

OVERTURNING AGENCY DECISIONS

Presented by Adriane J. Hofmeyr
Quarles & Brady LLP

Tuesday, June 20, 2017
10:20 pm to 11:05 am
11th Annual Specialized CLE for In-House Counsel
Hotel Palomar, 2 East Jefferson St.
Phoenix AZ

I. BIOGRAPHY

Adriane J. Hofmeyr – Partner, Quarles & Brady LLP
Adriane.Hofmeyr@quarles.com

My practice focuses on administrative litigation, administrative hearings, commercial litigation, and appeals (state and federal). Licensed in Arizona, California, Colorado and South Africa, with an LL.M in Constitutional Law. Formerly served as a Deputy District Attorney in Colorado and as in-house counsel to the Cape Town City Council (during South Africa's transition to constitutional democracy). Also a part-time Professor of Practice at the James E. Rogers College of Law, teaching a class "Practicalities of Suing Government."

II. THE PROBLEM

Businesses in state-regulated industries (usually requiring licensing) often face a negative decision or action by their regulating agency, including ADHS, ADWR, ADEQ, AHCCCS, ADOT, ADES, AZ Dept. of Financial Institutions, State Liquor Board, State Board of Regents, AZ Medical Board, Board of Dental Examiners, Board of Accountancy, Unified School Districts, State Retirement System, Board of Appraisal, AZ Dept. of Real Estate, Registrar of Contractors, Board of Education, all decisions of an ALJ, and Arizona Corporation Commission.

Business can challenge in court denial/suspension/withdrawal of a license (or other negative action, including unpopular zoning decisions), and sometimes the granting of a license to a competitor.

III. THE SOLUTION ... THE ADMINISTRATIVE REVIEW ACT

1. **Underlying principle:** "Judicial review of an administrative action is **not a matter of right** except in those situations in which the law authorizes review." *Rose v. AZ Dept of Corrections*, 167 Ariz. 116, 118, 804 P.2d 845, 847 (App. 1991).
2. The Administrative Review Act, A.R.S. § 12-901 *et seq* ("ARA" or "JRADA") allows **judicial review of administrative decisions**.
3. **Rules:** the ARA has its own set of rules - *Arizona Rules of Procedure for Judicial Review of Administrative Decisions*.
4. Applies to an "**administrative agency**," which means "every agency, board, commission, department or officer authorized by law to exercise rule-making powers or to adjudicate contested cases." A.R.S. § 12-901(1).
5. Can challenge "**administrative decisions**," which means "any decision, order or determination of an administrative agency that ... **affects the legal rights, duties or**

Overturing Agency Decisions

Adriane Hofmeyr

Page 3 of 7

privileges of persons and that terminates the proceeding before the administrative agency." A.R.S. § 12-901(2).

6. **ARA does not cover:** "judicial or legislative departments of the state government;" nor "any political subdivision or municipal corporation or any agency of a political subdivision or municipal corporation." A.R.S. § 12-901(1). In other words, the ARA mostly excludes decisions of a county or city or town. BUT statutes often expressly make the ARA applicable to county/city/town decisions, including:

- A county's decision to create a special taxing district is appealable under the ARA. A.R.S. § 48-261(A)(10).
- A county merit commission's decision to dismiss, suspend, reduce in rank or compensation certain county employees is appealable under the ARA. A.R.S. § 11-356(H).
- A county hearing officer's enforcement of various statutes and ordinances is appealable under the ARA. A.R.S. § 11-1006(D).
- Dismissal of a law enforcement officer (even by county/city/town) is appealable under the ARA. A.R.S. § 38-1004(A) (statute changed from special action to ARA as a result of the ruling in *Rash v. Town of Mammoth*, 233 Ariz. 577, 315 P.3d 1234 (App. 2013)).
- All decisions made by an ALJ are appealable under the ARA. A.R.S. § 41-1092.08(H).

7. **Very fast deadline:** must file "notice of appeal" in superior court within **35 days** of date that "copy of the decision sought to be reviewed is served upon the party affected." A.R.S. § 12-904(A). Superior court has jurisdiction under, and venue determined by, A.R.S. § 12-905. (For review of decision by AZ Citizens Clean Elections Commission, file Notice of Appeal within 14 days. A.R.S. § 16-957(B).)

8. Timely appeal is **jurisdictional:** unless review is sought "within the time and in the manner provided in this article," parties "shall be barred from obtaining judicial review of the decision." A.R.S. § 12-902(B). In other words, this defense cannot be waived. *Smith v. Arizona Citizens clean Elections Com'n*, 212 Ariz. 404, ¶29, 132 P.3d 1187 (2006).

9. **Notice of Appeal:** it must contain:

- Identification of final administrative decision sought to be reviewed (attach it);
- A "statement of the issues" presented for review; and
- A "statement of the findings" sought to be reviewed. A.R.S. § 12-904(A); A.R.S. § 12-909(A); *Rule 4*.
- Go big - if in doubt about an issue on appeal, include it.
- Ask for fees (see entitlement below).

