



A practical introduction
to administrative law
in Michigan

The Basics

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Perhaps the most significant development in American law over the past 30 years has been the explosion in law created, implemented, and enforced by administrative agencies. The number of federal and state administrative regulations has grown to impact almost every aspect of commercial life. As a practical matter then, most lawyers will—regardless of their specific area of expertise—practice “administrative law” in some form. Properly understood, the practice of administrative law goes beyond knowledge and application of specific regulations to a particular situ-

ation. The effective practice of administrative law requires an understanding of the basic attributes of administrative agencies, the source of agency authority, how agencies legislate, and how disputes between agencies and the regulated public are adjudicated. This article introduces newcomers to administrative law with these concepts and highlights some of the basic differences in practice and procedure between administrative agencies and courts of law. It is intended to be a broad overview and includes generalizations that may not apply in all circumstances.

Fast Facts

Administrative law is the law concerning the exercise of authority by administrative agencies and their relationship to the legislature, courts, and the public.

State agencies have only those powers granted them by the legislature.

Duly promulgated agency rules have the same force and effect as laws.

What is Administrative Law?

In essence, “administrative law” is the law concerning the exercise of authority by administrative agencies and their relationship to the legislature, courts, and the public. The effective practice of administrative law therefore requires: (1) an appreciation of the need for administrative agencies to assume a legislative role when implementing broad (and often vague or even contradictory) policy directives from the legislature, and (2) an understanding of the constitutional, statutory, and judicial constraints on this role. Administrative law also implicates the tension between the judicial branch and adjudicative powers invested in administrative agencies, which are part of the executive branch of government. Of course, the practice of administrative law further requires knowledge and application of substantive regulations governing an area of practice, but this aspect of the practice is framed by the larger issues involving the scope and extent of administrative authority.¹

What is an Administrative Agency?

The Michigan Constitution of 1963 authorizes and establishes the creation of agencies as part of the executive branch of Michigan state government.² Section 3(2)³ of the Michigan Administrative Procedures Act (MAPA) defines an agency broadly as any state “department, bureau, division, section, board, commission, trustee, authority, or officer” that is “created by the constitution, statute, or agency action.” Pursuant to Const art 5, § 2 and the Executive Organization Act of 1965,⁴ most state agencies are housed within several principal departments, subject to reorganization by the governor through executive orders. Importantly, agencies, boards, and so forth, created under the authority of local units of government do not qualify as an “agency” under MAPA and are generally not subject to the same requirements and constraints that apply to state agencies. The nature and scope of the powers exercised by these local governmental agencies are most often governed by various enabling acts and other statutes governing the operation of counties, cities, etc.

What Powers Do Agencies Have?

State agencies have only those powers granted them by the legislature.⁵ However, courts liberally construe the specific powers granted to agencies.⁶ In determining the nature and extent of an agency’s authority, it is critical to examine the statutes creating the agency or granting the agency authority to implement the regulatory program at issue. In addition, it is important to become familiar with MAPA, which delineates the general practice and procedures applicable to all state agencies.

Agencies often possess a broad range of conferred powers, including investigatory and enforcement authority.⁷ However, rulemaking and adjudication are two of the primary ways agencies exercise their authority.

Rulemaking

Rulemaking is how agencies exercise their legislative-type powers. Agency rulemaking is governed by Chapter 3 of MAPA.⁸ MAPA’s rulemaking requirements are extensive. The process includes publication of proposed rules in the Michigan Register, review by the Legislative Services Bureau, Office of Regulatory Reform, and the Joint Committee on Administrative Rules, public hearings, and a comment period. MAPA defines “rule” to mean “an agency regulation, statement, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency.”⁹ Therefore, virtually any kind of agency standard or instruction of “general applicability” to the public is a rule and must be promulgated in accordance with MAPA’s rulemaking provisions to be valid and enforceable.¹⁰

Duly promulgated agency rules have the same force and effect as laws. The rules of statutory construction apply to administrative rules.¹¹ Violations of rules can be a crime, *if* the enabling statute so provides. However, an agency cannot, by promulgation of a rule, itself make an act or omission a crime.¹² Michigan rules are codified in the Michigan Administrative Code of 1979. Rules (and rule amendments) promulgated after 1979 are found in the Annual Administrative Code Supplements (AACs) and the Michigan Register. (The Michigan Register contains the most recent rule promulgations—promulgations over the past 12–24 months—that have not yet been included in the AACs.) Agency rules and the Michigan Register can also be found on the Internet at the Office of Regulatory Reform website (www.state.mi.us/orr). It is also important to be aware of federal regulations and policy guidance that may be applied by state agencies depending on the regulatory program involved.

