

Administrative Law

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I. INTRODUCTION AND OVERVIEW

Administrative procedure is rarely the topic of after-hours conversations, trailing far behind baseball scores, what to eat, and famous personalities. However, the continuing creep of influence of administrative agencies impacts daily life far beyond casual observations. It is the work of administrative agencies that propels government on all fronts. This Article surveys chosen cases from the Georgia Supreme Court and the Georgia Court of Appeals from June 1, 2008 through May 31, 2009.¹ Cases from specific subject areas that one would expect to see in other articles contained in this volume have not been included unless points regarding administrative law or procedures were especially important.

This Article first reviews cases concerning the “any evidence” rule and then moves to exhaustion of administrative remedies. The Article then shifts to the defenses posed by agencies once proceedings have begun. Next, other standards for review of agency decisions are covered. Finally, legislation affecting the various state agencies, as passed by the Georgia General Assembly during its 2009 regular session, is noted.

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1. For analysis of Georgia administrative law during the prior survey period, see Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 1 (2008).

II. THE “ANY EVIDENCE” RULE

In several cases decided during this year’s survey period, the Georgia Court of Appeals addressed the “any evidence” rule and put limits on a court’s discretion in reviewing such cases. In the first case, *Glass v. City of Atlanta*,² the court of appeals held that the any evidence standard is applicable to the superior court’s review of an Atlanta Civil Service Board’s decision.³ On appeal, the board’s decision is to be “[v]iewed in a light most favorable to the Board, and with every presumption in favor of the Board’s decision indulged.”⁴ Officer Stuart Glass, a member of the Atlanta Police Department, was alleged to have used excessive force following an altercation while on a routine patrol. After an internal review, Glass was dismissed from the Atlanta Police Department.⁵

Glass appealed his dismissal to the board. The board heard testimony from the officers involved in the incident, a police academy instructor, and the former police chief, who all testified that Glass’s actions constituted impermissible excessive force. In addition, the emergency room physician who examined the victim also testified that the victim’s symptoms were consistent with the use of excessive force. The board issued an order affirming Glass’s dismissal. Thereafter, Glass appealed, and the superior court affirmed the board’s decision.⁶

Heard on discretionary appeal, the court of appeals determined that “[t]he appropriate standard of review to be applied to issues of fact on writ of certiorari to the superior court is whether the decision below was supported by any evidence.”⁷ The court further explained that, on appeal, “our duty is not to review whether the record supports the superior court’s decision but whether the record supports the initial decision of the local governing body or administrative agency.”⁸ Glass asserted that the evidence presented to the board was insufficient to support the board’s decision, “arguing that there was conflicting testimony, that some of the testimony against him constituted hearsay, and that some of the witnesses who testified against him were not

2. 293 Ga. App. 11, 666 S.E.2d 406 (2008).

3. *See id.* at 13–14, 666 S.E.2d at 408–09.

4. *Id.* at 12, 666 S.E.2d at 407 (citing *City of Atlanta v. Harper*, 276 Ga. App. 460, 461, 623 S.E.2d 553, 554 (2005)).

5. *Id.* at 12–13, 666 S.E.2d at 408.

6. *Id.* at 13, 666 S.E.2d at 408.

7. *Id.* at 13–14, 666 S.E.2d at 408–09 (quoting *City of Atlanta Gov’t v. Smith*, 228 Ga. App. 864, 865, 493 S.E.2d 51, 53 (1997)).

8. *Id.* at 14, 666 S.E.2d at 409 (quoting *Emory Univ. v. Levitas*, 260 Ga. 894, 898, 401 S.E.2d 691, 695 (1991), *overruled on other grounds by* *Pruitt Corp. v. Ga. Dep’t of Cmty. Health*, 284 Ga. 158, 161 n.4, 664 S.E.2d 223, 226 n.4 (2008)).

credible.”⁹ Dismissing these arguments, the court clarified that “[e]ven evidence which barely meets the any evidence standard is sufficient, and the presence of conflicting evidence nonetheless meets that standard.”¹⁰ Accordingly, the court of appeals held there was sufficient evidence to support the board’s decision.¹¹

Glass also contended that the board violated his due process rights by failing to conduct a hearing on the appeal within sixty days, pursuant to former City of Atlanta Code of Ordinances § 5-3064(1),¹² and by failing to conduct the hearing on consecutive days.¹³ In response, the court distinguished between directory and mandatory statutory provisions.¹⁴ When there is no injury to the defendant and no penalty provided in the statute, the provision is directory.¹⁵ Because the cited provision provided no penalty for failure to comply, the statute was directory, not mandatory.¹⁶ In addition, Glass failed to cite any provision in the ordinance that required the hearing to be held on consecutive days.¹⁷ Finally, Glass did not demonstrate that he was harmed by the delay of his hearing.¹⁸ While affirming the decision of the superior court, the court of appeals reprimanded the superior court for the twelve-year delay between Glass’s appeal from the board’s decision and the hearing in superior court.¹⁹

In the next case decided during the survey period, *Greene v. Department of Community Health*,²⁰ the court of appeals held that the any evidence standard of review is not applicable to an internal agency decision.²¹ Anthony Greene appealed the termination of his medical benefits by the Department of Community Health (DCH). An evidentiary hearing was held before an administrative law judge (ALJ), who affirmed the DCH’s decision.²² Greene then appealed under section 49-

9. *Id.*

10. *Id.* (internal quotation marks omitted) (quoting *Dep’t of Cmty. Health v. Pruitt Corp.*, 284 Ga. App. 888, 890, 645 S.E.2d 13, 15 (2007), *rev’d*, 284 Ga. 158, 664 S.E.2d 223 (2008)).

11. *Id.*

12. ATLANTA, GA., CODE OF ORDINANCES § 5-3064(1) (repealed).

13. *Glass*, 293 Ga. App. at 14–15, 666 S.E.2d at 409.

14. *Id.* at 15, 666 S.E.2d at 409–10.

15. *Id.*, 666 S.E.2d at 410.

16. *Id.*

17. *Id.*

18. *Id.* at 16, 666 S.E.2d at 410.

19. *Id.* at 18, 666 S.E.2d at 411.

20. 293 Ga. App. 201, 666 S.E.2d 590 (2008).

21. *Id.* at 201, 666 S.E.2d at 591.

22. *Id.* at 201–02, 666 S.E.2d at 591.

4-153(b)(1) of the Official Code of Georgia Annotated (O.C.G.A.),²³ “which authorizes an aggrieved recipient of medical assistance to obtain the [Georgia Insurance] Commissioner’s review of a recommended decision by an ALJ.”²⁴ In affirming the ALJ’s decision, the commissioner relied on *Commissioner of Insurance v. Stryker*²⁵ for the proposition that “findings of fact of the ALJ must be upheld unless they are not supported by any evidence.”²⁶ The superior court then affirmed the commissioner’s decision.²⁷

The court of appeals clarified that while *Stryker* applies to the superior court’s review of an agency’s decision, it does not apply to an agency’s review of an ALJ’s recommendation.²⁸ The ALJ’s role is “to make a recommendation, and if the aggrieved party challenges the recommendation, it is then up to the Commissioner . . . to ‘affirm, modify, or reverse’” the ALJ’s recommendation.²⁹ By this process, it is the agency head “that makes the ultimate decision as to how to resolve the aggrieved party’s claim.”³⁰ Because the commissioner applied an incorrect standard of review, the court of appeals vacated the superior court’s holding and remanded the case for review under the proper standard.³¹

The court warned that it in no way intended to indicate how the DCH should rule after the case was remanded.³² Quoting from *Glass v. City of Atlanta*,³³ the court of appeals noted that in the context of judicial review of an administrative decision, “[n]either this Court nor the superior court is authorized to substitute its judgment as to weight and credibility of witnesses.”³⁴ Furthermore, the court has no authority to dictate a department’s manner or standard of review as long as the department acts within its statutory authority.³⁵

The court of appeals further solidified the any evidence standard and its application to a superior court’s review of an agency decision in

23. O.C.G.A. § 49-4-153(b)(1) (2009).

24. *Greene*, 293 Ga. App. at 202, 666 S.E.2d at 591.

25. 218 Ga. App. 716, 463 S.E.2d 163 (1995).

26. *Greene*, 293 Ga. App. at 201, 666 S.E.2d at 591 (internal quotation marks omitted).

27. *Id.*

28. *Id.* at 203, 666 S.E.2d at 592.

29. *Id.* (quoting O.C.G.A. § 49-4-153(b)(1)).

30. *Id.*

31. *Id.* at 201, 666 S.E.2d at 591.

32. *Id.* at 204, 666 S.E.2d at 593.

33. 293 Ga. App. 11, 666 S.E.2d 406 (2008).

34. *Greene*, 293 Ga. App. at 204, 666 S.E.2d at 593 (alteration in original) (quoting *Glass*, 293 Ga. App. at 14, 666 S.E.2d at 409).

