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ADMINISTRATIVE LAW

by

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Decisions of the Texas appellate courts resolved several significant issues relating to administrative law in the past year. As in previous *Surveys*, these decisions are grouped into three broad areas for discussion: constitutional considerations, administrative adjudications, and judicial review. In addition to these noteworthy cases, important legislative developments in the field are reviewed.

I. CONSTITUTIONAL CONSIDERATIONS

A. Notice and Hearing

Fundamental to the administrative system is the constitutional due process requirement that all parties to a proceeding receive fair notice of and the opportunity to prepare for any hearing. The Administrative Procedure and Texas Register Act (APTRA) specifically provides that all parties to a contested case must be given "reasonable notice of not less than 10 days" of a hearing.[1] This section of the statute was construed in *Gibraltar Savings Association v. Franklin Savings Association* to mean that the notice provided always must be reasonable; it never may be less than ten days and occasionally may be more.[2] The case involved a challenge to an order of the Savings and Loan Commissioner approving Gibraltar Savings Association's branch office application. Southside Savings and Loan Association, which opposed the branch office application, received eleven days advance notice of the hearing, one day more than required by statute. Southside appeared at the hearing and protested that the notice it received was too late to enable it to prepare adequately for the hearing, although it offered no evidence to support its claim. The hearing examiner refused to postpone the hearing, and thereafter Gibraltar's application was approved. The court of civil appeals upheld the action of the hearing examiner, determining that he had not abused his discretion in refusing to postpone the hearing. Since Southside had failed to present any facts showing why it was not prepared, the court refused to hold that eleven days' notice was inadequate as a matter of law. The court stated that due process was satisfied by giving Southside an opportunity to prove its need for a continu-

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1. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 13(a) (Vernon Supp. 1982).
2. 617 S.W.2d 322, 325 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

ance; that Southside did not use the opportunity was its own fault.[3]

Strict adherence to the standard procedures for giving notice, however, is not always sufficient. For example, in *Winters v. Working*[4] United States customs officials had instituted summary forfeiture proceedings for a seized truck. In accordance with federal regulations, the customs officials utilized their standard procedure of publishing notice of the forfeiture hearing in a local newspaper.[5] They did not mail notice of the forfeiture hearings directly to the owner of the truck, despite the fact that they knew his address and had corresponded with him before. The owner did not read the published notice and did not learn about the forfeiture hearing until several months after it had taken place. The district court held that due process had been denied, even though notice had been given in the manner authorized by law.[6] The court concluded: "Due process requires that notice of an action be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Notice by publication is not sufficient with respect to an individual whose name and address are known."[7]

A party is entitled not only to notice of a hearing but also to fair notice of the nature of the hearing, so as to be afforded an opportunity to prepare for it. This constitutional principle is embodied in the Firemen's and Policemen's Civil Service Act, which requires department heads to furnish written statements to police and fire personnel stating the specific reasons for their suspensions.[8]

In *Lockhart v. Firemen's & Policemen's Civil Service Commission*[9] the letter of suspension written by the police chief ran afoul of this requirement. The letter referred not only to certain specific acts of the police officer on a particular night but also to his general record of performance for the previous six months without specifying any particular conduct during that six-month period. The court of civil appeals held this to be insufficient notice under the statute and ordered the police officer reinstated.[10] One is not always entitled to notice of the nature of a hearing however. A federal district court held in *Federal Savings & Loan Insurance Corp. v. First National Development Corp.* that neither the Constitution nor any statute required an administrative agency to inform subpoenaed witnesses of the purpose or scope of an administrative investigation.[11] Indeed, the

3. *Id.* at 328.
4. 510 F. Supp. 14 (W.D. Tex. 1980).
5. *See* 19 U.S.C. § 1607 (1976 & Supp. II 1978); 19 C.F.R. § 162.45 (1981).
6. 510 F. Supp. at 17.
7. *Id.*
8. TEX. REV. CIV. STAT. ANN. art. 1269m, § 16 (Vernon 1963).
9. 616 S.W.2d 426 (Tex. Civ. App.—Fort Worth 1981, writ granted).
10. *Id.* at 430; *cf.* Grace v. Structural Pest Control Bd., 620 S.W.2d 157 (Tex. Civ. App.—Waco 1981, no writ) (plaintiff who took steps to comply with Texas Pest Control Act when he learned of investigation held to have received notice of conduct alleged to warrant investigation after he had complied).
11. 497 F. Supp. 724, 732-33 (S.D. Tex. 1980).

court suggested that under the proper circumstances, an agency would be thoroughly justified in keeping the investigation as confidential as possible.[12]

Just as due process requires that a party be given advance notice of a hearing in order to prepare for the hearing, so also does it generally require that the party be given a hearing before the agency acts. In *Southwestern Bell Telephone Co. v. Public Utility Commission*,[13] however, the Public Utility Commission (PUC) attempted to do otherwise. The case involved a challenge to a tariff amendment the PUC had granted Southwestern Bell, allowing the telephone company to conduct an experiment of an electronic information system for businesses and consumers. During the pendency of the administrative proceeding, the PUC issued a cease and desist order restraining Southwestern Bell from conducting the experiment for the duration of the proceeding. Southwestern Bell immediately appealed to the district court, challenging the issuance of such an order without a hearing. The district court dismissed the suit. The court of civil appeals, however, agreed with Southwestern Bell and voided the PUC's cease and desist order.[14] Significantly, the court did not rule that the PUC lacked the authority to issue any cease and desist order. It held only that the PUC lacked the authority to issue the order on a summary basis without notice and hearing, because doing so was a denial of due process to Southwestern Bell.[15]

