

STATE OF LOUISIANA
19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE

NO. C 502311

SEC. 21

J. ROBERT WOOLEY
IN HIS CAPACITY AS ACTING COMMISSIONER OF INSURANCE

VS.

STATE FARM FIRE & CASUALTY COMPANY,
HONORABLE MURPHY J. FOSTER IN HIS CAPACITY AS GOVERNOR OF
LOUISIANA, ANN WISE IN HER CAPACITY AS DIRECTOR OF THE
DIVISION OF THE DIVISION OF ADMINISTRATIVE LAW, AND
ALLEN REYNOLDS IN HIS CAPACITY AS DIRECTOR OF THE
DEPARTMENT OF CIVIL SERVICE

MEMORANDUM IN OPPOSITION TO RULE TO SHOW CAUSE

FOR PRELIMINARY INJUNCTION

NOW INTO COURT, through undersigned counsel, comes Ann Wise in her official capacity as Director of the Division of Administrative Law, a defendant, who submits this memorandum in opposition to plaintiff's Rule to Show Cause For Preliminary Injunction. This is the only part of the Petition for relief for which a hearing has been noticed.

STATEMENT OF THE CASE

This case involves important issues of administrative and constitutional law in Louisiana affecting all state agencies. The Louisiana Legislature created the Division of Administrative Law (DAL) by Acts 1995, No. 739, effective October 1, 1996 (DAL Act) as Louisiana's centralized administrative hearings agency for executive branch adjudications, pursuant to the Administrative Procedure Act (APA), LSA-R.S. 49:991, *et seq.* The Acting Commissioner of the Department of Insurance (DOI) filed a petition seeking a preliminary and permanent injunction and a declaratory ruling that Act 739 of 1995 and Act 1332 of 1999 violate the Louisiana Constitution.

The DAL Act is applicable to all agencies of the executive branch of state government, with certain listed exceptions, and provides that the DAL shall conduct all adjudications for these agencies in the manner provided by the APA. LSA-R.S.

49:992(A)(2) & (D). Prior to October 1996, the affected state agencies hired and had supervision over their own administrative law judges (ALJs) to adjudicate their own cases. The Legislature wanted to end the commingling of the investigative, prosecutorial and adjudicative functions within state agencies, and put an end to ex parte communications between agency personnel.¹ To accomplish this, the adjudication function only, was transferred from various executive branch agencies to the DAL, consolidating this executive branch function within one executive branch agency. Citizens and businesses gained impartial adjudicators, professionally trained by DAL to conduct administrative hearings. La. R.S. 49:996(4) (training requirement). DAL ALJ's are required to be attorneys having at least five years' experience practicing law.² La. R.S. 49:994(A). There is and was no similar training, education or degree requirement in DOI's law for its ALJs; not even expertise or experience in insurance law, though petitioner has raised this issue as a concern in his filings. L.R.S. 22:1351. The DAL ALJs are far more qualified as adjudicators than agency heads must be.

Agencies which send cases to DAL decide what actions they wish to pursue, against whom, for what violations and remedies, and make final agency decisions before docketing the cases with DAL. Investigative and prosecutorial-type functions always remain with the agencies. After DAL issues a decision in a case, the agency can choose whether to enforce a favorable decision. The decisions are not self-executory in judicial court. Neither DAL nor its ALJs have any judicial executive branch powers of enforcement.

Since the DAL began in October 1996, DAL has docketed and handled over 69,322 cases for a wide variety of state agencies, including 1836 for the DOI through the year 2002. Last fiscal year alone, DAL docketed 11,769 new cases. DAL has handled cases for the Department of Public Safety, Department of Wildlife and Fisheries, Department of Health and Hospitals, Department of Social Services, Department of Environmental Quality, Department of Education, Office of State Fire Marshal, Louisiana Office of Student Financial Assistance, Office of Financial Institutions, Department of Revenue, Department of Natural Resources, Division of Administration, Baton Rouge Housing Authority, the Attorney General, the Louisiana Housing Finance

¹ L.R.S. 49:998(F)

² L.R.S. 49:994(C). ALJs transferred into DAL at its conception who did not meet this requirement were "grandfathered in".

