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THE WISCONSIN IDEA IN ADMINISTRATIVE LAW

KENNETH K. LUCE*

State administrative organization in Wisconsin functions within a constitutional and statutory framework typical in the American states. The constitution in separate articles allocates executive,¹ legislative,² and judicial power³ among distinct government departments. An article denominated "administrative" provides for a secretary of state, treasurer, attorney general, and certain county officers.⁴ Another creates a state superintendent of public instruction.⁵ With these exceptions, all the seventy and more agencies exercising statewide jurisdiction, and hundreds with only local jurisdiction, have been created by statutes enacted progressively as time and necessity have required in each field of regulation. A few agencies are almost as old as the constitution.⁶

The constitutional problems concerning permissible scope of legislative delegation of power were presented early for decision in Wisconsin. In *Dowling v. Lancashire Insurance Company*,⁷ a land mark case which severely restricted administrative rule making, the Court⁸ invalidated a statute authorizing the Insurance Commissioner to prescribe a standard form of fire insurance policy, and the standard policy in Wisconsin is still prescribed by legislative act.⁹ Soon thereafter another decision invalidated a state board of health order prohibiting unvaccinated children from attending school.¹⁰ Nevertheless the Court later sustained several statutes containing delegation at least as broad as that invalidated in the *Dowling* case. Notably these later decisions included those sustaining the powers of the Civil Service Commission,¹¹

* A.B., J.D., University of Michigan; Associate Professor of Law, Marquette University Law School. This paper received honorable mention in the State Administrative Law Essay Contest conducted recently by the Section of Administrative Law of the American Bar Association.

¹ Wis. Const., Art. V, Sec. 1.

² Wis. Const., Art. IV, Sec. 1.

³ Wis. Const., Art. VII, Sec. 2.

⁴ Wis. Const., Art. VI.

⁵ Wis. Const., Art. X, Sec. 1.

⁶ Local tax boards of review, Laws 1868, Ch. 130, Sect. 25; see *Phillips v. City of Stevens Point*, 25 Wis. 594 (1870).

⁷ 92 Wis. 63, 65 N.W. 738 (1896).

⁸ References in this paper to "the Court" are to the Supreme Court of Wisconsin.

⁹ Wis. Stat., 203.01 (1949).

¹⁰ State ex rel. Adams v. Burdge, 95 Wis. 390, 70 N.W. 347, 37 L.R.A. 157 (1897).

¹¹ State ex rel. Buell v. Frear, 146 Wis. 291, 131 N.W.832 (1911).

the Railroad Commission,¹² and the Securities Commission.¹³ In *Borgnis v. Falk Company* the Court sustained the Industrial Commission Act, and held the power to adjudicate private interests could be delegated so long as court review at least the equivalent of certiorari remained available.¹⁴

In 1928 another landmark appeared in *Wisconsin Inspection Bureau v. Whitman*.¹⁵ Here the Court sustained the power of the Insurance Commissioner to prescribe rules for an insurance rating bureau. It was conceded the *Dowling* case had been ignored in later cases, and that public necessity had revealed the constitutional propriety of a less mechanical and literal enforcement of constitutional safeguards. Justice Rosenberry stated:¹⁶

"For there can be no doubt that in sustaining laws which combine legislative and judicial power in a single administrative agency, we are on the way back to where we were when the doctrine of the separation of powers was enunciated as a political theory and before it had been wrought into our constitutional system. A refusal to recognize the facts as they exist and to give administrative law its rightful place in our legal theory has prevented a logical and symmetrical development of that law. * * * no doubt the whole field of administrative law has had an asymmetrical development because of the fact that it had no recognized place in our constitutional theory although it has of necessity been accorded a place in our law. It may well be that the nomenclature of the decisions should be retained and that kind of legislative power which may be delegated should be called the power to make rules and regulations, and that that kind of judicial power which may be delegated should be called the power to find facts, although the true significance of these terms should be better understood."

Since the *Whitman* case decisions in other states invalidating legislative delegation have not been reliable authority. For instance with respect to New York decisions the Court has stated:¹⁷

"* * * the courts of the State of New York have adopted a very much more stringent rule with respect to delegation of legislative power than the rule announced by this court."

Nevertheless the first blue sky law was declared unconstitutional¹⁸ because it delegated power to the Railroad Commission to "make such * * * award as may be just and equitable", language which described the

¹² *Minn. St. P. & S. S. M. Ry. Co. v. Railroad Commission*, 136 Wis. 146, 116 N.W. 905 (1908).

¹³ *Kreutzer v. Westphal*, 187 Wis. 463, 204 N.W. 595 (1925).

¹⁴ *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911).

¹⁵ 196 Wis. 472, 220 N.W. 929 (1928).

¹⁶ 196 Wis. 472 at 499-500, 220 N.W. 929 (1928).

¹⁷ *Modern System Dentists v. State Board of Dental Examiners*, 216 Wis. 190 at 193, 256 N.W. 922 (1934).

