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Administrative Law

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ADMINISTRATIVE LAW

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I. INTRODUCTION

The purpose of this section of the Survey is to review those cases decided during the Survey year which changed or clarified administrative law in New Mexico or decided issues of first impression.[1] The article is organized into two main topics: (1) the exercise of administrative authority and (2) judicial review.[2]

Under the first topic, there were significant cases clarifying the law on adequacy of administrative findings and the process of proof. The highlights included the pronouncement of a new standard for change of agency policies, a decision holding that a telephonic hearing meets all due process requirements, and a dissent calling for retreat from the "legal residuum rule" in New Mexico. Under the second topic, judicial review, the court once again announced and applied the usual standards, but in one case deviated from them without much helpful explication. The supreme court also decided three cases in which it discussed the unique constitutional standard for review of State Corporation Commission decisions.

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1. Authors' Note: The article as originally written provided an analysis of all the year's administrative law decisions. The authors were required to cut the article substantially to meet page limits imposed by the New Mexico Law Review. Therefore, the resulting article only highlights those cases which changed or clarified the law or decided issues of first impression.

2. Past Surveys have included an additional topic, Authority of Agencies to Act. This article does not include an Authority of Agencies to Act section; however, there were two cases decided during the Survey year on this topic. In Livingston v. Ewing, 98 N.M. 685, 652 P.2d 235 (1982), the supreme court upheld the validity of N.M. Stat. Ann. § 30-20-13(C) (Cum. Supp. 1982) in the face of a challenge that it impermissibly delegates legislative authority. This decision is consistent with state and federal cases which rarely invalidate statutes on this ground. W. Gellhorn, C. Byse & P. Strauss, Administrative Law 96 (7th ed. 1979). *But see* State v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), a prominent exception to the rule. In Kent Nowlin Constr., Inc. v. Environmental Improvement Div., 99 N.M. 294, 296, 657 P.2d 621, 623 (1982), the second case concerning authority of agencies to act, the court voided certain regulations issued to enforce the New Mexico Occupational Safety and Health Act as "beyond the Board's authorized powers." The court relied solely on rules of statutory construction, surprisingly ignoring the agency's interpretation of its statute and any inquiry into the purpose of the law.

II. THE EXERCISE OF ADMINISTRATIVE AUTHORITY

A. *Rules and Rule-Making*

An agency regulation has the force and effect of law and is binding upon the agency that issues it.[3] The corollary of this doctrine is that an agency action taken in violation of its rule will be invalidated by a court, particularly if the abridged rule is intended to benefit a party.[4] This point was made forcefully by the court of appeals in *Taylor v. Department of Human Services*.[5] *Taylor* was a direct appeal of a Department decision to reduce the plaintiff's food stamp allotment without citing a reason for the reduction. Lack of such notice is contrary to Department regulations.[6] Citing its decision in *Hillman v. Health and Social Services Department*,[7] the court reversed the Department's decision for failure to follow its own regulations and remanded the case with instructions to reinstate Taylor at her original food stamp allotment until the Department could give her a hearing "according to law."[8] The court did not discuss the nature of the violated regulation. Nevertheless, it is clear that the regulation is one which provides a procedural safeguard to an important benefit, and that the courts will require it to be strictly followed by the agency.

B. *Adjudications*

In *State of New Mexico, ex rel. New Mexico State Highway Department v. Silva*,[9] the court of appeals examined the adequacy of the findings of fact given by the State Personnel Board to support its decision that the State Highway Department had dismissed Silva without just cause. The Department argued on appeal that the Board's findings did not support this conclusion. The court disagreed. Although it implied that the Board's decision should have spelled out more findings of ultimate fact,[10] the court reviewed the evidentiary findings and found them to be sufficient

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3. Accardi v. Shaughnessy, 347 U.S. 260 (1954).
4. Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629, 630 (1974).
5. 98 N.M. 314, 648 P.2d 353 (Ct. App. 1982).
6. 7 C.F.R. § 273.13 (a) (1983); Human Services Department ISD Manual, § 441.24 (1982).
7. 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979).
8. 98 N.M. at 315, 648 P.2d at 354.
9. 98 N.M. 549, 650 P.2d 833 (Ct. App. 1982).
10. Professor Davis has defined an ultimate fact as:

> An ultimate fact is usually expressed in the language of the statutory standard. Examples: the rate is reasonable; the applicant is fit, willing and able to provide service . . .
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> * * *
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> [T]he basic findings are those on which the ultimate finding rests; the basic findings are more detailed than the ultimate finding but less detailed than the summary of the evidence.

K. Davis, Administrative Law Treatise, § 16.06 (1958).

to support the decision "because a fair construction of all the findings justifies the board's conclusion."[11] The court followed a reasonable path by placing substance over form to determine that the opinion sufficiently informed the reader of the reasons why the Board reached its decision in the face of conflicting evidence.

