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Has Administrative Law Finally Arrived in Oklahoma?

MICHAEL P. COX*

At least twice in the past decade, questions have been raised about the extent to which administrative law is being practiced and litigated in Oklahoma.¹ Since these observations were made, a number of developments have occurred that may signal a change is under way. For example, the Oklahoma Bar Association has created an Administrative Law Section,² interest has been shown by the Oklahoma legislature in revising Oklahoma's Administrative Procedures Act (APA),³ and a number of significant administrative law cases have been decided by the Oklahoma Supreme Court.⁴ This commentary focuses on one of these supreme court decisions: *Oklahoma Water Resources Board v. Texas County Irrigation & Water Resources Association (Texas County)*.⁵

The *Texas County* decision is particularly noteworthy because the Oklahoma Supreme Court recognized, and forcefully applied, a basic administrative law principle to the Water Resources Board. The case involved the legality of the issuance of a permit to use fresh ground water for tertiary recovery of oil and gas.⁶ The court remanded the case to the Water Resources Board with several instructions, one of which was: "Further, the Board

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1. See, e.g., Cox, *The Oklahoma Administrative Procedures Act: An Aid or a Hindrance?*, 37 OKLA. L. REV. 1, 2, 6, 7 (1984); Cox, *The Oklahoma Administrative Procedures Act: Fifteen Years of Interpretation*, 31 OKLA. L. REV. 886, 913 (1978).

2. See 57 OKLA. B.J. 271 (Feb. 1, 1986) (Report of Jan. 17, 1986, action of the Board of Governors).

3. See, e.g., H.R. 1493, 41st Okla. Legis., 1st Sess. (1987) (passed by Oklahoma House of Representatives on June 22, 1987, and by Oklahoma Senate on June 23, 1987. Enrolled and sent to Governor on June 25, 1987); S. 325, 39th Okla. Legis., 1st Sess. SEN. J. 339-40 (1983) (passed by Oklahoma Senate on Mar. 10, 1983, but not voted on by the House of Representatives). The Oklahoma Administrative Procedures Act is found at 75 OKLA. STAT. §§ 301-326 (1981 & Supp. 1986).

4. See, e.g., *Willbourn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986) (failure to comply with Torts Claims Act versus § 1983 action); *Westinghouse Elec. Corp. v. Grand River Dam Auth.*, 720 P.2d 713 (Okla. 1986) (failure to stay agency decision pending judicial review); *Oral Roberts Univ. v. Oklahoma Tax Comm'n*, 714 P.2d 1013 (Okla. 1986) (agency change of interpretation of statute); *Missouri-Kan.-Tex. R.R. v. State*, 712 P.2d 40 (Okla. 1985) (standing); *Oklahoma Water Resources Bd. v. Texas County Irrig. & Water Resources Assoc.*, 711 P.2d 38 (Okla. 1985); *Burdick v. Independent School Dist. 52*, 702 P.2d 48 (Okla. 1985) (estoppel applied). See also *Turner v. City of Lawton*, 57 OKLA. B.J. 1904 (Aug. 2, 1986) (illegally seized evidence not admissible in administrative hearing), however, mandate not issued pending resolution of Petition for Rehearing.

5. 711 P.2d 38 (Okla. 1985).

6. For an explanation of the differences between primary, secondary, and tertiary recovery, see *id.* at 49 n.2 (opinion of Special Justice Robinson).

before issuing permits for use of fresh ground water for tertiary recovery should do so only with the benefit of rules and regulations tailored to focus inquiry upon the pertinent issues peculiar to the tertiary process.”⁷

This directive is at first puzzling because nowhere else did Justice Wilson indicate in her majority opinion that the Board lacked substantive rules⁸ relating to issuance of permits for tertiary recovery. Justice Kauger in her concurring opinion, however, clearly indicated the nature of the deficiency ordered by the court to be corrected:

At the time of the hearing, *no* rules existed on the subject of the rights of the parties or the procedures to be followed before the Board regarding tertiary oil recovery. . . . The agency has no authority to conduct hearings until proposed rules have been promulgated in accordance with the [Oklahoma Administrative Procedures] Act. . . . Substantive rules must be published to avoid the inherently arbitrary nature of published ad hoc determinations. An unpublished substantive regulation cannot be given legal effect by the courts. The rationale for requiring administrative rule making is to protect both the public interest and the rights of the parties. . . . Because no rules had been adopted by the Board, it had no authority to conduct a hearing, to take evidence, to make findings of fact, or to issue temporary permits to mine fresh ground water for use in tertiary oil recovery.⁹

Justice Kauger’s characterization of the issues in *Texas County* is especially important because without her vote, only three justices concurred in Justice Wilson’s opinion; Justice Kauger is the fifth vote for the five-justice majority. Although the remaining four justices concurred in part and dissented in part, they dissented on the issue of whether the Board had adequate rules.¹⁰

