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## Goldberg v. Kelly, Welfare Reform, and the Case Against Judicial Review for the Client in State Public Assistance Hearings

Brenda Brown Perez

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# ***Goldberg v. Kelly*, Welfare Reform, and the Case Against Judicial Review for the Client in State Public Assistance Hearings**

**By Hon. Brenda Brown Perez\***

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\* This article is not intended to be an exhaustive discussion of the Texas Department of Human Services ("DHS") Administrative Hearings Department, but rather a general guide to various areas of adjudicative interest in state informal public assistance hearings process, judicial review, and procedure. In addition, this article is not submitted in any capacity of formal representation of TDHS. The thoughts and opinions expressed herein, unless otherwise cited, are my own.

The dilemma of the ever-increasing poor . . . presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such . . . .

While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review.<sup>1</sup>

## I. INTRODUCTION

In 1964, the United States enacted the Federal Food Stamp Act<sup>2</sup> in order to provide food stamps for individuals in need of basic sustenance. The concept envisioned was that food stamps would be distributed by state public assistance agencies entrusted by their respective legislatures to administer the programs. Individual applicants for assistance would need to meet certain eligibility requirements in order to qualify for assistance. *Goldberg v. Kelly*<sup>3</sup>

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1. *Goldberg v. Kelly*, 397 U.S. 254, 272-78 (1970) (Black, J., dissenting).

2. 7 U.S.C. § 2011-336 (2003). The Federal Food Stamp Act of 1964 provides benefits for eligible recipients that are exchanged for food at authorized locations. Recipients of food stamp benefits include persons who are unemployed, underemployed, elderly, disabled, homeless, members of large households, and others. *See also* TEX. ADMIN. CODE § 1.1 (West 2002).

3. 397 U.S. 254 (1970). *Goldberg* is the seminal public assistance case in American jurisprudence in the twentieth century. Welfare benefits were held to be a matter of statutory entitlement for persons qualified to receive them resulting in a necessary pre-termination evidentiary hearing providing the recipient with due process. For pre-*Goldberg* rulings, *see also* *Phillips v. Commissioner*, 283 U.S. 589 (1931); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Dent v. West Virginia*, 129 U.S. 114, 124-25 (1889). Of post-*Goldberg* interest, *see Mathews v. Eldridge*, 424 U.S. 319 (1976) (holding that an evidentiary hearing was not required prior to termination of Social Security disability payments as contrasted with the overriding private interest and immediate need of a welfare recipient); *Carleson v. Remillard*, 406 U.S. 598 (1972) (addressing the requirement that benefits be furnished with reasonable promptness, absent parent, or military service); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (providing lower welfare benefits for AFDC recipients than for the aged).

provided the legal avenue through which due process was made available to recipients who were denied assistance. Needless to say, the scope and progeny of the Food Stamp Act grew to encompass numerous, eventually massive public assistance programs. What was originally intended to be a program designed to meet the nutritional needs of the indigent and poverty stricken, eligible American households, increased the demands on a public taxpaying constituency that eventually demanded reform. In 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA").<sup>4</sup>

Welfare reform has met legal challenges. The juxtaposition of court decisions and the fluctuating scope of the national economy prompts us to examine due process on the front lines of existence in America. To that goal, this article examines the administrative fair hearings process in public assistance cases within the Department of Human Services ("DHS") in Texas. It identifies those federal and state legal precedents, as well as legislative acts and general agency rules that have shaped the current status of due process within this agency over a vast array of programs. The further purpose of this article is to focus on the ineffectiveness of judicial review in informal public assistance hearings. The application of this examination should prove to be of value to state welfare administrative hearings departments.

