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Administrative Law

by Martin M. Wilson*  
and Jennifer A. Blackburn**

I. INTRODUCTION AND OVERVIEW

Even in tough economic times, the work of administrative agencies seems to continue with particularly robust growth at the state level. The number of contested agency cases seems to be rising, even those involving the most trivial details. Although the idea of more government is not fashionable in most corridors, higher levels of activity by existing governmental agencies will be the norm until the state's economic picture achieves measurable improvement.

This Article is a survey of cases from the Georgia Supreme Court and Georgia Court of Appeals from June 1, 2009 through May 31, 2010.1 The cases chosen for review were prioritized by a concentration of administrative law principles in the opinions. One will be able to find specialized subject matters—some including administrative law principles—in other articles of this volume.

This Article begins with cases under Georgia's "any evidence" rule2 and then shifts to agency defenses. Next, cases highlighting judicial review and other standards of review for agency cases are addressed.

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1. For analysis of Georgia administrative law during the prior survey period, see Martin M. Wilson & Jennifer A. Blackburn, Administrative Law, Annual Survey of Georgia Law, 61 MERCER L. REV. 1 (2009).

The last section of the Article is an enumeration of legislation adding, subtracting, multiplying, and dividing administrative agencies as passed during the 2010 regular session of the Georgia General Assembly.

II. THE "ANY EVIDENCE" RULE

The Georgia Court of Appeals decision in Board of Regents of the University System of Georgia v. Hogan\(^3\) is a good example of how not to follow the any evidence rule. Hogan was the registrar at one of the universities governed by the Board of Regents of the University System of Georgia (Board). She was fired by the president of the university and appealed to an administrative law judge (ALJ). Upon a failure to obtain relief, Hogan sought review by the Board, which promptly adopted the decision of the ALJ. Hogan then appealed by means of a writ of certiorari in the superior court, which overturned the prior adverse decisions. In addition, the superior court awarded damages and attorney fees to Hogan as a part of the decision. The Board filed a successful application for discretionary review in the court of appeals.\(^4\)

Citing a failure to observe the any evidence rule, the court of appeals agreed with the Board and reversed the superior court's decision.\(^5\) The ALJ, with whom the Board had agreed, found Hogan to be an at-will employee and subject to discharge unless the action was "arbitrary and capricious." Because the facts showed the university president had not acted in such a manner, the ALJ upheld the termination. However, instead of relying upon the evidence produced by the ALJ, the superior court made independent findings of fact and overturned Hogan's termination.\(^6\) Consequently, because the superior court erroneously substituted its judgment for the ALJ's, the court of appeals reversed the decision.\(^7\)

Hogan had also asserted a due process claim, alleging that she had been given no reason for her termination and did not have an initial grievance hearing.\(^8\) The court of appeals was not impressed, however, because a full hearing had been convened before the ALJ.\(^9\)

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4. Id. at 456, 680 S.E.2d at 520.
5. Id. at 454, 457-58, 680 S.E.2d at 520, 522 (quoting Prof'l Standards Comm'n v. Smith, 267 Ga. App. 418, 418, 571 S.E.2d 443, 444 (2002)).
6. Id. at 456, 680 S.E.2d at 521.
7. Id. at 457-58, 680 S.E.2d at 522.
8. Id. at 457, 680 S.E.2d at 521.
9. Id. at 457, 680 S.E.2d at 522.
In *Georgia Real Estate Appraisers Board v. Krouse*, another reversal by the court of appeals, the any evidence rule played an important part. Krouse had a license as a real estate appraiser. He assigned a value of $113,000 to a parcel of property, although he knew that the market value was around $20,000-$25,000. The property was immediately donated to charity, which Krouse knew would happen, and the donor took a $113,000 charitable deduction on the donor's next filed federal tax return. As soon as the donation had been made, Krouse's wife bought the property for $25,000. In about two years, she sold the property to the Georgia Department of Transportation for over $250,000. When the local newspaper later reviewed the transactions by Mr. and Mrs. Krouse, the Georgia Real Estate Appraisers Board (Board) investigated. The Board initiated disciplinary proceedings to revoke Krouse's license, and a hearing was held before an ALJ. The ALJ recommended revocation, which was confirmed by the Board's final review.

Krouse appealed to the superior court, which reversed the Board on multiple issues. First, the superior court decided that the Board should have required expert testimony to establish Krouse's violations. The court of appeals disagreed and articulated the issue as "whether the violations for which Krouse was charged are of a complicated nature so as to require highly specialized knowledge and explanation by an expert to understand the parameters of acceptable conduct." The court held that Krouse's behavior and the sheer number and type of charged violations obviated any need for an expert because violations were clearly shown.

Alternatively, the Board also relied upon the position that the superior court had ignored the any evidence rule in making its determinations. The court of appeals found multiple instances of evidence in the record to support the revocation and agreed that error had been committed. Because the superior court failed to apply the any evidence rule when evidence existed to support the revocation of Krouse's license, the court of appeals reversed the ruling of the superior court.

Yet another reversal of a superior court judgment, the case of *Davane v. Thurmond* revolved around the payment of unemployment benefits.

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11. Id. at 73-76, 681 S.E.2d at 738-40.
12. Id. at 76, 681 S.E.2d at 740-41.
13. Id. at 76-77, 681 S.E.2d at 740-41.
14. Id. at 78-79, 681 S.E.2d at 742.
15. Id. at 79, 681 S.E.2d at 743.
16. Id. at 79-82, 681 S.E.2d at 743-45.
17. Id. at 82, 681 S.E.2d at 745.
In 2007 Davane was employed by a software company in a position that required a lot of travel. Shortly after getting the job, she had to stop the out-of-town work because of problems with child care. The employer gave her a temporary assignment that allowed her to work from home, but the employer inquired about her return to her original position a few months later. In 2008 when a new out-of-town project came up, Davane was assigned to the job, but she could not arrange for child care. The employer said that he had given roughly two-weeks’ notice of the assignment, but Davane testified that the employer gave only two-days’ notice. Since Davane could not arrange for child care, she was discharged from her position. Upon application for unemployment benefits, Davane was turned down. The Board of Review (Board) for the Georgia Department of Labor disqualified Davane from unemployment compensation on the basis that she should have procured child care and was at fault for not doing so. The superior court affirmed the Board’s findings, which included a finding that there was evidence to support the Board’s decision, and Davane appealed. The court of appeals reversed, using an analysis that basically incorporated the any evidence rule. The evidence before the Board concerning Davane’s time to respond to the out-of-town assignment was conflicting. However, the court of appeals held that the employer’s testimony that Davane was notified two weeks before the out-of-town assignment was based on information provided to the employer by a third party and therefore constituted hearsay. The hearsay evidence was neither competent nor probative to support a finding that Davane had been given ample notice to secure child care. Accordingly, Davane was not disqualified from receiving unemployment benefits because the only competent evidence showed that she had been given only two- or three-days’ notice. She was not intentionally failing to comply with the directions of the employer because she could not have been reasonably expected to procure child care in such a short period of time.

