforts nevertheless reflected the GPAC's position that the OAH should issue a final decision. The GPAC's recommendations were based as much on an effort to reduce the steps in the administrative process as a cost-saving measure than on a drive to provide meaningful APA reform.<sup>57</sup> Senator Hartsell seized upon the concept of a final OAH decision in his efforts to reform the APA process, but with a slant toward promoting fairness rather than efficiency. Yet, his measure did not grant final decision-making authority to the OAH, but instead mirrored the compromise fashioned by Senator Martin to bind the final decision maker to the ALJ's findings.<sup>58</sup> The Hartsell Amendment made the ALJ's findings

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51. *Id.*

52. *Wanted: Leadership*, CHARLOTTE OBSERVER, June 17, 1999, at 12A (noting that Representatives Martin Nesbitt, D-Buncombe, and Connie Wilson, R-Mecklenburg, voiced "concern[] that those who appeal contested cases under the current Administrative Law Judge system usually lose").

53. Senator Hartsell is a Republican from Cabarrus County representing District 22.

54. JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 892, 892 (1997).

55. Senator Martin is a Democrat from Guilford County representing District 31.

56. N.C. GOVERNMENT PERFORMANCE AUDIT COMMITTEE, OUR STATE, OUR FUTURE 102 (1992) (summarizing a legislatively commissioned performance audit of all state agencies conducted by KPMG Peat Marwick, Washington, D.C.).

57. *See id.*

58. JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA,

of fact and conclusions of law binding upon the final agency decision maker if the ALJ's findings and conclusions were supported by substantial evidence in the record.<sup>59</sup> This standard was identical to the standard found in Article Four of Chapter 150B that provided for the review of the final decision by the superior court.<sup>60</sup> Although House Bill 515 passed in the Senate,<sup>61</sup> its provisions relating to the APA were omitted in the House of Representatives.<sup>62</sup>

By omitting the Hartsell Amendment from the Clean Water Responsibility Act, Senate reformers believed that the House of Representatives was reluctant to change the APA system, preferring instead to maintain the status quo, and that no APA reform would occur without a change in philosophy in the House of Representatives. Between the 1997 and 1999 Sessions, the House leadership moved from Republican to Democratic Party control.<sup>63</sup> With this change, there appeared to be a more receptive environment for APA reform. Representatives Connie Wilson<sup>64</sup> and Martin Nesbitt<sup>65</sup> took up the cause in the House Chamber.<sup>66</sup> Representative Nesbitt had a long history with APA issues, dating back to the creation of the OAH in 1985.<sup>67</sup> Representative Wilson, a newcomer to APA issues, thought the process was unfair to the citizen/petitioner.<sup>68</sup> Their positions were supported by an array of private organizations that supported APA reform and many members of the General Assembly APA Oversight Committee.<sup>69</sup> The language

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1st Sess. 125, 125 (1993).

59. *See id.*

60. N.C. GEN. STAT. § 150B-51(b)(5) (1999).

61. JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 892, 893 (1997).

62. JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 1703, 1703-04 (1997).

63. Wade Rawlins, *GOP Loses Prized Majority*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 4, 1998, at A1.

64. Representative Wilson is a Republican from Mecklenburg County representing District 57.

65. Representative Nesbitt is a Democrat from Buncombe County representing District 51.

66. *See Wanted: Leadership*, *supra* note 52.

67. For a discussion of the background and legislative history of the 1985 legislation, see John Sanders, *Administrative Procedure*, in NORTH CAROLINA LEGISLATION 1985 (Robert P. Joyce ed., 1985).

68. *See Wanted: Leadership*, *supra* note 52.

