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SOUTH CAROLINA'S ALJ: CENTRAL PANEL, ADMINISTRATIVE COURT, OR A LITTLE OF BOTH?

I. INTRODUCTION:

South Carolina's fledgling Administrative Law Judge Division (ALJD) strikes a blow to the old adage "You can't fight city hall!" Currently and since the ALJD's inception, parties involved in disputes with administrative agencies voice their concerns to ALJs as opposed to the former hearing officers who were employed by the agencies themselves. The appearance of bias has been eliminated, and public confidence in agency function has risen in response.[1] Additionally, administrative process under the new adjudicative structure is arguably more efficient. Like most, these improvements come at an expense. The statutory framework establishing the ALJD, its duties, and the scope of its authority yet requires some clarifying revision. This article is offered to point out the advantages of South Carolina's new administrative law system in spite of the statutory inconsistencies and in contrast to ALJ structuring in other states and the federal system. Further, by focusing on the procedural steps in an administrative appeal, the aim is to increase the reader's understanding of ALJ jurisdiction and to highlight the impact of potential future developments.

1. See Chief Judge Marvin F. Kittrell's conclusions in Marvin F. Kittrell, *ALJs in South Carolina*, 7 S.C. LAW., May/June 1996 at 42, 44. For perspectives that allude to public distrust in the administrative arena, see Jay Bender, *The South Carolina Freedom of Information Act from the Private Practice Perspective*, 27 S.C. BAR C.L.E. DIVISION 3 (1995) (stating that the origins of the freedom of information movement were closely tied to a distrust for governmental agencies); COMPTROLLER GENERAL OF THE UNITED STATES, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED 1 (1978) (finding that the decisions of pre-ALJ hearing officers in the federal system were often suspect); and Edwin L. Felter, Jr., *Administrative Law Adjudication for the Twenty-first Century*, 24 COLO. LAW. 993, 994 (1995) (noting the power of public opinion and concluding that the public's recent call for "Total Quality Management" has particular application in the realm of administrative government).

II. BACKGROUND

A. The Various Organizational Models of Administrative Law

Authors Malcolm C. Rich and Wayne E. Brucar, in a concise look at the developing central panel approach to administrative law, recognize three fundamental systems of administrative adjudication.[2] The three arrangements differ primarily in the degree of independence they grant to their constituent ALJs. At the low end of the spectrum, the "agency staff" approach offers the least autonomy.[3] In the middle, the "central panel" or "central pool" system provides full agency separation for its adjudicators.[4] In this format, however, ALJ decisions remain subject to agency acceptance, rejection, or modification.[5] At the extreme high level of independence, the "administrative court" system generally grants exclusive jurisdiction over statutorily defined, contested cases; further, review of administrative court decisions goes directly to the true judicial branch.[6] Very few states, if any, employ a pure version of one of the three alternatives.[7] Likewise, South Carolina's administrative system of process blends features of the central panel and administrative court forms. Section III below presents a more detailed view of each system by highlighting the advantages and disadvantages of ALJ independence in South Carolina.

B. The Current Statutory Regime

Traditional administrative process is federal in origin.[8] As such, state administrative law borrows much of its foundations from federal statutes and decisions.[9] The South Carolina Administrative Procedure Act (SCAPA) is no exception. Prior to 1993's restructuring of government,[10] administrative

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2. MALCOLM C. RICH & WAYNE E. BRUCAR, THE CENTRAL PANEL SYSTEM FOR ADMINISTRATIVE LAW JUDGES: A SURVEY OF SEVEN STATES 10-11 (1983).

3. *See id.* at 10.

4. *See id.* at 11.

5. *See id.* at 10.

6. *See id.* Messrs. Rich & Brucar point out that in 1983 the administrative court system was in effect only in Maine and Missouri and even there only to a very limited extent. *Id.*

7. *See* Gerald E. Ruth, *Unification of the Administrative Adjudicatory Process: A Emerging Framework to Increase "Judicialization" in Pennsylvania*, 5 WIDENER J. PUB. L. 297, 321-24 (1996).

8. For a comprehensive historical treatment of developments in state and federal administrative law, see, *e.g.*, *id.* at 11-13; 1 KENNETH C. DAVIS & RICHARD J. PIERCE JR., ADMINISTRATIVE LAW TREATISE §§ 1.4-1.7 (3d ed. 1994).

9. *See* 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 7-8, 12 (1965).

