A STUDY OF ADMINISTRATIVE LAW; ADMINISTRATIVE RULE MAKING; THE CONDUCT OF ADMINISTRATIVE HEARINGS AND THE JUDICIAL REVIEW THEREOF

BULLETIN NO. 37

Nevada Legislative Counsel Bureau

DECEMBER 1958

Carson City, Nevada

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FOREWORD

The Nevada Legislative Counsel Bureau is a fact-finding organization designed to assist legislators, State officers, and citizens in obtaining the facts concerning the government of the State, proposed legislation, and matters vital to the welfare of the people. The staff will always be non-partisan, and non-political; it will not deal in propaganda, take part in any political campaign, nor endorse or oppose any candidates for public office.

The primary purpose of the Counsel Bureau is to assist citizens and officials in obtaining effective State government at a reasonable cost. The plan is to search out facts about government and to render unbiased interpretations of them. Its aim is to cooperate with public officials and to be helpful rather than critical. Your suggestions, comments, and criticisms will greatly aid in accomplishing the object for which we are all working-- the promotion of the welfare of the State of Nevada.

PREFACE

During the 1953 Session of the Nevada Legislature, the Assembly adopted House Resolution No. 37, which memorialized the Legislative Counsel Bureau to make a study of the "administrative procedures established by the statutes of Nevada for state departments, commissions, agencies and bureaus", to determine the advisability of recommending adoption of a uniform administrative procedure act for the State of Nevada.

The study was delayed by the pressure of other research and the lack of the necessary technical assistance until August of this year.

Several studies in this field continued for several years. (The United States Attorney General's study, and that which resulted in the drafting of the "Model State Administrative Procedure Act" by the National Conference of Commissioners on Uniform State Laws.)

The present study was begun and ended in less than six months. This was possibly only because of the many excellent reports of those who previously labored in this field, and because this writer was greatly aided in the study and the drafting of the proposed act by the generous and helpful counsel and advice of Mr. John G. Clarkson, Chief of the California Division of Administrative Procedure, and Mr. Ralph N. Kleps, California Legislative Counsel, who was the first chief of the California Division of Administrative Procedure. Any researcher goes about such a study as this more boldly and with greater confidence in ultimate success when advised by such eminent pioneers in this vital field of law.

The study is divided into three major divisions:

1. Administrative rule making
2. Administrative hearings
3. Judicial review of the decisions resulting from administrative hearings.

These three have several subdivisions which will be discussed and explained in the report. A discussion of the procedures followed in the several states is set forth in the report on each of the three divisions, together with a comparison of the various acts.

Because of the limited time and the resulting course of this study, we are comforted somewhat by a jocular remark attributed to the former distinguished California Attorney General, Robert W. Kenney, to the effect that "if in any study you obtain information from but one source, that is plagiarism, however, if you obtain it from two or more sources, that is research."

Lastly, this study was begun with an opposite frame of mind from others in the field who stated in reports that the subject was one of too great a complexity and diversity for a complete solution in a single act. We started with the premise, an old rule of law, that there is no legal problem for which a solution cannot be found. There is no student in this field who long hasn't heard the cry for a solution of the problems in the important field of Administrative Law and Procedure.

This study was undertaken and completed by Harrison W. Call, Consultant, 1/ with the Nevada Legislative Counsel Bureau.

J. E. Springmeyer
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1953 SESSION, NEVADA LEGISLATURE

ASSEMBLY RESOLUTION NO. 37

Memorializing the Legislative Counsel Bureau to make a study to determine the advisability of legislative adoption of a uniform administrative procedure act to govern proceedings before the public service commission of Nevada and all other state agencies, bureaus, commissions and departments.

WHEREAS, It is apparent from an examination of the Nevada statutes dealing with administrative proceedings before state boards, commissions, agencies, departments and bureaus that there is a wide difference of procedure established at the present time; and

WHEREAS, An identical situation was answered by the federal government in 1946 by the enactment of the Federal Administrative Procedure Act; and

WHEREAS, Other states, particularly California, have adopted similar legislation; now, therefore, be it

RESOLVED BY THE ASSEMBLY OF THE STATE OF NEVADA, That the Legislative Counsel Bureau is memorialized to make a study of the administrative procedures established by the statutes of the State of Nevada for state departments, commissions, agencies, and bureaus, and determine the advisability and practicality of recommending adoption of a uniform administrative procedure act for this state; and be it further

RESOLVED, That the Legislative Counsel Bureau make its report and recommendations to the next session of the legislature.

APPENDIX

PROPOSED ACT

SUMMARY-- provides for uniform rule making proceedure; creates department of administrative procedure, and provides for administrative hearing procedure and a judicial review thereof.

AN ACT concerning the procedure of state administrative agencies; the adoption of rules by such agencies; the conduct of administrative hearings and judicial review thereof; creating the department of administrative procedure; providing for the appointment, qualifications, compensation, powers and other duties of the executive heads of such divisions, and other matters properly relating thereto, and to repeal all sections of Nevada Revised Statutes in conflict herewith.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN

SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. As used in this chapter, unless the context or the subject matter otherwise requires:

1. "Agency" means any state board, commission, bureau, department, division, institution or agency of the government of the State of Nevada, operating by authority of law and supported in whole or in part by any public funds, whether such public funds are received from the Federal government of the United States or from any branch or agency thereof, or from the general or any special fund of the State of Nevada, or from private or any other sources, and whether any such funds are on deposit in the state treasury or elsewhere, and authorized by law to make rules, or to adjudicate contested cases, but it does not include an agency in the judicial or legislative department of the state government, nor does it include the board of pardons nor the board of parole commissioners.

2. "Rule" means the whole or any part of every rule, order, regulation, standard, or statement of policy, or interpretation of general application including the amendment or repeal thereof adopted by an agency, whether with or without prior hearing, to implement, interpret or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights, duties, privileges or immunities of, or procedures available to the public or interested parties.

3. "Department" means the department of administrative procedure.

4. "Director" means the administrative head of the department of administrative procedure.

Sec. 2. There is hereby created the department of administrative procedure of the State of Nevada in which shall bevested the administration of the provisions of this chapter.

Sec. 3. 1. The supreme court of the state of Nevada shall appoint a

person as director of the department of administrative procedure from an eligible list supplied by the state of Nevada department of personnel. He shall be a person who shall be trained, experienced and interested in governmental administration and administrative procedure. He shall be admitted to practice law in this or some other state, and shall have actively engaged in the practice of law for 5 years immediately preceding his appointment. He shall have a comprehensive knowledge of administrative law and the principles and practices of governmental administration, and the procedure of administrative agencies, including their rule making power and the problems of administrative hearings. He shall have the ability to draft administrative rules, and conduct administrative hearings and such other qualifications as the state of Nevada department of personnel may require.

2. The director shall receive an annual salary which shall be fixed in accordance with the pay plan adopted by the state merit and personnel system and shall be in the classified service of the state merit and personnel system.

3. The director shall receive the per diem expense allowance and travel expenses as provided by law.

Sec. 4. 1. The director, as executive head of the department of administrative procedure, shall direct and supervise all its administrative and technical activities.

2. The director shall appoint such professional, technical, clerical and operational staff as the execution of his duties and the operation of the department of administrative procedure may require, the appointments to be made in accordance with the provisions of the state merit and personnel system.

Sec. 5. It is the purpose of this chapter to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative rules. The provisions of this chapter shall control the exercise of any rule making power conferred by any statute heretofore or hereafter enacted, but nothing in this chapter shall be construed to repeal or diminish additional requirements by any such statutes. The provisions of this chapter shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.

1. The statute revisor shall, when requested by an agency, draft any rule which the agency requires or intends to adopt, to the end that all such rules shall be of uniform style and shall properly express the desired policy of the agency in legal terms so that all such rules shall be clear, unambiguous and legally enforceable.

2. When the agency determines that the rule as drafted expresses the intended policy of the agency, it shall, by an endorsement thereon, declare the rule adopted, and shall submit the same to the department for filing.

3. The department shall examine each rule submitted to it for filing and determine whether it has been duly and regularly adopted and whether it complies with the provisions of this chapter as to form and style, and is within the agency's authority to adopt, and is not in conflict, nor inconsistent with the statute creating such agency. If the department shall find the rule to be correct in form, style, and within the agency's authority to adopt, it shall number and index the rule and file it in the Nevada administrative register, and give notice of its

adoption and by what agency adopted in the notice section of said register, to the end that all interested parties shall have notice thereof in order that suggested amendments thereto, or revocation thereof, may be proposed as in this chapter provided.

4. No rule shall be given retroactive effect unless such effect be expressly provided therein, nor shall the repeal of any rule impair or take away vested rights or benefits, other than procedural rights or benefits.

Sec. 6. In addition to other rule making requirements imposed by law:

1. Each agency shall adopt rules governing the formal and informal procedures prescribed and authorized by this chapter.

2. No rule adopted by any agency shall be valid or effective unless issued and adopted in the manner and form provided in this chapter, and then only if reasonably necessary to effectuate the purpose of the statute creating such agency, and not in conflict or inconsistent therewith.

3. Any existing rules or regulations conflicting with this section are hereby repealed as of September 1, 1959, and from and after that date shall have no force or effect.

4. The statute revisor shall, as soon as practicable after the passage and before the effective date of this act prescribe the style in which all rules shall be prepared, and a standard size form to be used by all agencies in preparing and adopting such rules, which form shall be effective July 1, 1959.

Sec. 7. Each agency shall, whenever it is deemed reasonably necessary to effectuate the purpose of the statute creating it, adopt and file with the department such rules as are necessary to implement, interpret, or make specific or otherwise carry out the provisions of such statute, in accordance with the standards and requirements set forth in the chapter of NRS creating each particular agency. (Each agency is to be given a specific provision to meet its needs, but with statutory standards.)

Sec. 8. The department shall, as soon as practicable after the effective date of this chapter, compile, index,and publish in the administrative code all existing rules adopted by each agency and filed with the department, with periodic supplements of all rules required to be filed with the department, or of appropriate reference to any rules, the printing of which the department finds to be impractical, such as detailed schedules or forms otherwise available to the public or which are not of general application. The publication of compiled rules shall be known as the "Nevada Administrative Code" and the periodic supplements thereto shall be known as the "Nevada Administrative Register".

Sec. 9. The department shall:

1. Provide and maintain in the Nevada administrative register a section thereof which shall be entitled "notice section", and in which, at least 20 days prior to the effective date of any rule adopted under this chapter, shall

be published a notice of the adoption, amendment or repeal of any rule. The 20 day notice herein provided shall not be required in the case of emergency rule or rules, the effective date of which is set by statutes sooner than 30 days after adoption.

2. Prescribe regulations for carrying out the provisions of this chapter. Among other things, the regulations shall provide for the manner and form in which rules and the notice of repeal, modification, compilation, and codifications thereof shall be prepared, printed and indexed, to the end that all rules, codifications and compilations thereof shall be prepared and published in a uniform manner at the earliest practicable date. Each rule published shall be accompanied by a reference to the statutory authority pursuant to which the rule was adopted.

3. Each rule hereafter adopted, which is required to be filed with the department, shall become effective on the thirtieth day after the date of filing unless:

a. Otherwise specifically provided by the statute pursuant to which the rule was adopted, in which event it becomes effective on the day prescribed by such statute.

b. It is a rule prescribing an agency's internal organization or procedure, in which event it shall become effective upon filing, or upon any later date specified by the agency in a written instrument filed with, or as a part of such rule.

c. It is an emergency rule adopted pursuant to and in accordance with sections 10 and 11 of this chapter, in which event the rule shall become effective upon filing.

d. A later date is prescribed by the agency adopting such rule in a written instrument filed with, or as a part of such rule.

Sec. 10. In any particular case in which a state agency makes a finding, including a statement of facts constituting an alleged emergency, in writing, that the adoption of a rule is necessary for the immediate preservation of the public peace, health, and safety or general welfare, the rule may be adopted as an emergency rule, and shall become effective upon the filing thereof.

Sec. 11. No rule adopted as an emergency rule shall remain in effect more than 90 days. If such a rule so adopted be deemed necessary as a permanent rule, it shall thereafter be adopted in the manner herein provided for the adoption of regular rules.

Sec. 12. The notice of the adoption, amendment or repeal of a rule shall include:

1. Reference to the authority under which the rule is adopted and a reference to the particular section of the Nevada Revised Statutes or other provisions of law which are being implemented, interpreted or made specific.

2. Either the expressed terms of, or summary and appropriate reference to such rules, the printing of which the department has found to be impracticable, such as the detailed schedules and forms otherwise available to the public, or which are of limited or particular application.

3. Such other matters as are prescribed by statute applicable to the specific rule or class of rules.

Sec. 13. After the filing of the notice of the adoption of a rule in the administrative register, the department shall afford interested persons an opportunity to participate in the rule making through submission of written data, or arguments, with or without opportunity to present the same orally, as to why the rule should be amended or repealed.

The department and every agency shall accord any interested person the right to petition for the adoption, amendment or repeal of a rule.

Sec. 14. Nothing shall ever be printed or published in the Nevada administrative code or in the Nevada administrative register except rules or notices concerning the adoption, amendment and repeal thereof, or of matters in connection with administrative rule making or administrative hearings and the judicial review thereof, and official proclamations of the Governor.

Sec. 15. After the department has completed the publishing of existing rules in the Nevada administrative code, any subsequent printing or reprinting of such rules shall be printed in the format, including the numbering system prescribed by the department. The same rule shall apply to printings or the reprinting of rules published in the Nevada administrative register.

Sec. 16. The department shall keep a complete and up-to-date set of the Nevada administrative code and the Nevada administrative register in the office of the department, available to any interested persons during all hours of the working day of the department.

Sec. 17. 1.The publication of a rule in the Nevada administrative code or register shall raise a rebuttable presumption that the text of the rule as so published is the text of the rule adopted, and that the rule was duly and regularly adopted in the form and manner provided by the statutes and rules governing the adoption of administrative rules.

2. The courts shall take judicial notice of the contents of each rule printed in the Nevada administrative code or the Nevada administrative register and the register and code may be cited by the name "Nevada Administrative Code" and "Nevada Administrative Register", and the page number thereof.

3. The printing of any rule in the Nevada administrative code or register shall, and is hereby declared to be sufficient, legal and the best notice of its contents to any person subject thereto or affected thereby.

4. The Nevada administrative code and the Nevada administrative register shall be sold to any person who wishes to purchase either or both, or parts thereof, at such prices as will reimburse the state for all costs incurred for printing, publication and distribution.

5. All monies received from the sale of the Nevada administrative code and the Nevada administrative register, or sections thereof, and of each supplement to such code and register, shall be deposited in the state treasury and credited to the general fund, except that the amount necessary

to cover distribution costs shall be credited to the fund from which such costs have been paid.

Sec. 18. The department shall supply a complete set of Nevada administrative code and of the Nevada administrative register, and of each supplement to such code and register without charge to the clerk of the supreme court, to the county clerk of each county, to the state library, to each district court, and the department shall supply to each state agency requesting copies thereof, the sections of the Nevada administrative code and the Nevada Administrative register containing the rules adopted by the particular agency.

Sec. 19. Any interested person may obtain a judicial declaration as to the validity and meaning of any rule by bringing an action in the district court of the district in which such interested person resides, in accordance with the provisions of the Uniform Declaratory Judgments Act; (NRS Chapter 30), and in addition to any other ground which may exist, any rule may be declared invalid, in whole or in part, for a substantial failure to comply with the provisions of this chapter, or in the case of an emergency rule, upon the ground that the facts recited in the statement do not constitute an emergency within the provisions of section 10 of this chapter.

Sec. 20. It is the intention of the legislature that this chapter shall apply to and govern the conduct of all boards, commissions, bureaus, departments, divisions, institutions, officers and agencies of the government of the state of Nevada operating by authority of law, and supported in whole or in part by any public funds, whether such public funds are received from the federal government of the United States or any branch or agency thereof, or from the general or any special fund of the state of Nevada, or from private or any other sources and whether the funds are on deposit in the state treasury or not, in their rule making and conduct of all administrative hearings held for any purpose whatever, but it shall not apply to the legislative and judicial departments, nor to the board of pardons nor to the board of parole commissioners.

ADMINISTRATIVE HEARING PROCEDURE

Sec. 21. In the subsequent sections of this chapter, unless the context or subject matter otherwise requires:

1. "Agency" means any state board, commission, bureau, department, division, institution or agency of the government of the state of Nevada, operating by authority of law and supported in whole or in part by any public funds, whether such public funds are received from the federal government of the United States or from any branch or agency thereof, or from the general, or any special fund of the state of Nevada, or from private or any other sources, and whether any such funds are on deposit in the state treasury or elsewhere, and authorized by law to make rules, or to adjudicate contested cases, but it does not include an agency in the judicial or legislative department of the state government, nor does it include the board of pardons nor the board of parole commissioners.

2. "Contested case" means a proceeding before a department hearing officer in which the legal rights, duties, privileges or immunities of specific parties are required by law or constitutional provisions to be determined after or during such hearing.

3. "Party" includes the agency instituting the contested case, the respondent, and any firm, corporation or person, other than an officer or employee of the agency in his official capacity, who has been allowed to appear in the proceeding.

4. "Respondent" means any person against whom a complaint or statement of issues is filed.

5. "Presentation officer" means a presentation officer qualified under and appointed pursuant to section 23 of this chapter.

6. "Hearing officer" means a hearing officer qualified under and appointed pursuant to section 22 of this chapter.

7. "Agency member" means any person who is a member of any state agency, and includes any person who himself constitutes the agency.

Sec. 22. The director shall appoint a staff of hearing officers for the department as provided in section 4 of this chapter.

1. Each hearing officer shall have been admitted to the practice of law in this or some other state and shall have actively practiced law for at least 5 years immediately preceding his appointment, and shall possess such other qualifications as shall be established by the State of Nevada department of personnel for the hearing officer classification.

2. Full time hearing officers serving pursuant to appointment under this section shall receive an annual salary which shall be fixed in accordance with the pay plan adopted by the state merit and personnel system, and shall be in the classified service of the state merit and personnel system.

Sec. 23. 1. There shall be a personnel classification established by the State of Nevada department of personnel in the office of the Attorney General to be known as: "Presentation officers", which officers shall have the same qualifications as are herein provided for hearing officers, and such other qualifications as shall be established by the said Nevada department of personnel in cooperation with the Attorney General and Director of the department of administrative procedure.

2. A staff of presentation officers shall be appointed by the Attorney General from an eligible list supplied by the State of Nevada department of personnel, when requested by the Director of the department of administrative procedure.

3. Such presentation officers shall, as often as need for their services is required, be assigned to the same agencies to the end that they shall become and remain thoroughly familiar with the problems and policies of the particular agencies to which they are assigned. At such times as their services are not required as presentation officers, they shall serve as deputy Attorneys General under the direction of the Attorney General. Upon request of the Statute revisor, such presentation officers, when their services are not needed as presentation officers or deputy Attorneys General, may be assigned by the Attorney General to the Statute revisor for the performance of such duties as the Statute revisor may assign them.

4. It shall be the primary duty of such presentation officers upon request of the agencies to which they are assigned, to prepare complaints and statements of issues and to present the agencies' cases at all administrative hearings and before the courts upon any judicial review of administrative decisions.

5. Full time presentation officers, serving pursuant to appointment under this section, shall receive an annual salary which shall be fixed in accordance with the pay plan adopted by the State merit and personnel system and shall be in the classified service of the state merit and personnel system.

