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ADMINISTRATIVE LAW—Whole Record Review and the Real Story Behind *Walck v. City of Albuquerque*

I. INTRODUCTION

Current New Mexico law pertaining to whole record judicial review of administrative agency proceedings has been shaped and interpreted through the case law of the past decade.¹ Although both district and appellate courts sit in technically appellate postures to agency decisions,² it is the district court that has first review. The district court applies and tests the established evidentiary standards and it is at this level that these standards have the strongest impact. The standards make theoretical sense, but are not simple to apply because the district court often superimposes an external framework, a legal standard, within which the review standards must remain.³

This article explains the current status of judicial review of administrative proceedings in New Mexico as it relates to the substantial evidence rule and the legal residuum rule. Furthermore, it will use the factual background of a recent New Mexico case involving the discriminatory termination of employment of a police officer, *Walck v. City of Albuquerque*,⁴ to illustrate the tension that develops between the district court and the administrative agency when the evidentiary rules clash with the legal standard the agency does not wish to follow.

II. PRELIMINARY CASE BACKGROUND

In April 1986, Officer Alfred W. Walck was terminated from the Albuquerque Police Department ("APD") following an internal affairs investigation.⁵ After an evidentiary hearing on the matter, the city Personnel Board upheld his termination on August 4, 1986,⁶ concluding that

1. See Michael B. Browde, *Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolutions*, 18 N.M. L. REV. 525, 536 (1988).

2. See *Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n*, 101 N.M. 470, 476, 684 P.2d 1135, 1141 (1984).

3. Appellate courts, on the other hand, review the lower courts' decisions, and consequently are removed from direct contact with the agency. Also, appellate courts "give substantial deference to the trial court's judgment." Jeffrey Croasdel & Andrew McGuire, *Appellate Procedure*, 22 N.M. L. REV. 653 (1992) (citing *Clovis Nat'l Bank v. Harmon*, 102 N.M. 166, 692 P.2d 1315 (1984)).

4. 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992).

5. The following statements of facts are taken from the *Walck* case unless otherwise cited.

6. The City of Albuquerque Revised Ordinances of 1974 (revised 7/1/92), describes the function of the Personnel Board (Art IX, Sec. 2-9-5(B)): "The Personnel Board shall render a decision upon the appeal of classified employees of the City concerning certain grievances as provided in Section 25 of this Ordinance." Walck was required to follow the Grievance Resolution Procedure (Art IX, Sec. 2-9-25) in appealing his termination. The Standard Operating Procedure Manual ("SOP manual") of the APD, section 1-09-5, states that "[p]ersonnel are required to familiarize themselves with the procedures as outlined in the City Merit System Ordinance." The Merit System is described in Art IX, section 2-9-1 of the City of Albuquerque Revised Ordinances and states that "[i]n accordance with Article X of the Charter of the City of Albuquerque, there is hereby established a merit system governing the hiring, promotion and discharge of employees and providing for the general regulation of employees").

Walck had "engaged in conduct unbecoming an officer" in violation of Standard Operating Procedure ("SOP") section 1-19-2,⁷ and that he had failed to answer truthfully questions relating to the investigation in violation of SOP section 1-19-31.⁸

The incident which gave rise to the charges against Officer Walck involved an altercation between Walck and his wife, Belinda, from whom he had recently separated. Walck was aware that his estranged wife was having an affair with Dennis South.⁹ While off-duty, Walck drove his personal vehicle to South's house in Rio Rancho. He observed Belinda preparing to leave for work in her car, which was parked in the garage. It is undisputed that he twice struck his estranged wife's car with his own, after which the stories diverge.

Walck stated that he hit Belinda's car by mistake in an attempt to back up, that he shifted into park, that he placed his gun on his belt, and that he waited for two Rio Rancho public safety officers to arrive. Upon the arrival of the first officer, James Wilson, Walck identified himself as an Albuquerque police officer and handed over his gun.¹⁰ He continued that he had finally caught his estranged wife "sleeping around," and requested that Wilson write him a "good report." Walck was contesting child custody at the time.¹¹ Belinda Walck's testimony lent a different tenor to the occurrence. She stated that Walck repeatedly and angrily hit her Datsun, causing damage not only to the car bumper but to appliances which were directly in front of her car in the garage.¹² She testified that she feared Walck would use his gun and that he "kicked her once in the groin area and called her names."¹³

South supported Belinda's testimony.¹⁴ After the incident, South contacted Sergeant William Weil in Internal Affairs, who started the investigation leading to Walck's termination.¹⁵ Walck denied that he kicked

7. This section is now 1-04-1(F)(G) of the "Personnel Code of Conduct" in the SOP manual of the APD (effective 7/10/92), and it states that law enforcement officers "shall conduct themselves, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an officer or employee shall include that which brings the Department into disrepute or impairs the operation or efficiency of the Department."

