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## Report to the Judicial Council on the Administrative Law Judge Statute

James F. Flanagan

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# **REPORT TO THE JUDICIAL COUNCIL ON THE ADMINISTRATIVE LAW JUDGE STATUTE\***

**James F. Flanagan\*\***

**April 1998**

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#### I. Executive Overview

The Judicial Council of South Carolina requested that the state's Administrative Law Judge Division statute be reviewed. The statute has been in effect for five years, and sufficient experience has been gained to examine its operation.<sup>1</sup> Three topics are covered. The first is whether there should be any review, by the agency, of Administrative Law Judges (ALJ) decisions in contested cases. The present statute provides that the ALJ's decision in about 75% of the contested cases is the final agency action, subject to limited judicial review in the circuit court. However, ALJ decisions involving the Department of Health and Environmental Control (DHEC), the Office of Ocean and Coastal Resource Management (OCRM), a part of DHEC, and the Department of Natural Resources (DNR) may be appealed and reviewed by the agency, which can alter or amend the ALJ's decision under a limited

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<sup>1</sup> The Judicial Council is a statutory body authorized to study the administration of justice and recommend changes to the legislature and courts. See S.C. Code Ann §§ 14-27-10 to 100 (1976 & Supp. 1997). This report was prepared by Professor James F. Flanagan, University of South Carolina School of Law, at the direction of the Judicial Council and reprinted with its permission.

scope of review.<sup>2</sup> The agency's decision is then subject to judicial review in the circuit court.

The present statute was enacted, in part, to correct the problems that occurred when agency boards and commissions had unrestricted review of the decisions of hearing officers. There were substantial concerns about how ultimate decisions were made and the regularity of procedures. The present system appears to be working well. In all cases, the ALJ Division provides a decision-maker who is neutral and independent from the agency involved, and one who can render a final decision promptly. In most cases the ALJ's decision is the final agency action. In three instances the ALJ's decision may be reviewed by the agency. This limited agency review also appears to be working well.

Agency review of ALJ decisions occurs infrequently, and apparently only on matters of particular importance to the agency. There is some indication that the agency board reviewing the appeal may not be strictly observing the legal standard of review in the statute, but experience is limited to date.

The ALJ statute and the Division have clearly resolved concerns about the regularity of the administrative decision making process. However, the ALJ's unique independence from the agencies, and within the Division itself, while remedying the major defects in the prior system, has the unexpected consequence that contested case decisions by the ALJ may be inconsistent with previously established agency policy. This makes it more difficult to predict the outcome of cases, encourages litigation, and introduces uncertainty in the administration of agency programs. It is difficult to define the scope of the problem, and while it is clearly less significant than the issues which required reform, it is an issue of some importance in the administrative process.

Any decision to modify the current structure on agency review is ultimately a policy decision by the legislature that balances the need for consistent policy application, the determination of which entity should be responsible for policy determination, and the time, expense and effect of agency review.

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<sup>2</sup> Executive departments governed by boards or commissions may review ALJ decisions. Executive departments governed by a single director may not. S.C. Code Ann. § 1-23-610(A) (Supp. 1997). Approximately 25% of the ALJ Division's case load comes from agencies governed by a board or commission and consequently 75% of ALJ decisions are the final agency action. See *infra*, note 35.

The second issue considered is the appropriate court to review the final agency action. Presently, all appeals of final agency action, whether made by the ALJ or by the agency upon review, are filed in the circuit court. This creates a three-step procedure for judicial review in which the circuit court, court of appeals and the supreme court all may review, and all apply the same standard mandated by the Administrative Procedures Act. (APA). Appeals from professional licensing decisions are a four-step process because the initial appeal is to the Division and then to the circuit court, and then to the appellate courts. There is nothing inherent in these cases that requires a multi-level review, and a direct appeal to the appellate courts is recommended.

The third issue is the enforcement of the Code of Judicial Conduct. The ALJ statute makes all ALJs subject to the Code of Judicial Conduct found in SCACR 501, and directs the State Ethics Commission to enforce that Code through the procedures of the State Ethics Act. The result is a duplicate set of standards for ALJs governing the same conduct. The legislature adopted a different approach for members of the judiciary and limited the State Ethics Act's application to matters relating to reporting and campaign finance involving the judiciary. A similar approach for ALJs is recommended. Also, the current statute makes the sanctions under the State Ethics Act available for violations of the Judicial Code. This stitching together of standards from one source and sanctions from another appears to create a result which is inappropriate for ALJs.

## II. Introduction

### A. Background

The ALJ Division was created by Act 181 of 1993 as part of the restructuring of state government.<sup>3</sup> A major purpose was to improve

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<sup>3</sup> Prior to 1993 South Carolina's executive agencies were those under the constitutional officers, the Secretary of State, State Treasurer, Controller General, Attorney General, Superintendent of Education and Commissioner of Agriculture, Adjutant General and approximately 145 other agencies governed by boards or commissions. Most of the boards and commissions served part-time. Appointments were generally with legislative approval, although some were exclusively gubernatorial and some exclusively legislative appointments. *See* South Carolina Commission on Government Restructuring, *Modernizing South Carolina State Government for the Twenty-First Century* 33-39 (1991). No change was made in the constitutional offices. However, the Act created the ALJ Division and consolidated

administrative practice, and to provide a standard method of administrative procedure, particularly in contested case adjudications. Prior contested cases were heard by hearing officers appointed by the relevant agency for a particular case. This approach was criticized for a lack of established and consistent procedures, and by claims of irregular and secretive proceedings, over-reliance on agency staff, and the failure to separate the advisory function of the agency staff from the agency's adjudicative function.

The legislature made two decisions to cure the perceived defects in the prior administrative procedure. First, the General Assembly elects all ALJs for a specific term to the Administrative Law Division (Division), an independent agency within the Executive Department. They are neither employees, nor permanently assigned to the agency whose cases they hear. The ALJs meet the same qualifications as members of the judiciary. By statute, the ALJs rotate among the agencies providing the ALJs a broader administrative experience, and the agencies more professional and neutral decision-makers. The Division is a substantial improvement over the prior system. South Carolina's creation of a central panel of independent ALJs followed other jurisdictions.<sup>4</sup>

Second, the legislature gave the ALJs unique independence in many adjudications. South Carolina's ALJs are authorized to render the final agency decision in about 75% of their cases, subject only to judicial review by the circuit court. This approach is an exception to the general rule in both federal and state governments, as well as in South Carolina before the Division was created, that the ALJ's

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seventy-five agencies into seventeen executive departments led by individuals appointed by the governor with the advice and consent of the Senate. Five departments remain governed by boards and commissions appointed by the governor with the advice and consent of the Senate: Department of Natural Resources; Department of Health and Environmental Control; Department of Transportation; Department of Mental Health and Department of Disabilities and Special Needs. See James H. Hodges, *The Restructuring Act of 1993 -- Has the Ben Tillman Era Been Pitchforked?* S.C. Lawyer Sept/Oct 1993 at 18.

