ADMINISTRATIVE LAW

By CARROLL SIERK*

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Perhaps the only really significant development in Georgia administrative law in recent years has been the adoption of the Georgia Administrative Procedure Act (hereinafter sometimes abbreviated G.A.P.A.) in 1964.[1] By comparison all other recent developments seem trivial. For this reason it seems appropriate to review the effect of the adoption of this statute on Georgia administrative law at this time.

EFFECT OF GEORGIA ADMINISTRATIVE PROCEDURE ACT

The Georgia Administrative Procedure Act, which became effective on July 1, 1965,[2] has yet to be construed by the appellate courts of this state. In what appears to be the only published judicial opinion to cite the act thus far[3] a federal district court merely noted that a regulation involved in the litigation had been filed with the Secretary of State as required by the G.A.P.A. However, the existence of the G.A.P.A. certainly has been recognized in recent legislation both in 1965[4] and in 1966. The 1966 legislation includes an amendment to GA. CODE chapter 84-11, relating to the practice of optometry, providing that any action of the Georgia State Board of Examiners in Optometry relating to the granting, renewing, suspending or revoking of a license "shall be subject to appeal to the superior court in accordance with and subject to the provisions of section 20" of the G.A.P.A.;[5] a "Department of Agriculture Registration, License and Permit Act" which provides, among other things, that no registration license or permit shall be denied or revoked without opportunity for hearing in accordance with the provisions of the G.A.P.A.;[6] and an amendment[7] to the Georgia Water Quality Control Act[8] providing for the selective incorporation into the ad-

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1. GA. LAWS, 1964, p. 338.
2. GA. LAWS, 1965, p. 283 amended the G.A.P.A. in several respects including a change of effective date from April 1, 1965, to July 1, 1965.
3. Crews v. Undercofler, 249 F. Supp. 13 (N.D. Ga. 1966).
4. The 1965 legislation is reviewed in Figueroa, *Administrative Law*, 17 MERCER L. REV. 1 (1965).
5. GA. LAWS, 1966, p. 299.
6. GA. LAWS, 1966, p. 307.
7. GA. LAWS, 1966, p. 316.
8. GA. LAWS, 1964, p. 416.

ministrative procedures and judicial review sections of the act of certain applicable sections of the G.A.P.A.[9] The sections of the G.A.P.A. selected for incorporation into the Georgia Water Quality Control Act are sections 14 (except sub-paragraph (b) which relates solely to revenue matters), 16, 17, 18, and 20. Section 14, which appears to be based on section 9 of the Revised Model Administrative Procedure Act,[10] provides in some detail the procedure to be followed in the administrative determination of any contested case (defined in section 2(b) as "a proceeding, including but not restricted to rate making, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing") including such matters as notice requirements, representation by counsel, authority of the hearing officer or others conducting the hearing, subpoenas, and the contents of the record of the hearing. Section 16, apparently based on section 10 of the Revised Model Administrative Procedure Act,[11] deals with the rules of evidence, including matters of official notice, to be applied in contested cases. Section 17, which is substantially the same as section 11 of the Revised Model Act,[12] provides for a proposed decision, prepared by one who conducted the hearing or has read the record, to be served on the parties who shall have an opportunity to present exceptions to the officials who are to render the decision in those situations where the deciding officials have not heard the case or read the record. Section 18, which appears to be based in part upon section 8(a) of the Federal Administrative Procedure Act[13] and in part upon section 12 of the Revised Model Act,[14] deals with the matter of the decision or order resulting from the hearing of a contested case including the contents of such decision or order. Section 20, based upon section 15 of the Revised Model Act,[15] provides in detail for the judicial review of contested cases. One is left to wonder if this selective specific inclusion of certain sections of the G.A.P.A. as applicable to the Georgia Water Quality Control Board is to be interpreted as a legislative determination that all other sections of the G.A.P.A. are not applicable to such board.