## II. *GOLDBERG V. KELLY* AND THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT ("PRWORA")

It has been almost thirty three years since *Goldberg v. Kelly* was decided. The holding reached in that landmark case embodied the concept of welfare benefits as a matter of statutory entitlement for persons qualified to receive them, and the procedural due process

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4. PRWORA, Pub. L. No. 104-193, 110 Stat 2105 (1996) (codified as amended in scattered sections of 42 U.S.C. and 8 U.S.C.). This welfare reform act was created in 1996 and was codified in sections of title forty-two and eight of the United States Code. It created time limits for benefits under the Food Stamp and TANF programs. Additional limitations were placed on eligibility factors of recipients including some legal immigrants, illegal immigrants, those seeking asylum, single applicants, non dependant individuals, convicted felons, and others. See also 7 U.S.C. § 2011-38 (1977); 7 C.F.R. § 251.2 (2003); <http://www.financeproject.info.org/win>.

applicable to their termination. The essential requirements in a fair hearing have evolved to a substantial degree since that time. Welfare caseloads have declined significantly nationwide, almost by one-half since the inception of the PRWORA.<sup>5</sup> Fair hearings have been at the forefront of this decline in that appellants have the right to appeal the determination of ineligibility under the PRWORA. It has been more than six years since the PRWORA was enacted yet the jury is still out on the long term effects the PRWORA will have on children, families, and the workforce. Of concern are the early surveys which indicate that there continues to exist a disproportionately higher long term welfare caseload in large cities and counties.<sup>6</sup> For the hearing officer generally, this translates into continuing challenge within the framework of fair hearings, post PRWORA, in a wide panoply of programs not limited to Food Stamps and TANF.<sup>7</sup>

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5. Under the PRWORA, caseloads dropped significantly the first few years after enactment. Recent trends show a resistance to that earlier reduction according to the U.S. Department of Health and Human Services, by their report dated, September, 2002. There are approximately two million families receiving benefits nationwide. The PRWORA expired on September 30, 2002 but Congress temporarily extended the reform law in order to allow Congress the opportunity to reauthorize it.

6. See Margy Waller & Allan Berube, *Timing Out: Long Term Welfare Caseloads in Large Cities and Counties*, THE BROOKINGS INSTITUTION, CENTER ON URBAN & METROPOLITAN POLICY (2002).

7. Temporary Assistance for Needy Families ("TANF"), a cash assistance program, replaced Aid to Families with Dependent Children ("AFDC") with the enactment of welfare reform in 1996. Time limits for receipt of this type of aid characterized the change with significant emphasis on job search and employment as requirements for its receipt. States receive "block grants" from the federal government and have individual discretion on the parameters of the content of the job requirements for recipients. Emphasis is on "personal responsibility." Clients who fail to comply with requirements are sanctioned or penalized with reductions of their amounts of TANF assistance. In 1998, thirty seven states were administering "full family" sanctions, with five states imposing lifetime sanctions for repeat rule offenders. Texas is a partial sanction state. See also U.S. DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF INSPECTOR GENERAL, TANF, IMPROVING THE EFFECTIVENESS AND EFFICIENCY OF CLIENT SANCTIONS (1999) (citing U.S. DEPT. OF HEALTH AND HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, OFFICE OF PLANNING, RESEARCH AND EVALUATION, TANF PROGRAM FIRST ANNUAL REPORT TO CONGRESS (1998)).

### III. INFORMAL ADMINISTRATIVE HEARINGS IN WELFARE CASES IN TEXAS

#### A. *The Beginning of a Welfare State*

The Texas Department of Human Services ("DHS") was created in 1939 by the Texas Legislature, and was known as the State Department of Public Welfare ("DPW").<sup>8</sup> At the time of its creation, it assumed the duties of three divisions formerly under the administration of the State Board of Control. They consisted of the Old Age Assistance Commission, the Texas Relief Commission, and the Child Welfare Division, which encompassed those state assistance programs established under the Social Security Act of 1935.<sup>9</sup> In 1977<sup>10</sup> and then again in 1985, the agency changed its name with the later date being its present day nomenclature, the Texas Department of Human Services ("DHS"). The Health and Human Services Commission ("HHSC") was created in 1991 by the 72<sup>nd</sup> Texas Legislature<sup>11</sup> to oversee and coordinate the activities of

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8. There were various agencies that administered public assistance programs in Texas prior to 1939. However, an amendment to the Texas Constitution by the Texas Legislature allowed the state to utilize federal money to finance public assistance programs. 1931: Child Welfare Division established; 1932: First Federal relief funds were distributed by local chambers of commerce; 1933: Texas Relief Commission was created; 1935: Texas Constitution amended to authorize payment of Old Age Assistance grants; 1936: First Old Age Assistance grant was made in Texas. Aid to the Blind and Aid to Dependent Children ("ADC") were authorized by amendment to the Texas Constitution.

