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Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution

Michael B. Browde
University of New Mexico - Main Campus

SUBSTANTIAL EVIDENCE RECONSIDERED: THE POST-*DUKE CITY* DIFFICULTIES AND SOME SUGGESTIONS FOR THEIR RESOLUTION

MICHAEL B. BROWDE*

INTRODUCTION

The substantial evidence standard provides the primary vehicle by which the adjudicatory fact-finding of administrative agencies is subjected to judicial review. As a consequence, its application determines the result in most administrative appeals. In addition to providing the basis for decision in most cases, however, the substantial evidence standard also serves as the stage upon which a more generalized judicial struggle plays out whenever the court is applying the standard. On that more abstract level the application of the substantial evidence standard invariably engages the court in the high-wire act of providing some level of substantive review of the agency decision without encroaching on the essential fact-finding role of the particular agency.

Of late, the substantial evidence concern of the New Mexico appellate courts has focused on the proper articulation of the substantial evidence standard and what it means. The current debate was triggered by the supreme court's 1984 decision in *Duke City Lumber Co. v. New Mexico Environmental Improvement Board*,[1] in which the court held "we now expressly modify the substantial evidence rule as heretofore adopted by this Court and supplement it with the whole record standard for judicial review of findings of fact made by administrative agencies."[2] Seeking to blunt the criticism that the new standard undermines agency authority over fact-finding and places the court in the position of usurping that authority, the court characterized the new standard as but a "minor

*B.A., Brown University, 1965; J.D., Georgetown University Law Center, 1968; Professor of Law, University of New Mexico School of Law.

The author's renewed interest in this topic resulted from the request of his former colleague, The Honorable Pamela B. Minzner, that he assist in a presentation concerning judicial control of agency action at the State Bar's CLE program on "Administrative Practice and Procedure Before Natural Resources and Environmental Regulatory Agencies," held in Santa Fe on May 21-22, 1987. This article is an expansion of the author's brief comments made during that seminar.

The author wishes to acknowledge the debt of gratitude owed to Judge Minzner, for stimulating his further thinking about this topic, and for helping to give some framework to those thoughts. He also wishes to thank Dean Theodore Parnall for providing a summer research grant which enabled him to complete the necessary research and finish the initial draft during the summer of 1987.

The author also acknowledges the aid of research assistants John Howard and John Shoeppner, who did much of the difficult spade work.

1. 101 N.M. 291, 681 P.2d 717 (1984).

2. *Id.* at 294, 681 P.2d at 720. While *Duke City* involved fact-finding in the adjudicatory context, the court of appeals recently held that the force of its logic applies equally to on-the-record rule-making, i.e., rule-making which is required by law to be based on a record formulated at a formal hearing. *See*, Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n., 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987), *cert. denied*, 107 N.M. 469, 760 P.2d 161 (1988). The application of *Duke City* to the rule-making context is beyond the scope of this article.

departure from the customary substantial evidence rule."[3] Unfortunately, the *Duke City* court's attempt to clarify the meaning of the new standard has rather confounded its meaning and left the law in a state of confusion. Furthermore, the supreme court has not resolved the confused state of the law in its post-*Duke City* substantial evidence cases.

Most recently, however, the court of appeals has entered the fray. While the appeals court's recent opinions have brought some welcomed clarification, they have also brought a disturbing new wrinkle which may cause more disruption to the proper balance of authority between agency and court than the debate over the articulation of the standard.

This article attempts to clarify what the new *Duke City* standard means, and to suggest how it ought to be applied to meet the purposes for which it was designed. It begins with a description of the current debate,[4] followed by a review of the *Duke City* litigation.[5] It then reviews the post-*Duke City* substantial evidence cases in search of further understanding of the *Duke City* standard.[6] The article then turns to the recent court of appeals decisions on the subject, demonstrating how those opinions help clarify the *Duke City* standard, while at the same time adding a new element which may significantly undermine the purpose of the substantial evidence standard.[7] It then reviews the federal origins of the whole record substantial evidence standard, for what that history may offer to our understanding of the New Mexico debate.[8] The article concludes with some suggestions for bringing the current debate to a close in a way which may further the purposes of the substantial evidence standard, lead to more principled resolution of substantial evidence cases, and reduce some of the unnecessary burden these cases place on our appellate courts.[9]

I. THE SUBSTANTIAL EVIDENCE DEBATE

When a New Mexico appellate court reviews an administrative agency's fact-finding, it does so under statutory or constitutional authority, which usually articulates a standard of review. The traditional standard, whether or not explicit in the law creating the agency, requires that a fact-based decision of the agency be affirmed unless the decision is "not supported by substantial evidence."[10]

3. *Id.* (quoting New Mexico Human Servs. Dep't v. Garcia, 94 N.M. 175, 177, 608 P.2d 151, 153 (1980)).

4. *See infra* text accompanying notes 10-21.

5. *See infra* text accompanying notes 22-57.

6. *See infra* text accompanying notes 58-88.

7. See infra text accompanying notes 89-134.

8. *See infra* text accompanying notes 135-52.

9. *See infra* text accompanying notes 153-80.

10. This "traditional" substantial evidence standard was initially formulated by the United States Supreme Court in ICC v. Louisville & N.R.R., 227 U.S. 88 (1913) as a means of determining the scope of review which should be given to findings of fact made by the Interstate Commerce Commission—the first of the modern federal agencies with full adjudicatory powers. That standard then became incorporated into later federal statutes which specifically provided for judicial review of agency decisions. *See* Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938) (applying the substantial evidence standard contained in the National Labor Relations Act of 1935).

The New Mexico appellate courts have, until recently, used that same standard to review agency

That standard has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[11] While easy to articulate, the traditional substantial evidence standard of review has been subject to varying applications,[12] as the courts have struggled to perform their review function without undermining the fact-finding function of the agency involved.

The New Mexico courts have generally held that under the "traditional" substantial evidence test the evidence must be viewed in the light most favorable to the agency's action,[13] the court must not weigh conflicting evidence or judge the credibility of witnesses,[14] and the reviewing court must ignore contrary evidence against the agency's decision.[15] As thus formulated, the substantial evidence standard gives great deference to agency fact-finding.

This general state of the New Mexico law of substantial evidence has been complicated by a number of more modern judicial review statutes which specifically require that the substantial evidence test be applied by reference to "the record as a whole."[16] In these particular situations the legislature seems not to have contemplated as much deference to agency fact-finding.[17] Until the *Duke City* litigation, however, the New Mexico appellate courts did not seriously focus on the distinction between the traditional substantial evidence standard and the

fact-finding, both when articulated in the statute creating the agency, *see, e.g.*, Rinker v. State Corp. Comm'n, 84 N.M. 626, 506 P.2d 783 (1973), and when the statute made no specific reference to a reviewing standard. *See, e.g.*, Toltec Int'l, Inc. v. City of Ruidoso, 95 N.M. 82, 619 P.2d 186 (1980).

11. *E.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Wilson v. Employment Sec. Comm'n., 74 N.M. 3, 8, 431 P.2d 52, 55 (1963) (substantial evidence "means more than a scintilla of evidence and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion"); *see also*, Wickerstam v. N.M. State Bd. of Educ., 81 N.M. 188, 190, 464 P.2d 918, 920 (Ct. App. 1970).

12. As noted by Professor Davis, the substantial evidence standard "is made of rubber, not of wood. It can be stretched . . . [a]nd the courts are both willing and able to do the stretching, in accordance with what they deem to be the needs of justice." K. DAVIS, ADMINISTRATIVE LAW TEXT 530 (3d ed. 1972).

13. *See, e.g.*, Rinker v. New Mexico State Corp. Comm'n, 84 N.M. 626, 627, 506 P.2d 783, 784 (1973).

This appears to be the same standard that reviewing courts in New Mexico apply to the review of findings of fact made by a trial court, sitting without a jury. *See* Groff v. Stringer, 82 N.M. 180, 181, 477 P.2d 814, 815 (1970) ("we must view the evidence in the light most favorable to support the finding, and any evidence unfavorable to the finding will not be considered."). The New Mexico rule in this regard differs from the federal rule, which subjects trial court findings to review under the "clearly erroneous" standard. *See, e.g.*, Consolo v. Federal Maritime Comm'n, 382 U.S. 607 (1966).

14. *See, e.g.*, Lujan v. Pendaries Properties, Inc., 96 N.M. 771, 635 P.2d 580 (1981); Worthey v. Sedillo Title Guar., Inc., 85 N.M. 339, 512 P.2d 667 (1973).

15. *See, e.g.*, United Veterans Orgs. v. New Mexico Property Appraisal Dep't, 84 N.M. 114, 118, 500 P.2d 199, 203 (1973).

16. *E.g.*, N.M. STAT. ANN. § 27-3-4(F) (1978) (Public Assistance Appeals Act); *see also*,N.M. STAT. ANN. § 61-1-20 (1978) (Uniform Licensing Act); N.M. STAT. ANN. § 12-8-22 (1978) (New Mexico Administrative Procedures Act (APA), but not made applicable to any existing agencies).

17. Indeed, the general view has always been that the "whole record" substantial evidence standard is a less deferential standard than the "traditional" substantial evidence standard. *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-91 (1951) (Frankfurter, J., reviewing the federal legislative history and Congressional intent behind the whole record standard). For a further discussion of *Universal Camera, see infra* text accompanying notes 135-52.

more modern substantial evidence on the record as a whole standard. Indeed, on some occasions the courts have confused if not melded the two standards. For example, in one key case the court gave full consideration to the whole record while undertaking review under the traditional substantial evidence standard,[18] and in another case the court seemed to ignore the whole record provision of a statute, and afforded the agency the extreme deference of the traditional standard by considering only the evidence supporting the agency decision.[19]

In any event, during the last decade adherence to the traditional standard has invited the criticism that by wholly ignoring the portion of the evidence which was contrary to the ultimate decision reached, the courts were not performing their proper function. Instead, the critics maintained, such deference to the agency was tantamount to judicial abdication of the courts' statutory review function. The cries, therefore, began to mount, that the substantial evidence test should always require a review of the whole record, and that the court should articulate a whole record standard to redress the balance in favor of a more meaningful judicial review of agency fact-finding.[20]

It is against that backdrop that the supreme court was drawn into the substantial evidence debate in *Duke City*. The court rose to the challenge laid down by the court of appeals in that case,[21] and jettisoned the traditional substantial evidence standard, replacing it with the "whole record" form of that standard. The court did so, however, in a manner which has engendered even more debate about what the new standard means.

II. THE *DUKE CITY* LITIGATION

Duke City involved the protracted efforts of the State Environmental Improvement Board (EIB) to control the air pollution emanating from the wigwam

18. *See, e.g.*, Ribera v. Employment Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979). *See also*, Utton, *The Use of the Substantial Evidence Rule to Review Administrative Findings of Fact in New Mexico*, 10 N.M.L. REV. 103, 118-19 (Winter, 1979-80), and cases discussed therein.

19. *See, e.g.*, New Mexico Dep't of Human Servs. v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980). If in fact *Garcia* does represent a misapplication of the whole record standard, as has been suggested elsewhere, *see, 1979-80 Survey of Administrative Law*, 11 N.M.L. REV. 1, 26-28 (Winter, 1980-81), then reliance on it in *Duke City* was bound to cause problems.

20. *See* Utton, *supra* note 18, at 103 (arguing for the adoption of the whole record standard).

Soon after Professor Utton's article, Justice Felter, in Jones v. Employment Servs. Div., 95 N.M. 97, 619 P.2d 542 (1980), wrote a compelling dissent from the court's affirmance of a district court ruling that the Employment Services Division had properly denied unemployment compensation benefits to the claimant. The court applied the traditional substantial evidence standard to affirm the decision of the Agency and the district court. Justice Felter reviewed Justice Frankfurter's seminal opinion in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), which outlined the basis and purpose of the whole record substantial evidence standard. Based on that review, Justice Felter concluded that the whole record standard is "a more providential approach to judicial review of administrative action which should be adopted by this court." 95 N.M. at 101, 619 P.2d at 546 (Felter, J., dissenting). Under that more rigorous standard he would have reversed the Agency based on the "great body of evidence opposed to the decision below." *Id.* at 102, 619 P.2d at 547.

21. In Duke City Lumber Co. v. New Mexico Envtl. Improvement Div., 101 N.M. 301, 661 P.2d 727 (Ct. App. 1983), *rev'd*, 101 N.M. 291, 681 P.2d 717 (1984), the court of appeals made a persuasive case for rejecting the traditional standard in favor of the whole record standard. The court of appeals, however, found itself compelled by the doctrine of *Alexander v. Delgado*, 84 N.M. 717, 507 P.2d 778 (1973), to leave such a change in the law to the supreme court. 101 N.M. at 291, 681 P.2d at 717. *See infra* text accompanying notes 25-31.

incinerator used at Duke City Lumber Company's Espanola sawmill to burn some of its wood waste. Although Duke City and the Agency reached some pollution control agreements during the 1970's, the case began in earnest in 1979 when Duke City applied for a variance from air quality control regulations. The applicable statute allowed a variance when the regulatory limitation would impose "undue economic burden . . . *and* . . . the granting of the variance would not result in a condition injurious to health and safety."[22] After extensive hearings the Board concluded that the record did not support the variance petition.

