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Adminsitrative Law: Journey through the Administrative Process and Judicial Review of Administrative Actions.

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COMMENTS

Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions

William H. Chamblee

I. INTRODUCTION

Although the judicial system is regarded as the ultimate arbitrator of disputes,[1] modern society has witnessed a decided trend toward the prevailing use of regulation and adjudication through administrative agencies.[2] In addition, the existence of administrative agencies has resulted, to a substantial degree, in the combination of legislative, executive, and judicial powers in a single entity.[3] Withstanding numerous attacks based on

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1. *See* U.S. Const. art. III, § 1. This article provides: "The judicial power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id.*

2. *See* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 130 (1952) ("rapid growth of administrative law" makes administrative agencies more important and controversial); Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1951) (Jackson, J., dissenting) (regulation by administrative bodies has increased significantly). "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." *Id.* at 487. Today, administrative procedure has a tremendous impact on the rights and liberties of all individuals. *See* Fascell, *The Problem of Complexities and Delays in the Administrative Proceedings and Practice,* 12 AD. L. BULL. 6, 6 (1959). Due to the increasing prevalence of administrative regulation, the Reagan administration has increased its emphasis on "administrative law reform." *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 4 (1972) (volume of federal and state administrative rules and regulations have approached an overwhelming level); Schwartz, *Administrative Law Cases During 1981,* 34 AD. L. REV. 83, 83 (1982).

3. *See, e.g.,* Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (each branch of government must remain free of control or influence); United States v. Grimaud, 220 U.S. 506, 517 (1911) (no clear line separating exclusive legislative powers from powers which can be exercised by administrative agencies); F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 27 (1982) (administrative tribunals exercise some measure of legislative and judicial power); *see also* Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) (delegation of authority to administrative agency recognized as essential to prevent legislative power from "becoming futile"); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) (Congress may authorize administrative agencies to prescribe "rules and regulations"). Granting administrative agencies the authority to formulate rules "is not a delegation of legislative power." *See* United States v. Grimaud, 220 U.S. 506, 521 (1911). Although the legislative function cannot be delegated, administrative agencies may exercise a degree of legislative power. *See* Harriman, *The Development of Administrative Law in the United States,* 25 YALE L.J. 658, 665 (1916). Administrative power often includes powers reserved to the executive branch of government. *See id.* at 665. Although many cases exist which equate administrative actions with those of the judicial system, the "judicial function of government" cannot be exercised by any tribunal of government other than the judicial body. *See id.* at 664. It is the principle of separation of powers, and the inevitable encroachment upon this constitutional principle, which has been the cause of past hesitancy to recognize administrative law as a jurisprudence. *See* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 27 (1982). "[A]dministrative agencies are permitted to exercise powers which logically belong to the courts, or to the legislature, so long as the independence of the courts or of the legislature is not impaired." *Id.* at 31. Constitutional principles are violated when an administrative agency is vested with or claims powers which will deprive the legis-

the doctrine of separation of powers, administrative agencies, having their birth in necessity,[4] have rapidly increased in both state and federal government.[5] Furthermore, even though the courts, for many years, refused to acknowledge the existence of "administrative law" as a jurisprudence,[6] the modern judicial system regularly refers to well-recognized or fundamental principles of administrative law.[7] Today, administrative regulation pro-

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lature or the courts of their constitutional mandates. *See id.* at 32. Although a claim against an administrative agency based on the "non-delegation doctrine" will likely fail in the federal courts, many cases can still be won in the state courts by "asserting the non-delegation doctrine." *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 51 (1972).

4. *See, e.g.,* Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1939) (congressional delegation of authority to administrative agencies is essential to fulfillment of legislative power); Sylvester v. Tindall, 18 So. 2d 892, 899 (Fla. 1944) (use of administrative agencies is essential to "complete exercise of powers of all the departments"); Handlon v. Town of Belleville, 71 A.2d 624, 626 (N.J. 1950) (administrative tribunals organized to fulfill governmental service which could not be effectively fulfilled by legislative or judicial action); *see also* Ray v. Parker, 101 P.2d 665, 674 (Cal. 1940) (increasingly imperative to entrust administrative agencies with many "quasi-legislative and quasi-judicial functions"); Keller v. Kentucky Alcoholic Beverage Control Bd., 130 S.W.2d 821, 824 (Ky. 1939) (administrative agencies are essential part of government). Our modern and often technical society has generated the need for regulation through administrative agencies. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 6 (1976).

5. *See, e.g.,* Danner v. Hass, 134 N.W.2d 534, 540 (Iowa 1965) (trend is to uphold tremendous vesting of discretion in administrative agency to promote public welfare); Pettit v. Penn, 180 So. 2d 66, 68 (La. Ct. App. 1965) (state legislature can delegate administrative agencies and boards power to enforce regulations); Board of Health v. New York Cent. R.R., 72 A.2d 511, 514 (N.J. 1950) ("[c]omplexities of our modern society" increase demand for agencies exercising administrative function for public good). "[T]here are fifty-one systems of administrative law in this country — a federal system and one in each of the states." B. SCHWARTZ, ADMINISTRATIVE LAW 24 (1976). Society has experienced such an increase in administrative regulation that the volume of federal and state administrative rules and regulations published each year has reached a tremendous level. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 4 (1972). The volume of administrative legislation published today far exceeds the statutes enacted by the legislative systems, and the "number of cases decided" by the judicial systems of this country does not compare in quantity with the decisions rendered by administrative agencies. *See* D. NELSON, ADMINISTRATIVE AGENCIES OF THE USA 5 (1964). The Reagan administration, in response to the volume of administrative rules and regulations published each year, announced an increased emphasis on "administrative law reform." *See* Schwartz, *Administrative Law Cases During 1981,* 34 AD. L. REV. 83, 83 (1982).

6. *See* United States v. Ruzicka, 329 U.S. 287, 295 (1946) (classification of administrative law as distinct legal field has seen only recent approval); DeGroot v. Sheffield, 95 So. 2d 912, 914 (Fla. 1957) (only recently has "substantial body of jurisprudence" been formulated "with reference to so called administrative law"). *See generally* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 3 (1982) (administrative law, for years, not acknowledged by state or federal courts as "distinct part of our legal system").

7. *See, e.g.,* Securities & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 196 (1947) ("emphasized a single but fundamental rule of administrative law"); ICC v. City of Jersey City, 322 U.S. 503, 514 (1944) (case presents a recognized question of "administrative law"); Allied Van Lines v. Parsons, 293 P.2d 430, 434 (Ariz. 1956) ("well-settled administrative

vides valuable assistance to the overburdened legislatures and judiciaries.[8]

Administrative agencies exist at both the federal and state levels of government, and the rules and regulations which promulgate and control an administrative agency will depend upon whether the agency is federally or state authorized.[9] Moreover, since the federal Constitution does not impose the doctrine of separation of powers upon a state's internal organization,[10] administrative agencies created by state law are analyzed with respect to the state statute which created the administrative agency and reviewed in light of the state constitution.[11]

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law"); *see also* Wilmington Country Club v. Delaware Liqour Comm'n, 91 A.2d 250, 254 (Del. 1952) (in delineating duties of agency, the legislature "definitely recognized principles of administrative law universally followed").

8. *See* United States v. Western Pac. R.R., 357 U.S. 59, 66 (1956) (complexities of tariff setting and voluminous evidence required dictates tariff setting be initially considered by agency embraced with duty and power). With regard to the Motor Carrier Act, the Supreme Court has declared that the judiciaries are not adequately equipped to weigh all the necessary factors with respect to establishing needed regulatory standards. *See* American Trucking Ass'ns v. United States, 344 U.S. 298, 309 (1953). Moreover, as pointed out by the Supreme Court, it is not the Court's "function to act as a super-commission." *See id.* at 309. With regard to the legislature, "traditional technique[s] of legislation" have not been effective in preventing anticipated evils from arising. *See* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 14 (1982). Administrative agencies have been effective in accomplishing those legal remedies which the legislature cannot address and have given substance to legislative action which has been taken. *See id.* at 15. A delegation of authority to an administrative agency is most effective and needed where the field of inquiry is highly technical or where there exists a need for continued observation. *See* Jaffe, *An Essay on Delegation of Legislative Power: I,* 47 COLUM. L. REV. 359, 361 (1947).

9. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 26 (1976) (important differences exist between federal and state administrative law). Although a recognition of federal administrative law is indispensable, an awareness of the importance which state administrative agencies play in state government is essential. *See id.* at 24-25. The states have not followed the federal government in certain important areas of administrative law, but have instead tailored their administrative policies to suit their own special needs. *See id.* at 26.

10. *See* Consolidated Rendering Co. v. Vermont, 207 U.S. 541, 552 (1908) (state is not bound by separation of powers doctrine imposed on federal government by federal Constitution). The federal Constitution does not prevent a state from authorizing a tribunal to adjudicate a legal question, although such function is usually reserved to the courts. *See* Reetz v. Michigan, 188 U.S. 505, 507 (1903). In the area of administrative law, the states are not required to observe those principles which control the federal government "except to a limited extent required by federal constitutional principles." *See* B. SCHWARTZ, ADMINISTRATIVE LAW 26 (1976).