69. Some individuals and organizations instrumental in implementing the amendments included Charles D. Case on behalf of a number of associations and business interests, Mike Carpenter of the North Carolina Home Builders Association, Dick Taylor of the North Carolina Trial Lawyers Association, Bill Rowe and Elizabeth McLaughlin of the North Carolina Community Development and Justice Center, Bob Slocum of the

of the original version of House Bill 968 modeled the language of the Hartsell Amendment, which had previously failed concurrence in the House.<sup>70</sup> Several other influential House members signed on to House Bill 968 as sponsors and the bill was introduced in the House of Representatives in the 1999 Session of the General Assembly.<sup>71</sup> To most observers' surprise, House Bill 968 quickly won committee approval,<sup>72</sup> was immediately calendared for House floor debate, and ultimately passed the House by a substantial margin in the face of what amounted to little organized opposition.<sup>73</sup> However, once the House enacted House Bill 968, it then passed over to the Senate, where rapid agency and executive branch opposition postponed consideration of the measure until the 2000 Short Session. Prior to adjournment, House Bill 968 had been assigned to the Senate Judiciary II Committee.<sup>74</sup> Between sessions, Senator Brad Miller, committee chair, inherited the daunting task of bringing a consensus bill to the Judiciary Committee and later to the Senate floor. He met extensively with interested representatives from all perspectives and solicited written comments from recipients of a widely distributed survey.<sup>75</sup> By allowing all interested persons to voice their concerns personally to him, Senator Miller, with the constant input of Representative Nesbitt and other representatives, skillfully drafted consensus changes to House Bill 968 to reflect agency and executive concerns. Ultimately, Senator Miller fashioned a compromise that expanded the authority of the superior court.<sup>76</sup>

The Senate version of House Bill 968 was a retreat from both the House version and the Hartsell Amendment with their significant deference to the OAH's recommended decision. The Senate bill

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North Carolina Forestry Association, Curtis Venable, a public interest attorney, Leslie Bevacqua of the North Carolina Chemical Council, Natalie English of the Charlotte Chamber of Commerce, and Christie Barbee of the Carolina Pavement Association.

70. JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 1703, 1703-04 (1999).

71. JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 430, 430 (1999).

72. *Id.* at 588.

73. *Id.* at 679.

74. JOURNAL OF THE SENATE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 1st Sess. 542, 542 (1999) (stating that H.B. 968 was reassigned to the Judiciary II Committee).

75. See Letter from Charles E. Daye, Henry Brandis Professor of Law, University of North Carolina at Chapel Hill School of Law, to Senator Brad Miller, North Carolina General Assembly (May 3, 2000) (responding to Senator Miller's letter requesting comments on House Bill 968) (on file with the North Carolina Law Review).

76. Legislative staff attorney, Karen Cochrane-Brown, drafted nineteen versions of H.B. 968 before reaching a consensus bill.

moved instead to a very detailed standard of review, preserving the agency's power to write its own decision, but requiring extensive analytical review of the ALJ decision before it could be rejected. This concept is presently embodied in the enacted legislation.<sup>77</sup> Upon presentation of this compromise bill, the Senate responded again with a unanimous vote ratifying the Senate substitute for House Bill 968 with the active support of President Pro Tempore Marc Basnight and his legislative staff.<sup>78</sup> It was then returned to the House for concurrence. A late-hour effort by stalwarts to defeat concurrence was mounted in the House, but due to the broad consensus, including the Governor's approval, and the skillful compromise fashioned in the Senate, Representatives Nesbitt and Wilson managed a sometimes rancorous floor debate to achieve House concurrence in the Senate amendments.<sup>79</sup> Their bill ultimately won final approval with only eleven dissenting votes.<sup>80</sup>

## II. PROCEDURES UNDER THE NEW APA

North Carolina has an exclusively petition-generated central panel.<sup>81</sup> The Rules of Civil Procedure and the General Rules of Practice for Superior and District Courts have been adopted and applied to the contested cases heard in the OAH.<sup>82</sup> The Rules of Evidence generally apply to proceedings before the central panel except as limited by section 150B-29.<sup>83</sup> Section 150B-36(c) provides that certain decisions by the ALJs are final decisions—mostly those based on prehearing motions such as jurisdictional motions, failure to prosecute, and failure to state a claim upon which relief may be granted.<sup>84</sup> Previously, motions based upon judgment on the pleadings

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77. N.C. GEN. STAT. § 150B-51(b) (Supp. 2000).

78. General Counsel Norma Mills of Senator Basnight's staff was the principal advocate.

79. Representatives Dan Blue, Billy Creech, Sam Ellis, and David Redwine were instrumental in convincing the House membership to concur.