10. Act of June 18, 1993, No. 181, §§ 11-19, 1993 S.C. Acts 1407, 1433-448 (codified as amended at S.C. CODE ANN. §§ 1-23-310 to -660 (Law. Co-op. Supp. 1995)).

process in South Carolina was, in fact, based on the 1961 Model State Administrative Procedure Act (MSAPA),[11] and the MSAPA is quite a close relative to federal administrative law.[12] Despite the thorough reference base that arises from its time-tested origins, South Carolina's administrative process presents a challenge to even the best decipherer of statutes.[13]

At the heart of the confusion lies a recurrent inability to reconcile individual agency statutes with the SCAPA.[14] This sort of difficulty should not be surprising. After all, agency promulgation statutes written well before the restructuring of government and primarily with executive goals in mind can hardly be expected to fully honor the dictates of an independent administrative adjudicatory process. Also, to the extent that the new administrative process represents a check on agency authority, a second source of tension is revealed. One need go no further than the definitions section of the SCAPA to find the beginnings of conflict. "Agency" is defined in South Carolina Code section 1-23-310 "to include the ALJ division." Indeed, the ALJ Division is an autonomous agency of the executive branch; however, the failure to make a referential distinction creates an obstacle that pervades throughout much of the remainder of the statute.[15] For instance, a fundamental precept of administrative law is the forestalling of judicial review until all internal agency remedy is exhausted.[16] Generally, an agency marks this exhaustion of remedy

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11. David E. Shipley, *South Carolina Administrative Law*, 1989 S.C. BAR C.L.E. DIVISION 1-3 (2d ed. 1989).

12. The evolution of the several administrative procedure acts is really quite tidy. In 1941 E. Blythe Stason, Dean Emeritus of the University of Michigan Law School and former administrator of the American Bar Foundation wrote a report that became the basis of the Federal Administrative Procedure Act (promulgated in 1946). 1 COOPER, *supra* note 9, at 6. Dean Stason also was a primary drafter of the 1946 Model State Administrative Procedure Act (MSAPA). *Id.* Further, Dean Stason acted as committee chairman for the group that revised the MSAPA into its 1961 version. *Id.* at 7. The draftsman's first effort having been the federal APA, it seems logical to conclude that the federal system and its experiences were the source from which he drew in creating the MSAPA. Writing in 1965, Mr. Cooper added credence to this conclusion by pointing out the extensiveness of debate over the federal system and the rather neglectful treatment of state systems. *Id.* at 1.

13. Professor Shipley states that even in 1989 the first attempt at codifying South Carolina's administrative process was not well understood. Shipley, *supra* note 11, at 1-4.

14. *Id.*; *see also* Home Health Services, Inc. v. South Carolina Dep't of Health & Envtl. Control, 298 S.C. 258, 379 S.E.2d 734 (Ct. App. 1989) (reconciling an apparent conflict with DHEC promulgation statutes and the SCAPA); Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731 (1989) (stating that conflicts between agency promulgation statutes and the SCAPA should be resolved in favor of the APA). The *Pringle* case may be limited to its facts—conflicts between the Workers Compensation Act and the SCAPA.

15. Mr. Frank E. Cooper, contributor to the 1961 Revised MSAPA, has also noted the exceptional importance of definitions in the administrative procedure statutes. For a more comprehensive treatment see 1 COOPER, *supra* note 9, at 95.

16. *E.g.*, *id.* at 561; 2 DAVIS & PIERCE, *supra* note 8, § 15.2.

by rendering its "final decision."[17] Because the definition of an agency in South Carolina Code section 1-23-310 includes the ALJD, the current scheme implies that ALJ adjudication constitutes this final decision. As a result, obvious questions arise: What level of conclusiveness must an agency decision reach before a contested case is ripe for ALJ review, and subsequently, what are the limits of ALJ authority in issuing a final decision? Can the ALJD consider the facts afresh and create its own remedy in all particulars or is it bound to simply approve or deny "agency" recommendations? Section IV below, entitled "Statutory Framework," is meant to aid the practitioner who faces these questions.

C. Future Developments in Administrative Law

Tabled at the end of the 1996 legislative session, House Bill 3427 recommended several worthy changes to the SCAPA.[18] Actually this legislation would have had more of a clarifying effect than one of substantive alteration. The bill primarily addressed South Carolina Code sections 1-23-380, 1-23-600, 1-23-610 and corresponding agency statutes.[19] Section V below takes a closer look at the particular ramifications of this bill and any similar future legislation. Lastly, in considering the impact of legislation and the probabilities of change, the practitioner is advised to take note of underlying constitutional issues not presently discussed.[20]

III. DISCUSSION

In 1993 the General Assembly's restructuring of government included amendments to the SCAPA and essentially created the ALJ Division.[21] The official purpose of the ALJD is to "provide a neutral forum for fair, prompt

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17. S.C. CODE ANN. § 1-23-380 (Law. Co-op. Supp. 1995).

