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Minnesota Department of Natural Resources, 289
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CASE NOTES

Administrative Law—INSTITUTIONAL DECISIONMAKING—*Urban Council on Mobility v. Minnesota Department of Natural Resources*, 289 N.W.2d 729 (Minn. 1980).

The role played by administrative agencies at both federal and state levels has increased dramatically.¹ “The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart.”² Although administrative agencies serve a legislative function,³ they also act in a quasi-judicial manner.⁴

Whether engaging in adjudication or rulemaking,⁵ agencies make in-

1. See K. DAVIS, ADMINISTRATIVE LAW TEXT § 1.02 (3d ed. 1972).

2. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

3. See K. DAVIS, *supra* note 1, § 2.01. “Congress may and does lawfully delegate legislative power to administrative agencies, and it may and does lawfully delegate to such agencies the much more dangerous power to make and to exercise discretion in cases involving identified parties.” *Id.* “The proper delegation of legislative power to administrative agencies within the executive department is not an infringement of article III.” *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 364, 66 A.2d 726, 730 (1949). See also *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

4. See *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

In *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 66 A.2d 726 (1949), the New Jersey court found:

Neither is the grant to administrative agencies of the power to adjudicate controversies within the various fields of administrative activity a violation of article III, for every administrative adjudication is subject to the doctrine of the supremacy of law or, as it has often been called, the Rule of Law. If an administrative adjudication is repugnant to the state or the federal Constitution or the law of the land as, e.g., a treaty, or is *ultra vires* a statute, it is subject to attack by judicial review.

Id. at 364, 66 A.2d at 730 (emphasis in original).

Similarly, in *State v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957), the New Mexico court recognized that administrative agencies have adjudicative powers. “This is not to say that the legislature, in the exercise of its police powers, may not confer ‘quasi-judicial’ power on administrative boards for the protection of the rights and interest of the public in general whose orders are not to be overruled if supported by substantial evidence.” *Id.* at 252, 316 P.2d at 1070.

5. Precise definitions of the terms “rulemaking” and “adjudication” are difficult to formulate. One commentator suggests that “precise definition in the abstract is not necessarily desirable, for the same function may well be regarded as rulemaking for one purpose . . . and as something else for some other purpose.” K. DAVIS, *supra* note 1, § 5.01. General definitions of both terms are useful, however. Rulemaking is essentially legislative in character, while adjudication is essentially a judicial function. The judicial and legislative functions have been distinguished as follows:

A judicial inquiry investigates, declares and enforces liabilities as they stand on

stitutional decisions. An institutional decision is a decision by an administrative entity rather than by a single administrator. Although the agency head makes the formal agency decision, the result usually is the collective effort of many others. Agency staff typically are responsible for formulating the agency's initial policy decision. An independent hearing examiner then conducts a hearing for the purpose of gathering evidence. This evidence is then studied by agency subordinates. Finally, the agency head makes a decision based upon the evidence and staff recommendations.⁶

Although institutional decisions differ from the personal decisions of a judge,⁷ agency decisionmaking is reviewable by the courts.⁸ Such review

present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). The Administrative Procedure Act, 5 U.S.C. § 551(4) (1976), adopts the *Prentis* view of legislation and defines a rule in part as "an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy . . ." See *id.* Judicial opinions support this view. See, e.g., *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 732 (3d Cir. 1973) (rulemaking involves concrete proposals and general policies, looking to the future and applied prospectively), *cert. denied*, 416 U.S. 969 (1974); *American Express Co. v. United States*, 472 F.2d 1050, 1055 (C.C.P.A. 1973) (rulemaking looks, not to evidentiary facts, but to policy considerations drawn from facts). See generally Schwartz, *Administrative Terminology and the Administrative Procedure Act*, 48 MICH. L. REV. 57, 65-69 (1949).

6. See K. DAVIS, *supra* note 1, § 11.01. The institutional decision has both strengths and weaknesses.

The strength springs from superiority of group work—from internal checks and balances, from cooperation among specialists in various disciplines, from assignment of relatively menial tasks to low-paid personnel so as to utilize most economically the energies of high-paid personnel, and from capacity of the system to handle huge volumes of business and at the same time maintain a reasonable degree of uniformity of policy determinations. The weaknesses of the institutional decision lie in its anonymity, in its reliance on extra-record advice, in frustration of parties' desire to reach the men who influence the decision behind the scenes, and in the separation of the deciding function from the writing of the opinion or report.

Id.