8. This is now section 1-04-4(X) under "General Orders" of the "Personnel Code of Conduct" in the SOP manual of the APD (effective 7/10/92), and it states that law enforcement officers "shall truthfully answer all questions specifically directed and narrowly related to the scope of employment and operations of the Department which may be asked of them."

9. Testimony from both Walck and South shows that the two couples met for the first time several months prior to the incident to engage in "swapping." Transcript of Personnel Board Hearing at RP81, 132, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736). By the time of the Personnel Board Hearing, Belinda Walck married Dennis South. *Id.* at RP54-55. Transcripts and exhibits from the District Court's hearings appear in the Record Proper and will be cited as "RP."

10. *Id.* at RP94-97.

11. *Id.* at RP41.

12. *Id.* at RP56.

13. *Id.* at RP57 and RP58.

14. Dennis South stated that Walck "rammed the back of [Belinda's] car," and "jammed it into the washing machine . . ." *Id.* at RP79. He also testified that at the time Walck called him prior to the incident to tell him to stop seeing Belinda, the relationship was not sexual. *Id.* at RP87.

15. South also filed a complaint against Walck for criminal damages. *Id.* at RP79.

Belinda, that he intentionally rammed her car, and that he brandished his gun.¹⁶ The Personnel Board concluded from these facts that Walck's behavior "constituted conduct unbecoming an officer" in violation of SOP Section 1-19-2.¹⁷ It also found that Walck was untruthful in his responses "to questions about his vehicle striking Belinda Walck's vehicle, . . . [and] when asked if he called her back after the incident occurred."¹⁸ These findings were sufficient to permit the Personnel Board to uphold the APD's decision to terminate Officer Walck. Walck appealed his termination.

III. STANDARDS FOR WHOLE RECORD REVIEW

The principles of whole record review were developed by appellate courts to help agencies and district courts maintain a proper mutual deference and delicate balance of power.¹⁹ The substantial evidence rule, the legal residuum rule, and second-tier review give reviewing courts some check over decisions which agencies make with complete autonomy.²⁰

A. Substantial Evidence Within Whole Record Review

1. Background

In the absence of any statutory standard for administrative review,²¹ New Mexico appellate courts review administrative findings of fact using the rule established in *Duke City Lumber v. New Mexico Environmental Improvement Board*: "if there is substantial evidence in the record to support a finding, the reviewing court is bound thereby."²² Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"²³ or "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs."²⁴

16. *Id.* at RP127 and RP124.

17. Findings of Fact and Conclusions of Law by Personnel Board at RP4-6, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736).

18. *Id.* at RP5.

19. The existence of administrative agencies helps increase the efficiency of the judicial system; they were "created, in part, to avoid some of the delays and technicalities of judicial procedures." Albert E. Utton, *The Use of the Substantial Evidence Rule to Review Administrative Proceedings*, 10 N.M. L. Rev. 103, 110 (1979).

20. For a discussion of second-tier review, see *infra* notes 89-97 and accompanying text.

21. New Mexico's Administrative Procedures Act, N.M. STAT. ANN. §§ 12-8-1 to -25 (Repl. Pamp. 1988), is only used as a "general guideline" for the resolution of administrative law questions. *Groendyke Transport v. New Mexico State Corp.* Comm'n, 101 N.M. 470, 476, 684 P.2d 1135, 1141 (1984); see also Michael B. Browde, *Administrative Law*, 12 N.M. L. Rev. 1, 57 (1982).

22. 101 N.M. 291, 294, 681 P.2d 717, 720 (1984).

23. *Rinker v. State Corp.* Comm'n, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973) (citation omitted).

24. *Duke City*, 101 N.M. at 295, 681 P.2d at 721 (citing N.M. STAT. ANN. § 12-8-11(a) (Repl. Pamp. 1978)).

