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ADMINISTRATIVE LAW

by

John L. Hill* and David C. Kent**

THE Texas appellate courts resolved several significant issues relating to administrative law in the past year. As in previous *Surveys*,¹ these decisions are discussed in three broad areas: constitutional considerations, administrative adjudications, and judicial review. In addition, important legislative developments in the field are reviewed.

I. CONSTITUTIONAL CONSIDERATIONS

A. *Right of Appeal*

It is well-established in Texas that a right of appeal from an order of an administrative body may exist in limited situations, even without express statutory authorization.² When a statute is silent on the subject, or even when a statute expressly denies the right of appeal, the courts may nevertheless recognize an inherent right to seek judicial review of the administrative order. As most recently stated by the Supreme Court of Texas, an inherent right of appeal exists when the administrative order "violates a constitutional right or adversely affects a vested property right."³ Texas courts during the survey period had several occasions to apply this rule.

Two cases arose from appeals from orders of municipal policemen's and firemen's civil service commissions. In one case, two Fort Worth police officers were temporarily suspended for using excessive force while making

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1. See Guinn, *Administrative Law, Annual Survey of Texas Law*, 27 Sw. L.J. 212 (1973); Guinn & Hawke, *Administrative Law, Annual Survey of Texas Law*, 26 Sw. L.J. 226 (1972); Guinn, *Administrative Law, Annual Survey of Texas Law*, 25 Sw. L.J. 201 (1971); Guinn, *Administrative Law, Annual Survey of Texas Law*, 24 Sw. L.J. 216 (1970); Fitzgerald, *Administrative Law, Annual Survey of Texas Law*, 23 Sw. L.J. 212 (1969).

2. See *Stone v. Texas Liquor Control Bd.*, 417 S.W.2d 385 (Tex. 1967); *Brazosport Sav. & Loan Ass'n v. American Sav. & Loan Ass'n*, 161 Tex. 543, 342 S.W.2d 747 (1961); *City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788 (1951).

3. *Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard*, 582 S.W.2d 778, 779 (Tex. 1979) (quoting *Stone v. Texas State Liquor Control Bd.*, 417 S.W.2d 385, 385-86 (Tex. 1967)). It is interesting that the court speaks in the disjunctive of violations of constitutional rights "or" vested property rights, since the protection afforded vested property rights is due process of law, a constitutional right. Cf. *City of Amarillo v. Hancock*, 150 Tex. 231, 234, 239 S.W.2d 788, 790 (1951) (referring to a vested property right as a constitutional right). It is open to question whether the court intends to recognize an inherent right of appeal from administrative orders that adversely affect a vested property right but do not violate due process or some other constitutional provision.

an arrest.⁴ Both suspensions were for less than fifteen days. Although the parties and both lower courts apparently assumed that judicial review of the order was proper, the Texas Supreme Court raised the jurisdictional issue *sua sponte* and reversed the judgments of both courts, ordering the cause to be dismissed because no appeal was authorized by law.⁵ The relevant statute, the Firemen's and Policemen's Civil Service Act,⁶ made no provision for appeals from disciplinary suspensions that did not exceed fifteen days in duration. The court held without discussion that no vested property rights or constitutional rights were involved, and thus no inherent right of appeal existed.⁷ In another case involving the same statute the issue was whether a right of appeal existed from an order denying a request for voluntary demotion.⁸ After lengthy analysis, the Tyler court of civil appeals held that the Firemen's and Policemen's Civil Service Act did not authorize judicial review of orders denying voluntary demotions, and then summarily concluded that no constitutional right or vested property right was affected, thus eliminating any inherent right of appeal.

These results should be compared with that reached by the Austin court of civil appeals in a suit brought by a college professor against the Board of Regents, State Senior Colleges of Texas, seeking both to overturn the board's order terminating his employment and to be reinstated.⁹ No statute either authorized or denied the right of appeal in such a situation, leaving the way open for the court to determine if an inherent right of appeal existed. The court held that such a right did exist.

A question of prime importance was whether the faculty member had any vested property right in his employment. Although language in certain Texas cases indicates that a public employee has no vested property right in his employment,¹⁰ the Austin court followed the modern trend toward recognizing greater rights for public employees. The faculty member had alleged that a *de facto* system of tenure existed at the university, that he had achieved tenure under this system, and that he therefore had an expectancy of continued employment. Taking these allegations to be true, the court held that he had established a vested property right, stating: "[A] college teacher may have a property interest in reemployment despite the absence of an explicit contractual tenure provision if such a provision may be implied from the words and conduct of the college administration" ¹¹ The court then held that due process required that the teacher

4. *Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard*, 582 S.W.2d 778 (Tex. 1979).

5. *Id.* at 779.

6. TEX. REV. CIV. STAT. ANN. art. 1269m (Vernon Supp. 1980). The statute has since been amended to authorize this type of appeal. *Id.* § 20.

7. 582 S.W.2d at 779.

8. *Bartek v. Firemen's & Policemen's Civil Serv. Comm'n*, 584 S.W.2d 358 (Tex. Civ. App.—Tyler 1979, no writ).

9. *Martine v. Board of Regents*, 578 S.W.2d 465 (Tex. Civ. App.—Tyler 1979, no writ).

10. *Attaway v. City of Mesquite*, 563 S.W.2d 343 (Tex. Civ. App.—Dallas 1978, no writ) (citing *City of Amarillo v. Hancock*, 150 Tex. 231, 237, 239 S.W.2d 788, 792 (1951)).

11. *Martine v. Board of Regents*, 578 S.W.2d 465, 470 (Tex. Civ. App.—Tyler 1979, no writ) (citation omitted). The court earlier spoke of "mutually explicit understandings"

not only be given the right of a hearing before the board, which he in fact received, but also the right to appeal the board's decision to the courts, even though no statute provided for such appeal. The scope of the court's review, however, was to be limited to a question of law: whether the board's order was supported by substantial evidence as reflected in the proceedings before the board.

In another decision the Austin court held that a taxpayer need not comply with statutorily prescribed procedures for bringing suit for tax refunds when the comptroller of public accounts does not follow the statutory methods for giving credits or refunds.¹² Although the court did not offer a specific reason for its decision, it quoted the general rule that an inherent right of appeal exists when a vested property right has been adversely affected.¹³ It also noted that because a suit against a government official for acts not lawfully authorized is a suit against the individual and not the state itself, it is not barred by the doctrine of sovereign immunity.¹⁴

B. Notice and Hearing

Most courts during the survey period were unsympathetic to plaintiffs who claimed that they had been deprived of due process of law by reason of inadequate notice or opportunity for a hearing. For example, a teacher was denied the right to any hearing on a school board's decision not to renew his contract, because he had not established that he had a vested property right in his job and therefore was not entitled to due process of law.¹⁵ In another teacher termination case, the San Antonio court of civil appeals said in dictum that any constitutional defects in the notice of hearing are waived if the complaining party participates at the hearing.¹⁶ In a similar vein, the holding in *Blanchard v. Firemen's & Policemen's Civil Service Commission*¹⁷ implied that any objections to the inadequacy of notice of a civil service commission hearing are waived if the complaining

between the parties as being sufficient to support a claim of entitlement to a right. *Id.* at 470; *cf.* *Turner v. Joshua Independent School Dist.*, 583 S.W.2d 939, 942 (Tex. Civ. App.—Waco 1979, no writ) (public school teacher had no vested property right in continued employment). This holding may be reconciled with that of *Martine*, inasmuch as *Turner* had a one-year contract that was not renewed and there was a finding of fact that there was no right of renewal, "either expressly under the contract, or implied by any custom, policy or action of the parties." *Id.* at 940-41.