11. *See* Neblett v. Carpenter, 305 U.S. 297, 302 (1938) (involves question of state constitutional law; whether there was unconstitutional delegation of legislative authority to commission). With regard to the assertion that there was an unconstitutional delegation of legislative authority to the commission, such represents "a question of state law" and the decision of the "state's highest court" will be binding on the United States Supreme Court. *See id.* at 302. The United States Supreme Court, however, will declare unconstitutional a delegation of authority to a state administrative agency which "is purely arbitrary, and ac-

The State of Texas, in 1975, passed the Administrative Procedure and Texas Register Act (APTRA),[12] which provided a uniform system of procedure for those administrative agencies having statewide jurisdiction.[13] During the seven years since APTRA became effective,[14] administrative law in the State of Texas has undergone some significant changes.[15] Due to the changes which have transpired with regard to state authorized administrative agencies and the roles which they maintain in deciding personal as well as public rights, the members of the legal profession must become more familiar with the rules and regulations governing administrative agencies within the State of Texas. This comment will examine administrative agencies created by Texas law and will focus specifically on the procedural and evidentiary requirements of an administrative hearing, the process by which an administrative order is appealed, and the manner in which the judicial system will review the action taken by an administrative agency. In addition, this comment will discuss policy reasons behind the modern attitudes of the judicial and legislative branches of government.

II. THE ADMINISTRATIVE HEARING

A. *Agency Authority to Formulate Rules and Regulations*

In Texas, those agencies governed by APTRA are required to give all parties to a "contested case" an opportunity for an administrative hear-

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knowledges neither guidance nor restraint." *See* Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886).

12. TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1984).

13. *See id.* § 1.

> It is declared the public policy of this state to afford minimum standards of uniform practice and procedure for state agencies, to provide for public participation in the rulemaking process, to provide adequate and proper public notice of proposed agency rules and agency actions through publication of a state register, and to restate the law of judicial review of agency action.

Id. § 1. " 'Agency' means any state board, commission, department, or officer having statewide jurisdiction, other than an agency wholly financed by federal funds, the legislature, the courts, the Industrial Accident Board, and institutions of higher education, that makes rules or determines contested cases." *Id.* § 3(1). Recognizing the important role which administrative agencies occupy in today's society, the recent attitude of the legislative and judicial branches has focused on improving the efficiency of the administrative tribunals. *See* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 13 (1982).

14. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 23 (Vernon Supp. 1984) (APTRA became effective on January 1, 1976).

15. *See* Shannon & Ewbank, *The Texas Administrative Procedure and Texas Register Act Since 1976—Selected Problems,* 33 BAYLOR L. REV. 393, 394 (1981) (APTRA is responsible for significant changes in Texas law relating to administrative agencies).

ing.[16] Prior to a discussion of the hearing requirements imposed by APTRA,[17] it is essential to recognize the rulemaking authority granted to statewide administrative agencies.[18] The statutory directives of APTRA impose a requirement upon administrative agencies to establish rules and regulations which will govern the procedural treatment of matters presented before the agency.[19] The rules and regulations adopted by the administrative tribunals will be presumed valid by the courts, and the burden of establishing the invalidity of such rules or regulations rests on the party asserting its invalidity.[20] Furthermore, even though the courts will strike down an administrative regulation which is not in harmony with statutory directives, or is overly vague so as to be misleading, administrative regulations are not invalid merely because they are unnecessary.[21] The importance of being aware of administrative regulations cannot be overemphasized, since such regulations often control the evidence which must be presented at an administrative hearing and the manner in which the administrative tribunal will review the case.[22]

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16. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 3(2) (Vernon Supp. 1984).

17. *See id.* § 13. "In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice of not less than 10 days." *Id.* § 13(a).

18. *See id.* § 4(a)(1).

19. *See id.* § 4(a)(1). Those agencies covered by the Act shall "adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available." *See id.* § 4(a)(1).

> "Rule" means any agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of any agency and not affecting private rights or procedures.

Id. § 3(7).

20. *See, e.g.,* Brown v. Humble Oil & Refining Co., 126 Tex. 296, 316, 87 S.W.2d 1069, 1070 (1935) (rules promulgated by Railroad Commission presumed valid until proven invalid); Browning-Ferris, Inc. v. Texas Dep't of Health, 625 S.W.2d 764, 767 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (administrative rules presumed valid and burden on opponent to demonstrate invalidity); Lloyd A. Fry Roofing Co. v. State, 541 S.W.2d 639, 643 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (administrative regulations presumed valid).

21. *See* State Bd. of Ins. v. Deffebach, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (critical factor in reviewing administrative rulemaking authority is whether agency acted within scope of statute). Rules and regulations promulgated by administrative agencies cannot go beyond statutory directives. *See* Bexar County Bail Bond Bd. v. Deckard, 604 S.W.2d 214, 216 (Tex. Civ. App.—San Antonio 1980, no writ). An administrative regulation will be held unconstitutionally vague "when there is substantial risk of miscalculation by those whose acts are subject to regulation." *See* Lloyd A. Fry Roofing Co. v. State, 541 S.W.2d 639, 642 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.). Administrative regulations are presumed valid and "need not be, in the court's opinion, wise, desirable, or even necessary." *See* Bullock v. Hewlett-Packard Co., 628 S.W.2d 754, 756 (Tex. 1982).

22. *See* Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 391, 395 (Tex. App.—Austin 1983, no writ) (commission must promulgate certain minimum rules to

The rulemaking authority of an administrative agency, however, is not wholly discretionary, but is limited and governed by certain provisions of APTRA.[23] The most significant guidelines concerning administrative rulemaking authority include the requirement that the agency "index and make available for public inspection all rules" which will be utilized by the administrative tribunal "in the discharge of its functions"[24] and that the agency must give "at least 30 days' notice of its intended action."[25] APTRA does contain a provision whereby the thirty day notice requirement need not be complied with in emergency situations.[26] In addition, "all interested persons" are afforded an opportunity to participate in the

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utilize in determining "its decision to issue or deny a certificate of need"). The Texas Health Facilities Commission will review a certificate of need in light of agency rules promulgated by the Commission. *See id.* at 400. "Pursuant to such legislative direction, and utilizing its administrative expertise, the Commission has promulgated rules which govern" the manner in which the administrative tribunal will review the evidence presented at the hearing. *See* Charter Medical Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 931-33 (Tex. App.—Austin 1983), *rev'd on other grounds,* 665 S.W.2d 446 (Tex. 1984). With respect to APTRA § 4(a)(1), the legislature passed § 3.10 of art. 4418h, which controls the promulgation of rules by the Texas Health Facilities Commission. *See* TEX. REV. CIV. STAT. ANN. art. 4418h, § 3.10 (Vernon 1976 & Supp. 1984). The Texas Health Facilities Commission must promulgate certain criteria that meet a certain standard. *See id.* § 3.10(a), (b). The minimum criteria which must be included in the rules established by the Texas Health Facilities Commission are:

> (1) whether a proposed project is necessary to meet the health care needs of the community or population to be served;
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> (2) whether a proposed project can be adequately staffed and operated when completed;
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> (3) whether the cost of a proposed project is economically feasible;
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> (4) if applicable, whether a proposed project meets the special needs and circumstances for rural or sparsely populated areas; and
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> (5) if applicable, whether the proposed project meets special needs for special services or special facilities.

Id. § 3.10(b). At the time pertinent to the administrative order issued by the Texas Health Facilities Commission in the case of Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 691 (Tex. App.—Austin 1983, no writ), the Texas Health Facilities Commission, acting pursuant to § 3.10, art. 4418h, had established certain criteria, ranging from economic feasibility to community health care requirements, that had to be met by the applicant prior to receiving a certificate of need. *See* Tex. Health Facilities Comm'n, 25 TEX. ADMIN. CODE § 513.1-.21 (Shepard's May 1, 1982).

23. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 4, 5 (Vernon Supp. 1984).

24. *See id.* § 4(a)(2). An administrative tribunal is also required to "index and make available for public inspection all final orders, decisions, and opinions." *See id.* § 4(a)(3).

25. *See id.* § 5(a). "Notice of the proposed rule shall be filed with the secretary of state and published by the secretary of state in the Texas Register." *Id.* § 5(a).

26. *See id.* § 5(d). "If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice" the agency may "adopt an emergency rule." *Id.* § 5(d).

formulation of agency rules.[27] Provided certain statutory mandates are met, every statewide administrative tribunal must consider the data and arguments presented by "interested persons" with regard to the adoption of an administrative rule or regulation.[28]

B. *Contested Case*

Although administrative rules and regulations have an important impact on the administrative hearing, only those parties coming within the definition of a "contested case," as defined by section 3(2) of APTRA,[29] will be afforded a hearing before an administrative tribunal.[30]

C. *Evidentiary Requirements of Administrative Hearings*

1. Due Process Considerations

Once the proper notice has been given and the opportunity for a hearing has been granted, section 14 of APTRA is the basic provision controlling the admissibility of evidence at the hearing stage.[31] It is significant to note

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27. *See id.* § 11. Section 11 of APTRA provides a procedure whereby any interested party may petition an agency requesting adoption of an administrative rule. *See id.* § 11.

28. *See id.* § 5(c).

> Prior to the adoption of any rule, an agency shall afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In the case of substantive rules, opportunity for public hearing must be granted if requested by at least 25 persons, by a governmental subdivision or agency, or by an association having at least 25 members. The agency shall consider fully all written and oral submissions concerning the proposed rule. On adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days after adoption, shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement its reasons for overruling the considerations urged against its adoption.

Id. § 5(c).

29. *See id.* § 3(2). " 'Contested case' means a proceeding, included but not restricted to ratemaking and licensing, in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing." *Id.* § 3(2).

30. *See id.* § 13(a). "In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice of not less than 10 days." *Id.* § 13(a).

