Avoiding Remand, Rehearing, and Reversal

Written materials to accompany a presentation at the
2021 Professional Development Conference
of the
National Association of Hearing Officials
November 1 - 3, 2021
Philadelphia Pennsylvania

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Wilsonville, Oregon

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Part 1: Getting it Right by Learning from the Mistakes of Others

I. Introduction: What are the agency's directives with respect to the issues of the case?

An Administrative Procedures Act and any other organic, controlling statutes that authorize and ultimately control an agency's administrative process, are only the beginning. Statutes provide the broader directives of authorizing legislation—the legal framework under which the agency functions. Legislators, however, may lack the technical or legal knowledge necessary to deliver comprehensive agency standards. Consequently, much greater detail than statutes can provide is vital to encompass all the possible scenarios an agency might encounter in implementing and performing its legally-mandated responsibilities. Rules or regulations amplify, explain, and expand upon the fundamentals and essentials supplied by the statutes. And then there's caselaw…it's law, too.

II. Substantive Administrative Law v. Procedural Administrative Law

Substantive Administrative Law:
Statutory law that governs the rights and obligations of everyone within its jurisdiction and which broadly defines violations and infractions as well as penalties and sanctions.

Procedural Administrative Law:
Law that establishes the rules regarding how the duties of the agency are to be conducted and the entitlements, privileges, and obligations of individuals under the jurisdiction of the agency

III. Hierarchy of Laws

Federal and State Constitutions Just as the Congress is authorized to make federal laws by the U.S. Constitution, state legislatures are authorized to make state laws by each state's constitution. Congressional legislation is presumed to be in accordance with the U.S. Constitution. State legislation is presumed to be in accordance with U.S. and state constitutions.

Statutory Law Statutes and codes enacted by the legislature (which may include the Administrative Procedures Act).

Regulatory Law Regulations required by agencies based on statute (which may include the Administrative Procedures Act).

Case Law Reported decisions of appellate courts which make interpretations of the law and can be cited as precedents. A court's interpretation of how the law should be applied to the facts of a particular case that is published in a "reporter."

Administrative Reporters Published decisions or reports of policy issued by an administrative agency and applicable only to that agency.

IV. What is a Rule?

For the purposes of this discussion, it is necessary to define or describe what we mean by "rule."

A. An established standard, guide, or regulation

B. Set up by an authority (agency, department, commission, board, etc.)

C. Prescribing or directing certain action or restraint

D. Regarding the conduct of public business by an administrative agency; and

E. Involving how that agency fulfills its function in relation to the public.

V. Purposes of Rulemaking

A. Clarify and/or interpret the broader concepts found in statutes;

B. Specify or particularize processes and procedures only generally defined in statutes;

C. Add scientific, industrial or other technical expertise to the directives in the statutes;

D. Increase the agency's operational efficiency by providing comprehensive instructions;

E. Find and employ compromise between the agency, the public and the legislature.

VI. Formal Rulemaking Pursuant to Statute/APA

The federal Administrative Procedure Act is the governing law for federal rulemaking. Each state has its own statutory requirements for rulemaking that somewhat parallels the federal system. Both state and federal rulemaking require strict adherence to standards of transparency and public participation. Although the process of rulemaking is somewhat standardized, the way in which the steps in the process are described in statutes can result in as few as six or as many as twelve separate steps. The process usually follows this general plan:

1. Agency drafts the rule and the tentative wording of the rule receives the approval of the agency head.

2. A notice regarding the development of the rule is published in the designated register or publication. This opens the "record" that will be made regarding the rule.

    a. The agency may ask the public for early input on key issues.

    b. Data and/or supporting and opposing statements are made available to the public for review.

3. Optional step: A copy of the rule and statements or data related to the rule is provided to a committee (AKA council or board) who:

a. Reviews the rule for legal, technical and functional errors;

b. Discusses and negotiates over the subject matter of the rule to create a more specific or detailed proposed rule; and

c. Verifies that the agency responds to all comments and inquiries.

4. Optional but likely step: Agency holds a public hearing allowing the public to comment. Representatives of the agency or the above-described committee may be present at the hearing to answer questions or provide clarifications regarding the proposed rule.
5. Optional step: Based on the committee's comments or the result of the public hearing, the agency my change the proposed rule.

6. The agency publishes the actual proposed regulatory wording in the designated register or publication which typically includes a discussion of the justification for and the analysis behind the rule as proposed. Early public comments and agency responses to those comments may also be published.