The minority opinion, written by Special Justice Robinson (sitting for Vice Chief Justice Simms), reveals that perhaps the import of Justice Kauger’s concurrence was not fully understood. Justice Robinson states that the Board had “adequate *procedural* rules concerning the use of fresh water for enhanced oil recovery (both secondary and tertiary).”¹¹ Justice Kauger, however, was not merely addressing the absence of “procedural” rules but also the lack of “substantive” rules. That the court’s remand was aimed at the absence of “substantive” rules is reinforced by the language used by Justice Wilson in her majority opinion, i.e., the Board was directed to promulgate rules that would “focus inquiry upon the pertinent issues peculiar to the tertiary process.”¹²

7. *Id.* at 47.

8. For a discussion of substantive rules and why they are necessary, see *infra* notes 13-22 and accompanying text.

9. 711 P.2d at 57, 58, 59 (emphasis in original text).

10. *Id.* at 54.

11. *Id.* (emphasis added).

12. *Id.* at 47.

For those not familiar with administrative law, clarification of the role of procedural and substantive rules in the administrative process may assist in understanding the importance of *Texas County*. Procedural rules provide the process that must be followed by an agency (as well as by those who appear before it) and enable the agency to resolve the substantive issues presented to it for decision.¹³ Agency-promulgated, procedural rules are necessary because the APA only provides broad, general procedures of agency practice. Each agency must fill in, consistent with constitutional and statutory dictates, any procedural gaps not covered by the APA.

Substantive rules (also referred to as legislative rules¹⁴) are used by agencies, along with constitutional, statutory, and judicial mandates, as the bases to decide the substantive issues presented for resolution. As one court explained, in "administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance."¹⁵ Use by an agency of substantive factors, standards, or guidelines that have not been produced through statutorily mandated rule-making procedures can be analogized to a court deciding a case with "unenacted legislation."¹⁶ Substantive rules are the administrative equivalent of statutes,¹⁷ and each is created by its own process. Statutes are the result of the legislative process; rules are the product of rule making.

The importance of properly promulgated and published substantive rules in the administrative process cannot be emphasized enough. They are essential in assuring that agency decisions are made in accordance with the rule of law, i.e., that "adjudicated cases be decided on the basis of general principles and standards known to the parties and applicable to all cases."¹⁸

Rarely do administrative agencies admit (and, in some instances, perhaps

13. 1 F. COOPER, *STATE ADMINISTRATIVE LAW* 173 (1965), characterizes "procedural rules" as "describing the methods by which the agency will carry out its appointed functions—rules which make provisions for the filing of applications, the institution of complaints, the serving of papers, the conduct of hearings, and the like."

14. 2 K. DAVIS, *ADMINISTRATIVE LAW* § 7:8 (2d ed. 1979).

15. *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974).

16. Although courts do announce new policy in judicial decisions, administrative agencies have less reason to do so because agencies, unlike courts, have power to promulgate substantive rules. See A. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* § 4.1.1 (1986); 1 F. COOPER, *supra* note 13, at 177-85. See also *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 202 (1947) ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct.")

17. For a discussion of substantive rules, see 2 K. DAVIS, *supra* note 14, § 7:8, at 36 ("Valid legislative [i.e., substantive] rules have about the same effect as valid statutes."); 1 F. COOPER, *supra* note 13, at 175-76; L. MODJESKA, *ADMINISTRATIVE LAW PRACTICE AND PROCEDURE* § 1.8, at 14 (1982) ("Substantive rules are analogous to, and have the force and effect of, statutes."); B. SCHWARTZ, *ADMINISTRATIVE LAW* § 4.6, at 158 (2d ed. 1984) ("A substantive rule . . . is one 'affecting individual rights and obligations'; it is the administrative equivalent of a statute, compelling compliance with its terms on the part of those within the agency.")

18. 1 F. COOPER, *supra* note 13, at 43.

even realize) that they are making substantive decisions without having adopted substantive rules according to the requirements of the APA. An agency may "focus" its inquiry on the "pertinent issues" without understanding that a factor, standard, or guideline it is using as a basis to decide an issue may, in fact, be within the definition of a rule as defined by the APA, i.e.: "[A]ny agency statement of general applicability and future effect that implements, interprets or prescribes substantive law or policy, or prescribes the procedure or practice requirement of the agency."¹⁹

This definition describes at least two types of rules: substantive ("statements of general applicability and effect"²⁰) and procedural ("procedure or practice requirements"). In the past the Oklahoma Supreme Court has clearly stated that an agency may not proceed to decide a case substantively until it has promulgated procedural rules.²¹ Not until *Texas County* did the court make such a strong statement regarding the requirement for APA promulgated, substantive rules prior to agencies acting substantively.

