

Administrative Law

by **Martin M. Wilson***

I. INTRODUCTION AND OVERVIEW

Administrative law continues to be a front-burner item in the practice of law because each day more and more activities, businesses, and persons fall under a state or local agency's regulatory sphere of influence. While the number of appellate cases reviewed in this Article has dropped slightly from recent years, reports from several agency heads in state and local governments would lead one to believe that agency workloads only continue to increase. Given the current economy and resulting shortfalls of tax revenues, it will be interesting to observe what effects static or reduced levels of enforcement and regulatory officials will have on the number of agency cases and resulting appellate filings.

This Article is a review of administrative law cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2002 through May 31, 2003. It is not an attempt to review all reported cases under the amorphous grouping of administrative law. Most topics reflecting the subject matter of other survey articles in this issue have been omitted. Because of the commonality of the interpretations of governing statutes and procedures between administrative agencies and local government entities, authorities, and agencies, some local government cases reported in this Article may also be reported in the local government law article. The cases in this Article focus on processes, procedures, and prelitigation activities and should be distinguished from comparative reviews.

The first substantive portion of this Article examines cases that highlight the defenses and immunities raised by agencies when controversies occur. A trio of cases involving the Georgia Tort Claims

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Act (“GTCA”)¹ are reported, along with one case involving the Georgia Open Meetings Act.² The next segment of the Article contains cases in which the appellate courts have discussed the standards of review used to determine whether an agency decision should stand. The validity of underlying rules is the topic of cases reviewed in the subsequent segment, and a discussion of recent legislation from the Georgia General Assembly completes the Article.

II. AGENCY DEFENSES AND IMMUNITIES

About the best defense an agency can have to a claim of liability asserted against it is the successful assertion of sovereign immunity under the Georgia Constitution.³ The Georgia Tort Claims Act (“GTCA”)⁴ provides only limited exceptions to sovereign immunity, and these exceptions have been conservatively, but fairly, interpreted. Agency personnel for the Georgia Department of Transportation (“DOT”), who assigned speed limits to state roadways, were given such immunity in *Department of Transportation v. Watts*.⁵

Simply described, the complaint in *Watts* came from the mother of a child who was struck and killed on a state highway by an automobile traveling at a speed within the posted fifty miles per hour speed limit. The complaint alleged that the DOT personnel were negligent and should have previously lowered the posted speed limit to thirty-five miles per hour because of residential congestion and the presence of pedestrians. The DOT claimed sovereign immunity as its defense and moved to dismiss.⁶ At trial the DOT cited the Official Code of Georgia Annotated (“O.C.G.A.”) section 50-21-24(5), which provides: “The state shall have no liability for losses resulting from . . . [a]dministrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature.”⁷

The court of appeals had no problem reversing the trial court’s denial of the DOT’s motion to dismiss.⁸ The court began its analysis by citing a Georgia Supreme Court case holding that an agency performs a quasi-legislative function when it promulgates rules—a power statutorily

1. O.C.G.A. §§ 50-21-20 to -37 (2002).

2. O.C.G.A. §§ 50-14-1 to -6 (2002).

3. GA. CONST. art. I, § 2, para. 9.

4. O.C.G.A. §§ 50-21-20 to -37 (2002).

5. 260 Ga. App. 905, 581 S.E.2d 410 (2003).

6. *Id.* at 905, 581 S.E.2d at 411.

7. O.C.G.A. § 50-21-24(5) (2000); 260 Ga. App. at 905-06, 581 S.E.2d at 411.

8. 260 Ga. App. at 907, 581 S.E.2d at 413.

authorized by the general assembly.⁹ In this case, state law gave the commissioners of transportation and public safety the authority to establish or alter certain speed limits, so those agencies exercised a quasi-legislative function when they established the speed limits on state highways.¹⁰ The court equated the administrative action of establishing a speed limit as a process similar to the legislative act of enacting laws.¹¹ Because the DOT's action was quasi-legislative, the DOT could not be held liable for the adverse consequences of such action, regardless of whether it was negligent.¹²

The ante litem notice provision of the GTCA¹³ seems to trip up at least one litigant in the appellate courts during every survey period. For this Article, the unlucky litigant was Jessica Dempsey. Ms. Dempsey was a University of Georgia student who was injured when a tree limb fell on her. Apparently, a grounds maintenance employee was trimming trees on the campus, and Ms. Dempsey had the misfortune of getting in the way. A university official sent a first class letter to the Department of Administrative Services Risk Management Division to relate the circumstances surrounding Ms. Dempsey's injuries and the possible need for further treatment.¹⁴ The university official purportedly told Ms. Dempsey the letter was being sent "so that her claim would comply with the notice requirements of the Georgia Tort Claims Act (GTCA)."¹⁵ After communicating with insurance adjusters for the state, Ms. Dempsey filed suit against the Board of Regents of the University System of Georgia. The trial court granted the Board's motion to dismiss premised on improper ante litem notice.¹⁶

On appeal Dempsey argued three propositions: (1) substantial compliance, (2) reliance on the actions of a university official, and (3) actual notice of the claim.¹⁷ The court of appeals decided against the first argument, citing a string of appellate court cases mandating a strict interpretation of the notice requirement and requiring that strict compliance be demonstrated.¹⁸ With respect to the second argument,

9. *Id.* at 906, 581 S.E.2d at 412 (citing *Long v. State*, 202 Ga. 235, 42 S.E.2d 729 (1947)).

10. *Id.* at 906-07, 581 S.E.2d at 412; *see* O.C.G.A. §§ 40-6-181 to -182 (2001).

11. 260 Ga. App. at 907, 581 S.E.2d at 412.

12. *Id.*, 581 S.E.2d at 413.