On appeal by Duke City, the court of appeals found sufficient evidence of undue economic hardship, but was dissatisfied with the evidence on injury to health and safety. The court, therefore, remanded the case to the Agency "to determine whether the wood smoke . . . is injurious to health and safety."[23] On remand, the Board again denied the variance. Duke City Company based its second appeal on three grounds: that it had made a prima facie case that the wood smoke was not injurious to health; that the Board's decision was not supported by substantial evidence; and that the Board acted arbitrarily in considering unsworn citizen testimony.[24]

The court of appeals began its analysis by mounting a most compelling attack on the traditional substantial evidence standard, arguing that the traditional standard should give way to the more modern whole record variation. The court first pointed out that the New Mexico standard is "not only outdated, but contrary to the rule followed by other jurisdictions and the federal courts."[25] It then went on to note that the United States Supreme Court discussion of the whole record standard in *Universal Camera Corp. v. NLRB*,[26] the seminal case on the subject, involved the interpretation of traditional substantive evidence statutory language, and that the broader "whole record" standard did exist in some New Mexico statutes.

The court found it unclear "why the legislature requires different standards of review for different administrative agencies."[27] Recognizing that a uniform approach to judicial review could be accomplished by legislative action, the court picked up on Professor Utton's suggestion that such uniformity could also be accomplished by judicial interpretation,[28] and then went on to list the advantages of a uniform whole record standard: "facilitating judicial economy . . . , pro-

22. N.M. STAT. ANN. § 74-2-8(A) (Repl. Pamp. 1981). (emphasis added.)

23. Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 95 N.M. 401, 407, 622 P.2d 709, 715 (Ct. App. 1980), *cert. denied*, 95 N.M. 426, 622 P.2d 1046 (1981). For a discussion of this aspect of the case, which involved the interesting problem of the respective burdens involved in proving the negative assertion that the granting of the variance would *not* endanger health, *see 1980-81 Administrative Law Survey*, 12 N.M.L. REV. 1, 40-42 (1982).

Since this was the first of four appellate decisions in this case, it is often referred to as *Duke City I*. Although the four opinions are identified in this article, only the supreme court's decision announcing the adoption of the whole record substantial evidence standard is central to the discussion. That case is therefore referred to throughout as *Duke City*, even though it is more properly identified as *Duke City III*.

24. Duke City Lumber Co. v. New Mexico Envtl. Improvement Div., 101 N.M. 301, 303, 661 P.2d 727, 730 (Ct. App. 1983) (*Duke City II*), *rev'd*, 101 N.M. 291, 681 P.2d 717 (1984).

25. 101 N.M. at 304, 681 P.2d at 730.

26. 340 U.S. 474 (1951).

27. 101 N.M. at 304, 681 P.2d at 730.

28. *Id.*, citing Utton, *supra* note 18, at 120.

moting even-handed treatment by all state administrative agencies, and helping to insure that agencies which perform fact-finding, charging, and prosecutorial functions do not lose sight of their statutory duty. . . ."[29]

Finding itself bound, however, by supreme court precedent articulating the traditional standard, the court applied that standard rather than the whole record standard.[30] Under that test, the court reviewed the evidence before the Board and held "that the evidence and the inferences to be drawn therefrom warrant a denial [of the variance], because subtle effects resulting from these concentrations [of air pollutants] may tend to cause exacerbations of respiratory conditions."[31]

It is in this posture that the supreme court was confronted with *Duke City*.[32] Certiorari was granted to resolve three questions—whether the court should adopt the "whole record" standard, whether there was competent evidence to support the agency decision, and whether the court of appeals' "tends-to-cause-harm" standard was the proper legal standard under the applicable statute.[33] As previously noted, the court expressly adopted the whole record standard. In addition, the court resurrected the "legal residuum rule" to strike the court of appeal's reliance on citizen testimony provided at the public hearings.[34] Neither of these rulings were determinative, however, since the court's ultimate holding was that the court of appeals had improperly relied on the "tends-to-cause-harm" standard in interpreting the burden of proof under the applicable statute.[35]

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29. *Id.*

30. The court cited United Veterans Orgs. v. New Mexico Property Appraisal Dep't, 84 N.M. 114, 500 P.2d 197 (Ct. App. 1972)—which expressly looked at the evidence in the light most favorable to the agency decision—as an authoritative traditional substantial evidence case.

31. 101 N.M. at 310, 681 P.2d at 736. The court found that the Board was being asked to make a judgment in an area where there was no available data to prove or disprove actual injury to health, but that given the purposes of the Environmental Improvement Act and the Air Quality Control Act—to protect against harm before it occurred—no such rigid standard of proving actual injury was required. To hold otherwise, said the court, would "not only thwart the purposes of the act in question, but would relegate the agencies charged with its enforcement to reacting to catastrophes after the fact." *Id.* at 305, 681 P.2d at 731.

The court went on to find that the Company had met its prima facie burden of showing no injury to health through its modeling study. *Id.* at 306, 681 P.2d at 737. It then found that the Division had carried its burden of rebutting the presumption raised by the Company's evidence. The court came to that conclusion based on the application of the traditional substantial evidence standard to the citizen testimony received at the hearing, coupled with the violations of the federal National Ambient Air Quality Standards (NAAQS) established by the Division's modeling results. *Id.* at 309-10, 681 P.2d at 735-36.

32. Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 291, 681 P.2d 717 (1984).

33. *Id.* at 292, 681 P.2d at 718.

34. For a discussion of the legal residuum portion of *Duke City*, *see infra* text accompanying notes 47-57.

35. The court rejected the court of appeals' legal conclusion that it was sufficient to uphold the denial of the variance because the evidence showed a condition which "tends to cause harm." The court rejected that conclusion because it found a definition of air pollution in the Air Quality Control Act which referred to contaminants which "may with reasonable probability injure human health." *Id.* at 294, 681 P.2d at 720, citing N.M. STAT. ANN. § 74-2-2(B) (Repl. Pamp. 1983).

Thus, the court reversed the case on ultra vires grounds—i.e., because in applying the "tends-to-cause-harm" standard the court of appeals had failed to follow the requirements of the Air Quality Control Act. 101 N.M. at 295, 681 P.2d at 721. Furthermore, the court noted that its resolution of

A. Adoption of the "Whole Record" standard

The Supreme court issued its initial *Duke City* opinion in November, 1983. The Board, however, petitioned for rehearing, supported by briefs from the Environmental Improvement Division and a number of other agencies opposed to judicial imposition of the whole record standard. Upon rehearing, the court withdrew its first opinion and issued a new opinion. The new opinion did not alter the result. It changed only one substantive paragraph,[36] but that one paragraph substantially altered the court's explanation of the whole record standard.[37]

In the unchanged portion of the opinion, the supreme court mirrored the court of appeals' criticism of the traditional substantial evidence standard by noting that the traditional standard "shroud[s] the judgment of the reviewing courts with imposed ignorance of enlightening evidence . . . [and] causes uneven treatment among those who seek review of the actions of various administrative boards and agencies."[38] Second, and again unchanged in the final opinion, the court made clear that its adoption of the whole record standard is particularly appropriate where the agency performs multiple functions. The supreme court thus picked up on the notion put forward by the court of appeals, that in such agencies the whole record standard will help assure that the agency decisionmaking function remains independent and faithful to the statutory mandate.[39]

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this point would be the same under either substantial evidence standard, *id.*, thus demonstrating that the whole record portion of its decision was obiter dicta.

The court expressly reserved judgment on whether the emissions exceeded the NAAQS, and remanded for a determination of whether a violation of that standard alone or in conjunction with the medical evidence justified denial of the variance under the proper standard of review. *Id.*

On remand, the court of appeals, in Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 102 N.M. 8, 11, 690 P.2d 451, 454 (1984) (*Duke City IV*) reviewed the record yet again and held that "violation of the NAAQS for particulate matter, as established by substantial evidence in this case, not only justified but mandated the denial of Duke City's application for a variance." The court also concluded that a violation of NAAQS established per se injury to health.

36. The new opinion also expressly provided for a remand to the court of appeals to apply its newly articulated standards—a necessary result which was implicit in the initial decision. The explicit remand instructions, however, were addressed more to the statutory standard governing injury to health, *see supra* note 35, than to the substantial evidence standard or the legal residuum rule.

37. All references to the unchanged portions of the opinion are to the reported final opinion rather than the initial opinion which only appears at 22 N.M. Bar. Bull. 1362 (Dec. 22, 1983).

38. 101 N.M. at 293, 681 P.2d at 719. This brief reference to the major criticism of the traditional substantial evidence standard found in Professor Jaffe's seminal work on the subject, *see* Jaffe, *Judicial Review of Questions of Fact*, 69 HARV. L. REV. 1020, 1027 (1956), ignores one essential fact—that for the most part the review standards are contained in statutes which directly control judicial review of agency decisions. While the court of appeals, in *Duke City II*, may have been correct in assuming that the choice of statutory language between "substantial evidence" and "substantial evidence on the record as a whole" has not been purposeful, *see* 101 N.M. at 304, 681 P.2d at 730, if the legislature should make clear in the future that it intends the less rigorous traditional substantial evidence standard (or any other standard created by legislative direction) to apply, then the court should be bound to give effect to that law. In the absence of such a "clear statement" by the legislature, however, the court's ruling in *Duke City* is tantamount to a presumption that whenever the legislature uses the words "substantial evidence" it intends the court to apply the "whole record" review standard. *Cf.* NCCI v. New Mexico State Corp. Comm'n, 107 N.M. 278, 756 P.2d 558 (1988) (absent an express legislative mandate to the contrary, the court will not infer that the burden shifted to the Board to prove that the industry filing for an insurance rate increase did not satisfy the statutory requirements).

39. In those agencies which engage in adjudicatory decisionmaking akin to the guilt or innocence determinations of courts, while also performing the investigative and prosecutorial functions—i.e.,

Finally, and most importantly, the supreme court, in its initial opinion, drew the critical distinction between the whole record standard and the traditional substantial evidence test in the following terms:

> The court will still only review the evidence in the record; it will not weigh it. [citations omitted] Substantial evidence to support a finding is still the rule; but instead of looking *only* to the evidence in the record favorable to the finding and refusing to consider evidence unfavorable to the finding, *and instead of mandating a review of the evidence only in the light most favorable to support the findings*, the court will review the whole record to determine whether there is substantial evidence to support the finding made by the agency.[40]

It is that critical paragraph—making clear that under the new "whole record" standard, agency fact-finding would no longer be viewed in the light most favorable to the agency decision—that the court eliminated in its final decision on rehearing.

Bending to the cries of the agency participants at rehearing[41] the court's final opinion did not contain the paragraph recited above. In its place the court substituted a quote from *New Mexico Human Services Department v. Garcia*,[42] to the effect that the courts are still to view the evidence in the light most favorable

agencies responsible for license revocation and professional discipline—the whole record standard should also serve as a check against agency bias or overzealousness. A decisionmaker who knows that a court will perform its reviewing function based on the whole record is more likely to be mindful of the whole record in reaching his or her decision. In prosecutorial agencies that mindfulness is particularly important.

It is interesting to note, however, that separation of functions was probably not a problem in the environmental agency involved in *Duke City*. According to the Agency's brief, the Environmental Improvement Board, as the decisionmaking body, is kept wholly separate and distinct from the Environmental Improvement Division, which performs the investigative and prosecutorial functions. *See* Brief of the EIB on Rehearing at 7-9.

40. 22 N.M. Bar. Bull. at 1365 (second emphasis added.)

41. The Environmental Improvement Board argued for retention of the traditional standard whereby the evidence is viewed "in the light most favorable to the agency decision," claiming that Duke City had never objected to such a standard, and that "a cursory canvas" revealed that the doctrine was alive and well throughout the country. Brief of EIB on Rehearing at 20-21.

The Board's most telling point was that the traditional standard is different from the whole record standard, and that the existence of both standards in various statutes evidences a legislative intent that different standards be applied to different agencies. The Board, therefore, argued that the failure of the court to give meaning to the two different standards found in different statutes did violence to separation of powers. *Id.* at 4-6.

The Board also rejected evenhandedness as a goal to be achieved by a single standard, arguing that the traditional standard makes particular good sense as a reviewing standard for agencies having technical expertise. *Id.* at 9-18.

The Environmental Improvement Division supported the Board's position, arguing that the substantial evidence standard should never allow the court to judge the credibility of the witnesses or to reweigh the evidence. Brief of the Environmental Improvement Division at 12. The Public Service Commission argued that injection of the whole record standard would result in an increased number of appeals. Public Service Commission Brief in Support of Rehearing at 6-7. The City of Albuquerque took a narrower tack, arguing that the traditional substantial evidence test was required by the Air Quality Control Act, N.M. STAT. ANN. §74-2-9(C) (1978). *See* Brief of the City of Albuquerque at 4-5.

