IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number_____
Filing Date: _____

Docket No. 24,311

PREMIER OIL & GAS, INC.,

Petitioner-Appellant,

vs.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, EXXON CORPORATION, and YATES PETROLEUM CORPORATION,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

Jay W. Forbes, District Judge

Kellahin & Kellahin
W. Thomas Kellahin
Santa Fe, NM
for Appellant

Hon. Patricia A. Madrid, Attorney General
Marilyn S. Hebert,
Rand Carroll, Special Assistant Attorneys General
Santa Fe, NM
for Appellee Oil Conservation Comm.

James Bruce
Santa Fe, NM
for Appellee Exxon Corp.

Campbell, Carr, Berge & Sheridan, P.A.
William F. Carr
Santa Fe, NM
for Appellee Yates Petroleum Corp.

DECISION

MAES, Justice.

{1} This is an appeal of a district court order affirming the decision of the New Mexico Oil Conservation Commission ("OCC" or "Commission") to allow Exxon Corporation's ("Exxon's")

application for unitization under the Statutory Unitization Act, NMSA 1978, §§ 70-7-1 to -21 (1975, as amended through 1987), of the Avalon-Delaware oil field in Eddy County. We have jurisdiction pursuant to NMSA 1978, § 70-2-25(B) (1981, prior to 1998 amendment).[1]

{2} Premier Oil & Gas, Inc. ("Premier") brings three issues before us on this appeal. First, it argues that Commissioner Jami Bailey improperly functioned both as the representative approving unitization for the Commissioner of Public Lands ("CPL") and as a member of the OCC. Second, Premier argues that Exxon's proposed participation formula is not a fair one and that the OCC therefore violated the Statutory Unitization Act. Third, Premier argues that the order is arbitrary and capricious, fails to protect correlative rights, and is not supported by substantial evidence in view of (a) the failure of the OCC to appreciate the existence of disputed "pay" at well FV3, (b) the alleged premature approval of a CO_2 flood, and (c) the alleged wrongful inclusion of Premier in a waterflood. For the reasons hereinafter stated we affirm the order of the district court.

I. Facts and Issues

{3} In May 1995 Exxon Corporation applied to the Oil Conservation Division ("Division") for statutory unitization of approximately 2118.78 acres, including an outer ring of 40 acres of edge tracts or "buffer zone," of state, federal, and fee lands to be known as the Avalon-Delaware Unit Area ("Unit Area"). Exxon also applied for authority from the Division to institute the waterflood project in a portion of the Unit Area.

{4} Twelve separate tracts of land are contained in the Unit Area. Appellant Premier owns a state oil and gas lease of a tract of land known as Unit Tract 6, which Exxon's application sought to include in the Unit Area. Yates Petroleum Corporation ("Yates"), which voluntarily included its tracts in the unit, appears in support of Exxon. Before the date of unitization, October 1, 1995, Exxon operated five of the tracts, Yates operated five, and Premier and MWJ Producing Company operated one each.

{5} Exxon's project is an attempt to recover three main categories of oil: primary oil reserves by using existing reservoir energy to produce that oil; secondary and work-over reserves by adding

---

[1]We do not consider the bearing, if any, the 1998 amendment to NMSA 1978, § 70-2-25(B) (1981) would have on our jurisdiction in this case, because this appeal was taken well before the effective date of that amendment.

additional perforation in existing wells and by injecting water into the reservoir to recover more oil; and CO_2 oil reserves by injecting a combination of carbon dioxide and water into the reservoir. The waterflood plan is an attempt to recover more oil from Exxon's and Yates' wells by injecting water into an interior portion of the unit containing 27 existing producing wells and using 19 injection wells of all which would be surrounded by the outer ring of 40-acre tracts. Premier owns the working interest in one of these buffer zone tracts, Unit Tract 6. While Premier's Tract 6 was to be included within the western boundary of the Unit Area, Exxon did not intend to attempt to recover from Tract 6 any remaining primary oil, any work-over oil, or any secondary oil by waterflooding. Only one of Premier's two wells in Unit Tract 6 was to be included in the Unit Area. Exxon contemplated that Unit Tract 6 would serve as a "buffer zone," so that if CO_2 flooding was ever determined to be feasible, Exxon would use part of Tract 6 for CO_2 injection wells to improve recovery from the Yates' tracts.

{6} Exxon and Yates proposed a participation formula for the Unit Area. Under this formula, out of each unit of production, or the proceeds therefrom, each tract receives a share proportionate to its share of total remaining reserves. This figure is divided into share of primary reserves, share of waterflood or secondary reserves, and share of CO_2 flood or tertiary reserves. Then, these shares are weighted to reflect their respective worth. Exxon's experts found that primary reserves are worth 25% of total reserves, waterflood 50%, and CO_2 flood 25%. Given that Premier's tract has no remaining primary or secondary reserves, Premier will receive allocations representing the tertiary reserves only. Because the tertiary reserves constitute only approximately 25% of total reserves, and because only about 4% of these reserves lie under the Premier tract, Premier will be entitled to roughly 1% of total unit production.

{7} The Division held a hearing on the application at which Exxon, Premier, and Yates appeared and were represented by counsel. The Division entered its order granting Exxon's request for statutory unitization and allowing Exxon to institute a waterflood project.

{8} Premier appealed the Division order to the OCC pursuant to NMSA 1978, § 70-2-13 (1955, as amended through 1981). The OCC held its de novo hearing on December 14, 1995, at which all parties appearing at the Division hearing appeared and were represented by counsel before the OCC.

The OCC entered its order on March 12, 1996, ordering the statutory unitization of the Unit Area and allowing Exxon to institute a waterflood project. Premier filed its Application for Rehearing with the OCC on March 20, 1996.

{9} The OCC did not act on the Application, and it was therefore deemed denied pursuant to NMSA 1978, § 70-2-25(A) (1935, as amended through 1981). Premier filed a Petition for Review of the Decision of the OCC in the district court on April 12, 1996, under Section 70-2-25(B). It was dismissed with prejudice on March 12, 1997, and Premier now appeals to this Court.

II. Standard of Review

{10} In Johnson v. New Mexico Oil Conservation Comm'n, 1999-NMSC-021, ¶ 16, __ N.M. __, __ P.2d __, we explained how an appellate court reviews legal and factual conclusions reached by the Commission:

> This Court conducts a whole-record review of the OCC's factual findings. See Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the [Oil and Gas Act] and its implementing regulations, we may afford some deference to the OCC, particularly if the question at hand implicates agency expertise. See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236. "However, the [C]ourt may always substitute its interpretation of the law for that of the [OCC] 'because it is the function of courts to interpret the law.'" Fitzhugh v. New Mexico Dep't of Labor, 1996-NMSC-044, ¶ 22, 122 N.M. 173, 922 P.2d 555 (quoting Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

Although this formulation is an accurate statement of the law, it does not account for each type of issue that may come before the OCC.

{11} If the issue is purely a question of law, and if it does not involve an interpretation of the statutes, rules, and regulations within the province and proficiency of the OCC, then we afford no deference to the OCC at all. Rather, we review the question de novo. If, on the other hand, the issue is merely one of fact, then we review for substantial evidence. See Bd. of Educ. v. Harrell, 118 N.M. 470, 486, 882 P.2d 511, 527 (1994) ("We hold that due process is satisfied by de novo review of [administrative] questions of law and substantial evidence review of [administrative] findings of fact."); see also Texas Nat'l Theatres, Inc. v. City of Albuquerque, 97 N.M. 282, 287, 639 P.2d 569,

574 (1982) (standard of review of a legal conclusion bearing upon administrative action is "whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party[,] . . . indulg[ing] all reasonable inferences in support of the court's decision, and disregard[ing] all inferences or evidence to the contrary") In Santa Fe Exploration Co., 114 N.M. at 114, 835 P.2d at 830, we explained how this Court determines whether the OCC's factual findings are supported by substantial evidence:

> In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. [Nat'l Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988)]. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. Id.

Applying these standards to the issues before us on appeal, we affirm the district court in all regards.

III. The Role Of Commissioner Bailey

{12} Premier's argument on this issue is that there was an inherent conflict of interest involved in the same person handling a unitization matter for the CPL and then sitting as the CPL's designee on the Oil Conservation Commission. The issue whether Commissioner Bailey should have been disqualified is a legal question that is clearly outside the province and proficiency of the OCC; accordingly, as discussed above, we review this question de novo without according any deference to the OCC. We begin analyzing this issue by looking at our constitution, which provides, "The commissioner of public lands shall select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law." N.M. Const. art. XIII, § 2. This authority is further defined by statute:

> For the purpose of more properly conserving the oil and gas resources of the state, the commissioner of public lands may consent to and approve the development or operation of state lands under agreements made by lessees of the state land jointly or severally with other lessees of state lands, with lessees of the United States or with others, including the consolidation or combination of two or more leases of state lands held by the same lessee. The agreements may provide for one or more of the following: for the cooperative or unit operation or

development of part or all of any oil or gas pool, field or area . . . .

NMSA 1978, § 19-10-45 (1961). Pursuant to this statute, Exxon, in May of 1995, requested and received the preliminary approval of the Commissioner of Public Lands for the Avalon-Delaware Unit, including CPL-owned Unit Tract 6 in which Premier held the leasehold interest. The approval letter was signed by Bailey as Deputy Director of the Oil, Gas, and Minerals Division. The letter indicated that final approval was conditioned "upon subsequent favorable approval by the New Mexico Oil Conservation Division." Following CPL action, Exxon proceeded to the Oil Conservation Division for an order of statutory unitization. See Section 70-7-3. A unitization order was issued by the Division, to which Premier objected, and a hearing de novo was held before the OCC. See NMSA 1978, § 70-2-6(B) (1979) (Division and Commission have concurrent jurisdiction). Pursuant to NMSA 1978, § 70-2-4 (1987), Bailey was the CPL's designee on the OCC, which has the power and the duty to prevent waste in the production or handling of crude petroleum or natural gas of any type or in any form, and to protect correlative rights. See NMSA 1978, § 70-2-2 (1949); NMSA 1978, § 70-2-11 (1977).

{13} Premier argues this is a case of hearing officer bias and conflict of interest. As to bias, the relevant inquiry is "whether, in the natural course of events, there is an indication of a possible temptation to an average man [or woman] sitting as a judge to try the case with bias for or against any issue presented to him [or her]." Reid v. New Mexico Bd. of Examiners in Optometry, 92 N.M. 414, 416, 589 P.2d 198, 200 (1979). This is part of the minimum due process requirement of a fair and impartial tribunal and a trier of fact free from any form of bias or predisposition regarding the outcome of the case. See id. These requirements apply most strictly to an administrative adjudication, where otherwise there is a tendency to relax safeguards customary in court proceedings "in the interest of expedition and a supposed administrative efficiency." Id. The law has also been stated that the mere appearance of partiality is enough to sanction a government decision-maker. Id.

{14} The idea of "appearance" has been discussed in the judicial context. "The leading view is that a court should review judicial behavior by its appearance 'to a reasonable person following review of the totality of the circumstances.'" Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 Marquette L. Rev. 949, 956 (1996) (quoting Matter of Larsen, 616 A.2d 529, 584 (Pa. 1992), cert.

denied, In re Larsen, 510 U.S. 815 (1993)). "Reasonable citizens require more than vague conjectures and subtle innuendo before they will entertain suspicions of judicial misconduct or ascribe the 'appearance of impropriety' to ambiguous facts and circumstances." Larsen, 616 A.2d at 584. Also, "when dealing with what the public thinks, we must be careful not to accept the view of the most cynical as the true voice of the public, lest we accept a lack of faith in our institutions as a categorical basis for restricting otherwise quite ethical conduct." Int'l Electronics Corp. v. Flanzer, 527 F.2d 1288, 1294 (2d Cir. 1975).

{15} These guideline statements about the standard of review in cases of bias or conflict of interest are brought into focus in State ex rel. Bardacke v. Welsh, 102 N.M. 592, 606, 698 P.2d 462, 470 (Ct. App. 1985), which, collecting New Mexico cases, held that to establish the appearance of impropriety, "there must be a reasonable *factual basis* for doubting the judge's impartiality." (Emphasis added.) Thus it follows that in Reid, for example, bias was found where the decision-maker actually voiced bias prior to the hearing. 92 N.M. at 415, 589 P.2d at 199. In Santa Fe Exploration Co., 114 N.M. at 108-10, 835 P.2d at 824-26, the appellant argued that there was an appearance of impropriety, and that its procedural due process rights were denied when the Oil Conservation Division Director had ex parte contact with another party before the Division prior to a certain drilling attempt, then approved the drilling, and then sat as a member of the OCC which affirmed the Division. We said:

> Unlike the Board member in Reid, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. . . . Moreover, by statute, the Director is a member of the Commission . . . and has a duty to prevent waste . . . .

Id. at 109, 835 P.2d at 825.

{16} Here, as in Santa Fe Exploration, where an OCC member had previously dealt with the same matter, Bailey's act of having merely given preliminary approval to the project on behalf of the CPL did not by itself create bias. With Premier as an objecting party whose due process rights were in issue, it was a different matter entirely, and the only question is whether Bailey, judging the need for or value of the unit from the point of view of the CPL, could have an open mind in judging its need

or value vis-à-vis Premier. There is no evidence that she had a fixed and preconceived opinion as to the facts such that it can be said that she had completely closed her mind to the proceeding. See Michael B. Browde & Andrew J. Schultz, Survey of New Mexico Law: Administrative Law, 15 N.M. L. Rev. 119, 134 (1985); see also Las Cruces Prof'l Firefighters v. City of Las Cruces, 1997-NMCA-031, ¶ 24, 123 N.M. 239, 938 P.2d 1384. At no time did Bailey give an indication of any inclination she might have as an OCC member. Her role as Deputy Director in granting preliminary approval does not equate to an opinion or commitment concerning the outcome of the OCC hearing. Nor, what amounts to the same analysis, is there a factual basis for concluding she carried a transactional conflict of interest from one position or decision to the other. Despite the relatedness of the two decisions, there was nothing apparently "tugging" at Bailey to decide a certain way in the second matter in light of her decision in the first.

{17} It is argued that a conflict of interest inheres in the statutory scheme. We think the statutory scheme is delicate but "where two statutes are related to the same general subject, the court will generally construe them *in pari materia* to give effect to each." Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 45, 125 N.M. 721, 965, P.2d 305. In this case, there was no financial incentive for Bailey to proceed in particular conformity with her action on behalf of the CPL, since she is not compensated for the performance of her duties on the OCC. §70-2-4. Any incentive to illegitimately align the carrying out of one public duty with another was non-existent. The statutes at issue here permit the exercise of reasonable discretion by agents such as Bailey unless impropriety or the appearance of impropriety is shown.

{18} There is a letter that was sent to the CPL by Premier complaining of the fact that Bailey was acting in two roles, and now Premier argues that the CPL's response constituted an admission of a conflict of interest. The letter from the CPL acknowledges that: (1) Premier's letter raised a conflict of interest question; (2) the role of the CPL designee on the Oil Conservation Commission results in an "institutional conflict" created by the legislature; and (3) the Land Commissioner will avoid a transactional conflict whenever it can "by making sure the [Land] Commissioner's designee has not worked directly on the matter before the Commission." However, contrary to the assertions of Premier, this letter does not admit a conflict of interest exists in this case. The letter states that the

CPL is satisfied that Bailey will act in this case "free from bias and prejudgment" and that "she can participate as a member of the Commission and hear the matter with complete professionalism and impartiality." The facts support a finding that Bailey could have and did act without bias or prejudgment.

IV. The Fairness of the Participation Formula

{19} The next issue before us is whether the adoption by the OCC of the participation formula proposed by Exxon and Yates was supported by substantial evidence. The question whether the OCC complied with the Statutory Unitization Act in approving Exxon's participation formula implicates the OCC's expertise; therefore, as mentioned earlier, we will accord some deference to the OCC's interpretation of the Act, but we may offer an interpretation of our own. If we conclude that the OCC's interpretation is not legally flawed, we will reverse only if the record lacks substantial evidence supporting the OCC's fact-specific determinations.

{20} The underlying basis for the participation formula recited above was explained by one of Exxon's experts, engineer Gilbert G. Beuhler:

> The intent was to base the formula on recoverable oil, and include risk, including economic factors. Remaining primary oil has the lowest risk, since it's already developed and has an established decline. It also has the highest value per barrel with low operating cost and no future development cost. While there is a fair amount of remaining primary reserves, they do constitute a low amount of unit potential reserves: about two percent. Therefore, primary oil was given the 25% weight factor . . . .
> Tertiary reserves are by far the largest in potential recovery, being approximately 81% of the unit's potential future production. However, they're also the highest risk, encompassing large areal expansions, and they're also very sensitive to future pricing. Tertiary reserves also have the lowest value per barrel, with the highest development and operating costs. Thus, they were given a 25% factor . . . .
> Secondary reserves are between primary and tertiary in both amount and value, but the main objective of the unit is the implementation of the water flood, and the secondary reserves also have relatively low risk with the project area encompassing the primary development area. Thus, they were given the highest weighting factor, 50%.

It was also clearly explained that under the formula, Premier's tract and other fringe tracts are assigned participation "in return for their acreage being used in future development." The participation formula proposed by Premier was based on 50% original oil in place, 10% January 1993 production rate, 20% remaining primary reserves, and 20% future production. Premier argues that

the OCC failed to comply with the Statutory Unitization Act by adopting the Exxon formula, which it is claimed does not allocate unitized hydrocarbons according to relative value. See Section 70-7-6(A)(6).

{21} The first issue here concerns Section 70-7-6(B), which states:

> *If* the division determines that the participation formula contained in the unitization agreement does not allocate unitized hydrocarbons on a fair, reasonable, and equitable basis, the division shall determine the relative value, from evidence introduced at the hearing, taking into account the separately owned tracts in the unit area, exclusive of physical equipment, for development of oil and gas by unit operations, and the production allocated to each tract shall be the proportion that the relative value of each tract so determined bears to the relative value of all tracts in the unit area.

(Emphasis added.) It is clear by the plain meaning of the conditional language of Section 70-7-6(B) that it is only once the participation formula proposed by the applicant has been shown to be unfair, unreasonable, or inequitable that the Division (or the OCC) need consider alternatives. Because the OCC found that the participation formula was fair, reasonable, and equitable, the OCC was not required to determine each tract's relative value.

{22} Premier's next issue is that its correlative rights,[2] which the OCC is bound to protect under Section 70-7-1, are being violated, and it advances two principal arguments attacking the fairness of the formula. First is that the Premier tract was included in the unit despite the OCC's findings that it is capable of only uneconomic primary production, and that it is incapable of any secondary production. The unit will take advantage solely of the tertiary potential of the Premier tract, if CO_2 flooding is undertaken. The question bearing on correlative rights is whether and how the Premier tract could be used for CO_2 flooding outside the unit. A review of the record reveals that Ken Jones,

---

[2]Under NMSA 1978, § 70-2-33(H) (1986),

> "correlative rights" means the opportunity afforded, so far as it is practicable to do so, to the owner of each property in a pool to produce without waste his just and equitable share of oil or gas or both in the pool, being an amount, so far as can be practically determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas or both under the property bears to the total recoverable oil or gas or both in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

owner-operator of Premier, testified that it would not conduct a CO_2 flood on its own. There were conflicting statements as to whether waste would occur in overall recovery terms without unitization, but there was substantial evidence in the form of expert testimony that waste would occur. On the basis of this expert testimony and Jones' testimony that Premier would not conduct a CO_2 flood on its own, we hold that substantial evidence supports the Commission's order and that Premier's correlative rights were not violated. See NMSA 1978, § 70-7-1 (1975). Premier argued to the Commission that its inclusion should be delayed until the CO_2 stage, but the technique it put forth to eliminate the resulting waste (the drilling of four lease-line CO_2 flood injection wells) was found, on the basis of substantial evidence in the record, to be unfeasible because of the relatively small 160-acre size of the Premier tract.

{23} Taking another tack, Premier brings out the fact that there was a difference of opinion among the experts as to whether the formula allocated water flood and CO_2 flood reserves equitably among the tracts. There was in fact some disagreement as to whether waterflooding would be advisable or possible on the Premier acreage—if so, its relative share of water flood reserves would be higher and it would receive a greater overall share of the unit. As noted, experts for Exxon and Yates testified before the Commission that Premier had a zero share of waterflood reserves. The expert for Premier disputed this, and testified that there were waterflood reserves; however, Premier only produced figures on "target oil in place." As the OCC recited in its order, "target oil in place" is a mere starting point in calculating recoverable reserves, on which equity is based. It must be adjusted by factors such as well-to-well continuity, sweep efficiency, affordable oil, pattern effects, and development costs to obtain recoverable reserves.

{24} The reason for the differing views was the way in which the lead well on the Premier tract, the FV3, was "modeled" or sampled for waterflood reserves, which was explained in detail to the OCC. The Commission members are required to have "expertise in the regulation of petroleum production by virtue of education or training." § 70-2-4. The director of the Division, who sits on the OCC, is required to be a registered petroleum engineer or have expertise in the field by virtue of education and experience. NMSA 1978, § 70-2-5 (1977, as amended through 1987). They are properly entrusted to bring these qualifications to bear in deciding technical issues which come before

them. Because there is substantial evidence in the record which could support the judgment of the OCC on the matter in issue, we defer to that judgment. See Santa Fe Exploration, 114 N.M. at 114-15, 835 P.2d 830-31. It may therefore be concluded that there are no waterflood reserves on the Premier tract.

{25} At most, according to the Technical Report prepared by Exxon but accepted by all parties as the basis for their opinions, Premier can say it has zero percent of economically producible primary reserves (though this is separately disputed; see below), 8.29% of water flood *oil in place*, and 5.88% of CO_2 flood *oil in place*. It is assigned, by the approved formula, a total of 4.08% of CO_2 reserves, and, even though the CO_2 flood may never happen, Premier will receive 1.02% of the unit proceeds. Payments are to begin not at the inception of the possible CO_2 flood, but immediately, Premier thus receiving a unit share whether its own reserves are ever tapped or not. Premier has not demonstrated that the mechanism employed in this unit was undeserving of Commission approval in its geology (Premier itself only claims 5.17% of total remaining reserves, mostly CO_2 flood, although it is unclear from where this figure is derived), or in its economics (Premier immediately receives a substantial benefit despite the fact that it is marginal, depending on future oil prices, whether it will contribute any oil to the unit.) There was substantial evidence upon which the OCC could conclude that a justifiable trade-off existed between the mere possibility of future production and a lower percentage participation for Premier. Similarly with the alleged presence of waterflood reserves, no hard facts were marshaled by Premier in a way that would refute the OCC's conclusion that, under Section 70-7-6(B), the proposed formula was a fair one.

{26} Premier also makes a general argument that the formula fails to use "traditional participation parameters." However, it has been observed,

> To use the language of the garment industry, pooling and unitization agreements are "tailor-made" and not "ready-made." Each negotiation has its own unique problems and substantial care must be exercised in the drafting of provisions appropriate for the particular situation. It is not possible to suggest language or clauses appropriate for all circumstances.

6 Howard R. Williams & Charles J. Meyers, Oil and Gas Law § 920 (1998). While some work has been done on the factors most commonly used, the "difficulty of obtaining agreement on a

participation formula has been a considerable barrier to the adoption of plans for cooperative, pooled, or unitized development." 8 id. at 763-64. We agree with Exxon and Yates that there are no "traditional values to be included in any participation formula," contrary to what Premier's expert seems to believe. See Amoco Prod. Co. v. Heimann, 904 F.2d 1405,1411 (10th Cir. 1990); Gilmore v. Oil and Gas Conservation Comm'n, 642 P.2d 773, 780 (Wyo. 1982). Furthermore, Premier's argument, here and elsewhere, for the comparable fairness of its own formula is not in itself compelling because as the OCC states: "It is not the Commission's responsibility to change a formula which was the product of negotiation [among interest owners] if that formula is 'fair.' That is not to say that other formulas, derived as a result of negotiations would not be 'fair' because there is no one perfect formula."

{27} In summary, because the formula in issue could be found on substantial evidence to "allocate unitized hydrocarbons on a fair, reasonable and equitable basis," and because it did not infringe on Premier's correlative rights, its adoption did not violate the Act.

V. Other Grounds on Which Premier Argues That the OCC's Order is Arbitrary and Capricious, Fails to Protect Correlative Rights, and is Not Supported by Substantial Evidence

{28} We said in Santa Fe Exploration:

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the "winnowing and sifting" process.'"

114 N.M. at 115, 835 P.2d at 831 (citations omitted.) We consider three areas of argument, each as to arbitrariness and capriciousness, violation of correlative rights, and lack of substantial evidence. We will review the OCC's actions and then determine whether they must be stricken for any of these reasons. Adhering to the principles of substantial evidence that we discussed earlier, we review each point with an eye to support in the record.

A. Disputed "Pay"

{29} "Pay" is reservoir rock containing oil or gas. 8 Williams & Meyers at 767. Premier argues that Exxon's experts mistakenly left out 82 feet of pay at the bottom of Upper Cherry Canyon in the FV3 well which would produce economically in the primary and water flood stages and attacks the

OCC's failure to credit them with such pay. The first aspect of the argument on this issue is the disagreement between experts on the geology of the well. A well log is a "record of the formations penetrated by a well, their depth, thickness, and (if possible) their contents." 8 id. at 1176. Both witnesses for Premier and Exxon discussed at some length various well logs. Exxon geologist David L. Cantrell introduced an exhibit showing a mud log and "several of the raw wireline log curves that [were] used in the geological and volumetric modeling," which included a gamma ray log, a depth track showing perforated intervals, a resistivity log, a water saturation log, and a porosity log. Cantrell interpreted these logs, testifying also to the meaning of observed surface and subsurface formations and phenomena. On the basis of these facts, he "picked" the base of the Upper Cherry Canyon reservoir some 82 feet higher than did Stuart D. Hanson, the Premier geologist, who, concentrating on the porosity log, argued he had found extra depth and theoretically greater pay. The OCC found that "the geological interpretation of Premier was a more believable and scientifically sound interpretation," but that "the production results show the pay to be uneconomic."

{30} The first production factor considered by the OCC and placed in issue by Premier involves some work that was performed in connection with the FV3 well, known as "the October 1995 test." Premier argues that it "attempted to test for oil production in its [FV3] well in zones *other than* the UCC reservoir and did not have sufficient time to test either the overlying or the disputed 82 foot interval before the test was terminated when Exxon disputed Premier's right to operate," but there is only tenuous support in the record for this assertion, to wit the testimony of Ken Jones that the well could conceivably have been economic at certain higher-than-expected levels of production. Premier then details what the work did involve. But the evidence is substantial that Gulf, the company that originally drilled the well, did not perforate the 82-foot interval and carried out its geology in contemplation of the non-existence of the additional pay, that Premier owned the well for five years without testing for or working over for this oil, and that in October of 1995, Premier would have or should have indeed tested for this oil if it thought it could have been produced economically. The Commission's findings that the work in question resulted in six to seven barrels of oil and 300 barrels of water per day and that such production is uneconomic, are supported directly by the testimony of Jones.

{31} The second factor relevant to production is the non-productivity of the south offset well to the FV3, the Yates ZG1. The OCC concluded, largely on the basis of the testimony and underlying exhibits of the geologist and the engineer for Exxon, that the similarity in the geology and production history of the two wells indicated that current and future production would also be similar, and that the additional pay would be unproductive. Hanson, testifying for Premier, in fact agreed that the "ZG1 looks a lot like the FV3," and did not contradict the fact that a valid comparison could be made between the two wells.

{32} With regard to the pay issue, therefore, having looked at the evidence upon which the OCC relied, the conflicting evidence, and the reasoning process used, we hold that the conclusion of the Commission—that additional pay did not exist so as to preclude inclusion of Premier oil in anything other than the CO_2 flood—was supported by evidence that was credible in light of the whole record and that was sufficient for a reasonable mind to accept as adequate. See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988). Our review of the record also shows that the conclusions of the OCC were rationally based and served ultimately to protect Premier's correlative rights.

B. Did the OCC Approve the CO_2 Project Prematurely?

{33} Premier argues that the supposedly speculative nature of the CO_2 flood means that its approval at the present time cannot be supported by substantial evidence, that Premier's correlative rights are being slighted, and that the OCC has acted arbitrarily and capriciously. In this case, the facts found surrounding CO_2 flooding at the Avalon Unit were based on extensive expert testimony received at the hearing. There was testimony that omission of the Premier tract would mean that CO_2 operations would have to be scaled back and that Premier's absence would result in the waste of as much as two million barrels of oil. With the CO_2 project, the potential additional recovery is 39.9 million barrels. Further, there was expert testimony that before a CO_2 flood could be implemented, sufficient volumes of water would have to be injected to "pressure up the reservoir," and that exclusion of Premier would lead to future problems with the development of the reservoir. This evidence in the record supports the OCC's conclusions. As discussed above, we also think Premier's correlative rights were considered and protected by the Commission in adopting the participation

formula. Premier had the opportunity, over a five-year period culminating in the disappointing test project in 1995, to develop whatever oil it could on its tract. There was ample evidence that there are no recoverable primary or secondary reserves there, and the suggestion that the tract could first be brought into the unit later, at the CO_2 phase, was discredited by expert testimony.

C. Including Unit Tract 6 in the Waterflood Project

{34} Finally, citing Section 70-7-4(J), Premier argues that "there is no substantial evidence to support including Premier's Tract 6 in the water flood project" because "Exxon, who operates or owns working interests in all tracts (except Tracts 6, 7 and 8), seeks to include the Premier Tract 6 only as a 'protection buffer' and contrary to [the Statutory Unitization Act], assigned no 'contributing value' for secondary oil recovery." The cited section reads:

> "Relative value" means the value of each separately owned tract for oil and gas purposes and its contributing value to the unit in relation to like values of other tracts in the unit, taking into account acreage, the quantity of oil and gas recoverable therefrom, location on structure, its probable productivity of oil and gas in the absence of unit operations, the burden of operation to which the tract will or is likely to be subjected, or so many of said factors, or such other pertinent engineering, geological, operating or pricing factors, as may be reasonably susceptible of determination.

{35} As we have discussed, however, Section 70-7-6(B) only necessitates a determination of relative value when the Division or OCC determine that a participation formula is unfair, unreasonable, or inequitable. In any event, the fact that a tract is included in a unit now for development later is not contrary to Section 70-7-4(J). Clearly, that section recognizes the nature of a unit as existing through a period of time during which its physical characteristics will change, including, in this case, the contribution being made by a given tract. Premier has not shown that the OCC acted arbitrarily or capriciously in accepting the plan. And to reiterate, the Commission could decide on the basis of substantial evidence, that the likelihood of a tertiary phase being instituted and of waste without the participation of Premier from the outset, were sufficient to create this unit.

VI. Conclusion

{36} Having considered all of the substantive arguments raised in this matter, we affirm the order of the district court.

{37} **IT IS SO ORDERED.**

PETRA J. MAES, Justice

WE CONCUR:

PAMELA B. MINZNER, Chief Justice

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PATRICIO M. SERNA, Justice

97 N.M. 88

In the Matter of Lance R. BAILEY, Attorney at Law.

No. 13954.

Supreme Court of New Mexico.

Nov. 23, 1981.

In attorney disciplinary proceeding, the Supreme Court, held that attorney's aiding person not authorized to practice law in New Mexico to engage in practice and holding such person out as attorney's partner in his advertising warrant public censure.

Public censure ordered.

Attorney and Client ⇐58

Attorney's aiding person not authorized to practice law in New Mexico to engage in practice and holding such person out as attorney's partner in his advertising warrant public censure.

William W. Gilbert, Chief Bar Counsel, Santa Fe, for Disciplinary Board.

Edward J. Apodaca, Albuquerque, for Bailey.

ORDER

This cause came before the New Mexico Supreme Court on the 18th day of November, 1981, on Recommendation by the Disciplinary Board of the Supreme Court that Attorney Lance C. Bailey be publicly censured for violations of the Canons of Ethics in that he aided a person not authorized to practice law in this State to engage in practice and held that person out as his partner in his advertising, although he had not been admitted to this bar.

Good cause being shown, it is therefore ordered that Lance C. Bailey is hereby censured for these violations.

97 N.M. 88

KERR-McGEE NUCLEAR CORPORATION, Phillips Uranium Corporation, Sohio Western Mining Company, Todilto Exploration and Development Corporation, United Nuclear Corporation and United Nuclear-Homestake Partners, Appellants,

v.

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD, Appellee.

No. 4653.

Court of Appeals of New Mexico.

April 2, 1981.

Rehearing Denied May 28, 1981.

Certiorari Quashed Nov. 23, 1981.

Appeal was taken challenging validity of the adoption of certain amended radiation protection regulations by the Environmental Improvement Board. The Court of Appeals, Sutin, J., held that: (1) radiation protection regulation requiring analysis of realistic tailing release scenarios was not in effect where it was not adopted by a majority vote of a quorum of the Environmental Improvement Board after it was placed in a state of suspension; (2) radiation protection regulation governing applications for radioactive material license for uranium mills was void where Environmental Improvement Board did not obtain the advice and consent of the Radiation Technical Advisory Council as provided by law; and (3) Environmental Improvement Board impermissibly delegated its authority to Director of Environmental Improvement Division to perform its work in preparation of the public hearing on proposed radiation protection regulations and Board should not have recognized the Division as an "interested person" nor sought legal guidance from the Division; thus, opponents of the regulations did not receive a fair and impartial hearing.

Regulations declared void and case remanded.

Wood, J., filed specially concurring opinion.

1. Health and Environment ⇐25.5(7)

Radiation protection regulation requiring analysis of realistic tailing release scenarios was not in effect where it was not adopted by a majority vote of a quorum of the Environmental Improvement Board after it was placed in a state of suspension.

2. Administrative Law and Procedure ⇐480

As normally used in context of administrative adjudication "reconsideration" implies reexamination, and possibly a different decision by the entity which initially decided it.

See publication Words and Phrases for other judicial constructions and definitions.

3. Health and Environment ⇐25.5(7)

Radiation protection regulation governing applications for radioactive material license for uranium mills was void where Environmental Improvement Board did not obtain the advice and consent of the Radiation Technical Advisory Council as provided by law. NMSA 1978, § 74–3–3.

4. Health and Environment ⇐25.15(1)

Opponents were not estopped from challenging validity of radiation protection regulations on grounds that Environmental Improvement Board did not receive "advice and consent" of Radiation Technical Advisory Council by virtue of failure of opponents to preserve error at a public hearing before the Board. NMSA 1978, § 74–1–9, subd. G.

5. Administrative Law and Procedure ⇐400

In administrative law it is essential that an independent state agency sit as a fair and impartial body at a hearing in which massive and important regulations are to be adopted.

6. Health and Environment ⇐25.5(9)

Environmental Improvement Board impermissibly delegated its authority to Director of Environmental Improvement Division to perform its work in preparation of the public hearing on proposed radiation protection regulations and Board should not have recognized the Division as an "interested person" nor sought legal guidance from the Division; thus, opponents of the regulations did not receive a fair and impartial hearing. NMSA 1978, §§ 9–7–13, 74–1–2, 74–1–3, subd. B, 74–1–6, 74–1–7.

7. Administrative Law and Procedure ⇐322

Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character, or which requires the exercise of judgment.

George W. Terry, Albuquerque, for Phillips Uranium Corp.

Edmund J. Moriarty, Chicago, Ill., for Sohio Western Mining Co.

Mark K. Adams, Rodey, Dickason, Sloan, Akin & Robb, P. A., Albuquerque, for Todilto Exploration & Development Corp.

Peter J. Nickles, John Heintz, Covington & Burling, Washington, D. C., for Kerr-McGee.

G. Stanley Crout, Sunny J. Nixon, C. Mott Wooley, Stephen J. Lauer, Bigbee, Stephenson, Carpenter, Crout & Olmsted, Santa Fe, for Phillips Uranium, Sohio Western Mining Co., Kerr-McGee Nuclear, United Nuclear Corp. and United Nuclear-Homestake.

Jeff Bingaman, Atty. Gen., Bruce S. Garber, Louis W. Rose, John K. Silver, Joseph F. Gmuca, Asst. Attys. Gen., Santa Fe, for appellee; David W. Douglas, Santa Fe, of counsel.

OPINION

SUTIN, Judge.

This appeal involves the validity of the adoption of two amended Radiation Protection Regulations (regulations) by the New Mexico Environmental Improvement Board (EIB) which read:

Section 3–300(L)

Mill applicants shall analyze realistic tailing release scenarios and provide systems to contain potential releases to company controlled property.

Section 3–300(J)

J.1. An application for a radioactive material license for a uranium mill or a commercial radioactive waste disposal site, or for any renewal thereof, or for an amendment thereto as described in 3–300 H(3), shall provide evidence satisfactory to the Director that title to any land, including any interest therein, used for the disposal of the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, or for the disposal of commercial radioactive waste, shall, prior to the deposit of such material on or under that land, be held by the federal government, the State of New Mexico, or the applicant. An appropriate title report or other documents evidencing land ownership, or a properly drawn purchase option, shall be attached to the application.

2. Exemptions from the provisions of this section may be granted by the Director if he determines that holding of title to land, or any interest therein, as otherwise required by this subsection is not necessary or desirable to protect public health and safety or to minimize or eliminate danger to life or property.

3. Prior to the termination of any license for a uranium mill or commercial radioactive waste disposal site, title to the land required to be owned by the United States, the State of New Mexico or the applicant pursuant to this section shall be transferred to either the United States or the State of New Mexico, at the option of the State of New Mexico. Land transferred to the State in accordance with this subsection shall be transferred without cost to the State (other than the administrative and legal costs incurred by the State in carrying out such a transfer).

4. For renewal or amendment of a license which was initially issued prior to the effective date of this subsection, and which does not alter the location of the land used for the disposal of the tailings or wastes, the Director shall take into consideration the status of the ownership of such land and interests therein and the ability of the licensee to transfer title and custody thereof to the United States or the State in reaching the determination of whether to require land ownership or transfer.

5. The provisions of this subsection respecting transfer of title and custody to land shall not apply in the case of lands held in trust by the United States for any Indian tribe or lands owned by an Indian tribe subject to restriction against alienation imposed by the United States. In the case of such lands which are used for the disposal of the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, or commercial radioactive wastes, the applicant shall enter into such arrangements with the Director as may be appropriate to assure the long-term maintenance and monitoring of such lands by the United States or the State of New Mexico.

INTRODUCTION

EI*B* means the New Mexico Environmental Improvement Board. EI*A* means the New Mexico Environmental Improvement Agency. EI*D* means the New Mexico Environmental Improvement Division.

At this point, a word of caution must be added. Point A, ante, is involved primarily with Parliamentary Rules of Order. Ordinarily, such boards are not learned in Rules of Order at public hearings where informality is prevalent. Neither are they learned in precise methods after adoption of amending, rejecting, repudiating, suspending, rehearing or reconsidering regulations, nor the precise meaning of those terms nor their application. Misunderstanding can

arise but certainty and clarit
in the final adoption of regul
ronmental protection. This
for punctiliousness because
poses of the Environmental
tect this generation as wel
unborn from health threats
environment." Section 74-
1978. Environmental regula
ation protection" are of vi
permanent in nature, mass
and generally unintelligible
son.

The Companies ultimatel
except two of some 300 p
tions. These two should
filed of record, and impos
industries if uncertainty exi
taken. Common sense dic
from parliamentary rules o
ity of a quorum should tak
the adoption of the regula
In Petition of Kinscherff,
556 P.2d 355 (Ct.App.1976)

* * * The acts of a maj
rum are binding on

EIB is an independent s
of any interposition of EI
posing parties are EID an
Nevertheless, § 9–7–13,
vides that:

The environmental in
shall receive staff supp
ronmental improvemen
health and environmen

"Staff support" should
yers from EID. If it d
Companies are opposing
the hearing, EIB sought
lawyers of EID. If EIB
of EID, EIB, EID and
structural administrative
make, adopt, publish a
tions as arbitrarily and
desires. This procedur
been undertaken with r
3–300(L). In *Addis v. S*
tion Protests Bd., 91 N.
822 (Ct.App.1977), this

arise but certainty and clarity are essential in the final adoption of regulations for environmental protection. This is a clarion call for punctiliousness because one of the purposes of the Environmental Act is to "protect this generation as well as those yet unborn from health threats posed by the environment." Section 74-1-2, N.M.S.A. 1978. Environmental regulations for "radiation protection" are of vital importance, permanent in nature, massive in number, and generally unintelligible to the lay person.

The Companies ultimately agreed to all except two of some 300 pages of regulations. These two should not be adopted, filed of record, and imposed upon mineral industries if uncertainty exists in the action taken. Common sense dictates that, apart from parliamentary rules of order, a majority of a quorum should take final action on the adoption of the regulations in dispute. *In Petition of Kinscherff*, 89 N.M. 669, 671, 556 P.2d 355 (Ct.App.1976) we said:

> * * * The acts of a majority of the quorum are binding on the entire body.

EIB is an independent state agency, free of any interposition of EID and EIA. Opposing parties are EID and the Companies. Nevertheless, § 9-7-13, N.M.S.A.1978 provides that:

> The environmental improvement board shall receive staff support from the environmental improvement division of the health and environment department * *.

"Staff support" should not include lawyers from EID. If it does, EIB and the Companies are opposing parties. During the hearing, EIB sought guidance from the lawyers of EID. If EIB favors the lawyers of EID, EIB, EID and EIA constitute a structural administrative agency that can make, adopt, publish and enforce regulations as arbitrarily and capriciously as it desires. This procedure appears to have been undertaken with reference to Section 3-300(L). In *Addis v. Santa Fe Cty. Valuation Protests Bd.*, 91 N.M. 165, 169, 571 P.2d 822 (Ct.App.1977), this court said:

> If the VPB [Valuation Protests Board] is to function as an independent quasi-judicial body, at a *minimum* it must obtain its legal guidance from someone other than the staff attorneys of the PTD [Property Tax Department]. [Citation omitted.] [Emphasis by court.]

Whenever parliamentary rules are involved in a public hearing EIB should not seek the advice of, nor seek to be represented by attorneys of EID. When this occurred, EIB became an opposing party instead of an independent quasi-judicial body.

A. *Section 3-300(L) is not in effect because it was not adopted by a majority vote of a quorum of the EIB after it was placed in a state of suspension.*

[1] On November 16, 1979, EIB adopted regulation 3-300(L) with suggested changes of EIA. A petition was filed by the Uranium Environmental Subcommittee and Kerr-McGee Nuclear Corporation (Companies) that EIB *reconsider its decision of November 18, 1979* which adopted the recommended amendments of EID as set forth in EID's written submission of September 4, 1979. Two reasons were given:

> (1) The Board has not met the statutory requirement of obtaining the "advice and consent" of the Radiation Technical Advisory Council (RTAC).
>
> (2) The Board seemingly has delegated its statutory rule-making authority to the EID * * *. The Board seemingly has based its decision on the EID's suggestions, without considering all of the evidence submitted by the various parties.

On March 14, 1980, the Companies "requested that the Board *suspend* its action of November 1979 and schedule time on their April agenda when all sides could present oral argument." A motion was made and carried 2-1 "to *suspend* the Board's November action and at the April 11th meeting to hear oral argument, *allowing the Board to take action again at that time.*" [Emphasis added.] The effect of the motion was to suspend the regulations until action was taken, rather than suspension until a certain date. At this stage, the regulations

could not be filed until the suspension was lifted. By a 2–1 vote, EIB rejected a motion to deny the request for reconsideration, thus agreeing to reconsider its decision of November 19, 1979.

At the outset of the April 11th EIB meeting, EID, which had proposed the regulations, specifically requested EIB to adopt those provisions of the proposed amendments which were *not* in dispute. The EID attorney said:

> * * * I am in complete agreement with * * * [EID attorney] that at this point there are two options for the board to do, that is, *to readopt those regulations that the board has already adopted once,* or, if the board has questions about the language that is used in those regulations that the board has already adopted once, *to go back to hearing,* and to set the hearing, allow thirty-day's public notice, and proceed as it is required in the law. [Emphasis added.]

Following this, the other EID attorney said:

> * * * I think the board has adopted all of the regulations * * *. We—*what we are asking now is to list [sic lift] the suspension on those parts of the regulations* * *. [Emphasis added.]

After hearing oral argument, EIB took action on other sections of the regulations. The only exception to this pattern involved treatment of Section 3–300(L). After discussion a board member moved that the board "rehear" 3–300(L) "so that all input necessary be allowed." The motion was seconded. Two members of the board voted for the motion and two against. The motion to "rehear" did not pass so that no action was taken. Immediately following the vote, the chairman stated, "[t]herefore, it will be published," and the section ordered to be filed with the State Records Center.

When questioned as to its legality, the EID lawyer stated:

> * * * The board adopted by majority this regulation, the board then suspended the regulation's effectiveness pending the hearing * * * today * * *.
>
> Since the board has not decided to go back * * * to continue the suspension, it's my interpretation that a two to two vote means the adoption is valid and it should be filed.

This advice was contrary to EID's position at the opening of the meeting. Yet, the chairman, without comment, let his ruling stand, in effect, adopting the lawyer's interpretation. The regulations were filed under the State Rules Act on or about April 21, 1980.