¹⁸ *Klein v. Barry*, 182 Wis. 255, 196 N.W. 457 (1923).

very function of a court.¹⁹ Primarily the defect was faulty draftmanship. Department of Securities power to make "such rules and regulations as may be necessary or appropriate in the public interest or for the protection of investors,"²⁰ illustrates the permissible scope of delegated power in Wisconsin today. It might be stated that delegation of legislative power will now be sustained where the policy standard is expressed in the clearest practicable language, if possible in language with defined legal meaning;²¹ where the subject matter of regulation is such that the legislature practicably cannot handle it directly or through a constitutional government agency;²² and where public necessity for regulation clearly outweighs the private interest affected.²³

Wisconsin statutes creating administrative agencies are dated over almost a century, and each one prescribes details of practice and procedure, and frequently a method of judicial review.²⁴ Such background alone sufficiently suggests wide diversity between agencies in practice, procedure, and judicial review. Obviously the greatest practicable uniformity in such matters as among all agencies is of paramount importance in the development of any settled body of administrative law, and of obvious interest to the practicing lawyer. To some extent such uniformity develops through legislative tendency to carry from existing statutes into new statutes workable sections which have received judicial approval and content. In our system constitutional limitations have proved a compelling force toward uniformity. The separation of powers doctrine, inherent in the state constitution, insures minimum court review of all administrative action,²⁵ and minimum standards for procedure are guaranteed by the constitutional concepts of equal protection and due process.²⁶

The writer intends to note the extent to which these factors have produced a settled and uniform body of administrative law in Wisconsin, and to appraise the contribution of the Administrative Procedure

¹⁹ See also *Kelly v. Tomahawk Motor Co.*, 206 Wis. 568 at 573, 240 N.W. 141 (1932).

²⁰ Wis. Stat. 189.17(2) (1949).

²¹ *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 72, 21 N.W. (2d) 5 (1945), where the Court considers the "public convenience and necessity" standard.

²² *Minn. St. P. & S. S. M. Ry. Co. v. Railroad Commission*, 136 Wis. 146 at 159, 116 N.W. 905, 17 L.R.A. (ns) 821 (1908).

²³ *Wisconsin Telephone Co. v. Public Service Commission*, 206 Wis. 589, 240 N.W. 411 (1932); *Modern System Dentists v. State Board of Dental Examiners*, 216 Wis. 190, 256 N.W. 922 (1934).

²⁴ *Boards of Review*, Laws 1868, Ch. 130, Sec. 25; *Board of Dental Examiners*, Laws 1885, Ch. 129; *State Board of Agriculture*, Laws 1897, Ch. 301; *Banking Department*, Laws 1897, Ch. 303; *Civil Service Commission*, Laws 1905, Ch. 363; *Railroad Commission*, Laws 1905, Ch. 362.

²⁵ *Borgnis v. Falk Co.*, 147 Wis. 327 at 360, 133 N.W. 209 (1911); *State ex rel. Inspection Bureau v. Whitman*, 196 Wis. 472 at 507-508, 220 N.W. 929 (1928); *Cranston v. Industrial Commission*, 246 Wis. 287, 16 N.W. (2d) 865 (1944).

²⁶ U.S. Const., Amend. 14, Sec. 1; Wis. Const., Art. 1, Sec. 9.

Act,²⁷ enacted in 1943, in this direction. This statute was enacted in Wisconsin substantially in the form approved in 1946 by the National Conference of Commissioners on Uniform State Laws as the Model State Administrative Procedure Act.²⁸ In Wisconsin it was the first attempt to prescribe uniformly for a group of agencies standard rules to govern procedure and review. It is significant that the Act did not affect local agencies, but only those with state-wide jurisdiction. Certain state-wide agencies also were excepted, namely the Department of Taxation as to public utility tax assessment, and the Industrial Commission as to workmen's and unemployment compensation.²⁹

THE PROCEDURE OF ADMINISTRATIVE ACTION

(1) *The requirement of notice and hearing.* The Supreme Court of Wisconsin has stated:³⁰

"Unless some care is exercised to preserve the distinction between legislative and judicial power when exercised by administrative bodies, the division of the government into coordinate departments will become meaningless."

This is so because many important legal consequences depend upon determination of the nature of the power exercised as legislative or judicial, among them the constitutional necessity for notice and hearing.³¹ For another example, under the Wisconsin constitution the courts may exercise judicial power only, and may not modify an administrative order considered legislative in nature, but must remand to the agency for further proceedings.³² The difficulty is that in some areas of regulation the distinction blurs, but Wisconsin statutes and decisions indicate notice and hearing generally have been provided in such doubtful areas. Statutes delegating power clearly judicial provide uniformly for hearing, and hearing is provided and has been held constitutionally essential in some statutes delegating power held legislative in nature. Examples are the Public Service Commission powers to regulate utility

²⁷ Wis. Stat., Ch. 227 (1949); Laws 1943, Ch. 375; Laws 1945, Ch. 511; Laws 1947, Ch. 411, Sec. 11. References in this paper to "the Act" are to the Administrative Procedure Act cited here.

²⁸ See Hoyt, "The Wisconsin Administrative Procedure Act", 1944 Wis. L. Rev. 214.

²⁹ Wis. Stat. 227.01(1) (1949).

³⁰ Gateway City Transfer Co. v. Public Service Commission, 245 Wis. 304 at 307, 14 N.W. (2d) 6 (1944).

³¹ See Armory Realty Co. v. Olsen, 210 Wis. 281 at 297, 246 N.W. 513 (1933); Folding Furniture Works v. Wis. L.R. Board, 232 Wis. 170 at 191, 285 N.W. 851, 286 N.W. 875 (1939); State ex rel. Inspection Bureau v. Witman, 196 Wis. 472 at 499, 220 N.W. 929 (1928); Gateway City Transfer Co. v. Public Service Commission, 245 Wis. 304, 14 N.W. (2d) 6 (1944).

³² Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59 at 77, 21 N.W. (2d) 5 (1945); Fort Howard Paper Co. v. Fox River Heights Sanitary District, 250 Wis. 145, 26 N.W. (2d) 661 (1947); State ex rel. Schleck v. Zoning Board of Appeals, 254 Wis. 42, 35 N.W. (2d) 312 (1948).

rates,³³ and to issue certificates of public convenience to motor carriers.³⁴ Other examples are the hearings provided interested parties prior to issue of general orders of the Committee on Water Pollution,³⁵ and the hearings available after issuance of general rules by the Department of Securities.³⁶ Occupational license statutes provide generally for hearing on revocation, but hearing before revocation may be unnecessary in cases of extreme public interest in prompt action.³⁷ An officer who summarily destroys livestock under the mistaken impression it is diseased may be held personally liable in a later damage action.³⁸ Further collateral attack is possible through action against agency officials for injunction³⁹ or mandamus.⁴⁰

(2) *General content of the hearing requirement.* Where agency statutes provide for hearing they are occasionally explicit with respect to such procedural matters as notice, preparation of a record, and opportunity to cross examine and confront witnesses,⁴¹ but more often the right to hearing is stated without more.⁴² Generally the statutory system before the Administrative Procedure Act contained nothing beyond coincidental similarity between agency statutes calculated to promote uniformity in hearing procedure, and the attorney could insist only upon minimum procedural steps required by due process. In the important *Wisconsin Telephone Company* rate case, the Court stated that administrative due process does not require formal court hearing but only observance of the essentials of common law hearing.⁴³ These were outlined as: (1) the right to reasonable notice of the charge; (2) opportunity to meet it by competent evidence; and (3) the right to be

³³ *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274 at 288, 293, 287 N.W. 122, 593 (1939), cert. den. 309 U.S. 657, 84 L.Ed. 1006, 60 S.Ct. 514 (1940). The Court stated that to authorize rate orders without hearing would be to confer unlimited arbitrary power to take utility property.

³⁴ *Gateway City Transfer Co. v. Public Service Commission*, 245 Wis. 304, 14 N.W. (2d) 6 (1944); *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 77, 21 N.W. (2d) 5 (1945); *Gateway City Transfer Co. v. Public Service Commission*, 253 Wis. 397, 34 N.W. (2d) 238 at 242, 248 (1948).

³⁵ Wis. Stat., 144.53(4) (1949).

³⁶ Wis. Stat., 189.22 (1949). See also Wis. Stat., 145.02(2) (1949), requiring notice and hearing by State Board of Health before issuing uniform plumbing regulations.

³⁷ *State ex rel. Nowotny v. Milwaukee*, 140 Wis. 38, 121 N.W. 658 (1909).

³⁸ *Lowe v. Conroy*, 120 Wis. 151, 97 N.W. 942 (1904).

³⁹ *Wasserman v. City of Kenosha*, 217 Wis. 223, 258 N.W. 857 (1935); *Great Lakes Tanning Co. v. Milwaukee*, 250 Wis. 74, 26 N.W. (2) 152 (1946).

⁴⁰ *Jaswinski v. Milwaukee*, 253 Wis. 17, 33 N.W. (2d) 224 (1948).

⁴¹ Hearing on revocation of real estate broker's license, Wis. Stat., 136.09 (1949); revocation of optometry license, Wis. Stat., 153.09 (1949); Department of Agriculture procedure, Wis. Stat., 93.18 (1949).

⁴² Securities Law, Wis. Stat., 189.22 (1949); revocation of pharmacist registration, Wis. Stat., 151.02(7) (1949); Public Service Commission, Wis. Stat., 196.26 (1949).

⁴³ *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274 at 303, 287 N.W. 122, 593 (1939).

heard by counsel upon the evidence and law, and to oral argument.⁴⁴ In this case the Court decided the Public Service Commission denied a hearing by making its rate order before the utility had opportunity to present its case in full. The Administrative Procedure Act has added emphasis to this case by requiring that all parties be "afforded opportunity for full, fair, public hearing after reasonable notice,"⁴⁵ and it has further contributed by prescribing certain definite requirements as to hearing procedure in contested cases, where the agency statute requires a hearing.⁴⁶ The Wisconsin Act omits the provision of the Model Act which requires notice where practicable and opportunity for interested persons to submit data and views as a part of rule making procedure.⁴⁷ And perhaps certain hearings required by agency statute will not be controlled by the Act because a contested case will not be involved, for instance the hearing available after issuance of a general rule by the Department of Securities. Some steps in hearing procedure prescribed by the Act add little to standards prescribed in previous Wisconsin cases, but others are definite contributions, and as to some of the former the Court in recent decisions appears to be insisting upon more complete agency compliance. These matters are considered in following paragraphs.

(3) *Publicity accorded administrative rules.* In Wisconsin administrative rules have force of law where the statute authorizing issuance so provides.⁴⁸ The necessity for publication, discussed by one writer in terms of government in ignorance of law,⁴⁹ finds legal sanction in a provision of the Wisconsin constitution that no general law shall be in force until published.⁵⁰ Compliance with this requirement is presumed until the contrary is proved,⁵¹ but certainly the need for compliance explains at least in part the frequent statutory requirement that agency rules be published in the official state paper prior to effective date.⁵² In 1939 the Legislature provided for a supplement to the Wis-

⁴⁴ Wisconsin Telephone Co. v. Public Service Commission, 232 Wis. 274 at 294, 287 N.W. 122, 593 (1939).

⁴⁵ Wis. Stat., 227.07 (1949).

⁴⁶ Wis. Stat., 227.07-227.14 incl. (1949).

⁴⁷ Model State Administrative Procedure Act, Sec. 2(3).

⁴⁸ State ex rel. Inspection Bureau v. Whitman, 196 Wis. 472 at 506 et seq., 220 N.W. 929 (1928); Modern System Dentists v. State Board of Dental Examiners, 216 Wis. 190 at 197, 256 N.W. 922 (1934); Verbetch v. Huettl, 253 Wis. 510 at 519, 34 N.W. (2d) 803 (1948).

⁴⁹ Griswold, "Government in Ignorance of the Law—A Plea for better Publication of Executive Legislation," 48 Harv. L. Rev. 198 (1934).

⁵⁰ Wis. Const., Art. VII, Sec. 21.