A case was reversed for the fourth time in Trawick Construction Co. v. Georgia Department of Revenue, this time by the supreme court.

19. Id. at 474-75, 685 S.E.2d at 447-48.
20. Id. at 474, 685 S.E.2d at 447.
21. Id. at 476, 685 S.E.2d at 448-49.
22. Id. at 475-76, 685 S.E.2d at 448.
23. Id. at 476, 685 S.E.2d at 448.
24. Id.
25. Id. at 476-78, 685 S.E.2d at 448-50.
26. Id. at 477-78, 685 S.E.2d at 449-50.
In Trawick the court decided that a federal income tax election of tax treatment made by a corporation does not apply to a state income tax election in the same situation. Trawick was an out-of-state Subchapter S corporation for federal tax purposes, meaning that its shareholders directly reported their individual portions of the business's income on their own personal tax returns. However, in Georgia, Trawick was a Subchapter C corporation, meaning the business entity paid taxes to the state for its in-state business income. The stockholders of Trawick sold all of the corporate shares and made an election under the Internal Revenue Code for the sale to be viewed by taxing entities as a sale of the corporation's assets. On Trawick's federal and state returns, the proportional amount from the sale for Georgia taxes was $47,980. The Georgia Department of Revenue (GDR) viewed the transaction as being apportioned differently and assessed $224,820 of additional taxes.

Trawick appealed to an ALJ, who decided that the $224,820 should not be paid. When the case was presented for a final decision to the Georgia Revenue Commissioner (Commissioner), the Commissioner reversed the ALJ. Trawick then appealed to the superior court, which reversed the Commissioner, leading to an appeal by the GDR to the court of appeals. As described in last year's survey article, the court of appeals reversed the superior court. Trawick then obtained a writ of certiorari and eventually received finality in the form of an order from the supreme court.

This is not so much an any evidence case as it is a case in which the conclusions drawn from the evidence differed according to the decision maker. The question was whether shareholders of Trawick, classified as a Subchapter S corporation, could make the election regarding the treatment of the transaction and its tax consequences or whether the corporate entity was entrusted with the choice. Stating that the court of appeals relied on irrelevant evidence to conclude that the corporate entity had participated in the election, the supreme court held that under section 48-7-21(b)(7) of the Official Code of Georgia Annotated

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28. Id. at 597, 600-01, 690 S.E.2d at 602, 604.
29. Id. at 597, 690 S.E.2d at 601-02.
30. Title 26 of the United States Code.
31. Trawick, 286 Ga. at 597, 690 S.E.2d at 602.
32. Id.
33. Wilson & Blackburn, supra note 1, at 10.
34. Trawick, 286 Ga. at 597, 690 S.E.2d at 602.
35. Id. at 597, 601, 690 S.E.2d at 602, 604.
36. Id. at 597-98, 690 S.E.2d at 602.
(O.C.G.A.), the taxpayer shareholders had the authority to direct which election would be made.

The last decision reviewed in this section completes the string of reversals. In *Neal v. Augusta-Richmond County Personnel Board*, a firefighter received a random drug test as part of the substance abuse policy carried out by the Augusta-Richmond County Personnel Board (Board). The urine specimen was sent to an independent laboratory, and the resulting lab report showed that Neal tested positive for marijuana. When the result was returned to a medical review officer, the report was forwarded to the county risk manager, who in turn informed the fire chief of the test result. The fire chief then placed Neal on administrative leave and recommended his termination.

Neal exercised his right to appeal and obtained an administrative hearing. The lab report and testimony from the medical review officer were admitted into evidence at the hearing over Neal's objections, which were on the grounds of hearsay and the right to confront witnesses. Following the hearing, an order was entered by the Board upholding the recommendation to terminate Neal. Neal then filed for a writ of certiorari to the superior court, but it was denied. In turn, an application for discretionary appeal was filed and subsequently granted by the court of appeals.

Neal argued that he had been denied his constitutional right to confront adverse witnesses because no one from the testing laboratory showed up at the hearing, yet the adverse lab report had been entered into evidence. Because the lab report did not constitute an exception to the hearsay rule, Neal argued that the case should be reversed. The court of appeals agreed. Additionally, even though the constitutional right to confrontation of witnesses generally arises in the context of a criminal case, Neal's property interest in his employment, coupled with his right to due process, indicated that his case should be reversed for a lack of evidence. The court of appeals stated that "the lab results were hearsay. Hearsay is without probative value to establish any fact. We have held that hearsay is not appropriate evidence even in an

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38. Trawick, 286 Ga. at 599, 690 S.E.2d at 603.
40. Id. at 115, 695 S.E.2d at 319-20.
41. Id. at 115, 695 S.E.2d at 320.
42. Id.
43. Id. at 116, 695 S.E.2d at 320.
44. Id.
45. Id. at 116, 118-19, 695 S.E.2d at 320, 322.
administrative proceeding.\footnote{Id. at 118, 695 S.E.2d at 322.} Because the Board relied on the test alone in deciding to terminate Neal's employment, the case was reversed.\footnote{Id. at 118-19, 695 S.E.2d at 322.}

