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The newsletter of the Illinois State Bar Association's Section on Administrative Law

McBurney v. Young: Freedom of Information, the Privileges and Immunities Clause and the Dormant Commerce Clause

By Yolaine Dauphin (Chair, Administrative Law Section Council)

On April 29, 2013, the United States Supreme Court issued its opinion in *McBurney v. Young*, 569 U.S. ___ (2013), slip opinion <http://www.supremecourt.gov/opinions/12pdf/12-17_d1o2.pdf>, affirming the decision of the United States Court of Appeals for the Fourth Circuit, 667 F. 3d 454 (CA4 2012), and upholding the validity of the Virginia Freedom of Information Act, Va. Code Ann. §2.2-3700 *et seq.,* (hereinafter the Virginia Act). The Virginia Act made public records "open to inspection and copying by any citizens of the Commonwealth," without granting a similar right to non-citizens. Several States have enacted similar freedom of information laws with rights reserved to citizens of those States. In *Lee v. Minner,* 458 F. 3d 194 (CA3 2006), the United States Court of Appeals for the Third Circuit found Delaware's Freedom of Information Act, Del. Code Ann., Tit. 29, §10003 (2012 Supp.), violated the Privileges and Immunities Clause of Article IV of United States Constitution. The Supreme Court granted a *writ of certiorari* in

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Hydraulic fracturing in Illinois—A remarkable presumption, evidence and making a record

By William J. Anaya

The Illinois General Assembly recently passed, and the Governor has signed, the Illinois Hydraulic Fracturing Regulatory Act (P.A. 098-0022). The final bill was the result of an unusual collaboration of environmental activists, industry representatives and regulatory and enforcement authorities, who produced what some describe as the toughest regulatory regime associated with oil and gas exploration in the country. Another view is the new law provides remarkable transparency, and provides an administrative mechanism for the oil and gas industry to prove that the process is safe, balanced with a remarkable rebuttable presumption that establishes a *prima facie* case to the contrary in the absence of credible and admissible evidence. The devil will be in the details—or, in this case—the admissible evidence generated and included in the administrative record. This note focuses on the rebuttable presumption and the lawyer's role in this administrative process.[1]

Others will continue to seek a moratorium on hydraulic fracturing in Illinois, but with the Governor's signature, a moratorium on hydraulic fracturing in Illinois is now merely a protest. Some are concerned that the protests will impact administrative rulemaking. Because the Illinois General Assembly wrote a fairly comprehensive

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McBurney to resolve the conflict between the Third Circuit and the Fourth Circuit.

Petitioner McBurney, a former resident of Virginia, asked Virginia's Division of Child Support Enforcement to file a petition for child support on his behalf because his former spouse had defaulted on her child support obligations. The Division filed the petition after a delay of 9 months. Claiming the delay resulted in the loss of child support payments, McBurney filed a request with the Division, pursuant to the Virginia Act, for "all emails, notes, files, memos, reports, letters, policies [and] opinions" related to his family; all documents regarding the petition for child support; and all documents related to the handling of child support claims like his. The Division denied McBurney's request because he was not a Virginia citizen. Subsequently, pursuant to the Government Data Collection and Dissemination Practices Act, Va. Code Ann. §2.2-3800 *et seq.*, McBurney obtained the information he had requested that pertained directly to his petition for child support. Petitioner Hurlbert, the owner of a California business that obtained real estate tax records for clients, filed a request with the Henrico County Real Estate Assessor's Office for real estate tax records for properties in the County. The Assessor's Office denied the request because Hurlbert was not a citizen of Virginia. Upon denial of their freedom of information act requests, McBurney and Hurlbert filed suit pursuant to 42 U.S.C. §1983, for declaratory and injunctive relief for violations of the Privileges and Immunities Clause. Petitioners asserted the Virginia Act violated four "privileges or immunities: the opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information." Hurlbert also claimed the Virginia Act violated the dormant Commerce Clause. The District Court granted Virginia's motion for summary judgment. *McBurney v. Cuccinelli*, 780 F. Supp. 2d 439 (ED Va. 2011), and the Court of Appeals affirmed.

Considering first Hurlbert's claim that the Virginia Act deprived him of the opportunity to pursue a common calling, and citing *Hicklin v. Orbeck*, 437 U. S. 518, 524 (1978), the Supreme Court recognized that the Privileges and Immunities Clause "protects the right of citizens to 'ply their trade, practice their occupation, or pursue a common calling.'" *McBurney*, 569 U. S. at ___. A law violates the privilege of pursuing a common calling when the law is enacted "for the protectionist purpose of burdening out-of-state citizens." *McBurney*, 569 U. S. at ___. The Virginia Act, however, "was enacted to 'ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted'" *McBurney*, 509 U. S. at ___, citing Va. Code Ann. §2.2-3700(B) (Lexis 2011), and Hurlbert had "offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens." *McBurney*, 509 U. S. at ___. Recognizing, moreover, that "Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth," *McBurney*, 509 U. S. at ___, the Court concluded the Virginia Act "essentially represents a mechanism by which those who ultimately hold sovereign power (*ie.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power." *McBurney*, 509 U. S. at ___. The Virginia Act "does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records." *McBurney*, 509 U. S. at ___.

The Supreme Court considered next Hurlbert's claim that the Virginia Act interfered with the right to own and transfer property in Virginia. The Court agreed that the right to own and transfer property is a protected privilege, and, "if a State prevented out-of-state citizens from accessing records—like title documents and mortgage records—that are necessary to the transfer of property, the State might well run afoul of the Privileges and Immunities Clause." *McBurney*, 509 U. S. at ___. Virginia does not do so, however, as records and papers of every circuit court, including records of property transfers, notices of tax liens, and notices of mortgages,

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"that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof." Va. Code Ann. §17.1-208 (Lexis 2010). As to Hurlbert's claim that Virginia prevented citizens of other States from obtaining records of real estate tax assessments, the Supreme Court noted that "Virginia and its subdivisions[, including Henrico County,] generally make even these less essential records readily available to all" by posting them online. *McBurney*, 509 U. S. at ___. The Court concluded that "[r]equiring noncitizens to conduct a few minutes on Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia." *McBurney*, 509 U. S. at ___.

McBurney claimed the Virginia Act "burden[ed] his 'access to public proceedings'" by creating "'[a]n information asymmetry between adversaries based solely on state citizenship.'" *McBurney*, 509 U. S. at ___. Citing *Canadian Northern R. Co. v. Eggen,* 252 U. S. 553, 562 (1920), the Supreme Court noted the Privileges and Immunities Clause does not require that States eliminate every distinction that "might conceivably give state citizens some detectable litigation advantage," but rather "the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." *McBurney*, 509 U. S. at ___. The Virginia Act does not deprive noncitizens of access to the courts. Further, Virginia's rules of civil procedure contained provisions for both discovery, Va. Sup. Ct. Rule 4:1 (2012), and the use of subpoenas *duces tecum*. Va. Sup. Ct. Rule 4:9 (2012). Virginia makes judicial records available to citizens and noncitizens. Va. Code Ann. §17.1-208. Lastly, "if Virginia has in its possession information about any person, whether a citizen of the Commonwealth or of another State, that person has the right under the Government Data Collection and Dissemination Practices Act to inspect that information. §2.2-3806(A)(3) (Lexis 2011)." *McBurney*, 509 U. S. at ___. Indeed, McBurney was able to obtain most of the information he wanted upon requesting same pursuant to the Data Collection and Dissemination Practices Act.

The Supreme Court rejected outright Petitioners' claim that the Virginia Act violated the Privileges and Immunities Clause because it denied them "the right to access public information on equal terms with citizens of the Commonwealth." The Court disagreed that the "Privileges and Immunities Clause covers this broad right," and noted it had "repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws." *McBurney*, 509 U. S. at ___. "It certainly cannot be said that such a broad right has 'at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.'" *McBurney*, 509 U. S. at ___, citing *Corfield v. Coryell,* 6 F. Cas. 546, 551 (No. 3, 230) (CCED Pa. 1825). "Nor is such a sweeping right 'basic to the maintenance or well-being of the Union.'" *McBurney*, 509 U. S. at ___, citing *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U. S. 371, 388 (1978).