7. A set period for public comment begins, usually from 30 to 180 days depending on the complexity of the proposed rule. During this time:

    a. The public may submit written comments to the agency;

    b. Agencies are usually required to respond to every issue raised in the comments;

    c. Committee typically verifies that the agency has responded to all comments and inquiries; and

    d. Adjustments to the rule *may* occur. If adjustments do occur, statutes *may* require another period of public comment if:

        i. Second draft of the rule is substantially different from the first draft; or

        ii. Second draft raises new issues that have not been submitted to the public for comment.

8. The agency files the rule for adoption with the date the rule will become effective.

9. The rule is published in the administrative code of regulations with the effective date.

IMPORTANT NOTE:

Any policy, guideline or principle to which the agency requires the adherence of the public <u>must</u> go through the statutorily required rulemaking process/promulgation if it is to be enforced upon the public. If the agency attempts to enforce a policy that has not been through this process and it is challenged in court, the ruling will be that the policy does not and cannot have the force of law until it is properly promulgated. Some agencies have attempted to alter policies through by the process of "interpreting" the policy differently without public input. Courts take a dim view of this approach.

VII. Overview of Pertinent Cases

***Garland v. Ming Dai*, 141 S.Ct. 1669 (2021)**

Subsequent to an administrative hearing, an immigration judge (IJ) found that a Mexican national should be deported for violating 8 U.S.C. § 1231(b)(3)(B)--"inflicting corporal injury on a spouse or cohabitant," because he had been convicted by a California Court of a serious domestic violence incident against his girlfriend, who was the mother of his daughter. He petitioned for review to the Board of Immigration Appeals (BIA), who affirmed the IJ's determination and declared him ineligible for relief from removal.

During another immigration hearing, a Chinese petitioned for asylum, testifying that he and his family had suffered past persecution by Chinese officials and expected future persecution upon return; however, he failed to disclose that his wife and daughter had both returned voluntarily to China since accompanying him to the U.S. When he was confronted with their return to China, he testified he had actually remained in the U.S. for reasons other than to avoid persecution. The IJ found that this testimony undermined his claim of persecution and denied him asylum. He, too, petitioned for review to the BIA who affirmed the IJ's determination and declared him ineligible for asylum.

Both noncitizens sought judicial review to the 9th Circuit Court of Appeals. In each case, the 9th Circuit noted that neither the IJ nor the BIA made an explicit "adverse credibility determination" under the Immigration Nationality Act (INA) §§ 1158(b)(1)(B)(iii), 123(b)(3)(C), 1129a(c)(4)(C). The 9th Circuit applied its own judge-made rule that a reviewing court must treat a noncitizen's testimony as credible and true absent an explicit adverse credibility determination by an IJ or the BIA. The 9th Circuit granted relief to both noncitizens. On appeal, SCOTUS granted certiorari in both proceedings.

In a unanimous decision, the U.S. Supreme Court held:

> "The Ninth Circuit's rule has no proper place in a reviewing court's analysis. The INA provides that a reviewing court must accept "administrative findings" as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." § 1252(b)(4)(B). And a reviewing court is "generally not free to impose" additional judge-made procedural requirements on agencies. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 98 S.Ct. 1197, 55 L.Ed.2d 460…. Reviewing courts, bound by traditional administrative law principles, must "uphold" even "a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447. In neither case did the Ninth Circuit consider the possibility that the BIA implicitly found the presumption of credibility rebutted. The BIA expressly adopted the IJ's decision in Mr. Alcaraz-Enriquez's case, which, in turn, noted that Mr. Alcaraz-Enriquez's story changed from the time of the probation report to the time of the hearing—a factor the statute specifically identifies as relevant to credibility, see §§ 1158(b)(1)(B)(iii), 1231(b)(3)(C), 1229a(c)(4)(C). And in Mr. Dai's case, the BIA also adopted the IJ's decision, which discussed specific problems with Mr. Dai's demeanor, candor, and internal inconsistency—an analysis that certainly goes to the presumption of credibility even if the agency didn't use particular words. See *ibid.* In each case, the Ninth Circuit should consider whether the BIA in fact found the presumption of credibility overcome."

***Pollock v. Patuxent Inst. Board of Review*, 374 Md. 463 (Md. App. 2003)**

An inmate in an alternative program for youthful eligible persons at a correctional institution challenged the nonrenewal of his parole before the institution's Board of Review. The nonrenewal of his parole had been based on a positive urine test for drugs. On appeal, the inmate challenged the action of the Board on two grounds: (1) that the notice he had received had been inadequate; and (2) that the results of the blood test had been improperly admitted in the Board hearing because no evidence was offered that the urine sample was collected properly or that the chain of custody of the urine sample had been maintained. The Maryland Court of Appeals, finding that the inmates notice had been inadequate, remanded the case back to the Circuit Court for it to decide whether the Board's action in admitting the urinalysis results had been in arbitrary or capricious. The Circuit Court found: the Board acted appropriately in admitting the urinalysis, there was enough evidence in the record to support a finding that the urine sample was that of the inmate, and that the Board acted upon the urinalysis results correctly when the inmate's parole was not renewed. Petitioner then filed a new appeal, asking the appellate court this question:

> "Does the Board's technical non-compliance with an internal Patuxent directive, which sets forth procedures governing the collection and handling of urine specimens from Patuxent inmates for the purpose of detecting illicit drug use, provide a basis for either invalidating the Board's revocation and non-renewal of Pollock's parole, or excluding the urinalysis drug test results upon which the Board based its decision?"

