STATE OF NEW MEXICO
DEPARTMENT OF ENERGY, MINERALS AND NATURAL RESOURCES
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE APPLICATION OF NEARBURG EXPLORATION COMPANY, L.L.C., SRO2 LLC AND SRO3 LLC FOR AN ACCOUNTING AND LIMITATION ON RECOVERY OF WELL COSTS, AND FOR CANCELLATION OF APPLICATION FOR PERMIT TO DRILL, EDDY COUNTY, NEW MEXICO **CASE NO. 15441 (*de novo*)**

IN THE MATTER OF THE APPLICATION OF COG OPERATING LLC FOR A NON-STANDARD SPACING AND PRORATION UNIT AND COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO **CASE NO. 15481 (*de novo*)**

IN THE MATTER OF THE APPLICATION OF COG OPERATING LLC FOR A NON-STANDARD SPACING AND PRORATION UNIT AND COMPULSORY POOLING, EDDY COUNTY, NEW MEXICO **CASE NO. 15482 (*de novo*)**
Order No. R-14187-E

NEX'S RESPONSE TO COG'S APPLICATION FOR REHEARING

This response to COG's Application for Rehearing is submitted by Montgomery and Andrews, P.A. (J. Scott Hall and Sharon T. Shaheen) and Haynes and Boone, LLP (David Harper, Aimee Furness, and Sally Dahlstrom) on behalf of Nearburg Exploration Company, L.L.C., SRO2 LLC, and SRO3 LLC (collectively, "NEX").

INTRODUCTION

The Commission has properly deferred resolution of the applications until the related questions of contract law have been determined in the district court. The Commission retained jurisdiction of the applications to enter orders "as may be appropriate in the light of any decision in" the case pending before the Santa Fe County district court. Order No. R-14187-E at 8, ¶ 7 ("Order"). Thus, contrary to COG's representations, the Commission has not acted in violation of the Oil and Gas Act. *See* Application at 11, ¶ 38. Rather, the Commission acted in

accordance with law. The decision was supported by substantial evidence; it was neither arbitrary nor capricious. COG's application for rehearing should therefore be denied.

ARGUMENT

I. The Commission's Decision Is Proper.

COG portrays the Commission's decision as "an impermissible avoidance and abdication of this agency's exclusive jurisdiction." Application at 4, ¶ 12; *see id.* at 3-4, ¶ 10; *id.* at 5, ¶ 13. COG contends that the Division and the Commission have exclusive authority to enforce the regulations. COG is wrong. It misreads the Commission's Order, misapplies the law, and relies on faulty assumptions.

For example, COG mistakenly assumes that the district court's determinations will be made upon review of the Commission's order and that NEX failed to exhaust its administrative remedies. *See, e.g.*, Application at 4, ¶¶ 11-12 (relying on cases addressing exhaustion of administrative remedies). That is not the posture here. Rather, the matter before the district court is an independent action in which NEX seeks relief from COG's violation of NEX's property rights, which violation is based on the same conduct that forms the basis for COG's regulatory violations. Both proceedings concern common facts that are not within the expertise of the Commission. The Commission has simply deferred the decisions regarding the regulatory claims within its expertise, until the district court has ruled on those common facts that are more suitable for resolution by the district court.

As is evident when reading the Order as a whole, the Commission determined that it could not make decisions as to the regulatory issues raised by the applications because the decisions rested on contractual and legal issues that should be considered by the district court.

See Order at 5, ¶¶ 23, 25, 26, 44. The Commission recognized that it did not have the expertise to make these underlying determinations.

COG represents that these contractual and legal issues are dispositive. *See, e.g.*, Application at 7-8, ¶ 23. However, COG assumes incorrectly that the underlying facts have already been determined or that these facts should be determined by the Commission. *See id.* For example, as pointed out by COG, the Division must enter a compulsory pooling order when certain preconditions have been met. *See* Application at 9, ¶ 31 (quoting Section 70-2-17). However, COG ignores the fact that the existence of the preconditions is dependent on contractual and legal issues. Section 70-2-17(C) provides that the division shall pool interests in the spacing or proration unit when the owners have not voluntarily agreed to do so and one owner has the right to drill. The parties dispute whether these preconditions have been satisfied. As properly determined by the Commission, resolution of these disputed issues is better left to the court, which has the experience in contract interpretation and the authority to decide questions of law. *See infra* at __.

