

Articles

Administrative Law

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I. INTRODUCTION AND OVERVIEW

Administrative law was a fairly low-key topic during the past year, but that comparative lull should not be mistaken as inactivity in the public sector. Quite the opposite, the number and types of administrative bodies continue to grow in state and local government, and the activity level of these agencies remains high.

This Article provides a survey of administrative law cases decided by the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2001 through May 31, 2002. Respecting other topics found in this survey issue, cases primarily involving criminal law, local government law, torts, trial practice and procedure, and workers' compensation have not been covered. Many cases in this Article blur the distinction between local government law and administrative law. However, the perspective of this Article maintains a focus on the functions of the

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administrative agency and its procedures, thereby giving a basis for comparison among different types of administrative agencies at various levels of government.

The first segment of this Article reviews a case on standing to challenge rules that were promulgated by the Department of Natural Resources under the Georgia Administrative Procedure Act ("GAPA").¹ Agency defenses and immunities comprise the theme of the subsequent section, with many cases analyzed under the Georgia Tort Claims Act ("GTCA").² Next, this Article surveys cases involving standards of review that appellate courts give to agency decision making and actions. Cases illustrating the effects of agency actions, including several good examples of analysis regarding the validity of rules promulgated by agencies, are contained in the last section in this Article that deals with court decisions. The final section contains an analysis and enumeration of current legislative developments of the Georgia General Assembly during at the 2002 regular session.

II. STANDING TO INITIATE PROCEEDINGS

In the only illustrative case on standing reported during the survey, *Board of Natural Resources v. Monroe County*,³ the good citizens of Monroe County learned, surely to their collective dismay, that they are a part of an "Area of Influence" for metropolitan Atlanta.⁴ The Department of Natural Resources had promulgated rules to help the state meet clean air standards mandated by both state and federal laws, although the primary culprit was perceived as metropolitan Atlanta. An area encompassing thirty-two outlying counties, including Monroe County, was also included because of the area's potential capacity as a contributor to detrimental air quality standards. Within this "Area of Influence," the new rules regulated and restricted such things as outdoor burning and the operations of gas depots.⁵

Monroe County apparently did not play a role in the rulemaking process or contest the proposals in the administrative forum. Instead, they filed an action in superior court for a declaratory judgment on the validity of the rules. The court denied the motion to dismiss or for

1. O.C.G.A. §§ 50-13-1 to -23 (2002).

2. *Id.* §§ 50-21-20 to -37.

3. 252 Ga. App. 555, 556 S.E.2d 834 (2001).

4. *Id.* at 555, 556 S.E.2d at 835.

5. *Id.* at 555-56, 556 S.E.2d at 835.

summary judgment, which questioned the standing of Monroe County to bring an action and formed the basis for an appeal.⁶

Just being in an Area of Influence, as the trial court stated,⁷ did not confer standing to sue.⁸ Monroe County had asserted no legal rights impaired by the new rules, and, as argued by the Board, "Monroe County's asserted rights [were] speculative, generalized economic interests contingent on hypothetical future events. In other words, its rights [were] based upon the *possibility* of lost industrial development or jobs and the *possibility* of lost revenue or taxes."⁹ The court of appeals agreed completely with the board.¹⁰ Citing, among others, the recent cases of *Higdon v. City of Senoia*¹¹ and *Burton v. Composite State Board of Medical Examiners*,¹² the court reasoned that, while declaratory relief is available under the GAPA as a means to test the validity of rules, one must show the actual impairment of legal rights as a precondition to obtaining such relief.¹³ Here, Monroe County had already admitted that only two of the nine areas of regulated activities in the rules might affect them, stating that it needed the right to conduct open burning as a part of road construction and that it also owned a fuel depot.¹⁴ The failure of the county to enumerate or articulate any actual detriment, as opposed to the possibility of some future detriment to its interests because of the enactment of the rules, meant that the county's standing to contest the rules also failed.¹⁵ Accordingly, the court of appeals reversed the trial court's failure to grant the board summary judgment in the action.¹⁶

III. AGENCY DEFENSES AND IMMUNITIES

Ever since the case of *Georgia Department of Human Resources v. Sistrunk*,¹⁷ state agencies have seen only a few attorney members of the Georgia General Assembly as adversaries in contested cases. The case of *Sistrunk*, decided in 1982, barred legislators who are also attorneys

6. *Id.* at 556, 556 S.E.2d at 836.

7. *Id.*

8. *Id.* at 559, 556 S.E.2d at 837.

9. *Id.* at 557, 556 S.E.2d at 836.

10. *Id.*

11. 273 Ga. 83, 538 S.E.2d 39 (2000).

12. 245 Ga. App. 587, 538 S.E.2d 501 (2000).

13. 252 Ga. App. at 557, 556 S.E.2d at 836 (citing O.C.G.A. § 50-13-10).

14. *Id.* at 557-58, 556 S.E.2d at 836-37.

15. *Id.* at 558-59, 556 S.E.2d at 837.

16. *Id.* at 559, 556 S.E.2d at 837.

17. 249 Ga. 543, 291 S.E.2d 524 (1982).

from receiving any financial remuneration for representing a client against the state or its agencies in a civil matter.¹⁸

In *Georgia Ports Authority v. Harris*,¹⁹ counsel for defendant Harris, The Honorable Thomas C. Bordeaux, Jr., a state representative from District 151 and the current chairman of the House Judiciary Committee, requested that the supreme court revisit the *Sistrunk* holding. The supreme court did so.²⁰ The Georgia Ports Authority had moved to disqualify Mr. Bordeaux as counsel for Harris. When Bordeaux responded that if the *Sistrunk* holding was not reconsidered and, accordingly, a conflict was found, he would waive his fee and remain as counsel, this action placed the matter squarely before the supreme court for an updated analysis.²¹ First, the court noted that just one year after *Sistrunk*, the Georgia legislature enacted conflict of interest statutes found at Official Code of Georgia Annotated ("O.C.G.A.") sections 45-10-20 through 45-10-28.²² Next, after finding that the *Sistrunk* rule of blanket disqualification of legislator attorneys having a financial interest in a case against the state was not required under the Georgia Constitution,²³ the court proceeded to overturn its prior strict and rigid rule.²⁴ It seemed apparent to the court that the *Sistrunk* rule was not accomplishing the ends envisioned by the sentiment of its ruling in 1982.²⁵ Not only is there a different treatment for such attorneys in criminal defense matters when the state naturally is adverse, but it is only the conflict created by a financial interest that otherwise would keep the legislator, who is also an attorney, from accepting a representation of any type of matter against the state.²⁶ Absent a financial interest, there was no other specified impediment preventing influence or acts by a legislator that would be contrary to the public trust he had sworn to uphold.²⁷ Because of the perceived ineffectiveness of a blanket disqualification, the court adopted an "ad hoc conflicts of interest standard"²⁸ requiring a determination

18. *Id.* at 547, 291 S.E.2d at 528.

19. 274 Ga. 146, 549 S.E.2d 95 (2001).

20. *Id.* at 146, 549 S.E.2d at 96-97.

21. *Id.*

22. *Id.*, 549 S.E.2d at 97 (referring to 1983 Ga. Laws 1326).

23. GA. CONST. art I, § 2, para. 1 (requiring the state's officials to be "trustees and servants of the people").

24. 274 Ga. at 147, 549 S.E.2d at 97.

25. *Id.*

26. *Id.* at 147-48, 549 S.E.2d at 97-98.

27. *Id.* at 148, 549 S.E.2d at 98 (examining the illumination given to *Sistrunk* by *Georgia State Bd. of Pharmacy v. Lovvorn*, 255 Ga. 259, 336 S.E.2d 238 (1985)).

