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NOTES

State Administrative Procedure—Scope of Judicial Review

The past decade has seen the birth and growth of activities in many states to make uniform the procedural processes of the various state administrative tribunals. In several jurisdictions¹ including Ohio,² this development has ripened into a single comprehensive legislative enactment resembling the Model State Administrative Procedure Act.³ In other states

² Ohio General Code §§ 154-61 to 154-74 (1946).
³ The text of the Model Act is found in Handbook of the National Conference of Commissioners on Uniform State Laws 329 (1944); it is reprinted
no such thorough legislative treatment has been attempted, but some statutory procedure has been established to govern various phases of administrative procedure. In some of these states such areas of agency activity as licensing have been brought under the directives of a single uniform act; in others, only the procedure for appeal from agency decisions to the courts has been uniformly established by statute. It is the purpose of this comment to discuss and compare the scope of the judicial review of agency adjudications allowed under the appellate provisions of all of these statutes.

Each act provides in some way for judicial review of agency fact finding; ordinarily one of the grounds of appeal is that the agency's findings of fact are not supported by the evidence. Most of the acts provide that the appeal is to be upon a transcript of the record made before the agency and certified by it to the reviewing court. The question then arises: Is the reviewing court, in considering the record, to weigh for itself the evidence in order to decide whether to affirm or reverse the agency's findings of fact?

In states which have not undertaken to reform the procedure for appeal from administrative adjudications, the procedure for each agency is usually found among the statutes governing procedure for that particular agency. Thus, in those states, the practice varies considerably from agency to agency.

In California, CAL. CIV. CODE § 1094.5 (1949); Indiana, IND. ANN. STAT. §§ 60-1501 to 60-1511, §§ 63-3001 to 63-3030 (Burns 1953); North Carolina, N.C. GEN. STAT. ANN. §§ 143-195 to 143-198, §§ 150-1 to 150-7 (1943); North Dakota, N.D. REV. CODE §§ 28-3201 to 28-3222 (1943); Pennsylvania, PA. STAT. ANN. tit. 71, §§ 1710.1 to 1710.51 (1942); Virginia, VA. CODE ANN. §§ 54-2 to 54-19 (1950).

In Illinois, ILL. ANN. STAT. c. 110 §§ 264 to 279 (1948); New Hampshire, N.H. REV. LAWS c. 414, §§ 1 to 22 (1942); Tennessee, TENN. CODE ANN. §§ 9008 to 9018 (Williams 1934).

In California, § 1094.5 (b) (appeal on ground of "abuse of discretion," and that phrase defined to include cases in which "the order or decision is not supported by the findings, or the findings are not supported by the evidence."); Illinois, § 273 (appeal extends to all questions of law and fact, administrative findings are "prima facie true and correct."); Indiana, § 63-3018 (5); Missouri, § 536.140 (2) (3); New Hampshire, § 13 (burden of proof on appellant to show that the agency decision is "clearly unreasonable"); all findings of the agency deemed "prima facie lawful and reasonable."); North Dakota, § 28-3219; Pennsylvania, § 1710.44; Tennessee, § 9014 (by implication, since the appeal is de novo on the record); Virginia, § 54-16 (5); Wisconsin, § 227.20 (1) (d). North Carolina and Ohio specify no grounds of appeal; but in the former state the appellant is entitled to a trial by jury in the reviewing court of the matter which was before the agency, and in the latter state it is sufficient that the appellant is "adversely affected by any order of an agency issued pursuant to an adjudication." Ohio, § 154-73.

In California, §§ 1094.5 (a) and 1094.5 (c); Illinois, §§ 272 (b) and 274; Indiana, §§ 63-3018; Missouri, §§ 536.140 (1); New Hampshire, § 14; North Carolina, §§ 150-4; North Dakota, § 28-3219; Ohio, § 154-73; Pennsylvania, § 1710.44; Virginia, § 54-16 (5); Wisconsin, § 227.20 (1) Tennessee, § 9014, provides: "The hearing shall be on the proof in the transcript and upon such other evidence as either party may desire to introduce; "

in 33 IOWA L. REV. 372 (1948), and also in GELLHORN, ADMINISTRATIVE LAW—CASES AND COMMENTS 1119 (2d ed. 1947).
To give the reviewing court uncontrolled independence in according weight to the evidence in the record would in effect make the agency a mere examiner for the court, a result which nullifies the very purposes for which administrative agencies are said to have been established. Therefore, most of the state procedure acts have attempted to lay down some standard whereby the court is limited in its power to give its independent consideration. While these various statutes are intrinsically quite similar the courts have taken divergent views in construing these limitations upon their powers of review.

Under the usual provision, the court is to decide whether the agency decision is supported by "substantial evidence." The natural effect of such criterion is to require that the court examine the record in order to determine if the evidence is "substantial," and this would seem to indicate a process of weighing. Courts, however, have not always reasoned in this way. The Supreme Court of Wisconsin has ruled under its review statute that:

on a review based upon the record the court does not retry the case. It is the duty of the trial [reviewing] court to examine the record sufficiently to determine whether the [constitutional] rights of the petitioner have been invaded by an error of the commission.

This court expressly adopted the federal interpretation, as it then existed, of similar statutory language. While Wisconsin still apparently follows

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8 This justification of administrative law is a common one, expressed by many writers on the subject. See, e.g., Davis, Administrative Law, c. 1 (1951).

9 These provisions are discussed infra.

10 California, § 1094.5 (c) ("substantial evidence" if the court is not authorized to use its independent judgment); Indiana, § 63-3018 ("substantial, reliable, and probative evidence"); Missouri, § 536.140 (2) ("competent and substantial evidence"); North Dakota, § 28-3219 ("the evidence"); Pennsylvania, § 1710.44 ("substantial evidence"); Virginia, § 54-16 ("substantial and reliable evidence"); Wisconsin, § 227.20 (d) ("substantial evidence"). North Carolina has no specific provision. The Ohio statute, as amended, is discussed infra.

11 Two states make "preponderance" the test. Both of these states also use a negative approach, requiring affirmance unless the agency decision is unreasonable or unlawful by the designated quantum of evidence. New Hampshire, § 13 ("clear preponderance of the evidence"); Tennessee, § 9014, as amended 1951 ("preponderance of the proof").

12 The United States Supreme Court evolved an interpretation of the phrase "substantial evidence" as it was used in the National Labor Relations Act. The Supreme Court view seems to have culminated in Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 59 Sup. Ct. 206 (1938), which gave rise to the rule that the reviewing court, in examining for substantial evidence, is to review only the evidence favorable
this view, it is noteworthy that the United States Supreme Court has since modified its former rule.

In Missouri a somewhat less restricted interpretation has been placed upon the "substantial evidence" provision, which in that state is guaranteed by constitutional provision as well as by statute. While the Supreme Court in that state has said that the Court is only to "set aside decisions clearly contrary to the overwhelming weight of evidence," this result is more liberal in permitting court review than the Wisconsin view, for great stress is placed by the Missouri courts on the fact that the court is to review the entire record.

Although the Illinois statute is broader than Missouri's, the rules evolved by the courts of the two states for the scope of judicial review are similar.


The same interpretation of "substantial evidence" as under the Wagner Act has been placed upon the phrase where it is found in other statutes, and has become the standard interpretation used in the federal courts. See, e.g., Gray v. Powell, 314 U.S. 402, 62 Sup. Ct. 326 (1941), discussed in DAVIS, ADMINISTRATIVE LAW 882 (1951). See generally, COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS (1951).


The Federal Administrative Procedure Act, 60 STAT. 237 et seq., 5 U.S.C. § 1001 et seq. (1946), provides in § 10(e) for the substantial evidence test, in language differing only slightly from that of the Wagner Act and the Taft-Hartley Law. In Universal Camera Corp. v. N.L.R.B., 340 U.S. 487, 71 Sup. Ct. 463 (1951), the Supreme Court, construing the APA and the Taft-Hartley Act together, indicated that full effect is to be given to the entire record by the reviewing court, and decidedly broadened the scope of review under its former decisions. See Comment, [1951] U. OF ILL. L. FORUM 166. But see DAVIS, ADMINISTRATIVE LAW 871-2 (1951). The writers are not in agreement as to the present scope of judicial review as established by the Supreme Court. Compare, e.g., Jaffe, Judicial Review: "Substantial Evidence on the Whole Record," 64 HARV. L. REV. 1233 (1951) with Netterville, The Administrative Procedure Act: A Study in Interpretation, 20 GEO. WASH. L. REV. 1 (1951).

Mo. CONST., Art. V, § 22 (1945), provides that decisions of administrative agencies must be "supported by competent and substantial evidence upon the whole record."

Missouri, § 536.140(2).


The Illinois statute extends the scope of review to "all questions of law and of fact presented by the entire record before the court." While agency findings are, by the same statute, made "prima facie true and correct," the court is nonetheless to review the proceedings on the record, and is to reverse the decision of the agency if it is "manifestly against the weight of the evidence."  

Several states have adopted a still more liberal view, allowing an appeal which is characterized as "de novo on the record." North Dakota has reasoned that since the appeal from the reviewing court to an appellate court is, by statute, de novo on the record, then the appeal from an administrative agency to the reviewing court must likewise be de novo on the record. In California, by reason of constitutional interpretation, the court is to weigh the evidence for itself—a trial de novo on the record—in the case of appeals from decisions of state-wide agencies. A New Hampshire case shows the most interesting approach. In that state the procedure act allows

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District Electric Co., 358 Mo. 1062, 218 S.W.2d 765 (1949), an inference drawn by the agency and based upon circumstantial evidence was held to comply with the constitutional requirement, and in Scott v. Wheelock Bros., Inc., 357 Mo. 480, 209 S.W.2d 149 (1948), circumstantial evidence was also held sufficient. The Karch case contains the following statement of the Missouri position:

If the Commission's findings and award are supported by competent and substantial evidence upon the whole record, we may not go further and substitute our own judgment for that of the Commission. [Emphasis supplied].

358 Mo. 1062, 1069, 218 S.W.2d 765, 769 (1949).

Illinois, § 274. The wording of this statute is to be explained by the fact that earlier Illinois constitutional decisions have denied the power of the legislature to limit the courts' power to review agency fact finding. See Ots Elevator Co. v. Industrial Comm'n, 302 Ill. 90, 134 N.E. 19 (1922). However, the court may itself limit the scope of the review of fact finding. See Sullivan, Judicial Review in Illinois, [1949] U. OF ILL. L. FORUM 304, 317; Dodd, An Appraisal of Illinois Administrative Procedure Today, [1949] U. OF ILL. L. FORUM 181.

Local No. 638, Boot and Shoe Workers Union v. Brown Shoe Co., 403 Ill. 484, 491, 87 N.E.2d 625, 630 (1949). In Drezner v. Civil Service Comm'n, 398 Ill. 219, 227, 75 N.E.2d 303, 307 (1947), the court said:

While the Administrative Review Act does not purport to give a reviewing court the right to reweigh the evidence in the cause appealed from, still the courts have the power to consider the record to determine whether or not the findings are against the manifest weight of the evidence.


Standard Oil Co. v. Board of Equalization, 6 Cal.2d 557, 59 P.2d 119 (1936) (state-wide agencies may not perform judicial acts, but local agencies may do so, under the California Constitution); see Clarkson, Administrative Law and Procedure, 3 ANNUAL SURVEY OF CALIFORNIA LAW 5 (1951).
the admission, in certain cases, of additional evidence in the reviewing
court.\textsuperscript{24} It has been held that since in those cases the court must necessarily
weigh the evidence for itself, it follows that the legislature intended the
court to weigh the evidence independently in \textit{any} appeal, even though
solely upon the record.\textsuperscript{25} Such a construction, it should be noted, would
be open to several of the states which have similar provisions for the admis-
sion of additional testimony.\textsuperscript{26}

The courts of three of the states have thus far avoided any problems in
the construction of the scope of review provisions. The following language
of the North Carolina statute apparently establishes the "de novo on the
record" idea, at least if timely motion for a jury trial is made by the appel-

The person whose license is involved shall upon his appeal have the
right to a trial by jury of the issues of fact arising on the pleadings, but
such trial shall be only upon the written evidence taken before the trial
committee or counsel.\textsuperscript{27}

The Indiana review provision requires the court to make written findings of
fact,\textsuperscript{28} but further provides that:\textsuperscript{29}

On such judicial review such court shall not try or determine said
cause de novo, but the facts shall be considered and determined exclusively
upon the record filed with said court pursuant to this act.

This secures the right of the reviewing judge to weigh the evidence inde-
pendently, though restricted to the record. Tennessee merely provides that
the court shall "weigh the evidence and determine the facts."\textsuperscript{30} Since in
that state any party may, on appeal, introduce new evidence not heard by
the board,\textsuperscript{31} it would seem to follow that the judge could give his inde-
pendent consideration to the evidence in the record.

\textsuperscript{21} Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948).
\textit{But cf.} Southern California Jockey Club, Inc. v. California Horse Racing Board, 36
\textsuperscript{24} New Hampshire, § 14.
\textsuperscript{25} Grafton County Electric Light & P. Co. v. State, 77 N.H. 490, 93 Atl. 1028
(1941).
\textsuperscript{26} If additional evidence be allowed, the court may hear it in the following jurisdic-
tions: California, § 1094.5 (d) (when the court is otherwise authorized to give to
the record its independent judgment); Indiana, § 1140.110(g) (similar to Califor-
nia); New Hampshire, § 14; Ohio, § 154-73; Tennessee, § 9014; Virginia, § 54-
16(5).
\textsuperscript{27} In Farrand v. State Medical Board, 151 Ohio St. 222, 85 N.E.2d 113 (1949),
discussed \textit{infra}, the Ohio Supreme Court rejected a similar argument brought under
the Ohio act, § 154-73.
\textsuperscript{28} North Carolina, § 150-4.
\textsuperscript{29} Indiana, § 63-3018.
\textsuperscript{30} \textit{Ibid.}
\textsuperscript{31} Tennessee, § 9014, as amended 1951.
\textsuperscript{31} \textit{Ibid.}
In Ohio the scope of review is as yet uncertain. Ohio General Code Section 154-73 provides for appeals from administrative adjudications to the courts of common pleas in the following language:  

Unless otherwise provided by law, in the hearing of the appeal the court shall be confined to the record as certified to it by the agency. The court shall conduct a hearing on such appeal. The hearing shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the statutes applicable to such action.

It is clear from the first part of the above provision that the review is to be on the record.

This section was first construed by the Supreme Court of Ohio in *Farrand v. State Medical Board,* in which a limited practitioner of medicine had appealed from a Board ruling revoking his license to practice. The licensee had contended that the provision of Section 154-73 making the civil procedure statutes applicable meant that the court should independently weigh the evidence in the record. The Supreme Court, however, dismissed this notion by construing that provision to apply only as to new evidence admitted upon review. Of the legislative intent in providing for judicial review, the Court said:

the General Assembly did not intend that a court should substitute its judgment for that of the specially created board or commission but did intend to confer a revisory jurisdiction [only]

It is clear that the Court meant to exclude entirely the possibility of a de novo review of any kind, and even to avoid the test of “substantial evidence,” for the Court said:

the General Assembly has limited such right [of appeal] to an appeal for a review of the administrative procedure to ascertain whether the rights of the parties have been determined by the administrative agency

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32 *Ohio General Code* § 154-73, as amended by 124 Ohio Laws § 118 (1951). The amendment did not change the quoted portion of the statute. See note 45 *infra.*

33 Ohio allows for the admission upon appeal of additional evidence, if newly discovered, and such evidence is to be introduced in the reviewing court. § 154-73. See note 26 *infra.*

34 151 Ohio St. 222, 85 N.E.2d 113, *oral hearing denied,* 89 N.E.2d 615, 55 Ohio L. Abs. 282, *appeal dismissed,* 152 Ohio St. 492 (1949). The court of appeals had held that the reviewing court should have weighed the evidence, stating: "The failure of the Court to give the case his independent judgment violated a substantial right of the appellant." *Farrand v. State Medical Board,* 81 N.E.2d 279, 52 Ohio L. Abs. 552 (1948).

35 151 Ohio St. 222, 225, 85 N.E.2d 113, 114 (1949). The provision for admission of new evidence is also found in § 154-73. Apparently this construction embodied the legislative intent, for no amendment was made to this portion of the statute.

36 151 Ohio St. 222, 224, 85 N.E.2d 113, 115 (1949).
in accordance with the statutes appropriate to the proceeding before the administrative tribunal.\textsuperscript{37}

The strict view of the \textit{Farrand} decision has been applied several times by the lower courts of Ohio.\textsuperscript{38} The case of \textit{Hershberger v. Ohio Aviation Board},\textsuperscript{39} a common pleas decision, illustrates the implications of the \textit{Farrand} doctrine as employed by these courts. In that case it was held that the reviewing court cannot substitute its judgment if there is \textit{any} evidence in the record supporting the agency adjudication, and the court found that a presumption of the regularity of the proceedings of a town council was sufficient “evidence” to require affirmation.

Before the stringent \textit{Farrand} doctrine was announced, the several lower courts which considered the scope of the review accorded by Section 154-73 had arrived at a more liberal view.\textsuperscript{40} And some reluctance has been shown on the part of some of these courts to accept the Supreme Court's view.\textsuperscript{41} For example, a court of appeals has recently stated that the reviewing court is to decide whether the agency decision is “against the manifest weight of the evidence,”\textsuperscript{42} indicating that the court is to weigh the evidence in the record.\textsuperscript{43}

The legislature has now shown its disapproval of the \textit{Farrand} doctrine.\textsuperscript{44}
The General Assembly has amended the penultimate clause of Section 154-73, so that the clause now reads:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such other additional evidence as the court may have admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law. In the absence of such a finding by the court, it may reverse, vacate or modify the order or make such other ruling as, in its opinion, is supported by reliable, probative and substantial evidence and is in accordance with law. [Emphasis supplied].

This new provision brings Ohio’s act into agreement with the procedure provisions of a majority of the other states discussed. It is therefore apparent that no rule of Ohio procedure as to judicial review can be stated until the courts pass upon the amended act, and it is equally clear that several courses are open to the Supreme Court when it does decide the issue.

It appears that the General Assembly intended, by its amendment of Section 154-73, to allow the reviewing court to weigh the evidence in the record independently. It is possible, however, that the legislature will still have the problem of clearly establishing the powers of the reviewing court. For under Section 154-73 in its present form, the Ohio Supreme Court may still limit the scope of judicial review as under the Farrand case.

**Summary and Conclusion**

The confusion arising under these acts illustrates the need for a clearly phrased statutory provision for appeal from administrative adjudications. Enlightened legislation is the only solution. Among the more important considerations which should affect such legislation are the powers to be entrusted to administrative agencies, the different functions and methods of the several agencies to be governed, and the burden to be placed upon the courts. It is the writer’s opinion that while some judicial review of administrative action should be allowed, the “de novo” inquiry allowed in some states is impracticable. It serves no useful purpose, provided faith can be accorded the competence of the tribunal, and it tends to clutter the courts with litigation originally referred to agencies to avoid burdening the courts.

Whether Ohio will continue to have a problem as to the scope of review remains for the courts to decide. If the General Assembly does in the future find it again necessary to redefine the scope of review, it is suggested that the Parrand decision in a report to the Bar Association. See 23 Ohio Bar 603 (Oct. 16, 1950).

124 Ohio Laws —, effective August 28, 1951. The penultimate clause formerly read: “The court may affirm, reverse, vacate or modify the order of the agency complained of in the appeal. .”

See note 10 supra.

This is indicated by the Bar Association Committee Report, note 44 supra.