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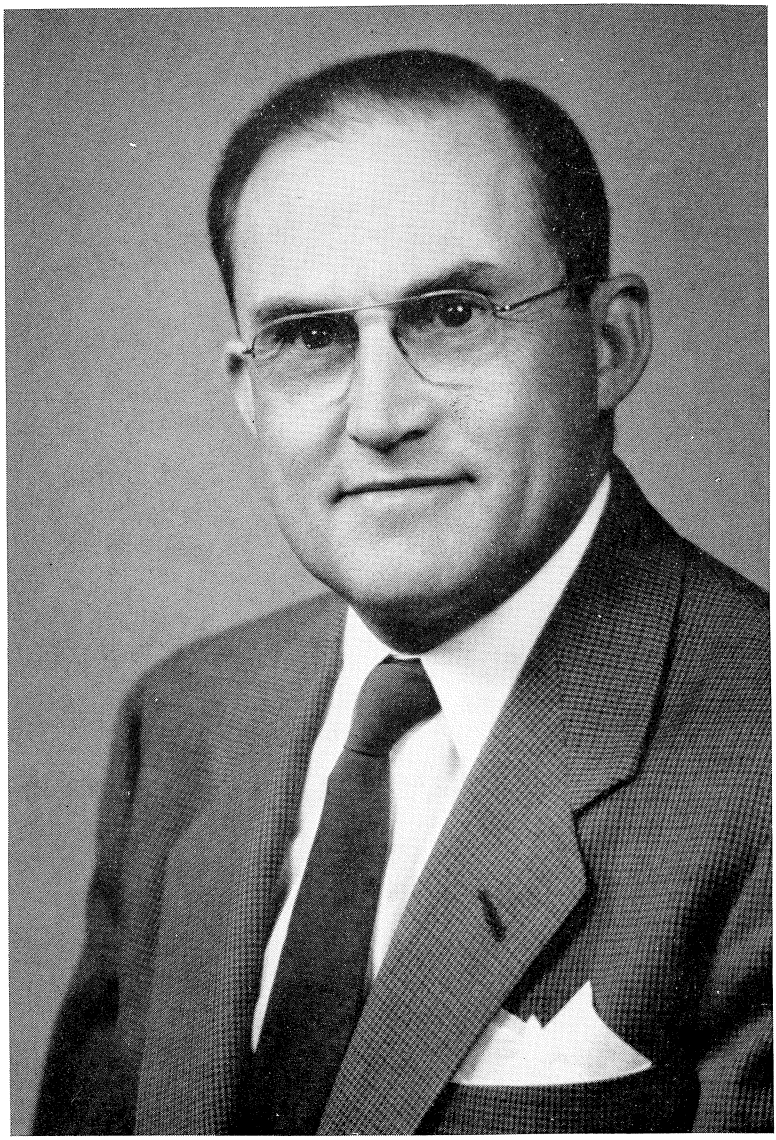

BYRON M. GRAY
Of the Topeka, Kansas, Bar

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FOREWORD

For a considerable length of time the Council has endeavored to secure the services of someone to make a study of and prepare an article covering statutory procedure and court review of proceedings before administrative agencies in Kansas. Fortunately, we have succeeded, and in this issue of the Bulletin appears such an article by Byron M. Gray, of the Topeka Bar, whose picture appears on the cover sheet.

Mr. Gray is a graduate of the Kansas City University School of Law, and was admitted to practice in Missouri in 1925. He practiced in that state until 1932, at which time he was admitted in Kansas and has continued to practice in this state ever since. Among other things, he served as special attorney for the Kansas Corporation Commission from 1937 until 1953, and for a number of years has been a lecturer on "Administrative Law" at Washburn Municipal University School of Law, Topeka. He is a member of the firm of Myers, Gray & Hall, comprised of J. Arthur Myers, Byron M. Gray and Lloyd L. Hall, with offices in the National Bank of Topeka Building, Topeka, Kansas.

We feel certain that Mr. Gray's article will be of interest to members of the legislature and to the bench and bar of the state.

Administrative Agencies in Kansas, Statutory Procedures and Court Review

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Administrative Agencies in Kansas; Statutory Procedures and Court Review

BYRON M. GRAY

From the Court of Visitation [1] to the Alcoholic Control Board [2] is a long journey without a road map, and if the road between seems to take no particular direction, it is not surprising. This lack of any pattern in the statutory procedures provided for the many agencies created in the past seventy years is not unique to Kansas. The Federal government struggled with the problem of bringing some uniformity into the procedures of the many Federal agencies and finally came forth with the Administrative Procedure Act.[3] That Act attempts to provide uniform procedures before the Federal agencies which will insure due notice and a fair hearing, insure publicity of the rules and procedures of the agencies, and insulate the hearing examiners against the possible influence of the agency heads. It also seeks to bring uniformity in the extent to which the orders of the agencies shall be reviewable. On this latter feature the new act does not adopt either extreme. It does not require the court to substitute its judgment for that of the agency, nor does it adopt the notion of administrative infallibility. It moved a little to the right from the then generally accepted "substantial evidence" rule, and provided that "the court shall review the whole record or such portions thereof as may be cited by any party. . . ." The requirement that the "whole" record be considered was inserted to give recognition to the fact that evidence which, standing alone, might appear to be substantial, might, in the light of refuting evidence, become altogether insubstantial. There is obviously a very thin line between the function of a court reviewing the whole record for the purpose of determining whether or not certain seemingly substantial evidence is so far discredited by other evidence as to lack the probative force to support the agency action, and the function of a court weighing evidence to reach an independent judgment. The "whole record" provision of the Administrative Procedure Act was destined to give the courts a great deal of trouble.[4]

It is too soon to gauge the success or failure of the attempt of the Federal government to bring some order into the chaos of procedures followed by the almost innumerable Federal agencies. Doubtless it has worked some improvement. However, even were the Federal act an admitted success of the first magnitude, it would be a fallacy to assume that it would necessarily fit the situation existing within a state. The assumption would be that the state agencies are doing the same things as are the Federal agencies, and under the same conditions. Such assumption is, of course, erroneous.

All of the large Federal agencies conduct their hearings through the use of hearing examiners. Only when the most important of public issues are involved do the agency heads themselves hear the evidence. This fact created one of the

1. Chapter 28, L. 1898 special session.
2. Chapter 242, L. 1949.
3. Act of June 11, 1946, Ch. 324, 60 Stat. 237, Public No. 404, 79th Congress, 5 USCA Ch. 19.
4. *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 95 L. Ed. 479.

principal criticisms of these agencies, a criticism sought to be met in the Federal act. This type of sub-delegation, while not wholly unused by our state agencies, is so little used as to create no serious problem.

State vs. Federal Agencies

The work of many of the large Federal agencies is so varied and of such volume that the fact is many of their decisions are agency decisions only in the most careless use of the term; they actually are staff decisions. While this same condition is present to a small extent in a few of the state agencies, it is not the general rule.

It must be perfectly clear that only a minor fraction of the activities of a major Federal agency can have the personal attention of the agency heads themselves. While the Kansas agencies deal with many of the same subjects dealt with by the Federal agencies, they do so on a scale so much smaller that for the most part the agency heads, while relying largely on the agency staffs in informal matters, are personally familiar with the facts in contested matters, and the ultimate determinations in such proceedings represent in actuality the considered judgments of the administrators themselves. When considering the procedures necessary to insure a fair hearing, this difference is of utmost importance. How to meet the requirement that "he who hears must decide" [5] and yet not run afoul of the inhibition against sub-delegation of the power to decide, does not present any formidable problem at the state level as it did in formulating the Federal act. And while the state agencies engage in many of the same activities engaged in by the Federal agencies, the emphasis is quite different; also, the state agencies perform many functions not performed by any Federal agency.

New York Report and Model State Act

At the state level, the problem of administrative procedures has been the subject of at least two extensive studies and reports. On March 9, 1939, the Governor of the State of New York appointed a Commissioner and a staff of nine assistants to study the problem and report back to him. It was thought the survey could be completed and the report made within a year. Actually it required three years. When the report finally was made, it was dated March, 1942.[6] The original intent was to cover only administrative adjudication, but the Commissioner found it not feasible to thus limit the survey.[7] The study purports to be "an objective, individualized and detailed examination of the existing administrative quasi-judicial procedures and of the fields of government in which they operate, and a concurrent study of the existing scope and procedure of judicial review." [8] The report fills a volume of almost four hundred pages. Needless to say, this article cannot go into the Kansas procedures so extensively. One gathers from reading the New York report that New York is confronted with the same problems that confront the State of Kansas. The work will be helpful and interesting to anyone studying the subject of administrative procedures.

5. Morgan Cases I, II, III and IV, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; 304 U. S. 1, 58 S. Ct. 773; 82 L. Ed. 1129; 307 U. S. 183, 59 S. Ct. 795; 83 L. Ed. 1211; 313 U. S. 409, 61 S. Ct. 999, 85 L. Ed. 1429.

6. Administrative Adjudication In the State of New York, Report to Honorable Herbert H. Lehman by Robert M. Benjamin, Commissioner.

7. Ibid. p. 5.

8. Ibid. p. 2.

The next effort at the state level was made by the National Conference of Commissioners on Uniform State Laws which, on September 9, 1944, adopted and approved as a model act the Model State Administrative Procedure Act,[9] set forth in the appendix hereto. A study of that so-called model act indicates that the attempt is made to solve the same problems disclosed by the New York report as present in that State, and that may generally be said to exist in Kansas. From the fragmentary outline hereinafter set forth of the Kansas agencies and the statutory procedures set up for them, it is apparent that all agencies do not engage in similar activities and that any attempt to pour them all in the same procedural mold should be accompanied with a good measure of caution.