The United States Supreme Court, in *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*), seemed to limit the institutional decision by asserting that "[t]he one who decides must hear." *Id.* at 481. But the Court hastened to add that the words were not to be applied literally. The requirement "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus may be sifted and analyzed by competent subordinates." *Id.* With its decision in *United States v. Morgan*, 313 U.S. 409 (1941) (*Morgan IV*), the Court effectively retreated from the "one who decides must hear" position. It held that the decisionmaker could not be examined about the manner and extent of his study of the record and his consultation with subordinates. See *id.* at 422.

7. In contrast to the institutional decision is the personal decision. In making a personal decision, an individual who hears or reads the evidence and argument presented by the parties makes a decision based on personal opinion. For example, a decision in the

exists to ensure that parties' due process rights are not violated.⁹ Because the United States Supreme Court has held it improper to probe the mental processes of agency decisionmakers,¹⁰ review is limited to an in-

judicial process made without a jury by a judge is a personal one. See K. DAVIS, *supra* note 1, § 11.01; *cf.* *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542, 544 (1943) (discussing appellate review: "[w]here men may reasonably differ, choice is determined by individual judgment, and an exercise of such judgment is . . . subject to review by an appellate court"). No such right for a personal decision exists for the parties in the administrative decision-making process. See *Utica Mut. Ins. Co. v. Vincent*, 375 F.2d 129, 131-32 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967); *Lacomastic Corp. v. Parker*, 54 F. Supp. 138, 141 (D. Md. 1944) ("[I]n judicial as distinguished from administrative proceedings, there is an inherent right on the part of litigants to have a decision rendered by the judge who presides at the trial and hears the testimony.").

8. See *Minnesota Pub. Interest Research Group v. Minnesota Environmental Quality Council*, 306 Minn. 370, 376-79, 237 N.W.2d 375, 379-81 (1975). In Minnesota, the right to appeal administrative findings of fact, law, or both is granted by statute. See MINN. STAT. § 15.0424 (1980). The United States Supreme Court has ruled that when there is no statutory provision for judicial review, reviewability is to be presumed. See *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970); *cf.* *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) (silence of Congress on issue of review is not construed as denial of ability to seek relief in federal courts).

9. When there is an inadequate review of the record prior to an agency decision, a due process violation occurs. See *Megill v. Board of Regents*, 541 F.2d 1073, 1080 (5th Cir. 1976); *Big Top, Inc. v. Hoffman*, 156 Colo. 362, 365, 399 P.2d 249, 251 (1965). *But cf.* *Burchett v. Cardwell*, 493 F.2d 492, 494 (9th Cir. 1974) (that only three of five justices of state supreme court heard oral arguments did not deny defendant due process); *Owens v. Battenfield*, 33 F.2d 753, 758 (8th Cir. 1929) (that four of five supreme court judges did not read evidence in record before joining in affirmance of judgment sought to be enjoined was not arbitrary or capricious exercise of power).

10. See *United States v. Morgan*, 313 U.S. 409, 421-22 (1941) (*Morgan IV*). Justice Frankfurter, writing for the Court, stated:

Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. 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.

Id. (citations omitted).

Generally, inquiry by the courts into the decision-making process to determine the extent of understanding and consideration of the record by the agency head is forbidden. The United States Supreme Court, however, has vacillated on the question of whether evidence should be admitted on the extent of an administrator's reading and comprehension of the record. Compare *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan*

quiry into the procedures employed by the agency head in making the

IV) (Secretary of Agriculture's mental processes should not have been probed) and *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585, 593 (1907) (cross examination of board members regarding operation of their minds in valuing and taxing roads was improper) with *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 410, 420 (1971) (court may require administrative decisionmaker to give testimony explaining his decision) and *Morgan v. United States*, 298 U.S. 468, 474-75, 481-82 (1936) (*Morgan I*) (district court should have considered fact that Secretary of Agriculture had not read or heard any evidence nor considered oral arguments). The *Overton Park* decision does not overrule the *Morgan IV* case, but is seen as an exception to the general rule that administrators' mental processes may not be probed. See generally, K. DAVIS, ADMINISTRATIVE LAW TREATISE § 11.00 (Supp. 1980); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

The acts of an agency decisionmaker in the deliberative process enjoy a "presumption of regularity." See *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *Hercules Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1977); *In re Plum Grove Lake*, 297 N.W.2d 130, 135 (Minn. 1980); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977); 2 F. COOPER, STATE ADMINISTRATIVE LAW ch. XIII, § 3, at 450-51 (1965); K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 11.00 (1976); cf. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (presumption of regularity rebuttable).