Another important issue in agency adjudication is the extent to which an agency must adhere to its established policies and precedents. The general rule is that an agency seeking to divert from a previous position must provide a reasoned explanation for its action so that the reviewing court may understand the basis for the agency's action and, thus, be able to judge the consistency of that action with the agency's mandate.[12] This year, the New Mexico Supreme Court had the occasion to rule on the standard which New Mexico agencies must follow when changing a previously announced position. In *General Telephone Company of the Southwest v. Corporation Commission,*[13] the court took an extremely narrow view of an agency's ability to change its policies. In this case, General Telephone Company of the Southwest (GTSW) sought a rate increase from the State Corporation Commission (SCC). To justify the request, GTSW calculated its last year's cash working capital under a method approved and used by the SCC in prior telephone rate cases. In this case, however, the SCC staff proposed the use of a different method for determining working capital. The SCC adopted the staff's proposal. On appeal, GTSW contended that choosing the staff's method was arbitrary and capricious, "in that it radically departs from past practice without proper notice or without reasonable justification in the record."[14] The supreme court agreed, holding that the SCC is required to give prior notice before it can change its policy.[15] This holding is a new restriction on the Commission's adjudicatory authority that is not in accord with the generally accepted standards governing an agency's ability to change its policies.[16] The supreme court apparently was concerned about the ret-

11. 98 N.M. 549 at 554, 650 P.2d 833 at 838.

12. A settled course of agency behavior results in a presumption that this behavior best carries out the Legislature's policies. Therefore, the agency must explain a departure from these norms. The agency may decide, for example, that changed circumstances warrant a change, or that a specific case before it requires that the rule not be applied. *See* Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973).

13. 98 N.M. 749, 652 P.2d 1200 (1982).

14. *Id.* at 755, 652 P.2d at 1206.

15. *Id.* See Southern Union Gas Co. v. New Mexico Public Service Comm'n, 84 N.M. 330, 503 P.2d 310 (1972), and Hobbs Gas Co. v. New Mexico Public Service Comm'n, 94 N.M. 731, 616 P.2d 1116 (1980), which the court inappropriately cited as precedent for its broad holding in this case. Neither *Southern Union* nor *Hobbs Gas Co.* required prior notice to change policy. *Southern Union* required "evidence of changed circumstances." 84 N.M. at 333, 503 P.2d at 313. *Hobbs Gas Co.* spoke of "substantial evidence" to sustain a change. 94 N.M. at 735, 616 P.2d at 1120.

16. *See supra* note 12 and accompanying text.

roactive effect of the Commission's change in policy in this case.[17] If so, the court should have examined the policy change in that context,[18] and not announced what appears to be a general rule that policy changes only can be made with prior notice to the parties.

There are three problems with this restriction. First, policy changes announced in an adjudication do not necessarily have retroactive effect.[19] Second, under traditional administrative law principles, a retroactive effect is not necessarily fatal to the validity of a change in policy.[20] Third, retroactivity without prior notice is quite accepted in our judicial system. As the Supreme Court announced in *Securities and Exchange Commission v. Chenery Corporation,* "every case of first impression has a retroactive effect whether the new principle is announced by a court or by an administrative agency."[21]

C. Access to Information

Kent Nowlin Construction, Inc. v. Environmental Improvement Division of the New Mexico Health and Environment Department[22] concerned the agency's desire to take testimony of Nowlin's employees without the presence of Nowlin or his counsel. The district court granted the Environmental Improvement Division's (EID) request for an order to take testimony of the employees by deposition in this manner, but the supreme court reversed. The court found that the New Mexico Rules of Civil Procedure provide that all parties to an action must receive notice and be afforded the opportunity to attend depositions. The court held that EID was bound by these rules because Section 12-8-15 of the New Mexico Administrative Procedures Act requires that administrative depositions be

17. The policy at issue in the case was how GTSW would be allowed to determine its working capital for purposes of a rate increase. The burden is on the company to establish the reasonableness of any method it proposes to use. Therefore, it cannot really be said that the Commission has adopted a policy on such an issue, but that the Company has in the past shown the method it proposed to use to be reasonable.

18. The traditional test is to balance the ill effect of the retroactive application of a new standard against the public interest in implementing the more equitable policy. Securities and Exch. Comm'n v. Chenery Corp., 332 U.S. 194 (1947). See also Retail Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972), which enumerates factors to be considered in the balancing test.

19. For example, policy changes could be explicitly announced to take effect prospectively. The opinion does not preclude this from its holding.

20. *See supra* note 18.

21. 332 U.S. 194, 203 (1947). Given the unique nature of state supreme court review of Corporation Commission decisions, *see infra* notes 86-95 and accompanying text, it might be argued that the holding in this case is limited to Corporation Commission procedures. Nevertheless, the possibility that the holding in this case might be applied to legislatively created agencies so concerned the New Mexico Public Service Commission that it subsequently had its statute amended to remove it from the prior notice restriction on change of policy. *See* N.M. Stat. Ann. § 62-6-14 (C) (Cum. Supp. 1983).

