ADMINISTRATIVE LAW REFORM IN NEW JERSEY: THE FIRST FIVE YEARS OF THE OAL

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Introduction

Five years have passed since the New Jersey Legislature restructured the State's administrative adjudication process.[1] The most apparent and pervasive result of the restructuring was the creation of the Office of Administrative Law (OAL). Operating as an independent entity within the executive branch of the state government,[2] the OAL's primary mission is to conduct hearings on behalf of virtually all administrative agencies in the state.[3] While its model is the federal corps of Administrative Law Judges which sits for federal agencies, the OAL was designed to be and is operated as a more independent institution.[4]

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[1] Act of July 6, 1978, ch. 67, 1978 N.J. Laws 374 (codified as amended at N.J. STAT. ANN. §§ 52:14F-1 to -11 (West Supp. 1983-84)).

[2] N.J. STAT. ANN. § 52:14F-1 (West Supp. 1983-84). "There is hereby established in the Executive Branch of the State Government the Office of Administrative Law . . . [and] is hereby allocated within the Department of State, but notwithstanding said allocation, the office shall be independent of any supervision or control by the department or by any personnel thereof." *Id. See also In re* Uniform Adm'v Procedure Rules, 90 N.J. 86, 94, 447 A.2d 151, 156 (1982); *In re* Kallen, 92 N.J. 14, 22-23, 455 A.2d 460, 464 (1983).

[3] The legislative intent behind the creation of the OAL is clearly articulated in the Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee Statement to S. 766, 198th N.J. Leg., 1st Sess. (1978), *reprinted in* N.J. STAT. ANN. § 52:14F-1 app. (West Supp. 1983-84) [hereinafter cited as *Committee Statement*]:

> The legislative goal embodied in this bill is to create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. . . . It transfers the "functions, powers and duties" of the Division of Administrative Procedure created pursuant to the "Administrative Procedure Act" to the Office of Administrative Law. . . .The bill excludes the State Board of Parole, the Public Employment Relations Commission, the Division of Workers' Compensation and the Division of Tax Appeals from the jurisdiction of the Office of Administrative Law.

Id.

[4] Aronsohn, *Unique Remedy for Traditional Problems*, 92 N.J. LAWYER 38, 40 (1980). On the federal level, those administrative adjudicators who have a pecuniary interest in the outcome of a matter may not adjudicate it. Withrow v. Larkin, 421 U.S. 35, 47 (1975), *citing* Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Previously expressed opinions about the subject matter of a pending

The independent operation of the OAL is not without controversy. Media criticism has focused on adjudicatory delay in the office,[5] while legal critics have unfavorably noted the OAL's attempts to abrogate unto itself powers arguably reserved to regulatory agencies.[6]

This article concentrates upon the operation of the OAL within the structural framework imposed on it by the Legislature, the state supreme court, and itself. The rule-making powers of administrative agencies, as well as the efficacy of the OAL in its seminal years, are not issues discussed at length except insofar as they have an impact on the OAL's own rule-making power. Of primary concern is the new adjudicative process and not the changes the OAL may have effected in rule-making.[7]

Background

A. *The 1947 Constitution*

New Jersey has been at the front of administrative institutionalization since at least 1947.[8] Prior to that time, the nature of administrative agency

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controversy does not establish bias on the part of that agency. Withrow v. Larkin, 421 U.S. 35, 48 (1975), *citing* FTC v. Cement Institute, 333 U.S. 683, 701 (1948). The combination of adjudicative and investigative functions in an administrative agency does not constitute denial of a fair hearing. Withrow v. Larkin, 421 U.S. 35, 52 (1975), *quoting* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 13.04, 11.14 (1958 & Supp. 1970). However, under the Federal Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982), the internal separation of functions is provided for. Those who investigate and prosecute are separated from those who hear and decide. Hearings under the Federal Administrative Procedure Act are conducted by independent administrative law judges who are prohibited from being responsible for and consulting with any agency employee involved in investigative or prosecutorial functions. *Id.* § 554(d)(1)-(2), *construed in* Withrow v. Larkin, 421 U.S. 35, 52 (1975).