Types of State Agencies

When broken down it will be found that the administrative agencies created by the State of Kansas fall into a limited number of categories. The largest group is that group of boards exercising the power to grant, withhold, suspend or revoke the licenses of those engaged in various trades and professions. The number of occupations one cannot lawfully pursue in Kansas without first procuring a license or certificate to do so, is imposing. From accountants and barbers to maternity hospital operators and podiatrists one must first establish his possession of the skills which either the legislature or the boards consider requisite in the public interest as a condition precedent to rendering the service. It should not be necessary to emphasize the importance of protecting from possible arbitrary action those whose means of livelihood can be taken from them by an administrative agency. Statutes fixing procedures before the agency to insure due notice and a fair hearing and providing for reasonable court supervision would seem demandable by those affected virtually as a matter of constitutional right.

Licensing

In the field of licensing it might reasonably be expected to find some uniformity in procedures before the various boards and in statutory provisions for court review. There is no semblance of uniformity. For example, the statutes regulating the trade of barbering [10] provide specifically for notice and hearing before the State Barber Board prior to suspension or revocation of a license. Specific provision also is made for court review, same to be limited to review on the record made before the Board. The Board is even granted power to fix minimum prices.[11] Considering the fact that the Board is comprised wholly of barbers, the constitutionality of this provision might be open to question, but the Supreme Court of Oklahoma has upheld a similar statute.[12] Compare the licensing of cosmetologists and manicurists.[13] The Board of Registration is empowered to license, suspend or revoke licenses. No provision is made for any kind of notice or hearing; nor is there any provision whatsoever for court review. Strangely the statute assures that it does not apply to persons licensed to practice medicine, surgery, osteopathy, optometry, nursing or dentistry if they are keeping to their own callings. Apparently the legislative representatives of the embalmers and funeral directors were out to lunch when this exclusionary proviso went into the statute.

9. Handbook of National Conference of Commissioners on Uniform State Laws and Proceedings, 1944, p. 329.
10. 65-1801 et seq., G. S. 1949.
11. 65-1830 G. S. 1949.
12. *Sparks v. State*, 72 Ok. Cr. 283, 115 P. 277.
13. 65-1901 et seq., G. S. 1949.

Preventative Role

The principal difference between laws that are administered by administrative agencies and those administered by the courts is that the latter attempt to compensate for the wrong, whereas the former attempt to prevent the wrong in the first instance. The idea of preventive law proved so appealing to mankind in general that once its potentialities were generally recognized its rapidly expanding use became inevitable. At common law it was unlawful for a carrier to charge a passenger or shipper an unreasonable amount for the services rendered. If an unreasonable amount were extracted, the patron could proceed to court to recover the excess charge. That the public ultimately would find some method of avoiding payment of the unreasonable charge in the first instance seems apparent. How to accomplish this? Obviously, determine in advance of shipment what would be reasonable charges. The legislature can, in theory, enact rate schedules complete in themselves, but are poorly equipped for such work. Early attempts at legislative rates were not successful. A legislature could, however, enact the general policy of the law, *i. e.*, that the rates of common carriers be no more than reasonable, and delegate to an administrative agency the duty of prescribing reasonable rates which should be thereafter charged. This may appear to be over-simplification, but it aptly illustrates the reason for the appeal that such regulatory acts have for the general public. Even the regulated often consider themselves better off, as is certainly true of the railroads, who find it much more satisfactory to know in advance what revenues they may retain, than to be certain only after limitations statutes have outlawed common law actions for alleged unreasonable charges. There is but one possible answer to the question of whether or not it is better to require that one desiring to practice medicine prove to a competent medical commission that he possesses the requisite learning and skill before permitting him to practice, or to permit all who might care to practice medicine to do so without restraint, leaving the public to sue for damages in the event of malpractice.

Emergence of Administrative Agency in Kansas

In spite of its rather obvious advantages in the field of regulation, Kansas did not yield easily to the siren call of the administrative agency. The dual capacity of the administrative board to act both legislatively and judicially either was slow in being recognized or, if recognized, was resisted. When it became apparent, for example, that the legislature could not effectively prescribe railroad rates by legislative fiat, we find the "Court of Visitation," above mentioned, given jurisdiction over the rates of railroad companies, with the declaration that "said court shall possess full common-law and equity powers." [14] Even as late as 1920, we find what is patently an administrative agency disguised behind the name of the "Court of Industrial Relations." [15] It was not, in fact, until 1929 [16] that the regulatory agency having jurisdiction over the rates and practices of railroads and utilities was given any authority that was not subject to the unrestricted power of the courts to set aside in a judicial proceeding that was in theory and in actual fact a complete retrial in the District Court of the issues presumably tried before the agency. Certainly it cannot be said that the State

14. 5787 G. S. 1899.
15. Chapter 29, L. 1920.
16. Chapter 220, L. 1929.

of Kansas plunged headlong into the morass of government by administrative agencies.

Nothing in this century has developed so wide a cleavage between lawyers and so much bitter expression as has the delegation to administrative agencies of an increasingly large body of governmental powers. To some, the administrative agency in whatever form is the work of the devil; to others, it is the long awaited Messiah. The facts are that the public through its legislative bodies has chosen the administrative agency as the vehicle best suited to make effective the economic and social reforms which have characterized this century. Certainly a great part of the unreasoned criticism aimed at the administrative agency stems actually from a strong dislike of the reforms themselves rather than the manner in which they are made effective; and much of the unstinted praise comes from a wholehearted support of the reforms themselves and not from any statesmanlike conduct of the administrators. When one finds a critic more vindictive than the facts justify, he is apt also to find one who has vigorously fought the reforms themselves; and when one finds the praise a bit too thick he expects to find a social reformer.

The Problem

The only practical problem in connection with the mounting numbers of administrative agencies is how best to enable them to fulfill their intended purposes. It is futile to oppose the attempt to accomplish public purposes by the elastic means of administrative agencies rather than by rigid statutory enactment. The futility of opposition is demonstrated as each meeting of the legislature adds new administrative boards to the already ample number. Those given the duty to study the problem have come to the conclusion that the most pressing problem is to develop fair and uniform procedures with sufficient court supervision to assure fair play and that the agencies stay within the scope of the powers delegated to them.

Definition

An administrative agency within the scope of this article may be defined as any agency with power to grant and revoke licenses or certificates required by law to be possessed by persons engaged in certain trades or callings, any agency that engages in rule making that otherwise would or could be done by the legislature, and any agency that engages in adjudication that otherwise might be done by a court. Some of the Kansas agencies perform all of those functions, the best example being the State Corporation Commission with its power to grant, withhold, suspend or revoke the certificates, permits and licenses of common, contract and private carriers respectively; its legislative (rule making) power to prescribe rates for the future; and its judicial power to issue reparation awards.

To the extent that these many agencies exercise powers touching private rights, none would question the proposition that to the fullest extent permitted by the nature of the power exercised, the statutes should provide for a fair hearing, and in so doing should set forth with reasonable particularity the procedure required to be followed. Also, as these agencies usually are fact finding bodies whose work cannot be properly performed without the powers necessary to make full discovery of the facts, the agencies should be given the

powers necessary to this end. Some judicial supervision seems called for, so the statutes should fix the nature and scope of the judicial review which the legislature may feel essential to protect private rights. To the fullest extent possible uniformity of procedure both before the agencies and in court review would seem desirable.

Whenever due process of law or the intent of the legislature require a fair hearing prior to agency action, the statutes should not leave the parties, the agency, and the courts in a quagmire of uncertainty as to the required procedure. With some notable exceptions, our Kansas statutes fail to cover the matters of procedure they should cover.

Suggested Statutory Provisions

At the outset, if there is to be a hearing, the statute should so provide, and also should provide for notice. The statute on notice should include the requirement as to parties to be served, method of service, and time for service. If the intent of the legislature is to permit any one other than the agency heads to conduct the hearing, the statute should so provide. To conduct a hearing, particularly one in the nature of an investigation, the agency will need the power to issue subpoenas and a method to enforce obedience thereto. Unless a hearing is to degenerate to the level of a tag team wrestling match, some rules of evidence must be enforced. The rules may be as liberal as the legislature cares to make them, but rules there must be. It is better that the legislature provide uniform rules for all than to permit the many agencies to make their own varying rules or to proceed with none at all on a catch-as-catch-can basis. Section 9 of the Model State Administrative Procedure Act [17] covers the subject intelligently and in a manner that could be followed without difficulty by most administrators be they lawyers or laymen. The subject is covered somewhat differently in the Federal Administrative Procedure Act,[18] but both acts come out at about the same point. In effect they provide that a record be made; that, except for matters of which official notice may be taken, the proceeding be decided on the record; that only evidence be admitted and considered which would have some probative value which reasonable men would commonly accept in the conduct of their own affairs. Easier said than applied? So are all rules of evidence, but they do prevent a hearing from turning into a brawl. Most agencies are certain to attempt to enforce some exclusionary rules of evidence if for no other reason than to get the matter over with and go home. It is better that the legislature provide them some guidance on the subject. Also, if a proceeding is to be decided on the record, there should be a transcript of the testimony, and it should be made available to the parties. The statutes should make provision for both the preservation of the testimony and a method whereby an interested party can procure a copy thereof. No method of insuring against arbitrary action has yet been found, but the nearest approach to it is to require that findings of fact be made. When a conclusion must be buttressed by findings of fact for which there is supporting evidence, it becomes much more difficult to conceal arbitrary action. The statutes should require that findings of fact be made. Most agencies could not operate effectively without the power to make necessary rules and regulations. Such agencies should be specifically given such power, and provision made for the public to have ready access thereto.

17. See appendix hereto.
18. Ibid. 3.

Statutory Procedures

(a) Licensing Boards

Measured by the above desirable characteristics, most of the Kansas statutes creating state administrative agencies and defining their powers can only be said to fall considerably short. A few of the more recent enactments measure up remarkably well. The 1947 law covering the licensing of engineers [19] gives the State Board of Engineering Examiners power, *inter alia*, to revoke the licenses of engineers and in connection therewith provides for hearing at a place to be fixed by the Board, for a copy of the charges together with a notice of the time and place of hearing, such notice to be personally served upon the licensee or mailed to his last known place of address at least thirty days prior to the hearing. The statute provides for subpoenas to be issued by the agency and for petition by the agency to the district court for enforcement of its subpoenas. The Board is empowered to make necessary rules and regulations. In contrast to these fairly adequate statutory procedural provisions, consider the power of the State Board of Registration for Cosmetologists to revoke licenses of cosmetologists.[20] As above noted, there is no statutory provision whatsoever made for notice or hearing, therefore, of course, no other statutory requirements to insure a fair hearing. There are statutes as to other agencies which fall somewhere in between the two above discussed as, for example, the statutes covering the State Board of Pharmacy.[21] Before the Board can revoke the certificate of a registered pharmacist, the statute provides for notice and hearing but lets the matter drop there. No provision is made for issuance of subpoenas or enforcement of the subpoenas, nor any provision for transcript of the record of the hearing. The statute does provide that the Board may adopt and promulgate reasonable rules and regulations. These are 1953 statutes and one might expect a somewhat more modern treatment of the subject. In the field of licensing, as indicated above, the statutes are entirely without semblance of uniformity, although there is no apparent reason for lack of uniformity.