12. *Amoco Prod. Co. v. Bullock*, 584 S.W.2d 388 (Tex. Civ. App.—Austin 1979, writ granted).

13. *Id.* at 391.

14. *Id.* at 391-92.

15. *Turner v. Joshua Independent School Dist.*, 583 S.W.2d 939 (Tex. Civ. App.—Waco 1979, no writ); *see* note 11 *supra*.

16. *McConnell v. Alamo Heights Independent School Dist.*, 576 S.W.2d 470, 477-78 (Tex. Civ. App.—San Antonio 1978, writ *ref'd n.r.e.*).

17. 577 S.W.2d 337, 339 (Tex. Civ. App.—Fort Worth), *rev'd on other grounds*, 582 S.W.2d 778 (Tex. 1979). *See also* *Board of Adjustment v. Nelson*, 577 S.W.2d 783, 786 (Tex. Civ. App.—San Antonio), *aff'd on other grounds*, 584 S.W.2d 701 (Tex. 1979), in which it was held that a citizen is charged with constructive knowledge of city ordinances and is not entitled to actual notice of a zoning ordinance that provides for automatic termination of nonconforming uses if the citizen fails to register such use with the proper city board or agency.

party participates at the hearing and fails to file a motion for continuance or request for recess. On the other hand, a federal district court held that the Texas Board of Law Examiners had denied an applicant due process of law by changing the qualification standards for taking the bar examination in such a way as to prevent the applicant from taking the test, without first giving the applicant notice of the proposed changes and an opportunity to be heard.¹⁸

C. Separation of Powers

The Texas Constitution provides that the powers of government shall be divided into three distinct departments: legislative, executive, and judicial, and that except as expressly permitted by the Constitution, "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others . . ."¹⁹ During the survey period, Texas courts found different ways to follow this proscription.

*Beacon National Insurance Co. v. Texas State Board of Insurance*²⁰ involved construction of a statute²¹ providing that judicial review of decisions of the State Board of Insurance was to be by trial de novo. The court of civil appeals held that any such statute violated the separation of powers doctrine to the extent that it required judicial review of legislative or executive determinations of state agencies as opposed to adjudicatory decisions of the agencies. Whether an agency decision is legislative, and thus not reviewable by trial de novo, or adjudicatory, and hence reviewable, depends upon the decision's being "general and future in effect" as opposed to "particular and immediate" or concerning "only the parties who are immediately affected."²² Concluding that the decision under review was legislative in nature, the court held the statute calling for review of such a decision unconstitutional and ruled that review under the substantial evidence rule was proper instead.²³

In *Bartek v. Firemen's & Policemen's Civil Service Commission*²⁴ the statute under consideration provided for judicial review of "any decision" of a policemen's and firemen's civil service commission.²⁵ The reviewing court recited the rule that a statute would not be given effect if it required the court to substitute itself for the administrative body and perform purely administrative acts.²⁶ If the statute were given literal effect and "any decision" of the commission were held to be subject to review, the court feared that its own role would be relegated to being only one more step in the

18. *Dasher v. Supreme Court*, No. A-78-CA-152, Order at 4 (W.D. Tex. Jan. 12, 1979), *appeals docketed*, Nos. 78-2616, 79-1253, 79-2343 (5th Cir. 1979).

19. TEX. CONST. art. II, § 1.

20. 582 S.W.2d 616, 619 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

21. TEX. INS. CODE ANN. art. 1.04(f) (Vernon 1963).

22. *Id.* at 619.

23. *Id.*

24. 584 S.W.2d 358 (Tex. Civ. App.—Tyler 1979, no writ).

25. TEX. REV. CIV. STAT. ANN. art. 1269m, § 18 (Vernon Supp. 1980).

26. 584 S.W.2d at 360; *see City of Amarillo v. Hancock*, 150 Tex. 231, 234, 239 S.W.2d 788, 790 (1951).

administrative decision-making hierarchy and that it would assume the role of reviewing all decisions of the commission. Instead of applying the statute literally and thus forcing the constitutional question, however, the court construed the phrase "any decision" to apply only to decisions of the commission involving disciplinary actions in the form of suspensions, dismissals, or demotions.²⁷ Consequently, the appeal of the commission's denial of a request for voluntary demotion was held to be outside the scope of judicial review.²⁸

In *Cameron v. Greenhill*,²⁹ perhaps the most interesting case involving the question of separation of powers, the issue was not even mentioned by the court. The Supreme Court of Texas entered an order providing for a one-time fee assessment of members of the State Bar of Texas to reduce the indebtedness on the Texas Law Center.³⁰ The supreme court entered its order only after compliance with all applicable provisions of the State Bar Act.³¹ Cameron, a licensed attorney and member of the State Bar of Texas, refused to pay the fee and brought suit against the individual members of the supreme court, challenging their authority to order the fee paid and claiming that the order had not been rendered in compliance with the Administrative Procedure and Texas Register Act (APTRA).³²

When faced with section 3(1) of the APTRA, which specifically exempted courts from the definition of "agency," Cameron argued that the justices had not been acting in their judicial capacity in assessing the fee, but had instead been acting in their other capacity as "the regulatory or administrative heads of the Legislatively controlled profession of law,"³³ and thus were as much subject to the APTRA as any other agency officials.³⁴

The stage was set for a potentially momentous decision. As one alternative, the supreme court could have rejected Cameron's "dual capacity" argument, ruled instead that the justices were acting in their sole capacity as a court, and thus held that they were exempt from the APTRA by the statute's own provisions. The other alternative was to accept Cameron's

27. 584 S.W.2d at 361.

28. *Id.*

29. 582 S.W.2d 775 (Tex. 1979).

30. *Id.* at 775-76.

31. TEX. REV. CIV. STAT. ANN. art. 320a—1 § 4 (Vernon Supp. 1980); State Bar of Texas, Rules and Code of Professional Responsibility art. IV, § 4 (1970). These rules require a vote by the board of directors of the State Bar of Texas requesting the supreme court to order a referendum of the members of the bar. No referendum is binding unless more than 51% of the members of the bar vote, and the question must pass by a simple majority of those voting.

32. TEX. REV. CIV. STAT. ANN. art. 6252—13a (Vernon Supp. 1980).

33. 577 S.W.2d 389, 389 (Tex. Civ. App.—Austin), *aff'd*, 582 S.W.2d 775 (Tex. 1979).

34. Section 5 of the APTRA provides that in general prior to the adoption of a rule, an agency shall give 30 days' notice of its intended action and an opportunity for all interested persons to submit their views on the subject, either orally or in writing. In certain classes of rules, opportunity for public hearing must be granted if requested by a certain number of persons or by certain classes of agencies or associations. Section 5(e) provides that no rule is valid unless adopted in substantial compliance with § 5. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 5 (Vernon Supp. 1980).