A number of letter opinions issued by the office of the Attorney General of Georgia have dealt with the scope of the G.A.P.A. Some such opinions have held particular agencies not subject to the rules adoption, filing, and publication requirements of the G.A.P.A. on the basis of one or more of the ten specific exclusions from the definition of "rule" contained in section

9. GA. LAWS, 1966, p. 333 makes a technical correction in section 18 of the G.A.P.A. (GA. CODE ANN. §3A-118 (Supp. 1965)).
10. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, pp. 206-223 (1961) [hereinafter cited as HANDBOOK] at p. 214, 9C UNIFORM LAWS ANN. 131-132 (Supp. 1965).
11. *Id.* at pp. 214-216, 9C UNIFORM LAWS, ANN. at 132-133 (Supp. 1965).
12. *Id.* at p. 217, 9C UNIFORM LAWS, ANN. (Supp. 1965).
13. 60 Stat. 237 (1946), 5 U.S.C.A. §§1001-1011 (Supp. 1950).
14. HANDBOOK *supra* n. 10 at pp. 217-218, 9C UNIFORM LAWS, ANN. (Supp. 1965 at 135).
15. HANDBOOK *supra* n. 10 at p. 220-221. 9C UNIFORM LAWS, ANN. (Supp. 1965 at 138-139).

2(f) of the G.A.P.A.[16] There have also been opinions holding that certain instrumentalities of state government, while not specifically exempted did not fall within the definition of "agency" set forth in section 2(a) of the G.A.P.A. in that they exercised neither rule-making nor adjudicatory functions and therefore were not covered by the act.[17] One recent opinion[18] concluded that the Georgia Commissioner of Labor has authority to promulgate rules and regulations pursuant to GA. CODE ANN. section 54-122(d) "for the prevention of accidents or the prevention of industrial or occupational diseases" and that the G.A.P.A. should be followed in the promulgation of any such rules and regulations. Another recent opinion[19] explains that certain rules of the Pharmacy Board were omitted from the compilation of rules being prepared as required by section 7 of the G.A.P.A. because of the Board's lack of specific statutory authority to make them.

In the 1953 administrative law survey in the *Mercer Law Review*, Professor Maurice Culp deplored "[T]he lack of any general requirement of the publication of the rules and regulations of the administrative agencies which vitally affect the rights and interests of the general public."[20] This defect in Georgia administrative law, a defect shared with many other states,[21] was corrected in 1964 by Section 7 of the G.A.P.A. Section 7 of the G.A.P.A. which as originally adopted was substantially the same as Section 5 of the Revised Model Administrative Procedure Act,[22] provides for all effective agency rules to be compiled, indexed, and published by the Secretary

16. Letter from the Attorney General of Georgia to Hon. A. R. Shirley regarding rules of the Georgia Forestry Commission, Dec. 21, 1964; Letter from the Attorney General of Georgia to Mr. F. R. Kendrick regarding rules of the Superior Court Clerk's Retirement Fund, Dec. 31, 1965; Letter from the Attorney General of Georgia to Hon. Jim L. Gillis, Sr., regarding the State Highway Department, May 10, 1965; Letter from the Attorney General of Georgia to Hon. H. E. Ruark regarding the Georgia Forest Research Council, May 14, 1965; Letter from the Attorney General of Georgia to Hon. S. Ernest McDonald regarding the Ordinaries' Retirement Fund, May 28, 1965; Letter from the Attorney General of Georgia to Mrs. Bruce Schaefer regarding rules promulgated by the State Department of Family and Children Services in connection with its public assistance programs, August 14, 1965.
17. Letter from the Attorney General of Georgia to Hon. T. T. Molnar regarding the Criminal Law Study Committee, May 19, 1965; Letter from the Attorney General of Georgia to Mr. Peter Wheeler regarding the Department of Veterans Service, August 1, 1965.
18. Letter from the Attorney General of Georgia to Hon. Ben T. Huiet, Commissioner of the Department of Labor, May 18, 1966.
19. Letter from the Attorney General of Georgia to Hon. C. L. Clifton, May 6, 1966. One paragraph of the letter offers the following explanation:
"The rule captioned 'Federal Law Prohibits Dispensing Without a Prescription' was probably omitted because the Board does not have the authority to make rules related to the classification of drugs dealt with in Georgia Code Section 42-709. The Board's rulemaking power is confined to effectuating the purposes of Chapters 84-13 and 42-1."
20. Culp, *Administrative Law*, 5 MERCER L. REV. 1 at p. 2 (1953).
21. 1 COOPER, STATE ADMINISTRATIVE LAW 232 (1965):
"The shocking fact is that in 1963 about half of the states did not have even minimal provisions for the publication, by printing, of administrative rules. In those states, a possibility exists that a citizen may be prosecuted for violation of a rule the existence of which was unknown to him, and could not have been discovered except by personal inquiry at the offices of the agency or perhaps at the secretary of state's office in the state capitol."
22. HANDBOOK *supra* n. 10 at p. 212, 9 C U.L.A. (Supp. 1965 at 129).