18. H.R. Res. 3427, 111th Gen. Assembly, 2d Sess. (1995).

19. *Id.*

20. *E.g.*, William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 596 (1991) (outlining due process issues and acknowledging that present systems do not fit perfectly within separation of powers boundaries, but maintaining that some deviation is essential to efficient government); Michael Asimov, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1189 (1995) (presenting a curious view of the link between administrative accountability and the appropriate standard of review of ALJ decisions). At the request of the General Assembly, USC Law School Professor James F. Flanagan has reported on several of the more current constitutional issues. JAMES F. FLANAGAN, JUDICIAL COUNCIL TO THE GEN. ASSEMBLY AND THE CHIEF JUSTICE OF S.C., REPORT ON THE FEASIBILITY AND CONSTITUTIONALITY OF MAKING THE SOUTH CAROLINA ALJ DIVISION A PART OF THE UNIFIED JUDICIAL SYSTEM 14-25 (1995).

21. Act of June 18, 1993, No. 181 §§ 11-19, 1993 S.C. Acts 1407, 1433-448 (codified as amended at S.C. CODE ANN. §§ 1-23-310 to -660 (Law. Co-op. Supp. 1995)).

and objective hearings for any person affected by an action, or proposed action of certain agencies of the State of South Carolina."[22] There are six administrative law judges who are elected by the legislature to serve staggered five year terms.[23] The qualifications required of ALJs equal those of justices and judges of the regular judiciary.[24] Despite some conjecture otherwise,[25] the ALJD is clearly part of the executive branch.[26] The Division is, therefore, not judicial, but "quasi-judicial" in nature.[27] Simply put, this quasi-judicial classification relieves the Division of the full burdens of res judicata[28] and stare decisis.[29] The ALJD opened for business in March of 1994, and

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22. S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1993-1994, at 1 (1994).

23. *Id.*

24. S.C. CODE ANN. § 1-23-510 (Law. Co-op. Supp. 1995); S.C. CONST. art V.

25. Felter, *supra* note 1, at 994 (claiming South Carolina has not decided to which branch of government its ALJD belongs).

26. S.C. CODE ANN. § 1-23-500 (Law. Co-op. Supp. 1995).

27. S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1993-1994, at 4 (1994).

28. *See infra* note 29. There is some slight confusion in the South Carolina cases that address the issue of whether agency decisions are subject to the doctrine of res judicata. Without question, *Earle v. Aycock*, 276 S.C. 471, 475, 279 S.E.2d 614, 616 (1981) and *South Carolina Department of Social Services v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 563, 320 S.E.2d 464, 469 (Ct. App. 1984) hold that the doctrine of res judicata applies to the decisions of state agencies. The second instance of litigation in these two cases was, however, before the circuit court, not the respective agencies themselves. Confusion is wrought by *Saint Philip's Episcopal Church v. South Carolina Alcoholic Beverage Control Commission*, 285 S.C. 335, 339-40, 329 S.E.2d 454, 456 (Ct. App. 1985), which, incidentally, cites *Earle v. Aycock*. Church leaders at Saint Philip's objected to the ABC's licensing a restaurant because of the eatery's close proximity to the Church and, presumably, a general disdain for alcohol consumption. *Id.* at 337, 329 S.E.2d at 455. The circuit court declared the litigation improper due to the bar of collateral estoppel (no appeal having been taken from the ABC's final decision). *Id.* at 339, 329 S.E.2d at 456. The court, however, also concluded that a subsequent contest (before the ABC) of the license on grounds other than proximity would *not* be barred. *Id.* This final statement by the court in *Saint Phillip's* mocks res judicata's bar to relitigation of not only issues previously decided but also those that *could have been heard*. Likely, the *Saint Phillip's* decision is anomalous or just plain incorrect. At any rate, the character of the ALJD is now more judicial than the agency, adjudicatory bodies of old. As such, its tenets of quasi-judicial status are strengthened, and those quasi-legislative are embraced to a lesser degree. That is, South Carolina's shift to a corps of ALJs makes the holding of *Earle v. Aycock* more firmly the law--even as regards attempts to relitigate before the ALJD.