22. 99 N.M. 294, 657 P.2d 621 (Ct. App. 1982).

taken as provided by law.[23] The court ruled, therefore, that agencies must use depositions in the same manner as private civil litigants.

D. Opportunity to be Heard

State of New Mexico ex rel. Human Services Department v. Gomez[24] was a case of first impression involving due process rights in an agency adjudicatory process.[25] In *Gomez,* the supreme court adopted the dissenting opinion of Judge Wood of the court of appeals and held that a telephonic hearing[26] regarding termination of benefits was not a per se violation of due process.[27] Judge Wood reached his decision in three steps. He first cited *Goldberg v. Kelly,*[28] and pointed out that the alleged defect of a telephonic interview, i.e., that the petitioner is not observed, is not an element listed in that opinion as being required in a pre-ter-

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23. It should be noted that the New Mexico Administrative Procedures Act does not apply to EID. *See* N.M. Stat. Ann. § 12-8-2(A) (1978).

24. 99 N.M. 261, 657 P.2d 117 (1982); *See also* 22 N.M. St. B. Bull. 51 (Jan. 20, 1983) adopting the dissenting opinion issued in Gomez v. State of N.M. *ex rel.* Human Services Dep't, 21 N.M. St. B. Bull. 1470 (Ct. App. Oct. 28, 1982), which was later published at 22 N.M. St. B. Bull. 160 (Ct. App. Feb. 10, 1983).

25. Two other cases decided last year also dealt with due process issues. In Livingston v. Ewing, 98 N.M. 685, 688, 652 P.2d 235, 238 (1982), the supreme court held that "there is no fundamental right to notice and hearing before the adoption of a rule." This is consistent with long-standing federal and state precedent. *See, e.g.,* Bi-Metallic Investment Co. v. Colorado, 239 U.S. 441 (1915). Another case, Atencio v. Board of Educ. of Penasco Indep. School Dist. No. 4, 99 N.M. 168, 655 P.2d 1012 (1982), is also of some interest. The United States District Court of New Mexico certified to the New Mexico Supreme Court the question of whether "a certified school instructor who has previously acquired tenure rights as a certified school instructor with the public school district lose[s] those tenure rights as a result of being re-employed for the next consecutive school year as a certified school administrator?" *Id.* at 169, 655 P.2d at 1013. The court answered the question in the affirmative. The court also found that Mr. Atencio did not retain a property interest as a tenured certified school instructor when he voluntarily forfeited that position to become a certified school administrator. The significance of these holdings is that the plaintiff could be denied reemployment as a certified school instructor without a hearing.

26. The purpose of telephonic hearings in New Mexico is to reduce the cost and energy use otherwise incurred by hearing officers travelling around the state to hold hearings. Corsi, *Introduction to the Symposium on Empirical Research in Administrative Law Part I,* 31 Ad. L. Rev. 443, 486 (1979).

27. The majority opinion of the court of appeals held to the contrary, citing S. Buchsbaum & Co. v. Federal Trade Comm'n, 153 F.2d 85 (7th Cir. 1946), *supp. opinion,* 160 F.2d 121 (1947); United States v. Raddatz, 529 F.2d 1976 (7th Cir. 1979); Smith v. Dental Products Co., 168 F.2d 516 (7th Cir. 1948); Shawley v. Industrial Comm'n, 16 Wis. 2d 535, 114 N.W.2d 872 (1962); Trzebiatowski v. Jerome, 24 Ill. 2d 24, 179 N.E. 2d 622 (1962); Gomez v. State of N.M. *ex rel.* Human Serv. Dep't, 21 N.M. St. B. Bull. 1470, 1471 (Ct. App. Oct. 28, 1982). The dissent criticized these cases as being only marginally supportive. Most of the cases relied on by the majority: (a) were concerned with a change in the hearing officer during the course of the hearing and (b) considered demeanor as a part of the constitutional right to confrontation. 99 N.M. at 269, 657 P.2d at 125.

28. 397 U.S. 254 (1970) (holding that a recipient of welfare benefits is entitled to a hearing prior to the termination of those benefits).

mination hearing.[29] Next, he found that "demeanor" is not an aspect of the constitutional right of confrontation as interpreted in New Mexico.[30] He also found that the United States Supreme Court "has never held that 'demeanor' is an aspect of the constitutional right of confrontation."[31] Finally, Judge Wood examined the particular circumstances of this case and determined that Gomez' demeanor was not necessary for the hearing to be conducted in a "meaningful manner."[32] Although the decision in this case finds that there is no blanket right to observation of demeanor in a post-termination hearing, it leaves open the possibility that there may be such a right in a case where the credibility of the witness is an issue.