42. 94 N.M. 175, 608 P.2d 151 (1980).

to the decision, but by virtue of this "minor departure from the customary substantial evidence rule" the reviewing court may "act on other convincing evidence in the record *and may make its own findings based thereon.*"[43]

Justice Sosa dissented from the first opinion, and he also dissented from the second on grounds which begin to define the debate in this struggle to better articulate the substantial evidence standard. Justice Sosa believed "that the new standard announced allows this court to substitute its judgement for the lower court or administrative body with impunity."[44] Indeed, if one focuses on the last sentence of the *Garcia* quote, noted above, substitution of judgment seems to be invited whenever the court finds "other convincing evidence in the record." On the other hand, the *Garcia* language, mandating that the evidence continue to be viewed in the light most favorable to the agency, suggests just the opposite. This language, coupled with *Garcia's* declaration that the distinction between the traditional and the whole record standards is a minor one, leads one to believe that extreme deference to agency fact-finding is still the order of the day.[45] *Duke City*, therefore, created as much if not more difficulty than it resolved. It clearly adopted the whole record standard, but left serious confusion about what that new standard meant.

The final *Duke City* opinion says that the reviewing court: 1) must review the entire record; 2) must not reweigh the evidence or reassign the preponderance of evidence; 3) must view the evidence in the light most favorable to the decision; but 4) remains free to act on other convincing evidence retaining the ability to make its own findings.[46] Unfortunately, in this unsuccessful effort to steer a middle course in the debate over too much versus too little judicial interjection into agency fact-finding, the court left us with palpable inconsistencies which have created a doctrinal mess. First, how can a court view the evidence in the light most favorable to the agency and still treat the record as a whole? Second, how can the court consider the whole record without reweighing or reassigning the preponderance of the evidence? Third, how can the court give deference to the agency decision by viewing the evidence in the light most favorable to that decision and also be free to make its own findings based on other convincing evidence? These are the imponderables with which the courts and litigants were left to grapple in the wake of *Duke City*.

B. The Threshold Requirement of a "Legal Residuum" of Competent Evidence

After its substantial evidence discussion, the *Duke City* court also considered the Company's challenge to the adequacy of the citizen testimony. The court of appeals had in part relied on this testimony for its conclusion that there was substantial evidence to support the Board's decision that the wood burning smoke

43. 101 N.M. at 294, 681 P.2d at 720 (quoting 94 N.M. at 177, 608 P.2d at 153.).

44. *Id.*

45. Indeed, if the commentators are correct that *Garcia* improperly applied the traditional standard in the guise of the whole record standard, *see supra* note 19, then this latter reading of *Duke City* is more nearly correct.

46. 101 N.M. 291, 294, 681 P.2d 717,720 (1984).

from Duke City's burner was injurious to health. Noting that such testimony was general and unsworn, the court declared that New Mexico continues to adhere to the "legal residuum rule" which requires that "an administrative action be supported by some evidence that would be admissible in a jury trial."[47] The court then noted that its adoption of the whole record standard did not negate the legal residuum rule: "the substantial evidence rule and the whole record standard . . . reaffirm the rule that some competent evidence is required to support an action by an administrative agency which affects a substantial right."[48] Thus, the court precluded the court of appeals on remand from using the unsworn, general citizen testimony, including the unsworn testimony of an Espanola doctor, as the basis for its factual determinations.

Despite this declaration of consistency between the legal residuum rule and the substantial evidence test, the legal residuum rule is more properly viewed as an exception to the substantial evidence test. Under a rigid application of the rule, even if all of the evidence meets the test of substantiality—i.e., it is such that "a reasonable mind might accept [it] as adequate to support a conclusion"[49]—the agency decision still must be reversed if there is not at least a residuum of evidence legally admissible in a trial before a jury to support the decision.

Indeed, the legal residuum rule has been roundly condemned as undercutting administrative flexibility and undermining the important principle that administrative agencies need to be more concerned with the probativeness of evidence rather than its legal admissibility.[50] In fact, in an earlier opinion, *Trujillo v. Employment Security Commission*,[51] the New Mexico Supreme Court had embraced those criticisms and stated that it was only retaining the legal residuum rule "in those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake."[52] Thus, *Trujillo* generally repudiated the legal residuum rule, while retaining it for what was then perceived as a narrow category of personal right cases.

It previously has been suggested that "[w]hen limited to those circumstances where important *personal* rights are involved, the added formality [of the resid-

47. *Id.* at 295, 681 P.2d at 721. *See e.g.*, Young v. Board of Pharmacy, 81 N.M. 8, 462 P.2d 139 (1969).

48. *Id.*

49. *E.g.*, Wickerstam v. New Mexico State Bd. of Educ., 81 N.M. 188, 190, 464 P.2d 918, 920 (Ct. App. 1970) (the accepted definition of substantial evidence).

50. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.10 (1958); Utton, *supra* note 18, at 109-17; *1980-81 Administrative Law Survey*, *supra* note 23, at 43-44. The criticism of the legal residuum rule is not, however, unanimous:

> The criticisms referred to ignore the tendency of agencies to exercise little or no control over the admission of evidence, which contributes to the elephantine record in so many agency proceedings. Fear that the legal residuum rule may be invoked leads agencies to insist on more careful presentation and examination of evidence.

B. SCHWARTZ, ADMINISTRATIVE LAW § 7.4, at 351 (2d ed. 1985).

51. 94 N.M. 343, 610 P.2d 747 (1980). This *Trujillo* opinion should not be confused with the recent court of appeals decision by the same name which deals with the proper application of the substantial evidence standard. For a discussion of the later *Trujillo* opinion, *see infra* text accompanying notes 90-108.

52. 94 N.M. at 344, 610 P.2d at 748. *See also*, Young v. Board of Pharmacy, 81 N.M. 5, 9, 462 P.2d 139, 142 (1969) (residuum rule is a sensible one where a person's livelihood is at stake).

uum rule] . . . properly serves to insure that more attention is paid to the protection of those important rights."[53] It particularly makes sense "when applied to professional disciplinary proceedings and other adjudications involving important governmental entitlements which run to individuals."[54] Its application beyond those limitations, however, could seriously erode the substantial evidence test.

Duke City ignores the general repudiation of the legal residuum rule contained in *Trujillo*, and broadens the scope of its application well beyond the *Trujillo* limitation. The *Duke City* court applied the legal residuum rule to preclude any reliance on the unsworn citizen testimony received during the "public participation" portion of the hearing to resolve the question whether smoke from the mill was injurious to health.[55]

Although the *Duke City* court made passing reference to the "substantial right" language in *Trujillo*, the fundamental personal rights involved in *Trujillo* (and *Young v. Board of Pharmacy*,[56] upon which *Trujillo* relied,) were absent in *Duke City*. Rather, *Duke City* only involved corporate economic rights. Also, *Duke City* failed to recognize the generalized criticisms of the legal residuum rule previously embraced in *Trujillo*. *Duke City* is, therefore, tantamount to a readoption of the legal residuum rule,[57] which is a sub silentio overruling of *Trujillo*.

Duke City, therefore, leaves us with uncertainty about the meaning and scope of the whole record substantial evidence standard. It also tells us that the substantiality of the evidence under any reading of that test may be irrelevant if the agency decision is not based on at least a residuum of legally admissible evidence under the rules of evidence.

III. THE POST-*DUKE CITY* SUPREME COURT DECISIONS

The supreme court's post-*Duke City* substantial evidence decisions brought no resolution to the duality contained in that opinion. Rather, the duality remains in *Duke City's* progeny, allowing the justices to use either the deferential "in-the-light-most-favorable-to-the-decision" aspect of the case to affirm some agency decisions, or the less deferential "viewing-all-the-evidence-to-see-if-on-balance-it-supports-the-decision" aspect of the case to overturn others.

Gas Company of New Mexico v. New Mexico Public Service Commission,[58]

53. *1980-81 Administrative Law Survey*, *supra* note 23, at 44.

54. *1983-84 Administrative Law Survey*, 15 N.M.L. REV. 119, 142 (1985).

Since disciplinary proceedings most often involve the application of law to past facts to resolve questions akin to guilt and innocence in the criminal sphere, and since the consequences are often penal-like, there is a good argument for the added protection of the rules of evidence.

55. It also found that the unsworn testimony offered by an Espanola physician "was general rather than specific," and that in his recitation to source material he "did not relate to or apply that material to the facts of this case." 101 N.M. at 295, 681 P.2d at 721. The lay witnesses and the doctor "testified that smoke from the burner caused asthma attacks and irritation of eyes, nose and throat." *Id.*

56. 81 N.M. 5, 462 P.2d 139 (1969).

57. If the legal residuum rule applies to bar reliance on all unsworn citizen testimony in the context of *Duke City* it is hard to articulate the kind of case where the legal residuum rule would not apply.

58. 100 N.M. 740, 676 P.2d 817 (1984).

the first post-*Duke City* substantial evidence case decided by the supreme court, provided no help whatsoever. In that case the court affirmed a Public Service Commission order imputing as income to the Gas Company a certain percentage of the reserve of the Company's affiliate, thereby reducing the cost of gas charged to utility customers. In doing so it merely referenced the *Duke City* whole record standard, and concluded, without analysis, that the standard had been met.[59] That case was followed by *Groendyke Transport, Inc. v. New Mexico State Corporation Commission,*[60] where the court affirmed the Corporation Commission's refusal to grant a state-wide certificate to a common carrier of petroleum products. In doing so, the court properly acknowledged that whole record review "is not a review limited to those findings most favorable to the agency order."[61] Again, however, it gave us no guidance on how the standard was to be applied, noting only its ultimate conclusion that "a review of the record reveals that the Commission's decision was supported by substantial evidence."[62] *Groendyke Transport*, therefore, only hinted that the *Duke City* standard was inherently inconsistent with the "light most favorable" test.

Following *Groendyke Transport*, the court decided *Mutz v. Municipal Boundary Commission,*[63] which upheld a municipal boundary commission's order of annexation against a landowner's protest. The district court had upheld the commission under the pre-*Duke City* standard. The supreme court affirmed, citing *Duke City*, and stating that it had examined the whole record *and* also viewed "the evidence in the light most favorable to the Commission's decision."[64] Thus, in contrast to *Groendyke Transport*, *Mutz* fell on the more deferential "light-most-favorable" side of the line. Similarly, in *Attorney General v. New Mexico Public Service Commission,*[65] deference was afforded the Public Service Commission's rate-making decision, requiring affirmance of that decision. In that case the court again claimed adherence to the *Duke City* whole record standard, and declared that under that standard it was required to view the evidence in the light most favorable to the Commission's decision.[66] In *Jimenez v. Department of Corrections,*[67] the court, in a split decision, affirmed the State Personnel Board's order upholding the Department's termination of Mr. Jimenez for negligent performance of his duties as a corrections officer. The majority applied the *Duke City* whole record standard with its deferential "light-most-favorable" gloss. The majority's review of the evidence persuaded it that there was substantial evidence to support the agency decision to fire Jimenez.[68]

59. *See also* Gonzales v. Public Serv. Comm'n, 102 N.M. 529, 697 P.2d 948 (1985) (merely referencing *Duke City's* whole record standard).

60. 101 N.M. 470, 684 P.2d 1135 (1984).

61. *Id.* at 477, 684 P.2d at 1142.

62. *Id.* Indeed, *Duke City* itself suffers from this same difficulty. There was no application of the new whole record standard in that case because the basis for the decision was the failure of the court of appeals to apply the correct legal standard to the determination of the question whether the wood smoke was injurious to health. *See supra* note 35.

63. 101 N.M. 694, 688 P.2d 12 (1984).

64. *Id.* at 699, 688 P.2d at 17.

65. 101 N.M. 549, 685 P.2d 957 (1984).

66. *Id.* at 553, 685 P.2d at 961.

67. 101 N.M. 795, 689 P.2d 1266 (1984).

68. *Id.* at 796-97, 689 P.2d at 1267-68.

Jimenez was the guard on duty in Tower 1 of the State Penitentiary on the night an escape took place. Ten inmates escaped just prior to Jimenez's coming on duty, but an eleventh, Harmon Ellis, made his escape a half hour after Jimenez began his duty. The majority were persuaded that there was substantial evidence that Jimenez neglected his duty with respect to Ellis' escape, and relied on the following facts: that Ellis' escape took place across an open space in front of Tower 1; that there was an unobstructed view of that space from Tower 1; that the tower was equipped with a spot light; that Ellis would have been observable from Tower 1 while he was pacing up and down the perimeter fence which was illuminated; and that even if Ellis escaped while Jimenez was releasing members of a visiting basketball team, the mirror in the tower would have enabled Jimenez to detect activity behind him.[69]

The dissenting justices, on the other hand, stressed the "on balance" evaluation of the whole record, which they believed the *Duke City* standard required.[70] The dissenters engaged in their own detailed review of the evidence. They focused first on the fact that the warden had recommended firing Jimenez "based on the mass escape of eleven inmates," before it was learned that ten of the eleven had escaped before Jimenez came on duty.[71] They also emphasized that Jimenez checked out the basketball team "through a gate adjacent to his tower assignment."[72] Particularly persuasive to the dissenters were the facts that the record nowhere contained an explanation of how the mirror, *located in the tower*, could have been of any assistance to Jimenez when he was occupied at the gate *adjacent* to the tower, and that the hearing officer had found that Jimenez could not have seen the escape while engaged in other duties.[73] These facts led them to conclude that "on balance" the evidence against neglect "outweighs any evidence of negligence or inefficient performance on the part of Jimenez."[74]

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69. *Id.* at 797, 689 P.2d at 1268.

