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WHAT WERE WE THINKING?: LEGISLATIVE INTENT AND THE 2000 AMENDMENTS TO THE NORTH CAROLINA APA

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The following piece is a reflection by North Carolina State Senator Brad Miller on the legislative history of the 2000 amendments to the North Carolina Administrative Procedure Act. Senator Miller begins with a discussion of the policy reasons supporting the amendments and the political maneuvering that preceded passage of the bill. Next, he discusses the competing interests of deference to agency expertise and administrative law judges. Senator Miller concludes with thoughts about the role and future of judicial review of agency decisions.

INTRODUCTION

In 2000, amendments to the North Carolina Administrative Procedures Act (APA) altering the review procedures for contested cases became law. Like most significant legislation, the amendments were the product of compromise. The legislation was a compromise between the state agencies charged with enforcing the laws and the industries subject to the laws—the "regulated community." More fundamentally, the legislation was a compromise between starkly different views of the purpose of contested case procedures.

The former law required administrative law judges (ALJs) to conduct hearings, create the record in a contested case, and

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recommend a decision to the agency making the final determination.[1] The ALJ's recommended decision included findings of fact and conclusions of law.[2] However, the agency was not required to give deference to the ALJ's findings of fact or conclusions of law.[3] The person challenging agency action—the "aggrieved person"—could then seek judicial review of an unfavorable final agency decision.[4] Under judicial review, questions of law were fully reviewable,[5] but the standard of review for findings of fact was very deferential. Findings of fact in the final agency decision were not disturbed on judicial review if supported by "substantial evidence" in the record as a whole.[6] North Carolina courts have defined "substantial evidence" as "more than a scintilla" of evidence.[7] Judges intent upon reversing agencies sometimes made the substantial evidence test sound like a rigorous standard of review, but generally, application of the substantial evidence test produced one result—the appellant lost.

Representative Martin Nesbitt was the principal sponsor of the legislation to amend contested case procedures, House Bill 968.[8] As introduced, the legislation made the ALJ's decision final, rather than recommended.[9] The agency no longer made the final decision, but was simply a party in the contested case on the same footing with the aggrieved person.[10] The aggrieved person or the agency could seek judicial review of an unfavorable decision by the ALJ.[11] The legislation retained the former law's standard of review: the

1. N.C. GEN. STAT. § 150B-34 (1999), *amended by* Act of July 12, 2000, ch. 190, sec. 6, 2000 N.C. Adv. Legis. Serv. 546, 547–548.

2. *Id.*

3. N.C. GEN. STAT. § 150B-36(b) (1999), *amended by* Act of July 12, 2000, ch. 190, sec. 6, 2000 N.C. Adv. Legis. Serv. 546, 548–549.

4. The judicial review provisions in the APA are in N.C. Gen. Stat. §§ 150B-43 to -52 (1999 & Supp. 2000).

5. N.C. GEN. STAT. § 150B-51 (1999).

6. N.C. GEN. STAT. § 150B-51(b)(5) (1999 & Supp. 2000).

7. *See, e.g.*, Norman v. Cameron, 127 N.C. App. 44, 48, 488 S.E.2d 297, 300 (1997); Lackey v. Dep't of Human Res., 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982).

8. *See* H.R. 968, v. 2, sec. 3, 1999 Gen. Assem., Reg. Sess. (N.C. 1999), *available at* http://www.ncga.state.nc.us/html1999/bills/AllVersions/House/h968v2.html (on file with the North Carolina Law Review), *reprinted in* MARY SHUPING, N.C. GEN. ASSEM. RESEARCH DIV., CONTESTED CASES UNDER ARTICLE 3 OF THE APA: BACKGROUND INFORMATION & OPINIONS ON THE CONSTITUTIONALITY OF OAH FINAL DECISION-MAKING AUTHORITY, PRESENTED TO THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE 5–10 (Feb. 17, 2000) (on file with the North Carolina Law Review).