13. O.C.G.A. § 50-21-26 (2002).

14. *Dempsey v. Bd. of Regents of the Univ. Sys. of Ga.*, 256 Ga. App. 291, 291, 568 S.E.2d 154, 154-55 (2002).

15. *Id.*, 568 S.E.2d at 155.

16. *Id.* at 291-92, 568 S.E.2d at 155.

17. *Id.* at 292-94, 568 S.E.2d at 155-56.

18. *Id.* at 293, 568 S.E.2d at 156.

the court refused to allow waiver to be asserted against the agency employee, even though plaintiff relied on the university official to give proper notice.¹⁹ Finally, the court deemed the actual notice argument irrelevant.²⁰ Accordingly, because subject matter jurisdiction was dependent upon giving proper ante litem notice, the trial court's dismissal was affirmed.²¹

The last GTCA case during the survey period was *Department of Transportation v. Montgomery Tank Lines, Inc.*²² This was an admittedly novel case before the supreme court. Certiorari was granted to settle whether the GTCA allows the state to be held liable for contribution or indemnity claims based upon an agency's or employee's status as a joint tortfeasor.²³ In the cases combined on appeal, defendant tortfeasors in the original pleadings settled wrongful death actions and subsequently sought contribution or indemnity from the DOT based upon negligent design and maintenance of an intersection.²⁴

The DOT defended the actions by urging a narrow interpretation of the term "loss," as defined in the GTCA.²⁵ Under the DOT's view, contribution or indemnity could not be a recoverable loss because the statutory definition is limited to first-party losses.²⁶ Because contribution and indemnity payments are not included in the statute's definition, and because the enlargement clause of the list provided in that definition pertains only to other first-party losses, no recognized loss could be proven or awarded in these cases.²⁷

The court of appeals rejected the DOT's argument, stating that the DOT could be held liable for contribution or indemnity if it could have been named under the GTCA as a defendant tortfeasor in the original action.²⁸ The supreme court arrived at the same conclusion, citing a consistent holding from the United States Supreme Court.²⁹ According to the court, if the DOT could have been sued in an original action under

19. *Id.* at 294, 568 S.E.2d at 157.

20. *Id.*

21. *Id.*

22. 276 Ga. 105, 575 S.E.2d 487 (2003).

23. *Id.* at 105, 575 S.E.2d at 488.

24. *See* Dep't of Transp. v. Montgomery Tank Lines, Inc., 253 Ga. App. 143, 143, 558 S.E.2d 723, 723 (2002); and Dep't of Transp. v. Fed. Express Corp., 254 Ga. App. 149, 149, 561 S.E.2d 470, 470 (2002).

25. 276 Ga. at 106-07, 575 S.E.2d at 489; *see generally* O.C.G.A. § 50-21-22(3) (2002).

26. 276 Ga. at 106-07, 575 S.E.2d at 489; *see* O.C.G.A. § 50-21-22(3) (2002).

27. 276 Ga. at 107, 575 S.E.2d at 489.

28. 253 Ga. App. at 145, 558 S.E.2d at 725.

29. 276 Ga. at 108, 575 S.E.2d at 490 (citing *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951)).

one of the causes of action listed as exceptions under O.C.G.A. section 50-21-24, then bringing a subsequent claim for contribution or indemnity is not barred by sovereign immunity.³⁰

As illustrated above, sometimes the defenses and immunities asserted by agencies are not successful. The Evans County Board of Commissioners had such an experience when it was sued by the local newspaper for a violation of the Open Meetings Act.³¹ After the trial court found a violation of the Act, the court of appeals entertained questions concerning the violation and remanded the case to the trial court with instructions to consider whether to award attorney fees.³² The trial court held a hearing, and it was stipulated that the local newspaper had attorney fees totaling \$21,320.63. Of this total, \$9,699.88 was for the lower court litigation. The trial court awarded the newspaper attorney fees for both the trial work and the first appellate case, despite the board of commissioners' argument that only the trial court litigation should be subject to the award. In compliance with the appellate court's instructions, the trial court found that the violation of the Open Meetings Act by the board of commissioners lacked substantial justification. In response the board of commissioners reminded the trial court of its prior finding that there had been no bad faith exhibited by the board of commissioners in its actions, and argued that this must preclude the trial court's finding that the board's actions were without substantial justification.³³

The court of appeals had explained the difference between acting without substantial justification and exhibiting bad faith in the prior appeal.³⁴ The question of first impression in the second appeal was whether a trial court could award attorney fees for the appellate work occasioned by the appeal of the original judgment by the board of commissioners.³⁵ Ruling in accordance with what the appellate court felt was a consensus of opinion under open government laws from other states, the pronouncement was as follows: "We hold that the Act permits recovery of costs and attorney fees for litigation in appellate courts when such costs and fees otherwise would be compensable under [O.C.G.A. section] 50-14-5(b)."³⁶

30. *Id.* at 110, 575 S.E.2d at 492.

31. *Evans County Bd. of Comm'rs. v. Claxton Enter.*, 255 Ga. App. 656, 566 S.E.2d 399 (2002); O.C.G.A. §§ 50-14-1 to -6 (2002).

32. *Claxton Enter. v. Evans County Bd. of Comm'rs*, 249 Ga. App. 870, 870, 549 S.E.2d 830, 830 (2001).

33. 255 Ga. App. at 657-58, 566 S.E.2d at 401.

34. 249 Ga. App. at 877-78, 549 S.E.2d at 836-37.

35. 255 Ga. App. at 659, 566 S.E.2d at 402.