Regulation 3–300(L) was not readopted, the suspension was not lifted, nor was the regulation returned for hearing. Furthermore no motion was made to file the regulation.

What is meant by "reconsider," "suspend" and "rehear"?

[2] As normally used in the context of administrative adjudication "reconsideration" implies reexamination, and possibly a different decision by the entity which initially decided it. *Union Oil Co. of Cal. v. State, Dept. of Nat. Resources,* 526 P.2d 1357 (Alaska 1974).

Given its ordinary meaning, the term "suspend" means nothing more than a temporary cessation; i.e., a holding in abeyance. *Kansas State Board of Healing Arts v. Seasholtz,* 210 Kan. 694, 504 P.2d 576 (1972).

"Although the words 'suspension' and 'suspend' usually connote something temporary, they have occasionally been used to mean 'a permanent stop' or 'discontinuance'." *Ridenhour v. Mollman Pub. Co.,* 66 Ill.App.3d 1049, 23 Ill.Dec. 36, 383 N.E.2d 803, 805 (1978).

"A rehearing refers to a reconsideration of a case by the same court in which the original determination was made." *Colvin v. Goldenberg,* 108 R.I. 198, 273 A.2d 663, 669 (1971).

In the instant case, the Companies petitioned the EIB to reexamine its adoption of regulation 3–300(L) to determine whether it might want to change its position. Upon reconsideration, EIB decided to hold its

adoption in abeyance unti
to allow it "to take action
no action were taken, th
remain suspended. At th
ing, EIB was asked agai
adoption of the regulatio
a majority of the quorur
or against a "rehearing
tion." It took no actio
legal advice given by E
regulation of vital impor
though doubt and uncer

The mere fact alone
words "reconsider," "sus
be taken" and "rehear"
Board never acted to re
lify that adoption" is a
sion. That was not th
Board. The regulations
suspension and no actio
issue. The regulation h
of Damocles over the C
is in a state of "suspe
tion cannot be filed un
ty of a quorum, lifts th
has not done. EID arg
sion was lifted at the
the Board failed to nu
300(L)." We disagree.
mained in effect unt
meeting, lawfully lif
amended the regula
Time would not have
had held a meeting
present and voting.

Whenever any dou
the adoption of any
Regulations," which
far into the future,
into certainty by a m
rum.

We hold that regu
in effect because it
majority vote of a q
was placed in a stat

B. *Section 3-300*
EIB did not
consent of t
Advisory Cou

[3] The Compar
3–300(J) is void bec

adoption in abeyance until April 11 in order to allow it "to take action at that time." If no action were taken, the regulation would remain suspended. At the April 11th meeting, EIB was asked again to reconsider the adoption of the regulation. By a 2–2 vote, a majority of the quorum did not vote for or against a "rehearing" or "reconsideration." It took no action. To follow the legal advice given by EID is to declare a regulation of vital importance adopted even though doubt and uncertainty existed.

The mere fact alone that EID took the words "reconsider," "suspend with action to be taken" and "rehear" to mean that "the Board never acted to repeal, rescind or nullify that adoption" is an erroneous conclusion. That was not the issue before the Board. The regulations were in a state of suspension and no action was taken on that issue. The regulation hangs like the Sword of Damocles over the Companies because it is in a state of "suspension." The regulation cannot be filed until EIB, by a majority of a quorum, lifts the suspension. This it has not done. EID argues that the suspension was lifted at the April meeting "since the Board failed to nullify or 'unadopt' 3–300(L)." We disagree. The suspension remained in effect until EIB, at a public meeting, lawfully lifted the suspension, amended the regulation or nullified it. Time would not have been wasted if EIB had held a meeting with five members present and voting.

Whenever any doubt arises relevant to the adoption of any "Radiation Protection Regulations," which affect life and health far into the future, doubt must be turned into certainty by a majority vote of a quorum.

We hold that regulation 3–300(L) is not in effect because it was not adopted by a majority vote of a quorum of EIB after it was placed in a state of suspension.

B. *Section 3–300(J) is void because the EIB did not obtain the advice and consent of the Radiation Technical Advisory Council.*

[3] The Companies claim that Section 3–300(J) is void because EIB did not obtain the advice and consent of the Radiation Technical Advisory Council as provided by law. We agree.

The "Radiation Protection Act" created a "Radiation Technical Advisory Council" (RTAC) consisting of seven members. These persons "*shall be individuals with scientific training* in one or more of the following fields: diagnostic radiology, radiation therapy, nuclear medicine, radiation or health physics or related sciences with specialization in radiation." Section 74–3–2(B), N.M.S.A.1978. "It is the duty of the council to advise * * * [EID] and * * * [EIB] on technical matters relating to radiation." Section 74–3–3. Following a public hearing on the adoption of regulations, and after considering the facts and circumstances, EIB shall have the authority, "with the advice and consent of the council * * * to promulgate rules and regulations:

> (1) concerning the health and environmental aspects of radioactive material and radiation equipment * * * *" Section 74–3–5(A).

Section 3–300(J) falls within this classification.

Following the public hearing held on the adoption of radiation regulations, the Council prepared a document entitled "COMMENTS AND RECOMMENDATIONS OF THE RADIATION TECHNICAL ADVISORY COUNCIL TO THE ENVIRONMENTAL IMPROVEMENT BOARD ON THE RADIATION REGULATIONS PUBLIC HEARING RECORD OF MAY 16–20, 1979." This report was made "[i]n accordance with the Memorandum Agreement * * *." pertinent parts of which were stated in the record. On the fourteenth page of "Comments and Recommendations," the following is stated:

> In regard to 3–300 J, after review, the RTAC has determined that this is outside of the scope of the technical expertise and is really a legal question which we would defer to the Board.

The Council made no recommendations with respect to the adoption of 3–300(J).

EIB adopted this regulation without the "advice and consent" of the Council.

EID uses several pathways off the legal course to overcome EIB's plain violations of law.

EID claims that § 74–3–3 which sets forth the duty of the Council to advise EIB on "technical matters" is inconsistent with "advice and consent" and creates an ambiguity. We disagree.

Under § 74–3–5(A), EIB is a radiation protection consultant who seeks the advice and opinion of other agencies including the "Radiation Technical Advisory Council." The Council *advises* EIB on technical matters, but if EIB wants to adopt regulations, it can do so only "with the advice *and consent* of the council." EIB cannot act lawfully alone.

The reason is obvious. EIB is composed of nonscientifically trained persons whose duties relate to a variety of other enactments. The Council is composed of scientifically trained persons. The legislature made certain that EIB could not adopt regulations simply on the advice of the Council on "technical matters." To "enact" as law, regulations which seriously affect the people of this State and industry, the legislature mandated that EIB "shall promulgate rules and regulations," not only with the advice of the Council, but with its consent. No discretion was allowed EIB. The legislature was wise. It did not allow the Radiation Protection Act "to slip through its fingers like an eel."

EID makes the assertion that RTAC's deferral to the Board on a legal matter outside the scope of its technical expertise constituted "confirmation"; that its deference to the Board constituted approval of whatever good judgment the Board would exercise. To argue that this is lawful "advice and consent of the council" in the promulgation of radiation regulations is feckless reasoning.

To support its position, EID relies on *Leek v. Theis*, 217 Kan. 784, 539 P.2d 304 (1975); *State v. Essling*, 268 Minn. 151, 128 N.W.2d 307 (1964); *Kligerman v. Lynch*, 92 N.J.Super. 373, 223 A.2d 511 (1966); *McMahon v. City of Des Moines*, 232 Iowa 240, 4 N.W.2d 866 (1942); *Larson v. City of St. Paul*, 83 Minn. 473, 86 N.W. 459 (1901). What we understand EID's position to be is: when a governor appoints a person to a public office, "The mere act of confirmation or rejection by the Senate, for whatever reason and in whatever manner, is sufficient to meet the requirements of said clause." *Kligerman* [223 A.2d 513].

Of course, an act of confirmation or rejection does not mean that "deference to the board constituted approval." What it means is that the "council shall approve of it, and take affirmative action * * *." *In Re Opinion of The Justices*, 190 Mass. 616, 78 N.E. 311, 312 (1906). "As has been pointed out, the legislative intent expressed in the statute is that the office shall be filled by an incumbent selected by the governor and approved by the senate * * *." *State v. Watson*, 132 Conn. 518, 45 A.2d 716, 724 (1946). See also, *Territory of New Mexico v. Stokes and Mullen*, 2 N.M. 63 (1881); *In the Matter of the Attorney-General*, 2 N.M. 49 (1881); *Klock v. Mann*, 16 N.M. 744, 120 P. 313 (1911).

We are involved "with the advice and consent of the council" prior to the publishing of radiation regulations. It is essential to the orderly conduct of EIB and RATC in this respect that formality be observed in this relationship. These agencies are charged with concurrent duties. Each agency should be able to rely upon the definite and formal notice of the action by the other.

Prior to the public hearing, the regulations were submitted to the Council for "advice and consent." After the public hearing, before EIB could publish the regulations, it needed a formal report from the Council, which it received, not only that it recommended the publication of the regulations, but that it formally approved them. This is what "advice and consent" means in simple ordinary language. This rule or doctrine should not be left in doubt or speculation, or by some interpretation of vague language used, or by deference to the

Board. "Advice and consent" must be stated in plain, unequivocal wordage.

The Council did not give its "advice and consent" to EIB prior to the publication of Section 3-300(J).

EID seeks to avoid "advice and consent" by way of a memorandum agreement between EIB and the Council. Pertinent parts were stated in the record as follows:

"Therefore, it is agreed that, one, the R.T.A.C. does not have, and should not have, a veto power over the E.I.D.'s adoption of radiation protection regulations.

"Two, in a promulgation and adoption of radiation protection regulations the following procedures are acceptable to both the E.I.B. and the R.T.A.C.:

"A. The R.T.A.C. will advise and make suggestions to the Environmental Improvement Division staff in the drafting of the proposed radiation protection regulations.

"B. At the public hearing before the Environmental Improvement Board, the R.T.A.C. may participate as individuals or as a body, as would any other participant. R.T.A.C. participation may include submittal of testimony, oral or written, and addressing questions to the witnesses.

"C. After the hearing record is closed and the transcript is prepared and available for public review, the R.T.A.C. and any other participant in the hearing shall have thirty days to submit final comments on the hearing record and propose final wording of the regulations. These comments may not include any evidence.

"D. The E.I.B. shall then consider the record, including final comments and proposed language, and shall take the action the E.I.B. feels is appropriate within the scope of the law."

EID says:

The agreement between RTAC and EIB is an interpretation by the two agencies of the Radiation Protection Act, said interpretation being *inter alia* an attempt to resolve a patent ambiguity in the statute. The interpretation is not unreasonable, erroneous or legally incorrect. Accordingly, it should be followed by this court * * *.

All that we find in this "agreement" is that RTAC cannot veto *EID's* adoption of radiation protection regulations; that RTAC will advise and make suggestions to *EID's staff* in drafting regulations, and after a public hearing, EIB "shall take the actions the EIB feels is appropriate within the scope of the law."

This "agreement" and interpretation of § 74-3-5(A) when exercised is a violation of the law.

[4] Finally, EID claims the Companies are "estopped" from arguing the "advice and consent" issue because the Companies failed to preserve their objection before EIB. EID is mistaken. EIB held its meeting May 16-20, 1979. The Council did not meet until the hearings were over. At its November 1979 meeting EIB adopted the regulations. At this meeting, EIB did not allow further comment by the Companies.

The Companies then filed a petition in which they "respectfully request the Board to reconsider its decision of November 18, 1979 adopting the recommended amendments of * * * [EID] as set forth in the EID's written submission of September 4, 1979. * * *:

1. The Board has not met the statutory requirement of obtaining the 'advice and consent' of the Radiation Technical Advisory Council (RTAC)."

EID filed a response. The Board was told of the issue and refused to do anything about it. For the Companies to have done more would have been futile. One is not required to do acts "which are vain or futile." *State ex rel. Norvell v. Credit Bur. of Albuquerque, Inc.*, 85 N.M. 521, 529, 514 P.2d 40 (1973).

In any event, this "procedural device" cannot be used on so important a matter as radiation regulations. Section 74-1-9(G) reads in pertinent part:

Any person who is or may be affected by a regulation adopted by the board may appeal to the court of appeals for further relief * * *.

"For relief" has a broad meaning. It is not limited in scope, i.e., it is not an appeal from a final order or judgment. "For relief" means that when a board adopts a regulation, which, when applied, leads to an unfavorable result to any "person," that "person" can appeal to this Court to challenge the validity of the regulation. This "person" may be an ordinary lay person, one of many at a public hearing, unlearned in the law and procedural process, quiescent in nature, whose thoughts and ideas are not expressed. This lay person stands on an equal footing with corporate "persons" represented by a legal staff. Relief for this lay person is justified in an appeal, notwithstanding the failure to raise legal or factual issues at the public hearing.

We are concerned with radiation regulations of far reaching effects. The legislature made the appellate process broad to allow "any person," lay or corporate, to seek relief, to keep EIB today or tomorrow reasonably aligned with the law. Preserving error at a public hearing is valueless because EIB is not learned in the law or procedural process. It could not legally decide whether a regulation is unconstitutionally vague, nor whether it received the "advice and consent of the council."

EID cannot claim "estoppel" because of the failure of the Companies to preserve error at the public hearing.

C. *The Companies did not receive a fair and impartial hearing.*

[5, 6] In administrative law it is essential that an independent state agency sit as a fair and impartial body at a hearing in which massive and important regulations are to be adopted. EIB was appointed by the Governor with the advice and consent of the Senate, § 74–1–4, without a staff of its own. EIB had to be responsible for environmental management and consumer protection of this generation as well as those yet unborn. Section 74–1–2. In the performance of its duties, EIB received "staff support" from EID. Section 9–7–13. From this point forward, the inter-relationship of EIB and EID began.

EID was organized within the health and environment department, § 74–1–6, composed only of a "Director." Section 74–1–3(B). The director's staff, which includes lawyers, serves both the director and EIB. The EID staff prepared the regulations for EIB and submitted them to EIB to be presented to all persons at a public hearing. The notice was directed to "all interested persons." At the hearing "all interested persons" were given an opportunity to submit data, views or arguments, orally or in writing, and were allowed to examine witnesses who testified.

The only power granted EID was to "enforce the * * * regulations * * * promulgated by the board * *." [§ 74–1–6], and "maintain, develop and enforce regulations * * *." Section 74–1–7. Its powers arose after the adoption of the regulations, not before. Nevertheless, at the public hearing EID and the Companies were the primary "interested persons." The Director of EID, whose staff prepared the regulations, set himself up as an "interested person," one who could not in any way be affected by the regulations. EID presented to EIB, in support of the regulations it drafted for EIB, all of the data, views and arguments allowed "interested persons," including the examination of witnesses. From the opening of the public hearing to its close, EIB looked to EID for legal guidance, in effect, giving the appearance of a client-attorney relationship with the Companies as adversaries.

EID had no duty or authority by law to prepare the regulations for EIB. We can only assume that EIB impermissibly delegated its authority to the Director of EID to perform its work in preparation of the public hearing. It would have been just as objectionable if EIB had delegated its work to the Companies to prepare the regulations and then come before the Board at a public hearing to defend themselves. The Companies would have prepared favorable regulations in good faith, as did EID, but like EID, it would have shaded the language to mean what the Companies considered to be reasonable requirements to become licensed. EID did not.

EIB should not have recognized EID as an "interested person." EID did not stand on an equal footing with the Companies.

EID and the Companies should stand equally before EIB at a public hearing in one way: that neither of them shall perform any services for EIB, either voluntarily or by request.

[7] Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character, or which requires the exercise of judgment. *Anderson v. Grand River Dam Authority*, 446 P.2d 814 (Okl.1968); *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (Iowa 1972); *Voth v. Fisher*, 241 Or. 590, 407 P.2d 848 (1965); 2 Am.Jur.2d *Administrative Law* § 222 at 52 (1962); 73 C.J.S. *Public Administrative Bodies and Procedure* § 57 (1951).

The proper adoption of radiation regulations falls within this category. EIB had a duty to have the regulations prepared by a staff of its own. It had no right to delegate this authority to one who was an "interested person" at a public hearing.

The promulgation of regulations 3–300(L) and 3–300(J) is declared to be void.

Companies claim regulation 3–300(L) is unconstitutionally vague. We do not deem it necessary to decide this point.

This case is remanded to EIB to take whatever steps are necessary to remove 3–300(L) and 3–300(J) from the Radiation Protection Regulations filed in the State Record Center.

The costs of this appeal shall be paid by the appellee.

IT IS SO ORDERED.

LOPEZ, J., concurs.

WOOD, J. (specially concurs).

WOOD, Judge (specially concurring).

Regulation 3–300(L)

In arguing for the validity of the adoption of this regulation, the EIB asserts the intent of the uranium companies was to suspend this regulation until the April, 1980 meeting. The intent of the uranium companies is not pertinent; the issue is the action taken by the EIB.

The EIB contends that the action taken was to suspend this regulation until the April, 1980 meeting. This is incorrect. The action taken was to suspend, with no termination date stated, to hear oral argument at the April meeting, and to allow the EIB to take action again.

The EIB claims that the motion for reconsideration at the April meeting, which failed by a tie vote, lifted the suspension because this vote was "action taken". I disagree; the tie vote resulted in no action. See *Petition of Kinscherff*, 89 N.M. 669, 556 P.2d 355 (Ct.App.1976).

The suspension not having been lifted, this regulation remains suspended, awaiting action by a majority of the EIB. Thus, I agree that this regulation is not in effect.

Regulation 3–300(J)

I agree generally with the discussion that regulation 3–300(J) is not in effect because the RTAC did not consent to the adoption of this regulation. The ways in which consent may be given need not be considered because, as the majority opinion points out, "consent" requires some showing of approval. RTAC's deferral to the EIB was a submission or yielding to the EIB and not approval of the regulation. The agreement between RTAC and EIB had no effect on the consent issue because the agreement was contrary to the statute requiring consent. See *Leaco Rural Tel. Coop., Inc. v. Bureau of Revenue*, 86 N.M. 629, 526 P.2d 426 (Ct.App.1974).

I concur in the result reached, but only on the basis stated in this special concurrence—that neither regulation 3–300(L) nor 3–300(J) was properly adopted.

ant judgment n. o. v., and its order so doing should be affirmed.

It is so ordered.

COMPTON, C. J., and CARMODY, J., concur.

72 N.M. 186

Amanda E. SIMS and George W. Sims, Petitioners-Appellants,

v.

Hon. Edwin L. MECHEM, Chairman, E. S. (Johnny) Walker, Member, A. L. Porter, Jr., Member, Secretary of the Oil Conservation Commission of the State of New Mexico, Olsen Oils, Inc., and Texas Pacific Coal and Oil Company, Successor to Olsen Oils, Inc., Respondents-Appellees.

No. 7206.

Supreme Court of New Mexico.

May 27, 1963.

Proceeding on oil conservation commission's order which established two separate standard production units and rescinded a prior order with respect to part of property involved. The District Court, Lea County, Caswell S. Neal, D. J., entered order denying petition for review and owners of mineral interests appealed. The Supreme Court, Compton, C. J., held that oil commission's order which did not contain finding as to existence of waste or that pooling would prevent waste was void.

Order denying petition for review reversed with directions to enter order declaring commission's order void

1. Appeal and Error ⇐170(1)

Question whether oil conservation commission had jurisdiction to enter order establishing two quarter sections as two separate 160 acre standard production units would be determined by Supreme Court, notwithstanding issue had been raised for first time in Supreme Court.

2. Mines and Minerals ⇐92.78

Oil conservation commission has authority to require pooling of property when pooling has not been agreed upon by parties and has further authority to modify any agreement between parties, but action of commission must be predicated upon prevention of waste. 1953 Comp. §§ 65-3-10, 65-3-14(c, e).

3. Mines and Minerals ⇐92.79

Oil commission's order which established two separate standard production units but which did not contain finding as to existence of waste or that pooling would prevent waste was void. 1953 Comp. §§ 65-3-10, 65-3-14(c, e).

C. N. Morris, Foster Windham, Carlsbad, for appellants.

Richard S. Morris, James M. Durrett, Jr., Santa Fe, for N. M. Oil Conservation Commission.

Campbell & Russell, Roswell, Girand, Cowan & Reese, Hobbs, for Olsen Oils, Inc. and Texas and Pacific Coal & Oil Co.

COMPTON, Chief Justice.

This appeal involves Order No. R-1310 of the Oil Conservation Commission, the validity of which is challenged here on jurisdictional grounds.

Reviewing the record, in August, 1955, the commission issued Order No. R-677 pooling contiguous acreage in Section 25, Township 22 South, Range 37 East, N.M. P.M., Lea County, consisting of 40 acres in the southeast quarter of the northwest quarter and 120 acres in the northeast quarter of the southwest quarter, and south half of the southwest quarter of Section 25 as a 160-acre non-standard production unit and approved the drilling of a well. In September, 1957, the appellants, being owners of the mineral interests in the above-described production unit, and the then holder of the outstanding oil

and gas leases thereon, entered into a communitization agreement pooling the leasehold estate for development. In January, 1958, a well was completed in the center of the 40 acres in the southeast quarter of the northwest quarter and its production attributed to the 160-acre production unit as provided in Order R–677 and the communitization agreement.

Subsequently, the successor in interest to the leasehold estate applied to the commission for a 160-acre non-standard gas proration unit consisting of the balance of the acreage in the northwest and southwest quarters of Section 25, on which it held leases or, in the alternative, for an order force-pooling the northwest quarter of Section 25 and the southwest quarter of Section 25 as two separate standard 160-acre production units. It was proposed in this application that if the two standard units were force-pooled that a second well would be drilled in the northeast quarter of the southwest quarter of the section.

After a hearing on the application, the commission found that the most efficient and orderly development of the acreage in the west half of Section 25 could be accomplished by force-pooling it into two standard units and, on December 17, 1958, entered Order No. R–1310 establishing the northwest quarter and the southwest quarter of Section 25 as two separate 160-acre standard production units, and rescinded its previous Order No. R–677. The production from each pooled unit was allocated to each tract in that unit in the same proportion that the acreage in said tract bore to the total acreage in the unit.

Pursuant to Order R–1310 the production from the first well was attributed to the acreage in the northwest quarter of Section 25 in which appellants held only a 1/45th royalty interest, and a second well was drilled in the northeast quarter of the southwest quarter and its production attributed to the acreage in the southwest quarter of which appellants were principal owners. The second well was a smaller producer than the first, resulting in diminished royalties to appellants.

Thereafter, in October, 1960, appellants filed an application before the commission for an order to vacate and set aside as void Order R–1310 and to reestablish the non-standard 160-acre production unit in conformity with Order R–677 and the communitization agreement. The basis of this application was the alleged concealment from the commission of the agreement between the parties, and it challenged the jurisdiction of the commission to enter Order R–1310 in violation of the agreement and of the rights of appellants. The denial of this application is the basis of appellants' petition for review.

On the hearing of the petition for review, the trial court denied appellants' petition and from such ruling they have appealed to this court for review.

Appellants have argued several points, but, in view of our disposition of this appeal, we need only concern ourselves with a determination of a basic jurisdictional question.

[1] They now urge that the commission was without jurisdiction to enter Order R–1310 because the commission failed to find that waste was being committed under Order R–677 or that waste would be prevented by the issuance of Order R–1310. Insofar as can be ascertained from the record, the lack of jurisdiction of the commission to enter Order R–1310 is raised here for the first time. Consequently, this jurisdictional question must first be determined. Davidson v. Enfield, 35 N.M. 580, 3 P.2d 979; State v. Eychaner, 41 N.M. 677, 73 P.2d 805; Brown v. Brown, 58 N.M. 761, 276 P.2d 899; In re Conley's Will, 58 N.M. 771, 276 P.2d 906. Also compare Driver-Miller Corp. v. Liberty, 69 N.M. 259, 365 P.2d 910; Warren Foundation v. Barnes, 67 N.M. 187, 354 P.2d 126; Section 21–2–1(20) (1), N.M.S.A.1953.

[2] Unquestionably the commission is authorized to require pooling of property

where such pooling has not been agreed upon by the parties, § 65-3-14(c), N.M.S.A.1953, and it is clear that the pooling of the entire west half of Section 25 had not been agreed upon. It is also clear from sub-section (e) of the same section that any agreement between owners and leaseholders may be modified by the commission. But the statutory authority of the commission to pool property or to modify existing agreements relating to production within a pool under either of these sub-sections must be predicated on the prevention of waste. Section 65-3-10, 1953 Comp.

The statutory authority of the Oil Conservation Commission was thoroughly considered by this court in the recent case of Continental Oil Company v. Oil Conservation Commission, 70 N.M. 310, 373 P.2d 809, wherein we said:

> "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it. The commission has jurisdiction over matters related to the conservation of oil and gas in New Mexico, but the basis of its powers is founded on the duty to prevent waste and to protect correlative rights. * * * Actually, the prevention of waste is the paramount power, inasmuch as this term is an integral part of the definition of correlative rights."

Appellees contend that the commission's finding that

> "* * * the most efficient and orderly development of the subject acreage can be accomplished by force pooling the NW/4 of said Section 25 and the SW/4 of said Section 25 to form two standard gas proration units in the Tubb Gas Pool, and that such an order should be entered."

is equivalent to a finding that this pooling will prevent waste. We do not believe the finding is susceptible to such construction. There is nothing in evidence before the commission tending to support a finding of waste or the prevention of waste by pooling the property into two standard units.

[3] We conclude, therefore, that since commission Order R-1310 contains no finding as to the existence of waste, or that pooling would prevent waste, based upon evidence to support such a finding, the commission was without jurisdiction to enter Order R-1310, and that it is void. Continental Oil Company v. Oil Conservation Commission, supra.

The order denying appellants' petition for review should be reversed, with directions to the trial court to enter an order declaring Order R-1310 of the commission void.

It is so ordered.

NOBLE and MOISE, JJ., concur.

72 N.M. 190

DIAMOND TRAILER SALES CO., a Colorado Corporation, Plaintiff-Appellant,

v.

Ray MUNOZ, Defendant-Appellee.

No. 7209.

Supreme Court of New Mexico.

May 27, 1963.

Declaratory judgment proceeding. The District Court, McKinley County, Frank B. Zinn, D. J., entered judgment declaring that trailer court owner's lien for unpaid rent and services took precedence over prior recorded chattel mortgage on house trailer, and chattel mortgagee appealed. The Supreme Court, Noble, J., held that the prior recorded chattel mortgage took precedence.

Reversed and remanded with instructions to vacate judgment and proceed.

1. Chattel Mortgages ⇐138(1)

Prior recorded chattel mortgage on house trailer took precedence over statutory

recent act, which is the latest expression of the legislative will, will operate as a repeal of the former to the extent of the repugnancy. 75 O.S.1961 § 22." (emphasis added)

Our conclusion is that the District Attorney here had no authority to speak for the state as to disposition of forfeiture proceedings against the pickup truck.

[2] Further, the trial court clearly erred in attributing *res judicata* effect to the pronouncement of the magistrate releasing the vehicle. The only matter properly before the court on May 18, 1982 was CRF-83-245, in which Gary Brown was making his initial appearance under the felony charge of selling marijuana. No forfeiture action had been filed. Proceedings such as this one involving seizure and forfeiture of vehicles under 63 O.S. §§ 2-503 and 2-506 are *in rem* and civil in nature. *Moore v. Brett,* 193 Okl. 627, 137 P.2d 539, 540 (Okl. 1943).

[3, 4] One ingredient essential to the validity of any judicial order is jurisdiction of the subject matter. *La Bellman v. Gleason & Sanders, Inc.,* 418 P.2d 949, 953 (Okl.1966). Subject matter jurisdiction is invoked by pleadings filed with the court. In *Consolidated Mtr. Frt. Terminal v. Vineyard,* 193 Okl. 388, 143 P.2d 610, 612 (Okl.1943) we observed:

"In the opinion of this court it was pointed out that jurisdiction exists when the courts have power to proceed in a case of the character presented, or power to grant the relief sought in a proper cause; that the power to proceed is acquired by an application of a party showing the general nature of the case and requesting relief of the kind the court has power to grant; that ordinarily jurisdiction is invoked by pleadings filed by the parties."

The subject matter jurisdiction of the court to hear an *in rem* civil forfeiture proceeding was not invoked by the filing of an information charging the unlawful sale of marijuana.

In *Union Oil Co. of California v. Brown,* 641 P.2d 1106, 1108 (Okl.1982) we stated that:

"[A] judgment outside the scope of the issues presented for determination by the court is of no force and effect, or *coram non judice,* and void at least insofar as it goes beyond the issues.

The district court sitting as magistrate in CRF-83-245 lacked subject matter jurisdiction to dispose of the seized truck. Its order of May 18, 1983 releasing the truck to the father is facially void, and may not be accorded legal effect in the later civil action.

The order of the District Court denying and in effect dismissing the forfeiture proceedings against the 1977 Chevrolet pickup truck is reversed and that cause is reinstated. The matter is remanded for further proceedings thereon.

COURT OF APPEALS OPINION VACATED; TRIAL COURT'S ORDER REVERSED AND REMANDED.

DOOLIN, C.J., HARGRAVE, V.C.J., and HODGES, LAVENDER, SIMMS and ALMA WILSON, JJ., concur.

OPALA, J., concurs in judgment.

KAUGER, J., recused.

VAN HORN OIL COMPANY,
Appellant,

v.

OKLAHOMA CORPORATION COMMISSION, an Oklahoma Administrative Agency; Hamp Baker, Corporation Commissioner; Norma Eagleton, Corporation Commissioner; James B. Townsend, Corporation Commissioner; and Samedan Oil Corporation, Appellees.

No. 66298.

Supreme Court of Oklahoma.

April 26, 1988.

Oil company filed application before Oklahoma Corporation Commission seeking

pooling of interest with oil producer in common source of oil supply. The Corporation Commission granted oil company's application for forced pooling, and oil producer appealed. The Supreme Court, Lavender, J., held that: (1) oil producer was not denied procedural due process when its motion for continuance was denied and it was forced to proceed without its principals who had voluntarily absented themselves from hearing; (2) oil producer was not denied procedural due process when Commission conducted immediate hearing on opponent's oral challenge to hearing officer is decision to grant continuance; (3) Commission had power to render decision on continuance issue contrary to that of its hearing officer regardless of whether hearing officer erred in reaching his determination; and (4) Commission did not err in refusing to reopen hearing to take evidence which could have been produced at time of original hearing.

Affirmed.

Doolin, C.J., Opala, Kauger and Summers, JJ., dissented.

1. Constitutional Law ⇐296(1)

Oil producer was not denied procedural due process when its request for one-week continuance on application for forced pooling was denied by Corporation Commission, after its principals had voluntarily absented themselves from scheduled hearing, or when its request to reopen case for submission of additional evidence was refused, where oil producer was afforded notice of hearing, and was provided with information regarding issues to be heard and opportunity to present evidence and argument through counsel. U.S.C.A. Const.Amend. 14.

2. Administrative Law and Procedure ⇐469

Mines and Minerals ⇐92.79

Corporation Commission acted properly in exercising its discretion to hear immediate oral challenge to hearing officer's grant of continuance to party opposing application for pooling where, by its rules, Commission had specifically retained power to waive rules of procedure and where normal procedure, requiring written motion filed within five days of decision, would have effectively denied opposing party effective challenge to grant of one-week continuance.

3. Constitutional Law ⇐296(1)

Oil producer was not denied procedural due process, when Corporation Commission heard opposing party's oral motion challenging hearing officer's grant of one-week continuance immediately following hearing; where no indication what, if any, material, in addition to that provided hearing officer, would have been relevant to presentation before Commission. U.S.C.A. Const. Amend. 14.

4. Administrative Law and Procedure ⇐107

Corporation Commission, when exercising adjudicative authority, is functional analogue of court of record with dispute resolution authority conferred by constitutional grant.

5. Administrative Law and Procedure ⇐479

Although Corporation Commission has authority to delegate power to hear evidence, hearing officers have authority only to receive evidence and make recommendations to Commission regarding exercise of Commission's judicial authority. 17 O.S. 1981, § 162; 52 O.S.Supp.1985, § 149.1.

6. Administrative Law and Procedure ⇐479

Corporation Commission had power to render decision contrary to that of hearing officer concerning motion for continuance regardless of whether hearing officer erred in rendering his decision. 17 O.S.1981, § 162; 52 O.S.Supp.1985, § 149.1.

7. Administrative Law and Procedure ⇐480

Corporation Commission did not err in refusing to reopen hearing on application

for pooling agreement to allow party, who appeared only through counsel on date of scheduled hearing, to introduce evidence on fair-market value of party's interest, inasmuch as such evidence was available at time of hearing and could have been produced.

Appeal from Order of the Oklahoma Corporation Commission. Appellee Samedan Oil Corporation filed application for forced pooling order in which interests of appellant Van Horn Oil Company were to be affected. Pooling order was issued and appellant seeks to have order vacated because appellant was denied a continuance on the date hearing was set on the application and because the Commission denied appellant's subsequent motion to reopen the cause for admission of additional evidence regarding the market value of appellant's affected interests.

AFFIRMED.

Dawson, Cadenhead & Kite by Jerry D. Kite, Oklahoma City, for appellant.

Ames, Ashabranner, Taylor, Lawrence, Laudick & Morgan by Guy E. Taylor and Donald F. Heath, Jr., Oklahoma City, for appellee Samedan Oil Corp.

LAVENDER, Justice:

On December 4, 1985, appellee Samedan Oil Corporation filed an application before the Oklahoma Corporation Commission seeking the pooling of the interests in the Cromwell common source of supply underlying a certain Section 29 in Hughes County, Oklahoma. As respondent in the application Samedan named appellant Van Horn Oil Company. Hearing was set on the application on December 30, 1985. Notice of this hearing was mailed to appellant on December 6 and received by appellant on December 10, 1985.

As background to this case it should be noted that a producing well had been drilled to the Cromwell common source of supply and was in production prior to the pooling application in this case. The well had been commenced in November 1984 under an emergency order while application for an order establishing spacing of the unit including the well was pending. The parties to the present action were in contest over the proper spacing of the unit in question. A spacing order establishing a 640 acre spacing unit including all of Section 29 was issued on May 15, 1985. The well in Section 29 had been completed as a gas producer in the Cromwell on January 22, 1985. Following completion of the well and the issuance of the spacing order appellant and Samedan had engaged in negotiations concerning appellant's participation in the well but were unable to come to terms. The failure to achieve voluntary agreement led to the application for order pooling appellant's interests in Section 29.

[1] On the date set for hearing the pooling application in this matter, Samedan appeared by counsel and with a witness in support of its application. Appellant appeared by counsel and made an oral request for a continuance. The request for a continuance was referred from the hearing officer who was to hear the application to a second hearing officer who was hearing motions for continuance. In the hearing on the continuance it was related that the continuance was sought because the principals of appellant had gone on vacation and were not available to testify on the application. The principals of appellant had not contacted their counsel regarding the application until December 24, 1985, and at that time requested that he secure a continuance of the hearing. Counsel related that he had not filed written motion for a continuance nor had he contacted counsel for Samedan because of press of business. The hearing officer granted a one-week continuance.

Following the hearing officer's ruling on the motion for continuance, counsel for Samedan secured an immediate review of that ruling on oral application to the Commission. Appellant's counsel was notified

and both parties presented arguments to the Commission regarding the motion for continuance. The Commission denied the continuance and remanded the case to the hearing officer previously scheduled to hear the pooling application on its merits on that date.

The hearing was held before the hearing officer and Samedan presented its witness in support of its pooling application. Counsel for appellant was allowed to thoroughly cross-examine this witness. After the hearing, but prior to issuance of the hearing officer's report to the Commission, appellant sought to have the case reopened for submission of additional evidence regarding the market value of appellant's interests in Section 29. This matter was heard before a third hearing officer, who recommended denial. The Commission entered an order putting this recommendation into effect.

The report of the hearing officer on the pooling application recommended that Samedan's application be granted. The Commission subsequently, following the filing of exceptions to the report by appellant and the hearing on those exceptions, entered Order No. 294581, granting the pooling application, allowing appellant to participate in the well or to receive a cash bonus for its interest as established by the pooling order as fair value for the interest.

Appellant subsequently sought reconsideration of Order No. 294581 by the Commission. This motion for reconsideration was denied and appellant has now challenged the validity of the Order on the grounds that the denial of the continuance on December 30, 1985, and the subsequent refusal to reopen the case for submission of additional evidence regarding market values effectively denied appellant due process in the proceedings. We find no merit in appellant's assertions.

Regarding the requirements of due process this Court has stated: [1]

> Procedural due process of law contemplates a fair and open hearing before a legally constituted court or other authority with notice and an opportunity to present evidence and argument, representation by counsel, if desired, and information concerning the claims of the opposing party with reasonable opportunity to controvert them. (citation omitted)

As the facts stated in this case clearly establish, appellant was afforded notice of the hearing, was provided with information regarding the issues to be heard and was provided with the opportunity to present evidence and argument. Counsel for appellant appeared at the hearing but appellant's principals chose to forego the opportunity afforded appellant to present evidence. Through counsel appellant was afforded the opportunity to present argument regarding appellant's position on the issues involved in the application for pooling. It should be axiomatic that a party to a proceeding cannot, by voluntary action, absent itself from that proceeding and then be heard to complain about the loss of opportunity to present evidence. There is nothing in the record in this case to indicate that appellant's failure to appear at the December 30 hearing was due to any factor other than the voluntary decision to subordinate an appearance at the hearing to appellant's principals' recreational desires.

Appellant has also suggested that it was denied due process by the grant of an immediate hearing by the Commission of Samedan's challenge to the ruling of the hearing officer which had been in favor of appellant's request for continuance. This argument is presented in several parts; first, that the allowance of the challenge was extraordinary; second, that appellant was not given time to prepare for the hearing; and third, that the Commission could not overrule the hearing officer's recommendation unless it found an abuse of discretion by the hearing officer in recommending the continuance.

[2] We find no impropriety of the allowance of the challenge to the hearing offi-

1. *Jackson v. Ind. School Dist. No. 16,* 648 P.2d 26, 30 (Okla.1982).

cer's recommendation directly to the Commission on oral motion. By its rules the Commission has specifically retained the power to waive the requirements of its own rules of procedure. Normal procedure regarding a challenge to the hearing officer's recommendation would have required a written motion filed within five days. The Commission exercised its discretion to waive this requirement and entertained an immediate oral motion. Under the circumstances of this case normal procedure would have de facto denied Samedan an effective challenge to the hearing officer's recommendation. The Commission's exercise of discretion to hear the challenge was clearly proper.

[3] Appellant has also argued that the manner in which its counsel was called before the Commission to hear the challenge on the continuance denied it due process. Appellant claims that short notice of the hearing on the challenge denied its counsel the opportunity to properly prepare. We disagree. Appellant's counsel had just finished presenting its argument in support of the continuance to the hearing officer. It is not suggested that any of the material presented in that argument was not available to appellant's counsel for presentation to the Commission. Counsel was prepared to present argument to the hearing officer, and has not given any indication what additional material would have been relevant for presentation to the Commission.

[4–6] Appellant's suggestion that the Commission is without power to render a decision contrary to a hearing officer unless the hearing officer has erred in rendering that decision is without merit. Appellant argues that the nature of the relationship between the Commission and its hearing officers parallels that between this Court and the district courts. Again we cannot agree. The Commission itself, when exercising its adjudicative authority, is the functional analogue of a court of record with dispute resolution authority conferred by Constitutional grant.[2] And while the Commission has been granted authority to delegate the power to hear evidence on matters before the Commission,[3] those officers to whom the hearing is assigned only have authority to receive the evidence and make recommendations to the Commission regarding the exercise of the Commission's judicial authority.[4] As stated in the case of *Anderson v. Grand River Dam Authority*,[5] in the Court's syllabus:

> Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Only the Commission itself is empowered with the authority to render an Order concluding a dispute within the Commission's jurisdiction.[6] The Commission's hearing of a matter which has been previously presented to a hearing officer does not constitute an appeal from the hearing officer's report. The procedure of hearing evidence, issuing reports and filing exceptions to those reports is designed to clearly define the dispute presented to the Commission. The Commission exercises its judgment in determining that dispute. No intermediate proceeding within the Commission may hamper the exercise of the Commission's judgment in resolving a dispute properly before it.

2. *Monson v. State ex rel. Okla. Corp. Comm.*, 673 P.2d 839, 842 (Okla.1983).

3. 17 O.S.1981 § 162; 52 O.S.Supp.1985 § 149.1.

4. See *Cameron v. Corp. Comm.*, 414 P.2d 266 (Okla.1966); *W.L. Kirkman, Inc. v. Okla. Corp. Comm.*, 676 P.2d 283 (Okla.App.1983).

5. 446 P.2d 814 (Okla.1968).

6. See *Monson v. State*, supra note 2.

[7] Finally, appellant argues that the Commission improperly denied appellant's motion to reopen the cause for introduction of evidence on the fair market value of appellant's interests in Section 29. The basis for this argument is that Commission Rules allow the introduction of evidence on reopening which was not available at the time of the hearing. Appellant argues that the phrase "was not" would cover the situation where, as here, the evidence simply was not produced at the hearing although it was clearly known to exist and could have been produced. The Commission did not accept this construction and neither do we. To do so would result in an outcome totally at odds with fundamental concepts of judicial economy and the duties of a party having notice of a proceeding to properly prepare to present its case.

We find no error in the Commission proceedings generating Order No. 294581. Accordingly that order is AFFIRMED.

HARGRAVE, V.C.J., and HODGES, SIMMS and ALMA WILSON, JJ., concur.

DOOLIN, C.J., and OPALA, KAUGER and SUMMERS, JJ., dissent.

Charles Earl HOPKINS, Appellant,

v.

STATE of Oklahoma, Appellee.

No. 0–87–557.

Court of Criminal Appeals of Oklahoma.

April 5, 1988.

An Appeal from the District Court of Tulsa County.

Charles Earl Hopkins, appellant, filed an application with this Court for an extension of time in which to file a petition for a writ of certiorari in Tulsa County District Court Case numbers TR–86–3252, TR–86–3253 and TR–86–3254. Appellant's request is DENIED.

Charles Earl Hopkins, pro se.

MEMORANDUM OPINION

BRETT, Presiding Judge:

On November 30, 1987, Charles Earl Hopkins, appearing pro se, filed an application with this Court for an extension of time in which to file a petition for a writ of certiorari in Tulsa County District Court case numbers TR–86–3252, TR–86–3253 and TR–86–3254. Applicant pled guilty and judgment and sentence was entered on his pleas on August 26, 1987.

Applicant filed an application to withdraw his guilty pleas on the same day, August 26, 1987, that he was sentenced. The District Court did not hold the hearing described in Rule 4.1 of the Rules of the Court of Criminal Appeals, 22 O.S.1981, ch. 18, App.

Applicant's request for extension of time is denied. Whether the District Court held the hearing within the 30 days prescribed in Rule 4.1 or not, the requirements of Rule 4.2 must be met timely. Rule 4.2 provides that "to perfect a certiorari appeal, the appellant must file, *within ninety (90) days from the date the judgment and sentence is pronounced* ..." The filing of a petition for a writ of certiorari and a certified copy of the record within 90 days are jurisdictional and this Court will not enlarge that time. There is no provision for extending the time to accommodate the hearing provided in Rule 4.1. In this regard, the hearing to request the plea be withdrawn is similar to a motion for a new trial. This Court has previously treated the mandatory language of 4.2 to supercede the mandatory language of 4.1 in order to resolve the conflict.

Thereafter Oscar, as representative of Spartan, proceeded to contract with plaintiff to drill and rework the leasehold, leading plaintiff to believe Spartan owned the leasehold, and through its employee (Pearce) obtained the services of Halliburton. Either before or after completion of the services a dispute arose between Oscar as to the contractual obligations of Spartan under the contract. Jo Chambers subsequently acquired Joe Barclay's working interest by exchanging it for an override. Jo Chambers signed a division order and commenced receiving payments for oil runs from the leasehold which she retained.

Joe Barclay was associated with Oscar Chambers in one of the many corporations. The evidence shows he was on the lease premises several times, gave directions, scrutinized billings, and did other acts in connection with development of the leasehold. He retained a working interest in the leasehold until all the services were rendered, and thereafter converted his working interest into an override.

In First Federal Savings & Loan Association of Elk City v. Rose, 183 Okl. 262, 79 P.2d 796, we held:

> "The question of agency when made an issue in a case, is a question of fact to be determined either by the jury or by the court as a trier of fact, from all the facts and circumstances in evidence connected with the transaction, and like any other question of fact, may be proved by circumstantial evidence."

See also Beasley v. Sparks, 163 Okl. 15, 20 P.2d 584.

[10] We observe that Jo Chambers and Joe Barclay accepted and retained benefits of the leasehold after the services were rendered. This places them in an inconsistent position to denounce the agency. We hold the trial court's finding concerning agency of Spartan between Jo Chambers and Joe Barclay, is supported by the evidence.

[11–13] Defendants further urge a check in the amount of $8,750.00 was accepted by plaintiff as a payment in full under the original contract. Payment must be alleged and proved. The intent of this payment was a question of fact for determination by the trial court. The trial court's finding in this respect is supported by the evidence. Pine v. Bradley, 187 Okl. 126, 101 P.2d 799.