9. In 1935, the Federal Social Security Act became effective. This Act provided for assistance programs later established to be state and federally funded. TEX. DEP'T OF HUMAN SERVS., *About DHS*, available at <http://www.dhs.state.tx.us/about/index.html> (last visited Sept. 21, 2003).

10. The Texas Department of Human Services changed its name from Department of Public Welfare to the Texas Department of Human Resources ("DHR"). *Id.*

11. This state legislation also transferred the Long-Term Care Regulatory program for inspection of nursing homes from the Texas Department of Health to the Department of Human Services and transferred Medicaid purchased health programs from DHS to TDH. TEX. DEP'T OF HUMAN SERVS., *Agency History 1930-1999*, available at <http://www.dhs.state.tx.us/about/history.html> (last visited Sept. 21, 2003). In addition, the Texas Department of Protective and Regulatory Services was created and provided assistance in child and adult protective services.

eleven health and human services agencies including DHS. Coordination between agencies resulted from the expansion of health and human services in the 1960's based on federally motivated contributions towards the complex delivery system nationwide as well as in Texas. Twenty separate state agencies with public assistance focus were in existence in Texas by 1983, charged with the responsibility of delivering services in Texas in addition to various local, county and federal agencies, most using disparate methods of determining eligibility for certification of assistance.

Today, DHS administers various state and federal human services programs that serve the elderly, persons with disabilities, low income parent, children, and victims of family violence.<sup>12</sup> One primary function of DHS today is to determine eligibility and certification of clients eligible for benefits. Client eligibility carries a program requirement to be reviewed at specific intervals and at changes in client status. Also, DHS recovers overpayments to providers and provides clients with ongoing quality control checks for payment accuracy. In addition, the agency strives to prevent, detect, and prosecute fraud and abuse of its various programs through the Office of Inspector General of DHS.

DHS also provides case management services in long term care programs as well as regulatory functions of long term care facilities; including licensing, surveying, and certification of nursing facilities, intermediate care facilities, adult day care facilities, personal care

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A complete agency list is available at [http://www.hhsc.state.tx.us/about\\_hhsc/HHS\\_Agencies.html](http://www.hhsc.state.tx.us/about_hhsc/HHS_Agencies.html).

12. The mission statement of DHS is "to provide financial, health, and human services that promote the greatest possible independence and personal responsibility for all clients" including "fostering of individual choices, dignity, safety and independence for the elderly, persons with disabilities, and families; encouraging self-sufficiency while sustaining families and individuals in times of need; and using public funds in a cost effective and efficient manner." TEX. DEP'T OF HUMAN SERVS., *Mission, Philosophy, and Goals*, available at <http://www.dhs.state.tx.us/about/mission.html> (last visited Sept. 21, 2003). See TEX. DEP'T OF HUMAN SERVS., *Reference Guide 2003*, available at [http://www.bms.dhs.state.tx.us/glance/Reference%20Guide%202003/2003\\_ReferenceGuide.pdf](http://www.bms.dhs.state.tx.us/glance/Reference%20Guide%202003/2003_ReferenceGuide.pdf) (last visited Sept. 21, 2003). See generally, <http://www.dhs.state.tx.us>.

homes, and home health agencies.<sup>13</sup> In addition, DHS provides investigation of allegations of abuse and neglect in these facilities. Recently, DHS's responsibilities have grown to include the transfer of the Deaf-Blind Multiple Disabilities Program and the Personal Attendant Services Program from the Texas Rehabilitation Commission.<sup>14</sup> Also, regulation of home and community support services agencies and home health medication aides has been transferred from the Texas Department of Health together with the Medically Dependent Children's Program.<sup>15</sup> DHS is charged with monitoring unlicensed facilities and reporting on their status.<sup>16</sup> Fair hearings and administrative disqualification hearings in the programs administered by DHS, are potentially possible at any point in the eligibility process of programs referenced above.<sup>17</sup>

### *B. Rules, Regulations, Policy and Procedure*

DHS has specific rules regarding the administration of its fair hearing process.<sup>18</sup> It is informative to look to the definition of what a fair hearing is within the DHS. The DHS Fair Hearings Handbook provides that a hearing is "[a]n informal, orderly, and readily

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13. TEX. DEP'T OF HUMAN SERVS., *Long Term Care-Regulatory*, available at <http://www.dhs.state.tx.us/programs/ltr/> (last visited Sept. 21, 2003).