(b) Regulation of Business

When one comes into the field of regulation of business and industry, lack of uniform treatment is found even within the same agency when exercising different powers. The Kansas Corporation Commission performs many regulatory functions other than the regulation of the rates and services of common carriers and utilities. Among these are the regulation of production and conservation of gas [22] and the regulation of production and sale of crude oil.[23] Both sets of statutes require notice and hearing, the statute relative to regulation of production and sale of crude oil grants to the Commission the power to issue subpoenas and to petition the District Court for their enforcement. This provision is made applicable to the production and conservation of gas by reference. In its regulation of disposal of brines and mineralized waters [24] the statutes provide for notice and hearing and again grant to the Corporation Commission the power to issue subpoenas and seek their enforcement in the District Court, though when it comes to the regulation of irrigation water

19. Chapter 26a G. S. 1949.
20. 65-1901 et seq. G. S. 1949 as amended.
21. 65-1624 et seq. 1953 Supp.
22. 55-601 et seq. G. S. 1949.
23. 55-701 et seq. G. S. 1949.
24. 55-1003 G. S. 1949.

rates,[25] while notice and hearing are required by statute, the power to issue subpoenas and seek their enforcement is not specifically granted. The same may be said of the Commission's power to license and regulate itinerant merchants [26] where notice and hearing are required but the subpoena power is not mentioned. In regulating the registration and the sale of securities,[27] the Commission is required to give notice and hold a hearing and is given the power to issue subpoenas and seek their enforcement in the district court; whereas in the regulation of the rates and practices of stockyards companies,[28] while notice and hearing are required, the power of subpoena is withheld unless it can be said to be granted by inference. The above clearly illustrates that not only is there no pattern to the statutes relating to this one agency, but in the main, it can be said that the statutes so far as they provide for procedures before the Commission are deficient in numerous particulars.

(c) State Board of Agriculture

The Secretary of the State Board of Agriculture is required by the statutes to perform many regulatory functions. Among these are the regulation of the sale and distribution of livestock and poultry feeds, regulation of the sale and distribution of agricultural chemicals, regulate the sale and distribution of livestock medicine, regulate the treatment of plant diseases and insects, regulate the sale and distribution of agricultural seed, grant and revoke licenses for the sale of agricultural products, and regulate the sale and distribution of commercial fertilizers.[29] The Secretary, in the exercise of all of these powers, is given the power by statute to make necessary rules and regulations. With the exception of the regulation of the sale and distribution of agricultural seed, the statutes require notice and hearing, but in no instance is the Secretary given the power to issue subpoenas, nor is any provision made in any of the statutes for a transcript of the record, although the exercise of his regulatory power to control the sale and distribution of agricultural chemicals is accompanied by provision for court review wherein the record before the Secretary shall be admissible in evidence.

(d) Livestock and Sanitary Commissioner

The Livestock and Sanitary Commissioner is empowered to control contagious diseases in livestock by treatment or condemnation,[30] to issue licenses and conduct investigations and hearings looking toward suspension or revocation of licenses to operate community sales of livestock,[31] to regulate and license the disposal of dead animals,[32] and to make investigations looking toward the suspension or revocation of licenses and to promulgate and enforce rules and regulations to carry out the statute relative to the feeding of garbage to hogs.[33] The first and the last of these powers are unaccompanied by any statutory provision for notice and hearing. The power to issue and revoke licenses in connection with community sales of livestock is accompanied by statutes requiring

25. 42-355 and 42-356 G. S. 1949.
26. 8-801 et seq. 1949.
27. 17-1223 et seq. G. S. 1949.
28. 47-901 et seq. G. S. 1949.
29. All of these powers are found in Ch. 2 of the General Statutes 1949 except regulation of sale and distribution of livestock medicine found in 47-501 et seq. G. S. 1949.
30. 47-601 et seq. G. S. 1949.
31. 47-1001 et seq. G. S. 1949.
32. 47-1201 et seq. G. S. 1949.
33. 47-1301 et seq. 1953 Supp.

notice and hearing, but the statutes go no further than that and the same is true of the statutes in respect to the disposal of dead animals.

(e) State Board of Health

The State Board of Health is given jurisdiction over a number of subjects where the statutes require notice and hearing. Among these are the licensing, inspection and regulation of hospitals; [34] the regulation of water supply and sewage; [35] the regulation of the sale of food, drugs and cosmetics; [36] the regulation of the slaughter and packing of meat and poultry; [37] and the regulation of the sale of enriched flour and bread.[38] As stated, all of these powers are accompanied by provisions requiring notice and hearing but the similarity ends there. The power to license, inspect and regulate hospitals is accompanied by a statute granting the State Board of Health the power to issue subpoenas but is silent as to enforcement thereof. The statute provides that a full and complete record shall be kept of all the proceedings and all testimony reported and that a copy thereof may be obtained by any interested party upon payment of the costs thereof. Another statute provides for the making of rules and regulations and that the procedure before the Board shall be governed by such rules and regulations. This is one of the few regulatory statutes requiring that the agency make findings of fact and conclusions of law. It can be seen that in providing for the exercise of the power delegated to the State Board of Health to regulate and control the licensing and inspection of hospitals, the legislature has comprehensively provided for the procedures to be followed by the agency. The fact that these are recent (1947) statutes is significant. The statutes set up separate provisions for procedures covering water permits; [39] cessation of water delivery to avoid contamination of public water supply; [40] investigations as to pollution of water supply by sewage; [41] permit, revoke or modify permit for discharge of sewage;[42] and rules and regulations and investigations for prevention of pollution of fresh water strata or supply.[43] All of these powers are accompanied by provisions for notice and hearing but are generally silent as to any other procedures. The same comment can be made as to the other powers of the State Board of Health, above mentioned, other than the power to license, inspect and regulate hospitals.

(f) State Labor Commissioner

The duties of the State Labor Commissioner cover a considerable range of labor matters. He is empowered to order mines closed when there is immediate danger to life and limb.[44] The statutes provide for notice, but a hearing would not be practicable and no hearing is provided. Through the State Boiler Inspector, the Labor Commissioner regulates the inspection and certification of boilers.[45] No procedure is provided for notice or hearing of any sort. The administration of the State's unemployment laws also is delegated to the

34. 65-425 et seq. G. S. 1949.
35. 65-161 et seq. G. S. 1949 and 65-171d, g, and h, 1953 Supp.
36. 65-655 1953 Supp.
37. 65-6a01 et seq. G. S. 1949.
38. 65-2301 G. S. 1949.
39. 65-163 G. S. 1949.
40. 65-163a G. S. 1949.
41. 65-164 G. S. 1949.
42. 65-165 G. S. 1949.
43. 65-171d et seq. 1953 Supp.
44. 49-201 et seq. G. S. 1949.
45. 44-901 et seq. 1953 Supp.

State Labor Commissioner.[46] A complete procedure for notice and hearing is set up in the statutes. Provision is made for examiners and for appeals to the State Labor Commissioner from the decisions of such examiners. The statutes set up what is probably the most comprehensive chain of administrative appeals to be found in the Kansas Statutes. Claims go initially to examiners. Their decisions may be appealed to an "appeal tribunal," whose decision in turn may be appealed to the Commissioner. Notice and hearing are required by statute. A record is to be kept in disputed cases. The chairman of any appeal tribunal, an appeals referee, or "any authorized representative of the Commissioner" are given power to issue subpoenas, and may petition for enforcement in any court of the State within the jurisdiction of which the inquiry is being carried on or within which the person guilty of refusal to obey is found. The Commissioner is given power to make rules and regulations governing the conduct of hearings, including rules of evidence and procedure. As the Supreme Court has stated, the act is complete within itself and supplies its own procedure.[47] The negligible amount of litigation that has arisen out of the administration of this act is convincing that the procedures provided by statute have proved satisfactory, at least to employers. Employees, particularly those suffering from unemployment, may have been dissuaded from judicial review by economic necessity. The Act is a good example of the virtue of studying the problems involved prior to enactment of the legislation, rather than leaving to lawyers and courts the work of determining how the intent of the legislature is to be made effective.

(g) Alcoholic Beverage Control Board

Another act complete in itself and providing its own procedures is the Alcoholic Beverage Control Act,[48] administered by the Alcoholic Beverage Control Director. The Act provides for notice and hearing, for issuance of subpoenas by the Director and enforcement thereof by the district and county courts. The Director is given the power to adopt rules and regulations subject to approval of the Board of Review. Proceedings before the Director shall be in accordance with rules and regulations established by the Director. An appeal at the administrative level is allowed from orders of the Director refusing, suspending or revoking licenses. This appeal is to the Board of Review. Such appeals to the Board apparently are not heard upon the record before the Director, as the Act provides for the taking of evidence before the Board and empowers the Board to issue subpoenas and procure enforcement thereof through the district courts. Judicial review is also provided by the Act, as hereinafter discussed. Like the Unemployment Act, if substantial lack of resort to the courts indicates general satisfaction on the part of those affected by the administrative procedures, the Alcoholic Beverage Control Act must be said to have proved procedurally satisfactory.