The Maryland Court of Appeals held:

> "An agency of the government generally must observe rules, regulations or procedures which it has established and under certain circumstances when it fails to do so, its actions will be vacated and the matter remanded. This adoption is consistent with Maryland's body of administrative law, which generally holds that an agency should not violate it own rules and regulations."

***Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So.2d 306 (Dist.App.Ct.-D1, FL 1997)**

Vantage Healthcare Corporation (Vantage) appealed a final order of the Agency for Health Care Administration (AHCA) awarding a certificate of need (CON) to Manatee Springs Nursing Center, Inc. (Manatee). In granting the CON to Manatee, the AHCA denied a CON to Vantage.

The facts of the case are simple. Vantage timely filed a letter of intent to apply for the CON. That triggered a 16-day grace period for competing applicants to file letters of intent under Florida Statute section 408.039(2)(b) and Florida Administrative Code Rule 59C-1.008(1)(g). Manatee filed its letters of intent on the next to last day of the grace period by delivering the letters to Airborne Express for overnight delivery. Manatee's letters of intent were delivered a day late. AHCA, nonetheless, accepted Manatee's letters of intent, under the doctrine of equitable tolling[1], despite FAC 59(c)-1.008(g) which expressly stated that the filing due date for certificates of need applications "shall not be expended." AHCA granted the CON to Manatee. Vantage appealed on the ground that the doctrine of equitable tolling was inapplicable, especially in light of FAC 59(c)-1.008(g). AHCA responded by arguing that it should be permitted to make a case-by-case determination regarding when to accept late filed letters of intent.

The Florida District Court of Appeals for the First District held: Doctrine of equitable tolling was inapplicable to untimely filed letters of intent from applicant for certificate of need (CON) for community nursing home beds, despite claim that applicant acted reasonably in relying on overnight carrier; applicant chose to wait until 11th

[1] The doctrine of equitable tolling: a statute of limitations will not bar a claim if, despite the use of due diligence, the plaintiff did not or could not discover the injury until after the expiration of the limitations period.

hour, selected carrier which was to deliver letters, and failed to follow up and confirm that letters had been received. The agency's argument that it should be permitted to make a case-by-case determination regarding when to accept late filed letters of intent conflicts with the express language of its own rule. Rule 59C–1.008(g), Fla. Admin. Code contains an express provision that "[t]he application filing due date shall not be extended for any applicant filing a letter of intent under the requirements of this paragraph." The agency is obligated to follow its own rules.

***Collier County Board of County Commissioners v. Fish & Wildlife Conservation Commission*, 993 So.2d 69 (Dist.App.Ct.-D2, FL 2008)**

The City of Naples, Florida (City), enacted a city ordinance to impose slow speed zones in portions of Naples Bay and applied to the Fish and Wildlife Conservation Commission (FWCC) to obtain a waterway marker permit to implement the ordinance. The FWCC published a notice of intent to issue the City the permit for the waterway marker. The Collier County Board of County Commissioners (County), the Marine Industries Association (MIA), and a number of individuals filed petitions for an administrative hearing to challenge whether the City's permit application met the requirements of rule 68D-23.105(1)(b):(1) to obtain the permit for the waterway marker. The ALJ conducted the hearing and found in favor of the Petitioners. The City filed exceptions to the ALJ's recommended order. The MIA asked the FWCC whether an oral argument would be allowed in the hearing before the seven-member Fish & Wildlife Conservation Commission, since that was the normal course of action when an exception to an ALJ's recommended order is file. The MIA learned that the FWCC has delegated to its Executive Director (ED) the authority to issue final orders and that the executive director would do so in this case.

The ED subsequently issued a final order granting the City's application for a waterway marker permit. The order indicates that the FWCC adopted all of the findings of fact in the recommended order "to the extent that they are relevant and material." The order reflected that the FWCC rejected most of the ALJ's conclusions of law. In substituted conclusions of law, the order provided that the FWCC was required to investigate only "to make sure the placement of markers are not a hazard to navigation." The order stated that "[p]ursuant to Section 327.40, Florida Statutes, the regulatory marker applicant was required to submit a statement describing the purpose of marking. This requirement was satisfied. Nowhere in the statute is FWC authorized to second guess a local government's authority as to whether a boating safety ordinance is needed." The FWCC's position was that it could not question the validity of the City's statements in its permit application or examine whether the City's statements meet the fact-based criteria of rule 68D–23.105(1)(b).

