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Ohio Revised Code Chapter 2506 - Judicial Review of Administrative Rulings

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Ohio Revised Code Chapter 2506 — Judicial Review of Administrative Rulings

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PERSONS ADVERSELY AFFECTED BY A DECISION OF ANY OFFICER, board, commission or other division of the great number of political subdivisions of the State usually encounter difficulty in appealing such decision. This fact has long troubled the judiciary of Ohio. Thus, adoption in 1957 of Chapter 2506 of the Ohio Revised Code — Appeals From Orders of Administrative Officers and Agencies — was immediately welcomed by the courts as providing assistance to those citizens who found themselves adverse to, and totally at the mercy of, their government.[1] Although Ohio Revised Code, Chapter 2506, radically changed the procedure with respect to appeals from boards and commissions below the state level,[2] the courts recognized the need for such change since frequently these local boards consist of non-legally trained personnel who, "almost universally, are part-time officials."[3] The procedures utilized by local boards and commissions oftentimes were so devoid of guarantees of due process of law for citizens appearing before them that at least one court, in commenting on the total lack of safeguards available to litigants was constrained to conclude that:

> A litigant ought not suffer the consequences of a procedure that is so loose and indefinite.[4]

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[1] Mentor Lagoons, Inc. v. Zoning Bd. of App., 168 Ohio St. 113, 151 N.E.2d 533 (1958).

[2] Schlagheck v. Winterfeld, 108 Ohio App. 299, 304, 161 N.E.2d 498, 502 (1958).

[3] Broad-Miami Co. v. Board of Zoning Adjustment, 89 Ohio L. Abs. 140, 154, 185 N.E.2d 76, 84 (1959).

[4] Chester Twp. Bd. of Trustees v. Kline, 19 Ohio App.2d 63, 66, 249 N.E.2d 921, 924 (1969).

Ohio Revised Code §2506.01 establishes the scope of Chapter 2506 and provides:

> Every final order, adjudication, or decision of any officer, tribunal, authority, board, bureau, commission, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located, as provided in sections 2505.01 to 2505.45, inclusive, of the Revised Code, and as such procedure is modified by sections 2506.01 to 2506.04, inclusive, of the Revised Code.
>
> The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.
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> A 'final order, adjudication, or decision' does not include any order from which an appeal is granted by rule, ordinance, or statute to a higher administrative authority and a right to a hearing on such appeal is provided; any order which does not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person; nor any order issued preliminary to or as a result of a criminal proceeding.

Ohio's Supreme Court has pointed out that Chapter 2506 was enacted by the Ohio General Assembly largely to adquately accommodate "the growing volume of zoning and building litigation confronting our courts and arising from adversary proceedings in respect to the interpretation and administration of urban and rural zoning and building ordinances."[5] Nevertheless, there can be no question but that the applicability of Chapter 2506 as set forth in §2506.01 applies to the final orders, adjucations or decision of *any and all* officers, tribunals, authorities, board, bureaus, etc. *of any and all* political subdivisions of the state or local governments. So long as a quasi-judicial as opposed to either a purely legislative or purely administrative function is being performed, the common pleas court is authorized to hear the matter on appeal according to a statutorily defined procedure.[6]

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[5] State *ex rel* Sibarco Corp. v. Berea, 7 Ohio St. 2d 85 at 90, 218 N.E.2d 428 (1966).

[6] M. J. Kelly Co. v. Cleveland, 32 Ohio St.2d 150, 290 N.E.2d 562 (1972). As to discussion of distinction between legislative and quasi-judicial functions and the inapplicability of OHIO REV. CODE, ch. 2506, to purely legislative matters *see* Myers v. Schiering, 27 Ohio St.2d 11, 271 N.E.2d 864 (1971); Donnelly v. Fairview Park, 13 Ohio St.2d 1, 233 N.E.2d 500 (1968); Jacobs v. Maddux, 7 Ohio St. 2d 21, 218 N.E.2d 460 (1966); Tuber v. Perkins, 6 Ohio St.2d 155, 216 N.E.2d 877 (1966); Berg v. Struthers, 176 Ohio St. 146, 198 N.E.2d 48 (1964); Remy v. Kines, 175 Ohio St. 197, 191 N.E.2d 837 (1963); Espy v. Montgomery, 30 Ohio App.2d 65, 283 N.E.2d 177 (1971); Stocker v. Wood, 18 Ohio App.2d 34, 246 N.E.2d 592 (1969); Szymanski v. Toledo, 18 Ohio App.2d 11, 246 N.E.2d 368 (1969); *In re* Latham, 5 Ohio App.2d 187, 214 N.E.2d

