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Administrative agencies in adjudicatory proceedings make findings of fact in much the same way as do courts. Courts in reviewing adjudicatory proceedings of administrative agencies are presented with the question of how intensively they should review administrative findings of fact. The United States Supreme Court tried to answer that question in *ICC v. Louisville & Nashville Railroad*[1] when it said that "[a] finding without evidence is arbitrary and baseless . . . . A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must . . . be set aside by a court of competent jurisdiction."[2] A finding of fact must therefore be based upon adequate evidence, and what constitutes adequate evidence is a question for the courts.

FEDERAL POSITION

The rule followed by most jurisdictions, including the federal courts, dictates that the courts uphold the agency's finding of fact on review if it is supported by "substantial evidence."[3] The formulations developed by the federal courts as to what constitutes substantial evidence are about as general and elastic as one might anticipate. Beginning in 1938, with its decision in *Consolidated Edison Co. v. NLRB*,[4] the U.S. Supreme Court said, "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[5] In its 1939 *NLRB v. Columbian Enameling & Stamping Co.*[6] decision, the Supreme Court elaborated and held that substantial evidence "means evidence which is substantial, that is, affording a substantial basis of fact from which the fact and issue can be reasonably inferred. . . . [I]t 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

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1. 227 U.S. 88 (1913).
2. *Id.* at 91-92 (citations omitted).
3. *See* text accompanying notes 3-11 *infra.*
4. 305 U.S. 197 (1938).
5. *Id.* at 229 (citations omitted).
6. 306 U.S. 292 (1939).

one of fact for the jury."[7] Thus, it was established in the early 1940's that the federal rule called for upholding administrative findings of fact if they were supported by substantial evidence.

Immediately after the war, Congress, in an attempt to require the courts to be more vigorous in their review of administrative decisions, amended the federal Administrative Procedures Act.[8] In that 1946 legislation, not only did Congress require that administrative finding of fact be supported by "substantial evidence," it also required that in making such determinations, courts consider "the whole record or those parts thereof cited by a party."[9] In the 1947 Taft-Hartley Act,[10] Congress also provided for review of the whole record of administrative decisions by requiring that "[t]he findings of the [National Labor Relations] Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."[11]

The United States Supreme Court decided what the "whole record" requirement signified in 1951. In the landmark case of *Universal Camera Corp. v. NLRB*,[12] the Court reviewed the legislative history of the language from both the Administrative Procedures Act and the Taft-Hartley Act and concluded that Congress did want the courts to review the findings of fact by administrative agencies more vigorously than they had in the past. Under the "whole record" requirement, the court was to look not just at one side of the record on review to see if there was "substantial evidence" which supported the administrative agency's finding but was to look at the evidence as presented in the entire record. After reviewing the evidence as presented in the entire record, the reviewing court was to decide whether, on balance, the agency's decision was supported by substantial evidence.[13]

The federal courts have followed the legislative mandate and have arrived at a position which requires not only that administrative findings of fact be supported by substantial evidence, but also that they be reviewed on the whole record. The entire record, or at least those portions of the entire record cited by the parties, must be looked at in evaluating whether the evidence is substantial. This position has been supported by Professor Jaffe who has said that the

7. *Id.* at 299-300 (citations omitted).
8. 5 U.S.C. §§ 551-59 (1976).
9. 5 U.S.C. § 556(d) (1976).
10. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-87 (1976).
11. *Id.* at § 160(e).
12. 340 U.S. 474 (1951).
13. *Id.* at 489-91.

purpose of review of the "whole record" is to determine whether the record provides

> a rational or logical basis for the finding. . . . This must mean evidence *in the case* and *in the context of the case.* To abstract out of a case that part of the evidence which can be made to support a conclusion is to imagine an abstract case, a case that was never tried. . . . Evidence which may be logically substantial in isolation may lose its logical relevance, even its claim to credibility, in context with other evidence. The rationality or substantiality of a conclusion can only be evaluated in the light of so much of the situation as is made to appear.[14]

THE NEW MEXICO POSITION

New Mexico's position on the standard for review of administrative findings of fact is less than clear, but the New Mexico courts usually follow the pre-1946 federal "substantial evidence" rule. Under that rule, the reviewing court looks to see if there is reasonable evidence to support the agency decision and ignores evidence to the contrary.[15]

This paper argues that not only would the New Mexico law be clarified but also improved by expressly rejecting the substantial evidence test and replacing it with the whole record standard for judicial review of administrative findings of fact.

