Washington Law Review

Volume 34
Number 3 *Washington Legislation—1959*

9-1-1959

Washington Legislation—1959; Administrative Law

Philip A. Trautman
University of Washington School of Law

Cornelius J. Peck
University of Washington School of Law

WASHINGTON LAW REVIEW
AND
STATE BAR JOURNAL

VOLUME 34 AUTUMN 1959 NUMBER 3

WASHINGTON LEGISLATION–1959

The following articles, the work of the faculty of the School of Law and a member of the Washington Bar, constitute the first academic comment on the laws of 1959. For obvious reasons, these articles are not represented to the reader as a complete survey of the legislative session. Rather, they are merely a compilation of comments on acts which the writers have found to be important, timely, or merely interesting.

ADMINISTRATIVE LAW

The Administrative Procedures Act. A vast improvement in the state of administrative law and the quality of government in Washington was made possible when the State Administrative Procedure Act[1] was adopted. Whether the full benefits of this legislation are realized depends not only upon the cooperative response of state officers and agencies, but also upon the diligence of the practicing bar in ensuring compliance with the provisions of the act.

Fortunately, for the assistance it affords in understanding the new legislation, the Washington act is based upon the Model State Administrative Procedure Act, which was approved by the Conference of Commissioners on Uniform State Laws in 1946. The model act has been enacted in five other states,[2] and substantial portions of comparable legislation of other states find their source in provisions of the model

[1] Wash. Sess. Laws 1959, c. 234.

[2] The annotations to the MODEL STATE ADMINISTRATIVE PROCEDURE ACT list the following states as jurisdictions adopting the act: Maryland, Michigan, Missouri, Oregon, and Wisconsin. 9C UNIFORM LAWS ANN. 14 (Supp. 1958).

act.[3] While litigation under the act does not appear to have been heavy, some case authority for the specific application of various provisions may be found. More important, the model act has been the subject of a number of scholarly law review articles which helpfully explain and discuss its various provisions in considerable detail.[4]

However, the Washington act is not an identical copy of the model act. A number of provisions of the Washington act were drawn from the Federal Administrative Procedure Act where that statute was considered to be superior.[5] Other portions of the Washington act are domestic legislative products.[6] Moreover, throughout the act changes of phraseology were made, some with minor effect, and others of considerable importance.[7]

Basic to an understanding of the Administrative Procedure Act is recognition that administrative agencies perform the functions of the three traditional departments of government: the executive, the legislative, and the judicial. Those sections of the act relating to rule-making are concerned with the functions performed by administrative agencies under delegations of legislative authority. Those sections of the act relating to agency action in what are defined as "contested cases" are concerned with the exercise of quasi-judicial powers of agencies.[8] The act is little concerned with the performance of what might be called executive functions of the agencies, but it does deal

---

[3] Kenneth Culp Davis lists the following states as having statutes which borrow generously from the model act: Arizona, California, Illinois, Indiana, Michigan, Minnesota, North Carolina, North Dakota, Ohio, Pennsylvania, Virginia, and Wisconsin. DAVIS, ADMINISTRATIVE LAW CASES 572 (1959). (Note the disagreement over what constitutes adoption and what is merely borrowing.)

[4] Schwartz, *The Model State Administrative Procedure Act*, 33 WASH. L. REV. 1 (1958); Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431 (1953); *Symposium on the Model State Administrative Procedure Act*, 33 IOWA L. REV. 193-375 (1948). The latter symposium contains a very valuable article by Dean Stason of Michigan, Stason, *The Model Administrative Procedure Act*, 33 IOWA L. REV. 196 (1948). See also, Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29 (1953).

[5] Section 2 (3) of the Washington act, which is concerned with the content of the notice of proposed rule-making, was taken from Section 4 (a) of the federal act, 5 U.S.C. § 1003 (a). Section 9 (2) of the Washington act, which enumerates powers of agencies and their designated agents in the hearings in contested cases was taken from Section 7 (b) of the federal act, 5 U.S.C. § 1006 (b).