Turning its attention to Hurlbert's claim that the Virginia Act violated the dormant Commerce Clause, the Supreme Court noted initially that the Commerce Clause empowers Congress to regulate commerce among the States, but does not expressly impose any constraints on the several States. "Nonetheless, the Court has long inferred that the Commerce Clause itself imposes certain implicit limitations on state power." *McBurney*, 509 U. S. at ___. The Court explained that "dormant Commerce Clause jurisprudence 'significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce.' *Maine v. Taylor,* 477 U. S. 131, 151 (1986). It is driven by a concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.' *New Energy Co. of Ind. V. Limbach,* 486 U. S. 269, 273-274 (1988)." *McBurney*, 509 U. S. at ___. The Virginia Act "neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all. The 'common thread' among those cases in which the Court has found a dormant Commerce Clause violation is that 'the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulations. *Hughes v. Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). Here, by contrast, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies—which would not otherwise exist—of state records." *McBurney*, 509 U. S. at ___. The Court concluded that "[b]ecause it does not pose the question of the constitutionality of a state law that interferes with an interstate market through prohibition or burdensome regulations, this case is not governed by the dormant Commerce Clause." *McBurney*, 509 U. S. at ___.

As an aside, the Court noted that Hurlbert's claim would fail "[e]ven shoehorned into our dormant Commerce Clause framework." *McBurney*, 509 U. S. at ___. The Court explained that "[i]nsofar as there is a 'market' for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it 'limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve.'" *McBurney*, 509 U. S. at ___, citing *Reeves, Inc. v. Stake,* 447 U. S. 429, 442 (1980)

Justice Alito delivered the opinion for a unanimous Court, with Justice Thomas filing a concurrence on the issue of the dormant Commerce Clause. ■

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Hydraulic fracturing in Illinois—A remarkable presumption, evidence and making a record

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statute, rulemaking likely will not be the forum for competing interests to sort through the issues. Rather, the registration, permitting and siting described in the statute will be the most likely public battleground as this process enters the next phase. And, we can expect enforcement actions to provide another arena where disputes will be public.

Both sides are well advised to consider the impact of the administrative record in challenging or supporting compliance with this law and the laws of the state – most notably, the Illinois Environmental Protection Act.

Rulemaking

While Section 1-130 of Public Act 098-0022 provides that the Illinois Department of Natural Resources ("IDNR") "shall have the authority to adopt rules as may be necessary to accomplish the purposes of this Act," it is also clear in the new statute that "[a]ny and all rules adopted under this Act by [IDNR] are not subject to the review, consultation, or advisement of the Oil and Gas Board."

In addition, while the Illinois General Assembly created a "Task Force On Hydraulic Fracturing Regulation" at Section 1-99 of Public Act 098-0022, the Task Force will not likely provide much of a public forum to address challenges. The purpose of the Task Force is limited to preparing a report evaluating hydraulic fracturing activity in the State, and making recommendations to the Illinois General Assembly on the need for further legislation. The report is due September 15, 2016.

Under the circumstances, it is clear that the Illinois General Assembly is comfortable with both the current scope and specifics identified in the statute, and with IDNR's capability in promulgating forms and rules—rules that will likely mirror the statutory requirements—to adequately administer the law associated with Hydraulic Fracturing in Illinois.[2]

Rulemaking will not be the next battleground for Hydraulic fracturing in Illinois. Rather, we can expect disputes during the permitting process and in enforcement actions initiated by governmental agencies or private parties who each have authority to enforce the new law. The admissible evidence generated and included in the Administrative Record will, therefore, be critical.

The Administrative Record and A Deferential Standard of Review

Indeed, the statute is very clear, with very specific terms regarding the technical requirements regarding registration, application and operation of hydraulic fracturing operations. The Illinois General Assembly itself has already established setback requirements for well operations with a requirement for a detailed description of the process to be employed by the operator. In addition, the Illinois General Assembly has already adequately and clearly articulated the requirement that the applicant/operator locate the hydraulic fracturing operations outside of prescribed distances from sensitive receptors (i.e., drinking water sources and people), with a requirement that the applicant/operator provide a detailed disclosure of hydraulic fracturing fluids, sources of the water to be used in the process, waste water disposal practices, well casing and cement sealing techniques, and public notice and participation.[3] Unlike other compliance and regulatory enabling statutes, this one has many of the specifics that are usually found in regulation. In other words, little detail needs to be added in rulemaking.

What is necessary now, and will be equally necessary after rulemaking, is an adequate and defensible Administrative Record. We can expect challenges to each step in the pre-permit statues—from registration, application, public participation, permit issuance/denial and appeals, not to mention yet, enforcement. It is remarkably important—critical—that the parities make and supplement an administrative record because judicial review of those activities will be based solely on the admissible evidence in the Administrative Record.

For those unfamiliar with administrative review in Illinois, an agency's interpretation of the law it administers (and some facts) will be entitled to judicial deference so long as the interpretation is not unreasonable or unlawful. And, the evidence that will be subject to judicial review will be only the admissible evidence that was generated and properly supplemented in the Administrative Record. There are some exceptions to these rules, but by and large an agency's determination will not be overturned upon judicial review unless the decision is arbitrary, capricious or unlawful.

To put that in context, some courts have indicated that they would not have ruled as had the agency, but the court affirmed the agency's decision in any event, because the court could not conclude that the agency had been arbitrary, capricious or that the decision was unlawful. While the court may disagree with the agency's determination, the court will not overturn it under what is correctly termed a deferential standard of review.

The Presumption and Enforcement Actions

Interestingly, what is not being discussed in the popular press is the remarkable "Presumption of pollution or diminution" described at Section 1-85 of Public Act 098-0022.

That section provides:

(a) This Section establishes a rebuttable presumption for the purposes of evidence and liability under State law regarding claims of pollution or diminution of a water source for use regarding the investigation and order authority under Section 1-83.

(b) Unless rebutted by a defense established in subsection (c) of this Section, it shall be presumed that any person conducting or who has conducted high volume horizontal hydraulic fracturing operations shall be liable for pollution or diminution of a water supply, if:

(1) the water source is within 1,500 feet of the well site;

(2) water quality data showed no pollution of diminution prior to the start of high volume horizontal hydraulic fracturing operations, and

(3) pollution of diminution occurred during high volume horizontal fracturing operations or no more than 30 months after the completion of the high volume horizontal hydraulic fracturing operations.

(c) To rebut the presumption established under this Section, a person presumed responsible must affirmatively prove by clear and convincing evidence any of the following:

(1) the water source is not within 1,500 feet of the well site;

(2) the pollution or diminution occurred prior to high volume horizontal hydraulic fracturing operations or more than 30 months after the completion of the high volume horizontal fracturing operations; or

(3) the pollution or diminution occurred as the result of an identifiable cause other than the high volume horizontal fracturing operations.

The enforcement regime described in the statute is where we will see the most interesting disputes between the parties with differing issues challenging each other's theories and conclusions.

And, while the regulatory enforcement authorities—which can include private parties seeking enforcement of the law (see Section 1-102 providing that "any person having an interest" can "compel compliance") -- have a rebuttable presumption that establishes a *prima facie* case, that presumption is rebuttable only so long as the operator provides "clear and convincing evidence" to the contrary. That evidence must be in a properly developed and supplemented Administrative Record.

As you will note, the typical burden of proof in enforcement actions changes in this statute, and the evidentiary standard articulated in this statute clearly requires more persuasion from the operator (i.e., not merely a preponderance of the evidence, but "clear and convincing" evidence). Perhaps most importantly, compliance with the regulatory regime described in this statute must be with admissible evidence that was developed in the Administrative Record.