9. *Id.*

10. *Id.*

11. *Id.*

substantial evidence test for findings of fact and a jump ball for conclusions of law.[12]

I. THE POLITICS AND THE POLICY

The bill had an impressive and diverse list of supporters. The business community, including the North Carolina Homebuilders, North Carolina Citizens for Business and Industry, and the Chemical Industry Council, overwhelmingly backed the bill. Business lobbies supported the bill because it improved their odds—leveled the playing field in their view—in challenges to state agency action, especially over environmental permits and fines. The AFL-CIO, the Police Benevolent Association and the North Carolina Academy of Trial Lawyers supported the bill for a different reason: public employee grievances.

The most vocal opponent of the legislation was the North Carolina Hospital Association, which opposed changing procedures for certificate of need proceedings.[13] Other opponents relied on the Hospital Association to do the heavy lifting in opposing the bill. Representative Nesbitt made a quick, quiet deal with the Hospital Association: He agreed to amend the bill to except certificate of need proceedings from the new procedures, and the Hospital Association agreed not to oppose it. With the Hospital Association neutralized,

12. *Id.*

13. North Carolina law requires a "certificate of need" before a health care provider can build or expand a facility or purchase equipment that involves a significant capital expenditure. To obtain a certificate of need, a health care provider must show that the proposed facility or equipment would improve access to medical care, especially for "underserved groups," N.C. GEN. STAT. § 131E-183(3) (1999), without increasing health care costs by an "unnecessary duplication of existing or approved health service capabilities or facilities." *Id.* § 131E-183(6) (1999). *See* N.C. GEN. STAT. §§ 131E-175 to -190 (1999). The North Carolina Hospital Association argued that the Department of Health and Human Services, which reviews applications for certificate of need, had the necessary expertise to decide to issue or deny a certificate of need, and that such a complicated decision should not be made by a lay ALJ. Disappointed applicants for certificates of need, however, argued that the Department tilted strongly to North Carolina health care providers—to serve "home cooking"—when out-of-state health care providers sought to enter the North Carolina health care market.

Certificate of need proceedings were not ultimately excepted from the bill because the legislature was convinced by the Hospital Association's arguments, but by a pragmatic calculation to get the Hospital Association out of the fight. The criticism that the exception of certificate of need proceedings from the legislation "further[s] the unraveling of the goal of consistency in administrative procedures" is a fair one. *See* Stephen Allred & Richard Whisnant, *State Government, in* NORTH CAROLINA LEGISLATION 2000 191, 193 (David W. Owen ed., Institute of Government 2000).

the bill easily passed the House before other opponents of the bill, notably state agencies and environmental groups, could regroup.

The bill was assigned to the Senate Judiciary II Committee, which I chaired. I received several helpful suggestions from the Senate leadership. First, we should honor the political deal struck in the House and except certificate of need proceedings. Second, we should see if we could satisfy the concerns of Governor James Hunt, who opposed the bill as undermining executive branch authority. We decided that if we could not reach a compromise on the bill, we would pass the bill in the same form as it passed the House.

The Senate support of the bill was undoubtedly motivated in part by a raw political calculation of the bill's supporters and opponents. The desire for compromise was undoubtedly motivated in part by a politician's natural desire to try to please everyone. Nonetheless, we also paid attention to the merits of the arguments made by each side. We concluded that there was a legitimate need to change the law, but that critics of the bill raised justifiable concerns about the proposed changes.

Supporters of the bill argued that agencies routinely rejected unfavorable recommendations by ALJs and entered final decisions upholding the agencies' actions. As a result, the opportunity afforded aggrieved persons to challenge agency actions was often a meaningless exercise. It was incompatible with procedural fairness, the bill's proponents contended, for one of the parties to a dispute also to act as judge. The different standards of review for factual findings also seemed inconsistent. It made little sense for an ALJ's findings of fact, especially findings based upon credibility determinations, to receive no deference by an agency making a final decision, but for the agency's findings of fact to be entitled to great deference on judicial review. The ALJ had the benefit of seeing the demeanor of the witnesses. The agency's decision, on the other hand, was based on a transcript of the hearing—the "cold record"—which was equally available to a judge on judicial review.