14. See TEX. DEP'T OF HUMAN SERVS., *What Kind of Help do You Need?*, available at <http://www.dhs.state.tx.us/programs/elderly/help.html> (last visited Sept. 21, 2003).

15. *Id.*

16. TEX. DEP'T OF HUMAN SERVS., *General FAQs about DHS*, available at <http://www.dhs.state.tx.us/faqs/general.html> (last visited Sept. 21, 2003).

17. TEX. DEP'T OF HUMAN SERVS., TEXAS WORKS HANDBOOK, available at <http://www.dhs.state.tx.us/handbooks/texasworks/partb/b900/tw-b930.asp> (last visited Sept. 21, 2003). Please note that in May 2003, the Texas Legislature passed House Bill 2292 which mandated a fundamental transformation of health and human services by consolidating the duties and functions of twelve existing state agencies into a single new health and human services enterprise comprised of the Health and Human Services Commission and four new departments, of which DHS is one. This Transition Plan must still undergo public review and comment as well as submission to the Governor sometime in 2004.

18. See TEX. DEP'T OF HUMAN SERVS., FAIR HEARINGS, FRAUD AND CIVIL RIGHTS HANDBOOK, available at <http://www.dhs.state.tx.us/handbooks/fhfc/1000/1220.htm> (last visited Sept. 21, 2003).

available proceeding held before an impartial DHS representative. At the hearing, an appellant or representative, including legal counsel, may present the case as he wishes to show that any action, inaction, or agency policy affecting the case should be corrected.”<sup>19</sup>

The major objectives in providing DHS fair hearings are to:

- provide each appellant the opportunity to assert his position regarding assistance from the department in relation to the law and DHS policies affecting his receiving assistance;
- enable the parties to examine facts so that DHS can make a just decision;
- contribute to the uniform application of the assistance laws and policies;
- safeguard appellants from mistaken, negligent, unreasonable, or arbitrary action or inaction by DHS or contracted agency staff; and
- call attention to DHS policies which are inequitable, unjust, or cause undue hardships, so that changes may be made.<sup>20</sup>

Rules prescribing qualifications of a hearing officer within DHS are specific.

A hearing officer can be any DHS official whom the commissioner might designate as responsible for conducting fair hearings . . . [and] making the final administrative decision [for DHS].<sup>21</sup> [A] program director, supervisor or other designated person may

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19. 40 TEX. ADMIN. CODE § 79.1102(4) (West 2003).

20. TEX. DEP'T OF HUMAN SERVS., FAIR HEARINGS, FRAUD AND CIVIL RIGHTS HANDBOOK § 1220 (2003) [hereinafter TDHS, FHFCR HANDBOOK]. Regulations concerning fair hearings for public assistance are found in 45 C.F.R., § 205.10; Regulations concerning fair hearings for medical assistance are found in 42 C.F.R. § 431.205. Food Stamp regulations are found in 7 C.F.R., § 273.15.

21. TDHS, FHFCR HANDBOOK § 1220, *see also* TEX ADMIN CODE 1 tit 1, § 357.9 (West 2003).

act as the hearing officer in his region, unless he is disqualified or unable to act.<sup>22</sup>

The right of appeal for an aggrieved party includes the opportunity for a hearing before a DHS hearing officer.<sup>23</sup>

A. Any applicant or recipient requesting a hearing for any of the following reasons has the right to appeal:

- i. The client makes a claim for assistance or services but the request is denied, modified, or not acted upon with reasonable promptness;
- ii. DHS takes action that results in suspension, reduction, discontinuance, or termination of assistance or services;
- iii. The client disagrees with the manner or form in which DHS makes payments to him, including restricted or protective payments, even though no federal financial participation is claimed; or
- iv. The client is dissatisfied with conditions he must meet to receive payments, including work requirements.<sup>24</sup>

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22. Tit. 40, § 79.1102(5). Most hearing officers in DHS are non-attorney hearings specialists who bring highly tenured and extensive program backgrounds into their careers as hearing officers. Hearing Officers are immediately supervised by managers, who also participate in adjudication of decisions and who oversee procedural and timeliness requirements as well as personnel issues. Those managers in turn are supervised by an Administrative Judge and Attorney at Law, who is certified as an Administrative Law Judge.