Both industry and activists will need an Administrative Record that supports their respective position when it comes to challenges to permits and activities that are alleged to create environmental damage. On the one hand, many hail this statute as the toughest regulatory regime in the country. Another way of looking at it is that both sides now have an opportunity to prove their case. Will the record show real evidence of safe operations and compliance? Or, will the record contain real evidence that will support a challenge to the operator?

The real beauty of this Act is not its perceived tough regulatory teeth. Rather, no party can rely only on anecdotal references, and there must be proof in a properly prepared and supplemented Administrative Record.

Conclusion

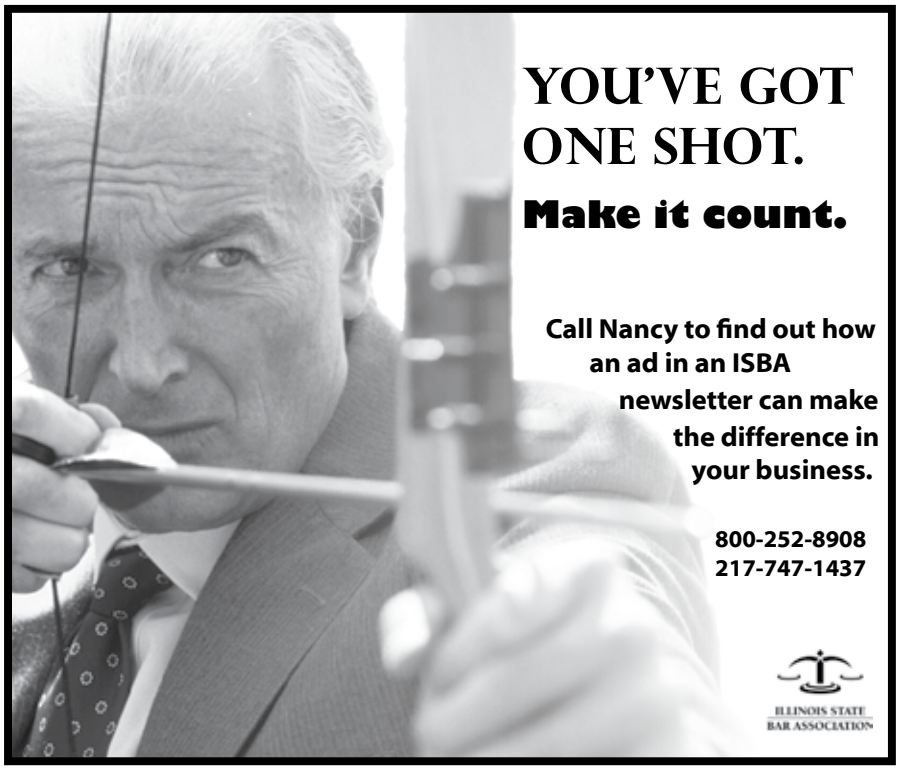
Just because a fact is obvious, it will not be admissible evidence unless it is in the Administrative Record. On the one hand, this standard will limit unsupported and anecdotal claims, but the unwary may not adequately or properly supplement the Administrative Record with admissible as need be. While other states are less regulated, operators in those states have less opportunity to provide evidence of compliance. The fact is, this activity takes place thousands of feet below the surface and after-the-fact evidence is virtually impossible to obtain. To the extent that authorities in Illinois now have a rebuttable presumption, operators will be well served to discuss evidence of compliance with counsel, and develop a defensible Administrative Record with admissible evidence of compliance. ■

For more information, please contact Bill Anaya, an environmental attorney with Arnstein & Lehr, LLP in Chicago. Bill is licensed in Illinois and Indiana and concentrates his practice in environmental enforcement actions and related litigation and transactions. Bill can be reached at 312-876-7109 or at wjanaya@arnstein.com

1. We have also written an article providing an overview of the technical requirements described in the statute on our Web page <http://legalnews.arnstein.com/2013/06/17/illinois-governor-signs-fracking-law/>.

2. Hydraulic Fracturing is not a new process as some believe. Indeed, there is evidence that there are approximately 20,000 currently fractured wells in Illinois. The process was first initiated in 1947. The estimate is difficult to verify simply because of the historic lack of transparency—now a feature of the new Illinois law. What is also new is the process of horizontal drilling—an expensive activity that, with the increases in energy prices, makes a largely speculative venture potentially profitable, not unlike oil and gas exploration generally.

3. Practically speaking, the issues facing local communities will be significant. The statute does not provide for the collection of impact fees by local governments. County roads are likely inadequate to handle the expected increase in truck traffic needed to bring water in and transport waste out for disposal. Also, area water resources will be involved. Operators will be required to anticipate these needs and invest substantial resources to perform hydraulic fracturing activities. Handled properly, the net effect will be an increase in jobs and considerably better infrastructure in the local area.



Mailing = Filing for workers' compensation review

By Carl R. Draper, Springfield, cdraper@feldman-wasser.com

Attorneys familiar with the special statutory jurisdiction issues that govern administrative review actions should review a very recent decision of the Illinois Supreme Court that held that it was sufficient for the purposes of meeting time deadlines to mail the request for issuance of summons in order to vest jurisdiction in the circuit court for judicial review of a decision of the Workers' Compensation Commission. On August 1, 2013, the Illinois Supreme Court reviewed a long history of the process for review of decisions of the Workers' Compensation Commission and found that the procedures for advancing the case from the administrative agency to the courts for judicial review was part of an appeal process very much like the appeal process in most civil litigation. Consequently, the court found that it had the authority to rule that the act of mailing a request for summons would be treated as the date of filing under the "Mailbox Rule" consistent with other civil appeals. *Gruszeczka v. Illinois Workers' Compensation Commission.,* 2013 IL 114212.

In that case, Mark Gruszeczka filed a claim for an injury sustained in the workplace before the Commission. The case came for hearing before an arbitrator who denied the claim, finding that there was insufficient evidence that it was a work-related injury. That decision was issued in March 2008. In accordance with the normal process for review, the claimant advanced the issue to the full Workers' Compensation Commission on a timely basis. The Commission upheld the decision of the arbitrator, leaving Gruszeczka without benefits.

The important timing issues began with the service of the Commission decision on the claimant's attorney. The attorney received the Commission decision on April 20, 2009. Under the Workers' Compensation Act, a disappointed party has only 20 days following service of a Commission decision to seek judicial review in the circuit court. 820 ILCS 305/19(f)(1). In an effort to comply with that requirement, the claimant's attorney submitted the request for issuance of summons and the affidavit of payment of the probable costs of the record, which are the two statutorily required elements to seek judicial review. The record in the circuit clerk's office, however, shows that the documents were file-stamped on May 14, 2009, which was 24 days after service of the decision. The employer filed a motion to dismiss asserting that the circuit court had no legal authority to consider the request for review. Claimant's attorney responded with an affidavit that these documents were mailed to the circuit clerk on May 4, 2009. The claimant had to rely on an argument that the "mailbox rule" should be applied for determining the date of filing.

Based on the apparent failure to meet the time limits required by the statute, the employers' Motion to Dismiss was heard and granted by the circuit court. On appeal, a divided appellate court held that the mailing of the request for review documents would be treated as the date of filing in the circuit court under the "Mailbox Rule" as it is more commonly known to other forms of civil litigation where appeals are made from the circuit court to the appellate court. The Supreme Court granted leave to appeal.

To understand the Supreme Court's reasoning in this case, it is necessary to review the statutory procedure for judicial review of decisions from the Workers' Compensation Commission. Section 19(f)(1) of that Act sets out the procedure for review. The pertinent provision states: "A proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission. The summons shall be issued by the clerk of such court upon written request...." 820 ILCS 305/19(f)(1). After receipt of such a request, the circuit clerk issues the requested summons, which are then served by mail on the parties.