80. JOURNAL OF THE HOUSE OF THE GENERAL ASSEMBLY OF NORTH CAROLINA, 2nd Sess. 543, 543 (2000).

81. N.C. GEN. STAT. § 150B-23(a) (1999) (stating that a contested hearing is "commenced by filing a petition with the Office of Administrative Hearings").

82. N.C. ADMIN. CODE tit. 26, r. 3.0101(1) (June 2000). For a discussion of the expanded attorney fee provisions in H.B. 968, see Charles D. Case, 2001: The Administrative Procedures Act, III-9 (Nov. 14, 2000) (on file with the North Carolina Law Review).

83. N.C. GEN. STAT. § 150B-29(a) (Supp. 2000). This section liberalizes the standards for admissibility of reliable evidence. *Id.* For example, "when evidence is not reasonably available under the rules to show relevant facts, then the most reliable and substantial evidence shall be admitted." *Id.*

84. *Id.* § 150B-36(c).

and summary judgment were treated as modified recommended decisions.<sup>85</sup> Under a new subsection enacted in section 150B-36(d), ALJs may now grant judgment on the pleadings under Rule 12(c) or summary judgment pursuant to Rule 56 that dispose of all the issues in the contested case.<sup>86</sup> The agency now reviews these orders under its new authority and is given the opportunity to make a final decision.<sup>87</sup> However, the aggrieved person may elect to appeal immediately to the superior court for judicial review.<sup>88</sup>

Under the provisions of the new APA amendments in section 150B-29(a), the party with the burden of proof in a contested case must establish the facts required by section 150B-23(a) by a preponderance of the evidence.<sup>89</sup> No prior APA statutory section had referenced or established the burden of proof in a contested case. Courts, however, addressed the issue:

In the absence of a valid statute or regulation establishing the standard of proof, G.S. § 150B-29 requires that “the rules of evidence as applied in the trial division of the General Court of Justice shall be followed.” Our Supreme Court has stated that the standard of proof in administrative matters is by the greater weight of the evidence . . . .<sup>90</sup>

Occasionally, the substantial evidence test—an appellate standard—was misinterpreted to be the trial standard burden of proof to be applied in the administrative hearing. Because the old APA standard located in section 150B-36(b) required the final decision maker to support its decision by substantial evidence, some advocates erroneously perceived this test as the appropriate burden at the contested case hearing. Substantial evidence was actually defined in the APA in section 150B-2(8b).<sup>91</sup> Consequently, the burden of proof

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85. *Id.* § 150B-36(c), amended by Act of July 12, 2000, ch. 190, sec. 7, 2000 N.C. Adv. Legis. Serv. 546, 549 (codified at N.C. GEN. STAT. § 150B-36(c) (Supp. 2000)).

86. *Id.* § 150B-36(d).

87. *Id.*

88. *Id.*

89. *Id.* § 150B-29(a).

90. *Dillingham v. N.C. Dep’t of Human Res.*, 132 N.C. App. 704, 711-12, 513 S.E.2d 823, 828 (1999) (citing *In re Thomas*, 281 N.C. 598, 603, 189 S.E.2d 245, 248 (1972)); see also *Brooks v. Austin Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 219, 401 S.E.2d 795, 800 (1991) (holding that the greater weight of the evidence is the standard of proof in an administrative hearing and noting that “proof by preponderance of the evidence and proof by the greater weight of the evidence are synonymous burdens of proof”).

91. “‘Substantial Evidence’ means relevant evidence a reasonable mind might accept as adequate to support a conclusion.” N.C. GEN. STAT. § 150B-2(8b) (1999).

in an administrative cause of action is now unmistakably the same as the burden of proof in a civil cause of action.<sup>92</sup>

Another significant APA change addresses agency expertise at the contested case hearing. Although no prior APA section specifically referenced agency expertise (other than section 150B-30), several appellate decisions afforded some deference to agency expertise.<sup>93</sup> In the 2000 amendments to the APA, section 150B-34(a) links the newly enunciated burden of proof with another new requirement that the presiding ALJ give “due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.”<sup>94</sup> This section, however, is silent as to the means of reflecting due regard in the record.