23. Tit. 40, § 79.1102(8). On August 1, 1999, DHS adopted the Uniform Fair Hearing Rules into existing Fair Hearing Rules. TDHS, FHFCR HANDBOOK § 1133.

24. Tit. 40, § 79.1102(8)(A).

Additional rights of appeal apply to the following:<sup>25</sup>

- nursing facility discharge,
- preadmission screening and annual resident review (PASARR), or
- protected resource amount in Medicaid eligibility cases.<sup>26</sup>

There is no right of appeal in the following situations:

- B. If DHS terminates a provider's contract or the provider stops providing services for some other reason, the individual recipient may not appeal unless his eligibility is otherwise affected.”
- C. “[A right of appeal] is not provided in cases. . . [where] . . . the sole issue is an across-the-board reduction of services or assistance to a class of recipients.”<sup>17a</sup>

#### IV. THE CASE AGAINST JUDICIAL REVIEW IN TEXAS WELFARE HEARINGS

In Texas there is no statutory law which allows an aggrieved party judicial review of a DHS administrative hearing. A DHS Hearing Officer, after hearing evidence, makes findings of fact and

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25. DHS rule and statutory authority stipulate a public assistance recipient's right to a fair hearing. See 1 TEX. ADMIN. CODE § 357.1 (West 2003); TDHS, FHFCR HANDBOOK § 1220. “The standards for fair hearings apply to all DHS programs except as otherwise provided by statute or departmental rules, including clients served through agencies under contract with DHS.” TDHS, FHFCR HANDBOOK §1310, *supra* note 20.

26. 1 TEX. ADMIN. CODE § 357.1(a) (West 2003). A client may appeal a DHS hearing officer's final administrative decision and request an administrative review. DHS administrative reviews are not hearings de novo. An agency attorney, or other qualified individual, reviews the paper case record and recordings made of the fair hearing for the basic tenets of due process. Wide discretion is afforded the hearing officer in his final decision. Except in the instance of denial of due process as evidenced from the record, or a glaring procedural mistake by the original hearing officer, final decisions in DHS will remain undisturbed. See also tit. 40, §79.1105.

conclusions of law and issues a final decision. There is no judicial review outside of an agency administrative review that is provided for an appellant.<sup>27</sup> Generally, in order for judicial review to apply, there must be a statute authorizing judicial review, or the action complained of must either (1) violate constitutional procedural due process, or (2) the states' immunity from suit is waived by the constitution.<sup>28</sup> Basic doctrines existing in Texas jurisprudence also further restrict the initiation of formal judicial review in the DHS fair hearings process.<sup>29</sup>

### *A. The Doctrine of Sovereign Immunity*

The doctrine of sovereign immunity bars a suit for judicial review against a state under two principles. First, a state must have given its permission to be sued.<sup>30</sup> That permission must be expressly given.<sup>31</sup> Likewise, a suit against an agency of a state is considered to be a suit against the state.<sup>32</sup> Second, sovereign immunity is the concept that a state has immunity from liability even though a state may have consented to being sued.<sup>33</sup> The doctrine of sovereign immunity removes judicial review from the immediate purview of DHS Hearing Officer final decisions. However, it begs the question of subject matter jurisdiction by a state district trial court as a viable alternative.

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27. tit. 40, § 79.1102(8)(B), (C).

28. *Southwest Airlines Co. v. Tex. High-Speed Rail Auth.*, 867 S.W.2d 154, 157 (Tex. App. 1993); *City of Port Arthur v. S.W. Bell Tel. Co.*, 13 S.W.3d 841, 845 (Tex. App. 2000).

