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Administrative Law—Discovery of Agency's Decision-making Process—In re Lecy, 304 N.W.2d 894 (Minn. 1981)

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CASE NOTES


To what extent may a party seeking review of an administrative agency decision probe the mental processes of an administrative decisionmaker? In In re Lecy the Minnesota Supreme Court clarified the

1. This question has plagued courts since Morgan v. United States, 304 U.S. 1 (1938) (Morgan I). In Morgan II the Court stated that it was not its function "to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required." Id. at 18.

In United States v. Morgan, 313 U.S. 409 (1941) (Morgan IV), the market agencies involved in a rate dispute with the Department of Agriculture sought to deposite the secretary of that department. The Court, relying in part on Morgan II, rejected the attempt:
The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

Id. at 422 (citations omitted).

In Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974), a corporation brought an action under the Freedom of Information Act (FOIA) to obtain from the Administrator of the Environmental Protection Agency two summaries of evidence developed at a hearing. Id. at 64. The court stated, "To probe summaries of record evidence would be the same as probing the decision-making process itself." Id. at 68. Thus, evidence of the agency's deliberative process is exempt from disclosure under FOIA. Id. at 71.

In Public Util. Comm'n v. District Court, 163 Colo. 462, 431 P.2d 773 (1967), the state public utilities commission granted a delivery service company extensions in its field of authorized operation. Id. at 464, 431 P.2d 774-75. Protestants sought to make the commissioners answer their requests for admissions. Id. The court held that unless the commissioners acted illegally, were biased, or acted in bad faith in their decision, it is improper to direct commissioners to answer requests for admissions. Id. at 469, 431 P.2d at 777; see also Bank of Commerce v. City Nat'l Bank, 484 F.2d 284, 288 (5th Cir. 1973), cert. denied, 416 U.S. 905 (1974) (Comptroller of Currency's decision which rendered findings of fact concomitantly with decision to grant charter to new national bank barred

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reviewing court from requiring agency officials to explain their actions); Libis v. Board of
Zoning Appeals, 33 Ohio App. 2d 94, 292 N.E.2d 642 (1972) (administrative officer sitting
in quasi-judicial capacity cannot be examined as to mental processes in arriving at deci-
sion). See generally Nathanson, Probing The Mind of the Administrator: Hearing Variations
and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75
COLUM. L. REV. 721 (1975); 50 WASH. L. REV. 739 (1975).
2. 304 N.W.2d 894 (Minn. 1981).
3. Id. at 900; see infra notes 19-41 and accompanying text. The court also reaffirmed
the substantial evidence test as the proper scope of review, 304 N.W.2d at 898; see MINN.
STAT. § 14.69(e) (1982), and restated the principle that a reviewing court cannot substi-
tute its judgment for that of the administrative decisionmaker in matters that involve the
credibility of witnesses. 304 N.W.2d at 898.

Minnesota courts have consistently required agency decisions to be supported by sub-
stantial evidence in view of the entire record as submitted. See, e.g., Urban Council on
Mobility v. Minnesota Dep't of Natural Resources, 289 N.W.2d 729, 733 (Minn. 1980)
(substantial evidence is that which "a reasonable mind might accept as adequate to sup-
port a conclusion" and absent manifest injustice inferences drawn from evidence by
agency must be accepted by reviewing court even though it appears contrary inferences
would be better supported), noted in 7 WM. MITCHELL L. REV. 221 (1981); Hennepin
County Court Employees Group v. Public Employment Relations Bd., 274 N.W.2d 492,
494 (Minn. 1979) (substantial evidence standard need not be restricted by deference his-
torically extended to agency decisions if subject matter "is specifically within the court's
particularized experience and expertise"); Reserve Mining Co. v. Herbst, 256 N.W.2d 808,
822-23 (Minn. 1977) (substantial evidence is appropriate standard unless lower court is
required by statute to grant trial de novo); St. Paul Area Chamber of Commerce v. Min-
nesota Pub. Serv. Comm'n, 312 Minn. 250, 259-60, 251 N.W.2d 350, 356-57 (1977) (when
administrative agency acts in judicial capacity its decisions will be reviewed on substantial
evidence standard; when agency acts in legislative capacity its decisions will be upheld
unless shown to be in excess of statutory authority or shown to be unjust, unreasonable or
discriminatory by clear and convincing evidence); Quinn Distrib. Co. v. Quasi Transfer,
Inc., 288 Minn. 442, 448, 181 N.W.2d 696, 698 (1970) (substantial evidence test and not
"any-evidence" test controls scope of review of findings of fact by Public Service Commiss-
ion); Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co., 288 Minn.
294, 180 N.W.2d 175 (1970). In Minneapolis Van the court commented on the substantial
evidence test:

The statutory rule also settles any doubt of our conformity with the major-
ity of courts, both state and Federal, in accepting the substantial-evidence rule as the
rule governing the scope of all judicial review of evidence supporting factual
findings of administrative agencies. . . . [S]ubstantial evidence is more than "a
scintilla" and is "such relevant evidence as a reasonable mind might accept as
adequate to support a conclusion." . . . While the test is "vague, rather than
precise" and the "intensity of review" may vary from case to case, "the test is the
same as the test on review of a jury verdict, but the review is narrower than the
review of the findings of a judge sitting without a jury," the latter being gov-
erned by the "clearly erroneous" test. The burden is upon the appellant to es-
tablish that the findings of the commission are not supported by the evidence in
the record, considered in its entirety. If the evidence is conflicting or the undis-
puted facts permit more than one inference to be drawn, the findings of the
commission may not be upset and the district court may not substitute its judg-
ment for that of the commission.