[6] Sections 3; 5 (4), (5), (6); and 19.

[7] To note the variations, compare the following sections of the Washington act with their counterparts in the model act: Sections 2 (1); 4 (2); 7 (2); 11; 12; 13 (1), (2), (3), (6). The more significant changes of phraseology are discussed, *infra*.

[8] Fuchs, *The Model Act's Division of Administrative Proceedings into Rule-Making and Contested Cases*, 33 IOWA L. REV. 210 (1948); Trautman, *Administrative Law Problems of Delegation and Implementation in Washington*, 33 WASH. L. REV. 33 (1958).

with the relationship between the agencies and the courts by establishing opportunities for, and standards of, judicial review.

Provisions relating to rule-making—the legislative function. The analogy between rule-making and legislation becomes apparent in the act's definition of a rule. Section 1(2) provides:

> "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations which concern only the internal management of the agency and do not directly affect the rights of or procedures available to the public.

Thus, like statutes, rules are of general applicability, and are not formulated as the particularized solution of an individual problem. Like statutes, rules are of future applicability, and do not have immediate consequences for particular individuals without further proceedings. As with statutes, the validity of rules does not depend upon the particularized facts of any previous transaction. Instead they are formulated as policy to govern future events. As in the case of legislation, individuals have no constitutional right to a hearing before the adoption of a rule.[9]

The act does not undertake to limit or broaden the substantive rule-making powers of administrative agencies. To determine the substantive basis for agency rules it will still be necessary to have reference to the statutes conferring substantive powers on the agencies and to the constitutional principles governing the delegation of legislative power.[10] However, the act does set up a number of rule-making procedures with which agencies must comply in the exercise of their substantive powers.

Agencies are required to adopt rules of procedure and to publish descriptive statements of procedures to assist parties appearing before them. Prior to engaging in rule-making activities agencies are required to file notice thereof with the Code Reviser, and to otherwise publish notice of intended rule-making activity, affording interested persons the opportunity to submit data or views, either orally or in writing. The required notice should state the time and place of public rule-

[9] Senior Citizens League, Inc. v. Dept. of Social Security, 38 Wn.2d 142, 228 P.2d 478 (1951); Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595 (1920); Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915).

[10] Trautman, *supra*, note 8.

making proceedings; it should contain a reference to the statutory authority under which the rule is proposed; and it should set out either the terms or the substance of the proposed rules.[11]

These procedural requirements obviously democratize the rule-making process by allowing participation of those governed in the formulation of the rules. In addition to satisfying this ideological objective, practical results of better rules may be expected when agencies are informed of possible unforeseen and undesirable effects of the proposed rules which can be avoided without sacrifice of the basic objectives.[12] In this respect, the act opens new avenues of practice for lawyers who may undertake to protect their clients' interests by participation in the rule-making process rather than in litigation over the impact of rules formulated without consideration of their effect on the clients involved.[13]

Emergency rules may be promulgated without compliance with these rule-making procedures established by the act if the agency makes a finding, incorporated in the emergency rule, that immediate adoption or amendment of the rule is necessary for preservation of the public health, safety, or general welfare.[14] However, such rules are effective for no more than ninety days.

All rules adopted by agencies are to be filed with the Code Reviser, and, except for emergency rules, they do not become effective until thirty days after filing.[15] The Code Reviser is directed to compile and index all the rules so filed, and to publish revisions or supplements to the compiled rules at least once every two years.[16] In addition, the Code Reviser is directed to publish a monthly bulletin, setting forth all the rules filed with him during the preceding month.[17] Copies of the compilations and monthly bulletins are to be supplied free to each

---

[11] Wash. Sess. Laws 1959, c. 234, § 2 (3). The portion of this section dealing with the content of the notice was taken from Section 4 (a) of the FEDERAL ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 1003 (a).

[12] See, for example, Hoover Commission on Organization of the Executive Branch of the Government, 157-162 (March 1955), TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, recommending that public participation in rule-making be afforded wherever practicable, and recommending repeal of some of the exemptions from public rule-making requirements now found in the Federal Administrative Procedure Act.