“dual capacity” argument and face the constitutional question of the extent of the legislature’s power, if any, to regulate the judiciary and the legal profession. This was a matter of grave concern because the state legislature was then debating the fate of the state bar under the Texas Sunset Act.³⁵ The court chose the first alternative, rejected the “dual capacity” argument, and in one paragraph ruled that the APTRA specifically exempted the courts from its application.³⁶ Lest there be any doubt, however, as to what the court’s decision would have been had it faced the constitutional question, one need only consider the court’s order of June 19, 1979,³⁷ and the elaborate dictum concerning inherent judicial powers in *Eichelberger v. Eichelberger*.³⁸ The court’s power is not derived from legislative grant, nor from specific constitutional provision, but from “the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.”³⁹

II. ADMINISTRATIVE ADJUDICATIONS

A. *Exhaustion of Remedies and Finality of Orders*

One of the oft-repeated maxims of administrative law is that judicial review of administrative orders is not available unless all administrative remedies have been pursued to the fullest extent. Over four decades ago, the exhaustion requirement was referred to as a “long settled rule of judicial administration.”⁴⁰ The doctrine most commonly is applied when a party has entered the courts while an administrative decision is still pending. Texas courts, however, applied the exhaustion rule to a slightly different situation during the survey period.

Section 19(a) of the APTRA codifies the exhaustion of remedies doctrine by restricting the right of judicial review to parties who have “exhausted all administrative remedies available within the agency.”⁴¹ Section 16(e) provides that a motion for rehearing is “a prerequisite to an appeal.”⁴² Courts considering these sections of the statute have construed them literally and held that failure to file a motion for rehearing is a fail-

35. TEX. REV. CIV. STAT. ANN. art. 5429k (Vernon Supp. 1980); see 1979 Tex. Sess. Law Serv., ch. 510, at 1081 (Vernon); text accompanying notes 133-141 *infra*.

36. 582 S.W.2d at 777.

37. Reprinted in 16 TEX. LAW. WEEKLY DIG., June 20, 1979, at 1; wherein the Texas Supreme Court ordered the continuation at the state bar in harmony with the State Bar Act. While recognizing the passage of the State Bar Act by the legislature and its approval by the Governor, the court nevertheless maintained that the judicial branch had the inherent power to regulate and supervise the State Bar of Texas.

38. 582 S.W.2d 395, 397-400 (Tex. 1979). “The inherent powers of a court are those which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.” *Id.*

39. 582 S.W.2d at 398.

40. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). There are, however, many exceptions to the rule. See K. DAVIS, ADMINISTRATIVE LAW TEXT 382-95 (3d ed. 1972).

41. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(a) (Vernon Supp. 1980).

42. *Id.* § 16(e).

ure to exhaust administrative remedies and thus deprives the court of any jurisdiction over the matter.

In *Butler v. State Board of Education*⁴³ a school teacher received notice in October 1975 that his contract would be terminated. The APTRA became effective on January 1, 1976. A hearing was held before the local school district's board of trustees in May 1976, during which the teacher's contract was terminated, retroactively effective in October 1975. The teacher appealed the decision through administrative channels to the State Board of Education, which in November 1977 upheld the trustees' decision. The teacher did not file a motion for rehearing before the board, claiming that a motion for rehearing was unnecessary. He argued that because he had been terminated in October 1975, two months before the APTRA became effective, the judicial review provisions of the Education Code, which did not require a motion for rehearing, should instead be controlling.⁴⁴ The court rejected this argument, noting that the decision of the State Board of Education was the subject of the appeal and that this decision was rendered in 1977, long after the passage of the APTRA. Therefore, the APTRA and its requirement for a motion for rehearing applied. Since the teacher filed no such motion before the board, he had not exhausted his administrative remedies and was barred from seeking judicial relief.⁴⁵

A problem closely akin to exhaustion of remedies is the rule prohibiting judicial review of all but final orders. In pursuing administrative remedies, an attorney must always be mindful of the exact nature of the administrative decision from which he appeals. This was aptly illustrated in a case involving an order of the savings and loan commissioner approving the merger of five savings and loan associations.⁴⁶ The commissioner issued three orders. The first order, entered on November 17, 1977, conditionally approved the merger pending certain action by two federal agencies. The aggrieved party timely filed a motion for rehearing to that order, but it was overruled on December 21, 1977. The second order, entered on December 13, 1977, incorporated the first order by reference, recited that certain protests had been filed and withdrawn, and concluded by acknowledging that the first order had become final. No motion for rehearing was filed to that order. The third and last order, entered on December 30, 1977, recited that the two federal agencies named in the first order had taken the necessary actions and formally approved the merger, effective December 30, 1977, the date of the third order. No motion for rehearing was filed to that order.

When the commissioner's order was appealed to the district court, the court dismissed the cause for want of jurisdiction. The Austin court of civil appeals affirmed. The order of November 17, 1977, was not a final

43. 581 S.W.2d 751 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

44. TEX. EDUC. CODE ANN. § 13.115 (Vernon 1972).

45. 581 S.W.2d at 755.

46. *Mahon v. Vandygriff*, 578 S.W.2d 144 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

order for purposes of appeal since it did not grant or deny the merger, but only conditionally approved it pending the occurrence of certain events in the future. Therefore, the motion for rehearing filed on the first order laid no predicate for appeal to the district court. Similarly, the second order was not a final order, because it did not rule on the merger. The only final order for purposes of appeal was the third one dated December 30, 1977, which formally approved the merger, and thereby left nothing further for agency disposition. Since the party did not file a motion for rehearing to the December 30 order, he failed to exhaust his administrative remedies and thereby lost access to the courts.⁴⁷

B. *Institutional Decisions*

The decision-making process of bureaucracies has long been a matter of vexation to policymakers and affected parties alike. In the words of Professor Davis: "Critics have expressed much dissatisfaction with the institutional decision, and many attempts have been made to kill it. But it has turned out to be a mighty hardy animal."⁴⁸ The Texas courts took major steps to shackle this "hardy animal" during the survey period.

One of the most significant decisions of the year involved the construction of section 15 of the APTRA, which provides:

If in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served on the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the officials who are to render the decision.⁴⁹

*Citizens Bank v. First State Bank*⁵⁰ arose from a decision of the State Banking Board. None of the three members of the board heard the contested case that later became the subject of the appeal. Two of the members had read the record; the third had not. The two members who had read the record disagreed, leaving the third member who had neither read the record nor heard the case to cast the deciding vote. No proposal for decision was served on the parties, nor were they given any opportunity to file exceptions or briefs prior to the final decision.

The Austin court of civil appeals upheld the decision of the board, construing section 15 of APTRA to apply only when a majority of the officials empowered to make the final decision have not read the record.⁵¹ The court reasoned that since two of the three members had read the record,

47. The court gave the following test for determining when an order is final: "For an administrative order to be final, there must be nothing left open for future disposition. If a right is made contingent upon the occurrence of some future event, the order is not final." *Id.* at 147.

48. K. DAVIS, *supra* note 40, at 227.

49. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 15 (Vernon Supp. 1980).

50. 580 S.W.2d 344 (Tex. 1979).

51. *First State Bank v. Citizens Bank*, 569 S.W.2d 604, 612 (Tex. Civ. App.—Austin 1978), *rev'd*, 580 S.W.2d 344 (Tex. 1979).

the requirements of the statute had been satisfied. The supreme court, while acknowledging that this interpretation of the statute was possible, felt that it did not comport with the legislative intent behind the statute.⁵² The court held that the phrase, "A majority of the officials of the agency *who are to render the final decision*," referred to the members of the voting majority of the board,⁵³ thus creating what might be termed a "majority of the majority" rule: the majority of the officials who cast the majority vote in a final decision must have heard the case or read the record or else serve a proposal for decision on the parties. In this case, since only one of the two members casting the majority vote had heard the case or read the record, there was no "majority of the majority." Hence, the order was invalid in the absence of the serving of a proposal for decision upon the parties.

