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Legal Summaries

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**Pepperdine University School of Law
Legal Summaries***

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* Prepared by the Legal Summaries Editors of the Journal of the National Association of Administrative Law Judges at Pepperdine University School of Law. The Legal Summaries are selected case briefs of recent court decisions on issues involving administrative law.

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UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA**Midwest Indep. Transmission Sys. Operator, Inc. v. Fed. Energy Regulatory Comm'n**, 388 F.3d 903 (D.C. Cir. 2004).

LAW: In order to compel rulemaking under most circumstances, there must be a demonstration that the agency's action was arbitrary, capricious, or an abuse of discretion.

FACTS: Under the Omnibus Budget Reconciliation Act of 1986, the Federal Energy Regulatory Commission (FERC) is required to assess and collect annual fees, which are to be calculated "on the basis of methods that the Commission determines, by rule, to be fair and equitable." Originally, charges were based on the amount of electricity transmitted and sales. However, in 2000, FERC implemented changes that would better reflect the "unbundling" of transmission and generation services that occurred during the 1990s. FERC proposed that costs be solely based on the amount of electricity transmitted; this policy was adopted in Order 641 after a notice and comment period.

However, in June 2000, crisis hit the electricity industry, as electricity prices skyrocketed in western states, particularly California. California state laws regulating energy prices forced utilities to suffer serious losses. As a result, FERC adopted a "Strategic Plan," which placed greater emphasis on market oversight. However, FERC denied requests for a rehearing on Order 641, which remained in place. Three transmission providers filed a petition asking FERC to reconsider its order. After these actions proved unsuccessful, they petitioned the court to review FERC's policy.

ANALYSIS: The court first analyzed the issue of jurisdiction; given the breadth of FERC's rulemaking power, the existence of a statute involving implementation by other authorities, and the presumption that Congress would place initial APA review in courts of appeals, it concluded that there was jurisdiction.

Articulating the standard of review, the court emphasized that it could only reverse FERC's actions if they were arbitrary, capricious, or an abuse or discretion. Deference was particularly warranted because the agency's determination was an exercise of rulemaking power; moreover, the interests in question were economic, whereas

cases reversing an agency's rulemaking decisions usually involve threats to health or safety.

In analyzing the agency actions, the court rejected the transmission providers' argument that FERC's change in focus undermined the basis of Order 641. FERC did not dramatically change its policy; rather, its reaction to the California crisis was an anomaly rather than a permanent shift, and transmission remained a priority with the agency. Moreover, in adopting Order 641, FERC was not exclusively concerned with transmission, but was simply placing greater emphasis on opening access to transmission systems in light of recent changes. Furthermore, FERC was able to explain its denial by stressing the need to focus on transmission in its reform of the western energy markets. Given the deferential standard of review, the court determined that FERC had provided satisfactory justification, and also concluded that it would be inappropriate to override FERC's order and interfere with the agency's attempts at reform.

HOLDING: Review of the FERC orders is denied.

IMPACT: The court retains its deference towards the quasi-legislative actions of agencies, and the transmission providers cannot judicially compel FERC to reconsider its policy.

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

Leia v. Ashcroft, 393 F.3d 427 (3d Cir. 2005).

LAW: The decision by an immigration judge who refused to give any consideration to unauthenticated documents was not supported by substantial evidence.

FACTS: Leia, a Ukrainian of Polish descent, claimed asylum after being beaten as a result of his involvement in the United National Front (UNF). In November 1995, the Immigration Judge (IJ) held that, based on her determinations of credibility, he was not eligible. Her holding was based largely on Leia's inability to obtain authenticated documents; she interpreted an agency regulation as forbidding the admission of these documents, and refused to consider

unauthenticated records as evidence in any capacity. In addition, the IJ cited inconsistencies with regard to the date of one of the beatings and inconsistent statements regarding the legal status of the UNF. Finally, the judge considered a Department of State advisory opinion and 1994 human rights report, which indicated that there were areas in the Ukraine where Leia could live free of persecution.

The Board of Immigration Appeals (BIA) gave Leia another opportunity to authenticate his evidence. Leia attempted to overcome the inconsistency in the date of his beating by submitting a hospital record. Additionally, he brought forth an expert on Ukrainian politics, who explained why it would be impracticable for Leia to authenticate documents. The IJ upheld the prior decision, stating that the expert's testimony was irrelevant as he was not an expert on authentication, and that Leia had failed to provide admissible authenticated documents. The BIA affirmed the IJ's decision, concluding that Leia had failed to offer sufficient evidence that he had a reasonable fear of persecution.

ANALYSIS: The court determined that the IJ's holding was inadequate under the substantial evidence standard, as a mistaken legal determination regarding the admissibility of documents undermined the agency's ability to correctly weigh the facts. Following recent precedent, the court held that the relevant agency rule did not absolutely exclude unauthenticated records, as asylum applicants may often be unable to get an authenticated document from a hostile government, and should be given the opportunity to authenticate evidence in other ways. Additionally, the court held that the decision to disregard the testimony of Leia's expert, as his expertise on Ukrainian politics was relevant to the issue of whether Leia could have his records certified. The medical records, which could explain one of the inconsistencies in Leia's testimony, should have been considered as evidence. Moreover, the court found that Leia's testimony regarding the legality of the UNF was not entirely contradictory; given the expert testimony, the inconsistencies might be attributed to the organization's unfair treatment by the Ukrainian government, and the IJ did not sufficiently explain her conclusion. Finally, the IJ's reliance on the Department of State profile and the 1994 human rights report was unwarranted, as the information was too general and out-of-date to provide substantial evidence for the

conclusion that Leia could successfully and reasonably locate to another region in the Ukraine.