The Oil and Gas Act expressly recognizes that a court may consider whether a violation of the Act or its implementing regulations has occurred.

> Nothing in this act . . . , or any rule, regulation or order issued thereunder, shall impair or abridge or delay any cause of action for damages which any person may have or assert against any person violating any statute of the state with respect to conservation of oil and gas, or any provision of this act, or any rule, regulation or order issued thereunder.

NMSA 1978, Section 70-2-29 (1977) (stating further that "any person . . . adversely affected by such violation . . . may . . . bring suit" to prevent a violation). Section 70-2-29 is consistent with the broad original jurisdiction of the district court, which includes jurisdiction concurrent with that of the Commission. *See* N.M. Const. art. VI, § 13. "The court has original jurisdiction under

the doctrine of primary jurisdiction . . . where there is an applicable common-law or legal remedy apart from or in addition to an administrative remedy . . . ." *McDowell v. Napolitano*, 1995-NMSC-029, ¶ 11, 119 N.M. 696.

Review of numerous cases reveals that the Commission acted properly in declining to exercise its jurisdiction at this time. *State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, ¶ 35, 85 N.M. 165, is the leading case in New Mexico that addresses the respective authority of an agency and the district court. Careful review of *Norvell* and its progeny reveals that the Commission properly declined to exercise its jurisdiction until the district court has resolved the contractual and legal issues. As explained by our Supreme Court in *Norvell*,

> '(C)ourt and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action.'

Id. ¶ 31 (quoting *United States v. Morgan,* 307 U.S. 183, 191 (1939)). And here, it is proper for the Commission to defer to the district court, which is better suited to address the contract issues. *See id.* ¶ 35 (recognizing that issues of law and statutory interpretation are better suited for the court); *Summit Properties, Inc. v. Pub. Serv. Co. of N.M.*, 2005-NMCA-090, ¶ 11, 138 N.M. 208 ("The general rule . . . is . . . that jurisdiction over contract or tort claims made against a public utility usually rests with the courts."); *Eldridge v. Circle K Corp.*, 1997-NMCA-022, ¶ 22, 123 N.M. 145 (stating that "the expertise of a technically expert body may not be needed if the question to be resolved is 'within the conventional competence of the courts'" (quoting *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290, 305-06 (1976)); *id.* ¶ 26 (holding that the workers' compensation judge should defer to the district court); *O'Hare v. Valley Utilities, Inc.*, 1976-

NMCA-004, ¶ 20, 89 N.M. 105 ("The Environmental Improvement Agency and Public Service Commission have no expertise in considering tort and contractual claims[.]"), *rev'd in part on other grounds,* 1976-NMSC-024, ¶ 20, 89 N.M. 262, 550 P.2d 274; *see also Campbell v. Mountain States Tel. & Tel. Co.*, 586 P.2d 987, 990-92 (Ariz. Ct. App. 1978) (discussing the doctrine of primary jurisdiction and the rule that construction of contracts and determination of their validity are judicial functions for the courts).

None of the cases cited by COG counsel otherwise under these circumstances. *See, e.g., U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't*, 2006-NMSC-017, ¶¶ 7, 13, 139 N.M. 589 (holding that each member of a putative class must individually exhaust its administrative remedies as expressly required under NMSA 1978, § 7-1-22 of the Tax Administration Act); *Cont'l Oil Co. v. Oil Conservation Comm'n*, 1962-NMSC-062, ¶ 1, 70 N.M. 310 (addressing the district court's affirmance, on appeal, of a contested order by the oil conservation commission); *Mountain States Nat. Gas Corp. v. Petro. Corp. of Texas*, 693 F.2d 1015, 1019 (10th Cir. 1982) (observing generally that "[t]he exhaustion doctrine applies where the agency *alone* has exclusive jurisdiction over the case (generally premised on the exercise of the agency's expertise), whereas primary jurisdiction applies where *both* a court and an agency have the legal capacity to deal with the issue"); *id.* at 1019, 1021 (holding that the court did not err in exercising primary jurisdiction rather than deferring to the oil conservation division and that the defendant violated the terms of the division order by failing to furnish the plaintiff with notice at least 30 days before drilling the well).

