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Administrative Law and Procedure

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Survey of Ohio Law—1959

ADMINISTRATIVE LAW AND PROCEDURE

VALIDITY OF STATUTES AND REGULATIONS

Since much of the effort of administrative officers and agencies is directed toward the enforcement of regulations or rules adopted by them, the validity of these regulations and rules is often challenged. Three cases reported during 1959 involved attacks of this type.

Regulation 53 of the Board of Liquor Control prohibits gambling in and upon the premises of any retail business authorized under permits issued pursuant to the Liquor Control Act.¹ The Board suspended a licensee's liquor permits because of the presence of a "pin-ball machine" on the premises. The licensee challenged the authority of the Board to issue the regulation, and the court of common pleas sustained this challenge.² The court of appeals³ reversed the order of the common pleas court and held that there was authority to issue the regulation under Title 43 of the Ohio Revised Code.⁴

A board of health of a general health district in Hamilton County adopted rules and regulations for the licensing and registration of plumbers. A common pleas court decision reported during 1959, held that the health board's action was valid under its implied powers.⁵ This position was sustained in substance by the court of appeals, but the supreme court held that there being no express power to license, none could be implied.⁶ The court relied upon the celebrated case of *Matz v. J. L. Curtis Cartage Company*,⁷ which held that the General Assembly cannot delegate legislative power to an administrative body. The inference from the majority opinion is that there can be no implied power to license in an administrative agency.

The acts of an administrative officer or tribunal must be predi-

1. OHIO REV. CODE ch. 4301.

2. *Stickley v. Board of Liquor Control*, 126 N.E.2d 603 (Ohio C.P. 1954).

3. *Stickley v. Board of Liquor Control*, 155 N.E.2d 81 (Ohio Ct. App. 1956).

4. Presumably, this regulation was predicated upon the authority set forth in OHIO REV. CODE § 4301.03(C), which states that regulations and orders may be issued providing in detail for the conduct of any retail business authorized under permits issued by the Board, with a view to insuring compliance with the liquor laws and the maintenance of public decency, sobriety, and good order in any place licensed under its permits.

5. *Wetterer v. Hamilton County Bd. of Health*, 160 N.E.2d 728 (Ohio C.P. 1955).

6. *Wetterer v. Hamilton County Bd. of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957). Chief Justice Weygant, in a dissenting opinion, expressed the view that there was implied authority under the pertinent statutes to adopt the rules and regulations in question. *Id.* at 139, 146 N.E.2d at 853 (dissenting opinion).

7. 132 Ohio St. 271, 7 N.E.2d 220 (1937). The majority opinion also relied very heavily upon the analogous case of *Brunner v. Rhodes*, 95 Ohio App. 259, 119 N.E.2d 105 (1953), involving the problem of the implied power of a city board of health.

cated upon a legislative enactment which defines the policy of the law and contains sufficient criteria or standards to guide the administrative branch in the exercise of the discretion vested in it. This is a basic rule which applies to municipal ordinances.⁸ A comprehensive zoning ordinance of the city of Lyndhurst required that certain buildings thereafter erected, remodeled, or altered must have "parking space reasonably adequate for commercial vehicles necessary to carry on the business of the occupants of the premises and for the normal volume of car parking by persons coming to the premises on matters incidental to the uses thereof."⁹ In issuing a writ of mandamus to grant a building permit, the court of appeals held the criteria too vague and insufficient to guide either the building inspector or the Board of Zoning Appeals. The supreme court affirmed this decision and held that the actual decision of the building inspector as to parking spaces for the building in controversy was unlawful because it was based upon the authority of the unconstitutional provision in the zoning ordinance.¹⁰

APPLICABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

Three decisions reported in 1959 determined the applicability of the Administrative Procedure Act¹¹ to three different state agencies. Two of these decisions did not involve an unusual application of the statute. The act itself defines "agency" to include the State Civil Service Commission.¹² In denying a writ of mandamus to the relator, a former state employee seeking restoration to his state agency position, the supreme court held that the act does apply to that agency and that the act provides "a plain and adequate remedy in the ordinary course of the law."¹³

The statutory definition of an agency in the Administrative Procedure Act does not mention the Director of Highways. Thus, the holding in *City of Lakewood v. Thormyer*,¹⁴ that the act does not apply to a proceeding to relocate a highway, is correct. Such a holding emphasizes the limited scope of the act's application to state agency action of a non-licensing nature.

8. *State ex rel. Selected Properties, Inc. v. Gottfried*, 163 Ohio St. 469, 127 N.E.2d 371 (1955).

9. Lyndhurst, Ohio, Ordinance 4122, art. IV, § 1(e), March 6, 1950.

10. *State ex rel. Associated Land & Inv. Corp. v. City of Lyndhurst*, 168 Ohio St. 289, 154 N.E.2d 435 (1958).

11. OHIO REV. CODE ch. 119.

12. OHIO REV. CODE § 119.01(A).

13. *State ex rel. Oliver v. State Civil Serv. Comm'n*, 168 Ohio St. 445, 446, 155 N.E.2d 897, 898 (1959) (per curiam). The supreme court observed that the order was appealable under OHIO REV. CODE § 119.12, but relator failed to prosecute such an appeal.