Three reasons have been given for denying the discovery of a decisionmaker's mental processes: (1) such an examination would consume the valuable time of the administrator, see *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I. 1966) (not in public interest to allow indiscriminate taking of depositions; allowed under facts of case, however); (2) such an examination would lead to judicial usurpation of the administrator's role as decisionmaker, see 50 WASH. L. REV. 739, 750 (1975); and (3) the examination would tend to undermine the administrator's sense of responsibility, see *United States v. Morgan*, 313 U.S. 409, 422 (1941) (*Morgan IV*).

In *Morgan IV*, the Court stated:

Just as a judge cannot be subjected to such a scrutiny . . . 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.

The prohibition against probing mental processes was modified in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Courts will now allow an examination of mental processes only when bad faith or improper behavior by the agency head can be proven. See *id.* at 420; *National Nutritional Food Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir.), cert. denied, 419 U.S. 874 (1974). In the *National* case, the court denied a request for an *Overton Park*-type hearing when petitioner claimed that the Commissioner of the Food and Drug Administration had not been in office long enough to properly consider the record of the proceeding. The court stated:

Nothing in the opinion suggests that the Court [in *Overton Park*] intended to allow inquiry into the relative participation of the Secretary and his subordinates. Similarly, strong preliminary showings of bad faith have been required in the court of appeals cases cited by petitioners before the taking of testimony has been permitted with regard to internal agency deliberations.

Id. (footnote omitted). An examination of mental processes will also be allowed when the record before the court fails to contain an explanation for the administrative action taken. See *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973) (per curiam); *Hempstead Bank v. Smith*,

decision.¹¹ The Minnesota Supreme Court in *Urban Council on Mobility v.*

540 F.2d 57, 62 (2d Cir. 1976); *Ozark Bank v. Smith*, 423 F. Supp. 406, 408 (W.D. Mo. 1976) (quoting *Camp*).

11. The processes that an administrator goes through in reaching a decision can be divided into two types, judgmental and procedural. See 50 WASH. L. REV. 739, 743 (1975). The procedural process requires an examination of the procedural steps that may be required by law. Limited discovery of these steps has been allowed in the federal courts. See D.C. Fed'n of Civic Ass'ns v. Volpe, 316 F. Supp. 754, 760 n.12 (D.D.C. 1970), *rev'd on other grounds*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972). The Volpe court stated:

The Court is aware that the Supreme Court in *United States v. Morgan* . . . prohibited the probing of the mental process of an administrative decision maker to determine his reasoning in reaching a decision. The interrogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as the basis for his determination, rather than his mental process in considering these materials.

316 F. Supp. at 760-61 n.12 (citation omitted). See also *Union Sav. Bank v. Saxon*, 209 F. Supp. 319, 320 (D.D.C. 1962).

Minnesota also allows discovery of administrative procedural processes. See *Urban Council on Mobility v. Minnesota Dep't of Natural Resources*, 289 N.W.2d 729, 736 (Minn. 1980); *People for Environmental Enlightenment and Responsibility, Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d 858, 873 (Minn. 1978); *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 378 (Minn. 1977). The Minnesota Supreme Court has stated: "[T]he discovery we sanction is limited to information concerning the procedural steps that may be required by law and [it] 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*" *People for Environmental Enlightenment and Responsibility, Inc. v. Minnesota Environmental Quality Council*, 266 N.W.2d at 873 (emphasis in original).

The effect of allowing this limited discovery is that procedural irregularities, such as a violation of the "he who decides must hear" principle, will be checked. See 50 WASH. L. REV. 739, 753-54 (1975).

The *Urban Council* court recognized the procedural/judgmental distinction in reviewing the institutional decision-making process. See 289 N.W.2d at 736. It found that interrogatories concerning the procedures followed by the Commissioner of Natural Resources in reaching his decision were permissible. *Id.*

In a recent decision, the Minnesota Supreme Court imposed limitations on the doctrine of discovery set out in *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375 (Minn. 1977) (allowing discovery of procedures used by agency decisionmaker in administrative decision-making process). See *In re Lecy*, Nos. 50451 & 51546, Finance and Commerce, Apr. 24, 1981, at 14, 16. The *Lecy* court stated:

Following a decision of the Commerce Commission, 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 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 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.

Id. The court's new rule is applicable to all instances of review of the process of administrative decisionmaking. Unfortunately, the court did not indicate the importance of each

*Minnesota Department of Natural Resources*¹² examined this institutional decision-making process. Although the *Urban Council* opinion does not focus on agency decisionmaking, the effect of the court's holding on institutional decisions is significant.