DEVELOPMENT OF THE NEW MEXICO STANDARD OF REVIEW

In New Mexico, the development of the standard of review of administrative findings of fact has been gradual and has gone through several different formulations. In 1913, the New Mexico Supreme Court, in the case of *Seward v. Denver & Rio Grande Railroad,*[16] said that it would not indulge in any presumption favoring the Commission's decision, but would review the evidence and form its own independent judgment as to the "reasonableness and lawfulness" of the Commission's order.[17] The court said, "While it is proper for the Commission to make findings of fact, still such findings can have no force or effect in this Court . . . . Our Constitution . . . requires this Court to pass upon the merits of the case, without indulging in any presumptions . . . . This Court forms its own independent judgment, as to each requirement of the order, upon the evidence."[18] Again, in

14. Jaffe, *Judicial Review: Question of Fact,* 69 Harv. L. Rev. 1020, 1027 (1956).
15. Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973).
16. 17 N.M. 557, 131 P. 980 (1913).
17. *Id.* at 583, 131 P. at 989.
18. *Id.*

1913, the New Mexico Supreme Court, in the case of *Woody v. Denver & Rio Grande Railroad,*[19] ruled that orders of the Corporation Commission must be supported by factual evidence. The court stated, "This court can determine the reasonableness and lawfulness of an order made by the Commission only upon the evidence adduced before the Commission."[20]

In later cases, the New Mexico Supreme Court proceeded to reformulate the "reasonableness and lawfulness" standard of the *Seward* case into a formula requiring that findings of fact by the Corporation Commission be supported by "substantial and satisfactory evidence."[21] In 1923, in *Kinney v. New Mexico Midland Railroad,*[22] the court upheld the Corporation Commission's finding regarding the justice of freight rates because it was supported by "satisfactory evidence."[23] In its 1931 decision in *San Juan Coal & Coke Co. v. Santa Fe S.J. & N. Railway,*[24] the court observed, "Previous decisions in rate cases have developed the rule that the commission's order or findings will not be disturbed if supported by satisfactory and substantial evidence."[25] By 1954, in its decision in *State Corp. Commission v. Mountain States Telephone & Telegraph Co.,*[26] the New Mexico Supreme Court cited the *Seward* "lawfulness and reasonableness" standard, but said that "findings will not be disturbed if supported by satisfactory and substantial evidence."[27] It is noteworthy, however, that although the phraseology has changed over the years, the New Mexico standard of review has remained one of reasonableness.[28]

The standard of review remains the same regardless of which type of agency's fact finding is being reviewed by the courts. For example, the State Corporation Commission is an agency created by the New Mexico Constitution, rather than by the legislature.[29] The constitu-

19. 17 N.M. 686, 132 P. 250 (1913).
20. *Id.* at 694, 132 P. at 253.
21. *See* text accompanying note 27 *infra.*
22. 28 N.M. 451, 214 P. 754 (1923).
23. *Id.* at 455, 214 P. at 756.
24. 35 N.M. 512, 2 P.2d 305 (1931).
25. *Id.* at 519, 2 P.2d at 308 (citations omitted).
26. 58 N.M. 260, 270 P.2d 685 (1954).
27. *Id.* at 266, 270 P.2d at 689. The New Mexico Supreme Court cited the 1913 *Seward* case, with its "reasonableness and lawfulness" standard. It also emphasized that "findings will not be disturbed if supported by 'lawful and substantial evidence.' " The court held that "the order of the commission is just and reasonable . . . ." 58 N.M. at 271, 270 P.2d at 692.
28. *Id.* at 267, 270 P.2d at 690. The court seemed to be judging the review standard of "satisfactory and substantial evidence" on whether it was reasonable.
29. N.M. Const. art. 11, §§7 and 8. The Corporation Commission carries the unusual power under the constitution to remove a case from the Commission to the supreme court.

tion provides for the scope of review of some Commission decisions.[30] In interpreting the language of the constitution, the courts have enunciated a standard whereby Commission orders will not be disturbed unless they are unsupported by substantial evidence.[31]

Review of other Commission decisions is provided for by statute.[32] In 1957, the New Mexico Supreme Court ruled on a statutory challenge in *Ferguson-Steere Motor Co. v. State Corp. Commission.*[33] The supreme court stated:

> This Court has consistently held that the courts may not overrule the acts of administrative officers on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious, *or not supported by evidence,* and that in reviewing the action of such bodies, the trial court is bound by the substantial evidence rule, that is, whether the findings of the administrative body are supported by substantial evidence.[34]

Hence, although the New Mexico Supreme Court has employed a variety of formulations for reviewing the decisions of the constitutionally-created Corporation Commission, it has generally followed a standard of reasonableness and "substantial evidence."[35]

Some agencies are created by the legislature rather than by the constitution. In reviewing the decisions of those agencies, the court has articulated variations on the theme of substantial evidence. The New Mexico Supreme Court's decision in *Baca v. Chaffin*[36] illustrates some of these articulated variations. The supreme court, in reviewing a finding of fact by the chief of the Liquor Control Division, a statutorily created agency, said, "There must be some substantial evidence of probative character to sustain the finding of the liquor authority . . . . A finding without some evidence of probative value would be arbitrary and baseless."[37] Therefore, whether the court is reviewing a constitutionally established agency such as the

30. *Id.*

31. *See, e.g.,* Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973).

32. N.M. Stat. Ann. §65-2-66 (1978).

33. 63 N.M. 137, 314 P.2d 894 (1957).