<sup>4</sup> The following jurisdictions have central panels of ALJs: Arizona, California, Colorado, Georgia, Florida, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, City of New York, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin and Wyoming.

decision in a contested case is subject to review and revision by the affected agency, and that decision thereafter becomes the final agency decision.<sup>5</sup> ALJ decisions involving DHEC and DNR may be appealed to those agencies, albeit, under a limited standard of review that is comparable to that provided by the judicial branch when the case is reviewed in the circuit court.

#### B. An Overview of Agency Review of ALJ Decisions in Other Jurisdictions

The rationale for the agency's review of an ALJ's decision in a contested case is that the legislature delegated to that agency the responsibility for enforcing a particular statutory scheme and determining and applying legislative policy to those regulated. Contested cases often raise important policy questions that could not have been anticipated, or are not covered by the regulations, or because the cases are unusually complex.<sup>6</sup> The agency, as the statutorily authorized entity, should review contested cases to determine these policy issues. A second, and equally important, justification for agency review of contested cases is that it provides consistency in decision-making, so that factually similar cases are decided the same way.

Agency review of ALJ decisions, while *de novo* in theory, is often considerably less so in practice. In some states, the findings of the ALJ must be given deference. For example, Colorado provides that findings of evidentiary fact, as distinguished from ultimate conclusions, will not be set aside unless contrary to the weight of the evidence.<sup>7</sup>

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<sup>5</sup> See 5 U.S.C. § 557(b) (1988); See e.g., *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). There are exceptions to the general rule. For example, at the Social Security Administration, the ALJ's decision can be reviewed by an appeals panel which renders the final agency decision. See 20 C.F.R. §§ 404.981 (1998). Some states make the ALJ's decision final, subject only to judicial review, in limited instances. See Mo. Ann Stat. §§ 621.015 - 621.189 (West 1988 & Supp. 1996) (contested licensing cases, appeals from the decisions of the director of revenue, and certain rule-making decisions that are not contested cases); See Me. Rev. Stat. Ann. tit. 4 §§ 1151-58 (West 1989) (Administrative Court has jurisdiction to hear agency initiated actions to revoke or suspend licenses). Other states permit, but do not require, the agency to delegate to the ALJ the power to make a final decision. See Ga. Code Ann. § 50-13-42 (b) (1994) (State Personnel Board, by rule, may provide that the ALJ decision is final).

<sup>6</sup> See *S.E.C. v. Chenery Corp.* 332 U.S. 194, 202-03 (1947).

<sup>7</sup> See Colo. Rev. Stat. Ann. § 24-4-105(15)(b) (1990).

Washington state requires the ALJ to identify findings that are based upon an evaluation of the credibility of the witness,<sup>8</sup> so that those findings will be given greater deference on agency appeal. South Carolina limits the agency review unless there is no substantial evidence to support the findings of fact or there has been an error of law.<sup>9</sup> Texas provides that findings of fact and conclusions of law may be changed only for reasons of policy.<sup>10</sup>

A second approach to agency review of ALJ decisions, found principally in the federal government, is the use of specialized bodies within the agency to hear the appeal. The specialized appeal body provides for agency input and consistency of decision-making and reduces the opportunity for arbitrary decision-making by political appointees. For example, the Postal Services uses a designated Judicial Officer to review ALJ decisions, and the Judicial Officer's decision becomes the final agency decision.<sup>11</sup> The Social Security Administration has a 24-member panel that reviews between 50,000 and 80,000 determinations and renders the final agency decision.<sup>12</sup> Other departments have review boards, but with the provision that the agency may review cases. For example, the FCC's review board's decisions are the final agency action unless they are reversed by that Commission which reserves the right to decide all policy questions and such questions must be certified to it.<sup>13</sup>

This brief summary of other administrative law statutes suggests there is no preferred model of agency review. Moreover, even if agency review is provided, the reality is that in many situations the scope of the review of ALJ decisions is limited. Any analysis of the desirability or necessity of agency review should consider that it occurs relatively infrequently and may serve limited purposes.

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<sup>8</sup> See Wash. Rev. Code. § 34.05.461(c)(3) (1990).

<sup>9</sup> See S.C. Code Ann. § 1-23-610(D) (Supp. 1997).

<sup>10</sup> See Tex. Gov't Code Ann. § 2001.058 (West 1997).

<sup>11</sup> See 39 U.S.C. § 204 (1988); 39 C.F.R. § 226.2(e) (1995).

<sup>12</sup> See generally, Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251, 255-57 (1996) (hereinafter referred to as Weaver). The appeals council judges hear cases individually. If the judge decides to overturn the ALJ decision the matter is randomly referred to another judge. If both agree, the case is resolved. If they disagree, a third judge reviews the matter, and the majority decision becomes the final agency action.

<sup>13</sup> See Weaver, *supra* note 12, at 263-64.



### III. The South Carolina ALJ Review Procedure

#### A. ALJ as Final Adjudicator

The ALJ's decision in a contested case is the final decision of every administrative agency headed by a director, that is subject to the Act. The contested case is a *de novo* trial proceeding in which the ALJ makes their own findings of fact in a contested case hearing.<sup>14</sup> Likewise, the ALJ makes independent conclusions of law in deciding the matter. The ALJ, of course, is bound to follow the statutes and regulations when the issue is clear.<sup>15</sup>

#### 1. The ALJ and Agency Policy

The issue, however, is not the application of well-established law to uncontradicted facts, but applying the law when the facts present new, novel or unanticipated situations. Then, the determination of policy becomes paramount. On this issue, South Carolina's model emphasizes the independent decision making of the ALJ.<sup>16</sup> The affected agency is an advocate that must persuade the ALJ of the validity of its interpretation of the applicable law and regulations. The ALJ statute does not provide any specific direction to the ALJ regarding the deference, if any, to be accorded to the agency's legal position.<sup>17</sup> This lack of statutory direction, the Division's status as an independent agency, and the statutory command to the ALJ to make independent findings of fact and conclusions of law, however, all lead to the inference that the ALJ is free to accord such deference as the judge deems appropriate in a particular case.

The full extent of this freedom in policy matters can be seen in

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<sup>14</sup> See S.C. Code Ann. § 1-23-320(d) (Supp. 1997); Rule 29(B), Rules of Procedure for the ALJ Division.

<sup>15</sup> See *Faile v. S.C. Employment Security Division*, 267 S.C. 536, 230 S.E.2d 219 (1976).

<sup>16</sup> See Hon. Marvin F. Kittrell, *ALJs in South Carolina*, S.C. Lawyer (May/June 1996) at 42, 43. The advantages of ALJ independence from the agency are also discussed in William B. Swent, *South Carolina's ALJ: Central Panel, Administrative Court, or a Little of Both?* 48 S.C. L. REV. 1 (1996).

