

Comment

Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework

I. THE DEVELOPMENT OF ADMINISTRATIVE PROCEDURE ACTS IN THE UNITED STATES

The rapid growth of administrative agencies is one of the most significant governmental developments of recent years. These agencies, almost unknown sixty years ago, now are a prominent part of state and national government structures. In spite of this seeming acceptance of administrative agencies, they have been widely criticised for failing to adhere to standards and values accepted in other branches of government. This deficiency arises primarily from the manner in which administrative agencies function. Created, as each is, for a particular purpose, the tendency has been to let each agency work out its administrative process as it sees fit. The result has been lack of uniformity in the procedures of the numerous agencies, and some lack of adherence to fundamental standards.¹

A United States Attorney General commented:

The rapid increase during the past few years of governmental agencies performing regulatory functions and duties of a quasi-legislative or quasi-judicial character, has centered the attention of the Bar and of the public at large upon the vital role played by the administrative process. Some criticisms have from time to time been directed at certain features of administrative procedure. It would tend toward a clarity of thinking to ascertain in a thorough and comprehensive manner to what extent, if any, these criticisms are well founded and to suggest improvements if any are found advisable.²

A member of Congress expressed a more pressing fear of the explosive growth in the administrative process:

Unless steps are taken to constrain the semi-judicial functions of Administrative Agencies within bounds which are defined with some exactitude, they seem quite likely to grow to a size and an importance far greater than their parent, the Congress. Efficient administration might conceivably be achieved through the unchecked activities of such agencies, though history would seem to refute such a possibility. Democracy would soon wither and die in an atmosphere where bureaucratic rule ran riot.³

While all of these remarks were made nearly half a century ago, they are equally true today. Administrative powers and actions are burgeoning. Many individuals

1. OHIO ADMIN. LAW COMM'N. (ALC), REPORT TO THE GOVERNOR AND TO THE 95TH GENERAL ASSEMBLY, at 7 (1942) [hereinafter cited as 1942 OHIO ALC REPORT].

2. Attorney General Frank Murphy, Comments in Appointing the U.S. Attorney General's Committee on Administrative Procedure (February 23, 1939), reprinted in ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 253, 77th Cong., 1st Sess. 253 (1941).

3. Smith, *Administrative Law: A Threat to Constitutional Government?*, 31 VA. L. REV. 1, 8 (1944). Howard W. Smith, the author of this article, served as a representative in Congress from the Eighth Virginia District. UNITED STATES GOVERNMENT MANUAL 28 (1945).

depend upon administrative agencies even for the basic comforts of everyday life.⁴ Yet, like fifty years ago, a uniform procedure does not exist to afford certainty and simplicity in administrative adjudications.

The rapid increase in the 1930s in the number of federal governmental agencies⁵ prompted President Franklin D. Roosevelt in 1939 to request the Attorney General to appoint a committee to investigate "the need for procedural reform in the field of administrative law."⁶ In 1941, the Attorney General's Committee on Administrative Procedure issued its final report,⁷ and in 1946, Congress passed the Federal Administrative Procedure Act.⁸

The increasing importance of administrative agencies in state government⁹ prompted the Section of Judicial Administration of the American Bar Association (ABA) in 1937 to create a Committee on Administrative Agencies and Tribunals. In 1939, this committee set forth a draft that was to serve as a model for state legislation.¹⁰ The ABA referred this draft to the National Conference of Commissioners on Uniform State Laws, which at its 1939 meeting, appointed a conference committee to further study and develop the act.¹¹ In 1946, after working with the Committee of the Judicial Administration Section and after considering the Final Report of United States Attorney General's Committee on Administrative Procedure, the conference committee approved the Model State Administrative Procedure Act (1946 MSAPA). Twelve states, including Ohio, adopted the 1946 MSAPA in whole or in part.¹² In 1961, the Revised Model State Administrative Procedure Act

4. Drivers' licenses, welfare, social security, workers' compensation (in Ohio), and student financial aid are governed in whole or in part by administrative agencies. These agencies also determine the price we pay for electricity, the cleanliness of the air we breathe, and the purity of the food we eat.

5. Att'y Gen. Order No. 3215 (Feb. 23, 1939), *reprinted in* ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 8, 77th Cong., 1st Sess. 252-53 (1941).

6. *Id.* at 254.

7. *Id.* at 2.

8. 5 U.S.C. §§ 101-706 (1982).

9. MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1961).

10. *Id.* American Bar Association involvement in administrative procedure began in 1933 when the ABA created its Special Committee on Administrative Laws. This committee prepared annual reports, which pointed out deficiencies in the existing administrative procedure. Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 196 (1948).

11. UNITED STATES ATTORNEY GENERAL'S COMM. ON ADMIN. PROCEDURE, FINAL REPORT, S. DOC. NO. 8, 77th Cong., 1st Sess. 252-53 (1941) [hereinafter cited as FINAL REPORT].

12. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1961); *see* 2 CAL. GOV'T CODE, div. 3 pt. 1, chs. 4-5 (West 1980); 1945 Ill. Laws 1144, *codified at* ILL. REV. STAT. ch. 110 §§ 264-279 (1945); IND. CODE ANN. ch. 30 § 63.3001 (Burns 1961); 1954 Mass. Acts. ch. 681, *codified at* MASS. ANN. LAWS ch. 30A (Michie 1966); MICH. STAT. ANN. §§ 3.560(21.1-.10) (Callaghan 1961); 37 MO. ANN. STAT. ch. 536 (Vernon 1953); N.C. GEN. STAT. §§ 150-1 to -341 (1970); 1941 N.D. Sess. Laws ch. 240, *codified at* N.D. CENT. CODE §§ 28-32-01 to -22 (1956); OHIO REV. CODE ch. 119 (Baldwin 1982); PA. STAT. ANN. tit. 71, § 1710.1 (Purdon 1962); 1944 Va. Acts ch. 160, *amended by* 1946 Va. Acts ch. 234, *codified at* VA. CODE §§ 55-2 to -16 (Michie 1950), *repealed by* VA. CODE 54-2 to -16 (Michie 1967 replacement vol.); 1943 Wis. Laws ch. 375, *codified at* WIS. STAT. ch. 227 tit. 1 (1947). *See generally* Nathanson, *Recent Statutory Developments in State Administrative Law*, 33 IOWA L. REV. 252 (1948); Schwartz, *The Model State Administrative Procedure Act—Analysis and Critique*, 7 RUTGERS L. REV. 431 (1953); Stason, *supra* note 10.

The history of the Ohio APA actually dates back to 1941 when the 94th General Assembly created the Administrative Law Commission (ALC) "to study practice and procedure before the administrative agencies of [Ohio's] government." 1942 OHIO ALC REPORT, *supra* note 1, at 7. The Commission divided its assignment into three topics to facilitate the study: 1) licensing; 2) sundry claims; and 3) major agencies. However, the Commission found its task too difficult and, desiring not to sacrifice quality, limited its study to licensing. *Id.* at 8. In 1942, the Commission prepared a proposed act, which addressed licensing. *Id.* at 11-12. The legislature passed this act, which became Ohio General Code sections 154-61 to -7312.

The 95th Ohio General Assembly then reauthorized the ALC to continue its work. OHIO ADMIN. LAW COMM'N.,

(RMSAPA),¹³ which has been adopted by twenty-seven states,¹⁴ updated the 1946 MSAPA. Finally, in 1981, the National Conference of Commissioners on Uniform State Laws created an "entirely new" Model State Administrative Procedure Act (1981 MSAPA), using the RMSAPA as a starting point.¹⁵

Yet, in spite of the expressed goal to apply these acts uniformly to all governmental agencies,¹⁶ the acts as adopted apply only to some agencies¹⁷ and only to some of the adjudications within these agencies.¹⁸ This lack of uniformity creates unnecessary confusion and complexity in the administrative process, which could be alleviated by implementing an administrative adjudicatory framework that includes procedures for informal adjudications and provides for complete interagency uniformity.

To understand the need for a uniform system, one first must examine the scope of the present acts. An act's reach in adjudicatory proceedings is determined by two primary variables: 1) the acts' definitions of agency; and 2) the acts' definitions of adjudication. Adjudications may be divided further either by procedural or substantive distinctions. Procedurally, adjudications are divided into two groups: formal adjudications, which are subject to the administrative procedure acts; and informal adjudications, which generally are not subject to the acts. Substantive distinctions categorize adjudications by the types of adjudicative functions, such as ministerial or punitive, that the agency performs. Substantive distinctions are helpful most when determining what procedure is required by due process. Thus, substantive distinctions also are important when setting up an adjudicative procedural framework. Only after analyzing the present adjudicatory frameworks, both as implemented (Ohio and Federal APAs) and in the prototypical state (RMSAPA and 1981 MSAPA), and considering the problems created by these frameworks, can one understand that interagency uniformity not only is preferable but also is possible if the adjudicatory framework reflects the substantive adjudicatory distinctions and provides at least minimum procedural safeguards for both informal and formal adjudications as well as for administrative appeals.

REPORT TO THE GOVERNOR AND TO THE GENERAL ASSEMBLY 24 (1945) [hereinafter cited as OHIO ALC REPORT]. The legislation resulting from this continued work amended section 154-74, which became Ohio Revised Code sections 119.01-.13. *Id.* at 7; OHIO REV. CODE ANN. § 119.01 comment (Baldwin 1982).

13. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961).

14. See ARK. STAT. ANN. §§ 5-701 to -714 (1976); CONN. GEN. STAT. §§ 4-166 to -189 (1983); GA. CODE §§ 50-13-1 to -22 (1982); HAWAII REV. STAT. §§ 91-1 to -18 (1976); IDAHO CODE §§ 67-5201 to -5218 (1980); ILL. ANN. STAT. ch. 127, §§ 1001-1021 (Smith-Hurd 1981) IOWA CODE ANN. §§ 17A.1-.23 (West 1978); ME. REV. STAT. ANN. tit. 5 §§ 8001-11008 (1979); MD. ANN. CODE art. 41, §§ 422-256A (1982); MICH. COMP. LAWS ANN. §§ 24.201-315 (West 1981); MISS. CODE ANN. §§ 25-43-1 to -43-19 (1983); MO. ANN. STAT. §§ 536.010-.150 (Vernon 1983); MONT. CODE ANN. §§ 2-4-101 to -711 (1983); NEB. REV. STAT. §§ 84-901 to -919 (1981); NEV. REV. STAT. §§ 233B.010-.150 (1979); N.H. REV. STAT. ANN. §§ 541-A:1 to :10 (1974); N.Y.A.P.A. §§ 101-501 (McKinney 1984); N.C. GEN. STAT. §§ 150A-1 to -64 (1983); OKLA. STAT. ANN. tit. 75, §§ 301-326 (West 1976); R.I. GEN. LAWS. §§ 42-35-1 to -18 (1977); S.D. CODIFIED LAWS ANN. §§ 1-26A1 to -40 (1984); TENN. CODE ANN. §§ 4-5-101 to -104 (1983); VT. STAT. ANN. tit. 3, §§ 801-847 (1983); WASH. REV. CODE ANN. §§ 34-04-010 to -940 (1984); W. VA. CODE §§ 29-1A-1 to -6-1 (1980); WIS. STAT ANN. §§ 227.01-.26 (West 1982); WYO. STAT. §§ 9-4-101 to -115 (1982).

15. MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1981).

16. See *infra* note 140 and accompanying text.

17. See *infra* notes 19-29 and accompanying text.

18. See *infra* notes 42-44, 47-60, 63-64, 66-69 and accompanying text.

II. PROCEDURAL DISTINCTIONS BETWEEN THE PRESENT ADMINISTRATIVE ADJUDICATIVE FRAMEWORKS—THEIR APPLICABILITY AND THE AVAILABILITY OF JUDICIAL REVIEW

A. Agencies Subject to the Acts

1. The Ohio Act

The Ohio Administrative Procedure Act ¹⁹ (Ohio APA) divides administrative agencies ²⁰ into four groups, which are determined by whether and how the agencies are subject to the Ohio APA. These groups are: 1) agencies or agency functions subject to the Ohio APA by virtue of express enumeration in the Ohio APA (express enumeration);²¹ 2) agencies made subject to the Ohio APA by reference in other chapters of the Ohio Revised Code (referenced enumeration);²² 3) agencies or agency functions expressly excluded from the operation of the Ohio APA (express exclusion);²³ and 4) agencies that are not subject to the Ohio APA but also are not expressly excluded (silent exclusion).²⁴

19. OHIO REV. CODE ANN. §§ 119.01–13 (Baldwin 1982).

20. Throughout this Comment the word, “agency” refers to all administrative agencies, board, commissions, and bureaus. For the purpose of the Ohio APA, however,

“[a]gency” means, except as limited by this division [chapter 119], any official, board, or commission having authority to promulgate rules or make adjudications in the bureau of employment services, the civil service commission, the department of industrial relations, the department of liquor control, the department of taxation, the industrial commission, the bureau of workers’ compensation, the functions of any administrative executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses.

OHIO REV. CODE ANN. § 119.01(A) (Baldwin 1982).

21. The Ohio APA enumerates several agencies that are subject to the act: the Bureau of Employment Services, the Civil Service Commission, the Department of Industrial Relations, the Department of Liquor Control, the Department of Taxation, the Department of Tax Equalization, the Industrial Commission, and the Bureau of Workers’ Compensation. *Id.* While the Bureau of Workers’ Compensation is enumerated as being subject to the Ohio APA, the Industrial Commission and Bureau of Workers’ Compensation specifically are excluded from operation of the Ohio APA under certain circumstances. *Id.* (For a discussion of when the Industrial Commission and Bureau of Workers’ Compensation are subject to the Ohio APA, see *infra* note 23.)

All of the adjudications of an enumerated agency are subject to the Ohio APA, regardless of the various types of functions the agency provides. However, some of the enumerated agencies also are subject to function exclusions. See *infra* note 22. Such agencies include the State Personnel Board of Review, OHIO REV. CODE ANN. § 124.03(F) (Baldwin 1984), the Civil Rights Commission, *id.* ch. 4112, and the Environmental Protection Agency, *id.* § 3745.05. The Bureau of Employment Services also is only partially subject to the Ohio APA in spite of its express enumeration. Ohio Revised Code section 119.01(A) limits the actions of the Bureau that are subject to the Ohio APA.

22. The number of agencies made subject to the Ohio APA, in whole or in part, by reference in other chapters of the Ohio Revised Code is great. Lexis research indicates that 150 other chapters of the Ohio Revised Code refer to chapter 119 a total of 308 times. While not all of these are referenced enumerations, extensive research is required for a practitioner to determine when the Ohio APA is and is not applicable. To determine whether an agency is subject to the Ohio APA, a practitioner first must check whether the agency is expressly enumerated in chapter 119. If the agency is not expressly enumerated, the practitioner then must find the chapter of the Ohio Revised Code that deals with the agency in question and must search through that chapter to see if that agency is enumerated by reference to chapter 119.

23. The Ohio APA expressly excludes some agencies from its provisions. For example, the Ohio APA does not apply to the Public Utilities Commission, OHIO REV. CODE ANN. § 119.01(A) (Baldwin 1982), or to actions of the superintendent of banks, the superintendent of building and loan associations, the superintendent of credit unions, and the superintendent of insurance in the taking possession of, and rehabilitation or liquidation of, the business and property of banks, building and loan associations, insurance companies, associations, reciprocal fraternal benefit societies, and bond investment companies, nor to any action that may be taken by the

2. *The Federal Act*

Under the Federal APA, “‘agency’ means each authority of the Government of the United States, . . . but does not include

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories of possessions of the United States; [or]
- (D) the government of the District of Columbia. . . .”²⁵

The Attorney General’s Committee on Administrative Procedure “‘regarded as the distinguishing feature of an ‘administrative’ agency the power to determine . . . private rights and obligations.’”²⁶ Express agency exclusions under the Federal APA are limited to governmental entities that must make decisions during wartime or under other exigent circumstances.²⁷ Unlike the Ohio APA,²⁸ the Federal APA does not employ express enumeration, referenced enumeration, or silent exclusion.²⁹

3. *The Revised Model State Administrative Procedure Act*

The RMSAPA defines “‘agency” simply as “‘each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases. . . .”³⁰ “[C]ontested case’ means a

superintendent of banks under sections 1113.02, 1113.05, 1125.10 and 1125.23 of the Revised Code, by the superintendent of building and loan associations under section 1155.18 of the Revised Code. . . .

Id.

The Ohio APA also does not apply to actions of the industrial commission or the bureau of workers’ compensation under sections 4123.01 to 4123.94 of the Revised Code with respect to all matters of adjudication, and to the actions of the industrial commission and the bureau of workers’ compensation under sections 4123.01–4123.09 of the revised code.

Id.

While these exclusions may appear to remove entire agencies from the operation of the Ohio APA, the exclusions are actually function exclusions because they either limit an earlier enumeration of agency subjectivity, *see supra* note 21, or the exclusions limit the possibility of referenced enumeration in other chapters of the Ohio Revised Code. *See supra* note 22. In this sense, function exclusions are limitations on the definition of adjudication and bear no relation to the definition of agency. *See infra* section II.B. for a discussion of the definitions of adjudication.

24. *See In re Martins Ferry Metropolitan Housing Authority*, 2 Ohio App. 2d 237, 240, 207 N.E.2d 672, 674 (1965); OHIO REV. CODE ANN. § 119.01(A) (Baldwin 1982).

Silently excluded agencies must develop their own administrative procedure. Some of these agencies, such as the State Treasurer’s office, OHIO REV. CODE ANN. ch. 113 (Baldwin 1983), have minimal adjudicative or rulemaking functions. Others, such as the Secretary of State, *id.* tit. 17, the Bureau of Unemployment Compensation, *id.* ch. 4141, and the Department of Public Welfare, *id.* ch. 5101, have many rulemaking and adjudicative functions. These agencies have developed their own adjudicative procedure.

25. 5 U.S.C. § 551(1) (1982).

26. FINAL REPORT, *supra* note 11, at 7.

27. Agency exclusions under the Federal APA are “‘agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes,” 5 U.S.C § 551(1)(E) (1982), “‘courts martial and military commissions,” *id.* § 551(1)(F), “‘military authority exercised in the field in time of war or in occupied territory,” *id.* § 551(1)(G), and functions conferred by either the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944. *Id.* § 551(1)(H), *see* Contract Settlement Act of 1944, 18 U.S.C. § 3287 (1982), 41 U.S.C. § 101 (1982); Surplus Property Act of 1944, 50 U.S.C. §§ 1622–1641 (1982).