III. AGENCY DEFENSES

This section highlights the novel defenses that agencies use to stand their ground and defend unwarranted litigation. For example, in \textit{Manlove v. Unified Government of Athens-Clarke County}\footnote{285 Ga. 637, 680 S.E.2d 405 (2009).} the plaintiffs, college students living in Athens-Clarke County, challenged the constitutionality of Athens-Clarke County Ordinance § 3-5-24\footnote{Athens-Clarke County, Ga., Code § 3-5-24 (2010).} by seeking a declaratory judgment in superior court. The rather restrictive enactment prohibited plainly audible sounds from a distance of 300 feet during the day and from 100 feet late at night. Additionally, sounds from inside a dwelling could not be plainly audible more than five feet from the building's boundary. The plaintiffs had never been cited for a violation of the ordinance, and none of the plaintiffs could show a particularized harm or injury. Accordingly, the superior court dismissed the action for lack of standing.\footnote{Manlove, 285 Ga. at 637-38, 680 S.E.2d at 405-06.}

Upon appeal to the Georgia Supreme Court, the dismissal was affirmed.\footnote{Id. at 638-39, 680 S.E.2d at 406.} The failure to show any adverse circumstance or injury resulting from the ordinance meant the plaintiffs could not maintain the action.\footnote{Id.}

In \textit{Expedia, Inc. v. City of Columbus},\footnote{285 Ga. 684, 681 S.E.2d 122 (2009).} the supreme court faced a question that had been in controversy for a few years about the imposition of the hotel-motel tax for transactions involving travel companies. Expedia is a popular travel company that conducts business via the internet. Expedia books and charges for rooms with contracted hotels at discount rates. The amount charged is actually a combination of the rate from the hotel plus fees from Expedia, although the company does not disclose how the amounts are separated. The customer pays nothing to the hotel after the stay, and the hotel bills Expedia for the agreed-upon room rate and applicable taxes and fees.\footnote{Id. at 684-85, 681 S.E.2d at 124-25.}
The City of Columbus (City) promulgated the Hotel-Motel Occupancy Excise Tax Ordinance,\textsuperscript{55} levying a 7\% hotel-motel tax on hotel guests.\textsuperscript{56} The tax was supposed to be remitted by whoever collected it from the person paying for the room.\textsuperscript{57} The City filed an extensive complaint against Expedia, largely based upon Expedia's failure to remit taxes for the whole amount charged to Expedia's customers instead of only the taxes paid by Expedia on the rate negotiated with the hotel. The trial court held that as long as Expedia failed to separate charges and disclose the allocations to the public, Expedia should pay taxes on the whole amount charged.\textsuperscript{58}

While this judgment was affirmed with direction by the supreme court, from the standpoint of administrative law, the interesting piece of this decision was Expedia's contention that "the trial court lacked subject-matter jurisdiction due to the failure of the City to exhaust its administrative remedies."\textsuperscript{69} The contention centered on City Ordinance § 19-117,\textsuperscript{60} which required written notice to Expedia from the City of the estimated tax Expedia was supposed to pay.\textsuperscript{61} The supreme court held that Columbus had sent the assessment notice showing an amount owed of $26,000.\textsuperscript{62} Expedia replied that the assessment was wrong and told the City that Expedia was not subject to its ordinances or to the general tax statute regarding the hotel-motel tax.\textsuperscript{63} In summary fashion, the supreme court held as follows: "Since neither the City's ordinance nor the Enabling Statute provide any other process or procedure to review the written assessment, the City has completed its administrative process."\textsuperscript{64}

In \textit{Goddard v. City of Albany},\textsuperscript{65} an employee termination was at issue. Goddard had been the director of the civic center, but she was terminated by the city manager for poor job performance. The city manager set up a meeting with Goddard before taking final action and allowed Goddard to bring an attorney and witnesses. However, the city

\footnotesize{\textsuperscript{55} COLUMBUS, GA., CODE § 19-111 (2010).}
\textsuperscript{57} \textit{Expedia}, 285 Ga. at 685, 681 S.E.2d at 125; see also O.C.G.A. § 48-13-51(a)(1)(B)(ii).
\textsuperscript{58} \textit{Expedia}, 285 Ga. at 686, 681 S.E.2d at 125-26.
\textsuperscript{59} \textit{Id.} at 687, 681 S.E.2d at 126. \textsuperscript{60} COLUMBUS, GA., CODE § 19-117 (2010).
\textsuperscript{61} \textit{Expedia}, 285 Ga. at 687, 681 S.E.2d at 126.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} at 687-88, 681 S.E.2d at 126.
\textsuperscript{65} 285 Ga. 882, 684 S.E.2d 635 (2009).}
manager went ahead with the final termination of employment after the meeting. Goddard petitioned for a writ of certiorari to the superior court on the grounds that her meeting with the city manager had been a “quasi-judicial” hearing. The superior court determined it did not have subject matter jurisdiction and dismissed the petition for certiorari. It also denied Goddard's claim for mandamus relief and other state law claims. Accordingly, Goddard appealed to the supreme court.66

The supreme court affirmed the judgment of the superior court on every point of the appeal.67 Regarding the lack of subject matter jurisdiction, the court reviewed various city charter and personnel ordinances.68 The court held that there was no conferred right to a hearing for someone at the department head level such as Goddard and that the city manager did not act in a quasi-judicial role as that term is used in the statutes.69 Thus, the dismissal of the petition for a writ of certiorari was proper.70 Other arguments posed by Goddard, including judicial estoppel, denial of equal protection, and various tort claims, were also rejected.71

R.A.F. v. Robinson72 was a curious case in which an irate parent, who was also a licensed attorney, filed a petition for mandamus to force the Georgia Department of Early Care and Learning, the Georgia Department of Human Resources, and the DeKalb County Department of Family and Children Services to investigate the Marcus Jewish Community Center (Center) for child abuse and neglect. The basis of the complaints was punishment levied by persons at the Center making R.A.F., a minor child, remove soiled materials from a toilet after a bathroom soiling accident. The agencies had investigated the matter and found no evidence of abuse or neglect. The parent, undeterred, filed a petition for writ of mandamus. The agencies moved to dismiss, only to be met with a second amended petition seeking the relief stated above.73