34. *Id.* at 144, 314 P.2d at 898 (citations omitted).

35. The New Mexico Supreme Court, it should be noted, has said that the substantial evidence rule is different than the rule of reasonableness. The rule of reasonableness requires that the court determine the reasonableness and lawfulness of an administrative order. If the evidence sustains the reasonableness and lawfulness of an order, it will be upheld under the rule of reasonableness. State Corp. Comm'n v. Mountain States Tel. & Tel. Co., 58 N.M. 260, 266, 270 P.2d 685, 689 (1954).

36. 57 N.M. 17, 253 P.2d 309 (1953).

37. *Id.* at 21, 253 P.2d at 311.

Corporation Commission, or a legislatively created administrative agency such as the Liquor Control Division, it uses the reasonableness standard of the substantial evidence rule.

The language of the substantial evidence rule is repeated throughout the case law. In *Floeck v. Bureau of Revenue,*[38] the New Mexico Supreme Court said that on review of an administrative finding of fact, a court has "authority only to determine whether upon the facts and law, the action of the Commissioner . . . was based upon an error of law or was unsupported by substantial evidence or clearly arbitrary or capricious . . . ."[39] In *McWood Corp. v. State Corp. Commission,*[40] the court said that "[w]here the findings are not supported by substantial evidence, the order is neither lawful nor reasonable. . . ."[41] And finally, in its 1979 *Public Service Co. of N.M. v. New Mexico Public Service Commission,*[42] the court stated that "[j]udicial review of a Commission's decision is limited to . . . whether the Commission's decision is supported by substantial evidence."[43] The New Mexico courts have thus consistently followed the "substantial evidence" language as a guide by which to measure the intensity of their review of administrative findings of fact.

THE USE OF THE "SUBSTANTIAL EVIDENCE" RULE IN NEW MEXICO

The very word "substantial" is one with enough elasticity in it to stretch from here to there and perhaps frustrate fastidious minds, but what does the phrase "substantial evidence" really mean? The New Mexico courts have wrestled with many different formulations, starting with "reasonableness and lawfulness," and ending with the generally accepted "substantial evidence" rule. The New Mexico Supreme Court has attempted to define the term with greater precision. In *Wilson v. Employment Security Commission,*[44] the court said that substantial evidence "means more than merely any evidence and more than a scintilla of evidence and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion."[45] In 1970 the New Mexico Court of Appeals, in attempting to define the term, said that "substantial evidence means such relevant evidence as a reasonable mind might accept as adequate

38. 44 N.M. 194, 100 P.2d 225 (1940).
39. *Id.* at 199, 100 P.2d at 228 (citation omitted).
40. 78 N.M. 319, 431 P.2d 52 (1967).
41. *Id.* at 322, 348 P.2d at 55.
42. 18 N.M. St. B. Bull. 430, 431 (June 21, 1979).
43. *Id.* at 431.
44. 74 N.M. 3, 389 P.2d 855 (1963).
45. *Id.* at 8, 389 P.2d at 858 (citations omitted).

to support a conclusion."[46] These definitions follow closely the language of the United States Supreme Court which has said that substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[47]

It is clear that the New Mexico standard for review of administrative fact findings is one of reasonableness. The question which must be answered in each case is: Was the agency's decision reasonable, based upon the evidence before it? It must, however, be noted that in determining whether the agency's decision was in fact reasonably supported by substantial evidence, the New Mexico courts follow the pre-1946 federal approach.[48] Under that approach, the courts look only at that evidence which supports the agency decision while ignoring conflicting evidence.[49] The position of the New Mexico courts was clearly stated in *Rinker v. New Mexico State Corp. Commission*,[50] where the New Mexico Supreme Court said that in reviewing an agency finding on appeal, "all reasonable inferences [are] indulged in support of the court or commission below, all evidence and inferences to the contrary disregarded and the evidence viewed in the aspect most favorable to the action of the court or commission which is being appealed."[51]

THE REQUIREMENT OF COMPETENT EVIDENCE UNDER NEW MEXICO'S "LEGAL RESIDUUM" RULE

In addition to deciding whether an agency's decision was reasonably supported by substantial evidence, New Mexico courts must also apply the "legal residuum" rule. The residuum rule requires a reviewing court to set aside an administrative finding unless it is supported by some evidence that would be admissible in a jury trial.[52] It has

46. Wickerstam v. N.M. State Bd. of Education, 81 N.M. 188, ____, 464 P.2d 918, 920 (Ct. App. 1970).

47. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (citations omitted).

48. *See, e.g.*, Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973).

49. *Id.* In so doing, the appellate courts apply the same "substantial evidence" standard to administrative agencies as they apply to courts sitting without juries. The position is stated clearly in *Groff v. Stringer*, where the court, in reviewing the finding of a court sitting without a jury, stated:

> It is fundamental that, if there is substantial evidence in the record to support a finding, we are bound thereby. In deciding whether a finding has substantial support, we must view the evidence in the light most favorable to support the finding, and any evidence unfavorable to the finding will not be considered.