⁵¹ Whitman v. Department of Taxation, 240 Wis. 564 at 577-578, 4 N.W. (2d) 180 (1942).

⁵² Securities Law, Wis. Stat., 189.02(9) (1949); Industrial Commission, Wis. Stat., 101.14(1) (1949); Department of Agriculture, Wis. Stat., 93.09(7), 93.18(3) (1949); Motor Vehicle Department, Wis. Stat., 110.06(1) (1949); Employment Relations Board, Wis. Stat., 111.09 (1949).

consin Statutes to contain the procedural and substantive rules of all state-wide agencies.⁵³ This supplement is cited as the "Red Book", and is now in its fifth edition. However it has followed the practice of reference to the agency address, where copies of rules may be requested but not always obtained, and has printed in full only the rules of the larger agencies. The requirement in the Administrative Procedure Act that state-wide agency rules be filed with the Secretary of State is therefore a valuable contribution to the Wisconsin system because it provides a central place where all agency rules may be available.⁵⁴

(4) *Responsibility of agency heads for decision.* The Court has held that an Industrial Commission order is invalid if a party can prove in the statutory review proceeding that the Commissioners, upon petition, did not personally consider the record made before the examiner.⁵⁵ Since workmen's compensation is excepted from the Act, these decisions are not affected by it. In the *Wisconsin Telephone Company* case,⁵⁶ the commissioners were absent during much of the proceeding, and the final order and findings were prepared by experts who were witnesses on the trial. The Court held such practice does not deny due process if the commission recognizes the doctrine of *Morgan v. United States*⁵⁷ that notice of expert findings must be served on the utility an opportunity afforded for argument, a requirement satisfied in that case through rehearing.⁵⁸ The provision in the Administrative Procedure Act that where the agency members have not fully participated in the hearing the parties be given opportunity to argue before them exceptions to the hearing officer's summary of evidence, statement of findings and decision, serves to clarify the procedure prescribed generally in the *Wisconsin Telephone Company* case.⁵⁹

(5) *Decisions based on material not included in the hearing or record.* The Administrative Procedure Act requires an official record

⁵³ Wis. Stat., 35.93 (1949).

⁵⁴ Wis. Stat., 227.03 (1949). See 32 Op. Att'y Gen. 359 (1943), setting forth classes of rules which must be filed.

⁵⁵ State ex rel. Madison Airport Co. v. Wrabetz, 231 Wis. 147, 285 N.W. 504 (1939); Kaegi v. Industrial Commission, 232 Wis. 16, 285 N.W. 845 (1939); Madison Airport Co. v. Industrial Commission, 231 Wis. 256, 285 N.W. 757 (1939).

⁵⁶ Wisconsin Telephone Company v. Public Service Commission, 232 Wis. 274, 287 N.W. 122, 593 (1939).

⁵⁷ 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).

⁵⁸ Wisconsin Telephone Company v. Public Service Commission, 232 Wis. 274 at 314-317, 287 N.W. 122, 593 (1939).

⁵⁹ Wis. Stat., 227.12 (1949). The Model Administrative Procedure Act, Sec. 10, requires agency members personally to consider parts of the record cited by parties. The Wisconsin Act substitutes the hearing officer's summary of evidence. For approved procedure under the Wisconsin section see: Gateway City Transfer Co. v. Public Service Commission, 253 Wis. 397 at 408, 34 N.W. (2d) 238 at 243 (1948); and also Lake Superior D. P. Co. v. Public Service Commission, 244 Wis. 543, 13 N.W. (2d) 89 (1944).

in contested cases;⁶⁰ that agency records used in decision be made part of such record;⁶¹ and that matters officially noticed be included and parties notified in time to contest such notice during the hearing.⁶² Use of agency reports not in the record was condemned by the Court before the Act, but was held not prejudicial error where other evidence in the record supported the finding.⁶³ The same principle is found in the Act, which requires prejudice from error of law for reversal.⁶⁴ But these new statutory requirements surely nullify the decision in *Chicago Northwestern Railway Company v. Railroad Commission*⁶⁵ which allowed the commission to base rate decisions on cost compilations taken from railroad reports in commission files but not offered in evidence.

(6) *Written findings of fact and law.* The Administrative Procedure Act requires that decisions in contested cases be accompanied by written findings of fact and law.⁶⁶ Before the Act, the Court frequently instructed agencies concerning this requirement and insisted upon careful compliance.⁶⁷ There is indication in decisions since the Act that the Court considers the statutory provision a mandate for renewed insistence upon well drafted, carefully considered findings.⁶⁸ In a recent decision the Court set aside a Public Service Commission order fixing telephone rates, and directed the Commission to change its methods with respect to the preparation of findings of fact.⁶⁹

(7) *Rules of Evidence.* Wisconsin decisions recognize that hearsay and other evidence inadmissible at common law may be admitted where relevant in administrative proceedings, but only provided such evidence has "some substantial probative force."⁷⁰ This appears substantially equivalent to the provisions of the Administrative Procedure Act that evidence possessing "reasonable probative value" shall be admitted, but immaterial, irrelevant or unduly repetitious testimony "shall" be excluded.⁷¹ It should be emphasized that improper admission

⁶⁰ Wis. Stat., 227.11 (1949).

⁶¹ Wis. Stat., 227.10(2) (1949).

⁶² Wis. Stat., 227.10(3) (1949).

⁶³ *Lupinski v. Industrial Commission*, 188 Wis. 409, 206 N.W. 195 (1925).

⁶⁴ Wis. Stat., 227.20(1) (1949).

⁶⁵ 156 Wis. 47, 145 N.W. 216 (1914).

⁶⁶ Wis. Stat., 227.13 (1949).

