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Administrative Law Progress in 1997: Selected Pennsylvania Supreme Court Decisions Involving Constitutional and Administrative Decisions

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ADMINISTRATIVE LAW PROGRESS IN 1997: SELECTED PENNSYLVANIA SUPREME COURT DECISIONS INVOLVING CONSTITUTIONAL AND ADMINISTRATIVE LAW

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I. INTRODUCTION

Like similar articles by the same author in 1995[1] and 1996,[2] this Article evaluates important constitutional and administrative law decisions made by the Pennsylvania Supreme Court in 1997. The object is to be selective and analytical, not descriptive or comprehensive in the sense of writing about every case involving constitutional or administrative issues. A major goal is to analyze and critique cases which address broad issues of structure (e.g., separation of powers) or underlying themes in an entire area.

This task is long overdue. The importance of state law grows every day, and in no area is this more true than administrative law.[3] The massive shift away from administrative action by the federal government has meant that state agencies are deciding more cases than ever before and that state courts are hearing more appeals than ever from agency action. Yet there has been little extended analysis—as distinguished from short descriptions of—changes in Pennsylvania administrative law. To remedy this lack of attention, this Article and the earlier articles in this series attempt to identify and analyze fundamental and structural administrative law issues and themes in significant opinions of the Pennsylvania courts.[4]

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[1] John L. Gedid, *Administrative Law Progress in 1995: Important Pennsylvania Supreme Court Decisions*, 5 WIDENER J. PUB. L. 625 (1996).

[2] John L. Gedid, *Major Constitutional and Administrative Decisions of 1996: Progress of the Supreme Court of Pennsylvania*, 6 WIDENER J. PUB. L. 595 (1997).

[3] As this author stated in an earlier article: "There is a growing interest in, and emphasis upon, state constitutional law, and state courts—including Pennsylvania's—are deciding more cases in this area. Administrative law is a branch of constitutional law; cases in this area merit critical scholarly examination and discussion." Gedid, *supra* note 1, at 626.

[4] As this author has stated in an earlier article on the same subject on 1995 cases:

> The author is hopeful that this style of analysis will lead to critical examinations of the state of administrative law in Pennsylvania and, perhaps, lead to a dialogue that will help in the continuing development of

II. JUDICIAL REVIEW

A. Bowman v. Department of Environmental Resources

1. Background and Analysis

In *Bowman v. Department of Environmental Resources*,[5] the Supreme Court of Pennsylvania addressed the issue of the proper standard for judicial review of an agency action. In the *Bowman* case, an employee, Bowman (Bowman or Appellant), who had been denied a promotion in favor of another employee appealed the decision of the Department of Environmental Resources (DER) to the Civil Service Commission (Commission).[6] The Commission awarded the position to Bowman after finding that the DER discriminated against him.[7] The Commonwealth Court of Pennsylvania reversed the decision of the Commission on the basis that the record did not contain substantial evidence to support the decision.[8] The Supreme Court of Pennsylvania reversed the commonwealth court for failure to apply the proper standard of review.[9]

The Appellant was a seasonal park ranger at Ricketts Glen State Park (Ricketts Glen), a Pennsylvania state park.[10] When an opening for a permanent park ranger position became available at Ricketts Glen, Bowman and another person named Gibson applied for the position.[11] The supervisor at Ricketts Glen interviewed both applicants and recommended Bowman because he considered him better suited for the position of permanent ranger.[12] The director of

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this area of the law. In any event, whether a dialogue develops or not, the author plans to write this review of important administrative decisions each year.

Gedid, *supra* note 1, at 626.

[5] 700 A.2d 427 (Pa. 1997).

[6] See Department of Envtl. Resources v. Bowman, 667 A.2d 499, 500 (Pa. Commw. Ct. 1995), *rev'd*, 700 A.2d 427 (Pa. 1997).

[7] *Id.* at 503

[8] *Bowman*, 700 A.2d at 428.

[9] *Id.* at 429.

[10] *Id.* at 427.

[11] *Id.*

[12] *Id.* at 428.

the Bureau of State Parks Department (Department) directed the appointment of Gibson, who enjoyed affirmative action priority status, to the park ranger position because there was "no significant justification for non-selection of the affirmative action candidate."[13]

Bowman appealed to the Commission.[14] After a hearing, the Commission decided that the Department had hired Gibson entirely on the basis of affirmative action considerations and, in doing so, had violated Section 905a of the Civil Service Act.[15] In an opinion written by Judge Friedman, the commonwealth court reversed the Commission on the basis that the record did not contain substantial evidence to support the Commission's finding.[16] Judge Friedman applied the standard of review set forth in Section 704 of the Administrative Agency Law.[17] Because the appeal involved a sex discrimination claim, however, Judge Friedman also turned to the standard of proof for sex discrimination cases that the commonwealth court had adopted in the past.[18]

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[13] *Id.*

[14] *Id.*

[15] *Id.*Section 741.905a of the Civil Service Act provides:

> No officer or employe of the Commonwealth shall discriminate against any person in recruitment, examination, appointment, training, promotion, retention or any other personnel action with respect to the classified service because of political or religious opinions or affiliations because of labor union affiliations or because of race, national origin or other non-merit factors.

PA. STAT. ANN. tit. 71, § 741.905a (West 1990).

[16] Department of Envtl. Resources v. Bowman, 667 A.2d 499, 502-03 (Pa. Commw. Ct. 1995).

[17] *Id.* at 501 n.6. *See* 2 PA. CONS. STAT. § 704 (1988).

[18] *Bowman*, 667 A.2d at 501-02. The standard of proof for sex discrimination cases is as follows: a complainant's prima facie case must establish "that more likely than not discrimination has occurred." *Id.* at 502 & n.8 (citing Department of Health v. Nwogwugwu, 594 A.2d 847, 850 (Pa. Commw. Ct. 1991) (stating that once the prima facie case is made, discrimination is assumed and becomes "determinative of the factual issue of the case" unless rebutted)). This can be proven by "the subjective intent of the alleged discriminator." *Id.* at 502 (citing Lynch v. Department of Pub. Welfare, 373 A.2d 469, 471 (Pa. Commw. Ct. 1977)). One way to prove subjective intent to discriminate is "to show that the appointing authority promoted the less qualified applicant." *Id.*

In her analysis of the evidence, Judge Friedman made extensive use of the concept of burden of proof. In this case the Department conceded that Bowman had established a prima facie case.[19] Judge Friedman asserted that after a prima facie case has been established in a sex discrimination case, the burden of proof shifts to the appointing authority to "advance a legitimate non-discriminatory reason for the personnel action."[20] The implementation of an affirmative action plan is a legitimate non-discriminatory reason that overcomes the prima facie case.[21] At that point, according to Judge Friedman, the burden shifts to the proponent to establish that the affirmative action plan is a pretext for discrimination.[22] Judge Friedman agreed with the Department that the record contained substantial evidence which established that the two applicants were equally qualified.[23] Thus the affirmative action plan could not have been a pretext. Next, she reviewed the evidence and concluded that Bowman had more experience than Gibson at parks the same size as Ricketts Glen.[24] The other applicant, however, had three more years of enforcement experience than Bowman at the level that the new position required.[25]

In a majority opinion authored by Justice Nigro, the supreme court reversed.[26] The court held that the commonwealth court had exceeded its scope of review and "failed to limit its review to a determination as to whether substantial evidence supported [the Commission's] findings."[27] Section 704 of the Administrative Code defines the proper standard of review by a court of agency adjudications as "a determination of whether constitutional rights have been violated, errors of law have been committed, or whether the findings of the agency are supported by substantial evidence."[28]

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[19] *Id.* at 502.
[20] *Id.*
[21] *Id.* (citing Johnson v. Transportation Agency, 480 U.S. 616 (1987)).
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 503.
[26] Bowman v. Department of Envtl. Resources, 700 A.2d 427, 429 (Pa. 1997).
[27] *Id.* at 429.
[28] *Id.* at 428.

The supreme court explained that this standard requires that "'courts . . . not review the actions of governmental bodies or administrative tribunals involving acts of discretion in the absence of bad faith, fraud, capricious action or abuse of power.'"[29] Mere disagreement with the outcome before the agency is not ground for judicial reversal because such action substitutes judicial discretion for administrative discretion.[30]

Applying these principles to the present case, the supreme court observed that Appellant's principal argument was that the Department had discriminated against him by hiring a less qualified applicant entirely on the basis of her gender.[31] Such practices violate section 905(a) because sex is a non-merit factor.[32] The Commission had found that Appellant had presented substantial evidence that he was better qualified. This decision was based on Appellant's experience in a large park and the absence of evidence that the other applicant was equally or better qualified.[33] Hence, the Commission reasoned that the other applicant had been hired because she fit an affirmative action category.[34] The commonwealth court rejected the Commission's finding with the finding that the Appellant's experience "is only one factor a reasonable person would consider in determining whether [Appellant] is more qualified for the . . . position."[35] The other applicant had been promoted three years earlier than Appellant to the seasonal park ranger position, which, according to the commonwealth court, meant that she was at least equally as qualified as Appellant.[36] The supreme court held that the commonwealth court's analysis of this evidence constituted error.[37] Instead of limiting its review to whether there was substantial evidence to support the Commission's conclusions, the

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[29] *Id.* at 428 (quoting Norfolk & W. Rwy. Co. v. Pennsylvania Pub. Util. Comm'n, 413 A.2d 1037, 1047 (Pa. 1980)).

[30] *Id.* at 429.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

commonwealth court had "reweighed the facts and impermissibly substituted its judicial discretion for that of the Commission."[38]

Justice Cappy, with whom Justice Castille joined, concurred that the commonwealth court should not have reversed the decision of the Civil Service Commission, but dissented from the majority on the basis that the decision of the Commission should not have been upheld.[39] Justice Cappy reasoned that under the particular version of standard of review which the majority adopted, when a reviewing court finds a single item of evidence that supports the evidence below, the reviewing court must affirm.[40] According to Justice Cappy, the majority's approach violated the standard set forth in a decision by the Supreme Court of the United States, *Universal Camera v. NLRB*,[41] and subsequently adopted in *Peak v. Unemployment Compensation Board of Review*[42] "as the appropriate scope of review under Pennsylvania agency law."[43] Pursuant to *Peak*, a reviewing court should affirm an agency's decision "[o]nly when the record *as a whole* contained substantial evidence to support the agency decision."[44] Because of this, Justice Cappy reasoned that the interpretation and application of the standard of review adopted by the majority violated the doctrine of stare decisis, thus reducing judicial review of agency decisions to a mere "rubber stamp."[45] Justice Cappy further argued that this result construed the legislatively created standard of review in such a narrow manner that it led to an "absurd" result, which violated the canons of interpretation.[46] Thus, according to Justice Cappy's line of reasoning, it was not error for the commonwealth court to

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[38] *Id.*

[39] *Id.* at 429-31 (Cappy, J., concurring and dissenting).

[40] *Id.* at 429-30 (Cappy, J., concurring and dissenting).

[41] 340 U.S. 474 (1951).

[42] 501 A.2d 1383 (Pa. 1985).

[43] *Bowman*, 700 A.2d at 430 (Cappy, J., concurring and dissenting) (citing *Peak*, 501 A.2d at 1387).

[44] *Id.* at 429-30 (Cappy, J., concurring and dissenting).

[45] *Id.* at 430 (Cappy, J., concurring and dissenting).

[46] *Id.* Under Pennsylvania law, there is a presumption that the legislature in enacting a statute does not intend a result that would be considered absurd or unreasonable. 1 PA. CONS. STAT. § 1922(1) (1988).

evaluate the potential importance of the other applicant's experience. Once that importance had been determined, however, the proper action was not to reverse, as the commonwealth court did, but to remand the case to the Commission so that the agency could address the question of the relative significance of each applicant's experience.[47]

Moreover, Justice Cappy forcefully argued that the Commission's failure to weigh the impact of the other applicant's experience in *Bowman* was one part of a more general problem: "agency opinion[s] need[] to contain sufficiently detailed findings of fact, together with a coherent legal discussion, so that the Commonwealth Court can perform a meaningful review."[48] Justice Cappy's requirements for agency opinions are necessary in light of the function of appellate courts "'to assure that the agency has given reasoned consideration to all the material facts.'"[49] In turn, this functional test requires that an "'agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts.'"[50]

2. Evaluation

In this case the Supreme Court of Pennsylvania wrestled with the "substantial evidence" rule, a standard of review problem which has plagued state and federal courts for fifty years.[51] The problem may be at an earlier stage of development in Pennsylvania than in some other jurisdictions due to the antiquated language of the Pennsylvania Administrative Code, which contains one of the

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[47] *Bowman*, 700 A.2d at 431 (Cappy, J., concurring and dissenting).

[48] *Id.*

[49] *Id.* at n.4 (Cappy, J., concurring and dissenting) (quoting Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir 1970)).

[50] *Id.* (quoting *Greater Boston Television Corp.*, 444 F.2d at 851).

[51] *See, e.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Matthaei v. Housing Auth. of Baltimore City, 9 A.2d 835, 838 (Md. 1939); Stockus v. Boston Housing Auth., 24 N.E.2d 333, 336-37 (Mass. 1939); Stork Restaurant, Inc. v. Boland, 26 N.E.2d 247 (N.Y. 1940); Blumenschein v. Housing Auth. of Pittsburgh, 109 A.2d 331, 334-35 (Pa. 1954); Appeal of Floersheim, 34 A.2d 62, 62-64 (Pa. 1943); Appeal of Liggett, 139 A. 619, 622 (Pa. 1927).

earliest versions of statutory language that attempts to describe the standard of review.[52]

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[52] The Pennsylvania Administrative Agency Law provides:

> After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is *not supported by substantial evidence.*

2 PA. CONS. STAT. § 704 (1988) (emphasis added).

Section 706 of the federal Administrative Procedure Act provides that the scope of review is as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be-
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> *In making the foregoing determinations, the court shall review the whole record* or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1994) (emphasis added).