29. *E.g.*, 2 COOPER, *supra* note 9, at 503-34 (1965) (pointing to the legislative character of a quasi-judicial body as justification to allow it to "change its mind"); 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE, § 6.63 (1985) ("Agencies need more freedom to change policies and meet new law enforcement exigencies." (citing International Harvester Co. v. OSHRC, 628 F.2d 982, 984-86 (7th Cir. 1980))). The ALJD cannot, however, *arbitrarily* reject the reasoning of its prior decisions; after all, there must be logic in the evolution of agency policy. *See* 330 Concord St. Neighborhood Ass'n v. Campsen, 309 S.C. 514, 517 424 S.E.2d 538, 540 (Ct. App. 1992); *see also* Weaver v. South Carolina Coastal Council, 309 S.C. 368, 423 S.E.2d 340 (1992) (suggesting that an unjustified change in agency position will amount to

although the Division will not admit to being at full capacity, statistics show the ALJs are hard at work.[30]

A. The Issue of ALJ Independence

Proponents of administrative reform often cite the need for greater independence in agency adjudication.[31] Opponents of reform parse the phrase "creeping judicialization" and worry about the erosion of agency policy and clout.[32] Both sides of this issue are represented in the following summary of advantages and disadvantages.

B. Advantages

1. Diversity of Cases Heard

As a centralized corps, the ALJD sees a diverse collection of cases arising from the multitude of agencies within its jurisdiction. Clearly, the greater its jurisdiction the more diverse will be the issues that the ALJD addresses. The benefits of this diversity are two-fold. Authors Rich and Brucar see the primary benefit being that the ALJs will maintain a fresh perspective.[33] Writing for the National Conference of Administrative Law Judges in 1986, Judge E. Earl Thomas, a Deputy Chief Judge in the federal administrative system, opined that this variety also created more of a challenge to ALJs.[34] Taken in context, Judge Thomas was making a positive comment about job satisfaction.

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a violation of equal protection and due process).

30. Interview with H. Lee Smith, Clerk of Court, S.C. ALJ Division, in Columbia, S.C. (Jan. 9, 1996); S.C. ADMIN. LAW JUDGE DIV., ANNUAL REPORT 1993-1994, at 8-9 (1994).

31. The evolution of reform in the federal administrative system provides a good example of the rising call for adjudicative independence. This aspect of the federal system's development is outlined in Frederick Davis, *Judicialization of Administrative Law: The Trial Type Hearing and the Changing Status of the Hearing Officer,* 1977 DUKE L.J. 389, 407 (1977). *See also* E. EARL THOMAS, ADMINISTRATIVE LAW JUDGES: THE CORPS ISSUE 2 (1986); Palmer & Bernstein, *Establishing Federal Administrative Law Judges as an Independent Corps: The Heflin Bill,* 6 W. NEW ENG. L. REV. 673 (1984); C. Stuart Greer, Note, *Expanding the Judicial Power of the Administrative Law Judge to Establish Efficiency and Fairness in Administrative Adjudication,* 27 U. RICH. L. REV. 103, 117 (1993).

32. RICH & BRUCAR, *supra* note 2, at 12 (citing comments made by, then professor, Antonin Scalia of the University of Chicago Law School at an ABA conference on the Role of the Judge in the 1980s).

33. *Id.* at 13.

34. THOMAS, *supra* note 31, at 9; *see also* Ruth, *supra* note 7, at 330-31. Gerald Ruth, Chief Administrative Law Judge, Pennsylvania Liquor Control Board, states, point blank, that "[t]his variety would combat the boredom that judges who continuously preside over the same issues face." *Id.*

2. Better Reasoned Opinions

Detachment from the individual agencies may also lead to better reasoned opinions.[35] Dual logic resides within this conclusion. If an administrative law judge feels equally accountable to both parties in a contested case, the judge's reasoned explanation of both sides of the dispute will be more detailed.[36] This conclusion gains weight after examination of a non-centralized system in which hearing officers are less likely to explain certain issues because they expect their main audience to be agency staff-persons who are acutely aware of the legal and factual arguments involved. Additionally, the greater qualification standards[37] and increased exposure to adversarial proceedings inherent in the "ALJ corps" approach should increase the legal competence demonstrated in ALJ opinions.

3. Increased Economic Efficiency

Messrs. Rich and Brucar explain that the corps approach may also be less expensive.[38] They reason that "larger agencies will not have to keep all the ALJs they need to handle cases [only] during peak periods[, and s]maller agencies will always have ALJ's available to them without having to pay larger sums to hire practicing lawyers, for example, to serve as temporary ALJs."[39] These authors further point out the savings that will result from a single set of support staff, a single office, a single set of account books, and other innovative measures.[40] Judge Thomas also cites savings from more efficient management and the elimination of otherwise duplicative expenses, and he supports his claims with reports from states that have implemented central panel systems.[41]

4. Less Agency Bias

Proponents of the corps approach also claim that detachment of judges from their respective agencies makes them less likely to blindly honor agency policy[42] and presumably more likely to issue a fair decision. It is, however,

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35. The South Carolina Code specifies what the record in a contested case shall include. One element of these requirements is "any decision, opinion or report by the officer or administrative law judge presiding at the hearing." S.C. CODE ANN. § 1-23-320 (Law. Co-op. Supp. 1995). Note that this section does not seem to *require* a report or decision.