HOLDING: Leia's petition is granted, and his case is remanded.

IMPACT: Leia and other asylum applicants may present documents as relevant evidence to demonstrate their fears of persecution without getting these documents authenticated by a potentially hostile government.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630 (9th Cir. 2005).

LAW: The Forest Service's issuance and renewal of special-use permits without a detailed analysis of possible cumulative impacts violated the National Environmental Policy Act's requirement that agencies take a "hard look" at the environmental consequences of their actions. Under the Wilderness Act, the Forest Service must determine both the necessity of commercial enterprise and the extent to which the enterprise is needed. The Forest Service is not entitled to Chevron deference when it gives out permits, and must consider its obligations, under the Wilderness Act, to preserve wilderness areas.

FACTS: Beginning in 1997, the Forest Service attempted to alter its existing Management Plan for the Ansel Adams and John Muir Wilderness Areas by granting special-use permits to commercial packstock operators and renewing earlier permits. High Sierra, a nonprofit organization, intervened and sought injunctive relief, claiming that the Forest Service's actions violated the National Environmental Policy Act (NEPA), the Wilderness Act, the National Forest Management Act (NFMA), and the Administrative Procedures Act (APA). The Forest Service adopted a plan immediately prior to the court's resolution, issuing a final Environmental Impact Statement (EIS), a Record of Decision, and a Wilderness Management Plan.

In its opinion, the lower court determined that the Forest Service complied with the NFMA and the Wilderness Act. The plan had

concluded that stock services were necessary after conducting an investigation, in compliance with the NFMA. Likewise, the court held that the Forest Service did not abuse its broad discretion under the Wilderness Act to determine acceptable amounts of commercial use. However, the court concluded that the Forest Service's actions violated NEPA, and thus granted the injunction and ordered the Forest Service to conduct a NEPA analysis of the cumulative impact of commercial packstock operations. Both High Sierra and the Forest Service appealed this decision.

ANALYSIS: High Sierra challenged the issuance of special-use permits. The Court determined that these were final agency actions with immediate consequences; thus, there was standing under *Lujan*.

The court found that the Forest Service had clearly violated NEPA's mandate that federal agencies take the necessary "hard look" at the potential environmental consequences of any given action. In its issuance of multi-year special use permits, the Forest Service failed to compile an EIS which considered the cumulative impact of issuing multiple permits. Moreover, the agency's attempt to classify its renewals as "categorical exclusions" which did not need to comply with NEPA requirements failed, as this stance contradicted the Forest Service's own regulations. The lower court's injunction was upheld; the court is given broad discretion to fashion a remedy, and the court properly balanced the risk of irreparable harm against the impact on the operations of the Forest Service.

In addition, the court found that the Forest Service did not comply with its obligations under the Wilderness Act. Under the Act, the agency is given the responsibility of preserving the "wilderness character" of an area; although commercial ventures are largely prohibited, commercial services are allowed to the extent they are necessary to realize the recreational and other purposes of the wilderness. Although the court deferred to the Forest Service's finding that packstock operations were "necessary," it also found that the agency failed to determine the extent to which these services were necessary. Finally, because the Forest Service was not acting with the "force of law" when issuing permits, the court declined to give *Chevron* deference to the agency's policy; thus, its interpretation of the relative importance of conservation and recreation in the Wilderness Act was only given "respect." The court ultimately concluded that the Forest Service's responsibility to preserve the

areas' wilderness character for future generations was not adequately considered, and that the agency was therefore acting outside its area of statutory discretion.

HOLDING: The District Court's injunction is upheld, and the case is remanded for a determination of appropriate relief for Wilderness Act violations.

IMPACT: The Forest Service must conduct a NEPA analysis of cumulative impacts and a site-specific analysis for each permittee, plus it must reduce the number of special-use permits. *Chevron* deference is not available for the Forest Service's determinations of its Wilderness Act responsibilities, and it may be separately liable for overemphasizing the recreational uses of the wilderness at the expense of conservation.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

Doe v. Rumsfeld, 341 F.Supp.2d 1 (D.D.C. 2004).

LAW: Agencies must adhere to the procedures set forth in their own regulations, even if they would not be required otherwise. Rules concerning the use of anthrax vaccines to combat inhalation anthrax were not a "logical outgrowth" of the original rulemaking process, which concerned cutaneous anthrax.

FACTS: Since 1972, the Food and Drug Administration (FDA) has been responsible for creating regulations which ensure the safety and effectiveness of biological products. It first considered the efficacy of anthrax vaccine absorbed (AVA) in 1973; an Advisory Panel recommended it as protection against cutaneous anthrax for the at-risk population of individuals who could become infected with the bacteria, particularly those who handled imported animal hides, bones, and hair. In 1985, the FDA proffered a Proposed Rule, which would reclassify bacterial vaccines. The agency proposed classifying AVA as a Category I substance, concluding that the risks were satisfactory for the limited group in question. No comments were received regarding AVA, and no action was taken by the agency.