Id. at 298-99, 180 N.W.2d at 177-78 (footnote, citations omitted); see also City of St. Paul v.
application of substantial evidence test after removal to federal court); Ekstedt v. Village
Under the Minnesota Administrative Procedure Act, an agency must come to an independent decision on the basis of the evidence presented to and the findings of the hearing examiner. Since the legislature in-

4. MINN. STAT. ch. 14 (1982). The Minnesota Administrative Procedure Act first took shape in 1945. See Act of Apr. 21, 1945, ch. 452, 1945 Minn. Laws 869-71. Entitled "an act to prescribe uniform rules of practice for administrative agencies," it defined "agency" in very broad terms and dealt only with rules and regulations. Id. § 1(2), 1945 Minn. Laws at 869 (current version at MINN. STAT. § 14.02(2) (1982)). Contested cases were not included. Later, the definition of agency was amended to include only those agencies with statewide jurisdiction and contested cases were included within the purview of the act. See Act of Apr. 27, 1957, ch. 806, 1957 Minn. Laws 1101.

5. MINN. STAT. § 14.61 (1982) (final decision in contested cases must be rendered by officials of agency after report of hearing examiner); see People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environment Quality Council, 266 N.W.2d 858, 873 (Minn. 1978).

6. The Office of Hearing Examiners was created by Act of June 4, 1975, ch. 380, 1975 Minn. Laws 1285, 1293 (codified at MINN. STAT. §§ 14.48-.56 (1982)). Among the hearings conducted by the examiners are cases from agencies required by the statute to utilize the office. See MINN. STAT. §§ 14.02(2), .50 (1982).

The Office of Hearing Examiners acts as an independent third party in the administrative process. Its legislative purpose is to insure full and fair public participation in both the rulemaking and the contested case process. It operates on a revolving fund by billing
tended agency members to consider the material presented to them prior to reaching their decision, the opportunity for discovery of the agency's decision-making process is important. Without discovery parties would be practically precluded from determining whether the agency simply

each agency for the cost of services rendered on its behalf. Examiners include specialists in transportation, environmental, and regulatory matters. See Harves, Independent Hearing Examiners—The Minnesota Experience, Hennepin Law., May-June 1980, at 6, 8. The office has no statutory authority to compel agencies to submit cases for hearing before it. Therefore, an attorney who is representing a client who requires agency action must initiate the hearing process by following the appropriate statutory procedure under which the agency operates. The agency must then contact the office for assignment of a hearing examiner. If in reviewing the appropriate statutes the attorney can find no provision for a hearing, he should check the agency's rules. Sometimes agencies provide for hearings in their rules when none exists in the statute. If no provision for a hearing exists in those sources, one must rely upon a constitutional source. For an excellent discussion of how the Minnesota Office of Hearing Examiners operates under the Minnesota APA, see Advanced Legal Education, Current Status of the Minnesota Administrative Procedure Act (1980); State Bar Ass'n Continuing Legal Education, The Administrative Law Process in Minnesota (1976). See generally Harves, supra.


PEER involved review of a construction permit issued by the Minnesota Environmental Quality Council (MEQC) for the construction of a high voltage transmission line. The court noted, "Under the APA the agency must review the evidence and findings amassed by the hearing examiner and come to an independent decision. Thus, the legislature clearly intended agency members to read the material presented to it prior to reaching their decision." 266 N.W.2d at 873.

PEER is important for two additional reasons. First, appellants alleged that not all of the members of the MEQC were familiar with the transcript and other documents pertaining to the public hearings on the route selection. Id. at 872. The district court held that it was not necessary to investigate the individual mental processes of the members of the MEQC because its findings were supported by substantial evidence. Id. at 872-73. The supreme court concluded that the findings were not sufficiently specific to permit judicial review. Id. It pointed out that generally the MEQC's refusal to answer PEER's interogatories and admissions as privileged material under Morgan IV would be appropriate. Id. at 873. However, the court reaffirmed its holding in Mampel v. Eastern Heights State Bank, 254 N.W.2d 375, 378 (Minn. 1977), that allows persons seeking judicial review of agency decisionmaking to make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process. "In order to insure that the statutory scheme is not thwarted and that the validity of administrative decisionmaking does not become suspect, it is necessary to permit limited discovery when a statute requires specified persons to make decision." PEER, 266 N.W.2d at 873.

The court also stated:

We must emphasize, however, that the discovery we sanction is limited to information concerning the procedural steps that may be required by law and does not extend to inquiries into the mental processes of an administrator which, being part of the judgmental process, are not discoverable under United States v. Morgan [Morgan IV]. It should be clear that this rule would similarly protect from discovery the process of judicial decisionmaking which is judgmental rather than procedural in nature.

