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# The Effect of the Utah Administrative Procedures Act on the Standards of Review for Final Administrative Agency Adjudications\*

## I. INTRODUCTION

Perhaps the most difficult problem in administrative law is determining the amount of deference that courts should accord final administrative agency decisions. The problem is complex and requires a proper allocation of expertise between courts and agencies.<sup>1</sup> As one commentator has explained:

If courts were to police agencies by assessing every administrative decision from scratch (*de novo*), any efficiency or other gains that [the legislature] seeks by vesting authority in expert administrators would be all but lost. Moreover, such a role would threaten to usurp policy authority from both [the legislature] and the executive. On the other hand, simply granting agency decisions deference would render the judicial role superfluous. Thus, determining the appropriate intensity of judicial oversight is of paramount importance in adjusting the courts' relationship to the other institutions of government.<sup>2</sup>

Utah courts have struggled with this problem of determining the appropriate standards of review for final agency adjudications. Before 1988, Utah courts reviewed final agency actions based on whether the question was one of fact, law, or mixed law and fact. Agency findings of fact were granted considerable deference and disturbed on appeal only if unsupported by "evidence of any substance whatever."<sup>3</sup> In contrast, agency determinations of general law were reviewed using a correction-of-error standard which accorded no deference to agency decisions. Finally, mixed questions of law and fact were reviewed using an intermediate deference standard. Under this standard, agency decisions were upheld so long as they were within the bounds of reasonableness.

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1. Tim J. Filer, *The Scope of Judicial Review of Agency Actions in Washington Revisited—Doctrine, Analysis and Proposed Revisions*, 60 WASH. L. REV. 653 (1985).

2. JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM CASES AND MATERIALS* 706-07 (3d ed. 1992).

3. Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 609 (Utah 1983).

In January of 1988, the legislature passed the Utah Administrative Procedures Act (UAPA).<sup>4</sup> UAPA governs all state agency action and review of such action.<sup>5</sup> Although UAPA details under what circumstances a party may seek appellate relief from an agency decision, it does not specify the standard of review courts should apply.<sup>6</sup> As a result, post-UAPA courts have been forced to make their own determinations as to what standards of review to apply to the various types of challenges that may be made.

This comment will examine both how Utah courts have articulated the standards of review under UAPA and the amount of deference Utah courts accord formal agency adjudications. Part II of this paper sets forth the standards of review used by the courts before UAPA was enacted. Part III sets forth the standards of review, as determined by the Utah Supreme Court, under UAPA, and explains how they differ from the pre-UAPA standards. Finally, Part IV evaluates the effect UAPA has had on the deference a court will accord agency decisions in adjudicative proceedings.

## II. PRE-UAPA STANDARDS OF REVIEW

Before the enactment of the Utah Administrative Procedures Act, the Utah Supreme Court had developed clear standards for reviewing final administrative agency actions. In *Utah Department of Administrative Services v. Public Service Commission*,<sup>7</sup> Justice Oaks, writing for a unanimous court, set forth three standards of review and made it clear that the degree of deference a court will accord an agency's decision depends upon whether the agency determination is a finding of fact, law, or mixed law and fact. Agency findings of basic fact were to be granted considerable deference and would only be overturned on appeal if they were not supported by "evidence of any substance whatever."<sup>8</sup>

In contrast, agency determinations of general law were to be reviewed using a correction-of-error standard, giving no deference to the agency's decision.<sup>9</sup> According to Justice Oaks, general questions of law included rulings concerning constitutional questions, rulings concerning the agency's jurisdiction or statutory authority, rulings concerning

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4. UTAH CODE ANN. § 63-46b-22(1) (1994) provides that "[t]he procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on or after January 1, 1988."

5. *Id.* § 63-46b-1.

6. *Id.* § 63-46b-16(4).

7. 658 P.2d 601.

8. *Id.* at 609.

9. *Id.* at 608.

common law principles such as the interpretation of contracts and certificates, and rulings concerning the interpretation of statutes unrelated to the agency.<sup>10</sup> The court refused to grant agency determinations of general law any deference because the court was comparatively more qualified than the agency to rule on such issues.<sup>11</sup>

Finally, for issues characterized as "special law,"<sup>12</sup> "mixed questions of law and fact," or the "application of the findings of basic facts . . . to the legal rules governing the case,"<sup>13</sup> an intermediate standard of review, which grants some deference to an agency's decision, was applied. Under the intermediate standard, agency decisions were to be upheld so long as they fell within the bounds of reasonableness and rationality.<sup>14</sup> According to Justice Oaks, an intermediate standard of review was necessary because:

[T]he terms *law* and *fact* and the extent of judicial review associated with them have not provided the analytical framework to explain the various types of review actually exercised by the courts. . . . [P]ractical experience with judicial review has unquestionably identified a major category of administrative decisions on which reviewing courts exercise a scope of review more extensive than when reviewing agency findings on questions of basic fact, but less extensive than when reviewing to correct error in agency decisions on questions of general law.<sup>15</sup>

Subsequent to *Administrative Services*, a large body of case law evolved applying and refining the scope of the three standards.<sup>16</sup> While

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10. *Id.*

11. *Id.*

12. Questions of "special law" or "agency specific law" deal with an agency's "interpretations of the operative provisions of the statutory law it is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency." *Id.* at 610.

13. *Id.*

14. *Id.* at 609-10.

15. *Id.* at 610 (citations omitted).

16. *See, e.g.*, *Telecommunications Resellers v. Public Serv. Comm'n*, 747 P.2d 1029, 1030 (Utah 1987); *Taylor v. Industrial Comm'n of Utah*, 743 P.2d 1183, 1186 (Utah 1987); *True-Flo Mechanical Sys. v. Board of Review*, 743 P.2d 1161, 1163 (Utah 1987); *Spreader Specialists, Inc. v. Public Serv. Comm'n*, 738 P.2d 1043, 1044 (Utah 1987); *Smith v. Board of Review*, 714 P.2d 1154, 1155 (Utah 1986); *Big K Corp. v. Public Serv. Comm'n*, 689 P.2d 1349, 1353 (Utah 1984); *Barney v. Department of Employment Sec.*, 681 P.2d 1273, 1275 (Utah 1984); *Bennion v. Utah State Bd. of Oil, Gas & Mining*, 675 P.2d 1135, 1139 (Utah 1983); *Harry L. Young & Sons v. Public Serv. Comm'n*, 672 P.2d 728, 729 (Utah 1983). The court of appeals also decided several cases applying the three standards of review articulated in *Administrative Services*. *See, e.g.*, *USX Corp. v. Industrial Comm'n*, 781 P.2d 883, 886 (Utah Ct. App. 1989); *Olympus Oil v. Harrison*, 778 P.2d 1008, 1010 (Utah Ct. App. 1989); *Capital Gen. Corp. v. Utah Dep't of Business Regulation*, 777 P.2d 494, 496 (Utah Ct. App.), *cert denied*, 781 P.2d 878 (Utah 1989); *Kline v. Utah Dep't of Health*, 776 P.2d 57,

review of agency determinations of fact remained consistent,<sup>17</sup> it was not always clear when courts should apply the intermediate standard of review. For example, in *Pinter Construction Co. v. Frisby*,<sup>18</sup> the Utah Supreme Court used the intermediate standard to review the Industrial Commission's interpretation of the term "employee" in Utah's workers' compensation statute. The court affirmed the Industrial Commission's decision that a subcontractor injured while installing metal siding was an "employee" of Pinter Construction Company entitled to workmen's compensation. The court deferred to the Commission's decision stating that "as to questions of mixed law and fact, the Court will not substitute its judgment for that of the agency as long as the commission's interpretation has warrant in the record and a reasonable basis in the law."<sup>19</sup>

Notwithstanding the decision in *Pinter*, the court used a correction-of-error standard to review the Industrial Commission's interpretation of the term "employee" in *Bennett v. Industrial Commission of Utah*.<sup>20</sup> In *Bennett*, the court considered whether the Commission had erred in deciding that Bennett was not entitled to workers' compensation because he was an independent contractor and not an "employee" under Utah's workers' compensation statute. This time the court refused to defer to the Commission's decision, stating that "[w]hether a worker is an employee within the meaning of the workers' compensation laws requires the application of a statutory standard to the facts. Since resolution of the issue is not benefitted by Commission expertise or experience, we do not defer to the Commission's ruling."<sup>21</sup>

Subsequent Utah Supreme Court cases have attempted to clarify which agency decisions should be reviewed under the intermediate standard, and which should be reviewed under the correction-of-error standard. In *Hurley v. Board of Review of Industrial Commission*,<sup>22</sup> the supreme court considered whether the Board of Review erred in holding that the 52-week period for applying for benefits under the Trade Act was to be computed from the worker's first lay-off rather than his second

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60 (Utah Ct. App. 1989); *Taylor v. Utah State Training Sch.*, 775 P.2d 432, 432-34 (Utah Ct. App. 1989); *Boyd v. Department of Employment Sec.*, 773 P.2d 398, 400 (Utah Ct. App. 1989); *Smith & Edwards Co. v. Industrial Comm'n*, 770 P.2d 1016, 1017 (Utah Ct. App. 1989); *Sisco Hilte v. Industrial Comm'n*, 766 P.2d 1089, 1091 (Utah Ct. App. 1988).