28. *See supra* notes 21–22, & 24.

29. Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The [Federal APA] is meant to be operative “‘across the board’ in accordance with its terms or not at all. Where one agency has been exempted, all like agencies have been exempted in general terms. H. REP. NO. 1980, 79th Cong., 2d Sess. 5 (1946).

30. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(1) (1961) (brackets in original).

proceeding, including but not restricted to ratemaking, [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. . . ."³¹ "It will be noted that the term 'agency' in the Model Act is made inclusive."³² Thus, the RMSAPA does not need any of the enumeration or exclusion schemes found in the Ohio³³ and Federal³⁴ APAs.

4. *The 1981 Model State Administrative Procedure Act*

The 1981 MSAPA has a tedious and confusing definition of agency.³⁵ The Act's drafters intended this definition to subject "as many state governmental units as possible to the provisions of the administrative procedure act."³⁶ The definition accomplishes this intention but is unnecessarily verbose and confusing and includes no more agencies than the RMSAPA.³⁷ The Commissioners on Uniform State Laws codified all inclusions explicitly, although they clearly were implied by the RMSAPA's simpler definition.³⁸ However, in spite of the 1981 MSAPA's excessive detail, it, like the RMSAPA,³⁹ does not employ the confusing exclusions and enumerations found in the Ohio⁴⁰ and in the Federal⁴¹ acts.

B. *Adjudications Subject to the Acts*

1. *The Ohio Act*

The Ohio APA defines "adjudication" as "the determination by the highest or ultimate authority of an agency of the rights, duties, privileges, benefits, or legal relationships of a specified person. . . ."⁴² Adjudication does not include "the

31. *Id.* § 1(2) (brackets in original). "Licensing" is defined as "the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license. . . ." *Id.* § 1(4). This definition is similar to the Federal APA's. See *infra* note 48. See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 14 (1961) for further description of the RMSAPA's licensing functions.

32. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(1) comment (1961).

33. See *supra* notes 19-24 and accompanying text.

34. See *supra* note 27 and accompanying text.

35. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102(1) (1981). This section defines "agency" as a board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. The term does not include the [legislature] or the courts [,or the governor] [,or the governor in the exercise of powers derived directly and exclusively from the constitution of this State]. The term does not include a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action . . . of their units. To the extent it purports to exercise authority subject to any provision of this Act, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the unit is located within or subordinate to another agency.

Id. (brackets in original).

36. *Id.* § 1-102 comment.

37. See *supra* notes 30-32 and accompanying text.

38. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102 comment (1961).

39. See *supra* text accompanying notes 32-34.

40. See *supra* notes 19-24 and accompanying text.

41. See *supra* note 27 and accompanying text.

42. OHIO REV. CODE ANN. § 119.01(D) (Baldwin 1982). For purposes of the Ohio APA, "[p]erson means a person, firm, corporation, association, or partnership." *Id.* § 119.01(F).

issuance of a license in response to an application with respect to which no question is raised, nor other acts of a ministerial nature."⁴³ This definition limits the Ohio APA's application to a small percentage of administrative adjudicatory functions because the act does not apply to any of the numerous adjudications that may precede a hearing before the "ultimate agency authority."⁴⁴ Under the Ohio APA, adjudication hearings may be held before referees or examiners who often are licensed attorneys.⁴⁵ The referee or examiner must submit to the parties and the agency a written report and a recommendation. After affording time for the party to file with the agency written objections to this report, the agency may approve, modify, or disapprove the referee's recommendation or even order additional testimony or permit the introduction of further documentary evidence.⁴⁶ Thus, even though referees and examiners often are licensed attorneys and presumably have developed expertise in the area in which the agency deals, referees and examiners cannot independently render a decision.

2. The Federal Act

The Federal APA defines "adjudication" as "agency process for the formulation of an order."⁴⁷ This definition is similar to the Ohio APA's since only final agency determinations are subject to the acts.⁴⁸ The acts differ in the Federal APA's inclusion of uncontested license issuances, which are excluded from the Ohio APA.⁴⁹ Interestingly, the Federal APA defines "adjudication" as a process,⁵⁰ while the Ohio APA defines "adjudication" as a determination.⁵¹ Thus, the Federal APA appears to employ a broader definition of adjudication than the Ohio APA.⁵²

The Federal APA applies only to "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing. . . ."⁵³ This Federal APA provision is similar to the Ohio APA's referenced enumerations.⁵⁴ The Federal APA, like the Ohio APA, requires research beyond the act itself to determine

43. *Id.* § 119.01(D).

44. *See infra* section III.A.

45. OHIO REV. CODE ANN. § 119.09 (Baldwin 1982).

46. *Id.* *But see* OHIO REV. CODE § 4121.35 (Baldwin 1984) (recent statutory enactment makes decisions of district and staff hearing officers the agency decision for most purposes in the Bureau of Workers' Compensation and the Industrial Commission, respectively).

47. 5 U.S.C. § 551(7) (1982).

48. *See supra* note 42 and accompanying text. The Federal APA defines "licensing" as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. § 551(9) (1982). A license under the Federal APA is "the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." *Id.* § 551(8).

49. *See id.* § 554(d)(2)(A).

50. *Id.* § 554(a).

51. OHIO REV. CODE ANN. § 199.01(d) (Baldwin 1982).

52. The term, "process," however, is ambiguous. It can refer only to the administrative procedure commencing at the time of a hearing. However, the "agency process" for formulating an order arguably begins with the decision to pursue an action in an agency tribunal. Taken even more broadly, the process for formulating an order extends back to the rules or statutes under which the action is brought or, at an extreme, even back to the legislation forming the agency, which can be traced further back to the Constitution!

53. 5 U.S.C. § 554(a) (1982).

54. *Id.*

if an adjudication is subject to the act, since under the Federal APA, a party must determine whether the pending adjudication is "required by statute to be determined on the record. . . ."⁵⁵ Also like the Ohio APA,⁵⁶ the Federal APA's application is narrowed even further by function exclusions to the act's application.⁵⁷ These function exclusions include internal agency functions,⁵⁸ military matters,⁵⁹ and adjudications for which the court remedy is adequate.⁶⁰

Unlike under the Ohio APA,⁶¹ an initial decision of the officer presiding at the hearing becomes final unless the party files a timely appeal to the agency or a motion for review by the agency.⁶² This procedure, in contrast to Ohio's, saves valuable agency time by requiring agency review only when a party is dissatisfied by the hearing officer's decision.

3. *The Revised Model State Administrative Procedure Act*

The RMSAPA broadly defines the adjudications subject to its provisions.⁶³ Unlike the Ohio and Federal APAs, the RMSAPA does not limit applicability of its provisions to the highest determination of an agency.⁶⁴ The RMSAPA is similar to the Ohio APA, since a single officer cannot render a decision against a party other than the agency without review by a majority of agency officials.⁶⁵

55. *See supra* note 22.

56. *See supra* notes 23, 43-44.

57. The Federal APA excludes the following functions:

- (1) a matter subject to a subsequent trial of the law and facts de novo in a court;
- (2) the selection of tenure of an employee, except an administrative law judge appointed under [title 5] . . . ;
- (3) proceedings in which decision rests solely on inspections, texts, or elections;
- (4) the conduct of military or foreign affairs functions;
- (5) cases in which an agency is acting as an agent to a court; or
- (6) to certification of worker representatives.

5 U.S.C. § 554(a) (1982).

Exception (1) is similar to the Ohio APA provision, since agency adjudications under the Ohio APA are not subject to a trial de novo in the common pleas court but rather to an appeal at which the court determines whether the agency's order is supported by "reliable, substantial, and probative evidence." Proceedings in exception (3) may be either simple ministerial functions of the agency such as licensing, *see infra* section III.A., or exception (3) proceedings better may be classified as decisions whether to adjudicate in which case the proceedings should not be considered adjudications at all. *See id.* Exception (4) actually is an extension of the act's agency exclusions. *See supra* note 27. Moreover, if an agency is "acting as an agency to the court" as in exception (5), presumably the party is subject to some sort of court adjudication, so an agency adjudication is unnecessary.

58. 5 U.S.C. § 554(a)(2), (6) (1982).

59. *Id.* § 554(a)(4).

60. *Id.* § 554(a)(1).

61. *See supra* text accompanying note 46.

62. 5 U.S.C. § 557(b) (1982).

63. The RMSAPA defines "agency" simply as "each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases. . . ." REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(a) (1961) (brackets in original). "[C]ontested case" means a proceeding, including but not restricted to ratemaking, [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 opportunity for a hearing." *Id.* § 1(2) (brackets in original). The RMSAPA defines "licensing" as "the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license. . . ." *Id.* § 1(4); *see id.* § 1(1) comment. (*See id.* § 14 for further description of the RMSAPA's licensing functions.) This definition is similar to the Federal APA's. *See supra* note 48.

64. *See supra* notes 42 & 53.

65. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 11 (1961); *see supra* text accompanying note 46.