The Department of Defense (DoD) instated its Anthrax Vaccination Immunization Program (AVIP) in 1997; the program required that service members be inoculated with AVA. The next year, Congress prohibited the administration of investigational or unapproved drugs to service members without informed consent or a Presidential waiver. Subsequently, President Clinton, in an Executive Order, required the DoD to obtain informed consent before administering investigational drugs, and also stated that waivers would only be granted in cases of absolute necessity.

In October 2001, a petition was filed; it requested that the FDA declare AVA ineffective for use against inhalation anthrax and alleged that the prior studies were unsatisfactory. Later, military personnel and DoD employees successfully obtained an injunction against the use of AVA without informed consent or a Presidential waiver. Shortly afterward, the FDA announced a Final Rule which classified AVA as a Category I drug. In its determination, the FDA cited the early study as well as a medical report and surveillance data conducted after the 1985 notice-and-comment period. After the Final Rule was announced, the court stayed the initial injunction except with respect to the original plaintiffs. The plaintiffs asked the court to reinstate the injunction, claiming that the rule was invalid.

ANALYSIS: The court noted that, although the FDA is afforded a high level of deference for its scientific determinations, it must comply with the relevant procedures. Although the decision to classify AVA as a Category I drug is an adjudicative determination rather than a comprehensive rule, the agency exercised its discretion to require notice and comment procedures; thus, the FDA must comply with these procedures as set forth in its own regulations.

The FDA failed to provide the public with a meaningful opportunity to comment on its decision. The determination to classify AVA as a Category I drug relied on studies that began long after the original comment period. Moreover, the Final Rule deviated significantly from the 1985 Proposed Rule; as it was not a “logical outgrowth” of that rule, notice-and-comment procedures were required. AVA was intended to protect against cutaneous anthrax, and parties would not have been informed of the possibility that the vaccine might be used to immunize individuals against inhalation anthrax. This lack of a meaningful opportunity to comment caused

prejudice, as the agency would have been exposed to opposing arguments if it had provided such a meaningful opportunity.

Finally, the court extended its permanent injunction beyond the named plaintiffs. The court noted that district courts have wide latitude to issue injunctions, and it concluded that it would be appropriate to issue a government-wide injunction in these circumstances. Broad relief would protect similarly situated parties from the application of an invalid programmatic rule.

HOLDING: The government is enjoined from forcing inoculations until notice-and-comment procedures are complied with.

IMPACT: Until the FDA complies with notice-and-comment procedures, military personnel and DoD employees may be compelled to submit to AVA without informed consent or a Presidential waiver.

UNITED STATES DISTRICT COURT, WASHINGTON

Green v. Trans. Sec. Admin., 351 F.Supp.2d 1119 (W.D. Wash. 2005).

LAW: Orders establishing No-Fly and enhanced screening Selectee lists were outside the district court's jurisdiction, and, because the constitutional challenges were intertwined with challenges to the larger program, the court could not consider these challenges. A government-created stigma or injury to one's reputation is not enough by itself to create a due process violation.

FACTS: The Transportation Security Administration (TSA) is responsible for screening passengers and property that are transported on passenger aircraft. To fulfill its goals, TSA has implemented two Security Directives which target groups that may pose safety risks. The "No-Fly List" prohibits individuals on the list from flying, while the "Selectee List" requires that people on the list go through extra screening procedures before being allowed to fly. However, the TSA allows individuals to challenge their placement on the No-Fly List through an ombudsman process, although the effectiveness and availability of the process has been disputed.

Innocent passengers who have been placed on both lists have challenged the adoption and administration of the lists, claiming that the TSA's actions have violated their Fourth and Fifth Amendment rights. These passengers claimed that they suffered harm to their reputations by being identified for screening, and that they were subjected to unreasonable searches.

ANALYSIS: Most of the claims were held to extend beyond the District Court's jurisdiction. First, Congress' special review statute indicates that the court of appeals would have jurisdiction over final agency actions. The Security Directives and No-Fly Lists are orders, providing a statement of the TSA's position and immediately affecting the parties involved. Moreover, because the broad constitutional claims are intertwined with the underlying merits of the Security Directives, the court could not review these claims without considering TSA policy, which it was unable to do.

However, the Ombudsman Clearance Procedures are not orders, but voluntary procedures, and the court was therefore able to review the claim that these procedures did not provide notice or an opportunity for innocent passengers to clear their names. The court concluded that the plaintiffs' injury was not substantial enough to implicate a liberty interest. Although singling out airline passengers for review may stigmatize them or cause them to become associated with terrorists, the passengers must be deprived of a tangible interest as well; injury to reputation alone, without something more, does not establish a due process violation. Furthermore, as nobody has the right to travel without any burdens, the burdens on a single mode of travel do not implicate the plaintiff's right to interstate travel.

HOLDING: The complaint is dismissed.

IMPACT: Airline passengers will not be able to challenge the TSA's Security Directives in a district court. This decision upholds the principle that individuals who are stigmatized by government action will not automatically be able to establish a due process violation unless they can also demonstrate a separate tangible harm.

CALIFORNIA STATE COURT

Bldg. Indus. Ass'n of San Diego County v. State Water Res. Control Bd., 22 Cal.Rptr.3d 128 (Cal. Ct. App. 2004).

