

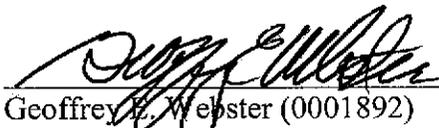
IN THE SUPREME COURT OF OHIO

MEDCORP, INC.	:	
	:	
Appellee,	:	Case No. 2008-0584 and 2008-0630
	:	
v.	:	On appeal from the Franklin County
	:	Court of Appeals, Tenth Appellate
OHIO DEPARTMENT OF JOB	:	District Court of Appeals
AND FAMILY SERVICES	:	Case No 07 APE 04-312
	:	
Appellant.	:	

**MOTION OF APPELLEE MEDCORP, INC.,
FOR RECONSIDERATION**

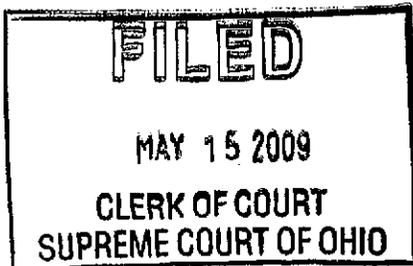
Pursuant to Rule XI § 2 of the Rules of Practice of the Supreme Court of Ohio, Appellee Medcorp, Inc., respectfully requests that the Court reconsider its Opinion issued May 7, 2009, in the above-referenced case and adopt the position of the dissenting opinions or, in the alternative, modify the Opinion so as to restrict its effect to matters for which appeals have been filed after the issuance of this Court's Decision and Entry. The reasons for this request are more fully set forth in the Memorandum in Support attached hereto and incorporated herein by reference.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Reconsideration before this Court is appropriate if it is confined strictly to the grounds urged for reconsideration, is not a re-argument of the case, and is filed with respect to one of the criteria listed in S.Ct.Prac.R. XI(2)(B), including, as in this case, a decision on the merits. S.Ct.Prac.R. XI(2)(B). The Court may invoke its reconsideration procedures in order to “correct decisions which, upon reflection, are deemed to have been made in error.” *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, quoting *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383. See, also, *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 597 (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration); *State ex rel. Eaton Corp. v. Lancaster* (1989), 44 Ohio St.3d 106 (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for “rehearing”).

The Court is urged to invoke its reconsideration procedures in this case for the same reason, and to vacate the Opinion and adopt the position of the dissenting opinions, particularly the opinion of Justice Lundberg Stratton or, in the alternative, modify the Opinion so as to restrict its effect to prospective application only.

The Opinion’s syllabus holds that “[t]o satisfy the ‘grounds of the party’s appeal’ requirement in R.C. 119.12, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal.” The majority bases this holding on the intent of the General Assembly in enacting the Administrative Procedures Act. Opinion at ¶ 13. However, the Opinion does not refer to any particular authority, and a review of the legislative history of the Administrative Procedure Act reveals the Court misinterpreted the General Assembly’s clear intent with regard to the appeals process.

The Report of the Administrative Law Commission submitted to the 95th General Assembly in 1943 (the “ALC Report”) discussed in detail how the judicial review provisions in the Administrative Procedure Act arose. See Am. Sub. S. B. No. 36, 120 Ohio Senate Journal (1942-1943) 1119-1138, attached. The most prevalent concern was the considerable variation and confusing lack of uniformity in various agencies’ procedures for having an administrative order reviewed by another tribunal. 120 Ohio Senate Journal, 1122-1123. This concern clearly is at odds with the Court’s conclusion that a need for “flexibility in selecting the process for resolution” (Opinion at ¶ 18) was the driving concern for the Act’s review procedures. Rather, the goal was to establish consistency and predictability as well as provide broad and easy access to the appeals process.

The legislature’s goals, which have not changed, are eliminated by this Opinion. Every appeal pursuant to R.C. 119.12 will now involve the time-consuming and expensive process of having the court determine whether an appellant has stated his grounds for appeal with sufficient specificity. As a timely illustration, see the attached motion to dismiss an administrative appeal before the Tenth District in *Burton Health Care Center v. Ohio Dept. of Health*, Franklin App., Case No. 09APH03 0256, filed the day after this Opinion was issued. Based on the Opinion, the moving party attacks not only the notice’s restatement of the statutory grounds, but further argues that, although the notice specifies certain errors, because it states that these were just “some of the errors” and not all of the errors, the notice is defective as to all errors. Thus, the slippery slope of determining the sufficiency of the “specific legal or factual errors” in a notice of appeal has begun. This will be the legacy of this Opinion if it is not vacated. Common pleas courts will now be required to determine, before ever reaching the merits of an appeal, whether

every notice sets forth sufficient legal or factual errors, and how much is enough. This was never the intent of the General Assembly.

That the Opinion misinterprets the General Assembly's intent is further illustrated by a historical review of the proposed bill. The ALC Report proposed that administrative orders be appealed to a newly established administrative board of review, and after board decision directly to the Supreme Court. See 120 Ohio Senate Journal, 1129-1137 (§§ 145-61 – 154-83). Whereas the appeal to the *board of review* contained the exact language currently found in R.C. 119.12 (“Any such person desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the *grounds of his appeal.*”), appeals from the board of review to the Ohio Supreme Court, which required *leave*, required a notice which set forth “*errors therein complained of.*” [Emphasis added.] See 120 Ohio Senate Journal, 1134-1135 (§ 154-77). Thus, as the language of these two procedures bear out, at the time the Administrative Procedure Act was being considered the General Assembly clearly regarded the term “grounds” and the term “errors” to have separate and distinct meanings. By contrast, the majority Opinion mistakenly *equates* the two terms.

In the legislative process following the introduction of this bill, the proposed appeal to the board of review was abolished in favor of an appeal to the court of common pleas and, as a result, the procedures were consolidated into the immediate predecessor of the current R.C. 119.12. In doing so, the General Assembly adopted the use of the term “grounds” rather than “errors.” If this Court's analysis of the General Assembly were correct, one would expect the consolidation process of “grounds for appeal” and “error therein complained of” to be resolved in favor of the latter. After all, the original bill made an obvious distinction between an appeal to another administrative agency and the appeal to the Supreme Court. However, taking into

account the General Assembly's acute awareness regarding the distinctions between "errors" and "grounds," the only possible conclusion must be that it was the General Assembly's express intent to not require the level of specificity this Court is now reading into R.C. 119.12, as the dissenting opinions point out. While the Opinion at ¶ 13 suggests that the Court "must construe statutes so as to give effect to the General Assembly's intent in enacting them," to interpret the "grounds" requirement in R.C. 119.12 as equivalent to the assignment of errors in the court of appeals or the propositions of law asserted in the Supreme Court directly contradicts the General Assembly's careful selection of terminology when enacting the Administrative Procedure Act.

Ultimately, this decision will result in immense uncertainty by abandoning a predictable and consistent, 65 year-old standard for administrative appeals which served the predominant goal of achieving uniformity and ease of access to court. The Opinion, if upheld, will create additional and unnecessary litigation before already over-worked court of common pleas judges and achieve the opposite of the General Assembly's intent. Uniformity will now be replaced by uncertainty, and it appears doubtful whether future case law will be able to recreate what the 95th General Assembly intended when enacting the Administrative Procedure Act in 1943.

There is no persuasive reason to deviate, as the Opinion does, from this well-established legal history. The Opinion tilts the playing field decisively in government's favor and creates yet another procedural obstacle that an appellant must face in order to obtain judicial review. While the majority's concern may have been directed at the fairness of the process to the unsophisticated appellant who files an appeal but identifies no issues and files no brief, it is in fact that appellant who is now most at risk.

Notwithstanding the fact that if a layman is not likely to file a brief or other paper explaining his position, he also is not likely to divine from the appeal instructions in the agency

order or the statutory “grounds” language of R.C. 119.12 the need to state “specific legal or factual errors.” How, then, will that same appellant now cope with a motion to dismiss from an assistant attorney general? Is that process more fair?

An overwhelming majority of common pleas courts in Ohio have adopted specific procedures and briefing schedules for administrative appeals. Many of these courts, such as Franklin County, issue a docketing statement with pre-set briefing dates when the appeal is filed. Those few that do not have established procedures treat administrative appeals like any other civil action and hold initial status conferences where issues, and briefing schedules if desired, can be discussed. The potential problem, therefore, of a court being unaware of the issue on appeal is minimal at best.