(h) Entomological Commission

The State Entomological Commission, a department of the State Board of Agriculture, performs numerous regulatory functions, most of which are emergency in nature to prevent the spread of infectious diseases, where the damage would be done were time taken for formal hearing. This Commission, however,

46. 44-701 et seq. G. S. 1949 as amended 44-703 et seq. 1953 Supp.
47. *Smith v. Robertson*, 155 Kan. 706.
48. Chapter 41 G. S. 1949 as amended.

is given the licensing power over those engaged or desiring to engage in termite and pest control.[49] Before the Commission may refuse or revoke a license, notice and hearing is required. The Commission is given the power to make rules and regulations concerning the conduct of such businesses but notice and hearing is required before such rules and regulations may be adopted. The statute makes no requirements as to procedures before the Commission. The power to issue subpoenas is not granted.

(i) Department of Social Welfare

The State Department of Social Welfare is given the licensing power over boarding homes for the aged.[50] This is a recent act (1951), and as would be expected reflects the greater detail of the more modern statutes. The act provides for notice and hearing before denial, suspension or revocation of a license. The method of notice is provided. Power to issue subpoenas is granted, but no method for enforcement is provided. Provision is made for a record of all hearings and for any interested party to procure a copy thereof. The agency is given power to adopt and enforce rules, regulations and standards.

(j) Commission of Revenue and Taxation

The Commission of Revenue and Taxation acts under numerous statutes to fix assessments on various types of taxable property, and as a State Board of Equalization it sits as an appellate tribunal sometimes sitting in judgment on its own previous determinations. An example of this latter situation occurs where it sits as a State Board of Appraisers to assess the properties of various types of utilities,[51] and later as the State Board of Equalization to equalize assessments.[52] No attempt will be made here to cover the powers exercised by the Commission of Revenue and Taxation. So far as the statutes go, they leave much to be desired in the way of procedures to be followed, and even where the statute requires a certain procedure, there is no assurance that it is being or will be followed. An example of this failure to follow the prescribed statutory procedure is found in the practice followed by the Commission in assessing the properties of various utilities under Article 7 of Chapter 79. The statute provides that where any interested party files written application for a hearing, the assessment shall not be made before the hearing.[53] Actually the Commission makes the assessment prior to the hearing. Likely there is nothing a taxpayer can do about this failure to follow prescribed statutory procedure. No statutory form of court review is provided, and doubtless in a direct attack a court would hold that as a hearing was had finally, the procedural deficiency was not prejudicial. As a matter of fact, it likely is prejudicial as not many men can reverse themselves on a conclusion once reached and made public.

(k) Banking Board

The State Banking Board exercises jurisdiction over state banks.[54] It has power to authorize or refuse to authorize establishment of a bank, to remove

49. 2-2401 et seq. 1953 Supp.
50. 39-901 et seq. 1953 Supp.
51. 79-703 and 79-704 G. S. 1949.
52. 79-1409 G. S. 1949.
53. 79-706 G. S. 1949.
54. 9-1801 et seq. G. S. 1949.

officers or directors, to make rules and regulations on the subjects set forth in the statute and to fix the maximum rate of interest a bank may pay on deposits. Its power to remove officers and directors is accompanied by the requirement of notice and hearing. The statute is reasonably complete with the exception that no provision is made for the issuance of subpoenas. Strangely enough, the act makes no requirement of hearing prior to refusal to authorize establishment of a bank. The act provides for an investigation, but not for a hearing.[55]

(l) Savings and Loan Board

The Savings and Loan Board which has jurisdiction over Savings and Loan Associations operates initially through the Savings and Loan Commissioner.[56] The procedures provided by statute to be followed in carrying out the Board's duties vary with the different duties although no reason appears for lack of uniformity. Upon petition for certificate of incorporation, the act provides for hearing before the Board, the Board being given the power to approve or disapprove the incorporation. When it comes to approval of amendments to by-laws, the Commissioner is brought into the act. Apparently without hearing, he is to approve or disapprove of the change. Appeal to the Board is provided from the action of the Commissioner. Change of name or location is solely in the hands of the Board, to be approved or disapproved only after hearing. Mergers are to be approved or disapproved by the Commissioner with right of appeal to the Board.[57] It is likely that all appeals from the Commissioner to the Board come under the statute covering appeals to Board from action of Commissioner, though the statute is so worded as to make this conclusion doubtful.[58] Where applicable, this statute provides the time within which appeal to the Board must be taken, the type of notice to be given, the time for notice, and numerous other details including designation of the parties entitled to be heard.

(m) Insurance Commissioner

The Insurance Department, acting through the Insurance Commissioner, exercises a wide range of regulatory powers over insurance companies.[59] He issues certificates to sell the stock of an insurance company, and grants licenses to sell such stock to persons acting as agents of the insurance companies. The standards upon which he acts in granting or withholding or in revoking a license are interesting. If the applicant is not of good business repute, does not serve the interest of the public, or "for any other good cause appearing to the Commissioner," the license may be denied or revoked, as the case may be. In the case of denial, the applicant may request in writing that a hearing be held, and the Commissioner "shall hold such hearing." That is as far as the statutes go on the subject of denial of a license. On the question of revocation, they do require the fixing of a time and place for hearing and infer that findings of fact are required. The statutes even provide for judicial review but are wholly silent as to the nature or scope of review. Apparently it is in the nature of an action in mandamus.[60] The Commissioner is given the power, after examination and hearing, to revoke the certificate of any insurance company to do business in

55. 9-1801 et seq. G. S. 1949.
56. 17-5201 et seq. G. S. 1949.
57. 17-5542 and 17-5544 G. S. 1949.
58. 17-5606 G. S. 1949.
59. Chapter 40, G. S. 1949.
60. 40-204, 40-205, a, b, c and d, G. S. 1949.

this state.[61] The statute is entirely silent as to the procedures to be followed, the only statutory provision being that the hearing be upon reasonable notice. In exercising the power to suspend or revoke the licenses of agents engaged in the sale of insurance, the provision for hearing is the same as for those engaged in selling stock, the hearing to be upon reasonable notice.[62] The statutory provision for admissibility of evidence, however, is unique. The agents, or the companies representing them "shall be given full opportunity to present such evidence as they deem pertinent to the issue involved." This may be the first time a party to a proceeding has been given a statutory mandate to pass upon the relevancy of his own evidence.

The Insurance Commissioner is given the duty to regulate and supervise the rates for fire, marine, inland marine and kindred lines of insurance.[63] The statutory plan for carrying out this bit of regulation contemplates a filing of the rates with the Commissioner who, within a waiting period fixed by the statute, may find the filing does not meet the requirements of law. Upon so finding, and upon not less than 10 days' notice, the Commissioner is to hold a hearing. There is a further provision that any person "feeling aggrieved" by the filing, other than the insurer or rating organization that made the filing, may make written application for hearing thereon. The provision for notice of such hearing is the same as for insurers and rating organizations, except that the statute does not state that the notice shall set forth the "matters to be considered" at the hearing.[64] Doubtless this requirement would be inferred. The Commissioner likewise is authorized to grant, suspend and revoke licenses of rating organizations. The statute is silent as to hearing in the event of refusal to grant the license, but does provide for notice and hearing before revocation.[65] No details of the notice or hearing are covered by statute. The Commissioner, by other statutes, is given the same type of control, subject to the same provisions for notice, of casualty, surety and fidelity insurance.[66]

As hereinbefore suggested, statutory provisions for examiners or hearing officers to conduct hearings for the agency are not extensive. Quite possibly, greater use should be made of this device for freeing the administrators for the performance of more important duties. However, if the effort to enlarge this practice should take the form of the statute applying to the State Corporation Commission,[67] the time of the legislature might just as well be saved. That statute, after providing for such hearing officers, provides that within ten days after a hearing officer has made his recommendations, "any proper party" may apply for further hearing, and the Commissioner "shall thereupon fix a time and place for further hearing before the Commission." Needless to say, this provision for a compulsory hearing before the Commission upon the mere request therefor, renders the statutory provision for examiners virtually worthless. It will be a foregone conclusion that one side or the other will not be satisfied with the recommendations of the examiner, and will express a "desire" in writing for a further hearing. The State Corporation Commission could make valuable use of hearing examiners, but cannot do so under the present statute.

61. 40-222 G. S. 1949.
62. 40-242 G. S. 1949.
63. 40-925 G. S. 1949.
64. 40-928 and 40-929 G. S. 1949.
65. 40-930 G. S. 1949.
66. Chapter 40, Article 11, G. S. 1949 and amendments.
67. 66-1511 G. S. 1949.

Judicial Control

A common concept of due process, especially by lawyers, is that it necessarily includes a judicial process. Such a concept is inaccurate. The Supreme Court of Kansas has emphatically held to the contrary,[68] as has also the Supreme Court of the United States.[69] Many of our statutes grant to administrative boards powers of the greatest magnitude to invade private rights, but provide for no judicial review of the orders of such boards. For example, sterilization of an inmate of a state institution, under conditions fixed by the statute,[70] may be ordered by various boards, and no judicial review is provided by statute. The Supreme Court has held in connection with this statute that judicial review is not a constitutional necessity.[71] If the legislature intends that there be judicial review of the orders of an agency, it should make specific statutory provision for the type and extent of judicial review it desires to grant.