New Mexico has used substantial evidence within a whole record concept since *Duke City*:²⁵

New Mexico [now] uses a standard of review which is 'limited to determining whether the agency acted within the scope of its authority, whether the order was supported by substantial evidence, whether the decision was made fraudulently, arbitrarily or capriciously, and whether there was an abuse of discretion or show of bias by the agency,' . . . [employing] . . . *whole record review*.²⁶

Duke City "expressly modif[ied]" the substantial evidence rule for New Mexico by holding that it must be applied to the *entire record*. Segments of the record may not be ignored in applying the rule,²⁷ although the change still affords administrative agencies considerable deference with the "light most favorable" requirement.²⁸ The new rule requires that the "reviewing court must now look at evidence which is contrary to the agency's finding instead of disregarding it as before."²⁹

2. The On-Balance Approach in Whole Record Review

Use of substantial evidence within a whole record structure provides more balance between reviewing courts and agency proceedings, but it is not so clear that the "light most favorable to the decision" standard should remain.³⁰ The alternative "of viewing-all-the-evidence-to-see-if-on-balance-it-supports-the-decision"³¹ offers a more neutral approach to the review process. The court would still be precluded from substituting its own findings for those of the agency *unless* the "agency's findings were *not* supported by substantial evidence."³² The less deferential approach of viewing the evidence entirely on balance has been used in decisions following *Duke City*, and in very recent cases.³³ For example, the court

25. Before *Duke City*, New Mexico courts viewed the evidence in "the light most favorable [to the agency] to support the findings," and limited their review to that evidence which supported the agency decision, thereby allowing the agency to create its own maximum threshold of review for the courts to accept—or not. *Duke City*, 101 N.M. at 294, 681 P.2d at 721 (citing N.M. STAT. ANN. § 12-8-11(a) (Repl. Pamp. 1978)). This limited record review allowed "accepting part of the evidence and totally disregarding other convincing evidence in the record considered as a whole," thus according the agency an obvious and overwhelming deference. *Id.* at 294, 681 P.2d at 720 (citations omitted). The *Duke City* court allowed that, in certain cases, it was proper to "engag[e] in a review of the record as a whole," as opposed to limiting its review strictly to substantial evidence submitted by the agency. *Id.* at 293, 681 P.2d at 719 (citations omitted).

26. *Walck*, 113 N.M. at 535, 828 P.2d at 968 (citing *In re Mountain Bell*, 109 N.M. 504, 505, 787 P.2d 423, 424 (1990)) (emphasis added).

27. *Duke City*, 101 N.M. at 294, 681 P.2d at 720.

28. *Id.*

29. *Trujillo v. Employment Security Dep't*, 105 N.M. 467, 469, 734 P.2d 245, 247 (Ct. App. 1987).

30. For a comprehensive overview of the post-*Duke City* decisions describing the struggle to clarify how the substantial evidence in whole record review standard should be applied, see Browde, *supra* note 1, at 535-40.

31. *Id.* at 535.

32. *Id.* at 541 (citing N.M. Human Services Dep't. v. Garcia, 94 N.M. 175, 177, 608 P.2d 151, 153 (1980)).

33. *Id.* at 535-40.

in *Cibola Energy Corp. v. Roselli*,³⁴ stated that the reviewing court must decide "whether, on balance, the agency's decision was supported by substantial evidence."³⁵ Even so, the "light most favorable" approach continues to be used.

In *Evans v. Valley Diesel*,³⁶ the supreme court took pains to clarify its previous holding as set forth in *National Council on Compensation Insurance v. New Mexico State Corp. Commission*:³⁷

While 'all evidence . . . will be viewed in the light most favorable to the agency's decision[,] [t]his would . . . not preclude the court from setting aside the agency decision when it cannot conscientiously say that the evidence supporting the decision is substantial, when viewed in the light that the whole record furnishes.'³⁸

A possible way to reconcile this co-existing "duality" of standards is to offer that the "light most favorable" approach be used to "uphold agency decisions which do not trammel fundamental personal rights . . . while reserving the 'on balance' line to overturn those decisions which do touch upon personal, fundamental rights, or which are arrived at through suspect process."³⁹

To illustrate, *In re Mountain Bell*⁴⁰ involved a denial by the New Mexico Corporation Commission of a telephone company's petition for detariffing public and semi-public services. No personal rights were involved, and the court made use of the "light most favorable" standard instituted in *Duke City*.⁴¹ *Akel v. New Mexico Human Services Department*,⁴² however, involved eligibility for disability benefits—rights which may be characterized as more fundamental and personal. Here the court used the on-balance approach.⁴³ This use of the substantial evidence rule within a whole record context allows the court considerable flexibility within individual cases.

B. The Legal Residuum Rule

The formation of the record itself is subject to certain standards. In New Mexico, testimony in the record must have passed the "legal residuum" threshold, so that in order to meet "New Mexico's review standard of 'substantial evidence,' an administrative record must contain

34. 105 N.M. 774, 737 P.2d 555 (Ct. App. 1987).

35. *Id.* at 776, 737 P.2d at 557; see also *Urioste v. Sideris*, 107 N.M. 733, 738, 764 P.2d 504, 509 (Ct. App. 1988).