In *Universal Camera Corp. v. NLRB*, the Supreme Court of the United States described the difficulties that had arisen under earlier versions of the Administrative Procedure Act which merely used the words "substantial evidence" without stating explicitly that such review was to be of the "whole" record. Numerous courts had interpreted such earlier language to mean that if there was any support in the record for the finding of the agency, the reviewing court would uphold the agency decision;

It can be argued that the majority reached the correct outcome. Unfortunately, however, the majority did not sufficiently explain its analysis. The majority stated the general rules about substantial evidence, then followed them with a discussion of Appellant's experience.[53] After reviewing this evidence, the majority turned to a detailed discussion of the commonwealth court's analysis[54] and concluded without explanation that the commonwealth court had

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the supporting evidence would be viewed in "isolation" and the whole record would be ignored. *Universal Camera*, 340 U.S. 474, 477-91 (1951). Under this view, the reviewing court would stop once it found any evidence at all that supported the agency decision and would not examine the whole record.

One court acknowledged the difficulty of the substantial evidence rule by stating that

> where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the Board. The courts may not weigh the evidence or reject the choice made by the Board where the evidence is conflicting and room for choice exists. . . .There is often greater difficulty in applying the test than in formulating it.

Stork Restaurant, 26 N.E.2d at 252, 255 (N.Y. 1940).

[53] The appellate court is "not directed to inquire into the administrative agency's adjudication, but rather only to determine whether it was supported by substantial evidence." *Bowman*, 700 A.2d at 428 (citing Bethenergy Mines, Inc. v. Workers' Compensation Appeal Bd., 612 A.2d 434, 436-37 (Pa. 1992)). Additionally,

> "courts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion in the absence of bad faith, fraud, capricious action or abuse of power . . . . That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; judicial discretion may not be substituted for administrative discretion."

Id. (quoting Norfolk & W. Ry. Co. v. Pennsylvania Pub. Util. Comm'n, 413 A.2d 1037, 1047 (Pa. 1980)).

[54] *Bowman*, 700 A.2d at 429. The Supreme Court of Pennsylvania stated that

> [b]y focusing on Gibson's experience and presenting arguments as to why she was as qualified as Bowman, the Commonwealth Court improperly exceeded its scope of review. Although the Commonwealth Court acknowledged the Commission's findings, it failed to limit its review to a determination as to whether substantial evidence supported those findings. Instead, the Commonwealth Court focused on Gibson's PR2 experience and found she was as qualified as Bowman for the Ricketts Glen position. In doing so, the Commonwealth Court reweighed the facts and impermissibly substituted its judicial discretion for that of the Commission.

Id.

erred in reweighing the evidence.[55] Then the majority stated that the decision must be reversed.[56] This terse majority explanation of the majority lends itself to the criticism of the concurring opinion that the majority merely searched until it found something—anything—in the record supporting the decision of the Commission; and, once that smidgen or scintilla of evidence was found, rubber stamped the

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[55] This writer does not disagree with the conclusion of Justice Nigro because there are compelling facts to indicate that the commonwealth court did weigh the evidence. The commonwealth court's opinion was painstakingly thorough, yet its thoroughness clearly illustrated a weighing of the evidence. In the opinion, Judge Friedman made extensive use of the concept of burden of proof and rebuttal of that burden to evaluate the evidence. *See* Department of Envtl. Resources v. Bowman, 667 A.2d 499, 502-03 (Pa. Commw. Ct. 1995). To do so, she first closely examined the evidence of the appellant and concluded that the appellant had made out a prima facie case. *Id.* at 502. This, of course, meant that there was evidence, which if believed, established and supported all elements necessary to the appellant's case. She then explained how the burden shifted to the appellee once the appellant had established his prima facie case. *Id.* She analyzed the evidence of the appellee and concluded that it, if believed, rebutted the prima facie case of the appellant. *Id.* She then explained what the appellant would have to establish to rebut appellee's position and concluded that the appellant had not done so. *Id.* at 502-03. It is submitted that the mere process of describing Judge Friedman's analysis in terms of burden of proof and rebuttal ipso facto illustrated a close weighing of the evidence. This is, of course, what an appellate court should not do in reviewing an appeal from an administrative agency.

Furthermore, Judge Friedman's analysis was arguably incorrect for several other reasons. First, the substantial evidence rule dictates that credibility determinations are for the agency, not the court. The commonwealth court opinion, however, goes on to conclude that both appellant's and appellee's versions are equally persuasive. *Id.* The opinion further pointed out appellee's earlier promotion of the woman who obtained the position at issue, which supported appellee's position. *Id.* at 503. In doing so, the commonwealth court made a credibility determination. That is, the commonwealth court decided that the appellee's version was as credible and persuasive as the appellant's. Under the substantial evidence rule, however, it is the province of the agency to make that determination, not that of the courts.

Consequently, another ramification of the substantial evidence rule is that where several different inferences can be drawn from competing testimony and evidence, it is the agency's function to draw that inference. The court should not substitute its judgment for that of the agency, unless the agency action is irrational or arbitrary and capricious.

[56] *Bowman*, 700 A.2d at 429.

decision of the Commission.[57] In fact, the majority opinion explictly appeared to state that the reviewing court may look no further once evidence is found to support the conclusion of the agency.[58] If this reading of the majority opinion is accurate, then the majority is using the antiquated and rejected "scintilla of evidence" rule.[59] This approach has been described as both a one-sided review of the evidence and as so narrow in scope that it probably impairs meaningful judicial review of agency action.[60] These criticisms, as trenchant as they are, do not meet the primary objection to the action of the majority: *in earlier decisions the Supreme Court of Pennsylvania has expressly adopted the substantial evidence on the whole record standard of review.*[61] But the majority opinion

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[57] *See id.*

[58] In its holding, the supreme court stated that "the Commonwealth Court improperly exceeded its scope of review. *Although the Commonwealth Court acknowledged the Commission's findings, it failed to limit its review to a determination as to whether substantial evidence supported those findings.*" *Id.* (emphasis added).

[59] One commentator found a pre-APA approach to the substantial evidence rule stating that

> "[I]f what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate . . . . Under this interpretaion, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored."

BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.7, at 638 (3d ed. 1991) (first alteration in original) (quoting Report of the Attorney General's Committee 210-11 (1941)). Under this approach, "substantial evidence" meant any evidence "*standing alone* would be sufficient to support a finding." *Id.*

[60] *Id.* at 642-43. When a court's review is limited "to the supporting testimony of . . . one witness [it] is bound to be based upon a distorted picture. It leads to all but routine affirmance since agency findings are almost always based upon at least *some* supporting evidence." *Id.* at 639.

[61] Peak v. Unemployment Compensation Bd. of Review, 501 A.2d 1383, 1387 (Pa. 1985) (holding that "the standard for judicial review of administrative determinations in favor of the party with the burden of proof . . . is substantial evidence on the whole record"); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (applying the same substantial evidence standard of review in the federal courts).

appeared to imply that, once some bit of evidence is found supporting the agency decision, the reviewing court must affirm. Substantial evidence on the whole record standard of review does not mean that a reviewing court could or should look at only one side of the record. In fact, the *Universal Camera* opinion, drawn upon in Pennsylvania's *Peak* decision adopting the substantial evidence on the whole record standard, was written in large part to dispel any idea that only one side of the evidence should be examined by the reviewing court.[62]

Justice Cappy was correct to criticize the majority opinion for just that reason. Under the majority test, a "reviewing court's function ends once it finds a single, substantive item of evidence that supports the decision below."[63] The majority's view reduced the role of the court to a "rubber stamp."[64] The *Peak* case, however, had adopted substantial evidence on the whole record as Pennsylvania's interpretation of section 704 of the Administrative Code.[65]

The concurring opinion raised a second problem which often occurs in judicial review of agency action. Relying on the case of *Page's Department Store v. Velardi*,[66] Justice Cappy argued that the Court should remand for additional findings of fact.[67] Under the doctrine of *Page's Department Store,* if the referee's (ALJ's) decision does not explain "why" he or she rejected the claimant's allegation, the case must be remanded for additional findings.[68] The *Page's Department Store* court stated that if "'the fact finder in an administrative proceeding is required to set forth his findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence and which are relevant to a decision.'"[69] Because the agency in *Page's Department Store*

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[62] *Universal Camera*, 340 U.S. at 487-88.

[63] *Bowman*, 700 A.2d at 429 (Cappy, J., concurring and dissenting).

[64] *Id.* at 430.

[65] *Peak*, 501 A.2d at 1387.

[66] 346 A.2d 556 (Pa. 1975).

[67] *Bowman*, 700 A.2d at 430 (Cappy, J., concurring and dissenting).

[68] *See id.* (citing *Page's Dep't Store*, 346 A.2d at 561).

[69] *Id.* (quoting *Page's Dep't Store*, 346 A.2d at 561).

did not discuss the bearing of the claimant's experience on its decision, it had not satisfied this requirement.[70] Justice Cappy explained that agency opinions must contain sufficiently detailed statements of fact so that courts can effectively conduct their review. Otherwise, the courts will be unable to assure that the will of the legislature is being carried out.[71] He explained that "[t]he agency adjudication needs to make sense standing alone. Thus, while the reviewing court must still review the record for substantial evidence, the court should do so to verify that the evidence is there: it should be evident from the adjudication why particular evidence is significant."[72]

It is difficult to disagree with this part of Justice Cappy's concurring opinion: agencies should give the findings on which their conclusions or decisions are based if the reasons are not obvious; for without such a foundation, judicial review is difficult. Unfortunately, this test is as amorphous and evanescent as the substantial evidence test—easy to state, but often difficult to apply. In the first place, it is questionable that the *Page's Department Store* opinion, on which Justice Cappy relies, is or should be controlling; the case is distinguishable. In *Page's Department Store*, there was a direct conflict in testimony as to the cause of a back injury.[73] The employer alleged that it was the result of an auto accident many years before, and the claimant argued that it was the result of a misstep while moving heavy merchandise at work.[74] The Workmen's Compensation Referee simply held that there had been an accident without any finding about causation of the back injury;[75] but causation was the principal issue in the case.[76] The court in effect held that the Referee had to state which experts he believed on the subject of causation.[77]

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[70] *Id.* (citing *Page's Dep't Store*, 346 A.2d at 561).

[71] *Id.* at 431 (Cappy, J., concurring and dissenting).

[72] *Id.*

[73] Page's Dep't Store v. Velardi, 346 A.2d 556, 558 (Pa. 1975).

[74] *Id.*

[75] *Id.* at 560.

[76] *Id.* at 560-61.

[77] *See id.*

In the present case, however, the nature of the conflict is different. In his appeal to the Commission, Appellant alleged that his extensive experience in parks similar to the one in the position he applied for made him better qualified. Furthermore, he alleged that the other applicant had been selected solely on the basis of gender without any consideration of her qualifications. On the other hand, the position of the Department was that affirmative action policies required the appointment of the other applicant.[78] Thus the issue joined before the Commission was not about the different versions of evidence placed into the record and contested by the parties, but whether Appellant's showing was sufficient in the face of the *policy* which the Department argued had to be followed. *It was not whether Appellant's showing was sufficient in the face of the experience of the other applicant.* The thrust of the Commission's case was that the actions of the employer were merely a pretext for sex discrimination, and thus the Department did not offer evidence in the record about the caliber of either the Appellant's or the Appellee's qualifications. Moreover, the Department did not directly challenge or contravene the credibility of, and inferences to be drawn from, the abundant, uncontradicted

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[78] In the description of the commonwealth court,

> The Department presented the testimony of Patty Robbins, a Personnel Analyst in the Placement Section of the Department, who described the process used in filling the Park Ranger 2 position. In addition, Sherri Keys, who handled personnel transactions for the Department's Bureau of State Parks, testified that the Department had an affirmative action policy which provided for the selection of an affirmative action candidate where candidates for a position were equally qualified and there was not substantial justification for selecting the non-affirmative action candidate. Keys stated that she examined Semmel's original paperwork and, noticing that Gibson had not been selected, contacted the regional office to request additional written justification for the non-selection of Gibson. When none was forthcoming, Keys reported to Donald Mains that an affirmative action candidate had not been selected for the permanent Park Ranger 2 position and that there was no significant justification for the non-selection. Mains testified that he contacted Wediger and told him that without substantial justification for the selection of Bowman, the Department had to act affirmatively and choose Gibson.

Department of Envtl. Resources v. Bowman, 667 A.2d 499, 501 (Pa. Commw. Ct. 1995), *rev'd* 700 A.2d 431 (Pa. 1997).

direct testimony about Appellant's qualifications. The Department argued that Appellee was just as qualified as Appellant and therefore the employer's affirmative action plan was not merely pretext for sex discrimination.[79] In response to framing the dispute in this fashion, the Commission chose to believe Appellant's version of facts, and inferences from those facts, that his qualifications were clearly superior to those of Appellee on the basis of extensive testimony which supported that very point.[80]

Given the posture of the case before the Commission and based on the positions that the parties took, it is almost unfair to argue, as Justice Cappy did in his concurring and dissenting opinion, that the Commission should have provided a more complete explanation. In our system, the parties control the characterization of the issues, the arguments, and the evidence presented. The tribunal can only decide the cases on the basis of the presentation that the paries have made. And that is what the Commission did in the present case.

Given the legal and factual positions that the parties took, it is plain to see what the Commission believed and why. The Commission believed the Appellant's assertion regarding the value of his extensive experience in an identical park.[81] The Department relied upon a presumption created by its affirmative action policy.[82] On the basis of Appellant's abundant and persuasive evidence, the Commission decided that the presumption had been rebutted.[83] Thus, the foundation for the Commission's decision is clear.

The preceding analysis points out one potential difficulty with the position of the concurring justices: that an agency must give the reasons or findings upon which its conclusions are based. This is a laudable and desirable goal, and one to which the author is sympathetic. To avoid another set of serious problems, however, the court must explain to what length an agency must go in explaining its decision. Is it necessary for an agency to state with specificity *why* it believes one witness and not another? Does an

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[79] *Id.* at 502-03.
[80] *Id.* at 502.
[81] *See* Bowman v. Commonwealth, 700 A.2d 427, 429 (Pa. 1997).
[82] *See id.*
[83] *See id.*

agency have to state *each* finding with an explanation of why *each* finding has been made?[84] This approach, which can be applied to force elaborate explanations, might eliminate the use of the over-general opinions of which Justice Cappy complained. Such an approach, however, may create an entire set of new problems. For example, this approach, if carried too far by zealous judges, may result in replacement of the authority that the legislature delegated to the agencies with decisions made by the courts. This problem, which involves the role of courts vis-a-vis the agencies and the legislature, obviously contains separation of powers overtones. Moreover, there will be constant pressure from counsel who have lost in agency hearings to have the court overrule credibility and other determinations that the agency has made. Thus, the principle, although excellent in that it relates the explanation that an agency must make to the necessities to enable meaningful judicial review, can lead to serious problems. In order for the principle to be useful, the supreme court must carefully and fully explain and limit it. Suitably limited, however, it is a principle which is, or should be, part and parcel of agency opinion writing and judicial review of agency decisions.