If, despite these processes, an appellant still fails to file a brief, as the majority points out in ¶ 19, then of course the appellant runs the risk of an adverse decision. But that risk is no different than when an appellant fails to file a brief in the court of appeals or Supreme Court. At least under those circumstances, however, the appellant has the opportunity to discover the procedures and present his issues knowing already the court has subject matter jurisdiction.

The majority expresses concern that R.C. 119.12 should not be read as to excise the “grounds” requirement from it. But, the counter-effect of the Opinion is to make redundant each common pleas court’s local rules on administrative appeals, with the added risk that if the errors stated in the notice of appeal are not specific enough (a standard that will vary on any given day before any of a multitude of judges assigned to an administrative appeal), the unwary appellant has no jurisdiction at all.

This particular case also implicates the Medicaid program, whose operation at the state level is governed by a host of federal standards, one such feature of which is the performance of

audits and claims review. See 42 U.S.C. 1396a(a)(37), (42). The provision of (and the payment for) care and services is subject to an overall standard set by Congress that “care and services will be provided in a manner consistent with *simplicity of administration and in the best interests of the recipients.*” [Emphasis added.] 42 U.S.C. 1396a(a)(19). As a result of this decision, Ohio cannot any longer claim that its administration of the state’s Medicaid program meets these elements.

A final, though not insignificant, concern is the retroactive effect of the Opinion. “A judgment rendered by a court lacking subject matter jurisdiction is void *ab initio.*” *Patton v. Diemer* (1988), 35 Ohio St.3d 68, paragraph three of the syllabus. A void judgment is “one that a court imposes despite lacking subject-matter jurisdiction or the authority to act.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, citing *State v. Wilson* (1995), 73 Ohio St.3d 40, 44. The authority to vacate a void judgment “constitutes an inherent power possessed by Ohio courts.” *Patton v. Diemer, supra*, at paragraph four of the syllabus. Such a judgment may be challenged at any time, directly or collaterally. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980.

As a result of this Opinion, any common pleas court which has ever considered an administrative appeal where the appellant appealed using the same or similar language used in this case has no subject matter jurisdiction. Thus, the thousands of administrative appeal decisions rendered by common pleas courts in the past 65 years, where the notice of appeal was similar to the one at issue here, are now *void* – not voidable. The undersigned have received numerous calls from administrative law attorneys stating this language has been routinely used and accepted over periods of practice ranging more than 30 years. From license revocation cases to overpayment matters, nothing prevents an agency from now seeking to impose its original

order on the unsuspecting appellant, regardless of the passage of time. See *Patton v. Diemer*, *supra*, at paragraph four of the syllabus. There is no standard that governs the uniform application of voiding of judgments, so agencies may pick and choose which cases they desire to overturn. It is no answer to state the executive branch will be “fair,” for if that were true there would be no need for an administrative appeals process in the first place. Surely, this was not the intended effect of the majority’s Opinion, but it is a certain result.

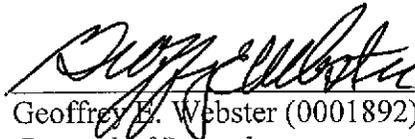
As noted in the Syllabus of the Court, number 2, “An Ohio court has discretion to apply its decision only prospectively after weighing the following considerations: (1) whether the decision establishes a new principle of law that was not foreshadowed in prior decisions, (2) whether retroactive application of the decision promotes or retards the purpose behind the rule defined in the decision, and (3) whether retroactive application of the decision causes an inequitable result.” *Dicenzo v. A-Best Prods. Co., Inc.* (2008), 120 Ohio St. 3d 149.

In the event the Court, upon reconsideration, refuses to see the error in its holding and adopt the position of the dissenting opinions, the Court is urged to modify the Opinion so as to restrict its effect to prospective cases, including Appellee Medcorp, Inc. At least four judges and an agency-appointed hearing examiner have examined the merits and full record in this case and have held the nearly \$600,000.00 (plus interest) claimed by the agency to be due is in fact *not* due. If this Court desires to fashion a new rule concerning judicial review of administrative actions so vastly different from 65 years of well-settled practice of the Bar, and which implicates subject matter jurisdiction where never before implicated, it should do so prospectively only and without prejudice to the untold numbers of citizens of this state who filed under the previous accepted standard of practice. Any other holding is unfair to Ohio’s citizens and contrary to the purposes of government.

CONCLUSION

For the foregoing reasons, Medcorp, Inc., respectfully requests that the Court vacate the Opinion and adopt the position of the dissenting opinions, particularly the opinion of Justice Lundberg Stratton or, in the alternative, modify the Opinion so as to restrict its effect to matters for which appeals have been filed after the issuance of this Court's Decision and Entry.

Respectfully submitted,



Geoffrey E. Webster (0001892)
Counsel of Record

J. Randall Richards (0061106)

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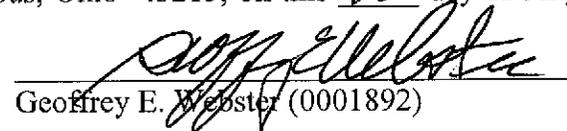
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PROOF OF SERVICE

I hereby certify that a copy of this Motion for Reconsideration was served via hand delivery to counsel for appellants, Benjamin C. Mizer, Solicitor General, Stephen P. Carney, Deputy Solicitor, Ara Mekhjian, Assistant Attorney General, Health and Human Services Section, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this 15th day of May, 2009:



Geoffrey E. Webster (0001892)

**REPORT OF THE ADMINISTRATIVE LAW COMMISSION
THE ADMINISTRATIVE LAW COMMISSION**

Chairman:

Arthur T. Martin, Dean of the College of Law, Ohio State University.

Vice-Chairman:

Donald C. Power, Executive Secretary to the Governor.

John F. Connolly, Senator.

J. L. W. Henney, Secretary of the Ohio State Bar Association.

Paul M. Herbert, Lieutenant Governor.

Thomas J. Herbert, Attorney General.

Harold W. Houston, Majority Floor Leader of the House of Representatives.

William M. McCulloch, Speaker of the House of Representatives.

Harold L. Mason, Minority Floor Leader of the House of Representatives.

Fred G. Reiners, Senator.

Frank E. Whittemore, President Pro Tempore of the Senate.

Executive Secretary:

Robert H. Hoffman (Appointed November, 1942).

Frederick J. Milligan (Resigned July, 1942, to enter military service).

Research Assistant:

Joseph V. Ralston.

To the 95th General Assembly,

To His Excellency, The Governor, The Honorable John W. Bricker.

Gentlemen:

In accordance with the provisions of the act creating the Administrative Law Commission, Amended Senate Bill 324 of the 94th General Assembly, Section 376 of the Ohio General Code, that Commission herewith presents a report of its study and recommended legislation.

JOHN F. CONNOLLY,

J. L. W. HENNEY,

PAUL M. HERBERT,

THOMAS J. HERBERT,

HAROLD W. HOUSTON,

WILLIAM M. MCCULLOCH,

HAROLD L. MASON,

FRED G. REINERS,

FRANK E. WHITTEMORE,

DONALD C. POWER, *Vice-Chairman,*

ARTHUR T. MARTIN, *Chairman.*

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S, Chairman
Vice Chairman

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REPORT OF THE ADMINISTRATIVE LAW COMMISSION

a. Creation of the Commission

The rapid growth of administrative agencies is one of the most significant governmental developments of recent years. These agencies, almost unknown sixty years ago, now are a prominent part of state and national governmental structures. In spite of this seeming acceptance of administrative agencies, they have been widely criticised for failing to adhere to standards and values accepted in other branches of government. This deficiency arises primarily from the manner in which administrative agencies function. Created, as each is, for a particular purpose, the tendency has been to let each agency work out its own administrative process as it sees fit. The result has been lack of uniformity in the procedures of the numerous agencies, and some lack of adherence to fundamental standards.

This general problem has been the subject of much discussion and of some organized study in New York State and in the national government.¹ However, very little progress has as yet been made toward the objectives of clarifying, coordinating, and properly standardizing administrative procedures. Meanwhile the problem has grown more serious and more difficult of solution as new agencies have been created with additional variations of procedure. Recognizing the desirability of early constructive action to preserve and improve a sound governmental structure in this State, the 94th General Assembly enacted a bill providing for an Administrative Law Commission to study practice and procedure before the administrative agencies of our state government. The bill provided that the Commission should submit a report and such proposed legislation as it deemed necessary to carry out its recommendations. The Commission was to be composed as follows: the Attorney General; the President of the Senate; the President pro tempore, and two members of the Senate appointed by the President pro tempore; the Speaker of the House of Representatives, and two members of the House of Representatives appointed by the Speaker; and three citizens appointed by the Governor.² In accordance with the provisions of the creating act, the Commission met and organized on September 2, 1941.