29. These doctrines include sovereign immunity, subject matter jurisdiction, primary jurisdiction, exclusive jurisdiction, and exhaustion of administrative remedies.

30. *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 592 (Tex. App. 1991); *Hosner v. De Young*, 1 Tex. 764, 769 (1847).

31. *Mo. Pac. R.R. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 814 (Tex. 1970).

32. *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

33. *Dillard*, 806 S.W. 2d at 592.

### *B. Subject Matter Jurisdiction by a Trial Court*

What burden does a plaintiff or aggrieved party have in affirmatively showing that a trial court would have subject matter jurisdiction in a governmental agency matter absent the availability of judicial review? Subject matter jurisdiction by a trial court is a question of law and is reviewed *de novo*.<sup>34</sup> The trial court would look solely to the allegations in the petition and the court of appeals would necessarily take the allegations in the petition as true and construe them in the light most favorable to the party pleading them.<sup>35</sup> A plaintiff could rely on the Administrative Procedure Act (“APA”) as a statutory basis for a suit in a Texas district court, however, numerous opinions hold that the APA procedural provision does not confer subject matter jurisdiction on a district court in a petition for judicial review unless that review is authorized under the agency’s enabling legislation or other statutory provision.<sup>36</sup> The absence of a statute providing for judicial review, together with the general lack of subject matter jurisdiction by a trial court, further confirms that no judicial review of a DHS Hearing Officer’s final decision is available in a trial court unless there exists an issue of constitutional deprivation of due process.

### *C. Primary Jurisdiction, Exclusive Jurisdiction, and Exhaustion of Administrative Remedies*

The doctrines of primary jurisdiction, exclusive jurisdiction, and exhaustion of administrative remedies generally arise in cases where jurisdictional issues arise between an administrative agency and a court. Texas courts had, until recently, historically applied the doctrines in an inconsistent manner. Although the doctrines are

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34. *Tex. Dep’t of Criminal Justice v. Miller*, 48 S.W.3d 201, 204 (Tex. App. 1999), *rev’d on other grounds*, 51 S.W.3d 583, 589 (Tex. 2001); *Mayhew v. Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998).

35. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Miller*, 48 S.W.3d at 204.

36. TEX. GOV’T CODE ANN. § 2001.171 (Vernon 2000); *Tex. Dep’t of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 658 (Tex. App. 1997); *S.C. San Antonio, Inc. v. Tex. Dept. of Human Servs.*, 891 S.W.2d 773, 776 (Tex. App. 1995).

distinct, they have often been applied as if they were interchangeable in concept. The doctrines are significantly different, albeit sharing issues of similarity in their use. For purposes of examination of judicial review of an agency action, it is essential to look to the scope and purpose of each doctrine.

### 1. Primary Jurisdiction

Primary jurisdiction is jurisdiction granted by a judicially created doctrine to an administrative agency in order to decide certain controversies initially before relief is sought in the courts. Primary jurisdiction also means that a court may dismiss or stay an action pending a resolution of all or some portion of the case by an administrative agency. By its very name, primary jurisdiction connotes that jurisdiction may be appropriate in some other court or forum than the one in which the question is being considered.

Under the doctrine of primary jurisdiction a matter which is rendered by statute to an agency for initial action must be determined by that administrative agency before the matter may be reviewed by a court. The doctrine applies when resolution of issues are placed within the special competence of an administrative body.<sup>37</sup> The doctrine's importance is most relevant when certain types of administrative decisions are desirable or when there is a need for the specialized knowledge of an agency.<sup>38</sup> The purpose of the doctrine is

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37. United States v. W. Pac. R.R., 352 U.S. 59 (1956).

