

OPINION

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Importance of law-based errors in appeals of agency decisions

By Robert J. Munnelly Jr.



An op-ed I wrote for Lawyers Weekly in 2003 on practicing before Massachusetts state agencies and ensuing appeals of adverse

state and local agency decisions ("Tips for practicing before an agency in Mass.," Oct. 13) made the following observation relative to administrative appeals: "Since 'error of law' is the easiest legal standard to meet, issues should be presented as involving legal questions to the greatest extent possible."

A survey of trial court and appellate decisions since 1990 in agency appeals brought under the Administrative Procedure Act (G.L.c. 30A, §14) and certiorari statute (G.L.c. 249, §4) has confirmed the fundamental accuracy of this conclusion.

"Error of law" and related law-based grounds for appeal (i.e., "in violation of constitutional provisions," "in excess of the statutory authority of jurisdiction of the agency" and "made upon unlawful procedure") provide by far the best opportunity for obtaining a reversal of an adverse agency decision as compared to the fact-based or discretionary grounds of "lack of substantial record evidence," "arbitrary and capricious action" or "abuse of discretion."

The latter three grounds prevail only rarely and, even then, often involve at their core agency procedural errors or unreasonable interpretations of underlying legal guidelines.

Consequently, just as my Lawyers Weekly article suggested six years ago, parties challenging an agency decision should maximize chances of winning on a law-based ground by (1) highlighting any and all procedural errors made by the agency, (2) shaping arguments to rely on a law-based ground if at all possible, and (3) shaping arguments to avoid the possible application of issues that trigger an agency-favorable scope of review (i.e., involving technical expertise, specialized knowledge, and scope of the agency's own statutes and regulations).

Furthermore, if no compelling material legal error is present, appealing parties should seek to bring themselves within the scope of the handful of "pure" substantial evidence and arbitrary and capricious/abuse of discretion precedents in which parties have prevailed in the Massachusetts courts.

Those precedents can be grouped into four principal categories and are especially important if one cannot identify a material law-based error.

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Overview of survey results

With the assistance of law clerks and associates, a survey was conducted of all reported appellate and trial court Chapter 30A and certiorari cases from 1990 to the present. In order to make the survey of manageable scope, decisions under the numerous other agency-specific appeal statutes were not included.

As expected, given the agency-favorable standards of review and requirements that courts should defer to an agency's specialized knowledge, technical expertise and reasonable interpretations of its own statutes and regulations, the agency decisions were upheld in a substantial majority of cases.

Also as expected, most winning arguments brought by aggrieved parties were based on error of law or one or more of the other law-based grounds.

Nevertheless, a surprising aspect of the survey results was the limited number of cases in which litigants prevailed solely based on a lack of substantial evidence, arbitrary or capricious action or abuse of agency discretion.

In most cases that purported to rest on these non-law-based grounds, the decision actually still relied substantially, and in some cases entirely, on agency procedural errors and misinterpretations of state and federal legal guidelines. (Some examples are discussed below.)

This suggests that parties seeking to challenge agency decisions that lack a significant law-based ground should pay particular attention to the relative handful of cases in which non-law-based grounds have prevailed. (The key grounds for reversal on "pure" non-law-based grounds are also outlined below.)

Legal error issues underlying non-law-based decisions

As noted above, many trial court and appellate decisions that purported to rest on one of the three principal non-legal grounds actually appear to be founded in whole or in part on some form of agency law-based error.

This substantially reduces the number of cases in which one could claim that the decision is based solely on a lack of sufficient factual support in the record or agency action that is either arbitrary or outside the bounds of reasonable discretion.

In one high-profile example, *Levy v. The Acting Governor*, 436 Mass. 736, 748-49 (2002), the Supreme Judicial Court reviewed acting Gov. Jane Swift's decision to remove two Massachusetts Turnpike members for "cause" under G.L.c. 30, §9, by first interpreting "cause" to exclude good-faith disagreements by board members over policy issues.

Having construed the legal issue before it in a manner different from the decision-maker whose order was challenged under the certiorari statute, the court reversed the order for lacking substantial evidence.

As only a few out of many other examples, one "arbitrary and capricious" finding that certain services were not "medically necessary" was founded in large part on the finding that the agency's prepayment review program at issue conflicted with federal law. *Massachusetts Eye*

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and Ear Infirmary v. Commissioner of the Division of Medical Assistance, 428 Mass. 805, 817 (1999).

In another, the SJC found that a taking of public property was "arbitrary and capricious" but based its decision on the lack of statutory authorization in G.L.c. 82 for the form of taking used by the agency. *Chandler v. County Commissioners of Nantucket County*, 437 Mass. 430, 441-442 (2002).

