7-28-1986

Anderson v. Colorado State Dep't of Personnel

SUPREME COURT, STATE OF COLORADO
DOCKET NO. 86-SA-61

DOUGLAS ANDERSON, PATRICIA CLISHAM, HARVY COCHRAN, THOMAS F. DIXON, JAMES DOTSON, EDWIN L. FELTER, JR.,WILLIAM FRITZEL, H. CONWAY GANDY,MICHAEL R. HOMYAK, THOMAS E. KORSON,PAUL KUBITSCHEK, PAUL LEIBOWITZ, HARRIET MOSKOVIK, THOMAS R. MOELLER, MICHAEL MULLINS, JUDITH F. SHULMAN,DAVID A SORENSON, ARTHUR G. STALIWE,DON P. STIMMEL, JOHN STUELPNAGLE, AND ROBERT E. TEMMER,

Plaintiffs-Appellants,

v.

COLORADO STATE DEPARTMENT OF PERSONNEL, AND GALE S. SCHOETTLER, EXECUTIVE DIRECTOR; AND THE COLORADO STATE PERSONNEL BOARD:

Defendants-Appellees.

NO. 83-CV-6795

MONTIE BARRINGER, PATRICIA CLISHAM, HARVEY COCHRAN, THOMAS F. DIXON, JAMES DOTSON, EDWIN L. FELTER, JR., WILLIAM FRITZEL, H. CONWAY GANDY, MICHAEL R. HOMYAK,THOMAS E. KORSON,PAUL KUBITSCHEK, PAUL LEIBOWITZ,HARRIET MOSKOVIK, THOMAS R.MOELLER, MICHAEL MULLINS, JUDITH F. SHULMAN, MARSHALL SNIDER, DAVID SORENSON,ARTHUR STALIWE, DON STIMMEL, JOHN STUELPNAGLE, AND ROBERT E. TEMMER,

Plaintiffs-Appellants,

v.

COLORADO STATE DEPARTMENT OF PERSONNEL AND GALE S. SCHOETTLER, EXECUTIVE DIRECTOR; AND THE COLORADO STATE PERSONNEL BOARD,

Defendants-Appellees.

NO. 84-CV-7110

PLAINTIFFS-APPELLANTS OPENING BRIEF IN CASE NO. 84-CV-7110.

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July 28, 1986

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SUPREME COURT, STATE OF COLORADO
Case No. 86-SA-61
Appeal from the District Court, City & County of Denver, Case No. 84-CV-7110

PLAINTIFFS-APPELLANTS OPENING BRIEF IN CASE NO. 86-SA-61

MONTIE BARRINGER, PATRICIA CLISHAM, HARVEY COCHRAN, THOMAS F. DIXON, JAMES DOTSON, EDWIN L. FELTER, JR., WILLIAM FRITZEL, H. CONWAY GANDY, MICHAEL R. HOMYAK, THOMAS E. KORSON, PAUL KUBITSCHEK, PAUL LEIBOWITZ, HARRIET MOSKOVIK, THOMAS R. MOELLER, MICHAEL MULLINS, JUDITH F. SHULMAN, MARSHALL SNIDER, DAVID SORENSON, ARTHUR STALIWE, DON STIMMEL JOHN STUELPNAGLE, AND ROBERT E. TEMMER, Plaintiffs-Appellants, v. COLORADO STATE DEPARTMENT OF PERSONNEL, AND GALE S. SCHOETTLER, EXECUTIVE DIRECTOR; AND THE COLORADO STATE PERSONNEL BOARD, Defendants-Appellees.	CASE NO. 86-SA-61

STATEMENT OF THE FACTS

The Plaintiffs are hearing officers (hearings examiners at the PUC) employed by the State of Colorado to hear quasi-judicial and quasi-legislative matters. The minimum qualifications for Colorado Hearings Examiner I-A (entry level) are graduation from an accredited law school, a current license to practice law in Colorado, and three years of prior legal experience. For Hearings Examiner I-C (senior level) the minimum qualifications are five years of legal experience, graduation

from an accredited law school, and a current Colorado law license. The above minimum qualifications for Hearings Examiner I-C (HE I-C) were established in this proceeding by plaintiffs' capsule job description (Volume III, Folio 81 - 82, and Volume I, Folio 64).

The procedure to determine the plaintiffs' salary is set forth in § 24-50-104, C.R.S., et seq. This statute requires the Colorado State Department of Personnel (department) to conduct an annual salary survey, to obtain valid data, and from this valid survey data determine plaintiffs' correct salary for the ensuing fiscal year. The department uses the position of HE I-C as the key job class to conduct plaintiffs' annual salary survey. In other words, the department uses HE I-C as the benchmark job to match with positions in other states. The department allows other states to make the job matches (Volume I, Folios 224, 230, 231, and 237). The department then uses the job matches received from other states, to derive plaintiffs' annual salary. The department is required by § 24-50-104(5)(a)(b) and (c), C.R.S., in conducting Plaintiffs' annual salary survey:

- To find comparable salary rates prevailing in other places of public employment.
- To determine plaintiff's correct annual salary from valid data.
- To use valid statistical techniques, review the data, and determine if the data received is valid.
- The department may also use the results of other appropriate salary surveys.