36. 111 N.M. 556, 807 P.2d 740 (1991) (upholding decision by workers' compensation judge to award benefits to worker).

37. 107 N.M. 278, 282, 756 P.2d 558, 562 (1988).

38. *Evans*, 111 N.M. at 559, 807 P.2d at 743 (citation omitted); see also *Watson v. Town Council of Bernalillo*, 111 N.M. 374, 377, 805 P.2d 641, 644 (Ct. App. 1991).

39. Browde, *supra* note 1, at 539.

40. 109 N.M. 504, 505-06, 787 P.2d 423, 423-24 (1990).

41. *Id.*

42. 106 N.M. 741, 742, 749 P.2d 1120, 1121 (Ct. App. 1987).

43. *Id.*

within it at least some evidence which is legally competent in the courts."⁴⁴ "[A] reviewing court [must] set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial."⁴⁵

It has been suggested that, because the legal residuum requirement curtails the flexibility of administrative proceedings,⁴⁶ it would 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."⁴⁷

The legal residuum rule, however, is not always employed.⁴⁸ One example of an alternative standard that commonly occurs at administrative hearings is unsworn citizen testimony.⁴⁹ In deciding when to use the legal residuum rule, the best guide may be that which is also used when choosing between standards of substantial evidence.⁵⁰ When "limited to those circumstances where important *personal* rights are involved [because] the added formality [of the residuum rule] . . . properly serves to insure that more attention is paid to the protection of those important rights."⁵¹ Case law has followed this guide.⁵²

C. "Conduct Unbecoming An Officer:" The Legal Standard

The Personnel Board's determination against Walck rested on allegations that Walck had violated two department regulations. Therefore, a judicial review of the Board's decision would require not only a determination of whether the evidence the Board relied on constituted substantial evidence but whether the regulation was in fact violated. The latter requirement depended on regulatory interpretation as well as legal conclusions.

The appeal process which ensued after Walck's termination involved careful consideration of all the evidence collected below during the agency deliberations. The district court, however, repeatedly reminded the agency of the parameters within which the allegations were made, namely, the meaning and interpretations of the two SOP regulations.⁵³

44. Utton, *supra* note 19, at 110.

45. Trujillo v. Employment Sec. Comm'n of New Mexico, 94 N.M. 343, 344, 610 P.2d 747, 748 (1980) (citation omitted); *see also* Duke City Lumber v. New Mexico Env'l Improvement Bd., 101 N.M. 291, 295, 681 P.2d 717, 721 (1984).

46. *See* Utton, *supra* note 19, at 112.

47. *Id.*

48. *See* Browde, *supra* note 1, at 534.

49. In *Duke City*, citizen testimony addressed the issue of the hazardous effects of wood-burning smoke coming from a sawmill, but was not considered admissible. *See* Browde, *supra* note 1, at 556 n.170.

50. *See* Browde, *supra* note 1 and accompanying text.

51. Browde, *supra* note 1, at 534-35.

52. *Duke City*, 101 N.M. at 295, 681 P.2d at 721 (affirming decision by appeals court which upheld rejection of emissions variance by Environmental Improvement Board) (citation omitted); *cf.* Trujillo, 94 N.M. at 344, 610 P.2d at 748 (1980) (reversing district and appeals courts' rejection of worker's unemployment compensation benefits based on issue being one of "substantial right").

53. The discussion to follow will look at the interplay between the Personnel Board and the District Court regarding this aspect.

Police officers are generally answerable for their off-duty conduct, including their "private" lives, when considering a possible violation of "conduct unbecoming an officer." Case law consensus is that police officers are held to a "higher standard."⁵⁴ A court's definition of the off-duty facet provides a legal standard for the agency in weighing the evidence.⁵⁵

The interpretation of a regulation provides another kind of legal standard for an agency to follow. In order to obtain conclusions of law from its findings of fact, the agency's findings must fit within the framework of the interpretation.

The Personnel Board failed to stay within this framework throughout the review process, leading to the ultimate dismissal of its decision by the New Mexico Court of Appeals.⁵⁶

IV. WALCK'S APPEAL FROM HIS TERMINATION

Walck petitioned the district court for writ of certiorari.⁵⁷ The court based its review on the whole record,⁵⁸ employing the usual substantial evidence and legal residuum standards. Even after two remands the Personnel Board was unable to meet these standards; more critically, it was bound to fail as a matter of law because its decision fell short of the legal standards set up by the SOP regulations.