14. 154 N.E.2d 777 (Ohio C.P. 1958), *aff'd*, 157 N.E.2d 431 (Ohio Ct. App. 1959). The court of appeals relied upon OHIO REV. CODE § 5521.01 and the reasons of the trial court generally. See also discussion in *Constitutional Law* section, p. 360 *infra*.

The third decision,¹⁵ while sound, is not so obvious and serves to emphasize the all-inclusive application of the definition of an "agency" whenever any licensing function is involved. The definition of an "agency"¹⁶ excludes the Superintendent of the Division of Building and Loan Associations in his action in the rehabilitation or liquidation of the business and property of building and loan associations. The refusal of the Superintendent to certify articles of incorporation of a proposed savings association to the Secretary of State was held to be the refusal to issue a license within the meaning of the Ohio Administrative Procedure Act,¹⁷ and the act was held to govern this aspect of the officer's official conduct.¹⁸

JUDICIAL REVIEW

Special Statutory Review of Local Government Agencies

In 1957, the legislature enacted a statute which provides a right of appeal to the courts from the final order, adjudication, or decision of every administrative agency within any political subdivision of the state.¹⁹ This appeal is authorized in addition to any other specific remedy of appeal provided by law. In *State ex rel. 12501 Superior Corporation v. City of East Cleveland*,²⁰ the court held that the existence of this new remedy results in the elimination of other methods of judicial review which depend upon the lack of a clear remedy at law, e.g., mandamus.

Review Under the Ohio Administrative Procedure Act

Appeals by the Agency

As originally enacted, the Administrative Procedure Act was silent on the matter of agency appeals, and the Ohio Supreme Court held that there was no authority under the Ohio Constitution or the

15. Metropolitan Sav. Ass'n v. Burdsall, 154 N.E.2d 754 (Ohio Ct. App. 1958).

16. OHIO REV. CODE § 119.01(A).

17. OHIO REV. CODE § 119.01(B) defines "license" to include any license, permit, certificate, commission, or charter issued by any agency. Thus, the issuance, denial, suspension, revocation, or cancellation of any license as described in paragraph (B) is the exercise of a licensing function which brings any state agency within the purview of the Administrative Procedure Act. See 1945 OPS. ATT'Y GEN. NO. 523 at 675 (Ohio).

18. See a further discussion of this case under the heading of "Agency Appeals," *infra*.

19. OHIO REV. CODE § 2506.01 (Supp. 1959). Chapter 2506 consists of four sections which together provide a complete procedure for an initial judicial review at the trial court level, with normal appellate review of the final order, judgment, or determination of the trial court.

20. 158 N.E.2d 565 (Ohio Ct. App. 1959). The court of appeals refused to grant a writ of mandamus on four grounds, one of which was the availability of an adequate remedy at law by virtue of the Administrative Appeals Act. The court relied upon the analogous case of *State ex rel. Oliver v. State Civil Serv. Comm'n*, 168 Ohio St. 445, 155 N.E.2d 897 (1959), which held that the provision for judicial review set out in OHIO REV. CODE § 119.12 furnished an adequate remedy at law, precluding the use of the writ of mandamus.

statute for an agency to appeal a decision.²¹ This decision was consistent with a previous holding that a local administrative body (township board of zoning appeals), having no statutory standing to appeal, could not appeal from a court decision reversing its revocation of a building permit.²² The Administrative Procedure Act was amended in 1953 to authorize an administrative agency to appeal from a judgment of the court of common pleas rendered on an appeal from the agency's decision.²³ After this amendment, the statute stated that "such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction or interpretation of statutes and rules and regulations of the agency"²⁴

The Ohio Supreme Court has interpreted this language as a restriction on the agency's right of appeal,²⁵ and it may appeal only upon questions of law relating to one of these enumerated matters. The Superintendent of the Division of Building and Loan Associations discovered that this limited right of appeal prevented him from appealing a common pleas court decision reversing his order as being arbitrary, capricious, and unlawful because not supported by reliable, probative, and substantial evidence.²⁶ It is possible that a common pleas court ruling which recites that an agency's decision is reversed because not supported by reliable, probative, and substantial evidence, and is not "in accordance with law," is appealable by the agency. The Board of Liquor Control was permitted to appeal from such a ruling when an examination of the court's opinion indicated that its action was based in part upon a construction of two sections of the Ohio Revised Code.²⁷

Venue for Appeals to Common Pleas Court

The Ohio Administrative Procedure Act sets forth the venue for judicial review of all agency action except for appeals from the Department of Taxation. Orders relative to licensing may be appealed

21. *Corn v. Board of Liquor Control*, 160 Ohio St. 9, 113 N.E.2d 360 (1953).

22. *DiCillo & Sons, Inc. v. Chester Zoning Bd. of Appeals*, 158 Ohio St. 302, 109 N.E.2d 8 (1952).

23. 125 Ohio Laws 488 (1953).

