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Scope of Judicial Review

Bobbie J. Baker

SCOPE OF JUDICIAL REVIEW

The scope of judicial review of the decisions of administrative agencies is a subject upon which much has been written. This, nevertheless, is a field in which there has been considerable recent development in this state and so it merits another look.

In a previous note[1] written for this publication in 1954 the commentator came to the conclusion, based on the material available at the time, that in Wyoming the courts, in reviewing evidence, would examine the evidence that most supported the agencies findings in order to determine if there was substantial evidence upon which such a decision could have been made. There was even less material for the commentator to work with, in determining the scope the court would use in the application of law to facts. However, from the sparse material available he concluded that the Wyoming courts would use the "rational basis" test as used by the federal courts. This article, in the light of the new material, will again explore the field and show how these conclusions have been changed or augmented as the subsequent cases have been decided.

There are at least three aspects to be considered in an article covering scope of judicial review. These are: (1) review of evidence, (2) review on questions of law, and (3) review of the application of the law to the evidence. This article will in so far as possible treat these aspects separately, although this will be somewhat difficult due to the fact that the courts tend to commingle them in many cases.

I

Review of Evidence

The test ordinarily used in determining the scope of review of evidence is that of "substantial evidence." This is the test used by the federal courts. It was stated by the United States Supreme Court[2] and has been incorporated into the Federal Administrative Procedure Act.[3] Substantial evidence:

> means 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.[4]

The other important test that is sometimes used to determine scope of review of evidence is the "clearly erroneous" test, which the Supreme court of the United States has defined thus: "A finding is 'clearly erroneous'

1. Note, Scope of Review of Decision of an Administrative Agency in Wyoming, 9 Wyo. L.J. 65 (1954).
2. NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292 (9139), is a good example of a case using the "substantial evidence" test before the Administrative Procedure Act.
3. 60 Stat. 243 (1946), 5 U.S.C. 1009 (1958).
4. NLRB v. Columbian Enameling and Stampling Co., 306 U.S. 292 (1939).

when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[5] This is the test that has been approved by the revised Model Act.[6]

The courts, of course, are not limited to these two tests. They may, either through judge made law or by legislative direction, go to extremes either way and on the one hand refuse to review the agency action at all, or on the other hand completely substitute their judgment on questions of fact for that of the agency.

The Wyoming Supreme Court, however, like the Supreme Court of the United States, has adopted the "substantial evidence" test. There are a few statutes that specifically require the courts to apply the "substantial evidence" test in reviewing decisions of certain agencies,[7] but the Supreme Court of Wyoming applies this test even when there is no statute requiring it to do so. In the case of *Howard v. Lindmier*,[8] a case involving a mixed question of law and fact, in which the Supreme Court had to determine if the Board of Land Commissioners was guilty of an abuse of discretion, one of the factors the court considered was whether or not there was "substantial evidence" upon which the Board could have made its decision. The court said, "the term 'substantial evidence' does not include the idea of weight of evidence, although it is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The court in the later case of *Queen v. Rayburne*,[9] stated, with no attempt to distinguish between the pure fact issues and the mixed law fact issues, that in *Howard v. Lindmier* they had "indicated that the court from the facts before it should determine whether or not the Board might reasonably have arrived at its decision." The court then stated, "this is another way of saying that the findings of the Board if supported by substantial evidence should be approved by the court."

Another excellent example in which the court applied the "substantial evidence" test without the aid of a statute is the case of *School District No. 9 v. District Boundary Board*,[10] a case involving the transfer of land from one school district to another. The court said: "It is therefore necessary here merely to examine the record in order that we may ascertain whether or not there was substantial evidence upon which the decision of the boundary board could reasonably have been based."

From the above statements it is obvious that the test used in Wyoming will not differ materially from the federal "substantial evidence" test.

5. United States v. United States Gypsum Co., 333 U.S. 364 (1948).
6. Revised Fourth Draft, Model State Administrative Proecdure Act § 15.
7. The Employment Security Commission, Wyo. Stat. § 27-27 (1957); the State Board of Health, Wyo. Stat. § 35-15 (1957); the Public Service Commission, Wyo. Stat. §§ 37-45, 37-191 (1957); the Soil Conservation Board of Adjustment, Wyo. Stat. § 11-249 (1957).
8. 67 Wyo. 82, 214 P.2d 737 (1949).
9. 78 Wyo. 359, 326 P.2d 1108 (1958).
10. Wyo., 351 P.2d 106 (1960).