[13] For a valuable account of the lawyer's role in this respect at the federal level, see HORSKY, THE WASHINGTON LAWYER (1952).

[14] Wash. Sess. Laws 1959, c. 234, § 3.

[15] Wash. Sess. Laws 1959, c. 234, § 4 (2). The comparable provision of the model act provides that regulations become effective upon filing. The Washington act is believed to be superior in postponing effectiveness, thus permitting the regulated parties opportunity to make necessary adjustments.

[16] Wash. Sess. Laws 1959, c. 234, § 5 (1).

[17] Wash. Sess. Laws 1959, c. 234, § 5 (2).

county law library, and additional copies are to be sold at cost to interested parties.[18]

Rules which have been so filed and published are to be judicially noticed, thus greatly simplifying the present problem of proving the existence of an administrative rule.[19]

In view of the very sizeable burden imposed upon agencies to codify and supplement their existing rules and the burden imposed upon the Code Reviser in editing and publishing the rules filed with him, the effective date for these rule-making provisions was delayed until one year after enactment of the law.[20]

Provisions Relating to Contested Cases—The Quasi-Judicial Function. The definition of a contested case is found in Section 1(3) of the act.

The section provides: " 'Contested case' means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."

An analogy between the judicial function and the administrative function is clear, as in the case of legislation and rule-making. Contested cases, like cases tried in the courts, involve the rights, duties, or privileges of specific parties. As with cases tried in court, contested cases will most frequently turn upon the particular and individualized facts of previous transactions. They will usually involve the pronouncement of a judgment upon past events and, like the judgment of courts, will have immediate consequences for particular parties unless review proceedings are undertaken. In some cases, however, as in the granting of licenses or the setting of rates, contested cases will also involve prospective operations or future activities of individuals.

However, a contested case does not arise upon every occasion in which an agency takes action affecting an individual. Such a case arises only if law—usually a statute—or the Constitution requires an agency hearing. Some agency actions are undertaken in summary fashion without hearing, and their validity and consequences are determined later in court review of the action.[21] Most frequently this

[18] Wash. Sess. Laws 1959, c. 234, § 5 (4). The model act contains no comparable provision for distribution of compilations and bulletins to county law libraries.

[19] Wash. Sess. Laws 1959, c. 234, § 5 (6). The model act does not contain a comparable provision.

[20] Wash. Sess. Laws 1959, c. 234, § 18.

[21] *E.g.* Suspension of a driver's license pursuant to RCW 46.20.290 does not involve a hearing by the Director of Licenses. The propriety of such action is determined in court review provided by RCW 46.20.340. For classic examples of summary adminis-

will occur where the governing statutes make no provision for an agency hearing. The absence of a statutory provision requiring an agency hearing does not, however, eliminate the possibility that the action will fall within the definition of a contested case in view of the constitutional doctrine which prohibits the delegation of legislative or executive functions to constitutional courts.[22] In such cases, if the Constitution requires a hearing at the agency level, that hearing, even though not provided by statute, will nevertheless be governed by the provisions respecting contested cases.[23]

As mentioned above, agencies are required to adopt and publish rules governing the procedures prescribed by the act.[24] In addition, agencies are required to adopt and publish rules of practice before the agencies, together with forms and instructions. These rules will include, of course, the rules of practice governing contested cases.

Powers of an agency, or the hearing officer designated as its agent in conducting a hearing in a contested case, are specifically enumerated in a provision taken from the Federal Administrative Procedure Act.[25] In a contested case all parties must be afforded an opportunity for hearing after reasonable notice. The notice, in addition to stating the time and place of the hearing, must also state the issues involved, unless, by the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, in which case they shall be stated as soon as practicable thereafter. The parties are guaranteed the opportunity to present evidence and argument with respect to the issues involved, and the agency is directed to compile an official record of the testimony and exhibits and to make that record available to any party upon the payment of the costs thereof.[26]

The rules of evidence which govern proceedings in court are not

---

trative action followed by court review to determine the propriety of such action, see North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891).