31. *See id.* § 14. This section provides:

> In contested cases, irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in nonjury civil cases in the district courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is the type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, if a hearing will be expedited and

that section 14(a) of APTRA provides that the "rules of evidence applied in nonjury civil cases in the district courts of this state shall be followed."[32] Prior to the adoption of APTRA, the court decision in *Lewis v. Guaranty Federal Savings & Loan Association*[33] played an essential role in the formulation of a policy that administrative hearings, in response to due process requirements, must be conducted in a manner similar to a judicial trial.[34] Since the adoption of APTRA, court decisions have consistently declared that an administrative hearing must conform to the requirements of due process whereby the parties are given the opportunity to have a hearing and present evidence.[35] The courts will vacate an administrative order or regulation on due process grounds if the order is arbitrary or violates the idea of "fair play," or if the regulation is so vaguely structured that persons subject to the regulation must guess at its meaning.[36]

2. Considering the New Texas Rules of Evidence

Although the due process requirement has had an important impact upon the manner in which an agency hearing is conducted, the new Texas Rules of Evidence (hereinafter referred to as the "new Rules") will proba-

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the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

Id. § 14(a).

32. *See id.* § 14(a).

33. 483 S.W.2d 837 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

34. *See id.* at 841. It is a denial of due process for the Commissioner to consider evidence which has not been introduced at the hearing and which has not been made a part of the administrative record. *See id.* at 841. Furthermore, the court in *Lewis* declared that the appellees had been denied their right to cross-examine. *See id.* at 841. "The basic elements of due process at the agency level are notice, hearing, and an impartial trier of facts." Reavley, *Substantial Evidence and Insubstantial Review in Texas,* 23 Sw. L.J. 239, 243-44 (1969).

35. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19. The Supreme Court of Texas has declared that the agency's order will be overruled if the appellant's rights have been "substantially prejudiced"; "a denial of due process is one ground for finding substantial prejudice." *See* Vandygriff v. First Sav. & Loan Ass'n, 617 S.W.2d 669, 672 (Tex. 1981); *see also* Lewis v. Metropolitan Sav. & Loan Ass'n, 550 S.W.2d 11, 13 (Tex. 1977) (due process is an administrative proceeding requirement); Thompson v. Texas State Bd. of Medical Examiners, 570 S.W.2d 123, 130 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) (administrative tribunals must afford due process).

36. *See* Browning-Ferris, Inc. v. Texas Dep't of Health, 625 S.W.2d 764, 765 (Tex. App.—Austin 1981, writ ref'd n.r.e.) (vague administrative "regulation violates due process" when one must guess at meaning). The courts will consider the procedural idea of "fair play" in determining whether an administrative agency has violated due process. *See* Murphy v. Rowland, 609 S.W.2d 292, 296 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). Furthermore, an administrative order can "be supported by substantial evidence" as required by statute and still be declared invalid due to arbitrariness. *See* Starr County v. Starr Indus. Servs., 584 S.W.2d 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.).

bly occupy an essential role in structuring the evidentiary requirements of an administrative hearing.[37] Section 14(a) of APTRA provides that the "rules of evidence as applied in nonjury civil cases in the district courts shall be followed."[38] The new Rules, which became effective September 1, 1983, therefore, will govern the evidentiary rules followed in an administrative hearing.[39] It is essential to note, however, that section 14(a) of APTRA provides that administrative agencies are to accept and apply the evidentiary requirements which govern in "nonjury civil cases."[40] The new Rules, while controlling jury and nonjury cases, might be applied differently in a jury case than in a nonjury case.[41] When a court is confronted with an evidentiary matter of admissibility which represents a close question, the court is more "likely to exclude the evidence if a jury is present" and allow such evidence in a nonjury case.[42] Since there is a difference between the manner in which the evidentiary rules are applied in jury and nonjury cases, it follows that the phrase "nonjury civil cases" was included within section 14(a) of APTRA to allow for the differing treatment.[43] In a proceeding before an administrative tribunal, it is therefore essential to recognize that by statutory directive the new Rules will apply to an evidentiary matter presented before the agency; but, by statutory directive, those administrative tribunals governed by APTRA will be permitted to relax the evidentiary rules to the same extent that they are

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37. *See* Lubbock Radio Paging Serv. v. Southwestern Bell Tel. Co., 607 S.W.2d 29, 32 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (under Texas Rules of Evidence, hearsay rules of evidence apply in administrative tribunals); *see also* TEX. R. EVID. 804.

38. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984).

39. *See id.* § 14(a).

40. *See id.* § 14(a) (administrative agencies bound by evidentiary rules which apply in "nonjury civil cases").

41. *See* F. COOPER, STATE ADMINISTRATIVE LAW 385 (1965) (evidentiary rules may be applied differently by court in absence of jury).

42. *See id.* at 385.

43. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984) (rules of evidence of "nonjury civil cases" apply); *see also* F. COOPER, STATE ADMINISTRATIVE LAW 385 (1965) (emphasizes difference between jury and non-jury cases). Cooper made the following important distinctions:

> The phrase "non-jury" was bracketed, as explained in the official Commentary published by the Commissioners [in response to the Revised Model State Act], because in some states it is difficult to differentiate between the rules followed in jury and non-jury cases. This means that if a state legislature concludes that the judges in that state do relax the evidentiary rules to the same extent in the trial of civil cases before a jury as in cases where a jury is waived, the word "non-jury" may be dropped. The result then is the same rules shall be applied in the administrative proceedings as are applied in all civil trials in the courts. In most states, of course, there is a noticeable differentiation in the vigor with which the rules are applied, as between jury and non-jury cases.

Id. at 385-86.

relaxed by the district court in a nonjury civil case.[44]

While providing that the administrative agency must observe the rules of evidence utilized by the judicial system, APTRA also dictates that the right to cross-examination must be afforded to all parties at the hearing stage.[45] Those who appear before an administrative tribunal, however, should be aware that section 14(a) of APTRA provides that "if a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form."[46] While APTRA does contain a best evidence rule,[47] and the courts have consistently declared that the hearsay rules of evidence apply to an administrative hearing,[48] the provisions of APTRA which allow any evidence to be received "in written form" may be in conflict with the hearsay rule and the best evidence rule under the new Rules.[49] With regard to the hearsay rule, although the new Rules require the unavailability of a witness to be proven under certain exceptions to the hearsay rules, section 14(a) of APTRA does not mandate that the unavailability of the witness be demonstrated or proven to the administrative tribunal.[50] Section 14(a) of APTRA merely provides that any evidence may be presented in written form, provided the interests of the other parties will not be substantially thwarted.[51] The procedure for use of written evidence in the place of oral testimony of witnesses, however, has been recognized by other states and praised by legal scholars due to the efficiency it produces at the administra-

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44. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984); *see also* F. COOPER, STATE ADMINISTRATIVE LAW 385 (1965) (administrative tribunals permitted to relax rules of evidence to same extent as nonjury case tried before court).

45. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(p) (Vernon Supp. 1984) (cross-examination allowed to obtain "full and true disclosure" of facts). Cross-examination, which provides a fair determination of all the relevant facts, is not confined to the trial level, but "applies also to administrative hearings." *See* Richardson v. City of Pasadena, 513 S.W.2d 1, 4 (Tex. 1974).

46. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984).

47. *See id.* § 14(o).

48. *See* Lubbock Radio Paging Serv. v. Southwestern Bell Tel. Co., 607 S.W.2d 29, 32 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.) (hearsay rules of evidence apply in same manner before administrative tribunal as before trial court). In an administrative hearing the hearsay rule applies to the administrative tribunal to the extent it applies to the reception of evidence before the trial court. *See* Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180, 186 (Tex. 1972).

49. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984); TEX. R. EVID. 804. With regard to the Texas Rules of Evidence, the testimony of a witness may be presented under the hearsay exceptions provided the declarant is unavailable as set out in rule 804. *See* TEX. R. EVID. 804.

50. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984).

51. *See id.*

tive level.[52]

III. Appealing an Administrative Order

Once an administrative agency controlled by APTRA has rendered its decision in a "contested case" and the aggrieved party has "exhausted all administrative remedies available within the agency," section 19 of APTRA provides for judicial review of the administrative order.[53] Furthermore, section 20 of APTRA dictates that an aggrieved party may obtain an appeal from the decision rendered by the district court which reviewed the administrative order.[54] When seeking judicial review of an administrative order, counsel appearing before the administrative agency must be concerned with preserving the record of the administrative hearing,[55] exhaust-

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52. *See, e.g.,* GA. CODE ANN. § 3A-116(1) (Supp. 1984) ("Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form."); OKLA. STAT. ANN. tit. 75, § 310(1) (West 1976) ("Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form."); R.I. GEN. LAWS § 42-35-10(a) (1977) ("Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form."). Allowing the testimony of a witness to be received in written form, rather than orally before the administrative tribunal, "saves time, shortens records, and makes for more effective cross-examination." *See* F. COOPER, STATE ADMINISTRATIVE LAW 399 (1965).

53. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19 (Vernon Supp. 1984). "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act." *Id.* § 19(a).

54. *See id.* § 20. "Appeals from any final judgment of the district court may be taken by any party in the manner provided for in civil actions generally, but no appeal bond may be required of an agency." *Id.* § 20.

55. *See id.* § 13(f). With regard to the administrative hearing of a "contested case," the record consists of the following:

1. all pleadings, motions, and intermediate rulings;
2. evidence received or considered;
3. a statement of matters officially observed;
4. questions and offers of proof, objections and rulings on them;
5. proposed findings and exceptions;
6. any decision, opinion, or report by the officer presiding at the hearing; and
7. all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

Id. § 13(f). The elements listed above, as set out in § 13(f) of APTRA, have appeared in identical form in the administrative statutes of other states. *See, e.g.,* CAL. GOV'T CODE § 1153 (Deering 1982) (record of administrative hearing contains "the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case"); GA. CODE ANN. § 3A-114(8)(A) (1975) (record of "con-

ing at the administrative level "all administrative remedies available within the agency,"[56] and timely filing the petition for judicial review.[57]

A. *Preserving the Administrative Record for Appeal*

The reviewing court, on appeal from an administrative order, will limit its review to the evidence contained in the record.[58] Creating the record of an administrative hearing, therefore, is equally as important as creating the record at the trial level.[59] Section 13(f) of APTRA establishes the seven elements which constitute the record of an administrative hearing, and subsection 2 of section 13(f) of APTRA provides that the record shall include all "evidence received or considered."[60] It is essential to observe that section 13(f)(2) does not dictate that evidence, to become a part of the record, must be received and considered.[61] Under section 13(f)(2), the record must include all evidence "received at the hearing stage," and it does not matter that the agency determined that the evidence was irrelevant or repetitious and therefore "refused to consider it."[62] Section 13(f)(2) of APTRA, however, does not remove the discretion given to the administra-

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tested case" shall contain "[a]ll pleadings, motions, intermediate rulings"); N.D. CENT. CODE § 28-32-06 (1974) (record shall include all "objections offered into evidence").

56. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(a) (Vernon Supp. 1984). Although APTRA provides for judicial review of an administrative order, § 19(a) of APTRA dictates that judicial review is only available when the aggrieved party has "exhausted all administrative remedies available within the agency." *See id.* § 19(a).

57. *See id.* § 19(b). Under APTRA, § 19(b) provides that the aggrieved party must file a petition for judicial review "within 30 days after the decision complained of is final and appealable." *See id.* § 19(b). In addition to the requirement that the petition for judicial review must be filed within 30 days from the date the administrative decision becomes "final and appealable," § 19(b) also provides, "[u]nless otherwise provided by statute," the following:

> (1) the petition [must be] filed in the District Court of Travis County, Texas;
>
> (2) a copy of the petition must be served on the agency and all parties of record in the proceedings before the agency; and
>
> (3) the filing of the petition vacates an agency decision for which trial de novo is the manner of review authorized by law, but does not affect the enforcement of an agency decision for which another manner of review is authorized.

See id. § 19(b).

58. *See id.* § 19(d)(3). Although the reviewing court will confine itself "to the record," "evidence of procedural irregularities alleged to have occurred before the agency but which are not reflected in the record" may be reviewed by the court. *See id.* § 19(d)(3).

59. *See* F. COOPER, STATE ADMINISTRATIVE LAW 595 (1965) (preserving record of administrative hearing equated with preserving record at trial level).

60. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(f)(2) (Vernon Supp. 1984).

61. *See id.*

62. *See id.* At the hearing stage, all evidence received by the agency will become a part of the record. *See* F. COOPER, STATE ADMINISTRATIVE LAW 421 (1965).

tive agency with regard to receiving evidence at the hearing stage.[63] Section 14(a) of APTRA mandates that administrative agencies must observe the rules of evidence which apply in "nonjury civil cases," and in response to the rules of evidence an administrative agency shall exclude all evidence which is in violation of such rules.[64]

The administrative agency, however, is not given unbridled discretion by the provisions of section 14(a).[65] When an agency has exercised its statutory power by excluding certain evidence, section 13(f)(4) of APTRA still provides that the record must include "questions and offers of proof, objections, and rulings" with regard to the objections.[66] Thus, even though the administrative agency may sustain the objection and exclude the evidence, if the evidence has been offered as dictated by section 13(f)(4) it will nevertheless become a part of the record for judicial review.[67]

It should be observed, however, that before the evidence will become a part of the record there must be an "offer of proof" as dictated by section

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63. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(f)(2) (Vernon Supp. 1984). The administrative agency is vested with discretion in receiving evidence at the hearing stage. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 294-96 (1974); *see also* Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180, 186 (Tex. 1972) (administrative agency given considerable discretion in receiving evidence at hearing); City of El Paso v. Public Util. Comm'n, 609 S.W.2d 574, 578 (Tex. Civ. App.—Austin 1980, no writ) (discretionary power vested in administrative tribunal).

64. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 14(a) (Vernon Supp. 1984). The statutory directive of § 14(a) of APTRA dictates that the administrative agency must exclude irrelevant evidence, observe the "rules of evidence" which apply in "nonjury civil cases," and give effect to the "rules of privilege recognized by law." *See id.* § 14(a).

65. *See id.* § 19(e). Even though an administrative agency is authorized to exclude evidence which is in violation of the rules of evidence, § 19 of APTRA provides for judicial review of the action taken by the administrative agency. *See id.* § 19(a). Upon judicial review, the decision of the administrative agency will be reversed or remanded if the administrative decision is:

(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory authority of the agency;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the record as a whole; or
(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. § 19(e).

66. *See id.* § 13(f)(4).

67. *See id.* § 13(f)(4) (record must include "questions and offers of proof, objections, and rulings of them"). Section 13(f)(4) is important when an affirmative order goes up for judicial review because if the court determines that "offers of proof" which were excluded were in fact relevant, the court will remand the case to allow for the introduction of additional evidence. *See* F. COOPER, STATE ADMINISTRATIVE LAW 424-25 (1965).

13(f)(4) of APTRA.[68] The judiciary has consistently held, in response to section 13(f)(4) and the limiting provisions of section 19(d)(3) of APTRA, that the evidence must be presented or offered for proof at the administrative hearing before the reviewing court will consider such evidence on appeal.[69] While certain provisions of APTRA can be considered individually with regard to creating the record of an administrative hearing for judicial review, it is essential to recognize that section 13(f), which dictates the contents of the record, section 14(a), which mandates the utilization of the new Texas Rules of Evidence by the administrative agency, and section 19(d)(3), which limits judicial review to the record, must all be read collectively.[70] Furthermore, legal scholars maintain that the provisions indicated above work together to guarantee the efficiency of the record and thus provide for meaningful judicial review.[71] In addition, provisions similar to the ones set out above have appeared in the statutes of other states, indicating the modern trend toward drafting adequate legislation to govern the record of an administrative hearing.[72]

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68. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(f)(4) (Vernon Supp. 1984).

69. *See* State Banking Bd. v. Valley Nat'l Bank, 604 S.W.2d 415, 419 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (exhibit not made part of record by mere attachment to administrative record). The rules of civil procedure, which apply to the judicial system, dictate that evidence which is not presented at trial will not be considered on appeal. *See* TEX. R. CIV. P. 371-377. It has been held that the rules of civil procedure, mandating that "evidence must be tendered and admitted into evidence in order to become a part of the record on appeal," apply to judicial review of an administrative record. *See* State Banking Bd. v. Valley Nat'l Bank, 604 S.W.2d 415, 418 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (evidence must be "tendered and admitted into evidence"). The policy reason behind the requirement that the evidence must be presented at the administrative level in order to be considered on judicial review stems from the court's reluctance to substitute its own decision for that of the agency. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974) (court is without authority to substitute its decision "for that of agency"); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (court will not "substitute its judgment" for that of agency). Section 19(d)(z) of APTRA does permit a party to obtain leave from the court to "present additional evidence" provided the party shows good cause for failure to present such evidence at the administrative hearing. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(z) (Vernon Supp. 1984). If a party is allowed to "present additional evidence" on judicial review, the court will direct that such evidence be taken before the administrative agency to afford the agency an opportunity to rule on such evidence. *See id.*

70. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(3) (Vernon Supp. 1984).

71. *See* F. COOPER, STATE ADMINISTRATIVE LAW 421-25 (1965) (provisions indicating contents of record provide for meaningful examination of administrative order by court).

72. *See, e.g.*, ALASKA STAT. § 44.62.560(c) (1980) (judicial review limited to complete record of administrative hearing); FLA. STAT. ANN. § 120.57(b)(5) (West 1982) (record includes "evidence received or considered; questions and proffers of proof and objections and rulings thereon"); MICH. STAT. ANN. § 3.560(204)(3) (Callaghan 1978) (court bound by record of administrative order); *see also* MINN. STAT. ANN. § 15.0424(6) (West 1977) (judicial review limited to record); MO. ANN. STAT. § 536.070(4) (Vernon Supp. 1984) (agency re-

B. *Prerequisite of Exhausting Administrative Remedies*

Although counsel appearing before an administrative agency must be concerned with preserving the record of the hearing for appeal, judicial review of an administrative order will never be available to counsel until "all administrative remedies available within the agency" have been exhausted.[73] Furthermore, the courts have consistently declared that filing a motion for rehearing at the administrative level is a prerequisite to judicial review, and failure to file such motion amounts to a lack of exhaustion of the remedies available at the administrative level.[74] There are instances, however, where the courts will not require a party to exhaust all adminis-

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quired to reduce all evidence at hearing to record). It should be recognized, however, that the statutory provisions of other states governing administrative agencies may not be completely identical to APTRA. *See* ALASKA STAT. § 44.62.460(d) (1980) (unlike APTRA, rules of evidence which apply to judiciary need not be observed by administrative agency); MINN. STAT. ANN. § 15.0419(1) (West 1977) (statute makes no indication that technical rules of evidence must be observed by administrative agencies). With regard to the provision of APTRA mandating that the agency must observe the "rules of evidence" applicable to "nonjury civil cases," other states have adopted identical provisions. *See* MICH. STAT. ANN. § 3.560(175) (Callaghan 1975) ("rules of evidence applied in a nonjury civil case" followed in the administrative tribunal).

73. *See, e.g.,* Butler v. State Bd. of Educ., 581 S.W.2d 751, 755 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (judicial review only available after counsel exhausts all remedies available at administrative level); Texas State Bd. of Pharmacy v. Kittman, 550 S.W.2d 104, 107 (Tex. Civ. App.—Tyler 1977, no writ) (courts will only entertain jurisdiction over administrative order after counsel exhausts all administrative remedies); Texas State Bd. of Pharmacy v. Walgreen Tex. Co., 520 S.W.2d 845, 848 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (requirement of exhausting administrative remedies mandatory although exceptions exist); *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(a) (Vernon Supp. 1984) (jurisdiction of court attaches after counsel has utilized all remedies at administrative level). Since the courts will not arbitrarily vacate an administrative order for the purpose of substituting their own decision, exhausting all administrative remedies represents a crucial step prior to judicial review. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974) (court will not substitute its decision in place of the agency's determination); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (court will not act as agency and substitute its determination arbitrarily in place of agency order). Administrative agencies have been created to perform essential functions in society, and the requirement that all remedies available at the administrative level be exhausted acts to assure that administrative expertise is fully utilized. *See* F. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 318 (1982). The courts will consistently apply the requirement of exhaustion when the question to be addressed is within the administrative tribunal's primary expertise. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 482 (1972).