[5] Weissman, *Administrative 'Judges' Face Top-Level Review*, Newark Star-Ledger, Dec. 19, 1982, at 1, col. 1 (Discussing an "agency that began as a reform of the conflict-tainted hearing officer system but has become plagued by delays caused by its complex procedures.").

[6] Kimmelman, *The Appropriate Role of the Office of Administrative Law*, 111 N.J.L.J. 157 (1983).

[7] The Director of the OAL has the power to develop uniform rules and standards which govern the conduct of contested cases. N.J. STAT. ANN. § 52:14F-5(e) (West Supp. 1983-84). These provisions, however, were not intended "to usurp the authority of agency heads to decide what controversy constitutes a contested case," but rather to "provide general guidelines for determining the type of controversies that rise to the level of a contested case for which an adjudicatory hearing is necessary." *In re* Uniform Adm'v Procedure Rules, 90 N.J. 85, 105, 447 A.2d 151, 162 (1982); *see also In re* Kallen, 92 N.J. 14, 21, 455 A.2d 460, 463 (1983) (agency head has exclusive authority to make final determination in a contested case).

[8] The administrative structure implemented has served as a model by incorporating the following principles:

(1) integration of all administrative activities of the State along functional lines within a few well-balanced principal departments;

operation was more *ad hoc.*[9] Recommendations which sought to change the haphazard nature of agency functioning were made,[10] and to a great extent incorporated into the Administrative Procedure Act (Act).[11] The 1947 Constitution formalized executive powers to a degree greater than its predecessors. This formalization necessarily led to a more concrete administrative agency structure. Contemporaneous with these changes in administrative structure was the constitutional grant of power to the state supreme court to control and administer New Jersey's courts under the practices and procedures clause.[12]

B. *State Supreme Court Decisions*

The changes wrought by the 1947 Constitution created external as well as internal pressures upon the administrative process. By far the most important influences mandating change in administrative proceedings were the requirements placed upon agency proceedings by the Supreme Court of New Jersey. As early as 1956, one of the foremost authorities on administrative law in the United States noted that the New Jersey Supreme Court, in *Mazza v. Cavicchia,*[13] had "broken new ground" in the field of administrative law by requiring that parties be provided with a sufficient analysis of the evidence to facilitate an understanding of the method by which the administrative adjudication was rendered.[14] The

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(2) establishment of direct lines of responsibility for the administration of such functions and activities—from the Governor, through the department heads, to the subordinate officers of each department;
(3) providing the Governor with executive authority commensurate with his responsibilities to the people of the State, and
(4) requirement for coordination of administrative activities, the elimination of duplicating and overlapping functions, and full utilization of all staff facilities within each principal department.

Milmed, *The New Jersey Constitution of 1947, printed in* N.J. STAT. ANN. CONST. ART. 1–3 91, 102-103 (West 1971).

[9] Before the 1947 reorganization of the state administrative structure, the Legislature had been free to create an unlimited number of State Administrative agencies as it deemed necessary. *Id.* at 101-102.

[10] For a discussion of Justice Nathan Jacob's criticisms of and suggested reforms to the area of administrative law see Yanoff, *Justice Nathan L. Jacobs—Prelude to a Judicial Career,* 28 RUT. L. REV. 213, 216-221 (1975).

[11] N.J. STAT. ANN. §§ 52:14B-1 to -15 (West 1970 & Supp. 1983-84).

[12] N.J. CONST. art. VI, § 2, para. 3.

[13] 15 N.J. 498, 105 A.2d 545 (1954).

[14] Davis, *New Jersey's Unique Conception of "Fair Play" in the Administrative Process,* 10 RUT. L. REV. 660, 662 (1956).

author noted, in particular, that in so ruling the court did not rely upon a single state or federal precedent to support its holding.[15]

Only one year after the *Mazza* ruling, the supreme court further circumscribed previously broad agency powers in *City of Asbury Park v. Department of Civil Service.*[16] In denying the State Civil Service Commission the power to decide whether an employee's suspension was appropriate where only two of three Commission members had heard the employee testify, the court stated that "fair play" is denied to litigants when a decision is influenced by a trier of fact who has not heard all of the testimony.[17] Pursuant to its constitutional power to make new or amended findings of fact,[18] the supreme court ruled that a complete, independent determination was appropriate.[19] The court did, however, uphold the suspension.[20]