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[84] In one section of his concurring opinion, Justice Cappy came perilously close to stating exactly this position by citing, as support, the United States Court of Appeals which held that

> [t]he function of the [appellate] court is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its *reasons* for decision, and identify the significance of the crucial facts . . . . [T]he court must not be left to guess as to the agency's findings or *reasons*.

Id. at 431 n.4 (Cappy, J., concurring in part and dissenting in part) (citing Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (emphasis added).

B. Pipkin v. Pennsylvania State Police[85]

1. Background and Analysis

In *Pipkin v. Pennsylvania State Police,*[86] the Supreme Court of Pennsylvania held that a probationary employee who had been released had no right to judicial review under the Administrative Code.[87] In the *Pipkin* case, after a hearing, a state police cadet on probationary status was terminated from his job.[88] The reasons given for his termination were that he was unable to perform his job satisfactorily and that he made inaccurate statements during certain investigations.[89] He appealed to the Commonwealth Court of Pennsylvania. The court dismissed the appeal on the basis of a motion by the Commonwealth that the court lacked jurisdiction to hear the appeal, because the decision to terminate the probationary trooper was not an adjudication under the Pennsylvania Administrative Agency Law (AAL).[90] The specific argument that

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[85] There is a characterization problem with this case, for it could have been placed with equal justification with the cases that involve procedural due process. The technical issue identified in the opinion is whether an "adjudication" as defined by the Administrative Agency Law (AAL) had taken place below. If it had, then the Appellant would have had a right to judicial review under the AAL. But, as will be seen in the discussion of the case, the pertinent review provision of the AAL, section 101, defines adjudication in the same terms as it defines due process rights. Thus, if there is a question about whether a party is entitled to due process and whether the process which that party received was adequate, an appellate court, under section 101 of the AAL, could refuse to review it on the basis that it is not part of the same adjudication. An argument can therefore be made that the true problem in these cases is substantially the same as the problems in the procedural due process cases, and this case should be examined with them. However, it is the author's experience that questions of right to review are separate from due process; therefore, the case is examined here.

[86] 693 A.2d 190 (Pa. 1997).

[87] *Id.* at 191.

[88] *Id.*

[89] *Id.*

[90] *Id.* Section 702 of the AAL provides for an appeal from an adjudication by stating that "[a]ny person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." 2 PA. CONS. STAT. § 702 (1988).

Additionally, Section 101 of the AAL provides that an adjudication is "[a]ny

the Commonwealth made consisted of two parts. First, Appellant had no personal or property right in employment because he was a probationary employee.[91] Second, section 101 of the AAL defines adjudications in terms of personal or property rights, privileges or immunities,[92] while section 702 of the AAL defines the right to appeal, and the jurisdiction of the commonwealth court provides for a right to appeal from a final order in an *adjudication*.[93] The Commonwealth thus successfully argued that Pipkin's termination was not an adjudication under the AAL because he was a probationary employee.[94] Adopting this reasoning, the supreme court affirmed that Appellant had no right to an appeal from the decision of the State Police to the commonwealth court.[95]

2. Evaluation

The language of the AAL defining adjudication is unfortunate, for it does not reflect the modern line of cases beginning with *Goldberg v. Kelly*.[96] As remarked in an earlier article, the *Goldberg* decision

> rejected the right-privilege distinction and attempted to construct an entirely new test for defining the private interests that may trigger due process protection. That test consisted of an authorization or entitlement test: if a statute entitles a person to benefits or state action—for example, money payments, a license, or a contract—and if the private loss would not be minimal, then due process rights attach.[97]

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final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceedings in which the adjudication is made." *Id.* § 101.

[91] *Pipkin*, 693 A.2d at 192-93.

[92] *Id.* at 192.

[93] *Pipkin*, 693 A.2d at 192.

[94] *Id.* at 192-93.

[95] *Id.* at 194.

[96] 397 U.S. 254 (1970).

[97] Gedid, *supra* note 1, at 642 (citing *Goldberg*, 397 U.S. at 262-63) (citation omitted). One commentator stated that the Supreme Court's "specific rejection of the

Moreover, cases following *Goldberg* specifically emphasized that the import of that case was that a property *right* is *not* necessary in order to trigger the protection of due process. In the case of *Board of Regents v. Roth*,[98] the United States Supreme Court "expressly" rejected the notion that property rights, or a right-privilege test, were necessary in order to trigger due process protections.[99] This rejection was made in "unmistakeable" terms.[100] Further, in another case the United States Supreme Court held that property includes a "broad range of interests,"[101] and, in so holding, rejected any test which involves labelling the interest involved as a "right" or a "privilege" (like Pennsylvania's AAL).[102]

In Pennsylvania, as pointed out above,[103] the relevant section of the AAL defines adjudication as a proceeding affecting any *rights*, *privileges*, immunities, duties, liabilities, or obligations.[104] Thus, in this Commonwealth, the statutory test for an adjudication is not consistent with the United States Supreme Court's decisions in the *Goldberg*, *Roth*, and *Perry* cases cited immediately above. Rather, the Supreme Court of Pennsylvania,throughout its opinion in the *Pipkin* case, appeared to interpret section 101 of the AAL to require a property "right" to amount to an adjudication.[105] The court reasoned that no adjudication had occurred because no "right" was present. Because no adjudication had occurred, then there was no right to judicial review.

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privilege concept" was the most important aspect of *Goldberg*. SCHWARTZ, *supra* note 59, § 5.15, at 257.

[98] 408 U.S. 564 (1972).

[99] *Id.* at 571-72 n.9.

[100] Gedid, *supra* note 1, at 642.

[101] Perry v. Sindermann, 408 U.S. 593, 601 (1972).

[102] Gedid, *supra* note 1, at 643.

[103] For the text of section 101 of the AAL, see *supra* note 90.

[104] 2 PA. CONS. STAT. § 101 (1988) (emphasis added). For the text of section 101, see *supra* note 90.

[105] Pipkin v. Pennsylvania State Police, 693 A.2d 190 (Pa. 1997). The court stated, for example, that "[a] governmental employee only has a personal or property *right*," that the "appellant must establish that his dismissal affected some personal or property *right*," and that it was "determining whether Section 205(f) of the Administrative Code confers a property *right*," *Id.* at 192 (emphasis added).

When one views the substance of the decision made by the supreme court, there is a strong argument that the outcome is correct on the merits. The legislature and the courts have consistently adhered to the view that probationary employees have no expectation or property interest in employment; such employees are at-will and can be discharged at any time without cause.[106] As such, they are not entitled to the protections of procedural due process and may be discharged without notice and a hearing. It is within the power and role of the highest court of this Commonwealth to make the determination that government employees are at will. Because it is obvious that the legislature did not want, and had gone to considerable lengths to prevent, the creation of property interests in employment, it is easy to see that there is no right to invoke the protections of due process.

In this situation, however, an easy case on the merits may be making bad law. Although the outcome of the case may be correct, one cannot conclude that the *Pipkin* analysis is desirable or useful; for there is a serious problem in the conceptual apparatus that the court used. That problem may involve constitutional problems, and at a minimum involves incongruity between the AAL and the type of analysis which it forces upon the Pennsylvania courts. The relevant section of the AAL, as interpreted by the supreme court, may well be unconstitutional under the *Goldberg* line of cases.

First, the AAL test appears to be based upon the pre-*Goldberg* analysis, which conceptualized the world for due process claims into persons with either "rights" or "privileges." But the *Goldberg* line of cases, which, incidentally, have not been reversed, entirely rejected a rights test or a right-privilege labelling process for procedural due process purposes.[107] In the *Pipkin* case, the Supreme Court of Pennsylvania, through the definition of "adjudication" in the AAL, appeared to make not only the right to procedural due process, but

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[106] Werner v. Zazyczny, 681 A.2d 1331, 1335 (Pa. 1996); Stumpp v. Stroudsburg Mun. Auth., 658 A.2d 333, 335 (Pa. 1995); Office of Admin. v. Orage, 515 A.2d 852, 853 (Pa. 1986).

[107] For a discussion of the *Goldberg* line of cases, see *supra* notes 96-102 and accompanying text.

also the availability of judicial review, turn on the pre-*Goldberg* type of property rights analysis.

Second, the supreme court, either because it believes itself bound by the language of the AAL, or because it is more comfortable with the old test, appears to continue to use the term and the test "property rights" for procedural due process and for the definition of adjudication under the AAL.[108] It is almost too well-established to bear repeating that the right-privilege and other such characterizations have been rejected because they operated unfairly and concealed the true nature of what was being taken in procedural due process cases.[109] The right to judicial review is equally important; it should not be made to turn on the same outmoded test. Thus, the present reviewer believes that, while the outcome in the *Pipkin* case is probably correct, the opinion suffers from the outmoded rights analysis which has pervaded Pennsylvania jurisprudence in the past. A better outcome would have been for the court to have held that there was a right to judicial review. This action could have been taken on the basis that the AAL recognizes the importance of review by a court and creates a presumption in favor of reviewability.

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[108] For a discussion of the court's use of the term "property right," see *supra* notes 104-105 and accompanying text. *See also* Gedid, *supra* note 1, at 638-44 (analyzing the case of Pennsylvania Game Comm'n v. Marich, 666 A.2d 253 (Pa. 1995) (holding that procedural due process guarantees do not attach until a dermination is made that a "protected liberty or property interest" is present)).

[109] For a more detailed discussion of the deficiencies of rights-based procedural due process analysis, see Gedid, *supra* note 1, at 641-44. In addition, excellent commentaries on the right-privilege distinction include the following: Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982); William W. Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 UCLA L. REV. 751 (1969); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977 (1986); *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-5, at 781-82 (2d ed. 1988) (arguing that the government may not condition privileges upon the denial of constitutional rights).

Therefore, the pertinent section of the AAL, section 101, should be construed with that presumption in mind.[110] The judicial review would be simple: based on the clear language of the applicable statute that a probationary employee has no entitlement to continued employment and thus no property interest under the applicable statutes, the reviewing court would hold that he or she has no right to employment or even to a hearing, because a property interest is necessary in order to trigger due process protection. In this fashion, the important principle that a person is entitled to judicial review would be protected, and the approach taken by the legislature and the court's would be preserved. But, under the holding of the Supreme Court of Pennsylvania in the *Pipkin* case, it is possible that a party may be denied the protections of due process, and the reviewing court, on the basis of an incomplete record, will hold that he or she did not have an adjudication. Thus, due process protections could be denied, and there would effectively be no judicial review.

III. CHARITABLE IMMUNITY FROM TAXATION: *CITY OF WASHINGTON V. BOARD OF ASSESSMENT APPEALS OF WASHINGTON COUNTY*

A. Background and Analysis

Reversing the commonwealth court, the Supreme Court of Pennsylvania in *City of Washington v. Board of Assessment Appeals of Washington County*[111] held that Washington and Jefferson College was entitled to an exemption from real estate taxation as "a purely public charity."[112]

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[110] In order to properly construe section 101 in conjunction with the presumption in favor of judicial review, the court could interpret section 101 for purposes of determining whether there is a right to review in light of the economic effect of the agency decision. For example, because terminating the probationary status of the petitioner would cost him his salary, there exists a serious economic impact or harm. This effect might be sufficient to justify judicial review. Another approach might be to hold that termination would result in the loss of a personal privilege under the language of the statute, and should thus be reviewable.

[111] 704 A.2d 120 (Pa. 1997).

[112] PA. CONST. art. VIII, § 2(a)(v).

Washington and Jefferson College (W&J or College) is a private liberal arts college located in the City of Washington, Pennsylvania. W&J claimed exemption from real estate property taxes under a Pennsylvania statute that exempts from taxation all universities and colleges "founded, endowed, and maintained by public or private charity."[113] The Pennsylvania Constitution forms the basis for this statute by providing for exemption from taxation for "[i]nstitutions of purely public charity."[114] The supreme court characterized the issue in *City of Washington* as "whether W&J meets the constitutional prerequisite of being a 'purely public charity' so that it can claim the statutory exemption."[115]

Resolution of this issue required application of the test that the court formulated in *Hospital Utilization Project v. Commonwealth* (*HUP*)[116] for determining tax exemptions for institutions of "purely public charity."[117] The *HUP* court formulated five requirements to qualify an entity as a "purely public charity," as follows: the entity must "1) [a]dvance[] a charitable purpose; 2) [d]onate[] or render gratuitously a substantial portion of its services; 3) [b]enefit[] a substantial and indefinite class of persons who are legitimate subjects of charity; 4) [r]elieve[] the government of some of its burden; and 5) [o]perate[] entirely free from private profit motive."[118] The balance of the opinion involved the application and explanation of this test to the situation of Washington and Jefferson College.

The first prong of the HUP test requires the exemption claimant to establish that they advance a charitable purpose.[119] This occurs if the charity furnishes a religious, educational, moral, physical or

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[113] PA. STAT. ANN. tit 72, § 5020-204(a)(3) (West 1995).

[114] PA. CONST. art. VIII, § 2(a)(v).

[115] *City of Washington*, 704 A.2d at 122.

[116] 487 A.2d 1306 (1985).

[117] *Id.* at 1312.

[118] *Id.* at 1317. The supreme court in *City of Washington* noted that the test which it formulated in *HUP* was a "synthesis" of earlier case law, and that *HUP* did not break new ground; hence, the court explained that the cases that *HUP* was based on "remain relevant" to exemption analysis. *City of Washington*, 704 A.2d at 122 n.2.

[119] *See HUP*, 487 A.2d at 1317.

social benefit to the public.[120] The supreme court stated that it has long been established in Pennsylvania that educational institutions further the public good and are considered to be charitable in nature.[121] W&J provides education for youth and serves a public purpose.

