# OKLAHOMA ADMINISTRATIVE PROCEDURES

CASES AND MATERIALS

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# Chapter 1

# Introduction

The purpose of this book is to provide externs with a handbook to discuss the application of administrative law to your Government Practice Externship placement site experience. This course will focus on state administrative law and will be based on the Oklahoma law, including the Oklahoma Constitution, the Oklahoma Administrative Procedure Act (OAPA) and Oklahoma decisional law.

All people residing in the United States are subject to a variety of administrative laws. These laws are created and enforced by the federal government agencies and state government agencies, county and municipal governments. Administrative law, whether at the federal or state level, has many sources of legal authority. Lawyers need to be familiar with administrative law and how to practice in this area.

## A. What is an Administrative Agency?

An overview of administrative law should begin with a general discussion of what an administrative agency is. Administrative agencies (hereinafter referred to as "agencies") are units of state government other than the legislature and the courts.[1] There are similar definitions in the United States Administrative Procedure Act (USAPA)[2] and in the 1981 version of the Model State Administrative Procedure Act (MSAPA).[3]

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[1] Subsection 3 of 75 O.S. § 250.3 reads:

> 3. "Agency" includes but is not limited to any constitutionally or statutorily created state board, bureau, commission, office, authority, public trust in which the state is a beneficiary, or interstate commission, except:
>
> a. the Legislature or any branch, committee or officer thereof, and
>
> b. the courts;

[2] Subsection (1) of 5 U.S.C. § 551 reads:

> (1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia;
>
> or except as to the requirements of section 552 of this title—
>
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

An agency has authority to carry out the law(s) delegated to it by the legislature and/or the state's constitution. The agency may be organized as a department, commission, board or public trust or some other designation under a statute or the Oklahoma Constitution. Agencies are part of the executive branch of the Oklahoma government. The agency is operated under the direction of a chief executive or a board. That leadership position is referred to as the agency head.[4] The agency head can be appointed by the governor, by a board or directly elected.

## B. Agency Expertise

Agencies implement a discrete area of the law and develop expertise over time. The implementation process includes rule-making and adjudication as well as enforcement of the law. These processes will be discussed in this book.

## C. Reasons for Studying State Administrative Law

Administrative law is an increasingly important area of the law. For those whose livelihood concerns administrative work this is an obvious statement. Students should consider the recent changes in the federal law—the Credit Card Accountability Responsibility and Disclosure Act of 2009, the Health Care and Education Reconciliation Act of 2010 and the Dodd-Frank Wall Street Reform and Consumer Protection Act—just to name a few. These laws will undoubtedly be the source of many new federal regulations. Additionally, state legislatures will enact laws to authorize state agencies to cooperate with the federal law and regulations. While law schools typically

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(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641 (b)(2), of title 50, appendix; 5 U.S.C. § 551

[3] Subsection (1) of the Model State Administrative Procedures Act § 1-102 reads:

(1) "Agency" means a board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head. The term does not include the [legislature] or the courts [, or the governor] [, or the governor in the exercise of powers derived directly and exclusively from the constitution of this State]. The term does not include a political subdivision of the state or any of the administrative units of a political subdivision, but it does include a board, commission, department, officer, or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of the state or any of their units. To the extent it purports to exercise authority subject to any provision of this Act, an administrative unit otherwise qualifying as an "agency" must be treated as a separate agency even if the unit is located within or subordinate to another agency.

[4] Subsection (1) of 75 O.S. § 250.3 reads:

1. "Administrative head" means an official or agency body responsible pursuant to law for issuing final agency orders;

teach and encourage students to take administrative law, those courses are primarily federal administrative law. Many lawyers practicing administrative law do so before state agencies, boards, public trusts and commissions that are not federal entities. While there are broad similarities between the USAPA and OAPA, the two acts are not identical. So an overview of OAPA should be helpful.

## D. Origins of OAPA

OAPA, like most state administrative procedure acts, was adopted after the implementation of the USAPA. In 1946, National Conference of Commissioners on Uniform State Laws (NCCUSL) developed its first version of the Model State Administrative Procedure Act (MSAPA) to provide states with guidance based on the federal administrative procedure act. NCCUSL has worked for the uniformity of state laws since 1892. It is a non-profit unincorporated association, comprised of state commissioners on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands.[5] NCCUSL has continued to update the MSAPA periodically. OAPA, as currently constituted, can be traced to the 1961 Model State Administrative Procedure Act (1961 MSAPA).[6]

## E. General Overview of OAPA

Since Oklahoma agencies are authorized to utilize powers that resemble legislative, executive and judicial, the exercise of those powers presents a challenge to the separation of powers of branches of government. Similar to the U.S. Constitution, the Oklahoma Constitution provides for three separate parts of government (departments in Oklahoma) and provides separation of powers.[7] So OAPA must satisfy the separation of powers provision of the Oklahoma Constitution.

Section 250.2 of OAPA recites the power of the Legislature granted in Article V of the Oklahoma Constitution including the power to establish agencies and designate agency functions. The section further recites the authority to delegate rulemaking authority to these agencies to facilitate administration of legislative policy. This delegation of authority has been upheld by the Oklahoma Supreme Court.[8] The Legislature has reserved its right to retract any delegation of rulemaking authority unless precluded by the Oklahoma Constitution.[9]

OAPA is set forth in Title 75 Oklahoma Statutes, §§ 250 through 323. OAPA is composed of two (2) major parts or articles:

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[5] *See* www.nccusl.org.

[6] *See* Administrative Procedures Act, 1963 Okla. Sess. Laws, Chapter 371 (originally codified at 75 O.S. §§ 301-325 (Supp. 1963)).

[7] *See* OKLA CONST. art. 4, § 1.

[8] *See* Walker v. Group Health Services, Inc., 2001 OK 2, ¶ 27.

[9] *See* 75 O.S. § 250.2.

(1) Article I relating to agency filing and publication requirements for rules shall consist of §§ 250. 2, 250.6, 250.7and 250.9 through 308.2 of this Title 75 and Section 5[10] of this act. See section 250.1; and

(2) Article II relating to agency notice and hearing requirements for individual proceedings shall consist of §§ 308a through 323 of this title. We will discuss these two (2) broad powers, rule-making and adjudicating, in detail in this book.

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[10] 75 O.S. 252.

# PART ONE

# SEPARATION OF POWERS AND NONJUDICIAL CONTROL

In your Constitutional Law course you studied the text of the U.S. Constitution and cases interpreting the provisions of the U.S. Constitution. The concepts of "separation of powers" and "checks and balances" were covered in that course. If you studied U.S. Administrative Law, you are aware that U.S. agencies possess delegated authority to make rules, to adjudicate individual cases, to engage in law enforcement, and to conduct other activities related to those functions. While the legitimacy of the legislative delegations has been contested, it is now settled law.[1] Since this book is designed to introduce students to the practice of administrative law in Oklahoma, it is appropriate to review some basic concepts of Oklahoma law.