of State. However, carrying out this legislative directive promptly and at a reasonable cost must have been a substantial task for the Secretary of State and his staff. Evidently in an attempt to relieve his office of part of the burdent imposed by Section 7, the General Assembly in 1965 added to section 7 subsection (e) which provides that the services of a privately operated editorial and publication firm may be engaged.[23] The Attorney General ruled that subsection (e) was to be literally construed and did not authorize the employment of a private person in the community to compile, index and publish the rules.[24] The latest information on the subject seems to be:

> For the past year the Georgia Administrative Procedure Act Division of the Office of the Secretary of State has been compiling and indexing these regulations as well as all amendments received through August 4, 1966.
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> The aforementioned rules, having been properly prepared, are now in the hands of the printer, who has promised to have them published by the end of the year, and at such time these rules and regulations will be made available to the general public. . . .[25]

One may quite properly ask whether any really significant change has been brought about by the passage of the G.A.P.A. Some may suspect that the act probably does little more than codify existing practice, producing no new benefits for either the agencies or the public with which they deal. To relieve these doubts, some of the changes brought about by the G.A.P.A. will now be briefly reviewed.[26] Prior to the effective date of the G.A.P.A. the procedures of each agency now covered by the G.A.P.A. were, and to the extent not inconsistent with the G.A.P.A. still are determined by the procedure sections of the statute creating the agency.[27] The effect of the G.A.P.A. will thus vary somewhat from agency to agency. However, in the case of all agencies now covered by the G.A.P.A. there will be easier accessibility and greater certainty as to the rules in effect as a result of the compiling, indexing, and publishing of the rules by the Secretary of State in accordance with section 7 of the G.A.P.A. The G.A.P.A. also provides an improved and uniform rule-making procedure.[28] Official publication will make it possible

23. GA. LAWS, 1965, p. 283.
24. Letter from the Attorney General of Georgia to Hon. Ben W. Fortson, Jr., Secretary of State, Feb. 28, 1966.
25. Letter from the Attorney General of Georgia to the author from Wade V. Mallard, Director of the Administrative Pocedure Act Division of the Secretary of State's Office, Oct. 6, 1966.
26. Most of these changes, and some others, have been previously reviewed in Feild, *The Georgia Uniform Administrative Procedure Act*, 1 GA. S.B.J. 269 (1965); Culp, *Administrative Law*, 16 MERCER L. REV. 12 (1964); or Davis, *Recent Noteworthy Administrative Law Developments in Selected States*, 17 AD. L. REV. 72 at 77-78 (1964).
27. Williams, *Administrative Law*, §4, 1 ENCYCLOPEDIA OF GEORGIA LAW p. 407 (1960).
28. GA. CODE ANN. §3A-104(a) (Supp. 1965). See Culp, *Administrative Law*, 15 MERCER L. REV. 1 (1963) criticizing the development of Georgia administrative law without a general administrative procedure act as one which "produces marked variations in statutory procedure among administrative agencies in Georgia and necessarily required consideration of administrative law and procedure on an agency to agency and an officer to officer basis." A not quite exhaustive search of the GA. CODE ANN. sections

for the rules of Georgia administrative agencies to be judicially noticed as provided by section 8 of the G.A.P.A., contrary to the past practice.[29] Uniform procedures, clearly within due process requirements,[30] are likewise provided for administrative adjudication.[31] The G.A.P.A. also provides a general statutory method of judicial review.[32]