In *Urban Council*, the Commissioner of the Department of Natural Resources (Commissioner) issued an order denying the Minnesota Department of Transportation (DOT) a permit to construct a portion of Interstate Freeway I-35-E over Blackhawk Lake in Eagan, Minnesota. In addition, the Commissioner ordered that a permit would be granted for the construction of an alternative highway around the east end of Blackhawk Lake.¹³ In making his decision, the Commissioner reviewed the entire record of the administrative hearing but read verbatim only those parts of the record in dispute. He also received a briefing from his staff prior to making his decision. The district court reversed the Commissioner's order.¹⁴ On appeal, the Minnesota Supreme Court reinstated the Commissioner's decision routing the highway around the east end of the lake.¹⁵

The *Urban Council* court was faced with the issue of whether the Com-

of the permissible interrogatories. Additionally, the court failed to state what would be the effect of the possible responses to the interrogatories.

12. 289 N.W.2d 729 (Minn. 1980).

13. *See id.* at 732 & n.1. The Commissioner stated that before the permit would be granted the DOT would have to get DNR approval of final plans and specifications. The Commissioner's order stated:

A permit will be granted for the freeway route which passes around the east end of the lake as more precisely described in the hearing record where it is identified as the A-2 route. It is a condition of any such permit that MnDOT must obtain approval from DNR of the final plans and specifications, which shall show that reasonable effort has been made to minimize its impact on the lake and the park.

Id. at n.1.

14. *See id.* at 732. The district court ordered that the DOT be allowed to build the highway across the lake. The court believed that "(1) the commissioner's decision was not supported by substantial evidence; and (2) the permit for route A-2 was improperly granted because no permit application had been made for A-2 and an EIS [Environmental Impact Statement] in final form on route A-2 had not been presented." *Id.* (footnote omitted).

Associated Families, a partnership of seven families that owned eighty acres of farm land on the north side of the lake, moved the court for a new trial on the ground that newly discovered evidence showed a minimal time difference between the construction of route A-1 over the lake and route A-2 around the lake. The court denied the motion. Associated Families then appealed to the Minnesota Supreme Court from the trial court's order denying a new trial, and from its order reversing the Commissioner's decision. The Department of Natural Resources did not appeal the reversal of the Commissioner's decision.

15. *See id.* at 737.

The Urban Council on Mobility argued against a reinstatement of the Commissioner's findings because it claimed his review was inadequate and merely a "rubber stamp" of the hearing examiner's report. *See id.* at 736.

The Urban Council on Mobility is an organization whose purpose is to work with the

missioner acted properly when he denied the DOT's permit application yet ordered that a permit would be granted for an alternative route. In resolving the question, the supreme court considered what constituted adequate review by an agency of a hearing examiner's report. Under federal law,¹⁶ an administrator can render an institutional decision without reading the entire record as long as substantial understanding of the record can be obtained by other means.¹⁷ The practice in most states is in harmony with federal law.¹⁸

state legislature and the Department of Transportation to ensure the completion of major highway systems in Dakota County, Minnesota.

16. The procedural requirements for agency decisionmaking under the Federal APA are set forth in 5 U.S.C. § 557 (1976).

17. See *Morgan v. United States*, 298 U.S. 468, 481-82 (1936) (Morgan I). Counsel for the private parties in *Morgan I* later admitted that the *Morgan I* rule, "he who decides must hear," did not impose upon agency heads the burden of reading the entire record in the case. See *Morgan v. United States*, 304 U.S. 1, 3-4 (1938) (Morgan II). On remand after the *Morgan I* decision the lower court stated:

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read all the evidence and, in addition thereto, to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Acts . . . cannot be administered.

Morgan v. United States, 23 F. Supp. 380, 382 (W.D. Mo. 1937) (citation omitted), *rev'd on other grounds*, 304 U.S. 1 (1938).

One commentator asserts that it is unlikely that there ever existed a requirement that agency heads read all the evidence and testimony gathered at an administrative hearing before making a decision. See 2 F. COOPER, *supra* note 10, ch. XIII, § 3. Professor Cooper states:

It has probably never been the law that he who decides must hear. If ever it was, it is no more. This time-honored rubric has now become no more than a nostalgic slogan. In both state and federal agencies, decisions are in fact made by officials who have neither heard the testimony nor read the transcript thereof, and (at least in the absence of specific statutory requirement) the courts do not deem this circumstance to be a sufficient reason for setting aside the agency decision. The courts go no further than to hold that if it can be shown that the official making the decision was unfamiliar with the contents of the record on which he was required to base his decision, then his decision may be set aside.