38. Shell Pipeline Corp. v. Coastal States Trading, Inc., 788 S.W.2d 837, 842 (Tex. App. 1990). In my opinion, formal judicial review in Texas would be inordinately burdensome on the state both financially and in terms of the sheer volume of informal hearings held by DHS each year. In addition, the burden on elected district court judges to conduct reviews as bench trials would be substantial. Judicial desk reviews would also serve as inadequate vehicles for hearings de novo, as they would not meet the due process standard outlined in *Goldberg v. Kelly* and its progeny. 397 U.S. 254 (1970). The Texas Government Code Sections 2001.171 - 2001.174 specifically addresses this point, stating in § 2001.174. Review Under Substantial Evidence Rule or Undefined Scope of Review:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or *if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but: (1) may affirm the agency decision in whole or in part; and (2) shall*

“to assure that the administrative agency will not be bypassed on what is especially committed to it [by the legislature].”<sup>39</sup>

## 2. Exclusive Jurisdiction

The Texas Supreme Court recently addressed a method for determining whether an agency had “exclusive jurisdiction” over a matter as opposed to primary jurisdiction.<sup>40</sup> They found that exclusive jurisdiction is a jurisdictional doctrine, as opposed to primary jurisdiction, which is a doctrine given to the prudence or reasonability of the jurisdiction as deemed through statute or judicial interpretation. Primary jurisdiction applies when both a court and an agency may have concurrent authority based on subject matter to

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reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (A) in violation of a constitutional or statutory provision; (B) in excess of the agency's statutory authority; (C) made through unlawful procedure; (D) affected by other error of law; (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code Ann. § 2001.174 (2003) (emphasis added).

39. *Foree v. Crown Cent. Petroleum Corp.*, 431 S.W.2d 312, 316 (Tex. 1968). See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), wherein the Supreme Court identified a category of interpretive choices distinguished by an additional reason for judicial deference, recognizing that Congress engages not only in express, but also in implicit, delegation of specific interpretive authority. “A very good indicator of delegation meriting *Chevron* treatment is express congressional authorizations to engage in the rulemaking or adjudication process that produces the regulations or rulings for which deference is claimed. Thus, the overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice and comment rulemaking or formal adjudication.” *United States v. Mead Corp.* 533 U.S. 218, 219 (2001). See also *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). The Supreme Court has also found reason for *Chevron* deference even when no administrative formality was required as in *Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995). Application of *Chevron* is not barred by lack of formal process. See also *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994); *State v. Pub. Util. Comm'n*, 883 S.W.2d 190 (Tex. 1994); *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820 (Tex. 1993).

40. *Cash Am. Int'l, Inc., v. Bennett*, 35 S.W.3d 12 (Tex. 2000).

make initial determinations in a dispute, although ultimately, jurisdiction would be appropriate in the primary forum.

Exclusive jurisdiction is an issue of statute and statutory interpretation as to which forum is the correct jurisdiction for resolution of the matter. For example, a court could determine that an agency did not have exclusive jurisdiction but the doctrine of primary jurisdiction would require the trial court to abate a proceeding until the final administrative decision was reached. In the alternative, if the legislature mandates that a party exhaust administrative remedies, that mandate constitutes exclusive original jurisdiction in that administrative agency.

### 3. Exhaustion of Administrative Remedies

The Merriam-Webster Dictionary defines the doctrine of exhaustion of administrative remedies as follows: “a doctrine of civil and criminal procedure: a remedy cannot be sought in another forum (as a federal district court) until the remedies or claims have been exhausted in the forum having original jurisdiction (as a state court, tribal court, or administrative agency).” The dictionary also notes that

the doctrine of exhaustion of remedies was first developed by judges in case law based on comity. It is used primarily in administrative law cases and federal habeas corpus cases, and it is now incorporated in the federal habeas corpus statute (section 2254 of title 28 of the U.S. Code). It may also be applied when an administrative agency has original jurisdiction over a claim. It is used in proceedings in tribal courts.<sup>41</sup>

Texas cases have held that the exhaustion of administrative remedies is a jurisdictional doctrine which provides that parties must first exhaust their administrative remedies before seeking judicial

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41. MERRIAM-WEBSTER'S DICTIONARY OF LAW 178 (ed. 1996).

review or filing a suit.<sup>42</sup> Purposes of the doctrine of administrative remedies include prevention of “premature interruption of an administrative agency’s duty of applying the regulatory statute to the facts of the case” in which the agency may hold the expertise, experience, and administrative discretion from which a court may be incompetent to handle.<sup>43</sup> Also, its purpose necessarily includes avoidance of the needless expenditure of district court judicial time and resources in the resolution of disputes that could be resolved within a continuing or ongoing administrative process. The doctrine allows an administrative agency the opportunity to rectify its own errors and therefore assure respect for the administrative process as well as discourage the disregard of that process.<sup>44</sup>

