# Judicial Review of Facts

# Learning Objectives for this Module

## Learn that Congress sets the standard of review for agency review of facts.

## Learn the limits on an agency ability to ignore the findings of an ALJ.

# Reading Assignment

## Chapter 7 to 308

# Issues to be addressed

## Scope of Judicial Review of Facts

### Congress sets scope of review, within constitutional boundaries.

### Since the Constitution is silent on agencies, Congress has a pretty free hand.

### Congress can allow anything from a trial de novo to no review, unless such an action otherwise runs afoul of the constitution.

## Standards for Judicial Review of Facts

### Trial De Novo

#### You start over at the trial court

#### Agency findings can be used as evidence, but there is no deference to the agency

#### FOIA

#### Used more by the states than the feds

### Independent Judgment on the Evidence

#### Decide on the agency record, but do not defer to the agency's interpretation of the record.

### Clearly Erroneous

#### Definite and firm conviction that a mistake has been made on the facts or policy

#### Same as reviewing a verdict by a trial judge without a jury

### Substantial Evidence - Formal Adjudications and Formal Rulemakings

#### 706(2)(E) - only applies to formal adjudications and formal rulemaking

#### Could a reasonable person have reached the same conclusion?

##### Standard for reviewing a jury verdict or for taking a case from the jury.

##### Should a jury get more or less deference than an agency?

#### Hint - substantial means some, not a lot, when you are the agency

### Substantial Evidence - Informal Adjudications and Rulemaking

#### 706(2)(A)

##### Arbitrary and capricious or abuse of discretion

##### Same assessment of reasonableness as 706(2)(E), so the result is about the same as the substantial evidence test used for formal proceedings

#### [it is] ‘‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’’; it is evidence sufficient to withstand a motion for a directed verdict. It is a less rigorous standard than ‘‘clearly erroneous,’’ the standard by which appellate courts review factual findings made by a trial judge. It is more rigorous than ‘‘no basis in fact.’’ The agency’s ‘‘findings are entitled to respect, but they must nonetheless be set aside when the record before a [court] clearly precludes the [agency’s] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. . . .’’Universal Camera v. NLRB, 340 US 474 (1951)

#### This is the most common standard

### Some Evidence

#### Scintilla test

#### The agency needs to show even less than in the substantial evidence standard

#### Only limited use

### Facts Not Reviewable At All

#### Congress can prevent certain types of judicial review

##### Compensation decisions under the Smallpox Vaccine Compensation Act are not reviewable

#### Enabling law is always reviewable unless Congress has taken away the court's subject matter jurisdiction.

## What if the court thinks the agency's policy choice is wrong?

### Should the court defer to findings which it believes are clearly erroneous, but are supported by substantial evidence?

#### Why is this consistent with the political control of agencies?

#### When the legislature gives the agency the power, it is also saying that it only wants agency decisions overturned in the most serious cases

### Courts have different political views than agencies and thus they should be esp. careful about reversing agency decisions.

## Agency Review of ALJ decisions and recommended rulings

### Basic questions

#### Assume there is a hearing before an ALJ, the ALJ prepares a recommended opinion, and the agency wants to overrule the ALJ.

#### Are there limits to the agency’s right to substitute its decision for the ALJ’s opinion?

#### What must the agency do when it wants to overrule an ALJ?

### Key issue

#### As with an appeals court review a jury or lower judge’s decision, the key is whether the record is sufficient for the appellant reviewer to make an independent determination of the issue.

#### We know that if it is a pure legal question, the reviewing body can evaluate the question without regard to the record.

#### In pure factual questions, the record is the only source for information about the facts. A court cannot look things up for its own, as it can for the law. But an agency can check some facts for itself by consulting with staff or using its own expertise.

#### If the agency accepts the facts as found by the ALJ, it can disagree about what they mean. For example, the agency can decide that testimony that the ALJ found credible is not sufficient to decide the case.

#### Problems arise when the agency wants to reject or modify facts that the agency cannot independently verify. These will mostly be veracity determinations about live witness testimony. Thus it is not just what the witness said, which can be found in the transcript, but the way it was said and how that influenced the determination about whether the testimony was credible.

#### The smoking hypothetical

##### In the smoking case, the agency wanted to reject testimony that that the ALJ found credible, and accept other testimony that the ALJ did not find credible. What is the problem with the Board making credibility decisions about witness testimony? What if the hearings are video recorded?

##### The agency must show its justification for rejecting this evidence. This might be inconsistencies with other evidence that the ALJ admitted, such conflicts in the chronology showing that witness could not have seen what he claimed to have seen. But if the agency cannot show why it is rejecting this testimony, it may be reversed on judicial appeal.

##### The agency can find other factual evidence that moots the testimony. For example, in this hypothetical, if the union organizer caught smoking was show to be violating a policy on smoking that was routinely enforced by firing, the other testimony would not matter. (There are petrochemical plants with these zero tolerance policies because of the fire hazard.)

#### In general, the question is whether the ALJ has special expertise or access to information that the agency cannot independently evaluate.

### Is it a mixed/hybrid question of law and fact?

#### O’Leary v. Brown-Pacific-Maxon, 340 U.S. 504 (1951)

##### Was a worker within course and scope of employment when he drowned trying to save a foundering swimmer?

##### Were there any disputed facts?

##### Is this a legal question, entitled to less deference, or a factual one, entitled to more deference?

#### Frankfurter’s Hybrid Decision Analysis

##### [This] only serves to illustrate once more the variety of ascertainments covered by the blanket term ‘‘fact.’’ Here of course it does not connote a simple, external, physical event as to which there is conflicting testimony. The conclusion concerns a combination of happenings and the inferences drawn from them. In part at least, the inferences presuppose applicable standards for assessing the simple, external facts. Yet the standards are not so severable from the experience of industry nor of such a nature as to be peculiarly appropriate for independent judicial ascertainment as ‘‘questions of law.’’

#### NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)

##### Company refuses to collectively bargain with buyers, saying they are managers.

##### Agency finds that only managers whose interests align with the company are exempted from unionization.

##### The court overruled the agency, holding that the law exempted all managers.

###### Why no substantial evidence review and Hearst/ Chevron deference?

##### How might the agency still get deference on the remand to determine whether buyers are managers?

###### Is the term “manager” well defined in the statute?

# Evaluation Questions

## Reviewing facts versus reviewing law

### Agencies find facts through adjudications and through their research in putting together the record to support rulemaking.

### Analogizing to Article III trial practice, why do appeals courts view review of facts differently from the review of law?

### Putting aside the various standards of review, are appeals courts more likely to defer to determinations of facts or of law?

## Standards of review

### Define and distinguish these standards for review of agency findings of fact:

#### Trial de novo;

#### Independent judgment on the evidence;

#### Substantial evidence – how is this effectively the same as arbitrary and capricious?

##### How does the *Chevron* standard for reviewing law look like the substantial evidence test for reviewing facts?

##### Should the court be more deferential to the agency when reviewing facts, as opposed to law?

#### Facts not reviewable at all.

## Reconciling ALJs and Agency Decisionmaking

### When a hearing officer is overruled by the agency, how should the reviewing court treat the ALJ's opinion?

#### What does the agency need to do if it wants to overrule the ALJ's finding?

#### When are the ALJ's findings most persuasive to the courts? When the agency wants to overrule the ALJ on this sort of evidence, such as the credibility of a witness, what would the agency need to show in the record?

#### Are agencies in Louisiana able to overrule ALJs in the central panel?

### What is a hybrid question of law and fact?

#### How do the courts review these?

#### How do you use the differing standards of review to support your arguments pro or con in a hybrid case?