[14] In view of the facts and circumstances reflected by the record, we are unwilling to say the finding of the trial court was not sufficiently supported by the evidence, or that the findings are against the clear weight of the evidence.

Judgment affirmed.

JACKSON, C. J., IRWIN, V. C. J., and DAVISON, WILLIAMS, HODGES, LAVENDER and McINERNEY, JJ., concur.

A. B. ANDERSON, Plaintiff in Error,

v.

GRAND RIVER DAM AUTHORITY, a legal entity or artificial person created by statute, Defendant in Error.

No. 41829.

Supreme Court of Oklahoma.

Oct. 8, 1968.

Rehearing Denied Nov. 26, 1968.

Proceedings on petition for mandatory relief and damages. The District Court, Craig County, John Q. Adams, J., sustained demurrer to petition and dismissed action, and plaintiff appealed. The Supreme Court, Hodges, J., held that assuming that statute delegating authority to conservation district to make and enforce rules prescribing the type, style, location and equipment of all wharves, docks and anchorages could be construed as giving district an unconditional discretion in prescribing location of houseboat anchor-

ages, such discretion must be exercised by the district, not redelegated by it to an abutting landowner, and rule adopted by district requiring that an applicant for a permit to anchor a houseboat first obtain written consent of abutting landowner constituted a substitution of abutting landowner's judgment for the district and was void.

Reversed and remanded.

1. Pleading ⇐214(8)

Since, for purposes of demurrer, allegation in plaintiff's petition that location and use of plaintiff's houseboat in no way interfered with health and safety of public was to be taken as true, defendant conservation district could not base a demurrer to petition on ground that its regulation requiring that an applicant for permit to anchor a houseboat first obtain permission of abutting landowner was justified by statute authorizing district to promulgate reasonable rules in interest of public health and safety. 82 O.S.1961, § 875.

2. Navigable Waters ⇐36(4)

Assuming that statute delegating authority to conservation district to make and enforce rules prescribing the type, style, location and equipment of all wharves, docks and anchorages gives district an unconditional discretion in prescribing location of houseboat anchorages, such discretion must be exercised by district, not redelegated by it to an abutting landowner, and rule adopted by district requiring that an applicant for permit to anchor a houseboat first obtain written consent of abutting landowner constituted a substitution of abutting landowner's judgment for district's and was void. 82 O.S.1961, § 862 (p).

3. Administrative Law and Procedure ⇐322

Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require exercise of judgment.

4. Navigable Waters ⇐36(4)

Statute providing that conservation district in course of exercising its powers shall at all times consider rights and needs of people living within and upon the land lying within watershed of rivers or streams developed by district does not, either directly or by implication, ascribe to abutting landowners any rights in property or otherwise not enjoyed by others living on watershed, and rule adopted by district requiring that applicant for permit to anchor houseboat first obtain written consent of abutting landowner in effect gave abutting landowners an unconditional, preliminary veto power over rights of others to use anchorages off shore and was void. 82 O.S.1961, § 862(q).

5. Navigable Waters ⇐36(4)

Conservation district could not justify rule requiring that an applicant for a permit to anchor a houseboat first obtain written consent of abutting landowner by arguing that since it was prohibited by statute from making a lease which would deprive owner of land adjacent to lakefront of ingress or egress to lake, it could neither issue a permit which would interfere with such rights, where petition, which was to be taken as true for purposes of demurrer, alleged that proposed houseboat anchorage did not interfere with landowner's rights. 82 O.S.1961, § 874.

6. Navigable Waters ⇐36(3)

Conservation district could not justify rule requiring that an applicant for a permit to anchor a houseboat first obtain written consent of abutting landowner by arguing that since it was prohibited by statute from making a lease which would deprive owner of land adjacent to lakefront of dock or boat anchorage privileges, it could neither issue a permit which would interfere with such rights, where petition, which was to be taken as true for purposes

of demurrer, at no time alleged that plaintiff sought docking or landing privileges. 82 O.S.1961, § 874.

7. Navigable Waters ⇐36(3)

Word "anchorage," as found in statute prohibiting conservation district from making a lease which would deprive owner of land adjacent to lakefront of dock or boat anchorage privileges, does not include docking or landing privileges. 82 O.S. 1961, § 874.

See publication Words and Phrases for other judicial constructions and definitions.

8. Declaratory Judgment ⇐392

Appeal from trial court's denial of petition to declare a regulation adopted by conservation district void would not be dismissed for lack of pursuit of administrative remedies or for failure to pursue a remedy through office of Attorney General.

Syllabus by the Court

Administrative bodies and officers cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions discretionary or quasi-judicial in character, or which require the exercise of judgment.

Appeal from the District Court of Craig County; John Q. Adams, Judge.

Action by plaintiff, A. B. Anderson, against the defendants, Grand River Dam Authority and others, for mandatory relief and damages. From the trial court's order and judgment sustaining the demurrer to the petition by defendant GRDA, and dismissing the action, plaintiff appeals. Reversed and remanded with directions.

Spillers & Spillers, Tulsa, for plaintiff in error.

Q. D. Boydstun, General Counsel, and James R. Tourtellotte, Assistant General Counsel, Vinita, for defendant in error.

L. Keith Smith, Gene A. Davis, Jay, for Grand Lake Ass'n, amicus curiae.

HODGES, Justice.

This appeal presents the question of whether GRDA (Grand River Dam Authority), defendant in the trial court, may legally promulgate and enforce a regulation requiring an applicant for a permit to anchor a houseboat in the Lake O' the Cherokees (commonly called Grand Lake) to obtain the written consent of the "abutting landowner" before the permit will be granted.

Plaintiff in the trial court, A. B. Anderson, had for 20 years anchored his houseboat at a point in Grand Lake approximately 100 to 150 feet offshore under permits from GRDA. The "abutting landowner" in this case is Rojac Development Company, which claims the lands on the shore opposite Anderson's anchorage, and also owns about three miles of adjacent shore line.

In 1964, GRDA amended and re-adopted its "Rules and Regulations Governing the Use of Shorelands and Waters of Grand River Dam Authority". Article XI(1) of these Rules provides in substance that no permit for the location of a houseboat will be issued to any person who does not own "the shore land abutting the Authority's owned land adjacent to the location of such facilities" unless the applicant first obtains the "written consent of such abutting landowner". Anderson was unable to obtain the written consent of Rojac Development Company (apparently a recent purchaser) without agreeing to pay it $150.00 per month for his continued use of the houseboat anchorage location. After his refusal, Rojac complained to GRDA which, acting under Article XI(1) and other applicable sections of its Rules, took possession of and moved the houseboat and later sold it for charges accrued against it.

The above is a summary of the pertinent facts alleged in the amended petition which Anderson, as plaintiff, filed against GRDA and other defendants in the trial court. He alleged that the rules under which GRDA acted were void, and also that the sale was void because of the inclusion of improper charges in the notice of sale. He asked for an order requiring GRDA to return the houseboat to its former location, and for damages he allegedly suffered.

The trial court sustained GRDA's demurrer to the amended petition upon the ground that no cause of action was stated and, when plaintiff refused to amend, entered judgment dismissing the action as to GRDA. From this latter judgment, plaintiff Anderson has perfected this appeal upon the original record. The trial court also sustained separate motions to dismiss to all other defendants, but this action of the trial court has become final and is not an issue on appeal.

In the briefs in this court, issue is joined upon the questions of (1) the validity of the GRDA regulation and (2) the validity of the sale.

On the first question, it is the position of plaintiff Anderson that the GRDA regulation requiring the written consent of the abutting landowner is void because, among other things, it amounts to an illegal delegation of authority by GRDA, and that his amended petition therefore states a cause of action and the demurrer should have been overruled. We agree.

GRDA, a conservation and reclamation district, was created and is governed by statutes now codified as 82 O.S.1961, Sections 861 through 881 as amended.

Section 875 provides in part as follows:

"The District shall not prevent free public use of its lands and lakes for recreation purposes and for hunting and fishing, except at such points where, in the opinion of the Directors, such use would be dangerous or would interfere with the proper conduct of its business, but may in the interest of public health and safety make reasonable regulations governing such use.

"* * * no charges shall ever be made for a permit to operate or use or for the inspection of boats and equipment, docks, anchorages, and landings in private use. The public shall have free use of and access to the waters of the lakes for private use, and shall have the right of anchorage, dock and landing privileges free of charge when used for private boating. * * *"

Under this section, GRDA is plainly authorized to "prevent free public use" of its facilities for recreation purposes at points where such use would be dangerous or would interfere with the proper conduct of the GRDA business; and it is authorized to promulgate reasonable rules to that end "in the interest of public health and safety".

[1] However, plaintiff's amended petition included an allegation that the location and use of plaintiff's houseboat "in no wise interferes with the health and safety of the public or with the proper conduct of the business of the Grand River Dam Authority". It is elementary that this allegation is taken as true for purposes of the demurrer, and the rule under which GRDA acted in this case therefore cannot be justified under the exception contained in the first paragraph of § 875.

Under 82 O.S.1961, § 862(p), GRDA is delegated authority to make and enforce rules "* * * prescribing the type, style, *location* and equipment of all wharves, docks and anchorages." (Emphasis supplied.)

[2] Assuming that this proviso be construed as giving GRDA an *unconditional* discretion in prescribing the "location" of the houseboat anchorage, such discretion must be exercised by GRDA, and not redelegated by it to the abutting landowner. A rule requiring an "abutting landowner" to give its written consent before the anchorage location could be maintained under the circumstances here presented would

be a substitution of the abutting landowner's judgment for GRDA.

In 2 Am.Jur.2d Administrative Law, § 222, it is said:

> "It is a general principle of law, expressed in the maxim 'delegatus non potest delegare', that a delegated power may not be further delegated by the person to whom such power is delegated and that in all cases of delegated authority, where personal trust or confidence is reposed in the agent and especially where the exercise and application of the power is made subject to his judgment or discretion, the authority is purely personal and cannot be delegated to another * * *. A commission, charged by law with power to promulgate rules, cannot, in turn, delegate that power to another."

[3] In 73 C.J.S. Public Administrative Bodies and Procedure § 57, it is said:

> "Administrative officers and bodies cannot alienate, surrender, or abridge their powers and duties, or delegate authority and functions which under the law may be exercised only by them; and, although they may delegate merely ministerial functions, in the absence of statute or organic act permitting it, they cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment."

Although no Oklahoma case precisely in point on the facts has come to our attention, see State, for Use of Board of Com'rs of Creek County ex rel. Jennings v. Strange et al., 202 Okl. 11, 209 P.2d 691, in which analogous principles of law were involved. In that case, this court considered Okla. Statute 1931, § 5918, which authorized the sale by the County Commissioners, under specified circumstances, of certain securities in which sinking funds of the county had been invested. The County Commissioners of Creek County, in a resolution which did not name the purchaser or set the purchase price, had in effect authorized the County Treasurer to make the sale. In an appeal in a subsequent action to recover for conversion of the sinking fund bonds, this court referred to § 5918, and held that "said section did not grant to the board of county commissioners power or authority to delegate this duty to any other person".

In defense of the trial court's judgment, and of the validity of the rule requiring the written consent of the abutting landowner, defendant GRDA cites other language from two sections of the statute governing GRDA.

[4] The first is the last paragraph of 82 O.S.1961, § 862(q), which provides in part that "* * * in the course of exercising its powers as herein enumerated, the said District shall at all times consider the *rights and needs of the people living within and upon the land lying within the watershed* of the rivers or streams developed by the District; * * *." (Emphasis supplied.) Defendant argues that this language "makes it crystal clear that the Legislature intended that special considerations should be given to abutting landowners". We are unable to agree. The quoted language from the last paragraph of § 862(q) does not, either directly or by implication, ascribe to abutting landowners, any rights (in property or otherwise) not enjoyed by others living on the watershed. The GRDA rule under consideration in effect gives to abutting landowners an unconditional, preliminary "veto" power over the right of others to use anchorages 100 to 150 feet off shore.

Defendant also cites the following language of 82 O.S.1961, § 874, in support of the rule:

> "* * * No lease shall deprive the owner of any land adjacent to the shorelands or lake front, or abutting thereon, of ingress or egress to and from the water of the lakes and shall not deprive said owner of any wharf, dock or boat anchorage privileges that would belong to said owner if said shorelands or lake front were not leased * * *".

Defendant states in its brief, "It is defendant's contention that if the defendant cannot make a lease which would interfere with these rights, neither can it issue a permit which would interfere with these rights". As is evident, this argument assumes two things to be true: (1) that the granting of plaintiff's permit *would* interfere with "these rights"; and (2) that the anchorage location plaintiff seeks would belong to the abutting landowner if the permit were not granted.

[5-7] Under the allegations of plaintiff's amended petition, which are taken as true for purposes of the demurrer, "the proposed site of a house boat anchorage did not unreasonably, *if at all,* interfere with the abutting landowners' use of or access to the lake". Also, we cannot say as a matter of law that the houseboat anchorage location plaintiff seeks, 100 to 150 feet off shore, would belong to Rojac Development Company if the permit were not granted. In this connection, we may observe that we do not agree with defendant's statement in its brief that "this case deals specifically with the location of a *dock* and anchorage." (Emphasis supplied.) Nowhere in the amended petition is there any language indicating that plaintiff seeks docking or landing privileges upon land owned by Rojac Development Company, or upon shore lands adjacent thereto. The term "anchorage" is not defined in any Oklahoma statute that has come to our attention. The exhaustive work, Words and Phrases, Permanent Edition, which purports to include "All Constructions and Definitions of Words and Phrases by the State and Federal Courts", does not include a treatment of the term. In its ordinary meaning, "anchorage" does not include docking or landing privileges. See Webster's New International Dictionary, Second Edition, Unabridged.

Defendant also cites a California case, In re Petersen, 51 Cal.2d 177, 331 P.2d 24, 77 A.L.R.2d 1291, in support of the rule. In that case the court considered a San Francisco ordinance giving the chief of police power to designate taxi cab stands on the public streets for the exclusive use of a particular cab company, but requiring the prior consent of the tenant or owner of the real estate abutting on the location. The ordinance was attacked upon the ground, among others, that the requirement of the consent of the landowner made it unconstitutional. In denying this argument, the court said that, "Such a requirement is proper where the proposed activity is otherwise prohibited and the prohibition is a reasonable exercise of the police power". No question was raised in that case as to the power of the City of San Francisco, if it so desired, to entirely prohibit the use of particular parking areas on public streets as cab stands. In the case now before us, however, the "proposed activity", the use of an anchorage location, is not "otherwise prohibited". On the contrary, our Legislature, in 82 O.S.1961, § 875, has affirmatively directed GRDA not to "prevent free public use" of anchorage locations except under circumstances not applicable here.

[8] We hold that, under the facts as alleged in the amended petition, and as admitted to be true for purposes of the demurrer, the GRDA regulation requiring the written consent of the abutting landowner is void as an illegal "re-delegation" of delegated authority by GRDA. We also find no merit in GRDA's contention that plaintiff's appeal should be dismissed for a lack of pursuit of administrative remedies and failure to pursue a remedy through the office of the Attorney General.

In view of this conclusion, it is unnecessary to consider the question of the validity of the sale of the houseboat.

The judgment is reversed and the cause is remanded to the trial court.

JACKSON, C. J., IRWIN, V. C. J., and DAVISON, WILLIAMS, BLACKBIRD, and McINERNEY, JJ., concur.

LAVENDER, J., concur in results.

tice is outweighed by the interests of the charged prisoner. See *Crooks v. Warne, supra; Powell v. Ward, supra.*[11] We affirm the 24 hour notice provision of the district court judgment.

(2) *Scope of the Judgment*

[10] The parties have raised some questions as to whether the last paragraph of the judgment is injunctive in character rather than merely declaratory. We construe it as declaratory only. The district court opinion states that plaintiffs are to be granted "declaratory relief under their first cause of action". 425 F.Supp. at 393. This is the only claim before us. The judgment itself, in the same paragraph that provides "plaintiffs' first claim for relief is granted" goes on to provide unequivocally that "plaintiffs' prayer for equitable and monetary relief respecting this claim is denied". Clearly the judgment does not grant injunctive relief.

[11] Even as to declaratory relief, moreover, the fact that this suit is not a class action precludes the judgment from being applied to prisoners other than the three named plaintiffs. The judgment therefore is modified to apply only to Adjustment Committee proceedings involving these plaintiffs.

Affirmed as modified. No costs.

11. Advance notice of charges has many salutary effects. It compels the charging officer to be more specific as to the misconduct with which the inmate is charged; it serves to narrow the inquiry at the hearing to the misconduct alleged; it informs the inmate of what he allegedly has done so that he can prepare a defense, if he chooses, to the specific charges set forth, based on whatever evidence he can muster, given the limited time available and the lack of an opportunity to interview or call witnesses; and it aids the fact finder to reach an informed decision. Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, *supra*, at 868, 873. The notice requirement also assures a degree of fairness in the proceedings so that an inmate is not summarily brought before a three-member panel and required on the spot to explain vague charges set forth in a misbehavior report which he has never seen.

We find no merit in defendants' contention that Judge Stewart's decision destroys the so-called "flexibility" of the "two-tiered disciplinary system" in New York's correctional institutions. The Adjustment Committee has the power to mete out punishment that is comparable in severity, if not in duration, to the sanctions at the disposal of the Superintendent's Proceeding officer. If the Adjustment Committee were truly one step in a two-tiered disciplinary system, its sanctions would not include the substantial punishment given to the prisoners in the instant case, but would be limited to the power to impose minor penalties such as loss of privileges. Furthermore, the claimed remedial and guidance purposes of the Adjustment Committee proceeding, if in fact an integral part of the hearing procedure, might validly distinguish the two procedures and lend credence to the contentions of the corrections officials as to the desirability of maintaining flexibility. The record in the instant case, however, indicates that the Adjustment Committee was concerned primarily with certain bare facts such as whether the particular inmate was present during the incident in question as charged in the misbehavior report.

REA EXPRESS, INC., Bankrupt, L. Orvis Sowerwine, Trustee in Bankruptcy, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents.

No. 1165, Docket 76-4278.

United States Court of Appeals, Second Circuit.

Argued May 23, 1977.

Decided Sept. 16, 1977.

Certiorari Denied March 20, 1978.

On petition to review orders of the Interstate Commerce Commission which (1) dismissed for lack of prosecution an application by the trustee in bankruptcy of REA Express, Inc. for permanent operating authority of a nationwide "Hub" system of express service, and (2) revoked the temporary operating authority previously granted for such service, the Court of Appeals, Timbers, Circuit Judge, held (i) that the Commission did not act arbitrarily or capriciously, nor did it abuse its discretion, in dismiss-

ing, for want of prosecution, the application of the trustee in bankruptcy of REA for permanent operating authority of a nationwide "Hub" system of express service; and (ii) that the Commission acted properly at the same time in revoking the temporary authority previously granted to REA.

Petition denied; Commission's orders affirmed.

1. Carriers ⇐39

Express carrier, whose services command premium rates, must not only furnish expedited carriage of goods upon firmly established schedules but also provide special handling for small parcels.

2. Commerce ⇐85(2), 99

Interstate Commerce Commission was entitled to great deference in its interpretation of its rule requiring applicant who does not intend to prosecute application timely to request dismissal thereof, as placing some affirmative duty on applicant to prosecute or seek dismissal, and where applicant had permitted eight years to pass without doing either, and, indeed, in prior application for irregular route authority had affirmatively demonstrated intent not to prosecute application for permanent HUB authority, dismissal of such application for permanent authority was warranted. Interstate Commerce Act, §§ 1 et seq., 206, 206(a)(1), 49 U.S.C.A. §§ 1 et seq., 306, 306(a)(1); National Transportation Policy, 49 U.S.C.A. preceding section 1.

3. Estoppel ⇐62.2(4)

Even if Interstate Commerce Commission could be estopped, there was no estoppel where there was no representation by Commission upon which applicant for authority justifiably could have relied and where, instead of suffering detriment from continued pendency of application for permanent authority, carrier reaped benefit of undisturbed continued operation of temporary authority for many years. Interstate Commerce Act, §§ 1 et seq., 206(a)(1), 49 U.S.C.A. §§ 1 et seq., 306(a)(1); National Transportation Policy, 49 U.S.C.A. preceding section 1.

4. Commerce ⇐99

Finding of noncompliance with order of Interstate Commerce Commission is not prerequisite to dismissal, under rule, of application for authority on ground of failure to prosecute application. Interstate Commerce Act, §§ 1 et seq., 206(a)(1), 49 U.S.C.A. §§ 1 et seq., 306(a)(1); National Transportation Policy, 49 U.S.C.A. preceding section 1.

5. Commerce ⇐121

Interstate Commerce Commission's finding that applicant for permanent authority, as applicant presently existed, was not fit to conduct proper and safe operations supported Commission's conclusion that dismissal of application for permanent authority would not be inconsistent with public interest, public convenience and necessity, or National Transportation Policy. Interstate Commerce Act, §§ 1 et seq., 17(3), 206(a)(1), 49 U.S.C.A. §§ 1 et seq., 17(3), 306(a)(1); National Transportation Policy, 49 U.S.C.A. preceding section 1; 5 U.S.C.A. § 706(2)(A).

6. Administrative Law and Procedure ⇐449, 755

Docket management is discretionary matter as to which courts virtually never substitute their judgment for that of administrative agency, but exceptional situation exists where two mutually exclusive bona fide applications should be considered together and, in appropriate case, considerations of administrative convenience, expedition and fairness may come down so strongly on side of consolidated consideration of interrelated questions that failure to consolidate would amount to abuse of discretion. Interstate Commerce Act, § 17(3), 49 U.S.C.A. § 17(3).

7. Commerce ⇐116

Interstate Commerce Act reflects determination of Congress that regulation of competition among carriers is necessary in public interest; as one part of its regulatory pattern, Act protects motor carrier industry from overt competition and preserves standards of safety and financial re-

sponsibility within industry by regulating entry, and entry ordinarily may be authorized by Interstate Commerce Commission only after full adversary proceedings. Interstate Commerce Act, §§ 205–209, 210a(a), 49 U.S.C.A. §§ 305–309, 310a(a).

8. Commerce ⇐115

Temporary authority provided for by Interstate Commerce Act is strictly limited exception to regulatory pattern of Act and was designed to provide Interstate Commerce Commission with swift and procedurally simple means of responding to urgent transportation needs; temporary authority thus is in nature of preliminary relief to be granted necessarily without thorough investigation into public need, carrier's fitness or interests of competing carriers. Interstate Commerce Act, §§ 205–209, 210a(a), 49 U.S.C.A. §§ 305–309, 310a(a).

9. Commerce ⇐99

Under circumstances including fact that express agency had continued operations under temporary authority for eight years in violation of Interstate Commerce Commission rule, Commission properly refused to let company seeking authority as transferee to stand in shoes of express agency, and properly dismissed express agency's application for permanent authority, on ground of failure to prosecute application, rather than considering application under Interstate Commerce Act section authorizing Commission to grant temporary approval for operation by transferee. Interstate Commerce Act, §§ 5(2, 4), 205–209, 210a(a, b), 49 U.S.C.A. §§ 5(2, 4), 305–309, 310a(a, b).

10. Commerce ⇐105

Under one provision of Interstate Commerce Act providing for temporary authority, existing service is not presumed, and applicant must show immediate and urgent need for service, but under section providing for temporary authority pending approval of merger or transfer of authorities, an authority already exists and basic public need for service in question is presumed; critical question in latter case is whether interim interruption in service will injure or destroy property to be transferred or interfere substantially with future usefulness in performance of adequate and continuous service to public. Interstate Commerce Act, §§ 5(2)(a), 210a(a, b), 49 U.S.C.A. §§ 5(2)(a), 310a(a, b).

11. Carriers ⇐23

National Transportation Policy is not directly concerned with problems of unemployment and creditors' rights. Interstate Commerce Act, § 210a(a, b), 49 U.S.C.A. § 310a(a, b); National Transportation Policy, 49 U.S.C.A. preceding section 1.

12. Commerce ⇐85.30(1)

Interstate Commerce Commission is not required under all circumstances to apply, to parties seeking to transfer temporary authority, provisions of Interstate Commerce Act concerning application for temporary authority of transferee. Interstate Commerce Act, § 210a(a, b), 49 U.S.C.A. § 310a(a, b).

13. Commerce ⇐118

Interstate Commerce Commission has continuing duty to reopen and reconsider its decisions regarding temporary authorities. Interstate Commerce Act, § 210a(a, b), 49 U.S.C.A. § 310a(a, b).

14. Commerce ⇐85.27(4)

Interstate Commerce Commission's dismissal of carrier's application for permanent authority constituted statutory "good cause" for revocation of temporary authority. Interstate Commerce Act, § 210a(a), 49 U.S.C.A. § 310a(a).

John M. Cleary, Washington, D. C. (John K. Maser, III, and Donelan, Cleary, Wood & Maser, Washington, D. C.; Donald L. Wallace, and Whitman & Ransom, New York City; Marcus & Angel, New York City, on the brief), for petitioner REA Express, Inc., Bankrupt, L. Orvis Sowerwine, Trustee in Bankruptcy.

J. William Cain, Jr., Washington, D. C. (Jack R. Turney, Jr. and Robert R. Redman, Washington, D. C.; Tibor Sallay, White Plains, N. Y., on the brief), for intervenor

Alltrans Express U.S.A., Inc. in support of petitioner.

John O'B. Clarke, Jr., Washington, D. C. (James L. Highsaw, and Highsaw, Mahoney & Friedman, Washington, D. C.; David J. Fleming, and Reilly, Fleming & Reilly, New York City; William J. Donlon, Rosemont, Ill., on the brief), for intervenor Brotherhood of Railway and Airline Clerks in support of petitioner.

Henri T. Rush, Atty., ICC, Washington, D. C. (Mark L. Evans, Gen. Counsel, ICC, and Charles H. White, Jr., Assoc. Gen. Counsel, ICC, Washington, D. C.; Donald I. Baker, Asst. Atty. Gen., and Lloyd John Osborn, Atty., Dept. of Justice, Washington, D. C., on the brief), for respondents United States and I. C. C.

John W. Bryant, Detroit, Mich., and Todd A. Peterman, Washington, D. C. (Richard H. Streeter, Edward K. Wheeler, and Wheeler & Wheeler, Washington, D. C.; Eames, Petrillo & Wilcox, Detroit, Mich.; Phillip Robinson, and Robinson, Felts, Starnes & Nations, Austin, Tex.; Nelson J. Cooney, Washington, D. C.; Daniel C. Sullivan, and Singer & Sullivan, Chicago, Ill., on the brief), for intervening respondents in support of the I. C. C.

Before WATERMAN and TIMBERS, Circuit Judges, and MEHRTENS, District Judge.*

TIMBERS, Circuit Judge:

On this petition to review orders[1] of the Interstate Commerce Commission (the Commission), the essential questions are whether the Commission acted arbitrarily and capriciously and abused its discretion in dismissing for want of prosecution the application of the trustee in bankruptcy of REA Express, Inc. (REA) under § 206(a)(1) of the Interstate Commerce Act (the Act), 49 U.S.C. § 306(a)(1) (1970),[2] for permanent operating authority of a nationwide "Hub" system of express service and at the same time in revoking the temporary authority previously granted to REA under § 210a(a) of the Act, 49 U.S.C. § 310a(a) (1970).[3]

We hold that the Commission did not act arbitrarily and capriciously and did not abuse its discretion. Accordingly we deny the petition to review and affirm the orders of the Commission.

I. FACTS AND PRIOR PROCEEDINGS

(A) *REA and the Hub System*

[1] "Express service", as defined by the Commission, entails the expedited carriage of goods upon firmly established schedules. The express carrier, whose services command premium rates, also must provide special handling for small parcels. *REA Express, Inc., Application for ETA*, 117 M.C.C.

* Hon. William O. Mehrtens, Senior United States District Judge, Southern District of Florida, sitting by designation.

1. The two orders of the Commission which are the subject of the instant petition to review were entered November 17, 1976 and January 27, 1977 in consolidated Docket No. MC-C 8862, *Brada Miller Freight System, Inc. v. Rexco, Inc. and REA Express, Inc.* (unreported).

2. § 206(a)(1) of the Interstate Commerce Act, 49 U.S.C. § 306(a)(1) (1970), in relevant part provides:

> "Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . ."

3. § 210a(a) of the Interstate Commerce Act, 49 U.S.C. § 310a(a) (1970), provides:

> "To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify, but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter."

80, 88–89 (1971); *Railway Express Agency, Inc., Extension-Nashua, N. H.*, 91 M.C.C. 311, 324 (1962). During the first half of this century express service was provided as an adjunct of the operations of the nation's railroads. In 1929 the railroads joined together to establish Railway Express Agency, Inc. (Railway Express), a non-profit agency designed to operate all express services provided by the railroads under their joint ownership and control. The non-profit arrangement continued until 1969. In that year the participating railroads, which were dissatisfied with Railway Express' continuous losses, extricated themselves from its ownership. *REA Express, Inc. v. Alabama Great Southern Railroad Co.*, 343 F.Supp. 851 (S.D.N.Y.1972), *aff'd*, 412 U.S. 934 (1973). REA, the bankrupt herein, emerged as an independent company which carried on the business of Railway Express.

Upon the organization of REA in 1969, it provided express service with a routing system significantly different from the railroad oriented system which its predecessor had operated. The steady decline in railroad passenger service after World War II had forced Railway Express into increasing reliance on supplementary operations by motor carrier. By 1962 it had acquired nearly 1,700 separate motor carrier operating rights from the Commission. These piecemeal acquisitions left Railway Express with an uncoordinated and unmanageable system of interlocking rail and motor routes. It consequently decided that a fundamental restructuring of its routing system was necessary.

In 1968 Railway Express submitted to the Commission under § 206 of the Act an application for permanent operating authority for a "Hub" system of operations. The salient feature of such system was its selection of 24 central points or hubs for the dispatch and receipt of traffic. Each hub was connected with each other hub by a regular motor route or rail line-haul route. A "satellite" area, served exclusively by motor carrier, surrounded each hub. All traffic to and from locations within the satellite area moved via the hub city. Railway Express, pursuant to § 210a(a) of the Act, made the usual application for temporary authority pending the Commission's action on its application for permanent authority. The Commission found that Railway Express met the "immediate and urgent need" requirement of § 210a(a) for its Hub service and accordingly granted the temporary authority. *Saginaw Transfer Co. v. United States*, 312 F.Supp. 662 (E.D. Mich.1970) (three-judge court); *Estes Express Lines v. United States*, 292 F.Supp. 842 (E.D.Va.1968) (three-judge court), *aff'd*, 394 U.S. 718 (1969) (per curiam) (grant of temporary authority sustained).

Railway Express commenced Hub operations in 1968 under the temporary authority. Its successor, REA, took no effective steps thereafter in prosecuting the permanent authority application. It relied on the temporary authority granted to Railway Express for continued Hub operations during the entire period of REA's existence. Once the Hub system was placed in operation under the temporary authority, it proved a disappointment to REA. As a result, in 1971 REA sought to abandon the Hub system and to replace it with a new system of irregular route service. In its new application for temporary authority REA represented that, despite strenuous efforts to implement the Hub system, it nevertheless had proved both "costly and inefficient for REA, and inadequate in providing service to the public." On August 9, 1971 the Commission denied the new application on the grounds that no immediate and urgent need had been demonstrated and the irregular route service proposed would be inconsistent with the concept of express service.

Although REA carried on under the temporary Hub authority, its actual operations departed significantly from those contemplated in the 1968 application. Referring to Hub operations in general, the Commission stated in its 88th Annual Report, at 54-55 (1974):

"The [Hub] concept proved to be inefficient, necessitating considerable exceptions to the basic operating plans. . . .

[T]he system today bears little resemblance to the original concept. . . ."

(B) *REA's Bankruptcy and the Rexco Division*

REA's operations continued to decline. As a result of the recession and other factors,[4] on February 18, 1975 it filed a petition for an arrangement under Chapter XI of the Bankruptcy Act in the Southern District of New York. The company continued operations as the debtor in possession until November 6, 1975. On that date it was adjudicated a bankrupt and ordered liquidated. Regular express services ceased the following day. Since then liquidation has been substantially completed. REA no longer has any operational capability.

Backing up for a moment to August 1975 —during the period of REA's unsuccessful reorganization proceeding—we come to the event which precipitated the Commission's proceedings here under review: establishing the Rexco Division of REA. Rexco amounted to little more than a brokerage business. Independent agents stationed at various locations east of the Rockies and acting on a commission basis solicited truckload traffic from shippers and then arranged for carriage in owner-operated trucks. A small Rexco office near Philadelphia solicited some business, but its chief function was billing shippers and paying agents and owner-operators. Rexco did not own or operate any equipment. It employed no drivers. It exerted little direct control over the operations carried on in its name. It failed to comply with the regular-route restrictions in REA's operating authorities and with the governing REA tariff. And by dispensing with fixed schedules and limiting itself to truckload shipments, Rexco lost any resemblance to the "express service" which REA was authorized to perform.

4. In 1946 REA handled 235 million surface shipments. By 1971 this figure had declined 94% to 14.5 million shipments. In 1973 the figure dropped to 9.99 million, in 1974 to 8.96 million. Revenues from surface traffic, which amounted to $350 million in 1965, had declined to $168.5 million in 1974.

REA's air express operations, which accounted for a substantial portion of its revenues, also declined. The number of shipments fell from 6.54 million in 1973 to 4.81 million in 1974. Revenues dropped from $107.4 million to $103.2 million during the same period.

(C) *Proceedings before the Commission and the Alltrans Application*

Particularly on longer hauls, Rexco undersold competing irregular-route carriers. Its business grew rapidly. Apparently because Rexco was the only profitable REA operation, the REA trustee in bankruptcy on November 10, 1975 amended his embargo notice so as to exempt Rexco from the embargo on all REA operations which the trustee, upon taking office three days earlier, had placed on all traffic tendered to REA. By December 11, 1975, 18 of the motor carriers whose business Rexco had been diverting responded with complaints filed with the Commission seeking a cease and desist order against Rexco's unlawful operations. On December 1, American Trucking Associations, Inc. (ATA), one of the intervening respondents herein, filed with the Commission a petition seeking dismissal of the still-pending 1968 application for permanent Hub authority and concomitant revocation of the 1968 temporary authority for failure to prosecute the application in violation of Rule 247(f) of the Commission's General Rules of Practice, 49 C.F.R. § 1100.247(f) (1976). On April 5, 1976 the Commission entered an order consolidating all proceedings arising from the motor carriers' complaints and the ATA petition. *Brada Miller Freight System, Inc. v. Rexco, Inc. and REA Express, Inc.*, Docket No. MC-C-8862.

On July 27, 1976, one day before the Commission set a date for oral hearings in the consolidated proceedings against REA, a bankruptcy judge in the REA Express, Inc. bankruptcy proceedings approved an agreement between the REA trustee and intervenor Alltrans Express U.S.A., Inc. (Alltrans) for the purchase of REA's outstanding permanent and temporary authorities. The agreement provided for down

payment of $2.5 million and a guaranteed minimum rental and purchase price of $9.6 million. It also contemplated that by September 25, 1976 Alltrans would file applications with the Commission for transfer of REA's authorities pursuant to §§ 5(2)(a) and 210a(b) of the Act, 49 U.S.C. §§ 5(2)(a) and 310a(b) (1970).[5] See *In the Matter of REA Holding Corporation (Manning v. Sowerwine)*, 558 F.2d 1127, 1129–30 (2 Cir. 1977). (dismissal of creditors Chapter X petition affirmed).

The essential elements of this agreement were the application for permanent Hub authority and the temporary authority, the continuing validity of which already had been drawn into question by ATA's petition of December 1, 1975. To assure the success of the Alltrans contract, the trustee therefore sought to delay the consolidated proceedings. On July 28 the Commission set the matter for hearing beginning August 30 before an Administrative Law Judge (ALJ). The trustee responded with a petition requesting a postponement of at least 45 days. He contended that adjudication of ATA's petition would frustrate the imminent transfer applications by Alltrans under §§ 5(2)(a) and 210a(b) and that priority consideration of the transfer applications would "moot" the questions raised by ATA's petition. On August 24 the Commission denied the trustee's petition.

On August 30 the hearing commenced as scheduled. It extended through September 22. On October 15 the Commission announced that in order to expedite proceedings it would dispense with an initial decision by the ALJ and that the full Commission would decide the matter on the record as certified by the ALJ [6] and on the briefs of the parties. It did so on November 17 by filing its report and order to which the instant petition to review is chiefly addressed.

The Commission held that the Rexco operation was outside the definition of express service and beyond the scope of REA's operating authorities. Accordingly it directed that a cease and desist order be entered prohibiting continued operation of Rexco by the trustee. With respect to ATA's petition for dismissal of the application for permanent Hub authority, the Commission found

> "That applicant REA . . . . has failed to prosecute its application in a timely manner; that applicant is not shown to be capable of prosecuting the application; that attempted prosecution of the application would not appear likely to result in a feasible operation consistent with the public interest and the national transportation policy or required by the public convenience and necessity such that any appropriate authority would be

5. § 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a) (1970), in relevant part provides:

> "It shall be lawful, with the approval and authorization of the Commission, ...
>
> (i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise. . . . ."

§ 210a(b) of the Interstate Commerce Act, 49 U.S.C. § 310a(b) (1970), in relevant part provides:

> "Pending the determination of an application filed with the Commission for approval . . . of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval . . . of the operation of the motor carrier properties sought to be acquired by the person proposing . . . to acquire such properties . . . if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

6. In certifying the record to the Commission the ALJ observed:

> "The statements and demeanor of all witnesses testifying at the hearing did not demonstrate any instance which would subject the credibility of such witnesses to question."

issued as a result of such prosecution . . . ."

Accordingly the Commission ordered that the application for permanent authority be dismissed and that the temporary authority be revoked.

The Commission also held that there were circumstances which justified revocation of the temporary authority independent of the dismissal of the permanent application for lack of prosecution. Referring to its finding that the trustee's Rexco operations were in willful violation of the law, the Commission concluded that "REA, as it now exists, is not fit to conduct proper and safe operations." This in turn was held to constitute good cause within the meaning of § 210a(a) of the Act for revocation of the temporary authority.

With respect to the cease and desist provisions of the Commission's order, the trustee immediately complied with them. He did not seek reconsideration of that part of the order or the findings of illegal operations upon which it was based. He does not challenge the cease and desist order provisions on the instant petition to review. With respect to the provisions of the Commission's order which dismissed the application for permanent Hub authority and revoked the temporary authority, the trustee did file a petition for rehearing. On January 27, 1977 the Commission entered an order adhering to its findings, report and order of November 17 and denied the various petitions and motions before it, including that of the trustee for rehearing referred to above.

The instant petition to review is addressed to the Commission's orders of November 17, 1976 and January 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 2342(5) (Supp. V., 1975), *amending* 28 U.S.C. § 2343 (1970). On January 5, 1977 we stayed the Commission's order of November 17, 1976 pending judicial review and ordered an expedited briefing and argument schedule.

Essentially the trustee challenges the dismissal of its application for permanent Hub authority and the revocation of the temporary authority previously granted. Various intervenors support the positions of either the trustee or the Commission. For the reasons below we deny the petition to review and affirm the orders of the Commission.

II. ICC RULE 247(f)

[2] Critical underpinning for the Commission's dismissal of the trustee's application for permanent Hub authority is Rule 247(f) of the Commission's Rules of Practice, 49 C.F.R. § 1100.247(f) (1976), which in relevant part provides:

> "An applicant who does not intend timely to prosecute its application, shall promptly request dismissal thereof. Failure to prosecute an application under procedures ordered by the Commission will result in dismissal thereof. . . . ."

In the record of the Hub system proceeding the Commission found a basis for faulting REA for inaction under Rule 247(f). At a pre-hearing conference on January 12, 1970 REA represented that it would be prepared to present its operating evidence in April of that year. Thereafter REA requested no further action from the Commission. As the Commission found in its November 17, 1976 report however REA in applying for irregular route authority in 1971 "specifically expressed its intention to dismiss the Hub proceeding", and thereby "in effect . . . repudiated that approach. . . ."[7]

The Commission interpreted its Rule, which requires that an applicant who does not intend to prosecute *promptly* to request dismissal, as placing "some affirmative duty on an applicant to prosecute or seek dismissal." Since REA had permitted 8 years to pass without doing either—but indeed in its 1971 application affirmatively had dem-

7. The Commission also found that
> "REA would have failed much sooner had it not been for the forbearance of this Commission . . . in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove."

onstrated its intent *not* to prosecute—the Commission concluded that dismissal was warranted under the Rule.[8] We agree. No citation of authority is needed for the elemental proposition that an administrative agency's interpretation of its own rule or regulation is entitled to great deference by the courts. We accord that deference to the ICC's interpretation here of its Rule 247(f).

III. LACK OF SUBSTANTIAL EVIDENCE CLAIM

The trustee mounts a massive attack upon the Commission's interpretation of its own Rule 247(f) and argues that there is no substantial evidence in the record to support the Commission's dismissal for lack of prosecution of the trustee's application for permanent Hub authority. We disagree.

The trustee contends that all of the delay in the Hub proceeding after 1970 was attributable to procrastination on the part of the Commission. He says that REA stood ready to proceed after the January 1970 pre-hearing conference and made no representations to the contrary. Upon this premise he concludes that the failure to commence the hearing in April and to take any action whatsoever in the case for four years should be charged to the Commission.

The trustee seeks to buttress this conclusion with a letter dated August 23, 1974 by a Commission employee responding to a request for information regarding the Hub case. It states that due to the "unusual nature" of the proceeding no estimated "processing time" could be given. The trustee argues that this amounts to an admission of culpability on the part of the Commission for the delay. He also relies upon an order entered sua sponte by the Commission on January 9, 1975 consolidating the Hub proceeding with several other pending REA applications. From this the trustee infers Commission recognition of the application's continuing "viability."

[3] We have carefully considered these and other facts relied on by the trustee in support of his claim that the Commission's finding that REA did not intend timely to prosecute its application within the meaning of Rule 247(f) is not supported by substantial evidence. We are not persuaded by the trustee's claim. The events of 1970 at best are ambiguous aids in the task of allocating blame for the delay. Moreover they were stripped of whatever probative force they might otherwise have had when REA in 1971 disrupted the status quo in the Hub proceeding with its application for irregular route authority. After the 1970 delay, rather than returning and requesting that the Commission move along with the Hub proceeding, REA requested that the entire matter be dropped. That action, together with REA's subsequent silence for many years and its deteriorating financial condition, certainly permits, if it does not compel, the inference that REA had no intention of pursuing the Hub application to a conclusion.[9] The letter of 1974 and the order of 1975, viewed in the familiar context of an administrative proceeding, amount to nothing more than isolated routine administrative actions. They neither rebut the inference of REA's intent not to prosecute its application nor do they fix responsibility on the Commission for the delay.[10]

8. The Commission also noted that the fact of REA's bankruptcy and subsequent liquidation removed any need to excuse REA's conduct and to permit its application to remain pending because of the public interest or the National Transportation Policy. 54 Stat. 899 (1940).

9. The trustee, relying on REA's continuous operations under the Hub system until 1975, challenges as arbitrary and capricious the Commission's characterization of the 1971 application as a "repudiation" of the Hub concept. According to the trustee REA had no choice but to adhere to Hub.

This is beside the point. REA's statements of repudiation in the 1971 application are highly probative on the question of intent to prosecute the *permanent* application. An intent not to prosecute the permanent application could have been, and probably was, consistent with an intent to continue Hub operations under the temporary authority for an indefinite period.

10. Implicit in the trustee's argument that responsibility for pressing the Hub proceeding was that of the Commission is the notion that the Commission's inaction estops it from relying on its Rule 247(f). Aside from the highly

We hold on the record as a whole that there was substantial evidence to support the Commission's dismissal of the application on the ground that REA did not intend to prosecute its application within the meaning of Rule 247(f).

[4] This does not end our inquiry with respect to the trustee's lack of substantial evidence claim. He also challenges the substantiality of the evidence from another angle. He suggests that the Commission's own decisions under Rule 247(f) limit dismissal for failure to prosecute to situations where the applicant has failed to comply with a procedural order of the Commission, citing *New Rochelle Moving & Storage—Contract Carrier Application*, 111 M.C.C. 418 (1970); *C. E. Carroll Common Carrier Application*, 3 M.C.C. 393 (1937); *Wellington Well Watkins Contract Carrier Application*, 2 M.C.C. 309 (1937); *Traffic Motor Express Common Carrier Application*, 1 M.C.C. 419 (1937). Since REA did not violate any Commission order, so the argument goes, stare decisis precludes application of Rule 247(f) under the circumstances of this case. Once again we disagree.

The cases on which the trustee relies were decided under the second sentence of Rule 247(f), see p. 947 *supra*, which deals explicitly with noncompliance with Commission orders. The issue here, to which the Commission opinion is addressed, involves the interpretation of the first sentence of Rule 247(f) which imposes a duty on the applicant to procure dismissal when it no longer intends to prosecute its application. The Commission, whose interpretations of its own rules are entitled to great weight, reads the first two sentences of Rule 247(f) in the disjunctive. We cannot say that this interpretation is incorrect. Under the trustee's contrary construction the second sentence would modify the first and thereby effectively repeal it.[11] Furthermore, the first sentence, by providing a means to enable the Commission to correct abuses of its temporary authority procedure, functions in aid of the Act's overall regulatory scheme of temporary and permanent authorities.

