

December 2019

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### Recommended Citation

Charles E. Hamilton, *De Novo Judicial Review of Wyoming Administrative Findings*, 15 Wyo. L.J. 67 (1960)  
Available at: <https://scholarship.law.uwyo.edu/wlj/vol15/iss1/6>

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## DE NOVO JUDICIAL REVIEW OF WYOMING ADMINISTRATIVE FINDINGS

In Wyoming a recurring and perplexing problem of administrative law has been the extent to which administrative determinations shall be reviewed "de novo" by the courts. In general, statutes relating to each agency set out the method of review, if one is provided, and these vary. The problem arises when a party, unsuccessful before the agency, attempts to seek relief from a determination or order under the terms of the statute.

The statutes involved vary from very precise and limited review to trial "de novo." This note will examine the interpretation placed on trial de novo by the courts of Wyoming, when it appears in a statute governing review of the agency decision.<sup>1</sup>

Black's Law Dictionary, Fourth Edition, defines trial de novo as: "A new trial or retrial had in an appellate court in which the whole case is gone into as if no trial whatever had been had in the court below." Beginning with this basic definition, this article will investigate what the actual scope of review is in Wyoming under statutes which provide for "trial de novo" in appeals from state agencies to the courts.

As an example, the statutes setting out the appellate procedure from decisions of the Board of Land Commissioners provide that the proceeding shall stand to be heard for trial de novo by the court.<sup>2</sup> There is also a provision that a certified copy of all the records and evidence in the case before the Board shall be transmitted to the court and at the trial of such appeal, evidence shall be taken and other proceedings had as in the trial of a civil action before said court.<sup>3</sup>

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1. A few agencies and statutes not specifically dealt with in this article, but which provide for de novo review are:  
 § 15-404 W.S. 1957 (Civil Service Comm., Police Dept.)  
 § 33-144 W.S. 1957 (Collection Agency Board)  
 § 33-162 W.S. 1957 (Chiropractic Board)  
 § 33-207 W.S. 1957 (Dental Licensing)  
 § 33-340 W.S. 1957 (Medical Examiners)  
 § 26-51 W.S. 1957 (Insurance Commissioner)  
 (This list does not purport to be exhaustive.)
  2. § 36-27 W.S. 1957 "Appeals to district court.—Any party who may feel himself aggrieved by the decision of the board of land commissioners . . . may have an appeal from such decision to the district court. . . . All persons joining in the appeal shall be joined as appellants, and all persons having interests adverse to the parties appealing . . . shall be joined as appellees; and upon said appeal being perfected, said contest proceeding shall stand to be heard and for trial de novo, by said court."
  3. § 36-29 W.S. 1957 "Transmission of evidence, orders and decisions appealed from to district court; hearing on appeal. —Upon notice of intention to appeal having been filed with the commissioner of public lands, he shall at once transmit to the clerk of the district court . . . , a certified copy of all papers and documents in evidence in the case together with a transcript of all orders and journal entries concerning the same and a certified copy of the decision appealed from. Unless otherwise ordered by the court, said appeal shall be heard upon the pleadings filed before the board of land commissioners and at the trial of such appeal, evidence shall be taken and other proceedings had as in the trial of a civil action before said court."

It would thus seem that a complete new trial is to be had; however, the courts of Wyoming have held otherwise. A review of the cases involving appeals from the Board of Land Commissioners reveals that this statutory trial de novo has been greatly limited.

In 1944 the case of *Banzhof v. Swan Co.*<sup>4</sup> came before the Wyoming Supreme Court. It held that trial de novo is simply limited to a determination on the part of the district court of whether on the facts proven there was an illegal exercise of the board's discretion, a case of fraud, or a grave abuse of discretion. Unless one of these three elements should appear, the action of the board should not be disturbed. In 1950 the case of *Howard v. Lindmier*<sup>5</sup> came before the court. Here, as in the *Banzhof* case (supra), the court restricted its review and that of the district court to evidence of fraud, illegality and abuse of discretion, but the court injected very strong language when it said:

Even if the court comes to a different conclusion than that of the Land Board, considering the evidence as a whole, . . . is in no means 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; in other words, that the Land Board abused its discretion.