One means traditionally available to the parties to establish agency expertise and official notice is found in the provisions of section 150B-30.<sup>95</sup>

Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.<sup>96</sup>

Official notice in administrative litigation is the counterpart of judicial notice in civil and criminal litigation with very little, if any, distinction between the two.<sup>97</sup> For years, this under-utilized section has been available to administrative litigants.<sup>98</sup> The party with the

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92. Under the new APA, the burden of proof is by a preponderance of the evidence, a standard far greater than the substantial evidence test. *Id.* § 150B-29(a) (Supp. 2000).

93. *See, e.g.,* Darryl Burke Chevrolet, Inc. v. Aikens, 131 N.C. App. 31, 36, 505 S.E.2d 581, 584 (1998) (stating that “[a]gency rulings and interpretations are not controlling upon the courts, but ‘do constitute “a body of experience and informed judgment” which have been “given considerable and in some cases decisive weight.” ’”) (citing *Schultz v. W.R. Hartin & Son, Inc.*, 428 F.2d 186, 191 (4th Cir. 1970) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

94. N.C. GEN. STAT. § 150B-34(a).

95. *Id.* § 150B-30.

96. *Id.*

97. *See id.* (stating that official notice may be taken whenever judicial notice may be taken); *see also* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT §§ 15.01–15.10 (3d ed. 1972).

98. DAVIS, *supra* note 97, at § 15.10. It is the opinion and experience of the author

burden of proof may request the presiding ALJ to take official notice of agency expertise. This ruling, however, is ultimately discretionary.<sup>99</sup> If the ALJ should decline to take official notice, then other options are available to the party with the burden of proof, although none are explicitly stated in the statute.

Just how is the agency to demonstrate<sup>100</sup> knowledge and expertise with respect to facts and inferences? Specialized knowledge must be demonstrated.<sup>101</sup> For example, agency expertise could be “demonstrated” through the testimony of an expert witness. Expert witnesses often appear in contested case hearings and offer a broad range of opinions to assist the trier of fact. Agency professionals who possess specialized knowledge could testify by opinion to establish the agency’s specialized knowledge. Once the expert is qualified and the opinion admitted into evidence, the ALJ must give “due regard” to this knowledge and expertise with respect to findings of fact and the inferences derived therefrom.<sup>102</sup>

Alternatively, an agency’s expertise could theoretically be established by rulemaking.<sup>103</sup> An agency standard interpreting a statutory delegation (including a congressional enactment or a federal regulation) could be adopted by the agency through rulemaking and offered as authority at the contested case hearing to demonstrate agency expertise in a given subject matter.<sup>104</sup>

If official notice is taken of agency expertise, if testimony is offered by an agency expert witness, or if agency rulemaking establishes agency expertise, then the ALJ must give “due regard”<sup>105</sup> when interpreting the evidence, making a finding of fact, and

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that trial attorneys rarely seek to establish facts by judicial or official notice, particularly as to the specialized knowledge of the agency. *Id.*

99. See CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 5.55 (2d ed. 1997).

100. Demonstrate is defined as “prov[ing] or mak[ing] evident by reasoning or adducing evidence.” THE AMERICAN HERITAGE DICTIONARY 380 (2d ed. 1982).

101. See N.C. GEN. STAT. § 150B-34(a) (Supp. 2000).

102. *Id.*

103. The North Carolina General Statutes defines a rule as “any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly.” N.C. GEN. STAT. § 150B-2(8a) (1999) (emphasis added); see also *United States v. Mead Corp.*, 121 S. Ct. 2164, 2167 (2001) (recognizing that “[a] very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the [process of] rulemaking . . . for which deference is claimed”).

104. *Mead*, 121 S. Ct. at 2167. But by definition it must be limited to a statement of general applicability and not promulgated for application to the facts of a specific contested case.

105. See *infra* notes 111–15 and accompanying text.

considering inferences that follow from the demonstrated agency expertise. Given that the preponderance of evidence standard now clearly controls in the administrative hearing, close factual cases could turn on the necessity of giving “due regard” to these expert findings and inferences in the decision of the ALJ. In short, the scales could be tipped in favor of expertise.