The department conducted national salary surveys in fiscal 1983 and 1984 for Plaintiffs, and derived a salary level for each of these years for

them. The Plaintiffs appealed the department's 1983 and 1984 surveys to the Colorado State Personnel Board (board), and appealed the board's decision on each of these appeals to the Denver district court. The plaintiffs here appeal the final order of the Denver district court on the 1983 and 1984 consolidated survey proceedings to this court. The plaintiffs appealed the board's action to the district court under § 24-4-106(7), C.R.S., which provides for court review of the board's action on the record made by the parties before the board.

The board is charged by § 24-50-104(5)(c)(II), C.R.S., with the duty to review the way the department conducts, and the results of plaintiffs' annual salary survey. The plaintiffs timely appealed the department's 1983 and 1984 salary surveys to the board, filed complete 1983 and 1984 salary data with the board to establish the inaccuracy of the department's 1983 and 1984 surveys for plaintiffs, and established the correct jobs for certain contested states, (Volume III, Folios 134 - 191). The department filed no salary data with the board in either 1983 or 1984 to support their surveys. The department did file a one page statement in 1983, and a six-page statement in 1984 with the board, alleging that the surveys were accurate (Volume III, Folios 195 - 200). However, no underlying data or job information was provided by the department. Plaintiffs emphasize that the only 1983 and 1984 salary data of record upon which the board's final orders were based was plaintiffs' unrebutted salary data.

On June 30, 1983, the board ordered that the department had not erred in the conduct of the 1983 survey and dismissed plaintiffs' appeal. On June 26, 1984, the board ordered that the department's conduct of the 1984 survey was not arbitrary, capricious, unreasonable, or contrary to law; that no data was invalid; and adopted the actions of the department in conducting the 1984 survey for plaintiffs.

Plaintiffs timely appealed the final 1983 and 1984 board orders to the district court (1983 Civil Action No. 83 CV 6795 and 1984 Civil Action No. 84 CV 7110). These two Civil Actions were consolidated on October 2, 1984 by court order. Plaintiff contended to the district court in both appeals that the consolidated record of proceedings before the board established board action on the 1983 and 1984 appeals which was:

- Arbitrary or capricious, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the consolidated record is considered as a whole, and otherwise contrary to law.
- Contrary to the ONLY evidence in the 1983 and 1984 consolidated record, and thus arbitrary as a matter of law.
- That § 24-50-104(5)(c)(II), C.R.S., is unconstitutional to the extent that it limits employees from presenting evidence, written or oral, before the State Personnel Board.

On November 2, 1984, the department filed a motion with the district court to supplement the record in Case No. 84 CV 7110 with material which was never filed with the board (Volume I, Folios 157 - 158). The plaintiffs filed a response in opposition to this motion on November 9, 1984 (Volume I, Folios 160 - 163). The department's reply to plaintiffs' response was filed on November 16, 1984 (Volume I, Folios 165

- 166). The court granted the department's motion to supplement the record on december 17, 1984 (Volume I, Folio 186). The plaintiffs filed a motion for reconsideration, clarification, and to strike on January 11, 1985 (Volume I, Folios 190 - 194). The department filed a response to this motion on January 21, 1985 (Volume I, Folio 195 - 196); and the plaintiffs filed a reply to the department's response on January 31, 1985 (Volume I, Folio 190 - 201). On February 4, 1985, the court entered an order denying plaintiffs' motion for reconsideration, to strike, and for discovery, and denied plaintiffs' motion for clarification as unnecessary because the: ". . . review is governed by C.R.S. § 24-4-106(7). Review is not de novo. . ." (Volume I, Folio 202).

Plaintiffs' opening brief was filed with the district court on december 4, 1984 (Volume I, Folio 167 - 185). The department's and board's answer brief was filed on February 4, 1985 (Volume I, Folio 206 - 248). Plaintiffs' reply brief was filed March 21, 1985 (Volume I, Folios 252 - 280). Argument was presented to the district court on July 11, 1985. Prior to argument and before the reporter was present, the court stated that the plaintiffs were passing through district court on their way to the Supreme court, and therefore the decision of the district court was unimportant. The court made no oral findings of fact or conclusions at the end of argument, and on December 23, 1985, entered its final written order on the consolidated cases (Volume I, Folios 306 - 307) which, except for the caption, is produced verbatim:

> Hearing in this matter having come before the court on July 11, 1985, and the court having reviewed the record and heard the arguments of counsel, hereby enters the following order:

ORDER

IT IS HEREBY ORDERED that the Order of the State Personnel Board in 83CV6795 is affirmed, and

IT IS FURTHER ORDERED that the Order of the State Personnel Board in 84CV7110 is affirmed, and

IT IS FURTHER ORDERED that CRS Section 24-50-104(5)(c)(II) (1982 and 1983 Supplement) is not unconstitutional.

Obviously, the above order contains no findings, nor any analysis of the issues presented. Plaintiffs will later contend that the above order represents a complete failure of the district court to discharge its duty to issue a decision on the merits of Cases No. 83CV6795 and No. 84CV7110, and is therefore unlawful.

Plaintiffs timely perfected their appeal of the district court's final order entered on December 23, 1985, on the consolidated cases. Plaintiffs requested an extension of time to file opening brief until July 28, 1986. This request was granted on June 23, 1986. Plaintiffs' opening brief was timely filed with this court on July 28, 1986.

LIST OF CONTENTIONS

The plaintiffs contend that this court should reverse the final Order of the district court entered on December 23, 1985, because the district court committed the following reversible errors:

I. The district court erred in ordering that the Orders of the State Personnel Board in Cases No. 83 CV 6795 and No.84 CV 7110 are affirmed.

II. The district court erred in ordering that the record before the district court be supplemented by material which was not filed with the Colorado State Personnel Board, and which material was never of record before the board.