After a hearing, the motion to dismiss was granted. Before the appeal took place, the parent filed a motion for reconsideration coupled with an application for certification of immediate review and a third amended petition. The parent was granted leave to file the instant appeal, but

66. Id. at 882, 684 S.E.2d at 638.
67. Id.
68. Id. at 883-84, 684 S.E.2d at 639.
69. Id. at 884, 684 S.E.2d at 639; see also O.C.G.A. § 5-4-1 (1995).
71. Id. at 884-87, 684 S.E.2d at 639-41.
73. Id. at 644-45 & n.1, 690 S.E.2d at 373 & n.1.
the superior court subsequently entered a second order dismissing the matter in its entirety.\textsuperscript{74}

Of the multiple errors cited by the parent, the supreme court dealt primarily with the dismissal of the petition for mandamus.\textsuperscript{75} Because the agencies had already looked into the matter and reached a determination, any direction from the supreme court seeking to have the agencies fulfill their duties was moot.\textsuperscript{76} Additionally, mandamus would not be proper to direct a discretionary act or somehow rectify a prior act absent some clear mistake.\textsuperscript{77}

This survey period hopefully marked the end of multiple rounds of appellate cases such as \textit{Hitch v. Vasarhelyi}.\textsuperscript{78} This plethora of cases arose because Hitch wanted to thwart his neighbor's plan to build a dock.\textsuperscript{79} Among other things, Hitch wanted a declaratory judgment that a hearing was available before an ALJ and mandamus requiring the Georgia Department of Natural Resources to allow the ALJ to rule on the dock permit application at that hearing.\textsuperscript{80}

In reviewing the decision from the superior court's denial of relief to Hitch, the court of appeals held that there was no basis for the right to a hearing.\textsuperscript{81} The two most prominent reasons the court of appeals discussed that pertained to administrative law were (1) the lack of a contested case and (2) the clear legislative intent that the hearing process would not apply to private dock applications.\textsuperscript{82}

The agency defense in \textit{Summerlin v. Georgia Pines Community Service Board}\textsuperscript{83} was based on a prior ruling that sovereign immunity of state employees did not cover borrowed servants. Summerlin brought an action against the Georgia Pines Community Service Board (Board) for the wrongful death of her son, who had been a patient at Georgia Pines. She alleged that two health care workers negligently caused her son's death. However, those two workers were actually employees from an outside staffing company.\textsuperscript{84}

\begin{itemize}
  \item \textsuperscript{74} Id. at 645, 690 S.E.2d at 373.
  \item \textsuperscript{75} Id. at 645-47, 690 S.E.2d at 373-74.
  \item \textsuperscript{76} Id. at 646, 690 S.E.2d at 374.
  \item \textsuperscript{77} Id. (quoting Bland Farms, LLC v. Ga. Dep't of Agric., 281 Ga. 192, 193, 637 S.E.2d 37, 39 (2006)).
  \item \textsuperscript{78} 302 Ga. App. 381, 691 S.E.2d 286 (2010).
  \item \textsuperscript{79} Id. at 381, 691 S.E.2d at 288.
  \item \textsuperscript{80} Id. at 383, 691 S.E.2d at 289.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} See id. at 383-84, 691 S.E.2d at 289-90. See generally O.C.G.A. §§ 12-5-283(b), -295(7) (2006); O.C.G.A. § 50-13-2(2)(2) (2009).
  \item \textsuperscript{83} 286 Ga. 693, 680 S.E.2d 401 (2010).
  \item \textsuperscript{84} Id. at 593, 690 S.E.2d at 401.
\end{itemize}
The court of appeals reversed the trial court's denial of Georgia Pines's motion to dismiss and held that borrowed servants were not state employees under the Georgia Tort Claims Act (GTCA)\(^8\) and that the waiver of immunity would thus not apply.\(^8\) After examining the GTCA, the supreme court noted that the GTCA provided a definition of "state employee," but it only stated that such person had to be an employee of the state.\(^7\) The supreme court determined that the legislature must have been aware that the term "employee" under both common law and case law included borrowed servants.\(^8\) Accordingly, the supreme court reversed and held that immunity would indeed be waived.\(^9\)

IV. JUDICIAL REVIEW OF AN ADMINISTRATIVE DECISION

In two cases decided within a day of each other, the court of appeals reaffirmed the previously established two-step process for judicial review of an administrative decision. The first case, *Lamar Co. v. Whiteway Neon-Ad*,\(^9\) illustrated the highly competitive market surrounding the location of technologically advanced multiple-message signs along state highways. In *Lamar* both parties owned signs located approximately 1200 feet apart along Interstate-85 in the City of Atlanta, and they had both been issued outdoor advertising permits by the Georgia Department of Transportation (GDOT). Subsequently, both parties applied for an additional permit to display multiple messages on their respective signs.\(^1\) Unfortunately for these two parties, O.C.G.A. § 32-6-75(c)(1)(C)\(^2\) requires multiple-message signs on the same side of the highway to be at least 5000 feet apart.\(^3\) Accordingly, only one of the parties could obtain a multiple-message permit.\(^4\) The dispute between the two companies arose from this determination.\(^5\)

In May 2005 the GDOT granted Whiteway's request to upgrade its existing sign by installing an LED message center under the condition that the sign would not change more than once every twenty-four hours. In September 2006 Whiteway submitted another request to revise its

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86. *Summerlin*, 286 Ga. at 593, 690 S.E.2d at 401.
87. Id. at 593-94, 690 S.E.2d at 402; see also O.C.G.A. § 50-21-22(7).
89. See id. at 596, 690 S.E.2d at 404.
91. Id. at 496, 693 S.E.2d at 848.
92. O.C.G.A. § 32-6-75(c)(1)(C) (2009).
93. *Lamar*, 303 Ga. App. at 495, 693 S.E.2d at 849; see also O.C.G.A. § 32-6-75(c)(1)(C).
95. See id. at 496-97, 693 S.E.2d at 850.
existing permit to a multiple-message permit. The GDOT granted the request but required the upgrade to be completed within one year, or the permit would revert back to the original sign configuration. Although the sign was upgraded within the one-year period, it "continued to change messages only once a day until approximately three weeks after the expiration of the" one-year period. In October 2007 Lamar applied for a multiple-message permit, which the GDOT denied because the sign was located within 5000 feet of Whiteway's sign. On December 6, 2007, however, the GDOT informed Whiteway that its multiple-message permit had been revoked because Whiteway had failed to change the sign within the one-year period.