One of the most common areas of dispute between agencies and the public is whether an agency’s internal guidelines or policies must be promulgated as a rule to be enforceable. MAPA recognizes that agencies need to develop guidelines setting internal procedures

the agency will follow and gives requirements for establishing such guidelines.¹³ However, MAPA narrowly defines “guidelines” to mean only agency statements and policies that, while binding the agency, do “not bind any other person.”¹⁴ Any agency policies, procedures, or statements that are intended to, or have the effect of, binding persons outside the agency are arguably “rules” and are unenforceable against such persons unless promulgated as rules.¹⁵

Practitioners of administrative law must always be wary of “secret rules”¹⁶ that, while never subjected



to public scrutiny, establish standards or procedures that the agency routinely enforces against the public. Some agencies have entire regulatory programs based on standards and procedures that have never been promulgated as rules. These situations present the difficult situation of dealing with an agency when the guidance the agency relies upon in regulating your client is not readily accessible to you or the public. However, these situations also present an avenue of legal challenge to the agency position and a better chance of achieving a negotiated resolution of the dispute at hand.

Agency Adjudication

In addition to legislative, or rulemaking, authority, among the most important powers granted to agencies is adjudicative authority. The legislature has invested many agencies with the power to adjudicate disputes arising under a particular statute or under an agency's own rules, including enforcement matters. Providing agencies with adjudicative authority is motivated by the sound policy of promoting uniform implementation of complicated regulations and taking advantage of the expertise the agency has in dealing with the subject matter within its jurisdiction.¹⁷

The courts have facilitated this policy through the doctrines of "primary jurisdiction" and "exhaustion." The doctrine of primary

judicial" powers.²¹ Unlike courts, agencies may not determine the validity of their enabling statutes and promulgated rules when adjudicating disputes.

Many agencies have their own unique rules governing proceedings before their administrative law judges or other decisionmakers. Practitioners should first determine if there are such rules, and then familiarize themselves with the MAPA contested case procedures described below. In terms of pre-hearing procedure, practitioners must determine if the agency has subpoena power and to what extent discovery is available. Most hearings before administrative tribunals—even evidentiary hearings—tend to be less formal than hearings before courts.²² However, this does not mean that they are any less important. The practitioner must take care to prepare the administrative record for judicial review, including preservation of any constitutional or evidentiary issues.

Chapter 4 of MAPA²³ delineates the basic procedures to be followed in "contested cases" proceedings before administrative agencies—proceedings involving an evidentiary hearing. These MAPA hearing procedures require application of the Michigan Rules of Evidence to the extent practical and provide for pre-hearing motion practice.²⁴ MAPA also provides for preparation of a Proposal for Decision (PFD) by administrative law judges or other decisionmakers in cases where the decisionmaker is not the "final" decisionmaker

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jurisdiction posits that, even in cases where a circuit court has concurrent jurisdiction over a matter before an administrative agency, it will defer to the agency to adjudicate the matter.¹⁸ Exhaustion is a jurisdictional barrier restraining a court from adjudicating a claim before the aggrieved party has pursued all remedies available before the pertinent agency.¹⁹ As a practical matter then, a person aggrieved by an agency licensing decision, enforcement action, or other determination must use administrative proceedings to remedy the situation if such proceedings are available. In such cases, there is no right of judicial review until after completion of the agency proceeding.