36. RICH & BRUCAR, *supra* note 2, at 13 (citing the testimony of Judge William Fauver during *Hearings on Administrative Law Judge System Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transp.*, 96th Cong. 28 (1980)).

37. S.C. CODE ANN. § 1-23-510 (Law. Co-op. Supp. 1995).

38. RICH & BRUCAR, *supra* note 2, at 13.

39. *Id.*

40. *Id.*

41. THOMAS, *supra* note 31, at 10.

42. Greer, *supra* note 31, at 120; *see also* Ruth, *supra* note 7, at 321-24 ("The [independent] Administrative Law Judges would not be dependent upon the agency-party for continued

precisely this drift away from policy-based decisions that opponents cite as the downside of the ALJ corps approach.[43] Mitigating either argument is the fact that so long as some ALJ decisions are reviewed by the adversarial agency, for rejection or revision, true freedom from agency bias does not exist.[44] Thus, only the pure "administrative court" system fully attains this advantage.[45] Therefore, to the extent South Carolina's ALJ decisions are not subject to agency review (and instead go directly to the circuit courts for further resolution) this state's system has merit.

5. Increased Public Confidence in Agency Action

The State of Colorado solicits public opinion as to the quality of its judiciary.[46] Surveys evaluating the function of the Colorado central panel system in 1992 showed an 88 percent approval rating.[47] Chief Judge Edwin

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employment, salary, promotions, benefits, office space, parking permits, etc., and would not be subject to retribution or 'control' via diminution of those items.").

43. *See, e.g.*, Felter, *supra* note 1, at 993 (directly confronting the value of agency expertise and policy as a basis for contested case decisions); James F. Flanagan, *Standard of Proof and Scope/Standard of Review: Definitions, Differences, Distinctions*, 27 S.C. BAR C.L.E. DIVISION 81 (1995). Professor Flanagan cites *Board of Bank Control v. Thomason*, 236 S.C. 158, 169, 113 S.E.2d 544, 549 (1960) and *Faile v. South Carolina Employment Security Commission*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) as establishing the deferential standard for judicial review of agency decisions. *Id.* at 81-82.

Arguments that this "due deference" standard should apply to ALJs hearing contested cases finds limited support in the language of South Carolina Code section 1-23-330(4), a pre-restructuring, pre-ALJD provision. If these arguments should hold, those fearful of eroded agency policy will gain solace. Section 1-23-330(4), however, does not actually speak of deference; it merely states that "an agency's experience" and "technical competence" may be considered. Therefore, the stronger position is a realization that, by separating the adjudicating body from the individual agencies and not explicitly providing for a deference standard, the General Assembly effectively eliminated the traditional nod to "agency expertise." *See* Evangelism Outreach, Inc., Docket No. 95-ALJ-17-0180-CC (March 1996).

44. RICH & BRUCAR, *supra* note 2, at 13. The authors outline the extent of adjudicative independence in the federal system. Essentially, tenure, promotion, and compensation of the agency affiliated ALJs in the federal system are beyond their respective agency's control. *Id.* at 8-9. On the other hand, the subordination of ALJ decisions remains. That is, ALJ decisions are still subject to agency acceptance or rejection. *Id.* at 8. This subordination precludes gaining true independence. Davis, *supra* note 31, at 407. Note also Rich and Brucar's colorful discussion of agency hostility in the face of change. RICH & BRUCAR, *supra* note 2, at 20-21.

45. For an example of a pure administrative court system, refer to Missouri's Administrative Hearing Commission. MO. ANN. STAT. §§ 621.015 to 621.189 (West 1988 & Supp. 1996). Note, however, the Missouri Commission's jurisdiction is limited to contested cases in professional licensing decisions, appeals from decisions of the director of revenue, and agency rule-making decisions which do not rise to the level of a contested case. §§ 536.050, 621.045, 621.050. Maine's Administrative Court provides a second example. ME. REV. STAT. ANN. tit. 4, §§ 1151-58 (West 1989).