74. *See* Butler v. State Bd. of Educ., 581 S.W.2d 751, 755 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (filing "a motion for rehearing" is mandatory prerequisite to judicial review); Texas State Bd. of Pharmacy v. Kittman, 550 S.W.2d 104, 106 (Tex. Civ. App.—Tyler 1977, no writ) (party seeking appeal from administrative order has not exhausted administrative remedies until filing of motion for rehearing); *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 16(e) (Vernon Supp. 1984) ("motion for rehearing is a prerequisite" to appeal of administrative order). Section 16(e) of APTRA, which mandates

trative remedies.[75] The Texas Court of Appeals for the Fourteenth Supreme Judicial District—Houston has declared that "[i]f the questions presented in the lawsuit are primarily judicial in nature or if the administrative agency is powerless to grant the relief sought, the courts and not the agency would have original jurisdiction."[76] In addition, the courts will not require a party to exhaust all remedies at the administrative level if the agency has issued an order or regulation which exceeds the agency's statutory authority.[77]

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that a "motion for rehearing" must be filed prior to judicial review, also establishes the requirements of a "motion for rehearing" which include the following:

> A motion for rehearing must be filed within 15 days after the date of rendition of a final decision or order. Replies to a motion for rehearing must be filed with the agency 25 days after the date of rendition of the final decision or order, and agency action on the motion must be taken within 45 days after the date of rendition of the final decision or order. If agency action is not taken within the 45-day period, the motion for rehearing is overruled by operation of law 45 days after the date of rendition of the final decision or order.

Id. § 16(e). Other states have enacted statutes similar to § 16(e) of APTRA. *See* N.D. CENT. CODE § 28-32-14 (1974) (provides for manner of rehearing at administrative level); WASH. REV. CODE ANN. § 34.04.130(1) (Supp. 1983-1984) (upon motion for rehearing agency decision does not become final until agency has acted thereon). There are, however, many states which dictate that a motion for rehearing is not a prerequisite to judicial review. *See, e.g.,* GA. CODE ANN. § 3A-120(c) (Supp. 1980) (filing motion for rehearing is not prerequisite to appeal); MINN. STAT. ANN. § 15.0424(2) (West 1977) ("nothing herein shall be construed as requiring" a motion for rehearing prior to judicial review); OKLA. STAT. ANN. tit. 75, § 318(1) (West 1976) (judicial review available regardless of "application for rehearing"); *see also* WIS. STAT. ANN. § 227.12(1) (West 1982) (party may seek judicial review without filing "petition for rehearing"). Prior to APTRA, neither the statutes nor the court decisions required a party to file a motion for rehearing as a prerequisite to judicial review. *See* Railroad Comm'n v. Houston Chamber of Commerce, 124 Tex. 375, 383, 78 S.W.2d 591, 595 (1935).

75. *See* F. COOPER, STATE ADMINISTRATIVE LAW 568 (1965) (situations exist where court will not require exhaustion of administrative remedies). The "doctrine of prior resort" is predicated upon the judicial policy that questions specifically within specialized knowledge of the agency should be left with the agency for "initial determination." *See id.* at 564-65. When the policy reasons underlying the "doctrine of prior resort" do not apply to a particular question, there is no reason to insist upon prior resort as a predicate to judicial review. *See id.* at 568. Neither the federal nor the state courts insist upon exhaustion when the agency is without jurisdiction to consider the case. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 382 (1972).

76. *See* Texas Catastrophe Property Ins. Ass'n v. Miller, 625 S.W.2d 343, 347 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ). The legislature may provide, by an appropriate statute, that certain issues which are "inherently judicial in nature" shall nevertheless be reserved to the exclusive jurisdiction of an administrative tribunal. *See* Foree v. Crown Cent. Petroleum Corp., 431 S.W.2d 312, 316 (Tex. 1968); Gregg v. Delhi-Taylor Oil Corp., 344 S.W.2d 411, 415 (Tex. 1961).

77. *See* Glenn Oaks Utils. v. City of Houston, 161 Tex. 417, 420, 340 S.W.2d 783, 785 (1960) (when agency exceeds authority, resort to courts can be immediate to prevent unjusti-

C. *Filing Petition to Obtain Judicial Review*

After a party has exhausted all administrative remedies, such party may file a petition to obtain judicial review of the administrative decision.[78] The petition for judicial review, as dictated by section 19(b) of APTRA, must be filed "within 30 days after the decision complained of" becomes "final and appealable."[79] It is significant to recognize the difference between the finality of an administrative decision and the appealability of an administrative decision. Before a party can obtain judicial review by the filing of a petition, the administrative decision must not only be "final," but it must also be "appealable."[80] An administrative decision is "final" when the decision is one which leaves nothing undecided and open to future disposition.[81] The administrative decision becomes "appealable"

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fiable injury); *see also* Roskey v. Texas Health Facilities Comm'n, 639 S.W.2d 302, 302-03 (Tex. 1982) (Texas Supreme Court indicates court of appeals decision with regard to no need to exhaust remedies would be affirmed had party introduced sufficient summary judgment proof).

78. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(b) (Vernon Supp. 1984) (judicial review instituted by filing petition for review).

79. *See id.* Unless statutory provisions dictate otherwise, the Travis County District Court is the only court wherein one may file a petition for judicial review of an agency's decision. *See id.* § 19(b)(1). Much like the requirements imposed at the trial level, "all parties of record in the proceedings before the agency," including the agency, must be served with a "copy of the petition." *See id.* § 19(b)(2). Furthermore, prior to the adoption of APTRA, the courts applied the principle that only those administrative orders which are final may be judicially reviewed. *See* Sun Oil Co. v. Railroad Comm'n, 158 Tex. 292, 296, 311 S.W.2d 235, 237 (1958) (judicial review of administrative order available when order is final).

80. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(b) (Vernon Supp. 1984).

81. *See, e.g.,* Railroad Comm'n v. Brazos River Gas Co., 594 S.W.2d 216, 218 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (nothing remains "open for future disposition in final order"); Railroad Comm'n v. Air Prods. & Chems., Inc., 594 S.W.2d 219, 221 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (final order "leaves nothing open for further disposition"); Walker Creek Homeowners Ass'n v. Texas Dep't of Health Resources, 581 S.W.2d 196, 198 (Tex. Civ. App.—Austin 1979, no writ) (administrative order becomes final when nothing remains subject to dispute); *see also* Mahon v. Vandygriff, 578 S.W.2d 144, 147 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (order not final "if a right is made contingent upon the occurrence of some future event"); Allen v. Crane, 257 S.W.2d 357, 358 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.) (decision not final when questions remain "open, unfinished, or inconclusive"). Many states predicate the right to judicial review upon obtaining a final administrative order. *See, e.g.,* ARIZ. REV. STAT. ANN. § 12-904 (1982) (judicial review only available after final administrative order); MASS. ANN. LAWS ch. 30A, § 14 (Michie/Law. Co-op. 1983) (final agency decision required before judicial review); MINN. STAT. ANN. § 15.0424 (West 1977) ("person aggrieved by a final decision in a contested case" entitled to resort to judicial review); *see also* N.D. CENT. CODE § 28-32-15 (1974) ("only final orders or decisions and orders or decisions substantially affecting the rights of parties are appealable"); WASH. REV. CODE ANN. § 34.04.130(1) (1965) (final decision appealable).

once the aggrieved party has complied with sections 16(c) and 19(a) of APTRA by "filing a motion for rehearing" and exhausting all "administrative remedies."[82]

IV. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS

A. *Early Judicial Review — The Unreasonable and Unjust Test*

The Texas Supreme Court decision in *Railroad Commission of Texas v. Houston & Texas Central Railway Company,*[83] decided in 1897, marked the beginning of judicial review of administrative actions in Texas.[84] In the early cases involving judicial review, the courts did not apply the modern "substantial evidence" test;[85] rather, the courts reviewed the administrative action by applying an "unreasonable and unjust" test.[86] The "unreasonable and unjust" test required the reviewing court to make its own judicial determination of the facts.[87] Furthermore, the application of the "unreasonable and unjust" test allowed the reviewing court to go beyond the evidence considered by the administrative agency and base its judicial determination upon any new and additional evidence.[88]

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82. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 19(a), 16(c) (Vernon Supp. 1984) (exhausting administrative remedies and filing "motion for rehearing" are prerequisites of appeal).

83. 90 Tex. 340, 38 S.W. 750 (1897).

84. *See* Lipscomb, *Judicial Control of Administrative Actions in Texas,* in 42 BAYLOR LAW BULLETIN 26 n.21 (1938) (requirements on judicial review changed since decision in *Sun Oil Co.).* Under the earlier court decisions, judicial review of administrative actions was conducted in a trial de novo manner and evidence not presented to the agency was received by the courts. *See id.* at 26.

85. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(5) (Vernon Supp. 1984) ("substantial evidence" test applied in judicial review). APTRA also provides for the "arbitrary or capricious" test as the standard for review when the agency action is challenged for exceeding the discretion of the agency. *See id.* § 19(e)(6).