70. *Id.* at 797, 689 P.2d at 1268 (Walters, J., dissenting, joined by Sosa, S.J.) Justice Sosa had dissented from *Duke City* because he thought it allowed too broad a scope of judicial review, but he was willing to apply its broader standard to protect the individual rights involved in this case.

71. *Id.* at 797, 689 P.2d at 1268.

72. *Id.*

73. *Id.*

74. *Id.* at 798, 689 P.2d at 1269. At this juncture in its analysis the dissent does suggest that the findings of the district court—which had overturned the administrative decision as lacking substantial evidence—must be viewed in the light most favorable to the successful party. This unfortunate confusion of the standard applicable to the review of judicial decisions, as opposed to the *Duke City* standard, which applies to judicial review of administrative decisions, slightly blurs what would otherwise stand as a clear example of the application of the "on-balance", less deferential strain in the *Duke City* opinion.

This concern with the subsequent fact-finding of the district court, and the suggestion that it be given more deference than the initial fact finding of the agency appears out of step with the long-standing view of the supreme court that in making its substantial evidence review, after a similar review by a lower court, it must "conduct the same review as the district court." Padilla v. Real Estate Comm'n, 106 N.M. 96, 97, 739 P.2d 965, 966 (1987); *see* Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984); Lloyd McKee Motors v. State Corp. Comm'n, 93 N.M. 539, 602 P.2d 1026 (1979). While the court's articulation of this repetitive second-tier judicial review is, perhaps, subject to criticism as unnecessary, wasteful of judicial resources, and an encouragement to forum-shopping, *see* text accompanying notes 148-52, the implication in the *Jimenez* dissent that in carrying out its subsequent substantial evidence review the supreme court should afford more deference to the district court fact-finding than the

Jimenez, therefore, provides us with a reasoned application of the divergent standards contained in *Duke City*. Indeed, it is the reasoned application by both the majority and the dissent which helps us to see clearly the duality of *Duke City*, and that the two inconsistent strains in the case can often lead to disparate results.

The next two supreme court cases on the subject added nothing to our understanding of the *Duke City* dilemma. *Alonzo v. New Mexico Employment Security Department*[75] ostensibly applied the whole record standard, without reference to either the "light-most-favorable" or "on-balance" glosses on that standard. It did engender a dissent, but the justices' debate in that case was over the legal definition of the word "misconduct" in the Unemployment Compensation Act,[76] rather than a disagreement over the facts. Similarly, in *State ex rel. Harkleroad v. New Mexico State Police Board*,[77] the court upheld an agency decision under the whole record standard, without a reasoned application which would allow us to see which aspect of *Duke City* predominated.

Three of the remaining opinions on this subject[78] are not so neutral, although collectively they provide no more certain resolution to the essential dilemma than the cases that preceded them. In *Elliott v. New Mexico Real Estate Commission*,[79] and *New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*,[80] the court affirmed agency decisions under the whole record standard, indicating that it was bound to view the evidence in the light most favorable to the decision.[81] On the other hand, in *Grauerholtz v. New Mexico*

agency fact-finding seems to be a perverse middle ground. If a second-tier substantial evidence review is deemed advisable, then it should be a full-blown review as suggested by the *Padilla/Groendyke Transport/Lloyd McKee Motors* standard. If it is unnecessary or inadvisable, then a different standard, which better serves as a check on the first reviewing court, rather than the agency, is in order. *See infra* text accompanying notes 148-52 and 172.

75. 101 N.M. 770, 689 P.2d 286 (1984).

76. Alonzo, a full-time office clerk at Baldridge Lumber Company, sometimes "helped out" at the cash register. On one occasion she was told by her supervisor to wear the Company smock while at the register. Wearing the smock was company policy with respect to cash register employees. When she failed to wear it the next time she worked the cash register, she was discharged. 101 N.M. at 770, 689 P.2d at 286.

The majority reversed the agency decision that she was ineligible for unemployment benefits because, in its view, the single failure to wear the smock did not meet the established test of misconduct, which requires "willful or wanton disregard of an employer's interests." *Id.* (quoting, Mitchell v. Lovington Good Samaritan Center, Inc., 89 N.M. 575, 577, 555 P.2d 696, 698 (1976)). The dissenting justices, on the other hand, were equally convinced that Alonzo's willful refusal to obey the order of her employer was an act of insubordination, and fell within the *Mitchell* definition of misconduct. 101 N.M. at 772, 689 P.2d at 288 (Stowers, J., dissenting).

77. 103 N.M. 270, 705 P.2d 676 (1985).

78. In another case, Warren v. Employment Sec. Dep't, 104 N.M. 518, 724 P.2d 227 (1986), the court affirmed a denial of unemployment benefits under the whole record standard, without reference to more.

79. 103 N.M. 273, 705 P.2d 679 (1985).

80. 104 N.M. 565, 725 P.2d 244 (1986).

81. *Elliott*, which involved the affirmation of the Real Estate Commission's suspension of Elliott's broker's license, did evoke a dissent, but only on the question of whether the Commission had jurisdiction to review Elliott's conduct in this case. The dissenters were of the opinion that Elliott was only involved as an attorney-in-fact for the sale of an interest in a real estate contract; that such a transaction was not a sale of real estate within the meaning of the relevant statute; and that therefore the Real Estate Commission had no jurisdiction. 103 N.M. 273, 276, 705 P.2d 679, 682 (1985) (Walters, J, dissenting).

Labor Commission,[82] the court upheld a Labor Commissioner determination that a subcontractor was required to pay additional wages under the Public Works Minimum Wage Act, reciting that portion of *Duke City* which requires an "on-balance" approach to the evidence. Again, in none of these cases did the court treat us to a reasoned application of the standard, but merely recited that after a review of the record, it found substantial evidence support for the Commission's decision.

The supreme court has had an occasion to deal with the *Duke City* standard since the court of appeals sought to resolve the *Duke City* duality by adopting the "on balance" view of the case.[83] Nonetheless, the supreme court sidestepped the issue by neatly bowing in each direction at the same time. In *National Council on Compensation Insurance v. New Mexico State Corporation Commission*,[84] the court upheld a district court affirmance of the Corporation Commission's denial of a workers' compensation insurance premium increase. In doing so the court had to deal with a substantial evidence claim, necessitating articulation of the *Duke City* standard. Again, the court began by claiming that it was compelled to view "the evidence in the light most favorable to the agency decision."[85] The court went on to suggest that such an approach does not allow the court to "view favorable evidence with total disregard to contravening evidence."[86] This small bow in the direction of the "on balance" approach was then accentuated by the court's declaration that "[n]o part of the evidence may be exclusively relied upon if it would be unreasonable to do so."[87]

The post-*Duke City* supreme court decisions thus fail to resolve what the whole record standard is supposed to mean. They also fail to give us any coherent view of *how* the standard is to be applied, although in one case the majority and dissenting opinions demonstrated how a reasoned application of the two existing strains in *Duke City* could lead to disparate results in a given case.

The *Duke City* duality prevents the substantial evidence test from serving as a standard which meaningfully establishes the boundary of judicial intervention into administrative agency fact-finding. On the other hand, if the substantial evidence standard is viewed only as a convenient device for framing decisions which are rooted more in a concern for the nature of the rights being affected by the given decision, or the quality of the agency process utilized in a given case, then the duality may prove useful in a perverse sort of way. It allows the court to choose "the light most favorable" line to uphold agency decisions which do not trammel fundamental personal rights, or which are arrived at by full and fair procedures, while reserving the "on balance" line to overturn those decisions which do touch upon personal, fundamental rights, or which are arrived at through suspect process.[88]

82. 104 N.M. 674, 726 P.2d 351 (1986).

83. *See infra* text accompanying notes 89-107.

84. 107 N.M. 278, 756 P.2d 558 (1988).

85. *Id.* at 398, 756 P.2d at 558 (citing Wolfley v. Real Estate Comm'n, 100 N.M. 187, 668 P.2d 303 (1983)), a pre-*Duke City* case.

86. *Id.*

87. *Id.*

88. Admittedly, most judicial review statutes contain additional standards of review—requiring reversal of agency decisions which are "arbitrary and capricious," or "otherwise not in accordance with law." *See, e.g.*, N.M. STAT. ANN. § 7-38-28(D) (Repl. Pamp. 1986) (appeals from County

Indeed, both of these considerations—the nature of the right affected, and the quality of the agency decisionmaking process—are important policy considerations which necessarily underlie judicial review of fact-based agency adjudication. It is, therefore, appropriate that these policy considerations drive the result in the marginal substantial evidence decisions. But, these considerations come into play in the *application* of the substantial evidence standard; they do not excuse the court from failing to articulate a clear standard which can then be applied with an eye toward these underlying policies.

IV. THE COURT OF APPEALS ENTERS THE FRAY

In its early post-*Duke City* substantial evidence cases the court of appeals gave scant attention to the internal inconsistency of that opinion.[89] In two early 1987 opinions, however, the court grappled with the *Duke City* duality. In doing so, it appropriately settled part of the struggle, while sowing the seeds for yet more intractable problems in the application of the substantial evidence standard to the review of administrative agency fact-finding.

A. The "On-Balance" Resolution of the Duke-City *Dilemma*

In *Trujillo v. Employment Security Department*,[90] the court of appeals was faced with what seemed a pedestrian administrative appeal. Trujillo and a group of his fellow workers had been dismissed from their employment for failure to

Valuation Protest Boards); *id.* § 27-3-4(F) (1978) (Public Assistance Appeals Act); *id.* § 12-8-22 (1978) (APA). These additional standards allow for review of legally deficient procedure. What may have affected the substantial evidence review in *Jimenez*, and other cases like it, however, is a procedural weakness which does not rise to the level of a legally defective process.

It has been suggested elsewhere that the courts have on occasion confused the various standards of review contained in judicial review statutes. *See, e.g., 1980-81 Administrative Law Survey*, *supra* note 23, at 58-60. While the three accepted standards—substantial evidence, arbitrary and capricious and otherwise not in accordance with law—do in fact serve different functions and ought to be subject to separate and discrete analysis, that topic is well beyond the scope of this article.

89. The early post-*Duke City* substantial evidence cases decided by the court of appeals are as unhelpful as those decided by the supreme court. In Muckey v. New Mexico Dep't of Human Servs., 102 N.M. 265, 694 P.2d 521 (Ct. App. 1985), the court applied the "light most favorable" standard from *Garcia* to uphold a welfare department denial of benefits. *Muckey* was followed by yet another welfare case, Gutierrez v. New Mexico Dep't of Human Servs., 102 N.M. 751, 700 P.2d 654 (1985), in which the court again applied the "light most favorable" standard to affirm an agency decision. Neither case cites *Duke City*, placing their entire reliance on *Garcia*, which was also a welfare case.

Muckey and *Gutierrez* were followed by Tapia v. City of Albuquerque, 104 N.M. 117, 717 P.2d 93 (Ct. App. 1985), in which the court upheld an administrative personnel decision. The *Tapia* court seemed to touch all the bases. It acknowledged the whole record standard of *Duke City*, declared that it must review the evidence in the "light most favorable" to the agency decision, and then concluded that "on balance" there was substantial evidence to support the agency decision.

The two following cases both involved unemployment compensation appeals. In Hinojasa v. Employment Sec. Dep't, 105 N.M. 212, 730 P.2d 1194 (Ct. App. 1986), the court affirmed an agency decision applying the "light most favorable" standard, and in Ortiz v. Employment Sec. Dep't, 105 N.M. 313, 731 P.2d 1357 (Ct. App. 1986), the court merely acknowledged that it was applying the whole record standard from *Duke City*. *See also*, Kleinberg v. Board of Educ., 107 N.M. 38, 751 P.2d 722 (Ct. App. 1988); Board of Educ. v. New Mexico State Bd. of Educ., 106 N.M. 129, 740 P.2d 123 (Ct. App. 1987) (later cases merely acknowledging the new *Duke City* standard).