The second prong of the *HUP* test requires that the claimant gratuitously donate or deliver a "substantial portion of its services."[122] In the case of W&J there are several practices which were relevant in this regard. First, W&J absorbs a portion of its tuition charges that "would otherwise be charged to the students," so that annually the College provides substantial amounts of free or partially free education for the students.[123] The College accomplishes this through the award of academic scholarships, grants, and aid. W&J also absorbs a portion of its programmatic expenses by contributions from its endowment fund.[124] The supreme court's analysis concluded that, as a result of these contributions, a student receives nearly fifty percent of his or her education without charge at W&J. Providing one half of its services for free is well above the level adequate for qualification as a charity entitled to exemption.[125] Furthermore, the fact that W&J charges tuition does not cancel the charitable status of the college. Numerous Pennsylvania cases have held that charities are not required to render wholly gratuitous services.[126]

The next requirement of the *HUP* test is that the claimant render a benefit to a "substantial and indefinite class of persons who are legitimate subjects of charity."[127] In ringing phrases, the court

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[120] *City of Washington*, 704 A.2d at 122.

[121] *Id.* at 123.

[122] *Id. See HUP*, 487 A.2d at 1317.

[123] *City of Washington*, 704 A.2d at 123.

[124] *Id.*

[125] *Id.* at 124.

[126] *Id.* (citing *HUP*, 487 A.2d at 1315-16; St. Margaret Seneca Place v. Board of Property Assessment Appeals & Review, 640 A.2d 380, 384 (Pa. 1994); Presbyterian Homes Tax Exemption Case, 236 A.2d 776, 780-81 (Pa. 1968); Hill School Tax Exemption Case, 87 A.2d 259, 263 (Pa. 1952).

[127] *Id.*

explained that young people seeking education qualify as legitimate objects of charity:

> In this era when the cost of attending college poses a major obstacle for youths seeking to further their education, even students who are financially secure in other phases of life are often "poor" in relation to the financial outlays that college requires. W&J provides substantial aid for students who would not otherwise be able to afford a college education.
>
> . . .
>
> The vast majority of the aid that W&J provides is directed to the financially needy, i.e., those who cannot afford the usual charges for tuition, room, and board.[128]

There is no necessity for all of the aid to go to the financially needy; great academic achievement or promise may be the basis of aid for some students.[129] The existence of admission standards does not disqualify a school from being a purely public charity, if admission is open to the public subject to reasonable admission standards.[130]

The *HUP* test also requires the party claiming charitable exemption to lessen a portion of the government's burden.[131] The Supreme Court of Pennsylvania held that "W&J, like other independent colleges and universities, relieves the load" on state schools.[132]

Finally, the *HUP* test requires that the exemption claimant operate entirely free from any profit motive.[133] According to the opinion, W&J had operated without a profit motive since its inception.[134] The school was founded by Presbyterian ministers to provide education, was incorporated as a nonprofit corporation, and

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[128] *Id.*
[129] *Id.* at 124-25.
[130] *Id.* at 125.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

reinvests any surplus in the college.[135] Furthermore, the supreme court observed that ipso facto the provision of education below cost was "evidence of a lack of profit motive."[136] The majority opinion concluded that, because W&J clearly and unquestionably satisfied the five factors of the *HUP* test for a purely public charity, the college was entitled to a realty tax exemption.[137]

Justice Nigro dissented.[138] He argued that the majority had "mechanically" applied the *HUP* test so that any private college or university could qualify for tax-exempt status.[139] He reasoned that W&J educated those who could afford the $20,000 per year tuition, and that, as a practical matter, its doors were closed to many persons who would like to attend.[140] Furthermore, he argued that the mere fact that an entity is nonprofit does not make it a charity entitled to tax exempt status.[141] The public does not consider private colleges to be charities, even though they provide a socially useful service.[142] Justice Nigro argued that the ease of satisfying the court's broad application and interpretation of the *HUP* test ensures that any nonprofit educational institution can satisfy that test.[143] That, he argued, was a clear indication that the test to determine a public charity had been expanded beyond traditional norms.[144]

B. Evaluation

The majority's test is an amalgam of numerous cases which have considered the charitable property tax exemption over many years.[145] The decision is a careful, thoughtful, and thorough review

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[135] *Id.* at 125-26.

[136] *Id.* at 126.

[137] *Id.*

[138] *Id.* (Nigro, J., dissenting).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See id.* (stating that, although institutions of higher education are valuable to society, "[i]t does not logically follow that they are charitable").

[143] *Id.*

[144] *Id.*

[145] The Supreme Court of Pennsylvania noted that the test from the HUP case

and evaluation of all of the factors, policies, and explanations for the rule which the Pennsylvania courts have considered over the years. It appears that, as a practical matter, the supreme court has considered all aspects of the term "charity" as used in the Pennsylvania Constitution. The court has been careful also to include consideration of the reasons for charitable exemption set forth in the constitution, so that the definition and application of that exemption preserves the spirit of the constitutional language.

The property tax exemption for educational institutions has existed since colonial times, and probably extends back to fourteenth century English practices.[146] The exemption has been championed in the United States as consistent with laissez-faire[147] and as promoting public spirit.[148] The HUP test—which the majority interpreted to deal with nonprofit educational institutions in the *City of Washington* case—takes into account the constitutional and legislative values and policies that have been recognized for many years in this Commonwealth. In addition, the decision attempts to draw on many years of accumulated judicial interpretation and application of those standards, values, and policies. To simply argue that the exemption is not applicable to educational institutions because local governments need more revenue is to ignore that history and the careful consideration and balancing of benefits and costs which has been made in the Pennsylvania Constitution, in the legislation enabling charitable exemption, and in the careful consideration of cases involving this exemption by the Pennsylvania courts for several hundred years. From this analysis, it is clear that, if there is to be any change in the charitable exemption for educational intitutions, it is one for the legislature to make and not local government.

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was itself a synthesis of many earlier cases on charitable exemptions, and that the earlier precedents were thus still relevant to the issue in this case. *Id.* at 122 n.2.

[146] John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions*), 35 ARIZ. L. REV. 841, 842-43 (1993).

[147] Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption,* 52 OHIO ST. L.J. 1379, 1430 n.144 (1991).

[148] *Id.*

It is difficult to understand Justice Nigro's characterization of the majority's application of the test as "mechanical" because he does not explain what he means. The closest that he comes to an explanation is to argue that the majority treats educational institutions as charities simply because they are nonprofit corporations.[149] He also argued that the public does not consider private educational institutions as charities, and that the supreme court should apply the "traditional" tests for a purely public charity.[150]

The majority test appears to be anything but mechanical, for it is a careful application of a complex, five-factor test that applies complex accounting and economic data and dozens of precedents.

Shortly after the Supreme Court decided the *City of Washington* case, the Pennsylvania General Assembly enacted the Institutions of Purely Public Charity Act (Act).[151] In this statute, the legislature adopted a clear set of criteria for defining an organization eligible to claim exemption from taxation as a purely public charity. In the Act the Legislature declared that its intent was to recognize: the contributions to the common good that charities make;[152] the danger of lack of clear standards in the area;[153] and the danger of inconsistent application of standards for charitable exemption.[154]

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[149] *City of Washington*, 704 A.2d at 126 (Nigro, J., dissenting).

[150] *Id.*

[151] Institutions of Purely Public Charity Act, No. 55, 1997 Pa. Laws 508 (codified at PA. STAT. ANN. tit. 10 §§ 372-85 (West Supp. 1998).

[152] Section 3 of the statement of legislative intent recognize the finding that: "Because institutions of purely public charity contribute to common good or lessen the burden of government, the historic policy of exempting these institutions from taxation should be continued." PA. STAT. ANN. tit. 10 § 372(a)(3).

[153] Section 4 of the legislative finding provides: "Lack of specific legislative standards defining the term institutions of purely public charirty has led to increasing confusion and confrontation among traditionally tax-exempt institutions and political subdivisions to the detriment of the public." *Id.* § 372(a)(4).

[154] Section 5 of the legislative findings provides: "There is increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which may violate the uniformity provision of the Constitution of Pennsylvania." *Id.* § 372(a)(5).

The Act adopted a five prong test which appears to be virtually identical to the *HUP* and *City of Washington* test.[155] Under this test, the organization meets the definition of purely public charity if it accomplishes one or more of the following: (1) relieves poverty; (2) advances education; (3) advances religion; (4) prevents or treats disease; (5) provides a government service; or (6) provides other appropriate charitable services, which are described as: "[a]ccomplishment of a purpose which is recognized as important and beneficial to the public and which advances social, moral or physical objectives."[156]

In the Act, the Legislature identifies and clarifies criteria to define a purely public charity and also gives the authority to the judiciary to construe or expand the Act as necessary in order to accomplish objectives of the legislature.

The Act also further clarifies by imposing certain financial tests and restrictions on charitable organizations, similar to the financial analysis of the supreme court in *City of Washington*.[157] In addition there is a new uniform process by which charities will seek their exemptions.[158]

A moment's thought leads to the conclusion that the legislature has perceived the wisdom of the *HUP* criteria. The close parallel between the legislative and judicial tests, coupled with the experience of the judiciary in applying the test, will be beneficial to the public. Because of this legislative-judicial congruence, one probable future effect will be to substantially clarify situations in which charities are able to claim exemption from taxation. The use of the virtually identical test in the statute as was applied in the recent charitable exemption cases means that, to the extent that the text and the intent of the statute and the cases are similar, there are available to the judiciary and to public charities a set of developed, relatively polished requirements for qualification as a purely public charity. Thus, the action of the legislature and supreme court represent a strong beginning to understanding what the statute

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[155] *See id.* § 372(b).
[156] *Id.* § 375(b)(6).
[157] *Id.* § 375(c).
[158] *Id.* § 376.

means and how it is to be applied. Of course, the Act is not identical to the law crafted by the supreme court in *HUP*, and, where it is different, the statute will control. But the similarity between the legislative and judicial approaches is sufficient to lend itself to significant clarity in this area, or to the creation of such clarity much more rapidly than would be the case if the statute had been enacted without using the same concepts as the judiciary. Such an approach is fairer and less expensive for charitable organizations and to the public fisc than the piecemeal litigation which has taken place in Pennsylvania for the past ten to fifteen years. Furthermore, the extensive review of the characteristics of private educational institutions that make them charitable is also one that distinguishes private educational institutions which do not meet the legislative test from those which do. The majority also examined precedents involving private educational institutions that were nonprofits and which *did not* meet the charitable tax exemption.[159] Thus, the implication of the dissent that satisfaction of the requirements for charitable exemption from taxation in Pennsylvania is met under the majority test simply as a result of an educational institution's status as a nonprofit corporation is an exaggeration.

Ultimately, one reading Justice Nigro's dissent is left with the impression that he bases his objection to the charitable exemption for private nonprofit educational institutions upon the idea that "it is the individual taxpayer who is left shouldering the burden of these institutions' tax-free status."[160] But that objection can be levelled at *any* exemption from taxation, for every exemption to some extent causes a shift from the exempt entity to other taxpayers. For example, if an educational institution supplied education to its students without any tuition cost whatsoever—that is, if it were one hundred percent charitable and absorbed all costs of education for its students—Justice Nigro's objection would still prevent tax-free treatment. Under his dissenting rationale, in such a situation taxpayers would still "shoulder the burden" of that institution's tax-free status. Thus, once analyzed, the spirit of his

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[159] *See id.* at 124-26.

[160] *Id.* at 126 (Nigro, J., dissenting).

objection appears to be to the existence of any exemptions at all, because they all cause taxpayers to shoulder some of the burden of the exemption. To such an argument it seems only fair to ask: what then of the constitutional language justifying charitable exemptions, and what of the actions of the General Aseembly in enacting the statute which implements that constitutional mandate? Our culture, our attitudes, and our understanding of the Constitution and its policy have not changed that much.

IV. SOVEREIGN IMMUNITY

A. Department of Transportation v. Patton

1. Background and Analysis

In *Department of Transportation (DOT) v. Patton*,[161] the Supreme Court of Pennsylvania held that in sovereign immunity cases involving the real property exception, Pennsylvania has retained the common law requirement of notice, which is a jury question.[162] The court rejected the argument that Pennsylvania had, or should, adopt the position of the Restatement (Second) of Torts that actual or constructive notice is not required in actions involving the real property exception brought against the Commonwealth.[163] The court also explained the standard of review on appeal for questions involving notice, as well as the application of that standard.[164]

In *Patton*, Brenda Patton was killed when a large tree branch, extending at a forty-five degree angle along the side of the highway, fell onto her car.[165] Alleging that the tree had been "topped" or trimmed in such a way as to cause it to decay, the plaintiff presented expert evidence that the dangerous condition of the tree

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[161] 686 A.2d 1302 (Pa. 1997).

[162] *Id.* at 1305-06.

[163] *Id.* at 1304-05. The real property exception provides that the Commonwealth may be held liable for injuries that result from "[a] dangerous condition of Commonwealth agency real estate and sidewalks." 42 PA. CONS. STAT. § 8522 (b)(4) (1995 & Supp. 1997).

[164] *Id.* at 1305.

[165] *Id.* at 1303.

should have been obvious to an inspector.[166] Refusing to give the jury instruction regarding notice that was requested by DOT,[167] the trial court held that neither actual nor constructive notice is necessary to establish negligence.[168] The trial court gave a general charge on negligence, and the jury returned a verdict in favor of the plaintiff.[169]

On appeal, the commonwealth court agreed with DOT that the trial court erred in holding that notice was not required in cases of this type.[170] The court concluded that the evidence was sufficient to establish that DOT knew or should have known of the dangerous condition.[171] Apparently concluding that the error was harmless, however, the commonwealth court affirmed.[172]

In reversing the decision of the commonwealth court, the Supreme Court of Pennsylvania addressed and clarified several questions involving sovereign immunity and its waiver in Pennsylvania. The plaintiff-appellee strenuously argued that the Restatement (Second) of Torts, section 363(2) does not require notice in cases of this type.[173] In addressing this argument, the court

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[166] *Id.*

[167] The jury instruction requested by DOT was:

> If you find that the alleged dangerous condition existed on June 1, 1988, and that it was caused by artificial conditions, then in determining whether or not the Commonwealth of Pennsylvania, Department of Transportation acted reasonably under all the circumstances here, you must determine whether or not the Commonwealth had actual or constructive notice[, prior to June 1, 1988,] of the allegedly dangerous condition of the highway where plaintiff's accident occurred. . . . Unless you are so convinced by a preponderance of the evidence, you must return a verdict in favor of the Commonwealth of Pennsylvania, Department of Transportation.