86. *See* Railroad Comm'n v. Houston & Tex. Cent. Ry., 90 Tex. 340, 353, 38 S.W. 750, 755 (1897) (court must review Railroad Commission's order under "unreasonable and unjust" test). The legislature conferred upon the court the duty to determine the reasonableness of the agency's action by utilizing the "unreasonable and unjust" standard of review. *See* Railroad Comm'n v. Weld & Neville, 96 Tex. 394, 403, 73 S.W. 529, 531 (1903). When a party has the right to attack the order of an administrative agency, such party has the burden of establishing that the agency action was "unjust and unreasonable." *See* Gulf, Colorado & Santa Fe Ry. v. Railroad Comm'n, 102 Tex. 338, 352, 113 S.W. 741, 747 (1908).

87. *See* Gulf, Colorado & Santa Fe Ry. v. Railroad Comm'n, 102 Tex. 338, 352, 113 S.W. 741, 747 (1908). The court must make its own determination of the reasonableness of the agency's action by looking to the plaintiff's petition which must establish the unreasonableness of the order by "clear and satisfactory evidence." *See id.* at 352, 113 S.W. at 747.

88. *See* Railroad Comm'n v. Houston Chamber of Commerce, 124 Tex. 375, 383, 78 S.W.2d 591, 595 (1935) (Commission's determination presumed correct; plaintiff must introduce evidence to establish unreasonableness of agency action). When the order of an administrative agency is attacked, the aggrieved party must introduce "new and independent

B. *Development of the Substantial Evidence Test — Prior to APTRA*

Responding to the increasing use of administrative regulation and recognizing that courts should not act as administrative bodies,[89] the Texas Supreme Court disregarded the use of the "unreasonable and unjust" test and adopted the "substantial evidence" test as the procedure for reviewing administrative actions.[90] In the formative years of the "substantial evidence" test, unlike the "substantial evidence" test utilized today, the courts received and considered evidence which had not been brought before the administrative tribunal.[91] The court, however, in *Trapp v. Shell Oil Company, Inc.*,[92] acknowledging that administrative tribunals are vested with specialized knowledge and duties, finally rejected the proposition that an aggrieved party can present, at the judicial level, new and additional evidence which is within the peculiar knowledge of the administrative agency.[93] Furthermore, the early decisions reviewing administrative hear-

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evidence" to overturn the agency decision. *See* Lipscomb, *Judicial Control of Administrative Actions in Texas,* in 42 BAYLOR LAW BULLETIN 26 (1938).

89. *See, e.g.,* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 130 (1953) (administrative agencies have experienced rapid growth); Board of Health v. New York Cent. R.R., 72 A.2d 511, 514 (N.J. 1950) (increased demand for administrative agencies prompted by "complexities of our modern society"); K. DAVIS, ADMINISTRATIVE LAW TEXT 4 (1972) (society has experienced dramatic increase in administrative regulation). The volume of administrative regulation has reached such an enormous level that it exceeds the statutory enactments of the legislatures; administrative decisions have also surpassed in number the decisions handed down by the courts. *See* D. NELSON, ADMINISTRATIVE AGENCIES OF THE USA 5 (1964). Courts will not act as agencies and arbitrarily vacate an agency order for the purpose of substituting their own judicial determination. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

90. *See, e.g.,* Trapp v. Shell Oil Co., 145 Tex. 323, 341, 198 S.W.2d 424, 436 (1946) (order of Railroad Commission upheld when supported by substantial evidence); Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 78-79, 161 S.W.2d 1022, 1029 (1942) (agency order will be sustained if supported by substantial evidence); Gulf Land Co. v. Atlantic Ref. Co., 134 Tex. 59, 74, 131 S.W.2d 73, 82 (1939) (validity of agency order determined by "substantial evidence" test).

91. *See* Marrs v. Railroad Comm'n, 142 Tex. 293, 303, 177 S.W.2d 941, 947 (1944) (as with civil cases, court may hear new evidence and make independent review of facts). When an action is brought to test the validity of the agency's action, the court will receive new and additional evidence at the judicial level. *See* Railroad Comm'n v. Shell Oil Co., 139 Tex. 66, 78, 161 S.W.2d 1022, 1029 (1942). Section 19(d)(2) of APTRA provides that a party may "present additional evidence"; but, if the court allows such additional evidence, the party is required upon court order to take the additional evidence before the agency for the agency's initial determination. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(2) (Vernon Supp. 1984).

92. 145 Tex. 323, 198 S.W.2d 424 (1946).

93. *See id.* at 349, 198 S.W.2d at 441 (court bound by record of administrative hearing). Questions within the specialized knowledge of the agency will not be set aside arbitrarily, but will be reviewed on the basis of the "substantial evidence" test and the court will confine

ings established the principle that the "substantial evidence" test is unlike the preponderance of the evidence standard, wherein the court considers the weight of the evidence.[94] The preponderance of the evidence standard, however, as declared by the courts prior to the adoption of APTRA, is the standard for review when an administrative action is challenged in a full trial de novo authorized by statute.[95]

C. *Substantial Evidence Test and Arbitrary and Capricious Test — After APTRA*

Today, the "substantial evidence" test utilized by the courts in reviewing administrative orders has been codified in section 19(e)(5) of APTRA.[96] The modern "substantial evidence" test, differing little from the "substantial evidence" test formulated prior to APTRA, embraces the judicial policy that the courts neither act as "super-agencies" nor substitute their own discretion for that committed to the administrative tribunal by the legislature.[97] The courts, therefore, will uphold the agency order, provided that it is reasonably supported by substantial evidence.[98] In addition, judicial

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its review to the administrative record. *See id.* at 349-350, 198 S.W.2d at 441. The judicial policy reflects the idea that questions specifically within the specialized knowledge of the agency should be addressed to the agency for its own "initial determination." *See* 2 COOPER, STATE ADMINISTRATIVE LAW 568 (1965).

94. *See, e.g.,* Southern Canal Co. v. State Bd. of Water Eng'rs, 159 Tex. 227, 233, 318 S.W.2d 619, 623 (1958) ("substantial evidence" test is different from preponderance of evidence test); Board of Fireman's Relief & Retirement Fund Trustees v. Marks, 150 Tex. 433, 437, 242 S.W.2d 181, 183 (1951) ("substantial evidence" test does not mean court determines whether evidence preponderates over administrative order); Hawkins v. Texas Co., 146 Tex. 511, 514, 209 S.W.2d 338, 340 (1948) (applying "substantial evidence" test court does not make determination "based upon preponderance of the evidence").

95. *See, e.g.,* Scott v. Texas State Bd. of Medical Examiners, 384 S.W.2d 686, 690 (Tex. 1964) (court applies preponderance of evidence test upon full trial de novo authorized by statute); Key Western Life Ins. Co. v. State Bd. of Ins., 163 Tex. 11, 15-16, 350 S.W.2d 839, 842 (1961) (full trial de novo dictates use of "preponderance of evidence" test rather than "substantial evidence" test); Lipscomb, *Judicial Control of Administrative Actions in Texas,* in 42 BAYLOR LAW BULL. 26 (1938) (trial de novo requires "new and independent evidence" unlike "substantial evidence" rule).

96. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(5) (Vernon Supp. 1984).

97. *See, e.g.,* American Trucking Ass'ns v. United States, 344 U.S. 298, 309 (1953) (not court's function to "act as a super-commission"); Employees Retirement Sys. v. Hill, 557 S.W.2d 819, 821 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (court not to "substitute its discretion for that committed to the agency by the Legislature"); Texas Real Estate Comm'n v. Turner, 547 S.W.2d 70, 72 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.) (substitution of court's discretion for that of agency is not duty of courts). When the field of inquiry is highly technical or a need exists to have continued observation, administrative agencies are the initial governmental bodies to be delegated discretion. *See* Jaffe, *An Essay on Delegation of Legislative Power: I,* 47 COLUM. L. REV. 359, 361 (1947).

98. *See, e.g.,* Board of Adjustment v. Leon, 621 S.W.2d 431, 434 (Tex. Civ. App.—San

review will be limited to the record of the administrative hearing, and the party opposing the administrative action has the burden of establishing that the entire administrative record is not supported by substantial evidence.[99] Furthermore, the court, strictly adhering to the principle established prior to APTRA, will refuse to consider new and additional evidence.[100] If a party desires to present additional evidence, the court, upon satisfaction that the evidence is material, will remand the case to the agency.[101] As pointed out prior to APTRA, however, new and independent evidence may be presented in a full trial de novo wherein the prepon-

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Antonio 1981, no writ) (presumption in favor of validity of agency decisions and upheld if supported by substantial evidence); Valley Fed. Sav. & Loan Ass'n v. Vandygriff, 609 S.W.2d 605, 608 (Tex. Civ. App.—Austin 1980, no writ) (commission's decision supported by substantial evidence); State Banking Bd. v. Valley Nat'l Bank, 604 S.W.2d 415, 420 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.) (State Banking Board orders governed by substantial evidence rule); *see also* Texas Employment Comm'n v. Gant, Inc., 604 S.W.2d 211, 214 (Tex. Civ. App.—San Antonio 1980, no writ) (order of Employment Commission governed by APTRA substantial evidence rule). Judicial review of an order by the Texas Health Facilities Commission is governed by an application of the substantial evidence test. *See* Nueces County Hosp. Dist. v. Texas Health Facilities Comm'n, 576 S.W.2d 908, 910 (Tex. Civ. App.—Austin 1979, no writ).