III. The district court erred in ordering that § 25-50-104(5)(c)(II), C.R.S., (1982 and 1983 Supplement) is not unconstitutional.

IV. The district court erred in entering a legally deficient final order on December 23, 1985, which order utterly failed to address the merits of Cases No. 83 CV 6795 and No. 84 CV 7110.

ARGUMENTS

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ORDERING THAT THE ORDERS OF THE STATE PERSONNEL BOARD IN CASES NO. 83 CV 6795 AND NO. 84 CV 7110 ARE AFFIRMED.

The plaintiffs emphasize that the consolidated record before the district court established that the department filed no underlying salary data, nor any other evidence before the board in 1983 or 1984. The record before the board and the court, established beyond argument that the only salary data of record was plaintiffs' opposing salary data (Volume III, Folios 141 - 191). The only document filed with the board by the department in 1983 and 1984, in reference to plaintiffs' appeals to the board, was the department's self-serving statements that the 1983 and 1984 surveys were correct (Volume III Folios 195 - 200). The plaintiffs also point out that the consolidated appeal to the district

court is governed by § 24-4-106(6) and (7), C.R.S., which manditorily requires that the district court review is limited to the record made before the board.

In summary, plaintiffs' salary data filed with the board in 1983 and 1984 showed the following types of errors in the department's 1983 and 1984 surveys:

- The job used by the department did not meet the plaintiffs' minimum capsule job requirements (i.e., no law degree required, no law school requirement, or less than five years experience required).
- The job used by the department was not the most comparable job. In other words, plaintiffs found a job in the state which better matched their job requirements and actual job duties.
- In many states where the department failed to receive a job match, the plaintiffs found a comparable matching job.

The consolidated record before the district court showed that the board was confronted in 1983 and 1984 with the following:

- Plaintiffs' appeal which alleged that the department's surveys were inaccurate, and which appeals specified state-by-state the alleged inaccuracies.
- Plaintiffs' salary data of record, which established state-by-state as a matter of law, that the department's 1983 and 1984 surveys were wrong in the specified particulars.
- No department data, and only the department's self-serving reply which stated that the surveys were correct.

In the face of the above state of the record, the board dismissed plaintiffs' 1983 appeal, and also approved the department's 1984 survey (Volume III, Folio 202). Plaintiffs argued to the district court, and now state to this court, that the consolidated record of these

proceedings establishes that the board and the district court acted in defiance of the record which was before them.

The plaintiffs pointed out to the district court that a comparison of the department's 1983 and 1984 surveys established that one or the other, or both, were grossly inaccurate. In support of this contention, the plaintiffs attached Exhibit No. 1 (hereafter Exhibit 1) to their district court opening brief (Volume I, Folio 182). This exhibit analyzed the department's 1983 and 1984 surveys. It is important to note that Exhibit 1 does not contain new evidence, but is only a comparison of the department's recommendations as to which state jobs match Colorado HE I-C in 1983 and 1984. Moreover, Exhibit 1 does not contain any of plaintiffs' salary data. As written, this exhibit only purports to analyze the state jobs recommended by the department in their 1983 and 1984 surveys. For the convenience of the court a copy of Exhibit 1 is attached to this brief.

Exhibit 1 shows the 1983 and 1984 state jobs which the department alleges are comparable to HE I-C for 34 states. Of these 34 state jobs reported in the department's 1983 survey, 11 of these <u>same</u> state jobs are not included in the department's 1984 survey. The 11 state jobs excluded from the 1984 survey are among the 17 lowest salaried jobs reported in the department's 1983 survey. Obviously if unsuitable for the 1984 survey, these jobs should not have been used in 1983.

It is plaintiffs' position that the department, by excluding the above 11 state jobs in 1984, admitted that these jobs should have been excluded in its 1983 survey for the plaintiffs. The department states, in reference to its 1984 survey, at Volume III, Folio 196:

> Responses were received from 47 of the states. The responses were reviewed by the Compensation Section to verify the matches and to ensure the data was reported in a usable form.
>
> . . .
>
> The department had 23 matches when the review process was completed, two less than required for a valid national survey sample. . . . (Emphasis added).

Plaintiffs argued to the district court that the department found in 1984, after reviewing jobs reported by 47 states, that only 23 of the 47 were good matches. Accordingly, had the department reviewed the same bad 11 jobs in 1983, it would have been compelled to exclude these noncomparable jobs from the 1983 survey, as urged by the plaintiffs. Plaintiffs simply argue that if the department had done its job in 1983, these same 11 non-matching jobs would have been excluded in 1983, as they were rejected in 1984. Plaintiffs assert that it is intellectually impossible for the same 11 jobs to be good matches in 1983, and then non-comparable in 1984. It is emphasized that the 11 state jobs at issue are the same jobs reported in 1983, but rejected by the department in 1984. The 11 state jobs are listed and analyzed in Exhibit 1 (Volume I, Folio 182).

Exhibit 1 also shows the difference between 1983 and 1984 reported maximum salary for the state jobs included in both department

surveys. Of the 17 lowest salaried state jobs reported by the department in 1983, only six of those state jobs are reported as good matches by the department in 1984. Three of these six alleged matching jobs reported in 1984 show 36, 23, and 21 percent increases over 1983 (Texas - 36%, Iowa - 23%, and Arkansas - 21%). The three other state jobs reported show increases of 13, 6, and 5 percent. Clearly, Texas, Iowa, and Arkansas, which the department reported as having 1984 salary increases of 36, 23, and 21 percent over 1983, had the wrong 1983 salary. Plaintiffs argued before the board, to the district court, and now contend before this court, that the Department reported the wrong salary for the jobs reported for Texas, Iowa, and Arkansas in 1983, and that the department de facto admitted these errors in its 1984 survey.