Advances by the New Jersey Supreme Court in assuring the integrity of the adjudicatory process perhaps reached their apex in 1975 when the court enunciated the requirements of due process in the context of prison disciplinary hearings.[21] Despite a recognition that the persons involved, by virtue of their own conduct, have lost some of the attributes of full citizenship, the court stated that it would not be satisfied with the enforcement of naked constitutional rights, but would go further to assure procedural fairness in prison administative proceedings.[22]

C. *Legislative Responses*

In the New Jersey Administrative Procedure Act, the judicially developed notions of administrative fairness were finally detailed. The Act expressly provided for the general requisites of due process: notice,[23] an

[15] *Id.* Within one year, *Mazza* had been cited with approval by the United States Supreme Court in Gonzales v. United States, 348 U.S. 407, 412 (1955), and was proclaimed as "the most complete judicial analysis of the problem of the reports of administrative hearing officers in the English-speaking world." Note, *Disclosure of Inspector's Reports—American Rejection of Arlidge Rule*, 33 CAN. BAR. REV. 223, 228-29 (1955).

[16] 17 N.J. 419, 111 A.2d 625 (1955).

[17] *Id.* at 423, 111 A.2d at 627.

[18] N.J. CONST. art. VI, § 5, para. 3.

[19] *Asbury Park*, 17 N.J. at 423, 111 A.2d at 627.

[20] *Id.* at 430, 111 A.2d at 631.

[21] Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975). At issue were rules promulgated with respect to prison disciplinary procedures by the Division of Correction and Parole of the New Jersey Department of Institutions and Agencies. The rules followed in the wake of the riot in the New Jersey State Prison at Rahway in 1971.

[22] *Id.* at 520, 341 A.2d at 642.

[23] N.J. STAT. ANN. § 52:14B-9(a)-(b) (West 1970). Included in the notice requirement by statute are "(1) A statement of the time, place, and nature of the hearing; (2) A statement of the legal

opportunity for the parties to respond and appear, and presentation of the evidence and argument on the issues involved.[24] Additionally, the Act requires that transcripts of proceedings be provided upon request of a party,[25] and memorialized the requirement that administrative findings of fact be based solely on evidence and matters officially noticed.[26]

In spite of these legislative safeguards on the integrity of the administrative adjudicatory process, certain inherently questionable aspects of the system persisted and went unanswered by the judiciary. In *Mackler v. Bd. of Education of the City of Camden,*[27] the supreme court upheld administrative action initiated by the formal complaint of two board of education members both of whom also participated in the hearing. Numerous appellate division decisions, in like fashion, upheld the merger of investigatory, prosecutorial, and adjudicative functions in an agency,[28] noting that the wisdom of creating an agency with both investigatory and adjudicative power was a legislative, rather than judicial function.[29] It was in direct response to the issue of agency impartiality that the OAL was created.

The Office of Administrative Law

The OAL, established in 1978, is "in but not of" the Department of State.[30] Independence is crucial to its function, and, in this regard, the sponsor's statement to the enabling legislation focused on the concerns which justified the OAL's existence.[31] Although not without criticism of

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authority and jurisdiction under which the hearing is to be held; (3) A reference to the particular sections of the statutes and rules involved; (4) a short and plain statement of the matters asserted. . . ." *Id.* § 52:14B-9(b).

[24] *Id.* § 52:14B-9(c).

[25] *Id.* § 52:14B-9(e).

[26] *Id.* § 52:14B-9(f).

[27] 16 N.J. 362, 108 A.2d 854 (1954).

[28] *See, e.g., In re* Blum, 109 N.J. Super. 125, 262 A.2d 431 (App. Div. 1970) (State Board of Medical Examiners); *cf.* F.S. Donahue, Santo & Co. v. Kugler, 119 N.J. Super 377, 291 A.2d 841 (App. Div.), *rev'd,* 61 N.J. 492, 295 A.2d 857 (1972) (upholding appointment of impartial individual for the sole and limited purpose of conducting the hearing and deciding the penalty).