In a detailed review of the history of the Mailbox Rule, the Supreme Court found that all stages of review for Workers' Compensation claims proceed from one level to the next with the date of each step being judged by the date of mailing with the one exception of review in the circuit court. Because the statutory procedure appears so like steps in appeal from the circuit courts through the appellate courts, the opinion written by Justice Thomas evaluated the issue as a question concerning the manner of compliance with the statutory requirements. The opinion recognized the long history of law that review by the courts of decisions of the Workers' Compensation Commission (or its predecessor, the Industrial Commission) consists of an act of special statutory jurisdiction.

The court recognized numerous decisions ruling that cases filed under a special statutory provisions unknown at common law require strict compliance with the statutory process to vest the court with power to review an administrative agency decision. After recognizing this the opinion goes on to state that the only question is how the strict compliance is observed and found that utilizing the Mailbox Rule satisfied the requirement of strict compliance by enforcing the 20-day time limit, but utilizing the Mailbox Rule to determine the date of filing rather than an old presumption that cases are filed in the circuit court when they are actually received at the clerk's office.

This decision comes as a surprise to attorneys practicing administrative law in other areas with different state agencies. Notably, the opinion in *Gruszeczka* makes no mention of other forms of judicial review of administrative decisions, tellingly making no reference to the Administrative Review Law. 735 ILCS 3/101 *et seq*. It took this author some time in analyzing the case to realize the importance of this omission. Decisions of the Workers' Compensation Commission are not subject to the Administrative Review Law.

There is a long history of decisions of the Supreme Court under the Administrative Review Law that have demanded strict compliance with the most minute details of pleading and meeting time requirements of that part of the Code of Civil Procedure. Absent strict compliance with every element of the Act including timing, the naming of the correct parties, and even the timing of having the clerk issue summons have formed the bases for dismissal of actions that did not strictly comply to the letter of the law. This history began in 1950 and with *Winston v. Zoning Bd. of Appeals,* 407 Ill. 588(1950) and continued to the infamous *Lockett v. Chicago Police Bd.,* 133 Ill. 2d 349 (1990) as two examples of the most demanding rulings.

Because the Supreme Court made no mention of the Administrative Review Law or common law *certiorari* remedies, attorneys will have to speculate about any ap-

plication of the *Gruszeczka* decision to other cases. A possible way to reconcile this more relaxed interpretation of compliance with statutory requirements might be the difference between the review procedures for Workers' Compensation cases as compared to the Administrative Review Law. The Workers' Compensation provisions quoted above make it clear that the only thing required to initiate review in the circuit court is the request for the issuance of summons together with payment of the probable costs for preparing the record. This procedure is far more akin to the one-page Notice of Appeal that will commonly satisfy the requirements for seeking review of a circuit court decision in the appellate court. As the Supreme Court noted in *Gruszeczka* the review procedure for Commission decisions seems to proceed as a continuation of the original proceeding throughout. At this point, at least, that is the current ruling and will be applied.

In the dissent by Justice Freeman, joined by Justice Burke, the argument was made that this decision flies in the face of all prior precedent and ignored the important distinction on the Mailbox Rule between appeals from the circuit court to the appellate court as an analogy for the judicial review of the administrative decision of the Commission. The dissenting opinion accepted that the Supreme Court has the authority to apply a Mailbox Rule for the various steps that occur within the judicial system itself. The *Gruszeczka* decision is unusual because it asserted that same authority to interpret the manner that parties should comply with the statutory requirements even though it presented a question of how to initiate a case in court that seeks the review.

Under the Administrative Review Law, the long history has always identified the fact that an administrative review proceeding is initiated by filing a complaint as the starting point. This was a focal point in the *Winston* decision where the Supreme Court noted that a complaint for administrative review still has to plead a cause of action, which would include a recitation of facts showing that the circuit court would have jurisdiction. Since a complaint must be filed, all of the traditional rulings of the court about the manner in which a complaint is initiated in court for civil cases applied. Historically, there are no decisions recognizing a Mailbox Rule for determining the date when a complaint is filed in the circuit court. What stands out as remarkable, however, remains the fact that the Administrative Review Law and the standards for reviewing decisions of the Workers' Compensation Commission are otherwise nearly identical. Many of the arguments that supported application of a Mailbox Rule could be argued with equal force under the Administrative Review Law. It will remain a matter of speculation at the present time whether the court would agree.

As a practical matter, however, any attorney practicing any form of administrative law would heed well the history of *Winston* and *Lockett* and make no assumption that a Mailbox Rule will be applied to determine the date of filing a complaint under the Administrative Review Law. It is certain that when an unfortunate event causes a party to have to rely on that interpretation, it certainly is expected that the debate before the Supreme Court may be vigorous. ■

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Administrative law case summaries

By Hon. Edward Schoenbaum

Cases Decided Before September 1, 2013

Illinois Appellate Court

Civil

Administrative Review 4th Dist

***West-Howard v. The Department of Children and Family Services,* 2013 IL App (4th) 120782 (August 29, 2013) Champaign Co. (HOLDER WHITE) Affirmed.**

(Court opinion corrected 9/4/13). DCFS issued final administrative decision to remove grandchildren from Respondent's home. Court properly dismissed Respondent's complaint for administrative review, as it was not filed within 35 days of date DCFS served a copy of its administrative decision. DCFS properly served Respondent's attorney of record with its administrative decision, via certified mail, and DCFS was not required to also serve a copy upon Respondent personally. Thirty-five day filing requirement is jurisdictional. (STEIGMANN and KNECHT, concurring).

Administrative Review 1st Dist.

***Howe v. The Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*, 2013 IL App (1st) 122446 (September 9, 2013) Cook Co.,1st Div. (DELORT) Reversed; Board decision vacated; remanded with directions.**

Retirement Board made procedural errors rendering its decision invalid. As Board never validly took final action on firefighter's disability application, Board's decision denying application, and court's ruling addressing merits of claim and affirming Board's decision are vacated. Board must conduct a proper affirmative vote on a specific written decision. Written decision of Board must be prepared and provided to each board member at or before time Board votes to take final action on application, and Board's only decision is the written version. (HOFFMAN and ROCHFORD, concurring).

Schools 1st Dist.

***Jones v. Board of Education of the City of Chicago*, 2013 IL App (1st) 122437 (July 30, 2013) Cook Co., 2d Div. (QUINN) Affirmed.**

(Modified upon denial of rehearing 9/3/13). Tenured teacher was terminated for repeatedly providing a false Chicago address for her two children to enroll them at selective-enrollment elementary school, where she taught in Chicago, and continuing for daughter to enroll in selective-enrollment high school. Non-resident students have no right or entitlement to free public school education in a district where they do not live. Board of Education properly determined that teacher's conduct in fraudulently enrolling her children via entering false address was irremediable per se because it was immoral. School District suffered monetary damage by teacher's failure to pay tuition for her children, and suffered non-monetary harm in that other Chicago Public School students were deprived the opportunity to enroll at these selective and highly competitive schools. (CONNORS and SIMON, concurring).

7th Circuit

Aliens

***Boika v. Holder*, No. 11-3655 (August 16, 2013) Petition for Review, Order of Bd. of Immigration Appeals Petition granted**

Bd. abused its discretion in denying alien's motion to reopen her asylum application proceedings based on new evidence indicating that alien's native country (Belarus) had conducted recent crackdown on political opponents that was subsequent to Bd.'s initial denial of her asylum petition that had alleged past persecution based on her political beliefs. Bd.'s one sentence rejection of proffered new evidence did not provide adequate explanation for denial of motion to reopen, and although alien's lack of credibility regarding her pre-2007 political opposition to Belarus govt. led to rejection of her initial asylum request, Bd. could not solely use said lack of credibility to discredit alien's new evidence concerning either her anti-Belarus govt. political activity in U.S. subsequent to denial of her asylum application or new violent crackdown by current Belarus govt. on its political opponents.