[22] Household Finance Corp. v. State, 40 Wn.2d 451, 244 P.2d 260 (1952). *Cf.* Federal Radio Comm'n. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933); Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923). *Cf.* also Floyd v. Department of Labor & Indus., 44 Wn.2d 560, 269 P.2d 563 (1954), distinguishing the Household Finance case and holding that the courts may be given power to review de novo the determinations of the Department of Labor and Industries because its functions were judicial in character and of the kind which could have been given in the first instance to the courts.

[23] *Cf.* Wong Yang Sung v. McGrath, 339 U. S. 33, 50 (1950), holding that section 5 of the FEDERAL ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 1004, applies to hearings not expressly required by statute but read into a statute to save it from constitutional invalidity.

[24] Wash. Sess. Laws 1959, c. 234, § 2 (1).

[25] Wash. Sess. Laws 1959, c. 234, § 9 (2).

[26] Wash. Sess. Laws 1959, c. 234, § 9 (1).

applicable to hearings in contested cases. Instead, the test is that of evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. Effect is given to privileges recognized by law and evidence may be excluded if it is incompetent, irrelevant, immaterial, or unduly repetitious.[27]

Records and documents in the possession of the agency of which it desires to avail itself must be offered and made a part of the record.[28] Agencies may take notice of judicially cognizable facts and, *in addition,* may take notice of general, technical, or scientific facts within their specialized knowledge. Parties must be notified of the material so noticed and given an opportunity to contest the facts.[29]

Other provisions of the act relating to the decisional process attempt to ensure that the officials authorized to decide the case are made aware of the issues involved, the evidence in the record, and the contentions of the parties with respect thereto. Thus, in any case in which the officials who are to render the final decision have not heard or read the evidence, a decision adverse to a party shall not be made unless that party is first served with a proposed decision, including findings of fact and conclusions of law, and afforded opportunity to file exceptions and present written argument to a majority of the officials who are to render the final decision.[30] The final decision adverse to a party must be in writing and contain concise statements of each fact found as well as the conclusions of law.[31]

Related to these provisions governing contested cases is the section authorizing an agency to issue a declaratory ruling with respect to the applicability to any state of facts of any rule or statute enforceable by it.[32] Such a ruling, if issued after argument and stated to be binding, is binding upon both the agency and the petitioner unless altered or set aside by a court. It should be noted that while this section permits agencies to make declaratory rulings, the language of the section is permissive and does not require the agency to make a binding declaratory ruling.

Provisions Relating to Judicial Review. The validity of any rule may be determined upon petition for a declaratory judgment thereon, filed in the Superior Court for Thurston County, when it appears that

[27] Wash. Sess. Laws 1959, c. 234, § 10 (1).
[28] Wash. Sess. Laws 1959, c. 234, § 10 (2).
[29] Wash. Sess. Laws 1959, c. 234, § 10 (4).
[30] Wash. Sess. Laws 1959, c. 234, § 11.
[31] Wash. Sess. Laws 1959, c. 234, § 12.
[32] Wash. Sess. Laws 1959, c. 234, § 8.

the rule, or its threatened application, interferes with or immediately threatens to interfere with, the legal rights or privileges of the petitioner.[33] In such a proceeding the court may declare the rule invalid *only* if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, or was adopted without compliance with required rule-making procedures.[34] Thus the section does not provide a vehicle for obtaining declaratory judgments concerning the applicability of rules to particular fact situations. In this respect the provision may be narrower than the provisions of the existing Declaratory Judgments Act,[35] and a question may arise as to whether that act has been rendered inoperable in this area by the general provision of the Administrative Procedures Act repealing all inconsistent acts or parts of acts.[36]

Of course, the validity of any rule may also be determined upon review of agency action in any contested case in which the applicability

[33] Wash. Sess. Laws 1959, c. 234, § 7.