In conclusion one can only repeat the criticism of earlier commentators that the main defect of the G.A.P.A. is the logically unjustified exclusion of several important agencies, especially the Public Service Commission and the State Board of Workmen's Compensation, and hope that some future session of the General Assembly will extend the coverage of the G.A.P.A. either directly, by removing exclusions from section 2 (a), or indirectly by incorporating selected parts of the G.A.P.A. into the enabling acts of the excluded agencies.[33]

LEGISLATION

Several statutes enacted during the 1966 session of the General Assembly may be classified as occupational licensing statutes. Most amended existing statutes to provide for more efficient administrative procedure,[34] to increase

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dealing with various administrative agencies reveals that generally rule-making authority is granted without any provision as to the procedure to be used in making such rules. Sometimes a direction to give "appropriate" notice of rules made is included in the statutes. The Georgia Seed Law provides for rules to be recommended by an advisory committee before being promulgated by the Commissioner of Agriculture. GA. CODE ANN. §5-2409 (1962 Rev.). Statutes enacted prior to the G.A.P.A. providing for procedures to be followed in the making of rules include: GA. CODE ANN. §45-115 (1957 Rev.), State Game and Fish Commission; GA. CODE ANN. §56-216 (1960 Rev.), Insurance Commissioner; GA. CODE ANN. §42-1514 (Supp. 1965), Georgia State Board of Pharmacy under the Georgia Drug and Cosmetic Act; GA. CODE ANN. §42-613 (Supp. 1965), Commissioner of Agriculture relating to Milk and Milk Products; and GA. CODE ANN. §111-525 (1959 Rev.), Commissioner of Agriculture under Georgia State Warehouse Act.

29. A number of Georgia cases holding that administrative rules cannot be judicially noticed are cited in GREEN, GEORGIA LAW OF EVIDENCE 18 (1957).
30. GA. CODE ANN. §3A-114 (Supp. 1965). "Due process in its application to administrative procedure is essentially a requirement of notice and hearing." SCHWARTZ, INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 105 (2d ed. 1962). See Marmon v. Bd. of Educ., 218 Ga. 48, 126 S.E.2d 217 (1962).
31. GA. CODE ANN. §§3A-114-119 (Supp. 1965). The quotation from Professor Culp's article, *supra* n. 28, is even more appropriate here. A survey, which is probably uncomplete, of the statutes enacted prior to the G.A.P.A. dealing with administrative adjudication procedue reveals a lack of uniformity. Apparently all of them provide for notice and hearing, often in those terms without elaboration. Statutes approximating the G.A.P.A. requirements include: GA. CODE ANN. §97-109 (Supp. 1965), Secretary of State acting as Commissioner of Securities under the Georgia Securities Act; GA. CODE ANN. §§56-218-224 (1960 Rev.), Insurance Commissioner acting to enforce the Georgia Insurance Code; and GA. CODE ANN. §84-3707 (Supp. 1965), State Board of Examiners for Registered Professional Sanitarians in license revocation proceedings.
32. GA. CODE ANN. §3A-120 (Supp. 1965).
33. *Supra* n. 23.
34. GA. LAWS, 1966, p. 130, amending the Georgia Fertilizer Act of 1960; GA. CODE ANN. §§5-1001-1024 (1962 Rev.), to provide that a registration thereunder may be renewed annually "in lieu of applying for a new registration if the identical information contained in the original application for registration is still applicable to the fertilizer registered."

the educational or other requirements of licensees[35] to provide an alternative method of qualifying for a license,[36] to extend licensing requirements to additional aspects of previously regulated areas,[37] and to impose licensing requirements for the first time in entirely new areas.[38] By way of editorial comment, it might be appropriate to say that while occupational licensing is nothing new in Georgia,[39] its growth in recent years suggests possible abuse and conflict with the right to make a living.[40] An objective study of all our occupational licensing statutes to ascertain to what extent they are in fact necessary for the protection of the public interest, as distinguished from the "vested interests" of the regulated profession, certainly seems desirable.

