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Administrative Law--Extent of Judicial Review--Rulings of the Federal Communications Commission

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STUDENT NOTES

ADMINISTRATIVE LAW—EXTENT OF JUDICIAL REVIEW—RULINGS OF THE FEDERAL COMMUNICATIONS COMMISSION.—A number of rules governing the extent of judicial review of findings of fact made by federal administrative tribunals have been formulated by various statutes and decisions. From the many cases arising as a result of the ever increasing expansion of the jurisdiction of administrative agencies and the activities regulated by such agencies there has developed one general proposition. The rule that has generally come to be determinative of the question of the scope of judicial review of findings of fact in cases before *federal* administrative agencies may be stated thus: the findings of fact are reviewable to the extent that the reviewing court is allowed to determine whether or not the findings are supported by substantial evidence.¹ For example, in one case involving an order of the Federal Communications Commission the United States Supreme Court said, "Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress."²

¹ Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1936). This is the rule applicable to most but not all of the federal administrative tribunals.

² National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1942).

As is also the situation with many other agencies, the rulings and determinations of the FCC have been made reviewable under certain procedures and directions embodied in a particular statute. The Communications Act of 1934 restricted the scope of judicial review of findings of the FCC by providing that such should be conclusive if supported by "substantial evidence."³ Given an understanding of the meaning of the term herein used, the extent of review permitted by the statute is quite clearly defined. The concept that "substantial evidence" is more than a mere scintilla, that it means an amount of relevant evidence sufficiently acceptable to support a conclusion in the mind of a reasonable man is supported by the authorities.⁴ To rise to that degree which will constitute substantial evidence the evidence adduced must do more than create a suspicion of the existence of the fact to be established.⁵

Even after the enactment of the Communications Act of 1934, another question existed concerning the substantial evidence doctrine. It was whether the evidence necessary to support the administrative finding of fact was substantial evidence picked out selectively and balanced up *in isolation* from the remainder of the record of a case or such evidence as drawn from a review and consideration of the *record as a whole*. It can be seen that the answer to this was not given by the statute, neither was it clear from the decisions.⁶

It is helpful at this point to examine a decision involving another agency and the interpretation of its controlling statute. Insofar as the limit of the scope of judicial review of findings of fact of the National Labor Relations Board was concerned—and regardless of what the answer to the above question had previously been—a Supreme Court decision in 1951 made it clear that the *record as a whole* is to be considered in determining whether there is substantial evidence to support the conclusion of the Board.⁷ While decisions in cases involving a particular agency or commission are not necessarily valid precedents for cases encompassing questions of review of the determinations of other administrative bodies—this being attributable to differences in enacting statutes, subject matter

³ 47 U.S.C. § 402(e) (1934).

⁴ See note 1 *supra*.

⁵ NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

⁶ For conflicting answers, see 64 HARV. L. REV. 1233 (1951); 50 COLUM. L. REV. 559 (1950).

⁷ Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

involved and the reviewing court's opinion of the professional competence of the particular body—the court in the *Universal Camera* case⁸ clearly was of the opinion that the scope of review permitted under the Administrative Procedure Act⁹ was the same as that permitted by the statute actually involved in the case being decided, the Labor Management Relations Act of 1947.¹⁰ From this it would seem reasonable to assume that those agencies subject to the provisions of the APA are in the same position as the National Labor Relations Board as to the extent of reviewability of their findings of fact. This is important because the Communications Act, as amended in 1952,¹¹ provides (instead of the substantial evidence criterion of the 1934 Act) that appeals shall be determined in the manner provided for in § 10(e) of the APA.¹² From the statutes and decisions then, in the absence of any arbitrary or capricious conduct on the part of the Commission, it would seem clear that judicial review of findings of fact made by the FCC is limited to an examination for the purpose of determining whether, upon a view of the *record as a whole*, the finding is supported by substantial evidence.

However, while ostensibly following the legislative mandate as embodied in the statutes, the courts, either because of disagreement with the result reached by an agency or because of a feeling that the agency's finding is founded on too weak a basis, sometimes substitute their own evaluation of the facts for those of the agency by rationalizations which actually void the degree of finality expressed in the statutes. This was illustrated in *Allentown Broadcasting Corp. v. Federal Communications Comm.*¹³ This was a proceeding involving a mutually exclusive radio broadcasting license application. The FCC, finding that the ability of both applicants to serve their respective communities was about equal, applied the "choice of local service" rule and therefore (overruling the findings of the trial examiner) granted the license to the applicant which would fill a greater need for local service broadcasting. The court of appeals, questioning the FCC's *evaluation* of the evidence as to (1) uncertainty of prevailing applicant's programming plans, (2) sincerity and straightforwardness of that applicant's witnesses and (3) the extent of monopoly and concentration of local communi-

⁸ *Id.* at 487.

⁹ 5 U.S.C. § 1001 (1952).

¹⁰ 29 U.S.C. § 141.

¹¹ 47 U.S.C. § 402(g).

¹² 5 U.S.C. § 1009 (e).

¹³ 222 F.2d 781 (D.C. Cir. 1954).

cations media, overruled the FCC and reversed the grant of the license. This disposition of the case involved first, an inquiry into the FCC's process of decision and, second, a substitution of the court's evaluation of the evidence for that of the FCC; this seemed clearly to go beyond the permissible scope of review as set forth, *supra*, by the statutes and prior Supreme Court decisions. The court of appeals reasoned that there was no substantial *preponderance* of evidence in the record as a whole to support the FCC in overruling the trial examiner's finding, and further that such substantial preponderance was necessary as a basis for the Commission's reversal of a trial examiner's findings as to the veracity of the witnesses. It held that once the evidence was evaluated properly, certain witnesses' testimony upholding the prevailing applicant's case was shown to be evasive and uncandid. The court seemed to disregard other factual data in the record upon which the FCC finding could factually have been based in spite of certain witnesses' demeanor which did detract from applicant's case. A strong dissent in the case very lucidly indicated the errors in the reasoning of the majority and took note of its departure from current concepts of the scope of judicial review of administrative determinations of fact.

Did this decision project into the law pertaining to scope of review another confusing consideration which would plague the bench and bar as had the "record as a whole" problem prior to the *Universal Camera* case;¹⁴ one which would obscure further the limits of finality to be accorded administrative fact findings? This question did not long remain unanswered. Certiorari was granted by the United States Supreme Court¹⁵ and when decision was announced¹⁶ the question posed above was answered in the negative. It was made clear that the scope of judicial review of the FCC's findings of fact is limited to a determination of whether the findings are based upon substantial evidence considering the *record as a whole*, and further that the courts are not to reevaluate the evidence considered by the FCC.¹⁷ The Court stated that, ". . . its [FCC's] rulings are subject to review by the Courts of Appeals within the scope defined by *Universal Camera Corp. v. N.L.R.B.* . . ."¹⁸ The opinion of the court likewise makes it clear that, like the NLRB, the FCC can reverse a trial examiner's findings even though

¹⁴ See note 7 *supra*.

¹⁵ 348 U.S. 910 (1954).

¹⁶ 349 U.S. 358 (1955).

¹⁷ *Id.* at 363.

¹⁸ *Id.* at 365.

such findings are not "clearly erroneous" and that it can do so without the necessity of having in its support a substantial preponderance of the testimony. It thus corrected the court of appeals' error in having disallowed the FCC's rejection of the trial examiner's finding of evasiveness and lack of candor on the part of the witnesses.¹⁹

By thus disposing of the above case, involving as it did the whole question of the current pattern of decisions regarding the scope of judicial review, the Supreme Court (1) reaffirmed the doctrine of the *Universal Camera* case, (2) showed that the same rules apply to the FCC insofar as the scope of review is concerned, (3) added further to the precedents directly holding on the requirement imposed by § 10 (e) of the APA, and (4) reduced by one the number of rationales which can be invoked to avoid the effect of the accepted criterion for determining the extent of judicial review of findings of fact by the FCC and other administrative agencies.

Although the foregoing problems are paramount in the rather nebulous area encompassing the answer as to just what the permissible scope of judicial review is, there are other bases upon which the courts can and do overrule the decisions of administrative tribunals. These other factors upon which finality depends include defective statements of findings of fact made by the agencies,²⁰ bias or prejudice on the part of the administrative officials,²¹ the use of unorthodox factual material, *e.g.*, decisions in other cases or reference to published matters not even cited in the record of the case up for determination,²² and finally, lack of agency authority or jurisdiction to act upon certain matters or in a certain way as determined from an examination of the statutes which create and give authority to the administrative bodies.

The final answer to all these questions has not been given nor is it yet in sight, but the Supreme Court has by the holding in the *Allentown Broadcasting* case narrowed down and more clearly defined for the FCC and those under its jurisdiction the allowable extent of judicial review of the rulings of that particular administrative tribunal as well as all other agencies whose actions are subject to the provisions of the APA.

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¹⁹ *Id.* at 364.

²⁰ *Federal Communications Comm'n v. RCA Communications*, 346 U.S. 86 (1953).

²¹ *Federal Trade Comm'n v. Cement Institute* 333 U.S. 683 (1948).

²² *Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio*, 301 U.S. 292 (1937); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).