82 N.M. 180, 181, 477 P.2d 814, 815 (1970) (citations omitted).

50. 84 N.M. 626, 506 P.2d 783 (1973).

51. *Id.* at 627, 506 P.2d at 784.

52. *See, e.g.*, Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969).

been held that for evidence to be "substantial" in New Mexico, there must be, somewhere within it, "at least a residuum of evidence competent under the exclusionary rules."[53]

Adoption of the "legal residuum" rule tends to negate one of the basic policy reasons underlying the establishment of the administrative process. Administrative agencies were created, in part, to avoid some of the delays and technicalities of judicial procedures, including restrictive evidentiary rules. Yet by adopting this rule, the New Mexico courts require at least a residuum of legally competent evidence under the evidentiary rules of those courts.

The New Mexico courts have been using the "legal residuum" rule for some time. In *Baca v. Chaffin,*[54] the district court reversed an order issued by the Liquor Control Division concerning the revocation of a liquor license. The supreme court, in affirming the district court's decision, cited with approval the district court's finding that " '[t]he record of the proceedings before the Chief of the Division of Liquor Control fails to disclose any competent, credible, substantial or relevant testimony. . . .' "[55] In the *Ferguson-Steere Motor Co.* case,[56] the supreme court elaborated on the requirements, adding that "[t]here must at least be such relevant evidence as a reasonable mind might accept as adequate to support the conclusion . . . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence."[57] The decisions indicate that, in order to meet New Mexico's review standard of "substantial evidence," an administrative record must contain within it at least some evidence which is legally competent in the courts.[58]

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53. *Id.* at 8, 462 P.2d at 142. The Utah Supreme Court in *State v. Scott* succinctly outlined the development of the exclusionary rule as follows:

> The basic rule of admissibility of evidence is that all evidence having probative value—that is, that tends to prove an issue, is admissible. In countries where the civil law prevails that is clearly recognized. But in the common law there were developed certain exceptions to that basic rule, for example, the hearsay rule, which made certain evidence, though relevant and material, incompetent. That was because of the danger of prejudice to the party against whom it was offered who would have no chance to cross-examine the source, or the probative value of the evidence offered was small as compared to the great prejudicial affect [*sic*] it might have. So-called "exceptions to the hearsay rule" are really not exceptions to the hearsay rule which is itself an exception to the basic rule of admissibility, but are in reality limitations on the hearsay exception.

State v. Scott, 111 Utah 9, ——, 175 P.2d 1016, 1021-22 (1947).

54. 57 N.M. 17, 253 P.2d 309 (1963).

55. *Id.* at 21, 253 P.2d at 311.

56. 63 N.M. 137, 314 P.2d 894 (1957).

57. *Id.* at 144, 314 P.2d at 899 (citations omitted).

58. The court in Young v. Board of Pharmacy, 81 N.M. 5, 8, 462 P.2d 139, 142 (1969) noted that the legal residuum rule is by no means unique to New Mexico; at least twenty-one other states have adopted the rule.

"Substantial evidence" refers, therefore, not only to the quantity of the evidence, but also to the quality of the evidence. Quality of evidence is precisely that with which the "legal residuum" rule is concerned. No matter how much evidence there may be in an administrative record supporting the decision made by the administrative agency, there must be at least some evidence which would be of a quality admissible in a court of law under the exclusionary rules of evidence. The New Mexico court decisions bear out this interpretation of the rule. They have used various adjectives to modify the word "evidence." They have used the modifying adjective "substantial," but have also added to it "probative," "competent," and have even, in Corporation Commission cases, required "substantial and satisfactory" evidence.[59] In determining what constitutes satisfactory evidence, there has been "lawyerlike inclination"[60] toward legally "competent" evidence.

There has, however, been at least one case[61] wherein the New Mexico Supreme Court, although citing the legal residuum rule with approval, specifically noted the policy underlying the liberalized rules for admission of evidence in administrative proceedings. The court stated that "[t]he Commission is an administrative agency and it is well established that the rules governing the admissibility of evidence before administrative boards are frequently relaxed for the purpose of expediting administrative procedure."[62] The court made a key distinction when it noted that, although rules of admission of evidence are relaxed in administrative proceedings, "[t]he rules relating to weight, applicability or materiality of evidence"[63] are not relaxed therein. Even though all sorts of relevant evidence may therefore be admitted in administrative proceedings, the crucial point is what evidence may be relied on—for example, what evidence has probative value—rather than what evidence may be admitted.

59. *E.g.*, Baca v. Chaffin, 57 N.M. 17, 21, 253 P.2d 309, 311 (1953), where the New Mexico Supreme Court confirmed a district court decision by holding that "[t]here must be some substantial evidence of probative character to sustain the finding . . . ." The supreme court approved the language in the district court opinion which said that the administrative record failed to "disclose any competent, credible, substantial, or relevant testimony or other evidence." Note that in *Baca*, the result would have been the same whether the legal residuum rule language of "competent" evidence was used or whether a substantial evidence standard was used. There was simply no substantial evidence in the record cited by the court to support the finding of the liquor director. *Id.* at 21, 253 P.2d at 311. There was no need for the trial court to even suggest the question of competent evidence since there was no "evidence of probative value" in the record under any standard.