Both parties appealed the GDOT's decisions, and the consolidated appeals were reviewed by an ALJ. In an initial decision, the ALJ determined that Whiteway's multiple-message permit was improperly revoked because the sign was reprogrammed as required within the one-year period, and the applicable statutes and GDOT regulations did not require that the sign display multiple messages during that time. Furthermore, because the GDOT's definition of "multiple-message sign" was evolving, the ALJ held that the GDOT's decision was not entitled to the usual deference given to an agency's interpretation of a statute it is required to enforce.

Finally, the ALJ decided that since Whiteway's multiple-message permit was valid, Lamar's application was appropriately denied for being too close in proximity to Whiteway's sign. Lamar sought agency review by the GDOT, and the deputy commissioner reversed the ALJ's initial decision. The deputy commissioner determined that allowing Whiteway to retain a permit for a multiple-message sign that was not actually in use within the required time period may violate the Supreme Court of the United States' "precedent by 'applying the more restrictive regulatory scheme for a multiple message sign to a sign that is indistinguishable from a static sign.'" Whiteway appealed the final decision, and the superior court reversed, finding that Whiteway had fully complied with all the permit requirements before the deadline. Lamar then sought discretionary review of the superior court's judgment.

96. Id. at 495-96, 693 S.E.2d at 849.
97. Id. at 496, 693 S.E.2d at 849.
98. Id. at 496, 693 S.E.2d at 849-50.
99. Id. at 496, 693 S.E.2d at 850.
100. Id. at 496-97, 693 S.E.2d at 850.
101. Id. at 497, 693 S.E.2d at 850.
102. Id.
In reviewing an administrative decision, the court of appeals first determines whether there is sufficient evidence to support the agency's findings of fact and then "examine[s] the soundness of the conclusions of law [drawn from] the findings of fact."\(^{103}\) While the any evidence rule is applicable to findings of fact, the court of appeals reviews conclusions of law de novo.\(^{104}\) In reviewing a superior court's order in an administrative proceeding, the court of appeals does not "review whether the record supports the superior court's decision but whether the record supports the final decision of the administrative agency."\(^{105}\)

Applying these established standards to this case, the court of appeals determined the GDOT deputy commissioner's final decision did not address the issues resolved by the ALJ in the initial decision and never addressed whether Whiteway failed to make the required upgrades to the sign in the one-year period.\(^{106}\) However, because the superior court incorrectly reviewed the ALJ's decision, instead of reviewing the final agency decision properly before the superior court for review, the court of appeals remanded the case for reconsideration by the GDOT, whose ruling will again be subject to superior court review.\(^{107}\)

The second case in this section also involved the two-step review process for an administrative decision with a slight twist on the standard of review applicable to the agency's findings of fact. In *Northeast Georgia Medical Center, Inc. v. Winder HMA, Inc.*,\(^{108}\) the court of appeals granted the two parties' applications for discretionary appeal, and the cases were consolidated for review.\(^{109}\) Both Northeast Georgia Medical Center (NGMC) and the Georgia Department of Community Health (DCH) challenged the superior court's reversal of the final decision of the State Health Planning Review Board (Board), which awarded a certificate of need (CON) to NGMC for a 100-bed hospital.\(^{110}\) The issue before the court of appeals was "whether the superior court had a proper basis for reversing the agency's final decision."\(^{111}\)
In November 2006 NGMC applied to DCH for a CON for a new 100-bed hospital that would replace a nearby facility.\textsuperscript{112} Three months later, Winder HMA, Inc.—d/b/a Barrow Regional Medical Center (Barrow Regional)—a competing hospital in the area, opposed NGMC’s application by alleging that NGMC was attempting to disguise a new facility as a replacement facility, which “require[d] different calculations to determine the need for a facility” under the DCH regulations.\textsuperscript{113} At a meeting a few days later, the DCH informed NGMC that it did not consider the proposed hospital to be a replacement facility, but it acknowledged a need for an additional facility in the area and advised NGMC to amend its request to seek the approval of a new hospital instead of a replacement hospital.\textsuperscript{114}

In April 2007 NGMC submitted its amended application, which Barrow Regional subsequently opposed. DCH, nevertheless, approved NGMC’s application and granted the requested CON. Barrow Regional appealed DCH’s decision, and following a full evidentiary hearing, the hearing officer affirmed the issuance of the CON. Upon appeal to the Board, the Board rejected Barrow Regional’s assertions and adopted the findings and conclusions of the hearing officer as its final decision. Next, Barrow Regional appealed to the superior court, which reversed and remanded the DCH’s final decision for consideration as a new application instead of an amended application.\textsuperscript{115} NGMC and the DCH then appealed the superior court’s decision to the court of appeals.\textsuperscript{116}

Under section 50-13-30 of the Georgia Administrative Procedure Act,\textsuperscript{117} the court of appeals had jurisdiction because the superior court’s decision terminated the proceedings regarding NGMC’s original application and was a final decision.\textsuperscript{118} Once jurisdiction was established, the court of appeals proceeded to discuss the proper two-step standard of review for an administrative decision.\textsuperscript{119} The court explained that a court must first determine whether the evidence is sufficient “to support the agency’s findings of fact[,] and second, [a] court [must] ‘examine[] the soundness of the conclusions of law [that are based on those] findings of fact.’”\textsuperscript{120} However, instead of applying the any evidence standard to the first step, as the court of appeals did in \textit{Lamar},

\textsuperscript{112} \textit{Id.} at 51, 693 S.E.2d at 112.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 51-52, 693 S.E.2d at 112.
\textsuperscript{115} \textit{Id.} at 52-53, 693 S.E.2d at 112-13.
\textsuperscript{116} \textit{See id.} at 50, 693 S.E.2d at 111-12.
\textsuperscript{119} \textit{Id.} at 54, 693 S.E.2d at 114.
\textsuperscript{120} \textit{Id.} (quoting \textit{Pruitt Corp.}, 284 Ga. at 160, 664 S.E.2d at 226).
under the CON program governed by O.C.G.A. § 31-6-44.1, the court applied a "substantial evidence" standard, which mandates that the evidence "shall be in excess of the any evidence standard contained in other statutory provisions." After applying this more stringent standard to its review of the record, the court held that DCH's decision was supported by substantial evidence.

For the second step of the review, the court of appeals examined the soundness of the DCH's conclusions of law based on its findings of fact, stating that "the reviewing court must give deference to the agency's interpretation of statutes it is charged with enforcing or administering and to the agency's own rules and regulations." The superior court determined that the DCH acted arbitrarily or unlawfully by allowing NGMC to amend its application instead of requiring it to file a new application. However, the court explained that the applicable rules and regulations adopted by the DCH provide that a determination of whether an amendment constitutes a total change is within the DCH's discretion. Giving appropriate deference to the DCH's interpretation of the applicable rules, the court of appeals held that the DCH's requirement that NGMC only file an amendment and not a new application was not plainly erroneous. Accordingly, the court held that the DCH had a rational basis to support its decision to grant NGMC's application and reversed the superior court.

The next case examines in more detail the court of appeals jurisdictional limitation as to final actions of the superior court. In Coastal Marshlands Protection Committee v. Altamaha Riverkeeper, Inc., the consolidated appeal resulted from an order from the Superior Court of Fulton County, Georgia, which reversed the AL's decision to affirm the issuance of a dock permit to a developer, Mid-Roc, LLC. The Coastal Marshlands Protection Committee (CMPC) issued the permit pursuant to the Coastal Marshlands Protection Act of 1970, which

121. O.C.G.A. § 31-6-44.1 (2009).
122. Ne. Ga. Med. Ctr., 303 Ga. App. at 55, 693 S.E.2d at 114 (internal quotation marks omitted); see also O.C.G.A. § 31-6-44.1(6).
124. Id.
125. Id. at 57, 693 S.E.2d at 116.
126. Id. at 58, 693 S.E.2d at 116-17.
127. Id. at 60, 693 S.E.2d at 118.
128. Id.
130. Id. at 1, 695 S.E.2d at 274.
allows a developer to construct a dock over state-owned marshlands.\textsuperscript{132} Altamaha Riverkeeper, Inc. (ARK) appealed the CMPC's decision to an ALJ, who affirmed the issuance of the permit. ARK then appealed the ALJ's decision to the superior court, which reversed and remanded the case back to the ALJ for rehearing. The CMPC, joined by intervening banks that held an interest in the property, sought review of the superior court's decision by the court of appeals.\textsuperscript{133}

Because the superior court's order was not final, the court of appeals determined that it was not appealable.\textsuperscript{134} The superior court's remand to the ALJ required further proceedings and reconsideration of the matter under a different standard than the ALJ had previously applied.\textsuperscript{135} The court warned, however, that the "mere use of the word 'remand' does not automatically render the superior court's order nonfinal and not appealable."\textsuperscript{136} Instead, each order must be evaluated on a case-by-case basis.\textsuperscript{137} Overall, the court determined that it was without jurisdiction to hear the appeals, and therefore, the appeals were dismissed.\textsuperscript{138}

V. OTHER STANDARDS FOR REVIEW OF AGENCY DECISIONS

The first case reviewed in this section, \textit{Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc.},\textsuperscript{139} addresses a wide range of administrative issues and errors and includes an important distinction in the appropriate standard of review an ALJ must apply when reviewing an agency decision.\textsuperscript{140} In \textit{Longleaf} the appeal arose from a Superior Court of Fulton County, Georgia ruling that "invalidat[ed] an air quality permit issued by the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources to Longleaf Energy Associates, LLC" to allow the construction of a power plant.\textsuperscript{141} Friends of the Chattahoochee, Inc. and the Sierra Club challenged the issuance of the permit, which the superior court subsequently invalidated.\textsuperscript{142} The court of appeals reversed the superior court's ruling on

\begin{itemize}
\item \textsuperscript{132} CMPC, 304 Ga. App. at 1-2, 695 S.E.2d at 274; see also O.C.G.A. § 12-5-286.
\item \textsuperscript{133} CMPC, 304 Ga. App. at 1-3, 695 S.E.2d at 274-76.
\item \textsuperscript{134} Id. at 4, 695 S.E.2d at 276.
\item \textsuperscript{135} Id. at 3, 695 S.E.2d at 276.
\item \textsuperscript{136} Id. at 3, 695 S.E.2d at 276.
\item \textsuperscript{137} See id. at 3, 695 S.E.2d at 275-76.
\item \textsuperscript{138} Id. at 4, 695 S.E.2d at 276.
\item \textsuperscript{139} 298 Ga. App. 753, 681 S.E.2d 203 (2009).
\item \textsuperscript{140} See id.
\item \textsuperscript{141} Id. at 753-54, 681 S.E.2d at 205.
\item \textsuperscript{142} Id. at 754, 681 S.E.2d at 205.
\end{itemize}
several grounds, affirmed in part, and remanded the case to the superior court with directions.143

In discussing the reasoning behind its holding, the court of appeals determined that the superior court had improperly ruled on three major issues.144 First, the superior court improperly ruled that the permit was required to include CO\textsuperscript{2} emission limits.145 The court reasoned that there was no evidence in the record of any Clean Air Act (CAA)146 "provision or Georgia statute or regulation actually controlling CO\textsuperscript{2} emissions, and . . . no federal or state court . . . ordering controls or limits on CO\textsuperscript{2} emissions pursuant to the CAA."147