17. *See, e.g.*, *Hurley v. Board of Review*, 767 P.2d 524, 526 (Utah 1988); *Bennett v. Industrial Comm'n*, 726 P.2d 427, 429 (Utah 1986); *Big K Corp.*, 689 P.2d at 1353.

18. 678 P.2d 305, 307 (Utah 1984).

19. *Id.* (citing *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982)).

20. 726 P.2d 427 (Utah 1986).

21. *Id.* at 429 (citations omitted).

22. 767 P.2d 524 (Utah 1988).

lay-off. The Board argued that the court should accord its decision deference and apply the intermediate standard of review because the issue was one of mixed fact and law.<sup>23</sup> Petitioners, on the other hand, argued that the question of whether the 52-week period should run from their first or second termination was solely a matter of statutory interpretation, and therefore no deference should be accorded the Board's decision.<sup>24</sup>

In distinguishing the two standards, the court noted that agency decisions which are granted a deferential review are often mixed questions of law and fact which require application of specific technical fact situations to the statutes that an agency is empowered to administer. These are the types of decisions and applications in which the agency's special expertise puts it in a better position than an appellate court to evaluate the circumstances of the case in light of the agency mission.<sup>25</sup> By contrast, decisions concerning statutory interpretations, issues of basic legislative intent, or construction of ordinary terms in the statute of an agency, involve areas in which an appellate court is as well suited to decide the legal questions as is the agency. In such circumstances, the court should apply the correction-of-error standard and accord no deference to the agency's decision.<sup>26</sup>

The court has since reaffirmed its conclusion that under pre-UAPA law the intermediate standard of review should only be applied in areas of agency technical expertise. The court stated:

[I]t is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review. Rather, what has developed as the dispositive factor is whether the agency, by virtue of its experience or expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.<sup>27</sup>

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23. *Id.* at 527.

24. *Id.*

25. *Id.* at 526.

26. *Id.* at 528.

27. *Morton Int'l v. Auditing Div. of Utah State Tax Comm'n*, 814 P.2d 581 (Utah 1991). See *Chris and Dick's Lumber & Hardware v. Tax Comm'n*, 791 P.2d 511 (Utah 1988), wherein the Utah Supreme Court stated:

In the usual case, questions of statutory construction are matters of law for the courts, and we rely on a 'correction of error' standard of review, according no deference to [the] administrative agency's interpretation. There are a limited number of circumstances where the agency's interpretation of a statute or rule may be entitled to some deference, as where construction of the statute should take into account the agency's expertise developed from its practical, firsthand experience with the subject matter.

Table I on the following page summarizes the pre-UAPA standards of review.

### III. STANDARDS OF REVIEW UNDER UAPA

In January of 1988, the Utah Legislature passed the Utah Administrative Procedures Act, which governs all state agency action and review of such action.<sup>28</sup> Section 63-46b-16 of UAPA prescribes the circumstances under which a reviewing court may grant relief to a party challenging final agency action based on a formal adjudication. Subsection (4) of this section provides that relief shall be granted only if the reviewing court determines that the aggrieved party has been "substantially prejudiced" by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
  - (i) an abuse of the discretion delegated to the agency by statute;
  - (ii) contrary to a rule of the agency;

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*Id.* at 513-14 (citations omitted). See also *Taylor v. Utah State Training Sch.*, 775 P.2d 432 (Utah Ct. App. 1989), wherein the Utah Court of Appeals stated:

The more likely it is that agency expertise will assist in resolving an issue, the more deference courts should give to the agency's resolution. The less pertinent agency insight is—or the more likely it is that judicial expertise will be most helpful—the less deference need be paid by reviewing courts to the agency's disposition.

*Id.* at 434.

28. UTAH CODE ANN. § 63-46b-1(1) (1994) states that "except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state and govern . . . all state agency actions . . . [and] judicial review of these actions." It is thus possible for a statute to contain standards of review that preempt the standards applied under UAPA.

TABLE I: PRE-UAPA STANDARDS OF REVIEW

	STANDARD OF REVIEW	DEGREE OF DEFERENCE
FINDINGS OF FACT	Evidence of any substance whatever	Great deference
ISSUES OF GENERAL LAW	Correction of error	No deference
ISSUES OF AGENCY-SPECIFIC LAW (Also characterized as questions of "mixed law and fact" and "questions of application of law to fact.")	Reasonableness and rationality (Intermediate standard of review) This standard is applied only where the court finds that the agency, by virtue of its experience or expertise, is in a better position than the court to determine the issue.	Some deference

- (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
- (iv) otherwise arbitrary or capricious.<sup>29</sup>

Implementing UAPA has proven difficult because section 63-46b-16(4) deals with judicial relief and not judicial review.<sup>30</sup> Section 63-46b-16(4) gives little guidance concerning the standard of review the court should apply in determining whether any of the listed errors has occurred. As Justice Durham has noted:

Section 63-46b-16(4) of UAPA upset [the] previously settled standards [of review] without indicating what standards should replace them. While some of the subsections of 63-46b-16(4) incorporate specific standards of review, most do not. Therefore, since UAPA's adoption, we have had to make our own determinations of what standards of review to apply to various types of challenges to formal agency adjudications.<sup>31</sup>

*Although the court has not yet developed a comprehensive guide to the proper standard of review applicable to each provision of section 63-46b-16(4), it has considered many of the provisions in individual cases. A review of these cases reveals that UAPA has altered the pre-UAPA framework in several significant respects.*

#### *A. Requirement of Substantial Prejudice*

Perhaps the first noticeable difference between UAPA and pre-UAPA case law is the added requirement in section 63-46b-16(4) that an appellate court find that a party seeking review has been "substantially prejudiced" by an agency's actions before it will grant relief. In *Savage Industries v. Utah State Tax Commission*,<sup>32</sup> the Tax Commission argued that the phrase "substantially prejudiced" implied that the court should grant deference to agency decisions and uphold them unless they were "substantially" incorrect.<sup>33</sup> The court disagreed, explaining that:

The phrase "substantial prejudice" within subsection (4) refers to the "person seeking review." It does not modify the actual standards of review found within subsection (4). This means that the person seeking

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29. *Id.* § 63-46b-16(4).

30. *Morton*, 814 P.2d at 584.

31. *Semeco Indus. v. Auditing Div. of Utah State Tax Comm'n*, 849 P.2d 1167, 1170 (Utah 1993) (Durham, J., dissenting) (citation omitted).

32. 811 P.2d 664 (Utah 1991).

33. *Id.* at 669.

review of an agency action must suffer substantial prejudice as a result of that action before a court may grant relief from the action. This portion of subsection (4) relates to the damage or harm suffered by the person seeking review and was written to ensure that a court will not issue advisory opinions reviewing agency action when no true controversy has resulted from that action. The phrase simply does not relate to the degree of deference a court must give an agency decision.<sup>34</sup>

Although the court has not yet developed a comprehensive guide to the proper standard of review applicable to each provision of section 63-46b-16(4), it has considered many of the provisions in individual cases.

### 1. Subsection (4)(a): Unconstitutional Agency Action

Subsection (4)(a) allows an appellate court to grant relief where "the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied."<sup>35</sup> The Utah Supreme Court reviewed a challenge brought under subsection (4)(a) in *Questar Pipeline Co. v. Utah State Tax Commission*.<sup>36</sup> In that case, the court was asked to determine whether the Tax Commission violated the U.S. Constitution's Commerce Clause by applying a sales and use tax to gas diverted by Questar from its pipelines into compressors, which provided the pressure necessary to move the gas towards its destination. In regard to the standard of review, the court first noted that "[a]lthough some of the subsections of section 63-46b-16(4) incorporate specific standards of review, taken individually, subsection 63-46b-16(4)(a) is not helpful in that regard."<sup>37</sup> The court then concluded that it would not grant the Commission's decision any deference because constitutional challenges under subsection (4)(a) are questions of general law which are to be reviewed under a correction-of-error standard, giving no deference to the agency's decision.<sup>38</sup> This is the same standard of review the courts applied to constitutional questions before UAPA was enacted.

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34. *Id.* See also *Morton*, 814 P.2d at 584, wherein the Utah Supreme Court held that the substantial prejudice requirement "does not affect the degree of deference an appellate court grants to an agency's decision. Rather, [the phrase] ensures that relief should not be granted when, although the agency committed error, the error was harmless." The court added that "an error will be harmless if it is 'sufficiently inconsequential that . . . there is no reasonable likelihood that the error affected the outcome of the proceedings.'" (quoting *State v. Verde*, 770 P.2d 116, 120 (Utah 1989)).

35. UTAH CODE ANN. § 63-46b-16(4)(a) (1994).

36. 817 P.2d 316 (Utah 1991).