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Thus, the provisions of Chapter 2506 have been held to apply to appeals involving the refusal to grant a continuing contract to a teacher by a board of education;[7] the firing of striking public employees by county commissioners;[8] the firing of employees of county general hospitals by hospital trustees;[9] the decisions of a county board of elections;[10] the decisions of a civil service commission;[11] the suspension of a police officer by a safety director;[12] the decisions of township trustees regarding incorporation pursuant to Ohio Revised Code §§707.15 and 707.16;[13] and an unfavorable ruling from the Public Utilities Commission on a complaint filed under Ohio Revised Code §4905.26.[14]

Planning Commissions, Boards of Zoning Appeals, and Building Commissions

Unquestionably, however, the most frequent application of Chapter 2506 comes in matters involving zoning, planning and building situations, and the boards under whose jurisdiction these matters fall. Members of these *supposed* quasi-judicial bodies often view their roles as that of *enforcers* of local zoning ordinances rather than as members of an impartial appeal agency. Under these conditions, it is not at all unusual to find the barest rudiments of due process of law frequently lacking and applicants badly confused as to their rights.

When appearing before these boards, applicants are often afraid to "run the risk of irritating" the board by introducing evidence or requesting procedural safeguards.[15] It is not uncommon to have a municipality attempt to justify its refusal to even pro-

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681 (1965); Bieger v. Moreland Hills, 2 Ohio App.2d 32, 209 N.E.2d 218 (1965); *In re* Clements, 2 Ohio App.2d 201, N.E.2d 573 (1965); *In re* McDonald, 119 Ohio App. 15, 196 N.E.2d 333 (1963).

[7] Crabtree v. Board of Education, 26 Ohio App.2d 237, 270 N.E.2d 688 (1970), *cert. denied,* 408 U.S. 943 (1972).

[8] Abbott v. Meyers, 20 Ohio App.2d 65, 251 N.E.2d 869 (1969); Adkins v. Meyers, 15 Ohio Misc. 91, 239 N.E.2d 239 (1968); Fleming v. Myers, 15 Ohio Misc. 205, 240 N.E.2d 511 (1968), *aff'd* 20 Ohio App.2d 65, 251 N.E.2d 869 (1969).

[9] Bell v. Board of Trustees of Lawrence County General Hospital, 21 Ohio App.2d 49, 254 N.E.2d 711 (1969).

[10] State *ex rel.* Cullinan v. Board of Elections, 28 Ohio App.2d 281, 277 N.E.2d 448 (1968); State *ex rel.* Smith v. Johnson, 12 Ohio App.2d 87, 231 N.E.2d 81 (1967).

[11] State *ex rel.* Marsall v. Civil Service Comm'n, 14 Ohio St.2d 266, 237 N.E.2d 392 (1968), *reversing,* 11 Ohio App.2d 84, 228 N.E.2d 913 (1967).

[12] State *ex rel.* Conant v. Jones, 176 Ohio St. 147, 197 N.E.2d 897 (1964).

[13] Petitioners v. Board of Twp. Trustees, 4 Ohio App.2d 171, 211 N.E.2d 880 (1965).

[14] State *ex rel.* Coury v. Ohio Bell Tel. Co., 172 Ohio St. 309, 175 N.E.2d 511 (1961).

[15] Mentor Lagoons, Inc. v. Zoning Bd. of Appeals, 168 Ohio St. 113, 151 N.E.2d 533, 537 (1958); Capello v. Mayfield Heights, 27 Ohio St.2d 1, 6, 270 N.E.2d 831, 834 (1971) (Schneider, J., concuring).

duce its building inspector before a board of zoning appeals which is hearing an appeal of the inspector's decision on a particular application on the grounds that "all the public officials of the city . . . were apparently of one mind . . . and for the city to formally state its position would be an exercise in futility."[16] In spite of these inconsistencies, applicants who hesitate to expose their entire case before the board during a procedurally defective hearing are deemed by the board to have failed to meet their burden of proof and the appeals are generally denied.