The case of *Bosler v. McKechnie*,[11] however, adds a little different twist to the "substantial evidence" test as used in Wyoming. Here one party had the burden of proof for proving certain facts before the Board and the court in reviewing the evidence held that the person having such burden had not sustained it. This at first glance seems to state a test that gives the court greater leeway in reviewing agency decisions than the "substantial evidence" test. This, however, is not necessarily so. The burden of proof is something that is often left out of consideration when reviewing for "substantial evidence," but ordinarily in actions before an agency one party has the burden of proof as in a court action. Therefore, in determining the presence or absence of "substantial evidence" it is not too amiss to say that there must be evidence from which a reasonable person could infer that the burden of proof had been met, and if there is no such relevant evidence as a reasonable mind might accept as showing that the burden of proof had been met, then there is no "substantial evidence" to support the Board's action.

The most interesting thing about the Land Commission cases,[12] is that the statute on judicial review[13] calls for a trial de novo. A true trial de novo means a complete new trial. The most typical example of a trial de novo is an appeal from a Justice of the Peace to a court of general jurisdiction.[14] So if the statutes that call for a trial de novo were applied literally, it would mean that the court should substitute judicial judgment upon the evidence. The Wyoming Supreme Court, nevertheless, applies the "substantial evidence" test in spite of this provision. This development of using the "substantial evidence" test where the statute calls for de novo review, as it is applied to review of decisions of the Land Commission and of other agencies where judicial review is to be by trial de novo, has been discussed at length in a previous note in the Wyoming Law Journal.[15] The trial de novo statutes, however, have some meaning; for the Supreme Court of Wyoming has said that if the statute calls for a trial de novo and there is no record suitable for an appeal, then the reviewing court may adduce evidence to determine if there was "substantial evidence" upon which the agency could have made its decision.[16]

A further problem is raised, upon a determination that the "substantial evidence" rule applies in Wyoming. This problem is the extent to which the courts must look at the record in determining whether or not there was "substantial evidence." At the time the prior note on scope of review was written the only case in point was *Application of Northern*

11. Wyo., 362 P.2d 809 (1961).
12. Howard v. Lindmier, 67 Wyo. 82, 214 P.2d 737 (1949); Queen v. Rayburne, 78 Wyo. 359, 326 P.2d 1108 (1958); Bosler v. McKechnie, supra note 11.
13. Wyo. Stat. § 36-27 (1957).
14. Wyo. statutes governing the trial of an appeal from a Justice of the Peace are, Wyo. Stat. §§ 1-625 and 7-448 (1957).
15. Note, De Novo Judicial Review of Wyoming Administrative Findings, 15 Wyo. L.J. 67 (1960).
16. Queen v. Rayburne, 78 Wyo. 359, 326 P.2d 1108 (1958); J. Ray McDermott Co. v. Hudson, Wyo., 348 P.2d 73 (1960).

Utilities.[17] In that case the court used the same rule that it used as a criterion in reviewing lower court decisions,[18] and said that a court on hearing an appeal should leave out of consideration the evidence of the unsuccessful party and consider only the evidence favorable to the successful party. This is different than the federal position relating to administrative agencies that review should be on the whole record.[19] The court, however, in the later case of *School District No. 9 v. District Boundary Board*,[20] took a view much closer to the federal position. The court stated, "(we) are required to exercise care that the decision was not only based upon substantial evidence but also that such evidence related to both the annexed and the annexing areas."

The apparent confusion in these cases may be explained by considering them upon their facts. The court, reviewing the Public Service Commission, in the *Northern Utilities* case, upon an issue involving rates and directly affecting the public interest, looked only at the evidence that supported the findings of the Commission. The court apparently used this same rule in *Svilar Light & Power v. Riverton Valley Elec. Assn.*,[21] another case before the Public Service Commission. On the other hand, in cases involving a contest between two parties and only indirectly affecting the interest of the general public, the court apparently looks at the whole record,[22] as they did in the *School District No. 9* case. This may not be the complete explanation. For example, the court may have more faith in the judgment of one agency than in another. At any rate the court is not consistent in this area, and an attorney in Wyoming will have to be aware of this unless and until the issue is finally settled either by decision or by the enactment of a State Administrative Procedure Act or otherwise.

There are two devices that have been used by the Supreme Court of the United States in order to completely substitute judicial judgment in reviewing evidence. These are the Constitutional Fact Doctrine and the Jurisdictional Fact Doctrine.