***Rosiles-Camarena v. Holder,* No. 11-3086 (August 21, 2013) Petition for Review, Order of Bd. of Immigration Appeals Petition granted**

Bd. erred in finding that it could use de novo review standard with respect to IJ's order that had granted alien's application for withholding of removal based on alien's homosexuality and HIV positive status, when reversing IJ's finding that there was likelihood that alien would be killed or injured as result of his sexuality and disease if forced to return to Mexico. On remand, Bd. is limited to considering whether IJ clearly erred in finding that alien was more likely than not to be persecuted if forced to return to Mexico.

***Salim v. Holder,* No. 12-3858 (August 28, 2013) Petition for Review, Order of Bd. of Immigration Appeals Petition denied**

Bd. did not err in denying alien's motion to reopen asylum and withholding of removal proceedings, even though alien submitted new evidence to support his claim that he would endure persecution on account of his Chinese national origin and his Christian religion if forced to return to Indonesia. Motion to reopen was properly denied since said evidence could have been presented at original hearing. Ct. also rejected alien's claim that he could qualify for asylum under Ninth Circuit's "disfavored group" analysis set forth in Tampubolon, 610 F.3d 1056.

Cases decided September 1 - October 1, 2013

Illinois Supreme Court PLAs

The Illinois Supreme Court granted petitions for leave to appeal in the following cases on September 25, 2013:

Illinois Department of Professional Regulation Law

***Hayashi v. Department of Financial and Professional Regulation,* No. 116023, 1st Dist.**

This case presents question as to whether section 2105-165 of Illinois Dept. of Professional Regulation Law, which automatically revokes licenses of health care workers convicted of certain sex-related charges or charges relating to battery of patients, is constitutional. Appellate Court, in upholding constitutionality of instant statute, rejected plaintiff-chiropractor's claim that said statute violated due process clause since it applied to underlying convictions that occurred prior to August, 2011 effective date of said statute, where Ct. found that instant statute did not

impose new legal consequence to plaintiff's conviction or his right to practice chiropractic medicine in time period between underlying conviction and effective date of statute. Fact that revocation occurred without hearing did not require different result. Ct. further rejected plaintiff's claim that said statute violated double jeopardy clause, ex post facto clause, or proportionate penalties clause, or that instant revocation was void because it occurred beyond applicable five-year limitations period for imposing any discipline that affected plaintiff's license.

Illinois Department of Professional Regulation Law

***Jafari v. Department of Financial and Professional Regulation*, No. 116023, 1st Dist.**

This case presents question as to whether section 2105-165 of Illinois Dept. of Professional Regulation Law, which automatically revokes licenses of health care workers convicted of certain sex-related charges or charges relating to battery of patients, is constitutional. Appellate Court, in upholding constitutionality of instant statute, rejected plaintiff-doctor's claim that said statute violated due process clause since it applied to underlying convictions that occurred prior to August, 2011 effective date of said statute, where Ct. found that instant statute did not impose new legal consequence to plaintiff's conviction or his right to practice medicine in time period between underlying conviction and effective date of statute. Fact that revocation occurred without hearing did not require different result. Ct. further rejected plaintiff's claim that said statute violated double jeopardy clause, ex post facto clause, or proportionate penalties clause, or that instant revocation was void because it occurred beyond applicable five-year limitations period for imposing any discipline that affected plaintiff's license.

Illinois Department of Professional Regulation Law

***Khalleeluddin v. Department of Financial and Professional Regulation*, No. 116023, 1st Dist.**

This case presents question as to whether section 2105-165 of Illinois Dept. of Professional Regulation Law, which automatically revokes licenses of health care workers convicted of certain sex-related charges or charges relating to battery of patients, is constitutional. Appellate Court, in upholding constitutionality of instant statute, rejected plaintiff-doctor's claim that said statute violated due process clause since it applied to underlying convictions that occurred prior to August, 2011 effective date of said statute, where Ct. found that instant statute did not impose new legal consequence to plaintiff's conviction or his right to practice medicine in time period between underlying conviction and effective date of statute. Fact that revocation occurred without hearing did not require different result. Ct. further rejected plaintiff's claim that said statute violated double jeopardy clause, ex post facto clause, or proportionate penalties clause, or that instant revocation was void because it occurred beyond applicable five-year limitations period for imposing any discipline that affected plaintiff's license.

Liquor Control Commission

***Wisam1, Inc. v. Ill. Liquor Control Commission*, No. 116173, 3rd Dist. Rule 23 Order**

This case presents question as to whether Local Liquor Control Commissioner properly revoked plaintiff's liquor license, after finding pursuant to parties' stipulation that plaintiff's manager had violated section 3-28 of Peoria ordinance prohibiting plaintiff's employee from violating any federal statute, when manager obtained federal conviction for illegal cashing of checks that formed part of plaintiff's business. In its petition for leave to appeal, plaintiff argued that revocation hearing was sham because hearing officer precluded it from introducing any evidence, and because revocation decision was based only on federal transcripts relating to manager's criminal conviction. Appellate Court found that plaintiff failed to establish prejudice arising out of any lack of due process, where plaintiff had entered into stipulation to admit federal transcripts, and where other evidence, including plaintiff's offer of proof, supported instant revocation. (Dissent filed).

Public Utilities Act

***People ex rel. Madigan v. Ill. Commerce Commission*, No. 116005, 2nd Dist.**

This case presents question as to whether Commerce Commission properly approved utility rate adjustment mechanism known as Rider Volume Balancing Adjustment that allowed two utility companies located in Chicago area to collect specific level of revenue from their residential and small business customers, regardless of how much or little natural gas said customers used. While objectors argued that Rider was improper because it altered traditional utility service ratemaking by subsequently increasing customer rates when customers used less natural gas, Appellate Court found that Rider did not violate either rule against retroactive ratemaking or rule against single-issue ratemaking. Ct. further observed that revenue decoupling mechanism in Rider served only to guarantee that utilities recoup costs for their infrastructure.

Illinois Appellate Court

Civil

Administrative Review 1st Dist.

***Burns v. The Department of Insurance*, 2013 IL App (1st) 122449 (September 30, 2013) Cook Co.,1st Div. (HOFFMAN) Affirmed.**

As a general rule, parties aggrieved by action of administrative agency cannot seek review in courts without first exhausting all administrative remedies available to them. Allowing Department of Insurance to reconsider evidentiary issues allows Department to use its expertise and correct its own errors. Plaintiff must exhaust all administrative remedies, including filing for a rehearing, before seeking judicial review of evidentiary issues raised. (CONNORS and DELORT, concurring).

Administrative Review 1st Dist.

***Shaw v. The Department of Employment Security*, 2013 IL App (1st) 122676 (August 26, 2013) Cook Co.,1st Div. (DELORT) Appeal dismissed.**

Circuit court reversed IDES decision denying unemployment benefits to former CTA employee. Administrative agencies must strictly maintain detached neutrality throughout appellate process. The judging agency cannot act on the employer's behalf if the employer, who is the real party in interest, declines to vindicate its interests through further litigation. State parties' limited role as nominal parties in administrative review suit is not sufficient to confer jurisdiction. (CUNNINGHAM and ROCHFORD, concurring).

Administrative Review 4th Dist

***Slepicka v. The State of Illinois*, 2013 IL App (4th) 121103 (September 12, 2013) Sangamon Co. (APPLETON) Vacated and remanded with directions.**

Plaintiff filed complaint for administra-

tive review of IDPH decision approving involuntary transfer or discharge of nursing home,patient due to non-payment. Sangamon County was impermissible venue, as nursing home was located in, and Defendant issued notice of involuntary transfer in, and administrative hearing was held in, Cook County. Filing in wrong venue, per Code of Civil Procedure, counts for purposes of filing within time prescribed, and filing in wrong venue is not fatal to subject-matter jurisdiction. Payment of amount sought by nursing home does not render appeal moot. (STEIGMANN and HOLDER WHITE, concurring).