60. It is not surprising that lawyers and judges, who have been extensively trained in the requirements of the rules of evidence, would be drawn to these technical rules.

61. Ferguson-Steere Motor Co. v. State Corp. Comm'n, 63 N.M. 137, 314 P.2d 894 (1957).

62. *Id.* at 143, 314 P.2d at 898.

63. *Id.*

The standard used in the New Mexico Administrative Procedures Act provides a reasonable answer to the question of what evidence may be relied upon. The language of the Act looks to evidence "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."[64] It would arguably be better if the courts, rather than focusing on rules of admissibility (as in the legal residuum rule), focused on what evidence may be relied on once admitted —that is, what evidence has probative value. The scrutiny of the court should thus focus on what evidence may be relied on, not on what evidence may be admitted. To use the words of the New Mexico Supreme Court in *Baca v. Chaffin,* "[t]here must be some substantial evidence of probative character to sustain the finding" of an administrative agency.[65]

This position finds further support if one compares the underlying purposes the rules of evidence serve in administrative and in judicial proceedings. The rules of evidence for administrative agencies must accomplish two primary tasks. They must provide guidelines that will ensure a complete and fair hearing. At the same time, they must be flexible enough to be employed by the agencies while preserving the informality and efficiency that are desirable in administrative proceedings.[66] In reviewing administrative findings of fact, therefore, the focus should not be on whether certain evidence was competent or legally admissible in a court of law, but rather on whether the evidence was of a probative character. Was it of the type that reasonably prudent men would rely on in the conduct of their affairs?[67] Was it in fact substantial evidence?

THE PARADOX OF THE NEW MEXICO POSITION

In answering the question of how intensively the courts should review administrative findings of fact, the New Mexico Supreme Court has said that evidence does not constitute substantial evidence unless there is at least some evidence which has a quality which would be of probative value.[68] On the other hand, the New Mexico courts have largely shunned the "whole record" requirement set forth in *Universal Camera*[69] and subsequently used by the federal

64. N.M. Stat. Ann. §12-8-11(A) (1978). *See also* Utton, *How to Stand Still Without Really Trying: A Critique of the New Mexico Administrative Procedures Act,* 10 Nat. Resources J. 840, 848 (1970).

65. 57 N.M. 17, 21, 253 P.2d 309, 311 (1953).

66. Utton, *supra* note 64, at 848-49.

67. N.M. Stat. Ann. §12-8-11(A) (1978).

68. Baca v. Chaffin, 57 N.M. 17, 21, 253 P.2d 309, 311 (1953).

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

courts. Instead of looking at the whole record, namely those parts of the whole record cited by both parties, the New Mexico courts have chosen to look only at that side of the record which supports the administrative determination. If, after looking at only one side of the record, the court finds that there is substantial evidence to support that side, the administrative decision is upheld.[70] In *Rinker v. New Mexico State Corp. Commission,*[71] the New Mexico Supreme Court said: "Upon appeal . . . all reasonable inferences [are] indulged in support of the court or commission below . . . and the evidence viewed in the aspect most favorable to the action of the court or commission which is being appealed."[72]

Using the *Rinker* standard, it seems that New Mexico appellate courts must apply the same substantial evidence standard[73] to reviews of administrative decisions that they apply when reviewing lower courts. Thus, in assessing what quality of evidence will be required when reviewing administrative determinations of fact, New Mexico courts on the one hand, apply the rather inflexible, legal residuum rule, while on the other hand, they look only at one side of the record. Using this "one-sided" standard, the courts resolve all disputed facts in favor of the agency's decision and disregard all inferences to the contrary.[74]

On reflection, Professor Jaffe's position advocating the necessity of judicial review[75] seems to be a more reasonable one. Reason dictates agreement with his final assertion that "[e]vidence which may be logically substantial in isolation may lose its logical relevance, even its claim to credibility, in context with other evidence."[76]

New Mexico, after starting out with the standard of review of reasonableness used in the 1913 *Seward* case,[77] now seems to have arrived, through the adoption of the legal residuum rule, at an unreasonable posture of judicial review. Although there are two sides to any dispute, the New Mexico courts take the position that the quality of evidence can be determined by looking at only one side of a record.[78] Such a review standard does not provide New Mexico

70. *See* Seward v. Denver & Rio Grande R.R., 17 N.M. 557, 131 P. 980 (1913).
71. 84 N.M. 626, 506 P.2d 783 (1973).
72. *Id.* at 627, 506 P.2d at 784.
73. *See* Wickersham v. New Mexico State Bd. of Educ., 81 N.M. 188, 190-91, 464 P.2d 918, 920-21 (Ct. App. 1970).
74. *See* Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 18 N.M. St. B. Bull. 430 (June 21, 1979) (citing with approval Rinker v. State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973)).
75. *See* text accompanying note 14, *supra.*
76. Jaffe, *supra* note 14, at 1027.
77. 17 N.M. 557, 131 P. 980 (1913).
78. Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973).

courts with a criterion likely to result in intensive review of administrative decisions. The desire to subject administrative determinations of fact to closer scrutiny is precisely why Congress statutorily required the federal courts to use the "whole record" standard.[79]

Logic appears to support the federal standard as opposed to the New Mexico standard. The New Mexico position seems contradictory. The legal residuum rule calls for the application of rigid evidentiary rules in order to determine what constitutes competent evidence. At the same time the courts look only at that evidence which supports the decision of the administrative agency. The courts refuse to look at any evidence which might conflict with or contradict the decision of an administrative agency.[80] One might argue that New Mexico's adoption of the legal residuum rule is in itself protection against error by the agency, and therefore the courts can afford to be permissive by refusing to examine or consider conflicting evidence. Surely, however, it would be more satisfactory to examine the reasonableness (and therefore the credibility) of the evidence and then weigh it against other evidence contained in the record than to rely upon rigid technical legal rules of evidence.

One might also argue that the legal rules have stood the test of time. Yet one of the reasons for establishing administrative agencies was to avoid some of the delays and technicalities of judicial procedures, including those of the exclusionary rules of evidence, thereby allowing agencies to gather the evidence as quickly and completely as possible without too much concern for the rules of admissibility. The idea behind administrative hearings was to let all relevant evidence in, avoid the technicalities of the exclusionary rules of evidence, and then weigh the credibility of the evidence and act on it as would reasonably prudent men.

A reasonable alternative has been codified in the Uniform Licensing Act. It provides that "[i]n proceedings held under the Uniform Licensing Act . . . boards may admit any evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs."[81] Since under this Act any relevant evidence may be admitted, the key question becomes one of deciding on which part of the evidence reliance may be put. The answer is that credibility shall be given only to that evidence relied on by "reasonably prudent men."[82] Under the "reasonably prudent man" test one accepts only evidence that would

79. Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
80. *See, e.g.*, Rinker v. New Mexico Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973).
81. N.M. Stat. Ann. §61-1-11 (1978).
82. *Id.*

be deemed to be substantial evidence by such a prudent man, rather than engaging in an analysis of what is "legally competent."

In his treatise on administrative law, Kenneth Culp Davis argues forcefully that reliance on the residuum rule is misplaced. He says that "[p]erhaps the strongest reason against the residuum rule is the lack of correlation between reliability of evidence and the exclusionary rules of evidence. The exclusionary rules were designed for guiding admission or exclusion of evidence, not for weighing its reliability, and were designed for juries, not for administrators."[83] He argues that reliability of evidence is the central question and that the legal definition of "competent evidence" does not assure reliability.[84] Davis argues at length that evidence "must be judged in particular circumstances, not in the abstract."[85] The types of circumstances he suggests be given consideration in determining whether evidence should be relied on or not are:

> the alternative to reliance on the incompetent evidence; the state of the supporting and opposing evidence, if any; the policy of the program being administered and the consequences of a decision either way; importance or unimportance of the subject matter and considerations of economy of government; the degree of efficacy or lack of efficacy of cross-examination with respect to particular hearsay declarations.[86]

It is particularly relevant for the agency and the reviewing court to consider the policy being administered. Chief Justice Moise, writing for the New Mexico Supreme Court in *Young v. Board of Pharmacy*,[87] said, "We deem the continued requirement of some compe-

83. K. Davis, Administrative Law Text 279 (3d ed. 1972).

84. *Id.* Specifically he reasons:

> Reliability of evidence must be judged in particular circumstances, not in the abstract. Because the residuum rule involves an abstract determination that evidence which would be excluded in a jury trial is necessarily and in all circumstances unreliable, it virtually assures that findings will be more often at variance with truth than they would be if the reliability were judged in the light of all the circumstances. *Id.*

Wigmore takes much the same position in criticizing the rule:

> [T]his "residuum of legal evidence," which is to be indispensable, will have some necessary relation to the truth of the finding. But the "legal" rules have no such necessary relation. . . . This "residuum" rule, then, is decidedly not the wise and satisfactory rule for general adoption. . . . Let us remember that the greatest part of the community's industrial, commercial, financial activity already functions on a solid basis of fact determined without any formal rules of proof. Let us, here too, put our trust in men and minds, rather than in rules.

1 J. Wigmore, Evidence 41-42 (3d ed. 1940).

85. Davis, *supra* note 83, at 279.

86. *Id.* at 280.

87. 81 N.M. 5, 462 P.2d 139 (1969).

tent evidence a sound one; for in administrative adjudications where a person's livelihood (a property right) is at stake, any action depriving him of that property must be based upon such substantial evidence as would support a verdict in a court of law."[88] Chief Justice Moise's position makes eminent sense where an administrative action takes on the nature of a trial in deciding a case which might take away one's livelihood. The court was considering the consequences of the decision of such an administrative action.