At the outset the Commission saw that it would need to assemble and organize a large amount of factual data on the functioning of the State's administrative agencies before it could appraise intelligently the particular procedures in use. For the purpose of effective study the Commission divided its assignment into the following topics: (1) licensing agencies; (2) sundry claims; (3) major administrative agencies such as the Industrial Commission, Public Utilities Commission, Bureau of Unemployment Compensation, Division of Aid for the Aged, Department of Taxation, Civil Service Commission, and the Pardon and Parole Commission. Each of these three areas of activity of administrative agencies seemed to require separate study, and yet it was hoped by the Commission that its findings and recommendations as to one area might be useful in dealing with the problems of another. After several months of intensive work, the Commission saw that it could not complete the study of all three areas in the time allotted without sacrificing the care and thorough-

¹See *Administrative Adjudication in the State of New York (1942)*; *Final Report of the Attorney General's Committee on Administrative Procedure (1941)*.

²The full text of the bill is set out in the Appendix to this Report, page 29.

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ness which the assignment should have. It chose to make a thorough study and to complete its recommendations on the first two areas, licensing agencies and sundry claims.

b. Findings and conclusions as to licensing agencies

In general

Early in September, 1941, the Commission started to survey the licensing activities of the State governmental agencies. Each agency issuing licenses, permits, certificates or charters was requested to submit a report giving certain detailed information according to a form prepared by the Commission.³ In making their reports these agencies were asked to include information on the following matters:

1. a statistical report on its licensing activity for 1940;
2. the history of the particular licensing act;
3. detailed information as to the governing administrative agency;
4. the procedure in granting a license;
5. the procedure in revoking, suspending or refusing a license;
6. power and procedure in making rules and regulations;
7. judicial review.

In due time the Commission received seventy-six separate reports on seventy-six different legislative acts, authorizing various types of licenses.⁴ The Commission gratefully acknowledges its indebtedness to the several agencies for their cordial cooperation and assistance.

On the basis of the information submitted the Commission found that there are 76 separate licensing acts administered by 47 different agencies of the State government controlling 187 different types of licenses.⁵ The total number of licenses issued by the various agencies of the State in 1940 was in excess of 8,300,000. The trend toward increased regulation through the device of licenses is clearly revealed by the following statistics. Of the 187 different types of licenses, 97 were created during the one hundred and twenty-seven years prior to 1930; 90 were created in the twelve years since 1930. A more detailed breakdown shows that, of the total of 187 types of licenses, 16 were created prior to 1900, 15 were created between 1900 and 1910, 42 were created between 1910 and 1920, 24 were created between 1920 and 1930, and 90 were created after 1930. Of the 90 created since 1930, 7 were created in 1931, 38 in 1933, 1 in 1934, 15 in 1935, 10 in 1937, 6 in 1939, and 13 in 1941. The full picture of increase in this type of regulation cannot be obtained from figures on the number of new licenses. The trend toward more licenses has been paralleled by a tendency to shorten the terms for which existing licenses are issued, or to require annual registration with fees for those licenses which are issued for longer terms.⁶

These facts make it clear that a very substantial portion of citizens of the State are directly affected by licensing procedures, and there is reason to suppose that the number affected will increase rather than decrease.

³ The report received on Cosmetology licenses is given in the Appendix, page 31.

⁴ Detailed information on the licensing acts will be found in the report in the Appendix which begins on page 35.

⁵ For an enumeration of the licenses, see the report in the Appendix which begins on page 38.

⁶ Information on the date of origin, number, term, and cost of licenses, will be found in the report in the Appendix which begins on page 45.

The procedures used by the 47 licensing agencies in administering the 187 types of licenses are matters of primary concern in fair and efficient government. For purposes of appraisal it is helpful to divide the procedure of administrative agencies into subdivisions dealing with rule making, hearings, and judicial review.

Rule-making power

Ordinarily administrative agencies are given power to make rules of general application in carrying out the functions entrusted to them. This is true of licensing agencies in this State. These rules and regulations have the force of law, and yet no standards have been set up to assure compliance by the agencies with sound governmental practices.⁷ Rules and regulations are commonly adopted by licensing agencies without notice to the general public or to the parties who may be affected, and after adoption, although required to be filed with the Secretary of State, they are not made freely available to licensees and other interested persons. When adopting a rule or regulation, an agency cannot inform individually every person who might be interested, and even after rules have been adopted an agency should not be burdened with the responsibility of sending copies of rules and regulations to all licensees and other interested persons. But safeguards can be created which afford substantial protection against abuse of the rule making power without impeding the efficient operation of the agency. Such safeguards involve a fixed type of notice in advance of the adoption of a rule; an opportunity for interested persons to have a hearing on their views with respect to the proposed rule; and full information on all rules and regulations available to any interested persons upon request.

Hearings

It is a fundamental principle of American government that a person should not be deprived of a right or privilege without a hearing if he desires one. This principle has not received adequate consideration in licensing legislation.⁸ Many licensing acts fail to provide for a hearing on the revocation, suspension, refusal to issue, or refusal to renew a license. In those acts which specifically contemplate a hearing there is generally a lack of provision for procedures essential to an adequate hearing, such as notice, record, and attendance of witnesses. There would seem to be no question but that every agency should have to offer a person a hearing when revoking, suspending, refusing to issue, or refusing to renew a license; and further, that the hearing afforded should conform to accepted standards of procedure for fair hearings.

Review

The reports of the licensing agencies show a confusing lack of uniformity on the privilege of an aggrieved person to have a decision reviewed by another tribunal.⁹ Twenty-four of the 76 licensing acts make no provision for any review; 16 provide for a review within the agency, and of these 5 provide for an appeal to the courts; altogether 41 of the acts

⁷ See the report on rules and regulations of licensing agencies beginning on page 55 in the Appendix.

⁸ See the report on hearings conducted by licensing agencies beginning on page 62 in the Appendix.

⁹ See the report on judicial review of action of licensing agencies beginning on page 64 in the Appendix.

provide for appeal to courts, but in these 41 acts there is considerable variation in the language designating the court to which an appeal may be taken. The grounds for appeal and procedure on appeal are even less satisfactorily covered. The Commission feels that two reviews outside of an agency are entirely adequate, and that any more tend to promote delay and unnecessary expense. This standard is in line with that of our State judicial system as well as of the Federal judicial system. However, under the provisions of our State Constitution an appeal from an administrative agency must be channeled either to Courts of Common Pleas or to the Supreme Court. Under the former alternative a case would have to go to three courts after decision by an administrative agency before the possibilities of appeal would be exhausted. On the other hand if cases were appealed directly to the Supreme Court the volume of work would be such as to impede the efficient functioning of that tribunal. The disadvantages of both of these alternatives caused the Commission to explore the desirability of a newly created administrative board of review. On careful consideration the Commission became convinced of the soundness of this idea. A board charged with the responsibility of reviewing all cases appealed from licensing agencies would acquire a familiarity with, and an insight into, problems of this general area far beyond that which a court could expect to acquire through a casual and intermittent experience. Through this process the decisions of the reviewing agency would perform a unifying and coordinating function of unique significance. As a final safeguard the recommended legislation contemplates an appeal to the Supreme Court by permission of that Court.

c. Preparation of the proposed act

After studying licensing agencies for several months and reaching tentative conclusions as to both existing deficiencies and desirable changes along the lines just discussed, the Commission prepared a statement of principles which might serve as the basis for legislation regulating the procedure of licensing agencies. Included in this statement were suggested principles on rule making, hearings, administrative review, and judicial review. The statement was printed in pamphlet form by the Daily Reporter of Columbus, and given wide distribution.¹⁰ The Commission then held a series of public meetings on the statement of principles in order to receive the comments and criticism of all interested persons. Notices were sent to all agencies of the State, as well as to interested organizations; this was supplemented with publicity in newspapers and professional publications. Hearings were held in Columbus on April 27, 28, 29, 30, and May 4, 1942; in Cincinnati on May 11; in Dayton on May 12; in Toledo on May 13; in Cleveland on May 14; and in Akron on May 15. A synopsis of the suggestions received was mimeographed and given to each Commissioner.