Authority, and others. DAL handles this heavy case load with only 14 ALJs. During calendar year 2002, the average length of time for DAL to handle a case, including all types and complexities from docketing to decision signed, was 50 days— a very high rate of efficiency.

DOI's petition effectively seeks the termination of the DAL. The relief requested by DOI would significantly affect all of these state agencies and others, and many thousands of cases affecting all the citizens and many businesses of the State. It may also affect the caseloads of the district and appellate courts.

SUMMARY OF DAL'S RESPONSE

DOI's chief argument is that the DAL is unconstitutional because the law prohibits judicial appeal by any state agency or its representative. As discussed in more detail in this memo, state agencies as 'juridical persons' do not enjoy the due process protections of the Constitution, and have only those rights and powers including appeal, which the Legislature chooses to give them. The Legislature has exercised its prerogative to deny state agencies the right of appeal.

The Acting Insurance Commissioner (COI) claims that he has a constitutional right to appeal, since his office is mentioned in the Constitution. However, the Constitution itself gives him no specific duties and does not mention hearings. La. Const. Art. IV §11. His powers are defined, and limited by statute.

The law provides that the DAL handles DOI's adjudications and that DOI and its commissioner have no appeal rights in administrative hearings. This applies to ALL state agencies, not just DOI or its Commissioner, and whether or not DAL conducts the hearings, as the APA also prohibits appeals by any agency. R.S. 49:951(5) and 964(A).

DAL's executive branch adjudications are executive, not judicial functions. Neither Act 739 nor Act 1332 impinge upon the constitutional grant to the district court of original jurisdiction of 'civil matters'.³ The 'adjudications' conducted under the DAL Act and the APA are not 'civil matters' under La. Const. Art. V §16(A) but have historically been a function of executive branch agencies. This case presents a challenge between two executive branch agencies over executive functions, not matters that fall

³ La. Const. Art. V § 16(A)

within the original jurisdiction of the judiciary. Because this case concerns executive branch functions, the doctrine of separation of powers is not violated.

**A STATUTE CANNOT BE DECLARED UNCONSTITUTIONAL AT A
PRELIMINARY INJUNCTION HEARING**

This case is set for hearing only on the preliminary injunction, which seeks, as to DAL, to declare it unconstitutional. If petitioner wishes the court to decide and declare the constitutionality of statutes, this case must be set on the ordinary calendar for hearing. The Louisiana Supreme Court has declared that a trial court cannot declare a statute unconstitutional at the preliminary injunction stage, as a summary hearing, as we have here. *Women's Health Clinic, Inc. v. State*, 2001- 2645 (La. 11/9/01) 804 So.2d 625; *Kruger v Garden Dist. Association, et al.* 1999-3344 (La. 3/24/00), 756 So.2d 309. The DAL thus urges the Court to reject DOI's request for a preliminary injunction. The declaratory judgment should be set for hearing as an ordinary action.

The burden of proof in an action such as this was explained in *Kruger* :

"Review of the judgment granting the preliminary injunction does not require a final determination on the merits of the constitutional issue. In order to obtain the preliminary injunction, plaintiffs were not required to prove the statute unconstitutional but rather to make a prima facie showing that they would prevail on the merits of the case. *General Motors Acceptance Corp. v Daniels*, 377 So.2d 346, 348 (La.1979)." 1999-3344 at p. 3, 756 So.2d 311.

The DAL has been handling DOI's cases for over six years. It is difficult to perceive how these issues now suddenly meet the irreparable harm test or reach the immediacy required for proceeding as a summary matter. (See Memorandum in Support of Dilatory Exception Of Unauthorized Use of Summary Proceedings.)