36. *Id.*

Three reasons were asserted for staying with the consensus.³⁷ First, the pertinent statute itself did not mention the term “trial court”; rather, the term “proceeding” was used and could apply to a variety of judicial forums.³⁸ Second, citing prior cases, the court concluded that allowing appellate costs and fees was a good public policy decision and could provide the resources from which private actions to enforce the Open Meetings Act could be followed to the conclusion of litigation.³⁹ Third, the court of appeals noted that the Open Meetings Act does not allow appellate courts to award attorney fees; the Act only allows superior courts to award costs and attorney fees.⁴⁰ If an individual was not permitted to recover costs and attorney fees for litigation in appellate courts, the resulting inequity could eventually frustrate attempts at private enforcement of the Open Meetings Act.⁴¹

III. STANDARDS FOR REVIEW OF AGENCY DECISIONS

A. *The “Any Evidence” Rule*

The “any evidence” rule is derived from interpretations of O.C.G.A. section 50-13-19(h).⁴² During the survey period, two good cases were handed down concerning the “any evidence” rule.⁴³ In *Professional Standards Commission v. Smith*,⁴⁴ Smith was an elementary school teacher accused of providing his students with answers to standardized tests. An administrative law judge conducted a hearing on whether Smith should be disciplined based on the accusations. One teacher’s testimony was hearsay of what students had told her. Another teacher testified that he had gone to Smith’s classroom and found copies of the standardized tests, complete with the students’ names and practice grades. The administrative law judge only admitted the copies as evidence to show that the copies were found in Smith’s classroom and had been used. The administrative law judge suspended Smith’s teaching certificate for six months. The Professional Standards Commission affirmed the decision, and Smith appealed to superior court. The superior court reversed, holding that the hearsay testimony and the

37. *Id.* at 659-60, 566 S.E.2d at 402-03.

38. *Id.* at 659, 660, 566 S.E.2d at 402, 403.

39. *Id.* at 659, 566 S.E.2d at 402.

40. *Id.* at 659-60, 566 S.E.2d at 402-03; *see* O.C.G.A. § 50-14-5 (1998).

41. 255 Ga. App. at 659, 566 S.E.2d at 402.

42. O.C.G.A. § 50-13-19(h) (2002).

43. *See* *Prof'l Standards Comm'n v. Smith*, 257 Ga. App. 418, 571 S.E.2d 443 (2002); *Infinite Energy, Inc. v. Ga. Pub. Serv. Comm'n*, 257 Ga. App. 757, 572 S.E.2d 91 (2002).

44. 257 Ga. App. 418, 571 S.E.2d 443 (2002).

documentary evidence were inadmissible. The case was remanded for a new hearing, but the Professional Standards Commission appealed.⁴⁵

Specifically citing the any evidence rule,⁴⁶ the court of appeals examined the administrative law judge's reasons for ruling that the documentary evidence was admissible.⁴⁷ In the court's view, there was sufficient evidence to support the administrative law judge's decision even after treating portions of the submissions as inadmissible or admissible only for limited purposes, as the administrative law judge had done.⁴⁸ Smith admitted that the materials were found in his classroom and that he used standardized test materials as "diagnostic tests."⁴⁹ The court also noted that, under undisputed testimony, all standardized tests constituted materials that teachers were only allowed to have when the students were taking the test.⁵⁰

Taking the available admissible evidence as a whole and applying the any evidence rule, the court reversed the superior court, holding that the administrative law judge received sufficient evidence to find that Smith had committed the alleged violations.⁵¹ Relying on *Handcrafted Furniture v. Black*,⁵² the court opined, "As factfinder, [the administrative law judge] had the exclusive prerogative of weighing evidence and determining the credibility of witnesses."⁵³

The second case applying the any evidence rule concerned the "true-up" procedures commonly used by gas marketers.⁵⁴ Many gas marketers used the Atlanta Gas Light distribution system, and under pertinent provisions, they had to estimate and supply Atlanta Gas Light with appropriate amounts of natural gas to deliver to the marketers' customers. Because these estimates were not exact predictions, the marketers had to true-up periodically according to actual usage. The Public Service Commission issued an initial true-up process order on September 18, 1998, which charged Atlanta Gas Light with putting

45. *Id.* at 418-20, 571 S.E.2d at 443-45.

46. *Id.* at 418, 420, 571 S.E.2d at 444, 446.

47. *Id.* at 420, 571 S.E.2d at 445.

48. *Id.*

49. *Id.*, 571 S.E.2d at 446.

50. *Id.*

51. *Id.*

52. 182 Ga. App. 115, 354 S.E.2d 696 (1987).

53. 257 Ga. App. at 420, 571 S.E.2d at 446 (citing *Handcrafted Furniture*, 182 Ga. App. at 117, 354 S.E.2d at 699).

54. *Infinite Energy, Inc. v. Ga. Pub. Serv. Comm'n*, 257 Ga. App. 757, 572 S.E.2d 91 (2002).

together true-up calculations for the marketers, but charged the marketers themselves with settling debits and credits for gas usage.⁵⁵

On April 5, 2000, the Public Service Commission approved an actual true-up settlement methodology proposed by several of the marketers and Atlanta Gas Light. This method was to be applied retroactively and affected all transactions dating back to November 1998, when gas marketers started servicing gas customers. Upon the denial of a motion for reconsideration brought by Infinite Energy, a petition for review was filed in superior court. Infinite Energy argued that the commission's order should not relate back to November 1, 1998, but the superior court disagreed and affirmed the decision of the Public Service Commission.⁵⁶

On appeal Infinite Energy asserted that the superior court used a "clearly erroneous" standard when evaluating the legal reasoning. This argument was based on the fact that the superior court judge's order did not state that the Public Service Commission's conclusions of law were subject to de novo review.⁵⁷ The appellate court noted that while courts review findings of fact only to determine whether there was evidence supporting the finding, all conclusions of law are reviewed de novo.⁵⁸ However, the appellate court refused to hold that the lower court used an erroneous standard of review simply because the order did not recite a standard.⁵⁹ To support its holding, the court reasoned that the order itself showed no improper review, and Infinite Energy did not reveal any such issue.⁶⁰

Additionally, the appellate court addressed Infinite Energy's argument that the issue of whether the gas marketers were on notice that they were required to resolve the gas volume differentials was a question of law, which the court should have reviewed de novo.⁶¹ The court rejected this argument and labeled the notice issue as a question of fact.⁶²

The court of appeals summarily rejected Infinite Energy's other two arguments.⁶³ Infinite Energy asserted that the superior court should have found that the Public Service Commission acted in an arbitrary and capricious manner when it overturned its own September 18, 1998

55. *Id.* at 757, 572 S.E.2d at 91-93.