28. *Id.*

that an actual conflict of interest exists before resorting to disqualification of counsel.²⁹ Because the record contained no evidence of such violations by Representative Bordeaux, the motion to disqualify him was denied.³⁰

Lest we forget, there was an actual case here. The issue in the case developed under the Georgia Tort Claims Act ("GTCA")³¹ because the claimant sent his ante litem notice by overnight delivery instead of by certified mail or personal delivery.³² The court upheld this manner of giving notice and provided the analogy that personal delivery had been made by the overnight delivery man hired by the claimant's counsel.³³ The date and fact of personal delivery had been stamped on the letter copy to be returned to claimant's counsel, and that was enough of a proper receipt for the appellate court.³⁴

Another action involving GTCA notice procedure was filed against the Department of Transportation by Lynn and Steven Sylvester based upon a hydroplaning accident allegedly due to the negligent maintenance of a highway.³⁵ From the initial service of defendants in the action, the Risk Management Division of the Department of Administrative Services did not receive the required ante litem notice.³⁶ A voluntary dismissal without prejudice was taken by the Sylvesters, and the case was refiled and served correctly, but after the original statute of limitations on the claim had already expired.³⁷

The Department of Transportation moved for summary judgment, which was granted by the trial court.³⁸ On appeal, the court of appeals had very little trouble affirming the grant of summary judgment.³⁹ Because there was not proper service of process in the original action, it was a nullity and there was nothing to renew within the six-month grace period after the expiration of the limitations period.⁴⁰ As the appellate court put it, "If a condition precedent to waiver of sovereign immunity has not been satisfied, then the trial court lacks subject matter

29. *Id.*

30. *Id.* at 149, 549 S.E.2d at 98.

31. O.C.G.A. §§ 50-21-20 to -35 (1998).

32. 274 Ga. at 149, 549 S.E.2d at 98-99. *See also* O.C.G.A. § 50-21-26 (2002).

33. 274 Ga. at 150, 549 S.E.2d at 99.

34. *Id.*

35. *Sylvester v. Dep't of Transp.*, 252 Ga. App. 31, 555 S.E.2d 740 (2001).

36. *Id.* at 31, 555 S.E.2d at 741. *See also* O.C.G.A. § 50-21-26.

37. 252 Ga. App. at 31, 555 S.E.2d at 741.

38. *Id.*, 555 S.E.2d at 740-41.

39. *Id.*

40. *Id.* at 32, 555 S.E.2d at 741. The renewal right stems from civil practices provisions found at O.C.G.A. section 9-2-61 (2002).

jurisdiction and no valid action is pending to toll the running of the statute of limitation."⁴¹

GTCA defenses proved only partially successful in the case of *Smith v. Department of Human Resources*.⁴² The Department of Medical Assistance terminated Smith's license as a Medicaid provider because of a report filed by the Department of Human Resources ("DHR"). That report, listing deficiencies in an assisted living facility Smith maintained, was based upon an anonymous complaint. Smith sued both state agencies, a contract private case manager acting on behalf of the DHR, and an employee of the case manager. In a later amendment articulating Smith's claim against the state agencies, Smith included a cause of action under the GTCA.⁴³

The trial judge had apparently handled all of the issues enumerated in the appeal by motion practice. The case manager and its employee won on their summary judgment because, as the trial court said, they could not be sued under the GTCA. The tort claims against the state agencies were dismissed as not falling under sections of the GTCA for which immunity had been waived. Finally, both state agencies obtained a grant of summary judgment on Smith's breach of contract and deprivation of due process rights claims.⁴⁴

The outcome of the appeal was somewhat like "win, lose, or draw." The court of appeals wasted no time in reversing the summary judgment granted to the case manager and the employee.⁴⁵ Although Smith had pleaded under the GTCA and had apparently noted the contractual relationship through which the private case manager was delegated certain functions by a defendant state agency, the trial court had lost perspective on the cause of action by ruling that neither party could be sued under the GTCA.⁴⁶ That determination did not mean a tort action would not lie against the private case manager and employee.⁴⁷ They could be sued as ordinary tortfeasors without pleading the GTCA claim at all.⁴⁸ A reversal of the summary judgment was the dictated result.⁴⁹

Smith's GTCA claims against the DHR and the Department of Medical Assistance were successfully defended, and the court upheld their

41. 252 Ga. App. at 32, 555 S.E.2d at 741.

42. 257 Ga. App. 33, 570 S.E.2d 337 (2002).

43. *Id.* at 34, 570 S.E.2d at 338.

44. *Id.*

45. *Id.* at 35, 570 S.E.2d at 339.

46. *Id.* at 34, 570 S.E.2d at 338.

47. *Id.* at 36, 570 S.E.2d at 340.

48. *Id.*

49. *Id.*

summary judgments based upon clear exceptions contained in the GTCA for administration of both inspection powers or functions and licensing powers or functions.⁵⁰ The court found that both state agencies possessed the necessary licensing powers and functions to bring them under the exception, meaning no claim would lie under the GTCA and found that immunity was not otherwise waived.⁵¹

Smith still managed to get a new day in court because the DHR was required to follow its own rules. The DHR provides for administrative review upon request and submission of supporting documentation.⁵² The appellate court disagreed with the trial court's conclusion that Smith waived her right to an administrative appeal because she failed to file such supporting documentation.⁵³ According to the appellate court, the original letter from the DHR to Smith notifying her of a right to appeal "was worded in such a way as to indicate that the submission of supporting documentation was optional."⁵⁴ This created an issue of fact regarding whether Smith waived an administrative appeal, requiring that the case be reversed in part.⁵⁵

The last GTCA case in this Article is *Board of Public Safety v. Jordan*.⁵⁶ Bennett Jordan had been superintendent of the Georgia Police Academy, but he was terminated from employment "for cause"⁵⁷ under O.C.G.A. section 47-2-2.⁵⁸ An administrative hearing officer entered findings of fact and conclusions of law substantiating the termination for cause, citing "irresponsible performance of duties" and "neglect of duty" based upon the factual allegations contained in the termination notice served on Jordan.⁵⁹ The Board of Public Safety ratified the decision of the administrative hearing officer.⁶⁰

Jordan entered no appeal from the action by the Board of Public Safety. Instead, he later filed a tort action accusing the Board of Public Safety of actually discharging him because of the Board's desire to consolidate the functions of several different public safety agencies under

50. *Id.* (citing O.C.G.A. § 50-21-24(8)-(9) (2002)).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 36-37, 570 S.E.2d at 340.

56. 252 Ga. App. 577, 556 S.E.2d 837 (2001).

57. *Id.* at 577, 556 S.E.2d at 839.

58. O.C.G.A. § 47-2-2 (2000).

59. 252 Ga. App. at 580, 556 S.E.2d at 840. The two quoted conclusions are respectively from O.C.G.A. sections 47-2-2(c)(5)(d) and 47-2-2(c)(7), relating to definitions affecting involuntary separation from employment.

60. 252 Ga. App. at 580, 556 S.E.2d at 840.

one supervising officer. He alleged intentional infliction of emotional distress based on the damage to his reputation stemming from the termination of employment.⁶¹

The Board of Public Safety moved to dismiss the action and based its motion, in part, on sovereign immunity. The motion was denied, and Jordan prevailed at trial.⁶² Upon appeal by the Board of Public Safety, the court of appeals analyzed Jordan's claims under the GTCA.⁶³ Jordan's claims had been described as not questioning the fact of his discharge; rather, he felt that the Board of Public Safety had used subterfuge, deliberate misconduct, and false information to create the case for discharge against him.⁶⁴

The court of appeals first sought to categorize the type of conduct that was alleged by Jordan to have created the intentional infliction of emotional distress.⁶⁵ The court reasoned that based on the charges brought against Jordan, only "slander, libel, or discretionary acts of the Board"⁶⁶ could have been the basis for Jordan's claims.⁶⁷ Using the provisions of the GTCA, the appellate court reversed, finding that all three categories of actions were protected and recovery was barred.⁶⁸

Dicta in *Jordan* indicated that the court of appeals probably would have reversed the trial court because Jordan had not exhausted his administrative remedies.⁶⁹ The decision in *Perkins v. Department of Medical Assistance*⁷⁰ turned, in part, on exactly that issue. Larry Perkins had a medical transportation business called Royal Lion Transportation, and Diane Finney was in the same business with Executive Nonemergency Transportation. Both had contracts with the Department of Medical Assistance to provide nonemergency transportation to Medicaid patients. The Department of Medical Assistance had audited claims for payment submitted by these businesses, and the audit determination denied several of the claims.⁷¹

61. *Id.* at 580-81, 556 S.E.2d at 840-41.

62. *Id.* at 581, 583, 556 S.E.2d at 841, 842.