The majority opinion of the court of appeals would have found a blanket due process right to observation of demeanor.[33] Much of the legal precedent relied on by both the majority and dissent of the court of appeals was correctly distinguished by the other.[34] The supreme court, therefore, should have provided better reasoning in support of its decision, including, perhaps, a discussion of the underlying policy issues not mentioned in the court of appeals' opinion.[35]

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29. The majority opinion of the court of appeals criticized this point, arguing that because the instant case is involved with a post-termination procedure, not a pre-termination hearing, *Goldberg* has no bearing upon the case. 21 N.M. St. B. Bull. at 1473.

30. Neither the defendant nor the majority in the court of appeals disagreed with this point, but they argued that it is not relevant to this case because in a fair hearing petitioner's due process rights are not similar to a witness's sixth amendment rights.

31. 99 N.M. at 268, 657 P.2d at 124.

32. *Id.*

33. *See supra* note 28.

34. *See supra* notes 28-31.

35. For example, there was no discussion of the importance of the perception of fairness by the person whose benefits are being terminated. *See* L. Tribe, *Structural Due Process*, 10 Harv. Civ. Rights—Civ. Lib. L. Rev. 269 (1975), who argues that this factor should be considered in deciding due process bounds. Nor was there any discussion of the importance of the government's reason for instituting telephonic hearings. The court also did not research the trend in other states toward telephonic hearings. *See, e.g.*, Corsi & Hurley, *Attitudes Toward the Use of the Telephone in Administrative Fair Hearings: The California Experience*, 31 Ad. L. Rev. 247 (1979). The authors explain that many California state agencies have adopted telephonic hearings as an improvement on hearings where the parties appear in person before a hearing examiner but do not appear together.

36. Board of Ed. of Alamogordo Public School Dist. No. 1 v. Jennings, 21 N.M. St. B. Bull. 1352 (Ct. App. Oct. 14, 1982) is also of some interest because it clarifies the process of proof used in de novo hearings held by the State Board of Education in reviewing local board decisions. In *Jennings*, the court held that the State Board may reject the findings and conclusions of its hearing officer who handled the de novo review and make a final decision without taking new evidence. This refinement of the law is consistent with Bertrand v. New Mexico State Bd. of Educ. 88 N.M. 611, 544 P.2d 1176 (Ct. Ap. 1975), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1976), which holds that the State Board may take new evidence if it wishes, and Board of Educ. v. New Mexico State Board of Educ., 88 N.M. 10, 536 P.2d 274 (Ct. App. 1975), which holds that the State Board is not compelled to follow the local board's decision even if the local board's decision is supported by substantial evidence.

37. 99 N.M. 198, 656 P.2d 861 (1982).

E. The Process of Proof

Two cases dealt with the process of proof in administrative proceedings.[36] *In re Donaldo A. Martinez, District Judge,*[37] concerned a proceeding of the New Mexico Judicial Standards Commission. The Commission conducted an investigation and an extensive hearing on the complaints of judicial misconduct against the judge, and filed its recommendation with the supreme court. Under article XI, section 32 of the New Mexico Constitution, the supreme court is required to review the Commission's record of the proceedings, but then make its own independent decision on the merits. The court declared that the complaint would have to be proved by "clear and convincing evidence."[38] In this case, and future cases of this kind, this choice of a standard of proof seems appropriate. It is not as strict as the beyond-a-reasonable-doubt standard used in criminal prosecutions, but is stricter than the civil preponderance of the evidence standard.[39]

In *Chavez v. Employment Security Commission,*[40] the supreme court reaffirmed the vitality of the "legal residuum rule" in New Mexico.[41] The issue on appeal in *Chavez* was whether there was substantial evidence to support the Employment Security Commission's determination that Ms. Chavez was discharged from her employment for misconduct and, therefore, not entitled to unemployment compensation. The court found that the testimony favoring the Commission was hearsay, and given the absence of "legally competent" evidence in favor of the Commission, the court reversed its finding.

Chavez is particularly noteworthy for its well-reasoned dissent by Justices Payne and Easley. The Justices noted that New Mexico adopted the legal residuum rule in *Young v. Board of Pharmacy,*[42] in which the license of a pharmacist was in question. The *Young* court held that where a person's livelihood is at stake, the legal residuum rule will be applied. The application of this rule was extended in *Trujillo v. Employment Security Commission,*[43] which involved a dispute about unemployment com-

38. 99 N.M. at 193, 656 P.2d at 866.

39. The New Mexico Supreme Court in *Martinez* relied upon *In re* Hanson, 532 P.2d 303, 308 (Alaska 1975), which reasoned that this stricter standard should be used because a proceeding to deprive one of public office is of a "serious nature." 99 N.M. at 193, 656 P.2d at 866.

40. 98 N.M. 462, 649 P.2d 1375 (1982).

41. The legal residuum rule requires a reviewing court to set aside an administrative finding unless the finding is supported by evidence which would be admissable in a jury trial. Davis, Administrative Law § 16:6 (2d ed. 1980). For additional discussion of this rule, see Utton, *The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico,* 10 N.M.L. Rev. 103, 109 (1979-80).

42. 81 N.M. 5, 462 P.2d 139 (1969).

43. 94 N.M. 343, 610 P.2d 474 (1980).

pensation. The Justices noted, however, that the legal residuum rule is now largely abolished in the United States. They agreed with the observation of Professor Davis that "rejection of the residuum rule does not mean that an agency is compelled to rely on 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."[44] The dissent stated that the loss of a professional license, as in *Young*, should not be equated with the "loss of a few hundred dollars in unemployment compensation" as in this case.[45] The dissent called upon the court to reverse *Trujillo* in this case or in the earliest subsequent case that comes before the court.

F. The Decision Making Process

In *Mountain States Telephone and Telegraph Company v. Corporation Commission*,[46] the supreme court announced that prejudgment of a case by a commissioner would have serious consequences. On appeal, Mountain Bell raised the question whether certain statements made by several of the three commissioners before, during, and after the hearing amounted to a specific prejudgment of the case or otherwise exhibited improper bias.[47] The court found it need not answer this factual question because it was judging independently the reasonableness of the order on appeal.[48] Nevertheless, the court held that in the future, comments by a commissioner which constitute prejudgment may constitutionally invalidate the ensuring order of the Commission. An invalid Commission order means that the entire rate increase requested by the company automatically would go into effect.[49]

III. JUDICIAL REVIEW

A. Scope of Review[50]

A reviewing court in most cases is required to uphold the decision of an administrative agency "unless the decision was (1) arbitrary, capricious

44. 98 N.M. at 466, 649 P.2d at 1379 (citing 3 Davis, Administrative Law § 16:6 (2d ed. 1980)).

45. 98 N.M. at 467, 649 P.2d at 1380.

46. 99 N.M. 1, 653 P.2d 501 (1982).

47. 99 N.M. at 7, 653 P.2d at 507. For example, on a radio show prior to the hearing on Mountain Bell's rate increase request one commissioner stated that although Mountain Bell had sought $48 million, the Commission staff consultant recommended no more than $29 million and the commissioner himself said that he thought "it will probably be lower than that." *Id.*

48. 99 N.M. at 7, 653 P.2d at 507; see also *infra* notes 84-93 and accompanying text, which discuss the nature of this review.

49. *See* N.M. Const., art. XI, § 8.

50. One sub-topic of judicial review not discussed in the text is limitations on review through the doctrines of exhaustion and primary jurisdiction. In one case decided this year, Gonzales v. Whitaker, 97 N.M 710, 643 P.2d 274 (Ct. App. 1982), the plaintiffs argued that the New Mexico

or an abuse of discretion; (2) not supported by substantial evidence; or (3) otherwise not in accordance with law."[51] In upholding a determination of the deciding body, generally the reviewing court articulates the test without analysis and then rules that the decision below was not arbitrary or capricious, was not an abuse of discretion, was supported by substantial evidence, and was lawful.[52] Cases upholding decisions on these grounds, therefore, generally do not afford useful analysis.

1. Questions of Law: The Arbitrary and Capricious Standard

This year, however, one case specifically discussed and set out the test for whether a decision is arbitrary, capricious, and not in accordance with law. In *Saenz v. New Mexico Department of Human Services*,[53] Saenz challenged the denial by the New Mexico Department of Human Services (DHS) of temporary disability benefits. Saenz' application for assistance was denied based on the testimony of two doctors. After notification of denial, he applied for a fair hearing, which was held six months after denial of benefits. Before the fair hearing, the hearing examiner sent Saenz two letters telling him to mail immediately to the examiner any documents Saenz wanted considered at the hearing. Although Saenz did not do so, he did submit a report at the hearing which was admitted into evidence. The document was a medical report by a third doctor and a consequent United States Social Security Department decision ruling that appellant was disabled. The hearing officer accepted the report into evidence, but the record showed that the original application was denied on the basis of the reports of the two doctors.[54] All parties agreed that DHS did not consider the third doctor's report even though it was introduced and accepted into evidence. Appellant claimed that because the report was not considered, the decision was arbitrary, capricious, and not in accordance with the law.

The court of appeals agreed. The court defined arbitrary and capricious as "that action which is unreasonable or does not have a rational basis . . . and . . . is a result of an unconsidered, wilful and irrational choice

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Environmental Improvement Agency (EIA) had primary jurisdiction over their complaint that a dairy, already approved by EIA, was a nuisance. The court disagreed, holding that the agency has already exercised whatever primary jurisdiction it held. This decision ensures that the law of nuisance will continue to be developed by the courts.