Davis concurs in the position taken by Justice Moise.[89] He advocates that the policy of the program being administered, the type of administrative action being taken, and the consequences of the particular decision be considered in determining the reliability of specific evidence rather than deciding in the abstract on the basis of whether the evidence is legally competent.[90] The U.S. Supreme Court has also applied this line of reasoning in *FTC v. Cement Institute.*[91] The Court stated:

> [O]f course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress.[92]

In any move to discontinue the use of the residuum rule in New Mexico, it is important to consider the alternatives to the rule and the consequence of discontinuance when the court reviews administrative decisions. Davis suggests that the alternative to the residuum rule is to

> allow agencies and reviewing courts to exercise discretion in determining in the light of circumstances of each case whether or not particular evidence is reliable even though it would be excluded in a jury case. In the exercise of such discretion, agencies and reviewing courts will in many circumstances find that particular hearsay or

88. *Id.* at 9, 462 P.2d at 143.
89. Davis, *supra* note 83, at 280 where he advocates:
> Just as in a criminal case we require proof beyond a reasonable doubt for a conviction, good sense requires that we should refuse to revoke a professional license solely on the basis of tenuous hearsay, even though the same tenuous hearsay would be deemed enough to support an award of, say, a social security benefit, or a veteran's benefit, or even workmen's compensation. In granting a license an agency may sometimes appropriately rely on evidence which would not be considered as a basis for the revocation of the license.

90. *Id.* at 279-80.
91. 333 U.S. 683 (1948).
92. *Id.* at 706.

> other so-called incompetent evidence has insufficient reliability. Rejection of the residuum rule does not mean that an agency is compelled to rely upon incompetent evidence; it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon. *Rejection of the residuum rule does not mean that a reviewing court must refuse to set aside a finding based upon incompetent evidence;* it means only that the court may set aside the finding or refuse to do so as it sees fit, in accordance with its own determination of the question whether the evidence supporting the finding should be deemed reliable and substantial in the circumstances.[93]

THE STATUS OF THE "WHOLE RECORD" REVIEW STANDARD IN NEW MEXICO

The New Mexico courts have, at times, either used or appear to have used the "whole record" concept in reviewing administrative findings of fact.[94] The state legislature has also, on occasion, adopted the "whole record" requirement, as for example in the New Mexico Uniform Licensing Act.[95] It provides that the court, when reviewing an administrative decision, may reverse that decision if it is "unsupported by substantial evidence on the entire record as submitted . . . ."[96] *Young v. Board of Pharmacy*[97] was decided under the Uniform Licensing Act, but it does not discuss the "entire record" provision.[98]

Other legislative expressions of the "whole record" standard exist. For example, the New Mexico Public Assistance Appeals Act[99] gives the courts the power to set aside a decision of the agency if it is "not supported by substantial evidence in the record as a whole."[100] The New Mexico Administrative Procedures Act has an "entire record" provision for judicial review,[101] but the Act has not been made to apply to any agency except the Human Rights Commission.[102]

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93. Davis, *supra* note 83, at 278 (emphasis added).
94. *See, e.g.*, cases cited *infra* in notes 103-13.
95. N.M. Stat. Ann. §§61-1-1 to -31 (1978).
96. *Id.* at §61-1-20.
97. 81 N.M. 5, 462 P.2d 139 (1969).
98. *Id.* Neither does the court in *Seidenberg v. New Mexico Bd. of Medical Examiners* expressly concern itself with the "whole record" requirement of the Uniform Licensing Act. That 1969 case was also decided under the Uniform Licensing Act. 80 N.M. 135, 452 P.2d 469 (1969).
99. N.M. Stat. Ann. §§27-3-1 to -4 (1978).
100. *Id.* at §27-3-4(F)(3) (1978).
101. N.M. Stat. Ann. §12-8-22 (1978).
102. *See* discussion in Utton, *supra* note 64, at 840-41.

There are also several cases wherein the New Mexico courts either may have or appear to have considered the whole record. In *Garrett Freight Lines Inc. v. State Corp. Commission,*[103] the supreme court did not specifically discuss the "whole record" standard for review of administrative findings of fact. However, it is possible to interpret the court's decision as having found that the agency determinations were supported by substantial evidence on the whole record. In that case, the court appears to have considered testimony presented by both sides in determining "whether the record discloses sufficient evidence"[104] to support the finding. Two years later, in the 1959 *Transcontinental Bus System v. State Corp. Commission*[105] decision, the court appears to have considered both favorable and unfavorable evidence in reviewing the extensive administrative hearing record. The court concluded that "the testimony of the witnesses, *considered as a whole,* affords a sufficient basis for the Commission's order, notwithstanding the cross-examination may have lessened the impact of the direct examination."[106] *Rinker v. New Mexico State Corp. Commission*[107] is another case in which the New Mexico Supreme Court seems to have considered evidence based on the "whole record" on review. Justice Stephenson, immediately after repeating the standard litany that in reviewing administrative decisions "all reasonable inferences [are] indulged in support of the . . . commission . . . , all evidence and inferences to the contrary dis-

103. 63 N.M. 48, 312 P.2d 1061 (1957).