Other noteworthy legislation during the 1966 session deals with such diverse subjects as repeal of the agricultural commodities authority act,[41] inspection of honeybee colonies by the State Department of Agriculture,[42] the providing of family planning services by various agencies of state and local government,[43] the creation of a State Council for the preservation of Natural Areas,[44] empowering the Department of Public Health to expend state funds for the financial support of day care centers for the mentally retarded and to set standards for and inspect such centers,[45] and expanding the scope of the Georgia Art Commission to include music and drama.[46]

CASES

The survey period seems to have produced no startling or exceptional judicial developments in the field of administrative law. In the opinion of this writer it produced only four administrative law cases worth mentioning here. In *Cota v. Northside Hosp. Ass'n, Inc.*[47] the citizens who resided in the vicinity of a proposed hospital site in Fulton County contended that zoning board action granting a special use permit to the hospital association was invalid in that Article XIX of the Zoning Resolution of Fulton County violated their rights under the fourteenth amendment to the Federal

35. GA. LAWS, 1966, p. 171, "certified structural pest control, wood-destroying-organism operator or fumigator"; GA. LAWS, 1966, p. 195, beauty schools, beauticians, cosmetologists; GA. LAWS, 1966, p. 232, medical doctors; GA. LAWS, 1966, p. 274, attorneys-at-law; GA. LAWS, 1966, p. 312, barbers; GA. LAWS, 1966, p. 346, osteopaths.
36. GA. LAWS, 1966, p. 289, registration as a graduate nurse, recognition of associate degree programs in nursing "administered by junior colleges, colleges or universities utilizing hospital and other clinical facilities. . . ."
37. Georgia Biological Permit Act of 1966, GA. LAWS, 1966, p. 334; GA. LAWS, 1966, p. 377, licensing of funeral establishments.
38. GA. LAWS, 1966, p. 398, pre-need funeral service contracts; GA. LAWS, 1966, p. 471, dealers in used motor vehicle parts.
39. One of the three laws initiated by the Trustees in January, 1734, and ratified by the King in Council in April, 1735, providied for licensing of persons trading with the Indians in Georgia. SAYE. CONSTITUTIONAL HISTORY OF GEORGIA 1732-1945 26-28 (1948).
40. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS, ch. 3 (1956).
41. GA. LAWS, 1966, p. 177.
42. GA. LAWS, 1966, p. 192.
43. GA. LAWS, 1966, p. 228.
44. GA. LAWS, 1966, p. 330.
45. GA. LAWS, 1966, p. 374.
46. GA. LAWS, 1966, p. 459.
47. 221 Ga. 110, 143 S.E.2d 167 (1965).

Constitution by failing to provide standards "by which the rights of the applicant for a special use permit or the rights of the objecting property owners could be determined" and in that at the public hearing relating to the granting of the permit "no witnesses were sworn and . . . counsel for the objecting parties was not permitted to examine witnesses under oath." The Supreme Court of Georgia found no merit in either of these contentions. The fourteenth amendment issue it found to have been settled by its prior decisions in *Vulcan Materials Co. v. Griffith,*[48] and *Binford v. Western Elec. Co.*[49] Both of these cases note that sweeping delegation of zoning authority from the General Assembly to local authorities is expressly permitted by the Georgia Constitution[50] and that it is not for the courts to overrule the people in this regard.[51] In rejecting the "no judicial type hearing" contention the court noted, "In acting on such application the board of commissions acts as an administrative agency and does not act in a judicial capacity."[52] It determined that the absence of sworn witnesses and cross-examination "would not render the board's granting of the permit either irregular or unlawful."[53] If one attempts to apply general principles of administrative law to this decision, the determination would seem to indicate that the court regards the granting of a special permit exception to a zoning ordinance as a rule-making procedure rather than an adjudication ,a judicial-type hearing, with sworn witnesses and cross-examination usually being required in adjudications.[54] If it is a rule-making (legislative) procedure, it would seem to produce a rule particular in effect, contrary to the usual definition of rule.[55] Perhaps this situation suggests the validity of Professor Davis' theory that the type of hearing required should depend not on whether the agency is engaged in rule-making (legislative) or adjudication (judicial) but on whether the facts the agency is trying to ascertain are legislative (of a general policy nature) or adjudicative (peculiar to the parties and their activities).[56] The facts usually dealt with in a zoning hearing would usually be of a legislative type, hence the result in the case is in accord with the Davis theory.