In an abundance of caution, and with reservation of its argument that the constitutionality issues are not ripe for decision on a motion for preliminary injunction, DAL will address the other issues raised in the petition.

THE ADMINISTRATIVE LAW JUDGE'S DECISION OF JUNE 5, 1998

The Administrative Law Judge's decision in the State Farm case before this court was issued in a matter that the COI sent to the DAL. The administrative law judge's opinion stated that this State Farm case is not an 'adjudication.' (ALJ Decision, Docket # INS- 0044, June 5, 1998, page 3). Amicus Professor Baier suggested in his brief that this

was not an 'adjudication.' DAL observes that both the DOI and State Farm believed that State Farm was entitled to a hearing under LSA-R.S. 22:1351, and DAL does not contest this. The DOI told State Farm to request a hearing under LSA-R.S. 22:1351, which State Farm did. The Department then forwarded the matter for a hearing before the DAL. This is the procedure used in all of the cases that the DOI files with the DAL, including permit denials and suspensions.

THE CONSTITUTIONALITY ISSUES

The legislation that created the Division of Administrative Law (DAL) Acts 1995, No. 739, as well as Acts 1999, No.1332 is presumed to be constitutional. "There is a strong presumption that legislative actions are constitutional. Only where the statute is clearly repugnant to the constitution will it be stricken. *Doherty v. Calcasieu Parish School Board*, 93-3017 (La. 4/11/94); 634 So.2d 1172, 1174." *In the Matter of Angus Chemical Company*, 94 1148, p. 4 (La. App.1 Cir. 6/26/96), 679 So.2d 454, 456.

"The burden of proving that an act is unconstitutional is upon the party attacking the act. Because the Legislature is entitled to exercise any power not specifically denied by the constitution, a party questioning the constitutionality of an act must point to a specific provision of the constitution which clearly prohibits the legislative action. *Board of Directors of the Louisiana Recovery District v. All Taxpayers, Property Owners, and Citizens of Louisiana*, 529 So.2d 384 (La.1988); *Board of Commissioners v. Department of Natural Resources*, 496 So.2d 281 (La.1986); *Swift v. State*, 342 So.2d 191 (La.1977); *Ancor v Belden Concrete Products, Inc.*, 256 So.2d 122 (La.1971). When a court can reasonably do so, it must construe a statute so as to preserve its constitutionality. *State v. Newton*, 328 So.2d 110 (La.1976)." *Moore v Roemer*, 567 So.2d 75 at 78.

**THE FIRST CIRCUIT HAS ALREADY RULED THAT THE DOI AND ITS
COMMISSIONER HAVE NO CONSTITUTIONAL RIGHT TO
JUDICIAL REVIEW UNDER ACT 1332⁴**

State agencies and their officials do not have Constitutional due process rights because they are not natural persons. As the First Circuit said in *21st Judicial District Court v. State of Louisiana*, 563 So.2d 1185 (La. App. 1st Cir. 1990):

"Public agencies and persons acting in these public capacities are not 'persons' for purposes of due process and equal protection guarantees under the Constitutions of the United States and Louisiana. Warren County, Mississippi v. Hester, 219 La. 763, 54 So.2d 12 (1951); Bartels v. Roussel, 303 So.2d 833 (La.App. 1st Cir.1974), writ denied, 307 So.2d 372 (La.1975); Penny v. Bowden, 199 So.2d 345 (La.App. 3rd Cir.1967). This same rule is applicable by analogy to determine when a party is a "person" for purposes of access to the courts. ... " 563 So.2d 1185 at 1192.

Further, the 19th JDC and the First Circuit have already ruled that Act 1332 does not violate the Department's or the Commissioner's constitutional rights. *Brown v. State Farm Fire & Cas. Co.*, 2000-0539, (La. App. 1 Cir., 6/22/01), 804 So.2d 41.