The Constitutional Fact Doctrine was first stated in the case of *Ohio Valley Water Co. v. Ben Avon Borough*.[23] In this case the Public

17. 70 Wyo. 225, 247 P.2d 767 (1952).
18. The court in the case of Granthan v. Union Pacific Coal Co., 69 Wyo. 199, 239 P.2d 220, 221 stated the criterion thus: "When a party comes here with a finding and judgment against him . . . we: '. . . 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 and fairly drawn from it.'"
19. The Federal Administrative Procedure Act, 60 Stat. 243 (1946), 5 US.C. 1009 (1958) states: "the court shall review the whole record or such portions thereof as may be cited by any party." Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
20. Wyo. 351 P.2d 106 (1960).
21. Wyo. 355 P.2d 52 (1960).
22. Another illustration of this is the case of Bosler v. McKechnie, Wyo., 362 P.2d 809 (1961). Here, although there was evidence to support the position of the agency, there was also conflicting evidence and the court considered this as much as the evidence for the Board. But cf., Exploration Drilling Company v. Guthrie, 370 P.2d 362 (Wyo. 1962).
23. 253 U.S. 287 (1920).

Service Commission of Pennsylvania ordered the company to reduce its rates, and the company contended that the Commission's valuation was too low and would result in a confiscation of the company's property. The Supreme Court of the United States, when the appeal came before it, reversed a Pennsylvania Supreme Court decision for the Commission, and said:

> In all such cases, if the owner claims confiscation of his property will result the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.

The Court reaffirmed the doctrine in 1936,[24] but since that time it has never used it. On the other hand the Court has not seen fit to overrule it and so there is always the possibility it may be used again in some future action.

The Supreme Court of Wyoming has never applied the Constitutional Fact Doctrine. The issue, it is true, has never been squarely raised in a public utilities rate fixing case, and so it would be impossible to say that it would not be used if the proper occasion arose. Nevertheless, it is unlikely that the Supreme Court of Wyoming would apply the doctrine as the tendency in this state is away from de novo review and toward the "substantial evidence" test.

The Jurisdictional Fact Doctrine also arose out of one leading case. This was the case of *Crowell v. Benson*,[25] which was a suit by an employer to enjoin the enforcement of a workmen's compensation award to an employee under the Longshoremen's and Harbor Workers' Act. Before the agency could have jurisdiction it was necessary to show that the injury occurred upon the navigable waters of the United States and that the relationship of master and servant existed. In reviewing the case the Supreme Court of the United States held that in the event that the facts to be determined are "fundamental" or "jurisdictional," then the Constitution required that such facts must be determined in a constitutional court. This doctrine seems to be laid to rest in the federal courts,[26] but it has never been overruled and so could be followed by the Supreme Court of Wyoming. The Supreme Court of Wyoming, however, has never decided a case using this doctrine and again as the tendency is away from de novo review probably will not do so.

24. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).
25. 285 U.S. 22 (1932).
26. The Supreme Court has not applied the doctrine since the Crowell case was decided in 1932 and five other Justices have concurred in opinions containing statements made by Mr. Justice Frankfurter critical of Crowell v. Benson. See Estep v. United States, 327 U.S. 114, 142 (1946), and City of Yonkers v. United States, 320 U.S. 685, 695 (1944).

II

REVIEW OF QUESTIONS OF LAW

The United States Supreme Court, in reviewing questions of law, has never hesitated to substitute judicial judgment. In discussing the scope of agency action, before the exactment of the Administrative Procedure Act, the Supreme Court of the United States stated: "It has been settled that the orders of the Commission are final unless (1) beyond the power it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law."[27] The Administrative Procedure Act now provides: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion . . . the reviewing court shall decide all relevant questions of law."[28]

The Supreme Court of Wyoming, like the Supreme Court of the United States, will not hesitate to substitute its judgment for that of the agency upon question of law. For example in the case of *Ruby v. Schuett*,[29] the County Commissioners of Campbell County misinterpreted certain statutes, and in due course were reversed by the Supreme Court for doing so. Another example, in which the court substituted its judgment for that of the agency upon a question of law, is the case of *Bosler v. McKechnie*.[30] This again, was a case of the agency misinterpreting a statute. The Board of Land Commissioners had read the preference statute[31] to mean that they, the Board, could disregard the preference when it was to the benefit of the state to do so. The Court pointed out that the Board could only disregard the statute if the prior lessee had violated the lease.

The Supreme Court of Wyoming, however, has not been as clear as it could be on just what it is doing when it does substitute judicial judgment on questions of law.