37. *Id.* at 317 (citations omitted).

38. *Id.* at 318 (citing *Savage Indus. v. Utah State Tax Comm'n*, 811 P.2d 664, 670 (Utah 1991)).

## 2. Subsection (4)(b): Agency Action Beyond Jurisdiction Conferred by Statute

Agency action challenged under subsection (4)(b), which permits relief if the agency has acted "beyond the jurisdiction conferred by any statute,"<sup>39</sup> is also reviewed using the correction-of-error standard. To date, the court has applied subsection (4)(b) in only one circumstance. In *Bennion v. ANR Production Co.*,<sup>40</sup> the court considered whether the State Board of Oil, Gas & Mining had authority to modify a pooling order. The court held that the issue was a question of law and thus its review was governed by the correction-of-error standard.<sup>41</sup> Although the court affirmed that the Board had the power to modify a pooling order, it did not grant the Board's decision any deference.

## 3. Subsections (4)(c), (4)(e) and (4)(f): Legal Error Provisions

The Utah Supreme Court has not yet had the opportunity to consider challenges to agency action under subsections (4)(c), (4)(e)<sup>42</sup> and (4)(f). Like subsections (4)(a) and (4)(b), these provisions do not incorporate any specific standards of review. By their terms, however, all three provisions concern legal error: subsection (4)(c) allows relief when an agency has not decided all of the issues requiring resolution;<sup>43</sup> subsection (4)(e) permits relief for "unlawful" agency procedure;<sup>44</sup> and subsection (4)(f) permits relief for an "illegally constituted" decision-making body.<sup>45</sup> As a result, Justice Durham has suggested in a dissenting opinion that these subsections also involve issues of general law which should be reviewed using the nondeferential, correction-of-error standard.<sup>46</sup>

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39. UTAH CODE ANN. § 63-46b-16(4)(b) (1994).

40. 819 P.2d 343, 349 (Utah 1991).

41. *Id.*

42. Although the Utah Supreme Court has not yet reviewed a challenge to agency action brought under subsection (4)(e), the Utah Court of Appeals has. In *Krantz v. Utah Dep't of Commerce*, 856 P.2d 369 (Utah Ct. App. 1993), the court, citing to Justice Durham's review of UAPA standards in *Semeco*, held that it would review questions under subsection (4)(e) for correction of error, granting no deference to the agency's conclusion of the appropriate procedure. *Id.* at 370.

43. UTAH CODE ANN. § 63-46b-16(4)(c) (1994).

44. *Id.* § 63-46b-16(4)(e).

45. *Id.* § 63-46b-16(4)(f).

46. *Semeco Indus. v. Auditing Div. of Utah State Tax Comm'n*, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting).

#### 4. Subsection (4)(g): Findings of Fact

The standard an appellate court should apply when reviewing an agency's factual findings under UAPA is clearly stated. Unlike most of the other subsections in section 63-46b-16(4), subsection (4)(g) incorporates a specific standard of review which allows an appellate court to alter an agency's factual findings only if they are "not supported by substantial evidence when viewed in light of the whole record before the court."<sup>47</sup>

In *First National Bank of Boston v. Salt Lake County Board of Equalization*,<sup>48</sup> the Utah Supreme Court applied subsection (4)(g) in reviewing whether the Tax Commission erred in calculating the fair market value of property owned by First National. In regards to the "substantial evidence" standard of review incorporated in subsection (4)(g), the court stated:

Section 63-46b-16(4)(g) requires an appellate court to review the "whole record" to determine whether the agency's action is "supported by substantial evidence." "Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. An appellate court applying the "substantial evidence test" must consider *both* the evidence that supports the [agency's] factual findings and the evidence that detracts from the findings. Nevertheless, the party challenging the findings . . . must marshal all of the evidence supporting the findings and show that despite the supporting facts, the [agency's] findings are not supported by substantial evidence.<sup>49</sup>

It is clear from the court's description of the "substantial evidence" test that UAPA has altered the standard of review for an agency's factual findings. Under pre-UAPA law, an agency's findings of fact were accorded great deference and upheld so long as they were supported by "evidence of any substance whatever."<sup>50</sup> The court's review under the "evidence of any substance whatever" test was limited to considering whether there was any competent evidence in the record supporting the agency's determination. The court in *Grace Drilling Co. v. Board of Review of the Industrial Commission of Utah*<sup>51</sup> explained, "In essence, courts reviewed only that portion of the record which supported the

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47. UTAH CODE ANN. § 63-46b-16(4)(g) (1994).