Why should substantive rules, these administrative counterparts to statutes, be formulated through rule making? Or put another way, what benefits are lost to the public if rule making does not occur? A concise answer has been given by the Court of Appeals for the District of Columbia:

The general policy of [rule making] is to provide for public notice and comment procedures before the issuance of a rule. This public participation assures that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions. Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objection remains as to substance.²²

No implication is intended that Oklahoma administrative agencies are intentionally failing to conduct substantive rule making prior to deciding individual cases. However, as Professor Arthur Bonfield of the University of Iowa Law School, the nation's foremost expert on state administrative rule making, has observed: "Experience has shown an inclination 'by some agen-

19. 75 OKLA. STAT. § 301 (2) (Supp. 1986).

20. In administrative law, a distinction is also made between interpretative and substantive rules. See A. BONFIELD, *supra* note 16, § 6.9.1, at 280 n.1, and the authorities cited therein; 2 K. DAVIS, *supra* note 14, §§ 7:8-7:15. The definition of "rule" in the Oklahoma APA, 75 OKLA. STAT. § 301(2) (Supp. 1986), does not make this distinction. As a consequence, both substantive and interpretative rules in Oklahoma are subject to APA rule-making requirements. The 1961 Model State APA, from which Oklahoma took its definition of "rule" verbatim, and "most APAs do not contain an exemption from usual rule-making procedures for interpretative rules." A. BONFIELD, *supra* note 16, § 6.9.2, at 283. The distinction between substantive and interpretative rules, therefore, is not relevant to the issues discussed in this commentary.

21. See *Adams v. Professional Practices Comm'n*, 524 P.2d 932, 935 (Okla. 1974); Cox, *The Oklahoma Administrative Procedures Act, Fifteen Years of Interpretation*, *supra* note 1, at 891.

22. *Guardian Fed. Sav. & Loan Assoc. v. F.S.L.I.C.*, 589 F.2d 658, 662 (D.C. Cir. 1978).

cies to label as 'bulletins,' 'announcements,' 'guides,' 'interpretative bulletins,' and the like, announcements which, in legal operation and effect, really amount to rules'.²³ What is being suggested is that, prior to *Texas County*, many Oklahoma agencies may not have understood (and perhaps still do not understand) the full extent of the APA's substantive rule-making requirement.

Without regard to whether agency deficiencies in substantive rule making are unintended or otherwise, the message of *Texas County* seems clear: The Oklahoma Supreme Court has put the state's administrative agencies on notice that, as a general principle, before they may proceed to decide substantive issues, not only do they have to adopt procedural rules, they also have to use rule making to develop, promulgate, and publish substantive rules. Prior to resolving substantive issues, agencies must generally²⁴ utilize statutorily mandated, rule-making procedures to inform the public in general, and affected individuals in particular, as to what factors, standards, guidelines, and the like will be used to resolve the substantive issues under consideration.

Texas County may have been precipitated because of the importance of the matter at hand. The use of fresh ground water (whether for agriculture, for oil and gas extraction, or for whatever) is an issue of great importance to the state. As a consequence, the justices may have felt that the factors, standards, or guidelines governing the allocation of this resource simply may not be developed outside the context of rule making.²⁵ One hopes, however, that the *Texas County* requirement of substantive rule making will not be limited to environmental, conservational, and similar-type issues, but will be applied to all subjects of administrative competence and inquiry.

Although the long-range consequences of what substantive principles govern the use of fresh ground water are critical to Oklahoma, application of the *Texas County* rationale to other agency responsibilities is likewise essential if the public is to be well-served by its administrative process. Because of *Texas County*, one can reasonably conclude that administrative law is, in fact, finally beginning to arrive in Oklahoma.

23. A. BONFIELD, *supra* note 16, § 3.3.1, at 74.

24. Instances will arise, of course, where circumstances will not permit the use of all APA rule-making provisions. For example, the APA, as well as other statutes dealing with agency rule making, permit a relaxation of statutory requirements in emergency situations. *See, e.g.*, 75 OKLA. STAT. §§ 253, 303(B) (1981 & Supp. 1986). Those Oklahoma agencies not subject to the APA (*See, e.g.*, 75 OKLA. STAT. §§ 301, 324 (Supp. 1986)) nevertheless remain obligated to conduct substantive rule making under the *Texas County* rationale even though that case involved the Water Resources Board, an APA agency. The requirement for substantive rules is basic to administrative law and does not depend on whether an agency is or is not subject to the APA. *See supra* notes 17 and 20.

25. *See, e.g.*, *Texas County*, 711 P.2d 38, 56 (Kauger, J.): "I can think of no commodity which affects and concerns the citizens of this state more than fresh groundwater."