Id. at 445. For cases supporting the viewpoint that the agency head need not read the entire record, see, e.g., *Megill v. Board of Regents*, 541 F.2d 1073, 1080 (5th Cir. 1976); *Florida Economic Advisory Council v. Federal Power Comm'n*, 251 F.2d 643, 648 (D.C. Cir. 1957); *Inland Steel Co. v. NLRB*, 105 F.2d 246, 251 (7th Cir. 1939) (quoting *Cherry Cotton Mills*); *NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 446-47 (5th Cir. 1938); *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938).

18. See, e.g., *Allied Compensation Ins. Co. v. Industrial Accident Comm'n*, 57 Cal. 2d 115, 120, 367 P.2d 409, 411, 17 Cal. Rptr. 817, 819 (1961) (independent examination of record must result in "substantial understanding" by any reasonable means that may be achieved by use of referee's summary); *Sinclair v. Baker*, 219 Cal. App. 2d 817, 822-23, 33 Cal. Rptr. 522, 526 (1963) (acceptance of proposed decision of hearing officer not violation of due process even though parties' evidence and arguments not reviewed), *appeal dismissed per curiam*, 377 U.S. 215 (1964); *Fichera v. State Personnel Bd.*, 217 Cal. App. 2d 613, 620, 32 Cal. Rptr., 159, 162 (1963) (reading of proposed decision and proposal of hearing officer may be sufficient review for valid agency decision); *Taub v. Pirnie*, 3 N.Y.2d 188, 194-96, 144 N.E.2d 3, 5-6, 165 N.Y.S.2d 1, 5-6 (1957) (board member's vote on variance

Because of a 1975 amendment¹⁹ to the Minnesota Administrative Procedure Act²⁰ (Minnesota Act) it is not clear what standard of review is required. Prior to the amendment, the Minnesota Act implied that agency decisionmakers were to hear or read all of the evidence before rendering a decision.²¹ Minnesota case law, interpreting the Minnesota Act before amendment, did not expressly require that the entire transcript of a hearing be read;²² however, it could be inferred that a mechanical reading of the record was required.²³

The present Act makes no mention of the extent of review to be made by agency officials prior to rendering a decision. In *People for Environmental Enlightenment and Responsibility, Inc. v. Minnesota Environmental Quality*

not invalid where board member had not read transcript of proceedings regarding zoning ordinance but had full knowledge of problems presented by request for variance); *State v. Industrial Comm'n*, 272 Wis. 409, 422-23, 76 N.W.2d 362, 369-70 (1956) (reliance on synopsis of testimony was adequate review of record so long as no prejudicial information had been omitted). See generally *K. DAVIS, supra* note 1, § 11.04. But see, e.g., *Walker v. De Concini*, 86 Ariz. 143, 153, 341 P.2d 933, 938-39 (1959) (agency decision invalid where no commissioners were present at hearing and no transcript was made from which commissioners could gain adequate knowledge for decision); *Big Top, Inc. v. Hoffman*, 156 Colo. 362, 365-66, 399 P.2d 249, 251 (1965) (agency ruling invalid where deciding officer was not present at hearing and read only synopsis of testimony).

19. See Act of June 4, 1975, ch. 380, § 7, 1975 Minn. Laws 1285, 1289-90 (codified at MINN. STAT. § 15.0421 (1980)).

20. MINN. STAT. §§ 15.0411-052 (1980).

21. See Act of Apr. 27, 1957, ch. 806, § 10, 1957 Minn. Laws 1100, 1105 (amended 1975) (current version at MINN. STAT. § 15.0421 (1980)). Before being amended, section 15.0421 read:

Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not *heard or read the evidence*, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including the statement of reasons therefor, has been served on the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.

Id. (emphasis added).

The implication arose in a provision dealing with the procedures to be followed in a contested case in which the evidence was not heard or read. In amending that provision, the legislature excluded the language requiring agency officials to furnish reasons for their decisions whenever the majority of officials who are to render the final decision have not heard or read the evidence. See Act of June 4, 1975, ch. 380, § 7, 1975 Minn. Laws 1285, 1289-90 (codified at MINN. STAT. § 15.0421 (1980)). The amended language provides:

In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the hearing examiner as required by section 15.052, has been made available to parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.

Id.

22. See *Mampel v. Eastern Heights State Bank*, 254 N.W.2d 375, 377-78 (Minn. 1977).

23. See *id.*

Council (PEER),²⁴ the Minnesota court, interpreting the present Act, stated: "Under the APA the agency must review the evidence and findings amassed by a 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."²⁵ It was under the same Act that the *Urban Council* court rendered its decision. The *PEER* rule requiring reading of the entire hearing examiner's record apparently was altered in *Urban Council*.²⁶ Although the Commissioner in *Urban Council* did not read verbatim the entire record and findings of the hearing examiner,²⁷ the *Urban Council* court found that the DNR Commissioner's review of the record was adequate.²⁸ Adequate review under

24. 266 N.W.2d 858 (Minn. 1978).