<sup>17</sup> The ALJ may take judicial notice of "generally recognized technical or scientific facts within the agency's specialized knowledge." S.C. Code Ann. § 1-23-330(4) (1976). However, that provision is discretionary, and applies to factual and technical knowledge rather than policy interpretations.

cases in which the ALJ may alter the fines imposed by the agency.<sup>18</sup> The amount of the fine for an admitted violation is a central aspect of enforcement policy. The amount is an agency judgment about the seriousness of the violation, the relative importance of the violation in the regulatory scheme, as well as a need to be consistent in factually similar cases. The amount of the fine is clearly an issue on which the agency brings to bear important institutional considerations. Yet, the agency's decision can be altered by any ALJ in three-fourths of the contested cases heard by the Division.

One consequence of South Carolina's administrative procedure is that it can create uncertainty and inconsistency between the regulatory policy articulated by the agency, and the policy ultimately enforced by the ALJ in contested cases. Two issues flow from this situation. First, the potential for changing an agency decision through adjudication may lead to more contested cases. Second, there is the question of who should make those policy decisions, the agency charged with the enforcement of the statutory scheme, or a neutral decision-maker who brings a broader perspective to the issue. There is no "correct" answer to these questions because they go to the key issue of what is expected of administrative agencies, and what is expected of a central panel of ALJs. Moreover, the decision must be made in the context of South Carolina's experience where unlimited agency review did not work well.

## 2. Consistency of Decisions within the Division

Another, and perhaps more significant factor, introducing uncertainty is the standard rule of precedent that a decision of one ALJ is persuasive, but not binding authority, on other ALJs. Judicial rotation among agencies means that an issue involving one agency may be decided differently by different judges. The issue is not that the ALJ decides, or that one decision is better than another, but that there are different interpretations of the same issue. The uncertainty affects all cases involving the agency, both before and after they become contested cases.

There is no formal or informal procedure for establishing consistency of interpretation on recurring issues in contested cases.

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<sup>18</sup> See, e.g., *South Carolina Dept of Revenue and Taxation v. Rainbow Inn and Deli*, 95-ALJ-17-0178-CC (Dec. 29, 1995) (finding violation but reducing fine).

Judicial review is not effective in restoring consistency of interpretation. The number of appeals reaching the courts is very small, and the likelihood that issues of consistency will be preserved and resolved is even smaller. This also creates an incentive among litigants to seek contested cases because of that uncertainty. Other judicial bodies have faced this problem. The South Carolina Court of Appeals, which sits in panels of three judges, adopted rules permitting a majority of the judges to order rehearings in banc "when consideration by the full court is necessary to secure or maintain uniformity of its decisions or (2) when the proceeding involves a question of exceptional importance."<sup>19</sup>

B. ALJ Decisions Reviewed by an Agency

An ALJ's decision can be reviewed by an agency in three instances. DHEC, (with appeal to the DHEC Board), the Office of Ocean and Coastal Resource Management (with appeal to the Coastal Zone Management Appellate Panel) and the Department of Natural Resources, (with appeal to the DNR Board) may review the ALJ's decision in a contested case.<sup>20</sup> The scope of review is limited by statute. Section 1-23-610(D) provides:

(D) The review of an administrative law judge's order must be confined to the record. The reviewing tribunal may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

(a) . in violation of constitutional or statutory

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<sup>19</sup> Rule 219 SCACR Hearing of Cases by the Court of Appeals *En Banc*; See also, *Burbach v. Investors Mgt. Corp.*, 326 S.C. 488, 484 S.E.2d 119 (Ct. App. 1997).

<sup>20</sup> The DNR contested cases involve violations of licensing statutes and regulations which are based upon criminal trials for the same violations. Therefore, there is little for the ALJ to do, and little reason to appeal the decision to the agency. See Benjamin T. Zeigler, *The South Carolina Administrative Law Judge Division and the Limits of Central Panel Decision-Making Power* (1997) 46, 47 and n.167 (hereinafter Zeigler) (Copy on file with author of this report). This raises the question of the necessity of any intermediate review of these decision, before review by the courts.

- provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon an unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The standard of review in § 1-23-610(D) follows the language of the general judicial review provision for administrative law decisions found in S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1997), with one exception. The ALJ statute does not include the first sentence of § 1-23-380: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."<sup>21</sup> However, for all practical purposes the standard of review is the same under both statutes.

Two issues arise from applying the judicial standard of review to agencies reviewing ALJ decisions. Section 1-23-380 contains a deferential standard of review and requires courts to defer to administrative agency decisions. The limited scope of review of factual findings is justified by the agency's expertise in the matter.<sup>22</sup> There is a similar deference in the agency's interpretation of its statute. "The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."<sup>23</sup> The doctrine of separation of powers also limits judicial review of the actions of an executive

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<sup>21</sup> The omission may support the argument that the board or commission has greater power to find facts, but, subpart (e) refers to the substantial evidence standard which indicates that the board's review of facts is limited.

<sup>22</sup> See *Board of Bank Control v. Thomason*, 236 S.C. 158, 169, 113 S.E.2d 544, 549 (1960). "The agency's experience, technical competence and specialized knowledge may be utilized in the evaluation of the evidence." S.C. Code Ann. § 1-23-330(4) (1986).

<sup>23</sup> *Faile v. S.C. Employment Security Comm.*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) (citations omitted).

agency.<sup>24</sup>

The rationale for requiring courts to defer to factual and policy determinations by the agency is a consequence of the policy decision that the agency, not the court, is responsible for enforcing the statutory scheme. The court's role is to ensure procedural fairness and a review of legal questions. This rationale does not necessarily require deference to an ALJ decision, particularly when it is the agency, with its greater expertise and experience in the subject, conducting the review of policy judgments.

Second, the statutory standard of review is a legal standard. In effect, the agency is to reverse the ALJ only if there has been an error of law, but not if it is a question of fact, or matter within the discretion of the decision-maker, so long as the decision is not arbitrary and capricious. Thus, the statute commands the board of an agency, which is normally concerned with policy issues, not to make policy decisions, but to apply legal standards.<sup>25</sup>

As might be expected in the application of a new statute, it is not clear that the standard always is being applied as drafted. As of January 1, 1998, there have been only six instances in which the agency has overturned an ALJ's decision. In one instance, the major ground appears to be an error of law because the ALJ imposed a condition that had been repealed.<sup>26</sup> In other instances the agency reversed the ALJ's decisions because of differences in the interpretation of regulations. While that arguably might be considered an error of law, it has been maintained that the agency decisions are inconsistent with the review statute because the agency was overturning a matter now committed to the discretion of the ALJ.<sup>27</sup> None of these cases have received judicial review and there are no opinions providing guidance on whether they are properly decided under the statute.