Id. (emphasis in original). For a discussion of the PEER decision with analysis of judicial review of institutional decisionmaking, see 7 WM. MITCHELL L. REV. 221, 228-31 (1981).
accepted the findings of the hearing examiner without exercising independent judgment, or whether the agency independently examined the evidence in reaching a conclusion.8

In re Lecy involved an application for a bank charter.9 A hearing ex-

8. See Mampel v. Eastern Heights State Bank, 254 N.W.2d 375, 378 (Minn. 1977). Mampel involved an application for a bank charter which was granted by the Banking Commission. Objectors sought judicial review in district court. They sought to take depositions of the hearing examiner and three commissioners. They also served a wide-ranging subpoena duces tecum upon the commissioners. The commissioners sought to quash the subpoena and obtain a protective order against the taking of depositions. Id. at 377.

Before the Minnesota Supreme Court, respondents argued that discovery was necessary to determine whether the commissioners had heard or read the evidence notwithstanding the statement in the agency's findings that it had considered all the evidence. Id. at 377-78. The Minnesota court stated, "Discovery of the mental processes by which an administrative decision is made generally is not proper." Id. at 378. However:

This is not to say that discovery is absolutely prohibited in proceedings for judicial review of agency decisions. Discovery may be permitted by the district court upon procedural matters if the discovery is appropriately limited. Persons seeking review may make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process.

Id. The court discerned the intent of the legislature to allow a narrow scope of review in such cases. To further this policy the court laid out the proper procedure for such discovery:

Because of the narrow scope of discovery presently permitted, we have concluded that the most appropriate method by which such discovery should be accomplished is through depositions of witnesses upon written questions as allowed under Rule 31, Rules of Civil Procedure. Moreover, because of the limited scope of discovery, in the absence of agreement by counsel, we direct that the deposition questions be presented to the trial court for approval before their submission to the witnesses. Such a policy will minimize the burden for public officials called upon to answer such interrogation, but will insure meaningful review to persons aggrieved by administrative action by allowing them to inquire into those procedures which comprise the fundamental decision-making process.

Id.

9. 304 N.W.2d 894, 895; see MINN. STAT. § 45.04 (1982). A prerequisite to operating a bank in Minnesota is the application for a bank charter. The incorporators of any proposed bank must execute an application in writing, file it with the Department of Commerce, and pay a filing fee of $1,000. An additional $500 must also be paid to the Commissioner of Banks for its investigation of the application. Within 60 days of the filing of the application a hearing is held to decide if the application will be granted. Notice is published and the Commerce Commission is required to listen to the applicants and all other witnesses who may appear in favor of or against the granting of the application. If the Commission decides in favor of the application it must file its order within 90 days of the hearing. This order directs the Commissioner of Banks to issue the certificate of authorization as provided by law. If the application is denied, a similar order is filed with the Commissioner of Banks notifying it of the application's disapproval. Notice of denial is then given to the proposed incorporators.

Litigation involving bank charters has been a colorful part of Minnesota case law. In fact, without it, administrative case law may not have developed to the extent it has in Minnesota. See, e.g., Suburban Nat'l Bank v. Department of Commerce, 260 N.W.2d 291 (Minn. 1977); Mampel v. Eastern Heights State Bank, 254 N.W.2d 375 (Minn. 1977);
aminer listened to the testimony of expert witnesses and considered several economic studies. Later, the Commerce Commission met to consider written and oral arguments and to consider the hearing examiner's proposed findings of fact. Two of the commissioners read the entire record. A third read approximately one-half. There was no discussion between the commissioners and approval of the application took about two minutes.

The parties objecting to the agency decision sought review in Ramsey County District Court. The trial court rejected all but one of their procedural and substantive claims, finding that the commission had se-


10. 304 N.W.2d 894, 896. The major focus at the hearing was the statutorily imposed criteria of reasonable public demand for the bank and whether the probable volume of business in the location was sufficient to insure and maintain the solvency of the new bank and the solvency of the then existing bank or banks in the locality. See MINN. STAT. § 45.07 (1982). At the hearing, respondents introduced an economic feasibility study. This study analyzed the market area and contained a household survey. The study established the trade area for the new bank as consisting of an eight township area.

11. Id. at 896. The hearing examiner's findings did not include conclusions of law or a decision to grant the charter because pre-1976 law did not authorize him to make a recommended decision. See MINN. STAT. § 45.032 (1982) (prior to creation of Office of Administrative Hearings all hearings of Commerce Department were conducted internally and hearing examiner was limited to making findings of fact); see also id. §§ 14.48-.56 (provisions governing Office of Administrative Hearings).