Opponents of the bill argued that the analogy to litigation was inapt. The purpose of a contested case was to force an agency head to review decisions made on the front line. The ALJ's role was really that of a hearing officer, compiling the record for a decision by the agency, and any recommended decision by the ALJ was an afterthought. The agency was not an interested party to a contested case. Agencies had the same duty as courts—to balance the rights of the aggrieved person with the public interest expressed in the law that the agency was charged with administering. Agencies had this duty in

reaching an initial decision and in reaching a final agency decision. Comity between the branches of government required deference by the judiciary in reviewing the decisions of the executive branch.

While ALJs often presided over cases that turned on a credibility determination, the new bill's opponents further argued, decisions just as often turned on issues of expertise within the specialized knowledge of the agency. An agency should not be bound by a lay ALJ's fact finding that was contrary to the agency's expert knowledge. To give ALJs final decision authority would undermine the ability of executive branch agencies to apply logically and consistently the law that agencies are charged with administering. In short, the proposed legislation would undermine the executive branch's ability to govern.

After weeks of negotiations, and at least eighteen drafts, we reached a compromise. Agencies would retain final decision-making authority, but there would be more scrutiny of final agency decisions through judicial review. Instead of the deferential substantial evidence test, final agency decisions reversing the ALJ's decision would be subject to *de novo* review.[14] The legislation also provided for deference by the ALJ to the expertise of the agency,[15] deference by the agency to credibility determinations by the ALJ,[16] and more elaborate procedures for the agency to follow in rejecting findings of fact by the ALJ.[17] The provisions in the legislation for how ALJs and agencies should decide issues of fact–rules of deference, standard of review–were intentionally hortatory, however, not enforceable. In cases in which the agency did not adopt the ALJ's decision, the court on judicial review will consider the contested case *de novo*, and make its own findings of fact and conclusions of law from the record created in the hearing before the ALJ, with no deference to the agency's expertise or to the ALJ's credibility determinations.[18] Therefore, the question of whether the agency or the ALJ properly deferred to the other on a factual issue should never arise on judicial review.

II. DEFERENCE TO THE AGENCY'S EXPERTISE . . .

The statute ultimately enacted makes a symbolic change. The decision of the ALJ was not a "recommended" decision. Rather, the

14. *Id.* § 150B-51(c).
15. *Id.* § 150B-34(a).
16. *Id.* § 150B-36(b).
17. *Id.* § 150B-36(b1).
18. *Id.* § 150B-51(c).

statute provides that "in each contested case the ALJ shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision."[19] The ALJ is to "decide the case based upon the preponderance of the evidence giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."[20] The "due regard" language was cribbed from Rule 52 of the Federal Rules of Civil Procedure, which provides that in cases tried by a court without a jury, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."[21]

The language describing the expertise of the agency was taken from section 150B-30 of the North Carolina General Statutes, which provides that in administrative hearings, "[o]fficial notice may be taken of . . . facts within the specialized knowledge of the agency."[22] The official notice provision is seldom used, but it assumes a deference by ALJs to the expertise of the agency. The purpose of the deference to the agency's expertise was to avoid putting the harried technical staff of an agency on equal footing with hired gun expert witnesses for industries challenging agency action in high-stakes contested cases.

In negotiations over the legislation, Representative Nesbitt and industry representatives insisted that the agency's expertise must be "demonstrated" to be entitled to deference by the ALJ, not just assumed. I argued that the manner in which the agency could demonstrate its expertise should be specified in the legislation. I suggested that the statute could provide that the agency demonstrate its expertise by qualifying an agency witness as an expert under Rule 702 of the North Carolina Rules of Evidence.[23] I thought this was an indulgent standard. Agency representatives in the negotiations balked at that, however, and argued that it would require too much of the agency.