51. State of N.M. *ex rel.* Highway Dep't v. Silva, 98 N.M. 549, 550, 650 P.2d 833, 834 (Ct. App. 1982).

52. *Id. See, e.g.*, Board of Educ. v. Jennings, 98 N.M. 602, 608, 651 P.2d 1037, 1043 (Ct. App. 1982). For a discussion of evidence in the record which meets the standard, see Kerr-McGee v. N.M. Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

53. 98 N.M. 805, 808, 653 P.2d 181, 184 (Ct. App. 1982).

54. *Id.*

of conduct and not the result of the 'winnowing and sifting' process."[55] The court found that the decision by DHS in this case was arbitrary and capricious because it did not consider all of the evidence submitted to it.

The arbitrary and capricious standard relates to the overall process in which the facts are accepted and considered. Although one treatise says that under the arbitrary and capricious test the court must uphold agency decision if there is any rational basis for the decision,[56] New Mexico courts use the rule to test whether proper legal standards were applied or whether fair procedures were accorded.[57] Applying this rule in this case, the court reached the correct decision. A hard and fast rule that an agency is required to admit and consider all admissible evidence presented to it, regardless of the stage of the hearing process, however, could work a hardship on the agency and distort the decision-making process. Such a rule would require an agency to consider complicated and technical evidence without time or resources for the analysis necessary for reasoned decision-making, and would subvert the administrative process.

2. The Substantial Evidence Standard

The substantial evidence test was explained by the court in *Baca v. Employment Services Division of the Human Services Department of New Mexico*[58] as follows:

> (1) that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) that on appeal all disputed facts are resolved in favor of the successful party, with all reasonable inferences indulged in support of a verdict, and all evidence and inferences to the contrary disregarded; (3) and although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence.[59]

Implicit in the *Baca* test is the presumption of correctness in favor of the deciding agency.

One case this year, *New Mexico Department of Human Services v. Tapia*,[60] discussed the "whole record" variation of the substantial evidence standard.[61] DHS decided after a hearing that the county correctly ter-

55. *Id.* (citing Garcia v. Human Serv. Dep't, 94 N.M. 178, 608 P.2d 154 (Ct. App. 1979), *rev'd*, 94 N.M. 175, 608 P.2d 151 (1980)).

56. 5 J. Mezines, J. Stein & J. Gruff, Administrative Law, § 42-02 (1983).

57. Saenz v. New Mexico Dep't of Human Serv., 98 N.M. 805, 808, 654 P.2d 181, 184 (Ct. App. 1982).

58. 98 N.M. 617, 651 P.2d 1261 (1982).

59. *Id.* at 619, 651 P.2d at 1263 (citing Toltec Int'l v. Ruidoso, 95 N.M. 82, 84, 619 P.2d 186, 188 (1980)).

60. 97 N.M. 632, 642 P.2d 1091 (1982).

61. Browde, *Administrative Law*, 12 N.M.L. Rev. 1, 68 (1982).

minated Tapia's benefits. The court of appeals reversed, holding that DHS failed to meet its burden of proof, and the supreme court reversed the court of appeals. The supreme court explained that under the statute,[62] the court of appeals erred in ignoring a report in the record which provided sufficient evidence to uphold DHS's decision. The court of appeals should have considered all of the evidence in the record to determine whether DHS's decision could be upheld.

The supreme court's reasoning in *Tapia* shows the interrelation of the record as a whole review and the substantial evidence standard: (1) evidence supporting the decision must be substantial when viewed in the light furnished by the record in its entirety, but (2) substantiality is still measured in the manner explained in *Baca*. The latter point can be inferred from the *Tapia* court's failure to note otherwise. Specifically, then, even under a whole record review, in inquiring whether substantial evidence exists, New Mexico courts would generally apply a presumption that the administrative decision is correct.[63] This precludes the court from substituting its judgment for that of the decision-maker[64] and from weighing the evidence.[65]

[Note: Subsequent to this Survey year and shortly before this article went to press, the New Mexico Supreme Court decided *Duke City Lumber Company v. New Mexico Environmental Improvement Board,* No. 15,078 (Nov. 23, 1983). The court adopted the whole record standard of review for appeals from all administrative agency decisions, while at the same time reaffirming the legal residuum rule. In its decision, the court erroneously framed the application of the whole record standard to agency decisions in stating that whole record review does not mandate viewing the evidence in the light most favorable to support the agency's findings. This statement is clearly incorrect. *See New Mexico Human Services Department v. Garcia,* 94 N.M. 175, 608 P.2d 151 (1980). The decision effectively holds administrative agencies to a standard of reliance in their decision-making which is more stringent than that applied to courts. At the same time, the same agencies are denied the presumptions on appeal which support judicial decisions. At this writing, motions for rehearing have not been acted upon by the court.]

62. "The court shall set aside a decision and order of the director only if found to be: . . . (2) not supported by substantial evidence in the record as a whole. . . ." N.M. Stat. Ann. § 27-3-4(F) (1978).

