Appellate Judicial Review of Administrative Agency Decisions Parts 1 and 2

Justice W. Michael Gillette
Oregon Supreme Court (Senior Status)

I. Core Functions of an Appellate Court

A. Review decisions of lower tribunals for legal errors claimed by a party to an action; and

B. Announce, clarify, harmonize and standardize the rules of law which govern the affairs of those who are not parties to the particular case being reviewed.

II. Step 1: The *First* Thing the Court Looks for In a Record on Appeal (ROA)

What's the fight about? It is unlikely that an appellate judge, or even the judge's clerk, will ever read the entire hearing record. (Well, maybe…but only if it's short.) The judge's concentration will be on what the "fight" is about:

A. What error did the appellant contend was made?

B. What was the original fight about? (scope of the original hearing)

III. Step 2: The Court's First Consideration Regarding a Record on Appeal

What is the scope of the court's authority with respect to the case on appeal? OR What might it be necessary that the court do in order to correct the error that is alleged?

A. Affirmed

B. Complete Reversal

C. Modification

D. Remand (most common)

IV. Step 3: Initial Review of the Record

Again, it is highly unlikely that an appellate judge will ever read the entire hearing record. But appellate judges will typically begin the review by reading:

A. Assignment of Error

B. Summaries of the Arguments

C. Conclusion of the Hearing Officer/Administrative Law Judge

V. Step 4: Review of What Hearing Official Considered in Making the Decision

The decision should contain a complete statement of everything the hearing official did and did not consider in rendering the decision:

A. Everything the hearing official considered in making the decision:

1. Stipulations

2. Waivers

3. Evidence: demonstrative, documentary, testimony, etc., all of it.

   a. When and how was it offered?

   b. Was there a timely objection raised?

   c. What was the basis for the objection?

   d. What was the ruling on the objection?

4. Arguments Made

B. Everything the hearing official was asked to consider but did not and an explanation as to why it was not considered.[1]

C. If event occurred during the course of the hearing that could have resulted in an additional item coming into the record but the item was not included in the record, there should be an explanation as to why the item was not in the record.

[1] If any event occurred during the course of the hearing that could have resulted in an additional item coming into the record, whether testimony, other evidence or argument, but that item was *not* included in the record, there should be some explanation as to why the item is *not* in the record.

VI. Step 5: Review of the Order

What sanction was imposed and why? If the hearing official had a range of choices regarding the penalty to impose, why did the hearing official choose the penalty that he/she selected?

VII. The Basic Process of Appellate Review

A. Review for an error in the way that the law has been applied:

1. Have procedural and substantive rules been followed?

2. Have statutes been correctly followed?

3. Have (state and/or federal) constitutions been correctly followed?

B. Review for an error respecting the facts of the case:

1. Errors respecting evidence admitted or excluded; *i.e.* was the evidence truly admissible? Admissibility is determined by asked, "Standing by itself, does this evidence make a fact in issue more or less probable?"

2. Errors respecting Findings of Fact are evaluated using the Substantial Evidence standard of review which requires that:

   a. The review is based on record in its entirety and only on the record.

   b. Substantial Evidence is "evidence a reasonable mind could accept to support a conclusion." Substantiality is determined by weighing the evidence supporting the ALJ's finding against all other evidence in the record and is about weight or persuasiveness, not admissibility.

      Determination of facts and credibility of witnesses are purview of administrative agency or tribunal which is in a better position to evaluate evidence offered at hearing. *Williams v. Arnold Cleaners*, 25 Mich.App. 672, 181 N.W.2d 625 (1970).

3. Errors respecting if/how the facts found are connected with the Conclusions of Law.

C. Reviewing Discretionary Actions of the Agency for Abuse of Discretion

1. Evaluating discretion (or lack thereof):

a. Was the agency vested with discretion by statute? (*e.g.* The word "may" in a statute was addressed to the party but agency misconstrues statute believing "may" allows agency to act in more than one way.

b. The agency had discretion but failed to exercise it (*e.g.* Agency decision states that "we have no choice but to respond in this way" when, in fact, they do have discretionary authority to do otherwise.)

c. Agency had discretion, but exercised it outside the legally permissible range of choices. (*e.g.* Agency imposed an administrative fine greater than the maximum amount authorized by statute.)