Overturing Agency Decisions

Adriane Hofmeyr

Page 4 of 7

10. **Service of Notice of Appeal:** must serve Notice of Appeal on agency AND "all other parties to the proceeding before the agency." A.R.S. § 12-906. (But need NOT name all parties as Appellees!)

11. **Appellees:** agency is Appellee. Other parties of record in the proceedings below "may" appear (used to read "shall"). A.R.S. § 12-908. You can object to Notices of Appearances by other parties.

12. **Briefs:** the ARA is more like an appeal, i.e. calls for an Opening Brief, Answering Brief and a Reply Brief. *Rule 7*. Time for filing briefs is 45/45/20 days. *Rule 6*. Parties are Appellant and Appellee.

13. **Standing:** must have been person appearing before agency or given notice of proceedings before the agency. *Roer v. Superior Court in and For Coconino County*, 417 P.2d 559 (app. 1966), cited and upheld in *Madsen v. Fendler*, 128 Ariz. 462 (1981). In other words, can challenge granting of a license to a competitor *if participated or had right to participate in agency proceedings*.

14. **Exhaustion of administrative remedies:** must only exhaust administrative remedies if a statute says so. For example, some agency actions must first be appealed to an ALJ (will say so in the agency letter, designating the decision an "appealable agency action" or a "contested case"). A.R.S. § 41-1092.03(A). In this case, you file a "notice of appeal or request for a hearing" with the agency within **30 days** (this procedure is usually set out in the agency letter). A.R.S. § 41-1092.03(B). **Standing at ALJ** is important because it may later establish **standing in court**: the appeal to an ALJ may be filed by "a party whose legal rights, duties or privileges were determined" by the agency AND may also be filed by "a party who will be adversely affected by the appealable agency action or contested case and who exercised any right provided by law to comment on the action being appealed or contested" (but grounds of appeal are limited to issues raised in comments). A.R.S. § 41-1092.03(B). (A client will be interested in participating if, for example, the client's competitor is applying for a license.) The hearing procedures are set out in A.R.S. § 41-1092.07 (for e.g., entitled to counsel, subpoenas and depositions permitted, conducted in "an informal manner and without adherence to the rules of evidence"). The ALJ's decision is sent to the agency head, who may "accept, reject or modify it." A.R.S. § 41-1092.08(B). The decision of the agency head is the "final administrative decision" and is only then appealable under the ARA. A.R.S. § 41-1092.08(F) and (H). If you failed to ask for a hearing after receipt of the "appealable agency action," then you cannot file suit under the ARA (the action is "not subject to judicial review"). A.R.S. § 41-1092.08(H). BUT this defense (failure to exhaust administrative remedies) is **waivable** if the agency forgets to raise it early on (it "does not implicate subject-matter jurisdiction")! *Moulton v. Napolitano*, 205 Ariz. 506, ¶ 9, 73 P.3d 637 (App. 2003).

15. **Not limited to record below:** "relevant and admissible exhibits and testimony that were not offered during the administrative hearing shall be admitted," unless they were withheld for an improper purpose, or would cause "substantial prejudice." A.R.S. § 12-910(B). And "the court may hear testimony from witnesses who testified

Overturing Agency Decisions

Adriane Hofmeyr

Page 5 of 7

at the administrative hearing and witnesses who were not called to testify at the administrative hearing." A.R.S. § 12-910(A).

16. **Evidentiary hearing:** if you want one, you must ask on motion within 30 days of Notice of Appeal. A.R.S. § 12-91010(A); *Rule 10*.

17. **New evidence:** if you want to introduce new evidence, you must ask on motion. *Rule 10*.

18. **Discovery:** you are not entitled to discovery UNLESS your motion to introduce new evidence or for a trial *de novo* is granted, and then only on motion for good cause. *Rule 12*.

19. **Jury trial:** may be entitled to a jury trial. For certain agency decisions, "the trial shall be *de novo*" if demanded in the Notice of Appeal and if a hearing was not held by the agency, and, "on demand of any party," the trial "may be with a jury." A.R.S. § 12-910(C); *Rule 11*.

20. **Stays:** the court "may" with or without bond "stay the decision, in whole or in part" for good cause. A.R.S. § 12-911(A)(1); *Rule 3*. Always a good idea to ask for one, in particular if a license has been granted to a competitor.

21. **Standard of review:** the court is very deferential to the agency, unless it is being asked to interpret law. The test: the court "shall" affirm the agency action unless the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious, or is an abuse of discretion. A.R.S. § 12-910(E). But the court is "free to reach its own conclusion" when the issue involves interpretation of law. *Romo v. Kirschner*, 181 Ariz. 239, 240, 889 P.2d 32 (App. 1995).

22. **Findings of fact:** the court is not obliged to make findings of fact. You must ask court to "make findings of fact and state conclusions of law on which its judgment is based" on motion before judgment. A.R.S. § 12-911(C).

