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# Scope of Review of Decision of an Administrative Agency in Wyoming

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## NOTES

### SCOPE OF REVIEW OF DECISION OF AN ADMINISTRATIVE AGENCY IN WYOMING

This note will attempt a comparison of judicial review of an administrative agency decision in Wyoming with that in the federal courts.

Review of agency decisions is to a limited extent made uniform in the federal courts by the provisions of the Administrative Procedure Act.[1] In Wyoming there is no uniform act and the provisions for review are found among the statutes for the particular agency in question.

The language of the review section of the Federal Administrative Procedure Act is: ". . . the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions. . . . It shall (B) hold unlawful and set aside agency action, findings, and conclusions found to be (5) unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the whole record. . . ."[2] The meaning of "substantial evidence on the whole record" is best illustrated by the history of review or orders of the National Labor Relations

1. 60 Stat. 237, 5 U.S.C. 1001, et seq. (1946).
2. Sec. 10(e), Federal Administrative Procedure Act.

Board. Under the Wagner Act[3] findings of the Board as to the facts, if supported by evidence, were conclusive on the court. In *NLRB v. Columbian Enameling Co.*[4] the court interpreted this language to mean substantial evidence. The court in its opinion stated: ". . . this (referring to the language of the statute), as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . ." Then a series of Circuit Court cases led some to believe that the courts in determining whether a finding was supported by substantial evidence would uphold the Board's finding if the court could find substantial evidence looking only at the evidence in support of the finding.[5] Then in 1946 the Administrative Procedure Act was passed and in 1947 the Wagner Act was amended. The language of both of these Acts procided that finds with resepect to questions of fact must be supported by substantial evidence on the record considered as a whole.[6] The court considered the effect of these provisions on the scope of review in *Universal Camera Corp. v. NLRB.*[7] Here the court said that in enacting the new legislation the Congress was expressing a mood requiring more careful scrutiny of the evidence by the reviewing court. Said the court, "Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." The court then went on to indicate that this did not mean that he reviewing court was to weigh the evidence or make its own independent determination. This then represents the present federal rule as to scope of review on questions of fact.

Many of the Wyoming statutes relating to administrative agencies provide for a trial de novo in the District Court. Presumably, therefore, with respect to decisions of such agencies the parties upon appeal to the courts are entitled to a new trial and an independent determination of the factual issues by the court. However, in Wyoming appeals from orders of the Public Service Commission under the appropriate statute are reviewed by the courts as to the facts only to determine if they are supported by substantial evidence.[8] In *Application of Northern Utilities Co.*,[9] an

3. NATIONAL LABOR RELATIONS ACT (1935), 49 Stat. 449, 29 U.S.C. 151, 29 U.S.C.A. 151.
4. 306 U.S. 292, 59 S.Ct. 501, 83 L.Ed. 660 (1939).
5. Nevada Consolidated Copper Co. v. N.L.R.B., 122 F.2d 587 (10th Cir., 1941); reversed, N.L.R.B. v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305 (1942); N.L.R.B. v. Columbia Products Corp., 141 F.2d 687 (2d Cir., 1944); Wilson & Co. v. N.L.R.B., 126 F.2d 114 (7th Cir., 1942).
6. See notes 2 and 3, supra.
7. 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).
8. Wyo. Comp. Stat., 1945, sec. 64-318.
9. 70 Wyo. 225, 247 P.2d 767 (1952).

appeal from a rate order of the Public Service Commission, the Wyoming Supreme Court indicated that "substantial evidence" meant looking only at the evidence that supported the Commission's findings. It quoted as follows from *Grantham v. Union Pacific Coal Co.*,[10] a non-agency decision, which it said guided the court in its decision of this case: "the court . . . must assume that the evidence in favor of the successful party is true, leave out of consideration entirely the evidence of the unsuccessful party in conflict therewith, and give to the evidence of the successful party every favorable inference which may be reasonably drawn from it." It would appear then that the law relative to substantial evidence in Wyoming is where the federal courts were prior to the passage of the Administrative Procedure Act and the interpretation of it in the *Universal Camera* case.[11]

It has been stated that the heart of the problem of scope of review is the extent to which courts review the agency's application of statutory language to established facts;[12] the so-called mixed question of law and fact. In *Gray v. Powell*[13] which involved the application of the term "producer" to undisputed facts, the Supreme Court indicated it would not substitute its judgment for that of the agency when the decision of he agency had a "reasonable basis in law." Said the court, "In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing . . .and an application of the statute in a just and reasonable manner." In Wyoming the cases concerning decisions of the Board of Land Commissioners seem to be cases of this type. The statute provides that state lands shall be leased so as to "inure to the greatest benefit to the state."[14] In *L. L. Sheep Co. v. Potter*[15] the court, quoting from *Howard v. Lindmier*,[16] stated, "Even if the court comes to a different conclusion than that of the Land Board . . . is in no wise conclusive. The court must go further. It must be able to determine that the Land Board might not reasonably, under the same state of facts, have come to a different conclusion. . . . The Board . . . is quite as well, if not better, qualified as the courts to investigate and to accurately consider and pass upon the conflicting claims of applicants for leases." The Wyoming view in this area then is quite similar to that in the federal courts.