In the end, we decided not to decide. The ALJ has complete discretion in deciding whether an agency has demonstrated its expertise. Again, the procedures by which the ALJ decides how agency expertise can be demonstrated should never be an issue on

19. *Id.* § 150B-34(a).
20. *Id.*
21. FED. R. CIV. P. 52.
22. N.C. GEN. STAT. § 150B-30 (1999).
23. N.C. GEN. STAT. § 8C-1, Rule 702 (Supp. 2000); *see also* FED. R. EVID. 702.

judicial review. When the decision of the ALJ differs from the final agency decision, the question on judicial review is not the procedural correctness of the decision below, but rather a *de novo* review of the record.

III. . . . AND DEFERENCE TO THE ADMINISTRATIVE LAW JUDGE'S CREDIBILITY DETERMINATIONS

Although the change in terminology from "recommended decision" to "decision of the administrative law judge" was largely symbolic, the statute added other provisions intended to make agencies think twice before rejecting the ALJ's findings of fact. The statute requires the agency to "show its work" when it rejects an ALJ's findings of fact. The agency is to "set forth separately and in detail" the "evidence in the record relied upon" in rejecting any finding in the ALJ's decision.[24] The statute also requires the agency, in rejecting the ALJ's decision, to "set forth its reasoning for the final decision in light of the findings of fact and conclusions of law in the final decision, including any exercise of discretion by the agency."[25]

The statute requires deference to the ALJ's findings of fact, especially those based upon a credibility determination. The statute provides that the agency adopt each finding of fact in the decision of the ALJ "unless the finding is clearly contrary to the preponderance of admissible evidence, giving due regard to the opportunity of the ALJ to evaluate the credibility of witnesses."[26] The "due regard" language in this section was also drawn from Rule 52 of the Federal Rules of Civil Procedure.[27]

The provenance of the phrase "clearly contrary to the preponderance of admissible evidence" is less respectable. At an early stage in the negotiations over the legislation, I suggested developing a standard of review by agencies for findings of fact made by the ALJ that was less deferential than the "substantial evidence" or "clearly erroneous" tests, but more deferential than *de novo* review. I wanted to find an existing appellate standard with an established meaning, the gloss that comes from years of application, that required a closer look by a reviewing court but still required some deference to the fact finder. I did not want to spend years litigating what a new standard meant, with all the expense and

24. N.C. GEN. STAT. § 150B-36(b1) (Supp. 2000).
25. *Id.* § 150B-36(b3).
26. *Id.* § 150B-36(b).
27. FED. R. CIV. P. 52.

uncertainty that would be involved. In an early working draft, I used the phrase "clearly contrary to the preponderance of the admissible evidence" as a place holder while the legislative staff prepared a menu of appellate standards with different gradations of deference. Extensive research by the legislative staff failed to find more nuanced appellate standards, however, at least none with the gloss I wanted. The courts might apply appellate standards in a nuanced way depending on the circumstances, but the stated standards generally were either "substantial evidence" or "clearly erroneous" tests on the one hand, or *de novo* review on the other.

I suggested that we simply drop the phrase "clearly contrary to the preponderance of the admissible evidence," and provide for *de novo* review by the agency of the findings of fact of the ALJ. Representative Nesbitt had taken a liking to the phrase, however, and was adamant that it remain in the legislation. I eventually capitulated on the point because I concluded that it would not matter. The question on judicial review of findings of fact was a *de novo* determination whether the finding was supported by the preponderance of evidence in the record, not whether the agency had correctly applied a more deferential standard of review in rejecting a finding of the ALJ. Judicial review would never turn on whether a finding rejected by the agency was "clearly contrary to the preponderance of the admissible evidence." There would not be years of litigation over what the standard required. In fact, the standard would likely never be addressed by a court at all. The standard would mean whatever the agencies decided it meant.

