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Legal Summaries

Lisa Lester

Pepperdine University School of Law
Legal Summaries*

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* Prepared by Lisa Lester, the Legal Summaries Editor of the Journal of the National Association of Administrative Law Judiciary 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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Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008).

LAW: The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (2008), provides a private right of action for any individual injured in either his property or business due to a violation of § 1962 (which contains RICO's criminal provisions). An individual may sue in the United States District Court and may recover three times the damages, plus reasonable attorney's fees.

FACTS: The Cook County Treasurer's Office annually holds a property auction in which it sells liens it has acquired from delinquent taxpayers. The prospective buyers do not bid in cash amounts; instead, they bid a percentage of the penalties due to the County. The property owner must pay the winning bidder in order to clear the tax lien. The bidder willing to accept the lowest percentage of the penalties wins the ability to purchase the lien on the property and pay the owed taxes. The original owner of the property may purchase his property back by paying the lien-holder the late taxes, plus the percentage paid to win the auction, and an additional twelve percent penalty on any other taxes paid by the lien-holder. If the property owner does not pay these fees within a certain time period, then the lien-holder may obtain a tax deed on the property, which essentially gives them ownership of the property. To prevent bidders from sending multiple agents to bid on the same property, the County adopted a "Single, Simultaneous Bidder Rule." This rule prohibits agents of buyers from being used. In addition, the bidder must submit bids in their own name and not in a third party's name. Moreover, if there are multiple bids at a zero percent rate, the County will allocate property on a rotating basis.

Both the Petitioner and the Respondent are regular bidders in these auctions. The Respondent brought suit against the Petitioner, alleging Petitioner had violated the "Single, Simultaneous Bidder Rule." Petitioner, Sabre Group LLC and its principal officer Rochman, arranged for other competing firms to bid in their name, so as to have multiple zero percent bids on several properties; thus, causing them to have a disproportionate share of the properties won at the zero percent rate.

ANALYSIS: The Court first addressed the Petitioner's alleged violations of RICO. Petitioner submitted multiple bids in violation of the "Single, Simultaneous Bidder Rule" and sent notice of their bids to the property owners by mail. Together, the mailings allegedly amounted to racketeering activities. Respondents were injured by losing the right to acquire liens on various parcels of property. Petitioner argued it was the County who received the fraudulent misrepresentations and not the Respondents; thus, no reliance by the Respondents existed. The Court rejected this argument and reasoned that RICO does not mention a first-party reliance requirement. Furthermore, the Court explained that a person may be injured because of mail fraud, even if the person does not rely on the mail fraud for any significant reason.

The Court gave a flexible definition of proximate cause, stating that the actual definition of what will constitute proximate cause varies case-by-case. The Court further recognized that in common law fraud, reliance on the misrepresentation is necessary in order to have a cause of action. The issue, however, is mail fraud, which is a civil RICO claim, not common law fraud. The Court added that the only person who can be injured from a fraudulent misrepresentation is the person who relies on it. In this case, Respondent was injured because of the County's reliance on the fact that the Petitioners were only bidding for themselves and not as part of a scheme to acquire a larger share of the property at the auction. The Court declined to narrow possible RICO claims and stated that they will give deference to Congress in certain situations.

HOLDING: The Court held that a plaintiff asserting a RICO claim based on mail fraud does not need to show reliance on the defendant's fraudulent misrepresentations as either an element of the claim itself or as an element necessary for proximate cause.

IMPACT: This holding has the potential to broaden the bases under which a federal RICO claim can be brought by a person who has suffered injury at the hands of another. Because a plaintiff does not need to show actual reliance on the defendant's fraudulent misrepresentations, they may be able to bring claims they were unable to bring before. The Court did recognize that there will often be other events which may displace the importance of a party's reliance, such as if the County had known about the fraudulent claims by the Petitioner in this case and still allowed them to participate in the auctions. Potential plaintiffs in a federal RICO claim, however, only have to show that someone relied on the fraudulent misrepresentations, not themselves personally, thus opening the door for more litigation.

CSX Transp., Inc. v. Ga. State Bd. of Equalization, 128 S. Ct. 467 (2007).

LAW: The Railroad Revitalization Regulatory Reform Act (Act), 49 U.S.C. § 11501 (2008), provides that the states may not assess railroad property at a higher ratio to the fair market value of the property than the ratio of other commercial property's fair market value.

FACTS: CSX Transportation, Inc. (CSX) had multiple railroad routes across the state of Georgia; making it subject to Georgia's ad valorem property tax. Although local county boards assess other commercial and industrial properties' value, railroad property is assessed by the State. The State's assessment is then submitted to the local county board for acceptance or alteration. In 2001, the Georgia State Board of Transportation (Board) placed a $4.6 million tax liability on CSX's property. The following year, a different method of assessment was used, which increased the fair market value of CSX's property by approximately forty-seven percent, to $6.5 million. CSX filed suit in the United States District Court for the Northern District of Georgia, claiming that its property was taxed at a ratio five percent higher than other similar commercial and industrial property. The District Court rejected CSX's argument and the Court of Appeals for the Eleventh Circuit affirmed.

ANALYSIS: The Court first addressed the Board's argument that there is a clear distinction between the State's valuation methods and their applications. The Court rejected this argument, stating that appraisers often employ several methods to determine the true fair market value (as there is no fixed market value for any type of property). These methods often produce vast differences in appraisals and the reviewing court must use the methods employed to determine whether the fair market value reached is fair. If the reviewing court were only to see the value and not the methods employed, the statute would likely be rendered inoperable. The courts would be forced into accepting the final value, since there would be no fixed, standard fair market value to measure it against. The Board next argued that a state's ability to assess taxes should be interfered with as little as possible by federal law. The Court rejected this argument, reaffirming the importance of ensuring that states treat railroads fairly and do not discriminate unfairly against them. The Court emphasized that a state may employ whatever valuation methods it desires, so long as they are not discriminatory in nature against the railroads.

HOLDING: Railroads may challenge the methods employed by the states in determining the value of railroad property as well as the state's application of these methods.

IMPACT: While the states may argue that this decision impedes on the state's ability to determine taxing rates, it merely ensures that discrimination will not be used against the railroads in assessing property value. The states are still free to select their valuation measure to determine the fair market value of properties, but they cannot employ methods which would treat railroads differently from other commercial properties.

Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 2007 (2008).

LAW: The Equal Access to Justice Act, 5 U.S.C. § 504(a)(l) (2008) permits a winning party in a lawsuit involving the United States government to recover reasonable fees and other costs in connection with a proceeding before a governmental administrative agency. For the most part, these fees are based on the prevailing market rate for the particular type of service involved.

FACTS: Richlin Security Service Company (Petitioner) was hired by the Immigration and Naturalization Service to provide guards for detainees at the Los Angeles International Airport. By mutual mistake, the contract misclassified the guard employees, and the

Department of Labor ordered Petitioner to pay back-pay under the Service Contract Act of 1965. Petitioner filed a petition with the Board of Contract Approvals of the Department of Transportation to reform the contract to make the Government responsible for all additional costs under the Service Contract Act. The Board ruled in its favor, and included that Petitioner could not recover paralegal fees at the billing rate, but solely at the cost to their attorneys. The Federal Circuit Court of Appeals affirmed the Board's decision and the Supreme Court of the United States granted certiorari.

ANALYSIS: The Government argued that the statute distinguished fees from other expenses, and that costs incurred by paralegals should be measured at the cost to the attorneys, rather than at the prevailing market rate. The Court disagreed with both arguments, stating that there is no distinguishing between fees and other expenses. In fact, Congress even uses the terms interchangeably. Furthermore, the Court equated paralegal fees to attorney's fees, which are measured at the market rate, rather than to costs from studies, analyses, and other reports. The Court also rejected the Government's argument that charging market rates for paralegal services would cause attorneys to give more work to their paralegals, with the intention that they could recover a higher percentage rate of their market value. This is because the Government makes no distinction between junior attorneys and senior attorneys, the latter of whom charge a higher rate.

HOLDING: The Supreme Court held that a prevailing party in a lawsuit involving the United States government may recover paralegal fees at the prevailing market rate.

IMPACT: Because fees are recoverable at market rates for virtually all parties involved in litigating a lawsuit before an administrative agency, parties which are brought before the agencies may be more likely to bring lawsuits, because they are now able to recover more of their litigation expenses. The Government may now think twice before bringing an action against a party, because the Government will now be responsible for more litigation costs. This could decrease the amount of actions brought before an administrative agency, as well as allow parties brought before an administrative agency to feel more secure that, if they are victorious, they can recover their costs at a fair market value.

Rowe v. N.H. Motor Transp. Ass'n, 128 S. Ct. 989 (2008).

LAW: Maine Revised Statute Annotated, Title 22 § 1555–C(1) and Title 22 § 1555-C(3) forbids anyone other than a Maine-licensed tobacco retailer from accepting a tobacco delivery. Furthermore, the statute requires that when a licensed retailer accepts or sends tobacco, the retailer must use a service that provides a type of recipient verification. In addition, no person can knowingly transport a product containing tobacco to another person in Maine unless either the sender or recipient has a Maine license.

FACTS: The New Hampshire Motor Transport Association filed suit, claiming that federal law pre-empts the Maine Statutes. The District Court and Court of Appeals for the First Circuit agreed.

ANALYSIS: The Court referred to the interpretation of the Airline Deregulation Act in *Morales v. Trans. World Airlines, Inc.*, 504 U.S. 374 (1992), which held that when the Court interprets a statutory provision and settles on its meaning, it is inferred that if the language is repeated in another statute, it also carries with it the judicial interpretation of that statute. The Court found that *Morales* applied to the case at bar because it indirectly involved motor carrier services by requiring a certain type of delivery service for the transport of products using tobacco. The Court stated that if they were to allow Maine to require special shipping measures, the Court would have to allow other states to do the same, which would create a disjointed system, and would defeat all congressional desire to leave matters such as this up to the market when there are no federal regulations in place. Maine argued that federal law does not pre-empt state law when the state is working to protect its citizens' health. The Court rejected this argument because the statute did not provide a public health exemption and Congress' concern was with the economy, not with state health provisions.

HOLDING: The Court held that federal law pre-empted the Maine Statutes in both Maine's efforts to regulate carrier services and its attempt to institute consumer-protection laws.