90. 105 N.M. 467, 734 P.2d 245 (Ct. App. 1987).

report for overtime duty.[91] The Employment Security Department denied their claim for unemployment benefits, finding them ineligible because they had been dismissed for misconduct. On certiorari,[92] the district court reversed and granted an award of benefits to the employees. On appeal the court of appeals was confronted with a straightforward substantial evidence question, complicated somewhat by the fact that, pursuant to the rule on certiorari, the district court had substituted its own findings and conclusions for those of the agency.[93] The Department framed the issue on appeal in terms of whether "the trial court abused its discretion in overturning the decision of ESD and in adopting findings of fact and conclusions of law contrary to those found by the administrative agency."[94]

The court first turned to the standard of review it needed to apply—the *Duke City* whole record standard—and found itself caught between the "on-balance" and the "most favorable light" aspects of that case in determining whether it was appropriate for the district court to enter its own findings and conclusions. The court grappled with what it considered to be two sources of confusion in *Duke City*. First, the *Trujillo* court found that *Duke City* had relied on *New Mexico Human Services Department v. Garcia*[95] for the proposition that the reviewing court may act on other convincing evidence and may enter its own findings. The court found, however, that *Duke City* had failed to make clear that *Garcia* only endorsed substitution of court findings for those of the agency when the agency's findings were *not* supported by substantial evidence.[96] Second, the court directly confronted the inconsistency between whole record review and the "most favorable light" standards, both of which had been endorsed in *Duke City*. The court found, through its analysis of *Duke City* and its supreme court progeny,[97] that here, too, "*Garcia* may be a root cause of confusion."[98] Since

91. Appellees were employees of Associated Grocers of Colorado who were working the noon to 8:30 p.m. shift. They had been asked to work overtime shortly before the shift ended, and refused, as was their right, because the employer's request had not been timely under the provisions of their union contract. Just before the end of the shift the supervisor met with them in what he testified was an attempt to draft them for overtime work, which he had the right to do under the contract in emergency situations. *Id.* at 469 and 472, 734 P.2d at 246 and 250.

The supervisor testified that he told them he was drafting them, that he wanted them back at 4:30 a.m, that the employees understood what he had said, and that there was no confusion or misunderstanding. The three employees who testified, however, said they and others were confused. They understood the supervisor to say that some employees were going to be called to come in at 4:30 a.m., and since they were not called they did not report. *Id.* at 468, 734 P.2d at 246.

92. Certiorari review to the district court from decisions of the Employment Security Department is specifically provided for by N.M. STAT. ANN. § 51-1-8 (1978), and the procedures therefore are delineated in N.M.R. CIV. P. 1-081(C).

93. Section 51-1-8(M) provides for district court review "both upon the law and the facts," and Rule 81(C)(4) specifically provides that in doing so the "district court shall make findings of fact and conclusions of law and enter judgment therein upon the merits."

94. 105 N.M. at 468, 734 P.2d at 246.

95. 94 N.M. 175, 608 P.2d 151 (1980).

96. *Id.* at 177, 608 P.2d at 153. *See also*, Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).

97. In its review of the post-*Duke City* supreme court cases dealing with substantial evidence, the court found that most of the "light most favorable" cases had relied either directly or indirectly on *Garcia*. *See* 105 N.M. at 470, 734 P.2d at 248.

98. *Id.* The *Trujillo* court was both patently correct in its analysis and more than kind in its understatement of the problem. After all, it was the removal of the critical paragraph rejecting the

Garcia made no reference to *Universal Camera*, and since the supreme court had reiterated in *Grauerhotz v. New Mexico Labor & Industrial Commission*,[99] that in *Duke City* "we adopted the whole record review announced in *Universal Camera*,"[100] the court of appeals was confident in concluding that it is the "on balance" aspect of the standard, found in *Universal Camera* rather than the "most favorable light" aspect of the standard which must govern whole record review under *Duke City*.[101]

The court of appeals then considered the application of the on-balance whole record standard to the facts before it. Rather than viewing the misconduct question as a legal question,[102] the court found it to be a factual question which was the subject of conflicting testimony—the testimony of the employees that they were confused about the overtime demand, contrasted with the testimony of the supervisor that his instructions were explicit and not confusing. Without elaborating on the specific testimony before it, the court concluded that the district court finding of employee confusion was in error because the evidence was conflicting and "would have supported conflicting conclusions."[103] Under any view of the standard, however, the court found comfort in the rubric that "[i]t is not the function of reviewing courts to determine the credibility of witnesses."[104] On this basis the appeals court reversed the decision of the district court holding that "the trial court improperly reweighed the evidence and substituted its judgment for that of the administrative agency."[105]

Trujillo thus correctly eliminated the *Duke City* confusion over the articulation of the whole record standard. In doing so, however, it failed to fully elaborate the facts before it, as the supreme court had failed to do in most of its post-*Duke City* cases. Indeed, by its quick resort to the rule that reviewing courts may not evaluate credibility, the court of appeals may have done little more than substitute that rubric for the "light most favorable" test which it seemingly rejected. If the court's holding means that whenever there is conflicting testimony, then agencies can make any reasonable finding free from meaningful judicial review, then indeed the evaluation of credibility rubric is merely another for-

"light most favorable" language, in its initial *Duke City* opinion, and the substitution of the *Garcia* paragraph in its stead, which led the supreme court to create the muddle in the first place. *See supra* text accompanying notes 36-46.

99. 104 N.M. 674, 726 P.2d 351 (1986).

100. *Id.* at 676, 726 P.2d at 353.

101. Indeed, even a cursory analysis of *Universal Camera* makes clear that the United States Supreme Court viewed the whole record standard as rejecting the "light most favorable" approach and requiring an "on balance" approach to judicial review of the evidence. *See infra* note 136.

102. The employees had relied on the "single isolated incident" exception to the misconduct definition, seemingly applied by the supreme court in Alonzo v. New Mexico Employment Sec. Dep't, 101 N.M. 770, 689 P.2d 286 (1984) more as a matter of law than of fact. *See supra* text accompanying notes 75-76.

103. 105 N.M. at 471, 734 P.2d at 249. The court relied on *Universal Camera* for the proposition that the whole record standard does not "mean that . . . a court may displace the . . . [agency's] choice between two fairly conflicting views." 340 U.S. at 488.

104. 107 N.M. at 472, 734 P.2d at 250. It is ironic that the court, after criticizing *Garcia* in the portion of its opinion on the substantial evidence test then resorted to *Garcia* as support for the proposition that a reviewing court should not engage in evaluating the credibility of witnesses.

105. *Id.* at 472, 734 P.2d at 250.

mulation of the "light most favorable" standard. If, on the other hand, the case truly involved the judging of the witnesses' credibility,[106] and the agency accepted one witness' testimony over another because it judged the testimony of one more credible, then the principle makes sense. In that latter instance, however, the reviewing court must insist that the agency actually evaluate credibility and state the basis for its credibility evaluation. "Credibility" should not become a make-weight for insulating agency decisions from judicial review in the myriad of cases in which there is conflicting evidence.

By failing to engage in the reasoned application of its articulated standard, the *Trujillo* court failed to give us any guidance in this regard. Instead, we are left with the disquieting feeling that credibility was not at all the basis for the agency decision in this case. Assuming that both the supervisor and the employees were honest and sincere in their testimony, and equally credible to a fair and impartial decisionmaker,[107] we are left with a supervisor who thought he was clear in what he said to his employees, and some employees who failed to understand those instructions. In that situation, it is hard to find "misconduct" under the settled definition of that term,[108] and the decision of the district court appears more correct than that of the agency.

The point here, of course, is not whether the district court rather than the court of appeals was correct in this particular case, but rather, how reasoned application of the substantial evidence test is absolutely essential to our understanding of the test and how it should be applied in the future. Perhaps, then, the real difficulty in this whole controversy is that so much judicial attention has been focused on the *articulation* of the whole record standard, with the implicit assumption that once we get it right, its application would be relatively straight-

106. In this case the court of appeals did not indicate that the testimony of the supervisor was more credible than that of the employees, nor was there any indication that credibility of the witnesses was critical to either the agency or the lower court.

107. Just a brief application of the articulated standard to the facts of record by the reviewing court is all that would be required to demonstrate the falseness of this assumption. If, of course, that cannot be done because the assumption is correct, then that would demonstrate that the issue here was not really a matter of credibility, and that the credibility rubric was not the correct basis for the decision.

Of course, a reviewing court may do the greatest service to the respective roles of agency and court when, in those instances where the basis of the agency decision is unclear, it remands to the agency to require such clarification. *See* Akel v. New Mexico Human Services Dep't, 106 N.M. 749 P.2d 1120 (Ct. App. 1987), *cert. denied*, 107 N.M. 74, 752 P.2d 789 (1988) (hearing officer's decision must adequately reflect the basis for his determination and the reasoning used in arriving at such a determination so that the appellate court may perform its review function.); Cibola Energy Corp. v. Roselli, 105 N.M. 774, 776, 737 P.2d 555, 557 (Ct. App. 1987) ("For purposes of judicial review, the order must, at least, indicate the reasoning of the board and the basis on which it acted." 105 N.M. at 778, 737 P.2d at 559, *citing First Bank v. Bernalillo Count Valuation Protest Bd.*, 90 N.M. 110, 560 P.2d 174 (Ct. App. 1977), *quoting* DAVIS, ADMINISTRATIVE LAW,§ 16.05 at 444 (1958)).

108. "[M]isconduct" . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations. . . . On the other hand mere . . . failure in good performance as the result of . . . ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Mitchell v. Lovington Good Samaritan Center, Inc., 89 N.M. 575, 577, 555 P.2d 696, 698 (1976).

forward. The fact, of course, is that articulation of any legal standard only takes us so far—the real difficulty, and the judicial art if you will, is in a reasoned application of the standard with a judicial eye on the values which the standard was designed to serve.

B. The Seeds of Further Difficulties—Allowing Independent Findings by the Reviewing Court

In addition to the disquiet with which we are left by the *Trujillo* court's failure to give us any sense of reasoned application of the whole record standard, that case also reiterated a pre-*Duke City* standard which may undermine much of the recent effort of our appellate courts to readjust the substantial evidence standard of review. *Trujillo* made clear that a reviewing court may substitute its judgment for that of the agency—making findings and conclusions independent of those of the agency—when the reviewing court finds that the agency decision is *not* supported by substantial evidence.[109] As a general principle, this, too, is very troubling.

The purpose of the substantial evidence test is to help define the role of the reviewing court, so that the court can properly perform its reviewing function without undermining the essential fact-finding role of adjudicatory agencies. If the court of appeals' substitution of judgment principle is generally applied when there is not substantial evidence to support the agency decision, however, it will undermine agency fact-finding. Agency fact-finding will be deferred to *only* if the agency gets it right the first time. If, however, the agency gets it wrong—makes a decision unsupported by substantial evidence—then the application of the substituted judgment principle means that the reviewing court is free to sidestep the agency and substitute its fact-finding abilities for those of the agency. Deference to agency fact-finding then would become only a sometime principle—applicable when the agency gets it right, and inapplicable when the agency gets it wrong.

Not only would such a principle undermine agency fact-finding in those instances when the agency makes an erroneous decision, but it would also eliminate one of the corollary values of judicial review of fact-finding—instructing the agency on the deficiencies in its fact-finding processes. When a reviewing court reverses an agency decision as unsupported by substantial evidence in the record as a whole, and does so by a reasoned application of the standard to the facts in the particular case, the court provides helpful guidance to the agency about its process of resolving factual disputes. Reversals with remands, rather than substituted findings and conclusions,[110] will allow the agency to engage in better

109. Neither *Universal Camera* nor *Duke City* . . . changed the standard of review so as to permit the reviewing court to enter its own findings if the administrative agency's decision is supported by substantial evidence. . . . [T]he independent findings by the reviewing court are authorized if the Board's findings, after considering all conflicting evidence, are unsupported by substantial evidence.

105 N.M. at 469-470, 734 P.2d at 247-48.

110. Our appellate courts have been less than consistent in this regard. *Compare* Ernest W. Hahn, Inc. v. County Assessor for Bernalillo County, 92 N.M. 609, 592 P.2d 965 (1978) (reversed and remanded to Valuation Protest Board with directions to reassess property in accordance with the standards set out in the opinion), *with* Cibola Energy Corp. v. Roselli, 105 N.M. 774, 737 P.2d

fact-finding the second time around, and help guide the agency to better fact-finding in the future. General application of the substituted judgement principle in all situations when the agency decision is not supported by substantial evidence would frustrate this important, if secondary, basis for judicial review of agency fact-finding under the whole record standard.