104. *Id.* at 53, 312 P.2d at 1064.

105. 67 N.M. 56, 352 P.2d 245 (1959).

106. *Id.* at 59-60, 352 P.2d at 247-48 (emphasis added). It is revealing to quote the court at greater length:

> [O]n review our jurisdiction is likewise limited to a determination whether *the evidence before the Commission,* and upon which the order was based, is substantial in character. If the evidence is found to be substantial it follows the order of the Commission is both legal and reasonable and the judgment must be reversed, otherwise, it must be affirmed.
>
> Bearing in mind the foregoing rules, we approach a most difficult task of evaluating a record consisting literally of thousands of pages of testimony, exhibits, etc. The record is so voluminous, we will not attempt to detail the testimony. It is sufficient to say that at the hearing before the Commission some *275 witnesses testified both pro and con, thereby presenting a direct conflict in the evidence* . . . .
>
> Transcontinental concedes that Geronimo made out a case on direct examination but contends that the answers of *its witnesses on cross-examination so discredit their testimony as to render the evidence unsubstantial.* We have given careful consideration to this contention and *conclude that the testimony of the witnesses, considered as a whole,* affords a sufficient basis for the Commission's order, notwithstanding a cross-examination may have lessened the impact of the direct examination.

Id. at 59-60, 352 P.2d at 247-48 (emphasis added) (citation omitted).

107. 84 N.M. 626, 506 P.2d 783 (1973).

regarded,"[108] stated "[s]uffice it to say that *we have carefully examined those portions of the record cited by the parties in support of their respective positions* and are of the opinion that the evidence is substantial."[109] The supreme court appears to say explicitly that it has examined both sides of the record, and found the evidence to be substantial on the record taken as a whole. Also of interest is the supreme court's review of *Ribera v. Employment Security Commission.*[110] The court stated that *"based upon all of the evidence,* we find that there was substantial evidence to support the findings and conclusions made by the Commission . . . ."[111] It appears that the court did use the "whole record" approach and did look at evidence presented by both sides.[112] Thus, in spite of the directions of earlier cases to look only at one side and disregard evidence to the contrary, the New Mexico Supreme Court has, on occasion, looked at both sides and weighed the evidence accordingly. This position was probably taken because it is so reasonable to do so.[113]

In the 1979 case of *Garcia v. New Mexico Human Services Department,*[114] the court of appeals construed § 27-3-4(F) of the New Mexico statutes,[115] which provides that the Human Services Department decisions shall be set aside if "not supported by substantial evidence in the record as a whole."[116] The court expressly held that "[s]ubstantial evidence in this context is predicated upon consideration of all evidence in the record as a whole, and not just that which supports the judgment as in other types of cases."[117] Judge Hendley, writing for the court, added that it appeared to the court that the Human Services Department had "ignored any evidence contrary or unfavorable to the original determination . . . ."[118] The court, upon considering such contrary evidence, concluded that the commission decision was "not supported by substantial evidence con-

108. *Id.* at 627, 506 P.2d at 784.
109. *Id.* (emphasis added).
110. 18 N.M. St. B. Bull. 289 (May 3, 1979).
111. *Id.* at 291 (emphasis added).
112. The court did consider reports of two physicians submitted on behalf of the losing claimant and found that "the physicians' reports are neither conclusive nor dispositive . . . ."
Id. at 291.
113. On the other hand, the supreme court in *Tapia v. Panhandle Steel Erectors Co.* said, "[n]or does the fact that there may have been contrary evidence which would have supported a different verdict permit us to weigh the evidence." 78 N.M. 86, 89, 428 P.2d 625, 628 (1967).
114. 18 N.M. St. B. Bull. 545 (Ct. App. July 26, 1979).
115. N.M. Stat. Ann. § 27-3-4(F) (1978).
116. *Id.*
117. 18 N.M. St. B. Bull. 545, 546 (Ct. App. July 26, 1979).
118. *Id.* at 547.

sidering the record as a whole."[119] Thus when provided with a statutory "whole record" standard, the court expressly considered both favorable and unfavorable evidence, "not just that which supports the judgment as in other types of cases."[120]

CONCLUSION

In summary, the dominant New Mexico position seems to be the one-sided substantial evidence rule, with the caveat that there are legislative provisions for the "whole record" standard for some agencies. Even without legislative mandate, the court appears at times to look at the whole record on review.

This ambiguity argues for clarification either by: 1) the adoption by the legislature of a uniform approach for the judicial review of administrative decisions through an administrative procedures act that applies effectively to the administrative process, or 2) by the adoption of a statement by the court resolving existing ambiguities by expressly applying the whole record standard in all future reviews of administrative decisions. In addition, that would be a propitious time for the court to reconsider the efficacy of the legal residuum rule.

119. *Id.*
120. *Id.* at 546.