IMPACT: This decision may decrease the state's influence in economic areas involving common carriers. It may also decrease the number of areas in which states may use the public health exemption to justify regulations. The Court's holding, however, leaves open other areas of economic regulations to the state because the decision explicitly eliminates only regulations involving common motor carriers.

UNITED STATES COURT OF APPEALS, FEDERAL CIRCUIT

GHS Health Maint. Org., Inc. v. United States, 536 F.3d 1293 (Fed. Cir. 2008).

LAW: 48 C.F.R. § 1652.216-70(b)(6) provides that in the event that a contract between the government and an insurance carrier is not renewed past the initial term, neither party is allowed any adjustment of claim for the difference between the subscription rate prior to rate reconciliation and the actual subscription rate.

FACTS: GHS Health Maintenance Organization, Inc. (GHS) had formally contracted with the Office of Personnel Management (OPM) to provide health benefits to federal employees and federal retirees under the Federal Employees Health Benefits Program. Through the use of 5 U.S.C. § 8902(i), Congress directed the OPM to calculate rates at a basis which would reasonably reflect the actual cost of the benefits provided by the plan. Under this direction, the OPM negotiates annually with the insurance provider for rates in a two-step process. First, the insurance provider calculates a reasonable estimate for what it would charge "similarly sized subscriber groups" (SSSG) for the same services during a year. Second, the OPM and the carriers try to reconcile these estimates with the actual rates the insurance providers are charging for their services. If the costs are higher than the estimate, the provider will reimburse the OPM, and if they are lower, the OPM will pay the difference to the provider. Neither party, however, receives any additional money during the final year in which the contract is valid due to the Nonreconciliation Regulation (48 C.F.R. § 1652.216-70(b)(6)). GHS sued the government, claiming the Nonreconciliation Regulation violated 5 U.S.C. § 8902.

ANALYSIS: The Court addressed the question of whether or not the Nonreconciliation Regulation is valid. The Court applied the two-part test established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). First, the reviewing court must look to see whether congressional intent was clear for enacting the statute. If it is clear, the court must defer to this interpretation. If it is not clear, the court should move on to whether or not the agency interpretation of the statute was reasonable and based on an acceptable construction of the statute.

The Court first stated that Congress had not directly spoken to the question at issue. The statute at issue does not mention reconciliation, nor can any inference be made from the statute. The Court proceeded to step two and concluded that Congress intended to leave the steps the OPM can take in establishing rates wide open, thereby allowing the OPM to establish their own requirements. Any regulation that comes out of the OPM under this rulemaking provision is binding, unless the reviewing court finds it to be procedurally defective, vastly conflicting with the statute, or "arbitrary and capricious" under *United States v. Mead Corp.*, 533 U.S. 218 (2001). The Court found that the way the OPM determines rates takes into account factors that Congress did not intend, including a reasonable profit by the insurance provider. Thus, even though the OPM tried to ensure reasonable rates by having the insurance provider charge rates similar to what they would charge non-governmental agencies, they still took into effect what a reasonable profit would be by offering to reimburse the provider if the actual costs were lower than the estimated costs.

Moreover, the fact that the Nonreconciliation Regulation treats the costs differently in the final year than in other years of the contract directly undermines the congressional mandate found in 5 U.S.C. § 8902, which states that the rates be determined at a reasonable and equitable rate. The Court further stated that the congressional intent was not to ensure that the OPM received rates comparable to that of SSSGs. In addition, the Court gave two reasons why the regulation is considered arbitrary and capricious. First, the OPM cannot articulate a reason why the regulation was initially enacted. Second, even if there was a problem that the regulation was designed to address, the connection between the problem and the proposed solution is not solid enough to sustain the regulation. The Court further held that the OPM's claim that they could not obtain sufficient data to support their regulation is not a compelling reason to sustain the regulation.

HOLDING: The Court invalidated the OPM's Nonreconciliation Regulation, because it was arbitrary and capricious and directly conflicted with 5 U.S.C. § 8902.

IMPACT: This seems to take some authority away from federal agencies in determining rules by which Congress gave them broad authority. The decision also demonstrates that *Chevron* deference is alive and well. An agency must be guided by some principles when making decisions; thus, agencies cannot have open-ended authority when enacting rules based on statutory authorization.

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Tablada v. Thomas, 533 F.3d 800 (9th Cir. 2008).

LAW: Title 18 U.S.C. § 3624 provides that a prisoner serving a prison sentence of more than one year may receive credit towards the service of the entire sentence, beginning at the end of the first year of the term. The credit may be up to fifty-four days per year of the term of imprisonment (beyond time-served).The Bureau of Prisons (Bureau) determines the credit given. The credit awarded during the last year of the prison term must be pro-rated and credited during the last six weeks of the sentence. The Bureau's interpretation of § 3624 is provided by 28 C.F.R. § 523.20, which states that the fifty-four day credit will be available for each year served.

FACTS: Petitioner is an inmate at an Oregon prison who was sentenced to a twenty-year prison term for a narcotics charge. Petitioner filed an amended writ of habeas corpus challenging the calculation of his "good time" credit.