We hold that a finding of noncompliance with an order of the Commission is not a prerequisite to dismissal of an application for failure to prosecute under Rule 247(f).

IV. ABUSE OF DISCRETION CLAIM

[5] We turn next to the trustee's principal challenge to the Commission's orders under review. The trustee asserts that the Commission abused its discretion in dismissing the Hub application under Rule 247(f) before acting on the pending Alltrans applications for transfer of REA's authorities pursuant to §§ 5(2)(a) and 210a(b) of the Act.

In its report and order of November 17, 1976 and in its order of January 27, 1977 the Commission expressly and in detail took into account the pending Alltrans applications, as well as the claims of Alltrans as an intervenor in the instant proceedings. In acting first on the REA application, however, we believe that the Commission acted well within its discretion. In short, we

dubious proposition that a government agency may be equitably estopped, see *Mitchell Bros. Truck Lines v. United States*, 225 F.Supp. 755 (D.Ore.1963) (three-judge court), *aff'd*, 378 U.S. 125 (1964) (per curiam); *Sims Motor Transport Lines, Inc. v. United States*, 183 F.Supp. 113, 119 (N.D.Ill.1959) (three-judge court), clearly there is no basis whatsoever for suggesting anything even akin to estoppel on the part of the Commission here. There was no representation by the Commission upon which REA justifiably could have relied. Far from suffering any detriment from the continued pendency of the application, REA reaped the benefit of undisturbed continued operation of the temporary authority for many years.

In any event the trustee cites no authority for the proposition that the responsibility for pressing the Hub application was on the Commission. Rule 247(f) is the only authority in point. We agree with the Commission that under that Rule the responsibility for pressing the application is on the applicant.

11. We note that unlike the second sentence the first does not provide explicitly for dismissal at the instance of the Commission. The Commission however obviously was entitled to infer such power. Otherwise it would lack any means of enforcing the first sentence. Cf. *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (inherent power of federal court to dismiss sua sponte for failure to prosecute).

agree with the Commission's conclusion set forth in its January 27, 1977 order that "in these circumstances, the disposition [of the REA application for permanent Hub authority] properly preceded disposition of the applications of Alltrans noted above".

The crux of the Commission's decision of November 17, 1976 in dismissing REA's application for permanent Hub authority was its recognition of "the probability that a bankrupt *and* liquidated carrier will not and cannot prosecute its outstanding applications." (emphasis that of the Commission). In support of its revocation of REA's temporary authority the Commission noted that REA "as it now exists, is not fit to conduct proper and safe operations." These findings clearly support the Commission's conclusion that "dismissal of this application will not be inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy . . . ."

The trustee urges that the Alltrans applications were relevant to these findings and conclusions of the Commission. He argues that absent an adjudication of the Alltrans applications there is an inadequate factual basis in the record for the Commission's conclusions that the REA application would not be prosecuted, that REA was unfit, and that dismissal of that application would have no adverse impact on the public interest and the National Transportation Policy. Accordingly the trustee invites us to hold that the Commission's decision that disposition of the REA application properly preceded disposition of the applications of Alltrans constituted an abuse of discretion and was arbitrary and capricious within the meaning of § 10(e)(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970).[12] We decline the invitation.

In doing so however we have carefully weighed the competing considerations. In its decision in the instant case the Commission recognized that dismissal of the Hub application must not be "inconsistent with the public interest, the public convenience and necessity, or the National Transportation Policy. . . ." The existence of a fit and willing substitute applicant, under appropriate circumstances, might be said to have a direct bearing on the inquiry. We also are mindful that, since an application or temporary authority which has ceased to exist cannot be transferred, the decision against the trustee here as a practical matter forecloses further consideration of Alltrans' applications for transfer.

[6] On the other hand docket management is a discretionary matter as to which courts virtually never substitute their judgment for that of an administrative agency. E. g., *FCC v. WJR*, 337 U.S. 265, 272 (1949); *Peninsula Corp. of Seaford, Delaware v. United States*, 60 F.Supp. 174 (D.D.C.1945) (three-judge court). Having said this, we recognize the exceptional situation where two mutually exclusive, bona fide applications should be considered together. See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1946). And we further recognize more broadly that in an appropriate case considerations of administrative convenience, expedition and fairness may come down so strongly on the side of consolidated consideration of interrelated questions that failure to consolidate would amount to an abuse of discretion. See *A. L. Mechling Barge Lines, Inc. v. United States*, 376 U.S. 375, 382-86 (1964).

With these principles in mind we turn to the instant case to determine whether the Commission was justified in declining in effect to permit Alltrans to stand in the shoes of REA. The Commission gave two

12. Alltrans as intervenor supports the trustee's position that the Commission should not have dismissed the Hub application without first considering the Alltrans applications. It argues that "orderly administrative process" required this because "if the Alltrans' application[s] had been processed . . . the matters now before this Court *would be rendered moot.*" (emphasis that of Alltrans' counsel). As authority for this argument Alltrans relies on the broad provisions of § 17(3) of the Act, 49 U.S.C. § 17(3) (1970), which provides that the Commission's proceedings shall be conducted "in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . ."

reasons for its action. First, such substitution would have permitted REA to " 'transfer away' redress for its breaches of the Act and this Commission's rules and regulations . . . ." Second, "if there is, in fact, [the] need for a nationwide general express service" which Alltrans claims, § 210a(a) provides "a means by which [such] immediate and urgent need for . . . service can be satisfied by willing carriers." In other words, a new application for temporary authority would provide an adequate remedy to Alltrans if shown to be in the public interest.

We find the Commission's explanation persuasive—especially when § 210a(a) and Rule 247(f) are viewed in the context of the Act's overall regulatory scheme.

[7, 8] The Act reflects the determination of Congress that regulation of competition among carriers is necessary in the public interest. As one part of its regulatory pattern, the Act protects the motor carrier industry from overcompetition and preserves standards of safety and financial responsibility within the industry by regulating entry. Under §§ 205–209 of the Act, 49 U.S.C. §§ 305–309 (1970), entry ordinarily may be authorized by the Commission only after full adversary proceedings. See *American Form Lines v. Black Ball Freight Service*, 397 U.S. 532, 543–44 (1970) (Brennan, *J.*, dissenting). The temporary authority provided in § 210a(a) is a strictly limited exception to this regulatory pattern. It was designed to provide the Commission with a swift and procedurally simple means of responding to urgent transportation needs. *Id.* at 539 (majority opinion). Temporary authority is in the nature of preliminary relief. It necessarily is granted without a thorough investigation into the public need, the carrier's fitness, or the interests of competing carriers. E. g., *Mobile Home Express, Ltd. v. United States*, 354 F.Supp. 701, 706 (W.D.Okl.1973) (three-judge court); *HC&D Moving and Storage Co. v. United States*, 317 F.Supp. 881 (D.Haw.1970) (three-judge court) (per curiam).[13]

In the instant case the temporary authority had been in existence for 8 years. REA had continued operations under it in violation of Rule 247(f). In refusing to permit Alltrans to stand in the shoes of REA, the Commission was enforcing orderly utilization of its regulatory procedures. If the Commission were held to lack discretion to prohibit renewal of temporary authorities subject to dismissal for violation of Rule 247(f), the limited function of § 210a(a) would be subverted. Carriers could acquire and misuse temporary authorities secure in the belief that such authorities could be put on the market if the Commission or their competitors proceeded against them.

[9–11] In *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962), the Supreme Court relied on a similar deterrent rationale in sustaining the Commission's disapproval of a merger under § 5(2) of the Act on the ground that the two carriers had violated the control provisions of § 5(4) prior to their merger application.[14] We think that the Court's view of the impact of

13. The courts have given the Commission broad discretion in making § 210a(a) determinations. *E. g., Garnett Freight Lines, Inc. v. United States*, 540 F.2d 450 (9 Cir. 1976) (per curiam); *Land-Air Delivery, Inc. v. United States*, 371 F.Supp. 217 (D.Kan.1973) (three-judge court); *Schenley Distillers Corp. v. United States*, 50 F.Supp. 491, 496 (D.Del.1943) (three-judge court).

14. For the relevant parts of § 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2) (1970), see note 5, *supra*.

§ 5(4) of the Interstate Commerce Act, 49 U.S.C. § 5(4) (1970), in relevant part provides: "It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. . . ."

the § 5(4) violation in *Gilbertville* is equally applicable to the Rule 247(f) violation here:

> "[E]ven an automatic rule is not necessarily arbitrary. . . . § 5(4) is integral to the success of the regulatory scheme. To approve a merger in the face of a § 5(4) violation may encourage others whose merger may not be consistent with the public interest to either present the Commission with a *fait accompli* or avoid its jurisdiction altogether. . . . [I]f such practices were encouraged, [the Commission's] 'administration of the statute in the public interest would be seriously hindered if not defeated'. . . ." *Id.* at 128.

See also *Lombard Bros. Inc. v. United States*, 226 F.Supp. 905, 908 (D.Conn.1964) (three-judge court) (Swan, *J.*).

Under *Gilbertville* however the Commission's interest in enforcing compliance with the Act in some circumstances may be outweighed by the public interest in granting the application. 371 U.S. at 129. The trustee urges here that the Commission only peripherally considered the public interest, preferring to relegate Alltrans to a new application under § 210a(a).

We are satisfied however upon a close comparison of the provisions of §§ 210a(a) and 210a(b), see notes 3 and 5 *supra*, that under the circumstances of this case the Commission acted well within its discretion. Under § 210a(a) existing service is *not* presumed and the applicant must show an "immediate and urgent need" for service. On the other hand, § 210a(b), under which the Alltrans transfer applications would proceed, provides for temporary authority pending approval of a merger or a transfer of authorities. Since an authority already exists in a § 210a(b) case, basic public need for the service in question *is* presumed; the critical question in such a case is whether an interim interruption in service will injure or destroy the properties to be transferred or "interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

In the instant case the Commission did make certain findings which bear on the § 210a(b) question referred to above.[15] It is arguable however that the Commission's findings did not conclusively show that the proposed transfer to Alltrans and continuation of Hub service was against the public interest. But the procedure proposed by Alltrans also would fail to result in an adjudication of the question of public interest in the transfer and continuation. The inquiry under § 210a(b) is not intended to go that far. The section presumes that the full adversary hearings on the issue of public convenience and necessity which the Hub authority never has undergone already have occurred. For its public interest anchor therefore Alltrans would have to fall back on the Commission's summary 1968 finding of "immediate and urgent need." The record in this case however provides ample justification for the Commission's refusal to presume the continued existence of the conditions which warranted its action in 1968.

We hold that the Commission did not abuse its discretion in dismissing the Hub application under Rule 247(f) without considering on their merits the Alltrans transfer applications. REA's violation of Rule 247(f) gave rise to a substantial enforcement interest. The circumstances of REA's collapse and the complete cessation of actual service under the Hub authority for one year preceding the decision in this case amply justified the Commission in requiring a minimal showing of public interest under § 210a(a) as a prerequisite to Alltrans' resumption of Hub services pending adjudica-

15. For example it found that other carriers had expanded to fill the void left by REA. Obviously this finding is correct and is supported by the record. The difficulty is that it is not a complete answer to the question of public interest in continued Hub operations. Doubtless some expansion has occurred. But the proceedings before the Commission were not directed to the determination of the precise extent of such expansion and the concomitant question of the extent of the need for renewed express service.

tion of the application for permanent authority.[16]

[12, 13] This holding necessarily disposes of the trustee's final contention—that he should have been held to the lesser burden of proof of § 210a(b). This case presented the Commission with questions of first impression regarding §§ 210a(a) and 210a(b). There is no rule that requires the Commission to apply the provisions of § 210a(b) to parties who seek to transfer temporary authority no matter what the circumstances. Such a rule would permit temporary authority to become a functional substitute for permanent authority and would distort the statutory scheme. The Commission moreover has a continuing duty to reopen and reconsider its decisions regarding temporary authorities. *Braswell Motor Freight, Inc. v. United States*, 336 F.Supp. 709, 712 (C.D.Cal.1971) (three-judge court). The Commission did not abuse its discretion in doing so here in the context of a proceeding which sought dismissal under Rule 247(f) of an application for permanent authority.

The trustee relies on *Eagle Motor Lines, Inc. v. ICC*, 545 F.2d 1015 (5 Cir. 1977), for the proposition that the shift in the burden of proof makes a fresh application an inadequate remedy for improper summary revocation of operating authority. Suffice it to say that that case arose under entirely different circumstances, under a different section of the Act and is wholly unpersuasive here.

[14] Temporary authority can exist only pursuant to a pending application for permanent authority. Accordingly the Commission's dismissal of the Hub application for permanent authority constituted "good cause" under § 210a(a) for revocation of the Hub temporary authority. Since we affirm the Commission's dismissal under Rule 247(f), we find it neither necessary nor appropriate to reach the trustee's objections to the Commission's independent grounds for revocation of the temporary authority.

We have carefully considered all of the claims of the trustee, as well as those of the intervenors who support the trustee, and we find them without merit.

We vacate our stay of January 5, 1977 and order that the mandate issue forthwith.

Petition denied; orders affirmed.

16. Intervenor Brotherhood of Railway and Airline Clerks (BRAC) contends that the Commission's orders violate the National Transportation Policy because the Commission failed to "collect facts" about employee interests. This contention is without merit. The Commission obviously was aware of the unemployed status of REA's employees. BRAC fails to suggest any material facts which further inquiry might have developed. Moreover the National Transportation Policy is not directly concerned with the problems of unemployment and creditors' rights. Cf. *Luckenbach S.S. Co. v. United States*, 122 F.Supp. 824 (S.D.N.Y.) (three-judge court) (A. Hand, J.), *aff'd*, 347 U.S. 984 (1954) (per curiam).

Schaffer Transportation Co. v. United States, 355 U.S. 82 (1957), on which BRAC relies, is wholly irrelevant.

W. J. USERY, Jr., Secretary of Labor, Plaintiff-Appellant,

v.

COLUMBIA UNIVERSITY, and William J. McGill, Individually and as President of Columbia University, Defendants-Appellees.

No. 398, Docket 76-6071.

United States Court of Appeals, Second Circuit.

Argued Jan. 5, 1977.

Decided Oct. 4, 1977.

On appeal from a judgment entered after a bench trial in the Southern District of New York, Richard Owen, J., 407 F.Supp. 1370, dismissing an action by the Secretary of Labor which sought

96 N.M. 525, 632 P.2d 1163 WOOD V. MILLERS NAT'L INS. CO. (S. Ct. 1981)

WENDELL WOOD, Plaintiff-Appellee,
vs.
MILLERS NATIONAL INSURANCE COMPANY, a Corporation
Defendant-Appellant.

No. 13165
SUPREME COURT OF NEW MEXICO
96 N.M. 525, 632 P.2d 1163
August 24, 1981

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY, GARNETT R. BURKS, JR., District Judge.

COUNSEL

WALTER R. PARR, P.O Box 1231, Las Cruces, New Mexico 88001, Attorney for Plaintiff-Appellee.

CROUCH, VALENTINE & RAMIREZ, P.C., Jerald A. Valentine, P.O. Drawer 850, Las Cruces, New Mexico 88001, Attorneys for Defendants-Appellant.

JUDGES

Payne, J., wrote the opinion. WE CONCUR: MACK EASLEY, Chief Justice, DAN SOSA, Senior Justice.

AUTHOR: PAYNE

OPINION

*{*526}* PAYNE, Justice.

The defendant, Millers National Insurance Company, has appealed an order denying its motion to compel arbitration, or in the alternative, to stay proceedings of the district court. The suit arose from a collision between the plaintiff Wood and an uninsured motorist, Gonzales. Both Wood and Gonzales were injured. Wood was operating a vehicle insured by Millers. Millers undertook Wood's defense in a suit initiated by Gonzales, and suggested that Wood counterclaim. Wood's personal attorney demanded that in additional to providing a defense, Millers cover Wood's own injuries under the uninsured motorist provisions of the policy. He also demanded arbitration if Millers refused to pay. Millers denied coverage for Wood's injuries and expressed a willingness to arbitrate, but suggested avoiding arbitration costs through agreement that the determination of liability between Wood and Gonzales in the pending *{*527}* litigation would determine Wood's claim for uninsured motorist coverage. Wood made a further demand for coverage, without response from Millers. Wood then filed suit, alleging that Millers' denial of coverage was not in good faith. Millers filed a motion to dismiss which was denied. Millers then filed its motion to compel arbitration. The latter motion is the subject of this appeal.

A.

The trial court concluded as a matter of law that there was no valid agreement of arbitration between Wood and Millers. However, the policy under which Wood makes his claim specifies

that matters upon which Millers **and any person making a claim under the policy** disagree shall be settled by arbitration. Wood argues that since he did not sign the policy, he should not be bound by its terms. We fail to see how this argument has any validity in the circumstances of this case. **See Jeanes v. Arrow Insurance Company**, 16 Ariz. App. 589, 494 P.2d 1334 (1972).

B.

The trial court also found that Millers waived its right to compel arbitration. We affirm the trial court on this issue.

This Court discussed the question of waiver in **United Nuclear Corp. v. General Atomic Co.**, 93 N.M. 105, 597 P.2d 290 (1979). As indicated in **United Nuclear**, this Court has encouraged arbitration and "all doubts as to whether there is a waiver must be resolved in favor of arbitration." **Id.** at 114, 597 P.2d at 299 [citations omitted]. **See also Dairyland Ins. Co. v. Rose**, 92 N.M. 527, 591 P.2d 281 (1979); **Bernalillo Cty. Med. Center Emp. v. Cancelosi**, 92 N.M. 307, 587 P.2d 960 (1978). Also, "dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver." **United Nuclear, supra**, 93 N.M. at 115, 597 P.2d at 300 (citation omitted). The type of prejudice usually invoking a waiver involves trial preparation based on the belief that the other party does not desire or intend to make a demand for arbitration. **Id.** at 117, 597 P.2d at 302. Thus, the extent of court action taken is an important inquiry. In **Cancelosi, supra**, this Court found no waiver of arbitration where "[t]he case was not at issue and since no hearings had been held, the judicial waters had not been tested prior to the time the motion for arbitration had been filed." **Id.** 92 N.M. at 310, 587 P.2d at 963.

With reference to waiver of arbitration, the pertinent dates and proceedings consisted of the following:

October 15, 1979:	Complaint filed by Wood
November 20, 1979:	Entry of Appearance by Millers
December 3, 1979:	Order for Enlargement of Time
December 14, 1979:	Motion to Dismiss by Millers
January 21, 1980:	Order to Deny Motion to Dismiss
January 29, 1980:	Motion to Compel Arbitration or Stay Proceedings filed by Millers
March 6, 1980:	Motion for Default Judgment or for a Partial Summary Judgment filed by Woods
April 30, 1980:	Order Denying Motion for Default Judgment
May 9, 1980:	Order Denying Motion to Compel Arbitration

Between October 15, 1979 (the date the complaint was filed), and January 21, 1980 (the date the motion to compel arbitration was filed), the trial court held a hearing on Millers' motion to dismiss. After the court denied Millers' motion, Millers moved to compel arbitration. The question then is whether, having invoked the court's discretionary power, Millers may thereafter seek to compel arbitration. We hold that it cannot.

The mere instigation of legal action is not determinative for purposes of deciding whether a party has waived arbitration. The point of no return is reached when the party seeking to compel arbitration *{*528}* invokes the court's discretionary power, prior to demanding arbitration, on a

question other than its demand for arbitration. Millers passed this point, and thereby waived arbitration. To hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration. We cannot sanction such a procedure.

C.

Millers also appeals the denial of its motion to stay proceedings. The power to stay proceedings pending the outcome of other litigation is within the discretion of the court, and we will only find error when the lower court has abused its discretion. **See Flinchum Const. Co. v. Central Glass & Mirror**, 94 N.M. 398, 611 P.2d 221 (1980). Millers claims that Wood's action should be stayed because the suit between Gonzales and Wood will settle the dispute between Millers and Wood. In essence, Millers is challenging Wood's right to bring a direct action against Millers for uninsured motorist benefits.

Different jurisdictions have focused on various factors in determining whether an insured has a right to bring a direct action against the insurer for uninsured motorist benefits. Among these factors are: 1) legislative intent in enacting the statute requiring uninsured motorist coverage; 2) the insurer's intent in drafting the provision; 3) judicial economy; 4) the meaning of the phrase "legally entitled to recover"; and 5) the effect of an arbitration provision. **See generally** Annot., 73 A.L.R.3d 632 (1976). Review of the cases indicates that there is no single prevailing view. We have considered the various factors as they relate to New Mexico law and conclude that a direct action against an insurer for uninsured motorist benefits is permissible.

1.

In **Chavez v. State Farm Mutual Automobile Ins. Co.**, 87 N.M. 327, 329, 533 P.2d 100, 102 (1975), we stated that "'the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance.' **Bartlett v. Nationwide Mutual Ins. Co.**, 33 Ohio St.2d 50, 52, 294 N.E.2d 665, 666 (1973)." In **Sandoval v. Valdez**, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978), **cert. quashed**, April 13, 1978, the Court of Appeals noted that the statute does not mention any limitations on actions except that the insured must be legally entitled to recover damages and the negligent driver must be uninsured. Accordingly, we cannot find any legislative intent that an insured must obtain a judgment against the uninsured motorist before bringing an action for uninsured motorist coverage.

The intent of the insurer in this case is clear from the wording of its policy and from the actions of its counsel. The relevant portion of the contract states:

[D]etermination as to whether the insured... is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured... and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury... shall be conclusive, as between the insured and the company, of the issues of

liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

Millers intended that claims under the uninsured motorist provisions should be settled between it and the insured, with the possibility that a suit between the insured and the uninsured motorist could be conclusive if prosecuted by the insured with the company's written consent. No provision is made for the situation where arbitration fails, as it did here, nor is there indication that a judgment against an uninsured motorist is a prerequisite for recovery.

*{*529}* Wood never agreed to Millers' proposed arrangement whereby the results of the litigation between Gonzales and Wood would be determinative of Wood's claim for uninsured coverage. The fact that Millers deemed it necessary to seek such an arrangement indicates that the parties did not intend under the contract that the separate suit would be inclusive.

3.

Judicial economy might favor a stay of these proceedings, but the notion should not be invoked where it substantially impairs a party's rights. **See** 1 Am. Jur.2d **Actions** § 97 (1962). The trial judge is in the best position to make the relevant determinations. We cannot hold as a matter of law that judicial economy is the overriding consideration or that the lower court's balancing of economy against harm to the plaintiff was erroneous.

4.

The phrase "legally entitled to recover" has been interpreted both as permitting direct action and as not permitting direct action. **See** Annot., 73 A.L.R.3d 632, §§ 8 and 9 (1976). We hold that the phrase merely requires that the determination of liability be made by legal means. Millers recognizes that agreement by the parties directly or through arbitration may result in a determination of what the insured is legally entitled to recover. No judgment against the uninsured motorist is necessary under this procedure. We hold that the same phrase does not constitute a barrier to court action where agreement and arbitration have failed.

5.

The contract provision requiring arbitration in the present case specifies that the parties shall submit to arbitration "upon written demand of either." Millers waived its right to make such a demand, as discussed **supra**. Under the circumstances of this case, Wood was not required to further pursue the arbitration procedure where Millers made no attempt to negotiate Wood's claim and failed to timely pursue arbitration on its own.

D.

We conclude that the trial court did not abuse its discretion by its denial of Millers' motion to stay proceedings. We recognize the difficult position Millers faces in defending two separate lawsuits which might subject Millers to a different liability than it would face if the present case were stayed. However, we cannot deny Wood his day in court because Millers failed to properly

demand arbitration. Wood has made allegations of bad faith against Millers which are separate from the issue involved in the Gonzales litigation. Thus we cannot say as a matter of law that the motion to stay should have been granted.

E.

The judgment is reversed in part and affirmed in part, and the cause remanded for further proceedings consistent with this opinion.

BE IT SO ORDERED.

WE CONCUR: EASLEY, Chief Justice, and SOSA, Senior Justice.

---

96 N.M. 510, 632 P.2d 745 ATENCIO V. LOVE (S. Ct. 1981)

99 N.M. 39, 653 P.2d 870 FIVE KEYS, INC. V. PIZZA INN, INC. (S. Ct. 1982)

FIVE KEYS, INC., a New Mexico corporation, RAY F. CHAVEZ and STELLA A. CHAVEZ, Plaintiffs-Appellants,

vs.

PIZZA INN, INC., a Texas corporation, Defendant-Appellee.

No. 14118
SUPREME COURT OF NEW MEXICO
99 N.M. 39, 653 P.2d 870
November 01, 1982

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Patricia A. Madrid, District Judge

COUNSEL

Thomas F. McKenna, Albuquerque, New Mexico, for Appellants.
Poole, Tinnin & Martin, Richard Yeomans, Albuquerque, New Mexico, for Appellee.

JUDGES

Riordan, J. wrote the opinion. WE CONCUR: WILLIAM R. FEDERICI, Justice, FRANK ALLEN, District Judge (Sitting by Designation)
AUTHOR: RIORDAN

OPINION

*{*40}* RIORDAN, Justice.

On May 1, 1981, Five Keys, Inc. and Ray and Stella Chavez (Plaintiffs) filed suit against Pizza Inn, Inc. (Defendant) seeking damages and a recision of the parties' Franchise Agreement and Asset Purchase Agreement (Bernalillo County Cause # 81-03139). On May 20, 1981, Defendant filed a motion to compel arbitration as required by the parties' contract. On May 21, 1981, the trial court granted Defendant's motion and **stayed** all further court proceedings.

The dispute between the parties went to arbitration and the arbitration hearing ended on September 3, 1981. On October 25, 1981, an award was made by the arbitrator in favor of Defendant against Plaintiffs. On October 30, 1981, Defendant filed a motion for confirmation of the arbitrator's award and an entry of judgment in Cause # 81-03139. On November 6, 1981, Plaintiffs filed an affidavit of disqualification directed at Judge Madrid in the same cause.

On November 9, 1981, Plaintiffs filed a new cause of action for the modification, correction, clarification and vacation of the arbitration award which was assigned to Judge Franchini (Bernalillo County Cause # 81-07816). On November 24, 1981, the two cases were consolidated by Judge Madrid because "the two actions involve common questions of law and fact, and that consolidation will serve to avoid unnecessary expense and delay." Plaintiffs again attempted to disqualify Judge Madrid by filing a second affidavit of disqualification in Cause # 81-07816. Also, on November 24, 1981, Judge Madrid refused to honor the first affidavit of disqualification

as being untimely.

On December 1, 1981, Judge Madrid entered orders confirming the arbitration award, denying Plaintiffs' motion for modification, correction, clarification or vacation of the arbitration award and refusing to honor the second affidavit of disqualification. Plaintiffs appeal. We affirm the trial court.

The issues on appeal are:

I. Whether Judge Madrid erred by refusing to honor the affidavits of disqualification.

II. Whether the arbitration award should be vacated because the award did not include findings of fact and conclusions of law, and because the award was not timely made.

I. **Affidavits of Disqualification**

On May 1, 1981, Plaintiffs filed their complaint. On May 21, 1981, upon motions and after a hearing in which both parties appeared and argued, Judge Madrid **stayed** further proceedings in Cause # 81-03139, pending arbitration. A stay of proceedings is defined as a "temporary suspension of the regular order of proceedings in a cause, by direction or order of the court, usually to await the action of one of the parties in regard to some omitted step or some act which the court has required him to perform as incidental to the suit. * * *" Black's Law Dictionary § 1267 (5th ed. 1979); **see Rossiter v. Aetna Life Ins. Co. of Hartford, Conn.,** 96 Wis. 466, 71 N.W. 898 (1897). A stay of proceedings is **not** a dismissal of a suit. **Solarana v. Industrial Electronics, Inc.,** 50 Hawaii 22, 428 P.2d 411 (1967).

On October 30, 1981, after the arbitrator's award was granted, Defendant filed a motion in Cause # 81-03139 for confirmation of the arbitrator's award. On November 6, 1981, Plaintiffs filed an affidavit of disqualification directed at Judge Madrid. An affidavit of disqualification of a district judge must be filed before a party has called upon the court to act judicially. **State v. Chavez,** 45 N.M. 161, 113 P.2d 179 (1941). On May 21, 1981, there was a hearing and the parties presented arguments before Judge Madrid concerning whether the parties were required to arbitrate. Judge Madrid acted judicially by granting the motion to require arbitration. Therefore, Plaintiffs' affidavit was not timely filed.

*{*41}* On November 9, 1981, Plaintiffs filed a second cause of action for the modification, correction, clarification and vacation of the arbitrator's award. On November 24, 1981, Judge Madrid consolidated the first cause of action and this second cause of action "on the court's own motion".

N.M.R. Civ. P. 42(a), N.M.S.A. 1978 (Repl. Pamp. 1980), states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; **it may order all the actions consolidated;** and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. [Emphasis added.]

The consolidation of causes of action is a matter vested solely within the discretion of the trial court. We will not disturb the trial court's decision unless there is a clear abuse of that discretion. **Hanratty v. Middle Rio Grande Conservancy Dist.,** 82 N.M. 275, 480 P.2d 165 (1970), **cert. denied,** 404 U.S. 841, 92 S. Ct. 135, 30 L. Ed. 2d 75 (1971). Because the two causes of action are so closely related, we find no abuse of the trial court's discretion in consolidating the two cases.

Concerning the second cause of action, Plaintiffs again submitted an affidavit for disqualification of Judge Madrid, which she refused to honor. We hold that Plaintiffs cannot disqualify Judge Madrid by filing a new lawsuit and a new affidavit of disqualification because both causes of action involved the same parties and issues and because Plaintiffs had previously invoked the jurisdiction of the court before attempting to disqualify Judge Madrid in Cause # 81-03139. **See State v. Ericksen,** 94 N.M. 128, 607 P.2d 666 (Ct. App. 1980). Therefore, Judge Madrid properly denied the second affidavit of disqualification.

II. **Arbitration Award**

Both parties agree that findings of fact and conclusions of law are not required to be made in an arbitration award unless required by statute or by the parties' agreement. 6 C.J.S. **Arbitration** § 100 (1975). Plaintiffs assert that the arbitrator violated paragraph 17 by failing to make findings of fact and conclusions of law. Paragraph 17 of the parties' contract stated:

Any dispute or controversy arising out of or relating in any way to this Agreement * * * shall be determined by binding arbitration * * *.

* * * * * *

(b) The arbitrator designated and acting under this Agreement shall make his award in strict conformity with the rules of the American Arbitration Association and shall have no power to depart from or change any of the provisions hereof, and shall determine the controversy in accordance with the **laws of the State of New Mexico as applied to the facts found by him.**

(c) The **decision** of the arbitrator shall be rendered within forty-five (45) days. * * * [Emphasis added.]

The rules of the American Arbitration Association do not require findings of fact or conclusions of law. **Hale v. Friedman,** 281 F.2d 635 (D.C. Cir. 1960); **General Construction Co. v. Hering Realty Co.,** 201 F. Supp. 487 (E.D.S.C. 1962). In interpreting the rest of paragraph 17, we look to the rules of contract law. **Christmas v. Cimarron Realty Co.,** 98 N.M. 330, 648 P.2d 788 (1982). Therefore, we will apply the "plain meaning" of the contract language as written in interpreting the terms of the contract. **Id.** Plaintiffs assert that the above emphasized portion of paragraph 17 required the arbitrator to make findings of fact and conclusions of law as ordinarily done in a non-jury trial. We do not find this argument persuasive. In our view, the trial court was correct in denying the motion for modification, correction, clarification or vacation because a reading of paragraph 17 does not exhibit a requirement for findings or conclusions

under this "plain meaning" standard. Therefore, we uphold the trial court's refusal to set aside the award for a failure to include findings of fact and conclusions of law.

*{*42}* Plaintiffs' final contention is that the award should be vacated because it was untimely made. The Commercial Arbitration Rules of the American Arbitration Association, Sections 41 and 35 (1981), provide:

§ 41 [t]he award shall be made promptly by the Arbitrator * * * no later than thirty days from the date of closing the hearings. * * *

§ 35 * * * [i]f briefs are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for the receipt of briefs. * * *

The arbitration hearing ended on September 3, 1981. Briefs to support the parties' respective position were to be filed on September 18, 1981. The arbitrator's award was to be made by October 18, 1981. The award was not made until October 25, 1981. However, no objection was made by Plaintiffs before the announcement of the award.

The Commercial Arbitration Rules of the American Arbitration Association, Section 38 (1981), provides:

[a]ny party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state objections thereto in writing, shall be deemed to have waived the right to object.

A party should not be permitted to wait and see whether the arbitrator will rule in his or her favor before asserting his or her objection. **Goble v. Central Security Mutual Insurance Co.,** 125 Ill. App.2d 298, 260 N.E.2d 860 (1970). Therefore, although the award was untimely made, Plaintiffs waived their right to object by waiting until after the award was made.

We affirm the decision of the trial court.

IT IS SO ORDERED.

WE CONCUR: WILLIAM R. FEDERICI, Justice, FRANK ALLEN, District Judge (Sitting by Designation)

.2d 221 FLINCHUM CONSTR. CO. V. CENTRAL GLASS & MIRROR CO. (S. Ct. 1980)

FLINCHUM CONSTRUCTION COMPANY, INC., a New Mexico corporation, Plaintiff-Appellee and Cross-Appellant,

vs.

CENTRAL GLASS & MIRROR COMPANY, INC., a New Mexico corporation, Defendant-Appellant and Cross-Appellee.

No. 12688
SUPREME COURT OF NEW MEXICO
94 N.M. 398, 611 P.2d 221
May 26, 1980

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY ROZIER E. SANCHEZ, District Judge.

COUNSEL

NORDHAUS, MOSES & DUNN, THOMAS J. DUNN, ADELIA W. KEARNY, Albuquerque, New Mexico Attorneys for Appellant.

MICHAEL L. DANOFF, PAUL R. SMITH, Albuquerque, New Mexico Attorney for Appellee and cross-appellant.

JUDGES

FEDERICI, J., wrote the opinion. WE CONCUR: MACK EASLEY, Justice, H. VERN PAYNE, Justice

AUTHOR: FEDERICI

OPINION

FEDERICI, Justice.

This case arose as a result of a contract entered into by appellee-contractor (Flinchum) and appellant-subcontractor (Central). Flinchum initially had contacted several subcontractors for bids. One bid showed an **additive** on alternative 2a. The other subcontractors bid alternative 2a as a **deductive** alternative. Flinchum submitted a bid to the City of Albuquerque in which it mistakenly showed 2a as a **deductive**. Flinchum offered the subcontract to Central. Central submitted a bid with alternative 2a as a **deductive**. The work to be performed was to have shown alternative 2a as an **additive**. When Central realized the error, and after unsuccessful efforts with Flinchum to remedy the situation, Central refused to perform and Flinchum sued for damages which the trial court awarded. Central appealed. Flinchum cross-appealed on the issue of failure of the trial court to award attorney fees and costs. We affirm.

*{*399}* The only issue in this appeal is whether Central could rescind the contract because of a unilateral mistake which Central contends resulted from Flinchum's misrepresentation of or failure to divulge to Central material facts concerning alternative 2a.

Central asserts and Flinchum concedes the principle of law to be that where a unilateral mistake is caused by the fraudulent misrepresentation of, or withholding of, material facts by the

other party, the mistaken party has the right to rescind the agreement. **See Krupiak v. Payton,** 90 N.M. 252, 561 P.2d 1345 (1977); **Rael v. American Estate Life Insurance Company,** 79 N.M. 379, 444 P.2d 290 (1968). **See also Modisette v. Foundation Reserve Insurance Co.,** 77 N.M. 661, 427 P.2d 21 (1967); **Sauter v. St. Michael's College,** 70 N.M. 380, 374 P.2d 134 (1962). Further, the burden was upon Central to establish the materiality of the omission. **Tsosie v. Foundation Reserve Insurance Company,** 77 N.M. 671, 427 P.2d 29 (1967).

Flinchum strongly urges, however, that there was no fraudulent misrepresentation or withholding of information of material facts in this case sufficient to warrant a rescission. The trial court found, among other facts, that:

3. The specifications for this construction project were drafted in a clear, precise manner * * *.

* * * * * *

12. The Plaintiff contacted Southwest Glass and informed them that they had bid Alternative 2a as an additive whereas the other subcontractors that had submitted bids had bid Alternative 2a as a deductive alternate.

* * * * * *

15. Fred Muehlmeyer, President of Central Glass & Mirror, relied on the expertise of George Mitchell and ratified the bid of George Mitchell by signing a contract with Flinchum Construction Co. for this project.

16. Defendant had ample opportunity to review the contract presented to them.

* * * * * *

21. It was customary that if the bidder or its estimator have any questions incident to the plans and specifications, they could contact the architect and/or the general contractor for any verifications.

22. The defendant, after having ample opportunity to contact the general contractor, or the architect of the project, for any clarifications of the plans and specifications, never did so.

Based upon the foregoing findings, the court concluded that there was no fraud involved on the part of Flinchum; that Central failed to establish the materiality of the withholding of information; and that the refusal of Central to perform constituted a breach of contract for which damages should be awarded. We agree.

The record discloses the following: The information known to Flinchum which was not disclosed to Central was that Southwest bid alternate 2a as an additive and all other prospective subcontractors, including Central, bid it as a deductive. Jerry Wulff, general manager of Flinchum, spent considerable time reviewing the contract with George Mitchell, the estimator for Central. Central admits that after it presented its bid to Flinchum, Flinchum came back to them

and asked them if there were in fact any mistakes in their bid. Central was very much aware of the terms of the contract and had ample time to review the contract prior to signing it. Central was also given the opportunity to recheck its bid prior to contracting with Flinchum. Wulff informed Mitchell that Southwest had been offered the contract because of its low bid. The contract written for Central was made subsequent to lengthy discussions with Central over the contract and also subsequent to Wulff's informing Central that Southwest "could not do the job as I had written the contract for." The contract was left with Central by Flinchum so they could review its contents before execution. No one from Central asked for clarification of the contract. It is traditional in the construction business for the architect and the *{*400}* general contractor to make themselves available for the resolution of any problems regarding contracts and both the architect and general contractor did so in this case. No questions were raised by Central as to why Southwest would not enter the contract as written even though it was known to Central that Southwest had made the low bid but yet would not execute the contract.

A reviewing court views the evidence in the light most favorable to the prevailing party to determine whether the trial court reached the proper conclusion. **Duke City Lumber Company, Inc. v. Terrel,** 88 N.M. 299, 540 P.2d 229 (1975). Where there is substantial evidence to support the findings made by the trial court, they will not be disturbed on appeal. **Boone v. Boone,** 90 N.M. 466, 565 P.2d 337 (1977). A reversal will be ordered by this Court only if there is a clear abuse of discretion. **Acme Cigarette Services, Inc. v. Gallegos,** 91 N.M. 577, 577 P.2d 885 (Ct. App. 1978).

On the cross-appeal by Flinchum for attorney fees which were denied by the trial court, the trial court found that those fees should be denied because Flinchum was aware of the problem involved on alternative 2a when it approached Central, and further, that Flinchum was not candid with Central. At first blush, it would appear that the court's statements here are inconsistent with its findings that there was no misrepresentation by Flinchum. However, upon analysis of the transcript, it appears that what the trial court intended was that the failure to be candid was not sufficient to constitute a misrepresentation of a material fact, but that it warranted some mitigation in the overall final result. The trial court concluded that attorney fees should be disallowed.

We find substantial evidence in the record to support the findings of fact, conclusions of law and judgment of the trial court. The judgment of the trial court is affirmed.

IT IS SO ORDERED.

WE CONCUR: MACK EASLEY, Justice, H. VERN PAYNE, Justice

105 N.M. 708, 736 P.2d 986 TENNECO OIL CO. V. NEW MEXICO WATER QUALITY CONTROL COMM'N (Ct. App. 1986)

TENNECO OIL COMPANY, Appellant-Petitioner,
vs.
NEW MEXICO WATER QUALITY CONTROL COMMISSION, Appellee-Respondent. NAVAJO REFINING COMPANY, Appellant-Movant, v. NEW MEXICO WATER QUALITY CONTROL COMMISSION, Appellee-Respondent

Nos. 9103, 9106
COURT OF APPEALS OF NEW MEXICO
105 N.M. 708, 736 P.2d 986
March 25, 1986
ADMINISTRATIVE APPEAL FROM THE WATER QUALITY CONTROL COMMISSION

COUNSEL

PAUL G. BARDACKE, Attorney General, ANDREA L. SMITH, Assistant Attorney General, DUFF WESTBROOK, Special Assistant Attorney General, Santa Fe, New Mexico, Attorneys for Appellee-Respondent.

KAREN AUBREY, KELLAHIN & KELLAHIN, Santa Fe, New Mexico, Attorneys for Applicant Tenneco.

BRUCE S. GARBER, Santa Fe, New Mexico, Attorney for Applicant Navajo Refining Co.

JUDGES

DONNELLY, J., wrote the opinion. WE CONCUR: A. JOSEPH ALARID, Judge, LORENZO F. GARCIA, Judge.

AUTHOR: DONNELLY

OPINION

*{*709}* THOMAS A. DONNELLY, Judge.

The issue before us involves the applications of Navajo Refining Company and Tenneco Oil Company, seeking to stay the enforcement of amendments to the Water Quality Control Commission regulations during the pendency of their appeal from the administrative order adopting such amendments. With the consent of the parties, the applications for stay have been consolidated for hearing.

In their applications for stay, applicants assert that the proposed amendments promulgated under the Water Quality Act, NMSA 1978, Section 74-6-1 (Repl. Pamp.1983), et seq., "will set more stringent numerical standards for discharge of substances which are controlled by the Water Quality Control Commission than presently exist" and that if such standards are permitted to become effective, applicants "will be irreparably harmed by enforcement of these regulations [sic] while this matter is pending on appeal."

Applicants have included in their petitions for stay, copies of the amended regulations which are the subject of their appeals, but have not alleged specifically in what manner the proposed

amendments to the regulations, if allowed to take effect, will result in "irreparable harm."

Section 74-6-4 empowers the Commission to adopt regulations and amendments applicable to water quality standards, after notice and hearing to interested persons. NMSA 1978, § 74-6-6 (Repl. Pamp.1983). The Act is silent, however, concerning any provision for the grant of a stay from regulations or amendments enacted by the Commission.

During the pendency of an appeal, an appellate court may grant supersedeas or stay to review any action of, or any failure or refusal to act by, the district court. NMSA 1978, Civ. App.R. 5 (Repl. Pamp.1984). The appellate rule, however, does not specifically refer to the granting of supersedeas or stay from orders of a state administrative agency. **Compare** NMSA 1978, Civ.P.R. 62 (Repl. Pamp.1980).

Under the Water Quality Act, provision is made for a direct appeal to the Court of Appeals from any regulation or amendment adopted by the Commission. NMSA 1978, § 74-6-7 (Repl. Pamp.1983). Implicit in the statute is the power to grant a stay from the operation of an administrative order or regulation, after due notice and opportunity for hearing. **See** N.M. Const. art. VI, § 29. During the pendency of an appeal, a stay can be granted as an incident to this court's power to review final administrative orders or regulations. **Compare** NMSA 1978, § 12-8-18 (specifying under Administrative Procedures Act, that the filing of an appeal does not stay enforcement of an agency decision, but the *{*710}* agency may grant, or Court of Appeals may order a stay upon appropriate terms).

Grant of an application for stay is not a matter of right, it is an exercise of judicial discretion, and the propriety of its issuance is dependent upon the circumstances of each individual case. **See State v. Doe,** 103 N.M. 30, 702 P.2d 350 (Ct. App.1984).

In cases where a stay is sought of agency action during the pendency of an administrative appeal, in accord with the general rule requiring a party to exhaust his administrative remedies, the party seeking the relief should first apply for a stay from the agency involved. **See Von Weidlein International Inc. v. Young,** 16 Or. App. 81, 514 P.2d 560 (1973) (en banc). **Cf. Angel Fire Corp. v. C.S. Cattle Co.,** 96 N.M. 651, 634 P.2d 202 (1981); **State Racing Commission v. McManus,** 82 N.M. 108, 476 P.2d 767 (1970).

In the absence of a specific statute or rule governing the granting of a stay of agency action pending appeal, what standard is applicable herein? Courts in other jurisdictions have applied varying standards. **See Tomasi v. Thompson,** 635 P.2d 538 (Colo.1981) (en banc); **Connecticut Life & Health Insurance Guaranty Ass'n v. Daly,** 35 Conn. Supp. 13, 391 A.2d 735 (1977); **Coordinating Committee of Mechanical Specialty Contractors Ass'n v. O'Connor,** 92 Ill. App.3d 318, 48 Ill. Dec. 147, 416 N.E.2d 42 (1980); **Teleconnect Co. v. Iowa State Commerce Commission,** 366 N.W.2d 511 (Iowa 1985). The standards recognized in some of these decisions are influenced in part by statutory provision or court rule.