24. OHIO REV. CODE § 119.12.

25. *Katz v. Department of Liquor Control*, 166 Ohio St. 229, 141 N.E.2d 294 (1957).

26. *Metropolitan Sav. Ass'n v. Burdsall*, 154 N.E.2d 754 (Ohio Ct. App. 1958). The appellate court may also review the correctness of the judgment of the court of common pleas upon its finding that the agency's order is not supported by any reliable, probative, and substantial evidence in the entire record, whenever the agency appeals on the statutory grounds contained in OHIO REV. CODE § 119.12.

27. *Schott v. Board of Liquor Control*, 155 N.E.2d 466 (Ohio Ct. App. 1958). Fortunately, the trial court had written an opinion in this case. In the absence of an opinion, presumably the existence or non-existence of a basis for appeal by the agency would be determined by the court of appeals on a motion to dismiss by an examination of the record. In fact, the court of appeals in the present case isolated the "question of law" discussed in the trial court's opinion and determined that it involved a construction of OHIO REV. CODE §§ 4303.13, .14.

to the court of the county in which the place of business is located or the county in which the licensee is a resident. Licensing orders of the Board of Liquor Control are appealable to the court in either the county of residence, the county in which the business is located, or the Franklin County Court of Common Pleas. Licensing appeals of non-residents who have no place of business in Ohio, non-licensing appeals from the Board of Liquor Control, and appeals from all other kinds of orders (other than licensing) go exclusively to the Court of Common Pleas of Franklin County.²⁸

A Cuyahoga County resident had applied for the restoration of his limited medical license, previously revoked by the Ohio State Medical Board. This application was denied, and the applicant appealed to the Common Pleas Court of Cuyahoga County, where his appeal was dismissed for want of jurisdiction. The dismissal was apparently based upon the theory that the provision for appeal to the common pleas court of the county of his residence applies only to a licensee, and not to a person who has been denied a license. The Ohio Supreme Court held that Cuyahoga County was the proper venue.²⁹ Its opinion points out that the Ohio Revised Code contemplates an appeal from four specific types of adjudications, two of which are concerned with persons who have never been licensed: (1) those denied admission to an examination, and (2) those whose applications for an initial license have been refused. The court did not believe that the legislature intended to confine the right to appeal to the "home" court to those who had been licensed previously. Accordingly, a person adversely affected by any one of the four specific adjudications may appeal to his "home" common pleas court.

Nature of the Hearing on Judicial Review

The Administrative Procedure Act declares that in order to affirm an administrative order, the common pleas court must find that upon all the evidence before the agency and whatever additional evidence may be received by the court, the order is supported by reliable, probative, and substantial evidence and is in accordance with law.³⁰

In Harlem Social Club, Incorporated v. Board of Liquor Con-

28. OHIO REV. CODE § 119.12 (Supp. 1959).

29. *Welsh v. Ohio State Medical Bd.*, 168 Ohio St. 520, 156 N.E.2d 740 (1959) (per curiam). Apparently the principal argument of the Medical Board in support of the dismissal of the appeal was that the appellant was not a "licensee" and, therefore, must appeal to the Franklin County court. The relief sought by the appellant was not very clear, but it had to be either for the issuance of a license or for the renewal of a previous one. Because of this vagueness, the precise limits of this decision as a precedent cannot be determined. However, the interpretation of the statute adopted by the court permits the use of this favorable venue provision by any person aggrieved by any one of the four specified types of administrative adjudication.

30. OHIO REV. CODE § 119.12.

trol,³¹ an order of the Board of Liquor Control was based upon a charge which alleged a violation of the Liquor Control Act³² and the Board's regulations. At the hearing, all of the evidence was directed to a violation of a regulation, and the Board's finding was that the allegations were well taken and supported by evidence. On appeal in the common pleas court, the hearing was confined to that part of the charge dealing with a violation of the regulation. The court held that the order was not in accordance with law, and the Board appealed. The court of appeals affirmed the judgment of the common pleas court for want of evidence insofar as the Board's finding was predicated on a violation of the regulation, and sent the case back to the common pleas court to determine whether that part of the order charging and finding a violation of the statute was supported by the necessary evidence required by the Administrative Procedure Act.³³

Does an appellant from an agency order, because of his failure to raise any objection at the administrative hearing, waive his right to object to matters of evidence supporting the order on his appeal to the court of common pleas? *Stickley v. Board of Liquor Control*³⁴ held that since the appeal to the court is on fact and law, the court hearing is a proceeding de novo for the purposes of this issue and the appellant is free to raise every question of fact and law anew.³⁵

This decision seems sound. While the supreme court has indicated that the hearing is not "de novo" for the purpose of making an entirely new record, it has said that the reviewing court must read and consider all the evidence offered by both sides and must appraise all the evidence as to credibility of the witnesses, the probative character of the evidence, and its weight.³⁶ In this process, counsel should have the opportunity of pointing out infirmities in the record made before the agency, even though no objection was raised at the administrative hearing.

31. 107 Ohio App. 95, 156 N.E.2d 863 (1958).