#### C. Judicial Review of Contested Case Decisions in South Carolina

Once the final decision is rendered, either by the ALJ or by the

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<sup>24</sup> See *Guerard v. Whitner*, 276 S.C. 521, 280 S.E.2d 539 (1981).

<sup>25</sup> See *Zeigler*, *supra* note 20, at 48.

<sup>26</sup> See *DHEC v. Oswald*, No 94-ALJ-07-0160 (1996) (regulation requiring a showing of need repealed).

<sup>27</sup> See *Zeigler*, *supra* note 20, at 49-51.

agency, appeal is to the circuit court and then to the court of appeals and, by writ of certiorari, to the supreme court. To date, there has been limited judicial review of the ALJ decisions. Prior law, however, required the courts to give substantial deference to the decision of administrative agencies. Findings of fact are sustained on appeal if they are supported by substantial evidence.<sup>28</sup> The APA itself states that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."<sup>29</sup> Findings of fact, however, can be reversed or modified if they are "clearly erroneous in view of the substantial evidence on the whole record,"<sup>30</sup> or if substantial rights of the appellant have been prejudiced because the finding, inferences, conclusions or decisions have been affected by an error of law.<sup>31</sup> Moreover, the courts may defer to the agency's interpretation of the statute.<sup>32</sup> Mixed questions of law and fact are entitled to the same deference. However, the court may reverse for any error of law.

The courts are apparently providing the same deference to the decision of an ALJ as they did to an administrative agency.<sup>33</sup> This is justified, in part, because the Division is an agency, and the APA requires the courts to grant deference to "agency" decisions. Judicial review is unlikely to provide much guidance on administrative procedure because of the few cases appealed to the courts and the deferential standard of review.

#### D. The ALJ Division and Agency Review in Perspective

The General Assembly chose a model of administrative procedure that gives the ALJs unusual independence in about three-fourths of their cases in which the ALJ makes the final decision, subject only to judicial review. In the remaining cases the ALJ decision is subject to agency review. Of the 481 cases filed in the last four fiscal

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<sup>28</sup> See *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 534, 489 S.E.2d 674, 677 (Ct. App. 1997).

<sup>29</sup> S.C. Code Ann. 1-23-380(A)(6) (Supp. 1997).

<sup>30</sup> *Welch Moving & Storage Co. v. Public Serv. Comm.*, 301 S.C. 259, 391 S.E.2d 556 (1990).

<sup>31</sup> See *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 336, 478 S.E.2d 74, 75 (Ct. App. 1996).

<sup>32</sup> See *Faile v. S.C. Employment Security Comm.*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) (citations omitted).

<sup>33</sup> See *Reliance Ins. Co. v. Smith*, 327 S.C. 528, 535, 489 S.E.2d 674, 678 (Ct. App. 1997).

years,<sup>34</sup> thirty-three cases have been appealed to the agency. Of those, twenty-one were affirmed, one affirmed in part and reversed in part, and five were reversed.<sup>35</sup> Seven others were resolved or dismissed without a decision on the appeal by the agency. Thus, of the 481 cases heard by the division, twenty-eight went to appellate decision by the agency, producing five reversals, and one partial reversal. The DHEC board reversed the denial of a certificate of need in one case, and in the remaining five cases, the OCRM reversed the ALJ. In those cases, one was because the applicant was not required to demonstrate a need for the full 100 feet of the dock, contrary to the finding of the ALJ,<sup>36</sup> and the four other cases reversed the ALJs interpretation of the agency's regulation regarding docks. Two of these cases concerned the location, and two the size of the dock.<sup>37</sup> In all five cases the agency board apparently reversed decisions which were inconsistent with the agency's prior interpretation of the regulation.

Several conclusions can be drawn from these data. First, the number of appeals of an ALJ decision to the agency is small. Less than 10% of the 481 cases filed in the Division involving DHEC and DNR were appealed to the agency. Moreover, the agency affirmed approximately three-fourths of the ALJ decisions. Thus, almost all cases were either consistent with agency policy, or at least, acceptable enough for it not to take an appeal. The small number of appeals, however, does not mean that they are unimportant. The DHEC and OCRM cases are the more complex ones before the Division and it is

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<sup>34</sup> The number of cases involving DHEC and DNR as indicated in the Annual Reports of the Division are as follows:

Fiscal Year 1993-94 --	48 cases	25.0%	of caseload
Fiscal Year 1994-95 --	131 cases	18.2%	of caseload
Fiscal Year 1995-96 --	147 cases	23.7%	of caseload
Fiscal Year 1996-97 --	155 cases	23.6%	of caseload

<sup>35</sup> See Chart Attached as Exhibit 1.

<sup>36</sup> See *DHEC v. Oswald*, No 94-ALJ-07-0160 (1996).

<sup>37</sup> In two cases the agency rejected the ALJ's decision to permit a larger dock for recreational purposes. See *DHEC v. Bessinger*, 94-ALJ-0207-CC (1995); *DHEC v. Hooser*, 94-ALJ-07-0372-CC (1995). Two involved a regulation requiring docks to stop at the first navigable creek, and reversed the ALJ's decision requiring the owner to align the dock to reach the first navigable stream, even if it could be avoided by placing the dock in another location. See *Norris v. Trott*, 95-ALJ-07-0744-CC (1997); *Mikell v. DHEC*, 96-ALJ-07-0447-CC (1997).

reasonable to assume those cases in which the agency and the ALJ disagree raise important issues, and have a significant impact on the agency and its enforcement of statutes committed to it. Nevertheless, the appeal to the agency is not being used routinely, nor does it appear that the agencies are continually disagreeing with the results of the contested case.<sup>38</sup>

Second, the cases that were reversed are an indication of what the agency considers important. At least four and possibly five cases reversed interpretations of the regulations by the ALJ that were inconsistent with the agency's prior interpretation. The appeals can be viewed as an agency attempt to restore consistency of interpretation of important regulations.<sup>39</sup> As noted above, in two cases the agency rejected larger docks for entertainment purposes, and two appeals rejected an interpretation of the "nearest navigable stream" to require particular placement of the docks. The number of docks in the state imposes a particular need for consistency. New interpretations may substantially alter the meaning of the regulation, and once adopted are applicable to all. Thus, individual changes, small in each case, may have tremendous ramifications for the enforcement of the regulatory scheme.

That appeals are used to restore consistency of interpretation suggests that the appellate route does serve an important function from the agency's point of view, particularly when not used indiscriminately. It also suggests that agencies value and need consistent interpretation to function efficiently. As noted above, the problem of consistency also occurs when different ALJs decide the same issue differently. The full scope of this problem may be hidden. Only about 25% of decisions are subject to any agency review, so in approximately three-fourths of the cases there is no effective way for an agency to present and resolve these inconsistencies.

This also suggests that there may be more uncertainty in the

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<sup>38</sup> In the first two years, the Division reversed approximately 20% of agency decisions (8 of 42 cases involving DHEC). See Eileen S. Githens, *Two Years with the ALJ Division*, S.C. Lawyer (May /June 1996) at 45. Through the fall of 1997, the number of final decisions reviewed by agencies was less than 10% of the cases filed. This suggests that a large percentage of decisions that are adverse to the agency are not appealed to the agency.

<sup>39</sup> See Zeigler, *supra* note 20 at 49-51.



current administrative procedure. An ALJ is not bound to adopt the agency position, nor is an individual ALJ bound to adopt the position previously adjudicated. The opportunity to overturn agency positions may encourage more contested cases, particularly those involving important or controversial issues, because the final decision is one reached *de novo*.

Third, the benefits of agency review come at the cost of another layer of review in the process. On average, an appeal to the agency takes approximately 180 days from date of appeal to the date of agency decision. There is a corresponding increase in expense as well as delay in the project when the ALJ decision is appealed to the agency.

E. Other Alternatives

1. Rule-Making as a Response to the Need for Consistency in Adjudication

One agency response is to develop policy by promulgating regulations which will bind ALJs.<sup>40</sup> Commentators have always preferred rule-making to adjudication as a means to develop and establish policy because of its full opportunity for comment. Rule-making, however, has its limitations. First, it is not possible to anticipate all issues that might arise. Any regulatory process inevitably must provide discretion to handle those unanticipated issues. It is precisely this discretion that is at issue when the ALJ is not bound to follow the judgment of the agency.

Moreover, the rule-making process in South Carolina is lengthy and complicated. The agency must give notice in the State Register of a drafting period with not less than thirty days for comments and a public hearing.<sup>41</sup> An ALJ presides at hearings on regulations to be promulgated by agencies that have single directors and, after the close of the record, issues a written report including the need and reasonableness of the proposed regulation.<sup>42</sup> The General Assembly may request an economic assessment of any regulation that has a substantial economic impact, and the agency must submit to the Division of Research and Statistics of the State Budget and Control Board a preliminary assessment on regulations that will have a

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<sup>40</sup> See Zeigler, *supra* note 20, at 35-37.

<sup>41</sup> See S.C. Code Ann. § 1-23-110(A)(Supp. 1997).

<sup>42</sup> See S.C. Code Ann. § 1-23-110(A)(3)(g)(Supp. 1997).

substantial economic impact.<sup>43</sup> The Division of Research and Statistics must then publish, within sixty days of the public hearing, a final assessment report.<sup>44</sup> All of the notices have to be published in the State Register, and its publication schedule imposes additional time delays since it is published once a month, and requires that material be submitted a few weeks before publication. The regulation must be submitted to the legislature for its review within one year of the commencement of the drafting process.<sup>45</sup> Thereafter, it is referred to the appropriate committee where, if no action is taken, it becomes effective 120 days after presentment.<sup>46</sup> However, the committee may determine that it will not approve the regulation as drafted, and after notifying the agency, it can withdraw and resubmit the regulation within thirty days. If regulations subsequently promulgated, contain substantive changes not considered or discussed by the public comments, the changes must be processed as a new regulation.<sup>47</sup>

Although the ALJs decisional independence may lead agencies to adopt regulations to restrict that discretion, it is a lengthy and difficult process, and the regulation that emerges may be different from originally proposed by the agency. Consequently rule-making will not resolve the problem.

## 2. Deference to Agency Positions by Statute or Practice

As noted above, courts, by statute, must defer to agencies in matters committed to the agency discretion. The substantial evidence standard permits agency fact-finding to stand, absent an abuse of discretion, although other fact-finders could draw different conclusions from the same evidence. Likewise, agency interpretations of statutes and regulations are entitled to deference by courts. ALJs, however, need not accord such deference to agency positions on fact-finding or its interpretations of statutes or regulations. The concept of a central panel of neutral decision-makers does not require complete independence from the agency interpretations of its statutory mandate. Statutory direction, or a practice, of deference to agency policy

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<sup>43</sup> See S.C. Code Ann. § 1-23-115 (B) (Supp. 1997).

<sup>44</sup> See *id.*

<sup>45</sup> See S.C. Code Ann. § 1-23-120 (Supp. 1997).

<sup>46</sup> See S.C. Code Ann. § 1-23-125 (C) (Supp. 1997).

<sup>47</sup> See S.C. Code Ann. § 1-23-125(E) (Supp. 1997).

positions and interpretations of statutes and regulations, similar to that required of courts, would eliminate a major cause of inconsistent decision making.

### 3. Procedure for En Banc Consideration of Issues

A second and complementary procedure for establishing a uniform position, when there are conflicting ALJ decisions, is the use of en banc review by the Division. En banc review is the standard method of resolving inconsistent determinations among panels. A similar result would follow from a practice that treats prior opinions as binding on the ALJs. This is the method in the United States Courts of Appeals. The rationale is that the first decision is a decision of the court and binds the court absent a rehearing en banc or an opinion of the Supreme Court.<sup>48</sup>

#### F. Summary on the Issue of Agency Review

The extent of agency review of ALJ decisions is a policy judgment committed to the General Assembly. By any measure, the ALJ Division has succeeded in standardizing procedure in contested cases, and providing fair, speedy and neutral adjudications. The appellate procedure is a small part of the operation of the Division, but, merits careful attention because of the importance of the cases involved. The legislature's initial decision, made in light of the prior practice of unrestricted agency review, was to provide for review only to certain agencies. The ALJ's decisions are the final agency action in virtually all cases. Even in those cases subject to appeal, the number of appeals is small, and most appeals affirm the decision of the ALJ. As suggested above, agency review provides an opportunity for the agency to establish consistency in interpretation, but it is not clear that the review board properly applies the statutory standard of review in all cases, and it is an additional layer of review increasing the time and cost of contested cases. There is some indication of a need for procedures or policies that result in consistency of interpretation within the Division so that both the agency and the litigants can have more predictability, but it is very difficult to assess the dimensions of the problem. If

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<sup>48</sup> See, e.g., *Davis v. Estelle*, 529 F.2d 437 (5th Cir. 1976).

deemed substantial, there are several ways to address this issue by adopting internal procedures that would provide consistent interpretation. Amendment of the statute to eliminate agency review would reduce the expense of contested cases and the time to final decision, but may lead to greater differences between the policies of the agency and those expressed in individual ALJ decisions in contested cases. That judgment is committed to the legislature.