Id. at 1304 (alteration in original) (citation omitted).

[168] *Id.*

[169] *Id.*

[170] Patton v. Department of Transp., 669 A.2d 1090, 1095 (Pa. Commw. Ct. 1996).

[171] *Id.*

[172] *Id.* at 1098.

[173] *Patton*, 686 A.2d at 1304. The Restatement (Second) of Torts § 363(2) provides that "a possessor of land in an urban area is subject to liability to persons

explained the extent of waiver in Pennsylvania. The court stated that when the legislature relaxed the doctrine of sovereign immunity in order to permit some recoveries against the Commonwealth, the legislature intended this waiver to be co-extensive with recovery for common law negligence against landowners.[174] In other words, the court explained, if a person could have recovered against a landowner at common law in a negligence action not involving sovereign immunity, then the legislature intended, by waiving sovereign immunity in cases involving real estate, that an identically-situated person should be able to recover against the Commonwealth.[175] At common law, such an action against a municipality required notice.[176] Thus, under the modern statute waiving sovereign immunity in Pennsylvania, the legislature intended for actual or constructive notice of the defect to be a necessary condition of liability for negligence.[177]

The court reasoned that the legislative intent in adopting the real property exception to sovereign immunity clearly required rejection of the plaintiff-appellee's argument that notice is not required.[178] Moreover, the court stated that it has never adopted section 363 of the Restatement (Second) of Torts.[179] To the contrary, the court reasoned, the doctrine that a possessor of land must have actual or constructive notice of a dangerous condition before being held liable for harm is "well established" in Pennsylvania.[180] Thus, the court maintained that if any Restatement (Second) section appears to require notice, "we will interpret it as requiring notice, if possible, or we must conclude that it does not

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using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway." RESTATEMENT (SECOND) OF TORTS § 363(2) (1965).

[174] *Patton*, 686 A.2d at 1304.

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.* at 1304-05.

[179] *Id.* at 1304.

[180] *Id.* at 1305.

comport with Pennsylvania law."[181] Consequently, the court rendered the trial court erroneous in failing to include the requested charge regarding notice.

The supreme court, however, found that the commonwealth court erred in applying the incorrect standard of review, a matter not immediately apparent from reading the opinion. *Patton* clarified the appellate court standard of review in cases where an appeal raises challenges to jury instructions. The supreme court stated that the general standard of review, in challenges to the refusal to grant a new trial, is whether the trial court committed an abuse of discretion or committed an error of law which affected the outcome of the case.[182]

The application of this standard, however, was what created difficulty for the commonwealth court. The court reviewed the evidence and found it sufficient to support a conclusion that DOT knew or should have known of the dangerous condition.[183] The supreme court held that the commonwealth court's review of the sufficiency of the evidence on the question of notice was erroneous.[184] The supreme court determined that the issue of notice in a case involving land is a question of fact for the jury.[185] As a result, notice is not a question on which either the trial or intermediate appellate court can substitute its judgment for that of the jury.[186]

In *Patton*, although the supreme court agreed with the commonwealth court that the record contained ample evidence to support a jury finding of actual notice, the record also contained ample contradictory evidence.[187] The fundamental error of the trial court was its failure to instruct the jury on the correct law regarding notice to DOT.[188] As a result, the jury was not instructed to

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[181] *Id.*

[182] *Id.*

[183] Patton v. Department of Transp., 669 A.2d 1090, 1095 (Pa. Commw. Ct. 1996).

[184] *Patton*, 686 A.2d at 1305.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

consider this question and it did not do so.[189] The supreme court stated that notice was a "major issue in this case" because it "could very well have controlled the outcome."[190] The court explained that the outcome might have been different because the jury may have believed that DOT did not need to have actual or constructive notice in order to be held liable.[191] Thus, the trial court erred in taking the question of notice away from the jury, and the commonwealth court erred in applying a standard of review that merely examined the sufficiency of the evidence without considering the issues presented to the jury.

It is difficult to disagree with the outcome of this opinion, unless one were to take the position that notice should not be required as a matter of law in cases of this type.[192] Questions of law as to notice, types of error, and standard of review, however, are matters of interest to the Supreme Court of Pennsylvania. The first question was substantive in that notice is required in actions against the Commonwealth. Thus, the meaning of the real property exception to sovereign immunity is absolutely clear. In actions involving that exception, actual or constructive notice to the landowner is required. The issue of actual or constructive notice is a factual question. Furthermore, the jury must be instructed that the Commonwealth cannot be found liable for negligence in the absence of notice.

A related question, also not readily apparent from the decision, is identifying and characterizing the error that the trial court committed. Identification of the trial court's error is necessary to determine the correct standard of review. Once the correct standard is determined, *application* of that standard becomes another relevant issue. This process is important because, if the appellate court fails to correctly characterize the error made by the trial court, the reviewing court will either apply the wrong standard of review or, even if the appellate court perceives the correct standard of review, could misapply the correct standard.

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[189] *Id.*

[190] *Id.* at 1305-06.

[191] *Id.*

[192] Such an inquiry, however, is beyond the scope of this article.

According to the supreme court's opinion in *Patton*, a misapplication of the correct standard of review occurred.[193] The supreme court observed that the commonwealth court understood the correct substantive law to be applied.[194] Notably, if the commonwealth court understood the correct law applicable to the question of notice, how could it have committed reversible error? The answer is that, while the commonwealth court appears to have understood that a major issue was whether the trial court applied the correct substantive law on the question of *notice*, the court misapplied the standard of review for *errors of law*.

The misapplication occurred in the following manner. DOT argued to the commonwealth court that the trial court had erred in holding that notice was not required,[195] and the commonwealth court correctly perceived a major substantive issue as whether notice was required.[196] The commonwealth court opinion correctly stated the applicable substantive law on the subject of sovereign immunity,[197]

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[193] *See Patton*, 686 A.2d at 1304.

[194] *Id.* The supreme court stated:

> This holding is correct. As the Commonwealth Court stated, "the notice that is required under the real estate exception [42 Pa.C.S. § 8522(b)(4)] is co-extensive with that required under a common law cause of action in negligence." (citation omitted). Under 42 Pa.C.S. § 8522(a), the legislature waived sovereign immunity in the instances specified in § 8522(b), provided that damages would have been recoverable at common law if the injury were caused by a person not having available the defense of sovereign immunity.

Id. (alteration in original) (citations omitted) (quoting Patton v. Department of Transp., 669 A.2d 1090, 1097 (Pa. Commw. Ct. 1996)); *see* Snyder v. Harmon, 562 A.2d 307, 310-11 (Pa. 1989); Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1120-21 (Pa. 1987).

[195] *Patton*, 669 A.2d at 1093. DOT argued "that Patton failed to establish a legally cognizable duty on the part of DOT because the evidence presented failed to show that the defect was discoverable by reasonable inspection." *Id.*

[196] *Id.*

[197] *Id.* at 1094. Regarding the duty that DOT owed as a "possessor of land," the court applied the standard set forth in the Restatement (Second) of Torts § 342 :

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land, if, but only if,
>
> (a) *the possessor knows or has reason to know of the condition* and should realize that it involves an unreasonable risk of harm

and that the law clearly required notice of the dangerous condition. Although the commonwealth court did not explicitly state that it was dealing with an error of law, this fact seems obvious from the supreme court's identification of the trial court error, the position of DOT on appeal, and the commonwealth court's discussion of the law relative to notice. However, after describing the error of law of the trial court and correctly identifying the applicable substantive law regarding notice, the commonwealth court merely reviewed the evidence and concluded that ample evidence existed to support the jury verdict of liability predicated upon actual or constructive knowledge of the Commonwealth.[198]

The supreme court reasoned that the trial court's mistake of law resulted in its failure to correctly instruct the jury.[199] Consequently, the court recognized that this failure prevented or impeded the jury from considering notice, which was one of the central, contested issues in the case.[200] The decision of the commonwealth court corrected the trial court's erroneous statement of law on the subject of notice, but failed to analyze its *effect*. In other words, when a trial court refuses a requested instruction based on an erroneous understanding of the applicable law, the standard of review for the appellate court to apply is whether that error of law related to a material contested issue and *whether it might have affected the outcome of the case*. If error did not affect the outcome of the case, it is harmless error; but if it did, the error is reversible.

> to such licensees, and should expect that they will not discover or realize the danger, and
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
> (c) the licensees do not know of or have reason to know of the condition and the risk involved.

Id. (emphasis added) (citing Miranda v. City of Philadelphia, 646 A.2d 71, 74 (Pa. Commw. Ct. 1994) (quoting RESTATEMENT (SECOND) OF TORTS § 342 (1965)).

[198] *Id.* at 1095.

[199] Department of Transp. v. Patton, 686 A.2d 1302, 1305-06 (Pa. 1997).

[200] *Id.* at 1305.

Applying this standard to *Patton*, the trial court focused on the issue of notice to the Commonwealth of the dangerous condition.[201] The court maintained that notice was not required as a matter of law and refused a requested instruction that the plaintiff must have established actual or constructive knowledge of the dangerous condition.[202] As a result, the supreme court held that the jury probably did not have the opportunity to consider the issue of notice because the trial court had taken that question away from the jury.[203] Subsequently, when the commonwealth court examined the record, it concluded that the evidence, *if considered by the jury*, was sufficient to support a verdict for the plaintiff.[204] The supreme court's analysis made clear, however, that even though the commonwealth court correctly stated the substantive law, instead of then determining the effect of that mistake on the jury deliberations, the court merely ascertained the existence of sufficient evidence to support the jury verdict regarding notice.[205]

2. Evaluation

The analysis of the supreme court is persuasive. It is one thing for evidence to be introduced at trial, but if the jury has considered that evidence under an incorrect statement of law, or if the jury was prevented from considering issues that are part of the applicable substantive law, then reversible error has occurred.

The *Patton* case is important for the lesson it provides on the standard of review on appeal. An appellate court selects the correct standard of review. The job of the court, however, does not end with this selection. After identifying the standard of review and determining whether error has occurred under that standard, the appellate court must then consider the effect of the trial court error under that standard in accord with the circumstances of the

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[201] *See id.* at 1304-06.

[202] *Id.* at 1304.

[203] *Id.* at 1305-06.

[204] Patton v. Department of Transp., 669 A.2d 1090, 1097-98 (Pa. Commw. Ct. 1996).

[205] *Patton*, 686 A.2d at 1307.

particular case. Proper appellate review, therefore, requires the court to consider the *effect* of the error. In *Patton*, this "effect" analysis led the supreme court to conclude that the jury was prevented from considering an important, contested, and material issue under the applicable substantive law. As a result, the effect of the error was harmful, not harmless, and reversal and grant of a new trial was required.

In the future, when the intermediate appellate courts of Pennsylvania discover an error of law, these courts should not merely provide the correct law in their opinion, but should inquire about the *effect* of the error. Regarding material mistakes of law, which are those that involve necessary factual elements of a prima facie case against a defendant, it is likely that the jury will be prevented from considering that issue or will consider the issue under a mistaken understanding of the applicable law. In either event, the appellate court should reverse and order a new trial.

B. Grieff v. Reisinger

1. Background and Analysis

In *Grieff v. Reisinger*,[206] the Supreme Court of Pennsylvania clarified the real property exception to governmental immunity.[207] The plaintiff-wife, Marlene Reisinger, was severely burned while helping members of the Emlenton Volunteer Fire Association (Association) clean their station.[208] When a volunteer fireman, Grieff, was using paint thinner to remove paint from the floor of the fire station, the thinner flowed across the floor to a refrigerator and ignited.[209] Fire then traveled across the room and badly burned Marlene. She and her husband brought a negligence action against the Association and Grieff.[210] The Association interposed municipal immunity, and the plaintiffs responded by pleading the real property

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[206] 693 A.2d 195 (Pa. 1997).
[207] *Id.* at 197.
[208] *Id.* at 196.
[209] *Id.*
[210] *Id.*

exception to such immunity.[211] The trial court held that the exception was applicable, but the commonwealth court reversed on the basis that the plaintiffs did not allege that the real property itself was defective.[212]

The Political Subdivision Tort Claims Act[213] immunizes local government from liability except in the case of certain, enumerated exceptions. One of those exceptions is known as the real property exception, which provides that a local agency may be liable if negligence involves the "care, custody or control of [its] real property."[214] In *Grieff*, the Association argued that the injuries did not arise from a defect in the real property; thus, the injuries were not caused by the property.[215] As a result, the Association argued, the plaintiffs' cause of action was not negligence based on a condition of the real property itself, but rather negligence involving the use and disposal of flammable materials and the failure to warn.[216]

In earlier cases, the Supreme Court of Pennsylvania had indicated that, for the real property exception to apply, the injury must have been caused by a defect in the real property itself.[217] In these cases, the court stated that the defect cannot be based on the manner in which the property was used, but must involve a dangerous condition, or actual defect, in the property.[218] As a result of such precedent, a question arises as to whether the real property exception applies in *Grieff*.

The gist of the plaintiffs' action in *Grieff* was that the injuries of plaintiff-wife were not caused by some defect in the fire station or its floor, the real property, but rather by the negligent handling

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[211] *Id.*

[212] Grieff v. Reisinger, 654 A.2d 77, 80 (Pa. Commw. Ct. 1995).

[213] 42 PA. CONS. STAT. §§ 8541-42 (1995).

[214] *Id.* § 8542 (b)(3).

[215] *Grieff*, 693 A.2d at 195, 197.

[216] *Id.* at 196.

[217] *See* Finn v. City of Philadelphia, 664 A.2d 1342, 1344 (Pa. 1995); Kiley by Kiley v. City of Philadelphia, 645 A.2d 184, 187 (Pa. 1994); Snyder v. Harmon, 562 A.2d 307, 312 (Pa. 1989); Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1124 (Pa. 1987).