The Petitioners timely filed their notices of appeal, and on the City's motion, the Florida District Court of appeals, 2nd District, consolidated the three appeals.

MIA contended that only the agency head had final-order authority, pursuant to Section 20.331(2):

> "The head of the Fish and Wildlife Conservation Commission is the commission, with commissioners appointed by the Governor as provided for in s. 9, Art. IV of the State Constitution." Section 120.52(2) defined agency action as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order." Section 120.52(7) defines a final order as a written final decision which results from a proceeding under s. 120.56, s. 120.565, s.120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. Thus, by statute, an order involves "agency action," and the final order here is "final agency action." Section 120.52(3) provides, " 'Agency head' means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action." Therefore, because the agency head is the seven-member commission, it has responsibility for final agency action which includes the final order at issue.

With respect to the agency's review of the ALJ's recommended order, the Court held that the agency "may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." § 120.57(1)(*l*), Fla. Stat. (2006). In addition to stating its reasons with particularity, the agency "must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." *Id.*
In their de novo review of the agency's conclusions of law, the Court determined that the FWCC "erroneously interpreted a provision of law and a correct interpretation compels a particular action," then this court must set aside the agency action or remand for further proceedings. § 120.68(7)(d).

The Court further held:

> "The fact that the executive director can "administer" activities necessary to fulfill the FWCC's statutory responsibilities does not mean that the executive director can completely perform the FWCC's duties. In the context here, "administer" means "to manage or direct (the affairs of a government, institution, etc.)." *Webster's New World College Dictionary,* 18 (4th ed. 2001). The FWCC did not delegate authority to the executive director only to draft the order based on an FWCC determination regarding the issues before it. Rather, the FWCC delegated authority to the executive director to *make* the FWCC's decision, as well as to draft and issue the order. We conclude that the FWCC's delegation of its complete decision-making responsibility for final agency action concerning the issues before it is improper and not supported by the applicable law. Thus, we set aside the final order and remand for further proceedings consistent with this opinion. Final order set aside and case remanded for further proceedings."

***North Slope Borough School District v. State, Department of Education*, 484 P.3d 106 (Alaska, 2021)**

The Department of Education and Early Development oversees primary and secondary public education in Alaska. One of the Department's responsibilities is to distribute billions of dollars annually in general fund support to over 500 public schools in 270 communities to help fund education. The Department accomplishes this responsibility in part through a school debt reimbursement program which allows municipalities to seek reimbursement for payments made on approved school construction bonds. Municipalities typically engage in a multi-step process to receive reimbursement. Specific statutory criteria govern the Department's allocation of debt reimbursement funds. For example, AS 14.11.100(j)(1) requires that applicable bonds "be repaid in approximately equal annual principal payments or approximately equal debt service payments over a period of at least 10 years."

North Slope Borough School District issued five bonds between 2006 and 2013. Despite the statutory requirement for approximately equal debt service payments over a period of at least ten years, for a number of years, the Borough had issued bonds with unequal service payments and the Department had partially reimbursed the Borough for them. The Borough asserted that the noncompliant payment terms for these bonds allowed it to achieve "short term budget certainty" and ensure it had sufficient revenue to make bond payments.

In 2014, denied the North Slope Borough's project application. The rejection letter stated that the bonds identified to fund the project did not meet the statutory requirements of approximately equal debt service payments over a period of at least ten years. The Borough asked the Department to reconsider its decision. The Department responded, in January 2015, that the bonds were not eligible for reimbursement because the debt service schedules did not comply with AS 14.11.100(j)(3).

In February 2015, the Borough appealed to the Commissioner. The Borough claimed, among other things, that the Department's denial constituted an unlawful change in policy or practice prohibited by equitable estoppel.

The Commissioner appointed a hearing officer to review the Department's decision. She affirmed the Department's decision that the bonds were "not amortized in approximately equal payments over ten years as required by AS 14.11.100(j)(3)" and also affirmed the Department's denial of the Borough's most recent project application because the bonds it proposed to fund the project did not meet the statutory requirements. The case ultimately made its way to the Alaska Supreme Court, which affirmed the hearing officer's decision to deny reimbursement for the bonds that didn't comply with the statutory requirements specified in AS 14.11.100(j)(3).