#### IV. Appeal to the Circuit Court

##### A. Introduction

A second issue to be considered is the appropriate court to review administrative decisions, whether made by the ALJ or by the agency. All litigants in administrative law cases are guaranteed judicial review by the State Constitution.<sup>49</sup> Appeals from the ALJ's decision, or from the agency, when it makes the final agency decision, are to the circuit court.<sup>50</sup> Even before the APA, judicial review could be had by an action in the circuit court for an injunction, declaratory judgment, writ of certiorari or mandamus.<sup>51</sup> The circuit court hears the matter as an appellate court, and applies the standard of review contained in the APA. The circuit court's decision may be appealed to the court of appeals and the supreme court.<sup>52</sup>

The designation of the trial court as the initial court for judicial review appears deliberate. The Model State Administrative Procedure Act, upon which our act is based, provides for review in the trial court.<sup>53</sup> South Carolina's APA also provides for actions in the trial court regarding the promulgation of regulations.<sup>54</sup> Perhaps more

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<sup>49</sup> See S.C. Const. Art. I, § 22. No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right of judicial review.

<sup>50</sup> See S.C. Code Ann. §§ 1-23-380(a)(1) and 1-23-610(B) and (C)(Supp. 1997).

<sup>51</sup> See David E. Shirley, *SOUTH CAROLINA ADMINISTRATIVE LAW*, Chap. VII p. 7-13 to 7-17 (1989).

<sup>52</sup> See S.C. Code Ann. § 1-23-390 (1976).

<sup>53</sup> See 15 Uniform Laws Annotated § 5-104 (1990).

<sup>54</sup> See S.C. Code Ann. § 1-23-150(b) (1976) (declaratory judgment action challenging regulation that interferes with legal rights).

importantly, at the time the APA was adopted the only appellate body was the state supreme court. A review in the trial court provided a two-step appellate process. The circuit court also acted at that time, and today, as an appellate body on appeals from some decisions of the master in equity,<sup>55</sup> the probate court<sup>56</sup> and the magistrates court.<sup>57</sup> The circuit court shares concurrent jurisdiction over some matters with these courts. Thus, directing the initial appeals from those courts to the circuit court centralized the procedure.<sup>58</sup>

The creation of the court of appeals, however, turned a two-stage appellate process into three stages, with potential review by the circuit court, court of appeals and supreme court, all applying the same standard of review. Recently, there have been efforts to reduce the appellate role of the circuit court. The decisions of the master in equity are now appealable to the supreme court if the order of reference gives the master the power to make the final decision and specifies that the appeal is to the supreme court.<sup>59</sup> Legislation was introduced in 1997 that would make all appeals of masters' decisions to the appellate court<sup>60</sup> thereby restoring a two-stage appellate process for these cases. A similar argument can be made for eliminating the circuit court in the appeal of administrative decisions. There is no longer a need for the circuit court to hear appeals since the court of appeals was created, and a proper allocation of judicial resources suggests that an appellate court is more conversant with appellate matters and hence more efficient. Finally, providing a direct appeal eliminates a redundant step in the trial court, for there is no need for two courts to apply the same standard of review to the same case before it reaches the supreme court.

One consideration however, is that the procedure in the circuit court is less formal than in the court of appeals. Review is initiated by

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<sup>55</sup> See S.C. Code Ann. § 14-11-85(A)(1) (Supp. 1997).

<sup>56</sup> See S.C. Code Ann. § 62-1-308 (1987).

<sup>57</sup> See S.C. Code Ann. § 18-7-10 (1989).

<sup>58</sup> The master in equity is an adjunct to the circuit court in some counties. The magistrates court and the circuit court have concurrent jurisdiction. See S.C. Const. Art V, § 11; S.C. Code Ann. § 22-3-10 (Supp. 1997). Certain probate matters may be removed to the circuit court. See S.C. Code Ann. § 62-1-302(c) (1989).

<sup>59</sup> See S.C. Code Ann. § 14-11-85 (Supp. 1997).

<sup>60</sup> See H.R. Bill No. 3586.

the timely filing of a petition in the circuit court.<sup>61</sup> A responsive pleading is not required, and the matter proceeds to hearing as scheduled by the trial judge who may reach the matter sooner than the court of appeals. Appeals to the court of appeals and supreme court require the formal briefing process.<sup>62</sup> In those cases where there is only an appeal to the circuit court the procedure is easier, but if the case is appealed further there is a redundant step in the process.

B. ALJ Review of Professional Licensing Decisions

The Division also reviews, on appeal, the "final decisions of contested cases before professional and occupational licensing boards or commissions within the Department of Labor, Licensing and Regulation."<sup>63</sup> The ALJ has the same power as a circuit judge and is statutorily directed to use the same standard of review in considering those appeals as a circuit court judge does when reviewing a final agency action.<sup>64</sup> Appeal of the ALJ's decision is to the circuit court and further appellate review is authorized.<sup>65</sup> Thus, this class of contested cases is subject to a four-stage appellate review involving the ALJ, the circuit court, the court of appeals and the supreme court. There is nothing inherent in these cases requiring such extensive review, and logic suggests that appellate review by the Division and by the circuit court is redundant.

C. Summary on the Appropriate Court for Judicial Review

The choice of the appropriate court for the initial stage of judicial review is a choice between the present three-step process, starting in the circuit court, or the four-step process for appeals of professional licensing decisions, and the more direct approach of all appeals commencing in the appellate courts. The present statute may provide a less expensive initial appeal to the circuit court, but at the cost of lengthening the appellate process. Since the APA provides for the same standard of review by any court hearing the appeal, there appears little justification for appellate review prior to the appellate courts.

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<sup>61</sup> See Rule 74 SCRCR.

<sup>62</sup> See Rule 207 SCACR.

<sup>63</sup> S.C. Code Ann. § 1-23-600(D) (Supp. 1997).

<sup>64</sup> See S.C. Code Ann. § 1-23-380(B) (Supp. 1997).

<sup>65</sup> See *id.*

## V. Judicial Ethics and the ALJ Division

### A. Introduction

ALJs exercise quasi-judicial powers, and the legislature made them subject to the Code of Judicial Conduct found in Rule 501 of the SCACR.<sup>66</sup> The doctrine of separation of powers, however, prevents the supreme court from exercising supervisory powers over executive department officials, including ALJs.<sup>67</sup> Consequently, the General Assembly gave another executive agency, the State Ethics Commission, responsibility for the enforcement and administration of the Rules of Judicial Conduct. ALJs are also "public officials" within the meaning of the Ethics Reform Act, and are bound by its requirements.<sup>68</sup>

### B. Duplicate Regulation

Two issues arise. First, the conduct of ALJs is subject to two separate and distinct sets of rules. By comparison, members of the judiciary are subject to a limited regulation under the State Ethics Act. Generally, members of the judiciary are excluded from the definition of a public official, and are not subject to the provisions relating to lobbyists and lobbyists' principles or the rules of conduct for public officials. These are matters governed under the Rules of Judicial Conduct. However, members of the judiciary remain subject to the campaign finance, campaign practices, public disclosure and disclosure of financial interests statutes.<sup>69</sup> This arrangement is logical because the Rules of Judicial Conduct are broader and apply not only to the performance of judicial functions, but also to aspects of administration and private conduct that could intrude on a judge's impartiality or fairness. For example, a judge is required to avoid the appearance of impropriety in all professional and private activities,<sup>70</sup> and to manage

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<sup>66</sup> See S.C. Code Ann. § 1-23-560 (Supp. 1997).