In order to provide relief to litigants finding themselves in what could be an impossible situation, Chapter 2506 establishes a formal appellate procedure whereby the common pleas court may review the actions of these officials and boards and determine whether

> . . . the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record. . . .[17]

Procedural Due Process

While the cases arising under Chapter 2506 indicate that the courts have begun to provide safeguards of procedural due process to litigants in matters where the courts have taken evidence beyond that presented to the board, the courts have neither limited themselves to the statutorily defined issue in Ohio Revised Code §2506.04, nor seized the opportunity to dispose of cases in a way designed to provide an incentive for administrative officials to adopt and adhere to the procedures contemplated by the Act at the hearing level. As we will attempt to show, these decisions prevent the reduction of the number of cases appealed, and, in fact, cause a multiplicity of hearings on the same matter to the severe disadvantage of the individual litigant.

Prior to the effective date of Chapter 2506,[18] no appeals from administrative decisions of political subdivisions of the state to the courts were provided for under the Ohio Revised Code, and

> . . . the action of a board of zoning adjustment either in granting or denying a variance, was final in the sense that it could be questioned only by way of an action in mandamus in which event the test was whether or not the Board was guilty of an *abuse* of discretion.[19]

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[16] Developers Diversified v. Highland Heights, #897, 602, Cuyahoga County Common Pleas Court (Appellees' supplemental brief).

[17] OHIO REV. CODE §2506.04 (Page Supp. 1972)

[18] September 16, 1957.

[19] Broad-Miami Co. v. Board of Zoning Adjustment, 89 Ohio L.Abs. 140, 185 N.E.2d 76, 78 (emphasis in original opinion).

By enacting the "Administrative Appellate Procedure Act," as Chapter 2506 is commonly known, the legislature has provided a new remedy in the ordinary course of law, thereby severely limiting the number of actions in mandamus.[20] Further, this remedy has changed the test to be applied to a board's decision from "abuse of discretion" to whether the board's decision falls into one of the prohibited categories of Ohio Revised Code §2506.04.[21] In order to determine whether the *procedures* before the administrative official or board have caused or contributed to the unreasonableness of the decision appealed from, the Code now enumerates certain specific indicia of procedural due process of law, the absence of which permits the common pleas court to take additional evidence and thereafter make its decision based upon the transcript of the hearing below *and* the evidence received by the court.[22]

Ohio Revised Code §2506.03 provides:
§2506.03 — Hearing of appeal.

The hearing of such appeal shall proceed as in the trial of a civil action but the court shall be confined to the transcript as filed pursuant to Section 2506.02 of the Revised Code unless it appears on the face of said transcript or by affidavit filed by the appellant that:

(A) The transcript does not contain a report of all evidence admitted or proffered by the appellant.

(B) The appellant was not permitted to appear and be heard in person or by his attorney in opposition to the order appealed from:

(1) To present his position, arguments and contentions;

(2) To offer and examine witnesses and present evidence in support thereof;

(3) To cross-examine witnesses purporting to refute his position, arguments and contentions;

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[20] State *ex rel.* Marshall v. Civil Serv. Comm'n., 14 Ohio St.2d 226, 237 N.E.2d 392 (1968); State *ex rel.* Sibarco Corp. v. Berea, 7 Ohio St.2d 85, 218 N.E.2d 428 (1966), *cert. denied*, 386 U.S. 957 (1967); State *ex rel.* Sibarco Corp. v. Hicks, 177 Ohio St. 81, 202 N.E.2d 615 (1964); State *ex rel.* Fredrix v. Beachwood, 171 Ohio St. 343, 170 N.E.2d 847 (1960); State *ex rel.* Gund Co. v. Solon, 171 Ohio St. 318, 170 N.E.2d 487 (1960); State *ex rel.* Grant v. Kiefaber, 114 Ohio App. 279, 181 N.E.2d 905 (1960), *aff'd*, 171 Ohio St. 326, 170 N.E.2d 848 (1960); State *ex rel.* 12501 Superior Corp. v. E. Cleveland, 81 Ohio L.Abs. 177, 158 N.E.2d 565 (Ct. App. 1959).