The Department employee that had, for years, accepted the unequal payments of the North Slope Borough School District supplied an affidavit stating he was unaware of the statutory requirements when he recommended reimbursement of the noncompliant bonds. Thus, the North Slope Borough School District, for years, mistakenly believed they were in compliance and, thus, misunderstood what the law required. In response, the court said: " If the Department were equitably estopped from correcting its former employee's failure to apply AS 14.11.100(j)(3), it would be prevented — now and arguably in the future — from denying reimbursement requests that contravened the statute and the legislative intent behind the statute."

***In re Provision of Basic Generation Service for Period Beginning June 1, 2008*, 15 A.3d 829 (N.J., 2011)**

The issue in this appeal was the procedural claim by the Department of the Public Advocate, Division of Rate Counsel (Rate Counsel), that the Board of Public Utilities (BPU) failed to comply with basic notice and opportunity for comment obligations before taking an action that, by administrative order, to pass $50 million in energy supplier costs to the ratepaying public.
Background: The BPU published a notice that it would hold a series of hearings regarding its Renewable Energy Portfolio Standards, which involved transitioning from the use of rebates to the use of market-based incentives to encourage solar renewable energy. In a parallel set of proceedings, the BPU engaged in the annual review of the manner in which it provided Basic Generation Service (BGS). Many of the parties to these two different hearings were the same. At a regular meeting regarding BGS that was open to the public but in which the public could not participate, a staff member raised a question regarding BGS suppliers who provided renewable energy and whether their increased cost, formerly capped at $300 but now capped at $711, could be passed on to the rate paying public. At that meeting, the BPU decided it would allow a "pass through to ratepayers" for the costs of alternative compliance payments and announced that decision in a subsequent notice. The Rate Counsel claimed that by conflating two separate proceedings, the BPU lost sight of its duty to provide interested parties with fair notice that the agency was considering such specific action and failed to allow those parties an opportunity to comment and be heard.

The New Jersey Supreme Court held: The BPU had an obligation, found in N.J.S.A. 48:2-46, to provide notice to potentially interested parties and allow a meaningful opportunity for comment. Instead, the BPU went ahead and entered the Order to pass on to ratepayers the higher contract costs of the suppliers under challenge, which "permitted them to foist onto ratepayers the new and higher contract rate. We deem the comments of those other interested parties who raised the issue to be inadequate notice rendering the proceedings below procedurally arbitrary and capricious."
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VIII. Common Errors Agencies Make That Hearing Officials Should Expect to See in Hearings

A. Agency fails to follow its own rule.

B. Agency engages in quasi-rulemaking via an "interpretation" of its policy

IX. Closing Summary or Part 1: Important Rule-of-Law Principles for Administrative Agencies

Professor Kevin Stack of the Vanderbilt Law School, in a summary of Professor Peter L. Strauss's scholarship regarding administrative law and government[2], provides the following guidance to administrative agencies and their adjudicators:

"In light of the scope of lawmaking by administrative institutions—our form of government is, importantly administrative government—the rule of law's demands of administrative government is a critical area of inquiry."

He went on to list the requirements the Rules of Law makes of administrative agencies:

1. **Authorization** for agency action: There must be legislative (statutory) authorization for all that the agency does to ensure that the state only acts or constricts an individual's liberty when it is authorized to do so.

2. **Notice**: The agency must provide notification of its actions. Notice must be:

   Public: not merely discussed in agency meetings or hearings but with well-publicized announcements;

   Clear: Written in a way that is understandable to the general public; and

   Prospective: Written not only for today's world but with thought to future impact.

3. **Provide stability**: regulatory changes should be made only when necessary—not with every shifting wind—and must serve as steady guidance for agency action that may impact an individual's liberty.

4. **Reasoned Justification**: for the action of an agency to be valid, there should be justification for the action. There is or should be a general duty for government to give reasons for what it does.

5. **Coherence**: Implement new statutes and rules in a way that is consistent with constitutional considerations, existing statutes and rules, and with an understanding of agency statutory interpretation.

6. **Fundamental Fairness**: the portion of the obligation of the Rule of Law that falls to agency adjudicators.

If agencies would follow the above recommendations, the dockets of all administrative adjudicators would decrease significantly. The impetus behind many hearing requests is the belief that the individual has been blindsided by an obscure rule they've never heard of and, after hearing of it, found it incomprehensible.

[2] Stack, Kevin M. *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, Columbia Law Review, Volume 115, Number 7 (2021)

Part II: How Judicial Review of the Hearing Official's Alleged Errors Occurs

I. How Judicial Review is Initiated

A. An agency has made some kind of decision; and

B. A party that has been or could be adversely affected or aggrieved by the decision requests that the court review the decision because the party believes that some kind of legal error has been made.

II. Legal Bases for Review: "What Business is it of the Appellate Court's?"

Some source of law must provide a basis for appellate review.

