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Judicial Review of an Agency's Determination of Fact in North Dakota

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NOTES

JUDICIAL REVIEW OF AN AGENCY'S DETERMINATION OF FACT IN NORTH DAKOTA

INTRODUCTION

Administrative agencies have been present on the American scene since the founding of this country and the number of agencies has increased steadily on both the state and federal level.[1] The sharpest increase has come in the last few decades as a result of the Depression, the New Deal and other economic and political factors too numerous to mention.[2] This increase in the number of agencies, as well as the increase in their powers and duties, has led to many serious problems in the field of Administrative Law; one of these is the problem of what the scope of judicial review should be with regard to the fact-findings of administrative agencies.

THE SUBSTANTIAL EVIDENCE RULE

To answer the question as to what the scope of review should be the courts have devised what is known as the "substantial evidence" rule. Accordingly, if the evidence in support of the agency's factual determination is substantial and if after viewing such evidence in the light of contradictory evidence it remains substantial, the court must accept those findings.[3] This rule, although now written into many statutes,[4] was originated by the courts because they were reluctant to substitute their independent determination

1. See generally, DAVIS, ADMINISTRATIVE LAW TREATISE § 1.02 (1958).

2. Most of the important federal agencies have been established in this period. *e.g.*, National Labor Relations Board, 1935 Securities and Exchange Commission, 1934 Federal Communications Commission, 1934 Federal Power Commission, 1920, reorganized in 1930, Civil Aeronautics Board, 1938, reorganized in 1958.

3. See Universal Camera Co. v. NLRB, 340 U.S. 474 (1951).

4. 29 U.S.C. § 210 (1958).

of facts, in highly specialized fields, when the agency's determination appeared to have been reasonably made.[5] There were two reasons generally given for this judicial restraint. The first being that because the legislature had given the agency power to make the initial findings of fact, its determinations deserved considerable weight in the courts.[6] The second, and perhaps strongest, reason was that the agencies were supposedly expert in their fields and thus were much better qualified to make findings than were the judges who lacked the special or technical knowledge upon which to base a correct decision.[7]

As can be expected with any rule such as this, differences of opinion arose as to what the term "substantial evidence" actually meant. The United States Supreme Court defined it in *Consolidated Edison Co. v NLRB*[8] as follaws: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The next year in *NLRB v Columbia Enameling & Stamping Co.*[9] the court expanded on this definition by saying:

> [It is] evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred , it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury

Even the courts that understood what the term meant were often confused as to how it should be applied to actual cases.

Three different approaches were often taken. On one extreme was the theory that if any evidence could be found in the administrative record that substantially supported the

5. See ICC v. Union Pac. R.R., 222 U.S. 541 (1912).

6. See State v. Great No. Ry., 130 Minn. 57, 153 N.W 247 (1915).

7. *Cf.*, Director, United States Bureau of Mines v. Princess Elkhorn Coal Co., 226 F.2d 570, 574 (1955), "The members of the Federal Coal Mine Safety Board of Review are much better qualified than are the members of this court to interpret the meaning of the word 'face' as used in the Act, in the context of the facts found by the Board."

8. 305 U.S. 197, 229 (1938).

9. 306 U.S. 292, 299 (1939).

agency's finding, no matter how strong the rest of the evidence was to the contrary, this was sufficient to satisfy the rule.[10] On the other extreme was the theory that to determine if there was "substantial evidence" the court must go through the entire record and weigh each piece of evidence. This meant, in effect, that the court would make an independent determination as to the facts in order to establish if, in fact, there was enough evidence to support the agency's decision.[11] This differed little from granting a trial de novo.[12] In 1951, after the passage of the Administrative Procedure Act[13] and the Taft-Hartley Act,[14] the court in *Universal Camera Co. v NLRB*[15] rejected both extremes and adopted a middle ground known as the "whole record" test. The court said it must first consider the evidence which supports the agency's findings to determine if it is substantial. It must then consider the opposing evidence and determine if in view of this opposing evidence the evidence supporting the agency is still substantial.[16] Using this test it is apparent that in applying the "substantial evidence" rule the record should be viewed as a whole; however, the judges should not substitute their independent judgment as to the facts, but should determine only whether in view of all the evidence the agency could have reasonably come to its conclusion.[17]