In this part of the book we will discuss the role of each department of Oklahoma state government in the administrative law process. Note the primary sources of authority are the Oklahoma Constitution and OAPA. Other sources of authority include the U.S. Constitution, federal statutes and other Oklahoma statutes describing the specific program implemented by the particular agency.

The Oklahoma Constitution was adopted in 1907. The Oklahoma Constitution declares that the state is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land.[2] The Oklahoma Constitution, like the U.S. Constitution, has a "separation of powers" provision set forth as follows:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.[3]

The powers of the three departments of the Oklahoma government are set out in articles 4, 5 and 6 of the Oklahoma Constitution. In this course, we will study the source and limits of the authority of state agencies in administrative law.

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1 *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

2 *See* OKLA. CONST. art. 1, §1.

3 OKLA. CONST. art. 4, § 1.

# Chapter 2

# Legislative Power and Delegation to Agencies

The Legislative authority of the State of Oklahoma is vested in a Legislature, consisting of a Senate and a House of Representatives. However, the people have reserved to themselves the power to propose laws and amendments to the Oklahoma Constitution and to enact or reject the same at the polls independent of the Legislature. The people have also reserved the power to approve or reject at the polls any act of the Legislature.[1] The reservation of the powers of the initiative and referendum does not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States.[2] The Legislature is directed to establish and maintain an efficient system of checks and balances between the officers of the Executive Department, and all commissioners and superintendents, and boards of control of State institutions, and all other officers entrusted with the collection, receipt, custody, or disbursement of the revenue or moneys of the State whatsoever.[3]

## A. The Nondelegation Doctrine and State Agencies

### 1. Federal Law

Before examining the Oklahoma Legislature's authority to "delegate" some of its authority to a state agency, a brief discussion of the U.S. law on this topic is helpful. Can Congress lawfully delegate its authority to an administrative agency? The U.S. Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[4] Additionally, the "necessary and proper" clause of the U.S. Constitution provides: "The Congress shall have the Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[5] In a series of decisions, the U.S. Supreme Court (Supreme Court) has articulated the "nondelegation" doctrine that limits the ability of the U.S. Congress (Congress) to delegate its legislative authority. The nondelegation doctrine invokes both separation of powers and checks and balances arguments. The *Marshall Field* decision[6] concerned the legislative

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1 *See* OKLA. CONST. art. 5, § 1.

2 *See* OKLA. CONST. art. 5, § 7.

3 *See* OKLA. CONST. art. 5, § 60.

4 U.S. CONST. art. 1, § 1.

5 U.S. CONST. art. 1, § 8.

6 *See* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892).

grant of power to the president of the United States to raise tariffs and suspend trade with foreign countries "for such time as he shall deem just" if he deemed the tariffs imposed by such countries on American goods to be unequal and unreasonable. The Supreme Court stated the nondelegation doctrine broadly, but upheld the delegation as execution of law. In the *J.W. Hampton* decision,[7] the Supreme Court articulated the "intelligible principle" or a "primary standard" as consistent with nondelegation doctrine. In 1935, the Supreme Court held twice that two separate provisions of the National Industrial Recovery Act of 1933 (NIRA) were unconstitutional under the nondelegation doctrine. These cases are the first and last Supreme Court decisions to overturn statutes as invalid legislative delegations to administrative agencies. Section 9 of NIRA made interstate shipment of hot oil a federal crime when the president of the United States deemed such a ban desirable. In *Panama Refining Co v. Ryan*,[8] the Supreme Court addressed § 9 of NIRA that placed a ban on interstate commerce of hot oil produced in newly discovered Texas fields that quickly reduced the price of oil. In overturning § 9 of NIRA, the Supreme Court noted ". . . Congress declared no policy, has established no standard, has laid down no rule."[9]

The second case that held a provision of NIRA unconstitutional was *A.L.A. Schecter Poultry Corp v. United States*.[10] In that case, the Supreme Court invalidated § 3 of NIRA under the nondelegation doctrine. The Supreme Court held that § 3 exceeded Congress's authority to regulate interstate commerce. This case involved the poultry code setting prices and required retailers to take all the chickens offered by wholesalers. The plaintiff was convicted of a crime because it permitted retailers to reject chickens. In a unanimous decision, the Supreme Court rejected § 3 because NIRA lacked an adequate standard to govern the drafting of codes. The Supreme Court distinguished this from other statutes like the Federal Trade Commission Act which focused on practices considered unfair or oppressive.

As noted above, the Supreme Court changed and did not find any other cases as violating the nondelegation doctrine. In *Yakus v. United States*,[11] the Supreme Court upheld, with a single dissent, a delegation in the Emergency Price Control Act of 1942 to the Price Administrator to fix maximum prices designed to address the economic inflationary spiral created by WWII. The Price Administrator had to ascertain and give due consideration to price prevailing as of October, 1941 and furnish a statement of considerations for particular prices. In *Yakus*, the plaintiff was convicted of selling beef in excess of ceiling price. The Supreme Court has never overruled *Schecter* and *Panama* cases!

### 2 Oklahoma Law

As noted above, Oklahoma's state government is divided into three separate departments.[12] Each department is separate and distinct and is prohibited from exercising the powers of the other departments unless authorized in the Oklahoma Constitution. The Oklahoma Legislature has explicitly stated its authority to delegate power to state agencies in § 250.2 of OAPA. That section

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7 *See* J.W. Hampton, Jr. & Co v. United States, 276 U.S. 394 (1928).

8 293 U.S. 388 (1935).

9 *Id*. at 415.

10 295 U.S. 495 (1935).

11 321 U.S. 413 (1944).

12 OKLA. CONST. art. 4, § 1.

recites the power of the Legislature granted in Article V of the Oklahoma Constitution including the power to establish agencies and designate agency functions.[13] The Oklahoma Legislature may delegate rule-making authority to agencies, boards and commissions to facilitate the administration of legislative policy pursuant to OAPA.[14] This provision has been upheld by the Oklahoma Supreme Court in *Walker v. Group Health Services, Inc.*, 2001 OK 2, ¶ 27 and reaffirmed in *Cox v. State*.

**Cox**
**v.**
**State ex rel. Dept. of Human Services**
2004 OK 17, 87 P.3d. 607

Following a pre-termination hearing, the respondent/appellant, Oklahoma Department of Human Services (DHS/employer), discharged the petitioner/appellee, Bruce R. Cox (Cox/employee), a permanent classified employee, for sexual harassment and retaliation against complaining employees. The employee filed a petition for reconsideration with the respondent, Oklahoma Merit Protection Commission (Merit Protection Commission). The administrative hearing officer upheld the discharge, as did the Commission *en banc*, and the employee appealed to the district court. Considering the parties' briefs and oral argument, the trial judge, Honorable Ryan D. Reddick, left undisturbed the administrative hearing officer's findings of fact but determined that the employer failed to follow statutory mandates for progressive discipline, reversed the administrative decision and ordered the employee reinstated. The employer appealed and the Court of Civil Appeals affirmed. We hold that: 1) 74 O.S. 2001 § 840-6.3 and Merit Protection Commission Rule OAC 455:10-11-4 do not mandate the imposition of progressive discipline in all instances nor do they require employers to prove that some less severe disciplinary act would be ineffective before imposing a more stringent penalty; and 2) although conflicting evidence was presented on the issues of sexual harassment and retaliation, the factual determination to uphold the employee's discharge was neither clearly erroneous in view of the reliable, material, probative and substantially competent evidence nor was it arbitrary or capricious; therefore, we may not substitute our judgment for that of the agency's factual determinations.