In fact, the application of the substituted judgment principle in cases like *Trujillo* is appropriate. It is appropriate in those cases, however, not because it represents a sound administrative law principle, but rather, because the statute and supreme court rule governing judicial review of Employment Security Department decisions mandate such treatment. The statute governing appellate review of Department decisions specifically provides that the decision "may be reviewed both upon the law and the facts by the district court . . . upon certiorari."[111] The procedural rules for the district court then provide the relevant procedural mechanism for that review, including the direction that the "court shall make findings of fact and conclusions of law and enter judgment therein upon the merits."[112]

Indeed, in *M.R. Prestridge Lumber Co. v. Employment Security Commission*,[113] an early appellate review case decided under this statute/rule configuration, the supreme court expressly rejected the application of traditional substantial evidence review. Given the specific wording of the statute and implementing rule, the court concluded that "the responsibility of making correct findings rests with the district court and it is not to be hampered or embarrassed in the performance of this duty by the findings of the Commission."[114]

More than a decade later, in *Wilson v. Employment Security Commission*,[115] the court retreated from that portion of *Prestridge Lumber* and adopted the current construction of the judicial review scheme found in the Unemployment Compensation Act (UCA) and its implementing court rule. Recognizing that judicial review of agency decisions is usually a matter of statutory construction, the court in *Wilson* concluded that this statutory/rule scheme embodies a modified substantial evidence review: "The trial court shall adopt as its own such of the Commission's findings of fact as it determines to be supported by substantial evidence. . . . [With respect to those findings which are not substantially supported] the district court shall make its own findings of fact, conclusions of law and decision. . . ."[116]

Substitution of judgment in unemployment compensation appeals is, therefore, rooted in the specific provisions of the controlling statute and court rule. In that context the reviewing court has no choice but to apply that standard whenever

555 (Ct. App. 1987) (reversed and remanded with instructions to enter judgment in favor of Cibola's valuations). *See generally, 1983-84 Administrative Law Survey, supra* note 54, at 147-48.

111. N.M. STAT. ANN. § 51-1-8(M) (1978).

112. N.M.R. CIV. P. 1-081(C)(4).

113. 50 N.M. 309, 176 P.2d 190 (1947).

114. *Id.* at 327, 176 P.2d at 198. The court noted that this primary duty of the district court to make findings did not mean that the court must ignore the findings of the agency. Rather, the court should "follow the Commission's findings *in making its own*, save where the evidence clearly preponderates against them." *Id.* (emphasis added.)

115. 74 N.M. 3, 389 P.2d 855 (1964).

116. *Id.* at 8, 389 P.2d at 858.

it finds decisions of the Employment Security Department are unsupported by substantial evidence.[117]

The UCA standard is a troublesome standard, however, because it represents a confused view of the role of court and agency where fact-finding is concerned. On the one hand, it attempts a deferential judicial posture toward agency fact-finding so long as the agency's facts are supported by substantial evidence. Once the court concludes that the agency's factual determinations are not sufficiently supported, however, the UCA standard then totally rejects any deference to the agency fact-finding process, and instead requires the court to be the ultimate decider of the facts. The court then has the right, one supposes, to reweigh the evidence, judge the credibility of the witnesses, and the like. In that instance the Department merely becomes a hearing officer to the district court—developing all of the evidence upon which the decision will be made, but leaving the decision to the district court based upon the administrative record. While it is hard to envision any rational justification for such a scheme of judicial review,[118] that is how the will of the legislature in this area has been interpreted.

It is questionable whether the legislature purposefully chose the judicial review mechanism in unemployment compensation cases.[119] Even if it did, however, there is absolutely no reason for the court to graft the tortured unemployment compensation review scheme onto the substantial evidence review standard contained in the vast majority of statutes providing for judicial review. This is especially so when many of our agencies are involved in complex fact-finding which requires the application of agency expertise, and where the nature of much

117. *See, e.g.*, Alonzo v. New Mexico Employment Sec. Dep't, 101 N.M. 770, 689 P.2d 286 (1984); Abernathy v. Employment Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979); Trujillo v. Employment Sec. Dep't, 105 N.M. 467, 734 P.2d 245 (Ct. App. 1987).

118. The *Prestridge Lumber Co.* interpretation—requiring independent findings and conclusions by the district court—fully transformed the district courts into agency decisionmakers, with the Commission serving merely as the hearing officer. While that result may have been more consistent with a literal reading of the statute and court rule, such a result certainly placed an additional burden on the district courts, while also expressing a lack of confidence in agency fact-finding.

The *Wilson* interpretation, on the other hand, represents a compromise of sorts. By requiring district court deference to agency decisions which are correct, and only mandating independent fact-finding by the court when it finds the agency decision not supported by substantial evidence, the *Wilson* view somewhat enhances the agency role, while also somewhat controlling the expenditure of judicial decisionmaking resources.

If one were searching for a rationale to support the *Wilson* interpretation, it might lie in the fact that most of the contested unemployment compensation decisions involve a determination of whether the employee was dismissed for "misconduct" within the meaning of the Act. Such a determination does not involve difficult questions which lie within the expertise of the agency; indeed, such an application of law to fact is precisely the sort of question and involves just the sort of evidence, with which our civil courts deal on a regular basis. The two-step judicial review scheme—deferential review to see if the decision is supported by substantial evidence, followed by more intensive full decisionmaking if the findings are not so supported—could, therefore, be justified as a system which allows the agencies to alleviate the work load of courts, but keeps the courts available as the ultimate decisionmakers on matters within their own experience and expertise when it is clear that the agency has not done the job.

119. *See* Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd., 101 N.M. 301, 304, 661 P.2d 727, 730 (Ct. App. 1983), *rev'd on other grounds*, 101 N.M. 291, 681 P.2d 717 (1984) ("it is not clear . . . why the legislature requires different standards of review for different administrative agencies.").

of our governmental regulation requires consistency of application to insure an orderly scheme of regulation.

Regrettably, the general discussion of substituted judgment in *Trujillo* has led to just such a generalized application,[120] thereby threatening to undermine the delicate balance between the protection of agency fact-finding and meaningful judicial review, which the *Duke City* formulation of the whole record standard was designed to foster. Just a few short months after *Trujillo*, in *Cibola Energy Corporation v. Roselli*,[121] the court of appeals overturned a decision of a local agency as unsupported by substantial evidence, and then went on to make its own independent decision.

Cibola Energy Corporation involved an appeal by Cibola Energy Corporation from a decision of the Valencia County Protest Board fixing the valuation of certain property owned by Cibola.[122] The County Assessor valued the lands, and Cibola protested those assessments to the Board. While the Board rejected the Assessor's valuation as too high, it valued the lands in excess of Cibola's proposed valuation, and from that final Board decision, Cibola appealed.

The *Cibola* court first noted that under the applicable statute, the decision of the Board is to be set aside if it is "not supported by substantial evidence in the record taken as a whole."[123] The court correctly reasoned that this statute required it to apply the *Duke City* standard, which, based on *Trujillo* and *Groendyke Transport*, required the court to determine, whether "*on balance* the agency's decision was supported by substantial evidence."[124] Thus, the *Cibola Energy* court left no doubt that the court of appeals had firmly adopted the "on-balance" view of *Duke City*. After applying the "on-balance" standard to the facts before it,[125] the court concluded that the Board's findings were not supported by substantial evidence based on the record as a whole.[126]

Such a conclusion, under the terms of the applicable judicial review statute[127] compelled the court to reverse the decision of the Board. At that juncture sound

120. In fairness it should be pointed out that the root of the evil is *Garcia*, a non-unemployment compensation case, in which the supreme court borrowed the substituted judgment principle from the unemployment compensation field, and, in unsupported dicta, said it would apply in Human Services Department decisions. *See* 94 N.M. at 177, 608 P.2d at 153.

121. 105 N.M. 774, 737 P.2d 555 (Ct. App. 1987).

122. The properties involved were initially owned by Horizon Corporation. The lands were part of a sales promotion scheme which Horizon advertised as a future development of modern shopping centers, coupled with commercial, industrial and residential areas. In 1981 the Federal Trade Commission issued a cease and desist order against Horizon, and that effectively brought an end to the land sales. After a series of complex transactions and occurrences, the land in question came under Cibola's ownership. *Id.* at 776, 737 P.2d at 557.

123. N.M. STAT. ANN. § 7-38-28(D) (Repl. Pamp. 1986).

124. 105 N.M. at 774, 737 P.2d at 555.

125. The court concluded from this review that the Board had decided that the assessor's valuations were too high, and that Cibola's were too low. The court found that "the Board chose valuations in between those offered by Cibola and the assessor's expert as a compromise." *Id.* at 777, 737 P.2d at 558.

126. The court properly rejected the Board's attempt at compromise because the Board's decision must be based on the evidence, and basing it merely on the idea of compromise was not a sound evidentiary basis. *Id.*

127. *See supra* note 123.

practice would have called for a remand to the Board for additional fact-finding.[128] The appeals court, however, went on to consider Cibola's second point, in which Cibola urged the court to enter judgment in favor of Cibola's own valuations. Cibola argued that its valuations were unrebutted by the county, and were supported by substantial evidence.[129]

In tidy and logical fashion the court of appeals accepted that argument. First, the court noted that under *Trujillo* "the whole record review standard allows independent findings by a reviewing court . . . where the decision of the administrative agency is not supported by substantial evidence."[130] Second, it found that the county's own expert "could not find that much to argue with in Cibola's valuations;"[131] that Cibola's method of valuation was a generally accepted one; and that it stood unrebutted by the county. The court, therefore, concluded that "Cibola's valuation is supported by the whole record," thereby requiring that "the Board enter judgment for Cibola in favor of its [Cibola's] valuations."[132]

The problem with this tidy syllogism, however, is the error of the assumption underlying its major premise—that *Trujillo's* substituted judgment principle where an agency's findings are not supported by substantial evidence applies outside the unemployment compensation context.[133] As noted above, this standard is highly intrusive into the sanctity of agency decisionmaking. It therefore undermines the purpose of the substantial evidence test—to set a proper boundary between meaningful judicial review and ultimate agency responsibility for its own fact-finding. Its application also fails to give the agency an opportunity to put the court's guidance to work in the case the court reviewed, thus depriving the agency of needed experience in improved fact-finding.[134]

Thus, after its insightful resolution of the *Duke City* dilemma by clearly setting out the "on balance" whole record standard, the *Trujillo* court went further than needed by suggesting that substituted judgment would be allowed when an agency decision was not supported by substantial evidence. While true enough for un-

128. Under a general remand the assessor may not have been able to produce any more evidence, which would in all likelihood have led the Board to enter judgment on the basis of Cibola's evidence—the very result compelled by the court's further action in this case. Nonetheless, a remand with instructions to the agency to do its fact-finding yet again would have proved a useful exercise. Indeed, it is by such directions that the reviewing courts remain mindful of their limited role, preserve to the agencies their essential fact-finding missions, and at the same time guide the agencies in the performance of that function.

129. 105 N.M. at 774, 737 P.2d at 555.

130. *Id.*

131. *Id.*

132. *Id.*

133. Indeed, as we were reminded in *Wilson*, the unemployment compensation judicial review standard is not analogous to other agency reviews because it derives from its own unique statute and implementing court rule. *See* 74 N.M. at 8, 389 P.2d at 858. Until the court of appeal's extension in *Cibola*, that standard had never been applied to any other agency.

134. For example, in *Cibola Energy*, if the fault lay with the county's failure to put on a case rebutting Cibola's valuations, the Board could use the court of appeals' opinion to require the county to do a better job in providing the Board with more evidence upon which to make a decision. The thrust of judicial review of agency fact-finding is always to insure that the agency does an adequate job in the review of the relevant facts. To the extent that agencies fail due to the inadequacy of the parties, reversals and remands in cases like this give added ammunition to agencies in their efforts to improve the level of advocacy before them.

employment compensation cases because of the dictates of the relevant statute and court rule, such a principle, when applied as it was in *Cibola Energy*, to other agencies, undermines in even more serious ways the substantial evidence balance.

V. THE FUNDAMENTAL TEACHING OF *UNIVERSAL CAMERA*

The United States Supreme Court decision in *Universal Camera v. NLRB*[135] is the seminal case on the subject of the whole record substantial evidence standard. Justice Frankfurter's opinion for the Court explains the intent of Congress in mandating somewhat heightened judicial review by the adoption of that standard in the federal Administrative Procedures Act.[136] In the process his opinion also touched upon the values inherent in such a standard.[137] But that opinion does even more. It explains—in Justice Frankfurter's inimitable style—how the essence of substantial evidence review lies in the reasoned application of the standard to the given facts of a case, rather than its articulation. It is that portion of *Universal Camera* which bears most significantly on the seemingly unending efforts of the New Mexico courts to properly define that standard.

Justice Frankfurter began with the important recognition that the want of certainty in the substantial evidence cases reflects, in part, "the intractability of any formula to furnish definiteness of content for all the impalpable factors

135. 340 U.S. 474 (1951).

136. Justice Frankfurter's opinion demonstrates how the uneven application of the traditional substantial evidence standard by the federal courts of appeal in reviewing Labor Board decisions under the Wagner Act led to criticism in the halls of Congress, which in turn led to enactment of the Walter-Logan Bill. President Roosevelt, however, vetoed that bill because of its undue restrictions on the administrative process. 340 U.S. at 478-79.