One additional note on these evidentiary changes is reflected in what is required by the agency in reaching its final decision after review of the decision of the ALJ. Of particular importance is the requirement that the agency examine the credibility findings made by the ALJ at the contested case hearing.<sup>106</sup> Although the decisional authority remains bifurcated, there is but one fact-finding hearing of record when witness demeanor may be directly observed.<sup>107</sup> The agency’s decision is based upon the review of the record, as is each of the steps of appellate review thereafter.<sup>108</sup> Under the new APA provisions, agency fact finders are still permitted to make credibility findings.<sup>109</sup> However, the agency must give “due regard” to the opportunity of the ALJ to evaluate the credibility of the witness.<sup>110</sup>

“Due regard” is a new term of art that was presumably employed in lieu of the term “deference.” Deference is a term of art that has a long-standing history of judicial construction in both state and federal appellate decisions.<sup>111</sup> However, “due regard” has no such history of judicial construction in the administrative law setting and logically would be interpreted as something less than deference.<sup>112</sup> It is neither required that the ALJ defer to the agency expertise, nor is it required that the agency defer to the credibility findings of the ALJ.<sup>113</sup> Nevertheless, the General Assembly seems to be balancing the specialized fact-finding expertise of the ALJ with the subject matter expertise of the agency. In the event that the decision of the ALJ is not adopted by the agency, the superior court judge, in the first tier of

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106. N.C. GEN. STAT. § 150B-36(b1) (Supp. 2000) (stating that a fact is deemed acceptable if not specifically rejected by the agency).

107. *Id.* § 150B-36(b).

108. *Id.*; Jarrett v. N.C. Dep’t of Cultural Res., 101 N.C. App. 475, 479, 400 S.E. 2d 66, 69 (1991) (holding that the court shall consider the “whole record” when reviewing agency decisions).

109. N.C. GEN. STAT. § 150B-36(b) (Supp. 2000).

110. *Id.*

111. “Deference” arose primarily from the landmark Supreme Court decision in *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

112. Black’s Law Dictionary defines “due regard” as “[c]onsideration in a degree appropriate to demands of the particular case.” BLACK’S LAW DICTIONARY 501 (6th ed. 1990).

113. N.C. GEN. STAT. § 150B-36(b) (Supp. 2000).



appellate review, is not required to give deference to either the agency or the ALJ's decision.<sup>114</sup> The superior court is free to adopt either of the prior decisions, remand the case, reverse the final decision, or prepare a neutral decision based upon the record.<sup>115</sup>

One additional efficiency measure was enacted in section 150B-44, in which the agency is required to reduce by thirty days the time for consideration of the OAH official record from ninety<sup>116</sup> to sixty days.<sup>117</sup> In spite of this diminution, the agency may grant itself one additional extension of time.<sup>118</sup> Therefore, if an agency takes advantage of both its original time of review and the extension, the period is shortened by sixty days, from a total of 180 days under the old law<sup>119</sup> to 120 days under the new law.<sup>120</sup>

### CONCLUSION

Despite the amendments discussed herein, there should be little noticeable change to the procedures governing the trial of contested cases in the OAH. When the agency adopts the ALJ decision, there is very little change in the appellate review standards, which remain based primarily upon the substantial evidence test and *de novo* review of conclusions of law.<sup>121</sup> The major reforms in the new APA revisions are illustrated in the new standards of review, which require the agency to give close and careful consideration to the findings and remedial relief contained in the ALJ decision when the agency fails to adopt the ALJ decision.<sup>122</sup> The superior court is free to adopt either of the prior decisions or essentially write the superior court's own decision based upon a review of the official record.<sup>123</sup> In this situation, the superior court judge is not required to give deference to

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114. *Id.* § 150B-51(c).

115. *Id.*

116. *Id.* § 150B-44 (1999), amended by Act of July 12, 2000, ch. 190, sec. 9, 2000 N.C. Adv. Legis. Serv. 546, 550 (codified at N.C. GEN. STAT. § 150B-44 (Supp. 2000)).

117. *Id.* § 150B-44.