There is considerable room for debate as to whether the court fashioned a "majority of the majority" rule or something even stricter. The key sentence of the opinion states that the proposal for decision must be served "when it is determined that the officials, one or more, who vote in favor of the final decision have not read the record."⁵⁴ Taken literally, this holding would require every member of the voting majority to have read the record, even when the vote was unanimous. Thus, if a seven-member board voted unanimously on an order, a proposal for decision would still be necessary if only one member of the board had not read the record. Considering the facts of the case and the wording of the statute, it is doubtful that the court intended such a result.

Perhaps what the court did intend, however, was a "modified majority of the majority" rule: a majority of the members of the board, *all* of whom are part of the voting majority, must have heard the case or read the record. Thus, on a seven-member board where the vote was five to two, at least four of the five who voted in favor of the order would have to have heard the case or read the record, thereby guaranteeing that a majority of the total members of the board would have read the record and would be in agreement. Thus, even if all those who failed to read the record subsequently did so and decided to join the minority, the decision of the board would not be changed. In the example given above, the vote might change from five to two to four to three, but the decision would remain unchanged. By contrast, under the "majority of the majority" approach, only three of the five members voting in favor of the order (*i.e.*, a minority of the total membership of seven) would have to have heard the case or read the record, thus leaving the way open for the decision to be changed on reconsideration.⁵⁵

52. 580 S.W.2d at 348. The supreme court reversed the judgment of the court of appeals on other grounds, but elaborated in a dictum on this point, "[f]or the future guidance of the Board." *Id.* at 347.

53. *Id.*

54. *Id.*

55. This argument assumes of course that those who heard the case or read the record prior to the first vote will not change their minds on reconsideration, but that those who read the record prior to the second vote will, two assumptions that are not necessarily valid.

Whatever the proper interpretation of this language may be, it should be recognized that the *Citizens Bank* decision places Texas among the minority of jurisdictions that have adopted such a rule.⁵⁶ The majority rule is that urged by the State Banking Board, and adopted by the court of civil appeals: the majority of *all* of the members of the board or agency who are authorized and have the duty under the law to make a final decision in a contested case must have read the record or heard the case, but there need be no "majority of the majority" or variation thereof.⁵⁷

The board went one step further in its argument, suggesting that the order of the board was valid because the board had complied with the spirit and intent of section 15, if not its literal terms. Although the third member had not heard the case or read the record, he had assigned a deputy commissioner to read the record and briefs and present a summary to the board at the hearing.⁵⁸ At the hearing, the board member questioned the deputy commissioner about the case and examined one of the exhibits.⁵⁹ The board argued that these actions fulfilled the intent and purpose of section 15's mandate to hear the case or read the record, inasmuch as the board member had acquired a substantial knowledge of and familiarity with the record. The board pointed out that there are many ways to acquire an understanding of the facts and issues of a case other than by the physical acts of listening to arguments or reading a transcript, such as consultations with other agency officials and memoranda from staff members. The board argued that it is important for the official to have a substantial understanding of the facts and issues involved, but that the mechanical procedure by which he acquires this knowledge is not important.⁶⁰ While the court did not specifically address this point, it probably is safe to assume that the argument was rejected *sub silentio*.

This decision raises the question of whether there is anything left of the

56. The decision brings to mind the phrase from the ill-fated *Morgan (I)* case: "The one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481 (1936). The administrative action stimulating the controversy generated four separate appeals reaching the Supreme Court before it was finally enforced. *See Morgan v. United States (IV)*, 313 U.S. 409 (1941).

57. *See Taub v. Pirmie*, 3 N.Y.2d 188, 144 N.E.2d 3, 165 N.Y.S.2d 1 (1957), in which the court upheld a decision of a zoning commission in which only three of the five members voted, and one of those three had neither heard the case nor read the transcript. The court pointed out that the member had thoroughly discussed the matter with the other two members and seemed to be knowledgeable about the situation. *See K. DAVIS, supra* note 40, at 226-44.

58. Statement of Facts at 19-21, *Citizens Bank v. First State Bank*, 580 S.W.2d 344 (Tex. 1979).

59. *Id.* at 77-79.

60. *See United States v. Morgan (IV)*, 313 U.S. 409, 420 (1941) (the Supreme Court held that once an administrator had adequately acquainted himself with the facts the Court would not challenge the administrator's knowledge or grasp of the information); *Allied Compensation Ins. Co. v. Industrial Accident Comm'n*, 57 Cal. 2d 115, 367 P.2d 409, 411-12, 17 Cal. Rptr. 817, 819-20 (1962) (the California Supreme Court ruled that the applicant was not denied a fair hearing when one or more members of an administrative panel did not read the entire record, when it was proved that the evidence was considered and appraised by the entire panel).

harmless error rule.⁶¹ At least one court has applied the harmless error rule to the agency decision-making level, holding that violations of the rules governing agency voting procedures will not vitiate an agency's order unless it can be shown that the violations resulted in the entry of an order different from that which would have been entered had there been full compliance with the rules.⁶²

C. *Time Limits for Agency Actions*

Section 16(d) of the APTRA provides that a final decision or order "must" be rendered within sixty days after the date the hearing is finally closed, with provisions for extensions of time under certain circumstances.⁶³ Not surprisingly, agencies often do not meet this deadline. Parties seeking to void agency actions on this basis, however, have learned that the statute does not mean what it says. "Section 16(d) was designed to promote the proper, orderly and prompt conduct of business by the agency and is, therefore, directory only."⁶⁴ Consequently, orders are not void by reasons of violations of section 16(d).

III. JUDICIAL REVIEW

A. *Method of Review*

Perhaps the most significant recent administrative law decision is *Southwestern Bell Telephone Co. v. Public Utility Commission*,⁶⁵ which involved the construction of conflicting statutes governing judicial review of orders of the Public Utility Commission. Section 69 of the Public Utility Regulatory Act (PURA) specifies judicial review of the commission's orders under the substantial evidence rule, but contains an important proviso: "The issue of confiscation shall be determined by a preponderance of the evidence."⁶⁶ Section 4 of the PURA further provides that the APTRA applies to all proceedings before the commission "except to the extent inconsistent with this Act."⁶⁷ As a general rule, the APTRA provides that

61. For an example of the harmless error rule in Texas, see TEX. R. CIV. P. 434.

62. *Angerman v. Stewart*, 586 S.W.2d 599, 602 (Tex. Civ. App.—Austin 1979, no writ). The State Banking Board violated a Texas Banking Code provision by permitting the first deputy treasurer to vote in place of the state treasurer on an application for a charter despite the presence of the treasurer when the vote was taken. See TEX. REV. CIV. STAT. ANN. art. 342—115, §§ 3(b), (d) (Vernon 1973). Because the vote to deny the application was unanimous, the majority vote would have been to deny the application no matter how either the first deputy treasurer or treasurer would have voted. Thus, the court of appeals refused to void the order.

63. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 16(d) (Vernon Supp. 1980).