III

REVIEW OF THE APPLICATION OF LAW TO EVIDENCE

This is the most troublesome area in considering the scope of judicial review of administrative action. As the first two sections of this article have brought out if the question can be resolved to be one of fact the court will not substitute its judgment for that of the agency, but will review only to see if the decision rests on substantial evidence; but on the other hand, if the issue is one solely of law the court will not hesitate to substitute its judgment for that of the agency. The problem arises when it is impossible to distinguish or separate the situation into neat compartments of law and fact. The Supreme Court of Wyoming recognized this in the *Svilar Light & Power* case.[32] The court there stated, "It is difficult at times to determine whether a statement is a fact or a conclusion."

27. ICC v. Union Pacific Railroad Co., 222 U.S. 541 (1912).
28. 60 Stat. 243 (1946), 5 U.S.C. 1009 (1958).
29. Wyo., 360 P.2d 170 (1961).
30. Wyo., 362 P.2d 809 (1961).
31. Wyo. Stat. § 36-66 (1957).
32. Svilar Light & Power v. Riverton Valley Electric Assn., Wyo., 355 P.2d 52 (1960).

This is a problem that has plagued the Supreme Court of the United States as well as the courts in Wyoming. The United States Supreme Court in a series of cases[33] developed a test where it will, without stating the issue to be one of fact or law, uphold the conclusion of the agency if such conclusion have a "rational basis." The only trouble with this test is that the Court does not always follow it, but in some cases in which the Court feels it has more or equal competence to handle the matter involved it will substitute its judgment for that of the agency in situations involving mixed questions of law and fact without any mention of the "rational basis" test or its reasons for disregarding it.[34] On the other hand in a case in which the Court feels that the agency is especially competent to handle the matter involved, the Court will apply the "rational basis" test even though the issue could be broken down into issues of fact or law.[35]

The prior note on scope of review concluded that the Wyoming courts would use a test not too different than the "rational basis" test. To say that the Wyoming courts would use such a test is an over simplification. It is true that the Wyoming Supreme Court does sometimes use language similar to the "rational basis" test. In *Howard v. Lindmier*[36] the court said:

> Even if the court comes to a different conclusion than that of the Land Board . . . that . . . is in no sense 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.

And the Supreme Court of Wyoming has many times said:

> The reviewing court will not substitute its discretion for that of the Commission, and it will not review or reverse the exercise of discretionary power by the Commission except where there has

33. ICC v. Union Pacific Railroad Co., 222 U.S. 541 (1912); Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282 (1934); Shields v. Idaho Central R. Co., 305 U.S. 177 (1938); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Gray v. Powell, 314 U.S. 402 (1941).

34. Office Employes v. NLRB, 353 U.S. 313 (1957) is one good example of a case in which the Court did not apply or mention the "rational basis" test. Professor Kenneth Culp Davis at 4 Davis, Ad. L. Treatise § 30.07 gives one opinion as to what should be the criterion as to when the Court should substitute judgment rather than apply the "rational basis" test. Professor Davis states: "Substitution of judicial for administrative judgment is often rather clearly desirable, especially when the statutory purpose is unclear, in many large categories of cases, including those involving problems which (1) transcend the single field of the particular agency, (2) call for interpretation of the common law, (3) are primarily problems of ethics or fairness of a common-law type, (4) are affected substantially by constitutional considerations, whether or not a constitutional issue is directly presented, (5) require analysis of legislative history, especially when political conflict is the essence and not legislative inquiry into technical understanding within the agency's field of specialization, (6) bring into question judge-made law previously developed in the course of statutory interpretation, and (7) impel the reviewing court to make a discretionary choice for any reason, explained or unexplained, to create or mold law as a guide for the agency and for affected parties."

35. Gray v. Powell, 314 U.S. 402 (1941) is the best single example of this; here the Court said: "Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept 'producer' is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed."

36. 67 Wyo. 82, 214 P.2d 737 (1949).

> been an abuse of discretion or there is a showing of capricious, unreasonable or arbitrary action or disregard of law.[37]

In the case of *Bunten v. Rock Springs Grazing Association*,[38] however, the court seemed to endorse a test imposing a lesser degree of limitation upon the agency than the "rational basis" test. In the *Bunten* case the court, in commenting upon the scope of review of an assessment made by the State Board of Equalization said:

> The matter is one of jurisdiction, of power, and in the absence of legislative provision to the contrary, courts cannot substitute their judgment for that of the persons and boards specifically provided for that purpose by the legislative department of our government.

This is language that sounds like the "rational basis" test, but then the court went on to say:

> The judicial department has jurisdiction over acts that are illegally done, but to extend its power over acts done in good faith, pursuant to the exercise of an honest judgment, and within the jurisdiction of the person or persons performing them, would be, in the absence of legislative authorization, judicial usurpation inconsistent with the fundamental constitutional principal of division of power.