56. *Id.* at 758, 572 S.E.2d at 93.

57. *Id.*

58. *Id.*

59. *Id.* at 759, 572 S.E.2d at 93.

60. *Id.*

61. *Id.*, 572 S.E.2d at 94.

62. *Id.*

63. *Id.* at 759-60, 572 S.E.2d at 94.

true-up order and substituted it with the April 5, 2000 order.⁶⁴ The court disagreed and categorized the later order as a mere amendment, which contained the means to implement its prior order that a true-up should take place.⁶⁵ In other words, the Public Service Commission had already ordered that the gas marketers were responsible for the true-up of gas volume differentials, and in its later order, it provided the methodology for doing so.⁶⁶

The final argument presented was a little far fetched. The superior court judge's statements at the hearing were allegedly contrary to the order subsequently entered.⁶⁷ How this was relevant as an enumeration of error is unexplained in the case, but it certainly was not accepted by the court of appeals.⁶⁸

B. Plain Meaning of Statutes

*Cox v. Barber*⁶⁹ concerned whether the plain meaning of a residency requirement could be applied in a constitutional manner despite an implicit latent ambiguity in the statute. In 1998 the general assembly established that members of the Public Service Commission, although elected statewide, must reside within geographic districts as provided in relevant statutes.⁷⁰ In part, the new requirement provided that to be eligible for election, a candidate on the ballot "must have resided in that district for at least 12 months prior to election thereto."⁷¹

Mac Barber had been a resident of Jackson County, what was then district four, until becoming a legal resident of Banks County on January 15, 2002. At its 2002 regular session, the general assembly changed the district lines for the district four Public Service Commission seat, no longer including Jackson County. However, it did include Banks County.⁷²

Upon Barber's attempt to qualify for the district four seat, his opponent entered an eligibility challenge. The administrative law judge ruled that the residency requirement had not been met, and the Secretary of State adopted the initial decision of the administrative law

64. *Id.* at 759, 572 S.E.2d at 94.

65. *Id.* at 759-60, 572 S.E.2d at 94.

66. *Id.* at 760, 572 S.E.2d at 94.

67. *Id.*

68. *Id.*

69. 275 Ga. 415, 568 S.E.2d 478 (2002).

70. O.C.G.A. § 46-2-1 (Supp. 2003).

71. *Id.*

72. 275 Ga. at 416-17, 568 S.E.2d at 479-80. The statutory change to O.C.G.A. § 46-2-1 is found at 2002 Ga. Laws 359, §§ 1, 2.

judge as the final agency decision as provided under O.C.G.A. section 50-13-17.⁷³

On appeal to the superior court, Barber prevailed. He was a resident of Jackson County in November 2001, one year before the election date. Because Jackson County was in district four one year before the election date, it would be unconstitutional to interpret the 2002 legislation in a manner to disqualify Barber as not residing within the district for one year prior to the election.⁷⁴

The question for the supreme court was how to interpret the statute.⁷⁵ Must candidates have lived within the district four territory, as defined in the 2002 enactment of the general assembly, for one year before the November election in 2002, or was it sufficient that the candidate resided in the district four territory as it had been defined one year prior to the election date? Barber, of course, urged that the superior court made the correct choice. Logic dictated that the choice must have been correct, because the district lines had not even been in existence for twelve months prior to the general election date.⁷⁶

The supreme court held otherwise.⁷⁷ Barber's equal protection argument was analyzed under the rational relationship test.⁷⁸ The court determined that an interpretation requiring twelve months' residence in the territory of the district as it exists on the date of the election was "rationally related to the state's legitimate interests in fostering informed voters and promoting knowledgeable and responsive candidates with ties to the community."⁷⁹

Whether this decision was correct or not, the interpretation was consistent with that of the residency requirement for state legislators under the constitution.⁸⁰ One must only look at the reapportionment process for state legislators after a decennial census to find many examples of the application of this interpretation. Sometimes two or more incumbents in the same house of the general assembly find themselves in the same district. They must either enter a tough re-election race against a fellow incumbent or quickly change their residences.

73. 275 Ga. at 416, 568 S.E.2d at 479-80; O.C.G.A. § 50-13-17 (2002).

74. 275 Ga. at 416, 568 S.E.2d at 479-80.

75. *Id.*

76. *Id.*

77. *Id.* at 419, 568 S.E.2d at 482.

78. *Id.* at 418, 568 S.E.2d at 481.

79. *Id.* at 419, 568 S.E.2d at 482.