[29] *In re* Information Resources, 126 N.J. Super. 42, 312 A.2d 671 (App. Div. 1973); *In re* Larson, 17 N.J. Super. 564, 86 A.2d 430 (App. Div. 1952).

[30] *See supra* note 2 and accompanying text.

[31] *Committee Statement, supra* note 3, provides in part that

> [t]he purpose of this legislation is to improve the quality of justice with respect to administrative hearings. In many agencies, hearing officers serve on a part-time basis. They are either self-employed persons who are paid per diem to hold hearings for State agencies or they are State employees who also perform other duties for their agency in addition to holding hearings. In both instances, a hearing officer frequently presides over

its operations,[32] the OAL has succeeded in achieving a great degree of impartiality.

The administrative law judges were given some of the attributes of the constitutional superior court judges. At present, permanent administrative law judges are appointed by the Governor, with the advice and consent of the Senate, to an initial term of one year. Upon favorable evaluation, the Governor makes the first reappointment for a term of four years. Any reappointment made thereafter is for a term of five years and is made with the advice and consent of the Senate. Administrative law judges who were nominated by the Governor prior to July 1, 1981, are permitted to serve for five-year terms upon confirmation by the Senate.[33]

The heart of the Act itself is contained in the powers and duties of the Director of the OAL, who is vested with all powers necessary to regulate that agency.[34] Just as the supreme court is vested with the power to establish its practices and procedures, the Act grants analogous power to the OAL by giving the Director the power to regulate and make rules governing the adjudicatory process within the agency.[35]

The general assignment of powers to the Director is without exception. For example, he is empowered to administer the work of the office, to organize and reorganize, and to assign various personnel.[36] The Legislature has given the Director broad powers to develop uniform standards, including rules of evidence and procedure, and the right to determine standards for deciding whether a summary or plenary hearing should be held.[37] The Director is further empowered to regulate, by rule, the conduct of all contested cases.[38]

The development of uniform standards and rules of evidence and procedure appears to extend beyond the Office of Administrative Law to

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> cases in which his own employer is an interested party. In some agencies the backlog of cases is extensive and some administrative hearings have been cited as examples of faulty procedure.
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> The legislative goal embodied in this bill is to create a central independent agency staffed by professionals with the sole function of conducting administrative hearings. This will tend to eliminate conflict of interests [sic] for hearing officers, promote due process, expedite the just conclusion of contested cases and generally improve the quality of administrative justice.

Id.

[32] *See* Weissman, *supra* note 5.

[33] N.J. STAT. ANN. § 52:14F-4 (West Supp. 1983-84).

[34] *Id.* § 52:14F-5.

[35] *Id.*

[36] *Id.* § 52:14F-5(a)–(b), (d).

[37] *Id.* § 52:14F-5(e).

[38] *Id.*

all agencies. Some agencies, such as the Casino Control Commission, are still able to conduct their own hearings.[39] The Act appears to require, however, that those agencies adhere to OAL guidelines and use its rules of procedure.[40] It is therefore arguable that any procedural rules and regulations adopted by such an agency are void if not developed in line with OAL rules and regulations. Furthermore, agencies appear to be bound by OAL rules in cases in which they conduct their own hearings. Indeed, it seems that the Legislature intended the Director of the OAL to have plenary power over all administrative proceedings. It gave the Director the authority to "[p]romulgate and enforce such rules [as are necessary] for the prompt implementation and coordinated administration of the Administrative Procedure Act,"[41] and to "[a]dminister and supervise the procedures relating to the conduct of contested cases and the making of administrative adjudication."[42] Moreover, the Director is required to advise agencies of their obligations under the Act, and to enforce rules required by or appropriate to the Act.[43] The Director also has access to all information concerning the agencies, to assure that they properly make all rules required by law.[44] The Director of the OAL is, therefore, the preeminent administrative agent in New Jersey, with general control over matters of procedure in all agencies.

The revisions to the Administrative Procedure Act which created the OAL did not repeal the general provisions of the Act. For example, the Act's definition of "contested cases"[45] continues, although it is delineated in regulations.[46] The OAL, in some respects, is an overlay on the Act.