⁶⁷ *Tesch v. Industrial Commission*, 200 Wis. 616, 229 N.W. 194, (1930); *Wisconsin L. R. Board v. Fred Rueping Leather Co.*, 228 Wis. 473, 494, 279 N.W. 673, 117 A.L.R. 398 (1938); *Folding Furniture Works v. Wisconsin L.R. Board*, 232 Wis. 170 at 180, 285 N.W. 851, 286 N.W. 875 (1939).

⁶⁸ *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 80-81, 21 N.W. (2d) 5 (1945).

⁶⁹ *Commonwealth Telephone Company v. Public Service Commission*, 252 Wis. 481, 32 N.W. (2d) 247 (1948); *Motor Transport Co. v. Public Service Commission*, 253 Wis. 497, 34 N.W. (2d) 787 (1948).

⁷⁰ *Folding Furniture Works v. Wisconsin L.R. Board*, 232 Wis. 170 at 188-189, 285 N.W. 851, 286 N.W. 875 (1939).

⁷¹ Wis. Stat., 227.10(1) (1949). The Model Administrative Procedure Act provides that such testimony "may" be excluded: Sec. 9(1).

of evidence, although unlawful procedure, is not ground for reversal unless substantial rights are prejudiced.⁷² This was true before the Act.⁷³ Nevertheless the Act should promote uniformity of practice as among state-wide agencies, especially where agency statutes are silent,⁷⁴ or permit admission generally of "such testimony as may be pertinent to the controversy."⁷⁵ The Employment Peace Act requires that Board hearings be "governed by the rules of evidence prevailing in courts of equity."⁷⁶ This standard may be more strict than that imposed by the Administrative Procedure Act, and may indicate a legislative trend to enforce closer administrative adherence to rules of evidence, because the former Labor Relations Act provided that "rules of evidence prevailing in courts of law or equity shall not be controlling."⁷⁷

The Wisconsin Act omits the Model Act clause concerning the right to cross examine witnesses,⁷⁸ and clearly permits introduction of affidavits and other documents in agency files without cross examination of the authors.⁷⁹

(8) *Agency power of subpoena.* Administrative agencies in Wisconsin are given power of subpoena by general statute,⁸⁰ and usually in the agency statute.⁸¹ A recent decision holds that an agency order overruling a motion to quash a subpoena is not reviewable.⁸² Review of such orders would promote undue confusion and delay in the administrative process. Thus in Wisconsin the person subpoenaed must comply or face a contempt citation.⁸³

(9) *Declaratory judgments and rulings.* Before the Administrative Procedure Act an individual contemplating activity subject to possible administrative regulation could obtain advance determination as to his rights or duties only through an equity proceeding for injunction against enforcement of the rule or rules involved. Such procedure was cumbersome and expensive, and obtained decision only upon jurisdic-

⁷² Wis. Stat., 227.20(1), 227.20(1)(c) (1949).

⁷³ *Lupinski v. Industrial Commission*, 188 Wis. 409, 206 N.W. 195 (1925). The Court stated that erroneous consideration of an unsworn report would be basis for reversal if the finding could not stand without reference to it.

⁷⁴ Public Service Commission, Wis. Stat., 196.26 (1949); Department of Agriculture, Wis. Stat., 93.18 (1949).

⁷⁵ Wis. Stat., 152.06(4) (1949), dental license revocation hearing.

⁷⁶ Wis. Stat., 111.07(3) (1949).

⁷⁷ Wis. Stat., 111.10(2) (1937). The Employment Peace Act replaced the Labor Relations Act in 1939, Laws 1939, Ch. 57.

⁷⁸ Model State Administrative Procedure Act, Sec. 9(3).

⁷⁹ Wis. Stat., 227.10(2) (1949).

⁸⁰ Wis. Stat., 325.01(4) (1949).

⁸¹ Public Service Commission, Wis. Stat., 196.02(6) (1949); Department of Agriculture, Wis. Stat., 93.14 (1949); Employment Relations Board, Wis. Stat., 111.07(2)(b) (1949).

⁸² *State ex rel. St. Mary's Hospital v. Industrial Commission*, 205 Wis. 516, 27 N.W. (2d) 478 (1949).

⁸³ Wis. Stat., 325.12 (1949).

tional and constitutional questions.⁸⁴ The court could not consider applicability of a rule to plaintiff or a particular set of facts.⁸⁵ The Administrative Procedure Act antiquates injunction procedure and substitutes two independent remedies. In either one advance determination is available as to any administrative rule which does or threatens to impair individual rights. First, the individual may petition for a declaratory judgment in the Dane County Circuit Court.⁸⁶ Second, the Act provides for declaratory agency rulings in agency discretion, but binding upon it and the parties, and subject to review as in other cases.⁸⁷ With issuance of such rulings in agency control the procedure should not become burdensome or a nuisance, and could prove a distinct contribution toward efficient administrative justice.

METHOD AND SCOPE OF JUDICIAL REVIEW

(1) *Methods of review.* Certain constitutional provisions have directly shaped procedure in judicial review of administrative action. The Supreme Court is vested with appellate jurisdiction, and with superintending control over inferior courts through such extraordinary writs as mandamus and certiorari.⁸⁸ Original jurisdiction to review administrative action is taken only in exceptional circumstances,⁸⁹ and then only to review action in excess of jurisdiction. It seems questionable whether the legislature could provide for appeal direct from an administrative agency to the Supreme Court.⁹⁰ Review of administrative action has been held a "civil matter" within the constitutional jurisdiction of the circuit courts,⁹¹ and the statutes generally have provided for review by action in, or appeal to, the circuit courts. The Administrative Procedure Act provides for review on the record in an action brought by a person aggrieved by decision in a contested case⁹² in the Dane

⁸⁴ *Modern System Dentists v. State Board of Dental Examiners*, 216 Wis. 190, 256 N.W. 922 (1934).