From this discussion it can be seen that on the federal level the courts do, or at least are supposed to, give great weight to the agency fact-determinations which come to them on appeal.[18] On the federal level the Courts of Appeals are the ones which usually apply the "substantial

10. *Cf.*, Wilkerson v. McCarthy, 336 U.S. 53 (1949). This case presented the question of the amount of evidence necessary to deny a directed verdict. See also, Universal Camera Co. v. NLRB, *supra* note 3, wherein the Court indicated that perhaps this was the view taken in prior cases.

11. FTC v. Curtis Publishing Co., 260 U.S. 568 (1922).

12. California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946) *In Re* Russell, 68 N.D. 447, 281 N.W 239 (1938).

13. 5 U.S.C. §§ 1001-1011 (1946).

14. 29 U.S.C. § 141 (1947).

15. 340 U.S. 474 (1951).

16. *Id.* at 487, 488.

17. *Id.* at 488.

18. See generally, Cooper, *Administrative Law The "Substantial Evidence" Rule*, 44 A.B.A.J. 945 (1958).

evidence" rule since they are normally the first to hear an appeal. The Supreme Court need only decide if the Courts of Appeals have applied the rule correctly [19] Whether the Supreme Court has followed this limitation in all cases is open to question.[20]

NORTH DAKOTA

In North Dakota most of the administrative law cases come from the decisions of two agencies, the Workmen's Compensation Bureau and the Public Service Commission. But, as is the case on the federal level, North Dakota administrative agencies are increasing in number each year [21] In 1941 the Legislature passed the Administrative Agencies Uniform Practices Act[22] (hereafter referred to as the AAUPA) The AAUPA, like the Federal Administrative Procedure Act,[23] was designed to correct many defects in the existing administrative practices. It was also designed to consolidate the diverse systems and procedures used by various agencies.[24]

The AAUPA expressly provides:

> The court shall affirm the decision of the agency unless it shall find that the findings of fact made by the agency are not supported by the evidence, or that the conclusions and decisions of the agency are not supported by its findings of fact.[25]

The wording of this section, when viewed in context with the rest of the chapter, indicates that "supported by the evidence" means "supported by substantial evidence",[26] and

19. Universal Camera Co. v. NLRB, *supra* note 15, at 491.

20. See, *e.g.*, Dickinson v. United States, 346 U.S. 389 (1953) O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951).

21. Compare the STATE OF NORTH DAKOTA DIRECTORY of 1963 *with* those of prior years.

22. N.D. CENT. CODE § 28-32 (1961).

23. See generally, LAVERY, FEDERAL ADMINISTRATIVE LAW, pt. 1 (1952), for a good analysis of the Federal Administrative Procedure Act.

24. N.D. CENT. CODE § 28-32-01(1) (1961) provides " 'Administrative agency' or 'the agency' shall include any officer, board, commission, bureau, department, or tribunal other than a court, having state-wide jurisdiction and authority to make any order, finding, determination, award, or assessment which has the force and effect of law and which by statute is subject to review in the courts of this state."

25. N.D. CENT. CODE § 28-32-19 (1961).

26. Federal courts have consistently supplied the term "substantial evidence"

the court has apparently so construed it.[27] Prior to the effective date of the AAUPA the court indicated in *Application of Theel Bros. Rapid Transit Co.*[28] that its scope of review was limited by the "substantial evidence" rule.[29]