KAUGER, J.

We granted certiorari to determine whether: 1) in all instances, 74 O.S. 2001 § 840-6.3 or Merit Protection Commission Rule OAC 455:10-11-4 require an employer to progressively discipline an employee before discharge or to demonstrate that some lesser disciplinary act would be ineffective before imposing a more stringent penalty; and 2) the factual determination to uphold the employee's discharge was clearly erroneous in view of the reliable, material, probative and substantially competent evidence or arbitrary or capricious. We determine that 74 O.S. 2001 § 840-6.3 and Merit Protection Commission Rule OAC 455:10-11-4 do not mandate the institution of progressive discipline before discharge in all causes nor do they require employers to prove that some less severe disciplinary act would be ineffective before imposing a more stringent penalty. Furthermore, although the record contains conflicting evidence on the issues of sexual harassment and retaliation, the factual determination to uphold the employee's discharge was nei-

[13] OKLA. CONST. art. 5, § 1.

[14] 75 O.S. § 250.2.

ther clearly erroneous in view of the reliable, material, probative and substantially competent evidence nor was it arbitrary or capricious. Therefore, this Court will not substitute its judgment for that of the agency on its factual determinations.

* * * *

The administrative hearing officer issued a final order on September 13, 2000, finding that: 1) progressive discipline need not always be imposed; 2) a preponderance of the evidence supported Cox's discharge; and 3) there had been no abuse of discretion under the facts and circumstances of the cause. The Commissioners *en banc* reviewed the hearing officer's ruling on October 30, 2000, denying Cox's request for rehearing or reconsideration of the order. On November 27th, Cox filed a petition for review with the district court. After hearing argument, the trial judge, Honorable Ryan D. Reddick, issued an order on July 30, 2001, leaving undisturbed the administrative hearing officer's findings of fact and determining that the employer failed to follow statutory mandates for progressive discipline, reversing the administrative decision and ordering the employee be reinstated. The employer appealed and the Court of Civil Appeals affirmed, subsequently denying DHS's petition for rehearing on August 8, 2003. On November 3, 2003, certiorari was granted.

* * * *

DHS contends that neither 74 O.S. 2001 § 840-6.3 nor Merit Protection Commission Rule OAC 455:10-11-4 mandate the imposition of progressive discipline in all causes. Cox does not dispute seriously this premise. Rather, he argues that public policy mandates that only when an agency demonstrates that no lesser alternative punishment would properly address the problem may an employee be discharged without being given the opportunity to correct behavior through the progressive disciplinary process. DHS asserts that neither the statute nor the rule impose such a burden on the employer. We agree.

In determining whether a statute applies to a given set of facts, we focus on legislative intent which controls statutory interpretation. Intent is ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each. The Court presumes that the Legislature expressed its intent and that it intended what it expressed. Statutes are interpreted to attain that purpose and end championing the broad public policy purposes underlying them. Only where the legislative intent cannot be ascertained from the statutory language, i.e. in cases of ambiguity or conflict, are rules of statutory construction employed.

Title 74 O.S. 2001 § 840-6.3 provides in pertinent part:

> A. Each appointing authority **shall establish written policies and procedures for progressive discipline** of employees according to the rules established by the Oklahoma Merit Protection Commission. . . .
>
> B. Progressive discipline is a system designed to ensure not only the consistency, impartiality and predictability of discipline, but also **the flexibility to vary penalties if justified by aggravating or mitigating conditions**. Typically, penalties range from verbal warning to discharge, with intermediate levels of a written warning, suspension or demotion. . . .
>
> C. Each supervisor **shall be responsible for applying discipline when necessary that is progressive in nature**, appropriate for the offense, and equitable. Each supervisor **shall consider aggravating or mitigating circumstances when determining the proper disciplinary action**. Each supervisor **shall use prompt, positive action to avoid more seri-**

> **ous disciplinary actions**. The Oklahoma Merit Protection Commission shall promulgate rules to establish the requirements and guidelines for discipline. [Emphasis provided.]

Cox finds support for his premise in the apparently mandatory language of the statute providing that: a progressive disciplinary process "shall" be established; supervisors "shall" be responsible for applying discipline progressively; and the requirement that supervisors "shall" move promptly to avoid more serious disciplinary actions. Although the use of "shall" generally signifies a legislative command, the term can be permissive. Furthermore, despite the Legislature's clear intent that progressive discipline should be the norm when employers deal with underperforming employees, the statute also provides that, within the system itself, flexibility exists to vary penalties when justified by aggravating or mitigating circumstances. Nevertheless, the statute does not impose a duty on the employer or agency to demonstrate that a lesser disciplinary action would be ineffective before any higher penalty is instituted.

The Legislature may delegate rule-making authority to agencies, boards and commissions to facilitate the administration of legislative policy pursuant to the Administrative Procedures Act, 75 O.S. 1991 §250 et seq. Administrative rules are valid expressions of lawmaking powers having the force and effect of law. Administrative rules, like statutes, are given a sensible construction bearing in mind the evils intended to be avoided. Statutory construction by agencies charged with the law's enforcement is given persuasive effect especially when made shortly after the statute's enactment. The Legislature has directed the Merit Protection Commission to promulgate rules to establish the requirements and guidelines for progressive discipline. In connection with its responsibility to provide such guidelines, the Merit Protection Commission promulgated OAC 455:10-11-4 providing in pertinent part:

> . . . Based on relevant circumstances, **a single incident may justify a higher step of discipline without proceeding through lower steps of discipline**. [Emphasis supplied.]

Taken together, the language of 74 O.S. 2001 §840-6.3, giving agencies the flexibility to vary penalties if justified by aggravating or mitigating conditions, and the text of the Merit Protection Commission's rule, providing that one incident may justify a higher step of discipline without proceeding through lower steps, make it clear that progressive steps need not always be imposed when disciplining an errant employee.

The Legislature has acquiesced in the Merit Commission Board's interpretation. Under the Administrative Procedures Act, the Legislature may: 1) approve, delay, suspend, veto or amend any rule or proposed rule under review by joint resolution; 2) disapprove a permanent or emergency rule at any time if it determines the rule to be inconsistent with legislative intent; or 3) make an emergency rule ineffective through its disapproval. Once administrative rules are promulgated and successive legislative sessions are convened with no action to reject a rule, the Legislature's silence is regarded as proof of the lawmakers' consent. The Legislature is deemed to have adopted an administrative construction when it amends or re-enacts a relevant statute without overriding the administratively-imposed construction.

Through the promulgation of OAC 455:10-11-4, the Merit Commission made it clear that there may be instances in which progressive disciplinary steps are not warranted. The Legislature amended 74 O.S. 2001 § 840-6.3 effective March 31, 2003. In doing so, it did not alter the construction placed on the statute by the agency rule. Therefore, it has adopted the Merit Commission's interpretation.

Neither 74 O.S. 2001 § 840-6.3 nor Merit Protection Commission Rule OAC 455:10-11-4 impose a duty on the employer or agency to demonstrate that a lesser disciplinary action would be

ineffective before any higher penalty is instituted. This Court does not read exceptions into a statute nor may we impose requirements not mandated by the Legislature. Therefore, we hold that 74 O.S. 2001 § 840-6.3 and Oklahoma Merit Protection Rule 455:10-11-4 do not mandate the imposition of progressive discipline in all instances. Furthermore, they do not require employers to affirmatively demonstrate that some lesser disciplinary act would be ineffective before imposing a more stringent penalty.

* * * *

We recognize that Cox's discharge seems a high price to pay for a supervisor nearing retirement. Nevertheless, a balance must be struck between the rights of the employee and the need to have governmental operations run smoothly. The Legislature has established a clear policy against sexual harassment in state agencies. Furthermore, it recently added a new subsection to the progressive discipline regime indicating that evidence over four years old shall not be considered in imposing an increased penalty to a formerly disciplined employee [much of the evidence introduced in relation to Cox was contemporaneous with the charges and, at the oldest, two years preceding the disciplinary action]. However, one of the specific exemptions from the stale evidence rule is any incident involving sexual misconduct and/or harassment. Here, in performing his duties, the employee violated standards, restraints and restrictions on conduct, clearly and explicitly prohibited by the Legislature. Certainly, as a general rule, employers should utilize progressive disciplinary standards to correct inadequate job performance whenever appropriate. Nevertheless, under these circumstances, requiring an employer to retain such an employee would contravene the legislatively created policy against sexual harassment—especially where 74 O.S. 2001 § 840-6.3 and Merit Protection Commission Rule OAC 455:10-11-4 do not mandate the imposition of progressive discipline in all instances or require employers to prove that some less severe disciplinary act would be ineffective before imposing a more stringent penalty.

The record contains conflicting evidence on the issues of sexual harassment and retaliation. Nevertheless, the factual determination to uphold the employee's discharge was neither clearly erroneous in view of the reliable, material, probative and substantially competent evidence nor was it arbitrary or capricious. Therefore, we may not substitute our judgment for that of the agency's factual determinations.

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### B. Limits on the Power to Delegate Authority to an Agency

A leading case in Oklahoma on this topic is *City of Oklahoma City v. State ex rel. Oklahoma Dept. of Labor*.

**City of Oklahoma City**
**v.**
**State ex rel. Oklahoma Dept. of Labor**
1995 OK 107, 918 P.3d 26

City and its public trusts sought declaratory judgment that Prevailing Wage Act violated provisions of Oklahoma Constitution. Trial court granted City's motion for summary judgment.

AFFIRMED.

HODGES, JUSTICE.

This dispute concerns the constitutionality of Oklahoma's Minimum Wages on Public Works Act, Okla.Stat. tit. 40, §§ 196.1-196.14 (1991), also known as the Prevailing Wage Act or the Little Davis-Bacon Act. This Court holds that the Act violates article IV, section 1, and article V, section 1 of the Oklahoma Constitution. It delegates the power to determine prevailing wages to a department of the federal government without setting standards for the exercise of that determination. Other assertions of unconstitutionality need not be addressed.

The City of Oklahoma City (City) became concerned about dramatic increases in the prevailing wage between October 31, 1994, and December 30th of that year. The Oklahoma City Airport Trust filed a "Request for a Hearing, Protest and Objection to the Validity of the Prevailing Wage Rate Act, and Request to Void or Amend the Prevailing Wage Rates" with State Labor Commissioner, Brenda Reneau, asking her to review the wage determinations. In response, Reneau explained that, pursuant to the Act, the determinations were made by the United States Department of Labor and that she had no statutory authority to investigate errors on inaccuracies in the federal determinations.

The City and four of its public trusts then filed an action in the district court seeking declaratory judgment, a permanent injunction, and a petition for review of the Labor Commissioner's decision that she had no authority to review the federal agency's wage determinations. The City moved for summary judgment raising several theories as to how the Act was void because it violated the Oklahoma Constitution. The trial court granted the motion without articulating the bases upon which the Act was constitutionally infirm.

The appeal, brought by the State of Oklahoma to this Court, is governed by the accelerated procedures found in Rule 1.203 of the Rules of Appellate Procedure in Civil Cases, Okla.Stat. tit. 12, ch. 15, app. 2 (Supp. 1994). The parties were allowed to brief the issues on appeal. In addition, the Oklahoma State Building and Construction Trades Council was allowed to file a brief as amicus curiae.

The challenged Act was promulgated in 1965. It mirrors provisions of the federal Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-5 (1994), which requires the payment of prevailing wages on federally financed construction projects. The Oklahoma Act declares the policy underlying its passage:

> It is hereby declared to be the policy of the State of Oklahoma that a wage of no less than the prevailing hourly rate of wages for work of a similar character in the locality in which the work is performed shall be paid to all workmen employed by or on behalf of any public body engaged in public works exclusive of maintenance work.

Okla.Stat. tit. 40, § 196.1. Thus, the Act prohibits state and local governments from driving down the amount of workers' wages through competitive bidding.

* * * *

The Act originally gave Oklahoma's Labor Commissioner complete authority to compile wage data and to determine prevailing wages. These determinations were made independently from any determination made by the United States Department of Labor. The Act required Oklahoma's Labor Commissioner to file wage determinations on July 1st of each year. Objections to those determinations were heard by the Labor Commissioner. Appeals from the commissioner's decisions were filed in district court.

In 1981, the Oklahoma Legislature amended the Act to provide that the prevailing wage, already determined by the United States Department of Labor for federally funded projects pursuant to the Davis-Bacon Act, be adopted by Oklahoma's Labor Commissioner. *Id*. at § 196.6. The Labor Commissioner can now determine a prevailing wage only when the United States Department of Labor has not determined the prevailing wage in a particular category of work or in a particular geographic area. No procedure was provided to protest or challenge a federal wage determination before Oklahoma's Labor Commissioner or in Oklahoma courts. A 1985 amendment to the Act provides for review only of wage rates set by the Labor Commissioner for a locality for which a federal determination has not been made.

The City charges that the Act impermissibly delegates the authority to make wage determinations to a federal agency while leaving Oklahoma's Labor Commissioner with no authority to check the accuracy of these determinations. The State of Oklahoma argues that the delegation is permissible because the United States Department of Labor is merely implementing the legislative policy articulated in the Act when it makes wage determinations.

Section 1 of article IV of the Oklahoma Constitution provides:

> The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

Section 1 of article V requires that "[t]he Legislative authority of the State shall be vested in a Legislature consisting of a Senate and House of Representatives. . . ." From these constitutional provisions comes the prohibition against the delegation of legislative power.