64. *Railroad Comm'n v. City of Fort Worth*, 576 S.W.2d 899, 903 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (order entered six months late, but made effective as of 60-day deadline date); accord, *Angerman v. Stewart*, 586 S.W.2d 599, 600-01 (Tex. Civ. App.—Austin 1979, no writ) (order entered 14 days late).

65. 571 S.W.2d 503 (Tex. 1978). Although decided prior to the current survey period, *Southwestern Bell* has not been covered in the earlier Administrative Law articles and is included here for its significance.

66. TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon Pam. Supp. 1963-1979).

67. *Id.* § 4.

the scope of judicial review is "as provided by the law under which review is sought."⁶⁸ The APTRA also details specific procedures for judicial review under statutes calling for review by "trial de novo"⁶⁹ and under those calling for review in a manner "other than by trial de novo."⁷⁰ Finally, the APTRA provides that judicial review by trial de novo shall be conducted as any civil suit and with utter disregard for the agency action, whereas review under the substantial evidence rule will be limited to a consideration of the agency record, with minor exceptions.⁷¹

The conflict between the PURA and the APTRA arose in two ways. First, section 69 of the PURA speaks of review under the substantial evidence rule, which would indicate that the manner of review should be classified as "other than by trial de novo." Prior to the enactment of the PURA, however, review of utility rates cases was by a form of trial de novo.⁷² When section 69 was coupled with section 4,⁷³ there was some doubt as to whether judicial review was to be strictly confined to substantial evidence or whether section 4 of the PURA had the effect of a savings clause and retained the trial de novo feature of rate case reviews.⁷⁴ The problem was compounded by the second conflict in the statutes, found in section 69 of the PURA, which specified review under both the substantial evidence rule and by the preponderance of the evidence test. Was this an indication that trial de novo was the proper method of judicial review?

The court of civil appeals held that it was, concluding that judicial review was to be had in the manner "accorded by pre-existing law in rate appeal."⁷⁵ If this holding had been allowed to stand, it threatened to undo much of that which the APTRA was intended to accomplish. Prior to passage of the APTRA, judicial review of administrative decisions in contested cases was a crazy-quilt of varying procedures. There were at least four different methods of review: (1) pure trial de novo; (2) substantial evidence trial de novo; (3) substantial evidence confined to the record; and (4) the rate case classification, which was also called a de novo fact trial.⁷⁶ On the other hand, the stated purpose of APTRA is to establish "minimum standards for uniform practice and procedure,"⁷⁷ and it expressly provides for only two types of review: trial de novo and review confined to the agency record.

The supreme court reversed the court of civil appeals.⁷⁸ It held first that the APTRA provided for only two types of review in contested cases, pure

68. *Id.* art. 6252—13a, § 19(e) (Vernon Supp. 1980).

69. *Id.* §§ 19(b)(3), (c).

70. *Id.* § 19(d).

71. *Id.* § 19(e).

72. *See, e.g., Lone Star Gas Co. v. State*, 137 Tex. 279, 308, 153 S.W.2d 681, 697 (1941).

73. *See note 44 supra.*

74. 571 S.W.2d at 506-07.

75. 560 S.W.2d 157, 160 (Tex. Civ. App.—Austin 1977), *rev'd*, 571 S.W.2d 503 (Tex. 1978).

76. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 571 S.W.2d 503, 507 (Tex. 1978).

77. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 1 (Vernon Supp. 1980).

78. 571 S.W.2d 503 (Tex. 1978).

trial de novo and review confined to the agency record. Secondly, section 69 of the PURA did not authorize judicial review by de novo fact trial, as did prior rate case law, but instead contemplated substantial evidence review confined to the agency record in accordance with the APTRA. The court then considered section 69 of the PURA, which called for review under the substantial evidence rule on all issues except that of confiscation, to which the preponderance of the evidence rule⁷⁹ was to be applied. The court declared the clause of section 69 calling for review by a preponderance of the evidence on confiscation issues inoperative and void, reasoning that the legislature could not validly prescribe two standards of review for various aspects of one case.⁸⁰ The court noted that, while the issue of confiscation is a question of law in rate cases, the preponderance of the evidence test normally is utilized in deciding questions of fact.⁸¹ Importantly, the court did not hold that the legislature is without power to provide for judicial review by a preponderance of the evidence test, but instead noted that the legislature could set whatever kind of review it desired, "so long as constitutional safeguards and requirements are not transgressed."⁸² The court merely held that those safeguards and requirements were transgressed by detailing two standards of review for one agency decision.⁸³

In another important decision construing the APTRA with prior statutes governing judicial review, the supreme court held that the APTRA applies only to administrative orders promulgated after January 1, 1976, the effective date of the statute.⁸⁴ All administrative orders made prior to the effective date of the APTRA must be reviewed under the laws applicable when the order was promulgated. At issue was whether the APTRA's provision allowing causes to be remanded to an agency for further consideration should be applied retroactively to a Railroad Commission order promulgated under a statute that allowed the reviewing court either to affirm the order or to reverse and render, but not to remand to the agency.⁸⁵ While the general rule is that changes in procedural law may be applied retroactively,⁸⁶ the court decided on policy grounds that the APTRA should have a prospective effect only.⁸⁷ The practical importance of this decision may be expected to diminish in the near future as fewer appeals arise from orders before January 1, 1976.

As noted above, the courts have long recognized an inherent right of appeal from administrative orders when necessary to correct violations of

79. TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon Pam. Supp. 1963-1979).

80. 571 S.W.2d at 510-11.

81. *Id.* at 511.

82. *Id.* (quoting *Gerst v. Nixon*, 411 S.W.2d 350, 356 (Tex. 1966)).

83. 571 S.W.2d at 512.

84. *Merchants Fast Motor Lines, Inc. v. Railroad Comm'n*, 573 S.W.2d 502, 506 (Tex. 1978).

85. See TEX. REV. CIV. STAT. ANN. art. 911b, § 20 (Vernon 1964).

86. See *Phil H. Pierce Co. v. Watkins*, 114 Tex. 153, 158-59, 263 S.W. 905, 907 (1924). See also *Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 525 (Tex. 1975).

87. 573 S.W.2d at 506.

constitutional rights.⁸⁸ The courts are hesitant to recognize any other right of appeal unless authorized by statute. The supreme court stated the general rule: "Assuming compliance with basic constitutional guarantees, no right of appeal from the action of an administrative body or a civil service department exists unless provided by statute."⁸⁹

On the same day that it made this statement, however, the court also reserved for future consideration whether or not an equitable action to vacate an administrative order for extrinsic fraud could be brought in the absence of any statutory authority to do so.⁹⁰ Suit had been brought in district court to set aside an order of the savings and loan commissioner allowing a competing savings and loan association to open a branch office. The plaintiff had failed to file a motion for rehearing before the commission. In the trial court, the plaintiff asserted two causes of action. One was an ordinary administrative appeal of the commissioner's order. The other was an equitable action seeking to set aside the order on the basis that it was obtained by fraud. The district court dismissed the case for want of jurisdiction due to plaintiff's failure to exhaust its administrative remedies by filing a motion for rehearing before the commissioner. The court of civil appeals affirmed that part of the trial court's judgment dismissing the administrative appeal cause of action.⁹¹ The court held, however, that the equitable cause of action was to be treated differently.⁹² The court noted that no Texas cases had addressed whether a proceeding in equity could set aside an administrative order for fraud, thus making this a case of first impression.⁹³

The court of civil appeals held that an equitable action should be available to an aggrieved party, inasmuch as "[f]raud vitiates even the most solemn . . . proceedings,"⁹⁴ and "equity will not suffer a right to be without a remedy."⁹⁵ The court stated: "Since a court of equity may vacate a judgment for extrinsic fraud, surely that court may vacate an administrative order for extrinsic fraud."⁹⁶ The test for proving extrinsic fraud in administrative proceedings would be the same as that required in a bill of review to set aside judicial actions for extrinsic fraud.⁹⁷ When measured by this standard, however, the plaintiff's amended petition did not allege facts that constituted extrinsic fraud, which meant that the trial court's dis-

88. See text accompanying notes 3-12 *supra*.

89. *Firemen's & Policemen's Civil Serv. Comm'n v. Blanchard*, 582 S.W.2d 778, 778 (Tex. 1979). See also *Firemen's & Policemen's Civil Serv. Comm'n v. Kennedy*, 514 S.W.2d 237, 239 (Tex. 1974).