B. Separation of Functions

One of the more disturbing aspects of the administrative system is the fact that each administrative agency concentrates and performs within itself those functions traditionally kept separate in our judicial system: investigation, prosecution, and judgment.[16] Despite the controversial nature of this concentration of powers, it is an accepted part of the administrative process, and does not of itself constitute a denial of due process.[17]

Nevertheless, the overlap of functions on occasions may be so inequitable that it violates the requirements of due process. *Rogers v. Texas Optometry Board*[18] involved such a situation. The Texas Optometry Board had issued an order suspending Dr. Rogers' license to practice optometry. The evidence presented at the board's hearing came from two members of the board who had investigated the case on an undercover basis. These members did not vote at the hearing, and a third member of the board

12. *Id.* at 733.
13. 618 S.W.2d 130 (Tex. Civ. App.—Austin), *writ dism'd per curiam*, 623 S.W.2d 316 (Tex. 1981).
14. 618 S.W.2d at 135.
15. *Id.* at 136.
16. K. DAVIS, ADMINISTRATIVE LAW TEXT § 13.01 (1972); B. SCHWARTZ, ADMINISTRATIVE LAW § 110 (1976).
17. *See* Withrow v. Larkin, 421 U.S. 35, 58 (1975); Grace v. Structural Pest Control Bd., 620 S.W.2d 157, 160 (Tex. Civ. App.—Waco 1981, no writ).
18. 609 S.W.2d 248 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

disqualified himself because of kinship to Dr. Rogers. The remaining three board members voted to suspend Dr. Rogers' license. The district court upheld the board's order on the ground that it was supported by substantial evidence. The Dallas court of civil appeals, with one judge dissenting, reversed, holding that the unusual circumstances presented resulted in a denial of due process.[19] The court acknowledged the general rule that a combination of functions was not, without more, unconstitutional, but at the same time held that an unreasonable risk of bias was created by a system that allowed board members to act both as investigators and judges.[20] Further the court stated that "to have members of the Board sit in judgment with their fellows one day and appear as investigators and witnesses before them the next creates an intolerable risk of unfairness under the circumstances shown here."[21] While presuming that the board members acted in good faith, the court nevertheless held that " 'a realistic appraisal of psychological tendencies and human weakness' "[22] led to the conclusion that "it is obviously difficult for members of the Board to reach a completely objective decision when the principal witnesses are other members of the same body and the issues presented involve their credibility."[23]

One member of the court dissented, arguing that the majority opinion effectively ignored the asserted presumption of honesty and good faith on the part of the board members and instead created a new presumption of bias without any evidence to support a showing thereof.[24] In addition, the dissent asserted that any risk of bias was minimized by the investigating board members' recusal, and that to carry the majority's reasoning to its logical extreme would open all agency decisions to attack because the supposed risk of psychological bias could exist with any of an agency's employees "who of necessity must work closely and confidentially with the [voting members of the agency]."[25]

Although the action of the board members unquestionably was somewhat unorthodox, to say as a matter of law that it was inherently unfair is difficult in the absence of any evidence of actual bias. Certainly, the majority's holding of presumed harm seems to run counter to the Texas Supreme Court's ruling in *Vandygriff v. First Savings & Loan Association*, just a few months earlier, which refused to apply a rule of presumed harm

19. *Id.* at 251.
20. *Id.* at 250.
21. *Id.*
22. *Id.* (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
23. 609 S.W.2d at 250; *cf.* Wong Yang Sung v. McGrath, 339 U.S. 33, 45 (1950) ("But the [presiding] inspector's duties include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today."); Local 134, IBEW v. NLRB, 486 F.2d 863 (7th Cir. 1973) (enforcement of NLRB order denied where hearing officer in earlier proceeding also served in prosecutorial capacity in later unfair labor practice proceeding).
24. 609 S.W.2d at 251-52.
25. *Id.* at 254 (Akin, J., dissenting). The majority attempted to avoid any such ramifications by emphasizing that its opinion was limited to the unusual facts presented. *Id.* at 250-51.

regarding ex parte communications.[26]

C. Separation of Powers

The year 1979 was a watershed year in Texas as to the respective powers of the state legislature and the Texas Supreme Court to regulate the practice of law. A major fight occurred in the legislature over the effect of the Texas Sunset Act[27] on the continued existence of the State Bar of Texas. The issue was largely resolved by the Texas Supreme Court's order of June 19, 1979,[28] and elaborate dictum concerning inherent judicial power in *Eichelberger v. Eichelberger*, wherein the court firmly set forth its position that the legislature regulated the practice of law only at the sufferance of the court.[29]

During the survey period, the court's position was further solidified. Article 5, section 3 of the Texas Constitution was amended in the fall of 1980 to provide that "[t]he Supreme Court shall exercise the judicial power of the State."[30] In *Vondy v. Commissioners of Uvalde City* the Texas Supreme Court considered this constitutional amendment to be an express recognition of its inherent power to regulate not only the practice of law, but also the entire judicial branch.[31] A constable in *Vondy* sought a writ of mandamus to compel the county commissioners' court to set a salary for his office. The supreme court held that a specific provision of the Texas Constitution compelled the commissioners' court to set such a salary.[32] Having found for the plaintiff on the basis of a specific constitutional provision relating to salaries for constables, the court could have ended its opinion; instead, though, it chose to discuss in dictum another "compelling reason" why the writ of mandamus was appropriate, namely, the court's inherent power to compel the expenditure of money if it was necessary and reasonable to the functioning of the judiciary.[33] As the court explained:

> The legislative branch of this state has the duty to provide the judiciary with the funds necessary for the judicial branch to function adequately. If this were not so a legislative body could destroy the judiciary by refusing to adequately fund the courts. The judiciary must have the authority to prevent any interference with or impairment of the administration of justice in this state.[34]

This language can only be read as a clear warning to those who would challenge the authority of the court.[35]

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26. 617 S.W.2d 669, 673 (Tex. 1981).
27. TEX. REV. CIV. STAT. ANN. art. 5429k (Vernon Supp. 1982).
28. *Reprinted in* 16 Tex. Law. Weekly Dig., June 20, 1979, at 1.
29. 582 S.W.2d 395, 397-400 (Tex. 1979).
30. TEX. CONST. art. V, § 3.
31. 620 S.W.2d 104, 109-10 (Tex. 1981).
32. *Id.* at 108.
33. *Id.* at 109. Perhaps because of this dictum, four members of the court only concurred in the result and did not join in the opinion. Notably the author of this opinion, Associate Justice Spears, also authored the *Eichelberger* opinion. *See* text accompanying note 29 *supra*.
34. 620 S.W.2d at 110.
35. *See also* State Bar v. Heard, 603 S.W.2d 829, 831 (Tex. 1980) ("The State Bar Act

II. ADMINISTRATIVE ADJUDICATIONS

A. Agency Expertise

The survey period produced several important decisions concerning an agency's reliance on its own expertise in deciding cases. The cases were divided into two groups, one dealing with expert evidence on medical standards, and the other dealing with expert evidence on rates of return in utility cases.

The medical cases all involved appeals from orders of the State Board of Medical Examiners suspending or revoking licenses to practice medicine. The central point in each case essentially was the same: no expert medical testimony in the record showed that the doctors had violated any applicable standard of medical care. In *Dotson v. Texas State Board of Medical Examiners*[36] the board found that the physician had improperly prescribed certain drugs to patients who had no need for the drugs and who actually were undercover agents working for the board. The evidence established that the doctor had prescribed the drugs at the times, dosages, and amounts found by the board, and that the undercover agents were in fact healthy. The problem was that no evidence was presented establishing that the drugs were nontherapeutic in the manner in which the physician prescribed them. The board argued that no such evidence was necessary because the members of the board were all medical doctors and therefore knew from their own experience and expertise that the prescriptions of the drugs were improper. The Texas Supreme Court rejected this argument, stating that "the APA limits the court's review to the record as made before the Board. A court obviously cannot review knowledge, however expert, that is only in the minds of one or more members."[37] The court observed that the board had failed to take official notice of these facts, pursuant to the APTRA; accordingly, it reversed the board's decision as not supported by substantial evidence.[38]

Precisely the same type of situation was presented in *Wood v. Texas State Board of Medical Examiners*.[39] The Fort Worth court of civil appeals followed the supreme court's lead, and reversed the decision of the board for lack of substantial evidence.[40] The question arose a third time in *Conley v. Texas State Board of Medical Examiners*.[41] The board, however, prevailed in that case because the record contained testimony concerning the applicable medical standards.[42]

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was passed in aid of this court's exercise of its inherent power to regulate the practice of law.").

36. 612 S.W.2d 921 (Tex. 1981).

37. *Id.* at 923.

38. *Id.* at 924.

39. 615 S.W.2d 942 (Tex. Civ. App.—Fort Worth 1981, no writ).

40. *Id.* at 944.

41. 605 S.W.2d 699 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

42. The opinion contains loose language to the effect that "the establishment of standards is unnecessary before a Board composed of medical specialists." *Id.* at 701. The Texas Supreme Court, however, disregarded this language, noting that the opinion also re-

All three of the utility rate decisions arose from disputes involving the Lone Star Gas Company.[43] Each case was a separate appeal by Lone Star from separate orders of the Railroad Commission setting residential and commercial rates for natural gas. Lone Star, in each case, presented its own expert witness who testified about the company's rate base and rate of return, using the "comparable rate of earnings" method for his calculations. The Railroad Commission, however, declined to follow the comparable rate method of calculating a rate of return, relying instead on the "discounted cash flow" method, for which no evidentiary support appeared in the record.[44] In each case, the Austin court of civil appeals reversed the Railroad Commission because the order was not supported by substantial evidence.[45]

In one instance the Railroad Commission tried to justify its actions by arguing that the discounted cash flow formula was not itself a matter of evidence, but rather merely a mathematical calculation applied to the facts already in evidence to determine a fair rate of return. The Austin court rejected this argument, noting that calculating the rate of return was one of the most controversial parts of a rate case and a proper subject for expert testimony.[46] The commission argued in another case that it had taken official notice of the discounted cash flow method, pursuant to section 14(q) of the APTRA, by mentioning it (for the first time) in the administrative law examiner's proposal for decision, several months after the hearing had closed. The Austin court also rejected this argument, holding that for the commission to take official notice of a fact at that stage was too late inasmuch as the delay deprived the parties of any chance to challenge or rebut the fact.[47]

The Railroad Commission argued in the final case that it needed no proof to support its methodology, but could rely on its own staff expertise instead. The court rejected this argument as well, stating:

> It is true that the expertise of the agency and its staff may be utilized in evaluating the evidence. This, of course, is quite a different thing from the utilization of agency expertise as a substitute for evidence. Stated differently, agency expertise cannot be a substitute for proof. A valid exercise of agency expertise, like other agency action, must find ultimate support in evidence taken at the hearing or upon facts offi-

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ferred to testimony in the record concerning such standards. *Id. See also* Dotson v. Texas State Bd. of Medical Examiners, 612 S.W.2d 921, 924 (Tex. 1981).