In June the Commission proceeded with the first draft of an act based on the statement of principles and the suggestions received at the hearings. Early this fall a tentative draft was mimeographed and sent to each licensing agency of the State for criticism. This draft was published in the "Ohio Bar," and additional copies were made available to attorneys, local bar associations, and other interested organizations. The principles were discussed at several regional meetings of the Ohio State Bar Association, and a joint meeting of the Commission and the Administrative

¹⁰ A copy of the statement will be found in the Appendix, page 65.

Law Committee of the Ohio State Bar Association was held on October 22. Suggestions received at that meeting and by mail from a variety of sources have been taken into consideration by the Commission in subsequent revisions of the proposed act.

The Commission has been greatly aided by the suggestions which it has received, many of which it has adopted in the bill which is submitted. Throughout its consideration of this legislation the Commission has endeavored to keep clearly in mind, on the one hand the right of licensees and other interested persons to certain safeguards, and on the other hand the need by the agencies for efficient, expeditious procedure. Some suggestions have emphasized the interests of licensees without considering the problems of the agencies; other suggestions have tended to overlook essential safeguards to licensees while stressing factors of agency convenience or efficiency. In the opinion of the Commission the proposed bill will secure substantial safeguards to persons affected by licensing acts without impairing the effective operation of the administering agencies.

d. Findings and conclusions as to sundry claims

Early in 1942, the Commission requested its secretary to prepare a report on the Sundry Claims Board. At the same time the Commission asked the Legislative Reference Bureau to prepare a digest of the laws of the various states and of the federal government pertaining to the disposition of claims against the state.¹¹ On the basis of these reports the Commission has made the following findings and recommendations.

The Sundry Claims Board had its inception in an act passed in 1917 (107 O. L. 532, General Code §270-6). The statute provides that the Board shall be composed of the Superintendent of the Budget in the Department of Finance, who shall be Chairman, the Auditor of State, the Attorney General, and the Chairmen of the House and Senate Finance Committees. The House and Senate members receive \$10.00 per day while attending meetings, plus expenses; the other members receive no remuneration for their services on this Board. The powers of the Board are not clearly defined, and no provision is made as to the procedure to be followed in claims which are filed.

During the biennium 1939-40, a total of 775 claims were filed. Of these, 424 were approved for a total amount of \$350,872. The claims arose out of contracts, personal injuries, property damage, unpaid bills, erroneously paid fees or taxes, and personal services for which compensation had not been received.

An examination of the laws of other jurisdictions shows that, while practically all states provide some means of handling and disposing of claims against the state, there is wide variation in the methods used. The Federal Government and three or four states have specially constituted courts, known as Courts of Claims. In Ohio this solution is unavailable under the Constitutional limitations on the power of the legislature to create courts. It would be possible to clarify the provisions as to procedure and allow claims to continue to be handled by the Board now provided for by the statute. Unfortunately three of the members of that Board have full time positions with the State in other capacities, and the other two members normally have duties and occupations which allow little time for

¹¹ A summary of the reports on sundry claims will be found in the Appendix, page 70.

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the consideration of sundry claims. The number and types of cases arising, and the sums involved, merit the continuing attention of persons whose major time and effort is devoted to deciding claims and other controversies. One method of accomplishing this would be to channel claims to the various Courts of Common Pleas. Two disadvantages of this method are apparent. First, the handling of these claims in eighty-eight different courts would render difficult, if not impossible, the formulation of a uniform policy in approving or rejecting claims. Second, appeals would have to be allowed to the Courts of Appeals and Supreme Court so that a long and expensive process through three courts might have to be pursued in order to get a decision which can amount to no more than a recommendation to the Legislature that the sum be paid or that it not be paid. The Commission has concluded that the best solution is to have these claims passed on by the Board of Review which is contemplated in the legislation herewith submitted. Appropriate provision has been made for the procedure applicable to the handling of these claims. In passing on these claims the Administrative Board of Review will act as an advisory agency to the General Assembly, and so no provision is made for appeal to the Supreme Court in these cases.

All drafts of the proposed Administrative Procedure Act have contained the proposed legislation as to sundry claims, thus affording a wide opportunity for comment and criticism on these recommendations of the Commission.

As indicated earlier in this report it was the intention of the Commission to study the administrative agencies of the State government not concerned with licensing functions, but time has not permitted a thorough consideration of agencies other than those discussed in this report, namely licensing agencies and the Sundry Claims Board. The Commission recommends that the General Assembly consider the desirability of creating another commission to study the rest of the administrative agencies of the State during the biennium of 1943-1944.

e. The proposal acts as to licensing agencies and as to sundry claims

A BILL

To enact supplemental sections 154-61 to 154-83, inclusive, of the General Code to provide uniform administrative procedure for the several licensing agencies of state government; to create the administrative board of review to pass upon appeals from such agencies and to pass upon claims against the state; to amend sections 544, 644, 644-1, 654-4, 669-11, 669-32, 703, 709, 709-3, 843-17, 894, 898-177, 1038-13, 1058-1, 1058-10, 1058-11, 1058-18, 1058-20, 1081-18, 1082-20, 1083-22, 1090-17, 1090-42, 1140, 1177-16e, 1177-74, 1307, 1335-6, 1335-7, 1347-4, 1347-15, 1377, 1464-4, 1890-20, 5542-3, 5544-6, 5545-7, 5545-19, 5545-5, 5546-17, 5805-13, 5894-8, 5894-21, 6064-3, 6289-7, 6296-32, 6346-2a, 6373-45, 7805-2, 8624-22, 8624-23, 8624-24, 9409, 9454, 9477, 9490, 9678 and 13171: and to repeal sections 154-36, 161-1, 270-6,

710-45, 871-53, 1038-8, 1052, 1080-11, 1089-8, 1276, 1295-31a, 1327, 1334-19, 5805-23, 6302-12, 6302-13, 6373-43, 6373-44, 9643-2, and 12730-5 of the General Code of Ohio.

Be it enacted by the General Assembly of the State of Ohio:

SECTION I. That sections 154-61 to 154-83 of the General Code be enacted to read as follows:

Sec. 154-61. This act, comprising sections 154-61 to 154-83 of the General Code, shall be known and may be cited as the Administrative Procedure Act.

Sec. 154-62. The following words when used in this act shall have the meanings respectively ascribed to them in this section:

"Agency" means and includes any administrative or executive officer, department, division, bureau, board or commission of the government of the state of Ohio having the authority or responsibility of issuing, suspending, revoking or cancelling licenses. Any subdivision of an office, department, division, bureau, board or commission which does not have the authority or responsibility of issuing, suspending, revoking or cancelling licenses, shall not be subject to the provisions of this act.

"License" means and includes any license, permit, certificate, commission or charter issued by any agency.

"Rule" means and includes any rule, regulation and standard having a general and uniform operation, adopted, promulgated and enforced by any agency under the authority of the laws governing such agency, but it does not include regulations concerning internal management of the agency which do not affect private rights.

"Hearing" means a public hearing by any agency in compliance with procedural safeguards afforded by the provisions of this act.

"Person" means and includes person, firm, corporation, association or partnership.

"Appeal" means and includes (a) the procedure by which a person aggrieved by an order of any agency, invokes the jurisdiction of the administrative board of review herein created, or (b) the procedure by which any agency or person aggrieved by an order of the administrative board of review invokes the jurisdiction of the supreme court of Ohio, and includes the proceedings before that board or that court.

Sec. 154-63. Every agency authorized by law to adopt, amend or rescind rules shall comply with the procedure prescribed in this act for the adoption, amendment or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any such rule or amendment hereafter adopted.

Sec. 154-64. In the adoption, amendment or rescission of any rule the agency shall comply with the following procedure:

(a) Reasonable public notice shall be given at least thirty days prior to the date set for a hearing, in such manner and form and for such length of time as the agency shall determine and shall include: A statement of the agency's intention to consider adopting, amending or rescinding a rule; a synopsis of the proposed rule, amendment, or rule to be rescinded; and the date, time and place of a hearing on said proposed action. In addition

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to such public notice the agency may give whatever other notice it deems necessary.

(b) The full text of the proposed rule, amendment or rule to be rescinded shall be filed with the secretary of state at least thirty days prior to the date set for the hearing and shall be available at the office of the agency in printed or other legible form without charge to any person affected by such proposal. Failure to furnish such text to any person requesting it, shall not invalidate any action of the agency in connection therewith.