118. *Id.*

119. *Id.* § 150B-44, amended by Act of July 12, 2000, ch. 190, sec. 9, 2000 N.C. Adv. Legis. Serv. 546, 550 (codified at N.C. GEN. STAT. § 150B-44 (Supp. 2000)).

120. *Id.* § 150B-44.

121. Compare N.C. GEN. STAT. § 150B-51(b) (1999), amended by Act of July 12, 2000, ch. 190, sec. 11, 2000 N.C. Adv. Legis. Serv. 546, 551 (codified at N.C. GEN. STAT. § 150B-51 (b) (Supp. 2000)) (providing that the superior court may reverse or modify the agency's decision if the decision is unsupported by substantial evidence and the petitioner's rights have been prejudiced), with N.C. GEN. STAT. § 150B-51(b) (Supp. 2000) (making the substantial evidence review standard applicable to judicial review only in the circumstance of agreement between ALJ and agency decisions).

122. N.C. GEN. STAT. § 150B-36(b) (Supp. 2000).

123. *Id.* § 150B-51(c).

either the agency expertise or the credibility findings of the ALJ.<sup>124</sup> This is a substantial departure from previous statutory law,<sup>125</sup> and will alter long established appellate case law governing the standard of review of the superior court decision in the context of judicial review when the agency did not adopt the ALJ decision.<sup>126</sup> However, appellate review of all APA decisions will remain subject to *de novo* review for questions of law without modification of prior case law.<sup>127</sup>

What do all of these statutory changes hold for the future of contested case hearings in the OAH? One result could be that contested cases that are weaker or more difficult to prove may be compromised, settled, or dismissed prior to the contested case hearing because after the OAH hearing the final decision maker is tightly bound to the ALJ decision with only narrow authority to modify this decision. If this prediction holds true, then the OAH should see a slight reduction in some types of contested case filings. Otherwise, there should be very little impact in the hearings process before the OAH. The major APA reform will come after the OAH evidentiary hearings, with the review of the ALJ's decision by the agency and the subsequent review of that decision in the superior and appellate courts. Ultimately, the citizen/petitioner will be accorded a heightened due process remedy under the decisions rendered by the ALJ as the trier of fact.

The trend of agency decision makers to adopt favorable ALJ decisions should continue under the new APA amendments. The high rate of agency reversals should diminish when the citizen petitioner prevails, because the ALJ decision can no longer be easily cast aside. Strict standards of review are now in place, which require agency decision makers to adopt ALJ decisions unless the record shows that this decision is clearly contrary to the preponderance of the evidence. Where prior law permitted no consideration of the ALJ decision on judicial review, now the superior court judge may

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124. *Id.* The court is charged with examining the agency's procedural review of the ALJ decision. *Id.* § 150B-51(a).

125. *Id.* § 150B-51, amended by Act of July 12, 2000, ch. 190, sec. 11, 2000 N.C. Adv. Legis. Serv. 546, 551 (codified at N.C. GEN. STAT. § 150B-51 (Supp. 2000)).

126. *See, e.g.,* Meads v. N.C. Dep't of Agric., 349 N.C. 656, 663, 509 S.E.2d 165, 170 (1998); Wilkie v. N.C. Wildlife Res. Comm'n, 118 N.C. App. 475, 482-83, 455 S.E.2d 871, 876 (1995).

127. Charlotte-Mecklenburg Hosp. Auth. v. Bruton, No. COA00-743, slip op. at 2 (N.C. App., July 17, 2001); Hedgepeth v. N.C. Div. of Servs. for the Blind, 142 N.C. App. 338, 346, 543 S.E.2d 169, 176 (2001); Sutton v. N.C. Dep't of Labor, 132 N.C. App. 387, 388-89, 511 S.E.2d 340, 341 (1999); Amanini v. N.C. Dep't of Human Res., 114 N.C. App. 668, 678, 443 S.E.2d 114, 120 (1994).

consider fully and adopt the ALJ decision. Gone is the judicially required deference given to a final decision maker when that decision maker summarily reverses an ALJ who has granted remedial relief to a citizen at trial in the OAH. Thus, administrative justice for the prevailing North Carolina citizen is no longer just a recommendation.