Second, the superior court improperly ruled that the CAA required the EPD "to consider as part of its . . . analysis whether the proposed power plant should be required to use Integrated Gasification Combined Cycle (IGCC) technology to minimize pollution."148 The court of appeals held that IGCC analysis was not required under the CAA and that to require such an analysis was contrary to related court and administrative decisions.149

Third, the superior court improperly ruled that the EPD applied an insufficient standard to the air quality modeling.150 There was no evidence that the Georgia standard applied by the EPD was arbitrary or capricious.151

In addition to recognizing these errors, the court of appeals further determined the superior court incorrectly reversed the ALJ's rejection of the challengers' amended counts for failing to comply with the pleading requirements.152 The court noted "that administrative review [is] not designed to redo the permitting process."153 Rather, administrative review is designed to allow for review of the initial permitting decision.154 Accordingly, the challengers carried the burden of "provid[ing] notice specific enough to enable a timely informed response from opposing parties and a prompt ruling by the ALJ."155 The court of
appeals held that the challengers failed to meet the pleading requirements with respect to their asserted claims. Moreover, the court held that the superior court erred by invalidating the permit based on the fact that the EPD employees who set the applicable emission standards were not registered engineers. Because the issue was not properly raised before the ALJ, the superior court did not have jurisdiction to consider the issue.

Despite the long list of rulings the court of appeals found to be erroneous, the court of appeals held the superior court correctly determined “that the ALJ . . . fail[ed] to apply the proper standard of review, and . . . that the ALJ’s final decision must be vacated.” Pursuant to the procedural rules governing the ALJ hearing, the hearing was required to be reviewed de novo, and the ALJ was required to make “an independent decision on whether the [challengers carried their burden to prove by the preponderance of the evidence that the permit should not have been issued.” The ALJ’s decision served as the final decision of the EPD. Accordingly, the ALJ’s deference to the EPD’s decision was inconsistent with the required standard of review. While such agency deference is the proper standard of review applied by the courts when reviewing a final agency determination, such deference is not afforded when the ALJ’s review is the final decision of the agency. The case was ultimately remanded “to the superior court with directions that the ALJ’s final decision be vacated, and that the Court remand the case to the ALJ to consider the evidence under the correct standard of review.”

The next case is revisited from last year’s survey. In Sumter Electric Membership Corp. v. Georgia Power Co., the supreme court granted certiorari to determine whether the court of appeals interpretation of O.C.G.A. § 46-3-4(4) was erroneous. The factual issue in the case centered around how territorial rights for electricity suppliers

156. Id. at 766, 681 S.E.2d at 213-14.
157. Id. at 767, 681 S.E.2d at 214.
158. Id.
159. Id. at 770, 681 S.E.2d at 216.
160. Id. at 768, 681 S.E.2d at 215.
161. Id.
162. Id. at 769, 681 S.E.2d at 215.
163. Id.
164. Id. at 770, 681 S.E.2d at 216.
166. 286 Ga. 605, 690 S.E.2d 607 (2010).
168. Sumter Electric, 286 Ga. at 606, 690 S.E.2d at 608.
are determined. The court of appeals applied only limited deference to the Public Service Commission's (PSC) interpretation of the statute. The supreme court agreed with the level of deference given, determining that "[a]lthough the PSC's interpretation of an act is entitled to great deference, this case does not involve interpretation of a technical question necessary to the administration of a law. It simply requires a judicial determination as to whether the PSC correctly interpreted the plain meaning of the statute." Because the PSC did not correctly interpret the plain meaning of the statute, the judgment of the court of appeals was affirmed. The newest member of the supreme court, Justice Nahmias, noted in his concurrence that while the parties spent a significant amount of time on corridor rights, the court did not need to decide that issue because no such rights were ever created for the electrical line.

The final case in this section, Georgia State Licensing Board for Residential & General Contractors v. Allen, is a 4-3 split decision from the supreme court involving the steadfast legal principle that ignorance of the law is no defense. The Georgia State Licensing Board for Residential and General Contractors (Board) appealed two orders from the Superior Court of Muscogee County, Georgia, in a suit brought by over forty contractors, the plaintiffs, against the Board and the Columbus-Muscogee County Consolidated Government (County) "seeking declaratory judgment, injunctive relief, and damages in regard to a statewide licensing system for residential and general contractors (licensing law)." The discussion for this Article will focus on the Board's challenge to the preliminary injunction granted to the plaintiffs relating to the enforcement of the licensing law.

The Board licenses and regulates general and residential contractors in Georgia. Under Georgia law, "a valid residential or general contractor license issued by the Board is required to lawfully engage in the business of residential and general contracting within the state." Applicants must normally pass on examination and meet certain

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169. See id. at 605-06, 690 S.E.2d at 607-08.
171. Sumter Electric, 286 Ga. at 607, 690 S.E.2d at 608-09 (citation omitted).
172. Id. at 607, 690 S.E.2d at 609.
173. Id. at 608, 690 S.E.2d at 609 (Nahmias, J., concurring).
175. Id. at 811-12, 692 S.E.2d at 344-45.
176. See id. at 812, 692 S.E.2d at 345.
177. Id.
178. Id.; see also O.C.G.A. § 43-41-17(a) (2008).
requirements to obtain the license. For an eighteen-month period, the law allowed a contractor to apply for an exemption to the examination if the local government required a local license, and if the criteria was "at least as strict and stringent, in the sole judgment of the Board, as those for the issuance of a corresponding state-wide license." Since the County had a local licensing requirement in place, the plaintiffs claimed that they were entitled to the state exemption and that the County failed to give timely notice of the change in the licensing law as required under O.C.G.A. § 43-41-14(b), thereby preventing them from filing for the exemption prior to its expiration. Finding that the harm to the plaintiffs outweighed the burden on the Board and the County, the superior court issued a preliminary injunction restraining the Board and the County from enforcing the licensing law pending a final determination. The Board appealed the issuance of the preliminary injunction.