(c) On the date and at the time and place designated in the notice the agency shall conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard.

(d) After complying with the foregoing provisions as to any proposed rule, amendment or rescission, the agency may issue an order adopting such proposed rule, amendment or rescission, and at that time shall designate the effective date thereof which shall be not earlier than the tenth day after said rule, amendment or rescission shall have been filed in its final form with the secretary of state as hereinafter provided. No rule shall be amended after the effective date of this act except by a new rule which shall contain the entire rule as amended, and shall repeal the rule amended.

(e) Prior to the effective date of a rule, amendment or rescission thereof the agency shall make such effort as it deems reasonable to inform those affected thereby and to have available for distribution to those requesting it the full text of the rule as adopted or as amended.

(f) If the governor, upon request of an agency, determines that an emergency requires the immediate adoption, amendment or rescission of a rule, he shall issue a written order, a copy of which shall be filed with the secretary of state, that the procedure herein prescribed with respect to the adoption, amendment or rescission of a specified rule be suspended and the agency may then adopt immediately said emergency rule, amendment or rescission and the same may be made to become effective on the date it is certified to and filed with the secretary of state as hereinafter provided. However, any such emergency rule, amendment or rescission shall become invalid at the end of the sixtieth day after the filing thereof with the secretary of state unless prior to that date the agency shall have complied with the procedure herein prescribed for the adoption, amendment and rescission of rules. If said agency fails to adopt said rule, amendment or rescission in conformity with the procedure herein prescribed within the said sixty day period the emergency rule shall become inoperative forthwith.

Sec. 154-65. Rules on file with the secretary of state when this act becomes effective shall continue in effect, and any rule which is not on file with that officer shall cease to be effective.

No rule adopted by any agency after the effective date of this act shall be effective before the tenth day after a certified copy thereof in final form shall have been filed with the secretary of state. The amendment or the rescission of any rule shall likewise be ineffective unless promulgated in the same manner. An emergency rule, amendment or rescission adopted as authorized in the next preceding section may become effective on the date of filing with the secretary of state; otherwise a rule, amendment or

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rescission of a rule shall become effective the tenth day after filing with the secretary of state unless the agency in the adoption thereof has designated a later date.

It shall be the duty of the secretary of state to maintain currently and preserve in an accessible manner all rules filed by the various agencies. The files wherein such rules are kept shall be properly indexed and open for public inspection.

Sec. 154-66. It shall be the duty of each agency to compile currently, publish, and at all times have available for distribution in book or pamphlet form all laws administered by it, all rules of general and uniform operation promulgated by it, and those sections of the General Code comprising the administrative procedure act with which the agency is required to comply. Such book or pamphlet shall be furnished to any person who requests it upon payment of a charge not to exceed the actual cost of printing said book or pamphlet as determined by the agency. Failure to furnish such book or pamphlet shall not invalidate any action of the agency.

Sec. 154-67. Any order of an agency denying an applicant admission to an examination or denying the issuance or renewal of a license, registration of a license or revoking or suspending a license, shall be ineffective unless said agency is specifically authorized by law to make such order and unless a hearing has been afforded as required by this act or other law.

Every agency shall afford a hearing prior to the revocation of any license unless the right to a hearing is waived by the licensee or the agency is required by statute to revoke a license pursuant to the judgment of a court.

Every agency shall afford a hearing prior to the suspension of any license unless a statute specifically provides that the hearing may be after such suspension or the right to a hearing is waived by the licensee or a statute requires the agency to suspend a license pursuant to the judgment of a court.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether the same be a renewal or a new license, unless a hearing was held prior to the refusal to issue such license.

Where periodic registration of licensees is required by law the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

No licensee shall be required to discontinue the operation of a business or profession because of the failure of an agency to accept or reject said licensee's application for a new license of the same type or class, or renewal of an existing license, or application for registration, prior to the expiration of the license held by said licensee at the time said application was made where said application was filed with the agency within the time and in the manner provided by statute or rule of the agency.

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Sec. 154-68. Except in a case where a statute specifically permits a hearing after a suspension and in a case where a statute provides for an automatic termination of a license, an agency shall give notice to the licensee or applicant of a hearing prior to the revocation, suspension, refusal to issue or renew a license, register a licensee, or refusal to admit to an examination. Such notice shall be given by registered mail, return receipt requested, at least fifteen days before the date of such hearing and shall include: the charges against said licensee or applicant or other reasons for such proposed action; the law or rule of the agency the licensee or applicant is alleged to have violated, if any; the date, time and place of the hearing; and the statement that said licensee or applicant may be present thereat in person, by his attorney, or both, and at said hearing may present evidence and examine witnesses appearing for and against him.

Where the statutes specifically permit a hearing subsequent to a suspension of a license, notice of the agency's decision in suspending the license shall be sent to such licensee by registered mail, return receipt requested, not later than the business day next succeeding such decision. Such notice shall state the reasons for the agency's action, cite the law or rule of the agency the licensee is alleged to have violated, and state that said licensee will be afforded a hearing upon request. If within ten days after receipt of said notice the licensee requests a hearing the agency shall immediately set the date, time and place for such hearing and forthwith notify the licensee thereof. The date set for such hearing shall be within fifteen days, but not earlier than seven days, after the licensee has requested a hearing, unless otherwise agreed to by both the agency and the licensee. In the notice giving the date, time and place of hearing the agency shall inform said licensee that he may be present at said hearing in person, by his attorney, or both, and may present evidence and examine witnesses appearing for and against him.

Where a statute provides for an automatic termination of a license such termination shall be effective without a hearing.

The failure of an agency to give the notices for any hearing it is required to afford by this act in the manner provided in this section shall invalidate any decision of the agency in revoking, suspending, refusing to issue, renew or register a license or admit an applicant to an examination.

Sec. 154-69. The date, time and place of each hearing required by this act shall be determined by the agency. However, if requested by the applicant or licensee, in writing, the agency may designate as the place of hearing either the county seat of the county wherein such person resides or a place within fifty miles of such person's residence.

In addition to the licensee or applicant, any person having an interest in or likely to be affected by the result of any hearing required by this act, shall be entitled to be present, in person, by his attorney, or both, and upon leave of the agency to present evidence and examine witnesses and to be heard.

Sec. 154-70. For the purpose of conducting any hearing required by this act the agency shall have the power to require the attendance of such witnesses and the production of such books, records and papers as it may desire, and further to take the depositions of witnesses residing within or without the state in the same manner as is prescribed by law for the

taking of depositions in civil actions in the common pleas court, and for that purpose the agency may, and upon the request of any person receiving notice of said hearing as required by section 154-68 of the General Code shall, issue a subpoena for any witness or a subpoena duces tecum to compel the production of any books, records or papers, directed to the sheriff of the county where such witness resides or is found, which shall be served and returned in the same manner as a subpoena in criminal case is served and returned. The fees and mileage of the sheriff and witnesses shall be the same as that allowed in the common pleas court in criminal cases. Fees and mileage shall be paid from the fund in the state treasury for the use of the agency in the same manner as other expenses of the agency are paid.

In any case of disobedience or neglect of any subpoena served on any person or the refusal of any witness to testify to any matter regarding which he may lawfully be interrogated, it shall be the duty of the common pleas court of any county where such disobedience, neglect or refusal occurs, or any judge thereof, on application by the agency to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court, or a refusal to testify therein.

Such hearing shall be had and the evidence for and against the revocation, suspension, issuance, renewal or registration of a license, or examination of an applicant for a license or the refusal to admit an applicant to an examination, shall be submitted as in the trial of civil actions.

At any hearing required by this act a stenographic report of the testimony and other evidence submitted shall be taken at the expense of the agency. Such report shall include all the evidence upon which the order of the agency is based.

The agency shall pass upon the admissibility of evidence, but a party may at the time make objection to the rulings of the agency thereon, and if the agency refuses to admit evidence, the party offering the same shall state the nature of such evidence and the facts which such party proposed to prove thereby, and such statement shall be made a part of the record of such hearing.

In any hearing required by this act the agency shall have the power to call the applicant or licensee, as the case may be, to testify under oath as upon cross-examination.

The agency, or anyone delegated by it to conduct a hearing, shall have the authority to administer oaths or affirmations.