Notably, COG has recognized that the district court has concurrent jurisdiction. COG filed a related complaint in Eddy County, asking the district court to declare, among other things, that COG "was authorized to drill the Wells [or i]n the alternative, that COG acted in good faith

when it drilled the wells." Plaintiff's Original Complaint for Quiet Title, Specific Performance, and Declaratory and Equitable Relief at 10, ¶ 33(d), *COG Op'g LLC v. Nearburg Expl'n Co.*, D-503-CV-2016-00196 (Feb. 12, 2016).[1] COG's position now—that the Commission has exclusive jurisdiction—is an inexplicable about-face that has no support in the law.

II. The Commission Identified the Correct Standard—Whether COG Had an Actual Right to Drill.

COG's "good faith belief" standard is erroneous. *See* Application at 5-8. COG misrepresents the certification required to apply for a permit to drill and ignores the clear direction provided by the Commission in Order No. R-12343-E. As explained in NEX's pre-hearing and post-hearing briefs, which are fully incorporated herein, COG must have a right to drill and a good faith claim to title prior to drilling a well. NEX's Pre-Hearing Statement ("NEX PHS") at 6-9 (Feb. 21, 2017); NEX's Post-Hearing Memorandum ("NEX PHM") at 10-13 (Apr. 11, 2017). Consequently, this Commission has made clear—an operator cannot "actually drill a well on acreage in which it had no interest before the Division or Commission decide[] a pooling application." NEX PHS at 9-12; NEX PHM at 13-14. For this reason, the Division's Form C-102 requires an operator to certify "that this organization either *owns a working interest or unleased mineral interest in the land* including the proposed bottom hole location(s) *or has a right to drill this well at this location pursuant to a contract* with an owner of such a mineral or working interest, or to a voluntary pooling agreement or a compulsory pooling order." *See* NEX PHS at 10-11 (quoting the Form C-102 certification) (emphasis added); NEX's PHM at 14 (same). Contrary to COG's representation, the Form C-102 does *not* allow an operator to simply certify its ownership interest "as true and correct to the best of [its] knowledge and belief."

[1] The Eddy County court dismissed COG's complaint based on the priority jurisdiction of the Santa Fe County court, where the issues were raised first in district court by NEX. Order, *COG Op'g LLC*, D-503-CV-2016-00196 (Oct. 7, 2016).

Compare Application at 6, ¶ 17 with NEX's PHM at 14. In light of the applicable law, the Commission properly rejected COG's standard of "good faith belief."

III. COG Did Not Have a Right to Drill or a Good Faith Claim to Title Prior to Drilling.

As also explained in NEX's pre- and post-hearing briefing, COG had neither a right to drill nor a good faith claim to title. NEX's PHS at 6-9; NEX's PHM at 10-13. Indeed, COG concedes in its Application that it had no right to drill.

COG states that the "first statutory requirement is creation of a single spacing or proration unit." Application at 10, ¶ 32. COG further states, "Once a spacing or proration unit is created, an interest owner has the authority and right to drill a well and compulsory pool any uncommitted interest owners." *Id.* ¶ 33. It is undisputed, however—no spacing or proration unit was created for the 043-H or the 044-H. *See id.* ¶ 34 (stating that it sought to create two proration units when it filed its applications at issue herein). Thus, COG admits that it had no right to drill either well at the time that each was drilled.

IV. COG Cannot Satisfy Its Erroneous "Good Faith" Standard

Even if COG's erroneous standard applied, which NEX disputes, the uncontroverted evidence shows that COG did *not* have a "good faith belief" in its right to drill on NEX's acreage. As explained in NEX's pre- and post-hearing briefs, neither the operating agreement nor COG's attempts to obtain another term assignment provide a basis for COG's "good faith belief." NEX PHS at 12-13; NEX PHM at 15-17. Moreover, COG was aware more than four months prior to drilling the 043-H that the term assignment had terminated. NEX Exh. No. 35A. Prior to drilling the 043-H, COG sent NEX a communitization agreement that NEX rejected. NEX PHM at 4, ¶ 11. Prior to drilling the 044-H, COG received a title opinion stating that the term assignment had expired and requiring a cure. *Id.* at 5, ¶ 15; NEX Exh. No. 20 at 22-23.