12. See 304 N.W.2d at 898. The presence of two commissioners meets quorum requiremets. MINN. STAT. § 45.02 (1982). The decision for approval was two to none. The two commissioners who voted considered the entire record before making the decision. 304 N.W.2d at 896-97. Their actions were consistent with the requirement of Urban Council on Mobility v. Minnesota Dep't of Natural Resources, 289 N.W.2d 729 (Minn. 1980). Urban Council requires the majority of the agency decisionmakers to review the entire record and read verbatim only those areas of testimony that are of substance or in dispute. Id. at 736. For an analysis of the PEER-Urban Council controversy over whether the agency decisionmakers must read the entire record, see 7 WM. MITCHELL L. REV. 221 (1981). Under Urban Council, a commissioner's failure to review the entire record would violate the Minnesota Administrative Procedure Act. See MINN. STAT. § 14.61 (1982). The fact that one of the commissioners in this case read one-half the record is irrelevant because those decisionmakers who rendered the decision had read the entire record. Brief for Respondent-Commerce Commission at 10, In re Lecy, 304 N.W.2d 894 (Minn. 1981).

13. 304 N.W.2d at 897.

14. Id. Review was sought pursuant to statute. See MINN. STAT. §§ 14.63-.69, 45.032(2) (1982). Section 14.63 allows "any person aggrieved by a final decision in a contested case" to seek judicial review. A petition must be filed by the aggrieved person not more than 30 days after the party receives the final decision and order of the agency. Id. § 14.63. Section 14.69 outlines the scope of judicial review for a contested case. It permits the district court to affirm the decision of the agency or remand the case for further proceedings. The district court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the
lected the incorrect trade area for the new bank.\footnote{Appeal was taken to the Supreme Court of Minnesota. Appellants argued that the commissioners should be required to hold collegial discussions on each of appellant's objections, or, in the alternative, to discuss petitioners may have been prejudiced because the administrative finding, inferences, conclusions, or decisions are:
(a) In violation of constitutional provisions; or
(b) In excess of the statutory authority or jurisdiction of the agency; or
(c) Made upon unlawful procedure; or
(d) Affected by other error of law; or
(e) Unsupported by substantial evidence in view of the entire record as submitted; or
(f) Arbitrary or capricious.}

\textit{Id.} § 14.69. Section 45.032(2) provides for review as otherwise provided by law.

The petition in \textit{Lecy} alleged that both the Commission and the hearing examiner had committed procedural and substantive errors in granting the application. Among the procedural errors alleged were that the Commission failed to decide the motions made by appellants and that the hearing examiner failed to follow statutorily required procedures by omitting conclusions of law and a proposed order from his report. 304 N.W.2d at 897.

The substantive errors alleged were that applicants did not establish a reasonable public demand for the new bank; that the trade area determination was inaccurate; that the population and economic statistics for the area did not justify another bank; that the applicants failed to establish that the new bank would remain solvent and that existing banks would not be adversely affected; and that the commission failed to comply with the open meeting law. \textit{Id.}

15. 304 N.W.2d at 897. Trade area is a term of art in banking. MINN. STAT. § 45.07 (1982) states:

\begin{quote}
[If there is reasonable public demand for this bank in this location . . . [and] if the probable volume of business in this location is sufficient to insure and maintain the solvency of the new bank and the solvency of the then existing bank or banks in the locality without endangering the safety of any bank in the locality as a place of deposit of public and private money, . . . the application shall be granted otherwise it shall be denied.\end{quote}

This section is limited to the trade area requirements. The statute also imposes other requirements upon applicants, such as good moral character and management guarantees. \textit{Id.} The Minnesota Supreme Court has established factors to be used by the commission in determining whether the reasonable public demand criteria have been satisfied.

(1) Number of banks already serving the area in which the proposed bank would locate; (2) size of area; (3) population of area; (4) wealth of residents of area; (5) commercial and industrial development of area; (6) potential growth of area; (7) adequacy of the services being provided by existing banks compared to the needs of residents and the services to be offered by proposed bank; (8) capability of existing banks to handle potential growth of the area; (9) convenience of the location of existing banks to residents of the area as compared to convenience of the proposed bank; (10) size of banks in area; (11) dates when the banks in the area were established; and (12) the number of persons in area who desire to use the proposed bank and the amount of business they would generate.


In \textit{Lecy} the trial court determined that the trade territory found by the Commission was not supported by the evidence. 304 N.W.2d at 898. It went on to draw its own conclusions as to deposits and solvency based on other evidence submitted by applicants. \textit{Id.} The supreme court held this to be error because "the weight of the evidence and the credibility of expert witnesses 'is a matter particularly within the province of the . . . hearing examiner.'" \textit{Id.; see supra note 3.}
those objections in a written memorandum. The supreme court re-

16. The Commerce Commission contended that the collegial discussion argument of appellants was simply a thinly disguised attempt to convince the court to allow inquiry into the thought processes of agency decisionmakers. Brief for Respondent-Commerce Commission at 6-7, In re Leczy, 304 N.W.2d 894 (Minn. 1981). The Commerce Commission also suggested in its brief that objectors to bank charter applications have an obvious financial incentive to delay the application process. The more protracted this process becomes, the longer it forestalls the opening of business by their new competitor. Id. at 1.

Appellant, in its reply brief, objected to these suggestions by pointing out that it had not asked for a stay from either the court or agency and that it had always acted in good faith. Reply Brief for Appellant at 1-2, In re Leczy, 304 N.W.2d 894 (Minn. 1981); see also MINN. STAT. § 14.65 (1982) (permits agency or reviewing court to stay proceedings upon such terms as it deems proper).

Notwithstanding either parties' arguments, the case had been in litigation for almost six years. The application process was started on September 19, 1975, and the Minnesota Supreme Court finally decided the case on April 24, 1981. Delay has been a significant factor.

Delay is a strategy which has been used successfully by many groups in the pursuit of their objectives.

All minority groups have gone through a learning process. They have discovered that it is relatively easy with our legal system and a little militancy to delay anything for a very long period of time. To be able to delay a program is often to be able to kill it. Legal and administrative costs rise, but the delays and uncertainties are added to their calculations, both government and private industry often find that it pays to cancel projects that would otherwise be profitable. Costs are simply higher than benefits. In one major environmental group, delays are such a major part of their strategy that they have a name for it, analysis paralysis. . . . The result is an adversary situation where the developer cannot get his project underway and where the environmentalists also cannot get existing plants such as Reserve Mining to clean up their current pollution. Where it helps them, both sides have learned the fine art of delay.


Even though delay is a powerful tactic which has been used by various groups very successfully, an attorney is subject to discipline for taking an action on a client's behalf solely for delay. ABA Code of Professional Responsibility DR 7-102(A)(1); see also ABA Model Rules of Professional Conduct (Discussion Draft Jan. 30, 1980), § 3.3 (Kutak). The Kutak draft requires:

A lawyer shall make every effort consistent with the legitimate interests of the client to expedite litigation. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client. A lawyer shall not engage in any procedure or tactic having no substantial purpose other than delay or increasing the cost of litigation to another party.

Id. In the official comment, the report outlined the policy considerations.

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged for the convenience of the advocates, nor for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not enough that a lawyer's procedural act, or refusal to act, is in personal good faith, or that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the act or refusal to act as having some substantial purpose other than delay.

Id. MINN. R. CIV. P. 11 provides that the signature of an attorney on a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. See Acevedo v. Immigration and Naturalization Serv., 538 F.2d 918 (2d Cir. 1976) (petition for review of Board of Immigration Appeals decision denying motion to reopen
jected these arguments stating, "[N]othing in the statutory requirement applicable to the Commission requires a collegial discussion between the commissioners prior to a final decision. . . . To require the commissioners to orally discuss in public a decision on which they have reached an independent judgment just for the sake of form is absurd."

The court considered the extent to which mental processes of administrative decisionmakers may be discovered. Since 1939 Minnesota courts have followed the general prohibition of *United States v. Morgan (Morgan IV)* which held that mental processes of administrative decisionmakers may not be probed. The court in *Morgan IV* reasoned that

deportation hearing to apply for suspension of deportation was so utterly frivolous and completely lacking in any merit that it permitted conclusion that it was interposed solely as delaying tactic by counsel and double costs taxed personally against counsel; *see also In re Crumpacker, 269 Ind. 630, 383 N.E.2d 36 (1978)* (attorney disbarred for professional responsibility violations including undignified or discourteous conduct before tribunal; judge told attorney he would impose sanction for counsel's delaying tactic and attorney told judge on record it was "bunk" and he would "waltz" judge to Disciplinary Commission if sanction were allowed to stand).

17. 304 N.W.2d at 899. None of the relevant statutes impose collegial discussion requirements upon agency decisionmakers. MINN. STAT. ch. 14 (1982) delineates the procedural requirements for agency decisionmaking and contains no mention of such discussion. The statutes require only a written statement of the reasons for an agency's decision.

Every decision and order rendered by an agency in a contested case shall be in writing, shall be based on the record and shall include the agency's finding of fact and conclusions on all material issues. MINN. STAT. § 14.62(1) (1982). Appellant argued that MINN. STAT. § 45.04(2) (1982) requires the Commission to "decide" whether charters should be granted or denied. *See Brief for Appellant at 10-11, In re Lecy, 304 N.W.2d 894 (Minn. 1981).* There is no requirement in the statute, however, that agency decisionmakers think out loud and verbalize in public that process as opposed to merely weighing the pros and cons separately in their own minds, independent of the other commissioners. 304 N.W.2d at 899.

18. 304 N.W.2d at 899. The *Lecy* court did not decide in *Lecy* whether appellants' argument was an attempt to inquire into the mental processes of the administrative decisionmakers. Apparently, the court felt that since no such requirement was found in the applicable statutes, it need go no further. The court, however, did outline what types of inquiry into the mental process of administrative decisionmakers are appropriate. *See infra notes 37-41 and accompanying text.*

19. 304 N.W.2d at 899-900.

20. 313 U.S. 409 (1941); *see supra* note 1.

21. As early as 1939, in *State v. Tri-State Tel. & Tel. Co., 204 Minn. 516, 284 N.W. 294 (1939),* the court, in response to a contention that the findings of the agency were not sufficiently specific, stated:

The zone of propriety between the extremes of mere conclusion and undue particularity has never been accurately defined. It has been said that all of the essential facts upon which the order is based must be found. On the other hand, the Commission is not obligated to display the weight given by it to any part of the evidence or to disclose the mental operations by which it reached its result. A candid statement of the reasons and processes by which its findings are reached would be of assistance to the reviewing court, yet the Commission is under no compulsion to expose its methods.