99. *See, e.g.,* Board of Adjustment v. Leon, 621 S.W.2d 431, 433 (Tex. Civ. App.—San Antonio 1981, no writ) (judicial review limited to record as a whole); City of Lubbock v. Estrello, 581 S.W.2d 288, 290 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) ("substantial evidence" test requires court to look at "record as a whole"); Mobil Oil Corp. v. Matagorda County Drainage Dist. No. 3, 580 S.W.2d 634, 644 (Tex. Civ. App.—Corpus Christi 1979) (aggrieved party has burden to show agency decision not supported by substantial evidence), *rev'd on other grounds,* 597 S.W.2d 910 (Tex. 1980). Presumptions are indulged in favor of administrative orders and the complaining party must satisfy the burden of establishing that the order does not meet the "substantial evidence" test. *See* Board of Adjustment v. Leon, 621 S.W.2d 431, 434 (Tex. Civ. App.—San Antonio 1981, no writ).

100. *See* Texas Oil & Gas Corp. v. Railroad Comm'n, 575 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1978, no writ) (APTRA does not allow court to consider additional evidence until agency has had initial opportunity). APTRA empowers the reviewing court, under special conditions, to order the administrative tribunal to hear additional evidence. *See id.* at 531; *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(2) (Vernon Supp. 1984).

101. *See* Texas Oil & Gas Corp. v. Railroad Comm'n, 575 S.W.2d 348, 351 (Tex. Civ. App.—Austin 1978, no writ) (additional evidence not allowed unless certain standards are satisfied). The court in *Texas Oil & Gas Corporation* declared:

> Before a cause may be remanded to the agency with instructions that additional evidence be taken under the authority of § 19(d)(2), the court must be satisfied (1) that the additional evidence is material and (2) that there were good reasons for the failure of the party to present the evidence before the agency.

Id. at 351. Section 19(d)(2) contains the requirements that a party wishing to offer additional evidence to the agency must satisfy the court that the evidence is material and that good reason existed which prevented the introduction of the evidence at the hearing stage. *See* Independence Sav. & Loan Ass'n v. Gonzales County Sav. & Loan Ass'n, 568 S.W.2d 463, 465 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.); *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(d)(2) (Vernon Supp. 1984).

derance of the evidence standard applies.[102]

APTRA, in addition to containing the "substantial evidence" test, established the "arbitrary and capricious" test as an additional standard for judicial review.[103] The "arbitrary and capricious" test, differing in application from the "substantial evidence" test, requires the court to make a determination of whether the agency has abused its statutory authority.[104] As indicated in section 19(e) of APTRA, the "substantial evidence" test and the "arbitrary and capricious" test are separate tests involving different judicial determinations.[105]

D. *Agency Findings of Basic Facts and Ultimate Facts*

Section 16(b) of APTRA is the basic provision requiring the administrative agency to include within its decision the "basic facts" and "ultimate facts" which support the agency's decision.[106] "Basic facts" are the true factual determinations made by the agency; such facts "must be based exclusively on the evidence and on matters officially noticed."[107] The "ultimate facts," differing from the "basic facts," are really conclusions of law, established by the agency, which represent "legal norms or 'criteria' which

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102. *See* Department of Pub. Safety v. Petty, 482 S.W.2d 949, 951 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.) ("substantial evidence" test does not apply in trial de novo and additional evidence is allowed). The *Petty* decision established the following distinction with regard to a trial de novo:

> If the function of the administrative agency is legislative, review in court is governed by the substantial evidence rule, and the court may not substitute its judgment for that of the agency. But if the agency has acted in a judicial or quasi-judicial capacity, the factual basis for its order or decision when reviewed by a court must be established by a preponderance of the evidence in a trial de novo.

Id. at 951.

103. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(6) (Vernon Supp. 1984).

104. *See* Starr County v. Starr Indus. Serv., 584 S.W.2d 352, 356 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) ("arbitrary and capricious" test requires court to determine if agency abused discretion by not genuinely engaging in "reasoned decision-making"); Texas Real Estate Comm'n v. Howard, 538 S.W.2d 429, 430 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (agency vested with discretion but still may not act arbitrarily or capriciously).

105. *See* Starr County v. Starr Indus. Serv., 584 S.W.2d 352, 355 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (order may be supported by "substantial evidence and yet be invalid for arbitrariness"); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(5)-(6) (Vernon Supp. 1984).

106. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 16(b) (Vernon Supp. 1984).

107. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 935 (Tex. App.—Austin 1983) (basic facts are true factual determinations), *rev'd on other grounds,* 665 S.W.2d 446 (Tex. 1984). The basic facts "must be based exclusively on the evidence and on matters officially noticed." *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 13(h) (Vernon Supp. 1984).

are applicable in all other similar cases."[108] It is the province of the agency, when rendering a decision in a "contested case," to determine whether the "basic facts" support the "ultimate facts" established by the agency.[109]

1. Judicial Review of Basic Facts and Ultimate Facts — Under Substantial Evidence Test and Arbitrary and Capricious Test

The duty of the court on judicial review is to apply the "substantial evidence" test to the "basic facts" and, thus, determine "the validity of the process by which the agency" inferred and established the basic facts from the evidence presented at the hearing.[110] The "arbitrary and capricious" test, as set out in section 19(e)(6) of APTRA, is utilized by the courts to measure the validity of the agency's application of the "basic facts" to the "ultimate facts."[111] Specifically, the application of the "substantial evidence" test to the "basic facts" requires the court to "consider whether the decision was based on a consideration of the relevant" evidence;[112] the application of the "arbitrary and capricious" test to the "ultimate facts" requires the court to make a determination of "whether there has been a clear error in judgment" by the agency.[113]

The Texas Supreme Court decision in *Railroad Commission v. Graford*

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108. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 934 (Tex. App.—Austin 1983) (ultimate facts are basically legal norms or conclusions of law), *rev'd on other grounds,* 665 S.W.2d 446 (Tex. 1984); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 4(a)(1) (Vernon Supp. 1984) (section 4(a)(1) of APTRA grants agency authority to establish rules and regulation which will constitute ultimate facts in contested case). Section 3.10 of art. 4418h controls the promulgation of rules and regulations, which become ultimate facts in a contested case, established by the Texas Health Facilities Commission. *See* TEX. REV. CIV. STAT. ANN. art. 4418h, § 3.10 (Vernon 1976 & Supp. 1984).

109. *See* Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 391, 402 (Tex. App.—Austin 1983, no writ) (task initially placed with agency to establish basic facts which support ultimate facts).

110. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 936 (Tex. App.—Austin 1983) ("substantial evidence rule" utilized to determine validity of process which agency applied in arriving at basic facts from the evidence), *rev'd on other grounds,* 665 S.W.2d 446 (Tex. 1984).

111. *See id.* at 936. The "arbitrary and capricious" test is utilized by the courts to determine the validity of the agency's action in applying the "basic facts" to the "ultimate facts." *See id.* at 936; *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e)(6) (Vernon Supp. 1984).

112. *See* Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 391, 403-04 (Tex. App.—Austin 1983, no writ) (agency infers findings of "basic facts" from evidence presented at hearing).

113. *See* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("arbitrary and capricious" test requires court to make determination of whether agency clearly abused discretion).

Oil Corporation,[114] established the basic principle that "[t]he findings [of fact] should be such that a court, on reading them, could fairly and reasonably say that they support the ultimate findings of fact required for its decision."[115] The principle laid down in *Graford Oil Corporation* has been consistently regarded by the courts as the primary rule regarding judicial review of administrative orders under the "substantial evidence" and "arbitrary and capricious" tests.[116]

2. Attempt to Alter Judicial Review Standard

The decision by the Texas Court of Appeals for the Third Supreme Judicial District—Austin in *Charter Medical-Dallas, Inc. v. Texas Health Facilities Commission,*[117] marked the first significant attempt to alter the standard of judicial review established in *Graford Oil Corporation.*[118] In *Charter Medical,* the court of appeals was presented with a question of whether an administrative order, which denied the plaintiff a certificate of need, represented a clear abuse of discretion.[119] The court was further required to determine whether the administrative order was supported by substantial evidence.[120] Reasoning that the Texas Health Facilities Commission had made "an express finding of basic fact" which contradicted findings of ultimate fact made by the agency, the court upset the judicial review standard by declaring that "[i]f the evidence establishes the existence of a basic fact that is relevant and contrary to the agency's 'finding' of an ultimate or intermediate fact, the agency may not ignore the basic fact; rather, it must make additional findings of basic fact which demonstrate the correctness of not giving effect to the contrary basic fact."[121]

The requirement expounded by the court of appeals at Austin in *Charter Medical* that the administrative agency must make "additional findings of

114. 557 S.W.2d 946 (Tex. 1977).

115. *See id.* at 950.

116. *See* Murphy v. Rowland, 609 S.W.2d 292, 295 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (findings should be such that the "court, on reading them, could fairly and reasonably say that they support the ultimate findings of fact required by the court for its decision"). The court, upon review of administrative findings of fact, must be able to declare that such findings "reasonably support the 'ultimate findings of fact.'" *See* Gage v. Railroad Comm'n, 582 S.W.2d 410, 414 (Tex. 1979).

117. 656 S.W.2d 928 (Tex. App.—Austin 1983), *rev'd,* 665 S.W.2d 446 (Tex. 1984).

118. *See* Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 391, 395 (Tex. App.—Austin 1983, no writ) (plaintiff declared *Charter Medical* "ushered in a 'new day' in the judicial review of the final orders of administrative agencies").

119. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 930 (Tex. App.—Austin 1983) (one issue in case is "whether the commission acted arbitrarily or capriciously"), *rev'd on other grounds,* 665 S.W.2d 446 (Tex. 1984).

120. *See id.* at 930.