63. Frazier v. Department of Human Serv., 98 N.M. 98, 99-100, 645 P.2d 454, 456 (Ct. App. 1982).

64. State of N.M. *ex rel.* Highway Dep't v. Silva, 98 N.M. 549, 555, 650 P.2d 833, 839 (Ct. App. 1982).

65. Frazier v. Department of Human Serv., 98 N.M. 98, 100, 645 P.2d 454, 455-56 (Ct. App. 1982).

3. Questions of Law

In reviewing questions of law previously decided by an administrative agency, the reviewing court may freely examine and interpret the law without according a presumption to the agency determination of legal questions.[66] Propositions of law not raised in the trial court, however, generally cannot be considered on appeal.[67] In *New Mexico Department of Human Services v. Tapia*,[68] the supreme court followed this doctrine in criticizing the court of appeals for having raised legal issues *sua sponte*, "without the benefit of briefs or arguments on appeal."[69] The court reiterated the exceptions to the rule as follows: (1) jurisdictional questions may be raised for the first time on appeal; (2) questions of a general public nature affecting the interest of the state at large may be determined by the court without having been raised below; and (3) the court will determine propositions not raised in the trial court where it is necessary to do so in order to protect the fundamental rights of the party.[70] The court then explained that these exceptions apply in very few cases and must be applied with restraint lest they swallow the rule.[71]

A case discussing many issues involved in the scope and standards of judicial review and noteworthy for its dissent is *Chavez v. Employment Security Commission*.[72] The supreme court reversed the district court's decision to uphold the Employment Security Commission on the issue of whether substantial evidence supported the decision that appellant was discharged from her employment for misconduct.[73] The court stated that whether the judgment of the district court was based on substantial evidence depends on whether there is a residuum of legally competent evidence in the record which would support a verdict in a court of law.[74] After discussing the evidence, the court concluded that, viewing the record as a whole, there was no legally competent evidence showing that appellant was guilty of misconduct because the evidence supporting the ESC was hearsay.[75] The court then concluded:

> Our assessment of appellant's own statement quoted above, said by

66. *See, e.g.*, Chavez v. Employment Security Comm'n, 98 N.M. 462, 649 P.2d 1375 (1982).
67. New Mexico Dep't of Human Serv. v. Tapia, 97 N.M. 632, 642 P.2d 1091 (1982) (citing Sais v. City Electric Co., 26 N.M. 66, 188 P. 1110 (1920)).
68. 97 N.M. 632, 642 P.2d 1091 (1982).
69. *Id.* at 634, 642 P.2d at 1093.
70. *Id.*
71. *Id.*
72. 98 N.M. 462, 649 P.2d 1375 (1982).
73. *Id.*
74. *Id.* at 463, 649 P.2d at 1376 (citing Young v. Board of Pharmacy, 81 N.M. 5, 462 P.2d 139 (1969)). *See* note 41 and accompanying text and text accompanying notes 50-52.
75. 98 N.M. at 464, 649 P.2d at 1377.

> appellees to show that she was warned, is that the statement only shows that appellant thought she was not given her Christmas bonus because she was not present at the company Christmas party. The statement quoted above is inadequate to show that appellant was actually warned about excessive absenteeism.[76]

It is clear from this language that although the court said it was applying the substantial evidence rule, and in other cases has said that it does not weigh the evidence in applying this rule,[77] the court, in fact, weighed the evidence here.

The dissenting opinion by Chief Justice Easley, concurred in by Justice Payne, took issue with the majority's scope of review, including the application of the legal residuum rule and its weighing of the evidence.[78] The dissent quoted the scope of review of ESC decisions set out in *Wilson v. Employment Security Commission*[79] and *Sandoval v. Department of Employment Security*.[80] Justice Easley explained that under these cases, the decision of the Commission is entitled to all the presumptions on appeal of all other cases and to the applications of the substantial evidence standard.[81] The dissent stated that the appellate court's function was to review the evidence considered by the lower court, not to weigh it.[82] The dissent went on to assert that the district court's decision is entitled to the presumption on appeal that all intendments and presumptions will be resolved against appellants in favor of proceedings in the trial court. The dissent criticized the majority's opinion for not adhering to the usual presumptions and the substantial evidence standard, and for reevaluating and weighing the evidence. The dissent's analysis was correct.

The majority's finding of lack of substantial trial evidence, because the ESC's position was supported by hearsay, also was strongly criticized by the dissent. The dissent stated that inasmuch as the ruling was controlled by the legal residuum rule, the rule was incorrectly applied here.[83] Although the import of this dissent is unclear, especially because the two dissenting justices have left the court, the case is useful for an analysis of the different applications of the scope of review.