Justice Frankfurter also explains how debate over the substantial evidence standard was played out in the final report of the Attorney General's Committee on the Administrative Process which was submitted in January, 1941. The majority of the committee rejected a proposal to expand review by allowing the courts to inquire into whether the findings of the agency were supported "by the weight of the evidence." The majority thought that departure from the traditional substantial evidence standard would either create uncertainty, or worse yet, would involve the courts in fact-finding on matters not within their competence. Attorney General's Committee on the Administrative Process, Final Report 91-92 (1941). The minority report, however, condemned the prevailing application of the standard—which, in its view, allowed the reviewing court to focus only on the evidence supporting the agency decision—and called for adoption of a "whole record" standard. *Id.* at 210-12.

Against this background, Justice Frankfurter concluded that by inserting the "whole record" requirement in the Administrative Procedures Act (APA) "Congress expressed a mood," 340 U.S. at 487, reflecting Congress' desire "for stricter and more uniform practice," *id.* at 489, whereby reviewing courts "must take into account whatever in the record fairly detracts from its weight." *Id.* at 487-88.

Universal Camera also held that inclusion of the whole record language in the Taft-Hartley Act evidenced Congress' intent that the standard of review should be the same under both the APA and Taft-Hartley. *Id.* at 487.

137. [T]he courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions. . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

Id. at 490.

involved in judicial review."[138] He went on to point out that the judicial review standard articulated in the APA "can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application."[139] This is so, he noted, because a standard helps afford "grounds for certitude, but cannot assure certainty of application."[140] Then, in words, most appropriate to the current New Mexico controversy, he opined: "Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismatic words that can avoid the process of judgment."[141]

The Court then took up the main substantive question before it—whether the court of appeals erred in refusing to take into account the report of the hearing examiner, which had been rejected by the Board. The Court concluded that the appeals court had erred in this regard because the examiner's report was part of the record and was therefore worthy of some consideration under the whole record standard.[142] In so holding, however, the Court indicated that the weight to be given the examiner's report was a matter for the court of appeals "in answering the comprehensive question whether the evidence supporting the Board's order is substantial."[143]

Thus, *Universal Camera* makes clear that *application* rather than *articulation* is the key to a comprehensive and consistent understanding of the substantial evidence standard. The lesson for the New Mexico appellate courts—at least now that the "light most favorable" versus "on balance" debate has apparently been resolved—is for them now to get on with the infinitely more difficult task of reasoned application of that standard rather than more detailed efforts to further refine the articulation of the standard.[144] This is not an easy task, for as Justice Frankfurter noted, enforcement of such a standard "implies subtlety of mind and solidity of judgment."[145]

Without denigrating the difficulty of the task, the courts could show a marked advancement if they would explain in their opinions, by specific reference to the facts of record, why in the particular case the evidence "on balance" either does or does not support the decision of the agency being reviewed. Such an effort will have a two-fold value. First, and foremost, through such reasoned

138. 340 U.S. at 477.

139. *Id.* at 487.

140. *Id.* at 488.

141. *Id.* at 489.

142. *Id.* at 493-96.

143. *Id.* at 497.

144. For example, in *Trujillo* the court of appeals sought to further explain the whole record standard by suggesting that the mandated "on balance" approach does not allow for "reweighing the evidence and reassigning the preponderance of evidence." 105 N.M. at 471, 734 P.2d at 249 (quoting *Duke City*, 101 N.M. at 294, 681 P.2d at 720.). This instruction leaves us with yet another level of confusion because the reviewing court must balance the evidence, but at the same time avoid both "weighing" or evaluating "predominance"—a seemingly impossible task.

All of this merely confirms the import of Justice Frankfurter's instruction: The real meaning of the substantial evidence test can only come from the difficult act of judicial application. Indeed, the above passage from *Trujillo* only suggests that beyond a certain point the more intense the attempt to refine the articulation of the test, the more unclear it is bound to become.

145. 340 U.S. at 487.

elaboration, the standard will take on more meaning and will become more understandable than through continued efforts to find the illusive perfect way to articulate it.[146] Only through such reasoned application will agencies and litigants be guided concerning the kind of evidence and manner of presentation which will sustain administrative agency decisions.[147] Second, the presence of reasoned elaboration in our appellate court opinions will help put counsel on notice that it is reasoned elaboration in briefs and arguments which will win cases. Just as too many substantial evidence opinions leap from the articulation of the standard to the result, the briefs lawyers submit to the appellate courts are often similarly deficient. Good appellate argument necessarily requires a cogent application of the standard to the facts of the particular case, together with a reasoned argument pointing out: 1) why the particular question involves or fails to involve the particular expertise of the agency, thus demanding more or less judicial deference, and/or 2) why the process the agency utilized was such that it should or should not give the court confidence in deferring to the agency's fact-finding. These questions are significant, especially in marginal cases, because the substantial evidence test attempts to define the balance of the relationship between court and agency, not as an end in itself, but rather to serve certain values such as deference to agency expertise, assurance that fundamental rights are protected, and the honing of agency processes to protect rights and lead to correct results.

Furthermore, this process is necessarily synergistic. The more reasoned the application of the standard which finds its way into the appellate decisions, the more likely the appellate courts will receive more reasoned briefs and arguments. With the increase in the latter, the reasoned decisionmaking of our appellate courts will invariably improve, and become easier for the judges to fashion.

One final point from *Universal Camera* requires mention in this context. Justice Frankfurter, in *Universal Camera*, suggests that the reviewing function is properly focused in one judicial institution. Showing great respect for the courts of appeal—where the Labor Act places the substantial evidence review in the first instance—Justice Frankfurter eschews any need for additional, repetitive review in the United States Supreme Court:

146. The supreme court's application of the substantial evidence standard in Jimenez v. Department of Corrections, 101 N.M. 795, 689 P.2d 1266 (1984), is a good case in point. Although there the court also split over the appropriate reading of *Duke City*, the majority and dissenting opinions at least gave us a sense of their reading of the record, so that we understood why the majority believed the evidence in support of the agency decision was substantial and why the dissenters believed it was not. *See supra* text accompanying notes 67-76. Only with that kind of application will the courts flesh out the standard and give guidance to agencies and litigants in terms of the kinds of evidence necessary to sustain administrative decisions.

147. Agencies and litigants should also be mindful that, in marginal cases, the courts will always be focusing on the nature of the question the agency must resolve, and the process the agency must use in the resolution of that question. Again *Jimenez* provides us with a meaningful example.

In that case it is arguable that Justice Walters' dissent was driven by three important factors. First, the agency decision—whether to terminate Jimenez—did not implicate particular agency expertise. Rather it presented a typical question of neglect of duty—an issue upon which the common law courts have equal if not greater experience. Second, that question touched upon a fundamental personal right to earn a livelihood. Such "rights" implicate due process concerns, which might justify more intensified substantial evidence review. *See supra* note 53. Third, and finally, the facts suggested less than adequate process, since the recommendation for termination came before it was known that 10 of the 11 escapes came before Jimenez had begun his duty shift.

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. *This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.*[148]

This relatively hands off approach by the United States Supreme Court[149] is a prudential guideline driven in part by that Court's need to reserve its limited resources for the most compelling of the cases which seek its discretionary review by way of certiorari. It also commends itself as a general principle applicable to state court judicial review of administrative agency decisions.

A second-tier of judicial review which limits the state supreme court to a consideration of whether the substantial evidence standard "was misapprehended or grossly misapplied" has several virtues. First, it avoids the time and expense of basically redundant judicial review. Second, it prevents the forum shopping aspects of the current system under which the supreme court merely reevaluates the essential substantial evidence balance and virtually ignores the decision of the first reviewing court.[150] Third, the second-tier of judicial review ought to be a review of the work of the first court,[151] rather than the agency, and the *Universal Camera* standard shifts the focus in that direction. Fourth, and finally, such a standard refocuses the attention of our supreme court to where it rightfully belongs—defining the legal principles and standards which are to govern litigants and the courts—rather than a redundant attention to whether the particular decision of a particular agency is correct.[152]

148. 340 U.S. at 490-91 (emphasis added).

149. Indeed, the Supreme Court has consistently applied that even more deferential standard to its ultimate review of substantial evidence questions under other statutes. *E.g.*, American Textile Manufacturers Inst. v. Donovan, 452 U.S. 490, 523 (1981) (substantial evidence review under the Occupational Safety and Health Act of 1970); Mobil Oil Corp. v. Federal Power Comm'n, 417 U.S. 283, 310 (1974) (substantial evidence review of FPC ratemaking under the Natural Gas Act); Federal Trade Comm'n v. Standard Oil Co., 355 U.S. 396, 401 (1958) (Supreme Court substantial evidence review of price discrimination cases under Robinson-Patman Act limited to deciding whether "Court of Appeals has made a fair assessment of the record.").

150. The supreme court must "make the same review of the . . . [agency] determination as the district court. Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). *See also, e.g.*, Transcontinental Bus Sys. v. State Corp. Comm'n, 67 N.M. 56, 352 P.2d 245 (1959). As a result, litigants tend to take a "second bite" attitude toward further judicial review once they lose in the lower court.

151. Interestingly enough, in a recent unemployment compensation case, the court of appeals ignored the settled law, which requires the second court to reevaluate the evidence anew, *see supra* note 74, and suggested a different standard for second-tier review. In affirming the Agency and the district court, the court of appeals, in Hinojosa v. Employment Sec. Dep't, 105 N.M. 212, 730 P.2d 1194 (Ct. App. 1987), noted that the district court was required to review the entire record to determine if the Department's decision was supported by substantial evidence. It then suggested a slightly different role for the court of appeals, when considering appeals from those district court judgments—limiting itself to a review of "the evidence considered by the lower court" and then viewing that evidence "in favor of proceedings in the trial court." *Id.* at 213, 730 P.2d at 1195. *See infra* text accompanying notes 172-180.

152. For an earlier discussion arguing for a narrower standard of second-tier judicial review of administrative fact-finding, *see 1983-84 Administrative Law Survey, supra* note 54, at 150-52.

VI. SOME SUGGESTIONS FOR RESOLUTION OF THE DIFFICULTIES

The New Mexico appellate courts have made great strides in the development of a coherent body of administrative law principles.[153] They are to be applauded for their continued struggle to make sense out of the substantial evidence test, and to make of it a device to assure meaningful judicial review of agency fact-finding, while protecting against unwarranted judicial intervention into the essential fact-finding role of our administrative agencies. In the process, however, the courts have lost sight of the central touchstone in the substantial evidence inquiry—its reasoned application to the particular facts of the given case. In addition, a new and troublesome strain has found its way into our caselaw—the thought that without a specific legislative mandate to that effect, reviewing courts might on some occasions substitute their own judgment of the facts for those of the agency being reviewed. Furthermore, some old, and perhaps outmoded notions have survived—i.e., that the fact-based decisions of agencies must, in all circumstances, be supported by a "residuum" of legally admissible evidence, and the retention of a second-tier of redundant review by a subsequent court when an initial court has already undertaken substantial evidence judicial review. The foregoing analysis of these residual problems leads to the following four suggestions for the resolution of the post-*Duke City* difficulties:

1. Reviewing Courts Should, in Substantial Evidence Cases, Focus Their Attention on the Application of the Whole Record Standard to the Particular Facts Before Them, Rather Than Attempting to Further Refine the Articulation of the Standard

Universal Camera forcefully suggested, and the cases from *Duke City* to *Trujillo* and *Cibola Energy Corporation*, make painfully clear, that the search for the perfect articulation of the substantial evidence standard is a modern quest for the holy grail. General standards like the substantial evidence test, at best, are merely frameworks for the difficult task of making judicial judgments. As Justice Frankfurter so aptly put it, "[t]here are no talismatic words that can avoid the process of judgment."[154] Indeed, the ever intensifying judicial search to further refine the articulation of the standard only diverts judicial attention from the essential task of making the hard judgments in often difficult cases. By being explicit in opinions about the application of the standard to the particular facts—i.e., why on the particular record the facts supporting or failing to support the

153. In addition to the courts' recent concern with the progressive development of the substantial evidence standard, our courts have been involved in furthering the development of modern and comprehensive rules governing administrative procedure. Two examples are the courts' insistence that agency determinations be articulated in findings and conclusions, *see, e.g.*, First Nat'l Bank v. Bernalillo County Valuation Protest Bd., 90 N.M. 110, 560 P.2d 174 (Ct. App. 1977); *see also* cases cited *supra* note 107, and the construction of the State Rules Act to require the public filing of agency rules before the courts will enforce those rules, *see* State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980). The general approach of our appellate courts is to develop consistent, and practical rules which help advance the cause of reasoned and fair administrative practices throughout the state.