[21] Broad-Miami Co. v. Board of Zoning Adjustment, 89 Ohio L.Abs. 140, 144, 185 N.E.2d 76, 78 (C.P. 1959).

[22] OHIO REV. CODE §2506.03 (Page Supp. 1972).

(4) To offer evidence to refute evidence and testimony offered in opposition to his position, arguments and contentions;

(5) To proffer any such evidence into the record, if the admission thereof is denied by the officer or body appealed from.

(C) The testimony adduced was not given under oath.

(D) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from or the refusal, after request, of such officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.

(E) The officer or body failed to file with the transcript conclusions of fact supporting the order, adjudication or decision appealed from;[,] in which case, the court shall hear the appeal upon the transcript and such additional evidence as may be introduced by any party. At the hearing, any party may call as if on cross-examination, any witness who previously gave testimony in opposition to such party.

In applying ¶(A) of Ohio Revised Code §2506.03, the courts have necessarily also reviewed Ohio Revised Code §2506.02.[23] Syllabus 2 in *Fleischman v. Medina Supply Company* states:

> Where, in such appeal, the transcript of the proceedings furnished the court by the agency, as provided by Section 2506.02, Revised Code, does not contain all the evidence submitted to it on the trial of the issue before the agency, as provided by paragraph "(A)" of Section 2506.03, Revised Code, . . . the court is required to hear such additional evidence that may be introduced by either party in the proceedings on appeal.[24]

The transcript in *Fleischman* was categorized as being "a scanty resume of the proceedings before the board which falls short of the statutory requirement."[25] Even in cases where the

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[23] OHIO REV. CODE §2506.02 provides:

> Within thirty days after filing the notice of appeal, the officer or body from which the appeal is taken shall, upon the filing or a praecipe, prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony and evidence offered, heard and taken into consideration in issuing the order appealed from. The costs of such transcript shall be taxed as a part of costs of the appeal.

[24] 111 Ohio App. 449, 173 N.E.2d 168, 169 (1960).

[25] *Id.* at 452, 173 N.E.2d at 171.

transcript filed with the court included lengthy detailed narratives of each and every argument presented by counsel together with a report of the dialogue between board members and remarks made by other witnesses, additional evidence has been allowed in reliance upon Ohio Revised Code §2506.03(A).[26] While it is hard to conceive of any transcript of a hearing being "complete," unless the record is a verbatim report taken by a court reporter or transcribed by a mechanical recording device, no court has, as yet, expressly stated that such record is what is required to satisfy Ohio Revised Code §2506.03(A). Instead, there is a case-by-case approach which almost always allows additional evidence before the common pleas court. The courts have failed to provide a judicially acceptable state-wide standard which is essential in view of the vast number and diversity of local quasi-judicial boards, commissions and agencies throughout Ohio. As a result, more and more actions filed pursuant to Chapter 2506 require the taking of additional testimony before the court which defeats the intended "apellate" nature of the proceeding.[27]

Cases which have applied the remaining paragraphs of Ohio Revised Code §2506.03, have also revealed a willingless by the courts to admit additional evidence coupled with a resistance affirmatively to state what constitutes an acceptable hearing procedure which would allow the court to reach its decision based solely upon the transcript filed in accordance with Ohio Revised Code §2506.02. Only the case of *In Re Appeal of Manning*[28] considered the common pleas decision as an attempt to re-try the issues of fact and substitute the lower court's judgment for that of the board. As a result, reliance is placed on *Manning* by appellees in Chapter 2506 proceedings in attempting to limit additional evidence which might be introduced. The court in *Manning,* however, first had determined as a matter of law that a complete transcript of the proceedings before the board had, in fact, been filed. Thus, although the courts generally pay lip service to the theory that proceedings under Chapter 2506 do not contemplate trial *de novo, Manning* is rarely followed with a court limiting itself to the transcript, since the appeal is to be heard "upon the transcript and such additional evidence as may be introduced by either party."[29]

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[26] Vlad v. Cleveland Bd. of Zoning, 111 Ohio App. 70, 164 N.E.2d 797 (1960); Susman v. Cleveland, 111 Ohio App. 18, 162 N.E.2d 225 (1959).

[27] *See, e.g., In re* Messiah Lutheran Church, 28 Ohio St.2d 52, 275 N.E.2d 608 (1971). A small number of local governments, in anticipation of an eventual requirement of a verbatim transcript have begun to utilize tape recorders or other mechanical devices in preparing the transcript. In so doing, they have oftentimes successfully prevented the presentation of additionl evidence to the court by appellants who have "held back" their best evidence in anticipation of the court hearing.

[28] 117 Ohio App. 55, 189 N.E.2d 651 (1962).

[29] OHIO REV. CODE §2506.03 (Page Supp. 1972).

Appeals from proceedings before an administrative board based upon Ohio Revised Code §2506.03(C) illustrate the courts' attempts to protect litigants' rights of procedural due process without stating affirmatively what is required of hearing boards. The Supreme Court of Ohio in *Arcaro Bros. Builders, Inc. v. Zoning Board of Appeals*[30] held that a decision of an administrative agency was *not* supported by a preponderance of substantial, reliable and probative evidence when that evidence was in the form of *unsworn testimony*. *Arcaro* involved an appeal to the zoning board of appeals by a land owner concerning revocation of a non-conforming use permit. At the board, the action of the building commissioner was affirmed, based in part upon unidentified statements apparently from the audience. These statements, of course, were unsworn. The chairman of the zoning board of appeals had, in fact, *refused* permission to swear witnesses. On appeal pursuant to Chapter 2506, the Hamilton County Common Pleas Court affirmed the decision of the zoning board without taking additional evidence. The Court of Appeals affirmed. In reversing, the Supreme Court referred to Ohio Revised Code §2317.30[31] and concluded:

> Thus, the record in this appeal contains no evidence. Hence, the decision of the board was not supported "by the preponderance of substantial, reliable and probative evidence on the whole record."
> Section 2506.04, Revised Code.[32]

Ohio Revised Code Chapters 2506 and 119—Identity of Purpose

Since *Arcaro* it has been recognized that there exists an identity of purpose between Chapter 2506 and Chapter 119 of the Revised Code. Chapter 119, the Administrative Procedure Act, deals with appeals from decisions of administrative agencies of the State.[33] Accordingly, cases which describe what is or is not substantial, reliable or probative evidence under Chapter 119, Revised Code, have equal bearing in cases brought under Chapter 2506. In *Doelker v. Accountancy Board*,[34] the rationale of *Arcaro* was adopted and expanded in an appeal pursuant to Ohio Revised Code Chapter 119 and the Supreme Court identified another situation which it found violative of procedural due process.

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[30] 7 Ohio St.2d 32, 218 N.E.2d 179 (1966).

[31] "Before testifying a witness shall be sworn to testify to the truth and nothing but the truth."

[32] Arco Bros. Builders, Inc. v. Zoning Bd. of Appeals, 7 Ohio St.2d 32, 33-34, 218 N.E.2d 179, 180 (1966).

[33] Hale v. Board of Educ., 13 Ohio St.2d 92, 234 N.E.2d 583 (1968).

[34] 12 Ohio St.2d 76, 232 N.E.2d 407 (1967).

Doelker involved an appeal from a determination of the Ohio Accountancy Board revoking Doelker's certificate to practice as a certified public accountant. The appeal was taken to the common pleas court pursuant to Ohio Revised Code §119.12.[35] No evidence was offered in the common pleas court in addition to that contained in the record as certified by the Accountancy Board. In reversing the decision of the common pleas court which had affirmed the decision of the Accountancy Board, the court of appeals found that the decision of the board was not supported by reliable, probative and substantial evidence.[36] The Supreme Court affirmed the decision of the court of appeals and stated:

> . . . a Common Pleas Court, on an appeal from an order of an agency revoking a license [is authorized] to affirm that order of the agency only "if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law." *This means that such evidence must not only exist, but must be in the record in order to support an affirmance.* Arcaro Brothers, Inc. v. Zoning Board of Appeals (1966) 7 Ohio St. 2d 32, 33, 218 N.E.2d 179.[37]

Following *Doelker* the Franklin County Court of Appeals continued the critical analysis of the due process requirements of administrative hearings. *In re Milton Hardware*[38] concerned an appeal from a decision of the common pleas court which had reversed a determination of the Administrator of the Bureau of Unemployment Compensation on the basis that the determination of the Administrator was not supported by reliable, probative and substantial evidence, and thus was not in accordance with law. The Court of Appeals was confronted with questions arising out of the conduct of the proceedings before the administrative officer.

> *Questioned basically [were] the activities of such hearing officers in the conduct of hearings and the alleged absence of adherence to evidentialy rules or rules of court procedure.*[39]

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[35] OHIO REV. CODE §119.12 provides, in part:

> The court may affirm the order . . . if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative and substantial evidence and is in accordance with law . . .

[36] Doelker v. Accountancy Bd., 12 Ohio St.2d 76, 78, 232 N.E.2d 407, 409 (1967).

[37] *Id.* at 80, 232 N.E.2d at 410 (emphasis added).

[38] 19 Ohio App.2d 157, 250 N.E.2d 262 (1969).

[39] *Id.* at 160, 250 N.E.2d at 265 (emphasis added).

The court first recognized that, generally, an administrative agency may adopt and follow hearing procedures which are not strictly according to rules of practice as found in the trial of civil cases.

The Court then concluded:

> However, the administrative agencies may not be permitted to sanction as evidence something which is clearly not evidence. *General Motors Corp. v. Baker,* 92 Ohio App. 301. And an administrative agency should not act upon evidence which is clearly not admissible, competent or probative of the facts which it is to determine. *Eastern Ohio Distributing Company v. Board of Liquor Control,* 59 Ohio L. Abs. 188.[40]

Following *Arcaro, Doelker* and *Milton Hardware Co.*, one would have expected that administrative boards sitting in a quasi-judicial capacity would have routinely sworn witnesses. The "voice in the audience" type of testimony should no longer be permitted nor should administrative officials be excused from setting forth the basis for their decisions. Since these cases failed to establish guidelines upon which the vast number of administrative tribunals could rely, additional litigation resulted requiring the Supreme Court to reiterate its position in *Capello v. Mayfield Heights.*[41]

Capello v. Mayfield Heights

Capello involved an application for a building permit for an auto wash with gasoline pumps in a commercially-zoned area. The building commissioner refused the requested permit on the basis that the zoning ordinance placed gas stations in a different use classification and made no provision for auto washes or a combination auto wash and gasoline station. An appeal was taken to the board of zoning appeals where lengthy discussions occurred between the applicant, his counsel, and the board. In addition, the applicant testified and answered the board's questions concerning the proposed project. Not one witness, not even the building commissioner, appeared in support of the commissioner's decision. Clearly, no oath was administered and the minutes of the proceedings only briefly summarized what had transpired. The board nevertheless, *affirmed* the decision of the commissioner.

At the trial before the common pleas court, pursuant to Chapter 2506, the court at first allowed, without objection, extensive testimony, including that of a real estate expert called by appellant. Following the expert's testimony, the municipality then sought to

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[40] *Id.* at 162, 250 N.E.2d at 266.

[41] 27 Ohio St.2d 1, 271 N.E.2d 831 (1971).

limit the court's findings to the transcript as filed by the board according to Ohio Revised Code §2506.03. The court, however, continued to take evidence. Again, the municipality failed to call any witnesses in support of the decision of the Commissioner and immediately rested. Several days after trial, the court entered the following judgment:

> Based upon the record of proceedings in the transcript filed in the appeal, and *excluding the additional evidence produced at the time of the final hearing before this court*, the court finds that the determination of the Board of Zoning Appeals, based upon what evidence it had before it, is reasonable and is supported by reliable and probative evidence, and is therefore affirmed.[42]

The Court of Appeals for Cuyahoga County affirmed without opinion, and suggested during oral argument that *appellants* could have and should have supplied the essential elements of due process which were lacking at the hearing before the board. Having failed to alleviate the deficiencies of unsworn testimony, appellants should not be heard to complain, reasoned the court.[43]

In this context, the Supreme Court of Ohio was faced clearly with the issue stated in Ohio Revised Code §2506.04 whether the decision of the board was unreasonable or unsupported by substantial, reliable and probative evidence on the whole record. In deciding whether the duty rests with the quasi-judicial agency or the litigant to create and maintain procedures which will afford a forum conducive to due process, permitting a fair and impartial determination of rights, the Court was in a position to decide whether, if that duty befalls the administrative tribunal, its failure constitutes an unreasonable manner of rendering a decision which is *ipso facto* unsupported by substantial, reliable and probative evidence on the whole record.

The Supreme Court unanimously reversed the decision of the court of appeals and held that a court reviewing an administrative ruling *cannot affirm that ruling upon a transcript which reveals an absence of a record of sworn evidence, irrespective of the reason for such absence.*[44] In reaching its decision in *Capello*, the Court relied heavily on *Arcaro* and *Doelker* in finding fault with proceedings which neither are under oath nor require some evidence, no

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[42] *Id.* at 4 (emphasis supplied).

[43] While there is no report of this discussion by the Court, except that contained in the briefs submitted to the Supreme Court, the author, as counsel, participated in the proceeding throughout.

[44] Capello v. Mayfield Heights, 27 Ohio St.2d 1, 271 N.E.2d 831 (1971).

matter how slight, to be contained in the record in support of the administrative decision. In rejecting the "waiver" theory followed by the court of appeals, the Supreme Court squarely placed the burden of creating and maintaining a proper procedure upon the reviewing board or agency.

The Courts' Unfinished Business?

As a result of *Capello*, there should be no question but that a reviewing court cannot simply affirm an administrative decision solely on the basis of the hearing before an administrative board where one of the enumerated defects of Ohio Revised Code §2506.03 has occurred. While this would be a significant advancement of the rights of litigants appearing before these boards, judicial attention must now be directed to the manner of disposing of these litigated matters. Although the mere filing of the affidavit described in Ohio Revised Code §2506.03 "does not automatically quicken the statutory right nor compel the court of common pleas to take additional evidence unless the record will support some one of these deficiencies enumerated in the statute,"[45] as previously illustrated, courts usually have not hesitated to seize the opportunity to take additional evidence. Still, these decisions have not significantly altered the hearing procedures of the administrative tribunals, resulting in an increase rather than a desired decrease in the number of cases requiring additional evidence which will be appealed to the courts. Litigants continue to be wary of presenting all of their evidence before administrative boards whose hearing procedures might be questionable unless courts frame the ultimate relief in a more affirmative manner.

Ohio Revised Code §2506.04 provides that consistent with the court's findings

> . . . that the order, adjudication or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable or unsupported by the preponderance of substantial, reliable and probative evidence on the whole record . . . the court may affirm, reverse, vacate or modify the order, adjudication or decision, *or remand* the cause to the officer or body appealed from *with instruction to enter an order* consistent with the findings or opinion of the court . . . (emphasis added).

The above-quoted portion of Ohio Revised Code §2605.04 does not contemplate a remand to the administrative agency or body to determine the legal justification of the administrative decision. If the *court* finds no such justification, it must make *its own conclusion based upon the record before it.* By remanding to administrative boards without first reaching its own conclusions as to what action

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[45] 12701 Shaker Blvd. Co. v. Cleveland, 31 Ohio App.2d 199, 211, 287 N.E.2d 283 (1972).

the boards must take, there is no incentive for the boards properly to proceed in the original instance. It is meaningless to be told by the courts that, in spite of a successful attack of the decision of an administrative board, the controversy is remanded back to the board as was the case in *Arcaro*.[46] In his concurring opinion in *Capello v. Mayfield Heights*, Justice Schneider points out "even to request a procedural right before an agency [staffed by laymen] often engenders hostility."[47] Imagine returning to the agency or board following reversal where the court has stated, in effect, that the board abused the applicant's procedural rights. Not only is this probably asking too much of the lay administrative board or agency, it is not contemplated by Ohio Revised Code §2506.04. Courts must not merely rely on the remedial and corrective provisions of Ohio Revised Code §2506.03, but must enter judgments tailored so as to grant affirmative final relief pursuant to Ohio Revised Code §2506.04 which would announce positive judicial explanations of what procedures are required in order to create a truly appellate process limited to review of transcripts filed by the quasi-judicial tribunals and which would allow litigants to proceed before the board free from fear and intimidation.

Conclusions and Recommendations

Wary litigants, confused boards and overburdened lower courts would be greatly assisted if the courts would go further than merely stating that a decision of an administrative board which has failed to make available and follow the procedures enumerated in Ohio Revised Code §2506.03 cannot be affirmed. Courts must be prepared to reverse administrative decisions and grant final relief to applicants, if appropriate, when the transcript of the administrative hearing does not contain a preponderance of substantial, reliable and probative evidence due in part to the failure or refusal of the tribunal to afford the procedures enumerated in Ohio Revised Code §2506.03. If the administrative board fails or refuses to follow the procedures enumerated in Ohio Revised Code §2506.03, such action should be a basis for a finding by a reviewing court that the decision below is unreasonable or unsupported by substantial, reliable or probative evidence, pursuant to Ohio Revised Code §2506.04. If, based upon such finding, the decision is reversed and final relief granted, litigants need not hestitate in presenting their evidence before the board since no unfair advantage of a second chance hearing will be gained by the administrator. While a possible harsh result might occasionally result, administrative boards and litigants alike would

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[46] Arcaro Bros. Builders Inc. v. Zoning Bd. of Appeals, 7 Ohio St.2d 32, 218 N.E.2d 179 (1966).

[47] Capello v. Mayfield Heights, 27 Ohio St.2d 1, 271 N.E.2d 831 (1971).

soon come to understand that full evidentiary hearings which are procedurally proper are required by statute and enforced by the courts. Courts will then be called upon less and less to supplement their appellate function with time-consuming evidentiary hearings.

Such an approach has been recognized in one case under Chapter 2506, and has, in fact, been consistently followed in appeals pursuant to Ohio Revised Code, Chapter 119. An important, yet generally unknown, postscript to *Capello v. Mayfield Heights*, is the decision of the Court of Appeals of Cuyahoga County rendered after the "further proceedings" of the common pleas court which were mandated by the Supreme Court's opinion. In affirming the decision of the court of common pleas which had granted judgment in favor of Capello and ordered the building permit to be issued, the Court of Appeals observed:

> A strict interpretation of *Capello v. Mayfield Heights* [27 Ohio St. 2d 1, 1971] would not permit the Court of Common Pleas to base its affirmance solely upon the transcript of the proceedings in the present case. *In the absence of any additional testimony by the Court of Common Pleas, a reversal of the Board of Zoning Appeals would be in order.*[48]

Thus, at least one court has now indicated that where an affirmance is impossible, a reversal, together with the granting of final relief, is required.

A close reading of *Doelker v. Accountancy Board*[49] *and In re Milton Hardware Co.*[50] reveals similar results in appeals taken pursuant to Ohio Revised Code, Chapter 119. As there was no evidence in the record to support an affirmance of the decision of the Accountancy Board, the revocation of Mrs. Doelker's certificate to practice was *vacated*.[51] Likewise, when the activities of the hearing officers in the conduct of the hearings was successfully attacked in *Milton Hardware Co.*, the determination of the Administrator of the Bureau of Unemployment Compensation was reversed and *set aside*.[52]

> Ohio Revised Code §119.12 provides, in part, as follows:
>
> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has ad-

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[48] Capello v. Mayfield Heights, No. 31366, Ct. App. Cuyahoga County (Dec. 23, 1971).

[49] 12 Ohio St.2d 76, 232 N.E.2d 407 (1967).

[50] 19 Ohio App.2d 157, 250 N.E.2d 262 (1969).

[51] Doelker v. Accountancy Bd., 12 Ohio St. 76, 232 N.E.2d 407 (1967).

[52] *In re* Milton Hardware Co., 19 Ohio App.2d 157, 250 N.E.2d 262 (1969).

> mitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative and substantial evidence and is in accordance with law . . . .

The above-quoted portion of Ohio Revised Code §119.12 is sufficiently similar to Ohio Revised Code §2506.04 so as to justify reliance on *Doelker* and *Milton Hardware* for purposes of framing final relief just as those case are relied upon with respect to other issues common to Chapter 2506 and 119 of the Ohio Revised Code.

It is hoped that the courts will adopt the approach used in Chapter 119 proceedings and apply it to actions under Chapter 2506 to the mutual benefit of litigants, administrative boards, and the courts themselves.