The case of *L. L. Sheep Co. v. Potter*<sup>6</sup> was brought to the court for consideration later in the same year. The Supreme Court commented that the Commissioner of Public Lands was a very competent official; that the board had the benefit of such competency; and that it is well, if not better qualified than the courts, to pass on conflicting claims. The court then proceeded to observe, as reviewing courts do, that the board had the opportunity to see and hear the witnesses, to evaluate testimony as to weight and credibility and to form direct conclusions in praesenti. In affirming, it concluded that there was not a grave abuse of discretion by the board, though, had it been in the board's place and invested with the board's powers, it might have decided otherwise.

In the relatively recent case of *Rayburn v. Queen*,<sup>7</sup> Justice Parker, writing for the court, restated the court's view, in definitive fashion, on the meaning of de novo in relation to review of determinations of the Board of Land Commissioners. There he stated:

Although we said in *Miller v. Hurley*, 37 Wyo. 344, 262 Pac. 238, 242, "That the court is to determine the facts for itself without regard to the determination of facts as found by the board," we explained this statement when we said that this should in no way interfere with or destroy the discretion inherent in the Board of Land Commissioners. We further clarified our views in *Howard v. Lindmier*, 67 Wyo. 78, 214 P.2d 737, when we indicated that

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4. 60 Wyo. 201, 148 P.2d 225.

5. 67 Wyo. 78, 214 P.2d 737.

6. 67 Wyo. 348, 224 P.2d 496.

7. . . . Wyo. . . . , 326 P.2d 1108 (1958).

the court from the facts before it should determine whether or not the board might reasonably have arrived at its decision. This is another way of saying that the finding of the board if supported by substantial evidence should be approved by the court on the trial de novo, and we think that such substantial evidence may consist of competent testimony either (a) taken before the board and properly preserved or (b) adduced in the trial before the court "as in the trial of a civil action" (Sec. 24-308, W.C.S. 1945).<sup>8</sup> Having ascertained in the instant case that except for copies of the legal instruments there was no competent evidence forwarded by the board, we look then to the record of testimony before the trial court to determine whether or not its findings and conclusion were warranted.

. . . The evidence developed in the trial de novo before the district court in general supported the decision of the board. No fraud being charged and no illegal action or abuse of discretion having been shown, the board's determination should not be disturbed. . . . The testimony before the board in contested cases should be preserved verbatim and be available to the court in the trial de novo as one of the bases for its judgment.

The above language indicates that on appeal the findings of the Board will be affirmed if supported by the evidence, absent a showing of fraud, illegal action or abuse of discretion. Of special interest is the fact that there was no record kept of the proceeding before the Board in this case so that the district court was compelled to conduct a full trial in order to arrive at its decision. Thus, it may be concluded, that if upon appeal the Board forwards a record bereft of the evidence adduced, the district court should hear *all* the evidence. This results in a complete, not a partial, trial de novo and protects the appellant by affording an opportunity for judicial scrutiny. Justice Harnsburger in a concurring opinion, commented rather poignantly on the unavailability of the complete record of proceedings before the Board in *Rayburn v. Queen* when he wrote:

What is being said sums up to this: (1) The board is the sole and exclusive authority to lease public lands in this state.<sup>9</sup> (2) This function of the board must be legally exercised. (3) The legislatively granted appeal from decisions leasing such lands in contested instances, although said to require a trial de novo in the district court, has been judicially limited to a review of the board's action to ascertain if there was an illegal exercise of the board's discretion, if there was fraud, or if the board had abused its discretion. (4) The statutory provision for taking of evidence in the district court must be interpreted as limited to the taking of evidence bearing upon fraud, illegality or abuse of discretion. . . .