The prohibition "rests on the premise that the legislature must not abdicate its responsibility to resolve fundamental policy making by [1] delegating that function to others or [2] by failing to provide adequate directions for the implementation of its declared policy." *Democratic Party v. Estep*, 652 P.2d 271, 277 n. 23 (1982). The facts of this case concern the second aspect of the prohibition.

* * * *

Of the thirty-one states that currently have a prevailing wage law, only Oklahoma's version delegates authority to the United States Department of Labor as the sole method of determining

the prevailing wage. Connecticut gives its Labor Commissioner the option of holding a hearing to determine the prevailing wage or adopting the federal determination. CONN. GEN. STAT. ANN. § 31-53(d). In Oregon, the Commissioner of the Bureau of Labor and Industry may use the federal wage only if local wage data are not available in a particular locality. OR. REV. STAT. § 279.350. These limited delegations of authority to the federal government have not been challenged in either state.

In the other prevailing wage law states, the wage determination is assigned to a state official, an appointed committee, or the authority awarding the contract. Therefore, challenges to the delegation of wage determinations in those states have involved delegation to entities other than the federal government. *See* Annotation, *Validity of Statute, Ordinance, or Charter Provision Requiring that Workmen on Public Works be Paid the Prevailing or Current Rate of Wages*, 18 A.L.R.3d 944, 965 (1968).

Oklahoma's Act suffers from the same constitutional infirmity as did the Arkansas Act. It is not enough that the Legislature declared its policy in the Act, because no standard was established to implement the wage determinations. As this Court has noted: "No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines or standards should appear expressly in the Act." *Estep*, 652 P.2d at 277 n. 25. Otherwise, legislative authority is abdicated.

The current version of Oklahoma's Act fails to articulate the necessary guidelines or standards for determining prevailing wages. Thus, it impermissibly delegates legislative power. The trial court did not err in granting the City's motion for summary judgment.

* * * *

**Notes and Questions**

1. Is the nondelegation doctrine still alive in U.S. administrative law? *See* the jurisprudence from *Marshall Field*, *J.W. Hampton* through *Yakus* discussed in the preceding section.

2. In Oklahoma, the *Walker* and *Cox* decisions are clear statements that the Oklahoma Legislature can delegate rule-making authority to agencies.

**Problem**

The Ethics Commission ("Commission") is a constitutionally created entity. The Commission was created by a vote of the people through Initiative Petition that added an article to the state constitution that created the Commission. The Commission is made up of five private citizens, who serve without compensation. One each is appointed by the Governor, President Pro Tempore of the Senate, Speaker of the House, Chief Justice of the Supreme Court and Attorney General. No more than three can be of the same political party. No more than one congressional district may be represented at a time. State law authorizes the Commission to promulgate rules of ethical conduct carrying civil penalties for: state officers and employees, campaigns for elective state office, and campaigns for state initiatives and referenda. The Commission drafts the rules and has direct prosecutorial authority over them. The Commission has held a hearing and determined that your client has violated the Ethics Rules. Can you challenge the Commission's validity based on Oklahoma's nondelegation doctrine? *See* Articles 4, 5, 6 and 7 of the Oklahoma Constitution *and* 75 O.S. § 250.2

## C. Agency Power to Interpret a Statute

The Oklahoma Legislature has the constitutional authority to establish agencies and designate agency functions, budgets and purposes.[15] The legislature has authorized agencies to interpret statutes by virtue of their rulemaking and adjudicatory power.[16]

**Estes**
**v.**
**ConocoPhillips Co.**
2008 OK 21, 184 P.3d 518

The United States District Court for the Northern District of Oklahoma certified two first impression questions of Oklahoma law under the Revised Uniform Certification of Questions of Law Act, 20 O.S. 2001 §§1601-1611:

> 1. Under the 2005 version of the Oklahoma Standards for Workplace Drug and Alcohol Testing Act, are evidential breath tests to determine an employee's blood alcohol content, laboratory services which must be confirmed by a licensed testing facility?
>
> 2. What is the standard to determine whether an employer has committed a willful violation of the Testing Act as the term in [sic] used in 40 O.S. 2001 §563(A)?

Evidential breath tests under the Testing Act are laboratory services which must be confirmed by a licensed testing facility before an employer may take disciplinary action in reliance on the test results. The term willful violation means conscious, purposeful violations or deliberate disregard of the Testing Act by those who know or should have known of its provisions.

**QUESTIONS ANSWERED.**

KAUGER, J.:

¶1 The United States District Court for the Northern District of Oklahoma certified two first impression questions of Oklahoma law:

> 1. Under the 2005 version of the Oklahoma Standards for Workplace Drug and Alcohol Testing Act, are evidential breath tests to determine an employee's blood alcohol content, laboratory services which must be confirmed by a licensed testing facility?
>
> 2. What is the standard to determine whether an employer has committed a willful violation of the Testing Act as the term in [sic] used in 40 O.S. 2001 §563(A)?

The plaintiff, Dennis E. Estes (Estes), a mechanical engineer, was employed by the defendant, ConocoPhillips Company (Conoco) for over thirty years. On the evening of May 23, 2005, his son came home from college, and Estes and his family celebrated with a family cookout, at which

[15] See 75 O.S. § 250.2.

[16] See 75 O.S. § 250.3.

he drank beer and wine. On May 24, 2005, Estes arrived at work around 1:00 pm, and his supervisor asked him to submit to a drug and alcohol test, which, unbeknownst to Estes, had been scheduled several days prior, pursuant to Conoco's testing policy. There is no allegation that Estes appeared intoxicated, that he had ever been intoxicated at work, or that he had been anything but a model employee.

Estes was sent to Conoco's Ponca City Medical Clinic (the clinic), where a registered nurse utilized an "evidential breath testing device" (EBT) to test Estes' blood alcohol content (BAC) at 1:30 pm. At the time of his test, it had been at least ten hours since Estes' last drink. The initial test results showed that Estes had a BAC of 0.076 gm/dl. At least fifteen minutes later, a second EBT indicated that Estes had a BAC of 0.064 gm/dl. The maximum allowable BAC under Conoco's testing policy was 0.04 gm/dl, a level 50% lower than Oklahoma's legal limit for operating a motor vehicle under the influence of alcohol: 0.08 gm/dl.

When a police officer subjects an operator of a motor vehicle to an EBT, Oklahoma law mandates that a sufficient quantity of breath must be obtained and retained for 60 days so that the person may have an independent laboratory conduct a test on the sample preserved. However, the Testing Act does not require employers to use an EBT that retains a breath sample for retesting. The clinic used the Intoximeter Alcosensor IV, the least expensive EBT included in the BOH Rules' table of approved EBTs. The Intoximeter Alcosensor IV is a handheld device powered by a nine volt battery that is of the "blow through" variety, therefore, no sample of Estes' breath was collected which could be independently tested at a later date, and no sample of any bodily fluid was taken or preserved. Based solely on the EBT results and no other evidence, Conoco terminated Estes within an hour of the administration of the second EBT, and informed him that there was no procedure to appeal his dismissal. It is undisputed that, at the time, the clinic did not have a license to perform laboratory services under the Testing Act.