*Id.* at 524, 284 N.W. 294, 301 (citations omitted). In *Village of Farmington v. Minnesota*
to hold otherwise would be to undermine the integrity of the administrator's role as a decisionmaker. Other state and federal courts have modified this rule under limited circumstances. For example, an inadequate record, bad faith, or improper behavior may justify limited discovery of the substantive decision-making process.

Mun. Comm'n, 284 Minn. 125, 170 N.W.2d 197 (1969), the court characterized a contention that the trial court had erred in refusing to permit appellants to call commission members as witnesses for the purpose of ascertaining the theory of law they had applied in reaching an administrative decision as "clearly without merit." Id. at 138, 179 N.W.2d at 205; see also People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 872-73 (Minn. 1978); Mampel v. Eastern Heights State Bank, 254 N.W.2d 375, 377-78 (Minn. 1977).

22. 313 U.S. at 422; see infra note 32.


In Overton Park the Secretary of Transportation's decision to route a six-lane highway was unaccompanied by formal findings. The Court remanded to the district court and required some explanation to determine if the Secretary acted within the scope of his authority and whether his action was justifiable under the applicable standard. 401 U.S. at 420-21. The Court noted that when the record is inadequate a reviewing court may require administrative officials who participated in the decision to give testimony explaining their action. Where, however, there are administrative findings made at the same time as the decision, there must be a strong showing of bad faith or improper behavior before such inquiry may be made. Id. at 420.

In Pitts the Court stated that if the agency fails to explain its decision, so that judicial review is frustrated, the court may "obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." 411 U.S. at 143; see also Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964). In Singer the labor relations board sought enforcement of a cease and desist order for unfair labor practices. The defendant argued that the board improperly prevented the admission of relevant testimony and denied it the right to interrogate the field examiner for the board. NLRB asserted the mental process rule as the justification for its refusing to allow the examiner's testimony. The court held that the mental process rule was but one facet of the general presumption of regularity which attaches to decisions of administrative bodies. Thus, where a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable. Id. at 208.

In Bank of Dearborn v. Saxon, 244 F. Supp. 394 (E.D. Mich. 1965), aff'd sub nom. Bank of Dearborn v. Manufacturer's Nat'l Bank, 377 F.2d 496 (6th Cir. 1967), an action was brought by a state bank challenging the validity of an approval of a national bank branch by the Comptroller of Currency. The court concluded that the comptroller abused his discretion in granting the charter and granted a permanent injunction. It held that the mental process rule was inapplicable when a prima facie case of sham and subterfuge on the part of the agency decisionmakers was established. 244 F. Supp. at 403.


In Tenneco an oil company sought judicial review of Department of Energy (DOE) orders which determined that the company had failed to comply with pricing regulations and was not entitled to be exempted from those regulations. 475 F. Supp. at 300. The company sought to compel discovery through interrogatories and a request to compel production of documents. It argued that completion of the administrative record is an exception to the mental process rule. DOE argued that this action sought to probe the mental processes of the decisionmakers within the agency. The court agreed with the
In Minnesota, approval of limited discovery first appeared in the 1977 company and required production of all information and documents necessary to complete the administrative record, stating:

Tenneco correctly asserts that it is entitled to discover any materials necessary to complete the administrative record. "Where there is to be a review on the record, the parties seeking review and the Court have a right to a complete administrative record and, when a showing is made that it may not be complete, limited discovery is appropriate to resolve that question." The complete administrative record consists of all documents and materials that were directly or indirectly considered by the decision-makers at the time the decisions were rendered. In the present case, Tenneco has urged, and a review of the materials certified to this Court would also suggest, that the certified administrative record may be incomplete. The transmitted record contains primarily Tenneco's submissions to the agency, along with the formal Decisions and Orders issued by FEA and DOE. It strains the Court's imagination to assume that the administrative decision-makers reached their conclusions without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to Tenneco's were evaluated in prior decisions by the agency. DOE may not unilaterally determine what shall constitute the administrative record and thereby limit the scope of this Court's inquiry.

Id. at 317 (footnote, citations omitted).

25. See Schicke v. United States, 346 F. Supp. 417 (D. Conn. 1972), rev'd sub nom. Schicke v. Romney, 474 F.2d 309 (2d Cir. 1973). In Schicke an action for declaratory relief was brought to determine whether the approval by the United States of the withdrawal of certain property acquired by a city under an open space land program for use as a park was valid. The court granted the government's motion for summary judgment. It held that the findings by the Secretary did not constitute a clear error of judgment. The court noted that inquiry into the motives of agency decisionmakers is permissible if there is bad faith. It concluded, however, that plaintiffs had not raised a genuine issue of fact as to whether the Secretary acted in bad faith. 346 F. Supp. at 421. The Second Circuit Court of Appeals reversed on the single ground that the administrative record was deficient. See 474 F.2d at 315. The appellate court supported the lower court's finding that no triable issue of bad faith existed. Id. at 319.