4. *The 1981 Model State Administrative Procedure Act*

The 1981 MSAPA defines adjudications "as the process for formulating an order."⁶⁶ Like the Federal APA, the 1981 MSAPA defines adjudication as a process.⁶⁷ Also like the Federal APA,⁶⁸ the 1981 MSAPA provides function exclusions to the definition of adjudication.⁶⁹ Unlike any of the other acts examined, before a formal hearing, the 1981 MSAPA provides for a prehearing conference, similar to a pretrial conference in the federal district court.⁷⁰

The 1981 MSAPA does not require that a hearing officer's order be reviewed by the highest agency authority.⁷¹ Instead, the RMSAPA provides that the "initial order" becomes a final order unless the agency or another party files an appeal within ten days of rendition of the initial order.⁷² In this respect, the 1981 MSAPA differs from the Ohio APA and the RMSAPA but is like the Federal APA. On appeal the parties may submit briefs and present oral argument.⁷³ The presiding officer on appeal may either render an initial order or remand the matter for further proceedings with instructions to the officer who rendered the initial order.⁷⁴

C. *The Availability of Judicial Review*

1. *The Ohio APA*

Under the Ohio APA a party adversely affected by the order of the highest agency authority has a right of appeal to the court of common pleas.⁷⁵ The appellate

66. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-101(a) (1981). The 1981 MSAPA defines an order as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interest of one or more specific persons." *Id.* § 1-102(5).

67. *See supra* text accompanying notes 47 & 50.

68. *See supra* note 57 and accompanying text.

69. The 1981 MSAPA's function exclusions include decisions

(1) to issue or not to issue a complaint, summons, or similar accusation;

(2) to initiate or not to initiate an investigation, prosecution, or other proceeding before the agency, another agency, or a court; or

(3) under Section 4-103, not to conduct an adjudicative proceeding.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-101 (1981). Like some of the Federal APA's function exclusions, function exclusions (1) through (3) actually are decisions whether to adjudicate and should not be considered adjudications at all. *See supra* note 57.

Section 4-103 of the 1981 MSAPA, which is the third adjudicatory function exclusion, provides that "[i]f an agency decides not to conduct an adjudicative proceeding in response to an application, the agency shall furnish the applicant a copy of its decision in writing, with a brief statement of the agency's reasons and of any administrative review available to the applicant." MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-103 (1981); *see infra* text accompanying notes 120-21.

70. *Compare* FED. R. CIV. P. 16 with MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 4-204, 4-205 (1981).

71. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 4-216 (1981).

72. *Id.* § 4-216(b). This period is tolled when a party files a petition for reconsideration of the "initial order." *Id.*

73. *Id.* § 4-216(e).

74. *Id.* § 4-216(g).

75. [O]rder of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, or registration of a license, or revoking or suspending a license . . . may appeal . . . to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. . . .

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county. . . .

OHIO REV. CODE ANN. § 119.12 (Baldwin 1982). This section does not apply to appeals from the Department of Taxation or the Department of Tax Equalization. *Id.*

rules do not apply to an appeal from an administrative agency to the common pleas court. Instead, such appeals are "governed by the statutory provisions including Chapter 2505."⁷⁶

The hearing on appeal to the court is confined to the record certified by the agency, but a court may grant a request for the admission of additional, newly discovered evidence when such evidence could not, with reasonable diligence, have been discovered prior to the agency adjudication hearing.⁷⁷ The parties may present briefs and oral argument.⁷⁸ The court must consider the credibility of the witnesses as well as the probative character and weight of the evidence⁷⁹ and may affirm the agency's order upon finding that the order is supported by "reliable, probative, and substantial evidence."⁸⁰ Otherwise, the court "may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."⁸¹ Either party may appeal the common pleas court decision to the court of appeals by following the procedure for civil appeals.⁸²

Mandamus is a means of relief from an administrative order when a party has no legal remedy, such as a direct appeal, and when the administrative officer is shown to have an unreasonable, arbitrary, or unconscionable attitude.⁸³ Mandamus, however, is available only when the officer has a clear legal duty to act or abuses agency discretion. Mandamus may not be used to control the discretion of an agency⁸⁴ or to substitute the court's judgment for the agency's concerning findings of fact.⁸⁵ Other forms of relief from agency orders, when the aggrieved party does not have a right of appeal (in actions not falling under the Ohio APA), include declaratory judgment with or without mandatory injunction⁸⁶ and possibly writs of prohibition⁸⁷ or procedendo.⁸⁸

In addition to (or instead of) filing an appeal to the courts, a party can request that the agency reconsider its order. The Ohio Supreme Court has held that "an administrative board or agency . . . has jurisdiction to reconsider its decisions until the actual institution of a court appeal therefrom or until expiration of the time for appeal. . . ."⁸⁹

76. A. WHITESIDE, OHIO APPELLATE PRACTICE, OHIO R. APP. P. 1 author's comment (1983). However, a bill pending in the Ohio legislature would change this. Instead of Ohio Revised Code chapter 2505, the Rules of Appellate Procedure would apply in administrative appeals to common pleas court if the bill were passed. Ohio H.B. 412, 116th Gen. Assembly, Regular Sess. § 119.12 (1985).

77. OHIO REV. CODE ANN. § 119.12 (Baldwin 1982). However, these provisions may be superseded when law provides otherwise. *Id.*

78. *Id.*

79. *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, 275, 131 N.E.2d 390, 391 (1955).

80. OHIO REV. CODE ANN. § 119.12 (Baldwin 1982).

81. *Id.*

82. *Id.*

83. *State ex rel. Pistillo v. Shaker Heights*, 26 Ohio St. 2d 85, 86, 269 N.E.2d 42, 43 (1971). Ohio Revised Code chapter 2731 sets forth the special procedure for mandamus.

84. *State ex rel. Breno v. Industrial Comm'n*, 34 Ohio St. 2d 227, 230, 298 N.E.2d 150, 153 (1973); *State ex rel. Martin v. Industrial Comm'n*, 34 Ohio St. 2d 109, 109, 296 N.E.2d 529, 530 (1973).

85. *State ex rel. Hughes v. Industrial Comm'n*, 29 Ohio St. 2d 91, 92, 278 N.E.2d 667, 668 (1972).

86. OHIO REV. CODE ANN. ch. 2721 (Baldwin 1982).

87. OHIO CONST. art. IV, §§ 2, 3.

88. *Id.*; OHIO REV. CODE ANN. §§ 2501.09(A), 2505.37(A) (Baldwin 1982).

89. *State ex rel. Borsuk v. Cleveland*, 28 Ohio St. 2d 224, 224, 277 N.E.2d 419, 419 (1972).

2. *The Federal APA*

Judicial review is available for adjudication under the Federal APA except when “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”⁹⁰ This provision is more problematic than Ohio’s because a practitioner must search through the code to determine whether a statute precludes judicial review or commits the disputed action to agency discretion. If a practitioner finds no statutory prohibitions, another search is necessary, because “[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute. . . .”⁹¹

If the practitioner finds no special statutory provision in the second search, “any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus”⁹² may be employed. In addition, “[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.”⁹³

3. *The Revised Model State Administrative Procedure Act*

Under the RMSAPA, a party who has exhausted all administrative remedies may file a petition for judicial review by the state trial court.⁹⁴ The RMSAPA provisions for judicial review are similar to the Ohio APA’s.⁹⁵ As with Ohio’s act,⁹⁶ filing a petition for review does not automatically stay execution of the agency order, but the agency or court may grant a stay “upon appropriate terms.”⁹⁷ Like the Ohio APA,⁹⁸ the RMSAPA allows additional evidence to be introduced at a court appeal when a party shows good reason for failing to present that evidence at the agency proceeding.⁹⁹ A court appeal under the RMSAPA is conducted without a jury and is confined to the record, but upon request, the court will receive briefs and hear oral argument.¹⁰⁰ A court hearing an appeal under the RMSAPA may not substitute its judgment for the agency’s.¹⁰¹ The RMSAPA, like the Ohio and Federal Acts,¹⁰² provides for appeal of the court’s decision, using the procedures for appeal of civil cases.¹⁰³

90. 5 U.S.C § 701(a) (1982).

91. *Id.* § 703.

92. *Id.*

93. *Id.*

94. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 15(a), 15(b) (1961).

95. *See supra* notes 75–81 and accompanying text.

96. *See supra* text accompanying note 89.

97. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(c) (1961).

98. *See supra* text accompanying note 77.

99. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(e) (1961).

100. *Id.* § 15(g).

101. *Id.*

102. *See supra* text accompanying notes 82, 91.

103. REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 16 (1961).

4. *The 1981 Model State Administrative Procedure Act*

Under the 1981 MSAPA, a party may file a petition for review of administrative adjudicatory action when all administrative remedies are exhausted or if a court determines that existing administrative remedies are inadequate.¹⁰⁴ This petition is filed with the clerk of courts¹⁰⁵ of the state trial court of general jurisdiction.¹⁰⁶ Either the agency or the court may grant a stay of the agency action pending appeal,¹⁰⁷ and in some circumstances, the court may grant a stay even if the agency previously has denied one.¹⁰⁸ Under the 1981 MSAPA, a court may grant declaratory or injunctive relief¹⁰⁹ and any ancillary relief necessary to “redress the effects of official action wrongfully taken or withheld. . . .”¹¹⁰ Damages, compensation, attorney’s fees, and witness fees may be awarded only to the extent authorized by statute.¹¹¹ The 1981

104. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 5-107 (1981).

105. *Id.* § 5-109(a).

106. *Id.* § 5-104.

107. *Id.* § 5-111(a), (b). “Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.” *Id.* § 5-111(a). “A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency’s action on an application for stay or other temporary remedies.” *Id.* § 5-111(b).

108. *Id.* § 5-111(c), (d). Subsection (c) provides that

[i]f the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety, or welfare, the court may not grant relief unless it finds that:

- (1) the applicant is likely to prevail when the court finally disposes of the matter;
- (2) without relief the applicant will suffer irreparable injury;
- (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- (4) the threat to the public health, safety, or welfare relied on by the agency is not sufficiently serious to justify the agency’s action in the circumstances.

Id. § 5-111(c). “If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency’s action on the application for stay or other temporary remedies was unreasonable in the circumstances.” *Id.* § 5-111(d).

109. *Id.* § 5-116.

The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by any one or more of the following:

- (1) The agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied.
- (2) The agency has acted beyond the jurisdiction conferred by any provision of law.
- (3) The agency has not decided all issues requiring resolution.
- (4) The agency has erroneously interpreted or applied the law.
- (5) The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.
- (6) The persons taking the agency action were improperly constituted as a decision-making body, motivated by an improper purpose, or subject to disqualification.
- (7) The agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this Act.
- (8) The Agency action is:
 - (i) outside the range of discretion delegated to the agency by any provision of law;
 - (ii) agency action, other than a rule, that is inconsistent with a rule of the agency; [or]
 - (iii) agency action, other than a rule, that is inconsistent with the agency’s prior practice unless the agency justifies the inconsistency by stating facts and reasons to demonstrate a fair and rational basis for the inconsistency [; or] [.]
 - (iv) [otherwise unreasonable, arbitrary or capricious.]

Id. § 5-116(c) (brackets in original); *see also id.* § 5-117(b).

110. *Id.* § 5-117(c).

111. *Id.* § 5-117(a), (c).

MSAPA also provides that in an action for civil enforcement of an agency order,¹¹² the party may assert defenses to block enforcement.¹¹³ All trial court decisions in administrative appeals are appealable to the appellate court of the state as in other civil cases.¹¹⁴

D. *Problems Created by the Present Adjudicatory Procedural Frameworks*

Although both of the prototypical frameworks, the RMSAPA and the 1981 MSAPA, employ a broad definition of agency, the implemented acts, the Federal APA and the Ohio APA, contain exclusions that narrow the acts' applications. The Ohio APA is especially confusing, since it requires research beyond the APA to determine its possible applicability by means of referenced inclusions. Thus, the implemented acts do not apply uniformly to all agencies.

The acts' applications are restricted further by narrow definitions of adjudication, which exclude from the acts' application adjudicatory proceedings that precede a final agency determination. Two of the acts define agency as a process; yet these acts dictate procedures generally for only final agency determinations. Thus, in spite of the perception of adjudication as a process, all of the acts apply only to a small number of the adjudicatory proceedings in this process.

Furthermore, although all of the acts grant a right of judicial review of final agency determinations, the implemented acts illustrate confusion in this area, as well. The Ohio APA's confusing definition of agency also frustrates effective judicial review, since adjudications in agencies not subject to the act may not be appealable to the courts. Thus, parties in such adjudications often have to resort to ad hoc procedures, such as extraordinary writs, or challenge upon the agency's attempt to enforce its order in the courts. To determine the type of available judicial review under the Federal APA, a party must pursue potentially extensive research that resembles the research required to determine referenced inclusions under the Ohio APA. Thus, in the implemented acts, consistent and predictable judicial review of agency adjudications seldom exists. Ohio's narrow definition of agency limits the act's application so greatly that certainty in adjudicative procedure is hopelessly frustrated prior to judicial review. Moreover, the Federal APA's judicial review provision resembles a residual procedure that applies only in the absence of other statutory procedures.

III. CRITERIA TO BE CONSIDERED WHEN DEVELOPING AN ADMINISTRATIVE ADJUDICATIVE FRAMEWORK

A. *Substantive Distinctions Between Administrative Adjudications*

Agencies perform three basic types of administrative adjudicatory functions: ministerial, enforcement, and punitive.¹¹⁵ Since each of these functions is concerned

112. *See id.* art. V, ch. II.

113. *Id.* § 5-203.

114. *Id.* §§ 5-118, 5-205.

115. J. LANDIS, *THE ADMINISTRATIVE PROCESS* 93-100 (1938).

with a different number of agency inquiries, the functions require different types of procedures.

Ministerial functions¹¹⁶ include the issuance of licenses and the distribution of government benefits by agencies such as the Bureaus of Workers' Compensation and Unemployment Compensation. Often, ministerial adjudications are little more than a simple comparison of the applicant's application to a checklist to determine if the applicant meets all of the prerequisites for the license or benefit sought.¹¹⁷ Although some applicants may fall within gray areas, in which the determination is left more to an employee's evaluation, generally, an applicant's qualifications clearly fall within or outside those required to receive the license or benefit. More often than not the applicant receives the benefit or license sought.¹¹⁸

With ministerial functions, justice usually can be quickly achieved through an *ex parte* determination consisting solely of an agency employee's examination of the application.¹¹⁹ In case of employee error or a dispute, upon request, the agency can provide a hearing at which more evidence can be received and examined.

Ministerial functions should not be confused with agency decisions whether to adjudicate.¹²⁰ The latter decisions also often are simple, *ex parte* determinations. However, a major difference between ministerial functions and decisions whether to adjudicate is that the former usually are commenced upon application by a party and deal with the granting (or denial) of benefits requested. Decisions whether to adjudicate, on the other hand, generally are instigated by the agency or a third party and are related to enforcement or punitive functions.¹²¹

Enforcement functions are similar to civil suits in the courts in which the agency is the plaintiff. The agency's goal in enforcement proceedings is to require the person to perform a legal duty, such as to pay workers' compensation or unemployment premiums.¹²² At enforcement proceedings the agency must determine both if the

116. These functions also are called nonregulatory or benefactory. See B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 26, 34 (1972).

117. Cf. E. GELLHORN & B. BOYER, *ADMINISTRATIVE LAW AND PROCESS* 116-17, 135-36 (1981).

118. *E.g.*, *id.* at 117.

In a recent fiscal year, nearly two million disabled workers were receiving SSI benefits, and the state agencies administering the program made more than a million initial determinations of disability. More than 200,000 disappointed claimants requested reconsideration of initial denials, and another 75,000 persons sought formal hearings after their claims were denied upon reconsideration.

Id. Although this number of initial denials sounds great, these figures reveal that only 20% of all applications for benefits were denied initially, and only 7.5% of all applicants resorted to the formal adjudicatory process to settle their dispute with the agency. See K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 4.01, at 88-90 (3d ed. 1972).

119. Cf. K. DAVIS, *supra* note 118, § 4.01, at 88-90.

120. Kenneth Culp Davis calls decisions whether to adjudicate "the Power to Prosecute and Not to Prosecute." K. DAVIS, *supra* note 118, § 4.09, at 109. However, Davis admits that his terminology is a misnomer since [t]he prosecuting power is not limited to those who are called prosecutors; to an extent that varies in different localities the prosecuting power may be exercised by the police, and a goodly portion of it is exercised by regulatory agencies, licensing agencies, and other agencies and officers. The prosecuting power is not limited to the criminal law; it extends as far as law enforcement extends, including initiation of proceedings for license suspension or revocation, and even to enforcement of such provisions as those requiring that rates or charges be reasonable.

Id. § 4.09, at 110. For more examples of decisions whether to adjudicate see *id.* § 4.02, at 90; A. COX, D. BOK, & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 113 (8th ed. 1977) (discussing NLRB General Counsel decisions whether to assert jurisdiction).

121. See *supra* note 120.

122. B. SCHWARTZ & H. WADE, *supra* note 116, at 30.

party has a legal duty (and what that duty is) and if the party has performed (or breached) that duty. With this two-prong consideration, the gray areas double, and more disputes arise.

In enforcement functions, *ex parte* determinations may provide a starting point by delineating the agency's position in the matter. However, these determinations actually are decisions whether to adjudicate rather than enforcement functions.¹²³ The agency makes a decision whether to adjudicate before the party receives notice. In enforcement functions, on the other hand, the party has notice of the proceedings. Also, even if the enforcement function is decided *ex parte*, a party with knowledge usually has presented some sort of defense or evidence (unless the proceeding is in the nature of a default judgment), perhaps through a letter objecting to the agency's decision to adjudicate and documentary evidence enclosed in that letter. However, disputes are more likely in enforcement functions than in ministerial functions, not only because of the additional inquiries in enforcement functions, but also because of the human tendency to resist more greatly when the government is taking away than when the government is refusing to grant a benefit. Thus, although the opportunity to present evidence is not necessary, it is more important in enforcement proceedings than in ministerial functions.

The third type of administrative adjudications is punitive,¹²⁴ like a criminal action or an action for punitive damages in a court. In punitive proceedings the agency seeks to punish a party for violating a legal duty. Examples of punitive functions include Industrial Commission penalties for employer violations of safety standards, Environmental Protection Agency proceedings for violation of pollution standards, and failure to comply with a previous order after an enforcement proceeding. Since punitive functions punish, they are more likely to be disputed. Punitive functions require a three-prong consideration: the existence of a legal duty, the breach of that duty, and the appropriate punishment. As with the enforcement function, punitive functions easily are confused with decisions whether to adjudicate. The distinction is, as with that between decisions whether to adjudicate and enforcement functions, that punitive functions relate to the agency and a party that has notice of the proceedings. Decisions whether to adjudicate generally are made without the party's knowledge.¹²⁵ Punitive functions should not be determined *ex parte* because of the quasi-criminal nature of these proceedings.¹²⁶

123. See *supra* note 120.

124. Punitive and remedial or enforcement actions may be distinguished by the following criteria:

"1. It [enforcement] must be intended to achieve the purpose of the legislation.

2. It must be capable of achieving such purpose.

3. It must be a reasonable measure towards that end."

Rosden, *The Legality of Suspension Orders Issued by Federal Emergency Agencies*, 33 GEO. L.J. 45, 51 (1944). Examples of punitive actions include: *Hewitt v. Helms*, 459 U.S. 460 (1983) (solitary confinement for prisoner who participated in prison uprising); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (discharge of federal employee); *Lloyd Sabavido Societa v. Elting*, 287 U.S. 329 (1932) (fine against steamship company transporting illegal alien).

125. See *supra* note 120.

126. Since punitive proceedings are quasi-criminal, due process procedural requirements are greater.

B. *The Need For a Uniform Informal Adjudicatory Procedure*

In each administrative agency there are generally two stages of adjudication. The first stage is informal, in which decisions are made on the basis of informal correspondence, conferences, interviews, and inspections, rather than on the basis of formal hearings. The second stage is formal, and becomes operative only when parties are dissatisfied with decisions made in the first stage. . . .¹²⁷

Even though "eighty or ninety percent of the impact of the administrative process comes from informal action,"¹²⁸ the acts examined do not provide any sort of minimum procedure for informal adjudications.¹²⁹ "[I]nformal discretionary actions are the lifeblood of the administrative process,"¹³⁰ yet many of these actions are not even theoretically reviewable.¹³¹ Furthermore, "more than ninety-nine per cent of what is reviewable is not in fact reviewed."¹³² Not only does this unchecked discretion in the informal adjudicatory process raise questions of fairness,¹³³ but in some instances, minimum procedural standards must be followed to assure valid agency action.¹³⁴

Usually, attempts to check the arbitrary and capricious exercise of agency discretion employ the legislative process to require substantive statutory standards that will guide agency decisionmakers.¹³⁵ However, this method is ineffective.¹³⁶ A system of agency precedent is another method of discouraging the arbitrary and capricious exercise of discretion.¹³⁷ However, this system presents difficulties in determining what weight can be given agency precedent while allowing growth in the law and is totally ineffective when no precedent exists to guide the agency decisionmaker.¹³⁸ Furthermore, when the agency action that sets the precedent is informal, later decisionmakers may not have a written decision to follow, much less a

127. P. WOLL, *ADMINISTRATIVE LAW: THE INFORMAL PROCESS* 25-26 (1963). "A possible exception to this rule exists where statutory provisions require that a hearing be given in a particular case category." *Id.* at 26; *see* 5 U.S.C. § 554 (1) (1977).

128. K. DAVIS, *supra* note 118, § 4.01, at 88.

129. *See supra* section III.A.

130. K. DAVIS, *supra* note 118, § 4.01, at 90.

131. *Id.* § 4.02, at 90.

132. *Id.*

133. *See id.* § 4.07. Even if informal adjudications are reviewable, great agency discretion combined with often vague standards may curtail judicial review, E. GELLHORN & B. BOYER, *supra* note 117, at 112, since reviewing officials might not be able to determine the bases for the initial decision and because when an action is left to agency discretion, reviewing officials may not be able to reverse the agency decision unless the appellant shows an abuse of discretion.

134. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

135. K. DAVIS, *supra* note 118, § 4.02, at 93.

136. The usual idea that the way to deal with unnecessary discretionary power is to require meaningful statutory standards is unpromising for these reasons: (1) Legislative bodies have neither the capacity nor the inclination to do substantially more through statutory drafting than they now do in providing policy guidance to administrators, and legislative bodies ought to be allowed to govern the extent of their own participation. (2) The idea of requiring standards fails to reach the great bulk of discretionary power which has grown without legislative delegation. (3) The hope not only for development of meaningful standards but also for going beyond standards to rules lies in the use of administrative rulemaking power.

Id.

137. *See id.* § 4.05.

138. *See id.*

clear statement of the findings of fact and conclusions of law in the earlier agency action.

The most expeditious and effective method of preventing arbitrary and capricious abuse of agency discretion and assuring fairness and consistency in agency adjudications is to adopt a minimum procedural structure for administrative adjudications. At the very least, this informal procedural framework should require that the decisionmaker set forth findings of fact and conclusions of law in a summary manner when the agency decision is contrary to the interest of a nonagency party. While this requirement may encourage decisions in favor of nonagency parties, it probably will have little more effect than to counteract any natural bias that the agency decisionmaker would have towards his or her employer, the agency.¹³⁹

C. *The Need for Interagency Uniformity in Administrative Adjudicatory Procedure*

Many commentators and legislative proposals favor uniform interagency procedures.¹⁴⁰ Yet, both of the implemented acts (the Federal APA and the Ohio APA) examined provide either agency¹⁴¹ or function¹⁴² exclusions, which remove certain agencies or certain adjudications within agencies from the operation of the acts.

The reasons for interagency uniformity are many. Knowledge and certainty of adjudicatory procedure will benefit parties to administrative adjudications.¹⁴³ “[U]n-

139. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); K. DAVIS, *supra* note 118, § 4.04, at 96-98. The idea of creating uniform informal procedures is not unique. In fact, the 1981 MSAPA and six states have adopted some sort of uniform informal procedures. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT prefatory note (1981); FLA. STAT. ANN. § 120.52(2) (West Supp. 1984); IOWA CODE ANN. §§ 17A.12-.19 (West Supp. 1984); MINN. STAT. ANN. §§ 15.0418-.0422 (West 1977 & Supp. 1982); N.Y.A.P.A. §§ 301-501 (McKinney Supp. 1981); OR. REV. STAT. §§ 183.413-.470 (1981); WASH. REV. CODE §§ 34.04.090-.120 (West 1965 & Supp. 1984). In addition, the American Bar Association, the Administrative Conference of the United States, proposed legislation, and commentators have suggested various types of uniform informal adjudicatory procedure. See, e.g., S. 518, 90th Cong., 1st Sess. § 5(b) (1980); S. 1663, 89th Cong., 1st Sess. (1964), reprinted in *ABA Proposals for Amendments to the Administrative Procedure Act*, 24 AD. L. REV. iii, 386 (1972) [hereinafter cited as *ABA Proposals*]; S. 2335, 88th Cong., 1st Sess. § 5(b) (1964), reprinted in *ABA Proposals, supra*, at 513. S. 1663, 88th Cong., 1st Sess. (1963), reprinted in *ABA Proposals, supra*, at 500. S. 1070, 86th Cong., 1st Sess. § 1004(b) (1959), reprinted in *ABA Proposals, supra*, at 412; 1 C.F.R. § 305.71-4 (1983); M. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES 34 (1982); *The 12 ABA Recommendations for Amendments to the Administrative Procedure Act*, 24 AD. L. REV. 389 (1982); *Report of Committee on the Administrative Process*, 15 AD. L. REV. 154 (1963); Comment, *Experiments in Agency Justice: Informal Adjudicatory Procedure in Administrative Procedure Act*, 58 WASH. L. REV. 39, 61 (1982).

140. See, e.g., S. 2335, 88th Cong., 1st Sess. § 1012 (1963), reprinted in *ABA Proposals, supra* note 139, at 443 (would have repealed all statutes granting exemption to the Federal APA); S. 1070, 86th Cong., 1st Sess. § 1004(a) (1959), reprinted in *ABA Proposals, supra* note 139, at 422 (would have deleted the six exceptions to the Federal APA); *id.* § 1012 (would have repealed all statutes granting exemption to the Federal APA); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2(a) comment (1961) (“It will be noted that the term, ‘agency’ in the Model Act is made all inclusive. It is desirable that it be so, although it is not always possible to get it through the legislature in that form.”); *Report of Committee on the Administrative Process*, 15 AD. L. REV. 154, 160 (1963) (“general” procedural statute seems possible); Vanderbilt, *Administrative Procedure: Shall Rules Before Agencies be Uniform?*, 34 A.B.A.J. 896 (1948), reprinted in *part* at Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate on S. 17, 83d Cong., 1st Sess. 25 (1953).

141. See *supra* notes 23 & 27.

142. See *supra* note 23.

143. Vanderbilt, *supra* note 140, at 28.

I trust we may assume that knowledge and certainty of the rules will benefit those who are regulated. Put these two things together and you have the reason why feasible simplicity of rules of administrative procedure will aid those who are regulated by conveying to them both knowledge and certainty. For when the procedures of nearly a hundred federal agencies are not only meaninglessly diverse but changing week by week, enlightened only by the feeble glow of the Federal Register, clients and lawyers alike can have only an imperfect knowledge and no practical certainty of the ways of federal regulatory agencies.

Id. (footnote omitted).

like court procedure, the citizen is often directly subject to continuing personal contact with administrative agencies.¹⁴⁴ Yet, unlike with the courts,¹⁴⁵ the administrative adjudicatory procedures often are as varied as the number of agencies adjudicating citizens' rights.

[T]here are at least two paramount reasons why feasible uniformity of rules of regulatory practice and procedure would be an aid rather than a hindrance. In the first place, uniformity and simplicity are of as great aid to government officials as they are to private lawyers. As a matter of fact, since the government is a giant organization, whatever simplifies and makes understandable its operations to those who serve in that organization is something that no far-sighted administrator can afford to overlook.

And even if administrators prefer unnecessary complexity, the public has an overriding right to any efficiency obtainable through uniformity of methods, procedures, and practice. Of even more importance is the fact that feasible uniformity and simplicity will improve governmental public relations. It is just as important for governmental programs and agencies to have good public relations as it is for a member of Congress to have approval of a majority of his constituents. The lack of public support is as fatal to the one as to the other.¹⁴⁶

Some commentators contend that interagency uniformity is inherently unfeasible due to the variety and complexity of agency "problems, jurisdictions, and personnel."¹⁴⁷ These commentators point out that in spite of the quest for a uniform court procedure, in the federal court system alone one can find several different procedures, such as the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Tax Court Rules, the U.S. Court of Claims Rules, and the Federal Rules of Appellate Procedure.¹⁴⁸ Yet these commentators fail to note that while the type of court function (i.e. punitive or criminal)¹⁴⁹ dictates differences in procedures, differences in the substantive law to be applied in a given proceeding do not. For example, the Ohio Rules of Civil Procedure apply to a wide variety of civil actions including ministerial (i.e. a civil action seeking a divorce), enforcement (i.e. an action for specific performance of a contract to sell land), and even punitive (i.e. a civil action for punitive damages for assault).¹⁵⁰ Likewise, the same procedural framework could be used for many different types of agency actions.

Although agency adjudications vary in complexity, the present procedures, as diverse as they may be, contain the key to a uniform interagency procedural

144. *Id.*

145. *E.g.*, FED. R. CIV. P.

146. Vanderbilt, *supra* note 140, at 28-29.

147. Committee on Administrative Law, Report on the Question of Uniform Rules of Administrative Practice and Procedure with Specific Reference to the McCarran Bill, S. 527 of the 81st Congress, Record of the Association of the Bar of the City of New York vol. 4, no. 6 (June 1949), reprinted in Hearing Before a Subcommittee of the Committee of the Judiciary of the United States Senate on S. 17, 83d Cong., 1st Sess. 34, 35 (1953).

148. *Id.* at 35.

149. *See supra* section III.A.

150. *See* OHIO R. CIV. P. 1. Indeed, the House Report to the Federal APA notes:

[U]niformity has been found possible and desirable for all classes of both equity and law actions in the courts It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power may likewise operate under uniform rules of practice and procedure. . . .

H. Rep. No. 1980, 79th Cong., 2d Sess., U.S. CONG. SERV. 1195, 1196-97 (1946) (quoting S. REP. NO., 442, 76th Cong., 1st Sess. 9-10 (1939)), quoted in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978).

framework. Today, most administrative procedure acts apply only to the most complex agency adjudications, which are called formal adjudications.¹⁵¹ Yet, there additionally exists an informal adjudicatory process, which generally is not subject to administrative procedure acts.¹⁵² In addition, most decisions by hearing officers or administrative law judges in formal adjudications are either appealable or must be ratified by the agency head or an agency review board.¹⁵³ Thus, the present administrative adjudicatory procedure contains at least three adjudicatory tiers: informal proceedings, formal hearings, and a review or ratification by the agency head or review board. By necessity, this tiered system has developed to accommodate the broad variety of complexity and due process requirements in agency adjudications,¹⁵⁴ but the system better would promote certainty and consistency in agency decision making if the system were applied uniformly to all agencies.¹⁵⁵

IV. PROPOSED FRAMEWORK FOR A FLEXIBLE ADMINISTRATIVE PROCEDURE ACT PROVIDING FOR INTERAGENCY UNIFORMITY AT ALL LEVELS OF THE ADJUDICATORY PROCESS

“The whole idea [of the administrative procedure act] has been to draw the skeleton upon which administrative agencies may adopt their own rules of procedure.”¹⁵⁶ Today, the procedural skeleton not only is lacking its informal adjudicatory arms,¹⁵⁷ but it also is failing to serve its structural purpose. Rather than a single skeletal structure onto which supplemental features are applied, the present agency procedural skeletons bear little similarity to each other.

The procedural skeleton may be supplemented by agency rules that do not distort the skeleton's basic structure.¹⁵⁸ This approach has been used in the federal¹⁵⁹ and state¹⁶⁰ courts in which local court rules may supplement but not contradict the basic rules of procedure. Indeed, even today, agencies that are subject to an administrative procedure act often supplement the act's adjudicatory framework with agency rules.¹⁶¹

151. See *supra* section II.B.

152. See *supra* section III.B.

153. See *supra* notes 46 & 65 and accompanying text.

154. Cf. Washington, *Federal Administrative Agencies: Are Uniform Rules of Procedure Practicable?*, 34 A.B.A. J. 1011, 1012 (1948).

155. Opponents of interagency uniformity assume that a uniform procedure would squeeze all levels and types of administrative adjudications into a single procedural mold. See K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 8.02, at 517; Washington, *supra* note 154, at 1013. Yet, the same commentators note the different levels of adjudications within individual agencies. See K. DAVIS, *supra* § 8.02, at 517. These commentators apparently fail to recognize that a uniform act could adopt the present tiered structure.

156. E. BORCHARD, DECLARATORY JUDGMENTS vii (1934).

157. See *supra* section III.B.

158. The conflict between those in support of and in opposition to interagency uniformity seems to center on the idea that agencies are specialists and need specialized procedures. See Washington, *supra* note 154, at 1012 (“Widely differing tasks assigned by Congress have made necessary the existence of separate administrative agencies. Diversity of procedure has likewise been compelled within agencies handling a variety of functions.”). However, even opponents of interagency uniformity do not foreclose the possibility that uniform rules could be supplemented effectively by agency rules. See *id.* at 1013.

159. See, e.g., SIXTH CIR. R.

160. See, e.g., CUYAHOGA CTY. R. OF THE CT. OF COMMON PLEAS, GEN. DIV.

161. See, e.g., 29 C.F.R. § 1903 (1983).

Therefore, not only is uniformity advisable to simplify the burgeoning administrative process, but uniformity is feasible. Today's system illustrates a tiered system of adjudication that allows for varying degrees of adjudicative complexity. These tiers easily could be made uniform and applied across the board. Any need for specialized procedure could be met through agency rules, which would put the flesh on the procedural skeleton created by the administrative procedure act.

The solution to the procedural problems presented by administrative adjudications is a uniform act that applies to all agencies yet provides the necessary flexibility for agency individuality. Total interagency uniformity in adjudicative procedure would result in certainty for parties, agencies, practitioners, and the courts. Less time would be spent researching and litigating procedural issues if a uniform administrative adjudicative procedure were adopted. First, issues relating to the applicability of the APA would not arise.¹⁶² Second, once the courts determined a procedural issue, such as when a time period begins to run, with regard to one agency, that determination would be applicable to all similar administrative adjudications in all agencies in that jurisdiction. Without a uniform act, the courts must decide this issue on an agency-by-agency basis.

The variety of administrative functions is not a barrier to a uniform act. The variety and complexity of administrative functions is no greater than the variety and complexity found in trial courts of Ohio and every other jurisdiction. Yet, the Ohio Rules of Civil Procedure and the Ohio Rules of Criminal Procedure apply to virtually all trial court actions.¹⁶³ The needs of individual courts in Ohio are satisfied by local rules, which may supplement but may not contradict the Ohio procedural rules.¹⁶⁴

A similar idea can be employed to create an administrative procedure act. All agencies perform a variety of ministerial, enforcement, and punitive functions that are adaptable to uniform procedures in an administrative procedure act.¹⁶⁵ Yet, rules of adjudicative procedure need to be adaptable to agencies' specialized areas of practice. This objective can be accomplished through agency rules that are like the local rules of court. Like the local court rules in Ohio, the agency rules permitted by the proposed administrative procedure framework would supplement but not contradict the administrative procedure act.¹⁶⁶

To further agency flexibility, the proposed act would provide for varying levels and numbers of adjudications for different agencies as illustrated in Chart A.¹⁶⁷ All agencies would be required to offer one formal adjudicatory hearing before a single officer who would render a final order that would be appealable to the "ultimate agency authority," preferably a board or commission.¹⁶⁸ In addition, agencies would