63. *Id.* at 583, 556 S.E.2d at 842.

64. *Id.* at 583-84, 556 S.E.2d at 842-43.

65. *Id.*

66. *Id.* at 583, 556 S.E.2d at 842-43.

67. *Id.*

68. *Id.* at 584-86, 556 S.E.2d at 843-45. O.C.G.A. section 50-21-24(5) (2002) retains immunity regarding discretionary administrative acts, and O.C.G.A. section 50-21-24(7) protects the state against claims based on libel or slander.

69. See 252 Ga. App. at 587, 556 S.E.2d at 845.

70. 252 Ga. App. 35, 555 S.E.2d 500 (2001).

71. *Id.* at 35-36, 555 S.E.2d 501-02.

Perkins had brought an earlier lawsuit to question the results of his audit and recovered an award of part of the denied claims.⁷² Finney had used no prior action to question the audit by the Department of Medical Assistance and had simply joined in the instant lawsuit by Perkins.⁷³

When the Department of Medical Assistance answered the complaint, it also presented a motion to dismiss or, in the alternative, a motion for summary judgment.⁷⁴ As against Finney, who owned Executive Nonemergency Transportation, the motion to dismiss should have been granted.⁷⁵ The failure to exhaust administrative remedies was fatal to her cause of action because of direct statutory commands that appeals of departmental determination of reimbursement amounts be filed first with the department.⁷⁶ Because the trial court had granted summary judgment instead of the motion to dismiss, the court of appeals vacated the judgment and directed that an order dismissing the action be entered.⁷⁷

Perkins had previously litigated the results of this same audit, but now wanted a larger amount returned to him by way of a "second bite of the apple."⁷⁸ Summary judgment based upon the doctrine of res judicata was affirmed.⁷⁹

This opinion provides an excellent review of the current status of Georgia case law regarding the exhaustion of administrative remedies. It is suggested by this author that readers desirous of a ready reference on the topic review directly the treatment given to it by Judge Eldridge in this case.

IV. STANDARDS OF REVIEW FOR AGENCY DECISIONS

A. *The "Any Evidence" Rule*

There really were no noteworthy cases during the survey period exemplifying the application of the "any evidence" rule as envisioned

72. *Id.*, 555 S.E.2d at 501.

73. *Id.* at 36, 555 S.E.2d at 501-02.

74. *Id.*, 555 S.E.2d at 502.

75. *Id.*

76. *Id.* at 37, 555 S.E.2d at 503 (citing O.C.G.A. §§ 49-4-153(c) (2002) and 50-13-19 (2002)).

77. *Id.* at 36, 555 S.E.2d at 502.

78. *Id.* at 38, 555 S.E.2d at 503.

79. *Id.*

under O.C.G.A. section 50-13-19(h).⁸⁰ However, *Georgia Board of Dentistry v. Brooks*⁸¹ did provide a unique illustration of how agency procedures intended to expedite administrative proceedings can backfire if the agency is not careful in compiling its record regarding the facts of its case.

The Board had lodged a complaint against Brooks because of the faulty or unacceptable construction of a denture. According to the complaint, the denture did not have wire clasps, so it was not suitable or well-fitting for the patient. Brooks not only denied all of the allegations contained in the complaint, he filed what is called a "motion for summary determination" according to the administrative procedures used by the Board.⁸² His motions were denied in the administrative proceeding, and the matter was appealed to superior court.⁸³

In filing the motion for summary determination, Brooks also used an accompanying affidavit for the supporting facts. He claimed to have met with the patient and made a denture containing wire clasps to hold it correctly in position. The Board submitted an affidavit from an expert it had chosen, and apparently, that expert examined a denture not having wire clasps. Accordingly, the allegation of mishandling the construction of the denture might have been well founded. There was only one problem: the Board, in relying solely on the expert affidavit, provided no evidence to tie Brooks to the construction of the clasplless denture presented to that expert.⁸⁴ Affirming the trial court's entry of summary determination for Brooks, the court of appeals stated that the Board had failed to meet its burden of proof under the appropriate administrative procedures applicable to a summary determination.⁸⁵ In other words, under the submitted facts, the court failed to find any evidence to support the allegations in the Board's complaint.⁸⁶

B. Plain Meaning of Statutes

Only one good "plain meaning" case was decided during the survey period, and it involved both the plain meaning of terms in a statute and the technical industry definition of terms. In *Insurance Department of*

80. O.C.G.A. § 50-13-19(h) (1998).

81. 273 Ga. 852, 548 S.E.2d 284 (2001).

82. This process, as found at GA. COMP. R. & REGS. 616-1-2-.15 (1997), is akin to a summary judgment action.

83. 273 Ga. at 852-53, 548 S.E.2d at 285.

84. *Id.*, 548 S.E.2d at 285-86.

85. *Id.*

86. *Id.*

Georgia v. St. Paul Fire & Casualty Insurance Co.,⁸⁷ the insurance commissioner had severely penalized St. Paul for not renewing some liability policies. The allegation, which the insurance commissioner concluded would support the penalties in his administrative order, was that St. Paul had committed an unfair trade practice under O.C.G.A. section 33-6-5(12), containing the prohibition that, “[n]o insurer shall cancel an entire line or class of business unless the insurer demonstrates to the satisfaction of the Commissioner that continuation of such business would violate the provisions of this title or would be hazardous to its policyholders or the public.”⁸⁸

Upon appeal to the Superior Court of Fulton County, St. Paul reiterated the presentation it had urged in the administrative hearing. St. Paul claimed it had not cancelled any policies. Rather, it had sent notices of nonrenewal to the affected policyholders, thereby allowing the policies to expire. Additionally, the nonrenewed policies were only part of the insurance writings in Georgia for that line of policies, not an entire line or class of business.⁸⁹

St. Paul’s characterization of the issues was accepted by the superior court, and the order of the insurance commissioner was reversed.⁹⁰ The Georgia Insurance Department appealed the matter to the court of appeals, and the differing interpretation of the unfair trade practices provision was reviewed.⁹¹

At issue was the meaning of the word “cancel.”⁹² The insurance commissioner urged a broad interpretation to encompass any type of termination of policies by an insurer.⁹³ The court of appeals agreed with the superior court that such an interpretation was not sustainable because there was no uncertainty or ambiguity that would substantiate departure from using the plain meaning of the term used in the statute.⁹⁴

Cancellation and nonrenewal are distinctly different treatments given by insurers to policies during the term of coverage.⁹⁵ The Georgia Insurance Code prescribes conditions for particular policies for which cancellation or nonrenewal may be appropriate.⁹⁶ In fact, within the

87. 253 Ga. App. 551, 559 S.E.2d 754 (2002).

88. *Id.* at 552, 559 S.E.2d at 755 (quoting O.C.G.A. § 33-6-5(12) (2000)).

89. *Id.*, 559 S.E.2d at 756.

90. *Id.*

91. *Id.* at 553-55, 559 S.E.2d at 756-57.

92. *Id.* at 553, 559 S.E.2d at 756.

93. *Id.*

94. *Id.* at 554, 559 S.E.2d at 757.

95. *See id.* at 553, 559 S.E.2d at 756.

96. *Id.*

same unfair trade practice statute cited by the insurance commissioner as creating the violation, a related paragraph uses both terms separately.⁹⁷ Accordingly, affirming the superior court, the court of appeals stated, "The legislature's inclusion of both 'cancel' and 'refuse to renew' in [O.C.G.A. section] 33-6-5(8) indicates that, contrary to the State's contention, those terms are not interchangeable for the purpose of the unfair trade practices chapter."⁹⁸

C. Agency Deference

*Professional Standards Commission v. Denham*⁹⁹ presented a classic example of the court deferring to actions taken by an agency, even when that court disagreed with the outcome. Denham was a teacher who administered a placement test to her class. Believing that one of the children had guessed successfully at several answers and obtained an inappropriate high score, she changed the answers to reflect incorrect choices. The Professional Standards Commission initiated administrative action and recommended suspending the teacher for a period of six months. Upon appeal to an administrative law judge, the prior suspension recommendation was adopted. This was, in turn, made a final decision by the Professional Standards Commission.¹⁰⁰

During the administrative process, several matters in mitigation had been presented and made a part of the record. Denham's local school board had only issued a reprimand.¹⁰¹ The teacher's record otherwise was a spotless one, and the school superintendent for her county had even entered testimony that the teacher's suspension for six months would be "detrimental to the school system."¹⁰²

Denham appealed the Professional Standards Commission's decision to the superior court. Obviously considering the mitigating factors in the record, the superior court reversed the decision of the Professional Standards Commission under O.C.G.A. section 50-13-19(h)(6) as either arbitrary or capricious or involving a clearly unwarranted exercise of discretion.¹⁰³

97. *Id.*

98. *Id.*

99. 252 Ga. App. 785, 556 S.E.2d 920 (2001).