⁸⁵ *Ritholz v. Johnson*, 246 Wis. 442, 17 N.W. (2d) 590 (1944).

⁸⁶ Wis. Stat., 227.05 (1949); see *Hecker v. Gunderson*, 245 Wis. 655, 15 N.W. (2d) 788 (1944).

⁸⁷ Wis. Stat., 227.06 (1947). For example of use of this procedure see *Lake Superior D. P. Co. v. Public Service Commission*, 250 Wis. 39, 26 N.W. (2d) 278, 170 A.L.R. 680 (1946).

⁸⁸ Wis. Const., Art. VII, Sec. 3.

⁸⁹ *State ex rel. State Central Committee v. Board*, 240 Wis. 204 at 214, 3 N.W. (2d) 123 (1942).

⁹⁰ *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 74-75, 21 N.W. (2d) 5 (1945).

⁹¹ *Clintonville Transfer Line v. Public Service Commission*, *supra*, at page 75.

⁹² An order of the Employment Relations Board for a referendum does not involve a contested case, and the Union is not a person aggrieved: *United R. & W. D.S. E. of A. v. Wisconsin E. R. Board*, 245 Wis. 636, 15 N.W. (2d) 844 (1944). See Wis. Stat., 227.16 (1949); same result in case of order appointing a conciliator: *Wis. Tel. Co. v. Wis. E. R. Board*, 253 Wis. 584, 34 N.W. (2d) 844 (1948).

County Circuit Court, except in employment relations⁹³ and certain other excepted cases where review may be in other circuit courts.⁹⁴ An Employment Relations Board petition in Circuit Court for an enforcement order is a review proceeding on the record.⁹⁵ Review in the Supreme Court is on appeal from the Circuit Court as in other cases.⁹⁶

Before the Administrative Procedure Act some statutes, typically the Public Service Commission statute, provided for review by action de novo in the Dane County Circuit Court,⁹⁷ and others indicated certiorari or other forms or were silent. Where the statute was silent only common law certiorari was available.⁹⁸ The Act expressly retained two pre-existing forms of review, namely of workmen's compensation on the record in the Dane County Circuit Court,⁹⁹ and of Board of Tax Appeals action in public utility property assessment by action practically de novo "to redetermine the assessment"¹⁰⁰ in the same court. With one exception all other state-wide agency statutes have been amended to provide for review under the Administrative Procedure Act, and such review procedure has been held exclusive.¹⁰¹ The one exception is the Examiners in Optometry statute which still prescribes certiorari from the Dane County Circuit Court.¹⁰² This exception was a legislative accident.

Methods of review of local agency action remain unchanged and diverse. Existing procedure includes statutory appeal to, or action with trial de novo in, a circuit or other court of record,¹⁰³ and statutory certiorari from a court of record with provision for taking of additional

⁹³ In the Circuit Court of the county in which a party resides or transacts business. Wis. Stat., 111.07(8) (1949).

⁹⁴ Review of Wisconsin Board of Tax Appeals determinations involving taxes of individuals are in the circuit court of the county of residence, or of the situs of the property where the taxpayer is nonresident. Wis. Stat., 73.015 (1949).

⁹⁵ Wis. Stat., 11.07(7); Wis. E. R. Board v. J. P. Cullen & Son, 253 Wis. 105, 33 N.W. (2d) 182 (1948).

⁹⁶ Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59 at 76-77, 21 N.W. (2d) 5 (1945).

⁹⁷ See Chicago N.W. Ry. Co. v. Railroad Commission, 156 Wis. 47, 145 N.W. 216, 974 (1914); Wisconsin Power & Light Co. v. Public Service Commission, 231 Wis. 390, 284 N.W. 586, 286 N.W. 392 (1939).

⁹⁸ Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59 at 69, 21 N.W. (2d) 5 (1945).

⁹⁹ Wis. Stat., 102.23 (1949).

¹⁰⁰ Wis. Stat., 76.08 (1949).

¹⁰¹ LeFevre v. Goodland, 247 Wis. 512, 19 N.W. (2d) 884, 161 A.L.R. 342 (1945); State ex rel. Martin v. Juneau, 238 Wis. 564, 300 N.W. 187 (1941).

¹⁰² Wis. Stat., 153.09(1) (1949); Laws 1943, Ch. 273.

¹⁰³ Public Works Board determination of improvement benefits: Wis. Stat., 62.16(6)(k) (1949); local board action in re malt beverage licenses: Wis. Stat., 66.054(14); see Fort Howard Paper Co. v. Sanitary District, 250 Wis. 145, 26 N.W. (2d) 661 (1947).

evidence by the court,¹⁰⁴ or the agency.¹⁰⁵ Common law certiorari is used where the statute makes no provision.¹⁰⁶ A local official has been compelled through mandamus to issue a building permit,¹⁰⁷ and revocation of a permit may be enjoined.¹⁰⁸ Such exceptions to standard review procedure exist necessarily. They do not detract from the considerable contribution of the Administrative Procedure Act in the area where standard procedure is feasible.

Those familiar blocks to court review, the doctrines of prior resort and exhaustion of administrative remedies, are enforced in many agency statutes¹⁰⁹ and decisions¹¹⁰ in Wisconsin. In tax cases where early finality is important they may be harshly enforced.¹¹¹ Numerous decisions precluding litigants claiming licenses or other privileges under statutes from contesting constitutionality were nullified by the Administrative Procedure Act, at least as to state-wide agencies.¹¹² Two agencies, the Board of Tax Appeals,¹¹³ and the Banking Review Board,¹¹⁴ are intermediate review agencies, independent of the enforcement agency, and their decisions alone are subject to court review.¹¹⁵

(2) *Scope of Review.* Before the Administrative Procedure Act many agency statutes adopted by reference the review procedure provided for workmen's compensation. Such review is equivalent in scope to review on certiorari, and is confined to inquiry upon the record as to

¹⁰⁴ County Zoning Adjustment Board, Wis. Stat., 59.99(10)-(13) (1949); City Zoning Appeal Boards, Wis. Stat., 62.23(7)(e)10-15 (1949); State ex rel. Robst v. Board of Appeals, 244 Wis. 566, 13 N.W. (2d) 64 (1944).