In any hearing required by this act the agency may appoint a referee or examiner to conduct said hearing who shall have the same powers and authority in conducting said hearing as granted heretofore to the agency. The referee or examiner shall submit to the agency written reports setting forth his findings of fact and conclusions of law. The agency may order additional testimony to be taken or permit the introduction of further documentary evidence. A report of the referee or examiner may be approved, modified or disapproved by the agency, and the order of the agency based on such report or on a transcript of testimony and evidence, shall have the same force and effect as if such hearing or hearings had been conducted by the agency. No such report shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings.

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After such hearing the agency shall serve by registered mail, return receipt requested, upon the person or persons affected thereby a certified copy of the order revoking, suspending, refusing or denying a license, or refusing to register a license or refusing to admit an applicant to an examination.

Sec. 154-71. At any hearing required by this act and in all proceedings in the courts of this state or of the United States to which any agency is a party, the attorney general or any one or more of his assistants or special counsel who have been designated by him to act as attorney for the agency shall represent the agency.

Sec. 154-72. There is hereby created an administrative board of review which shall be composed of three members; not more than two of whom at any time shall be affiliated with the same political party. Immediately after this act becomes effective the governor, with the advice and consent of the senate, shall appoint three members of the administrative board of review, one for a term ending on the second Monday in February, 1945, one for a term ending on the second Monday in February, 1947, and one for a term ending on the second Monday in February, 1949.

At the end of such terms, successors of each such members of the administrative board of review shall be appointed by the governor, with the advice and consent of the senate, for terms of six years each; the respective terms of the successors of such members to commence on the day following the second Monday in February, 1945, the day following the second Monday in February, 1947, and the day following the second Monday in February, 1949. Biennially thereafter a member shall be so appointed for a term of six years, commencing on the second Monday in February.

Any member of the administrative board of review may be removed from office for any of the causes and in the manner provided in section 13 of the General Code of Ohio. Any vacancy in the office of member of the administrative board of review shall be filled pursuant to section 12 of the General Code. An appointment to fill a vacancy shall be for the remainder of the term in which the vacancy occurs and until his successor is appointed and qualified.

Each member of the administrative board of review shall receive an annual salary of seven thousand five hundred dollars, together with his actual necessary traveling expenses incurred in the performance of his official duties, payable in the same manner as the salary of other state officials.

Each member of the administrative board of review shall have the same qualifications as a judge of the court of common pleas, shall devote his entire time to the duties of his office, and shall not hold any position of trust or profit under the authority of this state or of the United States, or engage in any occupation or business interfering with or inconsistent with his duties as a member of the administrative board of review, or serve on or under any committee of any political party.

Each member of the administrative board of review before entering upon the duties of his office shall take and subscribe the oath of office required by law. Such oaths shall be filed in the office of the secretary of state.

Sec. 154-73. The administrative board of review shall have the following powers and duties:

(a) To review the order of any agency in adopting, amending or rescinding any rule, and to declare invalid any rule determined by the administrative board of review to be unreasonable or unlawful.

(b) To review the order of any agency in revoking, suspending, refusing or denying a license, in refusing to register a license, or in refusing to admit an applicant to an examination; and to affirm the order of said agency if it finds the same to be reasonable and lawful, or to reverse, vacate or modify the order of said agency, if it finds the same to be unreasonable or unlawful.

(c) To receive, investigate, hear and recommend the allowance or disallowance of claims against the state for the payment of which no monies have been appropriated.

(d) To adopt, amend and rescind rules of procedure required in the performance of its duties.

(e) To appoint, employ, fix the compensation and determine the duties of such employees as may be necessary in the administration of its duties as required by this act.

(f) To exercise and perform any and all other powers and duties herein or hereafter conferred upon it by law.

Sec. 154-74. The administrative board of review shall be in continuous session and open for the transaction of business during all the business hours of each and every day, excepting Sundays and legal holidays. All sessions of said board shall be open to the public, and sessions of said board shall stand and be adjourned without further notice thereof on its records.

All of the proceedings of the administrative board of review shall be shown on its record of proceedings which said board is hereby required to maintain and which shall be a public record.

Any investigation, inquiry or hearing which the said board is authorized to hold or undertake may be held or undertaken by or before any one member of the board. All orders of the administrative board of review shall be made upon the affirmative vote of, at least, a majority of its members.

The office of the administrative board of review shall be in the Ohio departments building in the City of Columbus. It shall be the duty of the director of public works to provide suitable office space for the use of said board and upon request of said board to make available for its use hearing rooms within said building.

The administrative board of review may hold sessions in the court house of any county in this state and upon its request the board of county commissioners of any county shall provide suitable accommodations in the court house for that purpose.

Sec. 154-75. Any person adversely affected by an order of an agency in adopting, amending or rescinding a rule of general and uniform operation may appeal to the administrative board of review on the ground that said agency failed to comply with the law in adopting, amending, rescinding, publishing or distributing said rule, or that the agency's order

in adopting, unlawful.

Any such appeal. Such order of said agency or order effective date determined prior to with shall be

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in adopting, amending or rescinding said rule was unreasonable or unlawful.

Any such person desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. Such notice of appeal shall be filed within ten days after the order of said agency and prior to the effective date of such rule, amendment or order of rescission and such notice shall operate as a stay of the effective date thereof unless the appeal shall have been heard and determined prior to such effective date. A copy of said notice of appeal forthwith shall be filed by appellant with the administrative board of review.

Within ten days after a notice of appeal is filed the agency shall transmit to the administrative board of review a transcript of its record of proceedings relating to said rule. Within three days after receiving the transcript of the record the administrative board of review shall set the date, time and place for a hearing and immediately notify the appellant and the agency thereof. Such hearing shall be held within twenty days after receiving the transcript of the record and the decision of the administrative board of review shall be rendered within thirty days after the conclusion of said hearing and upon consideration of any testimony and evidence adduced at said hearing, the arguments, and briefs of counsel, and the transcript of the record of proceedings as transmitted by the agency.

If the administrative board of review decides that the procedural requirements in adopting, amending or rescinding a rule have been complied with by the agency and that the order of the agency in adopting, amending or rescinding such rule was reasonable and lawful it shall affirm the order of the agency. If the administrative board of review decides that the procedural requirements in adopting, amending or rescinding a rule have not been complied with by the agency or that the order of the agency was unreasonable or unlawful it shall declare invalid such order by said agency.

Any order of the administrative board of review in reviewing on appeal an order of any agency in adopting, amending or rescinding a rule shall be final unless an appeal is taken therefrom as hereinafter provided, but no person affected thereby shall be thereafter precluded from attacking the reasonableness or legality of any rule in its application to a particular set of facts or circumstances.

Sec. 154-76. Any person whose license has been revoked or suspended, or whose application for a license, renewal of a license, registration as a licensee, or admission to an examination for a license, has been rejected by any agency and any person granted leave by an agency to intervene may appeal to the administrative board of review from the order of said agency.

Any such person desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal forthwith shall be filed by appellant with the administrative board of review.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency; however, if it appears to the administrative board of review that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal the administrative board of review may grant a suspension

and fix its terms and conditions. Such notice of appeal shall be filed within ten days after the appellant receives notice of the agency's order.

Within ten days after receipt of notice of appeal from an order in any case wherein a hearing is required by this act the agency shall prepare and certify to the administrative board of review a complete record of the proceedings in said case. Such record shall include: the application filed with such agency whether the same be for a license, renewal, registration thereof, or for admission to an examination; a copy of the license if a license was issued or if not issued then a copy of the letter rejecting said application; a copy of the notice of hearing as required by Section 154-68, General Code, and the receipt showing service thereof; the stenographic report of the testimony offered and the evidence submitted at said hearing, and the order of the agency in such case as entered in its journal. Such record shall be prepared and transcribed at the expense of the appellant.

In the hearing of the appeal the administrative board of review shall be confided to the record as certified to it by the agency unless in the exercise of its discretion the said board grants an application for the admission of additional evidence in the hearing before said board.

The administrative board of review shall conduct a hearing on such appeal as soon as possible. At such hearing counsel may be heard on oral argument, briefs may be submitted and evidence introduced if the board has granted an application for the presentation of additional evidence.

The decision of the administrative board of review may affirm, reverse, vacate or modify the order of the agency complained of in the appeal and its order shall be final and conclusive unless reversed, vacated or modified by an appeal to the supreme court of Ohio as provided in section 154-77 of the General Code.

The administrative board of review shall certify its order to such agency or take such other action in connection therewith as may be required to give its order effect and shall serve by registered mail, return receipt requested, upon the person or persons affected thereby a certified copy of its order.