100. *Id.* at 785-87, 556 S.E.2d at 921-22.

101. *Id.* at 785-86, 556 S.E.2d at 921.

102. *Id.* at 786, 556 S.E.2d at 921.

103. *Id.*, 556 S.E.2d at 921-22.

The Professional Standards Commission appealed the judgment, and the court of appeals reversed the action of the superior court.¹⁰⁴ In two paragraphs of analysis, the court of appeals made it clear that Denham had committed an offense and that the mitigating factors were clearly part of the record considered by the Professional Standards Commission.¹⁰⁵ Because the punishment was an allowable one, whether there had been arbitrary or capricious action would be decided by examining the record to see if a rational basis existed for the decision by the Professional Standards Commission.¹⁰⁶ That rational basis was indeed present and described as "the state's interest in insuring the integrity of standardized test results."¹⁰⁷

Sometimes, deference to the expertise of an agency is not appropriate. In a small part of *State Farm Mutual Automobile Insurance Co. v. Mabry*,¹⁰⁸ the matter of deference to agency expertise was rebuffed. State Farm had been sued by Mabry for the insurer's failure to incorporate into its first-party automobile claims the handling of an element of damages known as diminished value. In the appeal of a judgment finding against the insurer, State Farm asserted that the trial court had failed to recognize the exclusive jurisdiction of the insurance commissioner over matters involving the Georgia Insurance Code. The argument was that claims handling procedures, including the question of diminished value, were properly addressed to the insurance commissioner, as he is charged with the regulation and enforcement of such matters.¹⁰⁹

The supreme court disagreed and differentiated between the argument advanced by State Farm and the order of the trial court.¹¹⁰ The lower court "did not mandate any certain claims handling procedure, only that State Farm start actually handling its claims in accord with its contract."¹¹¹ Because it was a mere contract violation and not an Insurance Code violation, there could be no requirement of deference or requirement of exhaustion of administrative remedies.¹¹² Accordingly, the trial court had acted properly.¹¹³

104. *Id.* at 786-87, 556 S.E.2d at 922.

105. *Id.* at 786, 556 S.E.2d at 922.

106. *Id.* at 786-87, 556 S.E.2d at 922.

107. *Id.* at 786, 556 S.E.2d at 922.

108. 274 Ga. 498, 556 S.E.2d 114 (2001).

109. *Id.* at 498-500, 556 S.E.2d at 116-17. See O.C.G.A. § 33-2-1 (2000).

110. 274 Ga. at 500, 556 S.E.2d at 117-18.

111. *Id.*, 556 S.E.2d at 117.

112. *Id.*, 556 S.E.2d at 117-18.

113. *Id.*

V. EFFECTS OF AGENCY ACTIONS

A. Collateral Estoppel from Agency Rulings

*Jordan v. Board of Public Safety*¹¹⁴ is a companion case that was a cross-appeal from the similar case under Section III of this Article. Jordan had maintained that his dismissal as the superintendent of the Georgia Police Academy was under the pretext of a "for cause" termination, but what really happened was that the Board of Public Safety wished to combine several different agencies under one supervisory authority. The trial court ruled in favor of Jordan on a claim of intentional infliction of emotional distress, but additionally ruled that Jordan was collaterally estopped from relitigating the issues from prior administrative hearings on the termination of his employment.¹¹⁵

Jordan's argument to the appellate court was that the administrative hearing had been limited to the actual charges brought against him to substantiate a termination for cause. The matter of piercing the Board's enumeration of actual charges and adjudicating the underlying issues had never been litigated.¹¹⁶

The court of appeals agreed with the prior determination by the trial court that the record showed Jordan had the opportunity to present his case regarding the Board's true reasons in firing him.¹¹⁷ Thus, even a somewhat ambiguous status of the record would not require a different outcome of the case.¹¹⁸ As the court observed:

"Like *res judicata*, collateral estoppel requires the identity of the parties or their privies in both actions. However, unlike *res judicata*, collateral estoppel does not require identity of the claim—so long as the issue was determined in the previous action and there is identity of the parties, that issue may not be re-litigated, even as part of a different claim."¹¹⁹

Jordan also raised the issue of the trial court's dismissal of the rarely asserted substantive due process rights. He alleged that he had been deprived of a constitutionally protected liberty interest because of the damage to his reputation stemming from the Board's pretextual

114. 253 Ga. App. 339, 559 S.E.2d 94 (2002).

115. *Id.* at 339-40, 559 S.E.2d at 95-96.

116. *Id.* at 340-41, 559 S.E.2d at 96.

117. *Id.* at 341-42, 559 S.E.2d at 96-97.

118. *Id.* at 341, 559 S.E.2d at 96.

119. *Id.* (quoting *Gwinnett County Bd. of Tax Assessors v. Gen. Elec. Capital Computer Servs.*, 273 Ga. 175, 178, 538 S.E.2d 746, 748 (2000)).

termination of his employment.¹²⁰ By this allegation, he sought to substantiate a 42 U.S.C. § 1983 claim, but the appellate court, citing *McKinney v. Pate*,¹²¹ ruled that such interests invoke only procedural due process rights.¹²² Because Jordan had failed to appeal the earlier administrative determination that his firing was “for cause” and had instead brought a separate, later court action, he could not successfully claim that due process had not been extended to him.¹²³

*Kell v. State*¹²⁴ illustrates a variation of estoppel because of prior agency action in the context of raising the issue in a subsequent criminal case. Kell was convicted of Medicaid fraud based upon his referral of patients to a laboratory in which he held a financial interest. According to his citation of prior administrative hearings, he had prevailed on allegations of this misconduct in the administrative forum. Kell argued that those determinations should substantiate a plea of double jeopardy because the state should be estopped from litigating the improper referral charges for a second time by way of criminal prosecution.¹²⁵

The record on appeal was deficient and did not substantiate Kell’s recounting of events.¹²⁶ On the relationship of the plea of former jeopardy and collateral estoppel, the court noted the following:

The double jeopardy clause embraces the doctrine of collateral estoppel and prevents the same parties from relitigating an issue of ultimate fact previously determined by a valid and final judgment. This doctrine only applies, however, if “[t]he record of the prior proceedings . . . affirmatively demonstrate[s] that an issue involved in the second trial was definitely determined in the former trial.” The mere “possibility that an issue may have been determined in the former trial does not prevent the relitigation of that issue.”¹²⁷

Finding that the record below did not show that the administrative law judge had entered a decision on the issue, the appellate court ruled against Kell.¹²⁸

120. *Id.* at 342, 559 S.E.2d at 97.

121. 20 F.3d 150 (11th Cir. 1994).

122. 253 Ga. App. at 342-43, 559 S.E.2d at 97-98.

123. *Id.* at 343-44, 559 S.E.2d at 98.

124. 254 Ga. App. 297, 562 S.E.2d 201 (2002).

125. *Id.* at 297-301, 562 S.E.2d at 203-08.

126. *Id.* at 304, 562 S.E.2d at 208.

127. *Id.* at 303-04, 562 S.E.2d at 208 (alterations in original) (quoting *Sanchez v. State*, 242 Ga. App. 686, 688, 530 S.E.2d 775, 777 (2000)).

128. *Id.* at 304, 562 S.E.2d at 208.