This last quoted language seems to give the agency a very great latitude of discretion in making a decision, and as such it could be argued that the *Bunten* case imposes less restriction upon the agency than the "rational basis" test.

The court, however, in the later case of *J. Ray McDermott & Co. v. Hudson*,[39] said that this was not the correct interpretation of the *Bunten* case, and that while Justice Blume in the *Bunten* decision had used the above language and had said further that to be considered illegal or fraudulent the action of the Board must be "grossly inequitable and palpably excessive," he had nevertheless not intended the agency to have unbridled discretion. Justice Parker in the *McDermott & Co.* opinion then emhasized some other language in the *Bunten* case where Justice Blume said, "that such a Board will not be permitted to act in an arbitrary, capricious, or fraudulent manner and that courts should restrain such administrative agencies from becoming despotic."

It can thus be concluded that the Wyoming Supreme Court has indorsed a test similar to the "rational basis" test as used in the federal courts. However, the important thing to note in this state is that the court, in deciding cases containing mixed questions of law and fact, always insists

37. Svilar Light & Power v. Riverton Valley Electric Assn., Wyo. 355 P.2d 52 (1960) where the court quoted from Application of Northern Utilities Co., 70 Wyo. 225, 247 P.2d 767 (1951).
38. 29 Wyo. 461, 215 Pac. 244 (1923).
39. Wyo., 348 P.2d 73 (1960). See also J. Ray McDonald & Co. v. Hudson, 370 P.2d 364 (Wyo. 1962).

that there be a certain minimum of "substantial evidence" upon which the agency decision rests and failure to develop and consider such evidence is in itself an abuse of discretion.[40] On the other hand the court will often consider the fact that there is "substantial evidence" as the controlling issue in the case when the real question is whether or not there is a "rational basis" for the result.[41] Therefore, it must be concluded that while the Wyoming Supreme Court has stated a test similar to the federal "rational basis" test, the Wyoming Court, unlike the Supreme Court of the United States, does not ordinarily decide a case involving mixed law fact questions on that basis alone; preferring instead to substitute judgment on questions of law or to uphold or reverse agency decisions depending upon whether there is or is not "substantial evidence" to support such decisions.

CONCLUSION

In summing up, it is apparent that the cases decided since the prior note was written have helped to clarify and consolidate certain areas relating to scope of review, but they have also raised some new problems. The courts in Wyoming have a modern outlook on the problems of scope of review, and the agencies within the state can work with the assurance that they will not be hindered by the courts, and on the other hand persons affected by the agencies can feel reasonably secure from arbitrary action. The situation, although good, could be improved by the enactment by the legislature of a carefully considered administrative procedure act.

Whether any Act adopted should use the Model State Administrative Procedure Act "clearly erroneous" test or whether it should, like the Federal Administrative Procedure Act, adopt the judicially stated "substantial evidence" test depends upon the degree the legislature feels that the reviewing courts should examine the evidence upon which administrative decisions stand.

A provision in an adopted Act giving the reviewing courts the final decision upon relevant questions of law would not change the existing law, but would make it clear what the courts are doing in this area.

A test such as the "rational basis" test is and should remain a test stated by the courts. Whether the Wyoming Courts should or should not decide cases relying exclusively upon such a test is a question that should be left to the discretion of the Supreme Court of Wyoming.

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40. The McDermott & Co. case, supra note 39, was actually reversed for lack of "substantial evidence" and the court in Application of Hagood, Wyo. 356 P.2d 135 (1960) said: "Even had the statutes or rules warranted the granting of a preferential right to an old lessee, the Board would not have been entitled to grant such right without consideration of evidence concerning the facts and circumstances surrounding the past or proposed development of the property; and its so doing would have been an abuse of discretion."

41. Certain Board of Land Commissioner cases, Howard v. Lindmier, 67 Wyo. 82, 214 P.2d 737 (1949); Rayburne v. Queen, 78 Wyo. 359, 326 P.2d 1108 (1958); and Thompson v. Conwell, Wyo. 363 P.2d 927 (1961), are good examples of this.

One thing that the legislature should do, in the event that they decide to adopt an administrative procedure act for this state, is to repeal the statutes that call for de novo review. However, if this is done, it will be necessary that the agencies make better records for the purpose of judicial review, in order to replace the court's present practice, when there is a statute calling for a trial de novo, of allowing the reviewing court to deduce evidence in the absence of a proper record to see if the agency's decision is supported by "substantial evidence."

BOBBIE J. BAKER