80. GA. CONST. art. III, § 2, para. 3.

C. Agency Deference

This Article reviews only one case illustrating the principle that an agency's statutory interpretation is entitled to deference in a court review. However, in this case, the agency was wrong. In *Department of Community Health v. Freels*,⁸¹ the parents of a five-year-old child with cerebral palsy sought reimbursement from the Department of Community Health's Medicaid program for hyperbaric oxygen therapy. The attending physician requested payment for the therapy, and the department's physician panel conducted a review and denied the requested sums. The parents then requested an administrative hearing.⁸²

The patient's father and an expert in hyperbaric medicine testified at the hearing. The expert testified that the therapy effectively delivered oxygen to the adversely affected area of the child's brain. He also showed that certain scans revealed increased blood flow, which may have restored more normal bodily functions. The results of the scans were accompanied by improvement in the patient's speech. The department called two experts, and both refuted any biological reasons why the therapy would be beneficial. Citing the department's witnesses, the department decided not to reimburse the parents for the costs of the hyperbaric oxygen therapy.⁸³

On appeal the superior court reversed the agency's decision. The judge determined that the department's legal analysis of the applicable governing provisions was incorrect, and the department's focus on the medical necessity of the treatments was the wrong standard.⁸⁴

The Department of Community Health took the matter to the court of appeals. The department argued that the standards used to evaluate whether the costs of the therapy would be reimbursed were permissible under the governing federal provisions of the Medicaid program. Additionally, the department argued that state rules were a permissible implementation of the Medicaid program in a consistent manner.⁸⁵

The court of appeals strongly disagreed with the department's assertion.⁸⁶ While noting that agency interpretations are entitled to deference,⁸⁷ the court stated that the department followed its own

81. 258 Ga. App. 446, 576 S.E.2d 2 (2002).

82. *Id.* at 446-47, 576 S.E.2d at 3-4.

83. *Id.* at 446-48, 576 S.E.2d at 3-5.

84. *Id.* at 448, 576 S.E.2d at 5.

85. *Id.* at 450, 576 S.E.2d at 6.

86. *Id.*

87. *Id.* at 449, 576 S.E.2d at 5.

rules, not the governing federal statute, when it decided not to reimburse.⁸⁸ Instead of deciding whether the chosen hyperbaric oxygen therapy “was necessary to correct or ameliorate [the child’s] physical condition,”⁸⁹ the department based its denial on medical necessity and standards of practice.⁹⁰ Medical necessity was not a requirement under the governing federal statute, so the department was incorrect.⁹¹

The appellate court affirmed in part, reversed in part, and remanded because the superior court failed to apply the any evidence rule regarding the determinations of fact.⁹² The department, not the reviewing court, should have decided whether the expert witnesses were qualified and which ones, if any, should be relied upon.⁹³

IV. VALIDITY OF RULES

The largest number of cases addressed in this Article concerned various attacks on the rules of agencies and governmental subdivisions. The first case was *Albany Surgical, P.C. v. Department of Community Health*.⁹⁴ One of the Department of Community Health’s duties was to enforce the Certificate of Need Act⁹⁵ to prevent unbridled capital expenditures on health care facilities and services. Albany Surgical sought a declaratory judgment in superior court regarding department rules, which provided that an ambulatory surgical center used for general surgery was not within the Certificate of Need program’s exemption for single specialties.⁹⁶ Albany Surgical appealed the grant of summary judgment in favor of the department.⁹⁷

Reviewing the lower court’s decision, the court of appeals considered two issues: first, whether the regulations were authorized by the legislature, and second, whether the regulations were reasonable.⁹⁸ Deciding both questions affirmatively, the court of appeals affirmed the lower court’s holding.⁹⁹ With respect to the first question, the court

88. *Id.* at 450, 576 S.E.2d at 6.

89. *Id.* (quoting *Freels v. Comm’r*, No. 01-CV-2932-10, 2001 WL 1809412, at *4 (Ga. Sup. Ct. Oct. 10, 2001)).

90. *Id.*

91. *Id.* at 450-51, 576 S.E.2d at 6.

92. *Id.* at 452, 576 S.E.2d at 7.

93. *Id.*

94. 257 Ga. App. 636, 572 S.E.2d 638 (2002).

95. O.C.G.A. § 31-6-40 (2002).

96. 257 Ga. App. at 636-37, 572 S.E.2d at 640. The rules in question were Ga. Comp. R. & Regs. R. 272-2-.01(19)(h)3, 272-2-.09(1)(b)10 (2002).

97. 257 Ga. App. at 636, 572 S.E.2d at 640.

98. *Id.* at 637, 572 S.E.2d at 641.

99. *Id.* at 636, 572 S.E.2d at 640.

determined that O.C.G.A. section 33-6-21(b)(4)¹⁰⁰ expressly granted authority for the department to make rules implementing the Certificate of Need Act.¹⁰¹ When the general assembly enacted the single specialty surgical center exemption from Certificate of Need requirements in 1991, there was already a promulgated regulation excluding general surgery from a predecessor exemption called the “limited purpose ambulatory surgical program.”¹⁰² The appellate court reasoned that the department’s actions must have followed the legislature’s intent for two reasons: (1) the legislature was presumed to be aware of those provisions existing at the time of the subsequent promulgation at issue, and (2) in 1998 the general assembly did not object to the regulation requiring a Certificate of Need for a multispecialty general surgery center.¹⁰³

The second question before the court, determining whether the regulation was reasonable, required a much simpler analysis. The Certificate of Need was meant to limit unnecessary duplication of health care facilities and services within close geographical proximity.¹⁰⁴ The regulation subjecting ambulatory surgical centers practicing general surgery to the Certificate of Need Act requirements followed that intent and was not unreasonable.¹⁰⁵

*United American Insurance Co. v. Insurance Department of Georgia*¹⁰⁶ concerned the rejection of Medicare supplement insurance rates as filed by the insurer under O.C.G.A. section 33-43-4.¹⁰⁷ Under the applicable statutes and regulations, which had been promulgated to implement the regulatory framework for such policies, United American was obligated to make its rate filing using proper actuarial principles. Because the premiums received by such insurers would be invested for a short time, actuarial standards recognized that income would be generated from these investments and required the filing to include an interest assumption. United American did not use an interest assumption in its rate filing.¹⁰⁸

100. O.C.G.A. § 33-6-21(b)(4) (2000).

101. 257 Ga. App. at 637-38, 572 S.E.2d at 641.