35. *Id.* at 206, 666 S.E.2d at 594.

Unified Government of Athens-Clarke County v. Georgia Public Service Commission.³⁶ The appeal arose “from a decision of the Georgia Public Service Commission [(PSC)] to reduce the amount of municipal franchise fees the Georgia Power Company [could] recover from its rate base.”³⁷ Following the PSC’s decision, the Georgia Municipal Association (GMA) filed a petition for judicial review and declaratory relief in the superior court, which affirmed the PSC’s decision.³⁸ The GMA appealed, contending “that the PSC’s decision was arbitrary and not supported by any evidence.”³⁹ The court of appeals affirmed the superior court’s decision, holding that the GMA failed to show the superior court’s decision was arbitrary, capricious, or unreasonable.⁴⁰

When reviewing a superior court’s order in an administrative proceeding, the appellate court is to determine “whether the record supports the final decision of the administrative agency.”⁴¹ The court must affirm “if any evidence on the record substantiates the administrative agency’s findings of fact and conclusions of law.”⁴² Following significant testimony from all parties, the PSC, noting its authority under O.C.G.A. § 46-2-23(a)⁴³ to determine “just and reasonable” rates for electric service, modified the Georgia Power Company franchise fee system.⁴⁴ The court of appeals held that the evidence before the PSC formed a sufficient basis for its decision to reallocate the franchise fees, and the GMA failed to show that this decision was arbitrary, capricious, or unreasonable.⁴⁵

In *Surgery Center, LLC v. Hughston Surgical Institute, LLC*,⁴⁶ the court of appeals reigned in the superior court after determining that it had exceeded its authority by substituting its own judgment for that of an agency.⁴⁷ The DCH denied a request by Hughston Surgical Institute, LLC (HSI) for a certificate of need to develop an orthopedic ambulatory surgery center in Columbus, Georgia. The hearing officer

36. 293 Ga. App. 786, 668 S.E.2d 296 (2008).

37. *Id.* at 786, 668 S.E.2d at 297.

38. *Id.*

39. *Id.*

40. *Id.* at 790, 668 S.E.2d at 299.

41. *Id.* at 786, 668 S.E.2d at 297 (quoting Ga. Peace Officers Standards & Training Council v. Anderson, 290 Ga. App. 91, 91, 658 S.E.2d 840, 841 (2008)).

42. *Id.* (internal quotation marks omitted) (quoting Prof'l Standards Comm'n v. Alberson, 273 Ga. App. 1, 4, 614 S.E.2d 132, 136 (2005)).

43. O.C.G.A. § 46-2-23(a) (2004 & Supp. 2009).

44. *Unified Gov't of Athens-Clarke County*, 293 Ga. App. at 787, 668 S.E.2d at 298.

45. *Id.* at 790, 668 S.E.2d at 299.

46. 293 Ga. App. 879, 668 S.E.2d 326 (2008).

47. *Id.* at 879, 668 S.E.2d at 327.

and State Health Planning Review Board affirmed the denial of the application.⁴⁸ Subsequently, “HSI . . . appealed the Review Board’s decision to the superior court, which held that the [DCH] had abused its discretion in denying HSI’s application.”⁴⁹ The court of appeals reversed the decision, reasoning that the superior court “improperly substituted its own judgment for that of the [DCH].”⁵⁰

Because “‘agencies provide a high level of expertise and an opportunity for specialization unavailable in the judicial or legislative branches,’” the court of appeals treated the review board’s decision with deference as the final decision of the DCH.⁵¹ Accordingly,

the superior court [could] reverse or modify the [DCH’s] decision “only if the appellant’s substantial rights [had] been prejudiced because the procedures used (1) violated constitutional or statutory provisions; (2) exceeded the [DCH’s] statutory authority; (3) were unlawful; (4) were affected by legal error; (5) were not supported by substantial evidence; or (6) were arbitrary, capricious, or characterized by an abuse or unwarranted exercise of discretion.”⁵²

As previously established, the court of appeals reviews a superior court’s decision in an administrative proceeding by determining “whether the record supports the final decision of the administrative agency.”⁵³ The DCH denied HSI’s application after “finding that the service area already had a surplus of operating rooms, that these existing facilities were significantly underutilized, and that HSI had failed to adequately [demonstrate] that the proposed project would remedy an atypical barrier.”⁵⁴ Following an evidentiary hearing, the hearing officer determined that the application did not satisfy the atypical barrier provisions of the applicable regulations and affirmed the DCH’s denial. The review board also affirmed the denial.⁵⁵

On appeal, the superior court reversed the review board’s decision, reasoning that it was “unsupported by any substantial evidence, an error of law, arbitrary, and an abuse of discretion.”⁵⁶ The court of appeals

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (quoting *Bentley v. Chastain*, 242 Ga. 348, 350–51, 249 S.E.2d 38, 40 (1978)).

52. *Id.* at 880, 668 S.E.2d at 327–28 (quoting *Ga. Dep’t of Cmty. Health v. Satilla Health Servs., Inc.*, 266 Ga. App. 880, 885, 598 S.E.2d 514, 518–19 (2004)).

53. *Id.*, 668 S.E.2d at 328 (quoting *Davis v. Brown*, 274 Ga. App. 48, 50, 616 S.E.2d 826, 828 (2005)); *see also supra* text accompanying notes 8, 34–35.

54. *Surgery Ctr.*, 293 Ga. App. at 881, 668 S.E.2d at 328 (internal quotation marks omitted).

55. *Id.*

56. *Id.* (internal quotation marks omitted).

reversed the superior court's decision, holding that the superior court exceeded its authority by substituting its judgment for that of the DCH.⁵⁷ Regardless of whether the court agreed with all of the hearing officer's inferences and conclusions, "the Review Board was authorized to conclude from the evidence . . . that HSI's application did not show the existence of an 'atypical barrier' to orthopedic care in the service area."⁵⁸

HSI argued the application should be approved because the DCH had approved similar applications in the past.⁵⁹ The record demonstrated that the hearing officer reviewed each of the similar decisions and distinguished them on a variety of grounds; therefore, the court of appeals would not substitute its judgment for that of the DCH.⁶⁰ Because substantial evidence supported the DCH's denial of the application, the court of appeals held that the superior court erred in its reversal of the DCH's decision.⁶¹

In a special concurrence, Presiding Judge Blackburn objected to the operation of the certificate-of-need system and the extensive control it afforded the government.⁶² Concurring in the judgment only, Presiding Judge Blackburn suggested that "[o]ur founding fathers never intended that the government limit new businesses to those it felt were economically necessary."⁶³

The court of appeals again upheld the any evidence standard as applicable to the superior court's review of an agency decision in *Jackson Electric Membership Corp. v. Georgia Public Service Commission*.⁶⁴ Jackson Electric Membership Corporation (Jackson EMC) appealed the PSC's determination that Free Chapel Worship Center had chosen Georgia Power Company as its electric service provider. Among other enumerations of error, Jackson EMC argued that the "Request for Electric Service" document presented by Georgia Power Company and executed by Free Chapel did not constitute a valid contract under Georgia law.⁶⁵ The court of appeals, affirming both the superior court and PSC decisions, determined that the request form constituted a binding contract.⁶⁶

57. *Id.* at 879, 668 S.E.2d at 327.

58. *Id.* at 882, 668 S.E.2d at 329.

59. *Id.*

60. *Id.* at 882–83, 668 S.E.2d at 329.

61. *Id.* at 883, 668 S.E.2d at 329.

62. *Id.*, 668 S.E.2d at 329–30 (Blackburn, P.J., concurring specially).

63. *Id.*, 668 S.E.2d at 330.

64. 294 Ga. App. 253, 668 S.E.2d 867 (2008).

65. *Id.* at 253–54, 668 S.E.2d at 869.

66. *Id.* at 254, 668 S.E.2d at 869.

“Under the [Georgia] Administrative Procedure Act,⁶⁷ an administrative agency’s findings and conclusions may be reversed by the superior court if they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.”⁶⁸ The applicable standard of review provides that “if any evidence on the record substantiates the administrative agency’s findings of fact and conclusions of law,” the decision must be upheld.⁶⁹ The appellate court’s “duty is not to review whether the record supports the superior court’s decision but whether the record supports the final decision of the administrative agency.”⁷⁰

Following an evidentiary hearing, the hearing officer determined that Georgia Power Company was the lawful supplier of electric service to Free Chapel and ordered Jackson EMC to cease providing such services. The PSC affirmed and adopted the hearing officer’s decision, finding that a valid contract existed between Georgia Power Company and Free Chapel. On appeal, the superior court affirmed the PSC’s decision.⁷¹ Applying the any evidence standard of review and holding that there was sufficient evidence to support the PSC’s findings, the court of appeals upheld the superior court’s decision.⁷²

The superior court failed to apply the proper standard of review of an agency decision in *DeKalb County v. Bull*,⁷³ and the court of appeals summarily reversed.⁷⁴ Officer Evan Bull was terminated by the DeKalb County Police Department following his involvement in a domestic violence incident. The hearing officer affirmed the termination. On appeal, the superior court reversed the hearing officer’s decision and reinstated Bull as a police officer. The police department appealed, contending the superior court erred in reversing the decision of the hearing officer and ordering Bull’s reinstatement.⁷⁵

Upon review of the police department’s decision to terminate Bull, the hearing officer determined that all the witnesses were credible, the police department’s investigation was solid, and the police department’s conclusions were reasonable. Based upon these findings, the hearing

67. O.C.G.A. §§ 50-13-1 to -44 (2009).

68. *Jackson*, 294 Ga. App. at 254, 668 S.E.2d at 869 (quoting *Profl Standards Comm’n v. Peterson*, 284 Ga. App. 424, 427, 643 S.E.2d 899, 901 (2007)).

69. *Id.* (emphasis omitted) (quoting *Profl Standards Comm’n*, 284 Ga. App. at 427, 643 S.E.2d at 901).

70. *Id.* (quoting *Profl Standards Comm’n*, 284 Ga. App. at 427, 643 S.E.2d at 901).

71. *Id.* at 257, 668 S.E.2d at 871.

72. *Id.*

73. 295 Ga. App. 551, 672 S.E.2d 500 (2009).

74. *Id.* at 555–56, 672 S.E.2d at 503–04.

75. *Id.* at 551–52, 672 S.E.2d at 501.

officer concluded that Bull failed to demonstrate that the police department made an erroneous finding of fact and affirmed the termination. Bull appealed to the superior court, arguing the hearing officer's decision was not supported by substantial evidence.⁷⁶

At the superior court hearing, "Bull contended that the police department had made erroneous factual conclusions during its investigation of the altercation," that the hearing officer also made errors in findings of fact upholding his termination, and that no evidence supported the police department's determination that he was the initial aggressor.⁷⁷ In his testimony, Bull referred to events that occurred after the hearing officer's review, "including his trial and acquittal on the criminal charges arising from the altercation."⁷⁸ Following the hearing, the superior court issued an order stating that "the record was 'more complete' than it had been when the hearing officer issued her ruling because of 'the facts that came out at trial,' including evidence of the criminal verdict in favor of Bull."⁷⁹ Finding that the hearing officer's decision was erroneous in light of the substantial evidence on the post-trial record, the superior court ordered the police department to reinstate Bull and provide back pay from the day of termination.⁸⁰

The court of appeals reversed the superior court's decision, holding that the superior court applied an improper standard of review.⁸¹ Applying the any evidence standard of review, the court determined that the evidence presented to the hearing officer supported her decision.⁸² "The superior court also erred in relying, at least in part, on the outcome of Bull's criminal trial . . . [because] the criminal trial had not yet occurred at the time of the [hearing officer's] decision."⁸³ The court of appeals held that "the outcome of the criminal trial was irrelevant to the determination of whether the department properly terminated Bull's employment."⁸⁴

While the any evidence standard of review is applicable to the appellate courts' review of an administrative decision, such standard of review is not applicable to an internal agency appeal.⁸⁵ In *Georgia*

76. *Id.* at 554, 672 S.E.2d at 502.

77. *Id.*, 672 S.E.2d at 502-03.

78. *Id.*, 672 S.E.2d at 503.

79. *Id.*

80. *Id.* at 555, 672 S.E.2d at 503.

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See supra* text accompanying note 21.

Department of Revenue v. Trawick Construction Co.,⁸⁶ the commissioner of the Georgia Department of Revenue issued an additional tax assessment against Trawick Construction Company for the short tax year of January 1, 1999 to October 1, 1999.⁸⁷ Trawick appealed the decision to the Office of State Administrative Hearings, and an ALJ issued an initial decision “finding that Trawick demonstrated beyond a preponderance of the evidence that the [commissioner’s] assessment of additional corporate Georgia income taxes on the proceeds of the Trawick stock transfer [at issue] was erroneous.”⁸⁸ Thereafter, the commissioner reversed the initial decision of the ALJ, and Trawick petitioned for judicial review by the superior court. The superior court reversed the commissioner’s decision and reinstated the ALJ’s initial decision.⁸⁹ The court of appeals held that the superior court improperly applied the any evidence standard to the review of the ALJ’s decision and thereby reversed the superior court and reinstated the commissioner’s decision.⁹⁰

The any evidence standard of judicial review does not apply to the ALJ’s decision in an internal agency appeal.⁹¹ The court of appeals explained,

[t]he ALJ’s role at an administrative hearing is to act as the representative of the Department and to make a recommendation. “[I]t is then up to the Commissioner to either allow the recommendation to become the Department’s final decision (by taking no action), or to affirm, modify, or reverse the decision appealed from.”⁹²

Because the commissioner’s findings of fact were supported by some evidence, “the superior court erred in rejecting such finding and adopting the contrary finding of the ALJ.”⁹³

86. 296 Ga. App. 275, 674 S.E.2d 350 (2009), *cert. granted*. In granting certiorari, the Georgia Supreme Court noted that it was “particularly concerned with the following issue or issues: What are the Georgia corporate tax implications of an election under Internal Revenue Code [(IRC)] § 338(h)(10) by the shareholders of a Federal sub-chapter S corporation?” Supreme Court of Georgia 2009 Granted Certioraris, http://www.gasupreme.us/granted_apps/granted_certs/gc_09.php#S09c1045 (last visited Nov. 8, 2009).

87. *Trawick*, 296 Ga. App. at 275, 674 S.E.2d at 352.

88. *Id.* at 275–76, 674 S.E.2d at 352 (alterations in original) (internal quotation marks omitted).

89. *Id.* at 276, 674 S.E.2d at 352–53.

90. *Id.* at 278–79, 674 S.E.2d at 354–55.

91. *Id.* at 278, 674 S.E.2d at 354.

92. *Id.* at 278–79, 674 S.E.2d at 354 (second alteration in original) (citation omitted) (quoting *Greene*, 293 Ga. App. at 203, 666 S.E.2d at 592).

93. *Id.* at 279, 674 S.E.2d at 355.

In the final case in this section, *City of LaGrange v. Georgia Public Service Commission*,⁹⁴ the court of appeals further emphasized the application of the any evidence standard in the appellate court's review of an agency decision. Alleging a violation of the Georgia Territorial Electric Service Act,⁹⁵ the City of LaGrange filed a petition against Diverse Power Incorporated (DPI) with the PSC.⁹⁶ The Act "establishes a plan whereby every geographic area within the state is assigned to an electric supplier," and provides that "[o]nce a service territory is assigned, an electric supplier shall have the exclusive right to extend and continue furnishing service to any new premises within that area."⁹⁷ The city alleged that under these provisions, "DPI was not authorized to provide electric service to the Troup County High School ball field or [auditorium] because both properties were within the City's exclusive service territory."⁹⁸

Following an evidentiary hearing, the hearing officer determined that DPI was authorized to provide electricity to the ball field and auditorium. The city filed an application for review and the commission adopted the hearing officer's decision.⁹⁹ In its decision, the commission relied on O.C.G.A. § 46-3-8(a),¹⁰⁰ "which allows a consumer to choose an electric supplier different from the assigned supplier where service is furnished to one or more new premises."¹⁰¹ On appeal, the superior court affirmed the decision of the commission.¹⁰²

When reviewing a superior court order in an administrative proceeding, the court of appeals must determine "whether the record supports the final decision of the administrative agency. [The court] will affirm if any evidence on the record substantiates the administrative agency's findings of fact and conclusions of law."¹⁰³ Deference is given to the factual findings of an agency.¹⁰⁴ Those findings will be rejected "only if they are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or

94. 296 Ga. App. 615, 675 S.E.2d 525 (2009).

95. O.C.G.A. §§ 46-3-1 to -15 (2004 & Supp. 2009).

96. *City of LaGrange*, 296 Ga. App. at 615, 675 S.E.2d at 526.

97. *Id.* at 615-16, 675 S.E.2d at 527 (quoting *Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 703, 544 S.E.2d 158, 160 (2001)).

98. *Id.* at 616, 675 S.E.2d at 527.

99. *Id.*

100. O.C.G.A. § 46-3-8(a) (2004).

101. *City of LaGrange*, 296 Ga. App. at 619, 675 S.E.2d at 529.

102. *Id.* at 616, 675 S.E.2d at 527.

103. *Id.* (internal quotation marks omitted) (quoting *Unified Gov't of Athens-Clarke County*, 293 Ga. App. at 786, 668 S.E.2d at 297).

104. *Id.*

characterized by abuse of discretion or clearly unwarranted exercise of discretion.”¹⁰⁵

The court of appeals determined “that the Commission’s findings and conclusions [were] supported by the evidence in the record and [were] not contrary to or in excess of the Commission’s statutory authority. Furthermore, [the court did] not find that the Commission’s decision was arbitrary or capricious or that it constituted an abuse of discretion.”¹⁰⁶ Accordingly, the court of appeals affirmed the superior court’s decision in favor of the commission.¹⁰⁷

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The appellate courts have stringently upheld a plaintiff’s obligation to exhaust all administrative remedies prior to filing an action with the courts. The cases in this year’s survey provide little relief to the doctrine of exhaustion of administrative remedies.

In the first case, *Northeast Georgia Cancer Care, LLC v. Blue Cross & Blue Shield of Georgia, Inc.*,¹⁰⁸ Northeast Georgia Cancer Care filed a lawsuit against Blue Cross and Blue Shield of Georgia,

seeking a declaratory judgment and alleging claims of breach of legal duty, tortious interference with business relations, and unfair trade practices. Pursuant to these claims, Northeast challenge[d] Blue Cross’s refusal to allow Northeast and its medical oncologists to participate as an approved health care provider for Blue Cross’s HMO network.¹⁰⁹

Northeast claimed that Georgia’s Any Willing Provider statute, O.C.G.A. § 33-20-16,¹¹⁰ “mandate[d] that Northeast and its medical oncologists be allowed to participate as providers in the Blue Cross HMO network under the same terms and conditions offered to other participating physicians.”¹¹¹

The trial court granted Blue Cross’s motion to dismiss.¹¹² The court of appeals affirmed the decision of the lower court to dismiss Northeast for failure to exhaust administrative remedies.¹¹³ Under O.C.G.A.

105. *Id.* (quoting *Douglas Asphalt Co. v. Ga. Pub. Serv. Comm’n*, 263 Ga. App. 711, 712, 589 S.E.2d 292, 294 (2003)).

106. *Id.* at 620–21, 675 S.E.2d at 530.

107. *Id.* at 621, 675 S.E.2d at 530.

108. 297 Ga. App. 28, 676 S.E.2d 428 (2009).

109. *Id.* at 28–29, 676 S.E.2d at 430.

110. O.C.G.A. § 33-20-16 (2000).

111. *Ne. Ga. Cancer Care*, 297 Ga. App. at 30, 676 S.E.2d at 431.

112. *Id.*

113. *Id.*

§ 33-20-30,¹¹⁴ which provides “the procedure for resolving disputes arising from the alleged violation of statutes regulating insurance health care plans”¹¹⁵ under the Health Care Plan Act,¹¹⁶ Northeast was first required to submit its dispute to the insurance commissioner.¹¹⁷

Northeast argued that “Blue Cross waived the exhaustion issue by failing to assert it as a defense in the answer to the complaint.”¹¹⁸ That position proved incorrect because “[t]he failure to exhaust administrative remedies is not designated as an affirmative defense or a defense that is waived if not presented in the answer to the complaint.”¹¹⁹ Moreover, the record reflected that Blue Cross timely raised the issue with the superior court, the superior court ruled on the issue, and Blue Cross again raised the issue on appeal.¹²⁰ Accordingly, the court of appeals acknowledged there was no waiver.¹²¹ The court proceeded to reprimand Northeast for attempting to “bypass the mandatory administrative procedures by attempting to present its claim under the guise of a tort action seeking the recovery of damages.”¹²²

In *Diverse Power Inc. v. Jackson*,¹²³ the supreme court affirmed the superior court’s dismissal of an action for failure to exhaust administrative remedies.¹²⁴ Arising from a request for a proposal to solicit competitive bids for electrical services for a training center, Diverse Power sued the Department of Technical and Adult Education (DTAE), Ronald W. Jackson—the Commissioner of the DTAE, and Georgia Power Company, seeking to enjoin performance of the contract between Georgia Power Company and the DTAE and to have the contract awarded to Diverse Power.¹²⁵ The trial court dismissed the action for failure to exhaust administrative remedies before seeking equitable relief from the court.¹²⁶

In a case of first impression, the supreme court granted Diverse Power’s petition for writ of certiorari to determine whether the Georgia

114. O.C.G.A. § 33-20-30 (2000).

115. *Ne. Ga. Cancer Care*, 297 Ga. App. at 30, 676 S.E.2d at 431.

116. O.C.G.A. §§ 33-20-1 to -34 (2000).

117. *Ne. Ga. Cancer Care*, 297 Ga. App. at 31, 676 S.E.2d at 431.

118. *Id.* at 32, 676 S.E.2d at 432.

119. *Id.* (citing O.C.G.A. §§ 9-11-8(c), -12(h)(1) (2006)).

120. *Id.*

121. *Id.*

122. *Id.* at 32–33, 676 S.E.2d at 432.

123. 285 Ga. 340, 676 S.E.2d 204 (2009).

124. *Id.* at 341, 676 S.E.2d at 205.

125. *Id.* at 340–41, 676 S.E.2d at 205.

126. *Id.* at 341, 676 S.E.2d at 205.

Vendor Manual (GVM)¹²⁷ or the State Purchasing Act (SPA)¹²⁸ required the exhaustion of administrative remedies.¹²⁹ Diverse Power argued it was not required to exhaust its available administrative remedies because the General Assembly did not include an express exhaustion requirement in the SPA.¹³⁰ However, the General Assembly, through the SPA, “expressly gave the Department of Administrative Services the authority to ‘make all rules, regulations, and stipulations and to provide specifications to carry out the terms and provisions of [the SPA] as may be necessary for the purposes of [the SPA].’”¹³¹ The GVM sets forth the rules, regulations, and stipulations to further the purposes of the SPA, and the GVM includes mandatory protest procedures.¹³² Accordingly, an expressed exhaustion provision in the SPA was not required.¹³³

When an administrative remedy exists, long-standing Georgia law requires an aggrieved party to exhaust all available administrative remedies before seeking judicial review of the agency’s decision.¹³⁴ Because Diverse Power failed to exhaust the available administrative remedies before seeking equitable relief, the supreme court affirmed the superior court’s dismissal of Diverse Power’s claim.¹³⁵

The final case discussed in this section, *City of Atlanta v. Hotels.com, L.P.*,¹³⁶ is revisited from last year’s article.¹³⁷ Here, the supreme court reversed the court of appeals and carved out a unique exception to the generally broad doctrine of exhaustion of administrative remedies.¹³⁸ This case presented an interesting twist on the normal usage of the exhaustion of administrative remedies defense. While generally used by governmental entities when litigants resort to court filings too quickly, here the roles were reversed. The City of Atlanta was seeking

127. STATE PURCHASING DIV., DEP’T OF ADMIN. SERVS., GEORGIA VENDOR MANUAL (2009) [hereinafter GVM], available at http://doas.ga.gov/statelocal/spd/docs_spd_general/georgiavendormanual.pdf.

128. O.C.G.A. §§ 50-5-50 to -146 (2009).

129. *Diverse Power*, 285 Ga. at 341, 676 S.E.2d at 205.

130. *Id.*

131. *Id.*, 676 S.E.2d at 206 (quoting O.C.G.A. § 50-5-54).

132. *Id.*; see also GVM § 3.8(1)(b)(i).

133. *Diverse Power*, 285 Ga. at 341, 676 S.E.2d at 206.

134. *Id.* at 342, 676 S.E.2d at 206.

135. *Id.* at 342–43, 676 S.E.2d at 206.

136. 285 Ga. 231, 674 S.E.2d 898 (2009).

137. See generally Martin M. Wilson & Jennifer A. Blackburn, *Administrative Law, Annual Survey of Georgia Law*, 60 MERCER L. REV. 1, 8 (2008) (discussing the court of appeals decision in *City of Atlanta v. Hotels.com, L.P.*, 288 Ga. App. 391, 654 S.E.2d 166 (2007), *rev’d*, 285 Ga. 231, 674 S.E.2d 898 (2009)).

138. See *Hotels.com*, 285 Ga. at 233, 674 S.E.2d at 900.

to collect hotel occupancy taxes against seventeen travel companies that operated on the internet.¹³⁹ Instead of making any tax estimates and delivering tax assessments to the companies, the city brought an action in superior court. In response, the companies moved to dismiss, arguing that the city had not exhausted its “administrative remedies” by following the normal tax assessment, collection, and appeals procedures. The motion to dismiss was successful, and the city appealed.¹⁴⁰

The court of appeals upheld the dismissal based on a lack of subject matter jurisdiction due to the city’s failure to exhaust available administrative remedies.¹⁴¹ Specifically, the court of appeals determined that (1) the city was required to provide written notice of taxes due prior to filing suit for recovery under the city’s Hotel or Motel Occupancy Tax Ordinance¹⁴² and (2) “the City was not excused from the exhaustion requirement under the theory that pursuit of administrative remedies would be futile or result in irreparable harm.”¹⁴³ The supreme court vacated the court of appeals decision, holding that “until the threshold legal issue of applicability of the hotel tax ordinance has been resolved, the City should not be required to submit to the administrative process” provided within the ordinance.¹⁴⁴

The threshold issue was whether the hotel tax ordinance applied and was absolutely determinative of the city’s authority over the companies for tax purposes.¹⁴⁵ Because there was still a “bona fide dispute over the applicability of the [hotel tax] ordinance, the City’s rights and obligations thereunder [had] not sufficiently ‘accrued’ so as to preclude declaratory relief.”¹⁴⁶ Accordingly, the supreme court vacated the court of appeals decision and remanded to allow adjudication of the city’s declaratory judgment claim as to the applicability of the hotel tax ordinance.¹⁴⁷ In a rather scathing dissent, Justice Melton asserted that, “without supporting authority, without any compelling reason, and contrary to prior precedent, the majority wrongly refuse[d] to determine

139. *Id.* at 231–32 & n.1, 674 S.E.2d at 899 & n.1.

140. *Id.* at 233, 674 S.E.2d at 900.

141. *Id.*

142. ATLANTA, GA., CODE OF ORDINANCES §§ 146-76 to -89 (Municode through Aug. 25, 2009).

143. *Hotels.com*, 285 Ga. at 233, 674 S.E.2d at 900.

144. *Id.*

145. *Id.* at 234, 674 S.E.2d at 901.

146. *Id.* at 235, 674 S.E.2d at 901.

147. *Id.* at 237, 674 S.E.2d at 902.

that the City's collection claims [were] procedurally and fatally flawed."¹⁴⁸

IV. AGENCY DEFENSES

The Georgia appellate courts decided an unusually high number of cases during the survey period that dealt with the Georgia Open Records Act¹⁴⁹ and agency defenses. The first case was *Unified Government of Athens-Clarke County v. Athens Newspapers, LLC*.¹⁵⁰ Athens Newspapers, LLC sent a request to the Unified Government of Athens-Clarke County asking for investigation records for an unsolved case from 1992.¹⁵¹ The request was later denied based on a statutory exemption for investigations and prosecutions that are "pending."¹⁵² The paper filed an action in court, seeking the records, attorney fees, and litigation expenses for tardiness because the request was not acted upon within three business days. The thrust of the argument presented by the paper was that the criminal investigation had been pending without activity for about thirteen years, so it could no longer be classified as "pending."¹⁵³

The trial court ruled in favor of the county on both matters through a summary judgment order. The paper appealed to the court of appeals, which reversed only part of the trial court's ruling. The court's opinion was that a pending investigation and a pending prosecution (the other item exempted in the relevant statutory paragraph) should have consistent interpretations. Therefore, when applying elements from prior pending prosecution cases, the court reasoned that the long period of inactivity of the criminal investigation meant that it was no longer pending. Regarding the tardy response to the request, the court felt that delivery to a particular custodian should not be the point at which the measurement of time commenced; rather, delivery to the agency itself should suffice.¹⁵⁴

Obviously, the county was not exactly elated by the ruling, so an application for writ of certiorari was made to the supreme court.¹⁵⁵ The supreme court felt that the court of appeals engaged in flawed reasoning by comparing a pending investigation to a pending prosecu-

148. *Id.* at 240, 674 S.E.2d at 905 (Melton, J., dissenting).

149. O.C.G.A. §§ 50-18-70 to -77 (2009).

150. 284 Ga. 192, 663 S.E.2d 248 (2008).

151. *Id.* at 192, 663 S.E.2d at 249.

152. *Id.* at 193; see O.C.G.A. § 50-18-72(a)(4).

153. *Athens Newspapers*, 284 Ga. at 193, 663 S.E.2d at 249.

154. See *id.*; see also *Athens Newspapers, LLC v. Unified Gov't of Athens-Clarke County*, 284 Ga. App. 465, 643 S.E.2d 774 (2007), *rev'd*, 284 Ga. 192, 663 S.E.2d 248 (2008).

155. See *Athens Newspapers*, 284 Ga. at 193, 663 S.E.2d at 249.

tion.¹⁵⁶ Instead, it recognized that there are criminal cases that may remain unsolved forever and many more that may take a long time to bring to a close.¹⁵⁷ Reviewing legislative amendments to the relevant provisions of the Open Records Act, the court concluded that it was without the necessary power to substitute its ruling for that of the law enforcement organization as to when an investigation should be considered closed.¹⁵⁸

As to the three-day response time, the supreme court and the court of appeals apparently felt the same about the matter.¹⁵⁹ Neither court thought a records request should have to be actually received by an employee with the job of holding custody of the records, even though the direct statutory reference mentions an “individual.”¹⁶⁰ The better way of measurement would be from the date the request was delivered to the agency.¹⁶¹ Thus, the supreme court affirmed that part of the court of appeals ruling.¹⁶²

Then-Presiding Justice Hunstein concurred in part and dissented in part, and then-Chief Justice Sears and Justice Thompson joined her opinion.¹⁶³ Basically, the supreme court had repeatedly pronounced that the public policy was to encourage the dissemination of as much information as possible.¹⁶⁴ Literally handing over the power to declare when a criminal investigation is no longer pending to law enforcement officials was perceived as greatly at odds with that policy.¹⁶⁵

A somewhat simpler issue—whether trade secrets of a state contractor can be protected from production by the relevant state agency—was presented in *United HealthCare of Georgia, Inc. v. Georgia Department of Community Health*.¹⁶⁶ United HealthCare, Inc. procured a contract with the DCH to administer the functional details of the health benefit plan for state employees. Part of the services involved maintaining a network of health care providers through contractual obligations.¹⁶⁷

A group of doctors, later followed into the matter by the Medical Association of Georgia, made a request for all the contract information

156. *See id.* at 195–96, 663 S.E.2d at 250–51.

157. *Id.* at 196–97, 663 S.E.2d at 251.

158. *See id.* at 197–98, 663 S.E.2d at 252.

159. *See id.* at 198–99, 663 S.E.2d at 252–53.

160. *Id.*; *see also* O.C.G.A. § 50-18-70(f).

161. *Athens Newspapers*, 284 Ga. at 199, 663 S.E.2d at 253.

162. *Id.*

163. *Id.* (Hunstein, P.J., concurring in part and dissenting in part).

164. *See id.* at 199–200, 663 S.E.2d at 253.

165. *See id.* at 203–04, 663 S.E.2d at 256.

166. 293 Ga. App. 84, 666 S.E.2d 472 (2008).

167. *Id.* at 84–85, 666 S.E.2d at 474–75.

held by United and by DCH. United told DCH that it did not want the documents produced, but DCH, interpreting its own responsibilities, was prepared to do so. Accordingly, United filed in superior court for injunctive relief, asking that DCH be enjoined from making the disclosures. The doctors intervened and argued in favor of the production of the documents. The interveners and DCH obtained a summary judgment declaring that both the documents in possession of DCH and in the possession of United were public documents, and none could be termed as trade secrets. United appealed to the court of appeals.¹⁶⁸

Two issues were determined in the ensuing decision. First, because a portion of the documents sought were actually in its possession, United argued that the Open Records Act should not apply.¹⁶⁹ Citing both the contract in place between United and DCH and provisions of the Open Records Act, the court “conclude[d] that, as a matter of law, the [United documents were] received or maintained by [United] ‘in the performance of a service or function for or on behalf of an agency,’ . . . and thus constitute[d] public records under the Open Records Act.”¹⁷⁰

Second, regarding trade secrets, the court reversed the determination initially made below.¹⁷¹ The trial court ruled that documents obtained from United could not be covered through any trade secrets exemption found in the Open Records Act because there was no requirement for the documents to be submitted to DCH.¹⁷² The court of appeals determined that ruling was nonsensical, and it read the trade secret exemption to mean that public documents would be treated as trade secrets if they met the test set forth under applicable trade secret provisions.¹⁷³ United had not waived its rights to retain trade secrets by signing the contract with DCH that contained a provision stating that DCH would disclose documents under the Open Records Act if the documents were subject to its provisions.¹⁷⁴ Accordingly, accompanying the reversal, the case was remanded for the trial court to apply the appropriate tests to ascertain whether the documents United sought to protect were indeed trade secrets.¹⁷⁵

168. *Id.* at 85–86, 666 S.E.2d at 475–76.

169. *Id.* at 87, 666 S.E.2d at 476.

170. *Id.* at 89, 666 S.E.2d at 478 (citation omitted) (quoting O.C.G.A. § 50-18-70(a)).

171. *Id.* at 89, 93, 666 S.E.2d at 478, 480.

172. *Id.* at 90, 666 S.E.2d at 478.

173. *Id.* The trade secret statutes are found in the Georgia Trade Secrets Act of 1990. O.C.G.A. §§ 10-1-760 to -767 (2009).

174. *United HealthCare*, 293 Ga. App. at 91–92, 666 S.E.2d at 479.

175. *Id.* at 93, 666 S.E.2d at 480.

The time requirements for a response by an agency under the Open Records Act was the core issue in *Jaraysi v. City of Marietta*.¹⁷⁶ Waleed Jaraysi owned an unfinished building for which the City of Marietta had initiated a criminal-type demolition action in the municipal court. Jaraysi made an open records request for basically all documents on file that were related to the construction of the building. No response was given to Jaraysi by the city until almost a month later when an attorney for the city said the request would not be honored because the parallel municipal court matter was criminal in nature.¹⁷⁷

Jaraysi responded with an action in superior court to make the city comply with the Open Records Act. After a short period of discovery, the city moved for summary judgment. The city argued for the first time in that motion that the records sought by Jaraysi were exempt under the Open Records Act provision regarding pending investigations or prosecution of criminal or unlawful activity. The trial court ruled in favor of the City and Jaraysi appealed.¹⁷⁸

Reversing the court below, the court of appeals ruled that the city could not use the exemption raised in the trial court as a basis to retain the records because it had not done so by notifying Jaraysi in writing within the three-business-day response period of the Open Records Act.¹⁷⁹ The court of appeals also remanded the case for a consideration of whether the city, by violating the Open Records Act, would be liable for costs and attorney fees incurred by Jaraysi.¹⁸⁰

In *Fulton-DeKalb Hospital Authority v. Miller & Billips*,¹⁸¹ the court of appeals held that the attorney work product doctrine failed to protect the agency involved.¹⁸² The Fulton-DeKalb Hospital Authority assigned one of its attorneys from the in-house office to look into some anonymous complaints alleging employee misconduct. The attorney talked to various persons, made tape recordings and notes, and summarized the work with a report to the in-house general counsel. Later, attorney Matthew Billips served the authority with a request for all of the work product of the investigation. The authority basically denied the bulk of the request, citing the work as attorney work product. An action in superior court was filed, and the judge held a hearing and

176. 294 Ga. App. 6, 668 S.E.2d 446 (2008).

177. *Id.* at 7, 668 S.E.2d at 447–48.

178. *Id.* at 7–8, 668 S.E.2d at 448. Concerning the exemption, see O.C.G.A. § 50-18-72(a)(4).

179. *Jaraysi*, 294 Ga. App. at 8, 668 S.E.2d at 448.

180. *Id.* at 11–12, 668 S.E.2d at 451.

181. 293 Ga. App. 601, 667 S.E.2d 455 (2008).

182. *Id.* at 603, 667 S.E.2d at 457–58.

inspected the records in camera. The superior court ruled that the attorney work product doctrine did not apply and that the materials should have been disclosed.¹⁸³

The authority appealed to the court of appeals in an effort to prevent disclosure.¹⁸⁴ The court first held that the review of the trial court's order would be confined to see if an abuse of discretion had occurred because a trial court possesses discretion to decide whether the Open Records Act protection applies and also possesses discretion on whether the attorney work product doctrine applies.¹⁸⁵

The trial court had ruled that the records protected by the authority did not fall under the attorney work product doctrine for two reasons. Not only had the authority initiated its investigation based upon some number of anonymous complaints about the conduct of employees, but there had been no actual claims and no litigation as a result.¹⁸⁶ Accordingly, there was no basis to find an abuse of discretion, and the lower court was affirmed.¹⁸⁷

The authority was back in court regarding matters pertaining to a hospital services manual in *Georgia Department of Community Health v. Fulton-DeKalb Hospital Authority*.¹⁸⁸ At issue was the use by the DCH of revisions to its manual to retroactively evaluate cost reports. The authority, on behalf of a division of Grady Health System known as the Hughes Spaulding Children's Hospital, argued in the administrative arena that the DCH's retroactive application of the manual provisions to the cost reports was unlawful. After losing the administrative case through the final agency decision of the DCH commissioner, the hospital appealed to superior court.¹⁸⁹ The agency decision was reversed as "an unconstitutional retroactive application" of the later revisions of the hospital services manual, and the DCH filed a discretionary appeal.¹⁹⁰

The court of appeals took little interest in the DCH's argument that the hospital had not exhausted its administrative remedies or correctly presented the issue for the first time in the administrative proceeding.¹⁹¹ The appellate court held, to the contrary, that the hospital had raised the issue in the administrative proceeding but was merely challenging the legal arguments advanced to support the DCH's

183. *Id.* at 601–02, 667 S.E.2d at 456.

184. *Id.* at 602, 667 S.E.2d at 456.

185. *Id.*, 667 S.E.2d at 456–57.

186. *Id.* at 603–04, 667 S.E.2d at 457–58.

187. *Id.* at 604, 667 S.E.2d at 458.

188. 294 Ga. App. 431, 669 S.E.2d 233 (2008).

189. *Id.* at 431–32, 669 S.E.2d at 233–34.

190. *Id.* at 432–33, 669 S.E.2d at 234–35.

191. *See id.* at 433, 436, 669 S.E.2d at 235, 237.

contention in superior court.¹⁹² Regarding the substance of whether the manual revisions were applied in an unconstitutional manner, the court affirmed that the DCH was bound under contract to use the payment methodology in effect on the date the hospital rendered services.¹⁹³

V. OTHER STANDARDS FOR REVIEW OF AGENCY DECISIONS

Both the any evidence rule and agency deference constituted a part of the decision in *Handel v. Powell*.¹⁹⁴ James Powell was a candidate for one of the district seats on the Georgia Public Service Commission, and the secretary of state challenged his qualifications on the basis of residence. An ALJ found in favor of Powell, enumerating several positive considerations from the set of criteria specified under applicable law. The secretary of state, who reversed the decision of the ALJ, cited only one failure to abide correctly according to the criteria—namely, that Powell had a homestead exemption on property located outside the district borders.¹⁹⁵

Powell appealed to superior court, and the decision was reversed. The court found that the use of the homestead exemption, by itself, could not support the decision against Powell.¹⁹⁶ The secretary of state appealed to the supreme court, which affirmed.¹⁹⁷ Foremost among the arguments maintained by the secretary of state was that the superior court should have affirmed because there was evidence to support the decision against Powell.¹⁹⁸ Drawing analogies between the Georgia Administrative Procedure Act¹⁹⁹ and election provisions,²⁰⁰ and citing *Pruitt Corp. v. Georgia Department of Community Health*,²⁰¹ the court stated that “judicial review of an administrative decision does not end with the determination that the findings of fact have evidentiary support.”²⁰²

192. *Id.* at 436, 669 S.E.2d at 237.

193. *Id.* at 436–37, 669 S.E.2d at 237.

194. 284 Ga. 550, 670 S.E.2d 62 (2008).

195. *Id.* at 550–51, 670 S.E.2d at 63–64.

196. *Id.* at 551–52, 670 S.E.2d at 64.

197. *Id.* at 555, 670 S.E.2d at 66.

198. *Id.* at 552, 670 S.E.2d at 64.

199. O.C.G.A. §§ 50-13-1 to -44 (2009).

200. The court commented that the standard of review under the election code provision, O.C.G.A. § 21-2-5(e) (2008), was basically the same as the standard under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-19(h). *Handel*, 284 Ga. at 552, 670 S.E.2d at 64–65.

201. 284 Ga. 158, 664 S.E.2d 223 (2008). This case is also discussed later in this Article. See *infra* text accompanying notes 217–26.

202. *Handel*, 284 Ga. at 552–53, 670 S.E.2d at 64–65.

The secretary of state further argued that the court should have deferred to the interpretation given to the list of criteria that the secretary had used.²⁰³ That proposal was erroneous and, according to the supreme court, the judiciary independently determines whether an interpretation of the statutory framework is correct.²⁰⁴ Because the secretary of state used only one of the criteria that was negative to Powell when there were seven or more out of the list likely in Powell's favor, the supreme court affirmed the superior court's ruling.²⁰⁵ "[S]ubstantial rights of the candidate [had] been prejudiced because the findings, inferences, conclusions, or decisions of the Secretary of State violate[d] a Georgia law or [were] affected by other error of law."²⁰⁶

Agency deference favored the DCH in the case of *Georgia Department of Community Health v. Medders*.²⁰⁷ Gracie Medders lost her husband in November 2002 and was the beneficiary under his will. However, she renounced any interest under the will in May 2003.²⁰⁸ Before what is known as the "look-back period" passed (at that time, three years from the date of the husband's death), Medders sought Medicaid benefits for payment of nursing home bills.²⁰⁹ DCH denied the benefits because the inheritance had been renounced, and Medders sought review by an ALJ. The ALJ affirmed the denial, and Medders appealed to the superior court.²¹⁰

The superior court reversed the DCH decision on the ground that the renunciation had the effect of erasing any rights that existed under the will. Accordingly, there could be no penalties to attach to Medders because she had no assets to dispose of or transfer during the look-back period.²¹¹

Upon appeal by DCH, however, the court of appeals determined that deference was appropriate for the interpretation of Medicaid requirements by DCH.²¹² Rules governing wills and estates were not neces-

203. *Id.* at 553, 670 S.E.2d at 65.

204. *Id.* (citing *Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 706, 544 S.E.2d 158, 162 (2001)).

205. *Id.* at 554, 670 S.E.2d at 66.

206. *Id.* at 553, 670 S.E.2d at 65.

207. 292 Ga. App. 439, 664 S.E.2d 832 (2008).

208. *Id.* at 439–40, 664 S.E.2d at 833.

209. *Id.* at 440–41, 664 S.E.2d at 833–34.

210. *Id.* at 440, 664 S.E.2d at 833. No final agency decision was needed because DCH took no further steps for thirty days, allowing the decision to become final under O.C.G.A. § 49-4-153(b)(1) (2009). *Medders*, 292 Ga. App. at 440, 664 S.E.2d at 833.

211. *Medders*, 292 Ga. App. at 441–42, 664 S.E.2d at 834.

212. *Id.* at 442, 664 S.E.2d at 834.

sarily the same as rules governing Medicaid claimants who renounce property or assets to which they have become entitled.²¹³

There were two other errors in the case that were corrected. The ALJ had found particular amounts of financial resources that Medders had renounced, but the record did not support that finding.²¹⁴ This was important to Medders because the penalties imposed by Medicaid were to be calculated against benefits that would otherwise be paid.²¹⁵ Further, the superior court found the May 2003 renunciation to relate back to the date of the death of Medders's husband; but, consistent with the court of appeals determination that inheritance statutes did not apply, the court of appeals deemed that the later date upon which the renunciation had been filed would prevail for purposes of Medicaid.²¹⁶

A mistaken application of agency deference by the court of appeals was corrected in *Pruitt Corp. v. Georgia Department of Community Health*.²¹⁷ Pruitt Corporation owned nursing homes and accepted Medicaid reimbursements under a contract with the DCH. A dispute arose over the meaning of terms in the DCH policies and procedures manual, such as *last approved cost report*. The terms of the manual were incorporated into the contract between DCH and Pruitt.²¹⁸

The court of appeals noted that the final decision from the agency, in this case the commissioner of the DCH, was entitled to deference because there had been evidence to support the decision.²¹⁹ However, the supreme court held that judicial deference was not appropriate because the subject matter was a policies and procedures manual, and not a statute or regulation.²²⁰ In fact, there should have been no deference whatsoever because what the court was essentially doing was interpreting a contract between Pruitt and DCH.²²¹ The correct analysis should have involved rules for contracts.²²²

The supreme court also determined that an analysis of the DCH decision must involve more than just a finding that there was evidence to support the decision.²²³ The court explained that O.C.G.A. § 50-13-

213. *Id.*

214. *Id.* at 442–43, 664 S.E.2d at 835.

215. *Id.*

216. *Id.* at 443–44, 664 S.E.2d at 835–36.

217. 284 Ga. 158, 664 S.E.2d 223 (2008).

218. *Id.* at 158, 664 S.E.2d at 224.

219. *Id.* at 159, 664 S.E.2d at 225.

220. *Id.* at 160, 664 S.E.2d at 225.

221. *See id.*, 664 S.E.2d at 226.

222. *Id.*

223. *Id.*

19(h)²²⁴ requires a reviewing court “to examine the soundness of the conclusions of law drawn from the findings of fact supported by any evidence, and [the court] is authorized to reverse or modify the agency decision upon a determination that the agency’s application of the law to the facts is erroneous.”²²⁵ Thus, the decision from the court of appeals was vacated, and the case was remanded.²²⁶

One normally does not think of the attorney general’s office as a regulatory agency, but it was in *Carolina Tobacco Co. v. Baker*.²²⁷ Georgia has laws regarding the implementation of historic tobacco settlement agreements.²²⁸ If a manufacturer was not part of the agreements and wishes to sell cigarettes in Georgia, there must be a submission to the attorney general that payment has been made into an escrow fund.²²⁹ The attorney general keeps the list of compliant manufacturers and all of their cigarette brands.²³⁰ If the brand is not on the list, it cannot be sold.²³¹

Carolina Tobacco Company did not actually manufacture the brand of cigarettes it sold. However, it took charge from the manufacturing step onward, and it owned the intellectual property rights to the brand. During the time of this outsourcing, the attorney general gave notice to Carolina of his intent to remove a Carolina brand from the directory because Carolina was not a manufacturer. Carolina had paid the escrow fund amounts in its own name with no involvement from the actual manufacturer. Carolina appealed to an ALJ, who found an ambiguity in the governing statute regarding the use of the term *manufacturer*, and the ALJ extended the meaning of the term to cover Carolina.²³²

As the court of appeals aptly put it, the attorney general “appealed the decision to himself.”²³³ Apparently applying the definition given to *tobacco product manufacturer* in the governing statute,²³⁴ the attorney general ruled that there was no ambiguity in legislative intent and reversed the decision of the ALJ.²³⁵ The superior court affirmed the

224. O.C.G.A. § 50-13-19(h).

225. *Pruitt*, 284 Ga. at 161, 664 S.E.2d at 226.

226. *Id.*

227. 295 Ga. App. 115, 670 S.E.2d 811 (2008).

228. See O.C.G.A. ch. 10-13, 10-13A (2009).

229. *Carolina*, 295 Ga. App. at 117, 670 S.E.2d at 812–13.

230. *Id.*, 670 S.E.2d at 813.

231. *Id.*

232. *Id.* at 116–18, 670 S.E.2d at 812–13.

233. *Id.* at 118, 670 S.E.2d at 813.

234. O.C.G.A. § 10-13-2(9)(A).

235. *Carolina*, 295 Ga. App. at 118, 670 S.E.2d at 813.

attorney general, and Carolina applied for discretionary review in the court of appeals.²³⁶

Reviewing the text of the statute and applying ordinary meanings to the term *manufacturer*, the appellate court had no problem agreeing with the attorney general and the superior court.²³⁷ Additionally, the attorney general had assigned an interpretive definition to the term *tobacco product manufacturer* through an agency regulation,²³⁸ and judicial deference to the interpretation of the agency charged with enforcing the regulatory framework was deemed appropriate.²³⁹

Although the court affirmed the attorney general's decision to remove the cigarette brand from the sales list during the period in which Carolina subcontracted the manufacturing, the court reversed the lower decisions through which the attorney general had determined that he had no discretion to add the cigarette brand to the list after Carolina took over.²⁴⁰ Citing directly to the governing statute on the point, O.C.G.A. § 10-13A-4(b),²⁴¹ the court determined there was discretion to put the brand name into the directory if any violations, such as the failure of the actual manufacturer to make proper reports and payments, had been cured.²⁴² The case was remanded on that point for the superior court to instruct the attorney general to give considerations accordingly.²⁴³

In *Georgia Power Co. v. Georgia Public Service Commission*,²⁴⁴ the court of appeals applied only limited deference to the agency. The issue in the case was exactly when territorial rights for electricity suppliers accrued.²⁴⁵ Statewide legislation in 1973 empowered the PSC to allocate different areas of the state to electricity suppliers.²⁴⁶ Besides territories for the suppliers, a supplier could receive "corridor rights" to service customers within 500 feet of transmission lines owned by the supplier.²⁴⁷

At the time of the original enactment and subsequent assignment of territories, Georgia Power was the geographic area supplier and also

236. *Id.*

237. *See id.* at 119–20, 670 S.E.2d at 814–15.

238. *See* GA. COMP. R. & REGS. 60-1-1.03(9) (2004).

239. *Carolina*, 295 Ga. App. at 120–21, 670 S.E.2d at 815.

240. *Id.* at 124, 670 S.E.2d at 817.

241. O.C.G.A. § 10-13A-4(b).

242. *Carolina*, 295 Ga. App. at 124, 670 S.E.2d at 817.

243. *Id.*

244. 296 Ga. App. 556, 675 S.E.2d 294 (2009).

245. *See id.* at 556–57, 675 S.E.2d at 295–96.

246. *Id.* at 557, 675 S.E.2d at 295–96 (citing O.C.G.A. § 46-3-4 (2004)).