Two so-called doctrines that have been much discussed in the federal law, but which seem never to have been raised in Wyoming, are the "constitutional fact" doctrine and the "jurisdictional fact" doctrine. In *Ohio Valley Water Co. v. Ben Avon Borough*[17] the Pennsylvania Public Service Commission had issued a rate order. The company contended that the

10. 69 Wyo. 199, 239 P.2d 220 (1951).
11. See note 7, supra.
12. DAVIS, ADMINISTRATIVE LAW, 868 (1951).
13. 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (1941).
14. Wyo. Comp. Stat., 1945, sec. 24-113.
15. 67 Wyo. 348, 224 P.2d 496 (1950).
16. 67 Wyo. 78, 214 P.2d 737 (1949).
17. 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920).

rate set amounted to a confiscation of its property. The U. S. Supreme Court held that where, as here, a constitutional issue is raised, there must be an independent judicial review of both the law and the facts in order to fulfill the requirements of due process. This holding, however, was not followed in the subsequent case of *Rowan & Nichols Oil Co.*[18] but as it made no mention of the *Ben Avon*[19] case, there is some doubt as to whether or not it was meant to overrule it. It is clear, however, that the doctrine was not overruled in cases involving civil liberties.[20] From the great number of agency determinations that are subject to a trial de novo in the District Court[21] in Wyoming it seems that nothing as important as civil liberties or confiscation is necessary for a full review on both questions of law and fact. When appeals from licensing boards, from assessments for local improvements by city council, and from decisions of the Board of Control with respect to water rights are entitled to a trial de novo, then surely in a similar case the doctrine of the *Ben Avon* case would be followed in Wyoming.

In connection with the above-mentioned trial de novo provisions there have been some unusual interpretations of them. In *L. L. Sheep Co. v. Potter,*[22] an appeal from a decision of the Board of Land Commissioners, it was stated by the court, "The trial de novo, as provided for in the statute outhorzing an appeal to the District Court from a determination of he Board of Land Commissioners in the matter of leasing state lands, is limited to decision whether, on the facts proven, there was a legal exercise of the Board's discretion." This then amounts to a restriction upon the meaning ordinarily attributed to that term.

In another case wherein the statute called for a trial de novo upon an appeal from the Board of Control the court said that the Board did not have exclusive jurisdiction but that its jurisdiction was concurrent with that of the court.[23] This situation in the federal courts is controlled by the "primary administrative jurisdiction" doctrine. In *Texas and Pac. Ry. v. Abilene Cotton Oil Co.*[24] it was held that no redress could be obtained through the courts without previous action by the agency. The theory was that any other holding would make a uniform rate structure impossible.

18. 311 U.S. 570, 61 S.Ct. 343, 85 LEd. 358 (1951).
19. See note 17, supra.
20. Patton v. Mississippi, 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 76 (1947).
21. Wyo. Comp. Stat., 1945:
    Sec. 29-1515 (Civil Service Comm., Police Dept.)
    Sec. 37-717 (Collection Agency Board)
    Sec. 37-811 (Chiropractic Board)
    Sec. 37-1117 (Dental Licensing)
    Sec. 37-2012 (Medical Examiners)
    Sec. 52-204 (Insurance Commissioner)
    Sec. 53-205 (denial of liquor license)
    Sec. 71-226 (Board of Control)
    (This list does not purport to be exhaustive).
22. See note 1, supra. Cf. California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946).
23. Simmons v. Ramsbotton, 51 Wyo. 419, 68 P.2d 153 (1937).
24. 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed 553 (1907).

It would seem that a similar argument could be made for a uniform system of water administration in Wyoming.

The "jurisdictional fact" doctrine was established in the federal courts by *Crowell v. Benson.*[25] This case involved review of a workmen's compensation award under the Longshoremen's and Harbor Workers' Act.[26] In order for the Commissioner to have jujrisdiction the injury must have occurred upon the navigable waters of the United States and the relationship of master and servant must have existed. Here the court held that where the determination of certain facts was essential to the jurisdiction of the agency, it would make an independent determination of both the law and the facts. Although this doctrine has been severely criticized,[27] it was followed by a circuit court in the subsequent case of *Pittsburgh S.S. Corp. v. Brown.*[28] No similar question seems to have been raised in Wyoming.

It is apparent that review of agency decisions has not been a fertile field of litigation in the Wyoming courts. Perhaps it has been a field in which there have not been many cases because the legislature has not seen fit to entrust the agencies to carry out the legislative delegation impartially. But could not just as much control be exercised over the agencies with review provisions similar to those governing federal administrative agencies? If agencies are going to be merely examiners for the courts, then we have a misconception of the true function and value of administrative agencies.

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## DUE DILIGENCE REQUIRED FOR SERVICE BY PUBLICATION

In attempting to obtain jurisdiction by constructive service over a defendant whose address is unknown, the plaintiff's attorney is immediately confronted with the question of how far he must go in his search, and exactly what he must do in order to satisfy the requirements of due diligence that are a necessary and essential part of this type of service. Although the requirements of the states vary, from a procedural approach there seem to be two general classifications. First are those jurisdictions that require an order for publication of the necessary notices after the court has been satisfied from the plaintiff's affidavit that due diligence has been exercised in attempting to find the defendant. The other group of jurisdictions merely require that an affidavit be filed before service by publication be made.

The requirement seems to be, in the first group mentioned above, that the court should decide from the facts set forth in the affidavit of the

25. 285 U.S. 22, 52 S. Ct. 285, 76 L.Ed 598 (1932).
26. 44 Stat. 1424, 33 U.S.C. 901 et seq.
27. See DAVIS, ADMINISTRATIVE LAW, 920 (1951).
28. 171 F.2d 175 (7th Cir., 1948).