Sec. 24. 1. No agency shall limit, suspend, revoke, condition, or refuse to renew a license, right, authority or privilege without first giving the person or persons possessing or enjoying the same, a notice in writing and an opportunity to be heard in the manner and form provided in sections 25 and 26 of this chapter, except where the proposed limitation, suspension, revocation or condition is necessary to preserve the public peace, health and safety or general welfare, in which cases, any agency may make a written emergency order which shall be effective immediately upon its issuance in the manner and form provided in this chapter.

2. In any case involving the issuance of an emergency order, as provided in subsection 1 of this section, the agency issuing such emergency order shall include in such order, as a part thereof, a finding, including a statement of facts constituting the alleged emergency, that the issuance of such emergency order is necessary for the immediate preservation of the public peace, health and safety or general welfare.

3. Within 10 days from the issuance of such an emergency order, the agency issuing such emergency order shall cause to be served on the party or parties affected thereby, a copy of such emergency order attached to a complaint or statement of issues in the manner and form provided in section 25 and 26 of this chapter. Thereafter the accused shall be entitled to an administrative hearing on the matter and a judicial review thereof as provided in this chapter.

Sec. 25. A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing a "complaint" in the department of administrative procedure.

The complaint shall be a written statement of charges setting forth in ordinary and concise language all the acts or omissions with which the respondent is charged, in order to enable the respondent to prepare his defense. The complaint shall specify the statutes and rules which the respondent is alleged to have violated, but it shall not consist merely of charges phrased in the language of such statutes or rules. The complaint shall be verified; such verification may be on information and belief.

Sec. 26. A hearing to determine whether a right, authority, license, or privilege should be granted, issued or renewed shall be initiated by filing a "statement of issues". The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and, in addition, any particular matters which have come to the attention of the department and which would authorize a denial of the action sought. The statement of issues shall be verified. Such verification may be on information and belief, and the statement of issues shall be served in the same manner as a complaint.

Sec. 27. 1. Upon the filing of the complaint, or statement of issues, the department shall serve a copy thereof on the respondent as provided in sub-section (2) of this section. The department may include with the complaint or statement of issues any information which it deems appropriate, but it shall include a post card or other form entitled "notice of defense" which, when signed by or on behalf of the respondent and returned to the department shall constitute a notice of defense.

2. The copy of the complaint or statement of issues shall include or be accompanied by a statement that respondent may request a hearing by filing the notice of defense served with the complaint or statement of issues within 15 days after service upon him of the complaint or statement of issues, and that a failure to do so will constitute a waiver of his right to a hearing, and permit the department to proceed as in a default matter.

3. The complaint or statement of issues and all accompanying information shall be served personally upon the respondent or by registered mail. Proof of service may be made as in civil actions. Service by mail shall not be effective unless the respondent is required by statute or rule to file his address with the agency initiating the charges and to notify the agency of any change in his address.

Sec. 28. Within 15 days after service of the complaint or statement of issues upon him, the accused may file with the department a notice of defense in which he may:

1. Deny or admit, in whole or in part, the allegations contained in the complaint or statement of issues.

2. Object to the form of the complaint or statement of issues upon the ground that the allegations thereof are so indefinite or uncertain that he cannot identify the transaction or prepare his defense.

3. Object to the complaint or statement of issues upon the ground that it does not contain allegations sufficient to constitute an offense under any existing statutes or administrative rules.

4. Present new matter by way of defense.

Sec. 29. The department may, in its discretion, extend the time for filing any notice of defense.

1. The notice of defense shall be in writing, signed by or on behalf of the respondent, and shall contain the address of the respondent, and of the counsel for the respondent if any there be.

2. Any notice of defense other than under subsections 2 and 3 of section 28 hereof shall be verified by the respondent or by someone in his behalf. Such verification may be upon information and belief.

3. A notice of defense need not be in any particular form, and if the respondent shall sign and return the post card or other form entitled "notice of defense", he shall be entitled to a hearing on the merits, and any such notice of defense, signed and returned, shall be deemed a specific

denial of all allegations of the complaint or statement of issues. Failure to sign and return such notice of defense as herein provided shall constitute a waiver of the respondent's right to a hearing, but the department, in its discretion may nevertheless grant a hearing. Unless objection to the complaint or statement of issues is made as provided in section 28, subsection 2, all objections to the form of the complaint shall be deemed waived.

Sec. 30. The department may permit the filing of an amended complaint or statement of issues at any time before the day set for the hearing. If such amended complaint presents new charges, the accused shall be granted a reasonable time, which shall not be less than 5 days, in which to file an amended notice of defense or any of the pleadings set forth in section 28.

Sec. 31. The department shall, as soon after the respondent's notice of defense is filed as is reasonably possible, set the cause for a hearing in the county in which the respondent resides, or has his or its principal place of business, unless the parties by stipulation select some other place of hearing.

Sec. 32. The department shall deliver or mail a notice of the time and place of hearing to all parties, or their counsel of record at least 20 days prior to day set for the hearing. Such notice shall also inform the parties that they may, but need not be, represented by counsel; that they are entitled to the issuance of subpenas to compel the attendance of witnesses and the production of books, documents or other written evidence or things relevant to the issues drawn by the pleadings.

Sec. 33. 1. Prior to the hearing, and during the hearing after reasonable cause shown, the department shall issue subpenas and subpenas duces tecum at the request of any party in the form and manner provided by NRS 178.260.

2. The subpenas issued pursuant to subsection (1) shall extend to all parts of the state and shall be served in accordance with the provisions of NRS 178.265. No witness shall be required to attend at a place out of the county in which he resides unless the distance be less than 100 miles from his place of residence, except that the department, upon affidavit of any party showing that the testimony or materials to be produced by such witness is material and necessary, may endorse on the subpena an order requiring the attendance of such witness in response to such subpena.

3. All witnesses appearing pursuant to subpena, other than parties, officers or employees of the state or any political subdivision thereof, shall receive fees and mileage in the same amounts and under the same circumstances as prescribed by law for witnesses in civil actions in the district courts. Witnesses entitled to fees or mileage who attend hearings at points so far removed from their residences as to prohibit return thereto from day to day, shall be entitled, in addition to fees and mileage, to the per diem compensation for subsistence and transportation authorized by NRS 281.170 for each day of actual attendance and for each day necessarily occupied in traveling to and from the hearing. Fees, subsistence and transportation expenses shall be paid be paid by the party at whose request the witness is subpenaed. The hearing officer may, in his discretion, award as costs the amount of all such expense to the prevailing party.

Sec. 34. The testimony of any material witness residing within or without the State of Nevada may be taken by deposition in the manner provided by the

Nevada rules of civil procedure. In the event, however, the witness resides within the State of Nevada, the verified petition required by NRCP Rule 27 shall be filed with the department and the hearing thereon shall be conducted and the necessary orders made by a department hearing officer.

Sec. 35. Every administrative hearing shall be presided over by a department hearing officer who shall exercise all powers relating to the conduct of the hearing.

1. A hearing officer shall voluntarily disqualify himself and withdraw from any case in which he believes he cannot accord all parties a fair and impartial hearing. Any party in any contested case shall have the right to one peremptory challenge to a hearing officer and need give no reason for such challenge. Thereafter, any party may request the disqualification of any hearing officer by filing an addifavit prior to the taking of evidence at a hearing, in which there must be alleged with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be had. The issue shall be determined by the director.

2. The proceedings at the hearing shall be reported by a phonographic reporter.

(1) Oral evidence shall be taken only upon oath or affirmation administered by a hearing officer.

(2) Every party to a contested hearing shall have the right:

a. to call and examine witnesses,
b. to introduce exhibits relevant to the issues of the case,
c. to cross-examine opposing witnesses on any matter relevant to the issues of the case, even though that matter was not covered in the direct examination,
d. to impeach any witness regardless of which party first called him to testify,
e. to offer rebuttal evidence,
f. if any party or witness called by either side does not testify, he may be called by the opposite party as if under cross examination.

3. The hearing shall not be conducted according to the technical rules of evidence. Any relevant evidence shall be admitted if it is the sort of evidence on which ordinarily prudent persons are accustomed to rely in the conduct of serious affairs, even though such evidence might be subject to objection in civil actions. Hearsay evidence, as that term is used in civil cases, may be admitted for the purpose of supplementing or explaining other evidence, but it shall not be sufficient to support findings of fact unless it would be admissable over objection in civil actions. The rules of privilege shall be effective to the same extent that they now are or may hereafter be applied in civil actions. Irrelevant and unduly repetitious evidence shall not be admissable, nor shall incompetent evidence, as that term is used in civil trials, with the exception of hearsay evidence as above provided, be admissable.

4. The parties or their counsel may by written stipulation agree that certain specified evidence may be admitted even though such evidence would otherwise be subject to objection.

Sec. 36. Affidavits may be used in evidence, but only if the party wishing to use such affidavit shall at least 10 days or more prior to the day set for a hearing, mail or deliver to the opposing party or counsel a copy of any such affidavit which he proposes to introduce in evidence, together with a notice stating:

1. the name of the affiant,
2. the title of the case,
3. the date such case is set for hearing,
4. the name and address of the party or his counsel proposing to use such affidavit,
5. that such proposed affidavit will be used in lieu of the oral testimony of the affiant, unless objection is filed with the department at least 3 days prior to the day set for the hearing. Such objection must be in writing, but need not be in any particular form. The evidence contained in such affidavit must be admissable under the provisions of section 35, subsection 3 of this chapter.

Sec. 37. The hearing officer may, before the submission of a case for decision, take official notice of any generally accepted technical or scientific matter within the special field of the agency initiating the case, and of any fact which may be judicially noticed by the courts of this state. But all such matters and facts so noticed shall be noted on the record, and parties against whom such matters or facts might bear shall be given a reasonable opportunity to object to such notice being taken, or to refute the officially noticed matters and facts by evidence or by written or oral presentation of authorities.

1. The hearing officer may, in his discretion before submission of the case for decision, permit the amendment of any pleadings presenting the issues so as to conform to proof.

2. The hearing officer may reopen the case before decision, upon his own motion, or that of a party, to permit the introduction of additional evidence. If such motion is made on behalf of a party, it must be by notice of motion and the reason for the motion must be given; if a reason be newly discovered evidence, the motion must be supported by an affidavit setting forth the reason why such newly discovered evidence was not known to the party prior to submission.

3. If the motion to open is granted, opposing parties shall be given the right to rebut any evidence admitted at the further hearing.

Sec. 38. After the hearing of a contested case, the hearing officer who heard the case shall prepare findings of fact and a decision of the issues presented. The findings may be stated in the language of the pleadings or by reference thereto. If the decision shall be against the respondent, it shall be submitted to the agency initiating the charges for the assessing of the penalty or punitive provisions which shall be endorsed upon the decision at the end thereof after the words "suggested penalty". After the penalty has been determined and so endorsed on the decision, the hearing officer who heard the case shall determine if the penalty is within the agency's power to impose. If he finds that it is, he shall endorse under the suggested penalty, "it is so ordered". The original decision shall be filed in the department with the date of filing noted thereon and shall be a public record. Copies thereof shall be forthwith delivered to the parties or their counsel personally or sent to them by registered mail.

Sec. 39. 1. The decision, if adverse to the respondent, shall become effective 30 days after the filing thereof in the department unless a reconsideration is ordered within that time, or the decision shall provide for an earlier effective date or a stay of execution is granted. If the decision shall be in the respondent's favor, it shall become effective immediately upon the filing thereof as herein provided.

2. Whenever the penalty or a part thereof includes a probationary or conditional order, any stay of execution may be accompanied by an order requiring respondent to comply with the terms of probation or with the condition of the order, provided, however, that the terms of probation or the conditions of the order shall be just and reasonable in the light of the findings and decision, and within the agency's power to impose.

3. After the decision becomes effective, a notice of any suspension or revocation shall be sent forthwith to any agency or public officer who would be affected thereby.

Sec. 40. If respondent fails to file a notice of defense or any appearance or to appear at the hearing in person or by counsel, such failure to appear by pleadings, in person, or by counsel may be construed as an admission of the truth of the charges contained in the complaint or statement of issued, and the matter may be disposed of as in a civil default case. In such case, when the burden of proof is upon the agency initiating the charges to establish, affidavits may be used as evidence without any notice to respondent.

Sec. 41. 1. The department may at any time within 30 days after the filing of the decision, unless the effective date is sooner than 30 days, order a reconsideration on its own motion or petition of any party. The power to order a reconsideration shall expire 30 days after the filing of the decision, or on the date set by the decision as the effective date thereof if such date is prior to the expiration of the 30 day period, or at the termination of a stay of not to exceed 30 days which the department, in its discretion, may grant for the purpose of filing an application for reconsideration. The department shall deny or grant the petition within the time allowed for ordering reconsideration.

2. If a reconsideration be granted, the further hearing shall be conducted by the hearing officer who originally heard the case, and he shall determine what additional evidence and argument shall be permitted. After such further hearing, the decision may be changed or amended as the evidence warrants. If the decision be changed or amended, it shall again be submitted to the agency initiating the charges for the imposition of such penalty as shall be warranted by the additional evidence. A motion for reconsideration shall not be a prerequisite to a judicial review of the decision.

Sec. 42. A person whose license has been suspended or revoked may not petition for a reinstatement or reduction of the penalty until after one year from the effective date of the decision or from the date of the denial of a similar petition. The department shall set such petition for a hearing, and shall afford petitioner an opportunity to present either oral or written argument in support of such petition. At the conclusion of such hearing, the hearing officer shall prepare a summary of any oral argument and shall submit

such summary and any written argument to the agency originally initiating the charges against respondent. Such agency shall consider such argument and shall notify the hearing officer what disposition of the petition it believes proper in the premises, and the hearing officer shall render his decision in accordance therewith.

Sec. 43. 1. Any party aggrieved by, and any person suffering legal wrong because of a final administrative decision in a contested case, may obtain a judicial review thereof as provided in this and subsequent sections of this chapter.

2. Proceedings for such a review shall be instituted by filing a petition therefor in the district court in and for the county in which the petitioner resides, or has his or its principal place of business. Such petition shall be filed within 30 days after the filing of the final decision of which the review is sought. The petition shall set forth the grounds or reasons why petitioner contends a reversal or modification should be ordered.

3. Copies of the petition shall be served upon the department and all other parties of record, or their counsel of record, either personally or by registered mail. The court, in its discretion, upon a proper showing, may permit other interested persons to intervene as parties to the appeal or as friends of court.

4. The filing of the petition shall not stay enforcement of the administrative decision, but the department or the reviewing court may grant such a stay upon such terms and conditions as are legal and just.

5. Within 30 days after the service of the petition for review, upon the payment of the fees for the transcript of the testimony, the cost of preparation of other portions of the record and for certification thereof, the department shall transmit to the reviewing court the original or a certified copy of the record of the hearing under review; by stipulation of all parties to the review proceeding, the record on review may be shortened. The complete record includes all the pleadings, all notices and orders issued by the department or hearing officer in connection with the case, all stipulations, the findings of fact and decision, a transcript of all evidence and proceedings and the exhibits admitted and rejected. The court, in its discretion, may allow the department additional time, not to exceed 15 days, in which to prepare and transmit the record on review. The fees for the preparation and transmission of the record on review shall be determined by the department in accordance with the fee schedule set forth in chapter 19 of Nevada Revised Statutes and section 2.259 thereof. If the requested record is not delivered to petitioner prior to 10 days before the expiration of the time within which a petition for judicial review may be filed, time for filing such petition shall be extended until 10 days after delivery to petitioner of the requested record. The reviewing court, upon a proper showing, may require or permit corrections or additions to the record when necessary to reflect a true record of the proceedings in the administrative hearing.

6. If a timely application is made to the district court in which the review is pending, by a notice of motion for leave to present additional evidence on the issues in the case, and it is shown to the court that the additional evidence is material and necessary, and sufficient reasons are shown explaining the failure to present such evidence in the administrative hearing, the court may order that the additional evidence be taken in open court, or before the hearing officer who presided at the administrative hearing, upon such conditions as the court shall deem proper and just. In cases in which the additional evidence is presented in a further hearing before the hearing officer, he may modify his findings and

decision as the additional evidence may warrant and shall file with the reviewing court a transcript of the additional evidence together with any modifications of the findings and decision, all of which shall become a part of the record of the case. The notice of motion shall be supported by an affidavit of the moving party or his counsel showing with particularity the materiality of the additional evidence and the reasons why it was not introduced in the administrative hearing. The moving party shall bear the expense incident to the presentation of additional evidence and the preparation of the additional transcript and record. Rebuttal evidence shall be permitted.

7. The review shall be conducted by the court sitting without a jury, and shall not be a trial de novo but shall be confined to the record, except that in cases of alleged irregularities in the administrative hearing not shown in the record, the court, in its discretion, may hear additional evidence and may hear oral argument and receive written briefs upon the alleged irregularities.

8. The court may affirm the decision or remand it for such further proceedings as the court may deem necessary or just, or it may reverse the decision if the substantial rights of the petitioners or any party of record may have been prejudiced because the administrative rule or rules upon which the charges were based, or the hearing officer's findings or decision are found by the court to be:

(a) in violation of constitutional provisions,
(b) in excess of the statutory authority or jurisdiction of the agency adopting the rule or rules, or of the hearing officer who presided at the hearing and rendered the decision,
(c) made upon unlawful procedure, or a substantial failure to comply with the administrative rule making procedure contained in this chapter,
(d) affected by other errors of law,
(e) unsupported by any competent, material and substantial evidence in view of the entire record,
(f) arbitrary or capricious.

Sec. 44. Any party aggrieved by a final decision in the district court after a review of an administrative decision may appeal to the supreme court in the manner and within the time provided by law for appeals in civil cases, and the supreme court shall follow the same procedure thereafter as in appeals in civil actions, and may affirm, reverse or modify the decision as the record and law shall warrant.

Sec. 45. The judicial review by the district and supreme courts in this chapter provided shall be a statutory right of review of administrative rule making and hearing procedure in order to provide a plain, speedy and adequate judicial review of administrative decisions so as to preclude the necessity of a resort to the use of any of the extraordinary common law writs, to the end that the constitutional and statutory rights of all persons affected by administrative rules and decisions shall be secured and protected and the legislature kept informed by judicial decisions after such review of any needed change in the provisions of this chapter. Such review shall not be limited, restricted or denied by any reference to the traditional or historical use of any common law writs.

Sec. 46. This chapter may be cited as the Nevada Administrative Procedure Act.

Sec. 47. If any person in an administrative hearing disobeys or resists any lawful order or refuses to respond to a subpena, or refuses to take oath or affirmation as a witness or thereafter refuses to submit to examination as a witness or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the proceeding, the hearing officer presiding at the hearing shall certify the facts to the district court in or for the county where theproceedings are held. The court shall thereupon issue an order directing the person charged with the contemptuous conduct to appear before the court and show cause why he should not be punished as for contempt. The order and a copy of the certified statement shall be served on the person ordered to show cause. Thereafter the court shall have jurisdiction of the matter. The same proceedings shall be had, the same penalties may be imposed and the person charged may purge himself of the contempt as provided in chapter 22 of NRS.

Sec. 48. This act shall become effective upon passage and approval.