Notwithstanding all that is here said, we must not overlook the

8. § 36-29 W.S. 1957, see note 3 supra.

9. Wyo. Const., Art 18, § 3 provides in part: "The governor, secretary of state, state treasurer, state auditor and superintendent of public instruction shall constitute a board of land commissioners, which under direction of the legislature as limited by this constitution, shall have direction, control, leasing and disposal of lands of the state. . . ."

fact that, whether properly or improperly, the district court did proceed to supplement the record sent to it, and received further evidence which was preserved and which we now find in the record sent to us. Of course we have no way of knowing if the evidence so produced before the district court was also given before the board or even that it is the same evidence given to the board for consideration. As we do not know if the evidence considered by the district court was the same evidence as that considered by the board, we cannot say the board's action was taken upon the same evidence which influenced the court. So we rest upon the horns of a dilemma and are truly between Scylla and Charybdis. . . . It seems clear that if this matter is remanded for further proceedings at this late date . . . it is reasonable to anticipate that . . . the same evidence . . . would now be produced before the board and if this occurred the board's decision to lease the lands to the appellee would have to be sustained as that district court evidence was sufficient and substantial to support the granting of the lease.<sup>10</sup>

And further:

This court has heretofore more or less directly indicated that testimony given before the land board in contested cases should be preserved, but so far the suggestion appears to have been unfruitful. Notwithstanding the board's failure to adopt the suggestion, this court has not seen fit to lay down a definite course of procedure conforming with what is here outlined, but we will continue to deplore the highly unsatisfactory state our present law in the matter.<sup>11</sup>

As to water rights, the statutes governing appeals from the Board of Control in this state do not specifically use the words *de novo*, but it is generally agreed that proceedings on appeal are conducted *de novo*. Sanction is found in the statutes which provide that when an appeal is taken from the Board of Control to the district court, evidence may be taken upon appeal.<sup>12</sup> They further provide that appeal to the district court in such case shall follow the provisions regulating appeals from the justice court; thus, as in a trial *de novo*, evidence can be introduced by either party.<sup>13</sup> It should be noted here that the Wyoming Constitution provides

10. *Supra* note 7, 326 P.2d at 1115, 1116.

11. *Supra* note 7, 326 P.2d at 1116. Note that § 36-22 W.S. provides that the board may, upon its own motion or on motion of either party interested, reserve and send to the district court a question which involves "an important or difficult matter of law or fact." It may also reserve a contest or proceeding for the district court's consideration when in the judgment of the board "any of its members are, for any reason, disqualified from considering and deciding the question or issues involved." § 36-26 W.S. 1957 provides that: "When such case is reserved to the district court the same shall be tried and determined by such court. . . ." Its findings and judgment have the same force and effect as if decided by the board. It is understood that the courts would not look with favor upon frequent reservation since it would, if improvidently used, tend to defeat the very purpose of the Board and argue against the reliance upon expertise so often referred to by the courts. However, there can be no question that upon such reference the court decides entirely upon evidence adduced before it.

12. § 41-193 W.S. 1957 "Rights to appeal to district court." § 41-196 W.S. 1957 "Transcript of proceedings, etc., before the board to be filed; service of process." § 41-198 W.S. 1957 "Pleadings and practice."

13. *Ibid.*

that the powers of the government of the state are divided into three distinct departments, and that the power belonging to one of these departments shall not be exercised by any other except as permitted.<sup>14</sup> The Board of Control is primarily administrative, exercising part of the executive power. Though this might be construed as permitting the Board to exercise judicial power in adjudicating water rights, there is nothing to indicate that the power of the courts has been superseded. That a suit may be brought in the courts to quiet title to a water course or to the rights of appropriators appears to be universally recognized.<sup>15</sup> Thus, it seems, the courts have concurrent jurisdiction with the Board of Control in actions to determine priority of water rights and the limitations placed upon appeals are not so strict as from the Board of Land Commissioners. The court asserts both its concurrent jurisdiction and its right to take evidence as in a trial de novo. This is another way of saying that the Board does not have primary jurisdiction, in the exclusive sense.