(a) Jurisdiction of Supreme Court

Another question on judicial review certain to arise and certain to give difficulty is the extent of judicial review where the statute provides for appeal to the district court but is silent as to the right to appeal to the Supreme Court. The question came directly before the Supreme Court of Kansas in *National Bank of Topeka v. State.*[72] The Court held that where the statute provided for a *review* of an administrative ruling by the district court and did not provide for appeal to the Supreme Court, the Supreme Court was without jurisdiction of an appeal from the district court. The reasoning of the Court is that the jurisdiction of the Supreme Court is limited to the original jurisdiction conferred by the Constitution and such appeal jurisdiction as is conferred by statute. The same conclusion was reached under an early provision of the Workmen's Compensation Act which provided for a limited review by the district court but made no provision for appeal to the Supreme Court.[73] This doctrine was adhered to in an attempted appeal from a district court order setting aside an order of a joint county school reorganization committee.[74] These three cases cover a wide range of administrative rulings; an order of the State Tax Commission, an order of the Workmen's Compensation Commissioner and an order of a county school reorganization committee. They suggest that if the legislature intends to provide for Supreme Court supervision of administrative rulings, it should do so by specific enactment. The decisions above referred to leave no doubt but that when the statute provides for review of the ruling of an agency by the district court on the record made before the agency and does not provide for appeal to the Supreme Court that the latter Court will decline to assume jurisdiction. The *National Bank of Topeka case* suggests, if it does not hold, that where the appeal provided by statute from the order of the agency is in the nature of a trial *de novo* rather than a review action, the jurisdiction upon appeal to the Supreme Court is the same as it is on appeal from the district court in an original action. If the appeal statute provides that the appeal from the agency ruling shall proceed in the district court as an *original action,* then

68. *State ex rel. v. Schaffer,* 126 Kan. 607, 270 P. 604.
69. *Reetz v. Michigan,* 188 U. S. 505.
70. 76-149, G. S. 1949.
71. Ibid. 68.
72. 146 K. 97.
73. *Norman v. Consolidated Cement Co.,* 127 K. 643, 274 Pac. 233.
74. *Evans v. George,* 162 K. 614, 178 Pac. 2d 678.

appeal would lie to the Supreme Court from the district court as in any other original action.

In the 1929 revision of the statutes providing for judicial review of orders of what is now the State Corporation Commission,[75] the provision for appeal to the State Supreme Court was omitted. The Supreme Court held, as was obviously the fact, that the omission was inadvertent and that the right of appeal to the Supreme Court could be inferred from other portions of the statutes.[76]

Any matter involving "in excess of one hundred dollars" [77] can be appealed to the Supreme Court as a matter of statutory right, provided only that it began as an original action in the district court. Under the doctrine of the cases above referred to, many matters of vital private concern and many of broad public interest cannot, under present statutes, be reviewed by the Supreme Court.

(b) Statutory Provisions for Review

The statutes, usually with no apparent reason for the distinction, create three different situations involving judicial review. Some omit any provision for court review, some provide for review limited to the record before the agency, and some for trial in the district court as an original action. In each instance appeal from the district court to the Supreme Court presents a different problem. If the statute makes no provision for court review, it may well be that the agency action is final, as it was held to be in *State ex rel v. Schaffer,*[78] or it may be that a review may be had under one of the various common law actions, as by injunction, or quo warranto, or by simply awaiting an attempt to enforce an order and then attacking validity of the order in the enforcement proceeding. As any such review involves an original action in the district court, an appeal would lie to the Supreme Court. When the review statute restricts the review by the district court to a review of the record before the agency, then appeal to the Supreme Court may be had only if the statute goes further and specifically provides for an appeal to the Supreme Court, or, as in *Hayward v. State Corporation Commission,*[79] the Supreme Court finds that the legislature intended to provide for such appeal.

(c) Review Under Alcoholic Beverage Control Act

If there were substantial reasons for the orders of the various agencies being accorded such widely varying degrees of judicial review, the confusion and uncertainty they bring into the law might be justified. A review of the statutes, however, is convincing that the statutes, like Topsy, just grew. A summary of the statutory provisions relating to boards possessing the power to withhold, suspend or revoke licenses of those engaged or desiring to engage in the various trades and professions which the legislature has felt it necessary to regulate, sharply illustrates the truth of this conclusion. The Alcoholic Beverage Control Act [80] is of recent origin, and would be expected to follow the modern pattern. The Director is given power to promulgate rules and regulations and original jurisdiction to refuse, suspend or revoke licenses with appeal to the Board of Review. The procedure before the Board of Review and for appeal to the Dis-

75. 66-118 (a) et seq., G. S. 1949.
76. *Hayward v. State Corporation Commission,* 151 K. 1008, 101 Pac. 2d 1041.
77. 60-3302 and 3303 G. S. 1949.
78. Ibid. 68.
79. Ibid. 76.
80. 41-201 et seq. G. S. 1949.

trict Court and Supreme Court are provided by the Act. In proceedings before the Director for suspension or revocation of a license, the Act specifically provides for notice and hearing. On appeals to the Board of Review from an order of the Director refusing, suspending or revoking a license, the Act provides for notice and hearing; it gives the Board power to issue subpoenas and to go into the district court to enforce obedience to its subpoenas. Judicial review is specifically provided by the Act, the appeal being to the district court where it "shall proceed as an original action" and "shall be heard as an equity action." The Act also specifically provides for appeal to the Supreme Court "as in civil cases." The court review provisions of the Act have, at least, the virtue of clarity, though the wisdom of giving the district court power to retry the matter as "an original action" in equity is open to question. In such a proceeding the Board of Review could be reversed on evidence not produced before it, violating one of the principles experience has proved necessary to apply if an administrative body is to be more than a flag station en route to the jurisdiction possessing the real authority. It has long ago been found that unless all evidence to be considered is required to be produced before the administrative board and the record on review held to this evidence, that hearings before the board become mere formalities, with the real show reserved for the district court. A prime example of what can happen under this type of review statute is found in *State v. Southwestern Bell Telephone Co.*[81]

The first case to come up under the Kansas Act,[82] found the district court reversing the State Alcoholic Beverage Control Board of Review on the interpretation of a portion of the Act and the Supreme Court reversing the district court. No question of fact was involved. However, the next case [83] involved both questions of law and of fact. Here again the district court disagreed with the Board. The Court reversed the Board on two questions of law and also on several disputed questions of fact. The Supreme Court reversed the district court on both questions of law, and found facts to exist which justified the Director in revoking the license. The case indicates that the Supreme Court will supervise the district court somewhat more closely than it normally does in a civil action tried to the court. The interesting thing is that in both actions the Supreme Court sustained the agency action and reversed the district court, even though in doing so in the latter case, it actually had to substitute its judgment on the evidence for that of the district court. The balance of the Act seems so expertly done and in such modern garb, that one cannot but wonder why the gay nineties style of judicial review.

(d) Review Under Various Licensing Acts

The Court review provisions of the Alcoholic Beverage Control Act have been stressed for the purpose of comparing with the treatment accorded other private rights which some would consider of equal stature to the right—actually held a mere privilege by most courts—to sell alcoholic beverages. An example is found in the act providing for licensing and registration of nurses.[84] If the license of a nurse is revoked by the Board, the review is by the district court upon the record before the Board and the scope of the review is limited to determining whether or not the order is unlawful, arbitrary or unreasonable. No

81. 115 Kan. 236, 233 P. 771.
82. *Lowe v. Herrick*, 170 Kan. 34.
83. *Chambers v. Herrick*, 172 Kan. 510.
84. Sec. 65-1113 et seq. G. S. 1949.

provision for appeal to the Supreme Court is provided in the Act. Hence, as the review is not an original action in the district court, the Supreme Court would be without jurisdiction to review the order of the district court. In the same position as nurses are barbers [85] and pharmacists.[86] It is not entirely clear why nurses, barbers and pharmacists would need only a limited district court review and no review at all by the Supreme Court before the right to pursue their professions should be finally taken from them, whereas a purveyor of alcoholic beverages requires four shots at the matter, first before the Director, then a review by the Board of Review, then a trial *de novo* before the district court, and lastly a review by the Supreme Court. This is legislative solicitude of a high order, possibly requiring another look at the settled doctrine that children and dogs are the favorites of the law.

In a worse plight than nurses, barbers, and pharmacists, however, are chiropractors,[87] osteopaths,[88] optometrists,[89] embalmers and funeral directors,[90], cosmetologists,[91] and podiatrists,[92] all of whom can be deprived of their licenses without benefit of any form of statutory review whatsoever. The limited review attainable by a direct action in one of the common law forms of action, such as mandamus or injunction, would be all that would be available to them. This patent discrimination is doubtless not one of legislative intent, but simply the end product of many different legislatures legislating on the various subjects at different times. On the other hand, accountants,[93] engineers,[94] architects,[95] and abstracters [96] get the full judicial treatment including trial *de novo* in the district court.

(e) Orders of State Board of Health

The two boards exercising jurisdiction over the greatest number of activities, with the possible exception of the State Corporation Commission, are the State Board of Health and the State Board of Agriculture. The method and scope of judicial review provided by statute as to the functions of each of these boards, might be expected to be uniform, but not so. In exercising its power to license, inspect and regulate hospitals, the orders of the State Board of Health are subject to judicial review in a trial *de novo* in the district court; [97] in issuing water and sewage permits and making rules and regulations to prevent water pollution, its orders are subject to a limited review on the record made before the board; [98] in regulating the packing of meat and poultry and issuing and revoking permits to engage in slaughterhouse operations,[99] its orders are not subject to any statutory provision for review. The orders of the chief engineer of the State Division of Water Resources, a division of the State Board of Agriculture, are subject to review in the district court as to "reasonableness." [100] The State

85. 65-1801 et seq. G. S. 1949.
86. 65-1624, 1953 Supp.
87. 65-1301 et seq. G. S. 1949.
88. 65-1201 et seq. G. S. 1949.
89. 65-1501 et seq. G. S. 1949.
90. 65-1701 et seq. G. S. 1949.
91. 65-1901 et seq. G. S. 1949.
92. 65-2001 et seq. G. S. 1949.
93. 1-201 et seq. and 1-301 et seq. 1953 Supp.
94. 26-a101 et seq. G. S. 1949.
95. 6-101 et seq. G. S. 1949.
96. 67-801 et seq. G. S. 1949.
97. 65-438 G. S. 1949.
98. 65-163, 164 and 171(a) G. S. 1949.
99. 65-6a01 et seq. G. S. 1949.
100. 42-703 G. S. 1949.

Dairy Commissioner, an employee of the State Board of Agriculture, in carrying out his duties, is given very broad powers to conduct hearings, administer oaths, examine witnesses under oath, issue subpoenas and to make application to the district court for their enforcement,[101] yet the statute is silent as to the right of any affected person to notice and hearing and there is no statutory provision for any kind of review.