46. Felter, *supra* note 1, at 994.

47. *Id.* at 995. The states of Maryland, Hawaii and Tennessee have also explored public

L. Felter, Jr. maintains that this mark represents an acceptable level of public confidence.[48] More importantly, Judge Felter shows us that there can be accountability in a centralized system.[49] In contrast, a perceived inability to directly address the source of unacceptable rulings from part-time hearing officers or from permanent decision-makers hiding behind the cloak of larger agency reputation and power seems very far from even the slight public scrutiny that Colorado's survey system offers. Furthermore, the definite rules of judicial conduct that apply to South Carolina's ALJs[50] provide a recourse not available in the realm of citizen-agency conflict.

C. Disadvantages

1. "Super Agency" Claim

The primary dissention over an ALJ corps approach comes from those who praise the merits of agency policy and expertise.[51] The term "super agency" refers to an ALJ panel that, through time, practice, and politics, substitutes its own policy objectives for those of the individual agencies.[52] In South Carolina, the legislative screening process that governs election of ALJs is only as susceptible to political influence as agency head appointment. Thus, it would seem unreasonable to conclude the ALJD is driven by inherent political objectives to any greater degree than the agency hearing officers of old. As for the ALJD's developing its own policy stances over time, one must admit the potential exists. The measure of the harm, however, seems speculative, especially considering that South Carolina's ALJs sit for finite terms.[53]

2. Trouble in Transition

Those states having recently adopted a central panel approach to ALJ organization report significant hostility from the affected agencies.[54] The complaints most often stem from a sense of lost authority.[55] A few states, like

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perceptions of fairness. Ruth, *supra* note 7, at 322-23 ("Tennessee said that the increased perception of impartiality and fairness by the public and the bar has been one of the most prominent and satisfying benefits.").

48. *See id.* at 994.

49. *Id.*

50. S.C. CODE ANN. § 1-23-560 (Law. Co-op. Supp. 1995).

51. Jeffrey S. Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 274 (1981); *See also*, RICH & BRUCAR, *supra* note 2, at 13. Rich and Brucar pose the conflict as "the trade-off between due process and administrative effectiveness [or authority] that administrators claim they need to make and implement policies." *Id.*

52. RICH & BRUCAR, *supra* note 2, at 13.

53. S.C. CODE ANN. § 1-23-510 (Law. Co-op. Supp. 1995).

54. RICH & BRUCAR, *supra* note 2, at 18-21.

55. *Id.* at 20.

Tennessee, avoided some of this conflict by implementing an intermediate stage of development; the Tennessee legislature made some resort to the ALJ voluntary.[56] And eventually, the Tennessee system evolved into a full fledged central panel with broad, mandatory jurisdiction.[57] Taking a more aggressive approach, South Carolina legislators intended to revise South Carolina's agency statutes to conform with the SCAPA as restructuring took hold.[58] Progress has been slow, with the 1995 Revenue Procedures Act[59] being perhaps the only real example of full conformance. In hindsight, a graduated approach like Tennessee's might have eased the difficulties of transition, but one cannot fault the General Assembly for its large initiative.

3. New Roles for Agencies

Professor James Flanagan has pointed out that, in South Carolina's system, "agencies without boards or commissions have a new problem of insuring that the agency position and policy reasons are in the record, because there will not be any opportunity for the agency to review the ALJ decision."[60] This point highlights earlier questions as to whose policy goals and how much room for exerting policy objectives (also referred to as "agency expertise") should be incorporated into an administrative system of adjudication. Without doubt, Professor Flanagan has it right, but the ALJD's hearing process is perfectly equipped to take note of agency policy arguments and determine the proper weight to be given. Surely, having agencies stand up and speak for themselves is not too great a burden and may even have some positive ramifications.

IV. STATUTORY FRAMEWORK

A. Obtaining ALJ Review

A party seeking review of agency action must first exhaust all administrative remedies.[61] This rule is based on ideals of judicial economy--the prevention of piece-meal and potentially vexatious litigation.[62] In an imprecise statutory structure, a party's having exhausted all administrative remedies may depend greatly upon whether the agency is willing to identify any

56. *Id.* at 19.

57. *Id.*

58. Interview with Stephen P. Bates, Judge (Seat 2), S.C. ALJ Division, in Columbia, S.C. (Sept. 13, 1996).

59. S.C. CODE ANN. §§ 12-60-10 to -3390 (Law. Co-op. Supp. 1995).

60. Flanagan, *supra* note 43, at 81.

61. 2 COOPER, *supra* note 9, at 572.