In *Brown*⁵, the earlier version of this same case, the Court held that the Department of Insurance as a juridical person has no more legal capacity than the law allows and the law limits its right to appeal from an administrative decision based upon La. R.S. 49:964(A)(2) and La. R.S. 49:992(B)(3). *Id.*

" With Acts 1999, No. 1332, however, the legislature specifically has chosen to deny state agencies any entitlement to judicial review under the LAPA, La. R.S. 49:964(A)(2), denying these agencies even status as "persons" under its terms. La. R.S. 49:951.5. In so doing the legislature apparently has concluded that the Commissioner's remedy before the ALJ is adequate to protect the interests entrusted to him by law." *Id.*, p.4; 804 So.2d at 45.

Specifically referring to La.Const. Art. I § 22 which the COI herein claims is violated by Act 1332, the *Brown* court said:

"Louisiana Constitution art.1, § 22 guarantees the Department of Insurance through its commissioner an adequate remedy by due process of law and justice for injury to the Department or its rights. As a matter of law and of Constitutional interpretation, however, we cannot say the legislature has afforded the Department of Insurance an inadequate remedy when the Department as a

⁴ LSA- R.S.49:964(A)(2) and 49:992(B)(3), as amended by Acts 1999, No. 1332 expressly provide that "no agency or official thereof, or other person acting on behalf of an agency or official thereof, shall be entitled to judicial review of a decision made pursuant to" the Louisiana APA or the DAL Act. Under the APA, state agencies have no right of appeal of appeal of any ALJ decision, as agencies are not a "person" and therefore do not qualify as a "person aggrieved" entitled to judicial appeal. LSA-R.S. 49:951(2) and 964 (A).

⁵ The Commissioner argued that Acts 1999, No. 1332 violated the Department of Insurance's constitutional right to appeal an adverse decision rendered by the ALJ. The Commissioner specifically cited article 1, § 22 of the Louisiana Constitution which provides:

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights. (Emphasis added.)

juridical person has no more rights than the law allows. We do not believe the Louisiana Constitution imbues a juridical person, the Department of Insurance through its commissioner, with the same constitutionally protected rights reserved to the individual and for the good of the whole. See art. 1, § 1 and art. 1, § 24 of the Louisiana Constitution (1974). The Louisiana Constitution provides in art. 1, § 1 that government is founded on the will of the people alone. The Legislature, speaking for the people, has elected to limit the right to seek judicial review by the Department of Insurance under the circumstances of this case." *Brown*, 2000-0539 at p.6, 804 So.2d at 45-46.

The *Brown* court cited another case which was recently decided on the same theory:

"Thus, in *State of Louisiana Department of Public Safety and Corrections, Office of Motor Vehicles v. Lee*, 98-0270, pp. 2-3 (La. App. 1st Cir. 2/19/99), 729 So.2d 717, 718-719, this court found that the Department of Public Safety and Corrections, (hereinafter, "DPSC") had no right to appeal the results of an administrative hearing because La. R.S. 49:964 permits only a "person," and not an agency, to appeal." *Brown*, 2000-0539 at p.5, 804 So.2d at 45.

* * *

"We do, however, conclude that the legislature has manifested a clear intention to limit the Department of Insurance's right to seek judicial review under the LAPA." *Id.*

The decision in *Brown v State Farm* should be dispositive on the issue of Act 1332's constitutionality. ⁶ Act 1332 does not impinge upon the constitutional role of the COI, the Department of Insurance, or the judiciary, as they argue herein.