B. Failure to Follow Agency Rules

The correct observance of the Georgia Open Meetings Act¹²⁹ continues to be a source of consternation for state and local agencies. This is not necessarily because agencies wish to disregard their responsibilities under the Act so much as it is due to the failure of agency personnel to understand when a meeting must be open and when it may be closed. *Claxton Enterprise v. Evans County Board of Commissioners*¹³⁰ offers new guidance to state agencies on this topic. The commissioners knew of an issue under which a recreation director would have to be compensated for accrued leave time. At the commission meeting, the chairman sought to close the meeting under the attorney-client exception to the Open Meetings Act in order to discuss possible litigation. The newspaper publisher objected, especially because the county attorney was not even there. Later, after the county administrator called each of the board members and consulted with them, the chairman attempted to change the cited reason for the meeting being closed to the discussion of actions regarding personnel.¹³¹

Upon the newspaper bringing the matter to superior court, two separate issues developed that are worthy of comment. First, the trial court ruled that the Open Meetings Act had not been violated by closing the meeting for asserted reasons regarding anticipated litigation. It also found that a later meeting closed for attorney-client privilege and personnel discussions did not violate the Open Meetings Act. The newspaper appealed.¹³²

The court of appeals first addressed the closure because of discussions of potential litigation.¹³³ The record showed that the recreation director had said "that if the Board failed to pay him, he would use whatever legal means necessary to get compensated."¹³⁴ In reversing the trial court's ruling of sufficiency of the threat of litigation, the court of appeals provided a construction of O.C.G.A. section 50-14-2(1)¹³⁵ that will be of great utility to agencies in the future:

Construing [O.C.G.A. section] 50-14-2(1) narrowly, we hold that a meeting may not be closed to discuss potential litigation under the attorney-client exception unless the governmental entity can show a

129. O.C.G.A. §§ 50-14-1 to -6 (2002).

130. 249 Ga. App. 870, 549 S.E.2d 830 (2001).

131. *Id.* at 870-71, 549 S.E.2d at 832-33.

132. *Id.* at 872-73, 549 S.E.2d at 833-34.

133. *Id.* at 874, 549 S.E.2d at 834.

134. *Id.* at 871, 549 S.E.2d at 832.

135. O.C.G.A. § 50-14-2(1) (2002).

realistic and tangible threat of legal action against it or its officer or employee, a threat that goes beyond a mere fear or suspicion of being sued. A realistic and tangible threat of litigation is one that can be characterized with reference to objective factors which may include, but which are not limited to, (1) a formal demand letter or some comparable writing that presents the party's claim and manifests a solemn intent to sue; (2) previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims; or (3) proof that a party has both retained counsel with respect to the claim at issue and has expressed an intent to sue.¹³⁶

The second illustrative issue concerned the contacts between the county administrator and each board member to change the stated reason for closing a prior meeting.¹³⁷ All that was clear from the record on this issue was that sometime after a July 1 meeting and before a July 6 meeting, the county administrator contacted each member to gain their acquiescence in changing the reason for the prior meeting closure.¹³⁸

The appellate court did not favor this procedure, but found the Board had not violated the Open Meetings Act.¹³⁹ Because "meeting" is a defined term under the Act and the county administrator's use of contacts over a number of days made the process fall outside of that definition, the court of appeals held that the trial court had been correct in its finding.¹⁴⁰

The court of appeals went on to qualify its ruling as a narrow one and indicated its willingness to construe readily as broad an interpretation as it might be able to accomplish in order to further the expressed legislative intent of the General Assembly.¹⁴¹ For purposes of agency administration, one would be wise to assume that compliance with the Open Meetings Act is required in the broadest terms reasonably possible.

*Interstate North Sporting Club v. Cobb County Board of Tax Assessors*¹⁴² settled a fairly narrow issue of procedural rules governing tax appeals. The club used a tax consulting service to appeal its ad valorem taxes. The service appealed the assessment of taxes on the club's property, but neither the Board of Tax Assessors nor the Board of Equalization changed the assessment. When the Board of Equalization informed the tax consulting service of the club's right to appeal to the

136. 249 Ga. App. at 874, 549 S.E.2d at 834 (citations omitted).

137. *Id.* at 875, 549 S.E.2d at 835.

138. *Id.*

139. *Id.*

140. *Id.* See O.C.G.A. § 50-14-1(a)(2).

141. 249 Ga. App. at 875, 549 S.E.2d at 835.

142. 250 Ga. App. 221, 551 S.E.2d 91 (2001).

superior court, the service requested that the agency findings be certified for the appeal. Long after making the certified findings to the superior court, the Board of Tax Assessors moved to dismiss the appeal because an attorney had not made the appeal on behalf of the club. In the view of the Board of Tax Assessors, O.C.G.A. section 48-5-311(g)¹⁴³ had been violated. The superior court agreed with the Board and dismissed the appeal.¹⁴⁴ The court of appeals saw two issues for resolution in the case.¹⁴⁵ First, there was the question of whether an attorney was needed to request the certification of the tax appeal to the superior court.¹⁴⁶ In an earlier case dealing with a different portion of the same statute, the court found that no lawyer was necessary for appearances before a Board of Tax Equalization.¹⁴⁷ The instant case, however, dealt with a different provision, which had not been examined.¹⁴⁸ The exact language of O.C.G.A. section 48-5-311(g)(2) did not say who had to send the notice of appeal to the county Board of Tax Assessors, only that it had to be in writing.¹⁴⁹ In the appellate court's reasoning, it followed that there was an ambiguity mandating that the interpretation should be made in favor of the action on behalf of the taxpayer.¹⁵⁰

The second question was whether the tax consulting service had engaged in the unauthorized practice of law.¹⁵¹ In finding for the club on this issue, the court first noted that neither the Board of Tax Assessors nor the Board of Equalization was a court of record.¹⁵² The tax consulting service had filed a notice of appeal on behalf of the club, but had made no appearance in the superior court.¹⁵³ Moreover, if the Board of Tax Assessors wished to raise the issue of the unauthorized practice of law by the tax consulting service, it should have done so prior to certifying the appeal to the superior court.¹⁵⁴ The proper method of raising the issue would have been to demand that the club obtain the services of an attorney before the Board would certify the appeal.¹⁵⁵

143. O.C.G.A. § 48-5-311(g) (2002).

144. 250 Ga. App. at 221-22, 551 S.E.2d at 92-93.

145. *Id.* at 222-25, 551 S.E.2d at 93-95.

146. *Id.* at 222, 551 S.E.2d at 93.

147. *Id.* at 223, 551 S.E.2d at 93 (citing *Grand Partners Joint Venture I v. Realtax Resource*, 225 Ga. App. 409, 411-12, 483 S.E.2d 922, 924-25 (1997) (comparing O.C.G.A. § 48-5-311(e)(6)(A) and § 48-5-311(g)(2)).

148. *Id.* at 224, 551 S.E.2d at 94.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 225, 551 S.E.2d at 94.

154. *Id.*, 551 S.E.2d at 95.

155. *Id.*

The second tax case in this Section is another Open Meetings Act case, but nothing quite so complex as the *Claxton Enterprise* case previously reviewed. In *Bryan County Board of Equalization v. Bryan County Board of Tax Assessors*,¹⁵⁶ there was only one question: Is the Bryan County Board of Equalization subject to the Open Meetings Act when discussing tough questions of tax valuation of property?¹⁵⁷ The Equalization Board attempted to have a closed meeting in order to deliberate and vote on particular tax matters, but the Board of Tax Assessors objected. The trial court found that the Open Meetings Act applied, but the Board of Equalization remained unconvinced.¹⁵⁸

While the court of appeals was sympathetic to the expressed plight of board members, it affirmed the trial court.¹⁵⁹ First, it rejected the attempt by the board of equalization to describe its property deliberations as those of a quasi-judicial entity.¹⁶⁰ Second, the court could find no provision of the Open Meetings Act that would give the Board of Equalization a reason to close its meetings.¹⁶¹ Finally, in a similar case involving a zoning appeals board, the court had likewise held that similar deliberations and voting on tax matters had to be conducted in an open meeting.¹⁶²

Sometimes it is the agency that fails to follow its own rules in handling administrative cases. *Katz v. Hospital Authority*¹⁶³ provides a good example of how not to handle such business. Katz, a doctor holding emergency room privileges, had a contract to provide and staff emergency room services. The chief of staff at the hospital called a meeting that resulted in a letter to Katz revoking his emergency room staff privileges. That meeting did not comply with the bylaws of the hospital, and the letter to Katz compiled at the meeting was used by the hospital to terminate the emergency room staffing contract.¹⁶⁴ The hospital later acknowledged there was an error in the prior letter and that the previous meeting should have resulted only in a recommendation that Katz's emergency room privileges be revoked. However, the separate contract was not reinstated.¹⁶⁵

156. 253 Ga. App. 831, 560 S.E.2d 719 (2002).