OAL Rules and Regulations

The OAL has promulgated rules and regulations which parallel the New Jersey Court Rules applicable to civil practice.[47] Unlike the jurisdiction of the New Jersey Superior Court, which is constitutional,[48] the

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[39] *See generally Casino Control Commission Opinions, reprinted in* 6 SETON HALL LEGIS. J. 105 (1982).

[40] N.J. STAT. ANN. § 52:14F-5(e) (West Supp. 1983-84).

[41] *Id.* § 52:14F-5(f).

[42] *Id.* § 52:14F-5(g).

[43] *Id.* § 52:14F-5(f), (h).

[44] *Id.* § 52:14F-5(k).

[45] *Id.* § 52:14B-2(b).

[46] N.J. ADMIN. CODE tit. 1, §§ 1-1.1 to -17.2 (1982).

[47] N.J. CT. R. 4:1 to 4:101.

[48] N.J. CONST. art. VI, § 1, para. 1.

OAL's jurisdiction is limited to "contested cases."[49] Through the years, questions have arisen as to the definition of a contested case.[50] The OAL has avoided a hard-and-fast definition by generally describing the nature of a contested case,[51] the characteristics of a contested case,[52] and matters which do not qualify.[53]

OAL rules and regulations include usual expressions concerning public hearings,[54] recordation of proceedings,[55] sanctions for failure to appear,[56] and representation.[57] There are certain rules and regulations unique to the OAL which derive from its function of unifying administrative practice.[58] There are also areas in the rules granting authority to administrative law judges which judicial officers have assumed over the course of centuries. One such rule in the OAL is a specific statement that the judge has "full power, jurisdiction, and authority to call and examine witnesses and to issue all orders necessary for the proper and expeditious handling of contested cases assigned for disposition."[59] Another unique, and probably beneficial OAL innovation is a regulation setting forth a policy concerning discovery.[60] Potential problem areas in discovery are addressed by the OAL, including a limitation on oral depositions to be available in OAL proceedings "only on motion for good cause shown served upon all parties."[61] In most other respects, the discovery rules resemble the rules of civil procedure.[62]

The nature of the Office of Administrative Law requires that it generate not a final determination, but an initial decision to be adopted or rejected by the agency head.[63] The OAL's regulations include procedural and substantive requirements to assure a prompt final decision.[64]

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[49] N.J. ADMIN. CODE tit. 1, § 1-2.2(a) (1982).

[50] *See* Bally Mfg. Corp. v. N.J. Casino Control Comm'n, 85 N.J. 325, 332-333, 426 A.2d 1000, 1003-1004 (1981).

[51] N.J. ADMIN. CODE tit. 1, § 1-1.5 (1982).

[52] *Id.* tit. 1, § 1-1.6.

[53] *Id.* tit. 1, § 1-1.7.

[54] *Id.* tit. 1, § 1-3.1.

[55] *Id.* tit. 1, § 1-3.3.

[56] *Id.* tit. 1, § 1-3.5.

[57] *Id.* tit. 1, § 1-3.7.

[58] One such rule requires all agencies to adopt a uniform system for marking exhibits. *Id.* tit. 1, § 1-3.4.

[59] *Id.* tit. 1, § 1-3.9.

[60] *Id.* tit. 1, § 1-11.1.

[61] *Id.* tit. 1, § 1-11.3.

[62] *Compare id.* tit. 1, §§ 1-10.1 to -11.7 *with* N.J. CT. R. 4:10 to :19, :22, :23.

[63] N.J. ADMIN. CODE tit. 1, § 1-16.3 (1982); N.J. STAT. ANN. § 52:14B-10(c) (West Supp. 1983-84).

[64] N.J. ADMIN. CODE tit. 1, § 1-16.5 (1982).