Similarly, the core element of the finding of an "abuse of discretion" in assigning a 12 percent interest rate on back pay damages rather than a floating interest rate was a misinterpretation of interest rate requirements in G.L.c. 231, §6I. *Sec'y of Admin. & Fin. v. Labor Relations Comm'n*, 434 Mass. 340, 344-345 (2001).

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Finally, the lack of substantial evidence for a retirement board's classification of an employee who served as a supervisor during non-business hours and in emergency situations revolved around the interpretation of the term "employment" in G.L.c. 32, §3(2)(g). *Tabroff v. Contributory Retirement Appeal Board*, 69 Mass. App. Ct. 131, 135 (2007).

Many similar cases exist in the reported appellate and trial court decisions interpreting G.L.c. 30A, §14, and G.L.c. 249, §4. They demonstrate that one of the best ways to receive a ruling that an agency lacked substantial supporting evidence, acted in arbitrary or capricious fashion, or abused its discretion is to show that the decision conflicted with the letter or intent of state or federal legal provisions and thereby ran afoul of one or more of these review standards.

Potential non-law-based grounds for appeal

There are surprisingly few cases in which courts have reversed state or local agencies purely on the three principal non-law-based grounds (lack of substantial evidence, arbitrary and capricious action, and abuse of discretion). Nevertheless, the cases that do exist offer at least four principal arguments that have found favor in one or more reported decisions. These should be considered for use in briefs.

• Absence of evidence supporting ruling

Courts have reversed agency decisions as arbitrary and capricious if no evidence whatsoever supported the facts on which the decision is based. See *Donovan v. City of Woburn*, 65 Mass. App. Ct. 375, 381-382 (2006) (citing lack of evidence supporting fear that applicant

would transfer license to someone else and that there were too many liquor stores in area, and was therefore arbitrary and capricious). One cannot expect this ground to be present in many cases. Nevertheless, this argument bears careful consideration in cases in which the plaintiff's knowledge of particular facts is an element in the decision. See *Jordan v. Superintendent*, 53 Mass. App. Ct. 584, 589 (2002) (reversing disciplinary finding due to lack of evidence to support plaintiff's knowledge of contraband).

• Absence of evidence supporting a key finding in ruling

Plaintiffs have prevailed on arbitrary and capricious or lack of substantial evidence grounds by arguing that an agency offered no grounds whatsoever to support a key factual finding such as the dollar amount of a benefits determination (see *Eady's*

need to build house on undeveloped lot of land); *Fender v. Contributory Retirement Appeal Board*, 72 Mass. App. Ct. 755 (2008) (improper rejection of evidence regarding cause of alleged disability). This is a great argument when applicable.

• Absence of written regulations or policy

Courts are skeptical of agency decisions that seek to implement a particular policy that is not adopted as a regulation or otherwise codified to ensure uniform application. See *Fieldstone Meadows Dev. Corp. v. Conservation Commission*, 62 Mass. App. Ct. 265, 268 (2004) (finding unwritten "no build" policy to be arbitrary and capricious). It should be noted that codification of policy is not required to sustain a decision, as agency decisions that reflect an unwritten policy have been upheld so long as such policy has been consistently followed and is not in and of itself arbitrary or capricious. See *Nichols v. Brewster Conservation Commission*, 24 Mass. L. Rep. 581, 2008 Mass. Super. LEXIS 336 (2008).

• Unexplained deviation from written regulations or policy

The converse of relying on the absence of a written policy is to support arbitrariness by pointing out unexplained deviations from written policies. See *Fafard v. Conservation Comm'n*, 41 Mass. App. Ct. 565, 572 (2000) (reversing denial of application for construction as arbitrary based on failure to give grounds for denial and withholding order of conditions for reasons not set forth in bylaws). Again, this is a great argument under applicable law but should be a relatively uncommon ground if agencies issue solid decisions that justify deviations in a particular instance.

Conclusion

Review of agency appeal cases under the Administrative Procedure Act and certiorari statutes since 1990 reveals that a substantial majority of successful litigants relied directly or indirectly on law-based grounds, with only a relevant handful prevailing on "pure" fact-based grounds such as lack of substantial evidence, arbitrary and capricious decision-making, or abuse of discretion.

This reinforces that common-sense point that courts are most comfortable reversing agency decisions based on law-based grounds rather than factual or discretionary grounds that are closest to an agency's core expertise.

In addition to asserting any and all law-based grounds, litigants should consider trying to shape fact-based grounds into one of the several non-law-based grounds above that have proven successful in recent cases. MLW

Letters to the editor are welcome

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