Plaintiffs also attached Exhibit No. 2 (hereafter Exhibit 2) to their opening district court brief (Volume I, Folios 183 - 185). This exhibit shows the department's 1984 state jobs which plaintiffs contend are incorrect. Exhibit 2 also shows the 1984 state jobs which plaintiffs contend are the correct matches for the contested states and which should be substituted. This exhibit also refers to plaintiffs' data which supports these good job matches. It must be again emphasized that the only salary data of record before the board in 1984, was plaintiffs' data, which supported the jobs that plaintiffs contended were the correct matches for the contested states, and the department filed no underlying 1984 data to support the jobs it reported.

The consolidated record which is only composed of plaintiffs' salary data, revealed that the department's 1983 survey did not contain the minimum number of 25 good matches to be a valid survey, by the department's own rule (Volume III, Folio 196 and Folios 141 - 191). In addition, plaintiffs' 1984 salary data, filed with the board. shows that the department failed to include jobs comparable to HE I-C for Oklahoma, Florida, and the Federal Government. Moreover, plaintiffs' 1984 data shows that the department found incorrect 1984 job matches for the states of Maryland, Texas, Illinois, Michigan, Wisconsin, Arizona, North Carolina, and Maine. A complete analysis of plaintiffs' 1984 salary data, revealing the above errors in the department's 1984 survey, is set forth in Exhibit 2, (Volume I, Folios 183 - 185 and Volume III, Folios 134 - 140).

Plaintiffs pointed out to the board and to the district court that their job requirements are clearly set forth in their capsule job description, which was of record before the board and before the court (Volume I, Folio 64 and Volume III, Folios 81 - 82), as was plaintiffs' job data for each of the contested states for 1983 and 1984 (Volume III Folios 141 - 191). Amazingly, and without any department evidence of record, the board dismissed plaintiffs' 1983 appeal, and in 1984 found no data to be invalid and adopted the department's action. Furthermore, upon the same record, the district court affirmed the board. The plaintiffs cannot understand how the board and the district court could possibly have found no department data to be invalid in 1984, when the department filed no 1984 data before the board. It is also significant

that the defendants admitted before the district court that they filed no data before the board in 1983 and 1984 (Volume IV, pages 58 - 59).

Plaintiffs contend that the district court, based upon the record before it, flagrantly erred in affirming the 1983 and 1984 actions of the board. Plaintiffs insist that it is difficult to imagine agency and court action which could be more arbitrary and capricious, than that as here presented. Plaintiffs have challenged the defendants at every stage of this proceeding to explain how the board could lawfully affirm the department in 1983 and 1984, without any supporting evidence, but the defendants have declined to address this issue, and have admitted that no department evidence was filed (Volume IV, Pages 58 - 59). Plaintiffs again request that the defendants point out any evidence of record before the board which would support their 1983 and 1984 final orders.

Plaintiffs contend that the board's 1983 and 1984 action, shows capricious and arbitrary action, per se., and that these unbelieveable board actions should have been reversed as a matter of law by the district court. Furthermore, for the district court to simply affirm the action of the board, upon an unrebutted record is reversible error as a matter of law. The plaintiffs urge this court to correct the above error by reversing the district court order of December 23, 1985.

Unfortunately, the district court in its December 23, 1985, final order, failed to analyze the issues presented, so that plaintiffs, the defendants, and this court have no understanding of the basis of the

court's order. It is clear to plaintiffs that the district court was faced with final agency orders which were not based upon any supporting evidence of record. Faced with this situation, the district court, in its zeal to affirm the board, chose to enter an order which contained no legal analysis, no findings, and no conclusions upon findings (Volume I, Folios 306 - 307). Plaintiffs suggest that if the district court had analyzed the record before it, as required by § 24-4-106(7), C.R.S., made findings from this analysis, and conclusions of law from findings, that board reversal was inescapable.

In a long line of decisions, this court has held that an administrative agency can only act upon the evidence which is of record before it, and the district court can only review the record which was made before the agency. Stream v. Heckers, 184 Colo. 149, 519 P.2d 336 (Colo. 1974), Lassner, v. The Civil Service Comm'n, 177 Colo. 257, 493, P.2d 1087 (1972); Homebuilders Ass'n v. Public Utilities Comm'n, et al., Case No. 84-SA-244, June 2, 1986 _____ P.2d ____ (Colo. 1986). This court stated in Board of Adjustment v. Handley, et al., 105 Colo. 180 95 P.2d 823, (1939) at pages 188 - 189 of the Colorado Report:

> Having held in County Court v. People ex rel., supra, that "the limit of the power of the reviewing court is to ascertain from the record [the record certified] alone, whether the inferior tribunal regularly pursued its authority," we limit our judicial notice to what is contained in the record and in accordance with sections of the Code of Civil Procedure supra, and cases construing them, base our decision on the record before us. (Emphasis added).