COG did not attempt to obtain a communitization agreement with NEX prior to drilling the 044-H. NEX PHM at 4, ¶ 12. Rather, for nine months, COG attempted to negotiate another term assignment while it concealed the fact that it had actually drilled the two wells at issue. *See, e.g.*, *id.* at 4-8, ¶¶ 10, 14-24, 31-36, 43. Indeed, prior and subsequent to unit termination, COG concealed the fact that it had drilled any wells in the unit area other than certain Avalon wells. *Id.* at 6, ¶ 25. In short, COG fraudulently concealed essential information necessary to NEX's decision regarding a new term assignment. Under these circumstances, COG cannot satisfy its erroneous standard of "good faith belief" in a right to drill.

In a footnote, COG suggests that its good faith belief should be presumed, because it signed the certification on the Form C-102. Application at 5, n.1. Such a proposition is astounding and should be rejected out-of-hand. The Commission requires a certification in order to ensure that an operator has obtained the interests necessary to drill in compliance with applicable statutes and regulations. To presume a "good faith belief" based on a faulty certification would encourage operators to sign and drill without obtaining the necessary interests, just as COG did here. It would effectively defeat the purpose of the certification.

V. The Division's Order Is of No Force or Effect; It Is Superseded by the Order of the Commission.

COG relies on the order issued by the Division in this matter, in support of its Application. *See, e.g.*, Application at 6, ¶ 17 (citing Order No. R-14187); *id.* at 7, ¶ 22 (same). The Division's order provides no support for COG.

The Oil and Gas Act provides that any party of record adversely affected by the decision of a Division examiner "shall have the right to have the matter heard de novo before the [oil conservation] commission upon application." NMSA 1978, § 70-2-13 (1981). The language of this statute is unusual in that it provides for de novo review within the same administrative

agency that entered the decision at issue. Although no New Mexico case is directly on point, the overwhelming weight of the relevant case law demonstrates that the effect of de novo review of an administrative order should be the same, regardless of whether such review occurs within the same agency or in the district court.

When a statute provides for de novo review of an administrative decision by the district court, such review is akin to a new trial on the merits. *See, e.g., In re Application of Carlsbad Irrigation Dist.*, 1974-NMSC-082, ¶¶ 5-6, 87 N.M 149 (describing the scope of a de novo proceeding provided by statute as "a trial anew" in which the district court "must form its own conclusion and enter such judgment as the proof warrants" (internal quotation marks and citations omitted)); *Clayton v. Farmington City Council*, 1995-NMCA-079, ¶ 15, 120 N.M. 448 (holding that de novo review of an agency decision "mean[s] judicial review which at a minimum: (1) contemplates additional evidentiary presentation beyond the record created in front of the administrative agency, and (2) allows the district court more discretion in its judgment than simply reversal of the agency's decision and remand for further proceedings"); *see also State v. Hoffman*, 1992-NMCA-098, ¶ 4, 114 N.M. 445 (holding that in a de novo appeal from magistrate court to district court "it is as if no trial had been held in the matter below"). Under such circumstances, "the first reviewing court considers the issues presented on its own, not bound, controlled or necessarily influenced, in any way by the actions of the inferior tribunal." *Clayton*, 1995-NMCA-079, ¶ 16 (internal quotation marks and citation omitted). Thus, the Division order in this matter can provide no support for COG's position.

In *Contreras v. Miller Bonded, Inc.*, 2014-NMCA-011, ¶ 19, 316 P.3d 202, the New Mexico Court of Appeals recently considered the effect of de novo review in the context of the New Mexico Human Rights Act (NMHRA), NMSA 1978, §§ 28-1-1 to -14 (1969, as amended).

The *Contreras* Court analyzed whether administrative decisions had collateral estoppel effect on a subsequent "trial de novo" conducted by the district court. Applying New Mexico Supreme Court precedent, it reiterated that "decisions made by the [c]ommission have absolutely no binding effect on subsequent de novo actions filed in the district court pursuant to the NMHRA." *Id.* ¶ 23. The *Contreras* Court noted, "to hold that the Legislature intended anything less than a full evidentiary hearing—a trial anew—would read unwarranted limitations into the otherwise clear command of" the governing statute. *Id.* ¶ 22 (alterations, internal quotation marks, and citation omitted).

As discussed above, Section 70-2-13 provides that parties adversely affected by a decision of the Division "shall have the right to have the matter heard de novo." Under such circumstances—where the Commission "form[s] its own conclusion and enter[s] such judgment as the proof warrants," *In re Application of Carlsbad Irrigation Dist.*, 1974-NMSC-082, ¶ 5 (internal quotation marks and citation omitted)—the Division's decision is superseded, just "as if no trial had been held in the matter below." *Hoffman*, 1992-NMCA-098, ¶ 4; *see* 3 Charles H. Koch, Jr. & Richard Murphy, Admin. L. & Prac. §10.10[3] (3d ed. 2017) ("The agency head or a body representing the agency usually has authority to review the lower level decision. *The determination at this level must be considered the decision of the agency.* Therefore its review of the decision of an authority lower in the bureaucracy, usually an administrative judge, is said to be de novo; it either adopts the decision of the lower authority or it substitutes its own judgment." (emphasis added) (footnote omitted)), attached as Exhibit A. An alternate conclusion would contravene the clear legislative intent expressed by the provision of de novo review of Division decisions by the Commission. *See Contreras*, 2014-NMCA-011, ¶ 36 ("We believe that the Legislature, by providing for de novo review under the NMHRA, has expressed its will

that NMHRA claims should be adjudicated independent of any prior agency proceeding or determination."); *see also Carillo v. My Way Holdings, LLC*, 2017-NMCA-024, ¶ 22, 389 P.3d 1087 ("When interpreting a statute, courts strive to give effect to the Legislature's intent and look to the plain language of the statute to discern that intent."). Here, the Commission did not adopt the decision of the Division, but rather issued its own order that differs greatly in substance from the Division's order. Thus, the Division's order can provide no support for COG.

CONCLUSION

The Commission's decision is proper. It was made in accordance with the applicable law and supported by substantial evidence. The decision is neither arbitrary nor capricious. COG's Application for Rehearing should therefore be denied.

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3 Admin. L. & Prac. § 10:10 (3d ed.)

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The Late Charles H. Koch, Jr. [a0]

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Part II. Control of the Administrative Process
Chapter 10. Review According to the Internal Administrative Process
A. Adjudication

§ 10:10. General principles

West's Key Number Digest

- West's Key Number Digest, Administrative Law and Procedure 513

Adjudication is any process for deciding individual rights or duties, § 2:11[1]. Administrative adjudicative processes run the full gamut of processes from trial-like to individual conferences. The core issues are specific or adjudicative facts and review usually focuses on the agency's conclusions regarding such facts. Nonetheless an agency may evolve policy or interpret statutory language in adjudications and review may have to evaluate the agency's decision on those issues as well. In short, adjudication presents an array of review issues.

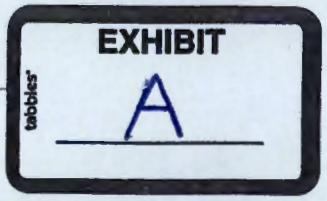
[1] Interrelationship with the other review approaches

Courts approach administrative adjudications, determination of individual rights and duties, in a manner distinct from other administrative decisionmaking processes. Still this review will be affected by the prescribed standard of review, subchapter 9B, and by the type of controverted issue, chapter 11. In addition, the formality of the adjudicative process and the record will have an effect on review of adjudication as discussed above.

The system often communicates the level of review through "standards of review." Because adjudication applies directly to identifiable interests, courts tend to look closely and the "substantial evidence" word formula, thereby the reasonableness test, is generally considered appropriate. However the other word formulas may also be applied to the results of adjudication.

Suggested in chapter 11 is a system based on the nature of the issues contested in the review rather than the nature of the procedures. Review of adjudication can be guided by this approach. Indeed adjudication usually focuses on certain types of issues and the issues categories suggest the appropriate review for adjudication in general.

Adjudication involves both categories of facts discussed in § 1:20[7]. Adjudication is particularly adept at finding individual or "adjudicative" facts. Courts are constrained in questioning such factfinding. Courts also generally accept



adjudicative findings of general or "legislative" facts, although the arguments for judicial restraint here are less compelling as discussed in § 11:24.

Courts are particularly responsible for assuring that the agency comply with the law. Thus, although the reviewing courts should give an adjudicative interpretations of the law some deference, it is free to substitute judgment where the agency has applied the wrong legal standard. Judicial dominance over questions of law exists regardless of the standard of review. [1]

Review of policymaking in the adjudicative context is one of the most complex issues in administrative law. Administrative policymaking is generally within the agency's specific authority and hence courts must show considerable restraint in reviewing administrative policy decisions in general, § 11:31. However adjudication is an individual dispute resolution process rather than a policymaking process even though interstitial policymaking necessarily takes place in many adjudications, § 2:12[3]. A court might take a closer look at policy created in an adjudicative context than in others, such as rulemaking. Still the policymaking function belongs to the agency and a court must take care not to arrogate power here as well.

[2] Effect of the nature of adjudicative decisions

The administrative process includes a great variety of methods for deciding individual rights and duties through "adjudications." The scope of judicial review must acquire the flexibility to deal with this variety. Still judicial review is often guided by the nature and formality of the proceeding under review.

[3] Various levels of the adjudicative bureaucracy

(a) Relative authority of the different levels. An adjudicative decision passes through several levels in today's expansive and complex adjudicatory bureaucracies, subchapter 5B. In general, the decision that reaches the court has already gone through several layers of decisionmakers, a process which often has all the characteristics of an independent court system.

The agency head or a body representing the agency usually has authority to review the lower level decision. The determination at this level must be considered the decision of the agency. [2] Therefore its review of the decision of an authority lower in the bureaucracy, usually an administrative judge, is said to be de novo; it either adopts the decision of the lower authority or it substitutes its own judgment. The agency need not substitute judgment and may decide to adopt the lower level decision and/or opinion as its own. Where the highest level adopts the findings and reasoning of the lower level, the court reviews that opinion as the agency's. [3] Regardless the lower level decision and opinion it becomes part of the record. [4]

While this is the norm, the various roles of the decisionmakers within this adjudicatory bureaucracy may confuse the allocation of authority between the courts and the agency as well as within the agency itself. Because of the layers of decisionmaking in most adjudicatory bureaucracies, a reviewing court sometimes faces the question of who speaks for the agency. This determination affects review because the agency decision has considerable authority.

The development of law and policy through adjudication, § 2:12[3], raises special questions. Since statutory interpretations and policy should be made at the highest levels, the court should look to the official in the adjudicative bureaucracy asserting the policymaking authority. The head of the agency or the administrative review authority acting on behalf of the agency head have the authority to determine law and policy in adjudicative proceedings. [5] Law and policy made at that level deserves considerable judicial respect. The lower levels of the adjudicative bureaucracy must

follow that law and policy. [6] It is the agency's interpretation or policy choice, not that of the administrative judge's, that is entitled to deference. [7] Hence the reviewing court is not free to choose the law or policy of a lower level decisionmaker.

(b) When the administrative levels disagree. The court's position is particularly difficult where the top of the adjudicatory bureaucracy disagrees with the administrative judge's decision. The court must review in some way both the administrative review authority's decision and the administrative judge's decision. [8] Still, in the end, the court must focus on the decision by the top of the adjudicatory bureaucracy and consider the lower level decision in order to evaluate that decision. [9] Even where the review authority disagrees with the administrative judge, the court must give the weight accorded the "agency's decision" to the administrative review authority's decision. [10]

Although the decision of the final review authority is generally considered the decision of the agency, courts are inclined to expect more support for those conclusions where those conclusions contradict the findings of the presiding official. [11] "We do not abandon the 'substantial evidence' standard of review in such a case, but the evidence supporting the Board's conclusions may be viewed as 'less substantial' than it would be if the Board and the ALJ had reached the same conclusion." [12] This is the reality even though technically the applicable standard of review remains the same. [13] Courts are particularly inclined to question an agency's disagreement with the administrative judge as to credibility determinations, § 11:24[5].

(c) Effect on judicial review of limits on administrative review. In some schemes, the administrative review authority reviews, § 5:28[1], the lower level decision under a limited standard of review. For example, the scheme may limit the administrative review authority to substantial evidence review of an administrative judge's decision. In such a scheme, the court reviews the administrative judge's decision and references the administrative authorities opinion about that decision.

The charge to conduct substantial evidence review of substantial evidence review might place the court in the position of merely second guessing the final agency authority. Under such circumstances, the court should focus on the final decision and the administrative review, while not de novo, should be more searching than the courts. [14]

The administrative scheme established to make black lung benefits and Longshore and Harbor Workers Compensation Act determinations, for example, places the power of decision in the hands of the ALJs. [15] Thus, even though appeals come from the Benefits Review Board, a court must evaluate the ALJ's judgment, not the Board's. [16] It reviews the Board's determination to assure that the Board has applied the proper standard of review to the ALJ's decision. [17] Where the BIA reviews an immigration judge for abuse of discretion, the court reviews the administrative judge's decision for abuse. [18]

[4] Effect of separating the adjudicating body from the enforcement agency

(a) Review in the split function model. As discussed in § 5:29, some schemes establish a separate agency for adjudicating violations from the agency which establishes policy and makes enforcement decisions. This separation may confuse the judgment as to what administrative decision the court is to review.

In general, a court reviews the final decision of the adjudicating agency. The relevant factual conclusions and the individual application of law and policy to those conclusions are those of the adjudicating agency. The policy judgments of the policymaking agency, however, should be considered the opinion of the agency for review on those issues.

(b) Review under the central panel model. Review in an adjudicative system employing central panels of administrative judges may be somewhat complicated. As described in § 5:24[8], such systems house all administrative judges in a single agency which supplies them to the operating agencies. The operating agencies retain some review authority over the individual decisions of these administrative judges. The conflict in authority between the panel official's decision and the agency's decision complicates judicial review.

As discussed above, when the agency and the administrative judge disagree, courts tend to review more carefully. It is likely that they will review disagreements between an agency and a panel judge even more closely. All the presumptions and weight usually afforded the final agency determination still belong to the agency however.

The type of issue giving rise to the disagreement should affect judicial review. The panel judge's decision as to fact and the application of law and policy to the facts should have particular weight because of the panel judge's special independence. However the agency's policy judgments still must be given controlling force. Where the agency disagrees with the panel judge on policy or interpretative issues, the agency's decision should be the focus of review and the panel judge's opinion should merely be considered part of the record for review.

The overarching question of which agency has the power to make a final policy choice or statutory interpretation is discussed more generally in § 11:30[3].

Footnotes

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1 Snyder v. Shalala, 44 F.3d 896, 898 (10th Cir. 1995) ("If the ALJ failed to apply the proper legal test, reversal is appropriate apart from a lack of substantial evidence.").

2 E.g., Khano v. I.N.S., 999 F.2d 1203, 1207 (7th Cir. 1993) (Board of Immigration Appeals).

3 Gandarillas-Zambrana v. Board of Immigration Appeals, 44 F.3d 1251, 1255 (4th Cir. 1995), cert. denied, 516 U.S. 806, 116 S. Ct. 49, 133 L. Ed. 2d 14 (1995).

4 Bullwinkel v. F.A.A., 23 F.3d 167, 170 (7th Cir. 1994); Grubb v. F.D.I.C., 34 F.3d 956, 961 (10th Cir. 1994).

5 Wood v. U.S. Dept. of Labor, 112 F.3d 592, 597 (1st Cir. 1997) ("While the ALJ may have no 'policy' authority, deference is still ordinarily due to the frontline adjudicator in applying general standards to particular facts.").

6 Of course, lower level adjudicators, including ALJ, must follow formal policy pronouncement in whatever form, as discussed in subchapter 5B.

7 Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs, 292 F.3d 533, 538 (7th Cir. 2002).

8 E.g., Pogue v. U.S. Dept. of Labor, 940 F.2d 1287, 1289 (9th Cir. 1991).

9 Balazoski v. I.N.S., 932 F.2d 638, 640 (7th Cir. 1991).

10 N.L.R.B. v. Frigid Storage, Inc., 934 F.2d 506, 509 (4th Cir. 1991) (The disagreement did not mean that the court should conduct some "special scrutiny."); but see, Burke County Bd. of Educ. v. Denton By and Through Denton, 895 F.2d 973, 981 (4th Cir. 1990) (State hearing officer's conclusion given weight over state review officer's decision in evaluating compliance with special education requirements.).

11 Tenneco Automotive, Inc. v. N.L.R.B., 716 F.3d 640, 651–52, 195 L.R.R.M. (BNA) 2861, 163 Lab. Cas. (CCH) P 10600 (D.C. Cir. 2013) (declaring that an agency that rejects an ALJ's determinations should "make clear the basis of its disagreement"); Dantran, Inc. v. U.S. Dept. of Labor, 171 F.3d 58, 72 (1st Cir. 1999) (Agency failed to justify rejection of ALJ's findings.); Ryan v. Commodity Futures

Trading Com'n, 145 F.3d 910, 916 (7th Cir. 1998)("An agency's findings which run counter to those of an ALJ are given less weight than they would otherwise receive."); Texas World Service Co., Inc. v. N.L.R.B., 928 F.2d 1426, 1430 (5th Cir. 1991); Simon v. Simmons Foods, Inc., 49 F.3d 386, 389 (8th Cir. 1995) ("While deference is usually accorded to an agency's expertise and discretion when the agency adopts the findings of the ALJ, a slightly different rule applies when the administrative agency rejects the ALJ's finding.").

12 N.L.R.B. v. Stor-Rite Metal Products, Inc., 856 F.2d 957, 964 (7th Cir. 1988).

13 Rowland v. U.S. Dept. of Agriculture, 43 F.3d 1112, 1114 (6th Cir. 1995), cert. denied, 515 U.S. 1158, 115 S. Ct. 2610, 132 L. Ed. 2d 854 (1995).

14 30 U.S.C. § 823(d) (standard for administrative review) and 30 U.S.C. § 816(a)(1) (standard for judicial review). National Cement Co. v. Federal Mine Safety and Health Review Com'n, 27 F.3d 526, 530 (11th Cir. 1994) ("[W]e are bound by the same standard that governs the Commission's review of the ALJ's findings.").

15 Dehue Coal Co. v. Ballard, 65 F.3d 1189, 1193 (4th Cir. 1995); Coloma v. Director, Office of Workers Compensation Programs, 897 F.2d 394, 396 (9th Cir. 1990), cert. denied, 498 U.S. 818, 111 S. Ct. 61, 112 L. Ed. 2d 36 (1990).

16 Cox v. Shannon-Pocahontas Mining Co., 6 F.3d 190, 192 (4th Cir. 1993); Peabody Coal Co. v. Vigna, 22 F.3d 1388, 1392 (7th Cir. 1994); Container Stevedoring Co. v. Director, Office of Workers Compensation Programs, 935 F.2d 1544, 1546 (9th Cir. 1991); Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1261 (11th Cir. 1990) ("Because this Court applies the same standard of review to ALJ decisions as does the [Benefits Review Board], our review of the [board] is *de novo.*").

17 Munguia v. Chevron U.S.A. Inc., 999 F.2d 808, 810 (5th Cir. 1993), cert. denied, 511 U.S. 1086, 114 S. Ct. 1839, 128 L. Ed. 2d 466 (1994); Alabama Dry Dock and Shipbuilding Corp. v. Sowell, 933 F.2d 1561, 1563 (11th Cir. 1991).

18 Alaelua v. I.N.S., 45 F.3d 1379, 1382 (9th Cir. 1995).

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