The deferential standard and the requirement that agencies show their work in rejecting findings of fact made by ALJs served a useful purpose. The standard and the "show your work" procedures signaled that agencies could not simply go through the motions of defending contested cases, making sure only that the agency inserted "more than a scintilla" of evidence into the record at the hearing to support the finding of fact that the agency intended to make in the final decision. Agencies are to take administrative hearings seriously, and to take unfavorable findings of fact in the ALJ's decision very seriously. The real deterrent to an agency taking a dismissive view of contested case proceedings, however, was judicial review.

IV. JUDICIAL REVIEW: A JUMP BALL

The keystone of the legislation is the amendment to the procedures for judicial review of agency decisions. Where the agency adopts the decision of the ALJ, the procedure will remain essentially

unchanged. The standard of review for findings of fact will still be the substantial evidence test,[28] and the result in challenges to findings of fact will still be fairly predictable: the aggrieved person will lose.

Where the agency does not adopt the decision of the ALJ, however, the procedure changes significantly: "the court shall review the official record, *de novo*, and shall make findings of fact and conclusions of law."[29] Where the decision is different, the standard of *de novo* review will theoretically apply to findings of fact on which the agency and the ALJ agreed. As a practical matter, however, the court will naturally focus on the findings of fact on which the agency and the ALJ differed, and the "show your work" requirement will assist the court in focusing on those factual findings.

The courts will likely accord mild deference to the ALJ on issues of credibility, and to the agency on issues of expert opinion. On issues of credibility, the court will likely decide to credit the testimony that is most plausible and most consistent with other evidence. When in doubt, however, the court will likely defer to the ALJ, who saw the witnesses testify. On issues of expert opinion, the court will likely base its decision on the logic of the testimony, which deprives polished, professional expert witnesses of much of their advantage. In addition, the court may be more likely to credit the testimony of the agency staff as more disinterested than the testimony of professional expert witnesses.

The legislation should not significantly change judicial review of questions of law in most instances. The deference shown to agencies on questions of law is much milder than the deference on questions of fact. In addition, the legislation only provides that "the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or conclusions of law contained in the agency's final decision."[30] If the *only* authority for the agency's interpretation of the law is the decision in that case, that

28. N.C. GEN. STAT. § 150B-51(b)(5) (Supp. 2000). Abuse of discretion was added by the amendments that became effective January 1, 2001. Act of July 12, 2000, ch 190, sec. 11, 2000 N.C. Adv. Legis. Serv. 546, 551–52.

29. N.C. GEN. STAT. § 150B-51(c) (Supp. 2000).

30. *Id.* The legislation should not disturb North Carolina law that provides that courts "should defer to the agency's interpretation of a statute it administers" on issues on which the statute "is silent or ambiguous" and the agency's interpretation of the statute "is based on a permissible construction of the statute." County of Durham v. N.C. Dep't of Env't and Natural Resources, 131 N.C. App. 395, 397, 507 S.E.2d 310, 311(1998). *But see* Allred & Whisnant, *supra* note 13, at 193 (noting that the APA "could be read as a statutory rejection [of this] doctrine of deference to long-standing agency interpretations of their statutes").

interpretation may be viewed skeptically on judicial review. If the agency can show that the agency has consistently applied that interpretation of the law, if the agency's interpretation of the law is not simply a "because I said so" response to the contested case, then the agency's interpretation should be accorded the same deference to which the agency's construction of the law was entitled under prior law.

There will be an inevitable revisiting of significant legislation once the legislation is put into practice. We may well need to adjust the law in light of experience—"tweaking" in legislative parlance. The overriding intent of the 2000 amendments to contested case procedures, however, was to assure that aggrieved persons have a meaningful opportunity to challenge state government action. That intent is unlikely to change soon.