A. Round One: To the District Court and Back

Walck petitioned the district court to review the case, claiming that: 1) certain exculpatory evidence was "excluded by the Board in its refusal to hear [two] witnesses;" 2) that there was a lack of evidence to show that the efficiency of the APD was "undermined or impaired" by Walck's conduct; and 3) that the actions of the Personnel Board were "arbitrary, capricious and unlawful, and not supported by substantial evidence."⁵⁹ The barring of the two witnesses' testimony was particularly critical in shaping the Personnel Board's decision, as Walck contradicted most of

54. *Faust v. Police Civil Service Comm'n of Bor. of State College Pa. Commonwealth*, 347 A.2d 765, 768 (Pa. Commw. Ct. 1975). *Faust* was one of the cases relied on by the City of Albuquerque in its appeal against Walck. *Walck*, 113 N.M. at 535, 828 P.2d at 968.

55. A broad construction of "off-duty" would seem to allow no limits in considering the private areas of an off-duty officer's life. The district court in Walck's case more specifically defined the parameters of "off-duty," and, as shall be seen limited the ability of the Personnel Board to find that Walck had violated either of the SOP sections.

56. *Walck*, 133 N.M. at 536, 828 P.2d at 969.

57. Petition for Writ of Certiorari at RP2, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612). The New Mexico District Court has "appellate jurisdiction in all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same." N.M. CONST. ART. VI, § 13.

58. *Walck*, 113 N.M. at 533-34, 828 P.2d at 966-67.

59. Petition for Writ of Certiorari at RP2, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

Belinda Walck's testimony.⁶⁰ For the next two years, the Personnel Board and the district court volleyed the case back and forth, culminating in Walck's reinstatement.⁶¹

On its first hearing, the district court partially remanded the case back to the Board for the limited purpose of recusal of a Board member.⁶² On rehearing, the Personnel Board conceded that not only was bias probable, but that the Board member should have brought the existence of his acquaintance with Belinda to the Board's attention earlier.⁶³ With this narrow issue decided, the case was returned to the district court for a review of the other issues in Walck's petition. In its final opinion,⁶⁴ the district court found that facts concerning material issues must be supported by substantial evidence, and that there was lack of substantial evidence to uphold Walck's termination.⁶⁵

First, the city used South's filing of a criminal complaint and an opening statement by the Assistant City Attorney alluding to a *nolo contendere* plea by Walck to support a finding of criminal behavior, which was used to infer conduct unbecoming a police officer. The court found this insufficient under the principle of substantial evidence as well as legal residuum.⁶⁶ Second, facts underlying Walck's actions that day, the credibility issue, and proof of untruthfulness were all not supported by substantial evidence.⁶⁷ The court further held that these facts, in turn, "must support logically related conclusions of law."⁶⁸ As a matter of law, these facts could not support the "conclusion that [Walck's] behavior . . . reflected unfavorably on APD or constituted conduct unbecoming an officer."⁶⁹ While the court felt that off-duty conduct of a police

60. Debbie Walck, Brenda Walck's daughter, would have testified that her mother "had taken Debbie's money;" that her mother "had lied to her physician in order to obtain prescription medicine;" and that her mother "habitually lied, including using family illness and death as excuses to miss work, when there was in fact no family illness or death." Richard Style, the second witness, would have offered proof "to the effect that Dennis South had represented himself as a law enforcement officer," although "he admitted that he had never been a law enforcement officer." Memorandum Brief in Support of Petitioner's Writ of Certiorari at RP60, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

61. The Personnel Board and the City of Albuquerque appealed the district court's decision not to uphold Walck's termination to the court of appeals, which affirmed the lower court's decision. *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992).

62. Order for Remand at RP152, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612). Walck had learned that one of the Board members had been acquainted with Belinda during the time of the Board's decision. Both Bill Watson and Belinda Walck were Team Father and Team Mother, respectively, for their sons' little league team.

63. Findings of Fact and Conclusions of Law by Personnel Board at RP183, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736).

64. Opinion and Final Judgment at RP184, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612). This is now the second remand made to the Board.

65. *Id.* at RP189.

66. *Id.*

67. Evidence of Walck's untruthfulness was based completely on the testimony of Sergeant William Weiland of Internal Affairs for APD. Sergeant Weiland felt that Walck was being equivocal about whether or not he had called Belinda after the incident. Personnel Board Hearing at RP91, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

68. District Court's Dec. 1987 Opinion at RP189, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

69. *Id.* at RP189-190.

officer does relate to the performance of his duties "insofar as it influences the public opinion," the effect of the behavior on the "public perception" must "constitute a cause related to employment."⁷⁰ The court vacated Walck's termination and remanded the case to the Board for a rehearing on *all* issues.⁷¹

The district court then offered the Board a clear direction of law by narrowing and specifying the parameters of the two regulations Walck was charged with violating. The regulation involving conduct unbecoming an officer would include off-duty behavior only when public opinion was affected in a way that was connected to employment. The regulation directing an officer to answer all questions truthfully would apply only to questions "specifically directed and narrowly related to the scope of employment and operations of the Department"⁷² The Board had two choices at this point: it could dispose of the case, or come back with new evidence.