A. Specific Statutes and/or Regulations:
The agency's statutes usually specify how judicial review is to be conducted.

B. Administrative Procedures Acts:
Where there is no specific authorization for or explanation of judicial review in the statutes governing the agency, the authorization for judicial review originates in the Administrative Procedures Act governing the agency.

C. Constitutional Considerations (both state and federal)
If there's no statutory/APA authority to conduct judicial review of an agency's decision, judicial review assures constitutional requirements are met.

III. Judicial Review of What?

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?
(e.g., *Hayes v. Board of Trustees of Police and Firemen's Retirement System*, 22 A.3d 150 (NJC App. Div. 2011)

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.

(1) *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951): Review is on the record as a whole and not merely on the evidence tending to support the finding.

(2) *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970). Hearing officer's findings are a part of the record reviewed by the court and the record, as a whole, must be considered; appellate courts tend to be wary when the agency rejects the result reached by the hearing officer.

(3) Both trial and appellate courts are precluded from receiving evidence which was not a part of the administrative record. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997).

(4) *County of Wake v. Environmental & Natural Resources*, 155 N.C. App. 225 (2002): The county filed a petition seeking judicial review of a decision of the Department of Environment & Natural Resources (DENR) ordering withdrawal of a permit to construct a municipal solid waste landfill that had been issued to the county. Trial court reversed DENR's decision and property owners and town appealed. NC Court of Appeals held: (1) owners of property located adjacent to site of proposed landfill had **standing** to raise the issue of whether the town approved the location of the proposed landfill; (2) town qualified as a **"person aggrieved"** under APA; (3) town approved site of proposed landfill before there was a legal distinction between a "new" landfill and a "lateral expansion" of a landfill; (4) town was equitably estopped from withdrawing its prior approval for county's proposed landfill facility; (5) county was not required to secure a franchise for operation of landfill; and (5) county was not required to consider alternative sites and socioeconomic and demographic data, or to hold a public hearing prior to selecting the site.

(5) "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…Accordingly, it must do more than create a suspicion of the existence of the fact to be established." *Bozzuto's Inc. v. National Labor Relations Board*, 927 F.3d 672 (U.S. App., 2nd Circ., June 24, 2019).

b. Substantial Evidence is defined as "evidence that a reasonable mind could accept to support a conclusion" *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197 (1938). 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.

(1) "The fact that it is possible to draw a different conclusion from the evidence than the hearing officer/agency drew does not prevent an agency's findings from being supported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966).

(2) *Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086 (4th Cir. 1969). Circumstantial evidence (indirect proof) can be "substantial evidence."

(3) Assessments of the credibility of the evidence are within the competence of the trier of fact, *Colonial Stores Inc. v. F.T.C.*, 450 F.2d 733 (5th Cir. 1971); credibility findings are reversed appeal only in extraordinary circumstances, *NLRB v. Penzel Construction Co.*,

449 F.2d 148 (8th Cir. 1971); credibility of witnesses are usually non-reversible unless controverted by documentary evidence of physical fact, *NLRB v. J.M. Machinery Corp.*, 410 F.2d 587 (5th Cir. 1969); 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); *Kohout v. Civil Service Commission of Chicago*, 28 Ill.App.2d 388, 171 N.E.2d 683 (1960).

(4) *Montgomery County, Maryland v. Leavitt*, 445 F.Supp 2d 505 (U.S. Dist. Ct., Southern Maryland, 2006), quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966): "Congress deliberately adopted this standard of review because 'it frees the reviewing courts of the time consuming and difficult task of weighing evidence, it gives the proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.' "

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

a. Courts are not bound by agency decisions on questions of law, *Beryllium Corp. v. United States*; 449 F.2d 362 (Court of Federal Claims, 1971).

b. Final application of law to facts must come from courts, not administrative agencies, *Colonial Stores, Inc. v. F.T.C.*, 450 F.2d 733 (5th Cir. 1971).

c. Whether a decision conforms to law is by definition a question of law in which appellate court reaches a conclusion independent of the lower court. *McCray v. Neb. State Patrol*, 710 N.W.2d 300 (2006).

d. *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346 (U.S. App. 5th Circ., 2008): "We review the FTC's legal analysis and conclusions de novo, although even in considering such issues the courts are to give some deterrence to the [FTC]'s informed judgment that a particular practice is to be condemned as unfair."

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. Unsuitability of the Term "Abuse of Discretion"

a. *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 in 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 Okla. 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,[3] 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 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.' "

b. Agency's decision in determining appropriate penalty won't be reversed unless an abuse of discretion is shown. *Sears v. Texas State Bd. of Dental Exam'rs***,** 759 S.W.2d 748, 751 (Tex. App.-Austin 1988, no writ).