On August 4, 2005, Estes filed a wrongful termination suit in the United States District Court for the Northern District of Oklahoma alleging that his employment was terminated in willful violation of the Testing Act. He sought injunctive relief to prevent Conoco from engaging in future testing and declaratory relief to reinstate him to his previous position. He also sought monetary damages including lost wages, compensatory damages for emotional distress and damage to his reputation, as well as attorney's fees, costs, and expenses. On August 25, 2005, Conoco moved to dismiss Estes' complaint for failure to state a cause of action under the Testing Act. On November 7, 2006, the federal court certified the questions to this Court.

* * * *

Pursuant to the Administrative Procedures Act, 75 O.S. 2001 §§250-323, the Legislature may delegate rulemaking authority to agencies, boards, and commissions to facilitate the administration of legislative policy. Administrative rules are valid expressions of lawmaking powers having the force and effect of law. Administrative rules, like statutes, are to be given a sensible construction.

Statutory construction by agencies charged with the law's enforcement is given persuasive effect especially when it is made shortly after the statute's enactment. Nevertheless, if the Legislature disagrees with an agency interpretation, it may: 1) delay, suspend, veto, or amend any rule or proposed rule by joint resolution; 2) disapprove a permanent or emergency rule at any time if it determines the rule to be inconsistent with legislative intent; or 3) make emergency rules ineffective through its disapproval. None of these actions have been taken by the Legislature in regard to the BOH rules. The Legislature's silence is evidence of the lawmakers' consent and adoption of the administrative construction.

This Court will show great deference to an agency's interpretation of its own rules. When the terms of a regulation are amenable to more than one meaning, we ordinarily defer to the interpretation adopted by those charged with the duty of administration. When choosing between two or more possible meanings of a regulation, controlling weight may be given to long-continued administrative usage unless it is plainly erroneous or inconsistent with the language. Deference to an agency's interpretation is even more clearly in order when the construction is that of an administrative regulation rather than a statute.

It is clear that the Board of Health has interpreted alcohol confirmation tests utilizing EBT as laboratory services requiring licensure, and that the Legislature has adopted this construction. Therefore, we find that under the version of the Testing Act in effect on May 24, 2005, evidential breath tests to determine an employee's blood alcohol level are laboratory services which must be confirmed by a licensed testing facility before an employer may take disciplinary action in reliance on those test results.

* * * *

The primary goal of statutory interpretation is to ascertain and follow the intent of the Legislature. Where a statute's meaning is ambiguous or unclear, we employ rules of statutory construction to give the statute a reasonable construction that will avoid absurd consequences. It is important in construing the Legislative intent behind a word to consider the whole act in light of its general purpose and objective, considering relevant portions together to give full force and effect to each. A statute will be given a construction, if possible, which renders every word operative, rather than one which makes some words idle and meaningless. We presume that the Legislature expressed its intent and intended what it expressed, and statutes are interpreted to attain that purpose and end, championing the broad public policy purposes underlying them.

The term willful does not have a uniform meaning throughout our statutes. As the Court stated in *Wick v. Gunn*, 1917 OK 607, ¶3, 169 P. 1087, there are "numerous definitions of the word [willful] by both lexicographers and jurists." In the context of a willful violation of the Alcoholic Beverage Control Act, this Court held: "The word 'willfully' is of similar import or the equivalent of 'knowingly' [and] requires that the licensee at least have some knowledge of the commission of the prohibited acts." The Court held that a willful violation of the Open Meetings Act, "does not require a showing of bad faith, malice, or wantonness, but rather, encompasses both conscious, purposeful violations of the law and blatant or deliberate disregard of the law by those who know, or should know, the requirements of the [Open Meetings] Act."

* * * Because the term willful does not have a singular meaning, it must be construed within the confines of the Act in which it appears.

* * * *

EDMONDSON, V.C.J., HARGRAVE, OPALA, KAUGER, WATT, TAYLOR, COLBERT, and REIF, J.J., concur.

WINCHESTER, C.J., not participating.

**Notes and Questions**

The Oklahoma Legislature may delegate rulemaking to agencies to facilitate the administration of legislative policy. Does the 2013 amendment to 75 O.S. § 250.2 change the rationale of ¶¶ 10 and 11 of the *Estes* case?

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## D. Delegation of Adjudicatory Power to Agencies

Agencies have no authority except that conferred by statute, executive order or Oklahoma Constitution. Any agency action is ultra vires if not authorized as described above. The U.S. Constitution vests the federal judicial power in Article III judges.[17]

As noted earlier, the Oklahoma Constitution provides for separation of powers among the three departments of state government.[18] The language of that section explicitly prohibits any department of Oklahoma government from exercising the powers of the other departments. It is clear that Oklahoma agencies, unlike federal agencies, may constitutionally exercise judicial power whenever there is a grant of authority by either the Oklahoma Constitution or a statute.

Article II of OAPA governs the hearing procedures of agencies[19] "covered" by OAPA.[20] Title 75 O.S. § 308a provides that the OAPA does not grant jurisdiction not otherwise provided by law.

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## E. Legislative Oversight and Controls

The Legislature retains the authority control and limit agencies by the following methods:[21]

- Retracting any delegation of rulemaking authority unless otherwise precluded by the Oklahoma Constitution;
- Establishing general policy by legislation;
- Designating the method for rule promulgation, review and modification; and
- Approving, delaying, suspending, vetoing, or amending the implementation of any rule or proposed rule.

As noted above, the Legislature can narrow the agency's enabling act or by overturning the specific agency action deemed objectionable. Enactment of statute to overturn agency action may be difficult since it requires concurrence by both the House and Senate. Additionally, legislative

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[17] U.S. CONST. art. III, § 1.

[18] OKLA. CONST. art. VII, § 1.

[19] Article II relating to agency notice and hearing requirements for individual proceedings shall consist of §§ 308a through 323 of this title. *See* 75 O.S. § 250.1.

[20] Title 75 O.S. § 250.4(B) lists agencies not required to comply with Article II of OAPA.

[21] 75 O.S. § 250.2(B).

action is subject to veto by the governor. Another power available to the Legislature is referred to as the legislative veto. This procedure allows legislators to invalidate or suspend agency action by less cumbersome means than the enactment of a statute. Each agency is required to send two copies of a permanent rule to the governor, speaker of the House of Representatives and president pro tempore of the Senate within ten days after adoption of the rule.[22] If the rules are received on or before April 1, the Legislature has until the last day of the regular legislative session of that year to review the rules. If the rules are received after April 1, the Legislature has until the last day of the regular legislative session of the next year to review the rules.[23] The Legislature, by the adoption of a joint resolution, may disapprove any rule or approve any rule which has been submitted for review, or otherwise approve any rule.[24] The governor has a role in the adoption of permanent rules as set forth in OAPA § 308.3.