23. Right to recover attorneys' fees:

- A.R.S. § 12-348 entitles ("shall") you to fees if you "prevail by an adjudication on the merits." This applies to suits under the ARA and special actions. A.R.S. § 12-348(A)(2) and (4). Note that your client is not exposed to fees - fees cannot be awarded *against* your client if you are unsuccessful. A.R.S. § 12-348(A). However, note that exceptions (bad behavior) and maximums apply, for e.g. there is a statutory cap of \$10K on fees. A.R.S. § 12-348(E).
- To override the statutory cap: the private attorney general doctrine allows you to get all reasonable fees. *Arnold v. ADHS*, 160 Ariz. 593, 775 P.2d 521 (1989); *Defenders of Wildlife v. Hull*, 199 Ariz. 411, 18 P.3d 722 (App. 2001); *Larkin v. AZ*, 175 Ariz. 417, 857 P.2d 1271 (App. 1992) (A.R.S. § 12-2030 and A.R.S. § 12-349).

Overturing Agency Decisions

Adriane Hofmeyr

Page 6 of 7

- For ARA suits between government entities, the court "shall" award fees to the "successful party." A.R.S. § 12-348.01 (questionable whether the cap of \$10K applies).
- Note that fees may also be available under A.R.S. § 12-2030 (if your suit is "to compel a state officer ... to perform an act imposed by law").
- And you may also be entitled to fees under A.R.S. § 41-1007(A), which entitles "the prevailing party" to fees at the administrative hearing.

24. **Public Records Request:** immediately request relevant agency records under A.R.S. § 39-101 *et seq.*

- Agency must provide copies "promptly." A.R.S. § 39-121.01(D)(1).
- Request deemed denied if agency "fails to promptly respond." A.R.S. § 39-121.01(E).
- If denied (or insufficient or you're blown off), you can "appeal the denial through a special action in superior court." A.R.S. § 39-121.02(A).
- You may get attorneys' fees and costs if you "substantially prevail," in addition to fees under A.R.S. 12-349. A.R.S. § 39-121.02(B).
- You may even get damages. A.R.S. § 39-121.02(C).
- Moreover, a records request from a litigant is broader than a discovery request - "litigants have a greater right to access than public generally." Quote from Arizona Agency Handbook relating to Public Records, citing *Grimm v. Ariz. Bd. Of Pardons and Paroles*, 115 Ariz. 260, 269, 564 P.2d 1227, 1235-6 (1977). And a litigant who makes a public record request need not demonstrate that the "documents are relevant to anything," and therefore may obtain records that would not be discoverable in litigation." *Bolm v. Custodian of Records of Tucson Police Dept.*, 193 Ariz. 35, 39, ¶ 10, 969 P.2d 200, 204 (App. 1998).

25. **Settlement:** may be political pressure on agency to settle. Likely a settlement agreement cannot be confidential. Intervenors will object.

26. **Federal:** U.S.C. § 701 *et seq.*, provides for administrative review of federal agency actions.

IV. FAILING WHICH ... BY SPECIAL ACTION

1. If the adverse action comes from a city or town or county (or an agency thereof), then generally you are *not* entitled to challenge the action under the ARA. But look out for statutes that permit judicial review by special action.

2. For example, to challenge to city or town zoning decision:

- Depending on city size, you must first take an appeal to a Board of Adjustment. A.R.S. § 9-462.06.

Overturing Agency Decisions

Adriane Hofmeyr

Page 7 of 7

- If you are unhappy with the ruling, you may within **30 days** file a complaint for special action in superior court. A.R.S. § 9-462.06(K).
 - Standing to appeal a zoning decision by special action: a “person aggrieved,” or a “taxpayer who owns or leases adjacent property or property within 300 feet.” A.R.S. § 9-462.06(K); *Pawn 1st, LLC v. City of Phoenix*, 231 Ariz. 309, 294 P.3d 147 (App. 2013).
 - Court applied the same standards as those found in A.R.S. § 12-910(E) (i.e. the ARA standards). *Pawn 1st, LLC v. City of Phoenix*, 239 Ariz. 539, ¶ 5, 373 P.3d 556 (App. 2016).
3. Follow *Rules of Procedure for Special Actions*. It is more like a civil action: you file a Complaint and an Answer (which ends up being very awkward, because what you really want is an Opening Brief). *Rule 4*. Parties are Plaintiff and Defendant. (Try to agree with opposing counsel to file Opening/Answering/Reply Briefs after the Complaint and Answer are filed.)
 4. Only three questions may be raised by special action, including “whether a determination was arbitrary and capricious or an abuse of discretion.” *Rule 3*
 5. No automatic stay. Must ask for one. *Rule 5*.
 6. No statutory deadline for review by special action! *Laches* applies in absence of statutory time limit. *Rash v. Town of Mammoth*, 233 Ariz. 577, ¶ 16, 315 P.3d 1234 (App. 2013).
 7. May get a trial "if a triable issue of fact is raised." *Rule 4(f)*. Then you may get "special orders concerning discovery." *Rule 4(f)*.
 8. If no statute provides for judicial review (either under the ARA or as statutory special action), always try an appeal as a discretionary special action. For example, challenges to county zoning decisions. Test is no "equally plain, speedy, and adequate remedy by appeal." *Rule 1*. Use *Rules of Procedure for Special Actions*, but include an “ask.”