90. *Vandergriff v. First Fed. Sav. & Loan Ass'n*, 586 S.W.2d 841, 843 (Tex. 1979) (correct name of the savings and loan commissioner is L. Alvis Vandygriff).

91. *First Fed. Sav. & Loan Ass'n v. Vandygriff*, 576 S.W.2d 904, 908 (Tex. Civ. App.—Austin), *rev'd*, 586 S.W.2d 841 (Tex. 1979).

92. 576 S.W.2d at 908.

93. *Id.* at 906.

94. *Id.* (quoting 2 AM. JUR. 2D *Administrative Law* § 492 (1962)).

95. 576 S.W.2d at 906.

96. *Id.* at 907.

97. See *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950); Comment, *Bill of Review: The Requirement of Extrinsic Fraud*, 30 BAYLOR L. REV. 539 (1978).

missal of the cause had been correct, even if not for the same reason as that expressed by the court of civil appeals. Nevertheless, the court of civil appeals remanded the case to the trial court in the interest of justice, so as to allow the plaintiff to replead and perhaps allege facts showing extrinsic fraud.⁹⁸

Interestingly enough, as the case came to the supreme court, the only points of error raised by the commissioner related to the lower court's remand of the case in the interest of justice. The commissioner did not object to the court's recognition of an equitable cause of action, as he stated in his application for writ of error:

The court [of civil appeals] concluded that, since a court of equity may vacate its own judgment for extrinsic fraud, a district court sitting as a court of equity may set aside an administrative order obtained by extrinsic fraud. Petitioners [the Commissioner] agree with this portion of the lower court's opinion.⁹⁹

Indeed, the commissioner had maintained the same position before the court of civil appeals, stating in its brief to that court: "[A]n administrative order obtained by extrinsic fraud should be reachable and reviewable and subject to being vacated."¹⁰⁰ Had the supreme court refused the application for writ of error "no reversible error," that action might have been interpreted as approving the lower court's recognition of an equitable cause of action, even though the point was not before the Texas Supreme Court, thus potentially allowing the establishment of a new rule of law by default. Instead, the supreme court reversed the judgment of the court of civil appeals on the points presented to it and reserved for future consideration whether or not "an equitable action to vacate an administrative order for extrinsic fraud may be brought, irrespective of any statutory authority to do so."¹⁰¹

General case authority in other jurisdictions supports the holding of the court of civil appeals,¹⁰² and it is the writers' opinion that the rule there announced is good. Such a rule would not necessarily be incompatible with the APTRA, since its stated purpose is to establish "minimum standards" of practice and procedure.¹⁰³ The requirement of a motion for rehearing should assume no more importance than does any time limit in a regular bill of review proceeding; *i.e.*, a bill of review is brought as a separate action precisely because the time limits have expired on the judgment complained of and it has become final.¹⁰⁴ The supreme court would have to retreat somewhat from its statements about limited rights of appeal, but

98. 576 S.W.2d at 908.

99. Application for Writ of Error at 3, *Vandergriff v. First Fed. Sav. & Loan Ass'n*, 586 S.W.2d 841 (Tex. 1979).

100. Response of Appellees to Questions Posed by Court of Civil Appeals at 6, *First Fed. Sav. & Loan Ass'n v. Vandygriff*, 576 S.W.2d 904 (Tex. Civ. App.—Austin), *rev'd*, 586 S.W.2d 841 (Tex. 1979).

101. 586 S.W.2d at 843.

102. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); 2 AM. JUR. 2D *Administrative Law* §§ 488, 492, 653 (1962).

103. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 1 (Vernon Supp. 1980).

104. See generally *Alexander v. Hagedorn*, 148 Tex. 565, 226 S.W.2d 996 (1950).

in some cases the court has at least referred to equity's power to correct fraud in administrative proceedings.¹⁰⁵

Perhaps the most important questions to be resolved, however, will concern the method of review adopted by the courts. Should the aggrieved party file its "administrative bill of review" with the administrative agency or in the courts? If before the agency, will the agency's decision be reviewable by the courts, and if so, under what standard of review: trial de novo or substantial evidence? Would the APTRA's rules governing judicial review even apply to such a situation, since the "administrative bill of review" would be a creation of the court? If suit is to be brought originally in court rather than before the agency, what matters are to be proven and how much of the record before the agency will be admissible in trial, if any? Will suit be conducted as in any civil case, or will the APTRA apply, or will some form of pre-APTRA review be resurrected? The Austin court of civil appeals answered these questions in only the most general way, holding that suit is to be brought in the courts without returning first to the agency, and suggesting that general rules applicable to all civil suits will apply there as well. This holding is not binding, of course, and courts considering the question in the future may reach different results.

B. *Judicial Notice of Agency Rules*

During the survey period the Austin court of civil appeals became the first appellate court in the state to take judicial notice of the acts of an administrative body officially published in the Texas Register.¹⁰⁶ Prior to this decision, Texas cases uniformly held that courts could not take judicial notice of any rules promulgated by an administrative agency.¹⁰⁷ Such rules were required to be proved as any other evidence in order to be admissible. The reason for this rule was that Texas previously lacked any official reports of these rules and regulations, thereby making it necessary for the moving party to introduce such matters into the record if he wished to rely upon them.

This problem was solved in 1976 when the Texas Legislature created the Texas Register as part of APTRA and required all agency rules to be published there.¹⁰⁸ Furthermore, the Austin court of civil appeals noted that Texas courts take judicial notice of federal rules and regulations¹⁰⁹ and that federal courts take judicial notice of utility tariffs in cases such as the

105. *Texas State Bd. of Examiners in Optometry v. Carp*, 388 S.W.2d 409, 416 (Tex. 1965).

106. *Southwestern Bell Tel. Co. v. Nash*, 586 S.W.2d 647 (Tex. Civ. App.—Austin 1979, no writ).

107. *See Imperial Am. Resources Fund, Inc. v. Railroad Comm'n*, 557 S.W.2d 280, 288 (Tex. 1977); *Byrd v. Trevino-Bermea*, 366 S.W.2d 632, 635 (Tex. Civ. App.—Austin 1963, no writ).

108. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 6 (Vernon Supp. 1980).