As recently as 1986 this court has affirmed the above principle of law in Homebuilders Ass'n v. P.U.C., et al., supra, and Ross v. Fire

and Police Pension Ass'n, 713 P.2d No. 4 (Colo. 1986) where this court stated at pages 1308 and 1309:

> The district court applied the standard of review applicable to state agency actions as set out in section 24-4-106(7), 10, C.R.S., (1982), of the Administrative Procedure Act. Under this standard, a reviewing court can reverse a state agency's decision if "the agency action is . . . unsupported by substantial evidence when the record is considered as a whole." See DeScala v. Motor Vehicle Division, 667 P.2d 1360 (Colo. 1983); Lassner v. Civil Service Commission, 177 Colo. 257, 493 P.2d 1087 (1972). This standard requires that there be more than merely "some evidence in some particulars" to support the agency decision. Lassner, 177 Colo. at 259, 493 P.2d at 1089 (emphasis in original). . . . Under either the "substantial evidence" or "no competent evidence" standard, the appropriate consideration for an appellate court is whether there is sufficient evidentiary support in the record for the decision of the administrative tribunal, and not whether there is an adequate source of evidence to support the decision of the district court. See, e.g., DeScala, 667 P.2d 1360; MacArthur v. Presto, 122 Colo. 202, 221 P.2d 934 (1950). (Emphasis added).

The district court had no alternative but to determine that the board committed reversible error in affirming the department, because there was no department evidence before the board, which supported the action of the department. Based on the consolidated record presented, and the unwarranted district court order of December 23, 1985, the plaintiffs respectfully request that this court reverse the district court, and order it to remand the 1983 and 1984 surveys to the board, with the direction that the board order the department to use plaintiffs' unrebutted salary evidence of record for 1983 and 1984, as the correct job matches for the contested states.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ORDERING THAT THE RECORD BEFORE THE DISTRICT COURT BE SUPPLEMENTED BY MATERIAL WHICH WAS NOT FILED WITH THE COLORADO STATE PERSONNEL BOARD, AND WHICH MATERIAL WAS NEVER BEFORE THE BOARD.

On November 2, 1985, the department filed a motion with the district court to supplement the record (Volume I, Folios 157 - 159). By this motion, the department requested the district court to include alleged salary data collected and used by the department in the custody and control of the department. Interestingly, the department states in its motion:

> 4. Because the plaintiffs request that this court review and order that their data be utilized instead of the department's, the department's records are necessary in order for the court to review and determine whether any relief should be granted. (Volume I, Folio 158)

It is also interesting to note that the department does not state in their motion that any of the supplemental data was filed with the board. Indeed, the department could not state that this data was filed with the board, because the consolidated record before the district court revealed that none of this material was filed with the board.

The plaintiffs opposed the above motion, contending that the record before the board can only be made by material filed with the board. Plaintiffs also argued that only the data filed with the board can possibly form the foundations of the board's 1983 and 1984 decisions. The Plaintiffs further contended that the district court would convert this review of agency action on the record made before the board under § 24-4-106, et. seq., into a de novo hearing if the motion were to be granted. Accordingly, in order for their rights to substantive and procedural due process to be protected, plaintiffs requested that if the court granted this motion, they be granted the

opportunity to cross-examine the individuals with knowledge of this new evidence, that they be granted full discovery, and that they have the opportunity to present evidence and testimony in opposition to the new evidence.

In opposing the department's motion to supplement the record, the plaintiffs pointed out to the district court that this proceeding was a review of agency action, on the record made before the agency under § 24-4-106, C.R.S., et. seq., and that this statute provides at subsections (2) and (7):

> (2) Final agency action under this or any other law shall be subject to judicial review as provided in this section, . . .
>
> . . .
>
> (7) . . . In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. . .

The question then becomes, what is the "whole record" which the district court was to review in this proceeding? Section 24-4-106(6), C.R.S., provides the clear answer:

> (6) In every case of agency action, the record on review, unless otherwise stipulated by the parties, shall include the original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the agency, rulings upon exceptions, and the decision, findings, and action of the agency. . . (Emphasis added).

This court has consistently held that an administrative agency can only act on the evidence of record before it, and it is reversible error upon review under §24-4-106, C.R.S., et seq., to supplement the record with material not filed before the agency. The rationale that

underpins this principle is that the record before the agency forms the basis of its decision. Evidence which was not submitted to the agency cannot be the basis of its decision. Moreover, to allow this type of material to be subsequently filed with a court charged with the duty to review the agency record for error, violates the procedural and substantive due process rights of the parties. Stream v. Heckers, Supra; Board of Adjustment v. Handley, et al., supra; E&G, Incorporated v. The San Miguel County Board of County Commissioners, et al., 541 P.2d 86, ___ Colo. App. _____ (1975); Ross v. Fire and Police Pension Ass'n, supra, and Home Builders Ass'n v. P.U.C., and Public Service Co., supra. 1986), where this court stated at Pages 20 and 21 of the Colorado Bar Association advance sheet headnote:

> The PUC adopted the embedded investment standards for calculating free construction allowances without taking any additional evidence on the appropriateness of such standards. Although the commission could have taken notice of other evidence in its files or gathered through its own investigation, . . . (citation omitted) it would have been obligated to include such additional evidence in the record as certified to the district court. . . . No such evidence, however, was included in the record as certified. Our determination of the validity of the PUC's decision, therefore, is dependent on the evidence presented at the initial hearing on Public Service's application, since it is that evidence which formed the basis of the commission's decision. (Emphasis added).