In *Schaefer v. Clark,*[57] a dismissal proceeding against a state agency employee, the Georgia Court of Appeals held that a defective notice of dismissal could be amended to make the grounds of dismissal specific as required by the rules of the State Personnel Board and that the dismissal could

48. 215 Ga. 811, 114 S.E.2d 29 (1960).
49. 219 Ga. 404, 133 S.E.2d 361 (1963).
50. GA. CONST. art. III, §VII, para. XXIII.
51. With regard to the "standards" requirement generally, *see* 1 COOPER, STATE ADMINISTRATIVE LAW 54-70 (1965), concluding that in some cases today "the requirement of a 'standard' is frankly abandoned."
52. *Supra* n. 47 at 112, 143 S.E.2d 167 at 169.
53. *Ibid.*
54. *See, Philadelphia Co. v. Sec. & Exch. Comm'r,* 175 F.2d 808 at 817; Schwartz, *Supra* n. 30 at p. 125.
55. GA. CODE ANN. §3A-102 (f) (Supp. 1965); 1 COOPER, *supra* n. 50.
56. DAVIS, ADMINISTRATIVE LAW §7.02 (1959).
57. 112 Ga. App. 806, 146 S.E.2d 318 (1965).

not be effective until the time of such amendment. In holding the original notice amendable, the court said: "A ruling to the contrary would have the effect of exacting much higher and stricter standards in pleadings before administrative bodies than is the case in the superior and other trial courts of this State, wherein the right of amendment has been said to be 'as broad as the plan of salvation.' "[58] It further observed, "To hold that there is imposed upon the lay head of an administrative agency a stricter account and a keener knowledge of the niceties and requirements of pleading than is possessed by those who are skilled in the law and permitted to practice in the courts is untenable."[59] In this view the court seems to be in accord with most other jurisdictions.[60] A dissenting opinion viewed the majority as inconsistent with its strict insistence on adequate notice in *Scott v. Undercofler*.[61]

In another Court of Appeals decision,[62] a conviction of operating a motor vehicle with a revoked license was reversed where the action of the Director of the Department of Public Safety in revoking the license was based upon a certification of conviction of driving under the influence of intoxicants from a court lacking jurisdiction to try such offense (The Recorder's Court of the City of Macon). Apparently the majority opinion viewed the Director as lacking administrative jurisdiction under such circumstances. A dissenting opinion contended, "[T]he act of the Director of Public Safety in revoking the driver's license of the defendant was a judicial act, and, being such, is not subject to collateral attack."[63]

The case of *Brown v. Quality Fin. Co.*[64] should be noted for its statements that administrative rules have the force and effect of law and that administrative rules cannot be judicially noticed without any recognition of possible inconsistency in these two rules. Of course both statements are correct.[65] As to agencies not excepted from the coverage of the G.A.P.A. the latter rule will be changed as soon as agency rules are published in accordance with the provisions of that statute.[66]

58. *Id.* at 808, 146 S.E.2d at 321.
59. *Supra* n. 57 at 809, 146 S.E.2d at 321.
60. DAVIS, ADMINISTRATIVE LAW §8.04 (1959).
61. 108 Ga. App. 460, 133 S.E.2d 444 (1963). Noted in Culp, *Administrative Law*, 16 MERCER L. REV. 12 at 18 (1964).
62. Wallace v. State, 112 Ga. App. 505, 145 S.E.2d 788 (1965).
63. *Id.* at 507, 145 S.E.2d at 790.
64. 112 Ga. App. 369, 145 S.E.2d 99 (1965).
65. Schwartz, *supra* n. 30 at pp. 52-53; Green, *supra* n. 29.
66. GA. CODE ANN. §3A-108 (Supp. 1965), provides:
"The court shall take judicial notice of any rule which has become effective pursuant to the provisions of this Act." The Georgia courts have refused to take judicial notice of administrative rules at least since Shurman v. City of Atlanta, 148 Ga. 1, 14, 95 S.E. 698, 703 (1918). See Green, *supra* n. 29.