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76. *Id.*
77. *See, e.g.*, Baca v. Employment Sec. Comm'n, 98 N.M. 617, 651 P.2d 1261 (1982).
78. 98 N.M. at 464, 649 P.2d at 1377. *See supra* note 41 and accompanying text.
79. 74 N.M. 3, 389 P.2d 855 (1963).
80. 96 N.M. 717, 634 P.2d 1269 (1981).
81. 98 N.M. at 465, 649 P.2d at 1378.
82. *Id.* (citing Duke City Lumber Co. v. Terrell, 88 N.M. 299, 540 P.2d 229 (1975)).
83. 98 N.M. at 465, 649 P.2d at 1379. For a discussion of this aspect of the dissent, see *supra* notes 42-45 and accompanying text.

4. Removal from the State Corporation Commission: The Constitutional Standard

Three cases during the Survey year reached the supreme court on removal from the State Corporation Commission. In each case, the court discussed its unique role in reviewing these removed cases. The first case is *General Telephone Company of the Southwest v. Corporation Commission.*[84] General Telephone filed an application with the State Corporation Commission for a rate increase in the amount of $2.2 million. In its decision, the SCC allowed an increase of only $694,000. General Telephone then filed a petition for an order of removal to the supreme court. The scope of review for cases removed from the SCC is determined by the New Mexico Constitution, article XI, section 7. That section provides that upon removal of an SCC proceeding to the supreme court, the supreme court may require or authorize additional evidence.[85] The constitution also gives the court power to decide these cases on their merits.[86]

This function is extremely unusual for a reviewing court[87] in that it allows the appellate court to arrive at a result in accordance with the preponderance of the evidence.[88] In *General Telephone,* the court explained that although it weighs the evidence, it is not a ratemaking body and does not have the power or authority to determine a fair rate of return. The court, therefore, after weighing the evidence, determines whether the order of the SCC is just and reasonable. After an independent determination based on the evidence adduced at the hearing before the SCC,[89] if the court does not find the order to be just and reasonable, it remands the matter to the SCC for further proceedings consistent with the court's independent determination.[90]

In *Mountain States Telegraph and Telephone Company v. Corporation Commission,*[91] the court stated that it believed the proper scope of review upon removal from the Corporation Commission is clear: the court may decide the case on the merits without indulging in any presumptions. The court went on to explain the rule by stating that the SCC's order will not

84. 98 N.M. 749, 652 P.2d 1200 (1982).

85. See Seward v. Denver & Rio Grande R. Co., 17 N.M. 557, 581, 131 P. 980, 988 (1913), where the court stated, "in no case does the constitution contemplate the taking of additional evidence in the Supreme Court, but as has been said, in a proper case, the cause will be referred back to the Commission for such purpose."

86. *See, e.g.,* Atchison, Topeka & S.F. Ry. Co. v. State Corp. Comm'n, 97 N.M. 424, 640.P.2d 924 (1982).

87. *In re* Donaldo A. Martinez, Dist. Judge, 99 N.M. 198, 656 P.2d 861 (1982).

88. N.M. Const. art. XI, § 7.

89. 98 N.M. 749 at 753, 652 P.2d 1200 at 1204.

90. *Id.*

91. 99 N.M. 1, 653 P.2d 501 (1982).

be disturbed if supported by satisfactory and substantial evidence.[92] It further elucidated this standard by stating that the term "satisfactory" is crucial to the test because it implies a weighing procedure, so that even if substantial evidence supports the SCC's ruling, the court may weigh the evidence and make a decision contrary to the SCC's order.[93]

IV. CONCLUSION

The New Mexico courts have decided significant issues of administrative law during the past Survey year. Generally the decisions are working to clarify and expand the law. The court's pronouncement regarding the prior notice restrictions on an agency's power to change its policy, as announced in *General Telephone Company of the Southwest v. Corporation Commission*,[94] however, should be reconsidered this coming year.

The *Duke City Lumber Company*[95] opinion, decided in 1983, should be consulted by practitioners for its effect on the substantial evidence test outlined in *Baca v. Employment Services Division of the Human Services Department of New Mexico*[96] and on the legal residuum rule as employed in *Chavez v. Employment Security Commission*.[97]

92. Mountain States Telephone and Telegraph Co. v. State Corp. Comm'n, 99 N.M. 1, 653 P.2d 501 (1982). *See also* the third case issued this year, Atchison, Topeka & S.F. Ry. v. State Corp. Comm'n, 97 N.M. 424, 640 P.2d 924 (1982).

93. 99 N.M. at 1, 653 P.2d at 501 (citing State Corp. Comm'n v. Mountain States Telephone and Telegraph Co., 58 N.M. 260, 267, 270 P.2d 685, 689 (1954)), *quoting* San Juan C & C Co. v. S.F., S.J. & NRY. Co., 35 N.M. 512, 2 P.2d 308 (1931).

94. 98 N.M. 749, 652 P.2d 1200 (1982).

95. 22 N.M. St. B. Bull. 1362 (Dec. 22, 1983).

96. 98 N.M. 617, 651 P.2d 1261 (1982).

97. 98 N.M. 462, 649 P.2d 1375 (1982).