The language of restriction used by the courts of this state on appeal from the Board of Land Commissioners, in defining trial de novo, bears a striking similarity to the statutory limitations placed upon appeals from the Public Service Commission. In effect § 37-45 W.S. 1957 provides that no new or additional evidence may be introduced in the district court except as to fraud or misconduct and that the court's review shall be limited to determining whether or not: (1) The commission acted without or in excess of its powers. (2) The order was procured by fraud. (3) The order was in conformity with law. (4) The finding of facts in issue was supported by any substantial evidence. The test on appeal is the legality of the determination and whether or no there is evidence in the record sufficient to classify the determination as reasonable. However, in this instance, statutory articulation alerts the attorney to the scope of review.<sup>16</sup>

Another statute using the words "trial de novo" sets out the appellate procedure from the State Board of Equalization to the district court.<sup>17</sup> There are no Wyoming decisions interpreting the meaning of "trial de novo" under this statute, and it is not known whether restrictions would be placed thereon.<sup>18</sup> However, several states have indicated that:

14. Wyo. Const., Art. II, § 1.

15. *Simmons v. Ramsbottom*, 51 Wyo. 419, 68 P.2d 153 (1937).

16. *Appeal of Hamilton Pipe Line Co.*, 65 Wyo. 350, 202 P.2d 184 (1949).

17. § 39-29 W.S. 1957 "Appeals from decisions. —Any person, persons, firm or corporation, who may feel aggrieved by the assessment or assessments by the board may take an appeal from the decision of the board to the district court of the county wherein the property or some part thereof is situated, where a trial de novo shall be had."

18. 4 Wyo. L.J. 240 at page 244 discusses this problem and asks the questions: "What weight should be given to the determination of the administrative officials as to the proper assessment? Should the district court become the assessing tribunal, and determine anew the proper valuation to be assigned to the taxable property? Should the court determine for itself whether a particular assessment is "exclusive," despite the fact that the assessment was made in compliance with the principle of uniformity. Should the court only hear evidence in order to determine whether the valuation placed on the property was the result of fraud on the taxpayer, or was erroneous to the extent that it was constructively fraudulent?"

A fraudulent overvaluation of property by an assessor will not be set aside where it appears that the board of equalization has brought its honest judgment to bear on the matter, and determined the true value of the property. Such action by the board is conclusive on the question of fairness of valuation and hence on the question of injury to the taxpayer by the attempted fraud of the assessor.<sup>19</sup>

However, in the State of Washington the rule seems to be that the courts will grant relief from a grossly inequitable and palpably excessive valuation of real property for taxation as constructively fraudulent, even though the assessing officers may have proceeded in good faith, and without regard to the action of the board of equalization.<sup>20</sup>

Trial de novo to the court is also provided for in appeals from orders of the Wyoming Liquor Commission.<sup>21</sup> In attempting to determine whether or not the supreme court would limit review, it is interesting to note the thinking of the Supreme Court of Errors of Connecticut in construing a similar statute. In *De Mond v. Liquor Control Commission*<sup>22</sup> Chief Justice Maltbie, writing for the court stated:

The requirement of a trial de novo can be given full effect within constitutional limitations. Previous to the enactment of the statute, we held that in appeals under this act in other similar situations the question for the court to determine was whether the commission acted arbitrarily, illegally, or in abuse of its discretion, and that this was to be determined upon the basis of the proceedings before it, if they were available, or upon the finding of facts by the court upon the assumption that these were the facts upon which the commission acted (citing cases) Evidently the requirement that there be a trial de novo was intended to change this method of determining an appeal from the liquor control commission. *The issue is still, was there legal and reasonable ground for its action; but the court, in reaching its decision is not confined, as heretofore, to the facts actually or assumed to have been proven before the commission; it conducts an independent inquiry. . . .* (italics supplied).