Since the North Dakota Supreme Court has construed the AAUPA to include the "substantial evidence rule", which originated in the Federal courts, one might reasonably conclude that it would mean the same thing in both jurisdictions; this is simply not the case. Prior to 1941, when the AAUPA was passed, there was a right to trial de novo on appeal from most administrative decisions. This right came from the express wording of the statutes in most cases,[30] but in others it came from judicial statutory interpretation.[31] The court, hearing a case on review, was not necessarily restricted to the record made by the agency[32] as it now is under the AAUPA.[33] When the AAUPA was passed it contained no language expressly continuing the right to a trial de novo; this, coupled with the fact that the courts were now restricted to the agency record, made it appear that perhaps a trial de novo could no longer be requested. The Court, however, in *Application of Midwest Motor Express*[34] stated that there was still a right to trial de novo in both the District Courts and the Supreme Court.[35]

As can be seen from the prior discussion this holding presents somewhat of a dilemma. The dictionary definition

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where the statute made no specific mention of it. An illustration of this is NLRB v. Columbia Enameling & Stamping Co., 306 U.S. 292, 299 (1939).

27. See Application of Ditsworth, 78 N.D. 3, 5, 48 N.W.2d 22, 24 (1951), Great No. Ry. v. McDonnell, 77 N.D. 802, 812, 45 N.W.2d 721, 725 (1950).

28. 72 N.D. 280, 6 N.W.2d 560 (1942)

29. *Id.* at 564.

30. See *e.g.*, N.D. Sess. Laws 1935, ch. 286, § 6, provided for a trial de novo in the Supreme Court in workmen's compensation cases.

31. *E.g.*, N.D. Sess. Laws 1933, ch. 164, § 29, expressly provided for a trial de novo in District Court. The Court in Tri-Motor Transp. Co. v. Great No. Ry., 67 N.D. 119, 270 N.W 100 (1936) construed this section to mean that appeals from the Board of Railroad Commissioners could also be tried de novo in the Supreme Court.

32. *But see,* Comp. Laws of N.D. § 4609c42 (Supp. 1925). Appeals from the Board of Railroad Commissioners were restricted to the administrative record.

33. N.D. CENT. CODE § 28-32-19 (1961).

34. 74 N.D. 416, 23 N.W.2d 49 (1946).

35. *Id.* at 52. The court cited N.D. REV. CODE §§ 28-3219, 28-3221, 28-2732 (1943), and stated that these three sections when construed together require a trial de novo in both courts.

36. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY. See *In Re* Heart River Irr. Dist. 78 N.D. 302, 316, 49 N.W.2d 217, 225 (1951).

of de novo is: anew, afresh, over again.[36] The Court apparently accepts this definition for it said in *In re Russell:*[37]

> In order to try the case *de novo*, the District Court must, of necessity, weigh the evidence and apply questions to which it relates, and determine whether its independent judgement to such evidence and the the order or decision appealed from is in accord with the weight of the evidence.

Whatever the "substantial evidence" rule might mean, it does not mean a trial de novo.[38]

Granting that the parties have a right by statute to a trial de novo, this does not necessarily prevent the Court from deciding the cases by application of the "substantial evidence" rule.[39] Since the rule originated in judge-made law it can be applied regardless of statute.[40] In many cases this might appear to be the path taken by the Court.[41] In other cases it is apparent from a reading of the opinion that the court has weighed the evidence, made its own determination of the facts and set aside the agency's decision without paying more than lip service to the "substantial evidence" rule.[42]

One possible explanation of the Court's variation in its decisions might be that in most of the cases where the Court appears to have decided the issues making an independent evaluation, the opinion points out that a trial de novo was specifically asked for the appellant.[43] In the cases which seem to lean toward the "substantial evidence" rule the

37. 68 N.D. 447, 454, 281 N.W 239, 243 (1938). *Accord,* California Co. v. State Oil & Gas Bd., 200 Miss. 824, 27 So. 2d 542 (1946).

38. See Universal Camera Co. v. NLRB, 340 U.S. 474 (1951).

39. *E.g.,* State Bd. of Medical Registration v. Scherer, 221 Ind. 92, 46 N.E.2d 602 (1943) The Court *held* that the trial de novo provision must be regarded as merely providing a procedure for seeking review. California Co. v. State Oil & Gas Bd., *supra* note 37. The Court *held* that in spite of this section the scope of review must be limited to the "substantial evidence" rule.