2. Case Law Regarding Abuse of Discretion

Diso v. Department of Commerce, 985 N.E.2d 517, 523 (Ohio App.5th Dist. 2012): "The term 'abuse of discretion' is unfortunate. In ordinary language, "abuse" implies some form of corrupt practice, deceit or impropriety. Webster's Third New International Dictionary (1976). In this sense, the application of the word to the act of a trial judge who ruled in accordance with all the decided cases on the issue is inappropriate. However, in the legal context, the word "abuse" in the phrase "abuse of discretion," has been given a broader meaning. In the few cases that have attempted an analysis, the ordinary meaning of the words has been considered inappropriate and the phrase as a whole has been interpreted to apply where the reason given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice. *State ex rel. Fletcher v. District Court of Jefferson Co.*. 213 Iowa 822, 831, 238 N.W. 290, 294 (1931). Similarly, a discretionary act which reached an end or purpose not justified by, and clearly against, reason and evidence "is an abuse." *Kinnear v. Dennis*, 97 Okl. 206, 207, 223 P.383, 384 (1924). The law would be better served if we were to apply a different term, but since most appellate judges suffer from misocainea,[2] we will no doubt continue to use the phrase "abuse of discretion." Therefore, we should keep some operative principles in mind. Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable considerations which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact of what occurs before him. *Walsh v. Centeio, supra*. Where a decision is made on that basis, it is truly discretionary and we will not substitute our judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable

[2] An abnormal dislike for new ideas; a hatred of change or innovation. (footnote not in original decision).

considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine law and policy and it becomes our duty to "look over the shoulder" of the trial judge and, if appropriate, substitute our judgment for his or hers. This process is sometimes, unfortunately, described as a determination that the trial judge has 'abused his discretion.' "

VIII. Elements Affecting Whether the Court Will Enter Into Full Appellate Review

A. Finality of the Decision: Ordinarily, reviewing courts will only consider matters with which the agency has finished.

B. Exhaustion of Administrative Remedies

Reasons for exhaustion:

1. "The Judiciary Branch will not lightly interfere with the workings of the Executive Branch."[3]

2. Development of facts by the agency is helpful to the court of review.

3. The Rule of Laziness[4]: There is no point in the appellate court becoming involved until the complaining party has lost. As long as there's hope the complaining party will receive relief via reconsideration or rehearing, the appellate court will permit the matter to continue before the agency.

C. Standing

"Standing" arises when a party is:

1. Adversely affected; or

2. Aggrieved (in many jurisdictions); or

3. Has been granted standing by a statute or the agency.

D. Preservation of Errors

"In the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the

[3] Balderdash!
[4] A term coined by Justice W. Michael Gillette of the Oregon Supreme Court.

complaining party could have, and should have, but did not present to the trial court." *Abrams v. Paul*, 453 So.2d 827 (Fla. 1st D.C.A. 1983).

For an error to be preserved for appellate review, the record must:

1. Timely:

   a. Objections must be contemporaneous;

   b. Motions may be preemptive or contemporaneous;
2. Specific:

   a. specific identification of the objectionable element

   b. specific legal ground on which the claim is based.

   DHSMV v. Sarnoff, 776 So.2d 976 (Fla.App. 1 Dist., 2000): "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings."

E. Appellate Review Regarding Rules

Appellate Review of Rules involves the following questions:

1. Were the rules promulgated and enacted properly and therefore valid?; and

2. Were the rules applied properly?

3. How was the matter preserved? (What is the scope of hearing officer/ALJ authority?

IX. Writing the Decision to Preclude Reversal by Appellate Court

A. Common Problems With Findings of Fact:

1. Reciting testimony or written statements of if they constituted findings of fact, *e.g.* "Mr. Smith said…"

2. Listing a finding that's irrelevant.

3. Beginning a finding with "It seems" or "It appears…"

4. Listing legal conclusions as findings of fact; and

B. Conclusions of Law

1. Legal conclusions are commonly worded similar to the wording of the statute.

2. Legal conclusions must follow, flow from, be based upon the facts found.

3. Conclusions of Law should be distinguished from Findings of Fact.

4. Conclusions of Law must be a logical consequence of the Findings of Fact that preceded them.[5]

5. There should be at least one Finding of Fact supporting each Conclusion of Law.

C. Discussion/Rationale

1. If the exhibits in the record are incomplete and/or contradict one another, you must explain how you filled in the gaps or resolved the conflict.

2. If testimony was contradictory or incredible, you must explain how/why one witness was more credible than another.

3. Legal arguments: Explain your responses to them citing the legal authority relied upon for your response.

D. Ultimate Decision or Order

Must be in accord with facts found, reasoning given, and authority relied upon.

X. Harmless Error vs. Harmful Error

A. Harmless Error Defined

1. An alleged error committed during the course of the hearing that was not prejudicial to the party alleging the error.

2. Had the error not been committed, the outcome of the hearing would have

[5] The words "arbitrary and capricious" are common to appellate decisions and are most often found when there is no "rational connection between the facts found and the choice made." *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 83 S.Ct. 239 (1962).

been the same.

3. Error which is not sufficient to warrant reversal, modification or rehearing.

B. Harmful Error Defined

1. An error which, more probably than not, affected the outcome of the hearing to the detriment of the party who complained about the error.

2. Because of the error, the outcome of the hearing was incorrect or unjust.