25. *Id.* at 873. The court was, in essence, saying that agency officials responsible for making the decision in a contested case cannot do so unless they themselves read and study all the material in the record of the hearing examiner.

26. *See* 289 N.W.2d at 736. The court did not require that the entire record be read. The court found it sufficient that the commissioner had reviewed the exhibits, the record in regard to the areas in dispute, and received a four or five hour briefing from his staff. *See id.*

In a recent decision by the Minnesota Supreme Court involving the discovery of the decision-making processes of an administrative head, *see In re Lecy*, Nos. 50451 & 51546, Finance and Commerce, Apr. 24, 1981, at 14, the court limited permissible interrogatories to the five questions specified in the opinion. *See* note 11 *supra*. One of those permissible interrogatories is: "Did the commissioner read the entire record prior to rendering a decision?" *In re Lecy*, Nos. 50451 & 51546, Finance and Commerce, Apr. 24, 1981, at 14, 16. It is arguable that inclusion of this question indicates that the *Urban Council* court did not intend to alter the *PEER* rule. Upon closer analysis, however, this conclusion is without support. First, the interrogatory in *Lecy* arose in a discussion of what may be asked of a decisionmaker to discover the procedures he followed in making his decision. In *Urban Council*, in which the same question was considered, the court was discussing what would be an adequate review of the record before a decision is made. Second, the inclusion of the interrogatory was not accompanied by any indication whether a negative response to the interrogatory would necessarily mean that there had been an inadequate review of the record by the decisionmaker. Because this particular interrogatory is only one of a number of permissible interrogatories, a negative response to any one interrogatory should not be dispositive of the issue; only when all of the questions have been answered is there a complete basis upon which to review the adequacy of the procedures followed. This analysis is supported by the *Urban Council* decision which found that the mere failure to read the entire transcript of a hearing does not indicate that the proper procedural processes were not followed in making a decision. *See* note 28 *infra* and accompanying text.

27. *See* 289 N.W.2d at 736.

28. *See id.* The court stated that

the commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript "reading verbatim those areas of testimony which [he] felt were of substance or were in dispute," and examined every exhibit submitted at the hearing. In addition, he received a four-or-five hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties. For the above reasons, we believe the commissioner acted properly in rendering his decision in this case.

Id. (brackets in original).

Urban Council involves reviewing the record and reading verbatim only those areas of testimony that are of substance or in dispute.²⁹ This new rule is consistent with federal practice.³⁰

The *PEER* rule places a heavy burden on agency administrators. They would have to read thousands of pages of transcripts each year, leaving little or no time for agency administration. The *Urban Council* decision is a more realistic approach to agency decisionmaking. It is a recognition that agency officials do rely on hearing examiners and other agency personnel to identify the important issues to be resolved and the facts to be determined.³¹

Although the language in *Urban Council* appears to change significantly the *PEER* rule, it is unclear whether the Minnesota Supreme Court desired such a result. The discussion of adequate review was dicta in both decisions. The strengths or weaknesses of the *PEER* rule are not mentioned in *Urban Council*, nor is the *PEER* decision cited. It is not clear whether these omissions were intentional or an oversight.³²

Despite the apparent conflict, it is possible that *Urban Council* and *PEER* are consistent. It is possible that the *PEER* court merely sought to point out a desired goal of the Minnesota Act and not set a rigid rule describing the minimum conduct sufficient for adequate review of a hearing examiner's record by an agency head.³³ The *PEER* court may have construed the Minnesota Act to require agency decisionmakers to read the entire hearing examiner's report only when practicable and feasible to do so. This interpretation is consistent with the *Urban Council* court's finding that the Commissioner's review was adequate even

29. *See id.*

30. *See* note 17 *supra* and accompanying text.

31. *See* Schwartz, *Institutional Administrative Decisions and the Morgan Cases: A Re-Examination*, 4 J. PUB. L. 49, 54 (1955).