Exceptions to the doctrine of exhaustion of administrative remedies have focused on challenges to administrative agency action based on constitutional grounds such as the denial of due process and civil rights violations.<sup>45</sup> However, despite constitutional challenges, actions by administrative agencies in Texas have been allowed notwithstanding the absence of any statutory right to appeal.<sup>46</sup>

## V. CONCLUSION

When PRWORA became law on August 22, 1996, our nation’s welfare system was transformed into one where work is required in exchange for public assistance within time limits.<sup>47</sup> The Food Stamp

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42. See *City of Sherman v. Pub. Util. Comm’n*, 643 S.W.2d 681, 683 (Tex. 1983); *Firefighters & Police Officers’ Civil Serv. Comm’n v. Herrera*, 981 S.W.2d 728, 732 (Tex. App. 1998),

43. *Pub. Util. Comm’n v. Pedernales Elec. Coop., Inc.*, 678 S.W.2d 214, 220 n.3 (Tex. App. 1984).

44. *Id.*

45. *Texas Educ. Agency v. Cypress-Fairbanks Indep. Sch. Dist.*, 830 S.W.2d 88, 91 (Tex. 1992); *Jones v. Dallas Indep. Sch. Dist.*, 872 S.W.2d 294, 296 (Tex. App. 1994).

46. *Yamaha Motor Corp. v. Motor Vehicle Div.*, 830 S.W.2d 223, 229 (Tex. App. 1993).

47. On February 13, 2003, the U.S. House of Representatives approved changes to PRWORA of 1996. These changes would require a larger percentage of a state’s aid recipients to take jobs and work longer hours. Recipients would be required to work or be involved in scheduled activities such as training. The requirement would split necessary hours between on the job hours and school, job

and TANF programs stand at the forefront of the reform. Work activities under TANF are defined within this law as are time limits and state maintenance of effort requirements referred to as "MOE."<sup>48</sup>

Fair hearings provide the vehicle for public assistance recipients to be heard through the often confusing and challenging eligibility requirements and certification process for public assistance. This becomes especially crucial in light of the absence of formal judicial review in Texas.

A hearing officer's impact on any of these areas has substantial importance when viewed in the perspective of PRWORA and its changing requirements.<sup>49</sup> A hearing officer, remaining faithful to the tenets promulgated under *Goldberg v. Kelly* and its progeny is possible without the statutorily created process of judicial review. The safeguards of impartial vigilance and observance of due process by trained hearing officers in fair hearings, administrative reviews, and administrative disqualification hearings in DHS cannot be underestimated, nor can it be duplicated through a formal process of judicial review. The future of DHS public assistance fair hearings without formal judicial review ultimately remains to be seen as

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training, drug rehabilitation, parenting classes or other instruction. It remains to be seen whether final passage of this change will become law.

48. States must spend a certain minimum amount of their own money to help eligible families under the TANF block grant program in a manner consistent with the purposes of the TANF program. States are rewarded for high performance and the reduction of out of wedlock births. One billion dollars is available through fiscal year 2003 to states for achieving program goals. Separate annual appropriations or bonuses will be awarded to the five states that can show the greatest success rates in reducing out of wedlock birth rates while also reducing abortion rates.

49. The United States Department of Health and Human Services may currently limit a state's block grant under TANF if it fails to meet satisfactory work requirements by its recipients, comply with five year limits on assistance, meet the state's basic maintenance of effort requirements, meet a state's contingency fund MOE requirement, reduce recipient grants for refusing to participate in work activities without good cause, maintain assistance when a single custodial parent with a child under six cannot obtain child care, submit required data reports, comply with paternity establishment and child support enforcement requirements, participate in the Income and Eligibility Verification System, repay a federal loan on time, use funds appropriately, and replace federal penalty reductions with additional state funds.

PRWORA requirements become increasingly focused on the personal responsibility of the recipient.