48. 799 P.2d 1163 (Utah 1990).

49. *Id.* at 1165 (emphasis added) (footnote omitted).

50. *Utah Dep't of Administrative Services v. Public Serv. Comm'n*, 658 P.2d 601, 609 (Utah 1983).

51. 776 P.2d 63 (Utah Ct. App. 1989).

agency's findings."<sup>52</sup> The "substantial evidence" test in subsection (4)(g) "grants appellate courts greater latitude in reviewing the record than was previously granted" under pre-UAPA law.<sup>53</sup> Under subsection (4)(g), the court will now review *both* sides of the record to determine whether the agency's findings are supported by "substantial evidence." This review is not as strict as a *de novo* review of the proceedings nor as lenient as a review for "evidence of any substance whatever." It simply accords deference to the agency where two reasonable, yet conflicting conclusions could have been reached.<sup>54</sup> Subsection (4)(g) thus substitutes an intermediate deference standard for a great deference standard. Reviewing courts will uphold an agency's findings of fact if they are reasonable and rational.<sup>55</sup>

### 5. *Subsection (4)(d): Erroneous Interpretations or Applications of Law*

Under subsection (4)(d), an appellate court may grant relief if an agency has "erroneously interpreted or applied the law."<sup>56</sup> In *Savage Industries v. Utah State Tax Commission*,<sup>57</sup> the Utah Supreme Court decided that under subsection (4)(d), just as under pre-UAPA law, a correction-of-error standard applies to appellate review of agency interpretations of general law. The issue in *Savage* was whether corporations acquired by Savage Industries were entitled to carry over their own preacquisition losses in determining their annual income for

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52. *Id.* at 68 n.7.

53. *Id.*

54. *Id.* at 68, wherein the Utah Court of Appeals stated:

In undertaking such a review [for substantial evidence], this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for *de novo* review. It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences.

*Id.* (citations omitted).

55. Justice Durham stated:

"[The] substantial evidence test [incorporated in subsection (4)(g) of UAPA] now appears analogous to the federal substantial evidence test, which requires the reviewing court to determine if the findings of fact were reasonable and rational. The substantial evidence test does not permit the reviewing court to conduct its own weighing of the evidence, but requires it to determine only whether the fact finder's weighing was reasonable, that is, supported by substantial evidence based on the record as a whole."

*Semeco Indus. v. Auditing Div. of Utah State Tax Comm'n*, 849 P.2d 1167, 1173 (Utah 1993) (Durham, J., dissenting).

56. UTAH CODE ANN. § 63-46b-16(4)(d) (1994).

57. 811 P.2d 664 (Utah 1991).

preparation of Savage Industries' consolidated tax returns. The Tax Commission, relying on its interpretation of title 59, section 7-108(14)(f) of the Utah Code,<sup>58</sup> held that the acquired corporations were not allowed to carry over their preacquisition losses. Savage Industries challenged the Tax Commission's decision on the ground that it was an erroneous interpretation of law.

In discussing the appropriate standard of review, the court first noted that because the Commission's decision was based entirely on its interpretation of section 59-7-108, it was a question of general law.<sup>59</sup> The court then held that subsection (4)(d) "incorporates the correction-of-error standard previously applied by the Utah courts in cases involving agency interpretations of [general] law."<sup>60</sup>

The court's decision to apply the correction-of-error standard was based on the word "erroneous" contained in subsection (4)(d), and UAPA's legislative history. UAPA was patterned after the Model State Administrative Procedure Act.<sup>61</sup> The commentators to the Model Act stated that, "[w]ith regard to the agency's interpretation to [sic] the law, courts generally give little deference to the agency, with the result that a court may decide that the agency has erroneously interpreted the law if the court merely disagrees with the agency's interpretation."<sup>62</sup>

Although *Savage* confirmed that under subsection (4)(d) a correction-of-error standard applies to agency interpretations of general law, it left unanswered whether questions of interpreting agency specific law and questions of applying law to fact should also receive correction-of-error review. Under pre-UAPA law, an appellate court would have reviewed these issues using the intermediate standard of review if the agency had experience or expertise in resolving the specific issue. But, "by using the word 'erroneously' and incorporating under one provision issues of application of law, interpretation of general law, and interpretations of [agency] specific law, subsection (4)(d) . . . upset the pre-UAPA

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58. UTAH CODE ANN. § 59-7-108(14)(f) (1994) states that, "[c]orporations acquiring the assets or stock of another corporation may not deduct any net loss of the acquired corporation incurred prior to the date of acquisition."