32. OHIO REV. CODE ch. 4301.

33. One of the objections to the appeal was that the order was not one appealable by the agency, but the court of appeals stated that the record disclosed that matters had been considered which shaped the judgment and supported the right of the Board to appeal. Apparently, the terms used in the charge referred to the statutory phase of the violation rather than to the regulatory one. However, the hearing proceeded on the regulatory phase, but upon evidence relating to the statutory phase (see syllabus by the court).

34. 155 N.E.2d 81 (Ohio Ct. App. 1956) (per curiam), *reversing* 126 N.E.2d 603 (Ohio C.P. 1954).

35. The court of appeals cited *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 131 N.E.2d 390 (1955), for authority in support of the last sentence in its opinion: "The appeal to the Common Pleas Court was on law and fact and therefore, the trial proceeded de novo." *Stickley v. Board of Liquor Control*, 155 N.E.2d 81, 82 (Ohio Ct. App. 1956). This may be making too much of the *Andrews* case as a precedent because the opinion of Judge Stewart denied that the 1951 amendment of OHIO REV. CODE § 119.12 provided for a trial de novo, but indicated that it provided for something beyond a mere review of law as was previously held in *Farrand v. State Medical Bd.*, 151 Ohio St. 222, 85 N.E.2d 113 (1949).

36. *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 131 N.E.2d 390 (1955).

Rehearings

A motion for a rehearing before the common pleas court is directed to the sound discretion of that court. A court of appeals held that it was not an abuse of discretion to deny a motion for a rehearing to a licensee whose permit had been revoked by the Board of Liquor Control, in the instance of a request to submit "newly discovered evidence" which was known to the licensee subsequent to the Board's order, but eight months prior to the hearing of the appeal in the common pleas court.³⁷

Review of Factual Determinations

The Administrative Procedure Act states that on appeal, the court may affirm the order of the agency complained of, if it finds, upon consideration of the entire record and such additional evidence as it has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law.³⁸ Whether the issue is presented in review proceedings either in the common pleas court or in the court of appeals, the overwhelming majority of decisions result in judgments sustaining the action of the administrative agency.³⁹ It is difficult to find a case in which the common pleas court has been reversed as a matter of law for its erroneous determination that an agency's order is supported by the proper degree of proof.⁴⁰

Power to Modify the Terms of the Agency's Order

A court of appeals has stated that it is only when the reviewing court does not find that the order is supported by "reliable, probative, and substantial evidence" that the court has the power to consider vacation, reversal, or modification of the order appealed from.⁴¹

37. DiNardo v. Board of Liquor Control, 158 N.E.2d 899 (Ohio Ct. App. 1958).

38. OHIO REV. CODE § 119.12.

39. All of the reported cases under the Administrative Procedure Act covered by this Survey were in review of the actions of the Board of Liquor Control. Since judicial review of this agency is exclusively in the courts of Franklin County, all of the cases reported are from its courts. In the court of common pleas: Harger v. Board of Liquor Control, 157 N.E.2d 463 (Ohio C.P. 1957); Kempe v. Board of Liquor Control, 156 N.E.2d 344 (Ohio C.P. 1957); Klingbeil v. Board of Liquor Control, 155 N.E.2d 525 (Ohio C.P. 1957); B.P.O. of Elks, Cincinnati Lodge No. 5 v. Board of Liquor Control, 155 N.E.2d 523 (Ohio C.P. 1957); Salvatore v. Board of Liquor Control, 156 N.E.2d 175 (Ohio C.P. 1955). In the Court of Appeals for Franklin County, in affirmation of the common pleas court: Neal v. Board of Liquor Control, 161 N.E.2d 513 (Ohio Ct. App. 1959); City Prods. Corp. v. Board of Liquor Control, 156 N.E.2d 347 (Ohio Ct. App. 1958); Cattaruzza v. Board of Liquor Control, 156 N.E.2d 167 (Ohio Ct. App. 1958); Musical Bar, Inc. v. Board of Liquor Control, 107 Ohio App. 104, 155 N.E.2d 509 (1958); Harger v. Board of Liquor Control, 157 N.E.2d 465 (Ohio Ct. App. 1957); Kempe v. Board of Liquor Control, 156 N.E.2d 344 (Ohio Ct. App. 1957); Klingbeil v. Board of Liquor Control, 155 N.E.2d 527 (Ohio Ct. App. 1957).

40. Longona v. Board of Liquor Control, 154 N.E.2d 453 (Ohio Ct. App. 1958).

41. Board of Liquor Control v. Buckeye Lake Hotel Co., 159 N.E.2d 632 (Ohio Ct. App. 1958). The judgment of the court of appeals was that the order of the common pleas court be reversed and that the order of the Board be affirmed.

Thus, when it does find that there is adequate evidentiary support, it has no power to change the order from a revocation to a suspension. It must affirm the order.⁴² Severity of a board's action does not alone justify a modification of the order.