109. *See C. McCORMICK & R. RAY, TEXAS LAW OF EVIDENCE* §§ 172, 184 (2d ed. 1956).

one before the court.¹¹⁰ The court therefore declared that no sound reason existed why Texas should not follow the federal rule in this regard and take judicial notice of the acts of administrative bodies as officially published in the Texas Register. The taking of such a step is significant, in that the outcomes of a large number of Texas cases have previously turned on the court's inability to take judicial notice of such rules.¹¹¹

Justice Shannon concurred in the result, but disagreed with the majority on the issue of judicial notice. He correctly stated that Texas courts take judicial notice of federal rules and regulations because Congress has specifically provided that "the contents of the Federal Register *shall* be judicially noticed . . ." ¹¹² No similar requirement is found in the APTRA. Justice Shannon asserted that the legislature, had it chosen to alter the long-standing rule in Texas, could have done so in the APTRA. It seems more reasonable to conclude, however, that since the refusal of Texas courts to take judicial notice of administrative rules is a doctrine created by common law, it is the province of the courts to refuse to follow an outdated precedent that no longer serves the purpose for which it was created.¹¹³

C. *Substantial Evidence Rule*

Over the years, Texas courts have stated and restated the definition of substantial evidence so as to include a wide variety of factors and qualifying terms.¹¹⁴ The heart of review under the substantial evidence rule is reasonableness,¹¹⁵ and as best stated, the test is "whether the evidence as a whole is such that reasonable minds could have reached the conclusion that the [agency] must have reached in order to justify its action."¹¹⁶ At its worst, the substantial evidence rule has been equated with not much evidence at all: "In practical result, it has not taken much evidence to qualify as substantial. In fact, the evidence may be substantial and yet greatly preponderate the other way."¹¹⁷ In between, Texas courts have added a variety of tests, factors, and conditions, not the least of which is the con-

110. See *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 491 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967).

111. See, e.g., *City of Manvel v. Texas Dep't of Health Resources*, 573 S.W.2d 825 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

112. 44 U.S.C. § 1507 (1976) (emphasis added).

113. "[T]he genius of the common law rests in its ability to change, to recognize when a timeworn rule no longer serves the needs of society, and to modify the rule accordingly." *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979).

114. See *Board of Firemen's Relief & Retirement Fund Trustees v. Marks*, 150 Tex. 433, 437, 242 S.W.2d 181, 183 (1951) (some evidence is not substantial evidence); *Cruz v. City of San Antonio*, 440 S.W.2d 924, 925 (Tex. Civ. App.—Waco 1969, no writ) ("[t]he test in applying the substantial evidence rule is whether the evidence is such that reasonable minds could not have reached the conclusion that the [agency] must have reached in order to justify its action").

115. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620-21 (1966); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

116. *Auto Convoy Co. v. Railroad Comm'n*, 507 S.W.2d 718, 722 (Tex. 1974).

117. *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11, 13 (Tex. 1977).

cept of arbitrary and capricious conduct.¹¹⁸ This is not to suggest, however, that these are necessarily inappropriate considerations, since the "reasonableness" of an agency's action must be measured against some standard of unreasonable conduct, *i.e.*, arbitrariness and capriciousness. In any event, Texas courts have tended to equate the substantial evidence rule with a consideration of the state of the evidence and the conduct of the agency.¹¹⁹

The passage of the APTRA, however, appeared to separate these two factors. Section 19(e) of the Act sets out the grounds upon which an agency order may be reversed or remanded, including the following: "(5) [the orders are] not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or (6) [the orders are] arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."¹²⁰ In *Starr County v. Industrial Services, Inc.*¹²¹ a Texas court expressly recognized for the first time that these are separate and independent grounds for reversal or remand of an agency order. Thus, an agency order that is amply supported by the evidence may nevertheless be overturned for having been rendered in an arbitrary or capricious manner. Various tests suggested by the court for determining whether an agency has acted arbitrarily or capriciously include: whether there is "a rational connection between the facts and the decision of the agency"; whether the agency considered "all relevant factors"; whether the agency has "actually taken a hard look at the salient problems and has . . . genuinely engaged in reasoned decision-making"; or whether the parties are "able to know what is expected of them in the administrative process."¹²²

While this decision may be applauded for its legal reasoning and analysis, it may only open the way for inconsistent application of the law to the facts. Consider, for example, two decisions rendered by the Austin court of civil appeals within a three-month period. In *City of Frisco v. Texas Water Rights Commission*¹²³ the plaintiff city appealed from an order of the Texas Water Rights Commission granting the applications of two other cities for permits to use water from a proposed reservoir project but denying Frisco's and others' applications to take water from the same project.

118. See *Lewis v. Metropolitan Sav. & Loan Ass'n*, 550 S.W.2d 11 (Tex. 1977); *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1967). See generally Note, *Beyond the Substantial Evidence Rule: Lewis v. Metropolitan Savings & Loan Association*, 31 Sw. L.J. 927 (1977).

119. "[A]n arbitrary action cannot stand and the test generally applied by the courts in determining the issue of arbitrariness is whether or not the administrative order is reasonably supported by substantial evidence." *Gerst v. Nixon*, 411 S.W.2d 350, 354 (Tex. 1966); *accord*, *Board of Firemen's Relief & Retirement Fund Trustees v. Marks*, 150 Tex. 433, 437, 242 S.W.2d 181, 182-83 (1951). This attitude persists today. *Warner v. City of Lufkin*, 582 S.W.2d 165, 166 (Tex. Civ. App.—Beaumont 1979, writ ref'd n.r.e.); *Texas Health Facilities Comm'n v. Baptist Gen. Convention*, 573 S.W.2d 575, 582 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

120. TEX. REV. CIV. STAT. ANN. art. 6252—13a, §§ 19(e)(5)-(6) (Vernon Supp. 1980).

121. 584 S.W.2d 352 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

122. *Id.* at 355-56.

123. 579 S.W.2d 66 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

The City of Frisco pointed out that the agency's staff experts had recommended action entirely different from that adopted by the commission. Frisco also quoted statements of individual commissioners indicating their initial agreement with the city. The court of civil appeals held that the staff recommendations were not binding upon the agency but could be considered by the court in reviewing the evidence.¹²⁴ The court refused to consider the statements of the commissioners, holding that they were irrelevant to a determination of whether the order was supported by substantial evidence.¹²⁵ The court upheld the order on substantial evidence without reviewing it for arbitrary or capricious conduct.¹²⁶

In *Starr County v. Starr Industrial Services, Inc.*¹²⁷ the plaintiff corporation appealed the order of the Texas Water Quality Board, predecessor to the Water Rights Commission, denying its application for a solid waste permit to create a dump for toxic wastes. The plaintiff pointed out that it had worked closely with members of the board's staff, who had seemed to favor the proposal. The plaintiff also quoted statements from members of the board, which were incorporated into findings of fact, citing adamant local opposition to the granting of any permit for a toxic waste disposal site. The court of civil appeals held that the board acted arbitrarily and capriciously by adding requirements and conditions to the permit not proposed by the staff, and by considering the irrelevant fact of local opposition.¹²⁸ The court emphasized plaintiff's total surprise at having its application denied, after receiving some sort of assurances that it would be granted.¹²⁹ The court did not reach the question of substantial evidence. The facts of the two cases are sufficiently close to make one question why the agency's conduct was arbitrary and capricious in one case but not in the other.¹³⁰

IV. LEGISLATIVE DEVELOPMENTS

A. *Data Collection and Utilization*

The burden of paperwork on individual citizens and private industry imposed by government agencies in search of statistical information is a very real problem in today's society. It has been estimated that the cost of complying with the paperwork requirements of the federal government alone exceeds \$100 billion annually, or about \$500 for each person in this country.¹³¹ In an effort to lessen the burden imposed on the citizens of Texas by the state government, the Texas Legislature passed a bill aimed

124. *Id.* at 72.

125. *Id.*

126. *Id.*

127. 584 S.W.2d 352 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

128. *Id.* at 356.

129. *Id.*

130. The difference possibly may be explained by the points of error raised by the parties in each case.

131. COMMISSION ON FEDERAL PAPERWORK, A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK—FINAL SUMMARY REPORT 5 (1977).

at coordinating the information-gathering functions of state agencies.¹³² The bill applies to all executive branch agencies with statewide jurisdiction that have authority over the issuance of licenses, registrations, or other permits required by law in order to engage in an occupation or to operate a business. The law requires the agency to determine whether information already in its files substantially satisfies its present information needs before it may request or obtain new information. The act also requires agencies to share information to the extent possible so as to reduce duplicative information searches. It is difficult to estimate the practical effect this statute will have on the paperwork burden. It will be interesting to see if the statute is used by citizens as a sword to cut through red tape or a shield to prevent unwarranted or undesired government intrusions into their private lives.

B. *Sunset Act*

No discussion of legislative developments would be complete without reference to the Sunset Act.¹³³ Although an in-depth discussion is beyond the scope of this Article,¹³⁴ suffice it to say that twenty-six agencies were scheduled for review in this the first year of Sunset review. Of these twenty-six agencies, one was abolished,¹³⁵ thirteen were continued with some modifications,¹³⁶ nine were terminated,¹³⁷ and three were merged

132. 1979 Tex. Sess. Law Serv., ch. 732, at 1800 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4413 (34a) (Vernon Supp. 1980)).

133. TEX. REV. CIV. STAT. ANN. art. 5429k (Vernon Supp. 1980).

134. See Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978).

135. The Board of Managers of the Texas State Railroad was abolished by the 65th Legislature in 1977. 1977 Tex. Gen. Laws, ch. 436, § 1, at 1149 (Vernon).

136. Board of Architectural Examiners (assumed Texas Board of Landscape Architects), 1979 Tex. Sess. Law Serv., ch. 619, § 2, at 1384 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 249a, § 2 (Vernon Supp. 1980)); State Bar of Texas, 1979 Tex. Sess. Law Serv., ch. 510, § 2, at 1081 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 320a—1 (Vernon Supp. 1980)); Board of Law Examiners, 1979 Tex. Sess. Law Serv., ch. 594, at 1253 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 304 (Vernon Supp. 1980)); State Board of Barber Examiners, 1979 Tex. Sess. Law Serv., ch. 613, at 1363 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 8407(a), § 26(a) (Vernon Supp. 1980)); Texas Cosmetology Commission, 1979 Tex. Sess. Law Serv., ch. 606, § 2(a), at 1340-41 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 8451a, § 2(a) (Vernon Supp. 1980)); Good Neighbor Commission, 1979 Tex. Sess. Law Serv., ch. 741, § 1, at 1825 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4101—2, § 1 (Vernon Supp. 1980)); State Board of Morticians, 1979 Tex. Sess. Law Serv., ch. 592, § 2A, at 1233, 1235 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4582b, § 2A(1) (Vernon Supp. 1980)); Texas Motor Vehicle Commission, 1979 Tex. Sess. Law Serv., ch. 709, at 1725 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4413(36) (Vernon Supp. 1980)); Texas Board of Licensure for Nursing Home Administrators, Tex. Sess. Law Serv., ch. 591, § 1(1), at 1226 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 4442d, § 3(1) (Vernon Supp. 1980)); Texas State Board of Public Accountancy, 1979 Tex. Sess. Law Serv., ch. 646, § 4a, at 1479-80 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 41a—1, § 4(a) (Vernon Supp. 1980)); Texas Real Estate Commission, 1979 Tex. Sess. Law Serv., ch. 585, § 1(a), at 1203 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 6573a, § 5(a) (Vernon Supp. 1980)); Texas Structural Pest Control Board, 1979 Tex. Sess. Law Serv., ch. 614, § 2(a), at 1369 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 135b-6, § 3(a) (Vernon Supp. 1980)); Texas Turnpike Authority, 1979 Tex. Sess. Law Serv., ch. 581, § 3, at 1193 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 6674v, § 3 (Vernon Supp. 1980)).

137. The agencies terminated included: "Battleship Texas Commission, Burial Associa-

with other agencies.¹³⁸ One new agency was created.¹³⁹

Of particular interest to lawyers was the action taken with regard to the State Bar of Texas. After extensive debate and public discussion, the State Bar Act¹⁴⁰ was passed, preserving intact the integrated bar and extending its existence for twelve more years. The most noticeable changes provided by the Act are in the composition of the board of directors of the bar. The board will include six lay persons who will be appointed by the supreme court and confirmed by the Texas Senate. Of the six, three will be appointed by the court from a list of its own choosing and three from a list of not less than fifteen names submitted by the Governor.¹⁴¹

tion Rate Board (functions transferred to State Board of Insurance), Board of County and District Road Indebtedness, Texas Navy, Inc., Pesticide Advisory Committee, Pink Bollworm Commission, Texas Private Employment Agency Regulatory Board (certain functions transferred to Department of Labor and Standards), Texas Stonewall Jackson Memorial Board, and Vehicle Equipment Safety Commission." Summer & Crowley, *Administrative Law and Sunset Act Application*, in M. CANON & B. ROBERTS, TEXAS LEGISLATIVE HIGHLIGHTS 1979, at 24 (1979).

138. The Texas State Board of Landscape Architects was consolidated with the Texas State Board of Architectural Examiners. 1979 Tex. Sess. Law Serv., ch. 619, §§ 9-10, at 1393 (Vernon) (amending TEX. REV. CIV. STAT. ANN. arts. 249a & 249c (Vernon Supp. 1980)). The Texas State Board of Registration for Public Surveyors and the Board of Registration for Public Surveyors were consolidated into the Texas Board of Land Surveying. 1979 Tex. Sess. Law Serv., ch. 597, § 30, at 1277-78 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 5282c (Vernon Supp. 1980), repealing *id.* arts. 5282a & 5282b (Vernon 1962 & Vernon Supp. 1978-79)).

139. Texas Board of Irrigators, 1979 Tex. Sess. Law Serv., ch. 197, § 3(a), at 1384 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 8751, § 3(a) (Vernon Supp. 1980)).

140. 1979 Tex. Sess. Law Serv., ch. 510, at 1081 (Vernon) (codified at TEX. REV. CIV. STAT. ANN. art. 320a-1 (Vernon Supp. 1980)).

141. *Id.* § 9. Similar provisions were made for nonattorney participation on local grievance committees. *Id.* § 12(e). The Board of Law Examiners also was considered and renewed under the Sunset Act for 12 years, with comparable requirements for the inclusion of nonlawyers on the board. 1979 Tex. Sess. Law Serv., ch. 594, at 1253 (Vernon). As of this writing, all appointments under both new laws have been made. See *Newsletter*, 42 TEX. B.J., Dec. 1979, at 1; *Newsletter*, 42 TEX. B.J., Nov. 1979, at 3; *Newsletter*, 42 TEX. B.J., Oct. 1979, at 1-2.