Newcomers to administrative law should be aware of the differences between administrative proceedings and judicial proceedings. While agencies can perform quasi-judicial functions and adjudicate the rights of individuals, agencies are not courts of law and are constitutionally prohibited from acting as such.²⁰ Accordingly, administrative tribunals have no inherent equitable powers, do not routinely address constitutional issues, or exercise other "purely

within the agency."²⁵ (In hearings concerning a person's eligibility for benefits, the presiding officer usually is the final decisionmaker.)

The PFD must include the rationale for the decision and specific findings of fact and law on each issue necessary to resolve the case. The purpose of the PFD is to provide enough detail about the decision to facilitate exceptions and a final decision.²⁶ Following issuance of the PFD, the parties are given an opportunity to file comments or "exceptions" to the PFD. The PFD is then forwarded to the final decisionmaker (often the head of the agency or a designee) for a final determination. The final decisionmaker may permit oral argument before making a determination. Once made, the determination becomes final agency action subject to judicial review.

The avenues of judicial review of agency decisions, scope of review, and issues arising under these topics are discussed in detail elsewhere in this issue. Judicial review of final agency action is available in most cases. Judicial review in contested cases may be governed by MAPA or the statute or statutes applicable to the specific

agency. Section 631 of the Revised Judicature Act²⁷ provides a third potential alternative for judicial review of final agency decisions that do not qualify for review under MAPA and where review is not provided for in statutes applicable to the specific agency. It is important to carefully evaluate these three potential avenues of review and focus on the deadlines they establish for filing petitions for review.

Conclusion

Due to the astounding growth in administrative regulations over the past 30 years, virtually every area of law practice involves, to some extent, the practice of administrative law. Almost all practitioners would be well advised to familiarize themselves with the basic aspects of practice involving administrative agencies and to develop an understanding of the issues framing the relationship between agencies and the regulated public. ♦

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Footnotes

1. For a detailed treatment of virtually every aspect of administrative law in Michigan, see LeDuc, *Michigan Administrative Law* (1993).
2. Const 1963, art 5, § 2.
3. MCL 24.232.
4. MCL 16.101.
5. *Union Carbide Corp v Public Service Comm'n*, 431 Mich 135; 428 NW2d 322 (1988).
6. *McKibbin v Corp and Securities Comm'n*, 369 Mich 69; 119 NW2d 557 (1963).
7. *Automotive Service Counsels of Michigan v Secretary of State*, 82 Mich App 574; 267 NW2d 698 (1978) lv den.
8. MCL 24.231-.264.
9. MCL 24.207.
10. *Detroit-Base Coalition for the Human Rights of the Handicapped v Dept of Social Services*, 431 Mich 172; 428 NW2d 335 (1988).
11. MCL 24.232(1).
12. MCL 24.232(3).
13. MCL 24.224-.227.
14. MCL 24.203(6).
15. *Detroit-Base Coalition for the Human Rights of the Handicapped v Dept of Social Services*, 431 Mich 172; 428 NW2d 335 (1988).
16. *Greenfield Const Co v Michigan Dept of State Highways*, 402 Mich 172, 210; 261 NW2d 718, 731 (1978).
17. LeDuc, *Michigan Administrative Law*, § 10.01 p 5.
18. See e.g. *Cherry Growers, Inc v Agricultural Marketing and Bargaining Bd*, 240 Mich App 153; 610 NW2d 613 (2000).
19. MCL 24.301; MSA 3.560(201); See also *IBM Corp v State Dept of Treasury, Revenue Division*, 75 Mich App 604; 255 NW2d 702 (1977).
20. Const 1963, art 3, § 2; see also *Judges of the 74th Judicial District v Bay County*, 385 Mich 710; 190 NW2d 219 (1971).
21. *Dation v Ford Motor Co*, 214 Mich 152; 22 NW2d 252 (1946).
22. *Sponik v Detroit Police Dept*, 49 Mich App 162; 211 NW2d 674 (1973). (Agency hearings must conform to dictates fundamental due process but need not duplicate a trial.)
23. MCL 24.271-.287.
24. MCL 24.275, .280(1)(d).
25. MCL 24.281.
26. See e.g., *Tziahonas v Dept of Licensing and Regulation*, 143 Mich App 75; 372 NW2d 477 (1985).
27. MCL 600.631.