¹⁰⁵ Wis. Stat., 62.13(5)(h) (1949); see State ex rel. Heffernan v. Board, 247 Wis. 77, 18 N.W. (2d) 461 (1945).

¹⁰⁶ Town, City and Village Boards of Review, Wis. Stat., 70.46, 70.47 (1949), except in first class cities where circuit court appeal is provided, Wis. Stat., 70.47(13) (1949). Certiorari: Knapp v. Heller, 32 Wis. 467 (1873); State ex rel. Russell v. Board of Appeal, 250 Wis. 394, 27 N.W. (2d) 378 (1947).

¹⁰⁷ State ex rel. Scandrett v. Nelson, 240 Wis. 438, 3 N.W. (2d) 765 (1942). Also to place a candidate's name on a ballot: State ex rel. Sullivan v. Hauerwas, (Wis., 1949), 36 N.W. (2d) 427. But see State ex rel. Wattawa v. Manitowoc Library Board, 255 Wis. 492, 39 N.W. (2d) 359 (1949).

¹⁰⁸ Great Lakes Tanning Co. v. Milwaukee, 250 Wis. 74, 26 N.W. (2d) 152 (1946).

¹⁰⁹ Public Service Commission, Wis. Stat., 196.405(2) (1949); Board of Tax Appeals, Wis. Stat., 73.015(1) (1949).

¹¹⁰ Attorney General v. Fasekas, 223 Wis. 356 at 362-363, 269 N.W. 700 (1937); State ex rel. Russell v. Board of Appeals, 250 Wis. 394, 27 N.W. (2d) 378 (1947); Odau v. Personnel Board, 250 Wis. 600, 27 N.W. (2d) 726 (1947).

¹¹¹ Lamasco Realty Co. v. Milwaukee, 242 Wis. 357, 8 N.W. (2d) 372, 865 (1943); Amnicon v. Kimmes, 249 Wis. 321, 24 N.W. (2d) 592 (1946).

¹¹² Wis. Stat., 227.20(2) (1949); see Gagnon v. Department of Agriculture and Markets, 232 Wis. 259, 286 N.W. 549 (1939).

¹¹³ Wis. Stat., 73.01 (1949). See Kaukauna v. Department of Taxation, 250 Wis. 196, 26 N.W. (2d) 637 (1947); for discussion of history and function of the Board.

¹¹⁴ Wis. Stat., 220.035 (1949); Ch. 187, Laws 1949.

¹¹⁵ Corstvet v. Bank of Deerfield, 220 Wis. 209, 263 N.W. 687 (1936); Board of Tax Appeals, Wis. Stat., 73.015 (1949); Baker v. Department of Taxation, 250 Wis. 439, 27 N.W. (2d) 467 (1947).

action in excess of power, findings which do not support the order, and whether there is any credible evidence which in any reasonable view supports the action taken.¹¹⁶ The term "credible evidence" is narrowed to exclude hearsay and non-expert opinion, and standing alone such evidence will not support a finding.¹¹⁷ This has been the scope of review as to all facts, and *Crowell v. Benson* does not require a court trial de novo upon jurisdictional facts in Wisconsin.¹¹⁸ Although a question remains as to so-called constitutional facts,¹¹⁹ commission findings upon such matters as the nature of river employment as local or maritime have not been subjected in the past to trial de novo upon court review.¹²⁰

By definition such review is narrower in scope than the inquiry directed in the Administrative Procedure Act, namely as to whether findings are supported by substantial evidence in view of the entire record as submitted.¹²¹ Although the Act excepts review of workmen's compensation, there are indications that the broader review provided in the Act is affecting the attitude of the Court even in compensation cases. For example, in an earlier decision the Court recognized that agency experience and technical competence should be accorded weight on review, a proposition codified in the Act,¹²² and sustained an Industrial Commission decision which was contrary to uncontradicted expert testimony as to the traumatic origin of hernia.¹²³ After the Administrative Procedure Act was passed, the Court held that the weight accorded technical competence will not be a substitute for evidence in the record, and rejected the contention that a finding of liability may be supported by technical competence alone.¹²⁴ Shortly before the Act, in the *Wis-*

¹¹⁶ Wis. Stat., 102.23(1) (1949); *General Accident F. & L. Assurance Corp., Ltd. v. Industrial Commission*, 223 Wis. 635, 271 N.W. 385 (1937); *Kuehnelt v. Wisconsin Board of Architects*, 243 Wis. 188, 9 N.W. (2d) 630 (1943); *Burt Bros. v. Industrial Commission*, 255 Wis. 488, 39 N.W. (2d) 388 (1949).

¹¹⁷ *Lloyd-McAlpine Logging Co. v. Industrial Commission*, 188 Wis. 642, 206 N.W. 914 (1926); *Loomis v. Industrial Commission*, 216 Wis. 202, 256 N.W. 693 (1934); *Folding Furniture Works v. Wisconsin L. R. Board*, 232 Wis. 170 at 188-189, 285 N.W. 851, 286 N.W. 875 (1939); *Globe Steel Tubes Co. v. Industrial Commission*, 251 Wis. 495, 29 N.W. (2d) 510 (1947).