In this consolidated proceeding the only salary evidence included in the record certified to the district court was plaintiffs' salary data for 1983 and 1984. Accordingly, plaintiffs' 1983 and 1984 salary data was the only evidence which formed the basis of the board's action in 1983 and 1984. For the district court to order other data which was never filed with the board to be made part of the record was

gross error. By allowing this supplemental evidence to be filed, the district court effectively changed this proceeding from a review of prior agency action into a de novo hearing. However, the district court is compelled by § 24-4-106(6) and (7), and the authorities set forth above, to review only the record made before the board. Plaintiffs request that this court reverse the district court for its unlawful action in supplementing the record, and grant the relief requested in this brief.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ORDERING THAT SECTION 24-50-104(5)(c)(II), C.R.S., (1982 AND 1983 SUPPLEMENT) IS NOT UNCONSTITUTIONAL.

The plaintiffs incorporate by reference the authority and argument in the companion opening brief in this Case No. 86 SA 61, pertaining to district court Case No. 86 CV 6795. Plaintiffs will here only summarize that argument as it applies to this appeal of District Court Case No. 84 CV 7110.

Plaintiffs argued to the district court, that § 24-50-104(5)(c)(II), C.R.S., (1982 and 1983 Supplement), now provides that the State Personnel Board is charged with review of the department's actions, but, "if the board decides to review the State Personnel Director's action, it shall do so in summary fashion, without referring it to a hearing officer, and on the basis of written material which may be supplemented by oral argument, at the discretion of the board. . . ." Accordingly, the affected employees may file written material, but may not present oral testimony, nor is face-to-face confrontation authorized.

Plaintiffs argued to the district court that written submissions are not sufficient to meet minimal constitutional requirements. The plaintiffs also contended that the statute is constitutionally infirm because it does not provide for vive voce hearings, an opportunity to confront witnesses, and the opportunity for a hearing before the agency's action becomes final. Because § 24-50-104(5)(c)(II), C.R.S., (1982 and 1983 Supplement), fails to authorize a hearing, oral testimony, and face-to-face confrontation, this statutory provision fails to meet minimum constitutional standards.

The plaintiffs contend that the district court should have determined the statute to be patently constitutionally infirm, rather than ordering that it is not unconstitutional. For the above reasons, and for the reasons stated in the companion brief filed to the appeal of District Court Case No. 83 CV 6795, plaintiffs request that this court reverse the district court's determination in this instance, and find this statute unconstitutional.

IV. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ENTERING A LEGALLY DEFICIENT FINAL ORDER ON DECEMBER 23, 1985.

The district court compounded the above errors by entering a legally deficient final order in the consolidated proceedings. Plaintiffs have reproduced the court's final order in its entirety at pages 5 and 6 of this brief. The order also appears at Volume I, Folios 306 - 307. Astoundingly, this order contains no legal analysis of the difficult and serious issues presented to the court, contains no findings of fact drawn from legal analysis of the issues presented, nor draws any

conclusions of law from any findings of fact. Without legal analysis of the issues presented, and without any findings of fact and conclusions thereon, this court, and the parties to this proceeding are not able to understand the basis of the district court's action affirming the board's 1983 and 1984 orders.

It is plaintiffs position that the district court is required by law to enter a decision which analyzes the legal issues presented, make findings of fact and conclusions of law from its analysis, and enter an order based upon the law as applied to the merits of the matter. Section 24-4-106(7), C.R.S., provides in pertinent part:

> . . . In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

Rule 52(a) C.R.C.P., Findings by the Court, states in pertinent part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to Rule 58; . . .

This court has interpreted Rule 52(a) C.R.C.P., and has stated in Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959) at page 201 of the Colorado Report:

> In Dunbar it does not appear whether there were disputed facts before the court, but that distinction is not the determining factor. It is the Rule itself which leaves the matter in the sound discretion of the trial court as to whether the findings shall be written or oral. But that discretion does not mean that no findings of fact

> need be made. The court has a duty to make one or the other, and if made orally to see that his statement thereon is transcribed in full. In either event such findings must be so explicit as to give the appellate court a clear understanding of the basis of the trial court's decision and to enable it to determine the ground on which it reached its decision. In Maher v. Hendrickson (7 Cir. 1951), 188 F. (2d) 700, the court said: "The ultimate test as to the propriety of findings is whether they are sufficiently comprehensive to provide a basis for decision and supported by the evidence." (Emphasis added).

Plaintiffs suggest that the district court was confronted with a consolidated record which required reversal of the board's action as a matter of law because the board had affirmed the department's 1983 and 1984 surveys without any supporting evidence before it, and because § 24-50-104(5)(c)(II), C.R.S., (1982 and 1983 Suppliment) was clearly shown to be unconstitutional. It is clear to plaintiffs that the district court, in its zeal to affirm the board and, as the court stated, to assist the plaintiffs to pass on to this court, simply searched for and found a way to affirm the board, when confronted with a record which demanded reversal. The consolidated record shows that the court's solution to the above dilema was to enter an order which did not address the issues which required board reversal. Plaintiffs also suggest that the district court's statement to the parties, that plaintiffs were merely passing through district court on their way to the supreme court, and thus the court's determination of the matter was unimportant, underscores the court's predetermined bias to affirm the board, regardless of the record and law before the court.

Plaintiffs again point out that the above action of the court in affirming the board was accomplished without any findings, conclusions,

or legal analysis of the issues presented. However, Rule 52(a), C.R.C.P., and the authorities above cited, required the district court to issue a decision which contains sufficient findings and conclusions, so that this court can understand the basis of the district court's action. Because the district court here entered a legally deficient final order, this court should reverse the district court and grant the requested relief.