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

c. "[T]his court will not reverse the particular sanctions imposed absent a showing of abuse of discretion." *Young v. Ribeiro Building*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

d. *McLane Co., Inc. v. E.E.O.C.*, 137 S.Ct. 1159 (2017): EEOC brought action against an employer who sought to enforce a subpoena issued in connection with its investigation of employee's gender discrimination charge under Title VII. U.S. Dist. Ct. granted in part and denied in part EEOC's request. EEOC appealed. 9th Circuit reversed in part and remanded. U.S. Supreme Court granted certiorari. Held: District Court's decision was to be reviewed for abuse of discretion, rather than de novo, abrogating *U.S. E.P.A. v. Alyeska Pupeline Service, Co*., 836 F.2d 443 (1988).

IV. Miscellaneous Considerations

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

B. Exhaustion of Administrative Remedies

1. Reasons for exhaustion:

a. "The Judiciary Branch will not lightly interfere with the workings of the Executive Branch."[4]

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

c. The Rule of Laziness[5]: 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.

2. Exceptions to exhaustion:

a. Where administrative remedy is not adequate, as where the remedy does not insure against "irreparable injury." *Utah Fuel Co. v. National Bituminous Coal Comm.*, 306 U.S. 56, 59 S.Ct. 409 (1939). See also, *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, U.S. App., DC Circ. 1986).

b. Challenge to constitutionality of basic statute.

c. Other special circumstances such as a major procedural ruling.

d. Where exhaustion would be "futile," such as:

(1) Exhaustion makes the issue moot; and/or

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

(2) Agency issued decision in a way that demonstrated requesting rehearing or reconsideration would not alter the outcome.

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.

For a good analysis of "standing," see: *Yavapai-Apache Nation v. Fabritz-Whitney*, 260 P.3d 299 (AZ Court of Appeals 2011)

D. Preservation of Errors

1. An objection is proper only if it timely identifies "the offending part of the proffered evidence and the rule that the court will violate if it admits the evidence." *Smith Motor Sales, Inc. v. Texas Motor Vehicle Comm'n*, 809 S.W.2d 268, 272 (Tex. App.-Austin 1991, writ denied).

2. One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong, *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

3. "For error to be preserved for appeal, the record must show appellant made a timely request, objection, or motion." *Castaneda v. State*, 130 S.W.3d 719, 723 (Tex. App.-Dallas 2003).

4. The statutory provision that the Iowa Insurance Division schedule a hearing on a cease and desist order within 15 days of the request is directory rather than mandatory; a delay in scheduling the hearing does not invalidate the subsequent proceedings unless prejudice is shown. Failure of the Insurance Division to schedule a hearing on a cease and desist order for a blue sky violation within the 15 days of the request as provided by statute did not preclude a later hearing and did not necessitate a dismissal and vacation of the cease and desist order, in the absence of allegations by the requesting corporation and its officers, before the ALJ or Insurance Commissioner, that they were prejudiced by the delay. *Renewable Fuels, Inc., v. Iowa Insurance Commissioner*, 752 N.W. 2d 441 (Iowa Court of Appeals, 2008).

5. For an error to be preserved, the complaining party must be timely and <u>specify</u> the alleged error. *Equal Employment Opportunity Commission v. CRST Van Expedited, Inc*., 277 F.Supp 3d 1,000 (U.S. Dist., Northern Iowa, 2017): "[T]he EEOC never explicitly raised the preclusion argument until the case reached the Supreme Court, the court does not view the preclusion argument as "implied" by the EEOC's argument that the dismissal of the claims was not on the merits and, in any event, such a broad argument is plainly insufficient for purposes of error preservation."

E. "Non-Reviewable" Agency Action

When there is explicit statutory exclusion from review or when statutory wording makes the action "final," courts still permit judicial intervention.

1. Jurisdictional questions may be reviewable. *U.S. Electrical Motors Inc. v. Jones*, 153 F.2d 134 (1946) (agency exceeded its authority).

2. Court may entertain a claim that a statutory procedural right has been denied. *Robertson v. Chambers*, 341 U.S. 37 (1951). Agency didn't heed its own rule. *Vitarelli v. Seaton*, 359 U.S. 535 (1959).

3. *American Academy of Pediatrics v. Food and Drug Administration*, 379 F.Supp.3d 461 (U.S. Dist. Ct., Southern Maryland, 2019): While an agency's decision whether to take an enforcement action is presumptively unreviewable, that presumption may be rebutted by pointing to statutory language constraining agency's exercise of its enforcement discretion. To determine whether an exception to the presumption of unreviewability applies, the court considers whether Congress intended to circumscribe the agency with enforcement discretion and provided meaningful standards to define the limits of discretion. If so, there is law to apply and courts may require the agency to follow that law.