LAW: State and local Water Control Boards acted within their authority under the Clean Water Act's provision that permit requirements limit pollution to the "maximum extent practicable" when they imposed stringent requirements on permittees.

FACTS: The Clean Water Act, prohibits the discharge of pollutants from "point sources" except in cases where the polluting party obtains a National Pollutant Discharge Elimination System (NPDES) permit. In addition, the terms of NPDES permits depend on the state water quality standards in a given area; water quality standards are based on the designated uses of a body of water as well as the conditions necessary to protect those uses. Congress' 1987 amendments to the Clean Water Act, which address the problem of storm sewer discharge, permit the fashioning of NPDES controls for municipal storm water discharge which reduce pollution "to the maximum extent practicable." The State Water Resources Control Board (State Water Board) is given the authority to issue NPDES permits under California's Porter-Cologne Act.

The California Regional Water Control Board, San Diego Region (Regional Water Board), after conducting a series of public hearings, issued a municipal storm sewer permit. Based on factual findings, the Regional Water Board prohibited permittees from discharging pollutants which have not been reduced to the maximum extent practicable or discharging pollutants which may contribute to the exceeding of state and federal water quality standards. Additionally, municipalities must report their violations and outline a means for improvement, and they are required to implement "best management practices" to minimize the effect of pollutants produced by storm water runoff.

Subsequently, an administrative appeal was filed by the Building Industry Association of San Diego County (Building Industry); the State Water Board made some changes to the permit but denied the Building Industry's appeal. The Building Industry brought its case to court. After a trial court decided in favor of the Water Boards, the Building Industry appealed, challenging the trial court's finding that

the Water Boards did not violate the federal Clean Water Act and claiming that the Water Boards imposed requirements which exceeded the “maximum extent practicable” standard allowed by federal law.

ANALYSIS: In looking at the language and history of the Clean Water Act, the court concluded that the Water Boards had the authority to promulgate the storm water permit requirements. The statute specifically permits government entities to promote techniques which are deemed “appropriate” for the control of pollutants, and, therefore, the “maximum extent practicable” was not intended to limit the Water Boards’ ability to adopt permit standards. Furthermore, given Congress’ intent to reduce the harms stemming from storm water pollution, the Clean Water Act should be interpreted as giving administrators the tools to combat storm water pollution rather than limiting their discretion. This interpretation is also consistent with prior interpretations of the Clean Water Act.

The court also rejected the Building Industry’s contention that compliance with the Water Boards’ standards was impossible. The court found that the Building Industry never met its burden of showing that the agency’s findings were not supported by the facts. Moreover, the legal argument that a “maximum extent practicable” standard would require an economically “feasible” solution is unpersuasive, given the standard’s inherent flexibility.

HOLDING: The trial court’s decision is affirmed.

IMPACT: Water Boards have the flexibility to fashion effective controls against municipal storm water pollution without having to adhere to the explicit text of the statute.

CONNECTICUT STATE COURT

Solomon v. Conn. Med. Examining Bd., 859 A.2d 932 (Conn. App. Ct. 2004).

LAW: Substantial evidence supported the Medical Board’s decision to revoke a physician’s license, and, as the physician’s case was

given appropriate consideration by panel members, his due process rights were not violated.

FACTS: Connecticut's Medical Examining Board brought charges against Solomon to revoke his license; the Board took action based on the fact that New York had suspended his license due to allegations of negligence, incompetence, and fraud, and the Board also contended that the alleged negligent actions constituted grounds for revocation. During six nonconsecutive days in 2001, Solomon's case was heard by a three member panel, which included one physician. The panel concluded that Solomon's testimony was not credible, that the department's expert was more credible than one of Solomon's experts, and that the testimony of Solomon's other expert supported the department's allegations. Solomon's license was revoked.

Solomon appealed, claiming that his right to due process was violated and that the finding was not supported by substantial evidence. In support of his due process claim, Solomon claimed that one of the panel members slept during portions of the hearing, that panel members were absent during portions of the hearing, and that only one panel member was a physician. The lower court upheld the revocation, finding Solomon's allegations to be without merit, and Solomon appealed.

ANALYSIS: The court agreed with the lower court's conclusions. The panel composition satisfied statutory requirements, and supplemented its arguably limited expertise by listening to the expert testimony of physicians. The court deferred to the lower court's finding that the panel member who Solomon accused of sleeping was attentive, asking questions throughout the hearing, concluding that this conclusion was not clearly erroneous. In addition, the absences of panel members were excused absences, and every panel member was familiar with the record in its entirety, in compliance with applicable statutes. Moreover, the court concluded that any alleged violation of due process did not materially prejudice Solomon, who had overwhelming evidence against him; thus, the court would not be required to set aside the administrative decision even if there was a due process violation.

Likewise, the court concluded that the panel's findings had provided a substantial basis from which its legal conclusions could be

inferred. The record contained a conclusive judicial admission that Solomon's New York medical license had been suspended, and the documentary evidence of negligence was adequate grounds to support the Board's revocation of the license. Additionally, in deference to the panel's role as trier of fact, the court refused to analyze its determinations of credibility.

HOLDING: The lower court's holding is upheld, and the Board's revocation is sustained.

IMPACT: This decision endorses Connecticut's procedural requirements, which were complied with by the Medical Board, and also demonstrates deference to the factual findings of the administrative panel and lower court.

DELAWARE STATE COURT

Free-Flow Packaging Int'l. v. Sec'y of the Dep't of Natural Resources and Env'tl. Control, 861 A.2d 1233 (Del. 2004).

LAW: After a statute changed the method of calculating permit fees, the administrative agency charged with assessing fees could calculate a polluter's permit fees without promulgating a regulation. Furthermore, the agency's assessment, based on past service reports, was not arbitrary and capricious, and the agency did not have to recalculate its statistical data after the statutory modifications were enacted.

FACTS: The federal Clean Air Act requires sources of air pollution to obtain operating permits, giving states responsibility over the permitting process. In 1999, Delaware's General Assembly changed the fee structures in its permitting plan; whereas fees were originally determined through emission levels alone, permit fees would be calculated by using an emissions-based "user fee" and a "base fee," which encompassed Department of Natural Resources and Environmental Control (DNREC) services for a given source of pollutants. After the new fee structure was adopted, the permit fee for Free-Flow increased from \$7,000 to \$20,000, and the company's classification changed from "small" to "complex" polluter. Free-

Flow only paid part of the fee, and DNREC issued a Notice of Violation, which was later upheld by the Environmental Appeals Board and affirmed by the Superior Court. Free-Flow appealed the decision to the Delaware Supreme Court, claiming that the assessment was either procedurally invalid or an arbitrary and capricious decision.

ANALYSIS: The court denied that DNREC was engaging in capricious policy-making. DNREC, following the statute, placed the company into one of four categories, using service expenses and emissions in its calculations. Because the DNREC was required to publish its results in the Delaware Register and Regulations and the statute provided information about the fee structure, affected parties could refer to written standards and concerns about arbitrary agency actions were therefore unfounded. Furthermore, the actions of the General Assembly in approving the modifications gave DNREC the authority to change base fee categorizations without implementing a regulation, particularly given the fact that the permit fees would be closely monitored and subject to revision.

In addition, the court concluded that DNREC's categorization of Free-Flow was not arbitrary and capricious. The record supported the DNREC's initial service estimates, which were used in calculating the permit fee. Moreover, although DNREC did not repeat its analysis after the statute was revised, the court concluded that requiring a reevaluation would be redundant and pointless.

HOLDING: The Superior Court's decision is affirmed, and DNREC's assessment is upheld.

IMPACT: Agencies may implement clear statutory directives outlining methods of classification without being required to create separate regulations.

FLORIDA STATE COURT

Fla. Democratic Party v. Hood, 884 So.2d 1148 (Fla. Dist. Ct. App. 2004).

LAW: The risk of uncertainty stemming from non-uniform recount procedures creates an immediate danger to the public, justifying an agency's creation of an emergency rule before an upcoming election.

FACTS: The Florida Department of State (Department) was given responsibility for certifying the state's voting systems, and was required by statute to adopt rules outlining what would constitute a clear indication of a voter's choice on a given voting system. The Department amended a Rule concerning recount procedures as applied to touchscreen voting systems; it concluded that no recounts would be conducted for these systems, as the use of touchscreen voting machines could not result in overvotes and review of undervotes would not reveal voter intent. The Department's rule was challenged and invalidated by an Administrative Law Judge (ALJ); the ALJ concluded that the Department did not have the authority to enact the Rule, as the legislature required the Department to "adopt specific rules" to determine voter choice in a certified voting system.

Subsequently, the Department issued an Emergency Rule which counted the machine's results as conclusive and eliminated manual recounts of overvotes and undervotes. To justify its adoption of the emergency rule, the Department stated that the absence of an applicable rule in the wake of the ALJ's decision could adversely affect the upcoming elections. The Emergency Rule was considered necessary to enact uniform standards for conducting manual recounts of touchscreen systems and ensure confidence in the voting process. The Florida Democratic Party (FDP) petitioned for review, claiming that the emergency rule merely reiterated the earlier invalidated rule and that the Department's reasons did not identify a sudden or unforeseeable event which would validate emergency rulemaking.

ANALYSIS: In a *per curiam* opinion, the court denied the FDP's petition for review. The court noted that, if an agency finds an immediate danger to public health, safety, or welfare which requires emergency action, it may institute any rule necessary to combat that danger. Without considering the merits of the Emergency Rule, the court concluded that the Department complied with applicable standards for emergency rulemaking. The court noted that, unless uniform recount rules were instituted, the electoral process could fall victim to the same confusion that plagued the state during the 2000 presidential elections. Additionally, the court certified the question of

the Emergency Rule's propriety, an issue "of great public importance," to the Florida Supreme Court.

HOLDING: The petition for review is denied, and the question of whether the Department enacted a valid emergency rule is certified to the Florida Supreme Court.

IMPACT: Agencies may bypass rulemaking procedures to avoid uncertainty in the voting process immediately before an election.

ILLINOIS STATE COURT

Nader v. Ill. State Bd. of Elections, 819 N.E.2d 1148 (Ill. App. Ct. 2004).

LAW: An Electoral Board's act of mechanically affixing numbers to potential candidates' petitions is a "reasonably incidental" administrative action and does not violate the Election Code. The Electoral Board is only empowered to consider whether a petition complies with Election Code requirements, and cannot issue subpoenas in order to investigate the manner in which objections were compiled.

FACTS: Ralph Nader and his electors (Candidates) filed a nominating petition with the State Board of Elections (Board). After the petition sheets were filed, the Board mechanically stamped page numbers to the bottom of each page. Later, an objector filed a petition challenging several of the signatures on the petition, claiming that the signatures were not from registered voters or were not authentic. In addition, the objector referred to several suspect signatures by citing to the Board's page numbers.

The Board, convening as the State Officers Electoral Board (Electoral Board), began to investigate the objector's allegations. During the investigation, the Candidates filed a motion to subpoena the payroll records of State employees who allegedly worked on the objector's petition at taxpayer expense, in violation of Election Code provisions. The hearing officer held that the Electoral Board had no power to investigate these violations, and the Electoral Board did not issue any subpoenas. After completing its investigations, the

Electoral Board sustained most of the objections and struck one third of the signatures on the ballot. After the signatures were stricken, the Candidates did not have enough signatures to be eligible for the ballot, and the Electoral Board ordered that Nader's name not appear on the ballot.

The Candidates petitioned for judicial review, challenging the Board's interpretation of the Election Code. After the Board's decision was affirmed, they appealed the matter to the circuit court. The Appellate Court later accepted the Candidates' request to appeal on an accelerated docket. In addition, they filed a request in the Illinois Supreme Court for a supervisory order mandating the reversal of the Board's decision and the placement of Nader on the ballot; however, the request was denied.

ANALYSIS: The court rejected the Candidates' contention that the Board violated the Election Code by mechanically adding page numbers to the petition. The relevant language, which prohibits filed petitions from being withdrawn or altered, was found to be a limitation on potential candidates rather than the Board. Moreover, numbering the pages was a "reasonably incidental" means of allowing the Board to perform its task of processing the petition.

Moreover, the court concluded that the Electoral Board could not issue subpoenas in its investigation. Although the Electoral Board is given the discretion to issue subpoenas, its inquiry is limited by the Election Code; it can only investigate whether a petition complies with Election Code requirements. Thus, the Electoral Board could not issue subpoenas in order to investigate the manner in which the objections were compiled.

HOLDING: The circuit court's decision is affirmed.

IMPACT: The scope of the Electoral Board's investigations is strictly limited, and it cannot investigate incidental matters that do not directly relate to the sufficiency of a petition, including alleged statutory violations by interested parties.

INDIANA STATE COURT

Borsuk v. Town of St. John, 820 N.E.2d 118 (Ind. 2005).

LAW: Zoning decisions which deviate from a comprehensive building plan are not presumptively arbitrary and capricious. A comprehensive plan is merely a guide, which a town must take into account when balancing relevant concerns.

FACTS: Chester Borsuk, the owner of a parcel of land that was partially zoned for residential use, petitioned the St. John Plan Commission to rezone his entire parcel for commercial use. Although the town's Comprehensive Plan foresees commercial zoning of the entire area in the future, and despite the fact that every other lot on the block is zoned for commercial use, the Plan Commission denied the petition, and the Town Council denied the request for rezoning. In its denial, the Plan Commission found that rezoning would not promote the welfare of the town or conserve property values. Borsuk filed a petition in court, claiming that the denial was arbitrary and capricious, and that it was an unconstitutional taking. A trial court upheld the Town's decision, but the Court of Appeals reversed it and ordered the Town to rezone Borsuk's parcel.

ANALYSIS: The court described the comprehensive plan as a guide to community development, rather than a strict set of rules which a community must follow. Moreover, the Indiana Code only requires that the legislature "pay reasonable regard to" the comprehensive plan, permitting other factors to be taken into account. Thus, the court rejected the Court of Appeals' conclusion that a municipality must demonstrate a compelling interest before making a zoning decision which deviates from the comprehensive plan.

In determining whether the zoning decision was arbitrary and capricious, the court noted that the Plan Commission did consider the statutory factors in reaching its decision. The Town properly weighed relevant factors and balanced competing interests, ultimately endorsing a zoning decision which was a permissible deviation from the Comprehensive Plan. Concerns which were addressed during meetings, including traffic congestion, the need for road construction, and property values, provided a rational basis for this conclusion.

In addition, the court upheld the trial court's admission of an affidavit explaining the rationale for the Town's decision; the affidavit acted as a supplement to the minutes rather than a substitute for the Town's official records. Finally, the court held that the zoning regulation would not constitute a taking, as it did not deny Borsuk economically viable use of the land and served a substantial state interest.

HOLDING: The trial court's decision is affirmed.

IMPACT: Zoning authorities may choose to depart from comprehensive building plans while making individual decisions without having to demonstrate a compelling reason for these determinations.

MISSISSIPPI STATE COURT

Titan Tire of Natchez v. Miss. Comm'n on Env'tl. Quality, 891 S.2d 195 (Miss. 2004).

LAW: Courts must defer to agency actions unless they are unsupported by substantial evidence, arbitrary and capricious, outside the scope of the agency's authority, or violative of a statutory or constitutional right.

FACTS: Fidelity Tire Manufacturing Company (Fidelity) sold its facility to Titan Tire of Natchez (Titan) in 1998, after Fidelity filed for bankruptcy. Because the tire manufacturing businesses discharged treated water into a nearby stream, a National Pollutant Discharge Elimination System (NPDES) permit was required. Fidelity had last modified its NPDES permit in 1996. The modified permit had been issued in order to allow Fidelity to install groundwater monitoring wells, and it had increased the amount of water discharge while decreasing the permissible contaminant concentration levels. However, Fidelity never installed the groundwater wells before selling its property to Titan.

Titan began operations without requesting modifications to the 1996 permit, and even applied for a new permit with the same terms as the earlier one. In addition, Titan hired several former Fidelity

employees, including the company's environmental manager. In 2001, the Mississippi Department of Environmental Quality (MDEQ) issued a complaint, alleging sixteen violations of Titan's NPDES permit. MDEQ argued that Titan became responsible for adherence to the permit after the property was purchased, while Titan contended that the permit should not be enforced against it, as Fidelity never installed the groundwater wells. After a hearing, the Mississippi Commission on Environmental Quality (Commission) found that Titan had violated its permit; the company was fined \$5,000. Titan appealed to the Hinds County Chancery Court, which upheld the Commission's decision. Subsequently, the issue was appealed to the Mississippi Supreme Court.

ANALYSIS: The court stressed that judicial review of an agency's decision is extremely deferential and limited; courts can only consider whether its action was supported by substantial evidence, whether it was arbitrary and capricious, whether it was outside the scope of the agency's authority, or whether it violated a statutory or constitutional right. The determination was supported by substantial evidence, as Titan's own discharge monitoring reports indicated that the company had exceeded allowable discharge limits under the terms of the permit. Likewise, as the order was supported by substantial evidence, it was not arbitrary and capricious. Moreover, the relatively low fine amount indicated that the Commission was not abusing its discretion.

Furthermore, the court concluded that the Commission was acting within its power to determine compliance using its chosen methodology. Although Titan argued that the Commission should have used mass limits, which are allowed by the Environmental Protection Agency (EPA), the court disagreed, noting that the EPA allows for both limits, and that the terms of the permit specified that concentration limits were to be used. Also, although Titan complained that it was a victim of "selective enforcement," the court did not find any violation of the company's equal protection rights, as the decision to prosecute was not based on impermissible grounds such as race, religion, or the exercise of constitutional rights.

HOLDING: The Chancery Court's decision is affirmed.

IMPACT: The longstanding policy of judicial deference to administrative agencies is upheld by the court, and aggrieved parties will be unable to contest an agency decision except under certain specific circumstances.

NEW JERSEY STATE COURT

Ass'n of Nurse Anesthetists v. Bd. of Med. Exam'rs, 859 A.2d 1239 (N.J. Super. Ct. App. Div. 2004).

LAW: Regulations requiring that nurse anesthetists be supervised are not arbitrary and capricious. Furthermore, while the regulations influence the nursing industry, they do not fall outside the jurisdiction of the Board of Medical Examiners, as it is allowed to regulate the practices of physicians administering anesthesia in their offices. Supervision requirements do not create an illegal guild, as nurse anesthetists are still able to practice.

FACTS: In 1997, the New Jersey State Board of Medical Examiners (BME) proposed changing its standards for the administration of anesthesia in physicians' offices during non-minor surgeries; the new regulation would require certified registered nurse anesthetists (CRNAs) to be supervised by an anesthesiologist or a physician who was not performing the surgery before performing anesthesia. The New Jersey Association of Nurse Anesthetists (NJANA) challenged the adoption of the regulation, testifying against the proposal during a public hearing. The regulation was adopted in 1998, but it decided not to take a position on an alternative privileging procedure until more hearings were held. An alternative privileging provision, which required practitioners without hospital privileges to submit an application for alternative privileges before offering anesthesia in an office setting, was adopted in 2001. NJANA challenged the adoption of these regulations in court.

ANALYSIS: Because an agency is best suited to review its own regulations, the court deferred to the BME's discretion and authority. The court noted that the agency had been given the authority to distinguish between services which nonprofessionals could perform and those which must be reserved to licensed health care providers.

Furthermore, the BME's exercise of line-drawing in this case was not arbitrary and capricious, given the discrepancy in expertise between CRNAs and anesthesiologists.

The court also rejected empirical data brought forth by NJANA which suggests that mortality rates for patients receiving anesthesia from CRNAs and anesthesiologists are similar; the studies relied on by NJANA do not compare mortality rates in an office setting, and the BME is empowered to draw the logical conclusion that anesthesiologists are better suited to administer anesthesia without waiting for bad results. Additionally, as NJANA presented its evidence during the hearing process, it was already properly considered. Furthermore, the court concluded that the conclusion of the Federation of State Medical Boards (FSMB) that CRNAs may act without the supervision of an anesthesiologist was not particularly relevant; the rule merely leaves the decision of whether to "opt out" of anesthesiologist requirements to state medical boards.

Additionally, the court concluded that the regulation was within the scope of the BME's authority. Even though the regulation indirectly impacted the nursing profession, it was directed at physicians who offer anesthesia in an office setting, and therefore fell under the BME's authority to regulate the practices of physicians. Finally, the court rejected the contention that the regulation establishes a "guild" for anesthesiologists, as CRNAs were still permitted to perform anesthesia under certain circumstances.

HOLDING: The court affirmed the BME's regulations.

IMPACT: Boards will continue to enjoy wide latitude when drawing lines to determine which practices may only be undertaken by licensed professionals.

UTAH STATE COURT

TDM, Inc. v. Tax Comm'n, 103 P.3d 190 (Utah Ct. App 2004).

LAW: Parties may seek judicial review before exhausting administrative remedies if exhaustion would serve no useful purpose, and, when a constitutional claim is a threshold legal issue, exhausting administrative remedies would be futile.

FACTS: Utah's new tax on sexually explicit businesses was challenged by a group of clubs featuring nude or semi-nude dancing and an escort service; the businesses claimed that the tax was content-based and therefore violated the First Amendment. The Tax Commission argued that the complaint was an "as applied" challenge and that the clubs would have to exhaust their administrative remedies before proceeding. The trial court dismissed the complaint for lack of jurisdiction.

ANALYSIS: The court noted that there was an exception to the exhaustion requirement when the exhaustion of administrative remedies would serve no useful purpose. The presence of a constitutional issue does not necessarily obviate the exhaustion requirement, as administrative hearings may eliminate the need to determine the constitutional issue and help to frame the factual issues. However, exhaustion of administrative remedies is not required when the legal questions are threshold issues which would need to be determined regardless of any developments that may occur during the administrative proceeding. As the clubs' First Amendment challenge is a threshold legal issue, and there is no alternative administrative basis which could resolve the issue, exhaustion would serve no useful purpose, and the trial court erred when it dismissed the claim.

HOLDING: The trial court's dismissal is reversed, and the case is remanded to the trial court.

IMPACT: Agencies may not require individuals to exhaust their administrative remedies before seeking judicial review of constitutional claims in cases where the constitutional question is central to the case and must necessarily be determined.

WISCONSIN STATE COURT

Gehin v. Wis. Group Ins. Bd., 692 N.W.2d 572 (Wis. 2005).

LAW: To constitute substantial evidence, an agency's findings must be based on more than uncorroborated hearsay evidence.

FACTS: Luann Gehin sought review of the determination made by the Group Insurance Board (Board) that her income continuation insurance benefits be terminated. The Board concluded that Gehin was no longer incapable of engaging in “substantial gainful activity,” basing its findings largely on the uncorroborated written hearsay reports of Drs. Whiffen, Lemon, and Redlin. These reports indicated that Gehin could work under certain restrictions; she would have to alternate between sitting and standing, could not lift more than 5 pounds, and must avoid bending and twisting. However, the reports did not indicate that any jobs which would fulfill these requirements were available. Gehin’s expert, Dr. Shannon, testified during the hearing, but the Board ultimately disregarded Shannon’s testimony, as he did not examine Gehin during the relevant time period. After the Court of Appeals upheld the termination, stating that the decision was supported by substantial evidence, Gehin appealed the matter to the Wisconsin Supreme Court.

ANALYSIS: Looking at the evidence put forth by the Board, the court concluded that the Board’s decision was not supported by substantial evidence. Although rules of evidence are relaxed in administrative matters and the hearsay reports were properly admitted, this uncorroborated hearsay could not form the sole factual basis for an administrative decision. The court thereby affirms the legal residuum rule, which states that an agency cannot rely solely on uncorroborated hearsay, which does not have sufficient probative force to constitute substantial evidence.

The court also distinguished the United States Supreme Court’s decision in *Perales*, which indicated that hearsay evidence may constitute substantial evidence under the social security statute. The court indicated that *Perales* was largely predicated on the need for efficient procedures in the context of a massive Social Security program; to the court, these concerns were not relevant in Gehin’s case. Moreover, the court stressed that the reports in *Perales* were corroborated by in-person testimony, in contrast to the reports used against Gehin. In addition, the court did not find the medical reports to be reliable, as they failed to address the ultimate question of whether Gehin fit the Board’s contract definition of “totally disabled.”

The court rejected the Board’s other arguments in opposition to the application of the legal residuum rule. Even though Gehin could

theoretically have subpoenaed the authors of the reports, this option is often unrealistic, and the court was unwilling to place the burden of requesting a subpoena on a claimant. Furthermore, the hearsay evidence would not be admissible as an exception to the hearsay rule. The medical records were compiled in anticipation of litigation, rather than as documents made in the course of business or records created by a health care provider. Additionally, the Board did not comply with the admissibility requirements for business or medical records; no qualified witness provided testimony to establish the medical records, and the Board did not give notice to Gehin. Finally, the court concluded that, even if the reports were admissible under an exception to the hearsay rule, they would still be hearsay, and, therefore, would only have limited probative value.

Although the hearsay reports corroborate each other, the court found this insufficient. For the court, hearsay evidence must be corroborated by non-hearsay evidence in order to prevent “bootstrapping” of uncorroborated evidence and preserve the fairness of the proceeding. However, the court indicates that this requirement would not apply in all circumstances, particularly if the evidence is presented by a claimant rather than an agency. Moreover, parties may stipulate to certain facts or agree that the agency may base its findings on uncorroborated hearsay, circumventing the requirement that agencies corroborate their hearsay documents.

Finally, the court rejected the argument that Gehin waived her right to challenge the Board’s exclusive reliance on the documents because she failed to object to their admission. At the time of admission, such an objection would have been futile, and a claimant should therefore not be required to object.

HOLDING: The appellate court’s decision is reversed.

IMPACT: The holding preserves the use of the residuum rule in Wisconsin, severely limiting the scope of the Supreme Court’s decision in *Perales*. The findings of administrative agencies will be held to a more stringent standard, as decisions cannot be based solely on uncorroborated hearsay such as medical reports.