The court's ruling was a clear message that, as things presently stood with the case, the evidence articulated in the Board's findings of fact was not enough to uphold Walck's termination. The Board's decision was doomed to reversal. Even new evidence would be bound within the parameters defined by the regulations.

B. Round Two: After the Second Remand

Notwithstanding the court's directive, the Board upheld Walck's termination on rehearing after this second remand, without offering any new evidence.⁷³ Not surprisingly, the district court granted Walck's petition to review the case a second time, finding that the Personnel Board "failed to comply with [the court's] Order on remand."⁷⁴ The court found that there was not substantial evidence underlying criminal charges against Walck nor was there substantial evidence of conduct unbecoming an officer or conduct that would reflect unfavorably on the police department.⁷⁵ Furthermore, there was no evidence that [Walck's] conduct was "reasonably related to the Department, its reputation or operation," and that there was not sufficient evidence nor a legal residuum of evidence to "support the conclusion [that Walck was untruthful]."⁷⁶ The court held that the Board's conclusion that Walck violated section 1-19-2 was without substantial evidence and therefore was incorrect as a matter of

70. *Id.* at RP192.

71. *Id.* It is unclear why the court waited for the Board's decision about the recusal before sending it back for a rehearing on all issues. One possibility is that because Walck did not find out about Bill Watson's acquaintance with Belinda until after his petition was filed, and that because the issue was not included in his brief for writ of certiorari, the court treated it separately.

72. *Id.* at RP190-91.

73. Personnel Board's New Findings of Fact and Conclusions at RP211, Walck v. City of Albuquerque, 113 N.M. 533, 828 P.2d 966, (Ct. App. 1992) (No. 11736).

74. Order and Writ of Certiorari at RP214, Walck v. City of Albuquerque, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

75. *Id.*

76. *Id.*

law.⁷⁷ The court also found that the Board's conclusion that Walck had violated section 1-19-31 was incorrect as a matter of law because the Board had "improperly considered and applied [SOP] section 1-19-31 to [the] case."⁷⁸ Moreover, the questions asked of Walck were found not to be "specifically directed and narrowly related to the scope of employment and operations of the Department."⁷⁹ The court ordered a reversal of the Board's decision, and a remand with directions to reinstate Walck with full retroactive pay and benefits.⁸⁰

The Personnel Board lost on two levels. On one level, it failed the substantial evidence and legal residuum rule thresholds. The court treated the Board's decision with an "on balance" rather than a "light most favorable" approach. Evidence to the contrary of the Personnel Board's decision was not only considered, but weighed equally (not less favorably) with evidence supporting the decision. For example, while the Board found that Walck was "untruthful" about a call to Belinda after the accident telling her he had "finally caught her,"⁸¹ the court found Walck's equivocations were not necessarily untruthful.⁸² The court evenly balanced the Board's vague feelings of untruthfulness⁸³ with testimony from Belinda and Dennis South. Similarly, the Board found that Walck's conduct toward his estranged wife was substantial enough to support termination, but the court looked at the rest of the record⁸⁴ and held to the contrary.⁸⁵

The court strongly relied on the legal residuum rule in striking at the Board's decision concerning Walck's "untruthfulness." The court found that there was lacking a "legal residuum of evidence in the record to support the conclusion [that Walck was being untruthful in the Internal

77. Court's Findings of Fact and Conclusions of Law at RP238-39, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

78. *Id.* at RP240.

79. *Id.* at RP239.

80. *Id.* at RP240. This was the district court's third remand to the Board.

81. Personnel Board Hearing at RP38, 48, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736).

82. District Court's June 1989 Opinion at 238-39, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612). The court's finding was not based on its own construction of the facts but rather on the insufficiency of facts necessary to support the agency's construction.

83. Personnel Board Hearing at RP93, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736).

84. The court was probably aware the Personnel Board might have been following its own agenda in deciding on termination, judging from some of the testimony at the Personnel Board Hearing. There were references to "conflicts" with administration, as well as to previous lawsuits filed by Walck against the department. *Id.* at RP36-37. In addition, police union representative Officer Mark Bradley testified that Walck was unfairly treated in the disciplinary process, suggesting that Walck was not adequately informed of the nature of the interrogation, as required under section 20 of the collective bargaining agreement. *Id.* at RP110-11. He further testified that he knew of the disposition of another domestic violence situation which resulted in a one-day suspension, not a termination. *Id.* at RP114.

85. The court held that "[e]ven after remand, the Board completely failed to make a factual finding on the disputed issues of whether [Walck] kicked his ex-wife or whether he brandished his weapon." Memo to Counsel from Sitterly, J. at RP219, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

Affairs investigation].”⁸⁶ The legal residuum rule requires more than the conclusion of a third person which the Board offered as evidence.⁸⁷

On a second level, the Board lost because it neglected the importance of the legal standards imposed by the regulations themselves. Even if the Board had unearthed new evidence following the district court’s second remand, it is doubtful that the court’s 1989 opinion would have had a different result. In fact, it would not have mattered that Walck had intentionally rammed his estranged wife’s car as the connection between his conduct and his employment was too tenuous to support a violation, considering the narrow scope given to the regulation by the court. It also would not have mattered if Walck actually was untruthful in his answers during the investigation, if none of the questions were related to his employment.

V. THE CITY’S APPEAL

The city appealed the district court’s June 1989 reversal of the Board’s decision to the New Mexico Court of Appeals.⁸⁸ Separate standards exist for the second-tier of judicial review of agency proceedings at the appellate court level, although there has been some confusion about the extent and nature of the review process.

A. Second-Tier Review

The reviewing court can make an independent finding only after a showing of a lack of substantial evidence to support the agency’s decision.⁸⁹ Once a lack of substantial evidence is shown, however, the question remains whether the court should set aside the agency’s decision and enter its own finding, or whether it should remand it to allow the agency “to engage in better fact-finding the second time around.”⁹⁰

The adoption of whole record review appears to have authorized independent findings, because the “reviewing court may act on other convincing evidence in the record and may make its own findings based thereon.”⁹¹ In *Watson v. Town Council of Bernalillo*,⁹² however, the

86. District Court’s June 1989 Opinion at RP239, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. CV86-08612).

87. *Id.* The “third person” was Sgt. W.E. Weiland, Internal Affairs Officer for the APD. Weiland based his allegations that Walck was being untruthful on the fact that Walck denied kicking his ex-wife, but the injury “required medical attention.” Personnel Board Hearing at RP90-91, *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (No. 11736). The transcript, however, contains no conclusive support for Weiland’s statement concerning the “required medical attention.”

88. *Walck v. City of Albuquerque*, 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992).

89. See Browde, *supra* note 1, at 544.

90. *Id.* at 544-45.

91. *Trujillo v. Employment Security Dept.*, 105 N.M. 467, 469, 734 P.2d 245, 247 (Ct. App. 1987) (citation omitted); see also *Cibola Energy Corp. v. Roselli*, 105 N.M. 774, 777, 737 P.2d 555, 558 (Ct. App. 1987) (“[T]he whole record review standard allows ‘independent findings by the reviewing court reaching a contrary result from that of the administrative agency . . . where the decision of the . . . agency is not supported by substantial evidence.’”) (citation omitted).

92. 111 N.M. 374, 376, 805 P.2d 641, 643 (Ct. App. 1991).

court "invite[d] the supreme court to consider [limiting review of agency fact-finding] at the second judicial tier" in order to preclude the appellant from getting the "benefit of a de novo appellate review at each judicial level."⁹³

The supreme court accepted the invitation in *Evans v. Valley Diesel*,⁹⁴ narrowing the circumstances under which independent findings could be made at the second-tier. In *Evans*, the court of appeals reversed the trial court's affirmation of an award of benefits by a workers' compensation judge. The supreme court held that the court of appeals had gone beyond "the admittedly sometimes fine line between reviewing [] and rewriting" the disposition of the agency.⁹⁵ The appeals court is not free to construe the record differently from the lower court, but should confine its independent findings to situations "when the trial court's findings are contrary to undisputed evidence in the record . . ."⁹⁶ *Evans* clarified the parameters for second-tier review by applying the requisite whole record standard of review and more critically, by also reviewing "the correctness of the court of appeals' opinion."⁹⁷

B. The Appellate Court's Decision

By the time the *Walck* case reached the second tier of review, the whole record had already been through several rounds of remands, and the appellate court deemed it sufficient to base its decision on the findings of the district court within a whole record review of the agency's decision, rather than a trial de novo.⁹⁸

The appellate court reviewed the record only to ascertain whether or not the district court applied the "relevant standard of review."⁹⁹ The court deferred to the district court's reasoning, finding insubstantial evidence for Walck's termination.¹⁰⁰ Walck's termination, the court found, could not be sustained because the Personnel Board "failed to comply with the district court's directive to determine whether [section 1-19-31, pertaining to untruthfulness] applies to this case."¹⁰¹ Although the appellate court examined evidence from the whole record,¹⁰² it considered the decision in light of the lower court's reasoning and construction of

93. *Id.*; see also Browde, *supra* note 1, at 544-49, 557-58.

94. 111 N.M. 557, 558-59, 807 P.2d 740, 741-42 (1991).

95. *Id.* at 559, 807 P.2d at 742.

96. *Id.* (citing Tallman v. Arkansas Best Freight, 108 N.M. 124, 129-30, 767 P.2d 363, 368-69 (Ct. App. 1988)). In *Evans*, a worker was injured when the battery in his vehicle, which he stored on his employer's premises, blew up in his face. Both the workers' compensation judge and the trial court construed the record to mean that Evans was on his employer's premises during the course of his employment, since Evans customarily locked up after storing his vehicle. The court of appeals, however, construed the record to mean that Evans was on his employer's premises for personal reasons not related to his employment. *Id.*

97. *Id.* at 558-59, 807 P.2d at 741-42; see also Croasdel & McGuire, *supra* note 3, at 658.

98. *Walck*, 113 N.M. at 535, 828 P.2d at 968.

99. Browde, *supra* note 1, at 558.

100. *Walck*, 113 N.M. at 534, 536, 828 P.2d at 967, 969.

101. *Id.* at 537, 828 P.2d at 970.

102. "A summary of the pertinent parts of the record is necessary to explain our result." *Id.*

the facts in the case. On this second-tier of review, the court offered no independent finding, but instead limited itself to "insuring that the first court [did] its job in reviewing the agency."¹⁰³ The appellate court kept in line with the test for second-tier review of the whole record as defined in *Evans*,¹⁰⁴ by considering "whether there [was] substantial evidence to support the judgment of the fact finder, not whether there is evidence to support an alternative result."¹⁰⁵

Appellate review in the *Walck* case yielded an interesting twist. After careful adherence to a limited second-tier review, and after accepting the district court's findings of fact as true, the appellate court decided that, *as a matter of law*, the facts could not support Walck's termination. It opined that Walck's behavior,¹⁰⁶ as well as questions asked by the Board,¹⁰⁷ were outside the scope of sections 1-19-2 and 1-19-31. It is ironic, that, although the district court clarified the legal standards to be followed in applying the regulations, the Board's own construction of one regulation prevented the Board from prevailing as a matter of law.¹⁰⁸

VI. CONCLUSION

Judicial review of administrative agency proceedings is based on evidentiary standards which allow the agency autonomy and flexibility. These rules of substantial evidence and legal residuum, however, all take place in the context of legal standards. In the *Walck* case, the legal standards rested on the interpretation and scope given to the SOP regulations, sections 1-19-2 and 1-19-31. The Board apparently lost sight of, or chose to ignore, the boundaries created by these legal standards. It failed to realize that findings of fact will lead to the desired conclusions of law only when such findings satisfy these standards. The "conduct unbecoming an officer" should have had some connection to employment, even when it influences public perception, and should actually, not potentially, bring the department into disrepute. The questions asked of Officer Walck during the investigation should have been "narrowly related" to employment, regardless of how untruthful his responses were.

The *Walck* case portrays the complexity of whole record review. The standards of substantial evidence and legal residuum represent just one

103. See Browde, *supra* note 1, at 557.

104. *Evans*, 111 N.M. at 558, 807 P.2d at 742.

105. *Id.* (citation omitted).

106. *Walck*, 113 N.M. at 536, 828 P.2d at 969.

107. *Id.*

108. Section 1-19-2 states that the conduct must "reflect unfavorably" on the APD. The appellate court noted that although "some jurisdictions have defined conduct unbecoming an officer to include conduct which *tends* to . . . bring the department into disrepute, the personnel board did not rely on such a construction in this case." *Walck*, 113 N.M. at 536, 828 P.2d at 969. The language of the New Mexico regulation indicates that the conduct in question must *actually* bring the department into disrepute. *Id.* The city relied on two Pennsylvania cases involving off-duty adulterous conduct by police officers, including *Fabio v. Civil Service Comm'n*, 414 A.2d 82 (Pa. 1980).

level of the review process. At the same time, agencies and courts must be aware of the legal standards issuing from regulations and statutes.

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