¹¹⁸ *General Accident F. & L. Assurance Corp., Ltd. v. Industrial Commission*, 223 Wis. 635, 271 N.W. 385 (1937); *Crowell v. Benson*, 285 U.S. 22, 76 L.Ed. 598, 52 S.Ct. 285 (1932).

¹¹⁹ *General Accident F. & L. Assurance Corp., Ltd. v. Industrial Commission*, supra, at page 650.

¹²⁰ *LaCrosse Dredging Company v. Industrial Commission*, 223 Wis. 308, 270 N.W. 62 (1936).

¹²¹ Wis. Stat., 227.20(1) (d) (1949).

¹²² Wis. Stat., 227.20(2) (1949); see *Ray-O-Vac Co. v. Wisconsin E. R. Board*, 249 Wis. 112 at 119, 23 N.W. (2d) 489 (1945).

¹²³ *McCarthy v. Industrial Commission*, 194 Wis. 198, 215 N.W. 824 (1927).

¹²⁴ *Globe Steel Tubes Co. v. Industrial Commission*, 251 Wis. 495, 29 N.W. (2d) 510 (1947); and *F. A. McDonald Company v. Industrial Commission*, 250 Wis. 134 at 138, 26 N.W. (2d) 165 (1947), where the Court stated: "To admit the Commission's claim in this respect would be to sustain an award on the basis

consin Telephone case, the Court stated that statutory presumptions favoring agency findings will lose force, sometimes entirely, when the record indicates agency bias and predisposition to decide on improper grounds.¹²⁵ And in tax cases the presumption favoring the assessment disappears upon introduction of evidence of inaccuracy.¹²⁶

With respect to local agency action it can be stated generally only that certiorari appears most frequently in the cases.¹²⁷ As to state-wide agencies, with the two exceptions noted, the Administrative Procedure Act has provided the foundation for a standard scope for review. Review under the Act¹²⁸ is on the record, except that the circuit courts may take evidence as to irregularities before the agency. The court must determine whether substantial rights of appellant have been prejudiced through action in violation of constitutional rights, in excess of agency power, arbitrary or capricious, taken in the course of unlawful procedure or other error of law,¹²⁹ or "unsupported by substantial evidence in view of the entire record as submitted."¹³⁰ This applies the substantial evidence rule, approved in the federal courts,¹³¹ to the record in quasi-judicial and also in legislative proceedings where findings are required by law to support a rule or order.¹³² The Administrative Procedure Act has broadened the scope of review beyond certiorari and other forms formerly available, and the Court has stated that "few if any statutes have come under our observation which prescribe broad-

of evidence that is not in the record, and to put beyond the reach of a judicial review a large number of cases in which by any ordinary process of reasoning there is no evidence to sustain the commission, but in which the commission asserts that because of some undisclosed knowledge on its part, or its experience and skill in drawing inferences, the fact has been established. It is our conclusion that such a view cannot be sustained."

¹²⁵ *Wisconsin Telephone Company v. Public Service Commission*, 232 Wis. 274 at 321, 329, 287 N.W. 122, 593 (1939).

¹²⁶ *State ex rel. Farmers & M. State Bank v. Schanke*, 247 Wis. 182 at 189-190, 19 N.W. (2d) 264 (1944).

¹²⁷ In ten of seventeen cases reaching the Supreme Court since 1944. See *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 9 A.R. 591 (1872); *State ex rel. Kenosha Office Building Co. v. Herrmann*, 245 Wis. 253, 14 N.W. (2d) 157, 910 (1944); *State ex rel. Baranowski v. Koszewski*, 251 Wis. 385, 29 N.W. (2d) 764 (1947); *State ex rel. Farmers & M. State Bank v. Schanke*, 247 Wis. 182 at 189-190, 19 N.W. (2d) 264 (1944); *State ex rel. Sippy v. Nee*, 253 Wis. 423, 34 N.W. (2d) 121 (1948).

¹²⁸ Wis. Stat., 227.20 (1949).

¹²⁹ See *American Brass Co. v. State Board of Health*, 245 Wis. 440, 15 N.W. (2d) 27 (1944).

¹³⁰ Wis. Stat., 227.20(1)(d); see *Milwaukee County v. Village of Stratford*, 245 Wis. 505, 15 N.W. (2d) 812 (1944).

¹³¹ Wis. Stat., 227.20(1)(d) (1949); *Consolidated Edison Co. v. National L. R. Board*, 305 U.S. 197, 229, 230, 83 L.Ed. 126, 140, 59 S.Ct. 206, 217 (1938), approved and quoted in *Gateway City Transfer Co. v. Public Service Commission*, 253 Wis. 397, 34 N.W. (2d) 238 at 242 (1948).

¹³² *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 75-77, 21 N.W. (2d) 5 (1945); *Pardeeville E. L. Co. v. Public Service Commission*, 246 Wis. 504, 17 N.W. (2d) 586 (1945); see recent discussion in *Gateway City Transfer Co. v. Public Service Commission*, 253 Wis. 397, 34 N.W. (2d) 238 at 241-243 (1948).

er or even as broad a scope of review as that prescribed by Ch. 227, Stats."¹³³ Clearly the circuit courts today have broader review powers in most cases than under previous statutes and decisions.

CONCLUSION

This short survey of the Wisconsin idea in administrative law reveals nothing startling, little that is unusual, and much that is sound and inclusive of the best in recent development. Many important agency statutes have undergone decades of legislative amendment and judicial interpretation, and numerous agencies, typically the Industrial Commission, Public Service Commission, and Department of Securities, occupy an accepted and respected place in the legal system. The Administrative Procedure Act has made a tremendous contribution toward simplified, standard agency procedure, and in broadening the scope of review it follows a conservative trend evident elsewhere in recent decisions and legislation.

¹³³ *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59 at 76, 21 N.W. (2d) 5 (1945).