CONSTITUTIONALITY OF THE DAL ACT:

DIVISION OF ADMINISTRATIVE LAW ADJUDICATIONS ARE NOT 'CIVIL MATTERS' CONTEMPLATED BY LA. CONST. ART. V § 16(A)

Courts have upheld legislative delegations to administrative agencies of administrative or ministerial authority to determine the facts upon which the law is to be applied. *State v. All Pro Paint and Body Shop, Inc.*, 93-1316, p. 6 (La. 7/5/94), 639 So.2d 707, 712 (internal citations omitted). By enacting the DAL Act the Legislature merely centralized into one executive agency the administrative hearing authority which had historically been vested in several executive branch agencies. DOI claims that the transfer of administrative hearing authority from the individual agencies to DAL violates the constitution by impinging on the original jurisdiction of the district courts under La. Const. Art. V § 16(A). The DAL Act does not impinge on the jurisdiction of the district

⁶ Plaintiff refers in brief to an unpublished opinion of the First Circuit Court of Appeals. DAL takes exception to discussion of an unpublished case. By rule, decisions without published opinions shall not be cited, quoted or referred to by any counsel, or in any argument, brief, or other materials presented to any court, except in continuing or related litigation. Uniform Rules of Louisiana Courts of Appeal, Rule 2-16.3.

court because DAL adjudications are not 'civil matters' as contemplated by La. Const. Art. V § 16(A).

The Louisiana Supreme Court has recognized the difference between district court jurisdiction and matters that the executive branch is entitled to decide. In *American Waste and Pollution Control Co. v. State*, 588 So.2d 367 (La.1991) it was held that Department of Environmental Quality (DEQ) determinations regarding waste disposal or water discharge permits are not 'civil matters' within the meaning of La. Const. Art. V § 16 (A). The Court distinguished environmental matters from the Workers' Compensation Act at issue in *Moore*⁷, *supra*, by noting that :

"Workers' Compensation, however, is distinctly unlike the environmental permitting matter in the present case. Protection of the environment through regulation and control of waste disposal and water pollution is a legislative creation which has historically been vested in the executive branch." 588 So.2d 367

And, in *Boeing Co., Inc. v. Louisiana Dept. of Economic Development*, 94-0971 (La. App. 1 Cir.,6/23/95) 657 So.2d 652,⁸ the First Circuit followed the same reasoning:

"The Supreme Court has previously addressed the meaning of "civil matters" in *Moore v. Roemer*, 567 So.2d 75 (La.1990), as well as in *Matter of American Waste*. In both cases, the court used an historical analysis to make its determination. If the subject matter of the suit was one which was traditionally brought before the court, it would be considered a civil matter over which district courts have original jurisdiction (e.g. claim of unconstitutional government action). If it was not, district courts lack original jurisdiction." *Boeing*, 94-0971 at 10; 657 So.2d 658.

In explaining their holding, the *Boeing* court said:

"In consideration of the foregoing and applying the same principles as that used in *Moore* and *Matter of American Waste*, we find that the regulation and control of ad valorem tax exemptions, at issue here, which are constitutionally delegated to the Board and the governor, are traditionally and historically matters handled by the executive branch and are not "civil matters" within the meaning of La. Const. art. V § 16(A)." *Id.*, 94-0971 at 12; 657 So.2d 659.

As *Boeing* mentioned, courts are using 'an historical analysis' to determine whether a case falls under the original jurisdiction of the district court or whether the APA applies. For example, under the factual situation in *Pope v State of Louisiana*, 1999-2559 (La. 6/29/01), 792 So.2d 713 the Supreme Court held that the Department of Public

⁷ In *Moore* the Court declared the Workers Compensation Act unconstitutional in that it eliminated district court involvement in the litigation in violation of the constitutional grant of original jurisdiction to the district court in La. Const. Art. 16(A).

⁸ Boards and commissions do not have to send their adjudications to the DAL, per La. R.S. 49:992(G). This case is cited because it relies on La. R.S. 49:964(A)(2) and the jurisdictional holding on "civil matters" within the meaning of La. Const. Art. V § 16(A).