Workers' Compensation 1st Dist.

***Garland v. Morgan Stanley and Company, Inc.*, 2013 IL App (1st) 112121 (September 12, 2013) Cook Co., 4th Div. (FITZGERALD SMITH) Affirmed.**

Fatal airplane crash resulted in deaths of pilot and three passengers. Widow of one passenger filed suit for wrongful death, including seeking recovery from her husband's employer, who was also employer of pilot. Court properly dismissed case based on exclusive remedy provision of Workers Compensation Act. Plaintiff failed to adequately establish applicability of dual capacity doctrine; duties and obligations of pilot in his business as financial advisor and in traveling to meet with prospective client are intertwined and cannot be deemed to generate obligations unrelated to the other role. (HOWSE and EPSTEIN,

Workers' Compensation 4th Dist

***Tiburzi Chiropractic v. Kline*, 2013 IL App (4th) 121113 (September 16, 2013) Macoupin Co. (TURNER) Affirmed as modified.**

Court erred in entering $2,010 money judgment for chiropractor and against his patient for balance of fees for chiropractic services. Patient had filed workers compensation claim for injuries, and employer paid chiropractor's bill per fee schedule in effect per Section 8.2 of Workers' Compensation Act. Chiropractor's compensable services under the Act are not recoverable. As chiropractor had submitted its bill to its workers' compensation insurance carrier, bills paid at fee-schedule rate were not recoverable, but $200 for cold packs, not paid for by carrier, were recoverable in small claims judgment. (POPE and HARRIS, concurring).

Workers' Compensation 1st Dist.

***Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699 (September 13, 2013) Cook Co., 6th Div. (REYES) Affirmed.**

Court properly dismissed amended complaint against State Treasurer for judgment on full amount of award received from Workers' Compensation Commission, and against Commissioners and Chairman for mandamus. Plaintiff was injured in workplace accident, but employer failed to have valid workers' compensation insurance. Claim against Treasurer is barred by sovereign immunity based on nature of cause of action and nature of relief sought. Plaintiff does not have clear right to direct disbursement from Illinois Injured Workers' Benefit Fund for medical expenses in full amount of award, as Commission already paid her medical expenses from Fund. (HALL and LAMPKIN, concurring). ■

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Impermissible venue under section 3-104 of the Administrative Review Law (735 ILCS 5/3-104)

By J.A. Sebastian

Venue is appropriate in the Circuit Court of any County in which any part of the hearing culminating in the agency decision, any part of the subject matter involved is situated, or any part of the transaction which gave rise to the proceedings before the agency occurred. 735 ILCS 5/3-104. However, Section 104 provides that, if venue is expressly prescribed in the statute under which the decision was made, then such venue shall control. Where an action was originally commenced in a court having jurisdiction, the order of that court transferring the cause to a court of proper venue did not abate the action. *Merit Chevrolet, Inc. v. Department of Revenue*, 33 Ill. 2d 207 (1965). But what happens if the action is commenced in a venue that may not be proper? A recent Illinois Appellate Court decision, *Slepicka v. State of Illinois, Department Of Public Health*, 2013 IL App (4th) 121103 (Sept. 12, 2013), provides guidance. Of note, this case reminds practitioners that the filing of a complaint for judicial review of an administrative decision includes filing that complaint in a permissible venue."One of the "statutorily prescribed procedures" or part of the prescribed "manner" of seeking judicial review [under Section 102 of the Illinois Administrative Review Law] is filing the complaint in a permissible venue." *Slepicka* at ¶ 24.

The case concerns a resident of a nursing home located in Cook County. Mary Slepicka ("Mary") was a resident of a nursing home in Palos Park, the Holy Family Villa ("nursing home"). The nursing home served Mary with a notice of involuntary transfer or discharge on the ground of nonpayment. See 210 ILCS 45/3-401(d) (West 2012). Mary administratively appealed to the Illinois Department of Public Health (Department). On February 23, 2012, an administrative law judge from the Department held a prehearing conference at the nursing home which, after the administrative hearing, issued a decision recommending approval of the involuntary transfer or discharge. Then, on August 29, 2012, in a final administrative decision, the assistant director of the Department concurred with the ALJ's recommendation. On September 14, 2012, in the Sangamon County circuit court, Mary filed a complaint for administrative review. The nursing home filed a motion to dismiss the complaint, or, alternatively, to transfer the case to the Cook County circuit court, on the ground that the Sangamon County circuit court was an impermissible venue. The Sangamon County circuit court denied the motion but ultimately upheld the Department's decision. Mary filed an appeal with the Appellate Court, Fourth District.

On appeal, the nursing home asserted, first, that under section 3-104 of the Administrative Review Law the Sangamon County circuit court was an impermissible venue for administrative review action and, second, that because Mary, in her choice of venue, did not "strictly pursue[]""the mode of procedure prescribed by statute," the circuit court lacked subject-matter jurisdiction and, consequently, the appellate court lacked subject-matter jurisdiction." *Slepicka* at ¶ 17, (citations omitted). The Appellate Court began its analysis with the Nursing Home Care Act to determine the court's jurisdiction. Since the Act empowers the Department to approve or disapprove an involuntary transfer or discharge if a resident requests a hearing, and the Act (210 ILCS 45/3-320 (West 2012)) expressly provides that "[a]ll final administrative decisions of the Department under this Act are subject to judicial review under the Administrative Review Law [(735 ILCS 5/3-101 to 3-113 (West 2012))], a circuit court receives its subject-matter jurisdiction from the Administrative Review Law to review the Department's decision to approve or disapprove an involuntary transfer or discharge. See Ill. Const. 1970, art. VI, § 9. The Nursing Home Care Act does not specify the venue for judicially reviewing the Department's decision to approve or disapprove an involuntary transfer or discharge, however.

Under Section 3-102 of the Administrative Review Law (735 ILCS 5/3-102): "Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision." The Supreme Court has interpreted this passage as withholding subject-matter jurisdiction from a circuit court unless "the statutorily prescribed procedures are *** strictly followed." *Slepicka* at ¶ 23, quoting *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 350 (2006), and citing *Fredman*, 109 Ill. 2d at 210-11.

The appellate court noted, that "[o]ne of the "statutorily prescribed procedures" (*Rodriguez,* 218 Ill. 2d 350), or part of the prescribed "manner" of seeking judicial review (735 ILCS 5/3-102 (West 2012)), is filing the complaint in a permissible venue. *Slepicka* at ¶ 24. Section 3-104 of the Administrative Review Law (735 ILCS 5/3-104) governs venue and provides:

> § 3-104. Jurisdiction and venue. Jurisdiction to review final administrative decisions is vested in the Circuit Courts, except as to a final order of the Illinois Educational Labor Relations Board in which case jurisdiction to review a final order is vested in the Appellate Court of a judicial district in which the Board maintains an office. If the venue of the action to review a final administrative decision is expressly prescribed in the particular statute under authority of which the decision was made, such venue shall control, but if the venue is not so prescribed, an action to review a final administrative decision may be commenced in the Circuit Court of any county in which (1) any part of the hearing or proceeding culminating in the decision of the administrative agency was held, or (2) any part of the subject matter involved is situated, or (3) any part of the transaction which gave rise to the proceedings before the agency occurred. The court first acquiring jurisdiction of any action to review a final administrative decision shall have and retain jurisdiction of the action until final disposition of the action.
>
> Id.

Indeed, a long-line of Illinois cases, many discussed at length in this newsletter over the years, have cautioned that unless a plaintiff files the complaint within the prescribed

"time" (within 35 days after service of the final administrative decision) and "in the manner" prescribed by the statute, judicial review is "barred" under Section 102 of the Administrative Review Law. 735 ILCS 5/3-102.