(f) Orders of State Board of Agriculture

Most of the powers of the State Board of Agriculture are by statute lodged in the Secretary of the Board. Those that deal with matters requiring emergency action to prevent the spread of infectious plant or animal diseases have no provision for hearing or court review, as the nature of the duty does not permit of delay in acting. However, his orders in performing duties not of an emergency nature are subject to widely varying statutory provisions for review. Three of these duties are regulatory in nature and suffice to illustrate the different statutory treatment of the same type of activity. The Secretary is given the power to regulate the sale and distribution of livestock and poultry feeds and to make rules and regulations to carry the statutes into effect.[102] There is no statutory provision for review. The Secretary is given the power to control the sale and distribution of agricultural chemicals and to make rules and regulations to carry out the intent of the statutes.[103] In carrying out this power his orders are subject to review in a trial *de novo* in the district court where both the evidence taken before the Commissioner and new evidence may be considered. The duty to control the sale and distribution of all livestock medicine and to make rules and regulations in connection therewith falls on the Secretary of the State Board of Agriculture.[104] The statutes provide for no judicial control. They do provide a procedure for enforcement of the law,[105] and presumably a limited review could be had in an enforcement action.

(g) Orders of State Corporation Commission

The statutes covering review of the orders of the State Corporation Commission in regard to the rates and services of common carriers and utilities,[106] provide a comprehensive and well planned method for judicial review. As above noted, while these statutes make no specific provision for appeal to the Supreme Court, that Court has held the intent of the legislature to provide for such appeal will be inferred. The simplicity and relative inexpensiveness of the review provided by these statutes recommend them. The statutes begin by defining who may seek review; they then proceed to require that petition for rehearing must be filed with the Commission before seeking judicial review and that the issues in any review action shall be limited to those set forth in such petition. After an application for review is filed in the district court, the Secretary of the Commission is required to file a certified copy of the record with the clerk of the court. The hearing in the district court is on the record made before the Commission; if the court concludes additional evidence should be heard, it is to send the case back to the Commission for the purpose of hearing such

101. 65-701 et seq. G. S. 1949.
102. 2-1001 et seq. G. S. 1949.
103. 2-2201 et seq. G. S. 1949.
104. 47-501 et seq. G. S. 1949.
105. 47-510 G. S. 1949.
106. 66-118(a) et seq. G. S. 1949.

evidence; the order then comes back to the court. The jurisdiction of the district court is to determine if the order is in any respect unlawful or unreasonable.

With so complete and satisfactory a method for statutory review of the orders of the Corporation Commission already in the statute book, one might expect that in giving that Commission new duties the legislature would make these statutes apply to orders issued by the Commission in pursuance of such new duties. To so expect is simply to fail to reckon with the ingenuity of the legislature. An opportunity to add to the confusion is not to be lightly frittered away. When the Commission was empowered to regulate the production of oil and gas the legislature apparently felt it could improve upon its previous efforts at providing procedures for judicial review and turned out a new statute applicable to these new powers.[107] To a considerable measure this statute followed the review statutes applying to rate orders of the Commission, but, for no apparent reason, departs from those statutes in spots. One change is an improvement; specific provision is made for appeal to the Supreme Court. Other than that, the departures are all for the worse. Instead of having the original record certified to the court, the complaining party files an abstract and the Commission or other interested party a counter abstract. This change seems unnecessary and burdensome. Strangely enough, if the court thinks more evidence should be taken and returns the proceeding to the Commission for that purpose, the Commission, after taking the additional evidence sends a certified transcript of such additional evidence to the court. Thus, the court would have before it abstracts of a portion of the record and a transcript of the balance. The most confusing change, however, comes in the power given the court. At one point the statute provides that the rule, regulation, order or decision of the Commission "may be superseded by the district court," and at another point provides that "the authority of the district court shall be limited to a judgment either affirming or setting aside in whole or in part" the rule, regulation, order or decision. Obviously the statute cannot mean both. As the powers exercised by the Commission under the oil and gas proration act are legislative rather than judicial in nature, likely the provision empowering the district court to issue an order superseding the order of the Commission would run afoul of constitutional objections under the separation of powers doctrine were it ever used. Whatever one may think of this review statute, the legislature apparently thinks well of it. As recently as 1945, the legislature provided it should apply to the orders of the Corporation Commission issued in the exercise of its powers to regulate the disposal of brines and mineralized waters.[108] On the other hand, the Commission's orders and regulations relative to itinerant merchants [109] are reviewed under the review statutes applying to rate orders. However, when it is observed that the review statute applicable to oil and gas proration orders has been made applicable to orders of the State Board of Health relative to prevention of pollution of the fresh water strata and supply,[110] it seems permissible to wonder if the legislature's feeling for this statute may not transcend mere pride of authorship. In fact this review statute begins with the assertion that it applies to "any action for judicial review of any rule, regula-

107. 55-606 G. S. 1949.
108. 55-1003 G. S. 1949.
109. 8-801 et seq. G. S. 1949.
110. 65-171d 1953 Supp.

tion, order or decision of the Commission." If it actually means that, then, being the later enactment, it would replace the review statutes under which rate orders of the Corporation Commission have been reviewed since 1929. Apparently no one has yet raised this question.

There has been no attempt to make a complete analysis of the statutory provisions for procedure and court supervision of the various administrative agencies of the state. There has not been even an attempt to cover all of the activities of any one of the larger agencies. It is believed, however, that the above analysis is sufficient to demonstrate that there is no uniformity and no fixed pattern for the statutory procedures covering these numerous state agencies. It would seem that wherever the nature of the activities of the agencies permits a greater uniformity in statutory procedures, the statutes might well make provision for such greater uniformity. If we are to have a large part of our activities regulated and governed by administrative agencies, it seems only fair that the rules of the game be made as explicit as may be by the statutes creating these agencies and fixing their powers.

MOTION DAYS IN DISTRICT COURTS—1955

(Please see notes on page 77)

County	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Allen (See note 2)	Iola	Spencer A. Gard	Mrs. Ina F. West	37	*11* 31	 14	7 21	4 18	*3* 23	 13	 12	*4* 17	7 28	 19
Anderson (See note 3)	Garnett	Floyd H. Coffman	Mrs. Nell R. Graves	4	4	4	*7*	1	6	*13*	9	*10*	4	2
Atchison	Atchison	Lawrence F. Day	Hal Waisner	2	5 12 19 26	2 9 16 23	2 9 16 23 30	6 13 20 27	4 11 18 25	1 8 15 22 29	14 21 28	5 12 19 26	2 9 16 23 30	7 14 21 28 .....
Barber	Medicine Lodge	Clark A. Wallace	Mrs. Edith Myers	24	5	*14*	11	*25*	12	9	9	*24*	10	8
Barton (See Note 4)	Great Bend	Roy J. McMullen	Geneva Steincamp	20	5	2	*1*	6	4	*7*	7	5	*7*	7
Bourbon (See Note 5)	Fort Scott	Harry W. Fisher	Amy Armstrong	6	*3* 7 14 21 28	4 11 18 25	4 11 18 25	1 8 15 22 29	6 *9* 13 20 27	3 10 17 24	2 9 *12* 16 23 30	7 14 21 28	4 18 25	2 9 16 23 30 .....
Brown	Hiawatha	John L. Gernon	Mrs. Edna Boicourt	22	18	22	22	19	17	7	20	18	22	20
Butler Div. No. 1 Div. No. 2	El Dorado	 Carl Ackarman W. N. Calkins	Harry R. Martin	13	12	2	*7*	6	4	*13*	7	12	*14*	7
Chase	Cottonwood Falls	Jay Sullivan	Mrs. Mildred Speer	5	28	25	25	29	27	24	23	28	25	30
Chautauqua Div. No. 1 Div. No. 2	Sedan	 Carl Ackarman W. N. Calkins	Cleopha Call	13	20	4	3	*4*	12	2	*6*	6	1	*5*

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Cherokee	Columbus	Jerome Harmon	Nina Coldiron	11										
Columbus Div.					4	1	1	5	3	7	6	4	1	6
Galena Div.					6	3	10	7	5	2	8	6	10	1
Cheyenne	St. Francis	Robert W. Hemphill	Charles N. Roberts	17	22	19	11	4	23	8	17	6	3	5
								14						17
Clark	Ashland	Ernest Vieux	Mrs. Hope Grimes	31	6a	10a	10a	7a	5a	9a	8a	6a	10a	8a
Clay	Clay Center	Lewis L. McLaughlin	Hazel K. Chestnut	21	5	2	*7*	6	4	*6*	8	5	*7*	1
Cloud	Concordia	Marvin O. Brummett	Mrs. Hazel Champlin	12	*3*	1	2	*4*	3	8	*26*	18	15	12
Coffey	Burlington	Jay Sullivan	Mildred Preston	5	31	28	28	25	30	27	26	24	28	26
Comanche	Coldwater	Ernest M. Vieux	Mary Guyer	31	4a	8a	8a	5a	3a	7a	6a	4a	8a	6a
Cowley (See Note 6)	Winfield	Doyle E. White	Mrs. Sallie K. Smith	19	7	4	*4*	1	6	3	2	*7*	4	2
					21	18	18	15	20	17	16	21	18	16
Crawford	Girard	L. M. Resler	Josephine Cattaneo	38										
Girard Div.					3	11	4	4	6	3	2	3	4	2
Pittsburg Div.					17	8	14	18	3	13	19	17	8	19
Decatur	Oberlin	Robert W. Hemphill	Mrs. Alice J. Vernon	17	20	17	9	12	9	2	15	4	4	15
						28						10		
Dickinson (Note 7*)	Abilene	James P. Coleman	Seth Barter, Jr.	8	*10*	2	2	6	*16*	1	*12*	5	7	7
Doniphan	Troy	John L. Gernon	Virgil W. Begesse	22	19	23	23	20	18	1	21	19	23	21
Douglas	Lawrence	Frank R. Gray	Mrs. Lucille Allison	41	14	*7*	4	1	*2*	3	2	7	*7*	2
Edwards	Kinsley	Lorin T. Peters	John Stoner	33	5e	*14*e	9e	6e	*2*e	2e	7e	*24*e	9e	7e
						9e			2e			5e		