157. *Id.* at 831, 560 S.E.2d at 719.

158. *Id.* at 831-32, 560 S.E.2d at 719-20.

159. *Id.* at 833, 560 S.E.2d at 720.

160. *Id.*

161. *Id.* at 832-33, 560 S.E.2d at 720.

162. *Id.* at 833, 560 S.E.2d at 720 (citing *Beck v. Crisp County Zoning Bd. of Appeals*, 221 Ga. App. 801, 472 S.E.2d 558 (1996)).

163. 254 Ga. App. 209, 561 S.E.2d 858 (2002).

164. *Id.* at 209, 561 S.E.2d at 859.

165. *Id.* at 209-10, 561 S.E.2d at 859.

Katz brought an action for damages in superior court. The hospital asserted that because emergency room privileges were not revoked, summary judgment should be granted in its favor. The trial court complied, and Katz appealed.¹⁶⁶ Both the trial court and the court of appeals agreed that Katz had not had his emergency room privileges actually revoked, but the court of appeals had a different view as to the effect on Katz's claim.¹⁶⁷ His claim for damages did not arise from the letter revoking the emergency room privileges.¹⁶⁸ It arose from the failure of the hospital to follow its bylaws and the resulting unauthorized action.¹⁶⁹ Accordingly, the trial court's ruling was reversed.¹⁷⁰

Whether the rules of an agency have been followed by a party who claims damages because of agency actions may, in hindsight, be a tough decision. This was the case in *GSW, Inc. v. Department of Natural Resources*.¹⁷¹ GSW wanted to build a landfill and had begun the applicable review and permitting process. It first procured a site-suitability letter and then began the design process. Ultimately, because of the proximity of the site to an aerial bombing range, the permit to operate a landfill was denied due to the likely threat to public health, safety, or well-being.¹⁷²

GSW lodged an administrative appeal, and the permit refusal decision of the Department of Natural Resources was upheld. A later appeal to the Superior Court of Fulton County produced no relief for GSW.¹⁷³

After the denial of a discretionary appeal from the trial court, GSW filed for a declaratory judgment in Dekalb Superior Court. GSW argued that the denial of a landfill license amounted to a taking of GSW's property. The superior court granted summary judgment to all of the state defendants and stated that the taking claim was either waived or was part of the ruling in the administrative appeal.¹⁷⁴

GSW argued on appeal that the administrative process was not the proper forum to plead and prove its constitutional taking claim because provision of the requested relief in that forum, *i.e.*, the granting of the landfill permit, would have prevented the taking. In other words, the

166. *Id.* at 210-11, 561 S.E.2d at 859-60.

167. *Id.* at 211, 561 S.E.2d at 860.

168. *Id.*

169. *Id.*

170. *Id.*

171. 254 Ga. App. 283, 562 S.E.2d 253 (2002).

172. *Id.* at 283-84, 562 S.E.2d at 254 (basing the denial on GA. COMP. R. & REGS. 391-3-4-.04(1) (1997)).

173. *Id.* at 284, 562 S.E.2d at 254.

174. *Id.*

claim was not complete until after the superior court ruled against GSW in the administrative action.¹⁷⁵

The court of appeals disagreed, citing precedent that constitutional challenges to the actions of an agency should be raised during the agency's administrative actions and concluded by superior court review and decision.¹⁷⁶ The record of submissions by GSW during the administrative process actually reflected that the constitutional taking claim had been raised during those proceedings.¹⁷⁷ Additionally, the superior court order ending the administrative action cited the consideration and review of all of the arguments.¹⁷⁸ Thus, GSW was bound by the Fulton County Superior Court decision and could not relitigate the issue in the subsequent lawsuit.¹⁷⁹

*Powell v. City of Snellville*¹⁸⁰ served as an instructional case on how to follow the rules governing appeals of agency decisions from the superior court to the appellate court. Powell owned land for which she could not obtain desired zoning classifications, and over the course of several years, multiple lawsuits were filed. A final order of the superior court was entered in the cases adverse to Powell, and appeals were originated by an application for discretionary appeal and a direct appeal from the judgments.¹⁸¹

At issue was whether a direct appeal would lie because of lower court rulings on causes of action for damages, a declaratory judgment, the constitutionality of rules, and other allegations. The City of Snellville, of course, argued that this was just a review of a zoning decision and could only be appealed by application.¹⁸² The supreme court, after a thorough review of the record of all the cases, agreed with the city on this matter.¹⁸³ Regardless of what had been included at the superior court level, the case remained, essentially, an embellished zoning decision appeal.¹⁸⁴ The previous direct appeals by Powell were dismissed, and because the review of the cases yielded no apparent error or need for precedent, the applications for appeal were denied.¹⁸⁵

175. *Id.*

176. *Id.* at 285, 562 S.E.2d at 255 (quoting *Chambers of Ga., Inc. v. Dep't of Natural Res.*, 232 Ga. App. 632, 633, 502 S.E.2d 553, 555 (1998)).

177. *Id.*

178. *Id.*

179. *Id.* at 286, 562 S.E.2d at 255.

180. 275 Ga. 207, 563 S.E.2d 860 (2002).

181. *Id.* at 207-08, 563 S.E.2d at 861-62.

182. *Id.* at 208, 563 S.E.2d at 862.

183. *Id.* at 209, 563 S.E.2d at 862.

184. *Id.*, 563 S.E.2d at 863.

185. *Id.* at 210, 563 S.E.2d at 863.

The last case illustrating a failure to follow agency rules is actually an exhaustion of remedies case. In *Walker v. Board of Regents of the University System of Georgia*,¹⁸⁶ a change in the contract of a university professor was at issue because of an investigation involving improper conduct. Walker had been removed from additional administrative positions and offered a nine-month academic year contract instead of an annual contract. The change in pay provision was provided for in the Board of Regents Policy Manual.¹⁸⁷

Walker brought an action in the superior court, and upon a grant of summary judgment to the Board of Regents, he appealed. Walker offered two arguments; the first was that the Board of Regents had violated its rules by reducing his salary. That argument was rebutted by the existence of an explicit rule allowing a salary to be determined as Walker's had been.¹⁸⁸ The second argument advanced was that there was an implied guarantee arising from Walker's past annual contracts that Walker would continue to receive an annual contract.¹⁸⁹ This argument was also rather easily rejected.¹⁹⁰ Because the duties assigned to Walker in his past contracts had been changed, any expectations that would have been implied could also be changed.¹⁹¹

Walker also offered a rather unclear reason for reversal of the summary judgment. He claimed that he had a property interest in the administrative position he was removed from because it was "classified" and that he had an additional property interest in his salary being based on that of similar faculty members.¹⁹² The court ruled that even if the unsupported arguments were assumed as correct, Walker would not be able to assert the claims because he did not take advantage of the administrative remedies available to him.¹⁹³ He should have insisted upon a hearing within fifteen days after the decision to remove him from the administrative position.¹⁹⁴ He did not do so, and his only administrative inquiry was to request a hearing on the issue of the nine-month contract.¹⁹⁵ The failure to exhaust administrative remedies available to him precluded further consideration of the claims.¹⁹⁶

186. 254 Ga. App. 15, 561 S.E.2d 178 (2002).

187. *Id.* at 15-16, 561 S.E.2d at 179.

188. *Id.* at 16-17, 561 S.E.2d at 179.

189. *Id.*, 561 S.E.2d at 179-80.

190. *Id.* at 18, 561 S.E.2d at 180.

191. *Id.*

192. *Id.*

193. *Id.*, 561 S.E.2d at 180-81.

194. *Id.*

195. *Id.*

196. *Id.*, 561 S.E.2d at 181.