[34] Section 7 (2) of the act provides: "(2) In a proceeding under subsection (1) of this section the court shall declare the rule invalid *only* if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures." (Emphasis added.) The word "only" does not appear in the comparable section of the model act. It was included in the Washington act to meet objections that the declaratory judgment provisions of the model act would impose an undue burden upon state agencies by requiring them to defend numerous declaratory judgment actions. See O'Connell, *Effect of Adoption of the Model State Administrative Procedure Act on Existing Administrative Procedures in Washington*, 33 WASH. L. REV. 17 (1958).

[35] RCW 7.24.010-.146.

[36] *Cf.* Tacoma v. Cavanaugh, 45 Wn.2d 500, 275 P.2d 933 (1954); State v. Becker, 39 Wn.2d 94, 234 P.2d 897 (1951); Abel v. Diking & Drainage Improvement Dist., 19 Wn.2d 356, 142 P.2d 1017 (1943). The Becker case states as a general proposition that a provision such as, "All acts or parts of acts in conflict herewith are hereby repealed," accomplishes nothing that would not have been accomplished in its absence. The latter two cases quote the following statement made in the Abel opinion: "Repeals by implication are ordinarily not favored in law, and a later act will not operate to repeal an earlier act except in such instances where the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, or unless the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot, by a fair and reasonable construction, be reconciled and both given effect."

Of course, canons of construction such as the one just quoted have utility only to the extent that they are a guide to the legislative intent. They never should be applied mechanically so as to defeat an otherwise apparent legislative purpose.

If the purpose of the State Administrative Procedure Act is, as stated in the Prefactory Note to the model act, 9C UNIFORM LAWS ANN. 177, to protect those subject to regulation by agencies by making provision for advance determination of the validity of administrative rules and assuring a proper scope of judicial review of administrative orders, there is no conflict with the purpose in preserving a broader or more extensive review under an existing statute. This view is supported by the statutory language of section 7 (2) of the Washington act which makes the word "only" applicable solely to proceedings under section 7 (1) of the act. On the other hand, if the insertion of the word "only" in section 7 (2) is taken as a manifestation of an intent to restrict the former availability of declaratory judgments rather than as a clarification of the scope of section 7 (1) that intention should prevail. The former view seems preferable to these authors.

or validity of that rule was involved. Review in this context goes not only to constitutionality, statutory authority, and compliance with rule-making requirements, but also to the applicability of the rule to a particular state of facts.

The provisions relating to judicial review in contested cases are of great importance. They offer an opportunity to eliminate the chaos and confusion created by the many and varied review provisions found in the various statutes dealing with particular agencies.[37] Moreover, there is clear evidence of an attempt to substitute a single uniform review provision for the many inconsistent and varied review provisions which formerly existed. The Washington act, like the act adopted in Maryland,[38] does not contain a savings clause set out in the model act which would have preserved the existing methods of review.[39] That clause was bracketed by the draftsmen of the model act to ensure consideration of its deletion. Moreover, the word "only" was added to the review provision of the Washington act to ensure the uniformity of an exclusive review provision for those cases falling within the definition of a contested case. Accordingly, while some doubt may exist as to the efficacy of the general repeal provision of the act operating upon specific provisions of specialized statutes, the prudent course for counsel is to seek review pursuant to the provisions of the Administrative Procedures Act and eschew reliance upon other review provisions.[40] As will be seen, the review provisions of the Administrative Procedure Act provide adequate protection to the interests of a client.

Under the Administrative Procedures Act, review of an agency decision in a contested case must be sought within thirty days, unless the agency has established a procedure for rehearing or reconsideration

---

[37] For a discussion of the hopeless confusion and chaos found in the individual review provisions respecting various agencies, see Peck, *The Scope of Judicial Review of Administrative Action in Washington*, 33 WASH. L. REV. 55 (1958).

[38] MD. CODE ANN. c. 41, § 255 (a) (1957).

[39] Section 12 (1) of the MODEL ADMINISTRATIVE PROCEDURE ACT, which is the comparable provision, reads:

> (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act [but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo, provided by law.]

[40] *Cf.* Yakus v. United States, 321 U.S. 414 (1944), holding under the Emergency Price Control Act that the validity of a price regulation could not be challenged in a criminal proceeding brought on an indictment for violation of the regulation where the act provided a separate and exclusive means of review.

and that procedure has been invoked.[41] In the latter case, review must be sought within thirty days after the agency has acted upon the petition for rehearing or reconsideration. The venue provision of the act represents a compromise between those forces which believe that review should be available to parties in the counties of their residence or place of business and those forces which believe that the specialized problems of administrative law can better be dealt with by the bench of Thurston County, where previous statutes have centralized much of the review of administrative action. Accordingly, the act preserves the former venue provisions with respect to review,[42] and leaves to future legislation the accomplishment of a more rational distribution. Likewise preserved are the special provisions governing stay or supersedeas of an agency decision, though a general provision has been made authorizing the agency or the court to order a stay in cases not governed by any specialized statute.[43]

The review of agency determinations in contested cases provided by the act is a record review.[44] The court does not take additional evidence,[45] nor does it redetermine factual matters de novo. Instead, the review of factual findings is guided by the standard of material and substantial evidence in view of the entire record as submitted. Of course, the court may also set aside agency decisions which are in violation of constitutional provisions, in excess of statutory authority, made upon unlawful procedure, affected by other error of law, or are arbitrary and capricious.

More detailed consideration of the judicial review provisions of the Model Administrative Procedure Act may be found in the authorities cited above.[46]

---

[41] Wash. Sess. Laws 1959, c. 234, § 13 (1). The provision relating to agency procedure for reconsideration or rehearing is not found in the model act.

[42] Wash. Sess. Laws 1959, c. 234, § 13 (2).

[43] Wash. Sess. Laws 1959, c. 234, § 13 (3). The provision preserving special provisions governing stay or supersedeas is not found in the model act.

[44] Wash. Sess. Laws 1959, c. 234, § 13 (6). At this point it may be noted that elimination of the word "competent" from Sections 13 (6) (e) would appear to avoid perpetuation of the Residuum rule in this state. See Leggerini v. Department of Unemployment Comp., 15 Wn.2d 618, 131 P.2d 729 (1942). For a discussion of the rule and its preservation by the word "competent" in the comparable provision of the model act, see Schwartz, *The Model State Administrative Procedure Act*, 33 WASH. L. REV. 1, 16 (1958).

[45] Indeed, Section 12 (5) of the model act, which would have permitted a remand to the agency for the taking of additional evidence upon a showing of good reason for failure to produce it before the agency, was eliminated in the state act. The deletion of this provision appears unfortunate.

[46] See note 4 *supra*.

The provisions of the act relating to contested cases become effective six months after its enactment, or on September 23, 1959.[47]

Exceptions From the Coverage of the Act. The exceptions from the coverage of the act are fortunately few.[48] However, in most instances the exceptions would appear to be unjustified and it may be hoped that as experience with the operation of the act is accumulated, the opposition of the agencies and the regulated industries may disappear and permit the elimination of most of the exceptions.

The only agencies enjoying a complete exemption from the act are the State Militia, the Board of Prison Terms and Paroles, and the Liquor Control Board. While there may be justification for exemption of the former two, the only rationale for the exemption of the Liquor Control Board is the judicially accepted,[49] but intellectually discredited[50] concept that traffic in liquor is a semi-legitimate business, which is at most a privilege not entitled to judicial protection. All of the practical problems of regulating the sale of liquors could be solved, if indeed they are so grave, by an emergency power to suspend licenses or issue orders, thus obviating the reasons for a complete exemption.[51]

Exempt from the provisions governing contested cases are the Board of Industrial Insurance Appeals, the State Board of Equalization, the Insurance Commissioner, and the State Tax Commission.[52] The history of jury review of workmen's compensation awards affords a doubtful

---

[47] Wash. Sess. Laws 1959, c. 234, § 18.

[48] Wash. Sess. Laws 1959, c. 234, § 15. Complete exemptions were made in the comparable Oregon legislation for the State Board of Parole and Probation, the Public Utility Commissioner, the State Tax Commission, the Civil Service Commission, the Department of Finance and Administration, the Department of Motor Vehicles, and the State Industrial Accident Commission. ORE. REV. STAT. § 183.310 (1957).

[49] State *ex rel* Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778 (1908); State *ex rel* Aberdeen v. Superior Court, 44 Wash. 526, 87 Pac. 818 (1906).

[50] See GELLHORN & BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 768-779 (1954). As the authors state on page 773, "It is only by an act of faith, however, that one reaches the conclusion that a quack doctor or shyster lawyer has less opportunity 'for the infliction of general and substantial injury' to the public than has, let us say, the proprietor of a tavern; or that the latter does not serve a purpose which potentially is socially as useful as that of the insurance broker or the manufacturer of near beer."

But see also, *In re* Flynn, 52 Wn.2d 589, 328 P.2d 150 (1958), a case involving revocation of a dentist's license, in which the majority of the court rejected an argument based upon the privilege concept, quoting and applying the following language from Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n. 5 (1957), "We need not enter into a discussion whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."

[51] *Cf.* Fahey v. Mallonee, 332 U.S. 245 (1947).

[52] Wash. Sess. Laws 1959, c. 234, § 15.

basis for the exemption of the Board of Industrial Insurance Appeals.[53] The exemption of the State Board of Equalization from the provisions governing contested cases would also appear to be unnecessary for the reason that the activities in which it engages[54] are properly characterized as rule-making.[55] No justification appears for the exemptions of the Insurance Commissioner or the State Tax Commission. Indeed, it may be wondered whether the State Tax Commission may not face a day of reckoning when some taxpayer finds it advantageous to point out that agency's consistent refusal to accord the word "hearing" in pertinent statutes[56] its normal and accepted statutory meaning.[57] Finally, the Department of Public Assistance is exempt from those provisions of the act relating to petitions for modification of rules, declaratory judgments, and declaratory rulings.[58]

Unfinished Work. Enactment of legislation such as the Administrative Procedures Act is only the starting point for improvement of administrative law in Washington. Much, of course, depends upon the cooperation and willingness of the governed agencies to accept and be guided by the provisions of the act. Much also depends upon the vigilance of the practicing bar in ensuring that agency action affecting their clients has been taken in accordance with the provisions of the act. And much depends upon the state judiciary, which, it is to be hoped, will give to the act the hospitable treatment which the federal judiciary has extended to the Federal Administrative Procedure Act.[59]

This is not to say that the work of the legislature has been completed. Much remains to be done there also. Among other things, it is to be hoped that subsequent sessions of the legislature will take proper account of the existence of the Administrative Procedures Act and refrain from enacting subsequent legislation with inconsistent provisions.[60] The unjustified exemptions from the act mentioned above

---

[53] Wollett, *The Board of Industrial Insurance Appeals after Nine Years: A Partial Evaluation,* 33 WASH. L. REV. 80, 94-99 (1958); Rutledge, *A New Tribunal of the State of Washington,* 26 WASH. L. REV. 196, 207-211 (1951).

[54] RCW 84.48.080.

[55] Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915).

[56] RCW 82.32.160-.170; RCW 84.08.140.

[57] *Cf.* Morgan v. United States, 298 U.S. 468, 479-481 (1936).

[58] Wash. Sess. Laws 1959, c. 234, § 15.

[59] *E.g.,* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[60] Of course authority can be found for the proposition that one session of the legislature cannot abridge the power of a succeeding legislature by prescribing the mode of effecting repeal of existing law, Great No. Ry. v. Glover, 194 Wash. 146, 77 P.2d 598 (1938). However, a sympathetic treatment of the Administrative Procedures Act will require a very clear showing of an attempt to effect a subsequent departure from its provisions. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

should be eliminated. The present act is deficient in its failure to provide adequately for separation of the functions of judge and prosecutor. Unlike the federal act, neither the model act nor the Washington act deal with the very important problem of establishing a panel of hearing examiners, independent and free from control by the agencies involved in the cases which they hear.[61] The compromise provision with respect to the venue for review of agency action must be replaced by a provision making an intelligent selection of those cases which require review in Thurston County and those cases which may more properly be heard in the county of the petitioner's residence or place of business. Provision should be made with respect to the availability of subpoenas in contested cases, and for their enforcement upon petition to the superior courts. While case authority is to the contrary,[62] it is difficult to see how in fact a fair hearing can be afforded to one whose rights, duties, or privileges are to be determined if he cannot compel the production of evidence in his favor. In addition to the provisions concerning publication of rules, provision must also be made for the publication, indexing, and digesting of the decisions of agencies in contested cases.[63] Finally, when sufficient experience has been obtained at the state level, an assault must be made upon the intolerable situation of administrative law which exists at the county and city level.

PHILIP A. TRAUTMAN
CORNELIUS J. PECK

Counties—Coordination of Administrative Procedures. By chapter 130 of the 1959 Session Laws the legislature has recognized the necessity and desirability of coordinating the administrative programs of the counties.

The assessor, auditor, clerk, coroner, sheriff, superintendent of schools, treasurer, and prosecuting attorney of each county are directed to take such action as they jointly deem necessary to effect the coordination of the administrative programs of the county. They are also to submit joint reports to the governor and legislature biennially

[61] For a discussion of this problem, see Schwartz, *The Model Administrative Procedure Act*, 33 WASH. L. REV. 1, at 11-13 (1958).

[62] Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40 (1926). See GELLHORN & BYSE, ADMINISTRATIVE LAW, CASES AND COMMENTS 628-640 (1954).

[63] Section 3 (b) of the FEDERAL ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 1002 (b) provides: "Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules."

recommending procedural changes to increase the efficiency of the respective departments. The county officials are empowered to use the Washington state association of elected county officials as a coordinating body through which the duties imposed by the act may be performed, harmonized or correlated.

Potentially much may be accomplished under this act in the way of eliminating duplication of facilities and functions within a county, thereby saving time and money. If more harmony can be obtained within each county in the activities of the elected officials and also among the several counties, all will benefit. In the end, whether the potential benefits will be obtained will depend upon the cooperation, interest, and zeal of the county officials. Certainly, however, the expression by the legislature of its wishes, combined with the direction to the county officials to implement such policy, is to be commended.

PHILIP A. TRAUTMAN

COMMERCIAL LAW

Small Loan Companies. In 1941, the Washington legislature enacted the Uniform Small Loan Law with certain modifications.[1] Eighteen years later, the 1959 legislature made some important changes in the 1941 act by the enactment of chapter 212, Session Laws of 1959.

Originally limited to loans of $500.00 or less, the maximum amount has now been increased to $,1000.00.[2] The license application fee has been increased from $50.00 to $100.00,[3] and the maximum cost of examining each licensed place of business is now $250.00 instead of $150.00.[4] Protection against misleading or deceptive advertising has been extended to include television.[5] Licensees are still permitted to charge three percent per month on loan balances of $300.00, or less, but the rate on balances in excess of $300.00 and not in excess of $500.00 is now one and one-half percent per month, and over $500.00 it is one percent per month. As before, "in lieu of such charges a licensee may charge one dollar per month, or fraction thereof, when

---

[1] Wash. Sess. Laws 1941, c. 208; for an excellent analysis of the 1941 act, see Shattuck, *Regulation of Small Loans in Washington*, 16 WASH. L. REV. 117, 124 (1941).
[2] Wash. Sess. Laws 1959, c. 212, § 1, amending RCW 31.08.020.
[3] Wash. Sess. Laws 1959, c. 212, § 2, amending RCW 31.08.030.
[4] Wash. Sess. Laws 1959, c. 212, § 3, amending RCW 31.08.130.
[5] Wash. Sess. Laws 1959, c. 212, § 4, amending RCW 31.08.150.