In its attempt to carry out its legislative mission, the OAL has isolated itself from agency interference at the hearing level. It attempted to remove institutional bias from the hearing procedure and from the decision making process. Several means of achieving this goal were utilized. This included an attempt to preclude an agency head from interlocutory review of OAL decisions. This rule, however, along with some others, failed to pass muster with the state supreme court.[65]

In re Uniform Administrative Procedural Rules

A. *Exposition*

The fundamental structure and legislative mission of the OAL survived its first confrontation with the Supreme Court of New Jersey in *In re Uniform Administrative Procedure Rules,*[66] where the appellant, Burlington Environmental Management Services, Inc., challenged approximately twenty OAL regulations as impermissibly vague or *ultra vires.* These regulations were made pursuant to the OAL's authority to promulgate rules "to regulate the conduct of contested cases and the rendering of administrative adjudications."[67] Subject to review in the appellant's broad-based attack were a number of rules, including those relating to the characteristics of contested and uncontested cases, and the power of agency review in matters pending before administrative law judges (ALJs).[68]

In affirming and invalidating those rules promulgated by the Office of Administrative Law, the supreme court applied those principles evolving from the purpose and background of the legislation which created the OAL. Justice Handler, writing for a unanimous court, stated initially that the primary reason for the replacement of agency examiners with administrative law judges was to achieve fairness, impartiality and objectivity in administrative adjudications.[69] A trial court decision was quoted with approval for its statement that the legislative intent in the creation of the OAL was to provide "a new system of administrative adjudication, promoting justice through uniformity and independence."[70]

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[65] *In re* Uniform Adm'v Procedure Rules, 90 N.J. 85, 447 A.2d 151 (1982).

[66] 90 N.J. 85, 447 A.2d 151 (1982).

[67] N.J. STAT. ANN. § 52:14F-5(e) (West Supp. 1983-84).

[68] 90 N.J. at 88-89, 447 A.2d at 153.

[69] *Id.* at 90, 447 A.2d at 154 (quoting Unemployment—Employed Council of N.J. v. Horn, 85 N.J. 646, 650, 428 A.2d 1305, 1307 (1982)).

[70] 90 N.J. at 90, 447 A.2d at 154 (quoting Hayes v. Gulli, 175 N.J. Super. 294, 299, 418 A.2d 295, 297 (Ch. Div. 1980)).

Despite this broad general statement of the philosophy of independence underpinning the OAL's existence, the court's analysis continued with a statement of the limits upon the OAL's powers. The court referred to provisions of the Administrative Procedure Act, and the OAL Act, which empower the agency head to "adopt, reject or modify the recommended report and decision [of the administrative law judge]."[71] From these legislative sources, Justice Handler concluded that "[t]he reservation of decisional authority in administrative agencies was purposeful on the Legislature's part."[72]

Against this conceptual framework, the court held that the OAL rule precluding agency review of procedural orders made by an administrative law judge during contested cases[73] was "inimical" to the function of an agency in setting and enforcing regulatory policy.[74] The court rejected the OAL's contention that freedom to rule on procedural questions was a necessary adjunct to "its statutory responsibility to enhance and expedite the conduct of contested cases."[75] More compelling was the agency head's power to engage in interlocutory review of ALJ orders as an adjunct to the agency's ultimate right to decide the case.[76] These determinations are at best questionable.

In rejecting the OAL's contentions, the court acknowledged that interlocutory review could delay a proceeding, but reasoned that longer delays could result if the agency head reverses the ALJ's order after completion of the hearing, possibly necessitating a new hearing.[77] The court added that "the agency head should be even less restrained than an appellate court in exercising discretion to review issues on an interlocutory basis."[78] Concluding its analysis on the question of procedural order review, the court noted that it anticipated that the agency would temper its power of review by ascribing to the general judicial averrance to

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[71] 90 N.J. at 91, 447 A.2d at 154-55 quoting N.J. STAT. ANN. § 52:14B-10(c) (West Supp. 1983-84)).

[72] 90 N.J. at 91, 447 A.2d at 155.

[73] N.J. ADMIN. CODE tit. 1, § 1-9.7(e) (1982), provides that

> [a]n agency head may not review a procedural order of an administrative law judge. A procedural order is one which relates solely to the conduct or management of a contested case while it is pending before the Office of Administrative Law and which is designed to ensure the full, fair and prompt resolution of a matter.

Id.

[74] 90 N.J. at 96, 447 A.2d at 152.