247. *Id.* at 558–59, 675 S.E.2d at 297 (citing O.C.G.A. § 46-3-4(4)).

owned transmission lines with 500 feet of certain office buildings. Georgia Power sold the transmission lines in 1982. Through further transactions, the interest in the transmission lines devolved to Sumter Electric Membership Corporation. For the transaction in question, Sumter had been requested by business owners in the subject office buildings to supply electricity. Of course, Georgia Power resisted and sought relief from the PSC. The hearing officer and, subsequently, the PSC ruled that Sumter had a corridor right because of its ownership of the transmission lines. In turn, the superior court upheld the decision of the PSC, and Georgia Power appealed to the court of appeals.²⁴⁸

Citing *Handel v. Powell*,²⁴⁹ the court of appeals stated that “although [it] generally defer[s] to the PSC’s interpretation” of the Georgia Territorial Electric Service Act,²⁵⁰ “that deference is not absolute.”²⁵¹ Concentrating its analysis on the background of the statutory framework, the court held that only an initial assignment for geographic areas and transmission line corridors were within the purview of the legislation.²⁵² Any interest acquired after the initial assignments would not change the law and would not bring about reassignment.²⁵³ Thus, the judgment was reversed.²⁵⁴

The court of appeals decision in *Fulton County Board of Tax Assessors v. National Biscuit Co.*²⁵⁵ involved an erroneous interpretation of tax appeal procedures. The Fulton County Board of Tax Assessors appraised property at a value far higher than what the National Biscuit Company believed it to be. The appraisal was appealed to the board of equalization, which lowered it somewhat, but nowhere near the value that National Biscuit obtained from an outside appraiser. Accordingly, National Biscuit appealed to superior court. The judgment of the superior court was that a value higher than that of the board of equalization’s findings was shown, but that a lower amount found earlier by the board of equalization provided the upper limit because the tax assessors had not filed their own appeal in the matter.²⁵⁶ In other

248. *Id.* at 557, 675 S.E.2d at 296.

249. 284 Ga. 550, 670 S.E.2d 62 (2008). This case is discussed earlier in this Article. *See supra* text accompanying notes 194–206.

250. O.C.G.A. §§ 46-3-1 to -15 (2004 & Supp. 2009).

251. *Ga. Power*, 296 Ga. App. at 559, 675 S.E.2d at 297.

252. *Id.* at 560, 675 S.E.2d at 298.

253. *See id.* at 560–61, 675 S.E.2d at 298.

254. *Id.* at 561, 675 S.E.2d at 298.

255. 296 Ga. App. 884, 676 S.E.2d 41 (2009).

256. *Id.* at 884, 676 S.E.2d at 42.

words, deference was shown to the decision of the board of equalization.²⁵⁷

On appeal by the tax assessors to the court of appeals, the superior court was reversed.²⁵⁸ Citing the applicable statute on property tax appeals²⁵⁹ and expressly disapproving dicta from a prior case,²⁶⁰ the court held that “a tax appeal requires a trial de novo, regardless of which party files the appeal, and that the superior court is not bound by any of the board of equalization’s prior findings.”²⁶¹

In the last case in this section, *McKelvey v. Georgia Judicial Retirement System*,²⁶² the court of appeals deferred to an agency interpretation regarding the amount of retirement pay.²⁶³ Howard McKelvey was a member of the Georgia Judicial Retirement System (JRS) by virtue of his position as a state court solicitor. In addition to a monthly salary, the governing county authority paid for administrative expenses and some level of benefits. The administrative expenses were reimbursed because the county had no office space for McKelvey to use, apparently finding it more economical for McKelvey simply to use his own law office. The amounts for administrative reimbursements and for benefits were never listed as income to McKelvey by the county, and neither the county nor McKelvey made contributions to the JRS on those amounts.²⁶⁴

When it was time to retire, McKelvey claimed that his monthly retirement income should be based upon the total compensation he had received, not just the salary amounts.²⁶⁵ The JRS disagreed, and McKelvey took the matter to superior court. When the superior court agreed with the JRS,²⁶⁶ the matter was taken by McKelvey to the court of appeals.²⁶⁷

The statutory framework governing the JRS provided somewhat convoluted interpretations to be afforded the terms *salary* and *compensation*.²⁶⁸ However, the court of appeals readily understood why the JRS

257. *See id.* at 884–85, 676 S.E.2d at 42–43.

258. *Id.* at 884, 676 S.E.2d at 42.

259. *Id.*, 676 S.E.2d at 42–43 (citing O.C.G.A. § 48-5-311(g)(3) (2009)).

260. *Id.* at 886, 676 S.E.2d at 43–44 (citing *Gwinnett County Bd. of Tax Assessors v. Ackerman/Indian Trail Ass’n*, 198 Ga. App. 723, 725, 402 S.E.2d 794, 796 (1991)).

261. *Id.*, 676 S.E.2d at 44.

262. 297 Ga. App. 650, 678 S.E.2d 120 (2009).

263. *See id.* at 654–55, 678 S.E.2d at 123–24.

264. *Id.* at 651–53, 678 S.E.2d at 121–22.

265. *Id.* at 653, 678 S.E.2d at 122.

266. *Id.* at 651, 678 S.E.2d at 121.

267. *Id.* at 653, 678 S.E.2d at 123.

268. *See id.* at 653–54, 678 S.E.2d at 122–23.

used only the salary amount that had been paid to McKelvey and found ample reasons to defer to the JRS decision to exclude fringe benefits or reimbursements that were not reported to tax officials as income to McKelvey.²⁶⁹ Of particular note, the employer and employee contributions to JRS had been based solely on the salary amounts and nothing else.²⁷⁰ In such an instance, the appellate court stated that “the administrator’s interpretation and application of the retirement plan law is not contradicted by the undisputed evidence or by the law’s plain language and purpose in this case.”²⁷¹

VI. LEGISLATIVE DEVELOPMENTS

Likely owing to the condition of the state economy and the strapped state budget, the General Assembly made few momentous changes in state agencies during the 2009 regular session. Mostly, it was all shuffling and adjustments. The following are the highlights:

(1) The Agricultural Commodity Commission for Ornamental Plants was created.²⁷²

(2) The Georgia Aviation Authority will now oversee state aircraft and related activities, supplanting prior work performed by the Department of Transportation.²⁷³

(3) The Georgia Retiree Health Benefit Fund has been replaced by the Georgia School Personnel Post-employment Health Benefit Fund and the Georgia State Employees Post-employment Health Benefit Fund, with a type of administrative delegation for their operations given to the Department of Community Health.²⁷⁴

(4) The State Ethics Commission has received changes in its powers and duties, along with a more specific authorization for the promulgation of regulations.²⁷⁵

(5) In a major reshuffling, functions of the Department of Community Health and Department of Human Resources have been split among a Department of Community Health, a Department of Human Services,

269. *See id.* at 654, 678 S.E.2d at 123.

270. *Id.* at 653, 678 S.E.2d at 122.

271. *Id.* at 654, 678 S.E.2d at 123.

272. Ga. S. Bill 152, § 4, Reg. Sess., 2009 Ga. Laws 446 (codified at O.C.G.A. § 2-8-13(a)(4) (Supp. 2009)).

273. Ga. S. Bill 85, §§ 1–3, Reg. Sess., 2009 Ga. Laws 848 (codified at O.C.G.A. §§ 6-5-1 to -10 (Supp. 2009)) (repealing O.C.G.A. §§ 50-19-20 to -26 (2009)).

274. Ga. S. Bill 122, §§ 1–3, Reg. Sess., 2009 Ga. Laws 49 (codified at O.C.G.A. §§ 20-2-874 to -879, 45-18-24 to -28 (Supp. 2009)) (repealing O.C.G.A. §§ 45-18-100 to -105) (Supp. 2009)).

275. Ga. S. Bill 168, § 1, Reg. Sess., 2009 Ga. Laws 620 (amending O.C.G.A. § 21-5-6 (2008 & Supp. 2009)).

and a Department of Behavioral Health and Developmental Disabilities. There is also a statutory new state officer called the State Health Officer, a new Advisory Council for Public Health, and a Public Health Commission.²⁷⁶

(6) There is now a statutorily created planning division and director for the Department of Transportation.²⁷⁷

(7) Many areas of health care services provisions will now be under the authority of the newly created Georgia Composite Medical Board. Primarily affected are physicians, acupuncturists, physician assistants, certain cancer and glaucoma treatments, certain respiratory care, clinical perfussionists, orthotics, and prosthetics.²⁷⁸

(8) In a referenced name change, the State Merit System of Personnel Administration becomes the State Personnel Administration.²⁷⁹

(9) The Department of Administrative Services has transferred to the various councils of judges certain retirement fund-related duties.²⁸⁰

276. Ga. H.R. Bill 228, §§ 1-1 to 3-27, Reg. Sess., 2009 Ga. Laws 453 (amending scattered sections of O.C.G.A. tits. 31, 37, 49 (2009 & Supp. 2009)).

277. Ga. S. Bill 200, §§ 1-13, Reg. Sess., 2009 Ga. Laws 976 (amending scattered sections of O.C.G.A. tit. 32 (2009)).

278. Ga. H.R. Bill 509, §§ 1-16, Reg. Sess., 2009 Ga. Laws 859 (amending scattered sections of O.C.G.A., primarily O.C.G.A. ch. 43-34 (Supp. 2009)).

279. Ga. S. Bill 98, § 1, Reg. Sess., 2009 Ga. Laws 752 (amending scattered sections of O.C.G.A. tit. 47 (Supp. 2009)).

280. Ga. S. Bill 109, §§ 1-20, Reg. Sess., 2009 Ga. Laws 753 (amending scattered sections of O.C.G.A. tit. 47 (Supp. 2009)).