43. Railroad Comm'n v. Lone Star Gas Co., 618 S.W.2d 121 (Tex. Civ. App.—Austin 1981, no writ); Railroad Comm'n v. Lone Star Gas Co., 611 S.W.2d 911 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.); Railroad Comm'n v. Lone Star Gas Co., 611 S.W.2d 908 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.). These decisions were discussed by the judge on the Austin court of civil appeals who authored them in Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems*, 33 BAYLOR L. REV. 393, 398-408 (1981).

44. 618 S.W.2d at 125; 611 S.W.2d at 913; 611 S.W.2d at 911.

45. 618 S.W.2d at 125; 611 S.W.2d at 914; 611 S.W.2d at 911.

46. 611 S.W.2d at 910.

47. 611 S.W.2d at 914.

cially noticed by the hearing officer in the record of such hearing.[48] Since no evidence in the record showed that the "discounted cash flow" method was a fair, accurate, or reliable method to use, or that it was even applicable to Lone Star Gas Company, the commission's orders were reversed for lack of support by substantial evidence.[49]

B. Ex Parte Communications

Section 17 of the APTRA provides that agency members or employees with decision-making powers in contested cases may not communicate with parties to a contested case "except on notice and opportunity for all parties to participate."[50] The statute thus clearly prohibits ex parte communications between an agency and the parties during the pendency of a contested case. Unclear, however, is the applicability of section 17 to ex parte communications that occur before or after a contested case begins or ends. At first glance, this might seem to be a matter of small concern if, indeed, the ex parte communication took place at a time when no contested case was pending. This apparent gap in the statute posed a difficult problem, however, in the case of *Vandygriff v. First Savings & Loan Association*.[51]

Vandygriff involved an appeal from an order of the Savings and Loan Commission that had been opposed by First Savings and Loan Association of Borger. The organizers of Citizens Security Savings and Loan Association originally filed an application for a charter in early 1978. After a hearing, the Savings and Loan Commissioner entered an order denying the application, and thereafter overruled a motion for rehearing filed by the organizers. The organizers did not appeal the order, but a few weeks later five of them went to Austin to visit with the commissioner and to explain to him why they thought the application should have been granted. Nearly two months after this ex parte meeting, the organizers filed a new application for a charter using essentially the same capital funds, organizers, and stock subscription form. The commissioner granted this second application. At the hearing on this second application, the commission heard testimony concerning the ex parte meeting. The commissioner also acknowledged the meeting in his final order, emphasizing, however, that his decision to grant the application was based solely on the written agency record. The trial court sustained the order of the commissioner, but the Austin court of civil appeals reversed.[52]

The Austin court acknowledged that the ex parte meeting had taken place at a time when no contested case was formally pending and, therefore, at a time when section 17 of the APTRA did not by its literal terms apply. Looking at substance rather than form, however, the court con-

48. 618 S.W.2d at 124-25.
49. *Id.* at 125.
50. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 17 (Vernon Supp. 1982).
51. 617 S.W.2d 669 (Tex. 1981).
52. First Sav. & Loan Ass'n v. Vandygriff, 605 S.W.2d 740, 743 (Tex. Civ. App.—Austin 1980).

cluded that the two applications were so closely connected and so substantially identical as in fact to be one continuing application.[53] The court held, therefore, that the ex parte communication ran afoul of the prohibitions of section 17, and that proof of the ex parte meeting, without more, constituted grounds for reversal of the commissioner's order under a rule of presumed harm.[54] The court justified its adoption of a presumed harm standard by reasoning that establishing prejudicial harm otherwise would be extremely difficult absent a virtual admission by the parties, since the thought processes of an agency head were not subject to probing.[55] Accordingly, the court reversed the order of the commissioner.[56]

On further appeal, the Texas Supreme Court reversed the judgment of the Austin court, concluding that the two applications, despite their many similarities and overlapping features, were sufficiently different so as to constitute two separate proceedings.[57] Consequently, the meeting was not prohibited by section 17 because no contested case was actually pending when it took place. The ex parte communications occurred after the first application was rejected and before the second application was filed. More importantly, however, the supreme court disagreed with the Austin court's ruling on presumed harm, noting that judicial review of orders of the Savings and Loan Commissioner was governed by the substantial evidence rule, which required the complaining party to show that " 'substantial rights . . . have been prejudiced.' "[58] According to the court the commissioner's order was presumed to be valid, and the complaining party had the burden of showing otherwise.[59] Consequently, the supreme court held that no basis existed for a rule of presumed harm; instead a complainant had the burden of demonstrating actual injury.[60]

The question presented in the *Vandygriff* case is a close one. The supreme court's decision may encourage parties to time their ex parte contacts carefully so as to avoid the sanctions of section 17 and yet achieve the desired result of the contact. If this occurs, the solution may be to amend section 17 to cover not only parties involved in actually pending contested cases, but also those who know they will be involved in a prospective contested case connected with the private communication.[61] The ruling on

53. *Id.* at 742. Indeed, one of the organizers testified that he regarded the two applications as "just one ongoing application." *Id.* at 741.

54. *Id.* at 742-43.

55. *Id.* at 742.

56. *Id.* at 743.

57. 617 S.W.2d 669, 671-72 (Tex. 1981). The court did not reject the concept that two separate applications might be so intertwined as to be one application in fact; rather, it held that the facts of this particular case did not rise to that level.

58. *Id.* at 672 (quoting TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(e) (Vernon Supp. 1982)).

59. 617 S.W.2d at 673.

60. *Id.* Without expressly so stating, the supreme court held that the plaintiffs failed to demonstrate actual harm because the ex parte communication had been openly discussed at the hearing, it was the subject of argument and cross-examination, and it was expressly declared by the commissioner to have formed no basis for his decision. *Id.* at 672.

61. This extension would provide coverage similar to that provided by the federal Administrative Procedures Act. *See* 5 U.S.C. § 557(d)(1)(E) (1976).

presumed harm is consistent with the general principles of appellate review of agency orders, but practically speaking, it imposes a very heavy burden of proof on a complaining party, a burden that may be difficult to sustain in all but the most blatant cases.[62]

C. *Standing*

Professor Davis has suggested that the test for standing should be summarized by "a simple proposition": "One who is adversely affected by governmental action has standing to challenge it, and one who is not adversely affected lacks standing."[63] This proposed test is deceivingly simple, for the problem then becomes one of determining the meaning of the phrase "adversely affected." During the survey period, the Texas courts moved toward adopting and defining Professor Davis's test. Prior to the adoption of the APTRA, the Texas common law of standing required a plaintiff complaining of administrative action to demonstrate a special injury, one unique to himself and not suffered by the public at large.[64] During the survey period, however, the Texas Supreme Court effectively eliminated this common law requirement by substituting the standard found in section 19 of the APTRA that a "person . . . who is aggrieved by a final decision in a contested case is entitled to judicial review."[65]

In *City of Houston v. Public Utility Commission* the Texas Supreme Court affirmed a judgment of the Austin court of civil appeals that the city of Houston lacked standing as a regulatory authority to contest a rate increase order for areas outside its corporate limits, but reserved the question of whether or not special injury was a requirement for standing.[66] Four months later, in *Hooks v. Texas Department of Water Resources*, the Texas Supreme Court reversed a judgment of the Austin court of civil appeals that the Hookses had no standing to contest an order of the Department of Water Resources because they had not established a special injury.[67] While the court did not expressly reject the special injury test, it effectively did so by holding that the Hookses qualified as "person(s) . . . aggrieved" under section 19 of the APTRA merely by showing that they would be affected by the order of the Department of Water Resources.[68]

Still unclear is the meaning of the phrase "person . . . aggrieved." It

62. For a strong critique of the supreme court's decision by the author of the Austin court of civil appeals' opinion, see Shannon & Ewbank, *supra* note 43, at 436-47.

63. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22.20 (Supp. 1980).

64. *See* Scott v. Board of Adjustment, 405 S.W.2d 55, 56-57 (Tex. 1966). By virtue of the wording of some statutes, this requirement is eliminated. For example, the Open Meetings Act grants standing to "any interested person." This language has been construed to mean that there is no requirement of particular damage. Cameron County Good Gov't League v. Ramon, 619 S.W.2d 224, 230-31 (Tex. Civ. App.—Beaumont 1981, no writ).

65. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 19(a) (Vernon Supp. 1982).

66. 610 S.W.2d 732 (Tex. 1980) (per curiam).

67. 611 S.W.2d 417, 419 (Tex. 1981).

68. *Id.* One member of the Texas Supreme Court has stated that the combined effect of the *City of Houston* and *Hooks* opinions eliminates the special injury requirement. Spears & Sanford, *Standing to Appeal Administrative Decisions in Texas*, 33 BAYLOR L. REV. 215, 224 (1981).

may be just another way of saying special injury, but during the survey period the Austin court of civil appeals held to the contrary. After the Texas Supreme Court's decisions in *City of Houston* and *Hooks* appeared, the Austin court announced in *City of Houston v. Public Utility Commission* that the special injury test was no longer required for standing to appeal orders of the Public Utility Commission.[69] The court reasoned that section 69 of the Public Utility Regulatory Act,[70] providing that "any party" to a proceeding before the commission was entitled to judicial review, was intended by the legislature to broaden the class of persons who had standing to appeal commission orders to include "those parties not showing special interest, as well as those showing special interest."[71] The court proceeded to state that a party still must meet the "person . . . aggrieved" test of section 19 of the APTRA to have standing to appeal the commission's order.[72] The term "aggrieved," however, was construed to mean "a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation upon a party."[73] Interestingly, this was the same standard used by the Austin court in its *Hooks* opinion, in which it found that the Hookses had not shown a special injury or that they were aggrieved by the agency order.[74] This may cause some confusion in future cases involving the meaning of "person . . . aggrieved."

Whatever the substantive requirements of proof for standing may be, a plaintiff always should make his record of proof before the administrative agency rather than wait until his appeal to the district court, at least in cases where review is limited to the agency record. Failure to do so may deny a deserving plaintiff his right to appeal. In *Hurlbut v. Dripping Springs Independent School District*[75] suit was brought challenging an order of the State Board of Education overturning a County Board of School Trustees' decision to create a new school district. Certain private citizens, who had participated in the administrative proceeding and who supported the order of the state board, sought to intervene in the suit in the district

69. 618 S.W.2d 428, 430 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

70. TEX. REV. CIV. STAT. ANN. art. 1446c, § 69 (Vernon 1980).

71. 618 S.W.2d at 430. By making this the basis of its decision, the court did not necessarily abandon the common law requirement of special injury, but simply held that the legislature had done so in this particular instance. The legislature's power to eliminate the requirement of special injury has long been recognized. *See* Scott v. Board of Adjustment, 405 S.W.2d 55, 56 (Tex. 1966).

72. 618 S.W.2d at 430-31.

73. *Id.* at 431. The plaintiff cities had standing as ratepayers to appeal the commission's order increasing electric rates, which would impose an added burden upon them. *Cf.* International Bank of Commerce v. City of Laredo, 608 S.W.2d 267, 270 (Tex. Civ. App.—San Antonio 1980, no writ) (plaintiff taxpayer satisfied special injury requirement by being losing bidder in allegedly illegal competitive bidding process for government contract); Texas Employment Comm'n v. Gant, Inc., 604 S.W.2d 211, 214 (Tex. Civ. App.—San Antonio 1980, no writ) (TEC had standing to appeal adverse judgment of district court, even when affected employee did not appeal, because it represented important public rights generally affected by all applications of the Unemployment Compensation Act).

74. 602 S.W.2d 389, 392 (Tex. Civ. App.—Austin 1980), *rev'd*, 611 S.W.2d 417 (Tex. 1981); *see* Hill & Kent, *Administrative Law, Annual Survey of Texas Law*, 35 SW. L.J. 465, 473-76 (1981).

75. 617 S.W.2d 332 (Tex. Civ. App.—Austin 1981, no writ).

court as taxpayers, landowners, and parents of children attending one of the affected school districts. The district court struck their plea of intervention because they had failed to establish at the administrative hearing that they had standing. The court of civil appeals affirmed this judgment, noting that the Texas Education Code was somewhat different from most enabling statutes in that it specifically provided that decisions of county school board trustees could be appealed through the State Board of Education's internal machinery only by aggrieved persons.[76] Accordingly, the private citizens had to prove at the administrative level that they had standing by showing that they were taxpayers, landowners, or parents of children attending school in one of the affected school districts. The private citizens had failed to prove this in the administrative proceedings, and review in the district court was limited to the agency record. Because the court was not allowed to receive new evidence curing the omission, it was required to strike the citizens' pleadings, even though the group had participated in and prevailed at the administrative level.[77] *Hurlbut* emphasizes the importance of precisely conforming to the requirements of the particular enabling statute under which judicial review is sought.[78]

D. Open Records and Open Meetings Acts.

The Texas Open Records[79] and Open Meetings[80] Acts are generally aimed at the same goal: providing public access to the workings of government. Because of the fairly technical aspects of the Open Meetings Act, running afoul of its literal requirements is not difficult. In recognition of this fact, Texas courts have been reluctant to invalidate government action for minor deviations from the statute, and have adopted a substantial compliance standard for testing alleged violations of the law.[81]

Section 3A of the statute requires governmental bodies to give public notice in writing of the date, hour, place, and subject of each meeting; any

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76. *Id.* at 333-34; *see* TEX. EDUC. CODE ANN. § 11.13(a) (Vernon 1972).

77. The State Board of Education had overturned the creation of the new school district. One of the affected school districts had appealed to the district court to set aside the order of the state board and to reinstate the decision of the county school board of trustees creating a new school district. The complaining parties intervened in the suit in district court, still challenging the creating of a new school district. The district court dismissed their plea in intervention, holding that they had no standing, even though they had participated in all levels of the administrative process and had prevailed there. 617 S.W.2d at 332-33.

78. In this regard, a useful compendium of the standing requirements of various state agencies is provided in Spears & Sanford, *supra* note 68, at 236-39.

79. TEX. REV. CIV. STAT. ANN. art. 6252—17a (Vernon Supp. 1982).

80. *Id.* art. 6252-17.

81. *See, e.g.*, Rogers v. State Bd. of Optometry, 619 S.W.2d 603, 605 (Tex. Civ. App.—Eastland 1981, no writ); McConnell v. Alamo Heights Independent School Dist., 576 S.W.2d 470, 474 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Santos v. Guerra, 570 S.W.2d 437, 440 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). *But see* Cameron County Good Gov't League v. Ramon, 619 S.W.2d 224, 231 (Tex. Civ. App.—Beaumont 1981, no writ) ("Nor are we impressed with the argument that a governmental body may substantially comply with this Act. . . . We believe our Legislature intended for a literal compliance with the Act.").

action taken on a subject not stated on the published agenda is voidable.[82] In *Coates v. Windham*[83] suit was brought challenging a highly controversial decision of the Texas Board of Corrections to purchase a particular tract of land as a prison site. The notice of the meeting only revealed that the board would discuss a "Report of Site Selection Committee." The court stated that those words "skirt[ed] the very edge of sufficiency," but nevertheless held that they "reasonably informed" the public of the probable action of the board.[84]

The "substantial compliance" standard does have limits, however. In *Porth v. Morgan*[85] the board of directors of a county hospital authority voted to make Porth a director of the board without listing the election as an item on the agenda, which omission was in violation of the Act. Ten days later, the board voted to make Porth its vice-chairman; the election of officers was an item on the agenda for this second meeting. The board tried to justify Porth's election by arguing that its subsequent election of Porth as vice-chairman, which was done in compliance with the Open Meetings Act, cured or ratified the prior action. The court rejected this argument, noting that the board could not ratify an act that was unlawful at the outset.[86] Consequently, the court held that Porth should be removed as a director.[87]

III. JUDICIAL REVIEW

A. Substantial Evidence

The substantial evidence rule is a legal principle of deceiving simplicity. The rule is easy to state, but often difficult to apply, in all probability because it is a creature born of compromise between the need for judicial review to protect parties against improper agency action and the need for agencies to be free to exercise their technical expertise without being unduly restricted by the review of judges who lack such expertise. The hallmark of the rule is reasonableness, and so long as the record as a whole contains evidence from which a reasonable person could reach the same conclusion as did the agency, the order will be sustained, even if the reviewing court might be disposed toward reaching the opposite conclusion.[88]

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82. TEX. REV. CIV. STAT. ANN. art. 6252—17, § 3A (Vernon Supp. 1982).

83. 613 S.W.2d 572 (Tex. Civ. App.—Austin 1981, no writ).

84. *Id.* at 577. The court rejected the board's argument that local notoriety or extensive advance newspaper publicity could suffice either to replace notice required by the statute or to cure an insufficient notice. *Id.*

85. 622 S.W.2d 470 (Tex. Ct. App.—Tyler 1981, writ ref'd n.r.e.).

86. *Id.* at 475-76.

87. *Id.* at 477.

88. A number of cases decided during the survey period discussed the substantial evidence rule. *See, e.g.*, McFarland v. Harris, 499 F. Supp. 550, 551 (E.D. Tex. 1980); Railroad Comm'n v. Continental Bus Sys., Inc., 616 S.W.2d 179, 183-84 (Tex. 1981); State Banking Bd. v. First State Bank, 618 S.W.2d 905, 908-09 (Tex. Civ. App.—Austin 1981, no writ); Murphy v. Rowland, 609 S.W.2d 292, 297-98 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

Because of the latitude afforded an agency under this standard of review, a complaining party often is hard-pressed to show that the agency's decision was unreasonable under the record as a whole.[89] The burden is especially heavy when the decision turns in part on the credibility of the witnesses testifying before the agency, since credibility is something only the agency members who heard the testimony and observed the witnesses can judge.

Credibility was particularly important in *Scharlow v. Schweiker*,[90] decided by the Fifth Circuit Court of Appeals. The court held that in Social Security disability hearings when the evidence includes complaints of subjective pain, the hearing examiner must make "credibility choices," and state the basis for those choices on the record to aid the reviewing court in determining the weight to be given subjective testimony of pain and injury.[91] The court explained: "[I]f the claimant could have prevailed if all of the claimant's evidence had been believed, the trier of fact has a duty to pass on the issue of the truth and reliability of complaints of subjective pain or the medical significance of such complaints once found credible."[92] Failure to make such credibility choices, according to the Fifth Circuit, required reversal and remand.[93]

B. Scope of Review

Prior to the adoption of the APTRA, the judicial review of administrative decisions was conducted under a variety of methods ranging from substantial evidence review on the agency record to trial de novo and, in between, some combinations of both methods.[94] With the passage of the APTRA and the Texas Supreme Court's decision in *Southwestern Bell Telephone Co. v. Public Utility Commission*,[95] however, all of this changed. Judicial review of contested cases under the APTRA now is limited to either trial de novo or substantial evidence review confined to the agency record.

The old forms of judicial review, however, do retain some vitality be-

89. Reversals are relatively infrequent. During the survey period, however, several reviewing courts did overturn decisions of administrative agencies for want of substantial evidence. *See* McDaniel v. Harris, 639 F.2d 1386, 1388-91 (5th Cir. 1981); Texas Alcoholic Beverage Comm'n v. Good Spirits, Inc., 616 S.W.2d 411, 415 (Tex. Civ. App.—Waco 1981, no writ); Board of Regents v. Martine, 607 S.W.2d 638, 640-43 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); Kittman v. State Bd. of Pharmacy, 607 S.W.2d 26, 28-29 (Tex. Civ. App.—Tyler 1980, no writ).

90. 655 F.2d 645 (5th Cir. 1981).

91. *Id.* at 648-49.

92. *Id.* at 648.

93. *Id.* at 649; *cf.* Benson v. Schweiker, 652 F.2d 406 (5th Cir. 1981) (hearing examiner failed to pass on credibility of witness's subjective complaints of pain); City of San Antonio v. Flores, 619 S.W.2d 601, 603 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (court found witnesses' testimony to be "incredible").

94. *See* Hill & Kent, *Administrative Law, Annual Survey of Texas Law*, 34 Sw. L.J. 471, 482 (1980); Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw. L.J. 239, 239-55 (1969).

95. 571 S.W.2d 503 (Tex. 1978).

cause the APTRA does not apply to all agencies. For example, the state legislature in 1979 exempted the Texas Employment Commission from the judicial review provisions of the APTRA,[96] thus returning judicial review to the substantial evidence trial de novo standard. In *Texas Employment Commission v. City of Houston*[97] the court faced the issue of the applicability of this exemption when the administrative proceeding took place prior to the effective date of the amendment, but the appeal to the trial court took place after the effective date. The court of civil appeals held that since the exemption was procedural in nature, it was applicable, and that, therefore, judicial review of the commission's order would be under the substantial evidence trial de novo standard.[98] This holding required a reversal of the trial court's judgment, because the trial court had limited review to the agency record, believing that the APTRA controlled.[99]

The APTRA generally applies only to those state agencies having statewide jurisdiction.[100] The Beaumont court of civil appeals emphasized this point in *West Gulf Maritime Association v. Sabine Pilots Association*.[101] The plaintiffs had brought suit challenging certain charges made by several branch pilots under authority given to them by the Board of Commissioners of Pilots for the ports of Beaumont, Port Arthur, and Orange, Texas. The thrust of the plaintiffs' argument was that the record of the proceedings before the board did not contain substantial evidence to support the validity of the pilots' fee charges. The court held that the Board of Commissioners of Pilots, while a state agency,[102] did not have statewide jurisdiction, and therefore, the judicial review provisions of the APTRA did not apply.[103] Instead, the board was subject to substantial evidence trial de novo review by which the court was to determine from the evidence presented in the trial court whether or not substantial evidence supported the order at the time the agency entered it.[104] This is so regardless of whether or not the evidence was actually presented to and made a part of the agency proceeding.[105] The plaintiffs failed to attack the order on this basis, and mistakenly confined all of their arguments to the sufficiency of the agency record. As a result, they failed to sustain their burden of proof, and the court upheld the validity of the fee charges.[106] These cases

96. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 21(g) (Vernon Supp. 1982).