The test articulated in **Associated Securities Corp. v. Securities & Exchange Commission,** 283 F.2d 773 (10th Cir.1960) and **Teleconnect,** we conclude, should be adopted herein. In both

Associated Securities Corp., and **Teleconnect,** the appellate courts recognized four conditions which they determined should guide an appellate court in determining whether its discretion should be exercised in the granting of a stay from an order or regulation adopted by an administrative agency. These conditions involve consideration of whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

The mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay. **Union Fidelity Life Insurance Co. v. Whaland,** 114 N.H. 549, 323 A.2d 585 (1974). An administrative order or regulation will not be stayed pending appeal where the applicant has not made the showing of each of the factors required to grant the stay. **Id.**

Applicants herein have alleged that irreparable harm will result unless a stay from the Commission's amended regulations is granted. Mere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay. However, in addition to a showing of irreparable harm, to obtain a stay of administrative action pending appellate review, an applicant must make a showing as to the other three conditions. In evaluating a request for a stay, the court must consider the applicant's presentation as to each of the enumerated factors.

Applying the above standards to the matters presented by applicants herein, we find that applicants have not established good cause for the granting of a stay under the factors recognized above. Denial of the requested stay does not constitute any determination of the validity of applicants' appeal on the merits.

The applications for stay are denied.

IT IS SO ORDERED.

ALARID and GARCIA, JJ., concur.

120 N.M. 778, 35 N.M. St. B. Bull. 1, 907 P.2d 182 ZAMORA V. VILLAGE OF RUIDOSO DOWNS (S. Ct. 1995) 1995 N.M. Lexis 358

ROBERT ZAMORA, Plaintiff-Appellant,

vs.

VILLAGE OF RUIDOSO DOWNS, Defendant-Appellee.

No. 22,107
SUPREME COURT OF NEW MEXICO
120 N.M. 778, 35 N.M. St. B. Bull. 1, 907 P.2d 182, 1995 N.M. LEXIS 358
October 26, 1995, FILED
APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY. Richard A. Parsons, District Judge.

Released for Publication November 13, 1995. As Corrected January 31, 1996.

COUNSEL

Hawthorne & Hawthorne, P.A., Charles E. Hawthorne, Ruidoso, New Mexico, for Appellant.
J. Robert Beauvais, P.A., J. Robert Beauvais, Ruidoso, New Mexico, for Appellee.

JUDGES

JOSEPH F. BACA, Chief Justice, RICHARD E. RANSOM, Justice, GENE E. FRANCHINI, Justice, STANLEY F. FROST, Justice, PAMELA B. MINZNER, Justice, concur.
AUTHOR: JOSEPH F. BACA

OPINION

*{*779}* **OPINION**

BACA, Chief Justice.

1. Appellant Robert Zamora appeals from a district court order granting a motion to dismiss in favor of Appellee Village of Ruidoso Downs. We address two issues on appeal: (1) Whether the district court erred when it concluded that the procedure to appeal a village personnel board's administrative decision was to petition the district court for a writ of certiorari, and (2) whether the district court erred when it concluded that Zamora failed to perfect a timely appeal. We review this case pursuant to SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992), affirm on the first issue, and reverse and remand on the second issue.

*{*780}* **I.**

2. On November 13, 1986, Zamora was employed by the Village, and on March 1, 1987, he became a permanent employee. On February 25, 1990, Zamora was injured in a non-employment-related accident. Pursuant to Section 3-9-27 of the Ruidoso Village Ordinance, the mayor granted Zamora a six-month disability leave without pay.[1] On April 23 Zamora received a partial medical release and requested to be assigned to light-duty work. The mayor refused to assign light-duty work to Zamora until he received a full medical release.

3. On September 17 the Village notified Zamora that his six-month disability leave had expired and that he was relieved of his duties. On October 2 Zamora filed a written request before the Village Board of Trustees to appeal the Mayor's decision to terminate his employment. The Board of Trustees, sitting as the Ruidoso Downs Personnel Board, granted Zamora's request. On October 20, after hearing the appeal, the Board upheld the Mayor's decision to terminate Zamora's employment.

4. On February 3, 1993, Zamora filed a complaint in district court for breach of employment contract and wrongful termination, alleging that the Ordinance required the Village to assign him to light-duty work.[2] On November 15 the Village filed a motion for summary judgment in which it conceded that the Ordinance was an implied employment contract but argued that there was no light-duty work available to which Zamora could be assigned. On January 5, 1994, the Village filed a motion to dismiss pursuant to SCRA 1986, 1-012(B)(6) (Repl. Pamp. 1991). The Village argued that absent a statute providing otherwise, Zamora can appeal the Board's administrative decision only by first petitioning the district court for a writ of certiorari. The Village also argued that the petition for a writ of certiorari must be filed within thirty days of the Board's administrative decision and that, by filing his complaint twenty-eight months after the fact, Zamora failed to perfect a timely appeal. On March 11 the district court filed an order granting the motion to dismiss. Zamora now appeals.

II.

5. We address whether the district court erred by concluding the procedure to appeal a village personnel board's administrative decision was to petition the district court for a writ of certiorari. Zamora argues that the district court erred, and his argument proceeds on two points: (1) The Board lacks jurisdiction to hear his claim for breach of an implied employment contract, and (2) the scope of review at the district court is de novo. We disagree with Zamora and hold that, unless otherwise provided by statute, the correct procedure to appeal a personnel board's administrative decision is to petition the district court for a writ of certiorari.

6. "Dismissal of a contract claim on a Rule 12(b)(6) motion is a legal, not evidentiary, determination . . . . '**The court must accept as true all the facts which are pled.**'" **Vigil v. Arzola,** 101 N.M. 687, 687-88, 687 P.2d 1038, 1038-39 (1984) (quoting **McCasland v. Prather,** 92 N.M. 192, 194, 585 P.2d 336, 338 (Ct. App. 1978)).

A.

7. Zamora argues that the Board does not have jurisdiction to hear his breach of implied employment contract claim because "all cases dealing with wrongful discharge by breach of contract in New Mexico have been tried **de novo.** We disagree.

8. The Board derives its authority over employment matters from NMSA 1978, Section 3-13-4(A) (Repl. Pamp. 1985), which authorizes municipalities, including the Village, to establish by ordinance a merit system for {*781} the hiring, promotion, and discharge of municipal employees. Municipalities are also authorized to create a personnel board to

administer the ordinance, Section 3-13-4(A)(1), and to establish rules including methods of employment, promotion, demotion, suspension, and discharge, Section 3-13-4(A)(2)(e). The ordinance is a "contract of employment between the municipality and an employee . . . ." Section 3-13-4(C). Accordingly, the Village adopted an Ordinance that includes sections relating to employee discipline, termination for "just cause," and for appeal of discipline and termination decisions to the personnel board. Thus, the Board was acting within its jurisdiction afforded by statute.

9. New Mexico courts have stated that an administrative body acts in a "quasi-judicial" capacity when it is "required to investigate facts, or ascertain the existence of facts, hold hearings, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." **Dugger v. City of Santa Fe,** 114 N.M. 47, 50, 834 P.2d 424, 427 (Ct. App.) (quoting **Black's Law Dictionary** 1121 (5th ed. 1979)), **cert. quashed,** 113 N.M. 744, 832 P.2d 1223 (1992). Moreover, it has long been held that "quasi[-]judicial" capacity is determined by "the nature of the act to be performed rather than the . . . board which performs it . . . ." **State ex rel. Sisney v. Board of Comm'rs of Quay County,** 27 N.M. 228, 231, 199 P. 359, 361 (1921) (quoting 11 C.J. **Certiorari** § 67, at 121 (1917)). We find that the Board was acting in its quasi-judicial capacity when it convened to investigate the facts surrounding Zamora's discharge and to determine whether the Mayor's termination of Zamora violated the Ordinance.

10. By arguing the Board has no jurisdiction to determine employment rights, Zamora has overlooked a fundamental distinction between public and private employment. A public employee who successfully can assert a property interest in employment is entitled to due process before he or she can be terminated. **Board of Regents v. Roth,** 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); **Perry v. Sindermann,** 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). On the other hand, private employees and public employees who cannot assert a property right in employment are not constitutionally entitled to the same procedures.

11. At a minimum, due process must include notice and opportunity to respond prior to termination. **Cleveland Bd. of Educ. v. Loudermill,** 470 U.S. 532, 545, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Due process "requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment." 470 U.S. at 542 (quoting **Roth,** 408 U.S. 564 at 569-70). The pretermination hearing should be "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." 470 U.S. at 545-46. When a public employee alleges that his employment was terminated in violation of an employment contract, he must be afforded an opportunity to respond at the required administrative hearing. See **Boespflug v. San Juan County (In re Termination of Boespflug),** 114 N.M. 771, 772, 845 P.2d 865, 866 (Ct. App. 1992); **see, e.g., Walck v. City of Albuquerque,** 113 N.M. 533, 828 P.2d 966 (Ct. App. 1992) (stating that terminated city employee appealed termination to city personnel board); **Montoya v. City of Albuquerque,** 98 N.M. 46, 644 P.2d 1035 (1982) (same).

12. In his complaint for breach of implied employment contract, Zamora argues that the

Village, contrary to the Ordinance requirements, refused to assign him to light-duty work. Zamora, however, ignores the fact that this question was already considered by the Board. The Ordinance requires "just cause" before a regular employee may be dismissed, and the dismissal is "effective when endorsed by the [Board]." Section 3-7-10. The Board's task was to determine whether there were "reasonable grounds" or "just cause" to uphold the Mayor's decision. The Ordinance provides a maximum six-month disability leave without pay. After having been on leave for more than six months, Zamora told the Board he had not yet received a full medical release to return to work and he did not know when he would {*782} obtain such a release. The Board, therefore, upheld the Mayor's decision.[3] Although the proceedings before the Board may not have been termed an action for breach of implied employment contract, those proceedings necessarily involved the question of whether the Ordinance--the basis of Zamora's alleged implied employment contract--was indeed violated.

B.

13. As a second point, Zamora argues the scope of review at the district court is trial de novo. Here, too, we disagree.

14. As we have noted above, the Board is delegated authority to administer matters relating to employment. In that capacity, the personnel board is an "administrative" body with authority to investigate and ascertain evidence in order to determine an individual's substantive rights in employment. Absent a statute providing otherwise, the Board's determinations are reviewable at the district court only by writ of certiorari for arbitrariness, capriciousness, fraud, or lack of substantial evidence.

> It is not the province of the reviewing court to interfere with a civil service commission's judgment and direct an order of affirmance or reversal of an order removing an officer, but the court is limited to a determination of whether the commission regularly pursued the authority conferred upon it, and the court may not reverse the case on the facts unless the commission acted arbitrarily or capriciously. In other words, the question of whether cause for discharge exists should generally be determined by the administrative agency and substantial deference must be given to its ruling.

4 Eugene McQuillen, **Municipal Corporations** § 12.266, at 675 (3rd ed. 1992). New Mexico has consistently followed this principle. **See Montoya v. City of Albuquerque,** 98 N.M. at 47, 644 P.2d at 1036 (quoting **Otero v. New Mexico State Police Bd.,** 83 N.M. 594, 595, 495 P.2d 374, 375 (1972) (stating rule that district court reviews administrative decision for arbitrariness, capriciousness, fraud, or lack of substantial evidence)); **Conwell v. City of Albuquerque,** 97 N.M. 136, 138, 637 P.2d 567, 569 (1981) (stating that judicial review of administrative decision is limited to determining "whether administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence"); **Walck,** 113 N.M. at 535, 828 P.2d at 968 (same); **Tapia v. City of Albuquerque,** 104 N.M. 117, 120-21, 717 P.2d 93, 96-97 (Ct. App. 1986) (same); **Rowley v. Murray,** 106

N.M. 676, 679, 748 P.2d 973, 976 (Ct. App. 1987) (stating preferred rule that, absent a **specific** statutory provision, court is confined to record made in administrative proceeding), **cert. denied,** 106 N.M. 627, 747 P.2d 922 (1987).

15. This appears to be the prevailing principle in other jurisdictions as well. **See. e.g., Matter of Larkin,** 415 N.W.2d 79, 81 (Minn. Ct. App. 1987) (stating standard of review on writ of certiorari of city civil service commission decision was arbitrary, capricious, or lack of substantial evidence); **Bates v. City of St. Louis,** 728 S.W.2d 232, 235 (Mo. Ct. App. 1987) (same).

16. We have recognized de novo review at the district court of administrative decisions when such review is provided by statute. **See Keller v. City of Albuquerque,** 85 N.M. 134, 137, 509 P.2d 1329, 1332 (1973) (stating that when statute provides for trial de novo for appeals from Human Rights Commission, district court has right to make independent determination from facts) **overruled on other grounds by Green v. Kase,** 113 N.M. 76, 77, 823 P.2d 318, 319 (1992); **Linton v. Farmington Mun. Schs,** 86 N.M. 748, 749-50, 527 P.2d 789, 890-91 (1974) (same). This principle governs in other jurisdictions as well **See e.g., Turk v. Bradley (In re Bradley),** 75 Wyo. 144, 293 P.2d 678, 679 (Wyo. 1956). Interestingly, at least one jurisdiction has gone so far as to limit statutorily provided de novo review to a determination of whether an agency's ruling is illegal or not supported by *{*783}* substantial evidence. **Fire Dept. of Fort Worth v. City of Fort Worth,** 147 Tex. 505, 217 S.W.2d 664, 666-67 (Tex. 1949); **Richardson v. City of Pasadena,** 513 S.W.2d 1, 3 (Tex. 1974). We need not go so far, however.

17. "A writ of certiorari . . . lies when it is shown that an inferior court or tribunal has exceeded its jurisdiction or has proceeded **illegally,** and no appeal or other mode of review is allowed or provided." **Rainaldi v. Public Employees Ret. Bd.,** 115 N.M. 650, 654, 857 P.2d 761, 765 (1993) (emphasis added). "Judicial review of administrative action . . . requires a determination whether the administrative decision is arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence." **Regents of Univ. of New Mexico v. Hughes,** 114 N.M. 304, 309, 838 P.2d 458, 463 (1992). An arbitrary and capricious administrative action is synonymous with an illegal action. **See id.** Zamora has not called our attention to a statute or any other provision that entitles him to a trial de novo in the district court.

18. This Court has long held that "certiorari is the appropriate process to review the proceedings of bodies . . . acting in a judicial or quasi[-]judicial character. **State ex rel. Sisney,** 27 N.M. at 231, 199 P. at 361. Hence, the correct procedure to appeal the decision of the Board was to petition the district court for writ of certiorari.

19. Zamora cites **Groendyke Transportation Inc. v. New Mexico State Corp. Commission,** 101 N.M. 470, 684 P.2d 1135 (1984), to argue that the scope of review at the district court is confined to the record of the administrative hearing only when the administrative agency possesses a "special expertise" and is entitled to deference. Zamora argues the Board has no such expertise and, therefore, he is entitled to a trial de novo. Zamora misinterprets **Groendyke.** In **Groendyke** the New Mexico State Corporation Commission, after a full evidentiary hearing, denied Groendyke a certificate of public convenience and necessity. 101

N.M. at 473, 684 P.2d at 1138. Groendyke petitioned the district court for a writ of mandamus and sought to introduce evidence that had not been before the Commission. **Id.** The district court denied the petition and the introduction of evidence. On appeal we explained that, unless a statutory exception applies, "the district court is limited to the record before the Commission when reviewing the Commission order." **Id.** at 475, 684 P.2d at 1140. Although we recognized the Commission's "expertise," our decision was based on the absence of a statutory exception providing for de novo review. Even were we to have based our decision solely on the Commission's expertise, New Mexico nonetheless recognizes that a district court should not defer

> if the agency, rather than using its resources to develop the facts relevant to a proper interpretation, ignores the pertinent facts, or if the agency, rather than using its knowledge and expertise to discern the policies embodied in an enactment, decides on the basis of what it now believes to be the best policy.

High Ridge Hinkle v. City of Albuquerque, 119 N.M. 29, 40, 888 P.2d 475, 485 (Ct. App.), **cert. denied,** 119 N.M. 20, 888 P.2d 466 (1994).

20. Zamora also cites **Mata v. Montoya,** 91 N.M. 20, 569 P.2d 946 (1977), arguing it established that unless a statute provides otherwise, the scope of review in the district court of an administrative decision is de novo. Zamora misreads **Mata.** Zamora's apparent confusion of our holding in **Mata** stems from the Court's citation to **Keller,** 85 N.M. 134, 509 P.2d 1329, and the cases cited therein. In **Mata** we held that the scope of reviewing administrative decisions was limited to determining whether the administrative decision was arbitrary, capricious, fraudulent, or not supported by substantial evidence, **unless** a statutory provision permits a "wider scope of review at the district court." **Mata,** at 21, 569 P.2d at 947.

21. The cases cited in **Keller** were provided by this Court in **Mata** simply to support the general rule that when reviewing administrative decisions, the district court acts as an appellate court, not as a fact finder. **Id.** The exception to the general rule, as noted by this Court in **Mata,** is when a statute provides a greater scope of review.

*{*784}* 22. Zamora also cites **Linney v. Board of County Comm'rs of Chaves County,** 106 N.M. 378, 743 P.2d 637 (Ct. App. 1987), as an example of de novo review of an administrative decision by the district court. Zamora misapplies **Linney. Linney** involved the discharge of two jail employees by a county sheriff. Immediately prior to their discharge, the employees had been summoned to the sheriff's office where they were first notified of the complaints against them and were asked only for brief explanations. 106 N.M. at 379, 743 P.2d at 638. On appeal the district court considered only whether the jail employees received the due process standards propounded by **Loudermill** and, contrary to Zamora's assertion, not whether the discharge was a breach of employment contract. 106 N.M. at 379-80, 743 P.2d at 638-39.

23. Finally, Zamora calls our attention to **Wheatley v. County of Lincoln,** 118 N.M. 745,

887 P.2d 281 (1994). In **Wheatley** the Lincoln County grievance board, after an evidentiary hearing, upheld Wheatley's termination from County employment. Wheatley appealed to the district court where he sought to introduce evidence that had not been before the grievance board. The district court refused to admit the evidence, concluding that the scope of review was not de novo but was limited to whole record review. 118 N.M. at 747, 887 P.2d at 283. Further, the district court concluded that as long as the procedural due process requirements were met, it could not substitute its judgment for that of the grievance board. The district court reviewed the record and found that the decision to terminate Wheatley's employment was based on bad faith but, nonetheless, upheld the grievance board's decision as being based on substantial evidence. **Id.** The district court was reversed, and Wheatley was granted a full trial on the merits.

24. In **Wheatley** we expressed our concern that allowing a county personnel board to determine whether a county officer breached an employment contract may be akin to allowing "the wolf to guard the henhouse." **Id.** at 748, 887 P.2d at 248. However, we remain confident that a trial court that properly reviews the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence will expose any underlying bad faith and bias in employment termination. This standard operates for such a purpose. "An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful, and does not result from a sifting process." **Oil Transp. Co. v. New Mexico State Corp. Comm'n,** 110 N.M. 568, 572, 798 P.2d 169, 173 (1990). Further, "arbitrary" is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act is one performed without an adequate determination of principle. **Huey v. Davis,** 556 S.W.2d 860, 865 (Tex. Civ. App. 1977), **rev'd on other grounds,** 571 S.W.2d 859 (1978). Indeed, the district court in **Wheatley,** applying the appropriate standard, found that Wheatley's termination from employment was grounded in bad faith. Yet, the termination was upheld as being supported by substantial evidence. Having found a bad faith employment termination, the district court had sufficient grounds to reverse the personnel board's decision, and any further evidentiary inquiry was unnecessary. "The determination of whether a decision is arbitrary, capricious and unreasonable is not a question separate and apart from whether the decision is supported by substantial evidence." **Board of Educ. v. New Mexico State Bd. of Educ.,** 88 N.M. 10, 12, 536 P.2d 274 (Ct. App. 1975)).

25. Unless a statute provides otherwise, municipal personnel board decisions are reviewable at the district court only by writ of certiorari and on the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence. In **Wheatley** we said that the employee was entitled to a trial de novo on his claim for breach of contract. That decision is inconsistent with our decision today (1) that municipal personnel boards are administrative agencies, the decisions of which may be reviewed on writ of certiorari by the district court, and (2) that the district court reviews such decisions on the whole record for arbitrary or capricious action, fraud, or lack of substantial evidence. To the extent of these inconsistencies, we overrule **Wheatley.**

26. In **Wheatley** we also said that "unless the legislature has expressly provided a *{*785}* constitutionally-sufficient independent quasi-judicial proceeding for review of termination of a tenured public employee, **see. e.g.,** NMSA 1978, § 22-10-14.1 (Supp. 1994) (providing special appeals process for terminated public school employees), the employee is entitled to a trial de

novo in district court." 118 N.M. at 748, 887 P.2d at 284. However, we must acknowledge that **Loudermill** does not require legislative provision of adequate guidelines to satisfy due process. Rather, the county's own personnel manual might have provided satisfactory procedures.

27. Nevertheless, we emphasize that the limitation on district court review does not preclude real scrutiny. **See State ex rel. Hughes v. City of Albuquerque,** 113 N.M. 209, 824 P.2d 349 (Ct. App. 1991) (remanding matter to personnel board because conclusions and findings did not support result). As we indicated above, the district court in **Wheatley** had sufficient grounds to reverse the personnel board decision without conducting a de novo trial.

III.

28. Finally, we address whether Zamora's complaint, filed in district court almost twenty-eight months after the Board's decision, was untimely. We note that there is no statutory time by which to file a petition for a writ of certiorari. This Court has discussed the issue previously, yet some ambiguity remains.

29. In **Eigner v. Geake,** 52 N.M. 98, 192 P.2d 310 (1948), we established that, absent a statute or court rule providing otherwise, the time limit for filing such a petition is the same as that set for appeals from a final judgment of the district courts, then being three months. We further stated that, unless there is **exceptionally good cause** for delay, there is no reason a party should have more time to ask for a writ of certiorari than he would have to take an appeal or sue out a writ of error in an ordinary case. **Id.** at 99, 192 P.2d at 310-11. "[A] party who delays more than three months in applying for a writ of certiorari is guilty of laches." **Id.**

30. After **Eigner** was decided, the statutory time limit for appeals from final judgments of the district courts suing out writs of error was shortened from three months to thirty days. In **Board of Education v. Rodriguez,** 77 N.M. 309, 311-12, 422 P.2d 351, 352 (1966), we correspondingly applied the thirty-day time limitation to the filing of writs of certiorari. In **Rodriguez** no question was raised whether there was "exceptionally good cause" to toll the time limitation.

31. In **Roberson v. Board of Educ.,** we addressed whether a petition for writ of certiorari was barred after fifteen and one-half months. We stated that

> no purely arbitrary time limit should be placed upon our right to issue certiorari; that the question should always be one of laches strictly; that where the lapse of time has not been accompanied by any change in situation, to the prejudice of a party if his victory should be turned into defeat on review, a delay . . . though seriously to be considered, should not necessarily be fatal.

78 N.M. 297, 301, 430 P.2d 868, 872 (1967) (quoting **Gallup Southwestern Coal Co. v. Gallup Am. Coal Co.,** 39 N.M. 94, 40 P.2d 627 (1935)).[4] Thus, lapse of time is but one factor in determining whether certiorari is issued. We then applied laches to determine not only whether

there was a lapse of time but also whether the delay prejudiced the defendant. We determined there was no prejudice and, because there was "exceptionally good cause" for delay, appellant was allowed to present her case to the district court under certiorari. Id. 78 N.M. at 302-03, 430 P.2d at 873-74.

32. We hold that the time limit in which a petition for writ of certiorari must be filed is determined by principles of laches. That is, in the absence of a statute providing otherwise, a petition for a writ of certiorari must be filed within thirty days of an administrative decision. If the petition is filed beyond the thirty-day limit, the district court shall consider the length of time the petition *{*786}* was delayed, whether the defendant has been prejudiced by the delay, and whether the petitioner has exceptionally good cause for such a delay. Application of laches is determined on a case-by-case basis. **Hughes,** 114 N.M. at 310, 838 P.2d at 464. The district court in the instant case dismissed Zamora's case without such a determination. Accordingly, we reverse and remand to the district court to determine, by applying the foregoing analysis, whether Zamora perfected a timely appeal.

IV.

33. In conclusion, we hold that the district court was correct in determining that, absent a specific statutory provision, the procedure to appeal the Village Personnel Board's administrative decision was to petition the district court for a writ of certiorari. Accordingly, the standard of review by the district court of an administrative decision is limited to the whole record for arbitrariness, capriciousness, fraud, or lack of substantial evidence. Finally, we reverse the district court and remand with instructions to determine whether Zamora perfected a timely appeal.

34. **IT IS SO ORDERED.**

JOSEPH F. BACA, Chief Justice

WE CONCUR:

RICHARD E. RANSOM, Justice

GENE E. FRANCHINI, Justice

STANLEY F. FROST, Justice

PAMELA B. MINZNER, Justice

OPINION FOOTNOTES

1 Section 3-9-27 of the Ordinance states in pertinent part: "Permanent employees may be granted personal leave without pay under certain conditions . . . . The Mayor must approve request for more than five days . . . . An employee may be granted leave without pay for a period not to exceed six (6) months because of illness or disability when certified by a physician . . . ."

2 Section 3-7-7 of the Ordinance states in pertinent part: "Employees who have suffered disability and

cannot perform their duties shall be assigned to light duty positions that they are able to perform, if such work is available."

3 This is not to say, however, that the Board's decision was or was not arbitrary, capricious, or fraudulent, or not based on substantial evidence. **See Mata v. Montoya,** 91 N.M. 20, 20-21, 569 P.2d 946, 946-47 (1977). Such a determination was first for the district court if and when Appellant properly and timely appealed thereto.

4 The Court in **Roberson** cited **Gallup Southwestern** only for its persuasiveness. Only three of the five justices, a bare majority, participated and "found themselves divided in principle and thus unable to dispose of [the case] in a manner to make it a precedent. **Gallup Southwestern,** 78 N.M. at 97, 40 P.2d at 629.

2000-NMCA-074, 129 N.M. 413, 39 N.M. St. B. Bull. 36 MARTINEZ V. NEW MEXICO STATE ENG'R OFFICE (Ct. App. 2000) 9 P.3d 657, 2000 N.M. App. Lexis 62

RONALD MARTINEZ, Petitioner-Appellant,

vs.

NEW MEXICO STATE ENGINEER OFFICE and NEW MEXICO STATE PERSONNEL BOARD, Respondents-Appellees.

Docket No. 19,621
COURT OF APPEALS OF NEW MEXICO
2000-NMCA-074, 129 N.M. 413, 39 N.M. St. B. Bull. 36, 9 P.3d 657, 2000 N.M. App. LEXIS 62
June 29, 2000, Filed
APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. Steven Herrera, District Judge.

Released for Publication August 29, 2000.

COUNSEL

Aaron Bartels, Santa Fe, NM, for Appellant.
Marcia E. Lubar, Marcia E. Lubar & Associates, Albuquerque, NM, for Appellee, NM State Engineer Office.

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: RUDY S. APODACA, Judge, M. CHRISTINA ARMIJO, Judge.
AUTHOR: JONATHAN B. SUTIN

OPINION

*{*415}*

SUTIN, Judge.

{1} This appeal raises the issue whether the New Mexico State Personnel Board is to adjudicate statutory disability discrimination claims in administrative just cause termination proceedings. The terminated employee in this case had a bipolar disorder.

{2} Ronald Martinez appeals the district court's judgment affirming the decision of the New Mexico State Personnel Board (the Board). That decision upheld his dismissal from employment with the New Mexico State Engineer Office (the SEO). After a hearing, the Administrative Law Judge (the ALJ) entered a recommended decision proposing to find that Martinez engaged in misconduct, insubordination, and abusive and threatening behavior toward employees constituting just cause for dismissal. The Board adopted the proposed findings of fact and conclusions of law of the ALJ and dismissed Martinez's appeal, and the district court affirmed.

{3} On appeal to this Court, in addition to a contention that the finding of just cause was not supportable, Martinez contends: (1) the decisions of the Board and the district court were

erroneous because the ALJ did not properly consider Martinez's mental disability or the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111 to 12117, in determining whether there was just cause to discharge him; (2) Martinez was denied due process because he was not afforded progressive discipline under the Board Rules; and (3) the district court erred by granting the SEO's motion to supplement the record on appeal to the district court. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

{4} Martinez was employed in the Hydrographic Survey Bureau (the Bureau) of the SEO for nine years, from April 1987 to April 1996. Martinez suffers from bipolar affective disorder, also commonly referred to as manic-depression. Bipolar disorder is a psychiatric disorder caused by a chemical imbalance *{*416}* and requires continuous medical treatment, usually in the form of lithium therapy. The disorder is characterized by extreme mood swings from severe depression to manic elation. Martinez was diagnosed with the disorder in 1989. Following hospitalization in 1992, Martinez had his treating physician inform his supervisor at the Bureau, Edward Ytuarte, of his medical diagnosis. The psychiatrist explained to Ytuarte that bipolar disorder could be successfully treated with lithium and that Martinez's prognosis was excellent if he complied with treatment. Prior to the diagnosis of bipolar disorder, Martinez had consistently been a good and reliable employee at the Bureau.

{5} After learning of Martinez's condition, his supervisors made efforts to work with him and to accommodate his disability by granting him leave of absence whenever he needed medical treatment or hospitalization. As a condition to returning to work, however, Martinez was required to obtain a release from his doctor certifying that he was fit to work. Eventually, by word of mouth, other employees in the Bureau became aware of Martinez's disorder and his need to control it with medication.

{6} Between 1992 and 1994, Martinez was stable, performed satisfactorily, and was promoted several times. By spring 1995, however, his conduct in the workplace deteriorated, as he became increasingly unstable and disruptive. He had problems concentrating, could not complete simple work tasks, and refused to take direction from his supervisors. Often he disappeared from the workplace without supervisor permission and without approved leave. One supervisor reported that Martinez had become increasingly disruptive, demanding, obnoxious, and abusive toward him and other employees. His opinion was that Martinez's behavior problems were getting out of control and that he needed medical attention which could not be provided in the workplace. He also believed Martinez was a danger to himself and others, stating, "I am afraid that he is going to get violent one of these days."

{7} On May 18, 1995, a coworker, Alice Mayer, complained that Martinez entered her office and violated her "personal comfort zone" by sitting extremely close to her, staring at her, and telling her that her "teeth looked pretty today." Mayer reported that she felt she was being watched by Martinez. Although she went to great lengths to avoid Martinez, she believed that he

was keeping track of her because he often appeared during her breaks and knew when she was planning to take leave. Mayer complained to management because she saw a pattern emerging and was worried about the effect of Martinez's aggressive and unpredictable behavior on her and other employees.

{8} Ytuarte, as the Bureau Chief, dealt with these complaints by counseling Martinez in person. He also placed Martinez on administrative leave with pay for five days so that he could "get some rest" and "some medical attention." Ytuarte required that Martinez return to work with a release from a qualified doctor certifying that he was fit to work and in a state of mind in which he could be responsible for his actions and not a threat to himself and others. Martinez was hospitalized in May and did not return to work until late June 1995. He was hospitalized again from November 16 to November 20, 1995, and again from December 6 to December 12, 1995, each time returning to work with a doctor's release.

{9} Whenever Martinez returned to work, however, his disturbing and erratic behavior persisted. Nonetheless, Ytuarte continued to accommodate Martinez by finding tasks that he could perform and by reassigning him to different supervisors. Ytuarte also sought assistance from Martinez's father and other relatives. On several occasions, Martinez's father was summoned to the workplace to address Martinez's behavior problems or to escort him to the hospital with the police when his behavior became intractable. Ytuarte also repeatedly counseled Martinez about the need to stay focused, stay at his work station, perform his job, get along with others and, most importantly, about the need to take his medication.

{10} Martinez's aggressive and confrontational behavior intensified on February 16, 1996. Early that morning, he went to Mayer's office where she was alone. He demanded that she hug him because she would soon *{*417}* be leaving the Bureau. Although she refused, Martinez insisted on a hug. Eventually, he stopped the improper behavior when he saw another employee approaching. Mayer testified that, during the encounter, she felt trapped by Martinez, was frightened by his conduct and believed she was put in a dangerous and threatening situation.

{11} Immediately following the encounter with Mayer, Martinez initiated a confrontation with his then immediate supervisor, Max Chavez. Martinez demanded to know why Chavez had logged four hours of annual leave on Martinez's timesheet for the previous day. Chavez responded that he had seen Martinez leave that day at approximately 1:00 p.m. without requesting leave or informing anyone that he was leaving. Martinez then became belligerent and began swearing at Chavez. When Chavez instructed Martinez to return to his work area, he became even more abusive and continued cursing at Chavez. As the confrontation escalated, Martinez stood up in a defiant and threatening manner, as if to throw a punch at Chavez. Chavez reported the incident to Ytuarte, believing that his safety was endangered by Martinez.

{12} When Ytuarte later met with Martinez to discuss his confrontation with Chavez, Martinez refused to accept any responsibility for the incident and stated he was being harassed by Chavez. Ytuarte then sent Martinez home and directed him to report back on the morning of February 19, 1996, to continue discussing the matter.

{13} On February 19, Ytuarte informed Martinez that his threatening and abusive conduct would no longer be tolerated. He was urged to get medical attention and to cooperate with his family. Ytuarte testified that, during the meeting, Martinez was upset, disoriented and went off on tangents, at one point talking about his experience in the Army. Believing he was being fired, Martinez began yelling at Ytuarte and then abruptly left his office. As he was leaving the building, he saw and approached Chavez, pointed at him and stated angrily, "I'm going to kick your ass, boy." Chavez testified that he took Martinez's threat seriously. Other employees who witnessed the encounter indicated that they, too, believed Martinez to be a threat to Chavez and to others in the workplace.

{14} Upon overhearing the threat against Chavez and interviewing other employees, Ytuarte determined that Martinez had crossed the line by threatening his supervisor and that his behavior posed a threat to all the employees at the Bureau. Ytuarte testified that at that point he recommended that Martinez be discharged on the grounds of misconduct, insubordination, and threats of physical violence against his supervisor.

{15} On March 4, 1996, while hospitalized at the Las Vegas Medical Center, Martinez contacted the workplace again by telephone. He asked the receptionist if everyone at the Bureau was afraid to come to work because of him and demanded to know who had accused him of sexual harassment. He then stated that if he was fired because of Chavez, he would "finish him off." The telephone call was reported to Bureau management and the Santa Fe police department.

{16} Martinez was issued a notice of contemplated termination by the SEO on March 19, 1996. The notice set forth the reasons for dismissal, including "continued unsatisfactory performance, workplace misconduct, insubordination, and threats of physical abuse directed toward agency employees," and described the incidents occurring in May 1995 and February 1996. Following a pretermination hearing, Martinez's employment with the Bureau was terminated. A notice of final action was served on April 10, 1996. Martinez appealed his termination to the Board on the grounds that the SEO did not properly consider his disability in terminating him, his behavior did not rise to the level of misconduct justifying termination, and he was denied progressive discipline. Following a hearing before an ALJ, and the ALJ's "recommended decision", the Board upheld Martinez's termination for just cause on the grounds of misconduct, insubordination, and threats of physical abuse.

{17} Martinez appealed the Board's decision, and the district court determined that substantial evidence existed in the record for the ALJ to have concluded that Martinez engaged in misconduct and was terminated *{*418}* for cause, and that "termination was the appropriate discipline and progressive discipline was not necessary." The district court further determined that "the decision of the . . . Board was not arbitrary, capricious or an abuse of discretion."

II.

DISCUSSION

A. Whether the Board Has Authority

to Decide ADA Issues in Personnel Appeal

{18} On appeal, Martinez contends that the Board did not properly apply the ADA and the Equal Employment Opportunity Commission (EEOC) guidelines in determining whether the SEO had just cause to dismiss him. We note that initially Martinez did not raise the ADA in the proceedings below. He argued only that the SEO failed to take into account his disability in terminating him and that his behavior did not rise to the level of misconduct justifying immediate dismissal. Instead, it was the SEO who injected the ADA into this case. In response to Martinez's arguments, the SEO argued that Martinez was terminated in compliance with the ADA. However, neither the ALJ nor the Board specifically referred to the ADA in their written decisions finding just cause to terminate Martinez. In filed exceptions to the ALJ's proposed findings and conclusions, Martinez argued that his termination violated the ADA and the EEOC guidelines, and that the ALJ's recommended decision was contrary to ADA law.

{19} The SEO argues that New Mexico courts do not have jurisdiction to determine issues under the ADA because Martinez failed to appeal a "no probable cause" determination issued by the New Mexico Human Rights Commission (NMHRC) on May 28, 1997, on the issue of discrimination. The SEO also asserts that the Board is without authority to decide claims of discrimination under the ADA and that only the NMHRC is vested with such authority pursuant to the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -7, 28-1-9 to -14 (1969, as amended through 1995). Finally, the SEO argues that, even applying the ADA to this case, Martinez is not entitled to relief because he is not a qualified individual with a disability, the SEO had a right to discharge a potentially violent and insubordinate employee, and no reasonable accommodation by the SEO would enable Martinez to perform the essential functions of his job.

{20} The threshold issue for us is whether the Board has authority to determine ADA issues in an administrative appeal under the Personnel Act. **See** NMSA 1978, § 10-9-1, and various sections up to and including 10-9-25 (1961). This is a question of law which we review de novo. **See Hyden v. New Mexico Human Servs. Dep't**, 2000-NMCA-2, P12, 128 N.M. 423, 993 P.2d 740.

{21} The district court, in upholding Martinez's dismissal, concluded that the district court did not have jurisdiction to consider claims under the ADA or the NMHRA because Martinez did not appeal the NMHRD's determination of no probable cause. For slightly different reasons, we conclude that the Board and the district court properly refrained from deciding issues under the ADA. **See In re Drummond**, 1997-NMCA-94, P12, 123 N.M. 727, 945 P.2d 457 (noting that "we may affirm the court's decision if it is right for any reason and affirming on a different ground would not be unfair to the appellant").

{22} The Board is a public administrative body created by statute. **See** NMSA 1978, § 10-9-8 (1980); **State ex rel. New Mexico Highway Dep't v. Silva**, 98 N.M. 549, 551, 650 P.2d 833, 835 (Ct. App. 1982). Therefore, the Board is limited to the power and authority expressly granted or necessarily implied by statute, **see PNM Elec. Servs. v. New Mexico Pub. Util. Comm'n (In re Application of PNM Elec. Servs.)**, 1998-NMSC-17, P10, 125 N.M. 302, 961 P.2d 147, which expressly defines its duties. **See** NMSA 1978, § 10-9-10 (1983). Among the primary duties of the Board is the power to promulgate rules to carry out the provisions of the Personnel Act and to hear appeals by state employees aggrieved by an agency's action affecting their employment. **See** § 10-9-10(A) and (B). Thus, the Board has both policy-making and quasi-judicial responsibilities. **See Montoya v. Dep't of Fin. &** ... *{*419}* **Admin.**, 98 N.M. 408, 412, 649 P.2d 476, 480 (Ct. App. 1982).

{23} In hearing appeals and thus acting in its quasi-judicial capacity, the Board conducts evidentiary hearings and makes findings of fact and conclusions of law. **See id.** at 413, 649 P.2d at 481. In particular, NMSA 1978, § 10-9-18(F) (1980), imposes on the Board the duty of determining whether action taken by an agency against an employee "was without just cause." **Silva**, 98 N.M. at 551, 650 P.2d at 835. If the Board determines the agency action was unsupported by just cause, the Board "may modify the disciplinary action or order the agency to reinstate the appealing employee to his former position or to a position of like status and pay." Section 10-9-18(F).

{24} Neither the Personnel Act nor the rules promulgated under the Personnel Act by the Board (the Board Rules) expressly grant the Board the power to resolve claims of discrimination raised by an employee challenging an agency's adverse personnel action. New Mexico courts have not previously addressed whether the Board has implied authority to address complaints of unlawful employment discrimination in a termination proceeding based on just cause under the Board Rules.

{25} Our review of case law from other jurisdictions has revealed sparse authority on this point. We note, however, that in some jurisdictions state personnel boards are expressly empowered by statute or regulation to consider claims of discrimination in administrative personnel proceedings. **See, e.g., Ruiz v. California Dep't of Corrections**, 77 Cal. App. 4th 891, 92 Cal. Rptr. 2d 139, 143 (Cal. Ct. App. 2000); **Cunningham v. Dep't of Highways**, 823 P.2d 1377, 1380 (Colo. Ct. App. 1991); **Cantrell v. State of Georgia**, 129 Ga. App. 465, 200 S.E.2d 163, 166 (Ga. Ct. App. 1973); **Walker v. Dep't of Pub. Works Sewerage**, 549 So. 2d 426, 428 (La. Ct. App. 1989).

{26} However, such provisions are absent from the Personnel Act and the Board Rules. Furthermore, we find no provision in the NMHRA that impliedly or expressly permits a state employee to adjudicate discrimination claims through the Board in termination proceedings under the Board Rules. Although we recognize that "legislative silence is at best a tenuous guide to determining legislative intent," **Swink v. Fingado**, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993), we conclude that had the Legislature intended for the Board to share authority with the NMHRC or to decide claims alleging violations of state and federal discrimination laws, it would

have expressly conferred such authority on the Board and established a procedural mechanism for considering such claims in a manner that would not conflict with the authority of the NMHRC or the administration of the statutory law against discrimination.

{27} In the absence of explicit language in the Personnel Act and the Board Rules, we conclude that the authority to decide whether a violation of the ADA or the NMHRA has occurred rests exclusively with those administrative agencies, such as the EEOC and the NMHRC, who have express statutory authority to adjudicate such claims and have specialized knowledge and expertise in preventing and remedying unlawful discrimination. **Cf. Ex parte Boyette**, 728 So. 2d 644, 645-46 (Ala. 1998) (per curiam); **Hawkins v. State**, 183 Ariz. 100, 900 P.2d 1236, 1240-41 (Ariz. Ct. App. 1995). Accordingly, an employee who asserts the absence of just cause based on unlawful discriminatory practices in violation of the ADA or the NMHRA must pursue his claim through the EEOC or the NMHRC, using the mandatory grievance procedures set forth in the respective statutes. **See Jaramillo v. J.C. Penney Co.**, 102 N.M. 272, 272-73, 694 P.2d 528, 528-29 (Ct. App. 1985) (stating that because the NMHRA provides the right, procedure and remedy, the statutory grievance procedure is mandatory when unlawful discriminatory practices are alleged); **see also Dao v. Auchan Hypermarket**, 96 F.3d 787, 788-89 (5th Cir. 1996) (explaining that, before filing ADA action in federal court, employee must file timely charge with the EEOC or with a state or local agency with authority to grant relief from alleged unlawful discrimination). The Board is without express or implied authority to adjudicate issues under the ADA or the NMHRA in a personnel proceeding. Here, the Board correctly declined to decide ADA claims.

{28} *{*420}* Martinez nevertheless points out that the Board Rules included a Purpose Statement which enumerated several principles to be followed by the Board, including:

> Fair treatment of applicants and employees in all aspects shall be assured for applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex, national origin, political affiliation, age, **disability**, or other non-merit factors, and with proper regard for their primary and constitutional rights as citizens, shall be assured.

State Personnel Board Rules--Purpose Statement (January 2, 1993) (emphasis added). This non-discrimination policy statement is not a contractual carte blanche for adjudication of discrimination claims in personnel proceedings. However, that is not to say that an employee's disability can never be raised in those proceedings. While we have held that the Board is without authority to determine violations under the ADA or the NMHRA, that holding shall not preclude an employee from raising his or her disability in a personnel proceeding to show that the agency's proffered reasons for its action are pretextual and that the real reason for the action was his or her disability. We note this is essentially what Martinez did in this case.

{29} Thus, an ALJ as an evidentiary matter may decide whether the reasons offered by the employer for a termination are pretext for discrimination because of the employee's disability.

However, for the reasons discussed above, we conclude that the Board may not determine whether there was a statutory violation of state and federal laws prohibiting discrimination; at least in the administrative context, that authority rests solely with the NMHRD and the EEOC. In short, we conclude that the ALJ and the Board acted appropriately by not determining issues under the ADA. Therefore, we do not consider the parties' arguments regarding whether Martinez was terminated in violation of the ADA.

B. Whether the Board's Just Cause

Determination is Supportable

{30} Next, we consider whether the Board's determination that Martinez was terminated with just cause was arbitrary and capricious, not supported by substantial evidence, or otherwise contrary to law. In order to find just cause, "the Board is required to determine not only that there was employee misconduct but also that the agency's discipline was appropriate in light of that misconduct." **Gallegos v. New Mexico State Corrections Dep't**, 115 N.M. 797, 802, 858 P.2d 1276, 1281 (Ct. App. 1992); **see Silva**, 98 N.M. at 552, 650 P.2d at 836. While the first prong focuses on the nature of the employee's conduct, the second prong focuses on the reasonableness of the agency's disciplinary action. **See Gallegos**, 115 N.M. at 802, 858 P.2d at 1281.