C. Validity of Rules

In *Consolidated Government of Columbus v. Barwick*,¹⁹⁷ the validity of differing distance requirements between two sets of alcoholic beverage licensing provisions was at issue. Columbus had a license requirement for establishments serving alcoholic beverages which required those establishments to be greater than six hundred feet from another licensee. Barwick had acquired a conditional alcoholic beverage license and had successfully renewed the license. At the time of the second renewal, another valid on-premises licensee was within six hundred feet. Additionally, an audit of Barwick's establishment showed that it did not meet the definition of a restaurant to which a license can be granted because it had an inadequate percentage of food sales.¹⁹⁸

Barwick petitioned the superior court for a writ of certiorari and challenged the decision. Columbus had also established a separate licensing provision for its geographic area known as the riverfront district. That licensing ordinance did not contain a distance provision.¹⁹⁹ The trial court found that the application of the ordinance to Barwick was unconstitutional because riverfront businesses were not subjected to the same distance requirement.²⁰⁰ The City of Columbus appealed by both direct appeal and an application for discretionary appeal to the Georgia Supreme Court.²⁰¹ The supreme court ruled that the relief requested below by Barwick stemmed from the review of the administrative agency's decisions.²⁰² Accordingly, the application for appeal was necessary under O.C.G.A. section 5-6-35.²⁰³

On the first issue raised by the City of Columbus, regarding the six hundred foot distance requirement between licensees, the court wasted little time.²⁰⁴ Citing *Powell v. Board of Commissioners*,²⁰⁵ the supreme court ruled that the distance requirement was a valid exercise of the police power of the city.²⁰⁶ Regarding the distinction between city ordinances eliminating the distance requirement only for the riverfront district and the analysis of the equal protection argument presented by

197. 274 Ga. 176, 549 S.E.2d 73 (2001).

198. *Id.* at 176, 549 S.E.2d at 73.

199. *Id.* at 177, 549 S.E.2d at 74.

200. *Id.*

201. *Id.*

202. *Id.*, 549 S.E.2d at 74-75.

203. *Id.* (citing O.C.G.A. § 5-6-35 (1995 & Supp. 2002)).

204. *Id.* at 178, 549 S.E.2d at 75.

205. 234 Ga. 183, 214 S.E.2d 905 (1975).

206. 274 Ga. at 178, 549 S.E.2d at 75.

Barwick, the court applied a "rational basis test."²⁰⁷ The test is described as follows: "This rational basis test requires that the classification drawn by the legislation 'be reasonable and not arbitrary, and rest upon some ground of difference having a fair and rational relationship to the legislation's objective, so that all similarly situated persons are treated alike.'"²⁰⁸

When the riverfront district was created, the city wanted to encourage the establishment of a commercial area that would have a high density of occupancy along with the food and entertainment services needed to provide for that high density development.²⁰⁹ The supreme court found no problem with the creation of the riverfront district as a valid exercise of power by the city council, and the exemption of alcoholic beverage licensees from the distance ordinance would help the city succeed in the development of the riverfront district.²¹⁰ The presence of this "rational relationship to a legitimate government concern" defeated the contrary equal protection argument, and the trial court was reversed.²¹¹

What is the distinction between a rule and a ruling? *City of Roswell v. Outdoor Systems, Inc.*²¹² presented that question to the supreme court. Roswell had a sign ordinance that was stricken as unconstitutional by order of a superior court judge. To give the city some time to prepare a new ordinance, Roswell imposed a temporary moratorium on the approval of applications for new signs. Outdoor Systems, Inc. sought a mandamus when, in accordance with the moratorium, Roswell failed to approve sign applications. The superior court granted the mandamus, and Roswell applied for an appeal.²¹³

Upon acceptance of the appeal, the supreme court differentiated between a final legislative action under the Zoning Procedures Law²¹⁴ and a temporary moratorium enacted by Roswell.²¹⁵ The court stated, "Because the moratorium was temporary, limited in scope to billboards exceeding a specific size, and enacted in response to a court order invalidating existing sign regulations, we conclude that it was a

207. *Id.*

208. *Id.* (quoting *City of Atlanta v. Watson*, 267 Ga. 185, 187-88, 475 S.E.2d 896, 899 (1996)).

209. *Id.*

210. *Id.* at 178-79, 549 S.E.2d at 75.

211. *Id.* at 179, 549 S.E.2d at 75.

212. 274 Ga. 130, 549 S.E.2d 90 (2001).

213. *Id.* at 130, 549 S.E.2d at 91.

214. O.C.G.A. §§ 36-66-1 to -5 (2000).

215. 274 Ga. at 130-31, 549 S.E.2d at 91.

reasonable interim action and therefore exempt from the procedural requirements of [O.C.G.A. section] 36-66-4."²¹⁶

This was a 5-2 decision.²¹⁷ Justice Benham concurred only in the judgment, citing the inapplicability of the Zoning Procedures Law.²¹⁸ Justice Carley, who dissented, saw the matter in an entirely different light.²¹⁹ According to Justice Carley, the moratorium itself was a zoning decision, which represented final legislative action.²²⁰ As it related to the administration of sign applications, he reasoned, "I submit that an enactment which terminates a property owner's right to pursue a particular use is certainly a procedural device which serves to regulate that use and, consequently, would be a 'zoning ordinance' as defined by [O.C.G.A. section] 36-66-3(5)."²²¹

Cobb County had its share of zoning problems as well. In *Outdoor Systems, Inc. v. Cobb County*,²²² an unconstitutional taking was alleged because of the application of a sign ordinance. Cobb County had adopted provisions to prohibit new signs known as "off-premises" signs, meaning that the sign was erected on property and not meant to reflect the nature of the operations of that particular property. The provisions allowed off-premises signs that were in place at the effective date of the ordinance to remain, but stated that any sign that was destroyed or materially damaged could not be replaced. When Outdoor Systems, Inc. did major repairs to a damaged sign, the county revoked the sign permit. An appeal to the Cobb County Board of Zoning Appeals followed, and the administrative agency affirmed the decision. A writ of certiorari to the superior court produced no relief for Outdoor Systems, Inc., and an appeal to the supreme court regarding the constitutionality of the ordinance followed.²²³

Cobb County argued that the constitutionality issue had not been raised before the Board of Zoning Appeals, but the supreme court ruled that the only requirement for raising the issue before the administrative agency is one that would give that agency enough notice so that it could fix the ordinance, not strict or elaborate notice to enable an adjudication on constitutionality.²²⁴ The record below revealed transcript entries

216. *Id.* at 131, 549 S.E.2d at 91-92.

217. *Id.* at 132, 549 S.E.2d at 92.

218. *Id.* at 132-35, 549 S.E.2d at 92-94 (Benham, J., concurring).

219. *Id.* at 135-36, 549 S.E.2d at 94-95 (Carley, J., dissenting).

220. *Id.* (Carley, J., dissenting).

221. *Id.* (Carley, J., dissenting) (citing O.C.G.A. § 36-66-3(5) (2000)).

222. 274 Ga. 606, 555 S.E.2d 689 (2001).

223. *Id.* at 606, 555 S.E.2d at 690.

224. *Id.* at 607, 555 S.E.2d at 690-91 (relying principally on *Ashkouti v. City of Suwanee*, 271 Ga. 154, 516 S.E.2d 785 (1999)).

of counsel for Outdoor Systems, Inc. questioning the constitutionality, and this was enough to give the level of notice needed.²²⁵

On the merits of the issue of constitutionality, the supreme court cited a recent decision in which an ordinance mandating that a sign could not be restored and that compensation would not be given at the time of its removal was unconstitutional.²²⁶ Accordingly, the judgment of the superior court was reversed on the constitutional charge.²²⁷ This was a 4-3 decision, with Justice Hines authoring the dissenting opinion.²²⁸ He categorized the majority as misinterpreting the precedent and stated that sufficient notice of the constitutionality of an ordinance could only be accomplished by a showing that also gave information to the agency on exactly how the provisions must be adjudged as unconstitutional.²²⁹

A constitutional challenge both to the enabling statutes under which agency rules were adopted and to the validity of the promulgated rules was considered in *Garden Club of Georgia, Inc. v. Shackelford*.²³⁰ The General Assembly had updated statutes permitting the trimming of trees on state property to prevent the obstruction of roadside signs as a response to a prior holding by the supreme court that the gratuities clause of the Georgia Constitution had been violated.²³¹ This time, the General Assembly made specific findings that the roadside signs served the public interest by giving directions and information.²³²

The trial court ruled that the statute was constitutional, and the supreme court did not disturb the findings of fact below.²³³ However, it did re-examine the trial court's conclusions and viewed the issue on appeal as "whether the new statutory provisions provide a benefit to the public that is sufficiently substantial to avoid being an unconstitutional gratuity."²³⁴

Affirming the lower court ruling, the supreme court cited two reasons that the new statute did not suffer the same fate as the prior regulatory framework.²³⁵ The new statute contained a legislative finding that a benefit had been conferred on the state because the public had better

225. *Id.*, 555 S.E.2d at 691.