The same Connecticut Court has also indicated that especially should there be this independent inquiry where there is no record, or the record is bare, or there is no statement in the record of the board showing the basis upon which it acted.<sup>23</sup>

The condition of the record in *Rayburn v. Queen* recalls the dissatisfaction of Judge Jerome Frank dissenting in the *Old Colony Bondholders* case<sup>24</sup> in which he said of the I.C.C.'s failure to give the basis of its decision:

19. For a review of the cases in several jurisdictions, see 9 A.L.R. 1284.

20. 99 Wash. 184, 168 Pac. 1138, 9 A.L.R. 1286 (1917).

21. § 12-29 W.S. 1957 at p. 633, "Upon appeal to the district court the hearing shall be de novo to the court without jury and conducted in the same manner as provided by law for the trial of civil actions."

22. 129 Conn. 642, 30 A.2d 547 (1943).

23. *Jaffe v. State Department of Health*, 135 Conn. 339, 64 A.2d 330 (1949).

24. *Old Colony Bondholders v. New York, N.H. & H.R. Co.*, 161 F.2d 413 at 449, 450 (C.C.A. 2, 1947) cert. denied, 331 U.S. 850, 67 S.Ct. 1754, 91 L.Ed. 1865 (1947).

I grant that, because of the "intuitive" factor, sometimes a complete articulation of the reasons for a decision—breaking it up into "legal rules and "facts"—is all but impossible, since at times the "rules" and the "facts" interact. A decision sometimes may be patterned "whole" (a "gestalt") which without some artificiality, cannot be thus nicely analyzed. This difficulty is greatest when the credibility of witnesses is involved. . . . Moreover, while allowing for the difficulties, government officers, judges or members of administrative agencies, when acting judicially, have an obligation to be as articulate as is practically possible. For no aspect of a democratic government should be mysterious.

If however, the Commission is sustained in this case, and, accordingly, behaves similarly in future cases, then its conduct will be reduced to a mystery. Its so-called "valuations" will then be acceptable, no matter how contrived. In that event, it would be desirable to abandon the word "valuation"—since that word misleadingly connotes some moderately rational judgment—and to substitute some neutral term, devoid of misleading associations, such as "valuation," or, perhaps better still, "woosh-woosh." The pertinent doctrine would then be this: "When the I.C.C. has ceremonially woosh-wooshed, judicial scrutiny is barred." It would then be desirable to dispense, to, with the Commission's present ritualistic formula, "Taking into consideration, etc.," replacing it with patently meaningless words—perhaps the same words spelled backwards, (i.e., "Gnikat otni noitaredisnoc, etc."). Then no one would be foolish enough to believe that the figures in a Commission plan necessarily have anything to do with deliberation, but everyone would know that the figures might well have been the product of omphalic inspiration, or ornithomancy, or haruspication, or aleatory devices, and that the conclusions of the I.C.C. might well be but the conjurations of mystagogues.

In conclusion, it is apparent that the Wyoming Supreme Court, in construing appeals from the Board of Land Commissioners, has restricted its review. This may be based upon matters such as expertise, a reluctance to infringe upon administrative functions, the fact that the agency heard the parties and the equating of its review functions with that of an appellate court of review of the chancellor in equity. Thus *de novo* can mean a *new look* rather than a *new trial* in its traditional implications. Of course, the extent of its inquiry will often be affected by the condition of the record and other factors.

It may be that a simple form of petition to review, with full definition of the procedure to be followed and specification of the grounds on which the court may set aside the administrative determination, would ameliorate the problem and the appellate procedure would be clear to litigants, attorneys and courts alike. The form of proceeding would be the same regardless of the type of administrative action or inaction and whether it is deemed to be discretionary, nondiscretionary, administrative, ministerial, unclassifiable or mixed. Such a form of judicial review is set out in Section 12 ("Judicial Review of Contested Cases") of the Model State Administrative Procedure Act. Its adoption in Wyoming would add both clarity and justice to a rather confused situation.

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