[75] *Id.*

[76] *Id.* at 97, 447 A.2d at 158.

[77] *Id.* at 99, 447 A.2d at 159.

[78] *Id.*

"piecemeal adjudications" and thereby sparingly exercise interlocutory review of the orders of ALJs.[79]

Having dealt with the major contested issue, the court then proceeded to test the validity of the remaining challenged rules in conjunction with its ruling on the interlocutory review rules. The court invalidated the rule which precluded agency head interlocutory review of ALJ orders concerning the ability of a person or entity to participate in a contested case.[80]

The court also voided the rule which empowered administrative law judges to "grant emergency relief in appropriate circumstances."[81] The court discussed the significance of emergency orders in the regulatory process and recognized that an ALJ has an important role to play based on his proximity to the litigation.[82] The authority of an ALJ, however, was found to be limited to making initial recommendations to the agency head who has the sole power to grant emergency relief.[83] Accordingly, the court invalidated the rule insofar as it failed to clearly reflect the ALJ's limited authority.[84]

The court upheld the rules which describe a "contested case."[85] It rejected appellant's claim that these OAL rules were inimical to the legislative purpose of reposing final authority on the issue of what constitutes a contested case with the agency head.[86] Instead, the court reasoned that the OAL rules adopted the statutory language defining contested cases, and were patterned on the case law defining contested cases.[87] Based on the court's judgment that the rules provided only general guidelines in the determination of what constitutes a contested case, the court concluded that the rules were made pursuant to the OAL's power "to develop uniform rules and standards to govern the conduct of contested cases."[88]

Finally, the court dealt summarily with the remaining OAL rules challenged by the appellant. The court upheld those rules which allow an ALJ to impose sanctions against parties obstructing the "orderly conduct"

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[79] *Id.* at 100, 447 A.2d at 159.
[80] *Id.* at 101-102, 447 A.2d at 160-161.
[81] *Id.* at 102, 447 A.2d at 161.
[82] *Id.* at 103, 447 A.2d at 161.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 104-105, 447 A.2d at 161-162.
[86] *Id.* at 105, 447 A.2d at 162.
[87] *Id.*
[88] *Id.*

of proceedings; those which permit an ALJ to accelerate or decelerate the time schedule of proceedings; those which allow summary decisions to be made by ALJs; and the rule establishing time limitations upon the filing of exceptions with the head of an agency following a hearing and initial decision by an ALJ.[89] Justice Handler concluded his analysis by stating that these rules were upheld because they presented no threat to the decisional authority of the agency, and were essential to the "proper conduct" of administrative hearings.[90]

B. *Analysis*

It is important to recognize the supreme court's failure to use specificity in its approach to interlocutory review of administrative rulings by ALJs. In holding that interlocutory review of ALJ procedural orders is mandated whenever an agency head deems "good cause" to exist, the court expressed reluctance to announce a more specific test in an area where determinations will depend on what the court referred to as "peculiar circumstances."[91] Additionally, the court stated that it was confident that over time decisional law would further define proper subjects for interlocutory review by agency heads.[92]

The OAL has been criticized for delays in its operations resulting in a backlog of cases.[93] Clearly a case-by-case analysis of interlocutory reviewability can only serve to exacerbate that backlog. The court could have clearly set forth the characteristics of reviewability. Such guidelines would promote the objective of leaving final decisional authority with the agency head while recognizing the legislative purpose in creating the OAL of expediting the "just conclusion of contested cases."[94] Instead, the court found compromise impossible between the extreme positions of non-reviewability and complete reviewability of OAL procedural orders.[95] The result of the supreme court's choice of the latter is to displace a previous state of non-reviewability with complete procedural reviewability, a state of affairs not contemplated by the Act's legislative purpose.[96]

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[89] *Id.*
[90] *Id.* at 106, 447 A.2d at 162-163.
[91] *Id.* at 100-101, 447 A.2d at 159-160.
[92] *Id.* at 102, 447 A.2d at 160.
[93] *See* Weissman, *supra* note 5.
[94] *See supra* note 31.
[95] 90 N.J. at 100-101, 447 A.2d at 160.
[96] *See supra* note 31.