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Elk	Howard		Mrs. Floy B. Magers	13	*3*	3	8	1	*2*	3	*19*	7	3	1
Div. No. 1		Carl Ackarman												
Div. No. 2		W. N. Calkins												
Ellis	Hays	Benedict P. Cruise	Walter J. Staab	23	10	*7*	14	13	*16*	14	2	*17*	17	14
Ellsworth	Ellsworth	A. R. Buzick	Harold E. Grant	30	24	17	3	25	20	14	5	10	4	7
Finney	Garden City	Roland H. Tate	G. Mae Purdy	32	*10*	3a	3a	2a	*9*	4a	*26*	6a	3a	3a
Ford	Dodge City	Ernest Vieux	Elta J. Riley	31	7a 14a 21a 28a	4a 11a 18a 25a	4a 11a 18a 25a	8a 15a 22a 29a	6a 13a 20a 27a	3a 10a 17a 24a	9a 16a 23a	7a 14a 21a 28a	4a 11a 18a	2a 9a 16a .....
Franklin	Ottawa	Floyd H. Coffman	Christina Woke	4	*3*	4	4	*4*	6	3	*12*	7	4	2
Geary (See Note 7)	Junction City	James P. Coleman	Frank C. Woodward	8	8	5	*7*	2	7	*6*	10	1	*14*	3
Gove	Gove	Benedict P. Cruise	Mrs. Louise Brown	23	12	16	*21*	11	10	*20*	12	11	*21*	12
Graham	Hill City	C. E. Birney	Louise Lee	34	6	*7*	16	20	*9*	8	*19*	12	15	15
Grant	Ulysses	L. L. Morgan	Mrs. Juanita Barber	39	5d	2d	2a	*11*a	3d	1d	3a	5d	1d	*5*a
Gray	Cimarron	Ernest Vieux	Carrie Borland	31	5d	9d	9d	6d	4d	8d	7d	5d	9d	7d
Greeley	Tribune	Roland H. Tate	Laura M. Holmes	32	4a	*14*	1a	1a	3a	1a	14a	*17*	1a	1a
Greenwood	Eureka		Alma Long	13	*17*	11	1	7	*16*	9	8	*10*	4	9
Div. No. 1		Carl Ackarman												
Div. No. 2		W. N. Calkins												
Hamilton	Syracuse	Roland H. Tate	Amelia J. Minor	32	6a	*28*	1d	1d	5a	3a	16a	*24*	1d	1d
Harper	Anthony	Clark A. Wallace	Helen Pearl	24	*10*	9	10	*11*	11	*20*	8	*10*	9	7

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Harvey (See Note 8)	Newton	Alfred G. Schroeder	Mrs. Mabel A. McMullen	9	6 20	3 *14* 17	10 24	7 21	5 *9* 26	2 16	1 15 29	6 20	3 *14* 17	8 22
Haskell	Sublette	L. L. Morgan	Mrs. Evelyn Yount	39	5a	2a	7a	6a	3a	1a	*19a*	5a	1a	1a
Hodgeman	Jetmore	Lorin T. Peters	Jane Hoagland	33	5d	*28*d 9d	9d	6d	*16*d 4d	2d	7d	5d	*14*d 9d	7d
Jackson	Holton	Robert H. Kaul	Mrs. Florence Clements	36	*10*	2	9	6	*2*	8	7	*3*	9	7
Jefferson	Oskaloosa	Robert H. Kaul	Mrs. Myrtle Kimmel	36	14	4	*7*	8	6	*6*	9	7	*7*	9
Jewell	Mankato	Donald J. Magaw	Iris Cosand	15	13	10	7	21	12	6	22	20	14	7
Johnson Div. No. 1 Div. No. 2 Div. No. 3	Olathe	Earl E. O'Connor Clayton Brenner Raymond H. Carr	Betty West	10	*3*	7	7	4	*2*	6	*6*	17	7	5
Kearny	Lakin	Roland H. Tate	Bertha Adams	32	6d	1d	*14*	6a	5d	3d	16d	4d	*14*	6a
Kingman	Kingman	Clark A. Wallace	Mrs. Nell H. Walter	24	7	11	*28*	8	13	*6*	*26*	7	11	*12*
Kiowa	Greensburg	Ernest M. Vieux	Eunice E. Rich	31	3d	7d	7d	4d	2d	6d	5d	3d	7d	5d
Labette Oswego Div Parsons Div	Oswego	Hal Hyler	H. L. Lane	16	7 21 10	25 7	4 25 28	29 4	6 27 30	10 24 13	9 23 12	28 24	4 25 28	9 23 12
Lane	Dighton	Roland H. Tate	Mrs. Eva Cramer	32	5a	2a	*28*	5a	4a	2a	15a	5a	*28*	2a

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Leavenworth	Leavenworth	Joseph J. Dawes	Dorothy Harrison	1	7	4	4	1	6	3	2	7	4	2
Lincoln	Lincoln	A. R. Buzick	Roy Livingood	30	3	14	4	8	16	8	1	21	7	1
Linn	Mound City	Harry W. Fisher	Will H. Bayless	6	6	3	3	*4* 14	12	9	8	6	3	*5*
(See Note 5)					20	17	17	28	26	23	22	20	17	29
Logan	Russell Springs	Benedict P. Cruise	Mrs. Ada F. Rogge	23	11	15	16	*4*	23	24	*5*	24	14	*5*
Lyon	Emporia	Jay Sullivan	Cleadora Held	5	26	23	30	27	25	29	28	26	30	28
Marion	Marion	James P. Coleman	Virgil M. Wiebe	8	11	*7*	3	7	*2*	3	8	*3*	2	1
Marshall	Marysville	Lewis L. McLaughlin	W. J. Koppes	21	7	*7*	4	8	*2*	10	9	*3*	4	9
McPherson	McPherson	Alfred Schroeder	Donald S. Clark	9	7 *10*	4	11	*4*	6 13	3	2 16	*3* 7	4	9
(See Note 8)					21	18	25	22	27	17	30	21	18	23
Meade	Meade	Ernest M. Vieux	Nell Bradley	31	5a	9a	9a	6a	4a	8a	7a	5a	9a	7a
Miami	Paola	Harry W. Fisher	Mrs. Ethel J. Hunt	6	4 18	*7* 15	1 15 29	12 26	10 24	*6* 21	6 20	*3* 18	1 15 29	13 27
(See Note 5)														
Mitchell	Beloit	Donald J. Magaw	Ida B. Jamison	15	10	11	10	18	13	9	26	21	17	8
Montgomery	Independence	Warren B. Grant	M. D. Smith	14										
Independence Div.					8	5	5	2	7	4	3	1	5	3
Coffeyville Div.					7	4	4	1	6	3	2	7	4	2
Morris (See Note 7)	Council Grove	James P. Coleman	Virginia Scholes	8	12	3	4	*4*	4	*20*	9	6	1	*5*
Morton	Richfield	L. L. Morgan	Mrs. Irene Kuder	39	4d	7a	3a	7d	4d	7d	*6a*	6d	2d	3a

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Nemaha	Seneca	John L. Gernon	Ruth Shaffer	22	17	21	21	18	16	6	19	17	21	19
Neosho	Erie	B. M. Dunham	Mamie Hayes	7	12	9	9	13	11	8	14	12	9	14
Ness	Ness City	Lorin T. Peters	Dorothy Stecklein	33	6e	10e	*14*e 10e	7e	4e	3e	*12*e 8e	6e	10e	*12*e 8e
Norton (See Note 9)	Norton	Robert W. Hemphill	Arthur V. Poage	17	3 10 19	16	12	18	13	3	5 14	7	15	14
Osage	Lyndon	A. K. Stavely	Mrs. Shirley Hull	35	7	4	*8*	1	6	*14*	2	7	*8*	2
Osborne	Osborne	Donald J. Magaw	Elma McColl	15	14	7	11	22	9	10	23	17	18	9
Ottawa	Minneapolis	A. R. Buzick	A. H. Finley	30	10	9	7	11	13	7	7	24	3	2
Pawnee	Larned	Lorin T. Peters	Mrs. Eulah Almquist	33	*24*d 4d	8d	8d	*11*d 5d	3e	1d	6d	*10*d 4d	8d	6d
Phillips	Phillipsburg	Robert W. Hemphill	Gene Britt	17	18	7 15	8	15	2	1	13 19	20	5	13
Pottawatomie	Westmoreland	Robert H. Kaul	Deane L. Arnold	36	13	3	10	*5*	5	9	*6*	6	10	*6*
Pratt	Pratt	Clark A. Wallace	Verna J. Barber	24	6	10	*14*	7	*16*	10	*12*	6	*14*	9
Rawlins	Atwood	Robert W. Hemphill	Mrs. Louise Portschy	17	21	18	10 21	13	16	7	16	5	2 7	16
Reno	Hutchinson	John F. Fontron, Jr.	G. R. Williams	40	7 14 21 28	4 11 18 25	4 11 18 25	1 8 15 22 29	6 13 20 27	3 10 17 24	2 9 16 23 30	7 14 21 28	4 11 18 25	2 9 16 23 30