102. *Id.* at 639, 572 S.E.2d at 642. The enactment was an amendment to O.C.G.A. section 31-6-2(14)(G)(iii) by 1991 Ga. Laws 1871. The former regulation was Ga. Comp. R. & Regs. R. 272-2-.09 (2002).

103. 257 Ga. App. at 639, 572 S.E.2d at 642.

104. *Id.* at 640, 572 S.E.2d at 643.

105. *Id.*

106. 258 Ga. App. 735, 574 S.E.2d 830 (2002).

107. *Id.* at 735, 574 S.E.2d at 830; O.C.G.A. § 33-43-4 (2002).

108. 258 Ga. App. at 736-37, 574 S.E.2d at 831-32.

Out of the approximately 150 filings for Medicare supplement premium changes pending, United American and one of its affiliates were the only filings without interest assumptions. The department rejected United American's rate filing because it did not comply with applicable provisions of law and regulations, and the insurer failed to provide requested additional information. The superior court affirmed the ruling.¹⁰⁹

On appeal United American questioned the rejection of its filing and the terms of the Commissioner's order, which required the insurer to go back to the inception of its Medicare supplement business and recalculate its loss ratios to account for the interest assumption that should have been made. United American argued that the department had approved every rate filing it had submitted prior to the rejected one and, accordingly, this gave the insurer the right to rely upon that approval. Thus, by ignoring past approvals, the Commissioner instituted a retroactive application of a rule.¹¹⁰

The court of appeals was not convinced.¹¹¹ The court termed the Public Service Commission's rate process as a legislative function;¹¹² in contrast, by determining "whether the proposed rates [were] calculated in accordance with the statutory formula, the Insurance Department was exercising an administrative function."¹¹³ There was no vested right to rely on the prior approved rates as a type of safe harbor.¹¹⁴ The court concluded that there was no retroactivity present in the ruling.¹¹⁵ The statutes and regulations required an annual analysis, which United American had not been performing correctly; thus, the ruling only required United American to begin using the correct formula.¹¹⁶

The next case regarding the validity of agency rules was *City of Buford v. Georgia Power Co.*¹¹⁷ Georgia Power began building a substation on its property in Buford. The city sought to enforce an ordinance that declared a one-year moratorium on the construction of substations within 500 feet of residential property. When the city issued a stop work order to Georgia Power, Georgia Power sued the city seeking

109. *Id.* at 737, 574 S.E.2d at 832.

110. *Id.* at 738, 574 S.E.2d at 833.

111. *Id.*

112. *Id.* at 739, 574 S.E.2d at 833.

113. *Id.*

114. *Id.*, 574 S.E.2d at 834.

115. *Id.* at 739-40, 574 S.E.2d at 833-34.

116. *Id.* at 739, 574 S.E.2d at 834.

117. 276 Ga. 590, 581 S.E.2d 16 (2003).

a declaratory judgment that the ordinance was unconstitutional and an injunction to keep the city from attempting to enforce that order.¹¹⁸

The trial court held that the ordinance was preempted by general state statutes. The city appealed to the supreme court.¹¹⁹ In a two-page opinion, the court affirmed the judgment of the superior court.¹²⁰ Beginning with the state constitution provision declaring that general laws preempt local or special laws,¹²¹ the court cited two reasons why the ordinance could not stand.¹²²

First, O.C.G.A. section 36-5-6(a)(5)¹²³ prohibits ordinances that interfere with the regulatory powers of the Public Service Commission for regulated business activities outside of an express power given to a city.¹²⁴ The Buford charter did not confer sufficient power upon the city to sustain the ordinance because the charter was directed only at restrictions on the use of city property.¹²⁵ Georgia Power was building on private property; therefore, the charter provision did not apply.¹²⁶

Second, the Public Service Commission was given virtually complete power to regulate electric light and power companies.¹²⁷ Citing numerous statutory provisions outlining this power, the court declared that legislative intent allowed the Public Service Commission to exercise its authority to the exclusion of the city's asserted power.¹²⁸

A novel argument asserting the unconstitutionality of a county ordinance was presented in *Board of Public Education v. Hair*.¹²⁹ Pursuant to an ordinance passed by Chatham County under O.C.G.A. section 48-5-404,¹³⁰ the county tax commissioner collected the school taxes for the school boards, and the county was paid a commission of 2.5 percent. This 2002 ordinance providing for the 2.5 percent commission replaced the 1.51 percent commission in 2001. The school board protested and pointed out that because of the increase in the county's commission, the school board was paying roughly 11 percent more than it cost the county to collect the funds. When the superior court ruled in

118. *Id.* at 590, 581 S.E.2d at 17.

119. *Id.*

120. *Id.*

121. *Id.* (citing GA. CONST. art. III, § 6, para. 4(a)).

122. *Id.* at 590-91, 581 S.E.2d at 17.

123. O.C.G.A. § 36-5-6(a)(5) (2000).

124. 276 Ga. at 590, 581 S.E.2d at 17.

125. *Id.* at 590-91, 581 S.E.2d at 17.

126. *Id.* at 591, 581 S.E.2d at 17.

127. *Id.*, 581 S.E.2d at 18.

128. *Id.* The delegated power was quoted from O.C.G.A. section 46-2-20 (1992).

129. 276 Ga. 575, 581 S.E.2d 28 (2003).

130. O.C.G.A. § 48-5-404 (1999).

favor of the county, the school board appealed to the supreme court and offered two arguments. First, the school board argued that O.C.G.A. section 48-5-404 conflicted with the applicable constitutional provisions. The board contended that the constitution provided that the local boards of education would reimburse the county for collection of school taxes, and the statute provided that the tax commissioner was entitled to a commission of a flat 2.5 percent.¹³¹ The board claimed that the statute was unconstitutional because it allowed the county to receive more money than the reimbursement amount permitted by the constitution.¹³²

The supreme court refused to accept this argument.¹³³ The constitution provided that the general assembly could set a statewide rate for such services by counties, and the general assembly had done so.¹³⁴ The court recognized that it was possible that some school boards would underpay the collecting governmental entity, while others might overpay.¹³⁵ However, the court could find nothing in the record to support the argument that 2.5 percent was an unreasonable rate for reimbursement.¹³⁶

Second, the board argued that the overpayment of costs violated the constitutional provision that school taxes can only be spent for educational purposes.¹³⁷ This argument was even weaker. Georgia law does not allow the board to collect school taxes, and constitutional provisions provide that the governmental entity collecting the taxes would be paid a statewide reimbursement rate.¹³⁸ Thus, the court reasoned that the amounts paid to the collecting entity are “a necessary and incidental public education expense, authorized under the Georgia Constitution.”¹³⁹

How do you attack agency actions if there is no rule upon which to question their validity? In *Georgia Oilmen's Ass'n v. Department of Revenue*,¹⁴⁰ the court of appeals offered potential plaintiffs a road map.¹⁴¹ The Oilmen and the Georgia Association of Convenience Stores brought a declaratory judgment action based on disagreements

131. 276 Ga. at 575-76, 581 S.E.2d at 30; see GA. CONST. art. VIII, § 6, para. 3.

132. 276 Ga. at 575-76, 581 S.E.2d at 30.

133. *Id.* at 576, 581 S.E.2d at 30-31.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 577, 581 S.E.2d at 31; see GA. CONST. art. VIII, § 6, para. 1(b).

138. 276 Ga. at 577, 581 S.E.2d at 31.

139. *Id.*

140. 261 Ga. App. 393, 582 S.E.2d 549 (2003).

141. *Id.* at 394-401, 582 S.E.2d at 549-55.

with the Department of Revenue (“DOR”) over several malt beverage distribution regulations. The trial court ruled in favor of the DOR on all of the questioned regulations, but granted summary judgment for the Oilmen based on an interpretive DOR rule on split deliveries. Both sides appealed, and the cases were consolidated for review.¹⁴²

The malt beverage distribution regulations were upheld by the court of appeals as reasonable and not in conflict with the constitution or general statutes.¹⁴³ The interesting part of the case is the Department of Revenue’s appeal. The department argued that the superior court mistakenly granted summary judgment to the Oilmen based on the prohibition of split deliveries. The prohibited conduct was for a wholesaler to receive a single malt beverage order, but then for the wholesaler to deliver the order in parts to more than one retailer.¹⁴⁴ The trial court “declared this ‘rule’ invalid because it was not published and was unreasonable.”¹⁴⁵

The court of appeals reversed, determining that the prohibition was not a rule but merely an interpretation of other statutes and rules.¹⁴⁶ Pursuant to O.C.G.A. section 50-13-11,¹⁴⁷ the way to attack an agency’s interpretive rule is to request a declaratory ruling from the agency.¹⁴⁸ The DOR’s rules specifically provided that an entity could seek a declaratory ruling on the applicability of a rule.¹⁴⁹ If the Oilmen did not get relief under the agency’s declaratory ruling, the Oilmen could then file an appeal to superior court.¹⁵⁰

Because a decision on the split deliveries prohibition was not pursued through the appropriate administrative procedures applicable to questions of interpretation by the agency, no original declaratory judgment action brought in superior court would lie against the DOR.¹⁵¹ Sovereign immunity, which is waived for challenges of rules appropriately brought under O.C.G.A. section 50-13-10,¹⁵² remained

142. *Id.* at 393-94, 582 S.E.2d at 550.

143. *Id.* at 395-99, 582 S.E.2d at 551-55.

144. *Id.* at 399, 582 S.E.2d at 555.

145. *Id.*

146. *Id.* at 400-01, 582 S.E.2d at 555.

147. O.C.G.A. § 50-13-11 (2002).

148. 261 Ga. App. at 399, 582 S.E.2d at 554.

149. *Id.* at 400, 582 S.E.2d at 554. The agency rule is Ga. Comp. R. & Reg. R. 560-1-1-.10 (2001).

150. 261 Ga. App. at 400, 582 S.E.2d at 554.

151. *Id.* at 401, 582 S.E.2d at 555.

152. O.C.G.A. § 50-13-10 (2002).

intact, and the motion to dismiss filed by the DOR should have been granted.¹⁵³

V. DIRECT APPEAL OR APPLICATION TO APPEAL

Appellate case reports are full of instances in which litigants have chosen the wrong procedure to obtain appellate review of cases. *Ferguson v. Composite State Board of Medical Examiners*¹⁵⁴ adds one more to the list. Ferguson requested that the Board of Medical Examiners reinstate his license to practice medicine, and the board denied his petition. Instead of appealing the denial to superior court, Ferguson filed for a writ of mandamus. Upon a ruling in favor of the board, Ferguson filed a direct appeal and an application for discretionary appeal.¹⁵⁵ The supreme court reviewed the application for discretionary appeal and denied it on the merits.¹⁵⁶ The court took the opportunity presented by the direct appeal to remind the legal community of the precedent set in *Rebich v. Miles*.¹⁵⁷

Ferguson questioned a ruling by the board, and although he brought an original petition for mandamus, he instead could have appealed the ruling.¹⁵⁸ Under O.C.G.A. section 5-6-35,¹⁵⁹ the review of a superior court decision regarding agency actions should always be pursued by an application for discretionary appeal.¹⁶⁰ The supreme court fashioned its warning to lawyers as follows:

Accordingly, we again caution litigants that before proceeding to this Court, a party should always 'review the discretionary application statute to see if it covers the underlying subject matter of the appeal. If it does, then the party MUST file an application for appeal as provided under [O.C.G.A. section] 5-6-35.'¹⁶¹

In *Ferguson* the court re-examined the direct appeal in *Sprayberry v. Dougherty County*¹⁶² and distinguished it from the *Ferguson* facts.¹⁶³ In *Sprayberry* the owners filed for a mandamus to seek relief from the issuance of a zoning variance. Although the "underlying matter" in

153. 261 Ga. App. at 401, 582 S.E.2d at 555.

154. 275 Ga. 255, 564 S.E.2d 715 (2002).

155. *Id.* at 255-56, 564 S.E.2d at 716-17.

156. *Id.* at 256, 564 S.E.2d at 716-17.

157. *Id.*, 564 S.E.2d at 717; see *Rebich v. Miles*, 264 Ga. 467, 448 S.E.2d 192 (1994).

158. 275 Ga. at 256, 564 S.E.2d at 717.

159. O.C.G.A. § 5-6-35 (1995).

160. 275 Ga. at 256, 564 S.E.2d at 717.

161. *Id.* at 257, 564 S.E.2d at 717 (quoting *Rebich*, 264 Ga. at 469, 448 S.E.2d at 194).

162. 273 Ga. 503, 543 S.E.2d 29 (2001).

163. *Ferguson*, 275 Ga. at 257-58, 564 S.E.2d at 718.

Sprayberry was the zoning decision, the property owners did not try to avoid the administrative process or a discretionary appeal because they were not parties to the administrative case in which the variance was issued.¹⁶⁴ This distinction may have warranted a different result.

VI. RECENT LEGISLATION

The general assembly was extremely busy during the survey period with another regular session of record length. In spite of severe budget constraints, there continued to be a high level of activity for changes in agencies, perhaps owing to the presence of a new governor. Among the highlights were the following:

1. The Georgia Motor Vehicle Franchise Practices Act¹⁶⁵ will now be enforced by the commissioner of motor vehicle safety instead of the state revenue commissioner;¹⁶⁶

2. The Geo. L. Smith II Georgia World Congress Center Authority Overview Committee received changes to its composition and appointments of members;¹⁶⁷

3. The Oconee River Greenway Authority revised membership and purposes, along with a new power to organize a subsidiary nonprofit corporation;¹⁶⁸

4. Because of new provisions for criminal defense of indigent persons in the Georgia Indigent Defense Act,¹⁶⁹ the old Georgia Indigent Defense Council was abolished, and a new Georgia Public Defender Standards Council was created;¹⁷⁰

5. The governing bodies for the Georgia Student Finance Commission, the Georgia Student Finance Authority, and the Georgia Student Finance Corporation were revised;¹⁷¹

6. The Georgia Fire Fighter Standards and Training Council received revised composition, appointment provisions, and terms;¹⁷²

7. The War on Terrorism Local Assistance Act¹⁷³ created entities for each county and city in Georgia to be known as a public safety and

164. *Id.* at 258, 564 S.E.2d at 718.

165. O.C.G.A. §§ 10-1-620 to -670 (2002).

166. 2003 Ga. Laws 445, 447-48, § 2 (amending O.C.G.A. §§ 10-1-665 to -68 (2000)).

167. *Id.* at 386-87, § 1 (amending O.C.G.A. § 10-9-20 (2000)).

168. *Id.* at 448-50, §§ 1-5 (amending O.C.G.A. §§ 12-3-401 to -404 (2001)).

169. *Id.* at 191-217, § 1 (amending O.C.G.A. §§ 17-12-1 to -128 (2002)).

170. *Id.* at 191-222, §§ 1-9 (amending various titles of the O.C.G.A.).

171. *Id.* at 158-69, §§ 1-8 (amending O.C.G.A. §§ 20-3-234, -264, -265, -312, -314, -315, -344, and -374 (2001)).

172. *Id.* at 888, 891-94, §§ 5-7 (amending O.C.G.A. §§ 25-4-3, -7 (2003) and enacting new O.C.G.A. § 25-4-7.1 (2003)).

173. O.C.G.A. §§ 36-75-1 to -10 (Supp. 2003).

judicial facilities authority, to be activated by ordinance or resolution,¹⁷⁴

8. The Georgia Athlete Agent Regulatory Commission and the Georgia Athletic and Entertainment Commission received lengthy revisions;¹⁷⁵ and

9. The Advisory Board on Anatomical Gift Procurement now must have an organ recipient as a board member.¹⁷⁶

Four specific enactments will directly affect agency conduct, rules, and operations:

1. Rules of the Department of Human Resources will by statute supersede those of a county board of health in the event of conflict;¹⁷⁷

2. The Open Meetings Law¹⁷⁸ will not apply to the discussion of otherwise public records that are exempt from inspection;¹⁷⁹

3. Related to the above, the Open Records Act¹⁸⁰ will exempt from public inspection any record for which disclosure could compromise security against sabotage or terrorism;¹⁸¹ and

4. The Open Records Act now exempts public records which would identify a person calling the 911 system, unless the request is made in a criminal proceeding and only then for certain purposes.¹⁸²

174. 2003 Ga. Laws 862-71, § 1 (enacting new Chapter 75 in Title 36 of the O.C.G.A. (2003)).

175. *Id.* at 774-93, §§ 1-32 (amending O.C.G.A. §§ 43-4A, -4B (2002)).

176. *Id.* at 567-68, § 1 (amending O.C.G.A. § 44-5-149 (1991)).

177. *Id.* at 569, § 1 (amending O.C.G.A. § 31-2-4 (2001)).

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

179. 2003 Ga. Laws 880, § 1 (amending O.C.G.A. § 50-14-3 (2002)).

180. O.C.G.A. §§ 50-18-70 to -77 (2002).

181. 2003 Ga. Laws 880-81, § 2 (amending O.C.G.A. § 50-18-72 (2002)).

182. *Id.* at 602-03, § 1 (amending O.C.G.A. § 50-18-72 (2002)).