Sec. 49. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

INTRODUCTION

As stated in the preface, this study was commenced with an abiding confidence that a thorough, complete and workable Administrative Procedure Act could be drafted that could deal with minor as well as major principles of administrative procedure. We believed also that such an act could be so drawn that the flexibility so essential to proper administrative agency functions would not be impaired; the agency administrator's control and direction of policy would in no way be lessened, yet an orderly, uniform system or procedure for administrative rule making could be written, to the end that all rules will be uniform in style and structure, legally enforceable, with a provision for public participation in the rule making process. It is our contention that all rules, before they become legally effective, should be filed in an administrative register 30 days before their effective dates, with exception made for immediate adoption of emergency rules, and rules, the effective date of which are otherwise set by legislative or administrative action. The effective date is delayed in order to permit interested parties an opportunity to protest the rule or suggest ammendments before it becomes "full born".

The "code" is to contain all rules existing at the time the "code" is first compiled, and the "register" is to contain all subsequently adopted rules during a given period. These are later transferred to the code, so that the register will contain only recent additions to this great body of administrative edicts, most all of which have the full force and power of legislative enactments.

The filing of all rules in the code and register assures all affected parties a proper notice of the existence of such rules.

All interested parties are afforded an opportunity for an advance judicial determination of the validity and legal effect of rules by resort to the procedure of the uniform declaratory Judgments Act, which is a part of the Nevada Revised Statutes.

The requirement that all administrative hearings shall be presided over by a legally trained administrative hearing officer possessing the same qualifications required of district or supreme court justices, assures all accused of that "fundamental fairness", which is the very heart of our American and English system of Jurisprudence.

This requirement will also be a boon to administrators and relieve them of the onerous burden of conducting administrative hearings, a task few administrators are remotely qualified to perform.

This salutary provision will also prevent the continuance of that system, so abhorrent to legally trained minds, in which an unholy trinity is often found in one administrative officer, when he is (1) the accuser (2) the prosecutor and (3) the judge, all in the same proceeding. Often he is also the creator of the rule alleged to have been violated. It is beyond the power of the human mind in such a situation to rule and decide impartially without prejudice and bias. In the administration of criminal justice we accord by constitution and legislation fiat to the foulest criminals charged with the most heinous or brutish crimes, several privileges and immunities, and a fair and impartial trial, yet more often than not, deny these same rights to a citizen charged only with a violation of an administrative rule.

This is not meant as an unjust or unfair criticism of administrators. What has been done by them was done in a zealous desire to carry out the duties of their offices and legislative edicts without proper legal advice and guidance.

> "Occasionally, in a spirit of crusading zeal to accomplish their ends, they display an eagerness that tends to defeat their proper purposes." 1/

The creation in the proposed act of the office of "Presentation Officer" having the same qualifications as hearing officers, and charged with the duty of presenting the agency's case at the administrative hearing, and on the judicial review of the decision and hearing, will also remove a burden from administrative agencies, and assure a competent presentation of the agency's case at all stages. It will also prevent the continuance of a fiasco often seen in hearings, where the accused is represented by able, experienced legal counsel and opposed by a lay representative of the agency possessing an abysmal or massive lack of legal or procedural knowledge. This provision too will, or should, assure a minimum of error in the record that would warrant a judicial reversal of the decision. It alone should result in an untold saving of time and money, and also assist in the maintenance of a uniform policy for all agencies.

While the act requires the findings of fact and decision to be made by the hearing officer who hears the case, thus complying with the rule that "he who hears must decide", 2/ it also provides that when the decision is adverse to the respondent, (the accused), it must be submitted to the agency head for the assessment of the penalty, which is binding on the hearing officer if he finds it within the agency's power to assess.

This assures that the agency will have complete control of its established policy. For a hearing officer may consider an offense minor, when in the light of the agency's established policy it is major, and a light penalty by the hearing officer might result in a disruption of agency policy and an invitation or temptation to others to engage in like violations.

The sections dealing with the hearing procedure and the evidentiary features thereof, will result in hearings entitled to judicial respect, and further guarantee all parties that fair, orderly and impartial hearing to which they are entitled by constitutional and legislative provisions. These sections too, maintain the more informal type of hearing as opposed to the formal, rigid trials in court, that have come down to us from Common Law days with all the anachronisms of centuries, and the ancient and often outmoded rules of evidence and procedure. Every precaution has been taken to prevent the denial of the due process of law at any stage of administrative activity.

The last sections provide for a well defined and ordered system of judicial review. In them we have endeavored to provide a procedure for judicial review of administrative rules and decisions that will assure a proper scope of review, but not require the court to again evaluate and weigh the evidence, yet permit a reversal if the findings are not supported by any substantial competent evidence.

1/ The Lawyer and Administrative Agencies by Frank E. Cooper, Professor of Law University of Michigan, (1957), page 5.

2/ Morgan vs U.S. 298 U.S. 468, 304 U.S. 1.

Such a review is not only necessary to maintain the constitutional and legislative guarantees to all parties, the agency included, but will serve also to keep the legislature informed of needed changes to keep abreast of the growth and development of administrative law and procedure and gently admonish the agency of excesses. This is the most dynamic field of law today but was born of necessity and has grown by accretion.

We are not unmindful of the constitutional hurdles and problems other students in this field have faced, nor of the stream so often muddied by some judicial opinions that would have been better left unwritten. But this magic world in which we now live, where "moon shots" and "space travel" are commonplace, certainly can cope with proper developments in so mundane a realm as administrative law and procedure.

CHAPTER I

HISTORICAL REVIEW OF ADMINISTRATIVE LAW AND PROCEDURE

Judge Augustus N. Hand, a decade ago said: "It can hardly be questioned that one of the most significant, if not revolutionary, developments of law during the last fifty years has been in the field of public administration."[1/]

Another writer in referring to the subject used these words:

> "The outstanding development of the law in the present century has, beyond any doubt, been the growth of innumerable administrative agencies. They have flourished in both the national government and in the states in peace and time of war alike. The volume of subordinate legislation promulgated by them exceeds by many times the corresponding additions to the statute books and the number of their decisions is so vast as to dwarf, in comparison, the output of the traditional courts." [2/]

Many writers in the field of administrative law treat the subject as if it were of comparatively recent origin. It is true that the most congressional or legislative recognition of the rule making and adjudicatory functions of administrative agencies dates from civil war days,[3/] but administrative law, rules and regulations are hoary with age.

From the earliest known times, administrative law, under that, or some other name, has formed a substantial and important part of most every system of jurisprudence.

Dean Roscoe Pound, of Harvard Law School in 1921, referred to the administrative law of Greece in the fifth century B.C., as:

> The customary course of decision "that had become a tradition, which "later (by) popular demand for publication results in a body of enactments." [4/]

Again Dean Pound, in referring to the writings of Cicero, the illustrious Roman writer of the first century, said that Cicero enumerated seven forms of law, but that three were not heard of thereafter. He agreed with Cicero that one of the forms of law existing in Cicero's day and now, was: "Administrative edicts," which Dean Pound referred to as:

1/ Judge Augustus N. Hand, "Foreword" to "A Symposium on State Administrative Procedure", 33 Iowa Law Rev. 193, (1948).

2/ Judge Arthur T. Vanderbilt, The Federal Administrative Procedure Act and The Administrative Agencies, New York Univ., School of Law Instit. Proc. 7, p. iii.

3/ Final Report of United States Attorney General's Committee on Administrative Procedure 11, (1941).

4/ Roscoe Pound, An Introduction to the Philosophy of Law, page 21, (1921).

"The Growing Point of Law" [1]

The significance of administrative law as an outstanding development of the twentieth century has been compared to the growth of Equity Jurisprudence Under the English Chancellors of the eighteenth Century. [2]

The growth of this great body of law has amazed and confounded some writers, and political scientists.

One able law professor and writer said:

> "....The evil lies in legislating for administrative procedure on a general basis at all, since any attempt to do so necessarily involves lumping unlike things together and imposing a harmful uniformity upon them.....why not recognize then, that the differences are more significant than the resemblances and leave the regulation of procedure to statutes that operate separately within each field of administration and that can be adapted to the circumstances actually existing there. [3]

In a similar vein, another writer despaired of and condemned uniform procedure in these words:

> "My description of diversity in existing procedure has, I believe, shown in more than the extent of change that a general procedural code would bring about. It has shown that much of the existing diversity exists for reasons that are not merely valid but inescapable. Thus a uniform procedure would be impossible, if it were thought desirable." [4]

A member of the President's Committee on Administrative Management in 1937, after referring to administrative agencies as; "a hybrid", "a monstrosity", "part elephant, part jack rabbit, and part field lark", made these amazing remarks:

> "These hybrids constitute a headless fourth branch of government, a haphazard deposit of irresponsible agencies and uncoordinated powers which does violence to the basic theory of the American Constitution that there should be three major branches of the federal government." [5]

1/ Ibid p. 28.

2/ McFarland and Vanderbilt, Administrative Law, Cases and Materials, 2nd Edition, 1952, (Matthew Bender & Co., New York, p. 1.

3/ Ralph F. Fuchs, Professor of Law, University of Indiana, "The Model Act's Division of Administrative proceedings into Rule Making and Contested Cases", 33 Iowa Law Review 210.

4/ Robert M. Benjamin, Administrative Adjudication in New York, 35, 1942.

5/ Report of President's Committee on Administrative Management, Senate Document No.8, 75th Congress, 1st Session (1937).

The author of this unwise observation would now undoubtedly prefer to remain anonymous. One fact is patent from his words: He either was woefully deficient in his knowledge of political science or constitutional history, or he had a serious lapse of memory. For administrative agencies, and administrative law, by those or some other names, were known and in operation before the dawn of our governmental history. Further, there is no constitutional provision whatever that forbids their creation or operation. As Professor Davis says:

> "Administrative law existed before the term administrative law came into use. The first federal administrative law was embodied in the 1789 statutes. Further enactments, interpretations, and practices gradually produced a whole body of administrative law." 1/

Furthermore, as Professor Davis pointed out in the same citation at page 6 footnote 18:

> "The basic thesis that the whole structure of federal administrative agencies is unconstitutional has never been supported by a single decision of the supreme court."

Another well known writer in 1893 said:

> "....There has always existed in England, as well as in this country, an Administrative law." 2/

A half century after the first congressional recognition of administrative agencies having quasi-legislative and quasi-judicial powers, the president of the American Bar Association, Mr. Elihu Root, in 1916 stated that the growth of administrative law was inevitable, and that:

> "....The old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the flight."

He then added:

> "We shall go on--because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 3/

Such a recognition of the need for administrative agencies and the frank statement that "such agencies furnish protection to rights and obstacles to wrong doing" was the rankest heresey in 1916. Only a person of national standing and renown as Mr. Root, could make such a declaration without receiving a tirade of vilification and abuse, for as Professor Davis said:

> "In the clarity of his perception on this point, Elihu Root was a generation or more ahead of other leaders of the bar." 4/

1/ Administrative Law (Davis 1951) p. 4, Section 2

2/ Goodnow, Comparative Administration Law (6-7), (1893).

3/ 41 American Bar Association R.355.

4/ Davis, Administrative Law, p.5.

However, when Mr. Root made the above quoted statement, he also issued this warning:

> "If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed. (Underscoring ours.) 1/

This sound and cogent advice fell on deaf ears; for the bar, and must of the bench of both the United States and England, fought not only the growth of this important and necessary body of law but its very existence. (see supra page 9.) They were blind to the absolute need for, as well as the boon and benefits that flow as a consequence from, an orderly system of administrative law and procedure. These opponents followed the emotional outbursts of those who assailed the existence of administrative agencies, having rule making and adjudicatory powers, as violative of fundamental constitutional restrictions as to the separation of powers.

A Solicitor General of the United States in 1932 catigated the growth of administrative law in the United States with this unwise deprecation:

> "Uncle Sam has not yet awakened from his dream of government by bureaucracy, but ever wanders afield in craze experiments in State socialism. Possibly some day he may awaken from his irrational dreams, and return again to the old conception of government, as wisely defined in the Constitution of the United States."

A few years prior, in England, criticism of the growth of "The New Despotism", as one writer termed it, led, in 1929, to the appointment by the chancellor of the "British Committee on Ministers' Powers". However, in its report filed in 1932, the committee found there was no ground for alarm or fear, "if the right precautions are taken." (emphasis ours).

Here again we see Mr. Root's 1916 warning repeated, of the need for a system of administrative law and procedure. This warning had gone unheeded for almost 20 years; yet administrative law and agencies kept growing, as need demanded, with no controls as to "the limits of their power over the citizen" fixed or determined. In fact, the bench and bar continued their fight for an adherence to the traditionalfunctions of courts and legislatures. Their warnings went unheeded, for necessity was again the creator, and legislative bodies continued to create new administrative agencies and to give them increased powers. The reasons for this will be later discussed.

Soon after the report of the English Committee on Ministers' Powers was filed, the first United States Committee was appointed by the American Bar Association. For four years, the bar committee continued its fight to curtail the extension of administrative agencies' functions in the adjudicatory field; 2/ and to keep the decision of administrative contests in the courts. 3/

1/ 41 American Bar Association Rep (1936) 355.

2/ 39 American Bar Association Rep. 539, 549 (1936).

3/ 41 American Bar Association Rep. 720 et seq.

At last, in 1937, a realization that the system of administrative law and procedures was a permanent fixture on our structure of government began to prevail, and the advice of Mr. Root began to get serious consideration.

Next came the first real constructive step already too long delayed. President Roosevelt in 1939 requested the Attorney General to form a committee authorized to make a thorough study of this growing field of governmental activity and to study and report on the need for reform in this dynamic field of administrative law and procedure.

The committee was outstanding, was properly staffed and after a lengthy, objective and thorough study filed both majority and minority reports which were a monument to the committee and were, and still are, a storehouse of information.[1/] The ultimate result was the enactment of the Federal Administative Procedure Act in 1946.[2/]

Prior to the activity of the Attorney General's Committee, the then Governor of New York in 1930 appointed Mr. Robert M. Benjamin to direct a study and to investigate the activity of administrative agencies exercising rule making and "quasi-judicial functions in the State of New York." The report, a voluminous work, was filed in 1942. It is comparable in value and extent as to state agencies to the report of the Attorney General dealing with the federal problems.

State activity began to quicken and soon after the Attorney General's report, several states undertook administrative studies, notably California.

In California the 1943 legislature directed the Judicial Council to undertake "a study of the procedure of California administrative agencies and of the judicial review of their decisions."[3/]

A similar directive to the Judicial Council had been made by the 1941 legislature;[4/] No action was taken, however, under the 1941 statute as no funds were provided to carry out the survey. The study was directed by Mr. Ralph N. Kleps, now California Legislative Counsel, and who was the first Chief of the Division of Administrative Procedure after the act was adopted in 1945.

The California report[5/] is a thorough, scholarly work and the study was so ably done, and complete, that little or no objection to the adoption of the act was raised in either house.

1/ Final Report of Attorney General's Committee on Administrative Procedure (1941), Senate Doc. No. 8 - 772, Congress, p. 7.

2/ Public Law No. 404, 79th Congress (USCA title 5, sections 1001-1011. See also: Admin, Pro. Act. Legis. Hist. Senate Doc. 248, 79th Congress.

3/ California Statutes 1943, Ch. 991.

4/ California Statutes 1941, Ch.1190.

5/ Tenth Biennial Report, Judicial Council of California, Dec. 31, 1944, p. 8-172.

In September of 1944, the Administrative Procedure Committee of The National Conference on Uniform State Laws completed a lengthy and searching study which resulted in the drafting of the Model Administrative Procedure Act. The chairman of the Committee was Dean E. Blythe Stason of University of Michigan Law School. Their preliminary and final reports and the Model Act are truly "models" which should be required reading for all who labor in this intriguing field of law.

Originally it was intended that the act to be drafted would be a "Uniform Act" rather than a model for states to pattern after and change to their particular needs. Enroute to their goal, however, the committee felt that there were such diverse statutory practices in the several states that a "model" act was more advisable than a "uniform" one. As a result, the committee in 1943 coverted the proposed uniform act into the present model state act, and eliminated all "minor matters of administrative law".

Many students in this field feel this action was regrettable, (including this writer), who do not agree that the several state statutory practices are so diverse that a uniform act could not have been evolved by so learned and able a group of scholars. For, when consideration is given to just what it is we are trying to achieve, does the problem present any greater complexity or difficulty than is presented in the drafting of a code of civil procedure to apply to all civil actions from divorce thru mining, water rights, property rights, patents and copyrights, torts, the guardianship of minors and the foreclosure of mortgages, with the numerous problems of conflict of laws and constitutional constructions? This writer does not believe so.

It is sinerely hoped that the act resulting from this study, may be, at least, a partial answer to the many problems besetting administrative agencies in Nevada and other states that have not yet undertaken an administrative procedure study.

The writer is deeply grateful to all who have plowed so deeply in this field, that we who come after can reap so rich a harvest.

CHAPTER II

SCOPE OF THE STUDY

As was previously pointed out in the introduction and historical review, ssveral studies have been completed by persons of outstanding qualifications, but the end result of such studies were acts dealing only with part of the problems that have plagued everyone involved in this field for decades.

California was hampered and prevented from doing a complete job because several of their agencies were constitutionally created, and some created by a vote of the electorate through the initiative method, both of which methods prevented legislative change in the procedures of such agencies.

Other agencies escaped inclusion in the act because of their "unique and specialized functions". However, many that requested and procured exclusion have since sought and obtained inclusion. This undoubtedly was influenced because of a recognition by such agencies of the benefits to be gained from the administrative procedure act. A justice of the California supreme court in a decision written before the enactment of the California Act, said: (inter alia)

> "Not the least of the beneficiaries of such legislation would be the boards and officers themselves, most of whom are striving diligently and conscientiously to serve the public despite the uncertainties of the procedures which they have attempted to follow and to which they have been subjected." 1/

Many state and federal administrators have viewed proposed administrative procedure acts with a jaundiced eye, believing that the act, if adopted, would unnecessarily limit their powers and prevent a full and proper compliance with the laws they have to administer. Actual practice under the acts have removed these false fears.

It has been the constant care of those conducting this study in Nevada, to see that the act to be proposed would not in any way hamper or hinder the proper operation of administrative agencies. On the contrary it is our considered and confirmed belief that the act will relieve the agencies of many burdens of detail and give administrators greater time to attend to the major problems of policy, and assure them that rules adopted for the proper implementation and efficient operation of their departments will be legally enforceable; also that violators of such rules will be afforded hearings before legally trained hearing officers experienced in the conduct of such hearings, to the end that the accused, if convicted, cannot say he was not accorded a fair and impartial hearing.

In this connection we have followed an admonition of Professor Heady to the effect that:

1/ Concurring opinion of B. Ray Schauer, Justice, in Sippon vs. Urban, 22 Cal. 2nd 138, 152 137 Pac. 2nd 425, 431.

"Administrative procedure must strike a balance between the objective of protecting individuals from arbitrary action by administrative agencies and the equally important goal of expeditious execution of public policy." 1/

We felt also that the study should not be limited to the rule making powers only, but should also include a method for the publication and filing of all rules, so as to give notice to all affected by such rules of their existence, and an opportunity for participation in the rule making.

It was also our belief that a complete hearing procedure should be enacted by which the accused (termed "respondent" in the act) would be given formal notice in a complaint of his alleged derelictions, to which complaint the accused or his counsel could file a demurrer or answer, and would be accorded a hearing having the dignity, yet not the rigid formality of a court trial.

The next step which naturally followed was to provide the accused with a full and complete "day in court", through a judicial review of the hearing officers decision at the district court level and a subsequent appeal therefrom to the supreme court. It is well to point out that the judicial review and supreme court appeal is afforded all aggrieved parties including the agency initiating the charges, and "any person suffering legal wrong because of a final decision in a contested case." 2/

We believe, from our studies, that this proposed act is the first of its kind to attempt a complete answer to all administrative procedure problems. However, we sincerely recommend consideration in its entirety. For, we humbly yet firmly believe that within its several sections lies the answer to many a criticism of administrative practices as well as answers to most administrative headaches.

1/ Professor Ferrel Heady, Administrative Procedure Legislation in the States, page 3 (University of Michigan Governmental Studies No. 24, 1952).

2/ The proposed act Section 43, subsection 1.

CHAPTER III

DISCUSSION OF THE ACT

Of necessity the proposed act is rather lengthy. As presently drafted, it contains 49 main sections and 88 subsections, which is comparable to the length of the California Act which has 59 main sections and 79 subsections. This comparison in length is a natural consequence, since much of the proposed act was patterned to a considerable extent on the California Act, with a due regard to the model act, and the Federal Administrative Procedure Act. Other acts and study reports which aided and not heretofore mentioned were: (1) The Report of the North Carolina Special Commission, December 1952; (2) The Research Report of the Wisconsin Legislative Council, 1955; (3) The North Dakota Administrative Agencies Uniform Practice Act, adopted in 1941 (Chapter 240, North Dakota Session Laws 1941); (4) The Missouri Procedures Act of 1945, (Missouri Laws 1945, page 1504); also the report in 6 Missouri Bar Journal 123-24 (1950) and 4 Missouri Bar Journal 171-176, 1948; (5) The Oklahoma Legislative Council, Second Biennial Report (1950); (6) Report, June 1954, Publication No. 61 Minnesota Legislative Research Committee on "Administrative Rules"; (7) Nebraska Legislative Council, Committee Report No. 66, July 1956, and (8) The Maryland Administrative Procedure Act, Chapter 94, Statutes 1957, approved March 1, 1957.

In addition to these reports and acts, a wealth of information and guidance was obtained from text books and law review articles.

Of course the most fruitful law review articles were those written by Dean Stason and Professor Fuchs. Others will be enumerated in the bibliography, so that a ready reference thereto may be had by any one who reads this report.

A delightful and informative article written by E. B. Prettyman [1/] can be found in 44 Virginia Law Review 685-701.

In this last cited article, Judge Prettyman answers all the die-hards and carping critics of the growing system of administrative procedure. I shall later quote from his lucid article.

I would be remiss if I did not state that to fail to read Professor Davis' "Administrative Law".[2/] is to deprive oneself of a complete course, both undergraduate and postgraduate in the field of administrative law and procedure.

Now to return to a discussion of the act. Lest it be thought the proposed act is verbose and unduly lengthy, let me again point out that this act, unlike most every other one adopted to date is intended to cover every phase of administrative procedure in all its dispersion. Whereas many, if not most, acts deal with only one segment thereof, mainly rule making and a means of recording

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1/ United States Circuit Judge for District of Columia Circuit presented as an address to the University of Virginia Law School in the Spring of 1958 under the auspices of the Wm. H. White Lecture Foundation.

2/ Administrative Law, by Kenneth Culp Davis, Professor of Law, University of Minnesota, (West Publishing Company, St. Paul, Minnesota, 1951).

rules for the public information, or as in the model act "eliminate all minor matters of detail" and deal only in the most general terms with the "major principles of administrative law". 1/

It was a natural consequence from early criticism of adminsitrative excesses, that the first matters of reform dealt mainly with rules adopted by administrative agencies, the manner of their making, of their publication, and recording or filing for reference thereto. Although such rules have the same force as legislative enactments, and valuable rights can be lost or a citizen may be jailed or fined for a violation of such rules, it was an actual impossibility for all but a few experts experienced in the field to locate a particular rule with any despatch. Nor was it possible to be certain that a rule once found was still in effect or had not been superseded by another.

Lest this fault be taken lightly, or a reader believe that only a novice or tyro would experience difficulty in finding existing rules, a leading case in the supreme court gives an interesting answer. 2/

This is often referred to as the "Hot-Oil" case, and that term was used by Chief Justice Hughes who wrote the opinion. The case came to the supreme court on a writ of review from the circuit court of appeals for the fifth circuit.

The first headnote to the case points out that the case came up to enable th e supreme court to "review--a decree affirming the validity of an executive regulation--rendered in a suit begun and ended below after the regulation had been withdrawn: (emphasis ours) Please note, here were no novices. Four counsel appeared for petitioners and the Solicitor General of the United States together with an Assistant Attorney General and seven other attorneys were on the brief for the government. It is undoubtedly true that all did not participate at the district or circuit court level, but many certainly did including United States attorneys.

In the decision at page 412, the Chief Justice points out that the controversy as to one count "was initiated and proceeded in the courts below (a district and circuit court) upon (the) false assumption" that the section under which the charge was brought by the government was still in effect. The court then adds:

"Whatever the cause of the failure to give appropriate public notice of the change in the section--the prosecuting authorities, and the courts, were alike ignorant of the alteration." In other words, the United States Attorney, the attorneys for the defendants below; a federal district judge and 3 circuit judges did not know the section or rule in question had been repealed. They had little or no opportunity to make such a discovery. The case arose before the establishing of the Federal Administrative Register, in which all executive orders and administrative rules are now supposed to be printed. I use the word "supposed" for a purpose. See also Gibson vs United States 3/ another case that reached the United States Supreme Court, and in which the court pointed out that the repeal or important changes in administrative regulations were not known by or called to the attention of the district judge nor the circuit judges. It follows also that none of the counsel were aware of the change. This case was tried and decided

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1/ "The Model Administrative Procedure Act" A Symposium by Dean Stason 33 Iowa L R page 196 at page 199.

2/ Panama Refining Company vs Ryan, 293 U.S. 388.

3/ 329 U S 338-341 N. 4 (1946)

almost 10 years after the Federal Register existed.

In an article on these two cases [1] by Professor Newman of the University of California Law School, he stated that the disclosure of the failure to discover the repeal of the rule in the Panama "Hot-Oil" case resulted in an uproar that led Congress to pass the Federal Register Act requiring all regulations to be formally published and codified. He then added as to the Gibson case:

> "But if regulations still be undetected--even though formally published--because of inadequate publication, then the lessons of the "Hot-Oil" case need to be retaught."

Professor Newman further points out that prior to the adoption of the Federal Register Act "the government was allowed to penalize citizens under rules whose existence was unproclaimed and whose texts could be found only in the vaults of the Department of State. The doctrine of "promulgation" required no more than a deposit of the document with the Department of State."

Why has there been a lack of knowledge of existing federal rules after the Federal Register came into being? There are several reasons. Professor Newman gives a few as follows: (page 933)

> "There are thousands of rules--that create and interpret law, that state policy, and that describe agency organization and procedures--which do not appear in the Federal Register.--In most instances, however, failure to publish seems to result from a refusal to believe that Congress really intended what it said. In effect, there has been an unwitting conspiracy to exclude from the Federal Register a huge quantity of documents that have general applicability and legal effect."

It is a considered and confirmed opinion of most writers in this field that little or no discretion should be given in matter of publication, and the rule: "When in doubt, publish" should be extended so that no rule may be adopted and made enforceable unless published in an appropriate register except, perhaps, emergency rules, and rules dealing solely with the internal affairs and organization of an agency.

The Attorney General's report in 1941 sharply criticized this fault by saying:

> "An important and far-reaching defect in the field of administrative law has been a simple lack of adequate public information concerning its substance and procedure." [2]

Why Administrative Rule Making Power?

At the beginning of this section of the report it may be helpful to consider a few agencies and their functions to get a mental picture of the scope of their work.

1/ 63 Harvard Law Rev. 929.

2/ Attorney General's Report, Committee on Administrative Procedure (1941) p. 25.

This will also demonstrate the need for administrative rule making power in order to implement and extend or rather bring to fruition legislative intent as indicated by particular legislative enactments.

At the federal level of government we have approximately 60 agencies with rule making power and possessing adjudicatory power; that is: The power to conduct hearings and make orders and decisions.

Among these are: (1) The Securities and Exchange Commission possessing plenary power over the sale, or offering for sale, the registration and transportation in interstate commerce of securities. The index alone for "Regulations under various acts" of this commission covers 20 pages of the General Index for the Code of Federal Regulations. No description or explanation of this commission's work is needed to show the need for such an agency.

There is also the Interstate Commerce Commission, which regulates by rules and adjudication every phase of commerce between states, and much of purely intrastate when ultimately destined for interstate shipment.

The Federal Communications Commission which regulates those great magical media of visual or oracular entertainment and information, and that too often inflicts on us that horrendous, cacophonous jargon of sound that attempts to pass under the pseudonym of "music".

The National Labor Relations Board whose rules affect the lives of millions of American workers.

The Civil Aeronautics Board that regulates the operations of most commercial air transportation.

These are but a few agencies of the federal government that affect the people and the business world of America through administrative rules and hearings.

We often hear the saying: "Justice delayed is justice denied." A few moments reflection will bring forcefully to mind how much greater the delay in our courts, if the phethora of hearings now conducted by administrative agencies, or hearing officers, were to be added to the already mountainous load of court cases. Such a flood would inundate our courts and prevent even the remotest kind of expedition. It would also require at least ten times the number of judges now in our judicial system. For administrative hearings exceed court hearings by more than that ratio.

Consider for a moment, also, what congressional and legislative chaos would occur, if every statute had to be specific in detail, so as to delineate minutely for all the conduct of administrative functions, rather than enacting a more general statute, and authorizing an administrative agency to implement the act with administrative rules and regulations.

We live in a magic world, where the ominous prophecies of the Jules Verne variety are less than commonplace. The last century has seen the birth and astonishing growth of a gigantic industrial system hitherto undreamed of. As Judge Prettyman has so clearly stated: 1/

1/ The Nature of Administrative Law 44 Virginia Law Review 685, at page 686, E. Barrett Prettyman, U. S. Circuit Judge, District of Columbia.

"The processes of commerce and industry became big and complex and novel. Many great new enterprises used much property and many facilities owned by the public.

Giant, often antagonistic, forces developed within private industry, and between private enterprise and the public weal. These conflicts had to be controlled. A balance had to be struck between public and private interests. So government came to have more and more to do with the routine of the worka-day world, and that government was the federal government."

The Judge again points out in his next paragraph:

"Law is the rule which prescribes the conduct of man. In our political system governmental power cannot be exercised, nor can private rights be circumscribed, except as law-making authority directs. We recognize no other way. This new regulation and control then, had to be by law. The control of the emerging industrial complexities and the regulation of their economic relationships had to be accomplished according to standards and prescriptions enacted by law-making authority. And so, as the economic world changed, a vast array of new laws came into being. The new laws required agencies of administration more stable than the executive establishment, more adaptable than the Congress, more flexible than the courts.

These required new laws needed a different kind of "agencies of Administration" than had theretofore existed. The rigid formalism of courts, the part time functions of legislatures, and the inconstancy of executives' terms, forced into being the administrative functions we know today, and without which neither our federal nor state governments could render the service now daily demanded of them.

Again Judge Prettyman's words are apt: 1/

"The problem was quasi-legislative, quasi-executive, quasi-judicial. The new facilities of the law must be endowed with power to look forward so as to make rules, power to look backward so as to adjudicate disputes, and power to explore the present so as to inform themselves. The new facilities were custom-tailored to fit these specialized tasks."

Thus, administrative law and procedure theretofore the bastard offspring of necessity became legitimated and has now assumed a real stature and taken its rightful place in this business we call government.

We should ever remember and see that administrators keep ever in mind, that this phase of government is or should be that of "a rule of law not of men". For administrative agencies do nothing more or less than administer law. To administer a law, it must first be interpreted. If its meaning is in doubt or obscure, the administrator should seek a legislative counsel's or Attorney General's opinion or a declaratory court opinion and follow it as a mariner does a chart and compass.

1/ Ibid page 687

One of the greatest evils in government today is the attitude of many administrators that the legislature is a temporary nuisance and their enactments are road blocks in the way of administrative progress. Through administrative rules and regulations and kangaroo hearings they have distorted and extended statutes so as to make them conform to their concept of what the statute should have been. These types of agency heads attempt to set up administrative empires, and howl like wounded banshees when legislatures or committees thereof, or Attorneys' General demand that they conform to legislative intent. It was this sort of conduct that brought down on representative government the tirades and criticism of injured citizens, courts, lawyers and professors of law and political science during the last half century. Legislative intent as expressed in laws and interpreted or obtained as always from the wording of the statutes, should be the sole guiding light. All that is needed is an implementation of the statute by rules that do not contravene the statute, nor are in excess of administrative power. Then as was so ably stated 1/ "--Agencies are power tools, of functional design, intended for "production and capable of colossal chores".

The Judge then added when the agency fails to abide by the formula that is, administering law, no more no less, and departs from the formula:

> "--it ought to be yanked back again."

On page 692, after pointing out that judicial power or discretion is always to be used so as to give effect to legislative intent or "will" that is "the will of the law", the Judge added:

> "Similar considerations limit administrative discretion to the four corners of the statute by which the Congress (Legislatures too) empowered the agency to act."

Administrative Rule Making

In the proposed act, the first 20 sections deal mainly with rule making and the manner thereof.

The definitions in section 1 are similar to those in most other similar acts, including the model act, the California Act, and the federal act. In subsection 1, some verbiage is used in defining an agency that might not express meaning to some not familiar with our agencies. A few agencies have from time to time expressed opinions that they were not truly official agencies because of the source of much, or most of their funds. A careful study will patently and forcefully show this to be incorrect. So instead of a lengthy enumeration of all agencies to be included it was thought more advisible to define "agency" in such a manner as to include all not expressly excluded.

We were fortunate not to have any constitutionally created agencies, nor to have constitutional sections that hampered. We naturally excluded courts and the legislature, and of necessity, the boards of Pardons and Parole Commissioners because of their peculiar functions.

In section 2 of the proposed act, a separate and distinct Department of Administrative Procedure is created. So far as can be learned, this is the first of its kind.

1/ Ibid page 689

California has a division of Administrative Procedure in the Department of Professional and Vocational Standards. The Judicial Council Report [1] recommended that a separate department be established; and the bill as passed by the California Senate was so worded.

Unfortunately, an amendment was adopted in the Assembly just before final passage of the bill, that placed the agency in the Department of Professional and Vocational Standards, as a division thereof. This can only be termed a serious error, as it subjects the division to the whims of the various administrators who head the department. This is especially true with respect to the budget of the division. A department head submits the budget requests for all the divisions in his department. If he is not in accord with the functions of a properly operated administrative division, he can cut the budget to a crippling degree. If, for instance, a hearing officer decides contrary to the director's wishes in a contest in which one of his decisions is involved, the director can exert an influence detrimental to the division of administrative procedure. If in the wisdom gained from experience, a division head recommends corrective legislation, the director can prevent its passage, and even order the division head to refrain from any attempt to secure the passage of such legislation. If in spite of his will, the legislation is adopted by the legislature, the director, being an appointee of the governor, can most always procure a governor's veto.

There is a more fundamental and forceful reason for the separate existence of a department of administrative procedure. Its work is quasi-legislative and quasi-judicial. In this use, the latin word "quasi" means "almost". So, the work, or much of it being "almost" judicial, the personnel should be as free from possible influence or bias as a judge is or should be. No director can be so unbiased or free from influence as a subordinate to an agency head. His salary, often his tenure, so vital to freedom of decision, yes his very existence as the divisional head, can be subject to the whims of an arrogant department head. The hearing officers and director pass upon and decide the rights, privileges and liberties of thousands more than courts deal with. They must be above the very suspicion of bias, prejudice or influence, and free to recommend legislative improvement in their procedures. A study of California's experience will show how true these statements are, and what a mistake it was to make the administrative agency a division, instead of a department.

It is to be noted that both the Attorney General's Report, [2] and the report of Mr. Benjamin on Administrative Adjudication in New York, recommended a separate department of administrative procedure, [3] although neither recommendation bore fruit.

From this present study, it appears that the only proper course to pursue is that set forth in the act, namely, a separate department in which the director and independent hearing officers would be isolated from all phases of a case other than hearing and deciding. This will put an end to the spectacle so shocking to an accused, and to legally trained minds of one person acting as accuser, prosecutor and judge.

1/ Tenth Biennial Rept. Judicial Council of Calif. Dec. 31, 1914.

2/ Senate Document No. 8, 77th Congress 1st Session, 1941.

3/ Section 8 of the Executive Law, New York, 1942.

In a New York case, [1] the court after stating certain fundamental, federal and state, legal and constitutional rules for administrative hearings made this wise observation:

> "The cause may not be prejudged, and no man may be both accuser and judge. Otherwise a hearing becomes a fiction, and no fiction can destroy constitutional guarantees."

So, also in a California case, [2] in which an accused health officer sought by a writ of prohibition to prevent the Mayor who instituted charges from sitting as one of the hearing commissioners on the case, the appellate court in an original proceeding for a writ of mandate to prevent the accuser from also sitting as a hearing commissioner, thoroughly reviewed the authorities. After discussing the "rule of necessity" which permits an accuser to sit as a hearing officer when his absence would prevent a quorum, the court concluded:

> "Were Homan (the accuser) permitted to sit on the Commission during the trial he would appear in the capacities of a complaining witness who filed the charges, a juror to weigh the evidence, and a judge to pass sentence.--good ethics should not permit him to occupy these positions. We have no hesitance in holding that under the facts before us he is not qualified to do so."

Benjamin in the New York report disapproved also. [3]

The federal act is silent on the question, and under the act the "unholy trinity", can still function.

I am at a loss to understand Professor Davis' comparison of a judicial ruling on a demurrer, or the granting of a temporary restraining order, ex-parte, to that of a Federal Trade Commission officer issuing a complaint. [4] For, in both the demurrer and the petition for a temporary restraining order the sole questions are: Are there facts therein properly stated and set forth, which if true, would warrant granting the relief prayed for? No question of the truth of the allegations can arise until on the trial of the demurrer case, and the hearing for the issuance of a temporary injunction in the other case. Until then, the truth or falsity of the facts alleged is never considered. Whereas, in the case of the Federal Trade Commission officer filing a complaint, he considers or enters into some process of judgement to determine if there is truth and substance enough in the accusation to warrant the filing of charges. In most cases he must certainly make inquiry into how the charges may be proved, or, if they can be proved; who are the witnesses for the government, and often reads a summary of the testimony of those who will be witnesses.

1/ Sharkey vs Thurston 268 N. Y. 123, 196 N. E. 766, (1935).

2/ Nider vs. Homan, 32 Cal. App. 2nd 11, 89 pac. 2nd 136, (1939).

3/ Benjamin, Admin. Adjudication in New York 65.

4/ Davis, Administrative Law, p. 436.

That is a far cry from a judge ruling on a demurrer who might well say: "I don't care a whit whether the allegations of this complaint are true or not. As they are here set forth they constitute a valid cause of action under our rules of civil procedure, and I must therefore overrule your demurrer."

I believe the bench and bar and professors and others in the field of administrative law and procedure, should urge Congress and state legislatures to amend the various acts so as to separate the functions of accuser, prosecutor and judge, and prevent this objectionable practice. Then and then only should the decisions of these agencies attain dignity, and merit respect.

The question of who should appoint the director, was bothersome. For, we again felt the impelling necessity of "insulation from all political influence." If the appointment were made by a governor, that official would be subjected to partisan pressure and influence. As the Personnel Commission is constituted in Nevada, that body could not make the selection, although it is a thorized to furnish an "eligible list" from which the appointment shall be made.

An appointment by the Attorney General was considered, but because "presentation officers" are to be selected by him and be members of his staff, it was believed improper to have him appoint the director. 1/

It was finally decided to give the appointing power to the supreme court for several reasons. First, because the director will be the head of a quasi-judicial body, and second because there was some precedent for the decision, in that the statute revisor was originally appointed by the court. However, this was perhaps agreed to because the court is ex officio the statute revision commission.

The "insulation" question was so important that the court appeared to be the only proper appointing authority. Furthermore the court is certainly more qualified to evaluate the qualities and experience of a quasi-judicial officer, than a lay agency.

The director, the hearing officers and presentation officers are all placed in the classified service in order to give tenure, as far as may be under Nevada law. 2/

One of the original objections of the American Bar Association Committee in 1936 was the fact that the tenure of administrative "judges" (sic) was so insecure as to impair the standing or merit of their decisions. 3/ Many writers decried this insecurity and made such criticism forceful by comparing this insecurity with the "life tenure" and the constitutional prohibition against diminution of the salaries of federal judges while in office. 4/

1/ Proposed Act, Sects. 3 subsect. 2; 22, subsect. 2; and 23, subsect. 5.

2/ Proposed Act, Sects. 3 subsect. 2; 22, subsect. 2; and 23, subsect. 5.

3/ 61 American Bar Association Rept. 1936.

4/ Davis, Administration Law, p. 19.

The American Bar Committee, even made the extreme contention that "life tenure should be assured to all who are to exercise judicial functions". 1/

As to the necessity for "insulation" from any influence, the following comment by Interstate Commerce Commissioner Joseph B. Eastman, one of the most outstanding federal administrators of all time, is to the point in this present discussion: 2/ After speaking on the necessity of agencies such as the Interstate Commerce Commission, and the duties of the President and Congress in connection with appointment and policies, he stated:

> "----but in the administration of these policies these tribunals must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment of the facts and the law.----Political domination will ruin such a tribunal."

Heeding the foregoing advice to the best of our statutory abilities, we have provided for the director to be appointed by the supreme court and have such tenure as the personnel act affords.

Basic Requirements for Adoption of Rules

Sections 5 through 20 deal with the requirements of rule making, adoption and filing. The required procedure is set out in detail, and it is also provided that:

> "No rule adopted by any agency shall be valid or effective unless issued and adopted in the manner and form provided in this chapter and then only if reasonably necessary to effectuate the purpose of the statute creating such agency, and not in conflict or inconsistent therewith." 3/

This latter provision has a twofold benefit. (1) It is an admonition to an agency head that he does not possess unlimited rule making power and to study his statute or seek legal aid before contemplating the adoption of a rule, and (2), it authorizes a court on either a judicial review or an application for a declaratory judgment to hold invalid any rule the court finds is not "reasonably necessary" or is in conflict or inconsistent with the statute creating such agency.

The question of how and by whom administrative rules should be drafted presented this problem: Should the actual drafting or putting the rule into legal phraseology be done by the department of administrative procedure, or by the statute revisor? Because the department has the important duty of interpreting such rules, again, from a great abundance of caution, it was decided the wiser course was to have the statute revisor do the drafting.

The present statute revisor of Nevada, has just finished the monumental task of completely revising and putting into loose leaf volumes all the statutes of Nevada, with a complete index thereto. This work is titled "Nevada Revised Statutes", and could wisely be adopted as a model for structure, form and style by other states.

1/ American Bar Association Rept. 1936, p. 720

2/ McFarland and Vanderbilt Admin. Law. Cases and Materials p.653-657

3/ Proposed Act. Sect. 6, Subsect. 2.

The office of statute revisor was the natural agency to which the duty of rule drafting should be assigned. The work being done there assures compliance with that part of section 5, subsection 1, which states:

> "----All such rules shall be of uniform style and shall properly express the desired policy of the agency in legal terms so that all such rules shall be clear, unambiguous and legally enforceable."

To permit rules to be drafted by lay, inexperienced, agency personnel is to invite challenge in court and an unnecessary waste of time and money in administrative hearings. Often such rules so drafted are ambiguous, obscure as to meaning and contravene either constitutional or statutory provisions. There is scarcely a lawyer of long or short experience who can properly draft rules or laws without taking a training course under people experienced in the field.

After the rule is drafted, the adopting agency determines if the rule as drafted expresses the intended policy of the agency. If it does, an endorsement is made thereon declaring the rule adopted and the rule is then submitted to the department for filing in the Nevada Administrative Register which is to be kept in the department of administrative procedure. 1/

It is not filed in the register until the department first determines:

1. It has been duly and regularly adopted,
2. It complies with the provisions of the act as to form and style,
3. It is within the agency's authority to adopt,
4. It is not in conflict, nor inconsistent with the statute creating the agency.

After these four determinations have been made, the rule is numbered, indexed and filed, and a notice printed in the "notice section" of the register at least 20 days prior to the effective date of the act, informing all interested parties of the adoption of such a rule. 2/ The rule becomes effective 30 days after filing. 3/ This waiting period is provided in order to permit anyone who is interested to offer or suggest amendments, or to submit oral or written data and arguments why the rule should be withdrawn or revoked.

In many state procedure acts, there are mandatory provisions requiring public hearings before the adoption of any administrative rule. However, investigation has shown that the amount of public participation is so negligible as not to warrant so cumbersome a procedure. As one writer, in discussing the Indiana Act, expressed his view:

> "Elimination of objectionable rules after adoption would seem preferable to (such) a consideration of all rules prior to adoption. The scheme of the instant statute, and the proposal for direct legislative review, seem to provide inadequate compensation for the loss of administrative efficiency which they entail." 4/

1/ Proposed Act. Sect. 5, Subsect. 2.
2/ Proposed Act. Sect. 5, Subsect. 3.
3/ Ibid, Sect. 9, Subsect. 3.
4/ 41 Col. L.R. 950

To require a legislative or judicial or gubernatorial review of all administrative rules is to ignore the fact that most administrative rules come into being because experts in a given field of administration believe them necessary and essential to implement legislative enactments. In most governmental agencies, both federal and state, either administrator or agency head, or the personnel of the agency or both, are experts in their chosen field, often with many years of experience. Why then hinder or impair with a requirement of a public hearing before a rule may be adopted, 1/ or require legislative review of rules, as in Wisconsin, Connecticut, Kansas, Michigan, Nebraska and South Carolina, 2/ or a review by the Attorney General as in ten states, or a review by the Governor as in Maryland? 3/

It is submitted that the procedure provided in the proposed act requiring:

1. That all rules be drafted by the statute revisor upon request of the agencies,
2. The determination by the director of the department of administrative procedure that the rule is within the agency's power to make, that it does not contravene the statute creating the agency nor inconsistent therewith; and that it is in proper form and style, and was duly and regularly adopted,
3. That all interested parties may obtain a judicial declaration as to the validity and meaning of any rule without the necessity of an intentional violation to test its legality, and lastly a judicial review after an administrative hearing before a legally trained hearing officer, is a thorough protection from administrative excesses.

To dump all administrative rules back in the legislative lap every session seems political nonsense that would perhaps double the work of the legislature, and prevent their proper consideration of necessary new legislation.

Further, to require a legislative, or any other approval of administrative rules, will prevent the agency from being a "functional tool capable of colossal chores", 4/ as Judge Prettyman termed them.

1/ Minn Stat. (1953) Sects. 15.041 to 15.049.

2/ Wisconsin Joint Committee on Rule Making Prelim. Rept. May 20, 1953.

3/ Minnesota Legis. Research Committee Publication No. 61, June 1954, p.25

4/ Prettyman - 44 Va. L.R.

CHAPTER IV

PUBLICATION OF RULES

If statutory or case law were in the remotest degree as difficult to discover as administrative rules are, the administration of civil and criminal justice would be in a state of chaos the equal of which has never existed.

It was demonstrated by authorities on pages 10-11 (supra), the virtual impossibility of determining what rules are in existence. In the two cases cited, parties were actually prosecuted for violation of rules that were no longer in existence, and these cases reached the United States Supreme Court.

In one case, it will be recalled, the prosecution occurred ten years after the federal register was in being.

Any publication, to be effective must be a complete codification of all existing rules. The individual publication of rules by each separate agency is too cumbersome and does not lend itself to a ready, convenient source of knowledge to all interested or affected persons. This is so, even when all such rules are required to be filed with an office such as the Secretary of State.

The pattern in Nevada set by our very excellent Nevada Revised Statutes seems clearly the answer to all requirements. In one study 1/ it was stated that all rules should be in a single volume. In most states this would result in a volume that would dwarf Webster's unabridged dictionary. If a loose leaf code is required, as in Nevada Revised Statutes, it will provide a perfect answer, with a uniform style for all rules, a uniform index and numbering system, and the unqualified assurance that every existing rule is in the register or code.

The requirement that the department of Administrative Procedure "shall keep a complete and up-to-date set of both code and register in the office of the department, available to any interested persons during all hours of the working day," 2/ together with the other provisions making the code and register, or sections thereof available to all interested parties at cost, 3/ and the provisions requiring the department to furnish, without cost, complete sets to clerk of the supreme court, each county clerk, the state library, to each district court and to each state agency requesting copies thereof 4/ we hope will provide a convenient source of knowledge of all existing administrative rules which have the full force and effect of law.

1/ Minnesota Legis. Research Comm. Rept. on Admin. Rules Pub. 61, 1954, p.33

2/ Proposed Act, Sect. 16.

3/ Ibid, Sect. 17, Subsect. 4.

4/ Ibid, Sect. 18

Public Notice of Adoption of Rules

The provision in the proposed act [1] requiring publication of notice of adoption of any rules by an administration applies to all except emergency rules, the effective date of which is set by statute sooner than 30 days after adoption.

This public notice is to be published in the "Notice Section" of the administrative register, and section 17, subsection 3, of the proposed act is a legislative declaration that such notice is "declared to be sufficient legal and the best notice of its (the rule) contents to any person subject thereto or affected thereby".

The California Act requires notice to be "published in such newspaper of general circulation, trade or industry publication, as the state agency shall prescribe". [2] The "state agency" is not the division of administrative procedure, but the agency adopting the rule. There is also a provision requiring notice to be "mailed to every person who has filed a request for" such notice. There is another provision in the section which provides that failure to mail such notice shall not invalidate the rule.

The model act [3] states that "The adopting agency shall so far as practicable, publish or otherwise circulate notice" of its intention to adopt any rule.

Usually the word "practicable" means "capable of being done". [4] It has also been judicially defined as "feasible, if it can be done with reasonable convenience". [5]

The provision, therefore, would appear not be mandatory, and a failure to give notice would not invalidate the agency's act in adopting the rule.

The federal act, with numerous exceptions, provides notice shall be published in the federal register. [6]

Public notice is essential to permit public participation in rule making before and after the adoption of any rule, and to inform interested parties of the existence and effective date of any rule.

It is our belief that the publishing of notice in the "notice section" of the register is actually the best means of informing all persons who may be affected or interested in the existence of the rule. No newspaper has full statewide circulation, and in most instances a publication in a particular newspaper would only have the possibility of conveying notice to the people of a relatively small section of a state.

Whereas, interested parties will watch each edition of the register to see what new rules have been adopted.

1/ Proposed Act, Sect. 9, Subsect. 1.
2/ Calif. Govt. Code, Sect. 11423
3/ Model State Admin. Pro. Act, Sect. 2, Subsect. 3.
4/ Blacks Law Dictionary.
5/ Wilcox vs. Supreme Council etc. 123 N.Y. Supp. 83, 86.
6/ Federal Admin. Pro. Act, USCA title 5, Sec. 1003, (a).

While the proposed act does not require the publication of notice in the case of emergency rules, it does provide that no emergency rule may be effective for longer than a period of 90 days. 1/ If the rule is deemed necessary for a longer period, it must be adopted in the manner required for the adoption of regular rules.

We have tried to curb the evil practiced by many agencies of adopting most or all of their rules as emergency rules. 2/

Here again, we respectively differ from the opinion of Mr. Benjamin, expressed in his report at page 322, 3/ where he states that because of such varied circumstances that the effective date of all rules should be left to the discretion of the issuing agency.

If this were permitted, it is safe to assume that most all rules would be given effect upon adoption, thus preventing public participation in rule making prior to effective dates. 4/ The greater evil, however, would be that an accused, or his counsel, might prepare the defense of a case on several established rules only to be met with a barrage of new ones, impossible of discovery, before the hearing. These new rules could be adopted overnight. Such action would not only cause an outburst of criticism, but would merit it.

Some states 5/ require the governor's agreement that an emergency exists before an emergency rule may be adopted. This could very well work a serious hardship in some fields, particularly that of public health.

It would serve no useful purpose to enumerate all the different statutory requirements as to the effective date of rules, and would unduly lengthen this report. I shall include in the bibliography an ample number of sources sufficient for the purpose of any student.

In answering this question, we had to again consider and balance the equities, that is, a consideration of the general public right to be informed in advance of effective dates of rules that will affect them or their industry, and the vital need of numerous agencies, such as public health, agriculture or conservation, to promulgate emergency rules to protect public health, safety and welfare.

Such impediments as a governor's or attorney general's agreement that an emergency exists, may even cost human life in extreme cases.

Professor Davis forcefully demonstrated this occasional need in the following language:

> "If the contagion is spreading, or the unfit pilot is about to jeopardize the passengers, or the harmful medicinal preparation is being sold to the public, summary administrative action in advance of a hearing is appropriate." 6/

1/ Proposed Act, Sect. 11.
2/ Heady, Admin, Pro. Legis. in the States, pages 40-49.
3/ Benjamin, Admin. Adjudication in the State of New York.
4/ Heady, Admin, Pro. Legis. in the States, Michigan University Governmental Studies No. 24, pages 44-49
5/ Michigan, Mich. Stats. Ann. Sect. 3. 560 (10) (1949 Suppl.)
6/ Davis, Admin. Law, page 260, Sect. 6.

The better course, by far, appeared to be to let the experts in a given field decide the issue, with a check on agency excesses left, first, to a determination by the director of the administrative procedure department, that the facts alleged, if true, constitute an emergency as defined in the proposed act, [1] and also authorize judicial declarations for any "interested person" who may wish to contest the "emergency" issue. [2] In addition, the judicial review provided furnishes a further curb on administrative excesses in rule making. [3]

The proposed act also requires that the notice of the adoption, amendment or repeal of a rule shall include:

1. Reference to the authority under which the rule is adopted,
2. A reference to the particular section of the statutes which are being "implemented, interpreted or made specific",
3. The express terms of the rule, or a summary or reference to any rules, the printing of which is found to be impracticable such as detailed schedules or forms otherwise available to the public or which are of limited or not of general application, and
4. Such other matters as the law requires. [4]

These requirements may prove excessively burdensome. Mr. John Clarkson, [5] in a very helpful and constructive criticism of a preliminary draft of the proposed act, indicated some California agencies had found a similar provision somewhat onerous. It may well be that the provision as proposed should be relaxed.

A study has been made of every grant of rule making power in the Nevada statutes. There appears to be in excess of 75 such grants. Many can only be described as "broad as the canopy of Heaven" with no legislative statements of policy or standards to guide, limit or govern an agency administrator in the exercise of a grant of rule making power.

The writer was in 1946 a member of the California Legislative Committee on Administrative Regulation which, through the service of the then California Legislative Counsel, Fred B. Wood, now associate justice of the California District Court of Appeal, procured a compilation of a complete summary of all California statutory provisions granting rule making power to all California administrative agencies. [6] This is an extremely valuable document consisting of 128 pages, which unfortunately is out of print. It is hoped reprints may be again authorized. The summary is alphabetically arranged by departments and agencies with a very complete table of contents enabling a reader to locate any agency standard or grant in a few moments. It should be available to all legislative counsel bureaus and bill drafting agencies. Copies may possibly be located in either the California State Library or the State Archivist's office, State Capitol, Sacramento, California.

1/ Sect. 5, Subsect. 3.
2/ Sect. 43, Subsect. 8, Proposed Act.
3/ Sects. 43-45, Proposed Act.
4/ Proposed Act. Sect. 12, Subsects. 1, 2 and 3.
5/ Chief, Calif. Div. of Adm. Procedure.
6/ Published July 20, 1946 by Calif. State Printing Office

In concluding the discussion of rule making, I would like to revert for a moment to suggested plans for curbs on administrative rule making, by pre-adoption approval, or a veto power after adoption, by the governor, attorney general, legislature or a committee or commission thereof.

As Professor Heady stated, [1] "obviously, rule making cannot always proceed at a snail's pace". Professor Davis' statement, page 23 (supra), emphasizes this by the examples stated.

There have been many attempts to curb or limit agency authority in this emergency, or summary field of activity, with some resulting evils. Notwithstanding attempts to restrict resort to the making of emergency rules, little benefit has resulted. Even when the governor's consent is necessary before an emergency rule can be adopted, the percentage of emergency rules remained extremely high. [2]

The imposition of undue or onerous burdens that impede or impair the necessary flexibility of, and ability to promulgate needed agency rules, seems most always to result in the agencies evading such controls "by the simple expedient of issuing fewer formal rules". Such agencies continue to function and make determinations that are not, but should be, known to the public.

> "As a result, the primary aim of recent procedural legislation dealing with the rule making, which has been that the rules should be known to those affected, is being defeated." [3]

Michigan's experience seems to clearly support Professor Heady's warning of the experience that follows onerous prerequisites to agency rule making. [4]

Missouri seems to have adopted the most extreme requirements yet found. [5]

The constitutional provision of Missouri provides that all rules, except those applying to internal management of an agency, shall take effect not less (sic) than ten days after they are filed with the Secretary of State. No exception appears to have been made for emergency rules, which would appear to be a serious oversight. This prohibition or requirement for delay indicates a strong antipathy from perhaps a previous experience with precipitate agency rule making. For this dynamic field of necessary law should not be shackled by constitutional inhibitions. It should ever remain capable of legislative extension or growth as future experience shall dictate. Again I remind the reader of this fantastically magic and changing world in which we struggle and too often grope. Surely this vigorous, powerful category of law capable of such "colossal chores", should never be put in a constitutional straight jacket, so as to become immutable as were the laws of the Medes and the Persians.

1/ Heady, Op. Cit. pages 46 to 61.
2/ Ibid, page 46
3/ Davis Op. Cit. page 62
4/ Ibid, page 61.
5/ Mo. Const. Sect. 16 of Art. 5
Mo. Rev. Stats. Ann. (1950 Suppl.), Sect. 2 (b)

We have a "prayerful hope" that the sections of the proposed act dealing with the rule making power will answer many public complaints as well as administrative headaches, and assist in making all administrative regulations easy to find, certain of interpretation, and legally enforceable.

CHAPTER V

HEARING PROCEDURE

Sections 21 to 42 inclusive provide in detail a complete procedure for the conduct of all administrative hearings.

The definition of "agency" was repeated so as to emphasize the intent that not only rule making, but hearing and appellate procedure was to apply to every agency in state government except the four classifications excluded by section 1.

Reference was made in the introduction to the necessity of a separation of functions in administrative hearings to prevent the officer that decides an issue from also being the prosecutor or the person who initiates the charges.

This problem is not difficult of solution, in cases in which a single hearing officer conducts administrative hearings in place of a single agency head. The more difficult problem is presented where hearings are being conducted by a multiple member agency such as the Interstate Commerce Commission in the federal government, or a public utility commission at the state level.

The time has long since gone when lay agency members of any agency should be permitted to conduct an administrative hearing.

Administrators often object to the proposal that a trained hearing officer supplant them in the conduct of agency hearings. They argue that even though the hearing officer who in federal practice is variously termed "trial examiner", "referee", "commissioner", may be skilled and trained in the conduct of hearings or adjudications; he can not be informed or expert in the particular field of the agency action. For instance, they ask what would he know about public health, fish and game, public utility regulation, taxation or an agriculture department with its multiple functions?

The answer to these objections is the same that is used in civil courts, that is, the use of expert witnesses from the agency in question or from the same field in private enterprise. Thus, the hearing officer can be informed as to technical matters with which he may not be familiar.

The usual custom in the assignment of hearing officers, is to assign them regularly to the same agencies, in order that they may become and remain familiar with the policies and complexities of such agencies. The proposed act requires this to be done, also, with presentation officers. 1/

In multiple agency member hearings, they object to the proposal that one person be authorized to make the important decisions that necessarily must be made in the normal course of agency business. They make the contention that the questions presented are too complex, too technical, and are far too important to be decided by a single person no matter how skilled or qualified he may be.

1/ Proposed Act. Sect. 23, Subsect. 3.

As to the complexity, and technical aspects, it should be sufficient to point out that always in equity, and often in legal cases, a single federal or state judge is called upon to decide issues replete with the greatest complexities of so technical a nature that it would appear to demand a board of engineers or scientists. Yet, the one trial judge is able to wade through a labyrinth of facts, evaluate the testimony and other evidence that may have taken months to record, and apply the law. The resulting decision is respected in most cases as "the law".

Many of these cases involve mining and water rights; patent law, international law, contracts of great importance, often made more difficult by constitutional and conflict of law questions. In our system of jurisprudence, these decisions are subject to appeal to higher courts with three or more judges; so also are the decisions of hearing officers under the provisions of the proposed act. 1/

As to the argument that many questions are too important to be decided by a single hearing officer, it should be remembered that in the administration of civil justice, often great fortunes, or the existence, or ownership of great industries are involved in the issues of a single civil case in which the hearing is conducted, and decision made, by a single trial judge.

Certainly, far more important is the fact that often in criminal cases one trial judge determines whether or not a citizen must spend the rest of his life in prison or forfeit his life in capital cases. It is true in all criminal cases, the defendant has the right to a jury trial. However, in a surprising number of such cases the defendant waives a jury trial and is tried by a single trial judge.

Certainly in no administrative hearing are issues presented more complex than in the civil cases enumerated, nor more important or sacred than the life or liberty of a citizen.

The proposed act, (section 22), provides that the hearing officers shall be "in the classified service" and "shall have been admitted to the practice of law in this or some other state and shall have actively practiced law for 5 years immediately preceding his appointment". It is further provided that he "shall possess such other qualifications as shall be established by the department of personnel.".

In most instances, an applicant will have had four years undergraduate study in a university, and three years, often four years, in an accredited law school. In addition he will have had at least five years in the active practice of the law, and will be required to pass a competitive examination in order to be placed on an "eligible list". Part of that examination will be designed to determine if the applicant possesses that quality termed "judicial temperament"; that is, the ability to critically examine and evaluate the evidence and the pleadings dispassionately, and not to give any greater weight to the demands of the presentation officer than to that of opposing counsel, nor greater weight or cogency to the evidence adduced by either side.

The trained hearing officer will exercise his authority so as to maintain decorum and an orderly procedure. He will confine the testimony to what is relevant to the important issues, so as to "reduce its volume and sharpen the issues".

1/ Proposed Act. Sect. 43, et seq.

"Where this is not the case, the testimony wanders, and the proceeding loses direction. Evidence is admitted 'for what it is worth'--time is lost and expense increased." 1/

The hearing officer should be immune from agency or any pressure or influence in reaching a decision except that brought to bear by the admissable evidence and the applicable law.

The California Senate Interim Committee on Administrative Procedure brought to light some weird concepts of administrators as to the conduct of hearings and appeals therefrom.

In one instance a person representing the Social Welfare Board stated:

"Our board; our Social Welfare Board has felt in the past that welfare workers make better hearing officers than do attorneys--" 2/

Another witness didn't think there should be an appeal from an administrator's decision in the denial or revocation of a real estate broker's or salesman's license. He states his belief as follows: 3/

"Excuse me, may I say in that connection that if a man is charged with the responsibility of administering an agency, might it not be wise to allow him to have the last say as to whether a man should have a license or that license should be revoked without having to go through the machinery of an appeal?"

The social welfare representative was, in another instance, asked:

"Well, employing your own hearing officers then, are they instructed ahead of time what type of decision to render in accordance with the board's wishes? (Underscoring ours.)

and the witness gave this amazing answer:

"No and yes,--the board expects that its regulations will be followed; also the board desires uniformity of decision, and if one particular type of situation has been decided in the past on a certain basis, they like to have matters coming up again on the same factual basis decided in the same way."

A little later the witness again said:

"We certainly do not contend that the referees are independent of the social welfare board. We wouldn't want it that way at all."

What a travesty and farce such hearings must be! Before even a witness is sworn or a proceeding begun, this so-called hearing officer is told what decision he is to make. Why subject the state to such needless expense as the alleged hearing?

1/ Final Rept. Attorney General's Committee on Admin. Pro. pp 44-50 (1941).

2/ First report of California Senate Interim Comm. on Admin. Regs. and Adjudications (1957) p. 67.

3/ Ibid p. 64.

This witness is the type of administrative officer that Judge Prettyman said should be "yanked back" when he departs from an "administration of law". 1/

Better still he should be given some of his own treatment and discharged from state service without benefit of hearing.

This conduct is the very kind that Judge Prettyman castigated by quoting some imagined questions posed by such a character:

> "Why give this scoundrel a hearing? He is guilty. Away with him", or "why give a hearing on this protest or on this motion for reconsideration? We know perfectly well what we are going to do. Let's do it." 2/

The judge then summarizes:

> "To the mind of the man on the street the idea of the administration of law is akin to his idea of justice. The elements it embodies are impartiality, certainty, accuracy, patience, adherence to the right. Idealistic though these concepts be, they are in composite the goal toward which an administrator of the law should strive. Such an officer has a stated mandate to carry out, a mission in the public interest. At the same time he is restricted to that mission. He ought never pursue personal predilections. He may not give vent to spleen, or yield to attractions, or be swayed by fear of reprisals. His is a high calling. In my thesis I mean to ascribe all this to the men in the agencies. I would bind them to all the idealism inherent in the terms "rule of law" and "administrative law." 3/

In most administrative hearings, there is always the serious question of due process of law. Stated simply, it means that if the denial, revocation or suspension of a constitutional or statutory right is involved, the person entitled to such a right is entitled to a notice of proposed action and the right to a hearing.

Often there is a serious legal question involved in determining whether in a given instance a "right" or a "privilege" is involved. In many cases the question is not clearly answered by either statutory or constitutional provisions and resort must be had to case law, that is, to the decisions of supreme and other appellate courts.

For instance, it has been held that a license to sell intoxicating liquors confers merely a "privilege"; 4/ whereas, a license to practice medicine confers a valuable property right. 5/

The California courts seem to have established this rule: If the business is such that the state may prohibit it, under the police power, a license to engage in such business confers a privilege, not a right. 6/

1/ 44 Va. L.R. p. 690
2/ Ibid, p. 691.
3/ Ibid, p. 694.
4/ Board of Equalization vs. Sup.Ct. 5 Cal. App. (2nd) 374, 42 Pac. (2nd) 1076.
5/ Hewitt vs. Bd. of Medical Examiniers 148, Cal. 590, 84 p. (2nd) 39 (1922).
6/ Vincent Petroleum Co. vs. Culver City, 43, Cal. App. (2nd) 511; 111 Pac. (2nd) 433 (1941).

It must be remembered, however, that even though a license be deemed a "privilege", it may not be denied or revoked without the licensee being given a notice and a "fair and impartial" hearing or at least the right to such a hearing. 1/

This is in accord with Professor Gellhorn's contention. 2/

In the Federal Constitution, two amendments guarantee due process. The Fifth Amendment applies to federal procedure, and the Fourteenth is applicable to state officers and agencies. Both forbid the deprivation of "life, liberty or property without due process of law."

There are two subject heads to "due process". One relates to procedural rights; the other to substantive rights.

It has only been in comparatively recent times that procedural rights were considered protected by the constitutional provisions of due process. The supreme court, however, in the Morgan cases 3/ reversed the lower court, largely upon the ground that the procedure of the Department of Agriculture in establishing rates for stockyard operators was not in accord with procedural due process requirements.

Certainly the better administrative course to pursue is to apply the same "due process" protection to procedural as well as substantive rights.

The same trend now, and for some years has been, apparent in court decisions, as to "rights" and "privileges". For, although courts formerly held that a "privilege" might be revoked without an opportunity for a hearing, 4/ this holding was expressly disapproved by the California supreme court five years later. 5/

In the latter case the license of a trainer of race horses was in jeopardy, and the supreme court held the license could not be revoked without a hearing. In a reference to the previous holding of a district court of appeal 6/ the supreme court said:

> "--The conclusion reached in that case is contrary to both principle and authority, and it is disapproved to the extent that it is inconsistent with the present decision."

In the same year, (1940), in the Irvine case, footnote 1, an appellate court in California, in tune with the tenor of the supreme court in the decision next above cited, said:

> "--We cannot forget that the law contemplates justice, whether the license is granted as a privilege or recognized as a vested right; that under the American system of justice it is the policy of our law that a person should not be deprived even of a "permit" to engage in a legitimate business without a fair and impartial hearing and without

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1/ Irvine vs. Bd. of Equalization 40 Cal. App. (2nd) 280; 104 Pac. (2nd) 847 (1940).
2/ Admin. Law Cases and Comments (2nd) Edit. p. 274 (1947).
3/ Morgan vs. U.S. 298 U.S. 468 and 304 U.S. 2.
4/ Supra, footnote 1.
5/ Carroll vs. Horse Racing Board, 16 Cal. (2nd) 164; 105 Pac. (2nd) 110, (1940).
6/ Bd. of Equalization vs. Superior Court 5 Cal. App. (2nd) 374, 42 Pac. (2nd) 1076.

an opportunity to present competent evidence for consideration by the licensing authority in opposition to the proposed revocation of his permit." (Citing Martin vs. Board of Supervisors, 135 Cal. App. 96, 26 Pac. (2nd) 843, and Smith vs. Foster 15 Fed. (2nd) 115.)

In the Carroll case (supra p. 31) the California Court seems really to have subscribed to the more recent theory of administrative agency limitations and requirements in connection with license revocation or denial. In that case, Carroll, a horse trainer was granted a license for the year 1937 at the first of the year. His signed application contained an agreement that the license might be summarily revoked by the Horse Racing Commission, and the license itself provided that it might at any time be "revoked, cancelled, temporarily suspended or withdrawn".

Under a racing commission rule a trainer could be suspended for life, if a saliva test after a race proved the presence of drugs.

On January 1, 1937, the very day on which the license was issued, a horse owned by the stable employing Carroll, the trainer, won but was found to have alkaloid poison in its saliva, indicating the use of strychnine as a stimulant.

Upon this evidence the trainer's license was suspended for a year by the racing board, without a notice or hearing. It is interesting to note that the relevant section of the California Horse Racing Act (Section 3) did not provide for or mention a hearing. It merely provided no license should be revoked "without just cause"; whereas section 5 of the act required a notice and hearing for the removal of a racing commissioner. This difference was urged upon the court as indicating the intent of the legislature not to require a notice and hearing in the trainer's case.

The court rejected the argument on the ground that section 3 of the act provided that no license could be rejected "without just case", saying such a phrase implies a right to a notice and hearing. The court stated:

> "It would be difficult to give it any other interpretation, for the determination of "just cause" necessarily requires a fair consideration of any evidence offered by the accused." 1/ (underscoring ours.)

The court also held that the board in forcing the licensee to give up his statutory right by the agreement in his application, "was acting wholly beyond its powers".

This case is in line with the more recent thinking, and court decisions in the field of administrative procedure in the issuance and revocation of licenses. Contrary decisions should be considered as to their dates.

In the proposed act, we have followed the course and admonition of these more recent court decisions, and in the hearing procedure sections, there is provided in detail the procedure to be followed as to the rights of respondents in the denial, suspension and revocation of a "license, right, authority and privilege". 2/

1/ 16 Cal. (2nd) 164 at p. 167.

2/ Proposed Act, Sects. 24 to 42 inclusive.

A notice of hearing or opportunity for a hearing is required in all cases except where it is necessary to preserve the public peace, health, safety or general welfare. In such cases any agency is authorized to make a written emergency order. The act as presently proposed makes these emergency orders effective upon "issuance".

It is now thought better to make such orders effective upon service on the parties to whom such orders are directed, because the person or persons affected may be far removed from the place where the order is issued. In such a case, if the order were effective on issuance, and service made several days later, the licensees would often operate under the license several days after the license was revoked.

The need for such emergency orders has been extensively discussed (supra) page 23 et seq.

Referring once more to the power to revoke or suspend licenses without hearing, whether or not a "right" or a "privilege" is involved, the cases should first be read to see if the decisions turn on statutory or constitutional provisions, or if they are general statements of case made law.

In most of the California decisions cited, (supra) the holding turned on constitutional or statutory provisions. However, the dissenting opinion of Chief Justice Gibson, in the Laisne case, quoted from infra, page 46 completely reviews a host of state and federal decisions and law review articles dealing with the "due process" requirements and its application to administrative hearing procedure and the scope of judicial review. 1/

The question should not be, "must a hearing be accorded for the refusal or revocation of a license", but rather "have we provided a hearing procedure that guarantees a fair and impartial hearing to accused and a proper judicial review of the resulting decisions?"

1/ 19 Cal. (2nd) p. 848 et seq.

CHAPTER VI

COMPLAINT

Section 25 of the proposed act provides that a hearing to determine whether a "right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing a 'complaint' in the department of administrative procedure".

The complaint, as well as the hearing procedure, is not restricted to the rigid formalism of civil actions. Section 25 requires the complaint to be simply "a written statement of charges setting forth in ordinary and concise language the acts or omissions with which respondent is charged". The statutes and rules alleged to have been violated must be specified, but they may not be phrased in the language of the statutes or rules. The thought is to prevent the excessive use of legal verbiage in pleadings, because in many, if not most instances, the respondent will not be represented by counsel. Hence the need for the use of "ordinary and concise language" in order that the respondent may, without legal aid if he so desires, prepare his own defense.

The section also provides that the complaint shall be verified, but this may be done on information and belief. Many acts do not require verification if the complaint is "made by a public officer acting in his official capacity or by an employee of the agency" initiating the proceeding. 1/

The model act merely requires "reasonable notice". 2/ No particulars whatever are set forth.

In the Federal Act, the only requirement is that "persons entitled to notice-- shall be timely informed of the time, place and nature" of the hearing. 3/

Such sketchy, incomplete provisions are not in accord with what is generally understood to be "due notice". If a property right or privilege of a citizen is in jeopardy he should be given a notice sufficiently complete to inform him what rule or statute he is charged with violating, and the alleged manner of the violation, that is, just what he is charged with having done, or has failed to do. Furthermore, we could see no reason why all complaints should not be verified. The provision permitting the verification on information or belief, allows an administrator to so verify a complaint on the basis of a report from a field agent or other employee of the agency.

I wish again to point out as to any criminal case, that in all criminal proceedings, sworn complaints are required.

The verification requirement will prevent the filing of frivolous complaints. It will certainly entitle the complaints to greater respect by all concerned, including hearing officers.

1/ Calif. Govt. Code, Sect. 11503.

2/ Model Act, Sect. 8.

3/ U.S. Code, Title 5, Sect. 1004.

The act necessarily requires a different pleading to initiate a proceeding "to determine whether a right, authority, license or privilege should be granted, issued or renewed". This is because the applicant is not being charged with a violation of a rule or statute. This pleading is termed a "statement of issues", and was borrowed from the California Act. 1/ In this pleading, the statutes and rules with which the applicant must show compliance are set forth, "and, in addition, any particular matters which have come to the attention of the department, and which would authorize a denial of the action sought." Verification is also required for reasons heretofore stated.

The department may include with the above pleadings "any information which it deems appropriate, but must include a "post card or other form entitled "notice of defense". 2/

When this is signed and returned to the department, it is deemed a specific denial of all allegations in the complaint or statement of issues, and entitles the respondent to a hearing on the merits. No verification is required of the form of "notice of defense", as there is nothing thereon to verify. However, a more formal notice of defense is provided by section 28 of the proposed act. This section provides for: (1) a general or specific denial; (2) a general or special demurrer, or (3) new matter by way of defense. If a respondent avails himself of the provisions of this latter section, the pleadings, other than the demurrers, must be verified.

If the respondent does not file what is equivalent to a special demurrer for uncertainty, 3/ he waives all objections to the form of the complaint, as in civil pleadings. 4/ The same rule of waiver does not apply to the provisions of section 28, subsection 3, which is the equivalent of a general demurrer. For, if the allegations of the complaint are not sufficient to constitute an offense, the question may be raised at any stage of the proceedings, even on appeal. This is also the usual rule in civil actions, the question being jurisdictional.

As to service of the initial pleadings, personal service is necessary unless the respondent is required by statute or rule to file, and keep current, his address with the agency initiating the charges. 5/

After service, the respondent is given 15 days in which to file authorized pleadings. 6/

Considerable latitude is permitted in the matter of amendment of pleadings, extensions of time and reopening cases for further evidence. Even in the case of the failure of a respondent to mail in the informal notice of defense within the time permitted, the department may in its discretion, grant a hearing. 7/

1/ Govt. Code, Sect. 11504.
2/ Proposed Act, Sect. 27.
3/ Ibid, Sect. 28, subsect. 2.
4/ Ibid, Sect. 29, subsect. 3.
5/ Proposed Act, Sect. 27, subsect. 3.
6/ Proposed Act, Sections 28 and 29, subsect. 3.
7/ Ibid, Sect. 29, subsect. 3. See also Sects. 29, 30, 37.

CHAPTER VII

EVIDENCE

This portion of the act is naturally of the essence of importance. Section 35, subsection 3 begins: "The hearing shall not be conducted according to the technical rules of evidence". This requirement is in accord with the different standards of proof in administrative hearings from the formal, more rigid standards in civil and criminal court procedure. There must be a less formal, more relaxed, system from that of courts. However, there must be some definite provisions which limit admissable evidence at least to that which is relevant and cogent. Relevant means "that which tends to prove or disprove the matters in issue", 1/ or that which leads rational or impartial minds to a conclusion; 2/ Cogent means "having the power of compelling a conclusion". 3/ If, therefore, these two words are put into a composite definition, it would approximate:

> "That which tends to prove or disprove the matters in issue and possesses the power of compelling a conclusion on the issues."

However, it must be noted that there must be a sensible limit as to what evidence could or should be admitted.

The definition, or test in the proposed act, is "any relevant evidence shall be admitted if it is the sort of evidence on which ordinarily prudent persons are accustomed to rely in the conduct of serious affairs". 4/

Hearsay evidence is admissable for the purpose of supplementing or explaining other evidence, but it shall not be sufficient to support findings of fact unless it would be admissable over objection in civil actions. 5/

The provisions of the proposed act relating to the admissability of evidence are taken largely from the Federal Act, the Model Act, and the California Act. 6/

Until rather recently many lawyers and judges expressed shocked surprise at the practice of admitting evidence in administrative hearings that would be excluded in court trials. Nevertheless some of the outstanding leaders of the bench and law school faculties have for years been severely criticising the long outmoded, archaic rules of evidence.

In an excellent article, Professor Charles McCormick of the Northwestern University Law School, after stating that with notable exceptions, trial judges "have only a discreet bowing acquaintance with the evidence rules", stated at page 508:

1/ Webster's Unabridged Dictionary, p. 1801.
2/ Black's Law Dictionary, 3rd Ed., p. 658.
3/ Words and Phrases, Vol. 7 A, p. 113.
4/ Proposed Act, Sect. 35, Subsect. 3.
5/ Ibid, Sect. 35, Subsect. 3
6/ Calif. Govt. Code, Sect. 11513 (c).

"In actual jury trials the machinery of evidence rules, devised to filter the testimony for the untrained minds of the jurymen, has become too complex for use, except to the limited extent indicated above. In trials without a jury the tendency is to disregard them altogether--. This type of trial, in which the rules of evidence have only the feeblest vitality, is displacing the old common law jury trials more completely than most of us realize--. Ultimately the courts will profit by borrowing some of the fact-finding methods of the administrative commissions." 1/

In a 1938 law review article 2/ a retiring American Bar Association president stated:

"Manifestly these rules, (common law rules of evidence) as such should have no application before permanent administrative tribunals in the absence of a legislative mandate--."

Then commenting on the dearth of such mandates the writer continued:

"The reason for the legislative failure to fasten on its commissions the rules of evidence at common law is obvious; to have done so would have defeated the legislative purposes of dispatch, elasticity and simplicity of procedure."

Commenting on this freedom from common law rules of evidence, the Supreme Court of the United States in a 1938 case, 3/ stated:

"The obvious purposes of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. But this assurance of a desirable flexibility in administrative procedures does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborative hearsay or rumor does not constitute substantial evidence."

See also Morgan & Maguire "Looking Backward and Forward at Evidence" 4/ in which Professor Thayer is quoted:

"1. Nothing is to be received which is not logically probative of some matter requiring to be proved; and (2) that everything which is thus probative should come in, unless a clear ground of policy or law excludes it."

Without prolonging this discussion on evidence unduly, I would like to quote from two great evidence professors. Thayer, writing in 1898, 5/ in commenting on a quotation attributed to Lord Erskine, as to the foundation of the rules of evidence, said:

1/ 24 Amercian Bar Association Journal, p. 507.
2/ 24 Iowa Law Review, p. 467, by Arthur T. Vanderbilt
3/ Consolidated Edison Co. vs. N.L.R.B. 305 U.S. 197 at p. 200, 1938, 59 Sup.Ct. 206, 217.)
4/ 50 Harvard Law Review, 909, 922-923.
5/ Thayer, A Preliminary Treatise on Evidence, (Harvard University).

"I think that it would be juster and more exact to say that our law of evidence is a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible--."

On page 516, of Thayer's Treatise, he states:

"The law of evidence undoubtedly requires that evidence--shall be clearly relevant, and not merely slightly so; it must not barely afford a basis for conjecture, but for real belief; it must not be remotely relevant, but proximately so."

There must be no decision or conclusion based upon evidence barely able to afford a conjecture or surmise that the alleged facts are true or untrue. The evidence must also be cogent; that is, have compelling force leading or impelling the trier of fact to a positive conclusion.

Perhaps the greatest evidence teacher and writer of all time, 1/ in discussing an article written by Sir Henry Maine on the theory of evidence in 1873, said:

"These sagacious observations of Sir Henry Maine may serve to warn us that any attempt to apply strictly the jury trial rules of evidence to an administrative tribunal acting without a jury is an historic anonomaly, predestined to probable futility and failure."

It may need to be called to mind that the use of the phrase "jury trial rules of evidence" means the common law rules of evidence, which was the offspring or foster child, legitimate or otherwise, of common law jury trials. The rules thus evolved after years or centuries of jury trials were mainly rules of exclusion. To use a threadbare phrase, these rules of exclusion have for decades been "honored in the breach thereof more than the observance."

The proposed act does away with virtually all rules of exclusion, leaving only the sensible and proper test of "relevancy". Any evidence is admissable if it is relevant and the "sort of evidence on which ordinarily prudent persons are accustomed to rely in the conduct of serious affairs". It must be competent" and not unduly repetitious. The word "competent" in this connection means no more than appropriate or suitable. This provision will keep the hearing an orderly one and prevent idle rumor or remote observations having no proximate bearing on proving or disproving the allegations of the pleadings. The qualified hearing officers will have no problems whatever in determining if evidence offered is relevant and therefore admissable, or irrelevant and unduly repetitious and therefore inadmissable. The ultimate result, after a hearing free from the usual rhetorical polemics of lawyers over the evidence, will be a decision based on proper evidence having probative force that compels a conclusion.

Affidavits are permitted in lieu of oral evidence, if the evidence therein contained is otherwise admissable, and if 10 or more days' notice prior to the hearing date is given to the opposing parties or counsel; which notice shall include the proposed affidavit and other required evidence, and provided written

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1/ Wigmore, Evidence (3rd) Ed. p. 31 Sect. 46.

objection is not made to the department at least 3 days before the hearing date by opposing parties. 3/

The use of writings in administrative hearings whether affidavits or official reports and documents, admissable under the "due course of business" rule, has long provoked comment, both "pro and con". Certainly in numerous cases, use of such material is desirable for reasons of economy in time and money.

Both Benjamin and the Attorney General's Committee favored an increased use of writings rather than oral testimony. The Attorney General's Committee believed that the increased use of writings would expedite and simplify administrative hearings, and advocated the "substitution, in appropriate situations, of written evidence for oral evidence." 1/

The real objection to substituting written for oral evidence in jury cases, springs from the belief that "juries cannot be expected to read lengthy documents and that writings must be read orally and explained. 2/ A vigorous argument is also made against the increasing use of written instead of oral evidence because cross-examination is precluded, unless the author of the writing or the person furnishing the evidence comprising the writing is required to be in court for the purpose of cross-examination.

Certainly the argument concerning the fear that lengthy documents will not be read, has little or no force when directed toward administrative hearings, particularly conducted under the proposed act, in which an experienced, legally trained hearing officer presides. In such a case, the hearing officer of necessity must read and evaluate all evidence in order to prepare findings.

The lack of an opportunity to cross-examine, however, still is a valid, forceful objection, for as Davis contends:

> "Whenever decision rests on affidavits, written statements, applications, or reports, the orthodox rules of evidence are violated. The adjudicator neither sees or hears the witness give his testimony, and the writing devices abridge or eliminate cross-examination, which to the lawyer has for so long been the essence of a fair hearing. No one should quarrel with the idea that cross-examination is indispensable to a fair hearing on certain types of questions. When two or more witnesses have observed an event and give different versions of what happened, the adjudicator should observe the demeanor of the witnesses, and opposing counsel must test perception, memory, narration, and veracity with cross-examination. But the important fact is that in the administrative process many types of cases lend themselves to exchanges of written materials, so that the crucial problems of interpretation or discretion or policy may be understood on their factual background and solved. One may consistently maintain the customary reverence for the method of cross-examination and at the same time appreciate the advantages for some cases of written presentations."

However, the possibility of cross-examination should always be afforded whenever possible. There is no other court room process which possesses the ability to separate chaff from the grain or the dross from the metal.

1/ Attorney General's Report, p. 69.
2/ Benjamin Report, p.137.
3/ Proposed Act, Sect. 36.

Official notice, the counterpart of judicial notice in civil court trials, may be taken of "any generally accepted technical or scientific matter within the special field of the agency initiating the case", and of any fact which may be judicially noticed by the courts of this state. 1/ However, the act keeps a little tighter rein on this official notice activity than does the Model Act (section 7, subsection 4) or the California Act (California Government Code, Section 11515). For, in those acts such notice may be taken "before or after" the submission of the case.

The Model Act provides that "parties" shall be informed of matters noticed, and the California Act states "parties present at the hearing" shall be so informed; and both acts accord to affected parties an opportunity to "contest" or "refute" the officially noticed matters.

However, it seemed a fairer proposal to require all evidence, even that officially noticed, to be recorded in the record before submission, so that those against whom such officially noticed evidence bears, shall be given a reasonable opportunity to object to such notice being taken or to refute the officially noticed facts or matters by written or oral evidence or presentation of authorities.

The same use of subpenas and subpenas, duces tecum, (i.e. to bring certain specified records and materials), and the same use of depositions are permitted as in civil cases.

A procedure authorized in Nevada courts and many federal jurisdictions, that of a peremptory challenge to a hearing officer by any party, without stating any reason, is permitted. After one such challenge, the parties are permitted to challenge the next or succeeding hearing officers for cause.

This provision may be onerous on rare occasions and work a hardship, but better the hardship than a hearing conducted by a biased or prejudiced hearing officer.

The right to a notice of motion to reopen the case, after submission, has already been discussed.

1/ Proposed Act, Sect. 37

CHAPTER VIII

THE DECISION

This subject is, of course, the most important to all parties involved. The question afforded us no small amount of trouble and mental effort. Probably as much research was spent on the decision and the form and manner of its making as on all other matters in the hearing and review procedure.

We discussed this to some length in the introduction. We do believe a little further discussion will be helpful. It is to be noted that conclusions of law are not required. The necessity of conclusions prior to an administrative decision does not present itself forcefully or at all. It appears that it is sufficient to require findings of fact, and a legal decision based upon those findings. If the findings are not supported by "any competent, material and substantial evidence, in view of the whole record", then the judgment cannot be sustained. In civil procedure, it is true, conclusions of law are based on findings of fact and the judgment based on the conclusions but a judgment is not sustainable if the conclusions of law are made from findings unsupported by competent, substantial evidence. So why require conclusions of law that seem wholly unnecessary in any administrative procedure act? The proposed procedure was, therefore, simplified by omitting the requirement of conclusions of law.

The decision and findings are to be prepared by "the hearing officer who heard the case". 1/ There is provided, however, what our study indicates is a new procedure in connection with the making of the decision. After the findings and decision, if adverse to the respondent, the decision is to be submitted to the agency for "the assessing of the penalty or punitive provisions". 2/

In this connection the proposed act will be amended before its introduction so as to provide, also, that in decisions involving the determination of rates for public utilities or taxes, the findings and decision will be submitted to the public service commission or tax commission for the purpose of fixing the rates according to the decision and findings.

The provision requiring the submission of the decision to the agency initiating the proceeding for the assessment of the penalty, as stated in the introduction, was to enable the agency to completely control established policy. This is particularly necessary in the case of the Nevada Gaming Control Board, a division of the Nevada Tax Commission. All gambling in Nevada is regulated by the gaming control board, with the approval of the tax commission, including the issuance, suspension, revocation and denial of licenses. Gambling in Nevada is a large industry. It contributes substantially to Nevada's General Fund, and the general economy of the state, although in far less an amount than generally believed. The records of administration of the gaming control board will show that this industry has been rigidly and strictly controlled. Any improper activity or ownership has resulted in swift, certain, and severe penalties,

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1/ Proposed Act. Sect. 38

2/ Ibid, Sect.

mostly revocation of licenses. It was our firm belief that this strict supervision should not be interfered with; although all hearings will be conducted by a hearing officer, the gaming control board will continue its strict enforcement by the determination and assessment of the penalty.

By the provisions of Section 39 of the proposed act, the decision if adverse to respondent becomes effective 30 days after the filing thereof with the department of administrative procedure. If it is in respondent's favor, it becomes effective immediately upon its being filed. This was believed proper in order to relieve a respondent from the effect of a summary emergency order at the earliest date, when he prevails in the hearing.

Provision is made, 1/ to prohibit repetitious petitions for reinstatement or reduction of penalties. A person who has a license or privilege revoked or suspended may not petition for reinstatement or a reduction of the penalty until after one year from the effective date of the decision or from the date of the denial of a similar petition. A hearing on such a petition is required.

Again we give to the agency in question the authority to grant or deny such petitions, as we believed it was a further device or method for continuing the agency's control of policy.

1/ Proposed Act, Sect. 42

CHAPTER IX

JUDICIAL REVIEW

This important and final section of the proposed act, introduces or is fraught with more legal problems than all the other sections combined.

The study of judicial decisions, text books and law review articles presented a variety of questions or sub-categories, demanding clear and specific answers. In sequence, these sub-categories are: 1. What shall be the scope of the review? 2. Shall it be in the nature of a trial de novo, rather than a review of the record and consideration of the findings of fact? 3. What court shall have the review jurisdiction? 4. Shall the review be limited by the use of common law writs? 5. Who may petition for review? 6. May the legislature authorize a distinct and exclusive statutory procedure for judicial review?

Consideration was given to the experience and the statutes and constitutional provisions of other states, particularly California.

In California, before and after the passage of the administrative procedure act, there was considerable diversity of judicial opinion as to judicial review of administrative decisions, the manner of obtaining it, and the extent thereof.

For years prior to 1936 the appellate courts apparently saw no objection to the use of the extraordinary common law writ of certiorari, (termed a writ of review) 1/ for the vehicle to bring administrative decisions before the appellate courts for review. Mandate had very limited use, prior to 1940, as a means of reviewing administrative action. For the use of that writ could be had only to require a ministerial officer to perform duties the law required him to perform. 2/ If discretion were vested in an administrative officer, mandate was not available. 3

Equitable aid, through injunctive relief, was not available if there were plain, speedy or adequate remedies available at law. 4/

However, by the use of certiorari, administrative action and decisions had been reviewed for years in California and elsewhere. 5/

The Supreme Court of California in 1936, opened a veritable Pandora's box of criticism, by a decision which ignored precedent, and without mention by name overruled a host of decisions that had been followed for years by the bench and bar of California. 6/

In that case, the Standard Oil Company sought a writ of certiorari to review the validity of an order of respondent Board of Equalization imposing an additional assessment for sales taxes for a given period.

1/ Code of Civil Procedure, Sect. 1067.
2/ Bodinson Mfg. Co., vs. Calif. Employment Comm. 17 Cal. (2nd) 321, 109 Pac. (2nd) 935 (1941).
3/ Bank of Italy vs. Johnson 200 Cal. 1, 251 Pac. 784.
4/ Moore vs. Superior Court 6 Cal. (2nd) 421.
5/ 25 Calif. L.R. at page 704, footnote 73.
6/ Standard Oil Co. vs. Board of Equalization, 6 Cal. (2nd) 557, 59 Pac. (2nd) 119.

Upon oral argument, the court suggested to counsel for petitioner that there was a serious jurisdictional question confronting the court; namely, could certiorari be used to obtain such a review? In answer, the Attorney General, in his brief, disagreed with the court, and agreed that petitioner was correct in its choice of writs.

The court held squarely to the contrary and in an opinion that ignored precedent and reason, held that: (1) Statewide administrative agencies did not possess judicial or quasi-judicial powers; (2) That the writ of certiorari could be used only to review the action of a judicial body, and finally (4) that any attempt by the legislature to grant judicial power to a state administrative agency would be held in conflict with Article VI, Section 1 of the California Constitution.

The court's decision could not be explained on either precedent in California, or elsewhere, or on its own reasoning, and the decision brought down a torrent of criticism. 1/

Three years after this unfortunate decision, the supreme court found a partial way out of their judicial dilemna. 2/ During the pending of the proceedings in the Drummey case, the devastating Standard Oil case, supra, was decided, and the petitioners in the Drummey case changed the method of their attack from a "one shot" attempt to a salvo; and amended their pleadings before the hearing so as to ask relief by way of review (certiorari), prohibition, or mandamus. They won on the latter request.

Thus the court deviated somewhat from the Standard Oil decision it made 3 years earlier. However, the Drummey case brought forth another flood of adverse comment, and rightly so. For having said unanimously, contrary to precedent and use in 1936, that the writ of certiorari could not be used to review an administrative decision, the court had to find a way out for litigants who needed the benefit of judicial review. In the Drummey case they showed an even greater lack of consideration for the traditional use of common law writs, by twisting mandate into what really was the function of a writ of certiorari. This led the very able chief of the California Division of Administrative Procedure to write the very amusing and insitructive Stanford Law Review article cleverly entitled "Certiorarified Mandamus". 3/

Since that decision, mandamus has been the accepted writ for a review of administrative action in California. An interesting sidelight to this confusion was that the court granted and still does grant writs of certiorari to review local rather than state wide administrative agency action. 4/

This exception was made upon the ground that such local agencies were "inferior courts" within the meaning of Article VI, Section 1, of the California Constitution that the separation of powers provision of Article III of that Constitution did not apply to such agencies.

1/ 29 Calif. L.R. p.275 (1941) by Professor Lowell Turrentine, Stanford Law School 29, Calif. L.R. p. 586 (1941) by Sheldon D. Elliott, Professor of Law, Univ. of So. Calif. 15 Cal. State Bar Journal 377, 1940.

2/ Drummey vs. State Bd. of Funeral Directors, 87 Pac. (2nd) 848, 13 Cal. (2nd) 75.

3/ Ralph Kleps 2 Stanford L.R. 285, (1950).

4/ Laisne vs. State Board of Optometry 19 Cal. (2nd) 831, 123 Pac. (2nd) 349 (1942) Nider vs. City Commission of Fresno. 36 Cal. App. (2nd) 14, 97 Pac. (2nd) 293.

A student might be confused by some decisions in California subsequent to those cited; [1] but the Board of Equalization, and some other state wide agencies have some constitutional background and are considered by the courts to have quasi-judicial powers.

Let us for a moment raise our eyes from the horizon of the distant common law days and their writs. Why flounder with specious arguments and distort the historical relics of common law days in order to secure a simple appellate review to curb administrative excesses? Legislatures certainly have the right to provide for a complete statutory right of review of the action of the agencies of their own creation. This review is not only necessary to keep the agencies within their statutory bounds and secure the rights of citizens, but also to obtain judicial information of agency excesses and the need for legislative reform of such agencies of government, to the end that governmental activity will improve rather than deteriorate.

In the proposed act, the judicial review is termed "a statutory right of review of administrative rule making and hearing procedure in order to provide a plain, speedy and adequate judicial review of administrative decisions so as to preclude the necessity of a resort to the use of any of the extraordinary common law writs". [2]

The section then states the purpose of the review as:

> "To the end that that the constitutional and statutory rights of all persons affected by administrative rules and decisions shall be secured and protected, and the legislature kept informed by judicial decisions after such review of any needed change in the provisions of this chapter." (i.e. the entire act.)

For the purpose of emphasizing that the method of review is a statutory review, and not to be confused with the types of review afforded by the common law writs. The section just quoted from ends with the following phrase:

> "Such review shall not be limited, restricted or denied by any reference to the traditional or historical use of any common law writs."

It is our desire to free litigants from the frustrating chore of choosing the proper writ for the purpose of obtaining relief. Why should anyone aggrieved by an administrative decision have to indulge in crystal gazing or psychic divination to choose a proper remedy, or as the petitioners did in the Drummey case (supra) fire a broadside, and ask the court to choose any one of three writs. In this connection, it should be remembered that the rules of common law pleadings were replete with rigid requirements for obtaining any of the writs, and each writ required different pleadings. [3]

Fortunately in Nevada, there are no agencies constitutionally created so as to preclude a uniform judicial review for all administrative agency action, as there are in California and other states. [4]

1/ Morgan vs. State Board of Equalization 89 Cal. App. (2nd) 674.
2/ Proposed Act, Section 45.
3/ High, Extraordinary Legal Remedies, Chapter VII, p. 319 et seq.
4/ Kleps, Certiorarified Mandamus, supra, p. 292 et seq.

It should be remembered that a trial de novo in court is not a form of judicial review, but a new trial in its entirety. 1/

In another California case decided in 1937, the year after the Drummey decision, 2/ Mr. Justice Curtis, who was also the author of the decision in the Laisne case (supra p. 44) made the meaning of a trial de novo crystal clear in the following words:

> "Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. It is in no sense a review of the hearing previously held, but is a complete trial of the contraversy, the same as if no previous hearing had ever been held."

In Professor McGovney's excellent article, 3/ he enumerates three degrees of court review of administrative decisions of issues of fact.

Degree I, is the most commonly known type. In this, the court accepts as final the agency's findings of the facts, if there is substantial evidence in the record to support every essential finding.

Degree II. The court in this type of review is permitted to re-evaluate all the evidence and make its own independent determination of the facts. In this instance, Professor McGovney says: The agency's "function is reduced to that of a mere collector of the evidence".

Degree III. Here the court is no more nor less than a trial court conducting a new trial of the same issued tried by the administrative agency. It is a misnomer to term it a reviewing court. For the court is not even limited to the evidence admitted below, but may admit any new evidence it believes desirable.

In this latter degree, Professor McGovney says:

> "The administrative agency is no longer even an authorative collector of the evidence. What incentive to upright, conscientious, zealous performance of duties by our administrative agencies remains?"

The most shocking fact about the Laisne case is that it was decided not a half century ago, but in 1942, contrary to most all precedent in the English speaking jurisdictions including California. Also it was a 4 to 3 decision. The devastating minority opinion being written by the very able and eminent Chief Justice Gibson and concurred in by Justices Edmonds and Traynor. The minority opinion not only correctly states the law, it is a treatise on the law relating to the judicial review of administrative decisions and constitutional law question incidental thereto.

On page 866 of the Laisne case, 4/ the chief justice in criticizing the majority opinion said:

> "Any rule which requires that a complete judicial retrial be held in each case where administrative action results in the deprivation of a property right is unworkable.--"

1/ McGovney 15, So.Cal. L.R. p.396, citing Collier & Wallis vs. Astor 9,Cal. (2nd) 202, 70 Pac. (2nd) 171.
2/ Collier & Wallis vs. Astor, 9 Calif. (2nd) 202,205. 70 Pac. (2nd) 171,173 (1937)
3/ Op. Cit. pgs. 394,395,396.
4/ 19 Cal. (2nd) 831, 869.

"We cannot treat the judicial review of administrative action as a static procedure requiring an identical judicial investigation in each instance. The degree of finality accorded the findings of administrative agencies created to carry out the legislative purposes is primarily a question of policy for the legislature and issues of such fundamental importance to the administration of government must be determined by reference to the intention of the law-making body."

The chief justice, in closing, urged the disapproval of the several opinions above cited which were contrary to the views expressed in the above minority opinion.

Mr. Dean Acheson, when the United States Attorney General and chairman of his committee on administrative law, stated this warning:

"Any attempt to transfer indiscriminately to the courts the burden of passing independently upon all matters adjudicated by administrative agencies would break down the judicial machinery and deprive the administrative process of all utility."

We submit that with the constant and necessary growth of administrative agencies, and the ever increasing number of administrative hearings, it is imperative that the findings made after administrative adjudications, if supported by substantial evidence, should be binding on the court on a review. 1/ If not, then why continue this very expensive and m aningless farce of administrative hearings, thus requiring two agencies of government where one should suffice?

Clearly the wiser and sensible course is to afford by statute a uniform procedure for judicial review in which the findings of fact, if supported by substantial evidence, will be binding on the court. The reviewing court naturally will not be bound by any errors of law, whether in the erroneous application of law, or the doing of acts which contravene law, or doing things in excess of statutory authority. Courts are the exclusive arbiters of legal questions.

In the much discussed Drummey case it was even suggested that a "statutory method of review" could be provided. 2/

It is important that a simple, certain and uniform procedure of judicial review be made applicable to the administrative decisions of all agencies.

If Mr. Benjamin's suggestion that each agency establish its own judicial review procedure by rule, be followed, the result would be greatly similar to what exists in Michigan. 3/ In the cited bar journal article, Mr. Frank E. Cooper, Chairman of the Michigan State Bar Committee on administrative law (1946-1949) and a visiting professor of law at University of Michigan Law School, referred to judicial review of administrative action in Michigan as an "oldfashioned patchwork quilt":

1/ The Morgan cases, 298 U.S. 468, 304 U.S. 2.
2/ 13 Cal. (2nd) p. 82.
3/ 36 Am. Bar Assn. Journal 595.

"Its varied hues and odd-shaped segments defy precise delineation, except through photographic processes. Similar difficulties attend any attempt to present a summarized description of the method by which decisions of the Michigan agencies are brought before the court for review. The diversities of statutory and common law procedures rival the geometric irregularities of the cloth patches on the quilt."

Mr. Cooper then reveals that:

"Ten methods of appeal are provided with respect to the eight agencies which produce most of the grist for the judicial mill. Examination of the salient features of these ten statutory appeal procedures discloses wide disparities and complete lack of uniformity. There are five alternate requirements as to the court to which the appeal should be taken. Likewise, there are found (among ten statutory appeal procedures) five divergent methods of applying to the reviewing court. Three dissimilar provisions exist as to the record on which the appeal is heard. The problem as to obtaining an interim stay of the administrative order, pending decision on appeal, is treated in four different ways."

Then after enumerating the confusing difficulties caused by this variety of requirements, he states:

"Obviously, adoption of a uniform appellate procedure, such as that set forth in the Model State Act, could accomplish substantial good."

Later in the article he points out that the scope or extent of the review "is not uniform and unvarying".

"In Nebraska there are no less than 63 sections of the statutes relating to the taking of appeals to the district court and 15 sections more, providing for appeals direct to the supreme court. 13 sections deal with judicial review of the orders and actions of the department of insurance alone. There is no uniformity whatever, as to what orders are appealable, the proper court in which to seek relief and persons who may seek review." 1/

It appears, with irresistable force from such a system of review procedure, that it is not wise to have a variety of review procedures with different filing dates and extent of relief available, and that a single uniform procedure should be provided by statute affording the same relief and scope of review in all judicial reviews of agency action.

In the California Judicial Council's report on administrative procedure, 2/ at page 27, this statement was made:

"Without affecting the historic uses of the writ it is suggested that, by the addition of a new section to the statute, the Legislature could prescribe the details of procedure where the writ is used for reviewing the adjudicory decisions of administrative bodies."

1/ Tenth Biennial Rept. December 31, 1944.
2/ Report of the Nebraska Legis. Council, Committee on Pleadings and Appeals, July 1956, pages 49 to 52.

Also in the California Supreme Court case, [1] Mr. Justice Schauer supports the contention herein made for a statutory method of review. His statement is as follows:

> "It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State, as is trenched upon in the Dare case, yet the need for such rules is patent. It seems highly probable that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public."

That is exactly what is provided by the proposed act.

It may interest some lawyers and judges to learn that there are certain decisions in which the findings can be and are upheld even though unsupported by evidence in the record. See, Market Street Ry. Co. vs. R.R.Comm. [2]

Findings are sometimes supported because of presumptions established by law. Professor Davis contends in such a case the findings are supported by "law and not on evidence". [3] He states the finding is sustained because of "what has been developed in previous cases in which the presumption or burden of proof or substantive law has been established, and not upon the evidence in the present record".

The statement by this outstanding legal authority in this field, that "findings often depend on law and not on evidence, overlooks the fact that a rebuttable presumption is not a matter of substantive law, but is evidence. This is so in Nevada [4] and California [5] and most jurisdictions by statute. See Wigmore, 3rd edition Volume IX at 287, et seq, where a North Carolina case is cited, [6] in which the court says:

> "The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption." (Underscoring ours.)

There are many diverse opinions as to what in truth a "presumption" is, with a myriad of judicial opinions that contribute little in the way of objective thinking.

Dean Wigmore in the volume cited (supra) discusses the problem and criticises the use of the word "presumption"; He says that "in strictness, there cannot be such a thing as a "conclusive presumption". With all deference to this great authority, it is submitted that if a state statute or code section states that presumptions "are evidence" and such statute states there are two kinds of presumptions, "rebuttable" and "conclusive", that as to that state, a rebuttable presumption is evidence, and a conclusive presumption is such a quantum of evidence as to constitute "proof".

1/ Sipper vs. Urban, 22 Cal. (2nd) 138, 151, 137 Pac. (2nd) 425, 431 (1943).
2/ 324 U.S. 548, at pages 560-561.
3/ Davis, Administrative Law, p. 540.
4/ N.R.S. 52.010.
5/ Calif.Code of Civil Procedure 1957.
6/ Cogdell vs. R.Co. 132 N.C. 852, 44 S.E. 618.

Calling presumptions rules of law and saying they are not evidence may contribute much to classroom training but very little to the practical problems of administrative judicial review. Two excellent law review articles treating the subject of inferences and presumptions as evidence give "further light" on this important problem. 1/

The generally accepted rule is that rebuttable presumptions are evidence, not a substitute for evidence; that they or their effect are to be weighed by the jury or the trier of the facts. In a jury case they go with all other evidence into the jury room; there to be considered with all other evidence. Such evidence, furnished by inferences and presumptions is not overcome by evidence to the contrary until the jury or the trier of the fact so decides after evaluating the other evidence, in which evaluation the interest and bias of witnesses are considered. To hold differently is to ignore the need for cross examination and the question of the bias, prejudice or credibility of witnesses. 2/ If a jury has the right to weigh and evaluate rebuttable presumptions and decide contrary thereto, how can they be deemed rules of law and not evidence?

If a presumption or an inference is involved, both are evidence, and under the provisions of the proposed act they must be noted in the record, before submission, and references made thereto, in order to afford the opposing parties or counsel an opportunity to rebut such evidence. Thus, will be avoided the possibility of a recurrence of cases on review referred to by Professor Davis, 3/ in which the reviewing court sustains the administrative decision without there being evidence to support the findings.

It should be noted that, although the filing of a petition for review does not stay enforcement of the administrative decision, authority is given to the "department" and the reviewing court to grant a stay upon terms and conditions as "are legal and just". This last phrase in quotes may need clarification. 4/

The Nevada Constitution, 5/ (inter alia) provides:

> "The court shall also have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and habeus corpus and also all writs necessary or proper to the complete exercise of its appellate jurisdiction."

This being a constitutional provision, no legislative act can limit the court's power in the use of the writs. However, the section does not in any provision limit legislative authority to provide for a statutory review procedure supplemental to or differing from the type of review afforded by any of the enumerated common law writs. It is to be noted that the constitutional provisions do not contain any procedure to be used in obtaining any of the writs. That authority is left to the legislature, and the legislature has in detail provided the necessary procedure. 6/

The constitutional section quoted from also provides for appellate jurisdiction "in all cases in equity". Section 6 of Article VI, gives the judicial district courts "original jurisdiction in all cases in equity", but not exclusive jurisdiction. The legislature by NRS 33.010 provides how injunctive relief shall be obtained.

1/ Fegen, 22 Geo. L.J. 750.
2/ McBain, 26 Calif. L.R. 519, 513, (1938).
3/ Supra, p. 49.
4/ Proposed Act, sect. 43, subsect. 4.
5/ Art. VI, Sect. 4.
6/ Nevada Revised Stats. Sects. 34.010 to 34.680.

As to the civil procedure, including appeals, the supreme court, under a grant of legislative authority 1/ has promulgated the Nevada Rules of Civil Procedure.

Implementing the grant of equity jurisdiction, the legislature enacted NRS 33.010 providing for injunctive relief.

These provisions have been set out to emphasize that these constitutional remedies continue to exist in addition to the statutory method of appeal provided in the proposed act. In addition, it is to be noted that a third remedy is available by reason of the Uniform Declaratory Judgment Act, NRS 30.010 to 30.160. Under the provisions of the uniform act, any "interested person" can obtain a judicial declaration as to the legality or effect of an administrative rule or decision.

The Uniform Declaratory Judgment Act, does not specifically include administrative rules. 2/ Reference is made only to "rights, status or other legal relations--afected by a statute--".

However, administrative rules have the force of law, and themselves are the result of statutes. As a result courts have not limited the act to statutes. 3/

In the Minnesota case cited, the court quoted from the act, in granting the relief;

> "--any person whose rights, status or legal relations are affected by a statute may have any question of construction or validity arising under such statute determined and obtain a declaration of his rights--" (underscoring ours).

The petition for review is required to be filed in the judicial district court, in or for the county in which the petitioner resides or has his or its principal place of business, which is the court given the original appellate jurisdiction. 4/ The department is allowed 30 days in which to prepare and certify the record on appeal to the reviewing court. 5/

In section 43, subsection 5, of the proposed act, there is specifically enumerated what shall constitute the record on appeal. Diminution of the record is permitted by a stipulation of "all parties".

A provision in subsection 6 of section 43, permits a motion for leave to introduce additional evidence in the hearing on the review, if a "timely" application is made, and sufficient reasons are shown to explain the failure to present such evidence in the administrative hearing. The court is also authorized to remand the case for the taking of the additional evidence by the hearing officer who originally heard the case. 6/

1/ Nevada Revised Stats. 2.120.
2/ NRS 30.040
3/ Montgomery vs. Minneapolis Fire Dept. Relief Assn. 218 Minn. 27, (1944).
4/ Proposed Act. Sect. 43, Subsect. 2.
5/ Ibid, Subsect. 5.
6/ Proposed Act. Sect. 43, Subsect. 6.

If the additional evidence is presented in a further hearing before the hearing officer, he may modify his findings as the additional evidence may warrant, and must file with the reviewing court a transcript of the additional evidence together with any modification of the findings and decision.

The notice of motion to introduce the newly discovered evidence must be supported by an affidavit "showing with particularity the materialty of the additional evidence and reasons why it was not introduced in the administrative hearing".

Section 43, subsection 7, of the proposed act expressly provides, "the review shall be conducted by the court sitting without a jury, and shall not be a trial de novo but shall be confined to the record--".

The reviewing court may affirm the decision or remand it for such further proceedings as the court may deem necessary or just; or the court may reverse the decision if the substantial rights of the petitioners or any party of record may have been prejudiced because the rule or rules upon which the charges were based, or the hearing officer's decision are found by the court to be:

(a) in violation of constitutional provisions,
(b) in excess of the statutory authority or jurisdiction of the agency adopting the rules on which the charges were based,
(c) made upon unlawful procedure, or a substantial failure to comply with the administrative rule making procedure contained in this chapter,
(d) affected by other errors of law,
(e) unsupported by any competent, material and substantial evidence in view of the entire record,
(f) arbitrary or capricious.

The act also provides that after the decision by the district court on a review, any party aggrieved by the final decision, may appeal to the supreme court "within the time provided by law for appeals in civil cases". 1/ The time for such appeals is set by rule 73 of the Rules of Civil Procedure at 30 days from service of the notice of entry of the judgment.

Lastly, section 47 provides for procedure to punish a witness who refuses to obey a subpena, or refuses to take an oath or affirmation as a witness, or after having been sworn refuses to submit to examination, or is guilty of conduct so near the place of hearing as to obstruct the proceeding.

As usual, whenever a state is considering the passage of a statute dealing with an agency that received federal grants, objection is raised by some employees of the federal agency warning that if the state adopts an act that in any way infringes upon the bureaucratic control of the federal agency administering the grants in aid, the continuance of the federal grants will be endangered.

It is time that the several states demand that Congress put an end to this bureaucratic nonsense. Such puerile mouthings are comparable to the child who takes his marbles and goes home because his companions won't play according to his rules. See supra, page 29 , where the witness before the California Senate Committee, said the Board of Social Welfare believed that social welfare workers

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1/ Proposed Act, Sect. 44

made better hearing officers than attorneys. This same witness a little later in the hearing 1/ disclosed why such a ridiculous contention was made. In this latter statement he revealed that hearing officers were instructed in advance to render a decision in accordance with the board's wishes.

Certainly Congress has a right to direct in statutes the standards by which congressional grants in aid should be disbursed to the classes of people who are the recipients of their bounty. However, must a state surrender its autonomy and sovereignity over a state agency in order to participate in the federal grants in aid? This is the type of federal activity that impels many legislators and others in state government to fight federal grants in aid as if a plague. This is the very thing that has lead many, including educators, to resist federal aid to education, fearing, and perhaps properly, that with the money will also come an attempt to dictate curricula, as well as state and even district administration.

Of necessity we will be required to amend the proposed act to the end that any provisions that may endanger or imperil the grants in aid will be removed. However, requests are being sent air mail to the United States Attorney General's office and to the Senate and house committees and the department of health, education and welfare in order to obtain authoritative information.

The states should not have their authority limited any more than is reasonably necessary to assure a federal direction of disbursements in accordance with the federal appropriation act.

It is to be noted that in California the hearing officers of the division of administrative procedure are used for all hearings concerning the licensing part of the social welfare department, but as to categorical aids they use the department's own hearing officers (social welfare workers), because as the senate committee chairman said:

> "they were able to instruct them to come up with a hearing or a decision and in accordance with the thinking of the Commission." 2/

From this, it is not difficult to understand why some federal appointees object to a comprehensive administrative procedure act that will guarantee a fair and impartial hearing before a trained hearing officer not subject to orders of a board or agency.

1/ California Senate Interim Committee on Admin. Regulations, p. 74 (1957).
2/ Ibid, page 122, (Remarks by Chairman).

CHAPTER X

SUMMARY

In the study resulting in the foregoing report and the act set forth at length in the appendix, we were guided by the following impelling needs:

1. A separate supervisory department in the field of administrative procedure to better enable the several agencies of our state government to carry out their legislative mandates and achieve uniform and effective administration.

2. Uniform procedure for rule making, prescribing in detail the form and manner in which rules are to be prepared for adoption and filed, without which, rules will vary as to form, style and numbering even within a single agency.

3. A provision for notice to all interested parties of the adoption of rules prior to the effective date in order to allow public participation in the rule making process.

4. The printing of all rules in a code and register to be kept up to date, in a central agency and available to the general public, with the assurance that no rule is effective unless printed in the code or register.

5. An opportunity for all interested parties to purchase the code and register, or parts thereof, in order to keep informed of all existing rules.

6. A uniform hearing procedure applying to all governmental agencies, (with a few required exceptions) and spelling out in detail the requirements for and the manner of notice and hearing; and the procedure required to be followed in all such hearings including evidentiary rules virtually doing away with the onerous rules of exclusion followed in civil jury trials.

7. The requirements for legally trained hearing officers to conduct the hearings and make the necessary findings of fact based upon legal evidence, and render decisions that determine the issues presented by the pleadings.

8. A continuance of the control of agency policy, by requiring the decision to be submitted to the agency initiating the proceedings for the assessment of the penalty, and for the fixing of rates whenever a public utility or assessment of a tax rate is involved.

9. A specific, detailed procedure for a judicial review of agency action in which the court is not required to re-evaluate the evidence, but determines the review on the record and the law and sustains the findings if they are supported "by any competent, material and substantial evidence in view of the entire record. The "record" being defined with particularity.

10. An opportunity to appeal to the supreme court, after the district court's decision on the review, in order to accord to all parties their full day in court, and keep the legislature and agencies informed of needed changes.

It is believed these ten impelling needs will be satisfied by the provisions of the proposed act.

If we have achieved success, it is because we were able to progress because of the beacon lights placed along the road we travelled, by those who preceded us in this field, and without which, our labors would have been in vain. We have a deep sense of gratitude to all those whose studies and reports made this study possible.

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