Sec. 154-77. The proceeding to obtain a reversal, vacation or modification of an order of the administrative board of review shall be by appeal on questions of law to the supreme court of Ohio on leave first obtained.

Appeals from orders of the administrative board of review determining appeals from orders of any agency in adopting, amending or rescinding any rule, in reviewing on appeal the order of any agency revoking, suspending, refusing or denying a license, or refusing to register a licensee, or refusing to admit an applicant to an examination, or in affirming the order of said agency if it finds the same to be reasonable and lawful, or in reversing, vacating or modifying the order of said agency if it finds the same to be unreasonable or unlawful, may be instituted on leave first obtained by any of the agencies or persons who were parties to the appeal before the administrative board of review.

Such appeals shall be taken within twenty days after the date of the entry of the order of the administrative board of review on the journal of its proceedings, by the filing by appellant of a notice of appeal with the administrative board of review. Such notice of appeal shall set

forth the order of the errors the board of review with shall be filed.

The filing of such a transcript of the proceedings before the board of review shall constitute a suspension of the order if it appears that hardship will be done by the board of review and a judge thereof.

The administrative board of review shall file a transcript of the proceedings before the board of review.

If upon appeal to the supreme court of Ohio the order of review appealed from is affirmed but if the supreme court vacates the administrative board of review and vacates the order of the agency in accordance with the order of the court.

The clerk of the supreme court shall cause judgment to be entered in accordance with the order of the court with as may be required.

Sec. 154-78. The provisions of this section shall be abolished as of the date of the effective date of this act.

All papers and documents now filed in the administrative board of review pending before the board of review shall be disposed of by the board of review and in accordance with the provisions of this act.

Sec. 154-79. The provisions of this section shall be repealed as of the date of the effective date of this act.

For the purpose of this act the board of review shall be deemed to be a board of review as herein enacted.

Upon the filing of a claim with the board of review the provisions of this act shall apply as provided in this act.

forth the order of the administrative board of review appealed from and the errors therein complained of. A copy of such notice of appeal forthwith shall be filed by the appellant with the supreme court.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of the administrative board of review; however, if it appears to the supreme court or a judge thereof that an unusual hardship will result from the execution of the order of the administrative board of review pending determination of the appeal, the supreme court or a judge thereof may grant a suspension and fix its terms and conditions.

The administrative board of review, shall, within ten days after the filing of such notice of appeal, file with the supreme court a certified transcript of the record of the proceedings of the administrative board of review pertaining to the order complained of, including a transcript of the proceedings before the agency and any additional evidence considered by the board in making such order.

If upon hearing and consideration of such record and evidence the supreme court is of the opinion that the order of the administrative board of review appealed from is reasonable and lawful it shall affirm the same, but if the supreme court is of the opinion that such order of the administrative board of review is unreasonable or unlawful, it shall reverse and vacate same or it may modify same and enter final judgment in accordance with such modification.

The clerk of the supreme court shall certify the judgment of the court to the administrative board of review which shall certify such judgment to such agency or take such other action in connection therewith as may be required to give the judgment effect.

Sec. 154-8. The sundry claims board of the state of Ohio shall be abolished as of the date of the taking effect of this act.

All papers, statements and copies thereof, relating to sundry claims now filed in the office of the department of finance, shall be turned over to the administrative board of review created by this act, and all claims pending before said sundry claims board shall be transferred to and disposed of by said administrative board of review in the same manner as though they originally had been filed with the administrative board of review and in accordance with the laws and rules pertaining to the administrative board of review.

Sec. 154-79. The administrative board of review is exclusively empowered to hear and recommend the approval or disapproval of claims against the state of Ohio for the payment of which no monies have been appropriated. Said board is authorized to receive original papers representing such claims against the state of Ohio. Such claims shall be filed and properly designated either by number or short title or both, and shall be carefully investigated by such board.

For the purpose of determining the merit of any claim filed with it, the board shall exercise such powers of investigation, hearing and determination as are conferred upon it by section 154-73 of the General Code, herein enacted.

Upon the request of a claimant the board shall afford a hearing on claims filed with it, and the procedure for such hearing shall be in accordance with the requirements of this act governing the procedure on hearings as provided in section 154-70 of the General Code. Such hearing shall

be held by the board within forty-five days after the request for such hearing has been made, but not earlier than thirty days after such request.

When the time, place and date of the hearing have been set by the board, notice thereof shall be sent the claimant and the agency of the state government through which the claim arose, if any. Whenever an agency of the state government is involved, the board shall furnish such agency with a copy of the claim as filed with it. The proper representative or representatives of the agency may be required to appear at the hearing as any other witness or witnesses for the purpose of testifying under oath and shall be subject to examination and cross-examination.

Sec. 154-80. The board is empowered to adopt rules and regulations, not inconsistent with this act and the constitution and laws of this state or of the United States, governing the procedure in the receiving, hearing and determining of the claims provided for in section 154-79 of the General Code; provided that in the adoption, amendment and rescission of such rules compliance be had with the provisions of this act respecting the subject matter of rules.

Sec. 154-81. Every claim shall be presented to the board within the period of two years after the claim has accrued; except where the claimant has been under legal disability, such as set forth in section 11229 of the General Code, in which event, the claim must be filed within one year after such disability has been removed.

Sec. 154-82. The decision of the board as to each claim shall be in the form of a recommendation to the next general assembly as to the allowance or disallowance of such claim, from which decision there shall be no appeal, as provided in Sec. 154-77 of the General Code.

Sec. 154-83. The director of finance shall include all claims allowed by the board in the state budget estimates.

Upon the convening of the regular session of each general assembly the board shall prepare and deliver to the chairman of the finance committees of the senate and of the house of representatives promptly upon the appointment of such chairman a list of all the claims filed with it since the submission of its list to the next previous general assembly, together with a report of the proceedings had by said board respecting each claim and the recommendation of the board as to allowance or disallowance of every claim.

All records of the administrative board of review respecting such claims shall be available to the finance committees of the senate and of the house of representatives in their deliberations incident to the preparation of the sundry claims appropriation bill.

No claim shall become an obligation of the state unless and until it shall have been approved by the general assembly and a specific appropriation for the payment thereof shall have been made by the general assembly and the auditor of state has issued his warrant on the treasurer of state, under the provisions of section 243 of the General Code. Before issuing such warrant, the auditor of state shall secure an affidavit from the claimant that there is no sum owing by claimant to the state of Ohio or claimed by the state of Ohio to be due it from such claimant. In the event there is a sum owing by claimant to the state of Ohio or claimed by the state of Ohio to be due it from such claimant, the auditor of state shall

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ascertain the correct amount of such sum and deduct it from the award received by the claimant. The amount so deducted shall be credited by the auditor of state into the respective fund or funds to which it is owing and the auditor of state shall issue his warrant on the treasurer of state for the balance of the claim payable to the claimant, under the provisions of section 243 of the General Code.

*

Section 2. If any provision of this act shall be held unconstitutional such holding shall not affect any of the other provisions of this act, not inseparably connected in meaning and effect with such part so held unconstitutional.

Section 3. That sections 154-36, 161-1, 270-6, 710-45, 871-53, 101038-8, 1052, 1080-11, 1089-8, 1276, 1295-31a, 1327, 1334-19, 5805-23, 6302-12, 6302-13, 6373-43, 6373-44, 9643-2 and 12730-5 of the General Code are hereby repealed.

a. Act creating the Commission

(Amended Senate Bill No. 324)

AN ACT

To provide for the appointment of an administrative law commission which shall study the administrative practice, procedure and process of review now in effect among the several departments, commissions, boards and bureaus of the state government, exercising regulatory or supervisory functions, and prepare and submit to the governor and the general assembly a report recommending such changes as will expedite, simplify and make more uniform the administrative practice, procedure and review among said administrative agencies, and draft proposed legislation necessary to carry into effect such changes.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. There is hereby created an administrative law commission consisting of eleven members as follows: The attorney general; the president of the senate, the president pro tempore, and two members of the senate appointed by the president pro tempore thereof; the speaker of the house of representatives, and two members of the house of representatives appointed by the speaker thereof; and three citizens appointed by the governor.

Not more than one of the members appointed to said commission by the president pro tempore of the senate and not more than one of the members appointed to said commission by the speaker of the house of representatives, and not more than two of the members appointed to said commission by the governor shall be members of the same political party.

All appointments to the administrative law commission shall be made

* The amendments to the existing statutes are omitted.

within thirty days after this act effect. Vacancies on the commission among those appointed by the governor shall be filled by him; vacancies among those appointed by the president pro tempore of the senate shall be filled by him from the membership of the senate; and vacancies among those appointed by the speaker of the house shall be filled by him from the membership of the house of representatives. The members of the commission shall serve without pay, but shall be reimbursed for their actual traveling and other necessary expenses incurred in connection with the duties of the commission.

Within ten days after the date of appointment of members to said commission, the governor shall call a meeting of the commission, and at such meeting the commission shall organize by selecting a chairman and a vice-chairman, employ a secretary and such clerical and other assistants as shall be necessary, and adopt rules of procedure.

The various departments, commissions, boards and bureaus of the state government shall render every reasonable service in furthering the work of the administrative law commission and shall make available to said commission all records requested by it. The commission shall proceed with all reasonable dispatch in the study of the practice, procedure and process of review before the several administrative departments, commissions, boards and bureaus of the state government; prepare a report with recommendations intended to make said practice, procedure and review more uniform, simplified and designed to expedite the business of such administrative agencies; and such commission shall submit the draft of such proposed legislation as is deemed necessary to carry into effect the commission's recommendations. The commission shall complete its work and submit its report, together with proposed legislation, to the governor and general assembly on or before December 15, 1942.

HAROLD W. HOUSTON,

Speaker pro tem. of the House of Representatives.

PAUL M. HERBERT,

President of the Senate.

Passed May 8, 1941.

Approved May 22, 1941.

JOHN W. BRICKER,
Governor.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 22nd day of May, A. D. 1941.

I hereby certify that the foregoing is a true copy of the engrossed bill.

JOHN E. SWEENEY,
Secretary of State.

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IN THE OHIO COURT OF APPEALS FOR THE TENTH DISTRICT

Burton Health Care Center,)	Case No. 09APH03 0256
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Appellant,)	
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v.)	
)	
Ohio Department of Health, <i>et al.</i> ,)	
)	
Appellees.)	

FILED
 COURT OF APPEALS
 FRANKLIN CO., OHIO
 2009 MAY -8 AM 10:51
 CLERK OF COURTS

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

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Appellee, Geauga Quality Long Term Care Realty, LLC, respectfully moves the Court to dismiss this appeal for lack of jurisdiction pursuant to the Ohio Supreme Court's May 7, 2009 decision in *Medcorp, Inc. v. Ohio Dept. of Job and Family Serv.*, Nos. 2008-0584 and 2008-0630, 2009-Ohio-2058, a copy of which is attached.

The Supreme Court held in *Medcorp* that "parties filing an appeal under R.C. 119.12 must identify specific legal or factual errors in their notices of appeal, not simply restate the standard of review for such orders." *Medcorp, Inc.*, 2009-Ohio-2058, ¶ 2 (emphasis added). The failure to comply with this requirement is a jurisdictional defect that mandates dismissal of the appeal. *Id.*, ¶¶ 21-22 (finding that "court lacked jurisdiction" to consider appeal for deficiency in the Notice of Appeal). Appellant failed to comply with this mandatory requirement under R.C. 119.12, and its appeal must accordingly be dismissed. (*See* Notice of Appeal.)

Appellant's Notice of Appeal simply states:

[1] The appeal is taken to the Tenth Appellate District Court of Appeals. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence. [2] The Appellant incorporates by reference the Objections to the Report and Recommendation filed before the Ohio Department of Ohio, a copy of which is attached, and which sets for *some* of the errors of fact and law which are the subject of this appeal. [3] In addition Appellant objects and assigns as error the Director's "findings and conclusions" numbered 1, 2, 4, 5, 6, 7, 8, 9 and 10 as such are contrary to law, the Director's powers, and are not supported by evidence of sufficient reliability, probative and substantial character to warrant the decision made. (Emphasis added).

Appellant's Notice of Appeal is therefore defective under R.C. 119.12:

1. The first sentence in the Notice of Appeal merely recites the standard of review for the appeal in violation of R.C. 119.12. See *Medcorp, Inc.*, 2009-Ohio-2058, ¶ 2 (holding that "parties filing an appeal under R.C. 119.12 must identify specific legal or actual errors in their notices of appeal, not simply restate the standard of review for such orders") (emphasis added).

→ appeal was taken pursuant to 3702.60(F)
→ no reference to 119.12; does not even require any ground only design of order

2. The second sentence fails as a matter of law:
 - a. The sentence merely references the Objections to the *Hearing Examiner's January 12, 2009 Report and Recommendation* and does not assign any errors to the *Director of Health's February 23, 2009 Adjudication Order*. The Hearing Examiner's January 12, 2009 Report and Recommendation is not on appeal before this Court. The only order on appeal before this Court is the Director of Health's February 23, 2009 Adjudication Order.
 - i. The assigned errors in the Notice of Appeal must be the alleged errors in the Director of Health's Adjudication Order, which is the appealed order, and not in the Hearing Examiner's Report and Recommendation, which is not on appeal.
 - ii. To the extent that Appellant may want to challenge the Director of Health's acceptance of certain findings by the Hearing Examiner, its Notice of Appeal must specify why it believes the *Director of Health* erred in *accepting* the Hearing Examiner's findings and not why it believes the Hearing Examiner was wrong. This is not the question before the Court in this appeal.
 - iii. Allowing an appellant to merely incorporate its objections to a hearing examiner's report and recommendation as the assigned errors in a notice of appeal defeats the purposes of R.C. 119.12, which requires the appellant to state the "grounds of the party's appeal." As the Supreme Court held in *Medcorp*, "to comply with R.C. 119.12, an appealing party must state in its notice of appeal the specific legal and/or factual reasons

why it is appealing.” *Medcorp*, 2009-Ohio-2058, ¶ 11. It cannot rely on objections it filed on January 20, 2009—before the Adjudication Order was even issued—as the grounds for its appeal of the February 23, 2009 Adjudication Order.

- b. Even if the Court were to accept the second sentence’s generic reference to objections to the Hearing Examiner’s January 12, 2009 Report as sufficient grounds under R.C. 119.12 to appeal the Director of Health’s February 23, 2009 Adjudication Order, which Appellee respectfully submits cannot be done under *Medcorp*, the second sentence still fails to comply with *Medcorp* because it expressly states that it simply sets forth “some of the errors” and not all of the errors. (Notice of Appeal)
3. The third sentence in the Notice of Appeal equally fails as a matter of law under R.C. 119.12 because it merely regurgitates the standard of review without specifying the errors, which the Supreme Court prohibited in *Medcorp*. See *Medcorp, Inc.*, 2009-Ohio-2058, ¶ 2

In *Medcorp*, the Supreme Court went into depth as to what a notice of appeal must contain to pass muster under R.C. 119.12. It held that appellants must “designate the explicit objection they are raising to the administrative agency’s order, much in the same way that appellants in a court of appeals must assert specific legal arguments in the form of assignments of error and issues for review, App.R. 16(a)(3) and (4), and appellants in this court must advance propositions of law, S.Ct.Prac.R. III(1)(B)(4) and VI(2)(B)(4).” *Medcorp, Inc.*, 2009-Ohio-2058, ¶ 11. The Court even gave specific examples of what such a notice of appeal must include:

In this case, *Medcorp* claimed that the department’s audit determination was based on a flawed statistical-sampling methodology for which there is no provision in the department’s internal procedural manuals. Thus, in its notice of

appeal, Medcorp could have stated, "The department erred when it employed a **flawed statistical-sampling methodology to support its audit finding against Medcorp**" or "The department used a statistical-sampling methodology not provided for in its internal procedural manuals." If Medcorp believed that the department acted in contravention of a specific statute, it could have simply said, "The department's audit was not conducted in compliance with" the statute.

Id., ¶ 12 (emphasis added). Appellant's Notice of Appeal in no way meets this requirement, and its appeal must be dismissed for lack of jurisdiction.

For all of the foregoing reasons, the Court should dismiss this appeal for lack of jurisdiction.

Respectfully submitted,

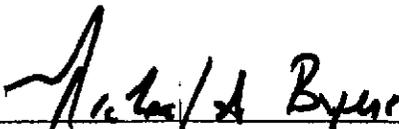
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CERTIFICATE OF SERVICE

This is to certify that on this 8th day of May, 2009, a copy of the foregoing was served on all counsel of record by depositing a copy of same in the U.S. Mail, postage-prepaid, addressed to the following:

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Quality Long Term Care Realty, LLC