MOTION DAYS IN DISTRICT COURTS—1955—CONTINUED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Republic	Belleville	Marvin O. Brummett	Warren A. Scott	12	4	7	1	6	2	7	28	17	16	13
Rice (See Note 4)	Lyons	Roy J. McMullen	Laura Saint	20	4	7	7	5	2	6	6	3	1	5
Riley (See Note 10)	Manhattan	Lewis L. McLaughlin	Joseph F. Musil	21	3	4	2	4	6	8	6	7	2	7
Rooks	Stockton	C. E. Birney	Irma Renner	34	10	16	17	21	2	9	6	13	16	16
Rush	La Crosse	Lorin T. Peters	Esta Manahan	33	10e 4	8e	28e 8e	5e	3d	1e	26e 6e	4e	8e	6e
Russell	Russell	Benedict P. Cruise	George W. Brandt	23	3	18	15	14	2	13	1	3	16	15
Saline	Salina	A. R. Buzick	Mrs. Winifred Groth	30	7	3	14	7	5	1	12	6	2	5
Scott	Scott City	Roland H. Tate	Nellie Scheuerman	32	5d	2d	2d	11	4d	2d	15d	5d	2d	12
Sedgwick	Wichita		L. D. Leland	18										
Div. No. 1		William C. Kandt			Each Monday									
Div. No. 2		Howard C. Kline			Each Tuesday									
Div. No. 3 (See Note	11)				Each Wednesday									
Div. No. 4		George Austin Brown			Each Thursday									
Div. No. 5		Henry Martz			Each Friday									
Seward	Liberal	L. L. Morgan	Mrs. Mary Lindley	39	10a	4a	4a	18a	6a	3a	2a	10a	4a	2a
Shawnee	Topeka		Mrs. Lucile Carter	3										
Div. No. 1		Beryl R. Johnson			14	4	18	8	20	10	2	14	4	16
						25		29			23		25	
Div. No. 2		Paul H. Heinz			21	11	4	15	6	17	9	21	11	2
							25		27		30			23
Div. No. 3 (See Note 12)		Dean McElhenny			7	18	11	1	13	3	16	7	18	9
					28			22		24		28		30
Sheridan	Hoxie	C. E. Birney	Mrs. Minnie Carder	34	3	21	14	18	16	6	12	3	14	12
Sherman	Goodland	C. E. Birney	Viva Peter	34	5	15	15	4	11	13	14	11	21	14

MOTION DAYS IN DISTRICT COURTS—1955—CONCLUDED

(Please see notes on page 77)

COUNTY	County seat	Judge	Clerk	No. Jud. Dist.	Jan.	Feb.	Mar.	Apr.	May	June	Sept.	Oct.	Nov.	Dec.
Smith	Smith Center	Donald J. Magaw	Lucille Figg	15	12	9	28	20	11	20	21	19	16	5
Stafford (See Note 4)	St. John	Roy J. McMullen	Arlene McCandless	20	3	*1*	2	4	*3*	1	8	*4*	2	6
Stanton	Johnson	L. L. Morgan	Tina B. Wilson	39	4a	*21*a	2d	6d	4a	7a	*12*a	6a	2a	1d
Stevens	Hugoton	L. L. Morgan	John F. Fulkerson	39	*24*a	3a	*21*a	7a	5a	2a	3d	*24*a	3a	3d
Sumner	Wellington	Wendell Ready	Laura McCormick	25	4	1	1	5	3	7	13	4	1	6
Thomas	Colby	C. E. Birney	Mrs. Winifred G. Van Horn	34	4	14	*21*	19	*23*	7	13	10	*7*	13
Trego	WaKeeney	Benedict P. Cruise	Mrs. Albert H. Acre	23	13	17	*7*	12	9	*6*	3	10	*7*	13
Wabaunsee	Alma	A. K. Stavely	Dorothy M. Walker	35	4	*1*	1	5	*3*	7	6	*4*	1	6
Wallace	Sharon Springs	Benedict P. Cruise	Evelyn P. Warren	23	14	14	17	*18*	24	25	*19*	25	15	*19*
Washington	Washington	Marvin O. Brummett	William Anderson	12	5	2	*7*	5	4	*6*	27	19	*14*	14
Wichita	Leoti	Roland H. Tate	Kate Elder	32	4d	1a	2a	*25*	3d	1d	14d	4a	2a	*19*
Wilson	Fredonia	B. M. Dunham	Dwaine Spoon	7	4	3	3	5	5	2	6	6	3	1
Woodson	Yates Center	Spencer A. Gard	Zelma Lawless	37	18	15	*1* 22	19	10	*7*	*13* 27	18	8 29	20
Wyandotte	Kansas City		Richard D. Shannon	29										
Div. No. 1		E. L. Fischer			8	5	5	2	7	4	10	1	5	3
Div. No. 2		Willard M. Benton			8	12	12	9	14	11	10	8	12	10
Div. No. 3		Harry G. Miller, Jr.			15	19	19	16	21	18	17	15	19	17
Div. No. 4 (See Note 13)		William H. McHale			22	26	26	23	28	25	24	22	26	17

e—9:00 a. m. a—10:00 a. m. c—1:30 p. m. d—2:00 p. m. b—1:00 p. m. f—3:30 p. m.

NOTE 1.—Italicized dates indicate the first day of a regular term of court.

NOTE 2.—In Allen county July 25 is motion day.

NOTE 3.—Motion days in Anderson county at 2:00 p. m. except when term opens—other times court opens at 9:30 a. m.

NOTE 4.—In Barton county, Rice county and Stafford county, court convenes at 10:00 a. m.—except when jury appears, when court will convene at 9:00 a. m.

NOTE 5.—In Bourbon county, July 1-8-15-22 and 29 are motion days; In Miami county, July 5 and 9 are motion days; In Linn county, July 11 and 21 are motion days.

NOTE 6.—In Cowley county, July 1 and August 5 are motion days.

NOTE 7.—Opening of term, January 3; Adjournment to motion day, January 10. No jury at May term in Dickinson county, and June terms in Morris county and Geary county except on special order. All sessions at 10:00 a. m., including Marion county.

NOTE 8.—In Harvey and McPherson counties all cases commence at 9:30 a. m.

NOTE 9.—In Norton county, August 29 is motion day.

NOTE 10.—Riley county opening day of term delayed one day on account of Labor Day.

NOTE 11.—A new judge for Division No. 3 will be appointed to fill unexpired term of present judge. In Sedgwick county if the regular motion day in any division comes on a legal holiday, motions will be presented on the next regular day of each division.

NOTE 12.—In Shawnee county the schedule continues through July and August as follows:

Division No. 1.—Judge Beryl R. Johnson: July 1 and 22 and August 12.

Division No. 2.—Judge Paul H. Heinz: July 8 and 29 and August 19.

Division No. 3.—Judge Dean McElhenny: July 15 and August 5 and 26.

NOTE 13.—In Wyandotte county, the division having law and equity has a motion day on Thursday of each week of term in addition to above-mentioned days. Wyandotte county has a regular motion day in four divisions during July as follows:

Division No. 1.—Judge E. L. Fischer: July 2.

Division No. 2.—Judge Willard M. Benton: July 5.

Division No. 3.—Judge Harry C. Miller, Jr.: July 16.

Division No. 4.—Judge William H. McHale: July 9.

APPENDIX

Model State Administrative Procedure Act

Be it enacted . . .

SECTION 1. *Definitions.* For the purpose of this Act:

(1) "Agency" means any state [board, commission, department, or officer], authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches, and except . . . [here insert the names of any agencies such as the parole boards of certain states, which, though authorized to hold hearings, exercise purely discretionary functions].

(2) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, but does not include regulations concerning only the internal management of the agency and not directly affecting the rights of or procedures available to the public.

(3) "Contested case" means a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.

SEC. 2. *Adoption of Rules.* In addition to other rule-making requirements imposed by law:

(1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this act. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(3) Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall as far as practicable, publish or otherwise circulate notice of its intended action and afford interested persons opportunity to submit data or views orally or in writing.

SEC. 3. *Filing and Taking Effect of Rules.*

(1) Each agency shall file forthwith in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules now in effect. The [Secretary of State] shall keep a permanent register of such rules open to public inspection.

(2) Each rule hereafter adopted shall become effective upon filing, unless a later date is required by statute or specified in the rule.

SEC. 4. *Publication of Rules.*

(1) The [Secretary of State] shall, as soon as practicable after the effective date of this act, compile, index, and publish all rules adopted by each agency and remaining in effect. Compilations shall be supplemented or revised as often as necessary [and at least once every two years].

(2) The [Secretary of State] shall publish a [monthly] bulletin in which he shall set forth the text of all rules filed during the preceding [month], excluding rules in effect upon the adoption of this act.

(3) The [Secretary] may in his discretion omit from the bulletin or the compilation rules the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if such rules are made available in printed or processed form on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained.

(4) Bulletains and compilations shall be made available upon request to [officials of this state] free of charge, and to other persons at a price fixed by the [Secretary of State] to cover publication and mailing costs.

SEC. 5. *Petition for Adoption of Rules.* Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for such petitions and the procedure for this submission, consideration, and disposition.

SEC. 6. *Declaratory Judgment on Validity of Rules.*

(1) The validity of any rule may be determined upon petition for a declaratory judgment thereon addressed to the [District Court] of _____ County, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(2) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

SEC. 7. *Petition for Declaratory Rulings by Agencies.* On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court. Such a ruling is subject to review in the [District Court] in the manner hereinafter provided for the review of decisions in contested cases. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

SEC. 8. *Contested Cases; Notice, Hearing, Records.* In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. The agency shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe shorthand notes unless requested for purposes of rehearing or court review. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

SEC. 9. *Rules of Evidence; Official Notice.* In contested cases:

(1) Agencies may admit and give probative effect to evidence which pos-

sesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses who testify, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

SEC. 10. *Examination of Evidence by Agency.* Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [This section shall not apply to the following agencies: _____.]

SEC. 11. *Decisions and Orders.* Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or to his attorney of record.

SEC. 12. *Judicial Review of Contested Cases.*

(1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act, [but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial "de novo," provided by law.]

(2) Proceedings for review shall be instituted by filing a petition in the [District Court] within [thirty] days after the service of the final decision of the agency. Copies of the petition shall be served upon the agency and all other parties of record. [In the manner provided by _____.] The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition shall not stay enforcement of the agency's decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(4) Within [thirty] days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review; but, by stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(5) If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(6) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(7) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(*a*) in violation of constitutional provisions; or

(*b*) in excess of the statutory authority or jurisdiction of the agency; or

(*c*) made upon unlawful procedure; or

(*d*) affected by other error of law; or

(*e*) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(*f*) arbitrary or capricious.

(SEC. 13. *Appeals.* An aggrieved party may secure a review of any final judgment of the [District Court] under this act by appeal to the [Supreme Court]. Such appeal shall be taken in the manner provided by law for appeals from the [District Court] in other civil cases.)

(SEC. 14. *Constitutionality.* If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.)

SEC. 15. *Repeal.* All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed, but such repeal shall not affect pending proceedings.

SEC. 16. *Time of Taking Effect.* This act shall take effect ————————.

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