{31} We apply a whole-record standard of review in considering appeals from an administrative decision by the Board. **See Clark v. New Mexico Children, Youth & Families Dep't**, 1999-NMCA-114, P7, 128 N.M. 18, 988 P.2d 888. Like the district court, we independently review the entire record of the administrative hearing to determine whether the Board's decision was arbitrary and capricious, not supported by substantial evidence, or otherwise not in accordance with law. **See id.** ; NMSA 1978, § 10-9-18(G) (1980, prior to 1998 and 1999 amendments).

{32} Just cause occurs when an employee engages in behavior inconsistent with the employee's position and can include, among other things, incompetency, misconduct, negligence, insubordination, or continuous unsatisfactory performance. **See** Board Rule 17.3 (March 26, 1994). Based on our review of the whole record, we conclude that substantial evidence exists to support the ALJ's finding and the Board's adoption of the finding of just cause to terminate Martinez based on misconduct, insubordination, and abusive and threatening behavior toward employees on February 16 and 19, and March 4, 1996.

{33} Martinez argues that dismissal was improper in light of his known disability. However, the record demonstrates that the Bureau made active and continuous efforts, beginning in 1992, to accommodate Martinez's disability. Ytuarte granted Martinez *{*421}* leave to seek medical treatment, reassigned him to different supervisors when conflicts arose, gave him simple and manageable assignments when he was unable to concentrate, consulted with his family about his worsening condition, and repeatedly counseled him to take his medication. Despite these efforts,

Martinez's behavior continued to deteriorate. The incidents in May 1995 and February 1996 suggested that Martinez was unable to control his disability. His physician stated in 1992 that his condition could be managed with lithium if Martinez complied with the prescribed treatment, though infrequent "break through" episodes were always possible.

{34} Although Martinez testified that he always complied with his doctor's orders, there is evidence in the record that he did not take his medication regularly. One employee testified that on several occasions Martinez told her that he was not taking his medication because he did not think he needed it. Moreover, although there was no medical testimony presented at the hearing, Martinez's frequent hospitalizations in 1995 and 1996 suggested that he was having difficulty regulating his blood lithium level and may not have conscientiously been following his medication prescriptions. According to one medical release in his personnel file, he was in need of "medical regulation" when he was admitted to the hospital on November 16, 1995. In yet another release, dated March 29, 1995, his treating physician stated that he could not guarantee that Martinez would take his medication on his own following his discharge from the hospital.

{35} In light of Martinez's misconduct in the workplace and his apparent failure to control a controllable disability, we conclude the district court's decision was neither arbitrary, capricious, nor contrary to law, and that the termination was appropriate. **See Gallegos**, 115 N.M. at 802, 858 P.2d at 1281; **cf. Fitzhugh v. New Mexico Dep't of Labor**, 1996-NMSC-44, P42, 122 N.M. 173, 922 P.2d 555 (misconduct justifying denial of unemployment benefits is conduct evincing callousness and deliberate or wanton misbehavior toward employer's interests and expectations).

{36} Martinez asserts that termination was too severe an action and that, under the **Gallegos** standard (whether the agency's discipline was appropriate in light of the misconduct), the discipline was inappropriate. **See Gallegos**, 115 N.M. at 802, 858 P.2d at 1281. We disagree. Martinez's conduct supported a just cause termination. Once it is determined that just cause exists to terminate, termination is appropriate under the Board Rules. **See New Mexico Regulation & Licensing Dep't v. Lujan**, 1999-NMCA-59, PP17, 19, 127 N.M. 233, 237, 238, 979 P.2d 744, 748, 749 (1999).

C. Progressive Discipline

{37} Martinez contends that he was denied due process because the SEO failed to provide him progressive discipline prior to his termination, contrary to the Board Rules and the SEO's policy manual. Though "violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process," **State ex rel. Hughes v. City of Albuquerque**, 113 N.M. 209, 210, 824 P.2d 349, 350 (Ct. App. 1991), a public employee may be entitled to relief if the procedures mandated by the Board Rules and the administrative agency's employee handbook are not followed. **See Lujan**, 1999-NMCA-59, P20, 127 N.M. at 238, 979 P.2d at 749. We determine, however, that the ALJ was correct in determining that the SEO was not required to use progressive discipline and in concluding that Martinez was provided

sufficient procedural due process.

{38} According to the Board Rules, the purpose of discipline is to correct unacceptable performance or behavior that is contrary to the employer's legitimate interests. **See** Board Rule 17.1(A) (March 26, 1994). "Progressive discipline shall be used whenever appropriate" and "can range from a reminder to an oral or written reprimand to a suspension, demotion or dismissal." Board Rule at 17.1(B). However, the Board Rules state that "there are instances when a disciplinary action including dismissal is appropriate without first having imposed a less severe form of discipline." **Id.** Similarly, under the SEO's disciplinary policy, which incorporates by reference Board Rule 17, progressive discipline "is to be used to correct unacceptable behavior *{*422}* and unsatisfactory performance whenever possible."

{39} Here, the ALJ concluded that Martinez's right to procedural due process was not violated, based on two findings of fact: the SEO (1) "followed a policy of progressive discipline" and (2) "was not required to use progressive discipline because of Martinez'[s] insubordination, misconduct in the workplace, and his abusive and threatening actions toward his supervisor." Viewing the record as a whole, we conclude that there is insufficient evidence in the record to support the ALJ's first finding of fact, but sufficient evidence to support his second.

{40} The record reveals that Ytuarte repeatedly verbally counseled Martinez about his performance and conduct troubles. Martinez was also given leave in order to obtain medical assistance for a condition that admittedly was a cause of these troubles. Martinez's personnel file also contained several memoranda from supervisors and coworkers documenting these problems. It is uncontroverted, however, that Martinez was not shown copies of the memoranda until after his dismissal and no one ever explained the disciplinary consequences of not correcting his behavior and performance problems. It is also undisputed that Martinez's performance appraisals did not note any of his conduct or performance problems. Moreover, Ytuarte testified that his counseling sessions with Martinez were not "disciplinary" in nature but merely "consultations" or "visits."

{41} At most, Martinez was only verbally reprimanded before his dismissal. It does not appear that he was ever reprimanded in writing, shown copies of the memoranda documenting his behavioral problems, or warned of the disciplinary consequences of his behavioral and performance deficiencies. This, we believe, is inconsistent with a progressive discipline scheme contemplated under the Board Rules. **See Lujan**, 1999-NMCA-59, P16, 127 N.M. at 237, 979 P.2d at 748 (when applying progressive discipline, employer has duty to adequately warn employee by identifying violation involved and consequences of violation); **see also Chicharello v. Employment Sec. Div.**, 1996-NMSC-77, P6, 122 N.M. 635, 930 P.2d 170. Therefore, considering the record as a whole, we find insufficient evidence that Martinez was afforded progressive discipline.

{42} The Board Rules state, however, that an employee may be subject to immediate dismissal in some instances without first imposing a less severe sanction. **See** Board Rule 17.1(B). In **Lujan**, we recognized that progressive discipline is not required before termination when the conduct for which an employee is terminated constitutes just cause to terminate. **Lujan**,

1999-NMCA-59, PP17, 19, 127 N.M. 233, 237, 238, 979 P.2d 744, 748, 749. Martinez was terminated on the grounds of insubordination, misconduct, and threats of physical violence against his supervisor, all of which clearly fall within the category of conduct constituting just cause for dismissal. **See** Board Rule 17.3(B) (March 26, 1994). Moreover, Martinez's conduct posed a threat to the safety of other employees. His conduct resulted from a controllable, yet uncontrolled, psychiatric condition of which his employer was aware. That conduct constituted the type of serious misconduct which does not have to be tolerated by an employer and which justifies immediate dismissal.

{43} We conclude that the Board's decision was affirmable based on the ALJ's second finding of fact that the SEO was not required to apply progressive discipline under the facts of this case. That the ALJ determined that the SEO followed a policy of progressive discipline is of no consequence. Irrelevant and "erroneous findings of fact not necessary to support the judgment . . . are not grounds for reversal." **Sanchez v. N.M. Dep't of Labor**, 109 N.M. 447, 452, 786 P.2d 674, 679 (1990); **see also In re T.J.**, 1997-NMCA-21, P20, 123 N.M. 99, 934 P.2d 293 (noting that erroneous finding of fact is not ground for reversal where fact-finder entered other findings that support judgment); **cf. Davis v. Los Alamos Nat'l Lab.**, 108 N.M. 587, 591, 775 P.2d 1304, 1308 (Ct. App. 1989) (affirming hearing officer's decision if right for any reason).

{44} Furthermore, while the history of Martinez's mental illness and resulting conduct *{*423}* and the SEO's consultations and accommodations preceding February and March 1996 cannot be considered in justifying the just cause basis of the termination, that history can properly be considered when evaluating the fairness of Martinez's treatment, **see** Purpose Statement, and the appropriateness of by-passing progressive discipline and determining that termination was the appropriate action under the circumstances.

{45} Therefore, in the case before us, the ALJ properly considered the history and entered findings regarding Martinez's psychiatric disorder, Martinez's "erratic and disruptive workplace behavior," repeated hospitalizations, and the SEO's counseling and continuing efforts to make accommodations for Martinez. Although falling a bit short of the formal progressive discipline contemplated under the Board Rules, this unique history was properly considered to place the cause of and concern about Martinez's conduct in the appropriate context.

{46} Martinez further argues that he was denied due process because the ALJ did not consider whether his termination resulted in disparate treatment. We do not consider this argument because it does not appear Martinez raised the argument below or presented any evidence of disparate treatment at the administrative hearing. **See Woolwine v. Furr's, Inc.**, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (deciding that in order to preserve issue for review, it must appear that appellant fairly invoked a ruling of the trial court on same grounds argued on appeal). Moreover, Martinez does not cite any pertinent authorities in support of his contention. **See In re Adoption of Doe**, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (stating that issues unsupported by cited authority will not be considered on appeal). Therefore, we do not consider the issue.

D. Supplementation of Record on Appeal

{47} Finally, Martinez argues that the district court erred in granting the SEO's motion to supplement the record on appeal with a complete copy of the SEO's disciplinary policy. The Board had before it only one of five pages of the policy. In support of its motion, the SEO argued that it had inadvertently omitted the other pages of the policy and that the pages were material to Martinez's progressive discipline claim.

{48} Rule 1-074(I) NMRA 2000 provides:

> If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

Martinez, however, correctly points out that in administrative appeals the district court is a reviewing court, not a fact-finder, and therefore may consider only evidence presented to the Board in the first instance. **See Zamora v. Village of Ruidoso Downs**, 120 N.M. 778, 782-84, 907 P.2d 182, 186-88 (1995) (defining whole record review of district court). Accordingly, we determine that Rule 1-074(I) cannot be read so broadly as to allow the addition of material in the record that was never presented to the Board in the first instance. Rather, Rule 1-074(I) is limited by the scope of the district court's review as described in **Zamora**. **See id.** Therefore, only material that was in fact presented below but was mistakenly or inadvertently omitted from the record may be included in a supplemental record.

{49} Accordingly, we conclude that the district court erred by supplementing the record on appeal with evidence that was never presented to the Board. However, we determine that such error was harmless in the absence of evidence in the record indicating that the district court relied on the supplemental record in affirming the Board's decision. The decision that Martinez was not entitled to progressive discipline was correct based on the limited provisions of the progressive discipline policy put before the Board. **See In re Estate of Heeter**, 113 N.M. 691, 695, 831 P.2d 990, 994 (Ct. App. 1992) ("On appeal, error will not be corrected if it will not change the result."). Therefore, because Martinez has not demonstrated any prejudice, we affirm on this issue as well.

*{*424}* **III.**

*{*668}* **CONCLUSION**

{50} Based on the foregoing discussion, we conclude that (1) the Board does not have authority to determine issues under the ADA in an administrative proceeding pursuant to the Personnel Act; (2) the Board's determination of just cause is supported by substantial evidence;

(3) the Board's decision was not arbitrary or capricious or contrary to law; (4) Martinez was not entitled to progressive discipline prior to dismissal and therefore was not deprived of due process; and (5) the district court's error in allowing the SEO to supplement the record on appeal was harmless. Therefore, we affirm the decisions of the Board and of the district court.

{51} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

RUDY S. APODACA, Judge

M. CHRISTINA ARMIJO, Judge

2000-NMCA-067, 129 N.M. 278, 39 N.M. St. B. Bull. 33 LORENTZEN V. SMITH (Ct. App. 2000) 5 P.3d 1082, 2000 N.M. App. Lexis 52

JOHN LORENTZEN and DEANA LORENTZEN,
Plaintiffs-Appellants/Cross-Appellees,
vs.
RONALD DEAN SMITH, Defendant-Appellee/Cross-Appellant.

Docket No. 20,070
COURT OF APPEALS OF NEW MEXICO
2000-NMCA-067, 129 N.M. 278, 39 N.M. St. B. Bull. 33, 5 P.3d 1082, 2000 N.M. App. LEXIS 52
June 28, 2000, Filed
APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY. James L. Shuler, District Judge.

Released for Publication August 3, 2000.

COUNSEL

Michael L. Danoff, Michael L. Danoff and Associates, Albuquerque, NM for Appellants/Cross-Appellees.
W.T. Martin, Jr., Martin & Shanor, Carlsbad, NM for Appellee/Cross-Appellant.

JUDGES

RICHARD C. BOSSON, Judge. WE CONCUR: RUDY S. APODACA, Judge, MICHAEL D. BUSTAMANTE, Judge.
AUTHOR: RICHARD C. BOSSON

OPINION

BOSSON, Judge.

{1} This appeal affords us another opportunity to address the New Mexico Subdivision Act (the Subdivision Act), NMSA 1978, §§ 47-6-1 through -29 (1973, as amended through 1995), in light of our recent opinion in **State ex rel. Udall v. Cresswell**, 1998-NMCA-72, 125 N.M. 276, 960 P.2d 818, and particularly the concept of merger as a means to identify subterfuges that are designed to circumvent the Subdivision Act. In that context, we also discuss whether a contractual right of first refusal at fair market value constitutes an unlawful restraint on alienation of property. Holding that the right of first refusal is enforceable in this case and that the doctrine of merger under the Subdivision Act is not a bar to enforcement, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{2} In 1978, Camille Smith deeded family land located on the Black River in southern Eddy County to Ronald Smith, Dorothy Lorentzen, and Olivia Quist, in equal undivided interests, so that "the homeplace and lands [would] remain in the family and owned by the family." Two years later, in 1980, the parties executed documents to each other so that each of the three grantees had sole ownership of a one-acre tract for the express purpose of building residences. The remainder of the Camille Smith conveyance (hereafter called "the 52-acre tract") remained with the three grantees, Smith, Lorentzen, and Quist, in undivided thirds. A final plat defining the new one-acre lots was duly prepared and recorded. Each of the three deeds for the residential one-acre lots contained an identical right of first refusal at "fair market appraised value" that could be executed by either of the other two grantees in the event its owner elected to sell. Mutual provisions for ingress and egress to each of the lots were also included in the three deeds. For his residence, Ronald Smith was deeded Lot One, which is the subject of the present dispute.

{3} Smith, Lorentzen, and Quist continued to own the 52-acre tract in undivided thirds until Smith filed a partition action in 1995. That lawsuit was eventually settled in part by Lorentzen and Quist deeding their undivided one-third interests to Smith. Smith then became the sole owner of both the 52-acre tract and Lot One. The settlement documents included a right of first refusal, similar to that contained in the deeds to the one-acre lots, that Lorentzen or Quist could exercise in the event Smith decided to sell the 52-acre tract by "matching the bona fide offer of the third party." Once Smith was deeded the additional 52 acres, that land, together with his one-acre Lot One, formed one contiguous piece of land consisting of approximately 53 acres. Lot One was completely surrounded by the 52-acre tract, although Lot One continue

87 N.M. 205, 531 P.2d 939 GRACE V. OIL CONSERVATION COMM'N (S. Ct. 1975)

Michael P. GRACE, II, and Corinne Grace,
Petitioners-Appellants,
vs.
OIL CONSERVATION COMMISSION OF NEW MEXICO,
Respondent-Appellee, and Cities Service Oil Company,
and the City of Carlsbad, Intervenors-Appellees.

No. 9821
SUPREME COURT OF NEW MEXICO
87 N.M. 205, 531 P.2d 939
January 31, 1975

COUNSEL

Marchiondo & Berry, Mary C. Walters, Albuquerque, Ferrill H. Rogers, Oklahoma City, Okl., for petitioners-appellants.

Losee & Carson, Artesia, David L. Norvell, Atty. Gen., William F. Carr, Sp. Asst. Atty. Gen., Jason Kellahin, Santa Fe, for appellees.

JUDGES

STEPHENSON, J., wrote the opinion. JAMES A. MALONEY and STANLEY F. FROST, District Judges, concur.

AUTHOR: STEPHENSON

OPINION

*/*207/* STEPHENSON, Justice.

Appellants (the Graces) petitioned the district court for review of Oil Conservation Commission (the Commission) Order No. R-1670-L (the Order) which was entered on June 30, 1972, pursuant to § 65-3-22(b), N.M.S.A. 1953. The district court affirmed the Commission. We affirm the district court.

The Order dealt with the South-Carlsbad Morrow Gas Pool (the Pool) in Eddy County. The Commission made eighty-six findings of fact from which it appears the pool is a relatively new one with little production history. The Commission's findings deal with all of the foundationary matters required to be found as prerequisite to a valid proration order under our leading case on this subject, Continental Oil Co. v. Oil Conservation Com'n, 70 N.M. 310, 373 P.2d 809 (1962). Complete and detailed findings were made on the subject of marketing facilities, production capacities, market demand, drainage and counter-drainage, correlative rights and waste. No assertion is made that the findings do not support the conclusions.

Based upon the findings, the Commission ordered the pool to be prorated effective September 1, 1972. Certain rules and regulations of the Commission were made applicable to the pool. The allowable production was provided to be allocated on a monthly basis by first

deducting the total allowable assigned to marginal wells and allocating the remaining allowable among the non-marginal wells in the proportion that each well's acreage factor bore to the total of the acreage factors for all non-marginal wells in the pool.

The Graces filed an application for rehearing as provided by § 65-3-22(a), N.M.S.A. 1953 asserting that, based upon the record, the Commission did not have jurisdiction to institute gas prorationing in the pool, and that the Commission improperly included acreage within the horizontal limits of the pool which has wells thereon not in communication with, or in the same common source of supply as the other wells in the area.

The motion for rehearing was denied by the Commission's failure to act thereon within ten days. § 65-3-22(a).

The Graces then petitioned the district court for review of the order. The grounds stated in the application for rehearing defined and limited the issues which could be reviewed on appeal to the district court. § 65-3-22(b), N.M.S.A. 1953. In its amended form, the petition asserted that there was no substantial evidence to support the Commission's jurisdictional findings that waste, as defined by § 65-3-3, N.M.S.A. 1953, is occurring or will occur in the pool unless production therefrom *{*208}* is restricted pursuant to § 65-3-13(c), N.M.S.A. 1953. It further claimed that the order contained no basic conclusions of fact required to support an order designed to protect the Graces' correlative rights and that it deprived them of their property without due process of law.

During the proceedings in district court, Cities Service Oil Company was granted leave to intervene as a respondent and the City of Carlsbad was granted leave to intervene as a petitioner. Ultimately, the district court, after recounting the proceedings before the Commission and summarizing the Commission's findings and actions, found, inter alia, that the Commission did not act fraudulently, arbitrarily or capriciously in issuing the order; that the transcript of the proceedings before the Commission contained substantial evidence to support its findings; that the Commission did not exceed its authority in issuing the order, and that the order was not erroneous, invalid, improper or discriminatory. Judgment was entered and the Graces appeal.

The district court reviewed the record of the administrative hearing and concluded as a matter of law that the Commission's order was substantially supported by the evidence and by applicable law. We make the same review of the Commission's action as did the district court. El Paso Natural Gas Co. v. Oil Conservation Com'n, 76 N.M. 268, 414 P.2d 496 (1966).

Most of the arguments advanced by the Graces center upon the adequacy of the record to support the Commission's action. That resolves itself into a question of whether or not the findings of fact are supported by substantial evidence, there being no claim that the findings do not support the conclusions of law or that the conclusions of law do not support the order. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Rinker v. State Corporation Commission, 84 N.M. 622, 506 P.2d 783 (1973). In resolving those arguments of the appellant, we will not weigh the evidence. By definition, the inquiry is whether, on the record, the administrative body could reasonably

make the findings. See 4 Davis, Administrative Law Treatise, § 29.01 (1958).

Moreover, in considering these issues, we will give special weight and credence to the experience, technical competence and specialized knowledge of the Commission. Cf., McDaniel v. New Mexico Board of Medical Examiners, 86 N.M. 447, 525 P.2d 374 (1974); § 4-32-22, subd. A., N.M.S.A. 1953.

The Graces assert that the Commission did not have "jurisdiction" to institute gas prorationing in the pool based upon the record before it. There are frequent references to "jurisdiction" in the Graces' briefs and some of their argument is addressed to the jurisdictional issue.

There is not a shred of a jurisdictional question here. A lack of jurisdiction means an entire lack of power to hear or determine the case and the absence of authority over the subject matter or the parties. 20 Am. Jur.2d, "Courts" § 87 (1965).

As we said in Elwess v. Elwess, 73 N.M. 400, 404, 389 P.2d 7, 9 (1964):

"The word 'jurisdiction' is a term of large and comprehensive import. It includes jurisdiction over the subject matter, over the parties, and power or authority to decide the particular matters presented, * * *."

Certainly the Commission had jurisdiction of the subject matter -- conservation of oil and gas -- and it had authority to decide the matters presented. See § 65-3-5, N.M.S.A. 1953. No question is raised concerning lack of jurisdiction over the parties.

"The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; * * *." State v. Patten, 41 N.M. 395, 399, 69 P.2d 931, 933 (1937).

*{*209}* See Houston Fire and Casualty Insurance Co. v. Falls, 67 N.M. 189, 354 P.2d 127 (1960).

The substance of appellant's argument is that the order was arbitrary, unreasonable, unlawful and capricious, because (a) in the first instance there was lack of substantial evidence that the wells were producing from the same pool; (b) the Commission failed to determine the amount of recoverable gas under each producer's tract or in the pool, and (c) the Order entered by the Commission deprives each producer of the opportunity to produce his fair share of the reserves in a quantity proportionate to the reserves in the pool.

These alleged shortcomings are said to be "jurisdictional." For the reasons mentioned, they are not. Rather, they are what Justice Carmody characterized in Continental Oil Co. v. Oil Conservation Com'n, supra, as "foundationary matters." By this he meant "basic conclusions of fact" which were held to be a prerequisite, together with support in the record, to sustain orders made by the Commission.

This court has in the past improperly phrased certain issues as jurisdictional. For example, in Sims v. Mechem, 72 N.M. 186, 382 P.2d 183 (1963) we held that the failure to find that a

pooling order would prevent waste was "jurisdictional," and the case was incorrectly decided on that basis. Actually, the failure to find that the order would prevent waste in Sims was no more jurisdictional than would be a failure to find negligence in a negligence case. Both are matters of proof of an issue that has nothing to do with jurisdiction.

The words "jurisdiction" and "jurisdictional" are occasionally loosely used in Continental Oil (70 N.M. at 321, 373 P.2d at 816). We understand that case to mean only that certain "basic conclusions of fact" must have been found as facts and supported by the record, and "are necessary requisites to the validity of an order" prorating production. El Paso Natural Gas Co. v. Oil Conservation Com'n, 76 N.M. 268, 414 P.2d 496 (1966).

We will consider the appellant's position upon the true issue presented, which is whether the findings in the order, which clearly comply with the mandate of Continental Oil, supra, are supported by substantial evidence in the record, devoid of any jurisdictional overtones.

Appellants first contend there is not sufficient evidence that the pool is truly a pool. They assert that it was not shown that there is subsurface communication between the wells or that they draw from a common source of supply. This argument is without substance. The record shows that the Morrow member of the Pennsylvanian formation is non-homogenous, consisting of separate stringers varying in thickness and not continuous across the pool with a number of producing zones. The formation is characterized by thickening and thinning and discontinuity over short distances. There was evidence that, although there was no one pay zone common to every well in the pool, nevertheless, there was no one well producing from a zone wholly isolated from every other producing well in the field. There was thus evidence of communication between the wells and that the wells were producing from the same pool. On this record, we do not consider the trial court's sustaining of the Commission's findings to be unreasonable. The first subpoint is ruled adversely to the Graces.

In their second subpoint, the Graces complain that the Commission failed to determine the amount of recoverable gas under each producer's tract or in the pool. The argument has a dual thrust. The findings made by the Commission indicate that, for various reasons, determination of such reserves was not practicable. The Graces point to expert testimony adduced by them to the effect that such determination was possible.

We view this argument as an attack upon the findings of the Commission *{*210}* which were sustained by the trial court. The findings disclose that the pool had been created by the Commission's order in the spring of 1969 and, thereafter, from time to time extended. At the time of the order, about five thousand four hundred and forty acres were included in the pool. By early 1972, only fourteen wells had been drilled in the entire pool and it had not been completely developed.

Bearing directly upon the contentions made by the Graces, the following findings were included among those made by the Commission:

"(70) That production from the Morrow formation in the subject pool is from many separate stringers which vary greatly in porosity, water saturation, and thickness, both within individual

stringers and between stringers.

"(71) That the above-described stringers are not continuous across the pool, but are interconnected by the perforations in the various completions in the pool.

"(72) That due to the above-described variations in the stringers and the lack of continuity of the stringers, the effective feet of pay, porosity of the pay, and water saturation of pay underlying each developed tract cannot be practically determined from the data obtained at the wellbore.

"(73) That there are recoverable gas reserves underlying each of the developed 320 acre tracts within the horizontal limits of the subject pool; that there are 15 developed 320-acre tracts in the pool as defined by the Commission.

"(74) That due to the nature of the reservoir the amount of recoverable gas under each producer's tract cannot be practically determined in the subject pool by a formula which considers effective feet of pay, porosity, and water saturation.

"(75) That due to the nature of the reservoir the amount of recoverable gas under each producer's tract cannot be practically determined in the subject pool by a formula which considers only the deliverability of a well.

"(76) That the amount of gas that can be practicably obtained without waste by the owner of each property in the subject pool substantially in the proportion that the recoverable gas under his tract bears to the total recoverable gas in the pool can be practically determined best by allocating the allowable production among the wells on the basis of developed tract acreage compared to total developed tract acreage in the pool.

"(77) That considering the nature of the reservoir and the known extent of development, a proration formula based upon surface acreage will afford the owner of each property in the pool the opportunity to produce his just and equitable share of the gas in the pool so far as such can be practicably obtained without waste substantially in the proportion that the recoverable gas under such property bears to the total recoverable gas in the pool.

"(81) That considering the available reservoir information, a 100% surface acreage formula is presently the most reasonable basis for allocating the allowable production among the wells delivering to the gas transportation facilities.

"(83) That the adoption of a 100% surface acreage formula for allocating the allowable production in the subject pool will, insofar as is presently practicable, prevent drainage between producing tracts which is not equalized by counter-drainage.

*211 "(85) That the adoption of a 100% surface acreage formula for allocating the allowable production in the subject pool will, insofar as is presently practicable, allow each operator the opportunity to produce his property ratably with all other operators connected to the same transportation facility."

There is evidence that development in this pool is such that data obtained at the well bore,

such as effective feet of pay, water saturation and deliverability are not sufficiently reliable to practicably determine recoverable reserves under each tract. There is evidence that the only reasonably accurate method of making such a determination would be by use of a pressure decline curve based upon substantial withdrawals of gas, but that there has not been sufficient production from the field to obtain accurate results by this method. The first well did not commence production until September, 1969, and most of the wells were not connected until about six months prior to the hearing.

The Graces argue that it was possible to determine reserves by other methods, pointing to their expert testimony. One of their witnesses did purportedly compute reserves underlying three tracts. Apart from the fact that this merely argues the weight of the evidence, which we will not consider, it ignores the language of our statutes and the construction placed thereon by this court in Continental Oil, supra. Our statutes are not couched in terms of what is "possible" but speak of what is "practicable" or "practical." § 65-3-14, N.M.S.A. 1953. In engineering contexts such as we here consider, what is practicable is of course possible, but what is possible may not be practicable. Cf., Pittsburg, C.C. & St. L. Ry. Co. v. Indianapolis, C. & S.T. Co., 169 Ind. 634, 81 N.E. 487 (1907). Upon this record, we do not find the trial court's approval of the subject findings of the Commission to have been unreasonable.

The second part of the Graces' argument under this subpoint raises a pure legal question. They argue that, without qualification or exception, the Commission is powerless to enter a proration order without first having determined the amount of recoverable gas under each producer's tract and in the pool. They quote from Continental Oil, supra:

"The commission was here concerned with a formula for computing allowables, which is obviously directly related to correlative rights. In order to protect correlative rights, it is incumbent upon the commission to determine, 'so far as it is practical to do so,' certain foundationary matters, without which the correlative rights of the various owners cannot be ascertained. Therefore, the commission, by 'basic conclusions of fact' (or what might be termed 'findings'), must determine, insofar as practicable, (1) the amount of recoverable gas under each producer's tract; (2) the total amount of recoverable gas in the pool; (3) the proportion that (1) bears to (2); and (4) what portion of the arrived at proportion can be recovered **without waste**. That the extent of the correlative rights must first be determined before the commission can act to protect them is manifest." (Emphasis by the Court) 70 N.M. at 318-319, 373 P.2d at 814-815.

The Graces again ignore the phrase "insofar as practicable," which makes Continental Oil readily distinguishable. The Jalmat Pool involved in Continental had been in production for a considerable time. It had been prorated on a pure acreage formula in 1954. An application was made to change the formula and the Commission entered an order to modify the formula to take into account deliverability. The order from which that appeal was taken was entered in early 1958. The Jalmat pool therefore had a considerably longer production history and nothing appears in that opinion which would indicate existing geological problems comparable to those in this case.

*{*212}* "The commission made no finding, even **'insofar as can be practically determined,'**

as to the amounts of recoverable gas in the pool or under the tracts." (Emphasis added). 70 N.M. at 319, 373 P.2d at 815

and:

"* * * Further, that portion of the same finding that there is a 'general correlation between the deliverabilities of the gas wells in the Jalmat Gas Pool and the recoverable gas in place under the tracts dedicated to said wells' is not tantamount to a finding that the new formula is based on the amounts of recoverable gas in the pool and under the tracts, **insofar as these amounts can be practically determined** and obtained without waste. **Lacking such findings** or their equivalents, a supposedly valid order in current use cannot be replaced. Such findings are necessary requisites to the validity of the order, * * *." (Emphasis added). 70 N.M. at 320, 373 P.2d at 815.

In Continental, no reason whatever appeared for the Commission's failure to determine the amount of recoverable gas under each producer's tract or in the pool and this court specifically recognized that this determination need only be made "insofar as these amounts can be practically determined." In this case, we are dealing with a very different situation and we have elaborate findings detailing reasons why the determination of such reserves was impracticable at the time of the hearing. We hold those findings valid.

The prime objective of the statutes under consideration is, "in the interest of the public welfare, to prevent waste of an irreplaceable natural resource." El Paso Natural Gas Co. v. Oil Conservation Com'n, supra. The Graces would have us hold that the Commission is powerless to enter proration orders in respect to newly discovered pools until sufficient data has been gleaned to make the reserve computations. We do not agree. Prevention of waste is paramount, and private rights, such as prevention of drainage not offset by counter-drainage and correlative rights must stand aside until it is practical to determine the amount of gas underlying each producer's tract or in the pool.

We hold that the Commission is not required as a prerequisite to the entry of a valid proration order, to first determine the amount of gas underlying each producer's tract and in the pool, in a case in which the Commission's findings demonstrate that such determinations are impracticable, and such findings are sustained by the record.

Other than the reservations expressed herein on Continental Oil's inaccurate use of the concept of jurisdiction, we reaffirm Continental Oil's requirements and continue to regard it as the primary oil and gas decision in New Mexico.

As their final subpoint, the Graces argue that they have been deprived of the opportunity to produce their fair share of the reserves. What we have said adequately answers this contention. Nor do we deem it necessary to elaborate on their second point to the effect they were entitled to a stay of the district court's judgment. Section 65-3-22(c), N.M.S.A. 1953 disposes of the contention.

The judgment of the district court is sustained.

It is so ordered.

JAMES A. MALONEY and STANLEY F. FROST, District Judges, concur.

---

87 N.M. 179, 531 P.2d 602 RIDLEY V. FIRST NAT'L BANK (S. Ct. 1975)

Steven G. RIDLEY, Michael G. Ridley and other members of the class of persons described herein, Petitioners,

vs.

FIRST NATIONAL BANK IN ALBUQUERQUE, a National Banking Association, Respondent.

No. 10314
SUPREME COURT OF NEW MEXICO
87 N.M. 179, 531 P.2d 602
January 30, 1975

Original Proceeding on Certiorari

OPINION

Now, therefore, it is considered, ordered and adjudged by the Court that the petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 1221, 87 N.M. 184, 531 P.2d 607, be and the same is hereby returned to the Clerk of the Court of Appeals.

---

87 N.M. 179, 531 P.2d 602 BYNUM V. BYNUM (S. Ct. 1975)

Sue M. BYNUM et al., Petitioners,

vs.

Harold D. BYNUM and Jane M. Bynum, his wife, Respondents.

No. 10332
SUPREME COURT OF NEW MEXICO
87 N.M. 179, 531 P.2d 602
January 30, 1975

Original Proceeding on Certiorari

OPINION

Now, therefore, it is considered, ordered and adjudged by the Court that the petition for writ of certiorari be and the same is hereby denied.

Further ordered that the record in Court of Appeals Cause No. 1395, 87 N.M. 195, 531 P.2d 618, be and the same is hereby returned to the Clerk of the Court of Appeals.

---

tended to punish the wrongdoer and deter others from engaging in similar conduct. 450 N.E.2d at 495. Applying a similar rationale as employed in *Husted*, the Hawaii court in *In re WPMK Corp.* decided that innocent partners are not liable for punitive damages unless it could be shown "that the partnership authorized, ratified, controlled, or participated in the alleged tortious activity." 59 B.R. at 997.

" 'The rule [on derivative liability] is well established in New Mexico that the principal, or master, is liable for punitive or exemplary damages *only* in cases where the principal or master has in some way authorized, participated in or ratified the acts of the agent or servant, which acts were wanton, oppressive, malicious, fraudulent or criminal in nature.' " *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 601, 577 P.2d 1245, 1247 (1978) (quoting *Couillard v. Bank of N.M.*, 89 N.M. 179, 181, 548 P.2d 459, 461 (Ct.App.1976)). This rule supported the holding in *Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 773 P.2d 1231 (1989), a defamation case in which we reversed an employer's liability for punitive damages due to the employee's tort. "[A] master or employer is liable for punitive damages for the tortious act of an employee acting within the scope of his [or her] employment *and* where the employer in some way participated in, authorized or ratified the tortious conduct of the employee." *Id.* at 431, 773 P.2d at 1238 (citing *Samedan Oil Corp.*).

Our law is consistent with the rule set out by the United States Supreme Court in the seminal case of *Lake Shore & Michigan Southern Railway Co. v. Prentice*, 147 U.S. 101, 107, 13 S.Ct. 261, 262, 37 L.Ed. 97 (1893), that punitive damages can only be awarded against one who has participated in the offense. *Samedan*, 91 N.M. at 601, 577 P.2d at 1247. In other words, "a master or principal is not liable for punitive damages unless it can be shown that in some way he also has been guilty of the wrongful motives upon which such damages are based." *Id.* at 602, 577 P.2d at 1248.

In *Meleski*, unlike the case at bar, the court held there was sufficient evidence for the jury to have found that the partners ratified or authorized the fraudulent acts. Here the court specifically found that the copartners, Mrs. Glenn and the Popes, "committed no fraudulent acts." Accordingly, absent a finding of ratification, authorization, or participation in the fraudulent conduct, punitive damages may not be recovered from copartners for one partner's fraudulent conduct.[1] Glenn, his wife, and Mr. and Mrs. Pope, as partners in P & G Investments are liable to plaintiff jointly and severally for the award of compensatory damages, attorney fees, and costs; however, only Glenn is liable to plaintiff for the award of punitive damages.

IT IS SO ORDERED.

BACA and MONTGOMERY, JJ., concur.

835 P.2d 819

SANTA FE EXPLORATION COMPANY, Petitioner–Appellant,

v.

OIL CONSERVATION COMMISSION OF the STATE OF NEW MEXICO, Respondent–Appellee,

and

STEVENS OPERATING CORPORATION, Petitioner–Cross–Appellant,

v.

OIL CONSERVATION COMMISSION OF the STATE OF NEW MEXICO, Respondent–Cross–Appellee.

No. 19707.

Supreme Court of New Mexico.

July 27, 1992.

Appeal was taken from order of the District Court, Chaves County, W.J. Schne-

1. In *Gallegos* this court prescribed that the determination as to the liability for punitive damages must be made separately when two or more defendants are involved. 108 N.M. at 728, 779 P.2d at 105.

dar, D.J., approving final order of the Oil Conservation Commission governing production of oil from pool. The Supreme Court, Baca, J., held that: (1) Commission member's ex parte contact with interest owner did not create appearance of impropriety; (2) interest owner's protected property right in producing oil underlying its tract was not implicated by virtue of another interest owner's drilling of well; (3) Commission did not exceed its authority under Oil and Gas Act when approved; and (4) Statutory Unitization Act does not preclude unitization of field in primary production.

Affirmed.

1. Administrative Law and Procedure ⇐682

Mines and Minerals ⇐92.21

Oil Conservation Commission's failure to provide proper citation to record in its answer brief did not require Supreme Court to disregard Commission's arguments or to accord Commission's arguments less weight on appeal; rather, counsel for Commission would be advised to read and follow appellate rules to avoid future violations. SCRA 1986, Rule 12–213, subds. A(3), B.

2. Administrative Law and Procedure ⇐314

Constitutional Law ⇐296(1)

Ex parte contact by member of Oil Conservation Commission with owner of interest in oil pool prior to owner's second directional drilling attempt, member's conditional approval of the drilling, and subsequent participation in affirmance of decision by Commission, did not create appearance of impropriety, in violation of due process; bias issue was not raised at Commission hearing, and member did not express opinion regarding outcome of case prior to hearing. NMSA 1978, §§ 70–2–2 to 70–2–4, 70–2–11; U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐255(1), 278(1.1)

At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of possible deprivation and an opportunity to defend; in addition, the trier of fact must be unbiased and may not have predisposition regarding outcome of case. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐296(1)

Interest owner in oil pool was not denied due process on appeal from Oil Conservation Commission when district court dismissed with prejudice its claim of bias on part of Commission member; court allowed briefing on question of whether to vacate claim of bias and whether dismissal of bias claim should be with or without prejudice. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇐277(1)

Interest owner's protected property right in producing oil underlying its tract in oil pool was not implicated by virtue of another interest owner's drilling of the well, for purposes of due process notice and hearing requirements. U.S.C.A. Const. Amend. 14.

6. Administrative Law and Procedure ⇐475

Constitutional Law ⇐296(1)

Mines and Minerals ⇐92.17

Oil Conservation Commission did not violate interest owner's due process rights in proceeding to determine whether to approve unorthodox well in oil pool and impose production penalty when it considered issues concerning allocation of production from pool, protection of correlative rights of pool members, and prevention of waste; parties had general notice of issues to be determined, and other evidence was presented at hearing before Commission made its final decision. U.S.C.A. Const. Amend. 14.

7. Constitutional Law ⇐296(1)

Mines and Minerals ⇐92.78

Oil Conservation Commission did not violate interest owner's substantive due process rights when it set low allowable production from unorthodox well in oil pool: Commission did not act in arbitrary or capricious manner, and Commission's actions were consistent with its statutory duties to prevent waste and protect correla-

tive rights of other producers in the pool. U.S.C.A. Const.Amend. 14.

8. Mines and Minerals ⇐92.78

Oil Conservation Commission did not exceed its authority under Oil and Gas Act when it approved unorthodox well in oil pool, placed restriction on production from that well, and limited oil production from entire pool; well was located so that it could produce oil from top portion of pool, thereby avoiding waste, but was also located so that it could effectively drain pool, supporting production penalty. NMSA 1978, §§ 70–2–11, 70–2–12, subd. B(7).

9. Mines and Minerals ⇐92.78

Statutory Unitization Act does not preclude unitization of oil field in primary production. NMSA 1978, §§ 70–2–11, subd. A, 70–7–1.

10. Mines and Minerals ⇐92.78

Oil Conservation Commission did not violate its rules set out in order establishing oil pool when it allowed interest owner to drill well at nonstandard location without prior notice and hearing to other lease holders in pool, where other lease holders had notice of subsequent hearing to determine whether well would be allowed to produce oil.

11. Mines and Minerals ⇐92.79

Substantial evidence supported decision Oil Conversation Commission approving well in unorthodox location in oil pool, placing restriction on production from that well, and limiting production from entire pool. NMSA 1978, §§ 70–2–4, 70–2–5, 70–2–33, subd. H.

12. Administrative Law and Procedure ⇐791

"Substantial evidence" necessary to support agency decision is relevant evidence reasonable mind would accept as sufficient to support conclusion.

See publication Words and Phrases for other judicial constructions and definitions.

13. Administrative Law and Procedure ⇐791

In determining whether there is substantial evidence to support administrative agency decision, Supreme Court reviews whole record; in such review, Court reviews evidence in light most favorable to upholding agency determination, but does not completely disregard conflicting evidence.

14. Administrative Law and Procedure ⇐788

Agency decision will be upheld if the Supreme Court is satisfied that evidence in record demonstrates reasonableness of its decision.

15. Mines and Minerals ⇐92.78

Oil Conservation Commission's decision to approve unorthodox well drilled in oil pool, place restrictions on production from that well, and limit production from entire pool, was not arbitrary and capricious; Commission considered evidence presented by parties, and in light of its statutory duties to protect correlative rights and avoid waste, fashioned creative solution to resolve dispute. NMSA 1978, § 70–2–13.

Padilla & Snyder, Ernest L. Padilla, Santa Fe, Brown, Maroney & Oaks Hartline, K. Douglas Perrin, Dallas, Tex., for appellant.

Robert G. Stovall, Santa Fe, for Oil Conservation Com'n.

Campbell, Carr, Berge & Sheridan, William F. Carr, Santa Fe, for Stevens Operating Corp.

OPINION

BACA, Justice.

This appeal involves a series of orders issued by the New Mexico Oil Conservation Commission (the "Commission") and the New Mexico Oil Conservation Division (the "Division"). These orders established and govern the production of oil from the North King Camp Devonian Pool (the "Pool") in which appellant, Santa Fe Exploration Company ("Santa Fe"), and cross-appellant, Stevens Operating Corporation ("Stevens"), owned interests. After the Division approved Stevens's request to drill a

well at an unorthodox location and limited production from the well, both Santa Fe and Stevens petitioned the Commission for a de novo review. After consolidation of the petitions, the Commission, in its final order, approved the Stevens well, placed restrictions on Stevens's production from this well, and limited oil production from the entire Pool. Pursuant to NMSA 1978, Section 70–2–25 (Repl.Pamp.1987), both Santa Fe and Stevens appealed the final order of the Commission to the district court, which affirmed. Both parties appeal the decision of the district court. We note jurisdiction under Section 70–2–25 and affirm.

I

In December 1988, at the request of Santa Fe, the Division issued Order No. R–8806, which established the Pool and the rules and regulations governing operation of the Pool. These rules established standard well spacings and a standard unit size of 160 acres; regulated the distances that wells could be placed from other wells, the Pool boundary, other standard units, and quarter-section lines; set production limits for wells in the Pool; and outlined procedures for obtaining exceptions to the rules. The order also approved Santa Fe's Holstrom Federal Well No. 1 (the "Holstrom well") for production, which Santa Fe began producing at the rate of 200 barrels per day.

In April 1989, Curry and Thornton ("Curry"), predecessors in interest to Stevens, applied to the Division to drill a well in the Pool and for an exception to the standard spacing and well location rules. Curry requested the non-standard spacing because it claimed that geologic conditions would not allow for production of oil from their lease from an orthodox well location. Santa Fe [1] opposed the application, claiming that the well would impair its correlative rights to oil in the Pool. In its Order No. R–8917, the Division approved Curry's application to drill the well at the unorthodox location but imposed a production penalty limiting the amount of oil that Curry could produce from the well to protect correlative rights of other lease holders in the Pool.

In May, Stevens, which had replaced Curry as an operator in the Pool, applied to the Division for an amendment to Order No. R–8917. Stevens requested that, instead of drilling the well authorized by Order No. R–8917, it be allowed to enter an existing abandoned well and drill directionally to a different location. The requested well, if approved and drilled, would also be at an unorthodox location. Santa Fe opposed the amendment and objected to the original production penalty, which it contended should have allowed less production from the Stevens well. The Division approved Stevens's application and issued Order No. R–8917–A amending Order No. R–8917. The amended order, while allowing directional drilling to an unorthodox location, required Stevens to otherwise meet the requirements of the original order, including the original production penalty.