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## F. Attorney General Opinions

The Oklahoma Attorney General is part of the Executive Branch of state government.[25] The Attorney General's duties include giving an opinion in writing upon all questions of law submitted by the Legislature or either branch thereof, or by any state officer, board, commission or department.[26] The Attorney General's office is an agency for purposes of OAPA.[27] That presents the question of whether an Attorney General's opinion is subject to OAPA? The *Grand River Dam Authority* case below addresses that question.

**Grand River Dam Authority**
**v.**
**State**
1982 OK 60, 645 P.2d 1011

OPALA, JUSTICE:

The single first-impression issue in this case is whether the Attorney General, when [645 P.2d 1013] issuing formal written opinions, is governed by the Administrative Procedures Act, 75 O.S.Supp. 1978 § 301 et seq. We hold that he is not and affirm the ruling of the district court dismissing the action for lack of venue.

Appellant, Grand River Dam Authority, is a conservation and reclamation district. Appellee, the Attorney General, issued Opinion No. 80-51, which construed appellant's authority, powers,

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22 75 O.S. § 303.1(A).

23 75 O.S. § 308.

24 75 O.S. § 308.

25 OKLA. CONST. art. VI, § 1.

26 74 O.S. § 18b(5).

27 75 O.S. § 250.3(3).

rights, duties and obligations under its enabling legislation, 82 O.S. 1981 §§ 861-890. Appellant brought an action in the District Court, Craig County, seeking declaratory and injunctive relief and to have Opinion No. 80-51 overruled. Appellee entered a special appearance and plea to jurisdiction and venue, on the ground that venue did not lie in Craig County, but rather in Oklahoma County, under 12 O.S. 1971 § 133. Appellant sought to convince the court that the special venue provision in 75 O.S.Supp. 1977 § 306 should govern the case. It allows a declaratory judgment suit that deals with an agency rule to be brought in the county in which the plaintiff resides. The district court ruled that the issuance of an opinion is a "quasi-judicial" activity of the attorney general and not a promulgation of a rule and, therefore, that the provisions of 75 O.S.Supp. 1977 § 306 of the Administrative Procedures Act [APA] did not apply. The court then granted appellee's motion to dismiss and this appeal followed.

* * * *

Appellant presses for application to the action of the special venue provisions in § 306 of the APA. That Act provides:

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied, if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. . . ."

* * * *

Third, the 1978 version of § 308(f) of the APA provided that agency rules could be promulgated only while the legislature was in session, unless there was imminent peril to the public health, safety or welfare. Attorney's general opinions are not so limited. To the contrary, 75 O.S.Supp. 1979 § 26.1 specifically provides that the attorney general shall construe certain laws enacted during a legislative session after the session has ended. Moreover, although the other sections dealing with such opinions are not so explicit, there would be no warrant for requiring the attorney general to wait until the next legislative session before he could issue an advisory opinion to state officials on problems that arose between sessions.

Fourth, the 1978 version of § 308(d) of the APA provided that an agency rule was subject to a "legislative veto" by the adoption of a resolution to that effect. It has never been suggested that the legislature, by a simple vote of disapproval by one house, could overturn an opinion of the Attorney General. To the contrary, a public [645 P.2d 1018] official with notice thereof is obligated to follow the opinion of the Attorney General "until relieved of such duty by a court of competent jurisdiction or until this Court should hold otherwise."

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### G. Filing Proposed Rules with Governor and Legislature

One of the ways the governor and legislature exercise control over agencies is through the rule review and adoption process described above and codified in OAPA.

**Musgrove Mill, LLC**
**v.**
**Capitol-Medical Center Improvement & Zoning Comm.**
2009 OK 19, 210 P.3d 835

Musgrove Mill, LLC brought a declaratory judgment action in the district court challenging the validity of the comprehensive plan and zoning regulations promulgated by the Oklahoma Capitol-Medical Center Improvement and Zoning Commission. Musgrove Mill sought this determination following the Commission's denial of Musgrove Mill's request to develop property that lies within the Commission's jurisdiction. The district court granted summary judgment in favor of the Commission and the Court of Civil Appeals affirmed. Musgrove Mill timely sought certiorari review by this Court.

PER CURIAM:

This Court granted certiorari to review a challenge by Musgrove Mill, LLC to the validity of the comprehensive plan and zoning regulations promulgated by the Oklahoma Capitol-Medical Center Improvement and Zoning Commission. The validity of the comprehensive plan and zoning regulations presents a public law question, because it concerns use of delegated Legislative power for "the orderly development of the district surrounding the State Capitol and the Medical Center of the University of Oklahoma under direct supervision of the State itself." 73 O.S.2001 § 82.1. In cases involving public law issues, this Court is free to grant corrective relief upon any applicable legal theory tendered by the record brought for review. *Russell v. Board of County Commissioners, Carter County,* 1997 OK 80, ¶10, 952 P.2d 492, 497. The scope of review extends to matters raised at oral argument.

In oral argument before the Court, Musgrove Mill contended that the Legislature's authorization for the Commission to establish a plan and zoning regulations that have the force of law is an unconstitutional delegation of Legislative power to an entity whose members are all appointed. In response, the Intervenor pointed out that there are numerous appointed boards, agencies, and commissions in State Government that have promulgated valid rules and regulations. To resolve this controversy, this Court must necessarily examine the statutes governing the Oklahoma Capitol-Medical Center Improvement and Zoning Commission and any other statutes that affect the Commission's law- making power.

The Statutes creating and governing the Commission are set forth at 73 O.S.2001 and Supp. 2007 §§ 82.1 through 92. Review of these statutes reveals that the Legislature did not expressly require that the plan and zoning regulations of the Commission be approved by the Legislature. Such silence in the Act, however, does not mean Legislative approval is not required nor preclude the operation of other general legislative policy regarding law-making by agencies of the State.

* * * *

The Oklahoma Capitol-Medical Center Improvement and Zoning Commission is a statutorily created commission and is not specifically excepted by name under § 250.4. It is also not "a specialized agency created by the Legislature to perform essentially local functions" that is excepted under § 250.5. The zoning performed by the Oklahoma Capitol-Medical Center Improvement and Zoning Commission is *not* essentially a local function, because the Legislature expressly stated its purpose was "to provide a comprehensive plan for the orderly development of the district surrounding the State Capitol and the Medical Center of the University of Oklahoma *under direct supervision of the State itself,* rather than by its governmental subdivisions." 73 O.S.2001

§ 82.1 (emphasis added). That is, zoning of the Capitol-Medical Center Improvement and Zoning District represents the will of the people of the State of Oklahoma and not merely local policy.

* * * *

Within ten days after the adoption of a permanent rule, the agency is required to file two copies of new rules with the Governor, the Speaker of the House of Representatives and President Pro Tempore of the Senate.75 O.S.2001 § 303.1(A). These new rules are to be accompanied by a report that summarizes the agency's compliance with the Administrative Procedures Act. 75 O.S.2001 § 303.1(E).