"The trouble with such reasoning is that it conflicts with section 2-104(a) and 2-106(b) of the Code of Civil Procedure (735 ILCS 5/2-104(a), 2-106(b))," observed the Appellate Court. *Slepicka* at ¶ 26. Based on sections 2-104(a) and 2-106(b), the Appellate Court concluded that filing in the wrong venue is not fatal to subject-matter jurisdiction. Turning next to whether Sangamon County was a permissible venue under section 3-104, the Appellate Court observed that Cook County, in which Palos Park is located, where the nursing home is located, where nursing home issued the notice of involuntary transfer or discharge, and where the Department held the administrative hearing, was the proper venue. *Slepicka* at ¶ 32

Even though the final administrative agency decision, made by the Assistant Director on delegation of the Director of the Illinois Department of Public Health, emanated from Springfield, the Assistant Director did not hold a hearing or proceeding in Springfield "by retiring to her office there and writing a decision" *Slepicka* at ¶ 30. Accordingly, the Appellate Court vacated the judgment of the Sangamon County circuit court and remanded the case with directions to transfer the case to the Cook County circuit court. *Slepicka* at ¶ 43.

This case serves as an important reminder to read the provisions of the Administrative Review Law, and the statutory provision that creates the state agency together, to determine the permissible venue under both the governing statute and section 3-104 of the Administrative Review Law. This case also provides a thoughtful analysis of the subject-matter jurisdiction bestowed on the circuit court by the Illinois Constitution. ■

The law of unintended (?) consequences

By Michael B. Weinstein

In November 2000, the Illinois General Assembly passed Senate Bill 851. The vote in the Illinois house was 114-0 and the vote in the Senate was 58-0. The unanimity reflected the fact the bill was an "agreed bill" pertaining to pension benefits for downstate police officers. The legislative debate, such as it was, suggests that since the bill was an "agreed bill", reflecting negotiations between the Federation of Police and the Illinois Municipal League, passage was a foregone conclusion. Subsequently, former Governor George Ryan signed the bill into law on February 1, 2001. The Act (Public Act 91-0939) was effective as of that date.

However, buried within the Act was a provision that applied only to a limited number of individuals and seemingly reflects one of the reasons why many members of the general public believe that defined benefit pension plans for public employees should be eliminated.

Among other provisions, the Act amended Section 3-114.1 of the Illinois Pension Code (40 ILCS 5/3-114.1) concerning line of duty disability pensions by inserting a new subsection (d) which reads as follows:

> (d) A disabled police officer who (1) is receiving a pension under this Section on the effective date of this amendatory Act of the 91st General Assembly, (2) files with the Fund, within 30 days after that effective date and annually thereafter while the pension remains payable, a written application for the benefits of this subsection, including an affidavit stating that the applicant has not earned any income from gainful employment during the most recently concluded tax year and a copy of his or her most recent Illinois income tax return, (3) has service credit in the Fund for at least 7 years of active duty, and (4) has been receiving the pension under this Section for a period which, when added to the officer's total service credit in the Fund, equals at least 20 years, shall be eligible to receive an annual noncompounded increase in his or her pension under this Section, equal to 3% of the original pension.
>
> The Fund may take appropriate steps to verify the applicant's disability and earnings status, and for this purpose may request from the Department of Revenue a certified copy of the applicant's Illinois income tax return for any year for which a benefit under this Section is payable or has been paid.
>
> The annual increase shall accrue on each anniversary of the initial pension payment date, for so long as the pension remains payable to the disabled police officer and the required annual application is made, except that the annual increases under this subsection shall cease if the disabled police officer earns income from gainful employment. Within 60 days after accepting an initial application under this subsection, the Fund shall pay to the disabled police officer, in a lump sum without interest, the amounts resulting from the annual increases that have accrued retroactively.
>
> This subsection is not limited to persons in active service on or after its effective date, but it applies only to a pension that is payable under this Section to a disabled police officer (rather than a survivor). Upon the death of the disabled police officer, the annuity payable under this Section to his or her survivors shall include any annual increases previously received, but no additional increases shall accrue under this subsection.

Twelve years later we now understand the import of this subsection as a result of the recent appellate court decision in *Gutraj v. Board of Trustees of the Police Pension Fund of the Village of Grayslake*, 2013 IL App (2d) 121163 (June 28, 2013). It turns out that any individual who qualified under this law is entitled to receive a 3% noncompounded increase in his or her disability pension in addition to the normal 3% noncompounded increase provided for under Section 3-111.1(c) of the Pension Code [40 ILCS 5/3-111.1(c)].

The facts in the *Gutraj* case are relatively straightforward. Conrad Gutraj became a police officer for the Village of Grayslake on July 1, 1975. Subsequently, on April 12, 2000, he suffered a heart attack while performing his duties as an officer. As a result of the heart attack he was no longer able to work as an officer. On October 14, 2000 he was awarded a "line of duty" disability pension pursuant to Section 3-114.1 of the Pension Code. At the

time of the award of the disability pension Officer Gutraj was 49 years old.

In accordance with the requirements in the amended Section 3-114.1, Officer Gutraj timely filed his written application (within the applicable the 30 day period) to avail himself of the amendment. Thereafter, he continued to file the required annual affidavits and continued to receive the 3% annual increase.

On March 4, 2011, Officer Gutraj turned 60 years of age. In October 2011, he sought an additional 3% annual increase to his pension, as provided in Section 3-111.1(c) of the Pension Code. The Grayslake Police Pension Board apparently denied (or took no action on) Officer Gutraj's demand so he then sought redress in Circuit Court.

The parties filed cross-motions for summary judgment with respect to the issue of whether the plaintiff was entitled to a 3% increase under both sections of the Pension Code. Subsequently, on September 26, 2012 the trial court ruled in favor of the plaintiff finding that he was entitled to separate yearly 3% increases under both sections of the Pension Code. The Pension Fund appealed this decision to the Second District Appellate Court.

On June 28, 2013, the appellate court affirmed the trial court's ruling. The court ruled that the 3% annual increase provided for in Section 3-114.1(d) was not mutually exclusive from the 3% annual increase found in Section 3-111.1(c). Thus, a limited group of disabled pensioners, including Officer Gutraj, were entitled to receive both annual increases so long as they met the criteria set forth in each of the statutes.

The appellate court based its conclusion upon a finding that the two statutes are unambiguous. In the court's view, the two statutes "bestow different benefits that have different criteria." There was nothing to indicate that the legislature required a qualified individual to choose one statute over the other. In the absence of such limiting language in either of the statutes, the court would not infer such limitation.

In fact, the legislature had specifically provided in Section 3-111.1(e) [40 ILCS 5/3-111.1(e)] that the increases granted by that subsection were in lieu of the increases granted by Section 3-111.1(a). Thus, since the legislature did not use similar language in Section 3-111.1(c), it presumably intended a different result.

The appellate court concluded that the result was neither unjust nor absurd.

The Legislature chose to give a 3% increase before age 60 to [a limited group of] disabled pensioners who cannot obtain other gainful employment. Then, after turning 60, all disabled pensioners receive a 3% increase regardless of employment status. The two increases fulfill two different purposes. It is not our province to assess the wisdom of legislative objectives.

What really makes this case interesting, aside from the fact that the special annual increase provided for in Section 3-114.1(d), was part of an "agreed bill," is that the plaintiff, Conrad Gutraj, is a longtime member of the Grayslake Police Pension Board of Trustees. According to the Daily Herald, while he has abstained from voting on the case, he has sat in on the Board's executive sessions when the case has been discussed. The Board recently voted 3-0 (with Officer Gutraj abstaining) to file a Petition for Leave to Appeal to the Illinois Supreme Court.