[218] *Finn*, 664 A.2d at 1344-46.

of flammable compounds and the failure to warn about the nature of the compounds.[219] Based on prior decisions of the supreme court interpreting the real property exception, the commonwealth court decided that the exception was not applicable.[220]

In *Grieff*, the supreme court distinguished its precedents that had narrowly construed the language of the real property exception.[221] The plurality rationale was that in earlier cases, although real property of the Commonwealth was involved and might have been a cause or somehow involved in the plaintiffs' injuries, the actions of *third parties* were a contributing cause of the harm.[222] For example, in *Mascaro v. Youth Study Center*,[223] a youth escaped from a juvenile detention facility and attacked the plaintiffs; and, in *Snyder v. Dombrowski*,[224] a plaintiff "fell into a strip mine adjacent to a state road." In these cases and others cited by the supreme court, the majority held that, for purposes of interpretation of the meaning and application of the real property exception, a narrow interpretation of the exception will be adopted to ensure that the municipality does not fall within the exception in cases *where third parties* contributed to the harm along with the municipality or its property.[225] The court distinguished this case since third parties were not involved in the negligent acts; only members of the defendant Association were actors.[226]

On the other hand, when properly interpreted, the non-applicability of the previously cited narrowing precedents does not establish that the language of the real property exception is applicable. The court addressed that issue and disposed of it in a direct and straightforward manner. The statutory language provides that the real property exception may be triggered where the "care, custody or control" of municipal real property is involved.[227] In

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[219] *Grieff*, 693 A.2d at 196.
[220] *Id.*
[221] *Id.* at 197.
[222] *Id.* at 196-97.
[223] 523 A.2d 1118 (Pa. 1987).
[224] 562 A.2d 307 (Pa. 1989).
[225] *See Grieff*, 693 A.2d at 197.
[226] *Id.*
[227] 42 PA. CONS. STAT. §§ 8542(a)(2), 8542 (b)(3) (1995).

Grieff, the court explained that the Association members were engaged in the *care* of the municipality's fire facilities when the accident occurred.[228] As a result, the majority concluded that the "plain language" of the real property exception rendered the exception applicable.[229]

The dissent[230] shed some light on why the lower courts had so much trouble with the "plain" statutory language. The dissent argued that the real property exception can be invoked only where the "alleged defect [is] in the property itself rather than in the manner in which the property was used."[231] The dissent based its interpretation on the fact that the statutory language of the real property exception must be "strictly construed."[232] The dissent relied upon *Finn v. City of Philadelphia*[233] for this proposition without further explanation.[234]

The author of this article analyzed the *Finn* opinion in a prior article.[235] The crux of the author's position was that the majority in the *Finn* case ignored the Pennsylvania Statutory Construction Act[236] and made no effort to ascertain the intent of the legislature.[237] The

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[228] *Grieff*, 693 A.2d at 197.

[229] *Id.*

[230] Chief Justice Flaherty wrote the dissenting opinion, and Justice Castille joined.

[231] *Grieff*, 693 A.2d at 198 (Flaherty, C.J., dissenting).

[232] *Id.*

[233] 664 A.2d 1342 (Pa. 1995).

[234] The lack of elaboration could be attributed to the fact that Chief Justice Flaherty, the author of the dissenting opinion in *Grieff*, was the author of the majority opinion in the *Finn* case.

[235] *See* Gedid, *supra* note 1, at 658-66.

[236] 1 PA. CONS. STAT. §§ 1501-1939 (West 1975).

[237] The author stated:

> The majority opinion in *Finn* is not persuasive. The Statutory Construction Act of 1972 makes it clear that finding the intent of the legislature is the paramount concern in cases involving statutory interpretation. Furthermore, other sections of the Statutory Construction Act make the findings of such bodies as the Legislative Reference Bureau persuasive, if not controlling, in ascertaining the intent of the legislature. Also, if possible, all portions or parts of a statute are to be given effect. Nevertheless, the majority made no attempt to find the true intent of the legislature, the report of the Joint State Government Commission was

result was to adopt an extremely narrow interpretation of the "sidewalk exception" that rendered the exception nearly nonexistent.[238] The author's major conclusion was that the mere *presence of the exceptions* to municipal sovereign immunity in the statutory language implies that the legislature deemed the exceptions significant.[239] Thus, inclusion of the exceptions in the statute reinstating sovereign immunity in no way signifies legislative disapproval of the "sidewalk exception" in particular, nor does it signify disapproval of the exceptions to sovereign immunity generally.[240]

On the other hand, the foundation of the majority opinion in the *Finn* case was an assumption that the legislative intent was precisely the opposite. The *Finn* court maintained that the legislature, by reinstating sovereign immunity, intended the exceptions to be narrow.[241] There is simply no justification in the statutory language, in the circumstances of the passage, or in logic to support the

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> ignored, and the "sidewalk exception" was construed so narrowly that it ceased to exist for all practical intents and purposes. Arguably, a construction of the exception that is this narrow does not give effect to all parts of the statute.
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> As pointed out above, the majority reasoned that the Act creates immunity, and therefore any exceptions must be narrowly construed. This conclusion does not appear to involve an attempt by the court to ascertain the intent of the legislature. It does not logically follow that, because the legislature in the Act established sovereign immunity after the court had abrogated the doctrine in the *Mayle* case, the legislature also meant, or only could have meant, the exceptions to the Act are to be construed as narrowly as possible. To the contrary, it is equally plausible that the legislature, in defining categories of real property municipal liability and the "sidewalk exception," intended those "exception" categories to be broadly construed or to be given their normal meaning, rather than the extremely narrow interpretation that the supreme court fashioned for those words. There is simply no support in the Act or in any other document to indicate that the legislature intended the "sidewalk exception" to be narrowly construed.

Gedid, *supra* note 1, at 664-66 (footnote omitted); *see generally* Mayle v. Pennsylvania Dep't of Highways, 388 A. 2d 709 (Pa. 1978).

[238] Gedid, *supra* note 1, at 666.

[239] *Id.*

[240] *Id.*

[241] *Finn*, 664 A.2d at 1344.

conclusion that the exceptions were not intended to be applicable to dangerous conditions involving real estate. Consequently, the assumption articulated by the majority in *Finn* appears to be unfounded.

2. Evaluation

The plurality opinion in *Grieff* recognized legislative intent regarding the real property exception to sovereign immunity by concluding that the defendants' "claim [fell] squarely within the real property exception."[242] The plurality opinion in *Grieff* is persuasive. The court's rationale was that earlier opinions adopting a narrow interpretation of the statutory exceptions to sovereign immunity involved third parties.[243] Thus, a narrow interpretation is not applicable where, as in *Grieff*, the injury involved real property and no third parties.[244] This distinction does not sufficiently clarify that the court's opinion in *Grieff* established the rule heretofore followed in cases involving sovereign immunity that the defect had to be "of" the real estate. In other words, the defect must be an actual defect in the real property itself.

This rule is no longer the law in Pennsylvania *whether third parties are involved or not*. Instead, a dangerous condition that triggers the real property exception may occur whenever the cause of the injury involves "care, custody or control" of real estate.[245] Furthermore, the Supreme Court of Pennsylvania will not interpret these statutory terms narrowly. Subsequent cases, however, will have to clarify this point.

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[242] Grieff v. Reisinger, 693 A.2d 195, 197 (Pa. 1997).
[243] *Id.*
[244] *Id.*
[245] 42 PA. CONS. STAT. § 8542(b)(3) (1995).

C. Jones v. Chieffo

1. Background and Analysis

In *Jones v. Chieffo*,[246] the Supreme Court of Pennsylvania held that where the negligence of a municipality and a third party are both arguably involved in causing injury, sovereign immunity is not available as a shield to prevent the tort action from going to a jury.[247] In so holding, the court reversed its earlier decision on the same subject in *Dickens v. Horner*.[248]

In *Jones*, the plaintiff was seriously injured and his wife was killed when a police car without a working siren was chasing another car that collided with the plaintiff's car.[249] The police car began to chase three cars after the cars ran a red light and shots were fired "from the second car towards the first car."[250] When the police officer driving the car, Chieffo, attempted to turn on his siren, it did not operate.[251] He continued the chase, and notified his supervisor by radio of the situation.[252] The cars then ran another red light where the third car being pursued by Chieffo struck the plaintiff's car.[253] The City of Philadelphia has a police directive in force which requires officers to report auto pursuits to a supervisor.[254] A Philadelphia police captain testified that the supervisor in this case should have terminated the pursuit due to the inoperative siren.[255]

The trial court applied *Dickens v. Horner*[256] and concluded that the city, as a matter of law, was not liable for the injuries inflicted

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[246] 700 A.2d 417 (Pa. 1997).
[247] *Id.* at 420.
[248] 611 A.2d 693 (Pa. 1992).
[249] *Jones*, 700 A.2d at 418.
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] 611 A.2d 693 (Pa. 1992).

by the fleeing third party.[257] The commonwealth court reversed, reasoning that the question of superseding cause was for the jury.[258]

The supreme court affirmed, relying on the same precedent as the commonwealth court, *Crowell v. Philadelphia*.[259] In *Crowell*, the supreme court held that the question of the city's negligence was for the jury.[260] The court held that when the act of a municipal subdivision and a third party jointly cause injury, the defense of sovereign immunity is not available to prevent the case from being heard by a jury.[261] The supreme court in *Jones* reasoned that the police officer in continuing the pursuit without a siren, and the police supervisor in failing to halt the chase, could be found negligent by a jury.[262]

The court also relied on *Powell v. Drumheller*.[263] In *Powell*, the supreme court held that a municipality could not invoke sovereign immunity to shield it from liability following an accident, in which a drunk driver injured the plaintiff, because the plaintiff alleged that the road signs where the accident occurred were defective.[264] The court rendered causation a jury question because, based on the evidence, a jury could find *both* the third party and the municipality negligent.[265] In *Jones*, the court did not distinguish *Dickens* from *Powell*. Instead, the court held that the trial court decision was wrongly decided and reversed.[266]

2. Evaluation

Jones is consistent with the other cases decided by the Supreme Court of Pennsylvania in 1997 on the subject of sovereign immunity. In *Jones*, the court refused to follow the unfounded

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[257] *Jones*, 700 A.2d at 419.
[258] *Id.*
[259] *Id.*; 613 A.2d 1178 (Pa. 1992).
[260] *Id.*; *Jones*, 700 A.2d at 419.
[261] *Id.*; *Crowell*, 613 A.2d at 1184.
[262] *Id.*; *Jones*, 700 A.2d at 420.
[263] 653 A.2d 619 (Pa. 1995).
[264] *Id.* at 621.
[265] *Id.* at 624-25.
[266] *Id.* at 625.

assumption in earlier cases that exceptions to sovereign immunity must be narrowly construed due to the intent of the legislature in enacting these exceptions.[267] In earlier cases, without evidence of legislative intent or purpose, the supreme court concluded that the exception to sovereign immunity had to be narrowly construed. That rule of narrow construction regarding exceptions to sovereign immunity was one of the principal ingredients of the *Dickens* case.[268]

The dissenting opinion of Justice Castille in *Jones* also invoked this presumption.[269] The use of this presumptive interpretation, however, violates the Statutory Construction Act,[270] and has no relation to any expressed intent of the legislature. The majority position in *Jones* is consistent with statutory intent, with the Statutory Construction Act, and with general principles of fairness to injured citizens. The action of the supreme court in moving away from the unwarranted presumption that any exception to sovereign immunity has to be given the narrowest construction is a fairer approach to statutory construction. Such an approach, which attempts to satisfy legislative intent, is in tune with modern attitudes regarding sovereign immunity.

V. PROCEDURAL DUE PROCESS

The Supreme Court of Pennsylvania decided two cases in 1997 involving statutory provisions for notice and an opportunity to be

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[267] For a discussion by the dissent in *Grieff* to "narrowly construe" these exceptions, see *supra* notes 223-27 and accompanying text.

[268] Dickens v. Horner, 611 A.2d 693 (Pa. 1992). The court in *Dickens* reasoned: "When considering whether an injury occurs as a result of one of the eight exceptions to the rule of absolute governmental immunity, we have indicated that *all* the exceptions must be narrowly interpreted given the expressed legislative intent to insulate political subdivisions from tort liability." *Id.* at 694-95 (citations omitted).

[269] Jones v. Chieffo, 700 A.2d 417, 421 (Pa. 1997) (Castille, J., dissenting). Justice Castille provided that "[t]his Court is constrained to narrowly construe this provision and all other provisions of the Political Subdivision Tort Claims Act since the legislature has expressed a clear intent to insulate political subdivisions from tort liability." *Id.* (Castille, J., dissenting) (citing Love v. City of Philadelphia, 543 A.2d 531, 532 (Pa. 1988)).

[270] 1 PA. CONS. STAT. § 1922 (1988).

heard. Those cases are *Montour Trail Council v. Pennsylvania Public Utility Commission (PUC)*[271] and *Commonwealth v. Mosley*.[272] In *Montour*, the court considered the meaning of the notice which must be given under the Public Utility Commission Code[273] before the PUC may change or rescind an order.[274] In *Mosley*, the court considered the notice required by the Controlled Substance Forfeiture Act.[275]

A. Montour Trail Council v. Public Utility Commission

1. Background and Analysis

In *Montour*, the Montour Trails Council (MTC) was the owner of a railroad right-of-way in Allegheny and Washington Counties under the Rails to Trails Act.[276] The PUC began an investigative proceeding to determine whether to abolish six rail-over-highway crossings in Allegheny County and sixteen rail-over-highway crossings in Washington County.[277] After extensive hearings, an administrative law judge issued a recommended order in February 1991.[278] The PUC issued an opinion and order in October 1991 which remanded the proceeding to the ALJ for further proceedings pursuant to the Rails to Trials Act and ordered that the Department of Environmental Resources (DER) be notified and made a party to the proceedings.[279] After joinder, however, the DER declined to participate in the proceeding by failing to put forth evidence.[280]

In October 1992, the ALJ announced a second recommended order.[281] This order provided for the abolishment of "five of the six

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[271] 690 A.2d 703 (Pa. 1997).

[272] 702 A.2d 857 (Pa. 1997).