226. *Id.* (citing *State v. Hartrampf*, 273 Ga. 522, 523, 544 S.E.2d 130, 131 (2001)).

227. *Id.* at 608, 555 S.E.2d at 691.

228. *Id.*

229. *Id.* at 608-09, 555 S.E.2d at 691-92 (Hines, J., dissenting).

230. 274 Ga. 653, 560 S.E.2d 522 (2001).

231. The earlier case, bearing the same name, can be found at 266 Ga. 24, 463 S.E.2d 470 (1995). The gratuities clause is GA. CONST. art. III, § 6, para. 6.

232. 274 Ga. at 653-54, 560 S.E.2d at 523.

233. *Id.* at 655, 560 S.E.2d at 524.

234. *Id.*

235. *Id.*

access to the information provided on roadside signs.²³⁶ More importantly, statutory provisions also made the sign owners pay to remove obstructions.²³⁷ Signaling perhaps some dissatisfaction or disagreement with the approach taken by the legislature, the supreme court commented,

Although the General Assembly could have chosen other ways to deal with the issue, we cannot say that its decision to allow the cutting of trees on public property in exchange for information on billboards and the payment of the value of the trees amounts to an illegal gift under our constitution.²³⁸

The validity of the rules promulgated by the Department of Transportation proved to be another matter. The Department was supposed to seek input under O.C.G.A. section 32-6-75.1²³⁹ from a Roadside Enhancement and Beautification Council, presumably before any rules were promulgated.²⁴⁰ The rules in question had been formulated and adopted by the Department of Transportation before this council had even been appointed.²⁴¹ Therefore, the rules were invalid and the trial court's decision to the contrary was reversed.²⁴²

Begner v. State Ethics Commission,²⁴³ the last case concerning the validity of rules, dealt with the subpoena power of agencies to compel testimony. Begner, a lawyer, had been subpoenaed by the State Ethics Commission to give testimony about a contribution he made to a political campaign that, admittedly, was not from his personal funds. When asked to reveal the name of the client from whom the funds were obtained, Begner refused. The commission sought an order from the superior court holding Begner in contempt, and the court complied.²⁴⁴

On appeal, Begner argued that he had complied with the subpoena. He made an appearance, took the stand, and gave testimony. His failure to reveal the name of the person who gave the campaign contribution was categorized by Begner as a valid invocation of his privilege against self-incrimination.²⁴⁵

236. *Id.*

237. *Id.*

238. *Id.* (citations omitted).

239. O.C.G.A. § 32-6-75.1 (2001).

240. 274 Ga. at 656, 560 S.E.2d at 524-25.

241. *Id.*, 560 S.E.2d at 525.

242. *Id.*

243. 250 Ga. App. 327, 552 S.E.2d 431 (2001).

244. *Id.* at 328-29, 552 S.E.2d at 432-33.

245. *Id.* at 329, 552 S.E.2d at 433.

Based upon an incomplete record, the court of appeals reversed the trial court's finding of contempt.²⁴⁶ Citing *Mallin v. Mallin*²⁴⁷ and drawing from analogous criminal cases, the court explained that the trial judge had been in somewhat of a peculiar situation because the first analysis of whether there had been a valid invocation of the privilege against self-incrimination had taken place on an administrative appeal.²⁴⁸ In an excellent synopsis, the court gave succinct directions for handling the problem:

Under the *Mallin* standard, the trial court could have properly found Begner in contempt of its orders only if it had first determined that the questions posed to Begner *could not* have been incriminating. If, however, the trial court had determined in its inquiry that the questions could have been incriminating, then Begner could have properly asserted his privilege against self-incrimination if he determined that the questions might incriminate him.²⁴⁹

Begner also raised the attorney-client privilege in the lower court proceeding, but not on appeal.²⁵⁰ The court of appeals, possibly anticipating a new round of questions after the remand of the case, pointed out that the "mere fact of employment" by the client whom Begner sought to conceal was not subject to a claim of privilege.²⁵¹ Further, citing *Marriott Corp. v. American Academy of Psychotherapists*,²⁵² Begner could not claim the privilege if it was apparent that a crime by either Begner or the client was involved.²⁵³

VI. RECENT LEGISLATION

There were no amendments to the GAPA by the General Assembly during its 2002 regular session. Probably owing to the downturn in the state's economy, there were only minor revisions at the state level to its agencies and authorities. Among the reshuffling and revisions were the following:

246. *Id.* at 332-33, 552 S.E.2d at 435.

247. 227 Ga. 833, 183 S.E.2d 377 (1971).

248. 250 Ga. App. at 331-32, 552 S.E.2d at 434-35.

249. *Id.*, 552 S.E.2d at 434.

250. *Id.* at 333, 552 S.E.2d at 435.

251. *Id.*

252. 157 Ga. App. 497, 277 S.E.2d 785 (1981).

253. 250 Ga. App. at 333, 552 S.E.2d at 435 (citing *Marriott Corp. v. Am. Acad. of Psychotherapists*, 157 Ga. App. 497, 502, 277 S.E.2d 785, 790 (1981)).

1. The Department of Human Resources has changed several functions and combined others to form the Division of Mental Health, Developmental Disabilities, and Addictive Diseases;²⁵⁴

2. Signifying its place within the Secretary of State, the Department of Archives and History is now the Division of Archives and History;²⁵⁵ and

3. The One Georgia Authority has been transferred from its administrative assignment with the Department of Industry, Trade, and Tourism to an affiliation with the Department of Community Affairs.²⁵⁶

There were a small number of new entities created by general enactments at the legislative session. Again evidencing attention to the status of the state's economy, several entities were for the purpose of economic development. The new creations are as follows:

1. The Power Alley Development Authority, denoting a geographic region bordering U.S. Highway 280 from Columbus to Savannah;²⁵⁷

2. The Oconee River Greenway Authority, originally set for Baldwin County, but open to other counties;²⁵⁸

3. The I-20 Corridor Regional Airport Study Commission, for the eastern part of the state;²⁵⁹

4. The Computer Equipment Disposal and Recycling Council, which will report to the General Assembly;²⁶⁰

5. The Department of Human Resources Bank Match Registry, to be used as an enforcement tool for child support;²⁶¹

6. The Natural Gas Consumer Education Advisory Board, functioning as part of the Public Service Commission;²⁶² and

7. The Georgia Technology Authority Overview Committee, designed to give some degree of review and evaluation of the success of the agency.²⁶³

254. 2002 Ga. Laws 1324, 1330, §§ 1-3 (amending several titles of the O.C.G.A.).

255. *Id.* at 532, §§ 1-32 (amending several titles of the O.C.G.A.).

256. *Id.* at 1059, §§ 1-6 (amending O.C.G.A. §§ 50-8-3, 50-8-9, 50-34-3, and 50-34-6 and enacting O.C.G.A. § 50-34-18).

257. *Id.* at 1198-200, §§ 1-2 (enacting O.C.G.A. §§ 12-3-680 to -708).

258. *Id.* at 820, §§ 1-4 (enacting O.C.G.A. §§ 12-3-400 to -414).

259. *Id.* at 831-32, § 3. This provision is not codified.

260. *Id.* at 1086, § 1 (enacting O.C.G.A. § 12-8-33.1).

261. *Id.* at 1247-48, §§ 1-20 (amending various provisions in O.C.G.A. ch. 19-6, 19-7, and 19-11). The registry establishment is O.C.G.A. section 19-11-30.1. *Id.* at 1255.

262. *Id.* at 500-01, § 18 (enacting O.C.G.A. § 46-4-160.4).

263. *Id.* at 974-75, § 1 (enacting O.C.G.A. §§ 50-25-15 and 16).

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