Safety and Corrections 'Corrections Administrative Remedy Procedure' divested the district court of original jurisdiction in a tot matter and violated La. Const. Art. V § 16⁹ *Id*, 1999-2559 at p.11; 792 So.2d 720 (emphasis added). But the very same act at issue in *Pope* came under scrutiny in *Peterson v Toffton*, 36,372 (La. App 2nd Cir 9/18/02); 828 So.2d 160, where the Court found that a matter should be decided administratively. The CARP Act was not declared unconstitutional in either of these cases; the court simply clarified what kind of matters could be adjudicated under the Act.

"Under the rationale of *In the Matter of American Waste & Pollution Control*, 588 So.2d 367 (La. 1991), a case involving injuries to a prisoner from conditions of discipline/confinement is not a traditional "civil matter" under Article V, § 16 of the 1974 Louisiana Constitution. The 19th Judicial District Court in such a case is not exercising "original jurisdiction" in its review of the DOC, but appellate jurisdiction, which, as also addressed in Article V, § 16, may be provided to the district court by the legislature. *Loop, Inc. v Collector of Revenue*, 523 So.2d 201 (1987). CARP, which was enacted after the 1974 Louisiana Constitution, like the DEQ legislation at issue in *American Waste*, is not unconstitutional when applied to injuries from prison confinement." *Peterson*, 36,372 at p. 8; 828 So.2d 164.

The jurisdiction of the DAL is distinct from that of the original jurisdiction of the district courts. DAL's jurisdiction is set forth in R.S. 49:992(A)(2):

"On or after October 1, 1996 the Division shall commence and handle all adjudications in the manner required by the Administrative Procedure Act ..."

The DAL is authorized to conduct hearings on "adjudications"¹⁰ on "decisions or orders".¹¹ The DAL Act did not expand the jurisdiction of the APA or change it in any way. A sample listing of the cases that DAL adjudicates includes: compliance and penalty orders of DEQ, or the Department of Natural Resources; drivers license suspensions, handgun permit denials, or violations of trucking safety regulations for the Department of Public Safety; review of sanitation orders for the Department of Health and Hospitals; adjudications on permit suspensions, license denials and revocations for the Department of Insurance; adjudication of violations of hunting and fishing laws and regulations of the Department of Wildlife and Fisheries, and others. None of these

⁹ The Court specifically said "..., our decision in the present case is not based upon a separation of powers violation under La. Const. Art. II §2, but on a violation of La. Const. Art. V § 16(A)."

¹⁰ LSA R.S 49:951(1) "Adjudication" means agency process for the formulation of a decision or order.

¹¹ LSA R.S 49:951(3) "Decision" or "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency, in any matter other than rulemaking, required by constitution or statute to be determined on the record after notice and opportunity for an agency hearing, and including non-revenue licensing, when the grant, denial, or renewal of a license is required by constitution or statute to be preceded by notice and opportunity for hearing. (emphasis added)

matters have historically been vested in the district courts. These matters are within the purview of the executive branch of government and the Legislature has merely centralized the administrative hearing authority from several executive branch agencies into another executive branch agency, the DAL.

DOI's petition fails to set forth any functions of the DAL which are civil matters that are encompassed by La. Const. Art. V §16. If the DAL is not adjudicating 'civil matters' there is no impingement upon the Constitutional powers granted to the judiciary.

DAL is not a judicial court and does not enjoy the powers of the judiciary. Petitioner claims that DAL's ALJs 'determine what the law is' and are therefore judicial courts. DAL ALJ's only interpret the law as applied in the adjudication, based on the facts of the administrative law case being adjudicated.

The APA says that all ALJ decisions, not just DAL's shall include findings of fact and conclusions of law. L.R.S. 49:958. This does not make all these decisions into unconstitutional judicial actions, or violate the separation of powers doctrine.

THE SEPARATION OF POWERS DOCTRINE HAS NOT BEEN VIOLATED

Article II, §1 of the Louisiana Constitution provides that "[t]he powers of government of the state are divided into three separate branches: legislative, executive, and judicial." Article II, §2 dictates that "[e]xcept as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." "Article II is violated only if one branch of government, or its members, exercises power belonging to either of the others." *In the Matter of Angus Chemical Company*, 94 1148 at p. 9 (La. App.1 Cir. 6/26/96), 679 So.2d 454, 458 (internal citations omitted).