<sup>67</sup> See *State v. McLeod*, 274 S.C. 81, 261 S.E.2d 303 (1979); *State v. Whittington*, 278 S.C. 661, 301 S.E.2d 134 (1983). ALJs who are admitted to practice in South Carolina remain subject to discipline as lawyers for conduct that violates the Rules of Professional Conduct. See Rule 407 SCACR.

<sup>68</sup> See State Ethics Adv. Op. SEC. A095-007.

<sup>69</sup> See S.C. Code Ann. §§ 2-17-100(18); 8-13-100(27) and 8-13-1300(28) (Supp. 1997).

<sup>70</sup> See Rule 501 SCACR, Canon 2.

extra judicial activities to minimize conflict with any judicial duties.<sup>71</sup> A judge is more restricted in his political activity and in seeking judicial office.<sup>72</sup> A comparable application of the State Ethics Act to ALJs is appropriate.

### C. Sanctions

The second issue is the sanctions applicable to ALJs. Of course, ALJs are subject to the criminal penalties provided in the Ethics Act for violations of that statute, as well as any other criminal law. By statute, the State Ethics Commission is responsible for the enforcement and administration of the Code of Judicial Conduct under S.C. Code Ann. § 8-13-320 (Supp. 1997), and it can impose sanctions for those violations too.<sup>73</sup> The sanctions available to the Commission include a recommendation of disciplinary or administrative action to the executive responsible for the respondent.<sup>74</sup> It can refer the case to the Attorney General for appropriate action, including injunctive relief.

The Commission also can impose a monetary penalty including a civil penalty of up to \$2000 per violation of the Ethics Act, or order forfeiture of gifts or profits received in violation of the statute. Financial penalties are more appropriate when the primary concern is financial misconduct, and the motivation for the violations relate to monetary considerations. However, many of the provisions of the Code of Judicial Conduct do not relate to financial conduct. Also, the supreme court does not impose monetary penalties for violations of judicial conduct.<sup>75</sup> More troublesome is the Commission's authority to "void nonlegislative state action obtained in violation of the chapter."<sup>76</sup> This power seems particularly inappropriate in cases involving ALJs

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<sup>71</sup> See Rule 501 SCACR, Canon 5.

<sup>72</sup> See Rule 501 SCACR, Canon 5 (g).

<sup>73</sup> S.C. Code Ann. § 1-23-560 (Supp. 1997).

<sup>74</sup> The Chief Administrative Law Judge is responsible for the administration of the Division. See S.C. Code Ann. § 1-23-570 (Supp. 1997). In cases involving the Chief Administrative Law Judge, the report is sent to the governor. See S.C. Code Ann. § 8-13-320(10)(k) (Supp. 1997).

<sup>75</sup> The court may order lawyers to make restitution to clients. See, e.g., *In re Holler*, 329 S.C. 395, 496 S.E.2d 627 (1998).

<sup>76</sup> S.C. Code Ann. § 8-13-320(10)(l) (Supp. 1997). This provision could be interpreted to permit the State Ethics Commission to reverse a decision of the ALJ involved, which presents very interesting problems of the interrelationship of agencies, and perhaps the judiciary.



because it could affect a case in litigation.

It appears that ALJs are not subject to any of the sanctions provided by the Code of Judicial Conduct. The ALJ statute only refers to Supreme Court Rule 501 which is only the Code. The sanctions are found in Rule 502 SCACR. In the absence of statutory authorization, there is no basis for the Commission to impose the sanction available under Rule 502 SCACR. Moreover, it can be argued that the most severe sanction available under Rule 502 should not be available to the Commission. The supreme court may sanction a judge by reprimand, public or private, and suspension, with, or without pay.<sup>77</sup> If there has been an indictment or conviction for a felony, the supreme court may impose an interim suspension. Similarly, a judge can be suspended if there is evidence that a judge poses a "substantial threat of serious harm to the public or to the administration of justice. . . ."<sup>78</sup> The power to suspend a judicial officer is an extreme measure, but one appropriate to an independent branch of the state government, particularly when that power is exercised through the supreme court, whose Chief Justice is the administrative head of the Judicial Department under the Constitution.<sup>79</sup> The rationale for the court having the power to suspend judges, however, does not automatically extend to a sister agency of the executive department. The General Assembly specifically designated the ALJ Division as an agency within the Executive Department.<sup>80</sup> The quasi judicial nature of its primary function requires that it be independent of other agencies.

#### D. Summary on Enforcement of Judicial Code of Conduct

The General Assembly adopted several provisions that treat ALJs in the same manner as members of the judiciary, although they are members of the Executive Branch. At the same time, ALJs have some characteristics of a circuit judge. An ALJ must meet the same standards for election to the position as a circuit judge.<sup>81</sup> An ALJ may issue

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<sup>77</sup> See Rule 502 SCACR (Rule 7 Grounds for Discipline: Sanctions Imposed; Deferred Discipline Agreement).

<sup>78</sup> Rule 502 SCACR (Rule 17 Interim Suspension).

<sup>79</sup> See S.C. Const. art.V § 4.

<sup>80</sup> See S.C. Code Ann. § 1-23-500 (Supp. 1997).

<sup>81</sup> See S.C. Code Ann. §§ 1-23-510 and 520 (Supp. 1997).

remedial writs and has the same power in chambers as a circuit judge.<sup>82</sup> Circuit judges and ALJs are subject to the same ethical standards of the Judicial Code of Conduct.<sup>83</sup> The logic of the ALJ statute strongly suggests that ALJs should be treated the same way as judges under the State Ethics Act, and not be subject to two sets of rules for the same conduct.

This report suggests that the issue of sanctions for violations of the Code of Judicial Conduct should be reviewed at this time. The sanctions available under the Ethics Act, applicable to ALJs for violations of the Judicial Code, are primarily monetary and different from the sanctions under the Code of Judicial Conduct. Moreover, the Ethics statute may enable the commission to void an ALJ decision which would be serious interference with the quasi judicial process in contested cases. There is a need for clarification on these matters.

#### VI. Conclusion

There is no doubt that the Division has been successful in providing prompt and fair adjudications in contested cases, and is a substantial improvement over the prior system. Five years experience with the operation of the Division has demonstrated this, as well as the need to address issues which have developed in that period.