ANALYSIS: The Court stated that § 523.20 was entitled to *Skidmore* deference, because the section was adopted through the Administrative Procedure Act's notice-and-comment procedure. The Court determined that it was not eligible under *Chevron* deference because the Bureau's interpretation of § 3624 did not carry the force of law; thus, *Skidmore* should apply instead. Under *Skidmore*, the reviewing court examines certain factors, including the rational validity of the agency's decision and whether the agency has consistently applied its rationale to the application of the statute. The Court deferred to the Bureau's interpretation of the statute. Under the Petitioner's argument, he could have received up to 540 days and an additional 54 days after only serving 111 days; thus, giving a "windfall." The Court stated that Congressional intent was to have the statute interpreted so as to be equitable in nature; therefore, the pro-rated scheme would better serve the intent.

The Court recognized that the Bureau consistently applied the standard for sixteen years. Furthermore, even though the Petitioner and others had presented a reasonable interpretation of the statute, deference had to be given to the Bureau's interpretation. Petitioner finally argued that the correct interpretation of the statute belonged to the United States Sentencing Commission, which proscribed that good time credit be given on 15% of the length of the sentence. The Court struck down this argument, holding that the Sentencing Commission had never objected to the Bureau's interpretation and that the Bureau itself, not the Sentencing Commission, is responsible for the determination of good time credit.

HOLDING: The Ninth Circuit held the Bureau's interpretation of § 3624 reasonable and held that proper deference should be given to the interpretation under the *Skidmore* doctrine.

IMPACT: The Court reached a standardized guideline for the Bureau of Prisons for determining the amount of good time credit a prisoner is able to earn. It also clearly indicated that the Bureau is responsible for the determination of good time credit and not the United States Sentencing Commission, which seemingly institutes the pro-rated standard for determining good time credit without negotiation.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Wilderness Workshop v. U.S. Bureau of Land Mgmt., 531 F.3d 1220 (10th Cir. 2008).

LAW: The Roadless Area Conservation Rule of 2001 (RAC), 36 C.F.R. § 294.12(a)-(b), provides for the prohibition of road construction and the harvesting of timber and other construction in "inventoried roadless areas" (IRA) which are under the National Forest Service's control unless they fall within an exemption, including for public health and safety or for a restoration action. The National Environmental Policy Act of 1969 (NEPA), 40 C.F.R. § 1508, states that federal agencies must disclose through environmental impact statements (EIS), the possible impacts their actions and any connected actions may have on the environment.

FACTS: SG Interests, Ltd. sought authorization from the United States Bureau of Land Management (BLM) to construct and operate a natural gas pipeline on BLM land. Following the request, BLM engaged in an environmental analysis to determine what effect the proposed pipeline would have on surrounding areas. BLM then issued a Record of Decision (ROD) authorizing a thirty year, fifty foot construction right of way for the pipeline, as well as temporary use permits and road use permits. The construction was scheduled to last three years and the right of way was to be rehabilitated, but no more trees would be allowed to grow and all motor vehicles would be permanently restricted. Plaintiffs filed an action alleging that the ROD violated both the United States Forest Service's RAC and NEPA and also filed for an injunction barring SG Interests from constructing the pipeline.

ANALYSIS: BLM claimed that it could issue the ROD because the pipeline could be built without any road construction. The Plaintiffs claimed this decision by BLM was arbitrary and capricious. The Court rejected this argument, because Plaintiffs chose to believe BLM's definition of "travelway" in the RAC, as excluding any areas that were to be used for construction zones necessary for the pipeline. The RAC provides that IRAs may be used for other uses and construction zones do not necessarily have to be roads.

NEPA contains a provision whereby agencies must deal with the "cumulative impact" of any proposed action. This provision ensures that an agency cannot take an action that would result in a substantial environmental impact and divide it into separate actions, which individually have minimal environmental impact. Next, the reviewing court is supposed to apply an "independent utility" test, whereby the court must look to see whether or not one of the smaller actions would have any utility on its own, or if it needs to be combined with another event in order for it to serve an independent function. BLM decided the potential natural gas well developments were not connected actions with the construction of the pipeline. The Court recognized that the development of natural gas wells may become more attractive to developers with the installation of the pipeline, but further recognized that it was impossible to state with any certainty that development would actually occur. Furthermore, the Court stated there has been increased development of natural gas in the area of the pipeline due to increased national demand for natural gas. Thus, additional infrastructure to support the transportation of gas would be a result and not a cause of the development.

HOLDING: The Court did not grant the Plaintiff's motion for preliminary injunction, holding that BLM correctly considered the possible environmental impact under NEPA. In addition, the definition of "travelway" under RAC correctly excluded construction right of ways.

IMPACT: This holding has the ability to undermine the importance of EIS assessment because a potentially certain event from the result of a federal agency action now does not have to be considered when applying the requirements of NEPA. Moreover, the narrow interpretation of the definition of "travelway" in the RAC, specifically excluding construction right of ways, has the potential to exclude other conveyances which normally would be considered roads.

ARKANSAS STATE COURT

Arkansas Beverage Retailers Ass'n, Inc. v. Moore, 256 S.W.3d 488 (Ark. 2008).

LAW: Arkansas Annotated Code § 3-4-218 prohibits (post-February 18, 1971) liquor permits from being issued or transferred to any non-liquor store. A non-liquor store is a store that sells alcohol, in addition to its main sales item of food or other products.

FACTS: The Arkansas Beverage Retailers Association, Inc. appealed an Arkansas Circuit Court decision, which dismissed the Association's petition for judicial review of an Arkansas Alcoholic Beverage Control Board's (AABC) decision. AABC approved an application for the transfer of beer and liquor permits on behalf of Sam's Club. The permits were originally granted to a liquor store and AABC decided it would be more of a public convenience to allow Sam's Club to directly sell liquor.

ANALYSIS: The Arkansas Supreme Court held that the Appellants had standing due to the difficulty of its retailers (members) to compete. The Court stated that as long as a person believes his or her rights were sufficiently harmed, he or she has a personal stake in the result of a claim and will suffer real and immediate injury. Thus, there is sufficient standing. The Court believed Appellants had demonstrated this in their petition because the immediate injury would be the fact that Sam's Club would be able to sell other retail goods and its members would suffer because they were unable to sell these other retail goods in addition to liquor. Furthermore, Appellants successfully demonstrated disparate treatment under the statute.

HOLDING: The Arkansas Supreme Court reversed the circuit court's reasoning that Appellants had suffered a sufficient injury to justify standing under the Code, as its members were unable to compete on equal footing with retail outlets which were able to sell other goods besides liquor. Moreover, when a state court is confronted with a standing question that the federal Administrative Procedure Act addresses, the reviewing court does not need to turn to the federal act. Instead, the court may rely on the state's applicable administrative procedure act or other areas of law.

IMPACT: This decision has the ability to broaden an association's standing in cases involving its members. A perceived possibility of an economic harm is now sufficient to claim standing in an action against an administrative agency. In addition, the case limits the AABC's discretionary role in deciding who receives liquor permits, by taking away some discretion when future harm may occur.

COLORADO STATE COURT

Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream, 187 P.3d 1207 (Colo. Ct. App. 2008).

LAW: The Colorado Constitution, article XXVIII, section 2(7)(b)(III) provides that an electioneering communication does not include any communication issued or made during the regular course and scope of business. The Colorado Fair Campaign Practices Act §§ 1-45-109(5), 1-45-109(5)(c) states that the Secretary of State's office will provide all filed reports to the public via a website which shall allow residents to search the reports. In addition, one such search function should be the name of the candidate.

FACTS: The Committee for the American Dream (CAD) is a Colorado-registered political committee that supports political candidates with a pro-business and pro-property mindset. CAD is solely funded by contributions from the Colorado Association of Home Builders (CAHB). During the November 2006 election, CAD funded television commercials opposing John Kefelas, a Colorado House of Representatives incumbent seeking re-election. CAD contracted with Rock Chalk Media (Rock) to produce commercials and Rock contracted with Comcast Spotlight to broadcast the commercials. CAD filed reports with the Colorado Secretary of State for all contributions they received, as well as all expenditures they made in 2006, including those made to Rock. They did not file, however, itemized reports of the contributions made by CAHB, nor a "separate electioneering communications report," which would have named Kefelas as the target of their commercials. The Colorado Citizens for Ethics in Government (CCEG) filed a complaint alleging

CAD violated the Colorado Constitution Art. XXVIII and the Fair Campaign Practices Act (FCPA). The Administrative Law Judge (ALJ) found that CAD violated the electioneering communication reporting requirement when it did not name Kefelas as the target, and also held that CCEG's accusations regarding membership contributions filing were groundless and fined them because of this.

ANALYSIS: The Court first addressed the issue arising under Colorado Constitution Article XXVII, §2(7)(b)(III) when it was asked to clarify the definition of what constitutes a business. The Court rejected the ALJ's decision to make the distinction of whether an entity is a business based on their profit or non-profit status. Instead, the Court chose to define a business according to the purpose intended by the legislature. The Court discussed the reasons why Colorado voters adopted the article, including the desire to limit special interests' influence over the political process; current campaign financing requirements frustrated by large increases in electioneering communications; the public interest best served by the enforcement of limits on campaign financing; and full disclosure of political advertisements. The Court found CAD did not fall within the business exception because its advertisements were meant to influence the 2006 election. An exception could not be made for every broadcaster or other provider of media just because they provide media communications within the normal scope of their business. Providing media communications to the public is their business and to allow them to be exempt from the electioneering communication requirement would frustrate the purpose of the article.

The Court found that CCEG's claim CAD violated the FCPA Rule 9.3 and Colorado Constitution Article XXVIII, § 6(1), because CAD did not disclose the name of the candidate in the electioneering report. The Court struck down CAD's counter-argument that the Secretary of State unlawfully adapted FCPA Rule 9.3 because it was out of his normal rule-making abilities. The Court stated that administrative rules carry with them a presumption of validity and will not be struck down unless the party challenging the rule has proved beyond a reasonable doubt that the rule should be invalidated. FCPA Rule 9.3 provides that the name of the candidate referred to in the electioneering communication should also be included in the electioneering report. The Court found that FCPA Rule 9.3 was within the Secretary of State's purview to enforce, because it was within the Secretary's ability to proscribe any rules and regulations "necessary and proper" to enforce any administrative rules and articles of the Colorado Constitution.

The Court last dealt with CCEG's argument against the ALJ's determination that its claims against CAD for membership contribution were groundless. The Court found the ALJ did not err in finding that the CCEG made no attempts to mitigate the costs involved in the lawsuit. In addition, the Court held that there was no error in finding that CCEG, at the time of trial, had no evidence to support its membership contribution claims.

HOLDING: The Court upheld the ALJ's holding that CAD violated FCPA Rule 9.3 and Colorado Constitution Article XXVIII, § 6(1), because CAD did not disclose the name of the candidate the electioneering communication referred to and that exempting CAD from reporting requirements would "frustrate the purpose" of the Colorado Constitution. The Court further upheld the ALJ's decision to impose a $1,000 penalty against CAD.

IMPACT: This holding has the potential to increase disclosure in election communication. Currently, political ads directed at a particular candidate must be specifically identified as such. In addition, the public should have search access via the Internet for all election communications covered under this case. The decision also represents that great deference to an ALJ is given unless the party bringing the suit can show a gross abuse of discretion or evident error.

DISTRICT OF COLUMBIA COURT

Berkley v. D.C. Transit, Inc., 950 A.2d 749 (D.C. 2008).

LAW: Title 7, § 311 of the District of Columbia Municipal Regulations provides that a person cannot receive unemployment compensation if he or she voluntarily leaves his or her job, unless it is for "good cause connected with the work." There is a presumption the employee left his or her job involuntarily unless the employer can prove otherwise. The burden of proof remains on the employer and not the employee. Section 311.6 provides a list of situations which do not constitute "good cause connected with the work," including a minor reduction in salary, transfer to similar work, and general dissatisfaction with the work being done. Section 311.7 provides situations which would fulfill the requirement, including racial and sexual harassment, failure to pay, unsafe working conditions, and illness and disability caused or made worse by the work.

FACTS: Petitioner, Ruth E. Berkley, filed a request with the District of Columbia Department of Employment Services (DOES) for unemployment benefits, which was subsequently denied. Berkley appealed to the Office of Administrative Hearings (OAH), saying that her previous employer, D.C. Transit (Transit) issued her a bad check for services rendered and she was not receiving adequate hours. OAH scheduled a hearing, at which Transit did not appear and Berkley appeared pro se. At the beginning of the hearing, the Administrative Law Judge (ALJ) informed Berkley that the issues to be decided were whether the ALJ had jurisdiction to hear the case and whether Berkley had voluntarily left her job. If she did voluntarily leave her job, then the question was whether she had good cause. The ALJ went into a detailed discussion with Berkley of whether or not she was eligible for unemployment under the D.C. Municipal Regulations.

The information obtained during Berkley's testimony was that she received disability benefits from the Social Security Administration for her disability and that she obtained work with Transit through the "Ticket to Work" program. She had worked at Transit full-time for approximately two months when she was involved in a verbal altercation with a dispatcher. After this altercation, Berkley did not receive assignments for approximately two weeks. She later returned to a regular work schedule, of which she seemed to express many complaints over the quantity and quality of the work that was provided to her. Berkley also asserted that the reason she left Transit was because the owner did not have any work for her.

The ALJ held that Berkley had not presented clear and convincing evidence that she involuntarily left Transit, and that her actions were not those of a reasonable person in the work place. Moreover, the

ALJ noted that Berkley did not take appropriate actions that a reasonable employee in the work place would take when they were unsatisfied with the working conditions.

<u>ANALYSIS:</u> Berkley argued that the ALJ failed to ensure that as a pro se litigant she truly understood the consequences of testifying, as well as the law. The Court stated that generally, a pro se litigant is accorded no special treatment in courts of law. However, there are a few exceptions, including cases concerning a remedial statute. The ALJ does not need to give the pro se litigant tactical advice, but the ALJ may have confused Berkley when he stated that "it's initially the [e]mployer's burden to establish that the [c]laimant voluntarily left work." This statement may have made it seem like the employer only had the burden of production in establishing this claim, and not both the burden of production and persuasion, as they do under the relevant statute.

The Court distinguished between "voluntarily leaving" and "voluntarily quitting." The Court again emphasized that there is a presumption in favor of the employee leaving his job involuntarily, unless the employer could convince the Court that the employee left voluntarily. In order to assess whether an employee left voluntarily, the Court or ALJ must consider all of the circumstances surrounding the employee's decision to leave. In this case, the Court held that the ALJ did not effectively deal with all of the surrounding circumstances. There is a category under involuntary termination that deals with the "quit or stay-and-be-miserable" as well as an exception under "quit or be fired." Either of these two exceptions could have been applied to Berkley because she was not receiving adequate hours. Thus, she received an inadequate salary and was highly dissatisfied and unhappy with her working conditions. The Court found that the ALJ's findings were not supported by substantial evidence in the record.

In determining whether Berkley was entitled to unemployment compensation, the ALJ must decide whether a reasonable person would have taken the same actions in similar circumstances. The Court held that a reasonable person would take the same actions if his or her work hours were substantially reduced, as Berkley's were here. Even though Berkley's testimony may have been confusing, she repeatedly emphasized that she was not receiving enough hours and tried to offer unauthenticated evidence to this point.

HOLDING: The Court held that Berkley was prejudiced by the ALJ's confusing explanation of the required burden of proof and that there was not substantial evidence on the record to show whether or not Berkley left for good cause connected with the work. The Court remanded the case to the OAH.

IMPACT: This case has increased an employer's burden of proof in an unemployment compensation case, since the burden of proof that the statute requires was strictly enforced. Also, greater leeway may be given to a pro se litigant who is unfairly treated in an unemployment compensation case and whose testimony and presentment of evidence is not given proper review by the ALJ presiding over the case.

INDIANA STATE COURT

MicroVote Gen. Corp. v. Office of the Sec'y of State, 890 N.E.2d 21 (Ind. Ct. App. 2008).

LAW: Indiana Code § 4-21.5 - 5-13 provides that any party who wishes to seek judicial review of an administrative agency action must transmit documents within thirty days including the agency record, all documents used by the agency in its deliberations, and any other material used in agency actions of the type at issue. An extension of time may be granted to the seeking party for good cause.

FACTS: An Administrative Law Judge for the office of the Indiana Secretary of State determined that MicroVote General Corporation (MicroVote) had violated Indiana election law and advised that a penalty of $250,000 be assessed against MicroVote, as well as additional costs of $133,562.25. Secretary Rokita approved both the penalty and additional costs. An Indiana trial court granted the Secretary's motion to dismiss MicroVote's petition for judicial review.

ANALYSIS: Even though MicroVote was only appealing questions of law, the Court rejected MicroVote's argument that they did not need to present the entire agency hearing record. The Court stated that only documents which would be deemed vital to the agency decision must be presented to the court. The Court also addressed MicroVote's argument that the Secretary's misconduct or an alleged filing error by the trial court caused the filing of the agency record to be late. The Court recognized that the party alleging estoppel must bear the burden of proof and held that MicroVote did not meet this burden. Furthermore, the Court stated that even if the trial court committed a filing error, it would not be a sufficient basis for estoppel. The Court rejected MicroVote's argument that it should be precluded from filing the agency record within thirty days because the agency record itself was not completed or finalized. The Court said that this was an insufficient argument because even if this was the case, MicroVote should have filed a timely extension with the Court.

HOLDING: The Indiana Court of Appeals held that relief was precluded by MicroVote's failure to timely file the agency record or to request a time extension to file the record. Additionally, MicroVote could not invoke the doctrine of estoppel as an excuse to either timely file the agency record or to file the time extension.

IMPACT: The Court provided some leeway in what a party appealing an administrative agency action had to supply in order to seek judicial review of the action. Thus, the entire agency record may not be needed, only those parts which are relevant to the decision.

MASSACHUSETTS STATE COURT

Ciampi v. Comm'r of Corrs., 892 N.E.2d 270 (Mass. 2008).

LAW: Massachusetts General Laws chapter 124, § 1 and chapter 127, § 33 state that the Massachusetts Commissioner of Corrections (Commissioner) has the ability to make and enforce rules and regulations which are incident to his other statutorily granted powers, including those necessary for safety and discipline within the state correctional facilities. In addition, the Commissioner may use "all necessary and proper means" to maintain order and enforce obedience within the correctional facilities. Further, title 103, §

430.09 (2006) of the Code of Massachusetts Regulations provides that when the Commissioner determines restitution is the appropriate sanction for an inmate, he must provide the inmate with an itemized list of costs and damages associated with the misconduct. Additionally, title 103, § 405.17 of the Code of Massachusetts Regulations provides that if an inmate receives a sanction of restitution, the inmate may subsequently consent to the amount of the sanction being deducted from his prison account. If the inmate refuses, the Superintendent may order the account be debited for up to one-half the amount of the sanction, or all of the sanction, if the prisoner is serving a life sentence or is a "sexually dangerous person."

FACTS: On September 13, 2002, a correctional officer searched plaintiff Dennis A. Ciampi's cell and found a bottle of what appeared to be home-brewed alcohol. Ciampi received a disciplinary report. If Ciampi was found guilty, then he may be required to pay $144 for the costs associated with the drug testing of controlled substances. Later that same day, a urine test performed on Ciampi tested positive for alcohol, which resulted in a second disciplinary report. Ciampi was notified when his disciplinary hearing would take place, as well as given a copy of all of the relevant reports (including the two disciplinary reports, the results of the drug test, and a notice dealing with the reimbursement of the costs of drug testing). The disciplinary hearing resulted in Ciampi having to pay restitution costs for the drug testing. Money was withdrawn from his prison account to pay these costs. The trial judge found that Ciampi had a protected property interest in his prison account and granted Ciampi's motion for summary judgment.

ANALYSIS: The Court analyzed whether the Commissioner had exceeded his scope of authority. The Court acknowledged that proper deference should be given to a "properly promulgated regulation." Ciampi argued that because Massachusetts law specifically stated several instances in which deductions are to be made from an inmate's account, the statute may not be read more broadly to include non-enumerated situations. The Court disagreed, stating that because of the broad grant of authority given to the Commissioner, a statute or rule will be upheld so long as it has a reasonably close relationship to the grant of powers. In this case, the rule ordering for the debiting of the prisoner's account is rationally related to the stated goals of the Commissioner, including: to deter future impermissible conduct, to protect the prison staff, and to hold the prisoner responsible for his actions. The regulation at issue here is reasonably related to the overall goal of maintaining safety and discipline in prisons; therefore, the regulation met the central goal of the Commissioner, which was to maintain internal security within the prison system.

The Court also recognized that an express grant of powers automatically carries with it all incidental authority necessary to effectively and efficiently carry out all powers under the grant of powers. The Court turned to Ciampi's argument that his "protected property interest" was violated when the Commissioner withdrew the funds from his prison account. Due process is owed to every person before they can be deprived of "life, liberty or property." Courts in the past have recognized that prisoners have a statutorily protected interest in their prison accounts and at a minimum, notice and an opportunity for a hearing must be given before he is deprived of a protected property interest. Ciampi was given written, advance warning of the disciplinary hearing, and during this hearing he was allowed to call witnesses, present evidence, and make a statement on his own behalf. Thus, there was no violation of his right to due process.

HOLDING: The Court entered summary judgment for the defendant. The Court reasoned that Ciampi did not suffer a violation of due process for the deprivation of his property (his prison account) because he was given written notice of a disciplinary hearing, and a hearing was held in which he could present evidence, call witnesses, and make a statement on his own behalf.

IMPACT: This case holds that administrative agency regulations are to be given deference when their purported purpose is even loosely related to the statute which gives them their power. This may allow the Commissioner here to extend his powers, using the broad reason that it is being done in order to promote safety or discipline in correctional facilities.

OKLAHOMA STATE COURT

Ashikian v. State, 188 P.3d 148 (Okla. 2008).

LAW: Oklahoma Horse Racing Commission Rule 325:I-1-7 establishes the limits of the Blue Ribbons Board of Stewards' (Stewards) jurisdiction to suspend licensing benefits or impose fines. Their jurisdiction over a matter begins seventy-two hours before entries are taken for the first race on the first day and extends thirty days past the close of the race meetings. If a controversy arises during this time, an extension may be granted for a reasonable time period. Oklahoma Horse Racing Commission Rule 325:70-I-23 further provides that a party served with notice must, in turn, serve a notice to appeal within three calendar days of receipt of the notice, unless the Commission allows an extension for good cause. The Oklahoma Administrative Procedures Act, 75 O.S.2001 § 250 et seq. provides the procedures by which a judicial review of an agency's action will be taken, including a time provision of thirty days following the service of a final agency action.

FACTS: Plaintiff Cynthia Ashikian was issued a horse racing license by the Oklahoma Horse Racing Commission and raced horses at the Blue Ribbons Race Track until her license was due to expire. The racetrack claimed Ashikian owed it money for stall rental and sent her a letter informing her of the debt. Ashikian never paid the debt and the Stewards sent her notice regarding the track's financial policy. Ashikian failed to appear and the notice was not forwarded to her at her new address. The Stewards declared her in default and issued an order suspending her ability to be licensed as a horse racer until the financial obligation had been resolved. The following year, Ashikian applied and was granted a horse racing license in Iowa. Soon after the Iowa license was granted, she learned about the action being taken against her in Oklahoma. Ashikian promptly paid the amount due and was restored to good standing with the Oklahoma Horse Racing Commission (OHRC). When the Iowa Board of Stewards learned of the Oklahoma action, they demanded Ashikian to return all prize money she had won in Iowa. Ashikian filed suit, alleging that the Stewards' order lacked jurisdiction and also that she had never received notice of the pending action. The OHRC and the Stewards filed a motion to dismiss Ashikian's claims, and Ashikian then filed a motion for summary judgment, again alleging that the Steward's action lacked jurisdiction.

ANALYSIS: The Court first recognized the principle that apart from a timely filing of judicial review, a final order from OHRC cannot be attacked. However, when jurisdiction appears to be absent, the order may be set aside. The burden is on the party seeking to invalidate the order. The Court stated that the only information Ashikian provided was the dates of when notice was originally given and when OHRC issued its final notice. OHRC argued that these dates were not part of the administrative record and that this information appeared outside of the four corners of the record, thus, making it insufficient to declare a lack of jurisdiction. The Court, however, stated that the information needed to establish the lack of jurisdiction was contained within material supplied by OHRC. This material became part of the administrative record. After the Court determined what materials could be submitted to establish a lack of jurisdiction, the Court addressed whether the Stewards' jurisdiction would automatically extend if no timely notice to extend was filed. The Court rejected this argument outright, stating that an administrative agency may not confer any greater power on a subordinate arm of its agency than the agency itself possesses. Because OHRC may not exercise unlimited jurisdiction for an infinite amount of time, the Stewards may not either.

HOLDING: The Court held that the Stewards did not have jurisdiction to issue the order in Iowa, even though they had authority under relevant Oklahoma legislation. They also ruled that the trial court's award of trial fees was unsupported by any legal authority. Thus, the Court overturned the award to Ashikian.

IMPACT: The case limits the authority of subordinate arms of a ruling agency. Furthermore, an agency cannot bestow greater powers upon its subordinate arms than it has itself. Thus, any attempt by a ruling agency to extend its own powers through its subordinate arms will be ruled invalid.