Claiming that the DAL Act violates the separation of powers doctrine the COI cites *Moore v Roemer*, supra *Pope v State of Louisiana*, supra, *State v O'Reilly c/w State v Brewster*, 2000-2865 (La. 5/15/01), 785 So.2d 768 and *Bruneau v Edwards*, 517 So.2d 818 (La. 1987).

In *Moore*, the Supreme Court held that workers' compensation matters are 'civil matters' contemplated by La. Const. Art. V§16(A) and therefore, the Workers'

Compensation Act that eliminated the district courts role from the litigation was unconstitutional.

In *O'Reilly* the Supreme Court struck down a statute that gave an appointed commissioner jurisdiction concurrent with district court judges in misdemeanor cases, based upon La. Const. Art. V §§ 1 and 22.

Pope, as previously mentioned, was decided on the basis of La. Const. Art. V § 16(A) not the separation of powers. 792 So.2d 713 at 720.

All these cases are distinguishable from Act 739. The legislation at issue in *Moore*, *O'Reilly* and *Pope* attempted to grant concurrent jurisdiction or eliminate original jurisdiction from the district courts usurping the role of the judiciary set forth in the state Constitution. Act 739 does not attempt to divest the district court of jurisdiction over workers' compensation, torts, or of any matter that the district courts have historically handled.

Bruneau concerned an unconstitutional delegation of legislative appropriation authority to the Governor. It was a suit by members of the legislative branch against the executive branch, not a case as we have here where an executive branch agency is claiming that the Legislature cannot constitutionally transfer functions among executive agencies.

Transfers of powers and consolidation of executive branch agencies' powers are done all the time.¹² This causes no violation of the separation of powers doctrine unless one branch of government exercises powers that belong to another branch. This case involves a challenge by one executive branch agency against another executive agency within the same branch. The DAL Act consolidated jurisdiction for handling adjudications— an executive branch function—from several executive agencies to one executive branch agency, the DAL. If handling executive branch adjudications is only reserved to the judicial branch, then declaring the DAL Act unconstitutional will result in these cases being transferred to the district courts, not back to the DOI to handle

¹² See for example: Acts 2001, No. 9 transfers functions of Office of Financial Intuition to the office of Governor from the Department of Economic Development. DAL did hearings for them under the Office of Economic Development and has continued to do so for the office of the Governor. See also Acts 2001, No. 702 enacting R.S. 40:600.6(A)(24), re the transfer of the authority to administer the federal grants for energy assistance from the Department of Social Services to the Louisiana Housing Finance Agency.

internally, as the Commissioner wishes. If it is unconstitutional for DAL to handle these cases then isn't also unconstitutional for the COI to handle them? A favorable ruling for DOI would leave intact LSA-R.S. 49:964 which prohibits judicial review of adjudications under the APA no matter who hires the ALJ. Will all agency adjudications, whether or not performed by DAL, also be unconstitutional? It has never been so declared.

The DOI and the COI only have those powers which the law allows. Petitioner implies that Article IV §1(B) and 20 give him Constitutional powers relating to conducting administrative hearings, but these articles do no such thing; those sections are irrelevant to the issues before the court. The relevant section is Article IV § 11, which states:

Commissioner of Insurance; Powers and Duties

Section 11. There shall be a Department of Insurance, headed by the commissioner of insurance. The department shall exercise such functions and the commissioner shall have powers and perform duties authorized by this constitution or provided by law.