Thereafter, the Governor has forty-five calendar days from receipt of the rule to approve or disapprove the rule and, if disapproved by the Governor, a rule cannot become effective unless otherwise approved by the Legislature. 75 O.S. 2001 § 303.2. The Speaker of the House of Representatives and President Pro Tempore of the Senate assign such rules to the appropriate committees of each house for review to be complete in thirty days. 75 O.S.2001 § 308. The Legislature has expressly reserved the right to approve, delay, suspend, veto or amend any proposed rule while under Legislative review. 75 O.S.2001 § 250.2(B)(4). With certain exceptions not relevant here, "no agency shall promulgate *any* rules unless reviewed by the Legislature pursuant to [§ 308]." 75 O.S.2001 § 308(G). Legislative review is clearly a substantive requirement for validity and not just a procedural requirement.

Given the Legislative oversight and approval of agency law-making provided for in the Administrative Procedures Act, this Court must conclude that agency law-making undertaken in compliance with Article I of the Administrative Procedures Act is not an unconstitutional delegation of Legislative power. Deciding that a state agency, like the Capitol-Medical Center Improvement and Zoning Commission, may constitutionally engage in law-making does not answer the question of whether the Capitol-Medical Center Improvement and Zoning Commission exercised its delegated power in compliance with the Administrative Procedures Act. Stated another way, the validity of the Commission's plan and zoning regulations depends upon the Commission's compliance with Article I of the Administrative Procedures Act, particularly review and approval by the Legislature.

"The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the county of the residence of the person seeking relief . . . if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff." 75 O.S.2001 § 306(A). This is the substance of Musgrove Mill's complaint in the declaratory judgment action below.

The record before this Court is silent on the issue of whether the Capitol-Medical Center Improvement and Zoning Commission has submitted its comprehensive plan and zoning regulations for Legislative review and approval. Therefore, this Court must remand this case to the district court to make that determination. If the district court determines that the plan and zoning regulations were not heretofore submitted to the Legislature for review and approval, Musgrove Mill would be entitled to declaratory relief, because "[n]o agency rule is valid or effective against any person or party, or may be invoked by the agency for any purpose, until it has been promulgated as required in the Administrative Procedures Act." 75 O.S.2001 § 308.2(A). Conversely, if the district court determines that the plan and zoning regulations were heretofore submitted to the Legislature for review and approval, then the Commission would be entitled to declaratory judgment in its favor on the issue of the validity of the plan and zoning regulations. The Commission would be entitled to such relief, because want of Legislative approval is the only substantive re-

quirement at issue. Relief for any non-compliance with procedural requirements would be barred under 75 O.S.2001 § 308.2(B).

In conclusion, this Court holds that the Oklahoma Capitol-Medical Center Improvement and Zoning Commission is a state agency subject to the Administrative Procedures Act. This Court further holds that the Commission's adoption of a comprehensive plan and zoning regulations must comply with the rule and rulemaking requirements of the Administrative Procedures Act to be valid, including submission of the plan and zoning regulations to the Governor and Legislature for review and approval. Any provision in the plan or zoning regulation promulgated without compliance with the Administrative Procedures Act is invalid based on such non-compliance, and not because of an unconstitutional delegation of Legislative power to an appointive body. The record before this Court does not permit this Court to determine whether the comprehensive plan and zoning regulations were promulgated by the Commission in compliance with the Administrative Procedures Act. Accordingly, this case is remanded to the trial court for further proceedings to make that determination. If the trial court determines there was non-compliance with the requirements previously discussed in this opinion, Musgrove Mill is entitled to judgment declaring the plan and zoning regulations invalid. If the trial court determines there was compliance with the requirements, the Commission is entitled to judgment declaring the plan and zoning regulations valid.

**OPINION OF THE COURT OF CIVIL APPEALS VACATED; REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

ALL JUSTICES CONCUR; REIF, ACTING C.J., AND BUBENIK, BURRIS, LINDLEY, MICHAEL, PETERSON, STILLWELL, TAYLOR, WOODSON, S.JJ.

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## H. Governor's Role in Rule-Making Oversight

The governor is the chief magistrate of the state.[28] The governor has the power to commission all officers not otherwise commissioned by law and fill vacancies, unless otherwise provided by law.[29]

An additional gubernatorial role is that agencies are required to file two copies of a "permanent" rule to the governor within ten (10) days of adoption.[30] If the Oklahoma Legislature fails to approve a rule by joint resolution, the agency may appeal to the governor to approve the rule.[31]

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[28] OKLA. CONST. art. VI, § 2.

[29] OKLA. CONST. art. VI, § 13.

[30] 75 O.S. § 303.1(A).

[31] 75 O.S. § 308.3.

# PART TWO

# AGENCY PROCEDURES

This part of the book discusses the two (2) broad powers agencies have: rulemaking and adjudication. OAPA is divided into Article I (rulemaking) and Article II (individual proceedings). Some agencies are completely excluded from OAPA coverage. Some agencies are covered by Article I only or Article II only. *See* 75 O.S. § 250.4 below for the list. Even if excluded in whole or in part from OAPA coverage agencies must publish their rules pursuant to 75 O.S. § 250.4a.

Title 75 O.S. § 250.4 reads:

A.1. Except as is otherwise specifically provided in this subsection, each agency is required to comply with Article I of the Administrative Procedures Act.

2. The Corporation Commission shall be required to comply with the provisions of Article I of the Administrative Procedures Act except for subsections A, B, C and E of Section 303 of this title and Section 306 of this title. To the extent of any conflict or inconsistency with Article I of the Administrative Procedures Act, pursuant to Section 35 of Article IX of the Oklahoma Constitution, it is expressly declared that Article I of the Administrative Procedures Act is an amendment to and alteration of Sections 18 through 34 of Article IX of the Oklahoma Constitution.

3. The Oklahoma Military Department shall be exempt from the provisions of Article I of the Administrative Procedures Act to the extent it exercises its responsibility for military affairs.

4. The Oklahoma Ordnance Works Authority, the Northeast Oklahoma Public Facilities Authority, the Oklahoma Office of Homeland Security and the Board of Trustees of the Oklahoma College Savings Plan shall be exempt from Article I of the Administrative Procedures Act.

5. The Transportation Commission and the Department of Transportation shall be exempt from Article I of the Administrative Procedures Act to the extent they exercise their authority in adopting standard specifications, special provisions, plans, design standards, testing procedures, federally imposed requirements and generally recognized standards, project planning and programming, and the operation and control of the State Highway System.

6. The Oklahoma State Regents for Higher Education shall be exempt from Article I of the Administrative Procedures Act with respect to:

a. prescribing standards of higher education,

b. prescribing functions and courses of study in each institution to conform to the standards,

c. granting of degrees and other forms of academic recognition for completion of the prescribed courses,

d. allocation of state-appropriated funds, and

e. fees within the limits prescribed by the Legislature.

7. Institutional governing boards within The Oklahoma State System of Higher Education shall be exempt from Article I of the Administrative Procedures Act.

8.a. The Commissioner of Public Safety shall be exempt from Sections 303.1, 303.2, 304, 307.1, 308 and 308.1 of this title insofar as it is necessary to promulgate rules pursuant to the Oklahoma Motor Carrier Safety and Hazardous Materials Transportation Act, to maintain a current