The court refused to allow administrative law judges final authority on participation motions authorizing agency head review on an interlocutory basis.[97] In light of an agency's ultimate decisional authority in administrative proceedings, this aspect of the court's decision can hardly be questioned. In a broader sense, however, the most satisfactory approach to the issue of participation motions in administrative proceedings is to commit such authority from the start to the agency possessing ultimate decisional authority in the case. This approach would free the administrative law judge from ruling on participation motions, and simultaneously allow an aggrieved party to apply directly to the agency for the right to intervene. In the case where such a motion was denied, appellate division review is possible. Such a procedure would thus insure proper participation in contested cases while expediting the hearing process before an administrative law judge.

The supreme court's denial of binding powers in ALJ emergency relief orders presents an even more controversial issue.[98] The court's position that an ALJ may make only an initial recommendation subject to possible reversal by the agency is inconsistent with the OAL's function and the nature of emergency relief in general.[99] The court's ruling on this question allows an ALJ, knowledgeable of the law and facts in a particular controversy, to be relegated to the position of an ineffectual advisor. Also possible is the situation where a party to an ongoing contested case may successfully thwart an administrative adjudication by obtaining emergency relief from an agency head less familiar with the litigation than the ALJ.

A preferred course would have been to permit an administrative law judge to enter an emergency relief order subject to immediate review or to specifically vest agency heads with emergency relief power subject to mandatory input from ALJ's. The court's decision to limit administrative law judges to initial recommendations has, in effect, created yet another delay in the disposition of matters.

Conclusion

Since the OAL was established five years ago, a sufficient body of precedent has developed from which to judge its structure and operation. The state supreme court has a history of continuous protection and en-

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[97] 90 N.J. at 101-102, 447 A.2d at 160.
[98] *Id.* at 103, 447 A.2d at 161.
[99] *Id.*

hancement of due process in the area of administrative proceedings.[100] The recent decision in *In re Uniform Administrative Procedure Rules,*[101] which declared certain rules invalid, appears poorly reasoned by contrast. The court itself characterized those rules as protecting the OAL from agency intervention during the course of proceedings.[102] Permitting the agency head to intervene during the conduct of litigation, particularly in motions for emergent relief, may reintroduce elements of institutional bias that the Legislature attempted to remove. This is particularly troublesome in view of the detailed procedural system which protects the rights of litigants. The court's decision will permit the governmental entity which is a party to the litigation to assert itself in a substantive way during the conduct of the litigation in a manner that appears the Legislature wished to avoid. The supreme court might have been hard pressed to justify allowing ALJ's full adjudicatory powers in all cases under all circumstances, but emergent matters, at least, should have been left to ALJs with immediate agency review. Hence, the OAL faces the future with less independence than might have proven beneficial. To some extent, the court in *In re Uniform Administrative Procedure Rules*[103] defined the outer limits of the OAL's powers in a manner consistent with the legislative intent.

There appears, however, to be no reason to withdraw the OAL's power to act *ad interim.* Nor does the nature of administrative adjudication require that the agency have the immediate input the court's decision permits. A more logical system would have mirrored the current court rules in the area of temporary restraints, with dissolution on two days notice or less.[104] At this juncture, the matter is one for the Legislature, and it should act to clarify its view of the OAL.

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[100] *See* Mazza v. Cavicchia, 15 N.J. 498, 105 A.2d 545 (1954); City of Asbury Park v. Dept. of Civil Service, 17 N.J. 419, 111 A.2d 625 (1955); Avant v.Clifford, 67 N.J. 496, 341 A.2d 629 (1975).

[101] 90 N.J. 85, 447 A.2d 151 (1982).

[102] *Id.* at 107, 447 A.2d at 163.

[103] 90 N.J. 85, 447 A.2d 151 (1982). It is important to note that the decision in *In re Adm'v Procedure Rules* has been followed. *See In re* Kallen, 92 N.J. 14, 30, 455 A.2d 460, 468 (1983), which held that "an agency head has the sole power to make the final decision in contested cases and that an administrative law judge does not have the authority to refuse to comply with an order of remand of the agency head." *Id.*

[104] N.J. Ct. R. 4:52-1(a).