What are these duties 'provided by law'? The Legislature, following the Constitution, has "provided by law" how the "duties" relative to adjudications are handled. The Insurance Code provides that administrative hearings shall be held under a number of circumstances, La. R.S. 22:1351, *et seq.*, and the DAL Act "provides by law" that DAL handles such hearings. None of the Constitutional articles cited by petitioner contradict this. The Legislature has also provided that there is no agency appeal of ALJ decisions under the APA. The Legislature can do this, as State agencies do not have the same rights to appeal as do natural persons, as previously discussed.

The powers in government are not held in rigidly separated compartments. The principle of separation of powers does not mean that the three branches of government should be kept entirely distinct or have no connection. There are lots of blendings of powers within state government. The adjudication functions exercised by the DAL do not violate these principles.

The COI does not want the DAL conducting adjudications under the Insurance Code and wants the right to appeal from decisions of the ALJ. The Legislature has decided otherwise. Does petitioner have a remedy? Yes, he can seek to have the law changed through the legislative process, to allow agency appeals or to be statutorily exempt from the DAL Act, for example.

CONCLUSIONS

The Court must begin with the presumption that Acts 1995, No. 739 and Acts 1999, No. 1332 are constitutional. The burden of proving that an act is unconstitutional is upon the party attacking the act. In this action the DOI has not overcome the presumption nor made a prima facie showing that it would prevail on the merits of the case. The 19th JDC and the First Circuit have already ruled and rejected plaintiff's arguments that Act 1332 violates the Constitution. Act 739 has not been shown to violate the Constitution since the Legislature only transferred executive branch functions to another executive branch agency. Neither Act violates the rights of the COI or the DOI since they are juridical persons and they only have the rights provided to them by law. These rights do not include the right to appeal APA or DAL decisions. Legislature is entitled to exercise any power not specifically denied by the constitution and plaintiff cites no specific provision which clearly prohibits the legislative action.

Only where the statute is clearly repugnant to the constitution will it be stricken and when a court can reasonably do so, it must construe a statute so as to preserve its constitutionality.

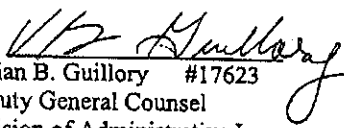
In the alternative, if this Court finds any part of these Acts violate the Constitution, the Court should sever that part and leave the remaining law intact.¹³ "The unconstitutionality of one portion of a statute does not render the entire law unenforceable if the remaining portions are severable from the offending portions. *State v. Brazley*, 00-0923, p. 6 (La.11/28/00), 773 So.2d 718, 722; *Pierce v. Lafourche Parish Council*, 99- 2854, p. 9 (La.5/16/00), 762 So.2d 608, 615; *Perschall v. State*, 96-0322, p.

¹³"The test for severability is whether the unconstitutional portions of the law are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention of the legislative body enacting the law. To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself. The law enforced after separation must be reasonable in light of the act as originally drafted. The test is whether the legislature would have passed the statute had it been presented with the invalid features removed. Where the purpose of the statute is defeated by the invalidity of part of the act, the entire act is void. Conversely, however, when the general objectives of the act can be achieved without the invalid part, the remaining parts of the act will be upheld. *Perschall*, 96-0322 at 29, 697 So.2d at 260 (internal citations omitted)." *State v O'Reilly c/w State v Brewster*, 2000-2865, p. 11 (5/15/01), 785 So.2d 768, 776.¹³

28 (La.7/1/97), 697 So.2d 240, 259." *State v O'Reilly c/w State v Brewster*, 2000-2865,
p. 10 (5/15/01), 785 So.2d 768, 775.

RESPECTFULLY SUBMITTED:

Ann Wise, in her official capacity as
Director of the Division of Administrative Law

BY: 
Vivian B. Guillory #17623
Deputy General Counsel
Division of Administrative Law
654 Main Street
Baton Rouge, Louisiana 70802
Telephone (225) 219-9982
FAX (225) 219-9983

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum In Opposition To Rule To Show
Cause For Preliminary Injunction has been faxed or hand delivered to all counsel of
record in this proceeding on the 13th day of January, 2003.