97. 616 S.W.2d 255 (Tex. Civ. App.—Houston [1st Dist.]), *writ ref'd n.r.e. per curiam*, 618 S.W.2d 329 (Tex. 1981).

98. 616 S.W.2d at 258. The court of civil appeals stated that "[i]t is settled that as to procedural statutes the Legislature may make changes applicable to future steps in pending cases; a litigant has no vested right in a procedural remedy." *Id.* Other agencies exempted from the APTRA are set out in TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 21(f) (Vernon Supp. 1982).

99. 616 S.W.2d at 258.

100. TEX. REV. CIV. STAT. ANN. art. 6252—13a, § 3(1) (Vernon Supp. 1982).

101. 617 S.W.2d 744 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).

102. *See* TEX. WATER CODE AUX. LAWS arts. 8264-8269 (Vernon Pam. 1981).

103. 617 S.W.2d at 747.

104. *Id.*

105. *Id.*; *see* Gerst v. Nixon, 411 S.W.2d 350, 354 (Tex. 1966).

106. 617 S.W.2d at 747-48.

demonstrate that the applicable standard of review must be carefully ascertained when challenging administrative orders.[107]

When judicial review is limited to the agency record, care must be taken to preserve the record. In *State Banking Board v. Valley National Bank*[108] the appellant complained of the trial court's refusal to consider a prior order of the Banking Board that was attached as an exhibit to the appellant's motion for rehearing before the board and was contained in the transcript of the agency proceeding. The court of civil appeals held that the exhibit never had been tendered or accepted into evidence at the board hearing and, therefore, could not properly be considered part of the agency record for purposes of judicial review, despite its physical inclusion in the transcript.[109] On the other hand, a party cannot defeat judicial review by deliberately omitting documents from the agency record, at least when the existence and contents of the missing document are acknowledged by all of the interested parties.[110]

IV. LEGISLATIVE HIGHLIGHTS

The state legislature in 1981 amended the APTRA[111] and the Texas Administrative Code Act[112] to provide that agency rules published in the Texas Register or the Texas Administrative Code are to be judicially noticed and constitute prima facie evidence of the text of the rules and their effective dates.[113] These amendments are especially significant in light of the fact that before their adoption Texas courts almost uniformly held that courts could not take judicial notice of any rules promulgated by an administrative agency; instead, such rules were required to be proved as any other evidence in order to be admitted.[114]

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107. *See id.* at 747; 616 S.W.2d at 259. *See also* Nu-Way Emulsions, Inc. v. City of Dalworthington Gardens, 617 S.W.2d 188, 189 (Tex. 1981) (per curiam) (decisions of city zoning boards are not tested by the substantial evidence rule).

108. 604 S.W.2d 415 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

109. *Id.* at 418-19.

110. *See* Big Three Indus., Inc. v. Railroad Comm'n, 618 S.W.2d 543, 549 (Tex. 1981), in which the court stated:

> The Commission does not contest the existence of a final order in Docket 500; it only asserts the order is not part of the record and is inadmissible in the trial court. The Commission specifically incorporated the final order in Docket 500 into the record in Docket 1702 by its June 18 order. However, it did not physically place the Docket 500 order in the record. The Commission cannot defeat appellate review by failing to include the final order or any other order properly a part of the record.

Cf. Basin, Inc. v. Railroad Comm'n, 613 S.W.2d 800, 801-02 (Tex. Civ. App.—Austin 1981, no writ) (appellant's failure to include agency transcript in appellate record left appellate court nothing to review; hence, trial court's judgment affirmed).

111. TEX. REV. CIV. STAT. ANN. art. 6252—13a (Vernon Supp. 1982).

112. *Id.* art. 6252—13b.

113. *Id.* art. 6252—13a, § 4(c), art. 6252—13b, § 4.

114. *See* Imperial Am. Resources Fund, Inc. v. Railroad Comm'n, 557 S.W.2d 280, 288 (Tex. 1977); City of Manvel v. Texas Dep't of Health Resources, 573 S.W.2d 825, 826-27 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); Byrd v. Trevino-Bermea, 366 S.W.2d 632, 635 (Tex. Civ. App.—Austin 1963, no writ). *But cf.* Southwestern Bell Tel. Co. v. Nash, 586 S.W.2d 647, 648-49 (Tex. Civ. App.—Austin 1979, no writ) (court may take judicial

The legislature also amended the APTRA to require agencies to include more information in the notices they are required to publish in the Texas Register on proposed rules.[115] This additional information includes a fiscal note and a public cost-benefit note setting forth five-year projections on the additional costs or savings to state and local governments and to the public that will result from the proposed rule.[116]

The legislature also enacted a statute intended to protect the general public from harassment by administrative agencies.[117] The statute provides that individuals who are sued by state agencies may recover their witness fees and attorneys' fees from the state if the court determines that the suit was "frivolous, unreasonable, or without foundation."[118] The statute applies only to suits against "individuals," and therefore excludes corporations, partnerships, and the like.[119] Furthermore, an agency may not avoid the penalty of the statute by voluntarily dismissing the suit prior to an adverse judgment because the statute applies to suits that are dismissed as well as to suits in which a judgment for the defendant is entered.[120]

notice of contents of Texas Register). *Nash* is discussed in Hill & Kent, *supra* note 94, at 486-87.

115. TEX. REV. CIV. STAT. ANN. art. 6252—13a, §§ 5(a)(4)-(5) (Vernon Supp. 1982).
116. *Id.*
117. *Id.* art. 2226b, §§ 1-5.
118. *Id.* art. 2226b, § 4.
119. *Id.* art. 2226b, § 3.
120. *Id.* art. 2226b, § 4.