32. The doctrine of stare decisis requires courts to stand by legal precedent and not disturb settled points of law. *See* *Neff v. George*, 364 Ill. 306, 308-09, 4 N.E.2d 388, 390-91 (1936), *overruled on other grounds*, *Tuthill v. Rendleman*, 387 Ill. 321, 56 N.E.2d 375 (1944); *cf.* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.30 (1977) (while importance of stare decisis is unquestioned, it is a principle of policy and not a mechanical formula). Departure from stare decisis may be necessary, however, to remedy a continued injustice. *See, e.g.*, *McGregor v. Provident Trust Co.*, 119 Fla. 718, 731, 162 So. 323, 328 (1935). In such a case, one would expect the court to argue the weaknesses of an established legal principle and how either special facts or public policy required this established legal principle to be changed.

33. In *PEER*, the court stated that "the legislature clearly intended" agency heads to read the evidence. *See* 266 N.W.2d at 863. The plain meaning of the words used by the *PEER* court supports this view because "intend" means to aim at or have a particular purpose in mind; "intend" does not mean that one must follow a particular course of action to the exclusion of other more reasonable means. *Cf.* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1175 (1971) ("to have in mind as a design or purpose . . . [or] as an object to be gained or achieved"). For a discussion of the language used by the court in *PEER*, *see* note 25 *supra* and accompanying text.

though he had not read the approximately 3,000 pages of transcript in its entirety.³⁴

If the apparent conflict between *PEER* and *Urban Council* cannot be resolved, it is possible that the *Urban Council* decision has not completely overruled *PEER*. *Urban Council* involved issues that were well defined and fully argued. If the issues in a case are not clearly defined, it is possible that the Minnesota court would apply the *PEER* rule and require an agency head to read the entire record of the hearing.³⁵ In addition to finding an adequate review of the record, the *Urban Council* court may not have applied the *PEER* rule because it found the Commissioner's decision supported by substantial evidence.³⁶

34. See 289 N.W.2d at 736. The court found it was not necessary for the Commissioner to read the entire record because there had been "adequate consideration of the voluminous evidence submitted at the hearing." See *id.*

35. Cf. NLRB v. Cherry Cotton Mills, 98 F.2d 444, 447 (5th Cir. 1938) (once evidence has been taken and factual disputes have been defined by argument of opposing parties, there is need to read and consider only evidence bearing on those disputes).

36. See 289 N.W.2d at 734. The rule in Minnesota is that the findings and decision of an administrative agency should not be disturbed unless unsupported by substantial evidence. See *In re Plum Grove Lake*, 297 N.W.2d 130, 135 (Minn. 1980); *Urban Council on Mobility v. Minnesota Dep't of Natural Resources*, 289 N.W.2d 729, 733 (Minn. 1980); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977); *Greene v. W. & W. Generator Rebuilders*, 302 Minn. 542, 544, 224 N.W.2d 157, 160 (1974) (per curiam); *Quinn Distrib. Co. v. Quast Transfer, Inc.*, 288 Minn. 442, 446, 181 N.W.2d 696, 698-99 (1970); *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse*, 288 Minn. 294, 298, 180 N.W.2d 175, 177 (1970).

The Minnesota Administrative Procedure Act defines the scope of judicial review of agency actions as follows:

In a judicial review under section 15.0424 the 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 petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) In violation of constitutional provisions; or
- (b) In excess of 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.

MINN. STAT. § 15.0425 (1980) (emphasis added).

In *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808 (Minn. 1977), the supreme court opined that the trial court's definition of substantial evidence was correct. See *id.* at 825. The trial court held: "by the 'substantial evidence' test is meant: 1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than 'some evidence'; 4) more than 'any evidence'; and 5) evidence considered in its entirety." *Id.*

Under federal law substantial evidence means

evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 299-300 (1939) (citations

Whether the suggested explanations are accurate does not change the effect of *Urban Council*; administrators are now permitted a greater degree of flexibility in decisionmaking. The standard of review established in *Urban Council* is theoretically sound. The *Urban Council* decision recognizes that a reading of the entire hearing examiner's record is not necessary to obtain a sufficient understanding of the record.³⁷ Requiring agency decisionmakers to read only those areas of testimony in dispute is comparable to the practice of judges hearing cases on appeal.³⁸ Appellate court judges often do not read entire trial transcripts.³⁹ In considering the arguments presented by counsel, appellate judges typically read and study only the disputed parts of the record before making a final decision; usually the parties have agreed to the rest of the record.⁴⁰ This type of judicial practice should be acceptable in agency decisionmaking as long as agency administrators make informed decisions.⁴¹

Practical considerations also support the *Urban Council* standard of review. Agency heads do not have the time to read all of the testimony presented at public hearings or listen to witnesses explain their testimony.⁴² In some of the larger state agencies, the number of hearings alone makes it a physical impossibility for the agency head to read the entire record before making a decision.⁴³ Requiring irrelevant or undisputed parts of the evidence to be read frustrates effective and efficient administration of agency business.