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<sup>82</sup> See S.C. Code Ann. § 1-23-630 (Supp. 1997).

<sup>83</sup> See S.C. Code Ann. § 1-23-560 (Supp. 1997).

ADMINISTRATIVE LAW JUDGE DIVISION											
ALJ	PETITIONER	RESPONDENT	DECISION	APPEALED	APPEAL HEARD	APPEAL DECIDED	NOA TO HEARING	NOA TO DECISION	NOTES		
95	0744	John W. Trott & Anne Jenkins Sawyers, et al	DHEC-OCRM & Nancy P. Norris	5/31/96	6/27/96						
95	0014	Anonymous Physician (M178-90)	LLR [Board of Medical Examiners]	6/29/95	7/31/95						Confidential File 3:00 p.m. Mandamus
96	0542	Greenwood Mills, Inc.	DHEC	6/30/97	7/30/97	10/9/97	11/8/97	71	101		Affirmed
95	0734	Casa Linda Mexican Restaurant, Perry & Vellegas Corporation	DHEC	5/15/96	5/21/96	9/12/96	9/23/96	114	125		Affirmed
94	0219	Anderson Area Medical Center	DHEC	11/9/94	12/9/94	N/A	5/17/95		159		Consent Order of Dismissal 5/17/95
94	0074	DHEC	Columbia Endoscopy Center	12/30/94	1/13/95	N/A	5/24/95		131		Administrative Consent Agreement 5/24/95
95	0539	Image Trust Florence, Inc.	DHEC and Florence Medical Imaging	4/19/96	5/20/96	10/9/96	10/9/96	142	142		Affirmed
95	0479	Professional Home Nursing, Inc., et al.	DHEC & Home Health of S.C. Inc. Lexington City	5/10/96	5/24/96	10/9/96	10/9/96	138	138		Affirmed
95	0132	McLeod Regional Medical Center	DHEC and Carolinas Hospital, Inc.	6/7/96	6/19/96	10/9/96	2/13/97	112	239		Originally affirmed on 10/9/96. Reversed on rehearing on 2/13/97.
95	0478	First American Home Care of S.C., Inc.	DHEC & Mediforce Home Health Agency Richland City	6/27/96	7/15/96	10/9/96	10/9/96	86	86		Affirmed

## ADMINISTRATIVE LAW JUDGE DIVISION

ALJ	PETITIONER	RESPONDENT	DECISION	APPEALED	APPEAL HEARD	APPEAL DECIDED	NOA TO HEARING	NOA TO DECISION	NOTES
96 0205	Oncology Therapies of Greenville, Inc.	DHEC & Greenville Cancer Center	6/6/97	8/7/97					Affirmed (copy of decision not yet available)
94 0151	Friends of the Earth, Inc. et al.	DHEC (Laidlaw Environmental Serv. Inc. TOC)	1/25/96	2/20/96	5/9/96	6/13/96	79	114	Affirmed
95 0690	Carolina Water Service, Inc. of N.C.	DHEC	6/19/96	8/14/96					Not appealed to DHEC Bd. (Per Finklea)
96 0082	Mr. & Mrs. Oscar C. Doster	DHEC & Baron Hendrix	8/5/96	10/28/96	12/12/96	12/12/96	45	45	Affirmed
96 0320	DHEC	Sun Hut Spas	10/2/96	10/28/96					Affirmed (copy of decision not yet available)
96 0206	Gnato's Acres	DHEC	10/7/96	10/30/96					Not appealed to DHEC bd. (Per Finklea)
95 0754	White's Auto Truck Plaza, Inc.	DHEC	1/8/97	2/11/97	10/9/97	10/15/97	240	246	Affirmed
96 0262	City of Cayce, S.C.	DHEC and Richland-Lexington Airport Commission	2/11/97	3/13/97					Appeal continued pending settlement negotiations
94 0207	Thomas Bessinger	DHEC-OCRM	12/22/94	1/5/95	4/28/95	8/4/95	113	211	Reversed
94 0161	Oak Lea Homeowners Association	DHEC-OCRM	2/8/95	3/1/95	4/27/95	12/4/95	57	278	Affirmed
94 0160	Blanche Oswald, Debbie Hattaway & Marian Standler	DHEC-OCRM/James Leland, Jr.	3/1/95	4/5/95	7/28/95	2/2/96	114	303	Reversed

ADMINISTRATIVE LAW JUDGE DIVISION										
ALJ	PETITIONER	RESPONDENT	DECISION	APPEALED	APPEAL HEARD	APPEAL DECIDED	NOA TO HEARING	NOA TO DECISION	NOTES	
94	0372	Jim Van Hooser	DHEC-OCRM	4/21/95	5/2/95	7/27/95	12/4/95	86	216	Reversed
95	0107	Pier 14 Limited Partnership	DHEC-OCRM	7/28/95	8/22/95	10/26/95	2/2/96	65	164	Affirmed
94	0397	Marjorie Groom	DHEC-OCRM	7/20/95	8/23/95	1/25/96	3/18/96	155	208	Affirmed
94	0258	Earl and Lynn Smalley	DHEC-OCRM	7/14/95	9/7/95	10/27/95	2/2/96	50	148	Affirmed
94	0309	L. Shealy, M/M J. delMontfort, K. Howey-Elliott & J. Ward	DHEC-OCRM & William Smith	9/19/95	9/28/95	10/26/95	2/2/96	28	127	Affirmed
95	0516	James W. Debruhl	DHEC-OCRM	11/3/95	11/29/95	1/25/96	5/3/96	57	156	Affirmed
95	0623	Thomas E. Garrick	DHEC-OCRM & Jimmy Fenn	1/31/96	2/16/96	7/19/96	12/18/96	154	306	Affirmed
96	0200	John W. Trott & Anne Jenkins Sawyers, et al	DHEC-OCRM & Nancy P. Norris	5/31/96	6/27/96	12/6/96	3/28/97	162	274	Reversed
96	0117	Northern Beaufort County Committee	DHEC-OCRM & Bull Point LLC	10/28/96	11/26/96	N/A	3/28/97		122	Consent Order
95	0762	Linda M. Hadstate	DHEC-OCRM and Interstate Speedway	12/3/96	1/28/97	N/A				Motion to reopen filed with ALJD 12/11/97
96	0440	Michael J. Oliveto, II & Elizabeth Anne Thompson	DHEC-OCRM and Thomas Ball	1/21/97	3/10/97	3/21/97	7/8/97	11	120	Affirmed
95	0390	Reese I. Joye, Jr.	DHEC-OCRM	4/3/97	4/9/97	N/A	N/A			Appeal Withdrawn 7/21/97
96	0447	John J. Mikell	DHEC-OCRM Eric Davison Robert Smiley	4/4/97	6/11/97	10/24/97	2/16/97	135	188	Affirmed in part, reversed in part