RELIEF REQUESTED

The plaintiffs requested the district court to grant the relief asked for in their 1983 and 1984 complaints. In addition, plaintiffs requested the district court to specifically order the following:

- Not remand the consolidated matter to the board for a board order requiring the department to do another salary survey for plaintiffs. Plaintiffs clearly stated that the court should order the board to require the department to use plaintiffs' valid 1983 and 1984 data, which is of record, in place of the department's invalid and non-filed data for these surveys.

- Declare § 24-50-104(5)(c)(II), C.R.S., unconstitutional to the extent it purports to limit employees from presenting evidence, written, and oral before the State Personnel Board.

- Order the board to order the department to use jobs which are comparable to the requirements of plaintiffs' capsule description for 1983, 1984, and for all future years.

- In particular, plaintiffs sought a district court order requiring the board to order the department to use the position of Federal Administrative Law Judge as one matching comparable job in the department's 1983, 1984, and future salary surveys for plaintiffs.

The plaintiffs here request this court to grant the above relief and all the relief prayed for in their 1983 and 1984 complaints (Volume I, Folios 9-10 and 62-63).

The plaintiffs especially seek an order from this court requiring the department to use appropriate federal survey data for one comparable job in their surveys for plaintiffs. The plaintiffs established before the district court that the position of Federal Administrative Law Judge is excluded by the department from their surveys for plaintiffs, only under the authority of a department rule, (Volume I, Folio 261). In the self-serving statement filed by the department in 1984, at Volume III, Folio 197, the department states:

> The 1984 procedures manual is very specific about the national survey sample. The manual directs the department to invite the participation of the 49 other states. The manual does not require that the department invite the Federal Government to participate. . . . Hearings Examiners, conducting administrative reviews of final state agency actions, is unique to state governments. Federal rates are collected for the local survey classes only. . .

Plaintiffs established before the district court that the department is required by § 24-50-104(5)(a), C.R.S., to obtain comparable salary rates for plaintiffs from all other places of public employment, and that no area of public employment is excluded by this statute (Volume I, Folio 180). Subsection (5)(a) of section 24-50-104, C.R.S., states in pertinent part:

> To determine comparable rates for salaries and fringe benefits prevailing in other places of public and private employment, the state personnel director shall annually conduct salary and fringe benefit surveys. . . .(Emphasis added).

Plaintiffs also demonstrated to the district court that the above department rule directly conflicts with § 24-50-104(5)(a) and (b), C.R.S., and as applied to plaintiffs, the conflict is irreconcilable (Volume I, Folios 261 - 264). It is stated at 73 C.J.S. Public Administrative Law and Procedure, § 89, Pg. 587 to 589:

> An agency must exercise its rulemaking authority within the grant of legislative power as expressed in the enabling statute, and may not exceed the authority conferred. A regulation adopted by the agency must conform to, and be consistent with, the applicable legislative provisions. An administrative body may make only such rules and regulations as are within the limits of the power granted to it and within the boundaries established by the standards, limitations, and policies of the statute giving it such power, and it may only implement the law as it exists.
>
> Accordingly, such a body may not make rules and regulations which conflict with, or are inconsistent with, or are contrary to, the provisions of a statute, particularly the statute it is administering or which created it, or which are in derrogation of, or defeat, the purposes of a statute. . .

Colorado follows the above rule of law. This court stated in Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300, (1976), at page 303 of the Pacific Report:

> As noted above, the Commissioners and the Director of Revenue have the authority, individually or jointly, to issue proper regulations to enforce relevant statutes. We recognize too, that construction of a statute by administrative officials charged with its enforcement shall be given great deference by the courts (citation omitted). However, administrative regulations are not absolute rules. They may not conflict with the design of an act,

> and when they do the court has a duty to invalidate them. Readon, supra. Furthermore, when an administrative official misconstrues a statute and issues a regulation beyond the scope of a statute, it is in excess of administrative authority granted.

This court has recently stated in Meyer v. State Farm Mutual Auto Ins. Co. 689 P.2d 585 (Colo. 1984), at page 589:

> . . . On July 1, 1984, the Commissioners adopted Colorado Insurance Regulation No. 74-20 that approves the household exclusion in automobile liability insurance policies. However, we hold that the household exclusion is invalid because it conflicts with the act. See Travelers Indemnity Co. v. Barnes, 191 Colo. 278, 552 P.2d 300 (1976). . . .

The conflict between the above department rule and § 24-50-104(5)(a) and (b), C.R.S., is irreconcilable. The above department rule mandates that national surveys can only be conducted by surveying other states. However, § 24-50-104(5)(a) and (b), C.R.S., mandatorily requires the Director to obtain salary rates for jobs in the public sector, which are comparable to plaintiffs. This statute is not limited in it applicability to state jobs, nor does it exclude federal jobs.

Federal Administrative Law Judge is known by all parties as a comparable job, because plaintiffs provided it to the board and to the department in 1983 and 1984 (Volume II, tab 5, pages 84 - 90; Volume III, Folios 182 - 194; and Volume I, Folios 119 - 121). Moreover, the department admittedly used Federal Administrative Law Judge in its 1981 salary survey for plaintiffs (Volume I, Folio 223 and Volume IV, pages 67 - 68). The consolidated record demonstrates that plaintiffs' job is unique to both State and Federal government, and is required by

§ 24-50-104(5)(a) and (b), C.R.S. to be used by the department as one comparable matching job in its surveys for plaintiffs.