162. Cf. *supra* notes 22, 24, 27-29 and accompanying text.

163. OHIO R. CIV. P. 1; OHIO R. CRIM. P. 1.

164. See, e.g., CUYAHOGA CTY. R. OF THE CT. OF COMMON PLEAS, GEN. DIV. Introduction.

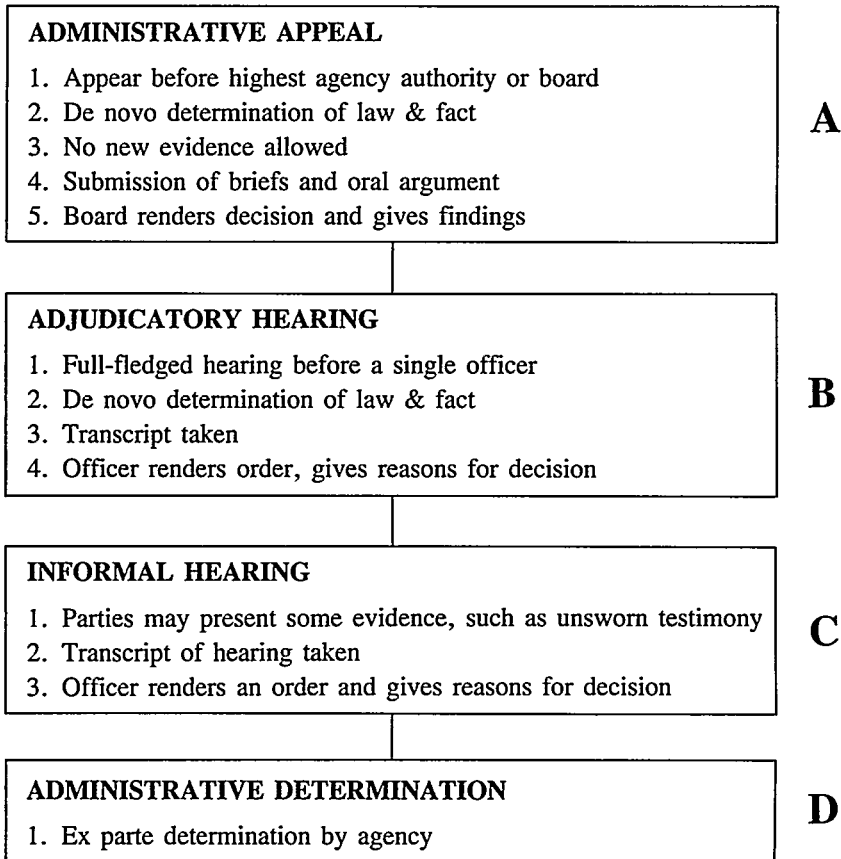
165. See *supra* section III.A.

166. See *supra* text accompanying notes 158-61. Like court rules, agency rules should be published in the Ohio Administrative Code, or the comparable publication in the agency's jurisdiction, to assure that all parties and practitioners have adequate notice of such rules.

167. *Infra* p. 375. See *supra* section III.A. for a discussion of the types of adjudicative proceedings most suited to specific types of agency functions. (For the purpose of example, ORC and OAC are used in Chart A to represent Ohio statutes and regulations respectively.)

168. A board or commission of three to seven members is preferable to a single "agency head," because a panel of an odd number more closely resembles the appellate courts and is more likely to yield consistent decisions.

CHART A
Administrative Adjudicative Levels



be categorized by the legislature into groups depending upon the type and number of additional adjudicatory determinations the agencies had prior to the formal administrative adjudicative hearing. The two optional hearings would be an *ex parte* determination called an administrative determination and an informal hearing preceding the adjudicatory hearing in which a transcript would be taken but in which minimal evidentiary safeguards would be observed.

While this variation in hearing levels may sound more confusing than the present Ohio law, the proposed act would enable the administrative adjudicative procedure to be reduced to chart form as illustrated in Chart B.¹⁶⁹ Such a chart would indicate how many and what types of hearings an agency offered plus show the existence of and provide references to any agency rules. Thus, a practitioner would have to learn only one set of rules for each type of hearing. The practitioner could check the chart to determine the types of hearings to which the client was entitled and to ascertain whether there were any applicable agency rules. The references in the chart would provide a quick and thorough resource for all procedures the practitioner could expect to encounter. Chart B lists ten sample agencies, all of which have different combinations of adjudicative levels and rules. Yet, at a glance, one can determine which hearings and which procedural rules, including agency rules, apply at each adjudicatory level in each of the agencies.

Administrative determinations would be especially helpful in ministerial functions. Administrative determinations, in agencies that had them, generally would take place in an agency employee's office as part of the employee's daily workload. The party probably would not be present, and the determination would consist of the employee's examination of the party's file and comparison of the information on the application to the standards for eligibility for the benefits or license sought. From this simple examination, the employee would decide whether the party was eligible for the benefits or license sought and would send to the party a notice of determination containing reasons for any adverse determination.

Within a set time of the agency determination, a party could request either an adjudicatory or informal hearing, depending on the agency's procedure. Informal hearings probably would not take place in the agency employee's office but rather in a room created for that purpose. The party would be present at this hearing and would have an opportunity to present some evidence in the form of documents or unsworn testimony. A transcript would be taken at this hearing, but this transcript could be made by means of a tape recording from which a written transcript would be prepared if the party elected to request an adjudicatory hearing. The hearing employee would have a set time after the informal hearing in which to issue an order.

After issuance of this order, the party could request an adjudicatory hearing. The adjudicatory hearing would closely resemble formal hearings under the acts discussed. A single hearing officer would preside at the adjudicatory hearing. The agency and the party would be permitted to introduce evidence, including au-

169. *Infra* p. 375.

CHART B
Chart Categorizing Agencies' Procedures

AGENCY	LEVEL A	LEVEL B	LEVEL C	LEVEL D	AGENCY RULES
1	yes	yes	yes	yes	for B & C— see OAC § xxx
2	yes	yes	no	no	no
3	yes	yes	no	yes	for all levels— see OAC ch. xyz
4	yes*	yes	no	yes	for level B— see OAC § pqr *level A before director only
5	yes	yes	yes	yes	for B & C— see OAC § abc
6	yes	yes	no	yes	no
7	yes	yes	yes	yes	for level A— see ORC § stq
8	yes*	yes	no	no	to be adopted by Jan. 1, 19xx *level A before director only
9	yes	yes	no	yes	for A & B— see OAC § wea
10	yes	yes	yes	no	for all levels— see ORC § acm & OAC § ewa

thenticated documents and sworn testimony, and a stenographic transcript would be taken.

While the hearing officer at an adjudicatory hearing would have, as part of the record, the administrative determination and the order and transcript from the informal hearing, the hearing officer at the adjudicatory hearing would make a *de novo* determination of law and fact. A *de novo* determination at this level is advisable for two reasons. First, the difference in evidentiary standards may yield a different result, and second, the hearing officers hopefully would be licensed attorneys who would be better equipped to judge the law and its relationship to the facts than the employees making prior decisions, who would not be required to be attorneys. After the hearing, the officer would render an order.

A party dissatisfied with this order could appeal to the highest agency authority. Also, the agency could appeal the officer's order, but only if the order was inconsistent with another order by the same or a different hearing officer. Preferably, the administrative appeal would be to a board consisting of three to seven members, to simulate an appeal in the courts. However, for some agencies, such as those headed by a single officer rather than a board or commission, it may be more feasible to provide that this appeal go to the agency's top officer.

The appellant would be required to submit its brief within the time for filing its notice of appeal. Appellee, of course, also could file a brief, in which case appellant could file a reply. Oral argument would proceed much as it does in the appellate courts of Ohio. However, an administrative appeal would differ from a court appeal, since the board would make a *de novo* determination of both law and fact. Since no new evidence (except newly discovered evidence) would be permitted at this level, the board's determination of facts would be based upon the record. After the oral hearing the board would render an order, after which the party could file an appeal into the courts.

The proposed framework would retain most of the Ohio provisions regarding appeals to the courts. Like all of the acts examined, a party other than the agency that was adversely affected by the board's order could appeal that order to the court of common pleas.¹⁷⁰ The Ohio standards with regard to scope of judicial review and stays of agency orders would be retained,¹⁷¹ and orders of the common pleas court would be appealable to the court of appeals.¹⁷²

The particulars of the proposed framework, such as the applicability of specific evidentiary rules at different adjudicative levels, is not within the scope of this Comment. However, a legislature should attempt to make procedures as simple as possible, so as to permit individuals to represent themselves in simple matters, to lower attorney fees and time, and to expedite the administrative adjudicative process so that justice better may be served.

170. See *supra* text accompanying notes 75, 90, 94, & 104.

171. See *supra* text accompanying notes 76-81.

172. See *supra* text accompanying note 82; see also *supra* text accompanying notes 103 & 114.

V. CONCLUSION

None of the acts examined provide for a uniform administrative adjudicative procedure for all agencies at all levels. Ohio's act in particular is confusing because it places agencies into four categories regarding the applicability of the act, and in some cases makes extensive research necessary to determine whether the Ohio APA applies. The Federal APA and the RMSAPA, like the Ohio APA, apply, at the most, to two administrative adjudicative levels, which are very rough equivalents to the adjudicatory hearing and the administrative appeal in the proposed act. The 1981 MSAPA goes further by providing for a prehearing conference, but this provision is a poor substitute for the informal hearing in the proposed act because the focus at a prehearing conference is likely to be on preparing for the adjudicatory hearing rather than on reconciling the agency and the party. No act explicitly provides procedures for an administrative determination although these determinations occur daily in many agencies.

The proposed framework simplifies administrative adjudications by providing interagency uniformity and uniformity at all adjudicative levels and allowing flexibility by allowing agency rules to tailor the procedure to the agency's needs. The proposed framework is uniform and yet so simple that it can be reduced to a chart that directs practitioners to the number of hearings and to the location of the additional rules for any agency. Unnecessary research, thus, is eliminated. In addition, the proposed act should result in quicker and fairer adjudication since uniformity would eliminate much confusion, error, and misunderstanding, so disputes could be settled at lower agency levels.

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