40. See ICC v. Union Pac. R.R., 222 U.S. 541 (1912), State v. Great No. Ry., 130 Minn. 57, 153 N.W 247 (1915).

41. See *e.g.,* Mickelson v. North Dakota Workmen's Comp. Bureau, 89 N.W.2d 89 (N.D. 1958) Williams Elec. Co-op. v. Montana-Dakota Util. Co., 79 N.W.2d 508 (N.D. 1956) Application of Ditsworth, 78 N.D. 3, 48 N.W.2d 22 (1951) Great No. Ry. v. McDonnell, 77 N.D. 802, 45 N.W.2d 721 (1950).

42. See *e.g.,* Northern Pac. Ry. v. Anderson, 95 N.W.2d 582 (N.D. 1959) Gullickson v. North Dakota Workmen's Comp. Bureau, 83 N.W.2d 826 (N.D. 1957) Feist v. North Dakota Workmen's Comp. Bureau, 77 N.D. 267, 42 N.W.2d 665 (1950), Application of Midwest Motor Express, 74 N.D. 416, 23 N.W.2d 49 (1946).

43. See cases cited note 42 *supra.*

opinion generally makes no mention of whether or not a trial de novo was requested.[44] This explanation has some support from the case-law[45] but it is weakened by several exceptions to this general pattern[46] and by the lack of support from the AAUPA.[47] A comparison of the dates of the cases casts no light on the subject, for such a comparison reveals no trend either toward or away from giving great weight to agency decisions.[48]

It appears that the correct explanation of this apparent variation lies in what the court has done rather than what it has said. In all of the cases one is left with the impression that in reviewing the record and the decision of an agency the Court is not looking so much to whether the agency was reasonable in its conclusions as it is to whether the agency was "right" Thus, even in cases where the Court has sustained the agency decision as being supported by "substantial evidence" it appears that it has to some extent weighed the evidence.[49] This writer believes that North Dakota, in spite of statements to the contrary,[50] does *not* actually follow the "substantial evidence" rule. The actual test on review of an agency decision in North Dakota does not seem to be whether or not the findings of the agency are supported by "substantial evidence" but rather, whether or not the findings are supported by a preponderance of the evidence.[51] Since the preponderance of the evidence can only be determined by weighing the evidence, this is exactly

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44. See cases cited note 41 *supra.*

45. See Security Imp. Co. v. Cass County, 9 N.D. 553, 84 N.W 477 (1900). The court *held* that if an appellant wishes to have the court re-examine the evidence or retry a particular question of fact pursuant to N.D. Sess. Laws 1897, ch. 5, § 6, N.D. CENT. CODE § 28-27-32 (1961) he must so specify in his statement of the case. This case would seem to have little effect on the present cases because normally when the facts are in issue upon appeal, the appellant is going to specify in his statement that he wishes those facts retried.

46. Northern Pac. Ry. v. Anderson, *supra* note 42 Mickelson v. North Dakota Workmen's Comp. Bureau, *supra* note 41.

47. Even if an appellant might be prevented from obtaining a trial de novo in the Supreme Court because of his failure to request it pursuant to N.D. CENT. CODE § 28-27-32 (1961), there is no language in § 28-32-19 which can be reasonably construed to place such a limitation on the District Courts.

48. Compare the dates of the cases cited in note 41 *supra, with* those in note 42 *supra.*

49. See *e.g.,* Application of Ditsworth, *supra* note 41.

50. See cases cited in notes 27, 28, and 41 *supra.*

51. See *In Re* Hanson, 74 N.D. 224, 227, 21 N.W.2d 341, 344 (1945). "If the preponderance of the evidence supports the findings of the commission, the courts do not substitute their judgefents for that of the commission."

what the Court has done. The Court itself stated this proposition quite forcefully in *In re Russell*:[52]

> but the power granted and the duty imposed on the District Court on such appeal is not satisfied by an inquiry as to whether there is substantial evidence in support of the decision or order of the Board of Railroad Commissioners. Where trial *de novo* is demanded and had, the duty extends to weighing the evidence, and the exercise of independent judgment upon the evidence submitted and a determination as to where the weight or preponderance of the evidence lies.