59. *Savage*, 811 P.2d. at 666.

60. *Id.* at 669.

61. UTAH CODE ANN. § 63-46b-16(4)(d) is nearly identical to Model State Administrative Procedure Act § 5-116(c). The court reasoned that "helpful information about the intended scope and application of Utah's Act can be obtained by resort [sic] to the comments and cases concerning the Model Act and its application in other states." *Savage*, 811 P.2d at 670.

62. *Savage*, 811 P.2d at 670 (quoting Model State Admin. Procedure Act § 5-116 cmt., 15 U.L.A. 127-30 (1981)).

framework for distinguishing issues suited for intermediate review from issues suited for no-deference review."<sup>63</sup>

The supreme court comprehensively analyzed subsection (4)(d) in *Morton International, Inc. v. Auditing Division of Utah State Tax Commission*.<sup>64</sup> In *Morton*, the Petitioner sought review of the Tax Commission's determination that certain expenditures made in the construction of facilities used to produce sodium azide pellets and igniter materials were not exempt from sales and use tax. Morton's claim to relief was based on the allegation that the Commission erred in its interpretation of the Utah Tax Code. Under prior case law, a correction-of-error standard would have been used to review the Commission's interpretation of the Code unless the Commission, by virtue of its expertise or experience, was in a better position than the court to decide the issue.

The court in *Morton*, however, held that under UAPA it was no longer appropriate to grant an agency deference solely on the basis of the agency's experience or expertise. The court stated:

[N]othing in the language of section 63-46b-16 or its legislative history suggests that an agency's decision is entitled to deference solely on the basis of agency expertise or experience. Indeed, there is no reference to agency expertise or experience in the statute or the statute's legislative history. Rather, in granting judicial relief when an "agency has erroneously interpreted or applied the law," the language of section 63-46b-16(4) clearly indicates that absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation or application of a statutory term.<sup>65</sup>

*Morton* thus established that, under subsection (4)(d), a reviewing court should not grant intermediate deference to an agency's interpretation or application of law simply because the agency, due to its experience or expertise, is in a better position than the court to decide the issue. Rather, an agency's interpretation or application of law should only be granted deference where the agency has been granted discretion

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63. *Semeco Indus. v. Auditing Div. of Utah State Tax Comm'n*, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J., dissenting).

64. 814 P.2d 581 (Utah 1991). The issue of whether UAPA altered the standard of review to be applied to agency specific law was first considered by the Utah Court of Appeals in *Pro Benefit Staffing, Inc. v. Board of Review*, 775 P.2d 439 (Utah Ct. App. 1989). In that case, the court determined that review of agency specific law is governed by UTAH CODE ANN. § 63-46b-16(4)(d). The court concluded that the intermediate standard of review was the appropriate standard. The court held that it would "not disturb the Board's application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality." *Pro Benefit Staffing*, 775 P.2d at 442.

65. 814 P.2d at 588.

“either expressly made in the statute or implied from the statutory language.”<sup>66</sup> If the court finds such a grant of discretion, it should review the agency’s decision under subsection 4(h)(i) for “abuse of discretion” using the intermediate standard of review.

#### 6. Subsection (4)(h)

a. *Subsection (4)(h)(i): Action is Abuse of Discretion.* Subsection (4)(h) contains four parts. Part (i) permits an appellate court to grant relief from agency action that is “an abuse of the discretion delegated to the agency by statute.”<sup>67</sup> The “abuse of discretion” standard pre-dates UAPA, and is a type of intermediate review.<sup>68</sup> An appellate court will uphold an agency’s exercise of discretion so long as it is reasonable and rational. As the court explained in *Morton*, this intermediate standard of review is only used where an agency’s interpretation or application of law is an exercise of the agency’s statutorily delegated discretion.<sup>69</sup> According to *Morton*, a statutory delegation of discretion may be either explicit or implicit.<sup>70</sup> Unfortunately, the court in *Morton* did not explain what the phrase “explicit grant of discretion” means.<sup>71</sup> The court did, however, provide an example of such discretion. The example of an explicit grant of discretion in *Morton* related to the Tax Commission deciding whether a piece of equipment qualified for an exemption from the sales and use tax. The court cited title 59, section 12-104(16) of the Utah Code, which provides for a tax exemption on “sales or leases of machinery and equipment purchased or leased by a manufacturer for use in new or expanding operations (excluding normal operating replacements . . . as determined by the commission).”<sup>72</sup> According to the court, the phrase “as determined by the commission” represents an explicit grant of discretion authorizing the Tax Commission to determine whether or not a piece of equipment qualifies for exemption status.<sup>73</sup> The Commis-

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66. *Id.* at 589. The *Morton* court suggested that this conclusion may not significantly affect review of agencies’ interpretation and applications of their own statutes because often where a court would summarily grant an agency deference because of its expertise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute. *Id.* at 588-89.