The Minnesota court's decision in *Urban Council* is important because of the court's apparent change in position regarding the extent of review required by agency administrators in examining the administrative hearing record prior to making a decision. Agency heads are no longer required to read the entire hearing record before rendering a decision on the issues involved,⁴⁴ but rather must read only those parts of the record

omitted). For cases supporting this view, see, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951) (substantial evidence involves evaluation of record as whole to determine whether that record reasonably supported conclusion); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). The substantial evidence test applies "only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself . . . or when the agency action is based on a public adjudicatory hearing." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (citation omitted).

37. See note 28 *supra*.

38. See Schwartz, *supra* note 31, at 60-61.

39. See *NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 447 (5th Cir. 1938); *Morgan v. United States*, 23 F. Supp. 380, 382 (W.D. Mo. 1937), *rev'd on other grounds*, 304 U.S. 1 (1938).

40. See *NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 447 (5th Cir. 1938).

41. See *Morgan v. United States*, 298 U.S. 468, 478-80 (1936) (Morgan I).

42. See K. DAVIS, *supra* note 1, § 11.07.

43. See *id.*

44. See note 28 *supra* and accompanying text.

relating to disputed testimony and issues.⁴⁵ As a result of the *Urban Council* decision, institutional decisionmaking in Minnesota parallels the federal system.⁴⁶ Without the onerous burden of reading the entire record of each hearing, agency administrators may have more time to formulate policies and supervise subordinates.⁴⁷ Allowing administrators to concentrate on policy making and supervisory functions should improve the operation and efficiency of the administrative system in Minnesota.

Civil Procedure—Jurisdiction—SAVCHUK v. RUSH: A EULOGY—*Savchuk v. Rush*, 311 Minn. 480, 245 N.W.2d 624 (1976), *vacated and remanded*, 433 U.S. 902 (1977), *aff'd on remand*, 272 N.W.2d 888 (Minn. 1978), *rev'd*, 444 U.S. 320 (1980).

In *Seider v. Roth*,¹ the New York Court of Appeals held that a state may exercise quasi in rem jurisdiction² over a nonresident defendant having

45. *See id.*

46. *See* notes 29-30 *supra* and accompanying text.

47. It may be questioned whether agency decisionmakers ever read the entire record of each hearing prior to *Urban Council*. Although this requirement seemed to be imposed on agency heads, it is unlikely that there was full compliance with the law. Practically speaking, it probably could not have been done. *See* notes 42-43 *supra* and accompanying text. It is for this very reason that the conclusion that the *Urban Council* rule will give administrators more time is suspect.

1. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The principle established in this case is commonly referred to as *Seider* jurisdiction.

2. The first notable case in the historical development of state court jurisdiction was *Pennoyer v. Neff*, 95 U.S. 714 (1877), *overruled*, *Shaffer v. Heitner*, 433 U.S. 186 (1977), which defined a state's judicial power by its territorial limits. *Pennoyer* established that every state had exclusive jurisdiction over persons and property within that state's boundaries. *See* 95 U.S. at 722. No state, however, could exercise direct jurisdiction over persons or property outside of its territorial limits. *Id.* A court's authority over a defendant's person within its territorial jurisdiction is defined as in personam jurisdiction. A judgment in personam can impose a personal obligation on a defendant. *See Shaffer v. Heitner*, 433 U.S. 186, 199 (1977); *International Shoe v. Washington*, 326 U.S. 310, 316 (1945); *Pennoyer v. Neff*, 95 U.S. 714, 735 (1877), *overruled*, *Shaffer v. Heitner*, 433 U.S. 186 (1977). An in rem proceeding is one brought directly against property within a court's territory. *See Pennoyer v. Neff*, 95 U.S. at 734. Its purpose is to dispose of the property to satisfy a claim to that property. A judgment in rem is limited to the property involved and cannot impose personal liability on the property owner. *See Shaffer v. Heitner*, 433 U.S. at 199. In *Harris v. Balk*, 198 U.S. 215 (1905), *overruled*, *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Supreme Court expanded jurisdictional concepts by allowing a quasi in rem action against a nonresident defendant when the property that served as the basis for jurisdiction was totally unrelated to the cause of action.

The three types of jurisdiction—in personam, in rem, and quasi in rem—were defined summarily by the Supreme Court in *Hanson v. Denckla*, 357 U.S. 235 (1958). The Court stated:

A judgment in *personam* imposes a personal liability or obligation on one person in favor of another. A judgment in *rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular