

Judicial Review of Agency Decisions in North Carolina – An Overview on Standards of Review

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I. Introduction

At the federal level, and in many administrative-law systems among the states, judicial review of agency decisionmaking follows a relatively consistent pattern, albeit a pattern with a few wrinkles. Recently, there have been some signs of potential changes at the federal level involving the so-called *Chevron* doctrine that, if they were to occur, could occur within the next decade. But, *Chevron* aside, the federal judicial-review baseline is fairly stable.

In North Carolina, understanding the typical pattern of federal judicial review is a useful first step in understanding standards of review in North Carolina courts. This is because North Carolina courts have explicitly adopted some features from the federal system. Sadly, however, this is not the final word. For North Carolina administrative law also contains judicial-review features found in very few other administrative law systems. Accordingly, it is appropriate that this program is being hosted live on November 1, the morning after Halloween. The full story about standards of judicial review of agency decisionmaking in North Carolina is no treat. Even if you're seeing this at a later date via video replay, it can still be a nightmare. Boo!

II. The Federal Judicial Review Baseline

The federal Administrative Procedure Act ("Fed-APA") provides for a right to judicial review of almost all "agency action," defined to include agency decisions reached through rulemakings or adjudications, formal or informal. Fed-APA §702. The "scope of review" is specified in Fed-APA §706. There, the statute provides that a reviewing court must reverse agency action found

to be either “arbitrary, capricious, abuse of discretion” or “not in accordance with law.” Fed-APA §706(2)(A).

Let me make several points about this scope-of-review provision. First, at the federal level the term, “arbitrary/capricious/abuse of discretion” is read as if it is a single word; there is not a special test for “arbitrary” that is distinct from that for “capricious” that is distinct from that for “abuse of discretion.” Second, the term, “arbitrary, capricious, abuse of discretion” is generally applied to agency factfinding or to the fact-based components of agency policymaking. Third, the test for “arbitrary/capriciousness” is meant to be deferential; it is not designed to allow a court to substitute its factfinding for the agency’s. Generally speaking, the test means something like “reasonable” or “rational.” A reviewing court is to affirm under this standard even if the court itself might have found some/many of the facts differently (had it been making the decision *de novo*), just so long as the record shows that the agency grappled with the facts and reached factual conclusions that could have been reached by a rational person. Finally, in making its “arbitrary/capricious” determination, a reviewing court is to consider the “whole record,” which means it must consider both the facts in the record that support the agency’s conclusion and those that detract from it.

There is also another factfinding-based standard of review in the federal APA. Section 706(2)(E) provides that agency decisions reached through the APA’s formal procedural mechanisms (oral testimony/cross examination), are to be reversed if not supported by “substantial evidence.” One of the US Supreme Court’s leading cases on this provision, *Universal Camera v. NLRB*, 340 U.S. 474 (1951), used the term in a way that is not very different from the arbitrary/capricious test. The *Universal Camera* Court found that a reviewing court, even though reviewing the “whole record,” was not to substitute its view of the facts for

those of the agency, even as to factfinding not requiring agency expertise. The North Carolina Supreme Court has explicitly adopted the reasoning of *Universal Camera*. See *Thompson v. Wake County Board of Education*, 233 S.E.2d 538, 541 N.C. 541 (N.C. 1977), and North Carolina courts have described substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” see, e.g., *N.C. Pesticide Board v. N.C. State Dep’t of Agriculture*, 509 S.E.2d 165 (NC 1998). Perhaps more functionally, the test has been described as akin to the standard for a judgment-notwithstanding-the-verdict (“JNOV”) or for a directed verdict, allowing a court to overturn (or bypass) agency factfinding only if it can conclude, after reviewing the whole record, that no rational factfinder could have made the factual conclusions reached by the agency. See Sarah H. Ludington, *Simplifying the Standard of Review in North Carolina Administrative Appeals*, 33 J. Nat’l. Ass’n. L. Jud., 585, 602 (2013)(“the substantial evidence standard is similar to the standard of review of a directed verdict”).

In contrast, at least at the federal level prior to the Supreme Court’s *Chevron* decision in 1984, a reviewing court’s analysis of questions of law was not particularly deferential. A commonly cited pre-*Chevron* decision is that of the U.S. Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 177 (1944), where the Court treated as a pure question of law, for itself to decide, whether Congress intended to import state common-law definitions of the term, “employee,” into federal labor-law legislation. The Court held that Congress did not so intend and, in its analysis of the statute’s general meaning, did not particularly emphasize, and certainly did not “defer to,” the federal agency’s view of this broad statutory question. But, this broad question of law decided *de novo*, the *Hearst* Court then continued to analyze a more limited question: the specific application of the federal law to a particular set of employees (newsboys) –

what legal analysts used to call “a mixed question of fact and law” and more modern analysts describe as “law applying.” And on this more limited question the Court definitely did hold that deference was appropriate to the agency’s view because this specific application of the law encompassed significant factual elements -- to be reversed only if the agency’s factual findings were “unreasonable.”

This is not to say that even as to pure questions of law, pre-*Chevron* federal courts completely ignored a federal agency’s view of the general meaning of “its” statute. Instead, the Court accorded agencies what is generally described as “*Skidmore* deference,” after the U.S. Supreme Court’s decision in another early labor-law case, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Under *Skidmore*, a reviewing court gives the agency’s view of the statute whatever weight the court thinks it “deserves” based on the persuasiveness of the agency’s reasoning. In *In re North Carolina Savings & Loan League*, 276 S.E.2d 404 (N.C. 1981), the North Carolina Supreme Court expressly followed *Skidmore*. *Id.* at 410. Under this approach, although North Carolina accords “some deference” to an agency’s interpretation of its enabling statute, “those interpretations are not binding.” *See id.* (rejecting the agency’s statutory interpretation).

This brings us, as we complete our survey of the federal administrative-law baseline, to the U. S. Supreme Court’s holding in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 832 (1984). In a nutshell, the so-called *Chevron* two-step “formula” has required federal courts to defer to agency statutory interpretations with which they disagree, so long as the agency’s view of the statute is not altogether unreasonable. Not surprisingly, given this highly deferential standard, there is empirical evidence from federal appellate courts that, in the five years after *Chevron*, agencies were upheld far more than they used to be under *Hearst/Skidmore*. See Peter H. Schuck & E.

Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984 (1990).

There is more to the story. Although *Chevron* is still highly influential in the federal courts of appeal, there is evidence that its fate in the U.S. Supreme Court has somewhat faded. The Court has developed at least three formal exceptions to *Chevron* often referenced as “Chevron Step Zero,” and at times is accused of abandoning *Chevron* altogether. See *U.S. v. Mead Corp.*, 533 U.S. 218 (2001)(Scalia, J.,dissenting)(“We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come”). The D.C. Circuit interposes something else called “Chevron Step One-and-One-Half.” The U.S. House of Representatives has passed legislation calling for *Chevron* to be overturned altogether (stalled in the Senate). And, in 2016, then 10th-Circuit federal Court of Appeals Judge Neil Gorsuch wrote a 10-page special concurrence claiming outright that *Chevron* is unconstitutional as it violates principles of separation of powers by taking federal judges out of the business of “saying what the law is,” see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 1986)(Gorsuch, J. concurring). At least two other currently sitting U.S. Supreme Court Justices, Justice Thomas and Justice Alito, have expressed broad doubts about *Chevron*, and newly confirmed Justice Kavanaugh, although perhaps not yet a solid fourth vote for overturning *Chevron* outright, as a judge on the D.C. Circuit supported one of *Chevron*’s major exceptions and has expressed broader concerns about *Chevron*’s current, doctrinal design.

The good news for us here, today, is that the North Carolina Supreme Court has never adopted *Chevron* and is on record in following the *Hearst/Skidmore* line of cases when reviewing an agency’s statutory interpretation – in a nutshell viewing such matters through the prism of *de novo* rather than deferential review. But, note, *Chevron* has been cited occasionally

in some opinions of the North Carolina Court of Appeals, *see, e.g.,* Ludington, *supra* at n.52 (citing cases), Michael Pappas, *No Two-Stepping In the Laboratories: State Deference Standards for Improving the Chevron Doctrine*, 39 McGeorge L. Rev. 977 (2008)(Appendix citing four NC Court of Appeals decisions), though the North Carolina Court of Appeals has not yet really weighed in on its view of the *Chevron* exceptions that are currently limiting *Chevron*'s reach in federal courts. Accordingly, for purposes of this presentation, we will assume that North Carolina follows *Skidmore* rather than *Chevron* deference on questions of an agency's statutory interpretation, with the caveat that readers need to be aware of the handful of NC Court of Appeals opinions that seem to follow *Chevron* – and thus could be affected in coming years by *Chevron*'s increasingly exception-prone existence and ultimate fate at the federal level.

But trust me on this! As we jump into the murky waters of North Carolina's unique system of judicial review of administrative decisionmaking, we will want to *cling* to the idea that there is a fairly stable baseline of federal administrative law to which we can draw comparisons and contrasts. So, for the rest of this presentation, let's set *Chevron* aside and assume that North Carolina is, formally, a *Skidmore* jurisdiction on judicial review of an agency's statutory interpretations (*de novo* review), and a *Universal Camera* jurisdiction on judicial review of an agency's factfinding (deferential review). Now, let's go crazy.

III. Judicial Review of Agency Decisions in North Carolina; Standards of Review

A. The Default Rule

The first notable feature of judicial review in North Carolina is that, generally, review of an agency's decision lies in Superior Court, a trial court, not in an appellate court such as the North Carolina Court of Appeals. This does not mean, however, that the Superior Court is to relitigate an agency's decision via a trial – although, astoundingly, in a limited number of cases this in fact

is what can occur. North Carolina General Statute Section 7A-250(a) provides for two types of jurisdiction by superior courts involving appeals of administrative action: “review by original action . . . or by appeal.” This jurisdictional provision must be read in conjunction with Article 4 of the North Carolina Administrative Procedure Act, N.C. General Statute Sections 150B-43 to -52 (2013), which was designed to create the “default” rule for judicial review of agency actions (but note exceptions to the default rule, discussed *infra*). The default rule provides for “appellate” jurisdiction (no trial) in superior courts from “agency action” by aggrieved persons who have exhausted all available administrative remedies, “unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.” NCGS § 150B-43. And the North Carolina APA provides that the default “standard of review” to be exercised by superior courts under their appellate review of agency action shall be, **for “questions of law”** a “de novo” standard, NCGS § 150B-51(c); see also Ludington, *supra*, at 594, **and for fact-based questions**, whether the agency decision is “supported by substantial evidence” or is “arbitrary, capricious, abuse of discretion” after looking at the “whole record” (deferential review), *id.* It is not uncommon for commentators to describe this fact-based standard as the “whole record” test.

B. Two types of exceptions to the default rule

One type of exception to the default rule of “appellate” review by superior courts, comes from statutes that locate appellate review directly in the North Carolina’s formal appellate courts. Thus, for example, general rate-making decisions of the NC Public Utilities Commission are heard directly in the North Carolina Supreme Court, and all other decisions of the Public Utilities Commission are heard in the North Carolina Court of Appeals. See Administrative Office of the Courts, *The Judicial System in North Carolina* 4 (2007). Generally speaking, though, the

standard of review of agency decisions heard by the appellate courts tracks the default standard of review: de novo review for questions of law and whole-record/deferential review for questions of fact.

The other broad type of exception is the unusual one – specific state statutes granting superior courts with “original” jurisdiction over administrative orders under which the superior court may conduct a new trial on both the facts and law in the case. To invoke this original jurisdiction, a statute “must specifically use language that directs the superior court to take new evidence or examine evidence anew.” Ludington, *supra*, at 592, citing *In re Dunn*, 326 S.E.2d 309, 311-312 (NC Ct. App. 1985). Statutes conferring this unusual jurisdiction on superior courts include those involving appeals from some decisions of the Board of Funeral Services, appeals from county game commissions, appeals from a local animal control board declaring a dog to be ‘potentially dangerous,’ appeals from discretionary revocation of a drivers license, appeals from the denial of voter registration by a county board of election, and appeals from the denial of a declaration of nomination or certificate of election by the State Board of Elections, and a handful of others. See Ludington, *supra*, at 617-618. Sometimes referred to as statutes conferring “de novo” jurisdiction to superior courts, this class of exception is not to be confused with those statutes conferring “appellate” jurisdiction to superior courts in which the court is to review questions of law *de novo*.

C. The Regulatory Reform Act of 2011: Decisions by the Office of Administrative Hearings and Their Effect on Standards of Appellate Review

Under the North Carolina APA a person “aggrieved” by an administrative decision can file a petition for a contested case hearing before an administrative law judge (“ALJ”). NCGS § 150-B-23 (2011); Asher B. Spiller, *The Folly in Finality: The Constitutionality of ALJ Final Decision-Making Authority in North Carolina*, 90 N.C. L. Rev. 2162 (2012). In North Carolina,

these hearings are not heard by ALJs located within the agency in question but, instead, are located in a central panel, the State's Office of Administrative Hearings ("OAH"). Prior to the Regulatory Reform Act of 2011, NCGS § 150B-34 (2011), ALJ decisions were not final. Instead, ALJs were required to return the decision to the agency for a final decision, Spiller, *supra*, at 2167, and the agency was allowed to reject the ALJ's decision and issue its own decision if it found the ALJ decision to be "contrary to the preponderance of the evidence in the record." *Id.* at 2167-2168. If the agency accepted the ALJ decision as its own, a court hearing a challenge to that decision on judicial review would follow the default reviewing standard: questions of law were reviewed *de novo* and questions of fact were reviewed deferentially under the substantial evidence/arbitrary&capricious standard. If, however, the agency rejected the ALJ decision, the reviewing court would review both questions of law and questions of fact under the *de novo* standard. *Id.*

Under the Regulatory Reform Act of 2011, however, things changed. Although in making its decision, an ALJ at OAH is required to "give due regard to the demonstrated knowledge and expertise of the agency," *id.*, OAH no longer returns its decisions to the agency for a final decision. *Id.* Upon judicial review, although an agency may submit an appellate brief defending its position, it is the ALJ's findings of fact that receive deferential review under the whole-record/substantial evidence/arbitrary&capricious test. Questions of law are reviewed *de novo*.

Conclusion

At bottom, a lot of mileage can still be had by appreciating the core default rule on standards of judicial review of administrative action in North Carolina: questions of law will be reviewed *de novo* and questions of fact will be reviewed deferentially. That said, there are quirks. Not only is appellate jurisdiction in the State principally located in superior courts rather than the

North Carolina Court of Appeals or the North Carolina Supreme Court, but under some statutes superior courts may even exercise true original jurisdiction and develop evidence through trial procedures. More generally, contested cases in North Carolina are heard by administrative law judges located within the centralized Office of Administrative Hearings, with ALJ decisions no longer needed to be returned to the agency at issue for final resolution. Instead, judicial review of the ALJ's decision will accord the OAH decisionmaker deferential review on questions of fact, even though questions of law are still reviewed *de novo*.