F. Appellate Review Regarding Rules

1. The two ways in which rules play a role in appellate judicial review:

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

   b. Were the rules applied properly?

2. The Three Types of Rules

   a. Quasi-Legislative Rules which are created via:

      (1) Informal Rulemaking: involves only Notice and Comment.

      (2) Formal Rulemaking: The legislature has authorized the agency to make a rule, after appropriate hearing, if there is substantial evidence that certain facts exist.

   b. Interpretive: Explains how agency interprets a former rule or statute.

   c. Procedural: Involves day-to-day business of agency: filings, notices, etc.

G. "Arbitrary and Capricious"[6]

1. Arbitrary: Exercising one's will without restriction, acting upon personal preference; using/abusing power without regard to law; unreasonable.

2. Capricious:subject to, led by, or acting on whim; odd/erratic notion or idea

3. Case Law Involving "Arbitrary and Capricious" Action

a. Agency must examine relevant data and explain its action including a "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).

b. Administrative decision is "arbitrary" when it disregards facts or circumstances and would not lead a reasonable person to the same conclusion. *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004); *Bethesda Foundation v. Buffalo County Board of Equalization*, 263 Neb. 454, 640 N.W.2d 398 (2002); *Benitez v. Rasmussen*, 261 Neb 806, 626 N.W.2d 209 (2001); *Phelps County Bd. of Equalization v. Graf*, 259 Neb. 810, 606 N.W.2d 736 (2000).

c. *Adams v. U.S. Dept. of Labor*, 360 F.Supp. 320 (U.S. Dist. Ct., SC, December 18, 2018): Agency action is arbitrary and capricious if:
(1) agency relies on factors Congress did not intend for it to consider,
(2) entirely ignores important aspects of the problem,
(3) explains its decision in a manner contrary to evidence before it, or
(4) reaches a decision that is so implausible that it cannot be ascribed to a difference in view.

c. Agency rules may be vacated if a court of competent jurisdiction deems the new rule to be "arbitrary and capricious." *United Steel v. Mine Safety and Health Administration*, 925 F.3d 1279 (U.S. App. DC Circ., 2019).

V. Writing the Decision to Preclude Reversal by Appellate Court

A. The Essential Elements an Appellate Court Expects to Find in a Decision

1. Identification of Parties (in the Heading, Case Caption or "Style")

2. Statement of the Case

a. Must provide jurisdictional explanation;

b. Must explain what happened to bring the parties to the hearing; and

[6] The creators of this outline believe that the handy catchphrase "Arbitrary and Capricious" is a truly meaningless all-encompassing phrase that appellate courts use to relieve themselves of the obligation to actually explain why they reject the reasoning (or the lack thereof) in the case. "Arbitrary and capricious" is yet another example of the reliance of appellate courts on the Rule of Laziness.

c. May set out procedural details that occurred before the hearings (*e.g.* pre-hearing conferences, pre-hearing motions and rulings, filing of briefs, etc.).

3. Statement of the Issues

4. Exhibit List (optional)

5. Findings of Fact

6. Conclusions of Law

7. Discussion/Rationale

8. Order (Imposition of Sanctions and Penalties)

B. How Appellate Courts Evaluate Written Decisions

1. Parties

a. Parties as of Right

b. Questions of Standing

2. Jurisdictional Explanation

Appellate courts expect the agency decision to supply specific citations to all statutory and regulatory authority permitting the agency to decide the issues before it. If an argument is raised that the nature of the dispute or the relief sought lies outside the agency's authority, there should be a statement as to what legal authority the agency relied on to impose the action taken.

3. Statement of Issues
Failure to identify issues is a "red flag" to an appellate court that parties' positions with respect to the issues may not have been properly addressed.

a. Sources of Issues

(1) Statutes and/or Regulations

(2) Parties
Parties may create or to try to create issues outside those provided by statute. What you decide regarding proffered issues, *including a decision not to deal with them*, must be explained in the decision.

4. Findings of Fact

Common problems with Findings of Fact:

a. Reciting testimony presented instead of finding facts;

b. Listing legal conclusions as findings of fact; and

c. Identifying a witness as unbelievable without explaining why.

5. Conclusions of Law

a. Legal conclusions are commonly written as the statute is worded.

b. Must follow, flow from, be based upon the facts found. *Dunlop v. Bachowski*, 421 U.S. 560 (1975)

6. Discussion/Rationale

This section is the "glue" of your administrative decision.

a. Must resolve issues of credibility (if there are any).

b. Must provide your reasoning process because that is the appellate court's only window into the thought processes that produced your findings and conclusions.

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