121. *See id.* at 936.

basic facts" was vigorously attacked by the plaintiff in *Presbyterian Hospital North v. Texas Health Facilities Commission.*[122] The decision in *Presbyterian Hospital,* also decided by the Texas Court of Appeals for the Third Supreme Judicial District—Austin utilized the new *Charter Medical* standard as the standard for reviewing an administrative order of the Texas Health Facilities Commission.[123] In *Presbyterian Hospital,* Justice Powers declared that the controversial principles discussed in the court's decision in *Charter Medical* were "quite literally 'hornbook law.' "[124]

The requirement that an administrative agency must make "additional findings of basic facts" does not appear to have been utilized by the courts prior to the court of appeals decision in *Charter Medical* in the application of either the "substantial evidence" or "arbitrary and capricious" tests.[125] To the contrary, the court in *Bryan v. Board of Trustees of Houston Fireman's Relief and Retirement Fund,*[126] decided prior to APTRA, held that conflicts in evidence should be resolved in favor of sustaining the administrative order.[127] In addition, the Texas Supreme Court decision in *Gage v. Railroad Commission,*[128] decided after the adoption of APTRA, held that the primary judicial principle when reviewing an administrative order is to uphold the agency order when the court can reasonably say that the "basic facts" support the "ultimate facts."[129]

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122. *See* Presbyterian Hosp. N. v. Texas Health Facilities Comm'n, 664 S.W.2d 391, 395-96 (Tex. App.—Austin 1983, no writ) (Texas Health Facilities Commission declared *Charter Medical* to be unprecedented action by court).

123. *See id.* at 395.

124. *See id.* at 395. As stated by Justice Powers in *Presbyterian Hospital,* the decision in *Charter Medical* not only represents "hornbook law," but the principles applied in *Charter Medical* are "familiar to all students of basic administrative law." *See id.* at 395.

125. *See, e.g.,* Gage v. Railroad Comm'n, 582 S.W.2d 410, 414-15 (Tex. 1979) (agency order sustained when court can declare that basic facts "reasonabl[y] support ultimate facts"); Railroad Comm'n v. Graford Oil Corp., 557 S.W.2d 946, 950 (Tex. 1977) (decision upheld when court can say basic facts reasonably support ultimate facts); Murphy v. Rowland, 609 S.W.2d 292, 295 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (must be shown that basic facts reasonably support ultimate facts); *see also* Citizens of Texas Sav. & Loan Ass'n v. Lewis, 483 S.W.2d 359, 367 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.) (agency order upheld when findings such that "pattern is furnished" by which court can determine agency action).

126. 497 S.W.2d 367 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.).

127. *See id.* at 373-74. In applying the "substantial evidence" test the court should resolve "conflicts in evidence" in favor of administrative agency's decision. *See id.* at 373-74.

128. 582 S.W.2d 410 (Tex. 1979).

129. *See id.* at 414.

3. Texas Supreme Court — Reaffirms *Graford* Standard in *Charter Medical*

The Texas Supreme Court decision in *Charter Medical-Dallas, Inc. v. Texas Health Facilities Commission,*[130] decided February 15, 1984, resolved the confusion generated by the court of appeals decision in *Charter Medical* with regard to judicial review of administrative orders.[131] Declaring that section 19(e) of APTRA provides the "primary guidelines to be used by the court in reviewing" administrative actions,[132] the Texas Supreme Court reversed the decision of the court of appeals.[133]

The *Charter Medical* decision, at the court of appeals level, stood for the proposition that an administrative order will be declared "arbitrary and capricious" if the evidence "establishes the existence of a basic fact," which is contrary to an "ultimate fact" established by the agency.[134] Under the standard set out by the court of appeals in *Charter Medical,* the administrative agency, in order to satisfy the "arbitrary and capricious" test, "must make additional findings of basic fact which demonstrate the correctness of not giving effect to the contrary basic fact."[135]

The Texas Supreme Court, in its decision in *Charter Medical,* reviewed the administrative order of the Texas Health Facilities Commission and in one respect arrived at the same conclusion as that reached by the court of appeals.[136] Specifically, the Texas Supreme Court found, as did the court of appeals, that many of the findings of the agency do not "satisfy the requirements previously stated since they are nothing more than recitals of evidence."[137] More importantly, however, the Texas Supreme Court, disagreeing with the court of appeals, declared that there were sufficient findings in the agency's order for the court to "fairly and reasonably say that the underlying or basic facts support the Commission's conclusions on the

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130. 665 S.W.2d 446 (Tex. 1984).

131. *See id.* at 454.

132. *See id.* at 449. In addition to applying the guidelines set out in APTRA, the court indicated that its judicial determination was also guided by the "Health Planning and Development Act" (HPDA), TEX. REV. CIV. STAT. ANN. art. 4418h, §§ 1.01-6.04 (Vernon 1976). *See id.* at 449; *see also* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 19(e) (Vernon Supp. 1984).

133. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 665 S.W.2d 446, 454 (Tex. 1984).

134. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 656 S.W.2d 928, 936 (Tex. App.—Austin 1983), *rev'd,* 665 S.W.2d 446 (Tex. 1984).

135. *See id.* at 936.

136. *See id.* at 951. The court declared that none of the "Commission's findings of ultimate facts" will be sustained. *See id.* at 951.

137. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 665 S.W.2d 446, 452 (Tex. 1984).

ultimate" facts.[138] Furthermore, the court held that it is not the duty of the judiciary to determine whether the agency arrived at the correct conclusion; rather, the true test is whether some "reasonable basis exists in the record for the action taken by the agency."[139] The Texas Supreme Court, therefore, while rejecting the standard set out by the court of appeals in *Charter Medical,* reaffirmed the judicial standard for review established in *Graford Oil Corporation.*[140] In addition, the Texas Supreme Court, in *Charter Medical,* recognizing the basic policy position of the courts, reasserted the fundamental judicial attitude that the courts must refrain from substituting their own judicial determinations in place of the agency's decision when the question is one committed to the specialized knowledge and sound discretion of the agency.[141]

V. CONCLUSION

Administrative agencies now control modern society to such an extent that the rights and liberties of all individuals are affected.[142] The increasing use of administrative regulation and control has resulted in legislative and judicial action aimed at increasing the efficiency by which the administrative tribunals carry out their specialized and peculiar functions.

The legislative branch of government in Texas responded to the increasing prevalence of administrative tribunals by passing APTRA.[143] APTRA, as declared by the legislature, was established both to provide a uniform system of procedure for statewide administrative agencies and to set out the standard of judicial review applicable to administrative actions.[144] The need for adequate legislative action to govern administrative agencies has been recognized by many states and has resulted in the adoption of a number of state statutes similar in nature to the Texas statute.[145]

The judicial branch of government in Texas began formulating its pol-

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138. *See id.* at 452.

139. *See id.* at 452.

140. *See id.* at 452. The decision of the agency will be upheld when the court can "fairly and reasonably say" that the basic facts support the ultimate facts. *See* Railroad Comm'n v. Graford Oil Corp., 557 S.W.2d 946, 950 (Tex. 1977).

141. *See* Charter Medical-Dallas, Inc. v. Texas Health Facilities Comm'n, 665 S.W.2d 446, 452-53 (Tex. 1984).

142. *See, e.g.,* Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, 130 (1953) (administrative agencies are growing rapidly); Federal Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (significant increase in administrative regulation); Fascell, *The Problem of Complexities and Delays in the Administrative Proceedings and Practices,* 12 AD. L. BULL. 6, 6 (1959) (rights and liberties of all individuals affected by administrative tribunals).

143. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 1 (Vernon Supp. 1984).

144. *See id.*

145. *See, e.g.,* GA. CODE ANN. § 3A-120(c) (Supp. 1980); MINN. STAT. ANN. § 15.0424

icy positions with regard to administrative agencies in 1897 when the Texas Supreme Court rendered its decision in *Railroad Commission of Texas v. Houston & Texas Central Railway Company.*[146]

Starting out with the "unreasonable and unjust" test as the standard for judicial review, the courts finally adopted the "substantial evidence" test as the primary criterion to apply to an administrative agency.[147] The application of the "substantial evidence" test, however, is controlled by the modern principle that the courts do not act as administrative tribunals.[148] The courts, therefore, will not arbitrarily substitute their own independent determination in place of the agency decision.[149] The Texas Supreme Court decision in *Charter Medical,* representing the most recent decision in the area of judicial review of administrative orders, reinforced the judicial policy positions that the courts are not empowered to act as super-agencies and are embraced with the judicial duty to uphold an agency order, provided they can reasonably say that the basic facts support the ultimate facts. More significantly, the Texas Supreme Court decision in *Charter Medical* recognized that administrative agencies, having a specialized knowledge, were created by the legislature to regulate and adjudicate peculiar issues which cannot be adequately dealt with by the judicial or legislative branches. The decision by the Texas Supreme Court in *Charter Medical,* therefore, acknowledged the fundamental principle that administrative agencies were created out of necessity, and out of necessity such administrative agencies must be vested with a certain amount of discretion.

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(2) (West 1977); N.D. CENT. CODE § 28-32-14 (1974); *see also* OKLA. STAT. ANN. tit. 75, § 318(1) (West 1976); WASH. REV. CODE ANN. § 34.04.130(1) (Supp. 1983-1984).

146. 90 Tex. 340, 38 S.W. 750 (1857).

147. *See, e.g.,* Valley Fed. Sav. & Loan Ass'n v. Vandygriff, 609 S.W.2d 605, 608 (Tex. Civ. App.—Austin 1980, no writ) ("substantial evidence" test standard of review); Texas Employment Comm'n v. Gant, Inc., 604 S.W.2d 211, 214 (Tex. Civ. App.—San Antonio 1980, no writ) ("substantial evidence" test applied by courts); Nueces County Hosp. Dist. v. Texas Health Facilities Comm'n, 576 S.W.2d 908, 910 (Tex. Civ. App.—Austin 1979, no writ).

148. *See* American Trucking Ass'ns v. United States, 344 U.S. 298, 309 (1953) (not function of court to act as "super commission").

149. *See* Bowman Transp., Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974) (court will not substitute its determination for that of agency); Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (agency order will not be arbitrarily vacated for purpose of substituting courts own decision).