[273] 66 PA. CONS. STAT. §§ 701-703 (1993).

[274] *Montour*, 690 A.2d at 704.

[275] 68 PA. CONS. STAT. §§ 6801-6802 (1988); *Mosley*, 702 A.2d at 858-59.

[276] *Montour*, 690 A.2d at 704; PA. STAT. ANN tit. 32, §§ 5611-5622 (West 1991).

[277] *Montour*, 690 A.2d at 704.

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

rail-over-highway crossings in Allegheny County and twelve of the sixteen rail-over-highway crossings in Washington County."[282] All of the crossings, however, were to remain in place; the ALJ did not recommend that they be demolished.[283] The PUC adopted the ALJ's proposal and also "ordered that DER be secondarily liable for the maintenance of the structures remaining after abolishment of the corresponding crossings."[284]

Subsequently, the Pennsylvania Department of Transportation (DOT), joined by MTC, filed a petition for clarification of the order.[285] The petition complained of the failure of the PUC to describe "the disposition and cost allocation of each structure."[286] Before the PUC acted on the petition, DER filed a petition for review with the commonwealth court.[287] The DER petition alleged that the PUC did not have the power under the Rails to Trials Act to hold DER secondarily liable for removal or maintenance of the structures.[288] The PUC then filed a petition with the commonwealth court requesting remand for the PUC to act on the DOT petition.[289] The commonwealth court subsequently granted the petition.[290]

On remand, the PUC entered a supplemental opinion which ordered that twelve of the highway crossings were to be removed or demolished, and "that DER was to be secondarily liable for the maintenance of two structures in Washington County."[291] Both the MTC and the DER appealed this order to the commonwealth court.[292] They complained that on remand the PUC had "changed its [decision about] the twelve structures in Washington County without providing all interested parties with notice and an

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[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.* at 705.
[290] *Id.*
[291] *Id.*
[292] *Id.*

opportunity to be heard."[293] After the commonwealth court affirmed the amended order of the PUC, this appeal followed.

The supreme court examined the language of the applicable statute, which provides that the PUC may rescind or amend any order "after notice and after opportunity to be heard."[294] Earlier decisions of the commonwealth court held that notice and an opportunity to be heard were not required where the PUC action was a clarification of an order or action; the Code, however, required notice and an opportunity to be heard when the PUC made a substantive change.[295] In *Montour*, the PUC argued that the DOT had filed a petition for clarification, and therefore, the PUC's action on remand was a mere clarification of what it had done previously.[296]

With very little explanation, the supreme court held that on remand the PUC had not merely clarified its order.[297] Instead, the court determined that the PUC had *changed* the action previously ordered.[298] The court maintained that the PUC changed the order requiring twelve Washington County highway crossings to be demolished, which was an expensive proposition.[299] The court also rendered the DER secondarily liable for several of the remaining Washington County structures.[300] According to the court, such change was "substantial"; therefore, the action "was not a mere clarification."[301] As a result, the supreme court held that the MTC and the DER must be given "notice and an opportunity to be heard

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[293] *Id.*

[294] 66 PA. CONS. STAT. § 703(g) (1993). This section, entitled "Rescission and amendment of orders," provides that "[t]he commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it." *Id.*

[295] *See, e.g.*, Scott Paper Co. v. Pennsylvania Pub. Util. Comm'n, 558 A.2d 914 (Pa. Commw. Ct. 1989); Westinghouse Elec. Corp. v. Pennsylvania Pub. Util. Comm'n, 404 A.2d 712 (Pa. Commw. Ct. 1979).

[296] *Montour*, 690 A.2d at 705.

[297] *Id.*

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

pursuant to section 703(g)" of the Public Utility Commission Code before the revised PUC order could be implemented.[302]

2. Evaluation

Several points stand out with regard to the *Montour* case. First, the caption on a petition should not, and will not, be permitted to control the characterization of the type of action that an agency is taking for purposes of the notice and hearing requirement in section 703(g) of the Public Utility Commission Code. In *Montour*, the caption on the petition for clarification filed by DOT was not permitted to control on that issue.[303] Second, although the opinion provided no explanation, it appears that the operative principle is that any change which is not de minimis or inconsequential triggers the notice and hearing requirement of section 703(g). That is, anything which is not minimal is "substantive."[304]

As applied in *Montour*, the principle is unassailable. Before the commonwealth court remanded to the PUC, twelve highway crossings in Washington County were permitted to remain standing, though not open. Prior to the remand, DER had no additional liability.[305] After the remand, the crossings had to be demolished, and the DER was secondarily liable as to several structures in Washington County.[306] The PUC order after remand changed duties of both MTC and the DER in ways that were significant and expensive. Thus, the second order was not a mere clarification or explanation of duties already imposed on which the concerned parties had previously been heard. Instead, the second order created new duties as well as changed rights and duties which had existed prior to the remand from the commonwealth court. Clearly, such change triggers the notice and hearing requirements of section 703(g).

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[302] *Id.*
[303] *See id.*
[304] *Id.*
[305] *See id.* at 704.
[306] *Id.* at 705.

B. Commonwealth v. Mosley

1. Background and Analysis

The second case, *Commonwealth v. Mosley*,[307] involved a civil forfeiture. Mosley was arrested after a police officer observed what he believed was a drug transaction.[308] After delivering silver packets to another person and receiving money in exchange, Mosley was arrested the next day and the money was seized.[309] Subsequently, he was acquitted of charges arising out of this transaction.[310] The Public Defender Association of Philadelphia filed a petition on Mosley's behalf seeking the return of the money seized at the time of the arrest.[311] The trial court informed Mosley that he could attend the hearing on this motion in person or answer written interrogatories; he elected to answer interrogatories.[312] At trial, the Commonwealth made an oral motion to grant forfeiture of the money under the Controlled Substances Forfeiture Act.[313] The trial court ordered forfeiture of the money seized from Mosley.[314] After the commonwealth court affirmed the forfeiture,[315] this appeal followed.

The court framed the issue as "whether the trial court's grant of the [forfeiture] motion [constituted] a denial of procedural due process."[316] Mosley argued that "he did not receive notice and an opportunity to be heard" on the subject of civil forfeiture.[317]

The court's analysis turned on the two types of motions involving the seized property that were filed in the case. At the trial court level, the action commenced with a motion for return of the

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[307] 702 A.2d 857 (Pa. 1997).
[308] *Id.* at 858.
[309] *Id.*
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*; 42 PA. CONS. STAT. §§ 6801-6802 (1995).
[314] *Mosley*, 702 A.2d at 858.
[315] *Id.*
[316] *Id.* at 858-59.
[317] *Id.* at 859.

property.[318] Pennsylvania Rule of Criminal Procedure 324 provides the basis for this motion.[319] The supreme court distinguished this action from a forfeiture action and reasoned that when a motion for the return of property is denied, forfeiture is not automatic.[320] Although it is common practice to hear the two types of action together, the court determined that they are in fact "distinct."[321] Filing a motion to return property does not ipso facto also commence a civil forfeiture proceeding.[322]

In *Mosley*, the Supreme Court of Pennsylvania explained that Mosley did not have notice of the forfeiture proceeding, nor did he have an opportunity to be heard.[323] When he made his decision to participate by interrogatory, he did not know about, and no motion had been made to begin, the forfeiture proceeding.[324] On the other hand, the Controlled Substances Forfeiture Act expressly provides for notice to an owner of property[325] as well as a hearing at which

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[318] *Id.*

[319] Pennsylvania Rule of Criminal Procedure 324 in relevant part provides:

> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of Common Pleas for the judicial district in which the property was seized.
>
> (b) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property forfeited.

PA. R. CRIM. P. 324.

[320] *Mosley*, 702 A.2d at 859.

[321] *Id.* The court noted that the normal practice in forfeiture situations is for the Commonwealth to "request that forfeiture has been duly made." This request can be "set forth as new matter in response to a petition for return of property." *Id.* (citing Commonwealth v. Pomerantz, 573 A.2d 1149, 1151 (Pa. Super. Ct. 1989)).

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] 42 PA. CONS. STAT. § 6802(b) (1988) provides:

> (b) Notice to property owners.— A copy of the petition required under subsection (a) shall be served personally or by certified mail on the owner or upon the person or persons in possession at the time of the seizure. The copy shall have endorsed a notice, as follows:

To the Claimant of within Described Property:

the owner participates.[326] The supreme court explained that these two provisions of the Controlled Substances Forfeiture Act provide that, after the Commonwealth has introduced its evidence that the money constitutes proceeds of a drug transaction, the civil claimant has a statutory right to respond with evidence of his or her own.[327] The court reasoned that because Mosley did not have notice of the forefeiture proceeding, he did not have the opportunity to respond with evidence of his own.[328] On this basis, the supreme court vacated and remanded to the court of common pleas to provide Mosley notice and opportunity to respond.[329]

2. Evaluation

This case is a good example of the careful attention that the supreme court has traditionally given to statutory requirements for notice and an opportunity to be heard. Plainly, the statutory language means that persons opposing the Commonwealth are to

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You are required to file an answer to this petition, setting forth your title in, and right to possession of, said property within 30 days from the service hereof, and you are also notified that, if you fail to file said answer, a decree of forfeiture and condemnation will be entered against said property.

[326] The supreme court discussed the hearing requirements imposed that enable a property owner to respond to the evidence presented by the Commonwealth:

(j) Owner's burden of proof.— At the time of the hearing, if the Commonwealth produces evidence that the property in question was unlawfully used, possessed or otherwise subject to forfeiture under section 6801(a), the burden shall be upon the claimant to show:

> (1) That the claimant is the owner of the property or the holder of a chattel mortgage or contract of conditional sale thereon.
> (2) That the claimant lawfully acquired the property.
> (3) That it was not unlawfully used or possessed by him. In the event that it shall appear that the property was unlawfully used or possessed by a person other than the claimant, then the claimant shall show that the unlawful use or possession was without his knowledge or consent. Such absence of knowledge or consent must be reasonable under the circumstances presented.

Mosley, 702 A.2d at 860 (quoting 42 PA. CONS. STAT. § 6802(j)).

[327] *Id.* at 860.

[328] *Id.*

[329] *Id.*

have notice adequate to inform them of their stakes in the proceeding at a time when such notice is meaningful. In *Mosley*, the lack of notice to Mosley before the forfeiture proceeding not only failed to inform him of what was at stake, but also failed to inform him that a forfeiture proceeding, in addition to his petition for return of property, would be held. The court determined that the failure to provide notice prevented Mosley's participation in the hearing; thus, he did not have an opportunity to be heard.[330]

VI. ULTRA VIRES: *ANELA v. PENNSYLVANIA HOUSING FINANCE AGENCY*

A. Background and Analysis

In *Anela v. Pennsylvania Housing Finance Agency*,[331] the Supreme Court of Pennsylvania decided an ultra vires[332] case. In *Anela*, the court affirmed that it still follows the principles of permitting broad delegations of authority because the legislature "has authorized the agency to adopt rules, regulations, and procedural requirements."[333] The court also clarified certain principles of interpretation for determining whether an agency has acted within its statutory authority.[334]

In *Anela*, Anela had purchased a home with her fiance, Prem, and they obtained a mortgage on the property.[335] Then, prior to their marriage, the parties ended their relationship.[336] Prem had never lived in the house, but Anela took up residence there.[337] Subsequently, a creditor, Harahan, obtained a judgment against Prem and began a sheriff's sale against "Prem's one-half interest in the property."[338] Harahan purchased the property at the sheriff's

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[330] *Id.*

[331] 690 A.2d 1157 (Pa. 1997).

[332] "Ultra vires" is defined as "[a]n act performed without any authority to act on subject." BLACK'S LAW DICTIONARY 1522 (6th ed. 1990).

[333] *Anela*, 690 A.2d at 1160.

[334] *Id.* at 1159.

[335] *Id.* at 1158.

[336] *Id.*

[337] *Id.*

[338] *Id.*

sale.[339] In 1993, Anela was laid off from her job as a legal secretary and defaulted on her mortgage payments.[340] She then applied for emergency mortgage assistance from the Pennsylvania Housing Finance Agency (PHFA or Agency).[341] This Agency is empowered under the Homeowner's Emergency Mortgage Assistance Act (Act)[342] to grant emergency financial assistance to homeowners who cannot make mortgage payments due to circumstances beyond their control.[343] PHFA denied her application because Harahan did not sign the application.[344] Harahan, the purchaser of Prem's share at the sheriff's sale, did not join in Anela's application for emergency mortgage assistance.[345] She appealed the denial, and "a hearing examiner affirmed [the denial] on the basis [that] a PHFA policy statement . . . requires" requests for mortgage assistance to be signed by all co-owners.[346]

Anela then appealed to the commonwealth court.[347] The court reversed on the grounds that the PHFA policy statement violated the intent of the Act.[348] Anela argued that the Agency policy statement violated the Act because the Act did not require co-owners to join in an application.[349] Alternatively, the PHFA argued that it had the authority to impose such restrictions on applications under its general power to implement the Act.[350] The Agency argued that the requirement is necessary because, if all property owners do not apply, the Agency cannot verify that any other owner does not have the financial ability to cure the mortgage deficiency.[351]

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[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] 35 PA. STAT. ANN. § 1680.401k. (West 1993).

[343] *Anela*, 690 A.2d at 1158.

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] Anela v. Pennsylvania Hous. Fin. Agency, 663 A.2d 850, 851 (Pa. Commw. Ct. 1995).

[349] *Id.* at 852.

[350] *Id.*

[351] *Id.*

The commonwealth court decided that "[t]he purpose of the Act is remedial and humanitarian."[352] The court reasoned that it was required to interpret the provisions of the Act "liberally and broadly."[353] Applying this liberal rule of interpretation, the court concluded that the "plain language" of the Act rendered the PFHA policy statement violative of the intent of the Act.[354]

The Supreme Court of Pennsylvania, however, employing two rationales, reversed the lower court's decision.[355] First, the court reasoned that there had been no unconstitutional delegation of legislative power, but rather a grant of power that enabled the agency to establish regulations which "implement the legislative intent."[356] In *Anela*, the Act broadly delegated the power to make rules and regulations to the Agency.[357] Second, the court reasoned that an agency interpretation of its own organic statute is entitled to great weight.[358] Furthermore, the Agency decided that the policy statement was required by its mandate from the legislature under the Act.[359]

In reaching this conclusion, the court engaged in an extensive analysis of the Act. The court opined that because the Act requires

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[352] *Id.* (citing Harman v. Pennsylvania Hous. Fin. Agency, 529 A.2d 1153 (Pa. Commw. Ct. 1987)).