26. In KFC Nat'l Management Corp. v. NLRB, 497 F.2d 298, (2d Cir. 1974), cert. denied, 423 U.S. 1087 (1976), a company petitioned the NLRB to review a decision of a regional director who had conducted an ex parte investigation into the company's claims of pro-union activity by its supervisory employees. The NLRB refused review finding the petition lacked merit. When the company refused to bargain, an unfair labor practice charge was filed. On review of the NLRB's unfair labor practice order, the company sought to compel discovery of documents and agency memoranda. The court denied the motion, except to determine participation by staff members in the NLRB's decision. The court learned that the individual members whose votes were cast by the assistants never considered the case and stated, "[O]nce there has been a prima facie demonstration of impropriety the courts will inquire into the administrative process in order to insure that the decision making was informed, unbiased and personal." Id. at 305.

In Abbott Laboratories v. Harris, 481 F. Supp. 74 (N.D. Ill. 1979), a manufacturer brought an action against the Secretary of the Department of Health, Education and Welfare, and the Food and Drug Administration (FDA) alleging that the FDA had failed to take final administrative action on the manufacturer's cyclamate food additive petition. The manufacturer also sought to compel discovery. Since the agency had provided no formal conclusive findings after six years, discovery concerning the decisions by officials and the bases for denial or delay was granted by the court. Id. at 78. The court concluded:

In view of the extended delay, plaintiff's supported contentions that non-technical factors have led to that delay and FDA's surprising assertion that considera-
case of *Mampel v. Eastern Heights State Bank*. In *Mampel* the court allowed "[p]ersons seeking review [to] make inquiry through discovery to determine whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process."28

A year later, in *People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council*,29 the court clarified the scope of this "limited discovery."30 Reaffirming the procedures outlined in *Mampel*, the *PEER* court emphasized that discovery "is limited to information concerning the procedural steps that may be required by law and does not extend to inquiries into the mental processes of an administrator which, being part of the judgmental process, are not discoverable under *United States v. Morgan*."31

Despite stated limitations, *PEER* and *Mampel* resurrected many of the horrors that *Morgan IV* sought to prevent.32 *Lecy* brought these fears to

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27. 254 N.W.2d 375 (Minn. 1977); see *supra* note 4.
28. 254 N.W.2d at 378.
29. 266 N.W.2d 858 (Minn. 1978); see *supra* note 7.
30. 266 N.W.2d at 873.
31. *Id.* (emphasis in original); see *supra* note 1.
32. One of the practical considerations behind the mental process rule is the extensive interrogation agency members were subjected to in the *Morgan IV* cases. Professor Feller predicted such abuses before *Morgan II* and *Morgan IV* clarified the mental process rules, stating:

We may even witness the incredible spectacle of long trials in which administrative officers are questioned at length on the amount of time which they spent in reading the record and what their mental attitudes were. This actually happened in the *Morgan* case. When the case went back for trial to the lower court, the plaintiffs submitted over a hundred interrogatories to the Secretary, and elaborate depositions were taken. The Secretary was asked how much time he had devoted to the testimony of each witness and to each exhibit, what weight he had accorded to such testimony, what pages of the briefs he had read, what theories of rate making he had considered and rejected, etc. If this sort of thing is to be permitted, administrative adjudication will become an ineffectual farce.


Four considerations support the *Morgan IV* privilege against discovery of an administrator's mental processes. First, such an examination would consume a valuable administrative resource—the agency decisionmaker's time. See *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I. 1966). Harassment of the decisionmaker by disappointed parties is also possible and must be guarded against. See *NLRB v. Botany Worsteds Mills, Inc.*, 106 F.2d 263, 267 (3d Cir. 1939). Second, examination of the factors that entered into the
fruition. The administrative decisionmakers in *Lecy* were forced to answer extensive interrogatories and to testify before the district court. The supreme court expressed alarm over the inordinate amount of time the case had spent in litigation and felt a significant portion of the delay was due to an inappropriate application of the limited discovery rule of *Mampel*. Since the discovery went beyond the contemplated limits of *Mampel*, the Minnesota court laid down strict standards for future cases:

> Written interrogatories may be submitted by an appellant within 30 days of the date of appeal directed to each commissioner. Such interrogatories shall be limited to the following questions: (1) Did the commissioner adhere to all statutory and administrative procedural rules in reaching his decision? (2) If the answer to question one is no, what deviations took place? (3) Did the commissioner read the entire record administrator's ultimate decision would be extremely difficult, perhaps impossible, because the exercise of judgment is a weighing process not susceptible to cross-examination. See *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1949). Third, such examination would lead to judicial usurpation of the administrator's role as a decisionmaker. See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*). Finally, the examination would offend the agency decisionmaker and tend to undermine his or her sense of responsibility. *Id.*

33. See 304 N.W.2d at 900. In November 1977, after engaging in various discovery battles with the applicants, appellants served, pursuant to MINN. R. CIV. P. 31, interrogatories on all of the commissioners and the hearing examiner. The commissioners were each asked 41 questions. The actual number was higher since many of the 41 were multiple questions. The questions inquired into whether the commissioners had any off the record communications with each other, with the hearing examiner, with the applicants, or with any other Minnesota government officials or employees. They were asked whether they had read all the evidence in the case, whether they had read every word of every line on every page and, if not, asked to describe what they had read and what percentage of it was read before, rather than after, oral argument. They were asked how many hours it took them to read the evidence. They were asked whether they themselves were aware of any procedural irregularity occurring in the proceedings. When the case was finally tried in May 1978, appellants took testimony from and cross-examined each of the commissioners, the hearing examiner, and the executive secretary of the Commission during a two-day trial reviewing the agency's order under the Minnesota Administrative Procedure Act. See MINN. STAT. § 14.68 (1982). Many of the areas inquired into in discovery were again inquired into at trial. Brief for Respondent-Commerce Commission at 3-5, *In re Lecy*, 304 N.W.2d 984 (Minn. 1981).