62. *Id.* at 573.

particular action as its final decision.[63] Mr. Frank E. Cooper, author of *State Administrative Law*, notes the potential for abuse in this traditional regime:

> Occasionally, agencies utilize techniques which suggest that an attempt is being made to exhaust the petitioner before he exhausts the administrative proceedings, in order to avoid judicial review . . . . [I]f delay on the part of an agency in deciding a case is so long and unreasonable, and so productive of hardship, as to evidence a complete disregard of a party's substantial rights, it may be considered that all effective possibilities of obtaining administrative relief have been exhausted, and an appeal to the courts permitted.[64]

According to South Carolina Code section 1-23-380(B), ALJs have much the same review authority as circuit courts when the ALJD sits in an appellate capacity.[65] As such, the decisions of certain agencies should be subject to the same grant of intermediate review that Mr. Cooper refers to above. Unfortunately, this same intermediate level review is not available when a party contests the actions of an agency whose actions fall outside the scope of the ALJD's limited appellate jurisdiction.[66] Moreover, is it not at all clear that the regular courts regard this sort of intermediate relief as efficacious.[67]

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63. *See id.* at 585. Mr. Cooper cites two cases to illustrate the point. One, *Detroit Edison Co. v. State*, 105 N.W.2d 227 (Mich. 1960), resembles a taxpayer dilemma recently resolved in South Carolina by enactment of the new Revenue Procedures Act. *See* SCE&G, Docket Nos. 95-ALJ-17-0466-CC and 95-ALJ-17-0485-CC (August 1995). In *Detroit Edison*, the taxpayer filed for judicial review of a twice computed and twice disputed franchise fee. 105 N.W.2d at 228. In an attempt to bar the case from judicial review, the State Corporation and Securities Commission rescinded its second computation of a tax deficiency and claimed the appealing corporation had not exhausted its administrative remedies. *Id.* at 231-32. The Michigan Supreme Court held that this sort of avoidance of a final agency action was improper and remanded the case to the lower court's jurisdiction. *Id.* at 233-34, 237.

South Carolina citizens seeking judicial review are certainly not immune to agency recalcitrance. *See* Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health & Envtl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

64. 2 COOPER, *supra* note 9, at 585.

65. S.C. CODE ANN. § 1-23-380(B) (Law. Co-op. Supp. 1995) actually refers back to § 1-23-380(A) for the grant: "A preliminary, procedural, or intermediate agency action is immediately reviewable if review of the final agency decision would not provide an adequate remedy." One might argue that this language would always assure an avenue to expeditious relief; however, in the face of statutes like S.C. CODE ANN. § 12-60-3390 (Law. Co-op. Supp. 1995) (mandating dismissal of all revenue actions brought to the circuit court without first visiting the ALJ Division), such confidence dims.

66. *See* S.C. CODE ANN. § 1-23-380(B) (Law. Co-op. Supp. 1995).

67. Nucor Steel v. Public Serv. Comm'n, 312 S.C. 79, 439 S.E.2d 270 (1994); Ross v. MUSC, ___ S.C. ___, ___ 435 S.E.2d 877, 878-79 (1993) (holding that "[a] petition for judicial review pursuant to S.C. CODE ANN. § 1-23-380 is neither a proceeding at first instance nor is it within the original jurisdiction of the circuit court"). *But see* Stanton v. Town of Pawleys

On the other hand, progressive statutes like South Carolina's new Revenue Procedures Act (RPA)[68] curtail the potential for this type of abuse. Section 12-60-460 of the RPA begins with the requirement that a taxpayer exhaust "his [or her] prehearing remedy" prior to requesting a contested case hearing before the ALJD.[69] "Prehearing remedy" is a defined term; it means the taxpayer must file a written protest, attend a conference with an assessor or proper agency official, and provide the facts and law supporting his position to various agency personnel.[70] With large liabilities at risk and the time value of money ticking away, this definiteness removes what was formerly quite a long lever arm for the Department of Revenue during settlement negotiations. In other agency statutes, when the substance of prehearing remedy remains undefined, the agency advantage is retained.

B. The ALJ Hearing and Beyond

When resort to circuit court is finally necessary, the SCAPA is rather explicit, setting out three parallel routes to circuit court jurisdiction.

1. Agencies With a Board or Commission

In instances when an agency is governed by a board or commission, the ALJ decision in a contested case goes back to the board or commission before becoming a final agency decision worthy of judicial review.[71] On this return trip to the agency, the ALJ decision may be accepted, modified, or reversed.[72] The board/commission review is, however, limited to the record.[73] That is, no new findings of fact or conclusions may be made. This is the pure central panel approach, and it places obvious limits on ALJ independence. Thus, such a process lacks many of the foregoing advantages that might otherwise be attributed to a corps ALJ.