[353] *Id.*

[354] *Id.*

[355] *Anela*, 690 A.2d at 1159.

[356] *Id.*

[357] *Id.* The Homeowner's Emergency Mortgage Assistance Act provides in relevant part:

> (a) The Pennsylvania Housing Finance Agency, hereinafter referred to as the "agency," may make loans secured by liens on residential real property located in Pennsylvania to residents of Pennsylvania eligible for such loans as described in this article . . . .
>
> (b) The agency shall carry out the program established by this article. Within sixty days of the effective date of this article, *the agency shall adopt initial program guidelines for the implementation of this article and may revise the guidelineswhenever appropriate*. . . .
>
> (C) *The agency shall develop uniform notices and rules and regulations* in order to implement the provisions of this article.

PA. STAT. ANN. tit. 35, § 1680.401c(a)-(c) (West 1993)) (emphasis added).

[358] *Id. Anela*, 690 A.2d at 1159.

[359] *Id.* at 1159-60.

repayment, the Agency is to grant emergency assistance only where the likelihood exists that recipients will be able to continue to make mortgage payments within a reasonable time.[360] Agency assistance may be given only after an investigation, which includes disclosure of all assets of the mortgagor.[361] The court reasoned that the responsibility of the Agency is to make loans, but to do so in a manner to insure repayment.[362] The Agency has issued regulations and policy statements which require disclosure of information by and about all property owners.[363] Such information is necessary to assure that the "co-owners have the desire, intention, or financial ability to cure the mortgage delinquency."[364] Therefore, the court determined that the policy statement at issue was consistent with the delegation made by the legislature, and the Agency interpretation of its organic statute was not ultra vires.[365]

B. Evaluation

The court's decision in *Anela* is interesting, not because it announces any new or different law on the delegation of legislative authority or of resolution of ultra vires issues, but rather because of the reaffirmation of an important principle of interpretation in administrative law cases involving issues of agency authority. That principle, often neglected, is that an agency interpretation of its statutory authority, especially one made soon after the creation of the agency, is entitled to great weight. It may well be asked how such a principle could be followed, for it is like setting a fox to guard a henhouse: agencies will naturally arrogate to themselves as much power as they can, and such a practice is also arguably inconsistent with our Constitution and with separation of powers. Nevertheless, this principle of interpretation is well-established in

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[360] *Id.* at 1159.
[361] *Id.*
[362] *Id.* at 1160.
[363] *Id.* at 1159-60.
[364] *Id.* at 1160.
[365] *Id.*

federal law, and with cases like *Anela*, will become more firmly established in Pennsylvania law.

Federal courts have long recognized the same principle.[366] Generally, the interpretation of an agency of its own statute will be given substantial deference. This deference is common in the event of a broad delegation of power to an agency that is directed to create a comprehensive process and procedure for accomplishing broad objectives. In such cases, federal courts have held that "[e]veryday experience in the administration of the statute"[367]and the "'usual administrative routine,'"[368] coupled with the intent of Congress to give broad authority to work out details, makes the agency determination one which courts should hesitate to overturn absent a very compelling reason for doing so.[369] In other words, a broad delegation under an intelligible principle in a situation where an agency is to create and administer a comprehensive program means that the intent of the legislature is to give the agency broad power to interpret and apply the statute within the policy guidelines that the legislature has enacted.

In Pennsylvania, it is now clear that the same principle will be followed. The court's decision in *Anela* builds on cases such as *Gilligan v. Pennsylvania Horse Racing Commission*,[370] which stated

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[366] *See* Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933). In *Norwegian*, the Court provided:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons. . . . *The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.*

Id. at 315 (emphasis added) (citations omitted); *see also* Gray v. Powell, 314 U.S. 402, 412 (1941) (stating that "a determination has been left to an administrative body, [and] this delegation will be respected and the administrative conclusion left untouched").

[367] NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130 (1944).

[368] *Id.* (quoting *Gray*, 314 U.S. at 411)).

[369] *Id.* at 130-31.

[370] 422 A.2d 487 (Pa. 1980).

that "[t]he latitude of the standards controlling exercise of the rulemaking powers expressly conferred on the Commission must be viewed in light of the broad supervisory task necessary to accomplish the express legislative purpose."[371]

A synthesis of the supreme court's decisions in both *Anela* and *Gilligan* leads to a statement of the operative principle of law in Pennsylvania as follows: *whenever the legislature makes a broad delegation to an agency to administer a comprehensive program, which includes the power to enact rules and regulations to implement and administer that program, courts should give substantial deference to the agency's interpretation of the means and methods necessary to accomplish that comprehensive scheme and the agency's interpretations of statutory terms. This is so because the legislature reposed broad authority in the agency to accomplish the purpose of the statute and its policy goals.* That being so, any reasonable regulation, reasonable in terms of being rationally related to the policy or goal of the statute, adopted by the agency will be held to be within the legislative delegation of statutory authority to the agency.[372]

VII. CONCLUSION

The Supreme Court of Pennsylvania has made significant changes in several areas of administrative law in 1997. With regard to exceptions to sovereign immunity, ultra vires, and procedural due process concepts applied to the notice and hearing statutory requirements, the court has accomplished particular improvement. The record is not so clear, however, that the law has been improved in the other areas of change.

First, in the area of sovereign immunity, the supreme court has begun to shake off the shackles of outdated, inconsistent, and opaque reasoning in its opinions. In the past, the court had based many of its decisions on the assumption that exceptions to sovereign immunity had to be narrowly construed because those exceptions

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[371] *Id.* at 490.
[372] *Id.*

appear in a statute providing sovereign immunity.[373] The rationale for such reasoning was probably a laudable caution not to violate the purpose of the legislature in imposing sovereign immunity. However, that approach did not attempt to ascertain legislative thinking upon enactment of the sovereign immunity statutes. This approach probably violates the Statutory Construction Act,[374] which enjoins an attempt to find the intent or purpose of the legislature.

Instead of deciding on the basis of this rule of narrow construction, the supreme court in the *Grieff*[375] and *Jones*[376] cases took the first step away from use of that approach. In both cases, the court attempted to construe and apply the language of the statutes involving sovereign immunity and its exceptions using the normal tools of statutory construction and interpretation.[377] In doing so, the object of the court was consistent with the objects of the Statutory Construction Act: to ascertain the intent and purpose of the General Assembly. Unlike the arbitrary presumption that the court had adopted in the *Finn*[378] and other cases, which forced a narrow construction of the exceptions to sovereign immunity without regard to the intent or purpose of the legislature in enacting the exceptions and without regard to the meaning of the language used in the statutes creating the exceptions, the majority has made a definite movement in the direction of defining exceptions to sovereign immunity as the legislature intended.

In *Patton*,[379] the other case dealing with a sovereign immunity exception, the court clarified the law on notice in cases arising under the real property exception. Other important issues, however, involve the court's treatment of the standard of review and reversible or prejudicial error.[380]

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[373] For a discussion of the court's narrow construction of the exceptions to sovereign immunity, see *supra* notes 214-38 and accompanying text.

[374] 1 PA. CONS. STAT. §§ 1501-1939 (1975 & Supp. 1996).

[375] 693 A.2d 195 (Pa. 1997).

[376] 700 A.2d 417 (Pa. 1997).

[377] *Grieff*, 693 A.2d at 197; *Jones*, 700 A.2d at 420.

[378] 664 A.2d 1342 (Pa. 1995).

[379] 686 A.2d 1302 (Pa. 1997).

[380] Consequently, the *Patton* case will be treated in the following paragraphs

In a major case raising delegation and ultra vires questions, the supreme court clarified its approach to questions of construing an agency's authority. In *Anela*,[381] the supreme court reaffirmed and clarified guidelines for construing the breadth of an agency's authority under a legislative delegation.[382] Where a broad delegation has been made to an agency which requires it to set up and operate a comprehensive program, and the legislature has also given the power to enact regulations as part of that same delegation, then any regulation reasonably calculated by the agency to accomplish that policy is within the authority delegated to the agency. In such a situation of a broad delegation and comprehensive program, the construction, interpretation, and application by the agency of its own organic statute is entitled to great weight. This reasoning is appropriate because the legislature has seen fit to repose in the agency broad discretion to accomplish the legislature's objectives and policies, and the agency is, or becomes, an expert in calculating how to accomplish those objectives. Thus, in construing the authority which the legislature has delegated to an agency, the factors that must be taken into account are not merely whether the statute is "liberal" or "humanitarian" in seeking to disburse benefits.[383] The court must also consider the policy objectives of the statute creating the program, whether the delegation to the agency was broad and included setting up a comprehensive scheme, and whether the legislature delegated general power to enact regulations to the agency to implement the general program. This principle of interpretation of delegations to agencies is used in Pennsylvania, but not frequently. It is a principle which is logical and well serves the needs of cooperation between the legislature and the judiciary.

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which deal with standard of review after treatment of the major case in the area in 1997, *Bowman v. Department of Envtl. Resources*, 700 A.2d 427 (Pa. 1997).

[381] 690 A.2d 1157 (Pa. 1997).

[382] *Id.* at 1159-60.

[383] *See* Anela v. Pennsylvania Hous. Auth., 663 A.2d 850, 852 (Pa. Commw. Ct. 1995).

The cases on procedural due process or statutory notice and opportunity to be heard requirements, *Mosley*[384] and *Montour*,[385] are clear and laudable. The supreme court has been careful to give meaning to the requirement of notice where it occurs in a statute and has used principles developed in connection with procedural due process to interpret the meaning of statutory requirements of notice and opportunity to be heard. Thus, the court held that any change in an agency decision which is not de minimis requires notice of the change and an opportunity to be heard before the change takes effect.[386] Further, the notice must clearly inform the claimant of the stakes in the controversy so that the individual can defend.[387] The cases fit the rubric often invoked in due process cases that fundamental fairness is the guideline in such cases. The Supreme Court of Pennsylvania has made certain that the test of fundamental fairness was met in these two cases.

The court's decision in *City of Washington v. Board of Assessment Appeals of Washington County*[388] displays the advantages of a system of stare decisis. In *City of Washington*, the supreme court synthesized jurisprudence on the meaning of charitable immunity developed over many years in many cases. Instead of changing the law, in *Washington*, the court drew on tests for a public charity developed over many years and explained each factor as it applied it to the case.[389] While the result is substantially correct, the judicial opinion is also well written. For, although the five factor test enunciated by the court is not simple, the opinion gives a comprehensive explanation of the meaning of each factor and how each factor is to be weighed. The court's opinion is one of the most craftsmanlike pieces of lawyer work to come out of the Supreme Court of Pennsylvania in many years.

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[384] 702 A.2d 857 (Pa. 1997).
[385] 690 A.2d 703 (Pa. 1997).
[386] *Montour*, 690 A.2d at 705.
[387] *Mosley*, 702 A.2d at 859-60.
[388] 704 A.2d 120 (Pa. 1997).
[389] *Id.* at 124-26.

The quality of the decisions in 1997 in the area of appellate review of agency court decisions is not as clear. In *Bowman*[390] the majority appears either to ignore its precedents on the meaning of section 704 of the Administrative Agency Law, which states that appellate review of an agency decision must be supported by substantial evidence,[391] or to apply that standard in a fashion which has been repeatedly repudiated by courts for many years. The position taken by the court appears to be that, so long as there is some or any evidence which supports the agency or commission, then under section 704 of the Administrative Agency Law, the agency decision must be affirmed.[392] State and federal courts have repeatedly repudiated this position, known as the "scintilla" or "iota" of evidence rule, because it sets such a narrow standard of review that the judiciary is practically powerless to act.[393] As a result, the judiciary is forced to be a mere "rubber stamp" for the agencies.[394]

On the other hand, the court is faced with an antiquated Administrative Agency Law, which does not use the modern phrase substantial evidence "on the whole record."[395] The court is working with the only statute available to it. Nevertheless, in its own precedents, the Supreme Court of Pennsylvania has interpreted section 704 to mean substantial evidence "on the whole record." [396] The problem with the court's decision in *Bowman* is that it misleads or at least fails to clarify the standard of review for factual questions, and may well create additional confusion in an area where substantial confusion already exists.

In another standard of review case, however, the court reached a more palatable result. In *Patton*[397] the supreme court followed the pattern that seems to be emerging in the area of exceptions to sovereign immunity and considered the intent of the legislature

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[390] 700 A.2d 427 (Pa. 1997).

[391] 2 PA. CONS. STAT. ANN. § 704 (West 1990).

[392] *See Bowman*, 700 A.2d at 428-29.

[393] *Bowman*, 700 A.2d at 430.

[394] *Id.*

[395] *Id.* at 428.

[396] *See* Peak v. Unemployment Compensation Bd. of Review, 501 A.2d 1383, 1387 (Pa. 1985).

[397] 686 A.2d 1302 (Pa. 1997).

without applying the canon of narrow construction. But the *Patton* case also dealt with standard of review and how to apply that standard. In *Patton* the supreme court held that where evidence exists on both sides of a disputed issue and the charge is erroneous on a question of law which involves that issue, reversible error has occurred.[398] This holding is a clarification of the law. What is more to the point, and what was clearly explained in *Patton*, was that the error involved was an error of law in the charge. Where such type of error occurs, if it might have had an effect on jury deliberations, then it constitutes reversible error. Great deference to agencies or lower courts has never been required on questions of law. If an error was committed under commonly accepted principles of standard of review, the appellate court may reverse.

The Supreme Court of Pennsylvania continues to make progress in improving administrative law in the Commonwealth. Most of the court's recent cases have clarified the law or brought it more closely in touch with legislative intent, representing clear progress. The law continues to evolve in the areas of procedural due process, sovereign immunity, and standard of review. One recurrent problem with which the supreme court must deal, however, is an antiquated Administrative Agency Law. But, the cure for that problem does not lie with the court.

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[398] *Id.* at 1305.