While it is unknown how many disabled officers fall within the narrow criteria set forth in Section 3-114(d), it appears that Officer Gutraj is the only disabled officer to have applied for the doubled benefits. ■

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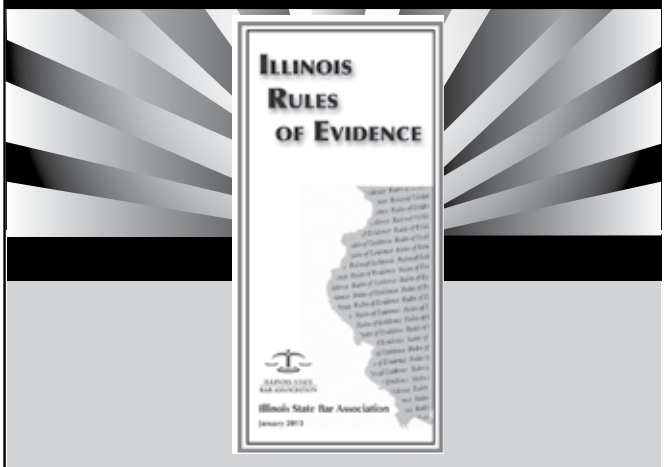

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Tuesday, 11/5/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Tuesday, 11/5/13- Live Webcast, ISBA Studio—Children and Trauma; A Guide for Attorneys. Presented by the ISBA Child Law Section. 11-12.

Tuesday, 11/5/13- Live Webcast, ISBA Studio—2013 Immigration Law Update-Changes which Affect Your Practice & Clients. Presented by the ISBA International & Immigration Law Section, ISBA Young Lawyers Division and the ISBA General Practice, Solo and Small Firm Section. 1:00-2:00.

Thursday, 11/7/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Friday, 11/8/13- Chicago, ISBA Regional Office—Successfully Navigating Civil Litigation Evidence and Theory Involving Topics of Expert Testimony. Presented by the ISBA Civil Practice & Procedure Section. 8:50-4:00.

Thursday, 11/14/13- Chicago, ISBA Regional Office—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8-5.

Thursday, 11/14/13- Springfield, INB Conference Center—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

Friday, 11/15/13- Chicago, ISBA Regional Office—Collection Issues You Don't Know About…But Should. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section. 9-4:30.

Wednesday, 11/20/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Friday, 11/22/13- Chicago, ISBA Regional Office—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

December

Thursday, 12/5/13- Chicago, ISBA Regional Office—Civility in the Courtroom. Presented by the ISBA Bench and Bar Section. 1-5.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Speaking to Win: Building Effective Communication Skills. Master Series presented by the ISBA. 8:30-11:45.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Legal Writing in the Smartphone Age. Master Series presented by the ISBA. 1:00-4:15.

January

Tuesday, 1/7/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

Thursday, 1/9/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

Wednesday, 1/15/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern.

February

Wednesday 2/5/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

Friday, 2/7/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

Friday, 2/7/14- Bloomington-Normal, Marriott Hotel and Conference Center—Hot Topics in Agricultural Law- 2014. Presented by the ISBA Agricultural Law Section. All Day.

Wednesday, 2/12/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 12:00 Eastern.

Wednesday, 2/12/14- Chicago, ISBA Regional Office—Tort Law Back to Basics. Presented by the ISBA Tort Law Section. All Day.

Thursday, 2/27/14- East Peoria, Holiday Inn and Suites—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8:00-5:00.

March

Tuesday, 3/4/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

Thursday, 3/6/14- Webinar—Advanced Tips to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

Thursday, 3/6- Friday, 3/7/14- Chicago, ITT Chicago-Kent School of Law—13th Annual Environmental Law Conference. Presented by the ISBA Environmental Law Section. 8:30-4:45 with reception from 4:45-6; 8:30-1:30.

Tuesday, 3/11/14- Webinar—Boolean (Keyword) Searches on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 2:00 Eastern.

Tuesday, 3/25/14- Chicago, ISBA Chicago Regional Office—Master Series: The Cybersleuth's Guide to the Internet: Super Search Engine Strategies and Investigative Research. Presented by the Illinois State Bar Association. All day.

Friday, 3/28/14- Chicago, ISBA Chicago Regional Office—Master Series: The Uniform Commercial Code Made Easy: A Groundbreaking Approach to Incorporating the UCC into Your Practice. Presented by the Illinois State Bar Association. All day. ■

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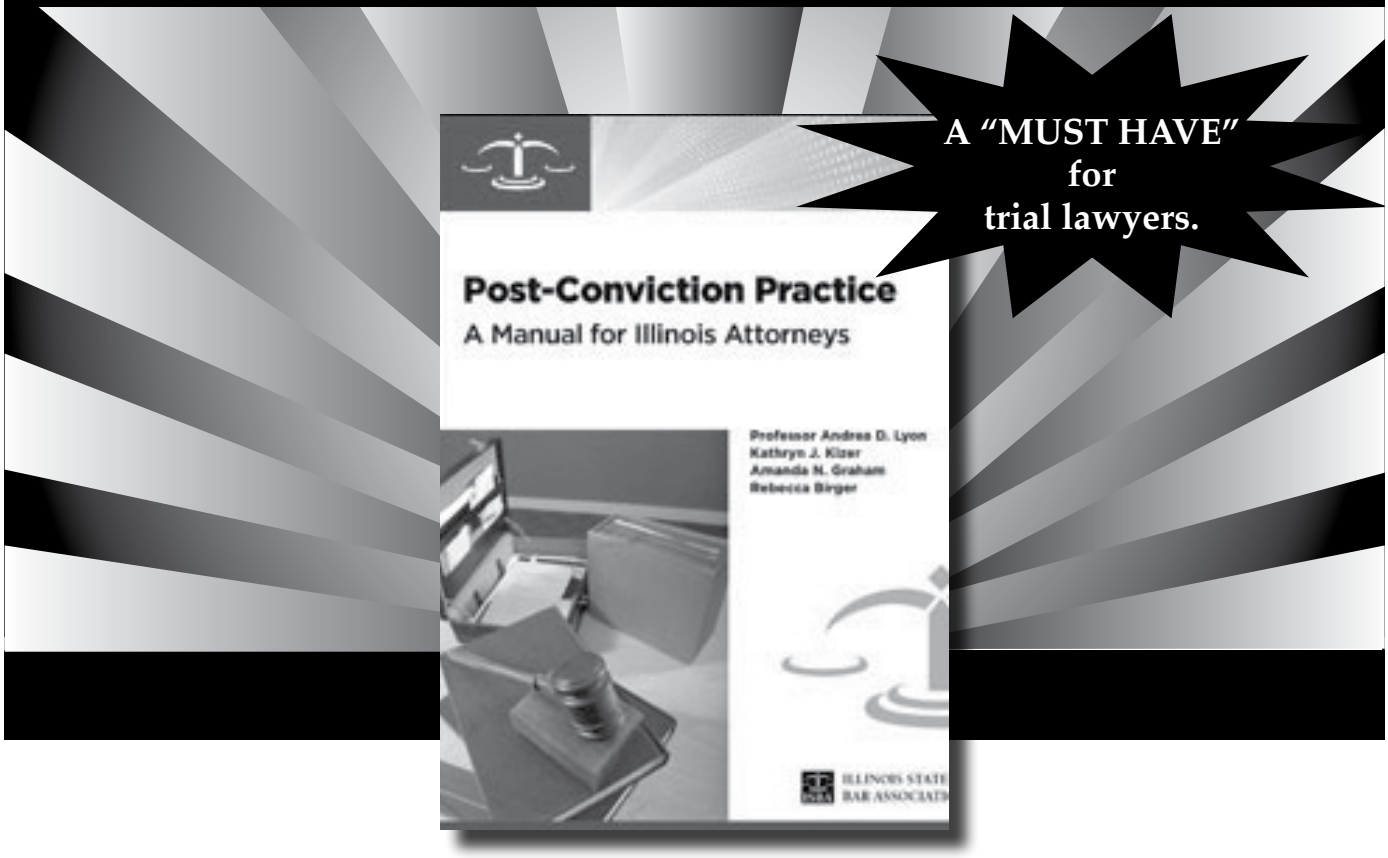

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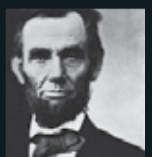

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