Island, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) (citing Andrews Bearing Co. v. Brady, 261 S.C. 533, 201 S.E.2d 241 (1973) (holding that "the question of whether to require the plaintiff to exhaust administrative remedies [is] a matter within the sound discretion of the trial judge")). Mr. Stanton argued that he should not have been required to exhaust administrative remedies as such would be an exercise in futility, and the court agreed. *Id.*

68. S.C. CODE ANN. §§ 12-60-10 to -3390 (Law. Co-op. Supp. 1995).

69. S.C. CODE ANN. § 12-60-460 (Law. Co-op. Supp. 1995).

70. S.C. CODE ANN. § 12-60-30(16) (Law. Co-op. Supp. 1995).

71. *See* S.C. CODE ANN. § 1-23-610(A) (Law. Co-op. Supp. 1995); Flanagan, *supra* note 43, at 74.

72. *See* Flanagan, *supra* note 43, at 74-75 (suggesting that the ability of a board or commission to modify ALJ findings has been curtailed but it is "unclear to what extent").

73. S.C. CODE ANN. § 1-23-610(D) (Law. Co-op. Supp. 1995). Moreover, this section expressly delineates the appropriate standard of review when an ALJ decision returns for further board or commission consideration.

2. Agencies With a Single Director

Contested cases between a party and an agency with a single director become final agency decisions upon the ALJ's issuance of an order.[74] Judicial review is directly to the circuit court without any agency opportunity for modification or review.[75] This arrangement is most like the Missouri and Maine administrative court structures[76] and should be attended by all the advantages of ALJ independence.

3. Occupational Licensing Boards

Decisions of occupational and licensing boards are final agency decisions before they get to the ALJ.[77] This fact alters the ALJD's function to one of appellate review.[78] Judicial review of the ALJ appeal is, however, a matter of right;[79] it simply goes forward with a record developed at the agency level. This arrangement also resembles an administrative courts structure and affords the aggrieved party with all the advantages of an independent ALJD.

V. FUTURE DEVELOPMENTS — HOUSE BILL 3427

House Bill 3427 would have effectively converted South Carolina's mixed central panel and administrative court system into a full administrative court.[80] The bill proposed expansion of the ALJD's original review authority over contested cases and increased the Division's appellate jurisdiction to cover appeals from South Carolina Coastal Council decisions.[81] Agency review like that which exists in contested cases under the authority of the Department of Health and Environmental Control would no longer exist. If H.R. 3427 had passed, all ALJ decisions would be final agency decisions reviewable only by the circuit court, and South Carolina's system would embrace the full advantage of ALJ independence.

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74. *See* S.C. CODE ANN. § 1-23-610(B) (Law. Co-op. Supp. 1995); Flanagan, *supra* note 43, at 76. The requisites of a final decision in a contested case are spelled out in S.C. CODE ANN. § 1-23-350 (Law. Co-op. 1986).

75. Flanagan, *supra* note 43, at 76.

76. *Compare* MO. ANN. STAT. §§ 621.015 to 621.205 (West 1988), *and* ME. REV. STAT. ANN. tit. 4, §§ 11151-58 (West 1989).

77. *See* S.C. CODE ANN. § 1-23-380(B) (Law. Co-op. Supp. 1995).

78. Flanagan, *supra* note 43, at 77.

79. S.C. CODE ANN. § 1-23-610 (Law. Co-op. Supp. 1995).

80. *See* H.R. Res. 3427, 111th Gen. Assembly, 2d Sess. (1995); Flanagan, *supra* note 43, at 80.

81. H.R. Res. 3427, 111th Gen. Assembly, 2d Sess. (1995).

VI. CONCLUSION

Twenty-one states around the country currently operate their administrative legal systems in a form resembling a central panel.[82] South Carolina makes twenty-two. Ours is not blind imitation of a thoughtless trend. South Carolina's system is unique in its heightened degree of independence granted to the ALJD.[83] This modification represents an improvement of the first order. Greater efficiency, fairness, economy, public confidence, and quality rulings make up but a short list of the advantages of increased independence. The costs, on the other hand, are slight. Thus, patience is in order for those caught in a web of conflicting statutory construction, and graceful resignation is the call for agencies being asked to divest a quantum of control. The General Assembly will no doubt untangle the web, and the change is for the better as control is moving towards its more practical location.

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82. MARVIN F. KITTRELL, CENTRAL PANELS (1996). Chief Judge Kittrell's pamphlet sets out vital particulars of the various state administrative systems that currently operate under a central pool of adjudicators. *Id.* The pamphlet also points out that, in addition to the twenty-two states, the City of New York has a central panel administrative body. *Id.*

83. Flanagan, *supra* note 43, at 73.

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