34. 304 N.W.2d at 900. Approximately five and one-half years had elapsed by the time the case was decided by the supreme court. See *supra* note 16.

35. 304 N.W.2d at 900. In *Mampel* the court stated "Discovery may be permitted by the district court upon procedural matters if the discovery is appropriately limited." 254 N.W.2d at 378. This standard permits a wide-ranging interpretation of good faith as to the extent of permissible discovery. It is unclear what constitutes "appropriately limited" discovery. The court also stated, "Included in this case would be limited and narrow inquiry into whether there was compliance with Minn. St. 1974, § 15.0421 [recodified as MINN. STAT. § 14.61 (1982)]." *Id.* Again, what "limited and narrow inquiry" encompasses is unclear. Obviously, the appellant in *Lecy* went beyond what the court intended in *Mampel*. The *Mampel* court's lack of specificity, however, contributed to the problems faced in *Lecy*.
prior to rendering a decision? (4) Did the commissioner rely on information outside of the record in making the decision? and (5) If the answer to question to four is yes, what information outside of the record was relied upon in making the decision? The commissioners shall not be deposed, nor shall they be required to testify before the trial court reviewing their decision.\(^3\)

These restrictive standards are significant for several reasons. First, they overrule dicta in *Mampel* which permitted depositions to be taken of administrative decisionmakers.\(^3\) Second, they prohibit requiring the decisionmaker to appear as a witness before a reviewing court.\(^3\) Third, they incorporate dicta in *PEER* by limiting discovery to only the procedural steps taken by the decisionmaker.\(^3\) Fourth, they allow parties to inquire into whether the administrator read the entire record prior to rendering a decision.\(^4\) Finally, they eliminate the former requirement that a party seeking discovery obtain prior approval of interrogatories from the trial court.\(^4\)

*Lecy* is an important step forward in Minnesota administrative law. It preserves the availability of limited discovery while protecting the integrity of the administrative process. Parties retain the right to discover whether administrative decisionmakers simply rubberstamped the findings of the hearing examiner or made an independent decision. These discovery limitations place Minnesota in line with the federal rule.\(^4\)

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36. 304 N.W.2d at 900.
37. See supra notes 27-28 and accompanying text.
39. 304 N.W.2d at 900. In *PEER* the court defined procedural matters to include "whether the agency adhered to statutorily defined procedures or the rules and regulations promulgated by the agency itself which enter into the fundamental decision-making process." 266 N.W.2d at 873 (quoting *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 378) (Minn. 1977)).
40. 304 N.W.2d at 900. It is unclear what the impact of a negative answer to the interrogatory is. See supra note 12; 7 WM. MITCHELL L. REV. 221 (1981).
41. *Mampel* required the use of depositions under Minn. R. Civ. P. 31.01. The deposition questions, in the absence of agreement by counsel, were required to be presented to the trial court for approval before their submission to the witnesses. 254 N.W.2d at 378. The *Lecy* court appears to reject the use of depositions of witnesses upon written questions. See 304 N.W.2d at 900 ("The commissioners shall not be deposed.").

The decision also made reference to the use of interrogatories. Id. Interrogatories to parties are controlled by Minn. R. Civ. P. 33.01 (limits interrogatories to 50 and requires answers within specified time periods). The court did not indicate whether interrogatories in the absence of agreement by counsel are required to be submitted for approval by the trial court prior to their submission to witnesses as they were in *Mampel*. Thus, it is unclear under *Lecy* whether interrogatories may be sent directly to the witnesses or first to the trial court for approval. From the language the court used, "Following a decision of the Commerce Commission, written interrogatories may be submitted by an appellant within thirty days of the date of appeal directed to each Commissioner," 304 N.W.2d at 900, a strong inference can be made that prior approval is no longer required.
allowing administrators to concentrate on policymaking and supervisory functions, rather than participation in protracted discovery and litigation, should improve the efficiency of the administrative system in Minnesota.


Religious organizations have long enjoyed a variety of exemptions from property and income taxes.1 Tax exemptions for church property date from colonial times in the United States and from as far back as the third century in Europe.2 Church property tax exemptions in this country have traditionally rested on statutory or constitutional provisions.3 A


3. See, e.g., Parker v. Commissioner of Internal Revenue, 365 F.2d 792, 795 (8th Cir. 1966); Lundberg v. County of Alameda, 46 Cal. 2d 644, 648, 298 P.2d 1, 4 (1956).