The supreme court determined that the plain language of O.C.G.A. § 43-41-14(b) requires notice of the licensing requirements and the effective dates of the requirements but not the available exemptions. Furthermore, the court noted that O.C.G.A. § 1-3-6 states, "After they take effect, the laws of this state are obligatory upon all the inhabitants thereof. Ignorance of the law excuses no one." Thus, under this general statute, the plaintiffs were charged with notice of the licensing law, including the expiration of the exemption. Moreover, injunctive relief is only appropriate when it is needed to preserve the status quo until the final adjudication of a case. The preliminary injunction oppressed the rights of the County, the Board, and the citizens of Georgia by enjoining the licensing law from safeguarding the public against unqualified residential and general contractors. The preliminary injunction was unnecessary because the plaintiffs still had a remedy available to them if they successfully challenged the licensing

179. Allen, 286 Ga. at 813, 692 S.E.2d at 345.
180. Id. at 812-14, 692 S.E.2d at 345-46 (internal quotation marks omitted); see also O.C.G.A. § 43-41-17(c)(2)(A) (2008).
183. Id. at 817, 692 S.E.2d at 348.
184. O.C.G.A. § 1-3-6 (2000).
185. Allen, 286 Ga. at 817, 692 S.E.2d at 348 (citation omitted); see also O.C.G.A. § 1-3-6.
186. Allen, 286 Ga. at 818, 692 S.E.2d at 349.
187. Id.
law—they could seek monetary damages for any work lost due to the licensing law during the applicable time period.\textsuperscript{188}

The dissent, written by Justice Benham and joined by Justices Carley and Thompson, adamantly disagreed with the majority's reversal of the preliminary injunction.\textsuperscript{189} Prior to the enactment of the state's licensing law, contractors such as the plaintiffs were only required to obtain a local license in Muscogee County. There was no notice given by the County as to the change in this policy or the expiration of the available exemption. Many of the plaintiffs testified at the preliminary injunction hearing that they were not aware of the exemption and that it therefore did not apply.\textsuperscript{190} Furthermore, the Board did not make a decision as to whether the County's local licensing requirements were "substantially similar to the state examination" until after the expiration of the exemption.\textsuperscript{191} Accordingly, the plaintiffs were no longer able to apply for the exemption following the determination by the Board that the County's local license met the statutory requirements.\textsuperscript{192} Because the facts of the case did not reflect an abuse of discretion as to the issuance of the preliminary injunction, the dissent would have upheld the superior court's order.\textsuperscript{193}

VI. 2010 LEGISLATION

Having little or no funds to work with because of a revenue shortfall, but realizing that 2010 was a re-election year, the General Assembly made an unexpectedly high number of changes in the realm of administrative agencies. The highlights were as follows:

1. There is now a Georgia Halls of Fame Authority Overview Committee, which takes over the role of the Georgia Music Hall of Fame Authority Overview Committee, with a combination of oversight for the Georgia Music Hall of Fame Authority and the Georgia Sports Hall of Fame Authority.\textsuperscript{194}

2. The Georgia Golf Hall of Fame Authority and the Georgia Golf Hall of Fame are gone.\textsuperscript{195}

\textsuperscript{188} Id.

\textsuperscript{189} Id. at 819, 692 S.E.2d at 349 (Benham, J., dissenting).

\textsuperscript{190} Id. at 820, 692 S.E.2d at 350.

\textsuperscript{191} Id. at 821, 692 S.E.2d at 350-51 (internal quotation marks omitted).

\textsuperscript{192} Id. at 821, 692 S.E.2d at 351.

\textsuperscript{193} Id.


3. The Georgia Agrirama Development Authority has been abolished, with the Board of Regents of the University System of Georgia inheriting the State Museum of Agriculture.\textsuperscript{196}

4. There is now a Joint Committee on Water Supply comprised of legislators to implement and oversee the expansive legislation on water matters enacted in 2010.\textsuperscript{197}

5. Advanced geography lives on with the establishment of the Georgia Geospatial Advisory Council.\textsuperscript{198}

6. There is now a Georgia Foundation for Public Education.\textsuperscript{199}

7. The State Ethics Commission has become the Georgia Government Transparency and Campaign Finance Commission.\textsuperscript{200}

8. The General Assembly created a 2010 Special Council on Tax Reform and Fairness for Georgians and a Special Joint Committee on Georgia Revenue Structure.\textsuperscript{201}

9. The Department of Transportation has a new statutorily created division known as the Intermodal Division.\textsuperscript{202}

10. The Georgia Workforce Investment Board and the Governor’s Office of Workforce Development have been established.\textsuperscript{203}

11. The Department of Public Safety has a brand new statutory division known as the Capitol Police Division.\textsuperscript{204}

12. The Georgia Athlete Agent Regulatory Commission is abolished.\textsuperscript{205}


13. The Georgia Environmental Facilities Authority has undergone a name change and is now the Georgia Environmental Finance Authority.\textsuperscript{206}

14. The Georgia Class Nine Fire Department Pension Fund has been repealed, and all of its functions have been transferred to the Georgia Firefighters' Pension Fund.\textsuperscript{207}

15. The Employees’ Retirement System of Georgia will no longer provide oversight for the Employees’ Social Security Coverage Group.\textsuperscript{208} That function has shifted to the State Personnel Administration.\textsuperscript{209}

16. There is now a Georgia Coordinating Committee for Rural and Human Services Transportation,\textsuperscript{210} along with a Transit Governance Study Commission.\textsuperscript{211} Both of these groups are part of advances made in comprehensive legislation regarding transportation in our state.

17. For the first time since the 1960s, Georgia will have a State Treasurer. The Office of Treasury and Fiscal Services has now been renamed as the Office of the State Treasurer, and its director receives the new title.\textsuperscript{212}

18. In order to facilitate coordinated actions among governments, there is now a Commission on Regional Planning.\textsuperscript{213}


\textsuperscript{209} Id. at §§ 1, 7, 2010 Ga. Laws at 1248, 1252.

\textsuperscript{210} Ga. H.R. Bill 277, § 4, Reg. Sess., 2010 Ga. Laws 778, 784 (codified at O.C.G.A. §§ 32-12-1 to -6 (Supp. 2010)).

\textsuperscript{211} Id. at § 7, 2010 Ga. Laws at 803 (codified at O.C.G.A. § 50-32-5 (Supp. 2010)).