This is not to say, of course, that the Court does not in many cases give substantial weight to the agency decision. It does mean, however, that the Court will feel no compunction about reversing an agency fact-determination which it feels is wrong, even though the agency might have been reasonable in coming to its conclusion.[53]

If this is the correct evaluation of the cases then the scope of judicial review has changed little from what it was in *Minneapolis St.P & S. S. M. R. v State Bd. of Ry Com'rs.*,[54] wherein the Court made it clear that it did not feel compelled to give great weight to the agency decision,[55] but acknowledged that the case might arise where, because of the expertise of the agency, the agency decision would be entitled to great weight.[56] The determining factor then, as set down in that case, is the nature of the subject matter, and the weight given to the agency decision will be determined accordingly This would explain why the Court is giving more weight to the findings of the Public Service Commission than to those of the Workmen's Compensation Bureau.[57] The obvious explanation is that the cases brought

52. *Supra* note 37, at 243.

53. See *e.g.*, Gullickson v. North Dakota Workmen's Comp. Bureau, 83 N.W.2d 826 (1957) Even though the Court reversed the agency decision there appears to have been ample evidence to say that the Bureau was not entirely unreasonable in reaching its decision.

54. 30 N.D. 221, 152 N.W 513 (1915).

55. *Id.* at 516.

56. *Ibid.*

57. Since the AAUPA was passed in 1941 there have been nine cases appealed from the Workmen's Compensation Bureau on the grounds that it was in error on its determination of facts of these nine, six were reversed and only three

to the Court from the Public Service Commission are cases which generally go a little beyond the normal scope of the judiciary A good illustration of this is found in *Application of Ditsworth*[58] where the Commission was to determine if the public convenience and necessity would be served by granting the petitioner's application to establish a new taxicab line. This question is clearly more administrative than judicial. The cases appealed from the Workmen's Compensation Bureau, on the other hand, generally present problems which the lawyers and judges deal with every day An example of this is found in *Feist v North Dakota Workmen's Compensation Bureau*[59] where the issue was one of proximate cause, *i.e.*, did the decedent's illness arise from the course of his employment. On an issue such as this the courts may feel that they are as well qualified to make a judgment as is the agency The difference in treatment of the two agencies might well be summed up by the Court's statement in *Great Northern Ry v McDonnell.*[60] "We try the case anew upon the record not as an administrative body, but as a court exercising judicial powers but not administrative discretion."

CONCLUSION

Perhaps the underlying reason for the reluctance on the part of the North Dakota Supreme Court to follow the "substantial evidence" rule, as it is found on the federal level, is the natural reluctance of the judiciary to yield judicial power to administrative agencies when the subject matter of the cases is such that the courts feel they are as well qualified to pass judgment as are the agencies. This argument has an appealing ring in a state such as North Dakota because it may well be that the agencies of this state are not faced with the highly technical problems that face the federal agencies. There has always been a fear in many

sustained. In the same length of time there have also been nine cases appealed from the Public Service Commission on the same grounds, of these nine, only three have been reversed and the other six sustained.

58. *Supra* note 49.

59. 77 N.D. 267, 42 N.W.2d 665 (1950).

60. 77 N.D. 802, 812, 45 N.W.2d 721, 725 (1950).

quarters that if the administrative agencies, being as they are beyond the direct reach of the citizenry, are given too much independence and power individual rights will soon suffer This argument, too, has a good deal of merit, but the fact still remains that the basic purpose of such agencies is to expedite the administration of laws, and if the agencies are to fulfill this purpose they must be given a good deal of latitude in their operation. It seems to this writer that for the courts to make an independent judgment of the facts upon the same evidence, which the agency based its determination upon, reduces the agency to little more than an evidence gathering service. This was probably not the intent of the Legislature. It can hardly be argued that giving three separate tribunals an opportunity to make three separate and independent judgments on the same record creates more efficient administration of the laws.

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