Stevens proceeded to drill the well authorized by the amended order. When the well failed to produce oil, Stevens contacted the Division Director and requested approval to re-drill the well to a different location and depth. The Director permitted Stevens to continue drilling at its own risk and subject to subsequent orders to be entered after notice to all affected parties and a hearing. Stevens drilled and completed this well (the "Deemar well") and filed an application for a de novo hearing by the Commission to approve production from the well and to consider the production penalty. *See* NMSA 1978, § 70–2–13 (Repl.Pamp.1987) (decisions by the Director may be heard de novo by the Commission). Santa Fe also filed an application for a de novo hearing opposing Stevens's application or, in the alternative, urging that a production penalty be assessed against the Stevens well.

The Commission consolidated the petitions and, after notice to the parties and a

1. Santa Fe and Exxon USA were co-owners of both the lease and the production from the Holstrom well. While both Santa Fe and Exxon USA contested the application, for the sake of simplicity we will refer to them collectively as "Santa Fe."

hearing, entered Order No. R-9035. This order estimated the total amount of oil in the Pool and the amount of oil under each of the three tracts in the Pool.[2] The order set the total allowable production from the Pool at the existing production rate of 235 barrels per day,[3] and allocated production to the two wells in accordance with the relative percentages of oil underlying each of the three tracts. Under this formula, Stevens was allowed to produce 49 barrels per day from its Deemar well, Santa Fe was allowed to produce 125 barrels per day from its Holstrom well, and the undeveloped tract left in the Pool would be allowed to produce 61 barrels per day, if developed. The order also allowed the production to be increased to 1030 barrels per day if all operators voluntarily agreed to unitized operation of the Pool.

Pursuant to NMSA 1978, Section 70-2-25(A), both Santa Fe and Stevens applied to the Commission for a rehearing. Santa Fe contended that the second attempt at directional drilling was unlawful; that it was denied due process and equal protection by the ex parte contact between Stevens and the Division Director; that the findings of the Commission apportioning production were not supported by the evidence; that the reduction of production was not supported by the evidence and was erroneous, capricious, and contrary to law; and that the unitization was illegal and confiscatory to Santa Fe. Stevens argued that the order was contrary to law because it would result in the drilling of an unnecessary well on the undeveloped tract, which would result in waste; that the order was arbitrary, capricious, unreasonable, and contrary to law because it exceeded the Commission's statutory authority; that the order violated its due process rights; and that the findings regarding recoverable reserves were contrary to the evidence and arbitrary and capricious. When the Commission took no action on the applications for rehearing, the petition was presumed to be denied and each party appealed to the district court, which consolidated the appeals. *See* NMSA 1978, § 70-2-25.

On appeal to the district court, Santa Fe contended that Order No. R-9035 was arbitrary and capricious, that it was not supported by substantial evidence, that the Commission exceeded its statutory authority, and that the Commission Chairman's bias against Santa Fe denied it due process. Stevens contended that the order was arbitrary, capricious, and unreasonable; that it was contrary to law; and that it denied Stevens's rights to due process. The trial court, after a review of the evidence presented at the Commission's hearings, affirmed the Commission's order. The trial court also dismissed, with prejudice, Santa Fe's contention of bias.

Pursuant to Section 70-2-25, both Santa Fe and Stevens appeal the district court decision to this Court. Santa Fe contends (1) that it was denied procedural due process because the Commission was biased; (2) that the district court erred when it failed to consider the question of bias; (3) that the Division violated its own regulations and procedures; (4) that the Commission abused its discretion when it lowered allowable production from the Pool; and (5) that the Commission decision was not supported by the evidence and was arbitrary and capricious. Stevens contends (1) that the Commission exceeded its authority when it reduced allowable production in an attempt to unitize operation of the Pool; (2) that the order violated the Commission's statutory duty to prevent waste; (3) that the order was not supported by substantial evidence; and (4) that its rights to due process were violated. Because of a substantial overlap of issues

2. The order estimated oil productive rock volume in the Pool to be 10,714 acre-feet and allocated the oil as follows: 21% to the tract on which Stevens held the lease and where the unorthodox well was located (E/2 W/2 of section 9); 53% to the tract on which Santa Fe held the lease and where the Holstrom well was located (SE/4 of section 9); 26% to the tract on which Santa Fe held the lease and where no producing well was located (NE/4 of section 9).

3. At the time, Santa Fe was producing 200 barrels per day of oil from its Holstrom well. Under the production penalty formula imposed by the prior Division order, Stevens would have been allowed to produce 35 barrels per day from its Deemars well.

raised by Santa Fe and Stevens, we consolidate these issues and address the following: (1) whether the Commission's actions violated due process rights of either Santa Fe or Stevens; (2) whether by issuing Order No. R-9035 the Commission exceeded its statutory authority or violated any of its own rules; (3) whether the Commission's order was supported by substantial evidence; and (4) whether the Commission's order was arbitrary and capricious.

II

[1] Before addressing the substance of this appeal, we first must address an issue of appellate procedure. Santa Fe contends that the Commission, in its answer brief, has disregarded SCRA 1986, 12-213 (Cum. Supp.1991), by failing to provide proper citation to the record proper, transcript of proceedings, and exhibits on which it relied. In light of this failure, Santa Fe urges us to disregard the Commission's arguments or, in the alternative, to accord the Commission's arguments less weight.

We agree with Santa Fe that the Commission failed to provide proper citations in its answer brief. Rule 12-213(B) requires an answer brief to meet the same requirements as the brief in chief, which include "citations to authorities and parts of the record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(3). The Commission's answer brief contains numerous factual statements without a single citation to the record below, except for a passing reference to several findings made by the Commission (but without citation to where such findings appear in the Record Proper) and one citation to the record in which the Commission's brief quoted Santa Fe's brief in chief and citation. The Court of Appeals, in addressing a similar violation, stated:

> [W]e caution [appellant's] counsel regarding violations of our appellate rules. [Appellant] provided no citations to the parts of the record and transcript he relied on, a violation of SCRA 1986, 12-213(A)(1)(c) and (A)(2). Technically, we have no duty to entertain any of [appellant's] contentions on appeal due to this procedural violation. *See Bilbao v. Bilbao*, 102 N.M. 406, 696 P.2d 494 (Ct.App. 1985). [Appellant's] counsel also failed to provide case authority for several of his issues, a violation of Rule 12-213(A)(3). We remind counsel that we are not required to do his research. *In re Adoption of Doe* [, 100 N.M. 764, 676 P.2d 1329 (1984)]. We will not review issues raised in appellate briefs and unsupported by cited authority. *Id.*

Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct.App.), *cert. denied*, 106 N.M. 7, 738 P.2d 125 (1987). As the Court of Appeals advised appellant's counsel in *Fenner*, we advise counsel for the Commission "to read and follow the appellate rules to avoid future violations." *Id.* 106 N.M. at 42, 738 P.2d at 914.

III

We turn now to the due process claims of Santa Fe and Stevens. Santa Fe claims that it was denied procedural due process for three separate reasons: (1) the Commission was biased by the ex parte communication between the Division Director and Stevens thereby tainting its decision; (2) the Division Director's approval of the second directional drilling attempt was given prior to notice and a hearing; and (3) the Commission failed to give notice that it was going to consider limiting allowable production from the Pool. Stevens, while contesting Santa Fe's charge of bias, contends that its procedural due process rights were violated because the Commission failed to give adequate notice of its intent to limit production from the entire field. Stevens also claims that its substantive due process rights were violated by the Commission's allegedly erroneous determination of the recoverable reserves underlying the Pool. We address each contention below.

A

[2] Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the

affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. *See, e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 564 (D.C.Cir.1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

[3] At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. *Reid v. New Mexico Bd. of Examiners in Optometry*, 92 N.M. 414, 415–16, 589 P.2d 198, 199–200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. *Id.* at 416, 589 P.2d at 200. Our cases also require the appearance of fairness to be present. *Id.*

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. *Id.* Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." *Id.*

In *Reid*, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. *Id.* at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. *Id.* at 416, 589 P.2d at 200.

The instant case is distinguishable from the *Reid* case. Unlike the appellant in *Reid*, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in *Reid*, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70–2–4 (Repl. Pamp.1987), and has a duty to prevent waste, NMSA 1978, Sections 70–2–2, –3 (Repl.Pamp.1987) (defining and prohibiting waste); NMSA 1978, Section 70–2–11 (Repl.Pamp.1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which

eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As *Reid* is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

[4] In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. *See Lowery v. Atterbury,* 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). *See also, Jones v. Nuclear Pharmacy, Inc.,* 741 F.2d 322, 325 (10th Cir.1984) (procedural due process not violated where petitioner given opportunity to address issue by memorandum).

B

We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

[5] Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. *Reid,* 92 N.M. at 415–16, 589 P.2d at 199–200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

[6] Citing *Jones* and *McCoy v. New Mexico Real Estate Comm'n,* 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission violated their due process rights.

Curiously, none of the parties cited *National Council on Compensation Insurance v. New Mexico State Corporation Commission,* 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In *National Council,* the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. *Id.* at 280–82, 756

P.2d at 560–62. On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. *Id.* at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "[t]he notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." *Id.* at 284, 756 P.2d at 564. In other words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

Like the notice given to NCCI in *National Council*, both Santa Fe and Stevens were reasonably informed as to the issues that the Commission would address at its hearing on the consolidated petitions. The parties themselves had each requested a de novo review by the Commission of Stevens's application for a non-standard well location. Santa Fe requested that the Commission deny the application or, in the alternative, impose a production penalty to protect its correlative rights. Stevens requested approval of its Deemar well for production and asked the Commission to reconsider the production penalty. At the hearing, the parties presented the evidence and requested that the Commission provide them the relief that each sought: the right to produce its proportionate share of the oil from the Pool. The parties knew, prior to the hearing, that the Commission would be considering production rates from the various wells and the correlative rights of all parties concerned.

The cases relied upon by the parties are either distinguishable or support the result we reach today. In *McCoy*, we considered whether a realtor's right to procedural due process was violated when her license was revoked by the Real Estate Commission. In that case, the district court based its decision on an issue raised by the Real Estate Commission for the first time on appeal. Because the realtor was denied notice and any opportunity to prepare her case and be heard on that issue in the district court, we held that the district court's decision violated due process. *McCoy*, 94 N.M. at 603–04, 614 P.2d at 15–16. In *Jones*, the appellant claimed that he was denied due process when the trial court did not allow him to present testimony at a hearing to determine whether a settlement agreement should be approved. The Tenth Circuit disagreed, and, held that, because the appellant was given notice and had the opportunity to be heard by submitting a lengthy memorandum, he was not denied due process. *Jones*, 741 F.2d at 325.

Unlike the appellant in *McCoy*, the parties in the instant case had adequate notice of the issues that were going to be addressed to allow them to prepare their cases. In fact, the evidence presented by the parties at the Commission's hearing shows that they had notice of the very issues that the Commission eventually considered: allocation of production from the Pool, protection of the correlative rights of Pool members, and prevention of waste in the Pool. The parties presented evidence of the size, shape, location, and structure of the reservoir. The parties presented evidence that the Stevens well was located so that it could effectively drain the entire reservoir and destroy correlative rights of the other parties unless a production penalty was assessed. The parties presented evidence of the efficient production rate of the Santa Fe well. Expert testimony presented at the hearing demonstrated that the oil in the Pool could be produced more efficiently under unitized operation. While the Commission crafted a unique solution to the problem presented to it, the *process* by which the Commission reached this solution was not unique. The parties had general notice of the issues to be determined, and evidence was presented at a hearing before the Commission made its final decision. Under these circumstances, we hold that Stevens and Santa Fe had adequate notice so as to be reasonably informed of the issues to be decided by the Commission. Thus, we find no violation of procedural due process here.

C

[7] The final due process argument that we discuss is whether Stevens's substantive due process rights were violated by the Commission's determination of the recoverable reserves underlying the Pool. Stevens argues that the setting of low allowable production from the well was an arbitrary decision that will deprive it of a valuable property right. Stevens, citing *Schware v. Board of Bar Examiners*, 60 N.M. 304, 291 P.2d 607 (1955), *rev'd*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), claims that this is a violation of substantive due process. We disagree. As discussed in Section VI, *infra*, the Commission did not act in an arbitrary or capricious manner. Moreover, as demonstrated in Section IV, *infra*, the Commission's actions were consistent with its statutory duties to prevent waste and protect the correlative rights of other producers in the Pool.

IV

The next issue that we address is whether the Commission exceeded its statutory authority or violated its rules when it issued Order No. R-9035. Both Santa Fe and Stevens contend that Order No. R-9035, while not requiring unitization, effectively unitizes operation of the Pool. They argue that the Commission does not have the statutory authority to require unitization of the Pool because, under the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 to -21 (Repl.Pamp.1987), unitization is available only in fields that are in the secondary or tertiary recovery phase. They assert that, because the Commission order effectively unitizes the Pool, a field in the primary development phase, the Commission exceeded its statutory authority. In addition, Santa Fe contends that the Commission violated its own rules when it allowed Stevens's second directional drilling attempt and that Order No. 9035 is void. The Commission argues that its actions were proper under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -38 (Repl.Pamp.1987 & Cum.Supp.1991), and argues that the Statutory Unitization Act is inapplicable to the instant case.

A

[8] "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." *Continental Oil Co. v. Oil Conservation Comm'n*, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). The Oil and Gas Act gives the Commission and the Division the two major duties: the prevention of waste and the protection of correlative rights. NMSA 1978, § 70-2-11(A); *Continental Oil Co.*, 70 N.M. at 323, 373 P.2d at 817. Correlative rights are defined as

> the opportunity afforded * * * to the owner of each property in a pool to produce without waste his just and equitable share of the oil * * * in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil * * * under the property bears to the total recoverable oil * * * in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). In addition to its ordinary meaning, waste is defined to include "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil * * * ultimately recovered from any pool." NMSA 1978, § 70-2-3(A).

The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties." NMSA 1978, § 70-2-12(B)(7). In addition, the Division and the Commission are "empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11.

In the instant case, evidence presented to the Commission indicated that the Pool was located under three separate tracts of land.

The Commission was called upon to determine the total amount of oil in the Pool and the proportionate share underlying each tract. Stevens's Deemar well was located so that it could produce oil from the top portion of the Pool, thereby avoiding waste that would have occurred unless the well was allowed. However, the well was located so that it could effectively drain the entire Pool. The Commission, charged with the protection of correlative rights of the other lease owners in the Pool, placed a production penalty on the well to protect these rights. Thus, the Commission attempted to avoid waste while protecting correlative rights. We hold that, under the facts of this case, the Commission did not exceed the broad statutory authority granted by the Oil and Gas Act.

[9] Moreover, we are unpersuaded by the argument of both Stevens and Santa Fe that the Statutory Unitization Act prohibits the Commission's actions. They argue that, by enacting the Statutory Unitization Act, the legislature intended to limit the availability of forced unitization to secondary and tertiary recovery only. Both Santa Fe and Stevens quote the following language from the Statutory Unitization Act to support their argument:

> It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by *primary recovery alone* and not to what the industry understands as exploratory units.

Section 70–7–1 (emphasis added by Stevens and Santa Fe). They assert that this section precludes unitization of a field in primary production such as the Pool. We disagree.

We read the above quoted language from Section 70–7–1 merely to say that the Statutory Unitization Act is not applicable to fields in their primary production phase, such as the Pool in the instant case. Nothing contained in the Statutory Unitization Act, including the above quoted section, however, limits the authority of the Commission to regulate oil production from a pool under the Oil and Gas Act. The Commission still must protect correlative rights of lease holders in the Pool while preventing waste. The Commission still has broad authority "to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70–2–11(A). As discussed above, in the instant case the Commission's actions were within its statutory authority. We hold that the circumstances of this case do not implicate the Statutory Unitization Act and that the Commission's actions in effectively unitizing operation of the Pool were an appropriate exercise of its statutory authority under the Oil and Gas Act.

B

[10] Santa Fe contends that, by issuing Order No. R–9035, the Commission abused its discretion by failing to follow the rules and regulations established by Order No. R–8806. That order established the Pool and set out special rules and regulations designed to prevent waste and protect correlative rights.[4] The order also established notice and hearing requirements before the Commission could allow a non-standard well to be drilled in the Pool. Santa Fe contends that, by allowing Stevens to drill a well at a non-standard location, *i.e.*, to within 70 feet of Santa Fe's lease line, without prior notice and a hearing, the Commission violated its own rules. Santa Fe also contends that lowering the allowable production from the Holstrom well to 125 barrels of oil per day without adequate notice is a violation of these rules. Santa Fe concludes that, because Order No. 9035 was issued in a manner inconsistent with these rules, the order is void and Order Nos. 8917 and 8917–A should be reinstated. We disagree.

4. These rules provided that the standard size for proration unit was to be 160 acres, that a well could not be located closer than 660 feet from the outer boundary of a proration unit nor nearer than 1320 feet from the nearest well in the Pool, and that the maximum production allowed from a standard production unit would be 515 barrels per day.

The Commission's actions in this case did not violate the Commission's rules established by Order No. 8806. While the Director did allow Stevens to make a second attempt to drill a well at an unorthodox location without notice to other lease holders in the Pool, the other lease holders had notice of the subsequent hearing to determine whether this well would be allowed to produce oil. In addition, this action was designed to further the Director's statutory duty to prevent waste by preventing added expense in the development of the field. Moreover, the Director could have approved drilling the second Stevens attempt at the hearing that it held prior to issuing Order No. 8917-A. Thus, the Commission's actions did not violate the rules established by Order No. 8806 and the Commission did not abuse its discretion in this matter.

V

[11] The next issue that we address is whether the Commission's Order No. R-9035 is supported by substantial evidence. Stevens argues that the Commission, in determining correlative rights of Santa Fe, did not refer to the recoverable oil underlying the tract. Stevens claims that this resulted in the Commission apportioning more oil in the Pool to Santa Fe than Santa Fe deserves based on evidence introduced at the hearing. Santa Fe contends that the Commission ignored testimony of its expert witnesses that indicated that a greater portion of the Pool was under its tract. Santa Fe concludes that the Commission underestimated its proportionate share of oil in the Pool and that this estimate is not supported by substantial evidence.

[12-14] Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. *Rutter & Wilbanks Corp. v. Oil Conservation Comm'n*, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. *Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. *National Council*, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. *Id.*

Stevens contends that the Commission did not consider the recoverable reserves underlying the Santa Fe tract, *see* NMSA 1978, Section 70-2-33(H) (correlative right based on recoverable reserves), thereby overestimating the amount of oil under the Santa Fe tract. Stevens also contends that the Commission ignored testimony by Stevens's expert witnesses indicating that more of the Pool was under Stevens's tract than the Commission ultimately concluded. Stevens concludes that the record lacks substantial evidence to uphold the Commission's estimate of Santa Fe's proportionate share of oil in the Pool. Santa Fe contends that the Commission underestimated its proportional share of oil because the Commission failed to accept as conclusive the engineering and geologic evidence presented by Santa Fe of the location and extent of the Pool, which would result in a higher proportion of the oil being allocated to Santa Fe. Santa Fe concludes that the Commission's estimate of Santa Fe's proportionate share of oil in the Pool is not supported by substantial evidence.

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. *See* NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engi-

neering"). Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n*, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

VI

[15] The final issue raised by this appeal is whether the decision of the Commission is arbitrary and capricious.

Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.'" *Garcia v. New Mexico Human Servs. Dep't*, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct.App.1979) (quoting *Olson v. Rothwell*, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965))[, *rev'd*, 94 N.M. 175, 608 P.2d 151 (1980)]. An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. *Le Strange v. City of Berkeley*, 26 Cal.Rptr. 550, 210 Cal.App.2d 313 (1962). An abuse of discretion will also be found when the decision is contrary to logic and reason. *Newsome v. Farer*, 103 N.M. 415, 708 P.2d 327 (1985); *Sowders v. MFG Drilling Co.*, 103 N.M. 267, 705 P.2d 172 (Ct.App.1985).

Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct.App. 1987).

In the instant case, the action of the Commission is not arbitrary and capricious. As discussed in Section IV, *supra*, the Commission did not exceed its statutory authority nor violate its rules when it issued the final order in this case. As discussed in Section III, *supra*, the Commission did not deprive either Santa Fe or Stevens of their due process rights. As demonstrated in Section V, *supra*, the findings of the Commission were supported by substantial evidence. The Commission considered the evidence presented by the parties, and, in light of its statutory duties to protect correlative rights and avoid waste, fashioned a creative solution to resolve this dispute. While the Commission's solution was unique, such a result is not arbitrary or capricious "if exercised honestly and upon due consideration, even though another conclusion might have been reached." *Perkins*, 106 N.M. at 655–56, 748 P.2d at 28–29 (citing *Maricopa County v. Gottsponer*, 150 Ariz. 367, 723 P.2d 716 (App. 1986)). In accordance with the foregoing discussion, we hold that Order No. R–9035 is not arbitrary and capricious.

The judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

RANSOM, C.J., and HARRIS, District Judge, concur.

835 P.2d 831

JMB RETAIL PROPERTIES COMPANY, f/k/a JMB Property Company, Petitioner,

v.

Hon. Benjamin S. EASTBURN, District Judge, Respondent.

No. 20594.

Supreme Court of New Mexico.

Aug. 3, 1992.

Petitioner sought writ of superintending control, prohibition, or mandamus requiring district judge to recognize petitioner's peremptory challenge of judge. The

114 N.M. 103, 31 N.M. St. B. Bull. 815, 835 P.2d 819 SANTA FE EXPLORATION CO. V. OIL CONSERVATION COMM'N (S. Ct. 1992) 1992 N.M. Lexis 233

SANTA FE EXPLORATION COMPANY, Petitioner-Appellant, vs. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Appellee, and STEVENS OPERATING CORPORATION, Petitioner-Cross-Appellant, v. OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO, Respondent-Cross-Appellee.

No. 19,707
SUPREME COURT OF NEW MEXICO
114 N.M. 103, 31 N.M. St. B. Bull. 815, 835 P.2d 819, 1992 N.M. LEXIS 233
July 27, 1992, FILED
Appeal from the District Court of Chaves County. W. J. Schnedar, District Judge.

COUNSEL

For Appellant: Padilla & Snyder, Ernest L. Padilla, Santa Fe, New Mexico, Brown, Maroney & Oaks Hartline, K. Douglas Perrin, Dallas, Texas.
For Oil Conservation Commission: Robert G. Stovall, Santa Fe, New Mexico.
For Stevens Operating Corporation: Campbell, Carr, Berge & Sheridan, William F. Carr, Santa Fe, New Mexico.

JUDGES

BACA, RANSOM, HARRIS
AUTHOR: BACA

OPINION

BACA, Justice.

*{*105}* This appeal involves a series of orders issued by the New Mexico Oil Conservation Commission (the "Commission") and the New Mexico Oil Conservation Division (the "Division"). These orders established and govern the production of oil from the North King Camp Devonian Pool (the "Pool") in which appellant, Santa Fe Exploration Company ("Santa Fe"), and cross-appellant, Stevens Operating Corporation ("Stevens"), owned interests. After the Division approved Steven's request to drill a *{*106}* well at an unorthodox location and limited production from the well, both Santa Fe and Stevens petitioned the Commission for a de novo review. After consolidation of the petitions, the Commission, in its final order, approved the Stevens well, placed restrictions on Stevens's production from this well, and limited oil production from the entire Pool. Pursuant to NMSA 1978, Section 70-2-25 (Repl. Pamp. 1987), both Santa Fe and Stevens appealed the final order of the Commission to the district court, which affirmed. Both parties appeal the decision of the district court. We note jurisdiction under Section 70-2-25 and affirm.

I

In December 1988, at the request of Santa Fe, the Division issued Order No. R-8806, which established the Pool and the rules and regulations governing operation of the Pool. These rules established standard well spacings and a standard unit size of 160 acres; regulated the distances that wells could be placed from other wells, the Pool boundary, other standard units, and quarter-section lines; set production limits for wells in the Pool; and outlined procedures for obtaining exceptions to the rules. The order also approved Santa Fe's Holstrom Federal Well No. 1 (the "Holstrom well") for production, which Santa Fe began producing at the rate of 200 barrels per day.

In April 1989, Curry and Thornton ("Curry"), predecessors in interest to Stevens, applied to the Division to drill a well in the Pool and for an exception to the standard spacing and well location rules. Curry requested the non-standard spacing because it claimed that geologic conditions would not allow for production of oil from their lease from an orthodox well location. Santa Fe[1] opposed the application, claiming that the well would impair its correlative rights to oil in the Pool. In its Order No. R-8917, the Division approved Curry's application to drill the well at the unorthodox location but imposed a production penalty limiting the amount of oil that Curry could produce from the well to protect correlative rights of other lease holders in the Pool.

In May, Stevens, which had replaced Curry as an operator in the Pool, applied to the Division for an amendment to Order No. R-8917. Stevens requested that, instead of drilling the well authorized by Order No. R-8917, it be allowed to enter an existing abandoned well and drill directionally to a different location. The requested well, if approved and drilled, would also be at an unorthodox location. Santa Fe opposed the amendment and objected to the original production penalty, which it contended should have allowed less production from the Stevens well. The Division approved Stevens's application and issued Order No. R-8917-A amending Order No. R-8917. The amended order, while allowing directional drilling to an unorthodox location, required Stevens to otherwise meet the requirements of the original order, including the original production penalty.

Stevens proceeded to drill the well authorized by the amended order. When the well failed to produce oil, Stevens contacted the Division Director and requested approval to re-drill the well to a different location and depth. The Director permitted Stevens to continue drilling at its own risk and subject to subsequent orders to be entered after notice to all affected parties and a hearing. Stevens drilled and completed this well (the "Deemar well") and filed an application for a de novo hearing by the Commission to approve production from the well and to consider the production penalty. **See** NMSA 1978, § 70-2-13 (Repl. Pamp. 1987) (decisions by the Director may be heard de novo by the Commission). Santa Fe also filed an application for a de novo hearing opposing Stevens's application or, in the alternative, urging that a production penalty be assessed against the Stevens well.

The Commission consolidated the petitions and, after notice to the parties and a *{*107}* hearing, entered Order No. R-9035. This order estimated the total amount of oil in the Pool and

the amount of oil under each of the three tracts in the Pool.[2] The order set the total allowable production from the Pool at the existing production rate of 235 barrels per day,[3] and allocated production to the two wells in accordance with the relative percentages of oil underlying each of the three tracts. Under this formula, Stevens was allowed to produce 49 barrels per day from its Deemar well, Santa Fe was allowed to produce 125 barrels per day from its Holstrom well, and the undeveloped tract left in the Pool would be allowed to produce 61 barrels per day, if developed. The order also allowed the production to be increased to 1030 barrels per day if all operators voluntarily agreed to unitize operation of the Pool.

Pursuant to NMSA 1978, Section 70-2-25(A), both Santa Fe and Stevens applied to the Commission for a rehearing. Santa Fe contended that the second attempt at directional drilling was unlawful; that it was denied due process and equal protection by the ex parte contact between Stevens and the Division Director; that the findings of the Commission apportioning production were not supported by the evidence; that the reduction of production was not supported by the evidence and was erroneous, capricious, and contrary to law; and that the unitization was illegal and confiscatory to Santa Fe. Stevens argued that the order was contrary to law because it would result in the drilling of an unnecessary well on the undeveloped tract, which would result in waste; that the order was arbitrary, capricious, unreasonable, and contrary to law because it exceeded the Commission's statutory authority; that the order violated its due process rights; and that the findings regarding recoverable reserves were contrary to the evidence and arbitrary and capricious. When the Commission took no action on the applications for rehearing, the petition was presumed to be denied and each party appealed to the district court, which consolidated the appeals. **See** NMSA 1978, Section 70-2-25.

On appeal to the district court, Santa Fe contended that Order No. R-9035 was arbitrary and capricious, that it was not supported by substantial evidence, that the Commission exceeded its statutory authority, and that the Commission Chairman's bias against Santa Fe denied it due process. Stevens contended that the order was arbitrary, capricious, and unreasonable; that it was contrary to law; and that it denied Stevens' rights to due process. The trial court, after a review of the evidence presented at the Commission's hearings, affirmed the Commission's order. The trial court also dismissed, with prejudice, Santa Fe's contention of bias.

Pursuant to Section 70-2-25, both Santa Fe and Stevens appeal the district court decision to this Court. Santa Fe contends (1) that it was denied procedural due process because the Commission was biased; (2) that the district court erred when it failed to consider the question of bias; (3) that the Division violated its own regulations and procedures; (4) that the Commission abused its discretion when it lowered allowable production from the Pool; and (5) that the Commission decision was not supported by the evidence and was arbitrary and capricious. Stevens contends (1) that the Commission exceeded its authority when it reduced allowable production in an attempt to unitize operation of the Pool; (2) that the order violated the Commission's statutory duty to prevent waste; (3) that the order was not supported by substantial evidence; and (4) that its rights to due process were violated. Because of a substantial overlap of issues *{*108}* raised by Santa Fe and Stevens, we consolidate these issues and address the following: (1) whether the Commission's actions violated due process rights of either Santa Fe or

Stevens; (2) whether by issuing Order No. R-9035 the Commission exceeded its statutory authority or violated any of its own rules; (3) whether the Commission's order was supported by substantial evidence; and (4) whether the Commission's order was arbitrary and capricious.

II

Before addressing the substance of this appeal, we first must address an issue of appellate procedure. Santa Fe contends that the Commission, in its answer brief, has disregarded SCRA 1986, 12-213 (Cum. Supp. 1991), by failing to provide proper citation to the record proper, transcript of proceedings, and exhibits on which it relied. In light of this failure, Santa Fe urges us to disregard the Commission's arguments or, in the alternative, to accord the Commission's arguments less weight.

We agree with Santa Fe that the Commission failed to provide proper citations in its answer brief. Rule 12-213(B) requires an answer brief to meet the same requirements as the brief in chief, which include "citations to authorities and parts of the record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(3). The Commission's answer brief contains numerous factual statements without a single citation to the record below, except for a passing reference to several findings made by the Commission (but without citation to where such findings appear in the Record Proper) and one citation to the record in which the Commission's brief quoted Santa Fe's brief in chief and citation. The Court of Appeals, in addressing a similar violation, stated:

> We caution [appellant's] counsel regarding violations of our appellate rules. [Appellant] provided no citations to the parts of the record and transcript he relied on, a violation of SCRA 1986, 12-213(A)(1)(c) and (A)(2). Technically, we have no duty to entertain any of [appellant's] contentions on appeal due to this procedural violation. **See Bilbao v. Bilbao**, 102 N.M. 406, 696 P.2d 494 (Ct. App. 1985). [Appellant's] counsel also failed to provide case authority for several of his issues, a violation of Rule 12-213(A)(3). We remind counsel that we are not required to do his research. **In re Adoption of Doe** [, 100 N.M. 764, 676 P.2d 1329 (1984)]. We will not review issues raised in appellate briefs and unsupported by cited authority. **Id.**

Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct. App.), **cert. denied**, 106 N.M. 7, 738 P.2d 125 (1987). As the Court of Appeals advised appellant's counsel in **Fenner**, we advise counsel for the Commission "to read and follow the appellate rules to avoid future violations." **Id.** at 42, 738 P.2d at 914.

III

We turn now to the due process claims of Santa Fe and Stevens. Santa Fe claims that it was denied procedural due process for three separate reasons: (1) the Commission was biased by the ex parte communication between the Division Director and Stevens thereby tainting its decision; (2) the Division Director's approval of the second directional drilling attempt was given prior to

notice and a hearing; and (3) the Commission failed to give notice that it was going to consider limiting allowable production from the Pool. Stevens, while contesting Santa Fe's charge of bias, contends that its procedural due process rights were violated because the Commission failed to give adequate notice of its intent to limit production from the entire field. Stevens also claims that its substantive due process rights were violated by the Commission's allegedly erroneous determination of the recoverable reserves underlying the Pool. We address each contention below.

A

Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the *{*109}* affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. **See, e.g., Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.**, 685 F.2d 547, 564 (D.C. Cir. 1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. **Reid v. New Mexico Bd. of Examiners in Optometry**, 92 N.M. 414, 415-16, 589 P.2d 198, 199-200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. **Id.** at 416, 589 P.2d at 200. Our cases also require the appearance of fairness to be present. **Id.**

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

Id. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. **Id.** Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." **Id.**

In **Reid**, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board

members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. **Id.** at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. **Id.** at 416, 589 P.2d at 200.

The instant case is distinguishable from the **Reid** case. Unlike the appellant in **Reid**, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in **Reid**, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70-2-4 (Repl. Pamp. 1987), and has a duty to prevent waste, NMSA 1978, Sections 70-2-2, -3 (Repl. Pamp. 1987) (defining and prohibiting waste); NMSA 1978, Section 70-2-11 (Repl. Pamp. 1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which *{*110}* eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As **Reid** is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. **See Lowery v. Atterbury**, 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). **See also, Jones v. Nuclear Pharmacy, Inc.**, 741 F.2d 322, 325 (10th Cir. 1984) (procedural due process not violated where petitioner given opportunity to address issue by memorandum).

B

We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. **Reid**, 92 N.M. at 415-16, 589 P.2d at 199-200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

Citing **Jones** and **McCoy v. New Mexico Real Estate Comm'n**, 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission violated their due process rights.

Curiously, none of the parties cited **National Council on Compensation Insurance v. New Mexico State Corporation Commission**, 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In **National Council**, the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. **Id.** at 280-82, 756 P.2d at 560-62. *{*111}* On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. **Id.** at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "the notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." **Id.** at 284, 756 P.2d at 564. In other words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

Like the notice given to NCCI in **National Council**, both Santa Fe and Stevens were reasonably informed as to the issues that the Commission would address at its hearing on the

consolidated petitions. The parties themselves had each requested a de novo review by the Commission of Stevens's application for a non-standard well location. Santa Fe requested that the Commission deny the application or, in the alternative, impose a production penalty to protect its correlative rights. Stevens requested approval of its Deemar well for production and asked the Commission to reconsider the production penalty. At the hearing, the parties presented the evidence and requested that the Commission provide them the relief that each sought: the right to produce its proportionate share of the oil from the Pool. The parties knew, prior to the hearing, that the Commission would be considering production rates from the various wells and the correlative rights of all parties concerned.

The cases relied upon by the parties are either distinguishable or support the result we reach today. In **McCoy**, we considered whether a realtor's right to procedural due process was violated when her license was revoked by the Real Estate Commission. In that case, the district court based its decision on an issue raised by the Real Estate Commission for the first time on appeal. Because the realtor was denied notice and any opportunity to prepare her case and be heard on that issue in the district court, we held that the district court's decision violated due process. **McCoy**, 94 N.M. at 603-04, 614 P.2d at 15-16. In **Jones**, the appellant claimed that he was denied due process when the trial court did not allow him to present testimony at a hearing to determine whether a settlement agreement should be approved. The Tenth Circuit disagreed, and, held that, because the appellant was given notice and had the opportunity to be heard by submitting a lengthy memorandum, he was not denied due process. **Jones**, 741 F.2d at 325.

Unlike the appellant in **McCoy**, the parties in the instant case had adequate notice of the issues that were going to be addressed to allow them to prepare their cases. In fact, the evidence presented by the parties at the Commission's hearing shows that they had notice of the very issues that the Commission eventually considered: allocation of production from the Pool, protection of the correlative rights of Pool members, and prevention of waste in the Pool. The parties presented evidence of the size, shape, location, and structure of the reservoir. The parties presented evidence that the Stevens well was located so that it could effectively drain the entire reservoir and destroy correlative rights of the other parties unless a production penalty was assessed. The parties presented evidence of the efficient production rate of the Santa Fe well. Expert testimony presented at the hearing demonstrated that the oil in the Pool could be produced more efficiently under unitized operation. While the Commission crafted a unique solution to the problem presented to it, the **process** by which the Commission reached this solution was not unique. The parties had general notice of the issues to be determined, and evidence was presented at a hearing before the Commission made its final decision. Under these circumstances, we hold that Stevens and Santa Fe had adequate notice so as to be reasonably informed of the issues to be decided by the Commission. Thus, we find no violation of procedural due process here.

*{*112}* **C**

The final due process argument that we discuss is whether Stevens's substantive due process rights were violated by the Commission's determination of the recoverable reserves underlying the Pool. Stevens argues that the setting of low allowable production from the well was an

arbitrary decision that will deprive it of a valuable property right. Stevens, citing **Schware v. Board of Bar Examiners**, 60 N.M. 304, 291 P.2d 607 (1955), **rev'd**, 353 U.S. 232 (1957), claims that this is a violation of substantive due process. We disagree. As discussed in Section VI, **infra**, the Commission did not act in an arbitrary or capricious manner. Moreover, as demonstrated in Section IV, **infra**, the Commission's actions were consistent with its statutory duties to prevent waste and protect the correlative rights of other producers in the Pool.

IV

The next issue that we address is whether the Commission exceeded its statutory authority or violated its rules when it issued Order No. R-9035. Both Santa Fe and Stevens contend that Order No. R-9035, while not requiring unitization, effectively unitizes operation of the Pool. They argue that the Commission does not have the statutory authority to require unitization of the Pool because, under the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 to -21 (Repl. Pamp. 1987), unitization is available only in fields that are in the secondary or tertiary recovery phase. They assert that, because the Commission order effectively unitizes the Pool, a field in the primary development phase, the Commission exceeded its statutory authority. In addition, Santa Fe contends that the Commission violated its own rules when it allowed Stevens's second directional drilling attempt and that Order No. 9035 is void. The Commission argues that its actions were proper under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -36 (Repl. Pamp. 1987 & Cum. Supp. 1991), and argues that the Statutory Unitization Act is inapplicable to the instant case.

A

"The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." **Continental Oil Co. v. Oil Conservation Comm'n**, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). The Oil and Gas Act gives the Commission and the Division the two major duties: the prevention of waste and the protection of correlative rights. NMSA 1978, § 70-2-11(A); **Continental Oil Co.**, 70 N.M. at 323, 373 P.2d at 817. Correlative rights are defined as

> the opportunity afforded . . . to the owner of each property in a pool to produce without waste his just and equitable share of the oil . . . in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil . . . under the property bears to the total recoverable oil . . . in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). In addition to its ordinary meaning, waste is defined to include "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil . . . ultimately recovered from any pool." NMSA 1978, § 70-2-3(A).

The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties." NMSA 1978, § 70-2-12(B)(7). In addition, the Division and the Commission are "empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11.

In the instant case, evidence presented to the Commission indicated that the Pool was located under three separate tracts of land. *{*113}* The Commission was called upon to determine the total amount of oil in the Pool and the proportionate share underlying each tract. Stevens's Deemar well was located so that it could produce oil from the top portion of the Pool, thereby avoiding waste that would have occurred unless the well was allowed. However, the well was located so that it could effectively drain the entire Pool. The Commission, charged with the protection of correlative rights of the other lease owners in the Pool, placed a production penalty on the well to protect these rights. Thus, the Commission attempted to avoid waste while protecting correlative rights. We hold that, under the facts of this case, the Commission did not exceed the broad statutory authority granted by the Oil and Gas Act.

Moreover, we are unpersuaded by the argument of both Stevens and Santa Fe that the Statutory Unitization Act prohibits the Commission's actions. They argue that, by enacting the Statutory Unitization Act, the legislature intended to limit the availability of forced unitization to secondary and tertiary recovery only. Both Santa Fe and Stevens quote the following language from the Statutory Unitization Act to support their argument:

> It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that would be recovered by **primary recovery alone** and not to what the industry understands as exploratory units.

Section 70-7-1 (emphasis added by Stevens and Santa Fe). They assert that this section precludes unitization of a field in primary production such as the Pool. We disagree.

We read the above quoted language from Section 70-7-1 merely to say that the Statutory Unitization Act is not applicable to fields in their primary production phase, such as the Pool in the instant case. Nothing contained in the Statutory Unitization Act, including the above quoted section, however, limits the authority of the Commission to regulate oil production from a pool under the Oil and Gas Act. The Commission still must protect correlative rights of lease holders in the Pool while preventing waste. The Commission still has broad authority "to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11(A). As discussed above, in the instant case the Commission's actions were within its statutory authority. We hold that the circumstances of this case do not implicate the Statutory Unitization Act and that the Commission's actions in effectively unitizing operation of the Pool were an appropriate exercise of its statutory authority

under the Oil and Gas Act.

B

Santa Fe contends that, by issuing Order No. R-9035, the Commission abused its discretion by failing to follow the rules and regulations established by Order No. R-8806. That order established the Pool and set out special rules and regulations designed to prevent waste and protect correlative rights.[4] The order also established notice and hearing requirements before the Commission could allow a non-standard well to be drilled in the Pool. Santa Fe contends that, by allowing Stevens to drill a well at a non-standard location, **i.e.**, to within 70 feet of Santa Fe's lease line, without prior notice and a hearing, the Commission violated its own rules. Santa Fe also contends that lowering the allowable production from the Holstrom well to 125 barrels of oil per day without adequate notice is a violation of these rules. Santa Fe concludes that, because Order No. 9035 was issued in a manner inconsistent with these rules, the order is void and Order Nos. 8917 and 8917-A should be reinstated. We disagree.

*{*114}* The Commission's actions in this case did not violate the Commission's rules established by Order No. 8806. While the Director did allow Stevens to make a second attempt to drill a well at an unorthodox location without notice to other lease holders in the Pool, the other lease holders had notice of the subsequent hearing to determine whether this well would be allowed to produce oil. In addition, this action was designed to further the Director's statutory duty to prevent waste by preventing added expense in the development of the field. Moreover, the Director could have approved drilling the second Stevens attempt at the hearing that it held prior to issuing Order No. 8917-A. Thus, the Commission's actions did not violate the rules established by Order No. 8806 and the Commission did not abuse its discretion in this matter.

V

The next issue that we address is whether the Commission's Order No. R-9035 is supported by substantial evidence. Stevens argues that the Commission, in determining correlative rights of Santa Fe, did not refer to the recoverable oil underlying the tract. Stevens claims that this resulted in the Commission apportioning more oil in the Pool to Santa Fe than Santa Fe deserves based on evidence introduced at the hearing. Santa Fe contends that the Commission ignored testimony of its expert witnesses that indicated that a greater portion of the Pool was under its tract. Santa Fe concludes that the Commission underestimated its proportionate share of oil in the Pool and that this estimate is not supported by substantial evidence.

Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record

demonstrates the reasonableness of the decision. **Id.**

Stevens contends that the Commission did not consider the recoverable reserves underlying the Santa Fe tract, **see** NMSA 1978, Section 70-2-33(H) (correlative right based on recoverable reserves), thereby overestimating the amount of oil under the Santa Fe tract. Stevens also contends that the Commission ignored testimony by Stevens's expert witnesses indicating that more of the Pool was under Stevens's tract than the Commission ultimately concluded. Stevens concludes that the record lacks substantial evidence to uphold the Commission's estimate of Santa Fe's proportionate share of oil in the Pool. Santa Fe contends that the Commission underestimated its proportional share of oil because the Commission failed to accept as conclusive the engineering and geologic evidence presented by Santa Fe of the location and extent of the Pool, which would result in a higher proportion of the oil being allocated to Santa Fe. Santa Fe concludes that the Commission's estimate of Santa Fe's proportionate share of oil in the Pool is not supported by substantial evidence.

In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. **See** NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engineering"). *{*115}* Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. **Stokes v. Morgan**, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n**, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

VI

The final issue raised by this appeal is whether the decision of the Commission is arbitrary and capricious.

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.'" **Garcia v. New Mexico Human Servs. Dep't**, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App. 1979) (quoting **Olson v. Rothwell**, 28 Wis. 2d 233, 239, 137 N.W.2d 86, 89 (1965)) [, **rev'd**, 94 N.M. 175, 608 P.2d 151 (1980)]. An abuse of discretion is established if the agency or lower court has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. **Le Strange v. City of Berkeley**, 26 Cal. Rptr. 550, 210 Cal. App. 2d 313 (1962). An abuse of discretion will also be found when the decision is contrary to logic and reason. **Newsome**

v. Farer, 103 N.M. 415, 708 P.2d 327 (1985); **Sowders v. MFG Drilling Co.**, 103 N.M. 267, 705 P.2d 172 (Ct. App. 1985).

Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

In the instant case, the action of the Commission is not arbitrary and capricious. As discussed in Section IV, **supra**, the Commission did not exceed its statutory authority nor violate its rules when it issued the final order in this case. As discussed in Section III, **supra**, the Commission did not deprive either Santa Fe or Stevens of their due process rights. As demonstrated in Section V, **supra**, the findings of the Commission were supported by substantial evidence. The Commission considered the evidence presented by the parties, and, in light of its statutory duties to protect correlative rights and avoid waste, fashioned a creative solution to resolve this dispute. While the Commission's solution was unique, such a result is not arbitrary or capricious "if exercised honestly and upon due consideration, even though another conclusion might have been reached." **Perkins**, 106 N.M. at 655-56, 748 P.2d at 28-29 (citing **Maricopa County v. Gottsponer**, 723 P.2d 716 (Ariz. App. 1986)). In accordance with the foregoing discussion, we hold that Order No. R-9035 is not arbitrary and capricious.

The judgment of the trial court is AFFIRMED.

IT IS SO ORDERED.

JOSEPH F. BACA, Justice

WE CONCUR:

RICHARD E. RANSOM, Chief Justice

JAY G. HARRIS, District Judge

OPINION FOOTNOTES

1 Santa Fe and Exxon USA were co-owners of both the lease and the production from the Holstrom well. While both Santa Fe and Exxon USA contested the application, for the sake of simplicity we will refer to them collectively as "Santa Fe."

2 The order estimated oil productive rock volume in the Pool to be 10,714 acre-feet and allocated the oil as follows: 21% to the tract on which Stevens held the lease and where the unorthodox well was located (E/2 W/2 of section 9); 53% to the tract on which Santa Fe held the lease and where the Holstrom well was located (SE/4 of section 9); 26% to the tract on which Santa Fe held the lease and where no producing well was located (NE/4 of section 9).

3 At the time, Santa Fe was producing 200 barrels per day of oil from its Holstrom well. Under the production penalty formula imposed by the prior Division order, Stevens would have been allowed to produce 35 barrels per day from its Deemars well.

4 These rules provided that the standard size for proration unit was to be 160 acres, that a well could

not be located closer than 660 feet from the outer boundary of a proration unit nor nearer than 1320 feet from the nearest well in the Pool, and that the maximum production allowed from a standard production unit would be 515 barrels per day.

---

817 P.2d 721

Virginia P. UHDEN, Plaintiff–Appellant,

v.

The NEW MEXICO OIL CONSERVATION COMMISSION and Amoco Production Company, Defendants–Appellees,

and

Meridian Oil, Inc., Intervenor–Appellee.

No. 19281.

Supreme Court of New Mexico.

Sept. 24, 1991.

Oil Conservation Commission denied application of owner in fee of oil and gas estate to vacate prior order granting increase in spacing pursuant to lessee's application. Owner appealed. The District Court, San Juan County, Benjamin S. Eastburn, D.J., upheld orders of Commission. Owner appealed. The Supreme Court, Franchini, J., held that: (1) proceeding on lessee's application for increase in spacing was adjudicatory and not rule making proceeding; (2) owner of fee in oil and gas estate had right to actual notice of proceeding on lessee's spacing application; and (3) increase in spacing was effective with respect to owner of fee from date of Commission's order denying owner's application to vacate increase in spacing order.

Reversed and remanded.

Montgomery, J., dissented and filed opinion.

1. Administrative Law and Procedure ⇐381

Mines and Minerals ⇐92.32

Proceeding of Oil Conservation Commission pursuant to application seeking increase in well spacing on oil and gas estate was adjudicatory and not rule making proceeding, where applicant presented witnesses and evidence regarding engineering and geological properties of particular reservoir, after hearings, Commission entered order based on findings of fact and conclusions of law, and order was not of general application, but rather pertained to limited area, persons affected were limited in number and identifiable, and order had immediate effect on owner in fee of oil and gas estate. NMSA 1978, § 70–2–7.

2. Mines and Minerals ⇐92.33

Spacing order can only be modified upon substantial evidence showing change of condition or change in knowledge of conditions, arising since prior spacing rule was instituted.

3. Mines and Minerals ⇐92.32

Owner in fee of oil and gas estate was entitled to actual notice of state proceeding on lessee's application for increase in well spacing, and failure to give notice deprived owner of property without due process of law, where owner's identity and whereabouts were known to party filing spacing application. NMSA 1978, § 70–2–7; Const. Art. 2, § 18; U.S.C.A. Const.Amends. 5, 14.

4. Constitutional Law ⇐277(1)

Mines and Minerals ⇐79.1(1)

Mineral royalty retained and reserved in conveyance of land is itself real property subject to due process protection. U.S.C.A. Const.Amends. 5, 14.

5. Mines and Minerals ⇐92.33

Increase in spacing of oil and gas well was effective as to owner in fee of oil and gas estate on date on which Oil Conservation Commission denied owner's application to vacate order granting increase in spacing on lessee's application, even though owner did not receive actual notice of initial proceeding in which Commission granted increase in spacing. NMSA 1978, § 70–2–18, subd. A.

Hinkle, Cox, Eaton, Coffield & Hensley, James Bruce, Albuquerque, for appellant.

Robert G. Stovall, Santa Fe, for appellee Oil Com'n.

Campbell & Black, William F. Carr, Santa Fe, for appellee Amoco Production.

W. Thomas Kellahin, Santa Fe, for appellee Meridian Oil.

OPINION

FRANCHINI, Justice.

On motion for rehearing, the opinion previously filed is hereby withdrawn and the opinion filed this date is substituted therefor.

This case comes before us on appeal from a district court judgment which affirmed a decision of the New Mexico Oil Conservation Commission. The issues presented are whether the proceeding was adjudicatory or rulemaking, and whether the royalty interests reserved by the lessor of an oil and gas estate were materially affected by a state proceeding so as to entitle the lessor to actual notice of the proceedings. We hold that the proceeding was adjudicatory and the lessor was so entitled under due process requirements of the New Mexico and United States Constitutions. Accordingly, we reverse.

Appellant Uhden is the owner in fee of an oil and gas estate in San Juan County. She transferred certain rights by lease to appellee Amoco Production Company (Amoco) in 1978. The lease included a pooling clause. Amoco drilled the Cahn Well, spaced on 160 acres. Uhden executed a division order with Amoco which entitled her to a royalty interest of 6.25 percent of production from the Cahn Well. Amoco began to remit royalty payments pursuant to the division order.

In late 1983, Amoco filed an application with the New Mexico Oil Conservation Commission (the Commission) seeking an increase in well spacing from 160 to 320 acres. The Cahn Well and Uhden's oil and gas interests were included in the area covered by Amoco's application. A hearing date was set to consider the application. At the time of application, NMSA 1978, Section 70-2-7 provided that notice of the Commission hearings and proceedings shall be by personal service or by publication.[1] It is undisputed that Amoco had knowledge of Uhden's mailing address, for Amoco had been sending royalty checks to Uhden. Nevertheless, Amoco chose to provide notice by publication only. After a hearing in January 1984, the Commission issued Order No. R-7588 which granted temporary approval of Amoco's application. Uhden did not attend or participate in the hearing.

A further hearing on the application was held in February 1986. The Commission issued Order No. R-7588-A, which granted final and permanent approval of Amoco's application. As before, Uhden was given notice only by publication. Uhden neither attended nor participated in the hearing. The result of the hearing had the effect of reducing Uhden's royalty interest from 6.25 percent to 3.125 percent of production. After Order No. R-7588 was issued, Amoco continued to pay royalties to Uhden based on 160 acre spacing. Amoco finally notified Uhden of the spacing increase in May 1986, made demand upon her for an overpayment of royalties, and retained all royalties due Uhden since then, claiming the right of offset. The asserted overpayment was approximately $132,000.00. Uhden subsequently filed her application with the Commission, designated Case No. 9129, seeking relief from the Commission Order Nos. R-7588 and R-7588-A based in part on her lack of notice. Her application was denied by the Commission by Order No. R-8653, dated May 11, 1988. Uhden unsuccessfully sought relief through the New Mexico Oil Conservation Commission appeal process. She then appealed to the district court, which upheld the orders of the Commission. This appeal followed.

Uhden argues that the lack of actual notice of a pending state proceeding deprived her of property without due process of law, in contravention of article II, section 18 of the New Mexico Constitution and the fourteenth amendment to the United States Constitution. We believe that this argument has a firm basis in New Mexico law, the law of other jurisdictions, and in the rulings of the United States Supreme Court.

1. NMSA 1978, § 70-2-7 was amended in 1987 to allow the Commission to prescribe by rule its rules of order or procedure. The current rule, New Mexico Oil Conservation Division Rule 1204, provides for notice by publication.

[1, 2] First, this was an adjudicatory and not a rulemaking proceeding. Under statewide rules, all gas wells in San Juan County are spaced on 160 acres. *See* N.M. Oil Conservation Rules 104(B)(2)(a) and 104(c)(3)(a). These rules are rules of general application, and are not based upon engineering and geological conditions in a particular reservoir. However, oil and gas interest owners, such as Amoco, can apply to the Commission to increase the spacing required by statewide rules. In this case, this was done by application and hearings where the applicant presented witnesses and evidence regarding the engineering and geological properties of this particular reservoir. After the hearings, the Commission entered an order based upon findings of fact and conclusions of law. This order was not of general application, but rather pertained to a limited area. The persons affected were limited in number and identifiable, and the order had an immediate effect on Uhden. Additionally, a spacing order can only be modified upon substantial evidence showing a change of condition or change in knowledge of conditions, arising since the prior spacing rule was instituted. *See Phillips Petroleum Co. v. Corporation Comm'n*, 461 P.2d 597 (Okla. 1969). We find that this determination was adjudicative rather than rulemaking. *See Harry R. Carlisle Trust v. Cotton Petroleum Corp.*, 732 P.2d 438 (Okla.1987).

[3, 4] Second, Uhden clearly has a property right in the oil and gas lease. "In this state a grant or reservation of the underlying oil and gas, or royalty rights provided for in a mineral lease as commonly used in this state, is a grant or reservation of real property. Mineral royalty retained or reserved in a conveyance of land is itself real property." *Duvall v. Stone*, 54 N.M. 27, 32, 213 P.2d 212, 215 (1949) (citation omitted). The appellees contend that Uhden's property right is somehow diminished by her lessor/lessee relationship with Amoco. They argue that the voluntary pooling clause in her lease, not the state's action in approving the 320 acre spacing pool, caused the reduction of her royalty interest. Pooling is defined as "the bringing together of small tracts sufficient for the granting of a well permit under applica spacing rules." 8 H. Williams and C. M ers, *Oil and Gas Law* 727 (1987). Withi the subject spacing orders, Amoco co never have pooled leases to form 320 a well units. The Commission's order aut rizing 320 acre spacing was a conditio precedent to pooling tracts to form a 32 acre well unit. *See Gulfstream Petroleu Corp. v. Layden*, 632 P.2d 376 (Okla.198 (entry of a spacing order is a jurisdictiona prerequisite to pooling). Thus, it was th spacing order, and not the pooling clause which harmed Uhden. Pooling is therefor immaterial under these circumstances, and the spacing order deprived Uhden of a property interest. Uhden's property right was worthy of constitutional protection, regardless of the fact that she had contractually granted Amoco the right to extract oil and gas from the estate.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), the United States Supreme Court stated that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314, 70 S.Ct. at 657. The Court also said that "[b]ut when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315, 70 S.Ct. at 657. Significantly, the Court refused to sanction notice by publication to those whose identity and whereabouts were ascertainable from sources at hand.

The due process requirements of fairness and reasonableness as stated in *Mullane* are echoed in the case law of this state. Administrative proceedings must conform to fundamental principles of justice and the requirements of due process of law. A litigant must be given a full opportunity to be heard with all rights related thereto. The essence of justice is largely procedural.

Procedural fairness and regularity are of the indispensable essence of liberty. *In re Miller*, 88 N.M. 492, 496, 542 P.2d 1182, 1188 (Ct.App.1975) (citations omitted), *rev'd on other grounds*, 89 N.M. 547, 555 P.2d 142 (1976).

Similarly, it has been held that due process requires the state to provide notice of a tax sale to parties whose interest in property would be affected by the sale, as long as the names and addresses of such parties are "reasonably ascertainable." *Brown v. Greig*, 106 N.M. 202, 206, 740 P.2d 1186, 1190 (Ct.App.), *cert. denied*, 106 N.M. 174, 740 P.2d 1158 (1987). The court of appeals also has held that when the state has reason to know that the owner of real property subject to delinquent tax sale is deceased, then reasonable notice of the proposed tax sale must be given to decedent's personal representative where one has been appointed and where record of that fact is reasonably ascertainable. *Fulton v. Cornelius*, 107 N.M. 362, 366, 758 P.2d 312, 316 (Ct.App.1988).

We are also persuaded by a line of cases from Oklahoma, a fellow oil and gas producing state. The facts of *Cravens v. Corporation Commission*, 613 P.2d 442 (Okla. 1980), *cert. denied*, 450 U.S. 964, 101 S.Ct. 1479, 67 L.Ed.2d 613 (1981), are similar to those of the case before us. An application was made for an increase in well spacing to the state commission. Although the applicants knew the identity and whereabouts of a well operator whose interests would be affected by a change in spacing, they made no attempt to provide actual notice. The applicant complied with the relevant statute and rule, which prescribed notice by publication of a spacing proceeding. The court held that when the names and addresses of affected parties are known, or are easily ascertainable by the exercise of diligence, notice by publication does not satisfy constitutional due process requirements. *Id.* at 444. Similar results were reached in *Union Texas Petroleum v. Corporation Commission*, 651 P.2d 652 (Okla. 1981), *cert. denied*, 459 U.S. 837, 103 S.Ct. 82, 74 L.Ed.2d 78 (1982), and *Louthan v. Amoco Production Co.*, 652 P.2d 308 (Okla.Ct.App.1982).

[5] In all of the foregoing cases, great emphasis is placed on whether the identity and whereabouts of the person entitled to notice are reasonably ascertainable. In this case, Uhden's identity and whereabouts were known to Amoco, the party who filed the spacing application. On these facts, we hold that if a party's identity and whereabouts are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed a spacing application to provide notice of the pending proceeding by personal service to such parties whose property rights may be affected as a result. Thus, the Commission Order Nos. R-7588 and No. R-7588-A are hereby void as to Uhden. We do find that Uhden eventually had notice and an opportunity to be heard on the issue of spacing. Her Case No. 9129, which requested the Commission to vacate the 320 acre spacing, resulted in Order No. R-8653, dated May 11, 1988. An increase in spacing is effective from the date of such order. *See* NMSA 1978, § 70-2-18(A) (Repl.Pamp.1987). Therefore, we find the 320 acre spacing effective to Uhden as of May 11, 1988. Finally, the principles set forth in this opinion are applicable to Uhden and to the Commission cases filed after the date of the filing of this opinion. The judgment of the district court is reversed and the cause is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

SOSA, C.J., and RANSOM and BACA, JJ., concur.

MONTGOMERY, J., dissents.

MONTGOMERY, Justice (dissenting).

There is much in the majority opinion with which I certainly agree. The lofty principles of due process—of a property owner's entitlement to notice and an opportunity to be heard before she can be deprived of her property rights—are of course thoroughly ingrained in our state and federal constitutional jurisprudence. Likewise, the proposition that the royalty

interest of a lessor under an oil and gas lease is a property right accorded constitutional protection under New Mexico law cannot be questioned. My quarrel with the majority opinion boils down to my flat disagreement with this simple statement: "The result of the hearing had the effect of reducing Uhden's royalty interest from 6.25 percent to 3.125 percent of production."

The purpose of the hearing before the Commission was to determine the appropriate size of a proration unit in the Cedar Hills–Fruitland Basal Coal Gas Pool in northwestern New Mexico, in which Amoco operated several wells and in which Uhden's mineral interests were located. Under NMSA 1978, Section 70–2–17(B) (Repl. Pamp.1987), a "proration unit" is defined as "the area that can be efficiently and economically drained and developed by one well...."

Determining the size of a proration unit has nothing to do with the ownership of property rights in the field in which the unit is located. The area which can be "efficiently and economically drained" by a single well is a function of the physical characteristics of the reservoir into which the well is to be drilled. Prescribing the size of a proration unit is a form of land-use regulation carried out by the Commission that depends entirely on the physical or geologic characteristics of the region and only affects the various property rights within the region in the same way as any other land-use regulation affects property owners within the area regulated. It is, if you will, a form of "rulemaking," performed by the Commission in the discharge of its duties to prevent waste and protect correlative rights. *See id.;* §§ 70–2–11, 70–2–12(B)(10).

When the Commission issued Order No. R–7588–A, Uhden's royalty interest was unaffected. In order to affect her interest, a further step was necessary—namely, the pooling of her interest with a similar interest in the 320–acre tract surrounding the Cahn Well. That further step was taken; but it was Amoco, not the Commission, that took it. Amoco took it because Amoco was authorized by the lease with Uhden to take it. As the majority notes, the lease contained a voluntary pooling clause under which Amoco was authorized to pool Uhden's royalty interest with others to form production units of not more than 640 acres.

It is true that the Commission's order authorizing 320–acre spacing was a condition precedent to Amoco's pooling of Uhden's interest in forming a 320–acre unit. However, the majority's conclusion that "it was the spacing order, and not the pooling clause which harmed Uhden" does not follow. Probably *every* zoning and other land-use regulation is a condition precedent to action taken by one landowner consistent with the regulation that may in some way adversely affect another landowner subject to the same regulation. But that does not mean that the *regulation* causes the adverse effect; if the adversely affected landowner has authorized the landowner taking the action to do so, the mere fact that the action conforms with an applicable land-use regulation does not make the regulation the cause of the adversely affected owner's harm.

Had Uhden owned the royalty interest on an undivided one-half interest in the entire 320 acres in the new unit, the Commission's spacing order would have had no effect on her cash flow. She would have continued to receive 6.25% of the proceeds from the single well allowed on the new unit. As it was, she had to share her 6.25% interest with the royalty owners of the other mineral interests pooled to form the new unit, but in return she received the right to receive a share of *their* royalty interest in the gas subject to their lease.

I realize that the trade-off just mentioned is small consolation to Uhden and that in a very real sense, at least in terms of her current cash flow, her rights have been reduced significantly. However, that is the result not of the Commission's spacing order, but of Amoco's decision to exercise its right under the lease to effect a voluntary pooling. I believe that the notoriously slippery distinction between rulemaking and adjudication is not particularly

helpful in this case and that, if the Commission's action *had* reduced Uhden's interest, then the constitutional concerns in the majority opinion would be well taken—whether or not the action constituted "rulemaking" rather than "adjudication." However, I do not think those concerns are implicated when the lessee exercises the right the lessor has given it in the lease to pool the leasehold and the associated royalty with other interests to form a new unit.

The majority having concluded otherwise, I respectfully dissent.

817 P.2d 726

Maria D. SANCHEZ, Petitioner,

v.

SIEMENS TRANSMISSION SYSTEMS and Zurich-American Insurance Group, Respondents.

No. 19820.

Supreme Court of New Mexico.

Sept. 25, 1991.

In workers' compensation case, worker's compensation administration, John Pope, Workers' Compensation Judge, awarded claimant temporary total disability and other benefits. Employer appealed. The Court of Appeals, 112 N.M. 236, 814 P.2d 104, affirmed in part, reversed in part, and remanded. Certiorari was granted. The Supreme Court, Ransom, J., held that: (1) legal counseling provided to claimant before discontinuation of benefits could be considered by workers' compensation judge in determining attorney fees, and (2) award of fees in amount equivalent to 102% of present value of final award was not per se excessive.

Reversed.

1. Workers' Compensation ⇐1981

Even though recovery of compensation is prerequisite to allowance of attorney fees, legal services rendered prior to termination of benefits may still be compensable. NMSA 1978, §§ 52-1-54, 52-1-54, subds. A-L.

2. Workers' Compensation ⇐1981

Employer is not liable for consultation fees incurred prior to termination of disability benefits only if employer does not wrongly terminate benefits. NMSA 1978, §§ 52-1-54, 52-1-54, subds. A-L.

3. Workers' Compensation ⇐1981

Attorneys are entitled to adequate compensation for work necessarily performed in workers' compensation cases, and, thus, determination of what fees are reasonable and proper lies within sound discretion of workers' compensation judge. NMSA 1978, § 52-1-54, subd. F.

4. Workers' Compensation ⇐1981

Attorney fees are not set at any specific percentage of claimant's recovery in workers' compensation case.

5. Workers' Compensation ⇐1981

Relationship between attorney fee award and actual recovery in workers' compensation case may be considered in determining reasonableness of attorney fees.

6. Workers' Compensation ⇐1983

Award of attorney fees in amount equivalent to 102% of present value of claimant's final workers' compensation award was not per se excessive; issues were seriously contested and complex, and, when reduced to hourly rate, fee did not appear unreasonable.

Jarner & Olona, Mark D. Jarner, Los Lunas, for petitioner.

Ray A. Padilla, Padilla, Riley & Shane, P.A., Albuquerque, for respondents.

OPINION

RANSOM, Justice.

We granted certiorari to review two issues addressed by the court of appeals in

1999-NMSC-021, 127 N.M. 120, 38 N.M. St. B. Bull. 19 JOHNSON V. STATE OIL CONSERVATION COMM'N (S. Ct. 1999) 978 P.2d 327, 1999 N.M. Lexis 129

TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr., Trust u/a° February 12, 1983, et al., Plaintiffs-Appellees,
vs.
NEW MEXICO OIL CONSERVATION COMMISSION, Defendant-Appellant. TIMOTHY B. JOHNSON, Trustee for Ralph A. Bard, Jr., Trustee u/a° February 12, 1983, et al., Plaintiffs-Appellees, v.
BURLINGTON RESOURCES OIL & GAS COMPANY, Defendant-Appellant.

Docket No. 25,061 consolidated with: Docket No. 25,062
SUPREME COURT OF NEW MEXICO
1999-NMSC-021, 127 N.M. 120, 38 N.M. St. B. Bull. 19, 978 P.2d 327, 1999 N.M. LEXIS 129
April 13, 1999, Filed
APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY. W. Byron Caton, District Judge.

As Corrected August 13, 1999. Second Correction June 7, 1999. Released for Publication April 29, 1999.

COUNSEL

Marilyn S. Hebert, Special Assistant Attorney General, Santa Fe, NM, Kellahin & Kellahin, W. Thomas Kellahin. Santa Fe, NM for Appellants.
Gallegos Law Firm, P.C., J.E. Gallegos, Jason E. Doughty, Santa Fe, NM for Appellee.

JUDGES

PAMELA B. MINZNER, Chief Justice. WE CONCUR: JOSEPH F. BACA, Justice, GENE E. FRANCHINI, Justice, PATRICIO M. SERNA, Justice.
AUTHOR: PAMELA B. MINZNER

OPINION

*{*121}*

MINZNER, Chief Justice.

{1} This is an appeal from the district court's review of an order by the New Mexico Oil Conservation Commission, which increased the spacing requirements for deep wildcat gas wells in certain areas of the state. Specifically, the Commission and the real party in interest, Burlington Resources Oil & Gas Co., appeal the district court's ruling that the order is without effect as to Timothy P. Johnson and other individual holders (Holders) of working interests and operating rights affected by the order.

{2} After the Commission issued its order, Holders timely filed with the Commission an

application for rehearing, but the Commission failed to act upon the application within ten days. Holders then appealed to the district court, naming the Commission and Burlington as defendants. The district court found in favor of Holders, ruling that the order, as against them, was without effect. The Commission and Burlington now appeal to this Court.

{3} The question we address in this appeal is whether the Commission violated the New Mexico Oil and Gas Act (OGA), NMSA 1978, §§ 70-2-1 to -38 (1935, as amended through 1996, prior to 1998 amendment), and its implementing regulations by issuing its order without first providing Holders with actual notice of the Commission's proceedings on Burlington's application for an increase in gas-well spacing requirements. We conclude that the Commission's order is invalid with respect to Holders, because Holders were not afforded reasonable notice of the proceedings as required by the OGA and its implementing regulations. Our conclusion that the Commission's order is invalid with respect to Holders makes it unnecessary for us to reach the question whether the Commission's order should be vacated on other grounds. We affirm the district court's judgment.

I.

{4} The parties involved in this dispute include Holders, Burlington, and the Commission. In all, Holders control over an eighty-percent working interest in the east half and southwest quarter of Section 9, Township 31 North, Range 10 West, San Juan County, New Mexico (Section 9). Burlington is also a working-interest owner in Section 9. The Commission is a creature of the OGA. **See** § 70-2-4. Pursuant to the OGA, the Commission regulates certain aspects of oil and gas operations throughout the state.

{5} The Oil Conservation Division, which is not a party to this suit, also is a creature of the OGA. **See** § 70-2-5. The Division has jurisdiction, authority and control of and over all persons, matters or things necessary or proper to enforce effectively the provisions of [the OGA] or any other law of this state relating to the conservation of oil or gas and the prevention of waste of potash as a result of oil or gas operations.

Section 70-2-6(A). The Commission has "concurrent jurisdiction and authority with the Division to the extent necessary for the *{*122}* Commission to perform its duties as required by law." Section 70-2-6(B).

{6} This case concerns the Commission's modification of Oil and Gas Rule 104, which addresses the spacing of wildcat gas wells. From 1950 until the time of this suit, Rule 104 had required all wildcat gas wells in the San Juan Basin to be located on drilling tracts consisting of 160 contiguous surface acres. **See** Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(c) (Jan. 1, 1950); Well Spacing; Acreage Requirements for Drilling Tracts, N.M. Oil Conservation Comm'n, Rule 104(b) (Feb. 1, 1951); Well Spacing: Acreage Requirements for Drilling Tracts, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.C.104.B(2)(a) (May 25, 1964, as amended through Feb. 1, 1996, prior to June 30, 1997 amendment).

{7} Rule 104 defines "wildcat well." Since 1996, the rule has provided the following definition for a "wildcat well" in the San Juan Basin:

> Any well which is to be drilled the spacing unit of which is a distance of 2 miles or more from:
>
> (i) the outer boundary of any defined pool which has produced oil or gas from the formation to which the well is projected; and
>
> (ii) any other well which has produced oil or gas from the formation to which the proposed well is projected . . . .

19 NMAC 15.C.104.A(1)(a) (Feb. 1, 1996).

{8} Beginning in June 1996, Burlington sent correspondence to Holders, seeking either to purchase or to farm-out Holders' acreage in Section 9, among other areas. Specifically, Burlington sought to drill high-risk deep wildcat gas wells in these areas. Burlington also planned to file an application with the Commission for the purpose of changing the Rule 104 spacing requirement from 160 to 640 acres for deep wildcat gas wells in the San Juan Basin. On February 27, 1997, Burlington filed its application, which was docketed as Commission Case No. 11745.

{9} Pursuant to Burlington's application in Case No. 11745, the Commission held a public hearing on March 19, 1997. At this hearing, Burlington's counsel informed the Commission that, by certified mail, Burlington had provided personal notice of the application and the hearing to nearly 200 operators in the San Juan Basin. For its part, the Commission provided notice by publication and afforded personal notice to 267 parties on its own mailing list. Apparently none of the Holders were on the Commission's mailing list, for none of them received personal notice from the Commission.

{10} Burlington did not provide personal notice to any of the Holders on either the application or the hearing, even though Burlington had actual knowledge of all of the Holders' names, addresses, and Section 9 interests long before it had filed its application. In fact, at the time of its filing, Burlington had been remitting overriding royalty payments to each of the Holders on a monthly basis, and Burlington had been engaged in litigation against Holders since 1992. In addition, Burlington not only had been seeking to purchase or to farm-out Holders' acreage in Section 9, the company had also selected Section 9 as the location for one of its initial deep-drilling test wells and had prepared a detailed Authority for Expenditure for this well. Further, Burlington had maintained a computerized database of the names and addresses of Holders and could have given them actual notice of its application and the proceedings thereon. Despite Burlington's actual knowledge of and involvement with Holders and their respective

Section 9 working interests, Burlington's counsel, during the Commission hearing, testified that, "to the best of [Burlington's] knowledge and belief[,] there [was] no opposition to having the Commission change [Rule 104] and allow deep gas to be developed on 640-acre spacing."

{11} During the Commission proceedings, only one party, Amoco Production Co., voiced some opposition to Burlington's application. Nonetheless, Amoco did not object to 640-acre spacing outright. Rather, believing it to be premature to establish a deep wildcat gas-well spacing order for the entire San *{*123}* Juan Basin, Amoco merely suggested "use of an Exploratory spacing order which would space a drillsite on 640 acres to be revisited after data was accumulated." Amoco is not a party to the suit before us.

{12} At the Commission hearing, Burlington's senior staff landman testified that Burlington had notified approximately 198 out of 315 operators in the San Juan Basin. The landman also testified that, apart from Amoco's suggestion, he was not aware of any other suggestions on Burlington's application. In fact, the landman explained, "We have received support."

{13} On June 5, 1997, the Commission entered its Order No. R-10815, which concluded, among other things, that Division Rule 104 should be amended on a permanent basis to increase the spacing requirements for deep wildcat gas wells in the San Juan Basin to 640 acres. **In re Burlington Resources Oil & Gas Co.**, N.M. Oil Conservation Comm'n Case No. 11745 (June 5, 1997) (Order No. R-10815). On June 11, 1997--six days after the Commission issued its order--Burlington filed an application with the Division, seeking to impose a compulsory pooling of Holders' interests in the east half and southwest quarter of Section 9 for a deep wildcat gas well proposed by Burlington. Obtaining Commission Order R-10815 was a condition precedent to Burlington's initiation of compulsory pooling proceedings against Holders, for under Rule 104 as extant prior to June 5, 1997, Burlington could not have petitioned the Division to impose a compulsory pooling order for 640 acres. **See** 19 NMAC 15.C.104.B(2)(a) (Feb. 1, 1996, prior to June 30, 1997 amendment) (requiring all wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 160 contiguous surface acres).

{14} On June 24, 1997, Holders timely filed with the Commission an Application for Rehearing of Order No. R-10815. When the Commission failed to act upon the application within ten days, the application was deemed denied. **See** § 70-2-25(A). Holders then properly appealed to the district court, naming the Commission and Burlington as defendants. Holders also moved for a stay of Order No. R-10815 for the duration of the appeal, and the district court granted the motion as to Holders only. Rule 104 was finally amended on June 30, 1997. **See** 19 NMAC 15.C.104.B(2)(b) (June 30, 1997) (requiring deep wildcat gas wells drilled in the San Juan Basin to be located on drilling tracts of 640 contiguous surface acres).

{15} In its Opinion and Final Judgment, the district court found in favor of Holders, ruling that, "knowing of its plan to pool the interests of [Holders] for a wildcat well on 640-acre spacing and knowing the identities and whereabouts of [Holders], Burlington's failure to provide personal notice to them of the spacing case proceeding . . . deprived [Holders] of their property without due process of law." Accordingly, the district court ruled that the order, as against Holders, was without effect. The Commission and Burlington now appeal to this Court, which has jurisdiction

under Section 70-2-25(B).[1]

II.

{16} This Court conducts a whole-record review of the Commission's factual findings. **See Santa Fe Exploration Co. v. Oil Conservation Comm'n**, 114 N.M. 103, 114, 835 P.2d 819, 830 (1992). On legal questions such as the interpretation of the OGA or its implementing regulations, we may afford some deference to the Commission, particularly if the question at hand implicates agency expertise. **See generally Regents of Univ. of N.M. v. New Mexico Fed'n of Teachers**, 1998-NMSC-20, P17, 125 N.M. 401, 962 P.2d 1236. "However, the Court may always substitute its interpretation of the law for that of the [Commission] 'because it is the function of courts to interpret the law.'" **Fitzhugh v. New Mexico Dep't of Labor**, 1996-NMSC-44, P22, 122 N.M. 173, 922 P.2d 555 (quoting **Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n**, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

{17} *{*124}* At the outset, we note that the district court held that Holders were denied due process of law under the United States and New Mexico Constitutions because they were not given personal notice of the Commission's proceedings on Burlington's application for increased spacing requirements. We agree with the district court that the failure to provide Holders with actual notice of the proceedings on Burlington's application for increased spacing requirements is dispositive. We do not agree, however, that it is necessary to reach the question whether this failure amounts to a violation of Holders' constitutional rights to due process. "Courts will not decide constitutional questions unless necessary to a disposition of the case." **Huey v. Lente**, 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973); **cf. Garcia v. Las Vegas Med. Ctr.**, 112 N.M. 441, 444, 816 P.2d 510, 513 (Ct. App. 1991) ("There would be no need to decide what federal procedural due process required if the plaintiffs could obtain the desired relief from an [order requiring] compliance with state law."). As we explain below, our disposition in this case only requires interpretation of the OGA and the Commission's procedural rules. Nevertheless, we are guided by the canon of statutory construction that "if a statute is susceptible to two constructions, one supporting it and the other rendering it void, a court should adopt the construction which will uphold its constitutionality." **Huey**, 85 N.M. at 598, 514 P.2d at 1094. We apply this canon to the Commission's procedural rules in the same manner that we apply it to a statute. **See Wineman v. Kelly's Restaurant**, 113 N.M. 184, 185, 824 P.2d 324, 325 (Ct. App. 1991) (applying a canon of construction used to interpret statutes to an interpretation of a rule adopted by the Workers' Compensation Administration). In applying this canon, we are also mindful of the holding in **Uhden v. New Mexico Oil Conservation Comm'n**, 112 N.M. 528, 817 P.2d 721 (1991), which relied on principles of due process to conclude that notice had been constitutionally deficient.

{18} In reaching its holding, the **Uhden** court noted that "the essence of justice is largely procedural." **Id.** at 530, 817 P.2d at 723. We reaffirm this principle today. In this case, however, we do not rely on the **Uhden** court's constitutional rationale. **Cf. State ex rel. Hughes v. City of Albuquerque**, 113 N.M. 209, 210, 824 P.2d 349, 350 (Ct. App. 1991) ("[The] violation of a state law requiring specific procedures does not necessarily constitute a violation of constitutional due process."); **see also** Bernard Schwartz, **Administrative Law** § 5.2, at 204 (2d

ed. 1984). Instead, we conclude that Holders are entitled to relief because the notice procedures required by the OGA and the Oil and Gas rules were not followed. **See** Additional Notice Requirements (Rule 1207), Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't. 19 NMAC 15.N.1207.D (Feb. 1, 1996) ("Evidence of failure to provide notice as provided in this rule may, upon a proper showing be considered cause for reopening the case."); **cf. Hughes**, 113 N.M. at 210, 824 P.2d at 350 (concluding that a party "may be entitled to relief if the procedures mandated by city ordinance were not followed"); **Atlixco Coalition v. Maggiore**, 1998-NMCA-134, P15, 125 N.M. 786, 965 P.2d 370 (concluding that an administrative agency "is required to act in accordance with its own regulations"). Accordingly, we reject the Commission's contention that it provided the requisite notice for a hearing on a rule amendment, as well as Burlington's contention that Holders were not entitled to actual notice of the proceedings under the OGA.

{19} The relevant statutory notice provisions in the OGA are contained in Sections 70-2-23 and 70-2-7. Section 70-2-23 imposes a "reasonable notice" requirement for all oil and gas hearings. This section provides, in pertinent part:

> Except as provided for herein [i.e., exceptions for emergencies], before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act, a public hearing shall be held at such time, place and manner as may be prescribed by the Division. The Division shall first give **reasonable notice** of such hearing (in no case less than ten days, except in an emergency) and at any such hearing any person having an interest in the subject *{*125}* matter of the hearing shall be entitled to be heard.

(Emphasis added).

{20} Section 70-2-7 provides: "The [Division] shall prescribe by rule its rules of order or procedure in hearings or other proceedings before it under the [OGA]." Although the text of Section 70-2-7 does not expressly mention the word "notice," the Division, pursuant to the authority in this section, has adopted rules establishing notice requirements for oil and gas hearings.

{21} In terms of publication notice for an oil and gas hearing, the Division has adopted the following rule:

> Notice of each hearing before the Commission and before a Division Examiner shall be by publication once in accordance with the requirements of Chapter 14, Article 11, N.M.S.A. 1978, in a newspaper of general circulation in the county, or each of the counties if there be more than one, in which any land, oil, gas, or other property which is affected may be situated.

Publication of Notice of Hearing, Oil Conservation Div., Energy, Minerals, & Natural Resources Dep't, 19 NMAC 15.N.1204 (Feb. 1, 1996). The referenced statutory provision mandates the following:

> Any notice or other written matter whatsoever required to be published in a newspaper by any law of this state, or by the order of any court of record of this state, shall be deemed and held to be a legal notice or advertisement within the meaning of [14-11-1 to 14-11-4, 14-11-7, 14-11-8 NMSA 1978].

NMSA 1978, § 14-11-1 (1937) (bracketed material in original).

{22} The Division has also adopted additional notice rules for specific situations. **See** 19 NMAC 15.N.1207. One such situation involves applications that may affect a property interest of other individuals or entities: "In cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities: (a) Actual notice shall be given to such individuals or entities by certified mail (return receipt requested)." 19 NMAC 15.N.1207.A(11).

{23} Pursuant to the rules promulgated under Section 70-2-7, Burlington and the Commission provided notice by publication. Although the notice by publication satisfied a necessary component of the statutory notice requirements, it was by no means sufficient. Section 7-2-23 of the OGA requires "reasonable notice" as a condition precedent to a hearing. This "reasonable notice" mandate should circumscribe whatever Division rules are promulgated for the purpose of notifying interested persons.

{24} In terms of the rules, we note that, at the time of its filing, the application, if approved, would have affected Holders' interests in Section 9. Specifically, we note that the increased spacing requirements would have expanded the scope of Holders' production-cost liability to include proportional allocations for wildcat gas wells drilled anywhere in a 640-acre area, rather than in a mere 160-acre area, and that Holders would have been able to avoid these unforeseen allocations only if they limited their rights to obtain production royalty payments in the future. **See** § 70-2-17(C). Furthermore, if the Commission increased the spacing requirements, a subsequent pooling order--if granted--would have precluded the owners from drilling deep wildcat gas wells anywhere else on Section 9. **See** 19 NMAC 15.C.104.B(2)(b) (June 30, 1997).

{25} If Burlington succeeded in pooling Holders' Section 9 property interests, and if Holders intended to enjoy the privileges of development and ensure receipt of full royalties in the future, they would have been compelled to contribute to the drilling costs associated with Burlington's high-risk wildcat well. In fact, as Holders maintain, they would have had to bear a higher percentage of the costs in aggregate than even Burlington would have had to bear. Although Burlington was well aware of these facts, it refused to provide Holders with actual notice of the proceedings on its application for increased spacing. Given that Burlington intended to affect Holders' Section 9 property interests with a subsequent pooling order, under Rule 1207.A(11) Holders were entitled to actual notice of the spacing application. *{*126}* Because neither

Burlington nor the Commission provided Holders with actual notice of the proceedings on the spacing application, Holders were denied the reasonable notice that the OGA and its implementing regulations required.

{26} Burlington asserts that Rule 1207.A(11) only applies to "adjudicatory" proceedings and has no application in this case because the proceedings in this case concern a rule amendment rather than an adjudication. To support the assertion that actual notice was not required for a rule amendment, Burlington and the Commission expend much effort in distinguishing **Uhden**, 112 N.M. at 530, 817 P.2d at 723, on the ground that the order in that case "was not of general application, but rather pertained to a limited area . . . [and] the persons affected were limited in number." Upon analysis, however, it becomes clear that this distinction is not at all dispositive. It is well established that notice requirements are determined on the basis of "'the character of the action, rather than its label.'" **Miles v. Board of County Comm'rs**, 1998-NMCA-118, P9, 125 N.M. 608, 964 P.2d 169 (quoting **Harris v. County of Riverside**, 904 F.2d 497, 501-02 (9th Cir. 1990)), **cert denied**, No. 25,292 (1998). As one commentator explains:

> No test can draw anything like a mathematical line between rulemaking and adjudication. . . . An adjudication may be based upon a new rule of law that is announced for the first time by the deciding tribunal. Conversely, a rule may have an effect on particular rights comparable to a decision in an adjudicatory proceeding involving the given parties.

Schwartz, § 4.15, at 190 (footnote omitted); **accord** 2 Am. Jur. 2d **Administrative Law** § 155, at 176 (1994); 4 Jacob A. Stein et al., **Administrative Law** § 33.01[1], at 33-3 n.2 (1998); **cf. Uhden**, 112 N.M. at 532-33, 817 P.2d at 725-26 (Montgomery, J., dissenting) (asserting that "the notoriously slippery distinction between rulemaking and adjudication is not particularly helpful in this case"). On the facts presented here, we cannot conclude that the Commission's order is accurately characterized as simply a rule amendment as it applies to Holders. Moreover, neither the "reasonable notice" requirement in Section 70-2-23 of the OGA nor the notice requirements in Rule 1207.A are expressly limited to adjudications.

{27} In **High Ridge Hinkle Joint Venture v. City of Albuquerque**, 1998-NMSC-50, P5, 126 N.M. 413, 970 P.2d 599, we observed the following rules of statutory interpretation:

> The first rule is that the "plain language of a statute is the primary indicator of legislative intent." **General Motors Acceptance Corp. v. Anaya**, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985). Courts are to "give the words used in the statute their ordinary meaning unless the legislature indicates a different intent." **State ex rel. Klineline v. Blackhurst**, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). The court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written." [**Burroughs v. Board of County Comm'rs**, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975)].

These canons of statutory construction apply to regulatory and rule interpretation as well. **See Wineman**, 113 N.M. at 185, 824 P.2d at 325.

{28} The language of Section 70-2-23 of the OGA plainly states that, except for emergencies, the requirement of "reasonable notice" applies to hearings regarding "any rule, regulation or order, including revocation, change, renewal or extension thereof." In addition, Rule 1207.A expressly provides that "each applicant for hearing before the Division or Commission shall give additional notice as set forth below." The rule makes no mention of "adjudication" or "rulemaking," or other words of similar import. The plain language of Rule 1207.A(11) applies to "cases of applications not listed above, the outcome of which may affect a property interest of other individuals or entities." The only limitations on the phrase "cases of applications" are the modifying phrases "not listed above" and "the outcome of which may affect a property interest of other individuals or entities." Because an application for increased spacing requirements is not listed earlier in the rule, and because the spacing order in this case {*127} clearly would affect Holders' Section 9 property interests, this case is governed by the plain language of Rule 1207.A(11).

{29} After careful review of the administrative record, we are not convinced that Burlington or the Commission have substantially complied with the "reasonable notice" requirements of the OGA or the specific notice requirements of Rule 1207.A(11) in this case. **See** 19 NMAC 15.N.1207.C ("At each hearing, the applicant shall cause to be made a record . . . that the notice provisions of this Rule 1207 have been complied with . . . ."). Our conclusion that substantial compliance is lacking makes it unnecessary for us to reach the issue whether strict compliance is required in this instance. **Cf. Green Valley Mobile Home Park v. Mulvaney**, 1996-NMSC-37, PP10-11, 121 N.M. 817, 918 P.2d 1317 (discussing circumstances in which strict compliance with mandatory notice provisions of a statute is required).

{30} The record shows that (1) Burlington had actual knowledge of Holders' interests in Section 9, (2) Burlington targeted Holders' interests long before it applied for increased well-spacing requirements, (3) Burlington intended to affect Holders' interests with a subsequent pooling order, (4) Burlington had actual knowledge of Holders' identities and whereabouts, and (5) Burlington had regular contacts with Holders. Under these circumstances, neither Burlington nor the Commission have shown that sending actual notice to Holders would have been more difficult than sending actual notice to the other persons with potentially affected property interests whom the company chose to notify in this case. Indeed, Burlington's prior dealings with Holders would appear to have made it easier to notify Holders than to notify others. Because Holders were not provided with actual notice under these circumstances, we conclude that Burlington and the Commission did not comply with the notice requirements of the OGA and its implementing regulations, and this failure to comply renders the Commission's order void with respect to Holders. Thus, we need not reach the issue whether the Commission's order should be voided on other grounds.

III.

{31} Because Burlington and the Commission did not comply with the notice requirements of the OGA and its implementing regulations, we conclude that the Commission's Order No. R-10815 concerning the spacing requirements for deep wildcat gas wells in the San Juan Basin is void with respect to Holders. Accordingly, we affirm the district court's final judgment in this matter.

{32} **IT IS SO ORDERED.**

PAMELA B. MINZNER, Chief Justice

WE CONCUR:

JOSEPH F. BACA, Justice

GENE E. FRANCHINI, Justice

PATRICIO M. SERNA, Justice

OPINION FOOTNOTES

1 We do not consider the effect, if any, of the changes brought about by the 1998 amendment to Section 70-2-25(B) because this appeal was taken well before the effective date of that amendment.

MILLER, STRATVERT & TORGERSON, P.A.
LAW OFFICES
POST OFFICE BOX 1986
SANTA FE, NEW MEXICO 87504-1986

HAND-DELIVERED
Steve Ross, Esq.
New Mexico Oil Conservation Division
1220 South St. Francis
Santa Fe, New Mexico 87505

9.4

discussed assignment of case to M. Sanchez w/ LW
discussed conversations w/ CL w/ B. Rogoff
discussed Brad's evaluation as "C" judge
discussed fact that the remaining judges ~~have~~ have criminal
or family law background except Judge Pfeffer
LW noted this is not a big case for use - not much
at stake, parties able to protect themselves
adequately
discussed pros w/ cons of excusal
decided against —

tactic
Arrington filed appeal
Now says it will be mooted by pooling cases
can't have it both ways
  either this is a critical matter or not
  if not, should dismiss appeal
obviously, it is considered a critical matter

comm's order shows clear distinction between this matter and completing pooling (quote)

previous attempts to consolidate rejected
  admin. agency has authority to manage procedural affairs
  is best place to do it complicated ~~fact~~ situations like this
  end-run around comm's procedural management

Time Issue

Order No. R-11700-B — 4.26.2002

Application for Rehearing (70-2-25 w/in 20 days after entry) — 5.15.2002 — okay

Notice of Appeal (39-3-1.1 w/in 30 days) — 6.25.2002 — okay

1/6 + 20 = 136

~~18 + 20 = 38~~

(5.16.2002)

deemed denied w/in 10 days after app. is fzed

5.28.02

148 + 30 = 178

(June 27)