The plaintiffs emphasize that they did not contend before the district court, as the district court repeatedly stated, that their salary should match the salary of Federal Administrative Law Judge (Volume IV, pages 8, 9, 10, 11, 20, and 29). However, plaintiffs do contend that Federal Administrative Law Judge is required by § 24-50-104(5)(a) and (b), C.R.S., to be one job used by the department in their salary surveys for plaintiffs, and a conflicting department rule cannot prevail over this specific statutory provision.

Plaintiffs also argued before the district court, that a remand for purposes of resurvey is not needed nor is warranted in this consolidated proceeding (Volume I, Folios 277 - 279). Plaintiffs established that the purpose of remand under § 24-50-104(5)(c)(II), C.R.S., is to obtain valid salary data when no valid data is available. However, the record of this consolidated proceeding establishes as a matter of law that plaintiffs valid salary data of record is is available and is the appropriate salary data to be used for the contested states in 1983 and 1984. Accordingly, a remand for resurvey would serve no purpose in this proceeding. Plaintiffs request that this court order that plaintiffs' valid salary data of record, filed with the board, be used for 1983, 1984, and that these positions be utilized henceforth, until affirmatively shown to be no longer valid.

Plaintiffs finally request that this court declare § 24-50-104(5)(c)(II), C.R.S., unconstitutional for the reasons set forth in this brief and in the companion brief incorporated by reference verbatim herein.

CONCLUSION

Plaintiffs request that this court reverse the district court, for the above reasons. It is emphasized that a remand to the district court for further remand to the board and department for additional resurveys will be no relief whatsoever. If the court orders resurveys as a remidy, the plaintiffs will be back on the unending merry-go-round, which started in 1982. It is also clear that a remand for further resurvey will only result in the department dredging up the same tired data which plaintiffs have repeatedly proven inaccurate as a matter of law.

The consolidated record reveals that plaintiffs filed valid and appropriate 1983 and 1984 salary data with the board, and this data is available to used. Accordingly, this proceeding does not present a case where a resurvey is required under § 24-50-104(5)(c)(II), C.R.S. Plaintiffs also request that this court order that the department be ordered to use valid survey techniques henceforth in their surveys for plaintiffs.

The plaintiffs again state that the consolidated record before this court presents a situation which demands reversal of the district court's Order of December 23, 1985, as a matter of law. For the the district court to affirm the actions of the department, based upon no evidence of record, was gross error. Moreover, the Order of the district court entered on December 23, 1985, utterly fails to address any of the issues raised in this proceeding, and unlawfully fails to provide a legal rational for the action taken, as required by C.R.C.P. 52(a). Based upon the consolidated record, and the law as here presented, the plaintiffs request that this court reverse the district court, and grant the requested relief.

Respectfully submitted,
for the Plaintiffs.

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Dated this 28th day of July 1986.

CERTIFICATE OF SERVICE

True copies of the above opening brief were served on July 28, 1986, as follows:

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Exhibit 1

ANALYSIS OF 1983 AND 1984 PERSONNEL DEPARTMENT SALARY SURVEYS FOR HEARINGS EXAMINERS

STATE	1983 MAXIMUM SALARY	1984 MAXIMUM SALARY	DIFFERENCE BETWEEN 1983 AND 1984 REPORTED MAXIMUM SALARY	PERCENT DIFFERENCE BETWEEN 1983 AND 1984 REPORTED MAXIMUM SALARY
Mississippi	1,005	Not included		
South Carolina	2,149	Not Included		
Montana	2,285	Not Included		
Massachusetts	2,293	Not Included		
Texas	2,302	3,140.00	+ 838.00	+ 36%*
Missouri	2,396	Not Included		
Connecticut	2,433	Not Included		
Arkansas	2,487	3,022	+ 535.00	+ 21%*
Maryland	2,505	2,655	+ 150.00	+ 5%
Iowa	2,520	3,116	+ 596.00	+ 23%*
Illinois	2,532	2,709	+ 177.00	+ 6%
Louisiana	2,617	Not Included		
Georgia	2,660	Not Included		
Oregon	2,780	Not Included		
Ohio	2,791	3,156.34	+ 365.34	+ 13%
Rhode Island	2,812	Not Included		
New Mexico	2,816	Not Included		

Of the above 17 states included in The Department 1983 Survey, 11 of them are not included in The Department's 1984 Survey. Three of the six states included in both surveys show 36, 23, and 21% increases in 1984 over 1983.

Washington	2,868	3,067	+ 199.00	+ 6%
New York	2,883	3,299.78	+ 416.78	+ 14%
Vermont	3,000	3,000	-	-
North Carolina	3,013	3,164	+ 151.00	+ 5%
Virgina	3,232	3,862.83	+ 630.83	+ 19%*
Arizona	3,235	3,396.58	+ 161.58	+ 4%
Minnesota	3,333	4,049	+ 716	+ 21%*
Utah	3,348	3,499	+ 151	+ 4%
W. Virgina	3,349	3,686.55	+ 337.55	+ 10%
Michigan	3,391	3,631	+ 240	+ 7%
Wisconsin	3,455	3,558.65	+ 103.65	+ 3%
Kansas	3,460	4,171	+ 711	+ 20%*
Alabama	3,530	3,529.50	-	-
Wyoming	3,929	3,928	-	-
California	4,211	4,464	+ 253	+ 6%
New Jersey	4,500	4,750	+ 250	+ 5%
Alaska	5,050	6,104	+ 1,054	+ 20%*

The above remaining 17 states are included in both the 1983 and 1984 surveys. * Four of these 17 states reflect increases of 19% or more from 1983 to 1984.