Appeals on Questions of Law

If an order is contrary to law, the reviewing court, under the statute,⁴³ may reverse, vacate, or modify the order or make such other ruling as is in accordance with law. Thus, it can and should order the issuance of a permit when the board has denied a permit to a person who did not own a business at the time of application, but who was the owner at the time of the hearing on the application.⁴⁴

If the order of the agency is supported by adequate proof and is in accordance with law, it will be affirmed. Thus, a finding of the Board of Liquor Control that it had no jurisdiction to order the Department of Liquor Control to make definite and certain its notice of rejection of an application for renewal of a permit was proper, and was affirmed.⁴⁵

Review Under Individual Agency Statutes

During 1959, the matter of "ripeness" for judicial review continued to come before the courts under the judicial review provisions of the amended Workmen's Compensation Act.⁴⁶ Two prior common pleas court decisions had held that an appellant was not required to obtain a decision by the Industrial Commission before appealing the decision of a board of review.⁴⁷ Another common pleas decision reported during 1959 reached a different result in an analogous situation.⁴⁸ It held that a ruling of the Administrator of the Bureau of Workmen's Compensation disallowing a claim was not appealable as a decision of the Industrial Commission. The court's opinion indicates that a fair construction of the judicial review section of the code⁴⁹ does not permit the reading of the word "Administrator" as

42. *Henry's Cafe, Inc. v. Board of Liquor Control*, 158 N.E.2d 543 (Ohio Ct. App. 1959).

43. OHIO REV. CODE § 119.12.

44. *Schott v. Board of Liquor Control*, 157 N.E.2d 752 (Ohio Ct. App. 1958). This decision affirmed the judgment of the common pleas court ordering the issuance of the permit.

45. *Joseph v. Board of Liquor Control*, 161 N.E.2d 543 (Ohio Ct. App. 1959).

46. OHIO REV. CODE § 4123.519 (Supp. 1959). For a decision reported in 1959 concerning applications for rehearing before the Industrial Commission under the old act (Ohio Revised Code § 4123.51, repealed by 126 Ohio Laws 1015 (1955)), see *State ex rel. Goins v. Industrial Comm'n*, 106 Ohio App. 544, 156 N.E.2d 155 (1958).

47. *Harrison v. Scanlon*, 147 N.E.2d 135 (Ohio C.P. 1958); *Wine v. Summer & Co.*, 154 N.E.2d 674 (Ohio C.P. 1956).

48. *Moore v. General Motors Corp.*, 154 N.E.2d 468 (Ohio C.P. 1957).

49. OHIO REV. CODE § 4123.519 (Supp. 1959). The opinion of Judge Leach utilizes the canon of *noscitur a sociis* as an aid in reaching the conclusion that the word "commission" as used in this section does not refer to the administrator.

the equivalent of the "commission." This common pleas court decision was affirmed in a court of appeals decision reported in 1958.⁵⁰ The following quotation from that court's opinion appeared to settle the matter of ripeness for judicial review of the decisions of both the Administrator and a regional board of review under the terms of the existing law:

The only authorization for an appeal to the Court of Common Pleas is found in Section 4123.519 of the Revised Code which permits an appeal from a decision of the Industrial Commission or from a Regional Board under certain conditions.⁵¹

The 1959 session of the Ohio legislature appears to have clarified this matter of ripeness by the enactment of an amendment to the judicial review section.⁵² In addition to the previously enumerated provisions for judicial review, the following language has been added: ". . . provided, however, that the claimant may take an appeal from a decision of the administrator on application for reconsideration or from a decision of a regional board."⁵³

Thus, under the foregoing conditions, it is now unnecessary to appeal to the Industrial Commission as a condition precedent to judicial review in the common pleas court.

Until October 16, 1959, it was necessary to file a notice of intention to appeal to the court of common pleas and to request a rehearing by the Board of Unemployment Compensation in order to lay a jurisdictional basis for a subsequent appeal from the decision of the Board on rehearing to the court of common pleas.⁵⁴ An appeal taken from the original decision of the Board, by-passing the rehearing step, was properly dismissed for want of jurisdiction.⁵⁵ An amendment, effective October 16, 1959,⁵⁶ eliminated the need for the request for a rehearing. The much simpler statutory provision now authorizes an appeal to the court of common pleas within thirty days after notice of the decision of the Board has been mailed to the parties.⁵⁷

The decision in *Schlagheck v. Winterfeld*⁵⁸ determined the scope of statutory judicial review of an amendment of a township zoning

50. *Moore v. General Motors Corp.*, 154 N.E.2d 98 (Ohio Ct. App. 1957).

51. *Ibid.* At the time of this decision, Ohio Revised Code § 4123.519 permitted an appeal "from a decision of the regional board from which the commission has refused to permit an appeal to the commission." 127 Ohio Laws 900 (1957).

52. This amendment (128 Ohio Laws 470 (1959)) of OHIO REV. CODE § 4123.519 (Supp. 1959) applies to all decisions of the administrator or of a regional board of review on its effective date (November 2, 1959), to all claims filed after the effective date, and to any action pending in a court on the effective date of the act.

53. OHIO REV. CODE § 4123.519 (Supp. 1959).

54. 127 Ohio Laws 900 (1957).

55. *Dilatash v. Board of Review*, 107 Ohio App. 551, 160 N.E.2d 309 (1959).

56. 128 Ohio Laws 1130 (1959).

57. OHIO REV. CODE § 4141.28 (Supp. 1959).

58. 108 Ohio App. 299, 161 N.E.2d 498 (1958).

ordinance adopted pursuant to the general township zoning statutes.⁵⁹ The court's opinion states that a board of township trustees exercises a legislative function in adopting amendments and that the function of the reviewing court is limited to the following matters: determination as to (1) whether the proceedings are in compliance with the statutory requirements; (2) whether the ordinance is unreasonable or unlawful; and (3) whether the legislative action taken has a reasonable relationship to the exercise of the police power delegated by statute to the board of township trustees.

Review Through an Action in Mandamus

The writ of mandamus is not a proper method of judicial review whenever there is a plain and adequate remedy at law or through equitable relief.⁶⁰ Other important limitations on the use of the writ have been indicated elsewhere.⁶¹ Despite these prohibitions, mandamus continues to be used extensively. Perhaps attorneys resort to this procedure because they can avoid the delays incident to congested dockets in the courts of common pleas. At least every reported case of mandamus concerning administrative action was an original proceeding either in the court of appeals or the supreme court.

Out of ten reported cases of mandamus, only four were successful. In one of these cases, a retired policeman established a "clear legal right" to a retirement pension, and the supreme court ordered the board of trustees to grant the pension.⁶² In *State ex rel. Killeen Realty Company v. City of East Cleveland*,⁶³ the supreme court affirmed a court of appeals order granting a variance under the city zoning ordinances, and held that a denial of a building permit was an abuse of discretion because of the unconstitutionality of the ordinance under which the denial of variance was issued. In another successful proceeding,⁶⁴ the relator had been denied a building permit on the

59. OHIO REV. CODE § 519.12 (Supp. 1959). This section was amended in 1957, eliminating the provision for an appeal. 127 Ohio Laws 363, 371 (1957). However, the court held that this specific appeal was governed by the provisions of Ohio Revised Code § 519.12 prior to its amendment, both as to manner and scope of the appeal. The court's opinion analogizes the scope of review to that existing under OHIO REV. CODE § 119.11 of the Administrative Procedure Act, which applies to state administrative rule making.

The court rejected an argument that this appeal was governed by OHIO REV. CODE § 2506.01 (Supp. 1959). This raises the question whether a "legislative act," such as the adoption of a zoning ordinance or of an amendment to such legislation, is a "final order, adjudication, or decision" within the meaning of § 2506.01.

60. OHIO REV. CODE § 2731.05.

61. See the discussion in the opinion in *Glass Co. v. Industrial Comm'n*, 162 Ohio St. 302, 123 N.E.2d 23 (1954), and the comment in Culp, *Administrative Law & Procedure, Survey of Ohio Law — 1955*, 7 WEST. RES. L. REV. 221, 224 (1956).

62. *State ex rel. Bailey v. Board of Trustees of Toledo Police R. & P.F.*, 169 Ohio St. 1, 157 N.E.2d 317 (1959). See discussion in *Municipal Corporations* section, p. 406 *infra*.

63. 169 Ohio St. 375, 160 N.E.2d 1 (1959). See also discussion in *Constitutional Law* section, p. 359 *infra*.

64. *State ex rel. Dille Labs. Corp. v. Woditsch*, 106 Ohio App. 541, 156 N.E.2d 164 (1958).

ground that the city would probably acquire the premises under eminent domain as a part of a highway relocation project. The writ was granted because the refusal was an unauthorized interference with the relator's rights of ownership. In the fourth case,⁶⁵ the court of appeals issued a mandamus to the Industrial Commission to accept jurisdiction of a claim for benefits under the silicosis and occupational disease provisions of the Workmen's Compensation Act.⁶⁶ It was apparent on the face of the relator's application that the one-year statute of limitations for filing claims for silicosis had run before the application was filed. However, there was uncontradicted evidence in the record that the claim was filed within six months of diagnosis. This established a clear legal right to have the claim considered.

There is no common basis which will explain the failure of the relators to succeed in six reported decisions wherein the writ of mandamus was denied or dismissed. Perhaps this lack of success can best be characterized as a failure by the relators to sustain the burden of proving that clear legal right which must be established to secure the issuance of the writ. In *State ex rel. Oliver v. State Civil Service Commission*,⁶⁷ the supreme court refused to issue the writ in order to restore the relator to a state job because there was a plain and adequate remedy under the Ohio Administrative Procedure Act. In another case,⁶⁸ a police lieutenant was unsuccessful in his effort to secure admittance to a promotional civil service examination for the position of captain in a city police department since he did not qualify under the terms of the applicable statute.⁶⁹ In *State ex rel. Ronald Incorporated v. City of Willoughby*,⁷⁰ the relator failed to secure his building permit because he had neglected to exhaust his administrative remedy of appeal. He had omitted to seek review from the board of zoning appeals of a decision by the city building inspector denying him a permit. In *State ex rel. Farley v. Board of Education*,⁷¹ the relator-school teacher was unable to obtain a continuing contract of employment because he did not meet the statutory prerequisites for continuing service status under the Teacher's Tenure Act.⁷² In another court of appeals case,⁷³ the relator sought a writ of mandamus to compel the issuance by the city of East Cleveland of an unrestricted

65. *State ex rel. Maxwell v. Industrial Comm'n*, 160 N.E.2d 346 (Ohio Ct. App. 1959). See also discussion in *Workmen's Compensation* section, p. 456 *infra*.

66. OHIO REV. CODE § 4123.68.

67. 168 Ohio St. 445, 155 N.E.2d 897 (1959).

68. *State ex rel. Boyes v. Civil Serv. Comm'n*, 169 Ohio St. 63, 157 N.E.2d 349 (1959).

69. OHIO REV. CODE § 143.34.

70. 170 Ohio St. 39, 161 N.E.2d 890 (1959).

71. 169 Ohio St. 388, 159 N.E.2d 747 (1959), *affirming* 156 N.E.2d 924 (Ohio Ct. App. 1958), relator having brought his original action in the court of appeals.

72. OHIO REV. CODE ch. 3319.

73. *State ex rel. 12501 Superior Corp. v. City of East Cleveland*, 158 N.E.2d 565 (Ohio Ct. App. 1959). See also discussion in *Constitutional Law* section, p. 359 *infra*.

permit to operate an automatic laundry. Relator's action was unsuccessful for two reasons: (1) he failed to show that the administrative modification was either arbitrary and unreasonable, or contrary to law, and (2) there was an adequate remedy at law under the Administrative Appeals Act.⁷⁴ Finally, in *State ex rel. Brummett v. Board of Health*,⁷⁵ the relator failed to secure a renewal of his license to operate a sanitary land fill, since he was unable to show that he had complied with the Board's rules or that the failure to renew was arbitrary.

Review Through an Action of Declaratory Judgment

Plaintiff, a vendor of newspapers, confections, and other items, had operated a stand in the State Office Building in Columbus since 1933. In 1955, the Director of Public Works gave notice that plaintiff's lease would not be renewed, sent her a request to vacate, and indicated his intention to give the canteen privileges to the Blind Commission of Ohio. The director's order was based upon a construction of a 1941 statute.⁷⁶ Plaintiff then filed an action for a declaratory judgment of her right to continue at the stand as long as she complied with the reasonable regulations of the state and paid the required rent. The court of common pleas rendered a judgment permanently enjoining the director from removing plaintiff or interfering with her right to operate a concession stand in the State Office Building.⁷⁷ In affirming the judgment,⁷⁸ a majority of the court of appeals determined that under the statute, plaintiff had a right to remain, a right which the legislature alone could terminate.

The opportunities here presented for judicial review of administrative orders at any level of the administrative hierarchy should not be overlooked. The Declaratory Judgment Act is very broad: "Courts of record may declare rights, status, and other legal relations whether or not further relief is or could be claimed . . ." ⁷⁹ The supreme court has recognized that administrative action at the state level can be reviewed under this statute and that such an action is not a suit against the state when the purpose of the action is to declare the legal rights of the plaintiff.⁸⁰

74. OHIO REV. CODE ch. 2506 (Supp. 1959).

75. 109 Ohio App. 57, 160 N.E.2d 289 (1959).

76. OHIO REV. CODE § 5109.11.

77. *Drugan v. Flaler*, 139 N.E.2d 704 (Ohio C.P. 1956).

78. *Drugan v. Flaler*, 161 N.E.2d 786 (Ohio Ct. App. 1958). Judge Fess, in his dissenting opinion, expressed the view that the only matter involved was that of an expired lease. He would have granted plaintiff relief in part by holding that under the terms of the statute, the director was not bound to refuse to renew her lease. Thus, the parties would be left to negotiate a renewal of the lease. *Id.* at 789 (dissenting opinion).

79. OHIO REV. CODE § 2721.02.

80. *American Life & Acc. Ins. Co. v. Jones*, 152 Ohio St. 287, 89 N.E.2d 301 (1949). Judge Taft was the lone dissenter. He argued that there was an equally adequate administra-

APPELLATE PRACTICE RULINGS INVOLVING
JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES

In *Buckeye Lake Hotel Company v. Board of Liquor Control*,⁸¹ the Board had appealed, but had not yet filed an assignment of errors. When a motion to dismiss the appeal was made, the time for filing such assignment had not expired. The motion was overruled as premature since there was still time to file the assignment of errors, and, thus, the court had no way of knowing whether the Board would show a statutory basis for its appeal. In another court of appeals case,⁸² a mistake in the transcription of evidence had occurred, which error the appellant had attempted to correct by the attachment of an affidavit to the brief and assignment of errors. The court granted a motion to strike the brief, but indicated that a proper application could be filed authorizing amendment at bar by interlineation in accordance with the statute.⁸³ Another decision permitted an appellant to amend his brief to include an assignment of errors, which had been inadvertently omitted.⁸⁴ The Board of Liquor Control in another case moved to dismiss an appeal, since the brief filed did not anywhere include the phraseology "assignment of errors." However, the brief did contain a part labeled "questions of law presented." The motion was overruled, and the court held that a label is unnecessary so long as the assignments of error are clearly set forth.⁸⁵

A court of appeals case⁸⁶ serves to emphasize the importance of following a rule of general appellate practice in prosecuting an appeal from the action of an administrative agency. Unless the transcript of proceedings in the common pleas court is signed or allowed by the trial judge, the transcript is not a "bill of exceptions," and the court of appeals cannot pass upon the trial judge's factual conclusions because of the incompleteness of the record.

The Ohio Revised Code does not provide for appeal on questions of law and fact in the review of a decision of the Board of Tax Appeals.⁸⁷ When an appellant from a decision of the Board designates his appeal as being on questions of law and fact, the appellate court

tive remedy afforded by statute, and that an action for a declaratory judgment cannot be maintained when the plaintiff has another equally serviceable and speedy statutory remedy available at the time. *Id.* at 299, 89 N.E.2d at 307 (dissenting opinion).

81. 154 N.E.2d 646 (Ohio Ct. App. 1958).

82. *Smith v. Board of Liquor Control*, 160 N.E.2d 350 (Ohio Ct. App. 1959).

83. OHIO REV. CODE § 2321.14.

84. *Karun v. State*, 159 N.E.2d 257 (Ohio Ct. App. 1958).

85. *Neale v. Board of Liquor Control*, 160 N.E.2d 352 (Ohio Ct. App. 1958).

86. *Cafe Tia Juana, Inc. v. Board of Liquor Control*, 160 N.E.2d 663 (Ohio Ct. App. 1956).

87. See OHIO REV. CODE § 2501.02, which states the ten statutory grounds for such an appeal.

will treat a motion to dismiss as a motion to reduce the appeal to an appeal on questions of law only.⁸⁸

A notice of appeal to the court of appeals from the common pleas court should be addressed to the journal entry. In a case in which the notice erroneously referred to matters discussed in the trial court's opinion, the court of appeals refused to dismiss the appeal on the motion of the Board of Liquor Control, and permitted the appellant to amend the notice to correct the error.⁸⁹

*Corwin v. Board of Liquor Control*⁹⁰ presented an interesting commentary on the venue provisions⁹¹ which localized judicial review of the Board of Liquor Control in the Court of Common Pleas of Franklin County. In the principal case, the controversial issue was presented by the existence of a church located within 500 feet of the permit location. Previously, in *Codic v. Board of Liquor Control*,⁹² the resident judges of the Franklin County Court of Appeals had held that there was substantial probative evidence to support the denial of a permit when the permit premises are to be operated within a distance of 500 feet of a church. The appellate bench in the *Corwin* case was made up of judges of other appellate districts sitting by designation in the Franklin County Court of Appeals. They all agreed that they would have decided the issues presented by the *Codic* case differently had they been sitting in their own judicial districts, and would have certified their own decision as being in conflict with the *Codic* decision. However, they were sitting by assignment in Franklin County and were, therefore, members of that court. Thus, they could not certify as a conflict their decision to affirm the denial of the permit.⁹³

The 1959 amendment of the Administrative Procedure Act⁹⁴ par-

88. *Bless v. Bowers*, 160 N.E.2d 663 (Ohio Ct. App. 1959).

89. *Neal v. Board of Liquor Control*, 106 Ohio App. 333, 154 N.E.2d 661 (1958).

90. 159 N.E.2d 369 (Ohio Ct. App. 1959).

91. OHIO REV. CODE § 119.12.

92. 98 Ohio App. 388, 129 N.E.2d 650 (1953).

93. Judge Younger, writing the opinion for the three judges sitting by designation, felt that as members of the Court of Appeals of Franklin County, it was their duty to affirm the judgment below. Since the record did not affirmatively show that the permit was rejected solely on the ground that the permit premises were located within 500 feet of a church, the court could not exercise its prerogative of re-determining a decision which it believes is clearly erroneous. *Corwin v. Board of Liquor Control*, 159 N.E.2d 369, 372 (Ohio Ct. App. 1959). However, as indicated by Judge Younger's opinion, it would be appropriate for a "foreign" bench sitting by assignment to redetermine a decision which it believed to be clearly erroneous. *Ibid.*

An early 1960 decision of the supreme court eliminated any doubt which may have existed concerning the merits of the judgment in the *Codic* case. In *Corwin v. Board of Liquor Control*, 170 Ohio St. 304, 164 N.E.2d 412 (1960), the supreme court reversed the judgment of the court of appeals and remanded the cause to the Director of Liquor Control with instructions to issue the requested permit. The court examined the entire record and concluded that the sole objection to the application was the church's opposition to the sale of intoxicants and its authorities' belief that it is not "proper" to have a liquor establishment so close to the church. This evidence was insufficient to support a denial of the requested permit.

94. OHIO REV. CODE § 119.12 (Supp. 1959).