154. *Universal Camera*, 340 U.S. at 489.

decision predominate—the court gives infinitely more guidance to agencies and litigants than it does in its ever more puzzling reformulations of the test being applied.[155]

Indeed, a comparison of two of the most recent post-*Trujillo* and *Cibola Energy Corporation* court of appeals decisions applying the *Duke City* standard demonstrates the value inherent in such an approach.[156] *Perkins v. Department of Human Services*,[157] dealt with the sufficiency of the evidence in an appeal from a district court affirmance of a decision by the State Personnel Board to dismiss two employees from the Human Services Department. The appellants did not contest the extensive findings of the hearing officer, which had been adopted by the Board. Rather, they "made a generalized attack contending that the findings are not supported by substantial evidence."[158] Confronted with that kind of unfocused claim, the court of appeals merely recited the hearing officer's detailed findings,[159] stated the *Duke City* standard embellished by the "on balance" gloss from *Trujillo* and *Cibola Energy Corporation*,[160] and then concluded that "[a]pplying the above rules . . . and based on a full review of the record . . . we determined that the findings and conclusions of the Board and the district court were supported by substantial evidence on the record as a whole."[161]

Perhaps this undifferentiated and non-analytical approach was forced on the *Perkins* court by appellants' generalized attack on the sufficiency of the evidence. But if so, the court ought not allow itself to be placed in that kind of position. If substantial evidence judicial review is to provide any guidance to agencies and litigants, then those appellate opinions must explain how the facts support or fail to support the decision, and by doing so the courts will inevitably force counsel to similarly focus their substantial evidence arguments in a reasoned fashion.[162]

Akel v. New Mexico Human Services Department,[163] decided two weeks after *Perkins*, stands in marked contrast to *Perkins*. *Akel* involved an administrative

155. Of course the theory being espoused here requires that judges remain disciplined in their approach to these problems, being ever mindful of their limited role. No matter how wedded to concerns for justice and fairness a given judge may be, there will undoubtedly be administrative decisions which, upon review, a judge believes are somewhat harsh, and yet are supported by substantial evidence. In those instances, the judge must still affirm—lest he or she do a graver general injustice by undoing the delicate balance between the role of reviewing court and agency in the matter of agency fact-finding.

156. The supreme court, on occasion, has also engaged in the kind of reasoned application of the substantial evidence standard being advocated here. *See supra* text accompanying notes 67-74.

157. 106 N.M. 651, 748 P.2d 24 (1987).

158. *Id.* at 645, 748 P.2d at 27.

159. *Id.* at 655, 748 P.2d at 28.

160. *Id.*

161. *Id.*

162. It may well be that the *Perkins* court should have refused to consider the "generalized" substantial evidence claim put forward by appellants. At a minimum the court should require that litigants who base an administrative appeal on the lack of substantial evidence point to those findings which are not supported by substantial evidence, and then explain why the evidence which does exist on the point is insufficient to rise to the level of "substantial evidence based on the record as a whole." This would necessarily require a recitation of the competing contrary evidence, which would greatly aid the court in its "on balance" review mandated by *Trujillo* and *Cibola Energy Corp.*

163. 106 N.M. 741, 749 P.2d 1120 (Ct. App. 1987), *cert. denied*, 107 N.M. 74, 752 P.2d 789 (1988).

appeal from the denial of general assistance benefits by the Department. In this case the Department highlighted the items in the record which it contended supported the denial of benefits, and the court of appeals was therefore able to focus its attention on each piece of evidence. With respect to one piece of evidence, the court concluded that the statements in the vocational expert's report were not sufficient, when taken in the context of the entire report, to constitute substantial evidence.[164] A second piece of evidence was discounted on purely legal grounds,[165] and the third piece of evidence—the determination by the Incapacity Review Unit (IRU) that appellant could perform her normal household duties—was also discounted by the court of appeals in a reasoned way. The IRU decision was probed by the court, and found to be based on appellant's past work record.[166] The court concluded that "her past work experience does not, . . . without more, constitute substantial evidence in support of the Department's decision."[167] Based on its analysis of the foregoing evidence put forward by the Department, together with its review of the other evidence of record, the court concluded that the decision was not supported by substantial evidence, and reversed the decision of the Department.

Such an approach focused on the inquiry, was instructive to the agency and the claimant, and helped direct both parties to the relevant evidence and how that evidence should be considered in the decisionmaking process. It is this kind of reasoned judgment which the application of the substantial evidence test is intended to foster, both for the benefits of litigants and agencies alike. It is, therefore, the *Akel* rather than the *Perkins* approach which must be fostered if the substantial evidence standard is to grow and develop in New Mexico's administrative law jurisprudence.

2. *The Courts Must Reject the* Cibola Energy Corporation *Approach, Which Allows the Reviewing Court to Substitute Its Judgment of the Facts for Those of the Agency Whenever the Agency Decision is not Supported by Substantial Evidence*

The recent struggle to define the whole record standard exemplified by the development of the law from *Duke City* to *Trujillo* represents an admirable search

164. *Id.* at 742, 749 P.2d at 1121. The vocational specialist's report did have some language indicating that the appellant might be employable, but a focused look at those statements in the context of the whole report convinced the court that the report was very tentative on that point, and that its major thrust was only that further assessment of the appellant was recommended. *Id.* This is precisely the kind of reasoned analysis that the substantial evidence test, however formulated, ought to require of a reviewing court.

165. The Department had argued that appellant's ineligibility for federal Social Security benefits ought to be evidence of her ineligibility for general assistance. Since, however, denial of eligibility for social security was one of the qualifying criteria under the general assistance regulations, the court "declined to adopt such an anomalous position," *id.* at 743, 749 P.2d at 1122, more as a matter of law than of fact.

166. In fairness, the Department was really arguing that this case was governed by a prior case, New Mexico Human Servs. Dep't v. Tapia, 97 N.M. 632, 642 P.2d 1091 (1982), which had held that an IRU determination constituted substantial evidence. The Department was, therefore, arguing from *Tapia* that as a matter of law the IRU determination met the substantial evidence standard. The court of appeals distinguished *Tapia* because that case did not consider the whole record, thus suggesting that *Tapia* may not survive the *Duke City-Trujillo-Cibola Energy Corp.* developments.

167. *Id.*

for the proper balance between adequate judicial review and the sanctity of agency fact-finding. Much of this important development could be seriously threatened, however, if the *Cibola Energy Corporation* principle continues to flourish. That principle—allowing the reviewing court which finds the agency decision *not* supported by substantial evidence to make its own findings and render judgment thereon—subverts the very principle which *Duke City* and *Trujillo* established. Admittedly, that substitution of judgment standard has its roots in the peculiar statutory review provisions provided for decisions of the Employment Security Department, and in that context, the standard must apply unless and until it is changed by the legislature.[168] Extension of that troublesome standard, however, to all substantial evidence cases, as suggested in *Cibola Energy Corporation* undermines the values sought to be achieved by maintaining the whole record review standard. The whole record standard assures meaningful judicial review, but it still dictates a limited role for courts, and thereby protects the essential fact-finding role of the agencies. General application of the *Cibola Energy Corporation* standard will destroy that delicate balance anytime a court finds the agency decision unsupported by the evidence contained in the whole record. *Cibola Energy Corporation* should therefore be overruled, and the loose dicta from *Trujillo* and *Garcia*, on which it was based, should be firmly rejected.

3. *The Courts Should Limit the Legal Residuum Doctrine to Those Cases in which Fundamental Personal Rights are Threatened by Traditional Guilt or Innocence-Like Determinations*

A further, if tangential, concern in this area emanates from the aspects of the *Duke City* decision which resurrects a full-blown legal residuum rule.[169] Our supreme court previously had rejected the general application of the legal residuum rule as inconsistent with the needed flexibility of agencies to decide questions based on reasonable and probative evidence, unconstrained by the technical rules of evidence.[170] Its rejuvenation in *Duke City*, however, suggests that all agencies must now not only be mindful of the substantiality of the evidence on the whole record, but must, in addition, make sure that there is at least a modicum of "legally admissible evidence" to support their every decision.

This added constraint on agency decisionmaking is certainly unnecessary, given the adoption of the whole record standard, which allows for more meaningful judicial review. It is also a frustrating constraint which serves very little if any purpose outside the context of personal rights litigation.[171] Thus, the

168. The supreme court, however, in its rule-making capacity, could have an impact on the standard by a judicious amendment of Rule 1-081.

169. *See supra* text accompanying notes 47-57.

170. Indeed, one might have thought that the ultimate question for decision in *Duke City*—i.e., whether the wood burning smoke emanating from the Duke City burner at its Espanola sawmill was hazardous to health—was one of those difficult and technical questions which an expert agency should decide, based on reasonable and credible evidence without regard to rules of admissibility. It is interesting that the *Duke City* court did not say that the citizen testimony was incredible or not worthy of consideration. Nor does the *Duke City* opinion reflect any unfairness to Duke City which resulted from the court of appeals' partial reliance on that unsworn testimony.

171. *See supra* text accompanying notes 52-54; *see also, supra* note 39.

resurrection of the legal residuum test in *Duke City* is a minor but unfortunate glitch in the otherwise reasonable attempt to stabilize the proper balance between reviewing court and agency in the complex matter of agency fact-finding. Its rejection would help make that relationship more consonant with the general principles which underlie the whole record standard.

4. The Supreme Court Should Consider Limiting Second-Tier Judicial Review in Substantial Evidence Cases

While the thrust of the whole record standard is to increase rather than decrease the scope of judicial review of agency fact-finding, having that review repeated by a second appellate court makes little sense and undermines respect for the judiciary by fostering a kind of forum shopping by litigants who seek a "second-bite." That second-tier review should serve as a means of insuring that the first court has done its job in reviewing the agency. Therefore, a standard focused on that task is more appropriate to second-tier judicial review of agency fact-finding. The United States Supreme Court's focus on whether the courts of appeal have "misapprehended the standard, or grossly misapplied it" serves that latter function, and helps deter resort to further appeal by those litigants who have lost but have been treated fairly by the reviewing court. It, or something akin to it,[172] is recommended as a counterpoint to the whole record standard—together they would work to liberalize judicial review of agency fact-finding in the first instance, and then narrow that review when it comes to further consideration by a higher court.

Indeed, our court of appeals has not been unmindful of the value inherent in a more narrow scope of review when a second appeal is had from an administrative agency. Most recently, in *Rowley v. Murray,*[173] the court applied a more deferential standard of review to its second-tier judicial review of a property assessment decision by the City of Clovis. In that case the property owners challenged the City's estimated benefit of the improvements to their land for the purpose of assessing costs for the improvement of the adjacent street.[174] The district court concluded that the City's benefit determination lacked a reasonable basis, and reversed the decision of the City Commission.[175]

When the City appealed the district court's decision, the essential issue was whether the applicable appeal statute mandated a trial de novo in the district court, or whether the district court was confined to a review of the record at the City Commission.[176] The court of appeals concluded that the district court was limited, under the applicable statute, to a review of the record before the governing body. The court, therefore, reversed the order entered by the district court

172. The "misapprehended or grossly misapplied" standard makes good sense, particularly where joined with a court imposed requirement that lower courts make clear in their findings and conclusions how and why they struck the substantial evidence balance the way they did. *See* Cibola Energy Corp. v. Roselli, 105 N.M. 774, 737 P.2d 555 (Ct. App. 1987) (district court reviewing agency decision must make findings and conclusions which reveal basis for the decision).

173. 106 N.M. 676, 748 P.2d 973 (Ct. App. 1987).

174. *Id.* at 677, 748 P.2d at 974.

175. *Id.*

176. *Id.*

after a de novo hearing as being in excess of the jurisdiction conferred by the statute.[177] The court went on, however, in dicta, to direct the district court on the proper standard of review under the applicable statute.[178] The court also indicated that the standard of review in subsequent appeals from the district court to the court of appeals would be somewhat different, and even more deferential than that applied by the district court.[179] The second-tier review, according to the court of appeals, would only be afforded to determine "whether the district court applied the relevant standard of review to the city's determination."[180]

Thus, *Rowley* demonstrates the recent recognition by the court of appeals that second-tier judicial review serves a separate and distinct function from that of the first level of judicial review. The conservation of judicial resources is also served by confining the second court to a more limited function. It is this kind of more deferential judicial review which is being advocated here for all substantial evidence second-tier judicial review cases.

VII. CONCLUSION

Above all else, *Duke City* represents our supreme court's willingness to adjust the balance of authority between agencies and courts, when necessary to enhance the values associated with the roles of each. Consistency with *Duke City's* overriding principle—i.e., that courts must play a role which encompasses meaningful review of agency fact-finding without undermining the primary role of the agency to control its own fact-finding—may require adoption of some additional new doctrine, as well as the jettisoning of some old doctrine. Constancy to this important principle, however, can be achieved only by the reasoned application of an agreed upon standard. Such reasoned application by courts and advocates will keep us on the path of proper accommodation in an ever changing and increasingly complex world of administrative regulation.

177. *Id.* at 680, 748 P.2d at 977.

178. The applicable statute failed to delineate a standard of review. Because the City Council was acting in a legislative capacity, however, the court of appeals concluded that the district court should afford great deference to the Council's decision, reversing only if "the absence of any benefit is clear or unless there is evidence of fraud, mistake, or discrimination that amounts to arbitrary conduct." 106 N.M. at 680, 748 P.2d at 977. Thus, *Rowley* is not a pure substantial evidence case, although its dictates with respect to second-tier judicial review are equally applicable in pure substantial evidence cases.

179. *Id.* at 680, P.2d at 977.

180. *Id.* at 681, P.2d at 978.