67. UTAH CODE ANN. § 63-46b-16(4)(h)(i) (1994).

68. *Morton*, 814 P.2d at 587. See also *Utah Dep’t of Admin. Serv. v. Public Serv. Comm’n*, 658 P.2d 601, 611-12 (Utah 1983); *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1316 (Utah 1982); *West Jordan v. Department of Employment Sec.*, 656 P.2d 411, 414 (Utah 1982).

69. 814 P.2d at 588-89.

70. *Id.* at 589.

71. *King v. Industrial Comm’n*, 850 P.2d 1281, 1287 (Utah Ct. App. 1993).

72. *Morton*, 814 P.2d at 588 n.40 (quoting UTAH CODE ANN. § 59-12-104(16) (1989)).

73. *Id.* at 588.

sion's decision under section 59-12-104(16) would be granted some deference and reviewed for reasonableness.

*Morton* also suggested what may constitute an implicit grant of discretion. In an important passage, the court stated:

[W]hen a legislative intent concerning the specific question at issue can be derived through traditional methods of statutory construction, the agency's interpretation will be granted no deference and the statute will be interpreted in accord with its legislative intent. However, in the absence of a discernible legislative intent concerning the specific question in issue, a choice among permissible interpretations of a statute is largely a policy determination. The agency that has been granted authority to administer the statute is the appropriate body to make such a determination. Indeed, both the legislative history to section 63-46b-16 and our prior cases suggest that an appellate court should not substitute its judgment for the agency's judgment concerning the wisdom of the agency's policy. When there is no discernible legislative intent concerning a specific issue the legislature has, in effect, left the issue unresolved. In such a case, it is appropriate to conclude that the legislature has delegated authority to the agency to decide the issue.<sup>74</sup>

As an example of this approach, the court cited the case of *Salt Lake City Corp. v. Confer*.<sup>75</sup> In that case the court held that the agency's interpretation of statutory provisions was entitled to deference because there was "more than one permissible reading of the statute and no basis in the statutory language . . . to prefer one interpretation over another."<sup>76</sup>

The methods for finding explicit and implicit grants of discretion suggested by the court in *Morton* are not exhaustive.<sup>77</sup> However, in spite of the approach a court uses, an agency's interpretation or application of statutory language should only be given deference if the court finds that the legislature granted the agency discretion concerning the language in question.<sup>78</sup>

The Utah Court of Appeals has had a difficult time applying the precedent set forth by the supreme court in *Morton*.<sup>79</sup> The difficulty has

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74. *Id.* at 589 (footnotes omitted).

75. 674 P.2d 632 (Utah 1983).

76. *Morton*, 814 P.2d at 588 (citing *Salt Lake City Corp. v. Confer*, 674 P.2d 632 (Utah 1983)).

77. *Id.* at 589.

78. *Id.*

79. In *King v. Industrial Comm'n*, 850 P.2d 1281 (Utah Ct. App. 1993), the Utah Court of Appeals noted that "the controlling precedent from the Utah Supreme Court [*Morton*] is less than clear and [has caused a] divergence in recent opinions of this court over how we discern the appropriate standard of review under UAPA." *Id.* at 1284. The court further stated, "We

come in determining whether an agency has been granted discretion, and thus whether the court's review should be governed by subsection (4)(d) or subsection (4)(h)(i). *Morton's* directive that courts seek out grants of discretion before applying the intermediate standard of review under subsection (4)(h)(i) has led to two different approaches in the court of appeals.

The approach taken by most of the judges on the court of appeals is outlined in *King v. Industrial Commission*.<sup>80</sup> According to this approach, the court first determines whether the legislature explicitly granted the agency discretion to interpret or apply the statutory language at issue.<sup>81</sup> The court will find that the legislature has explicitly granted the agency discretion if there is specific statutory language directing the agency to define a statutory term by regulation, or if a statute directs the agency to interpret or apply specific statutory language.<sup>82</sup> For example, in *Albertsons, Inc. v. Department of Employment Security*,<sup>83</sup> the court found an explicit grant of discretion in title 35, section 4-59(b)(1) of the Utah Code, which provides that a claimant is ineligible for unemployment benefits if the individual is "discharged for just cause . . . if so found by the commission."<sup>84</sup> When the court finds an explicit grant of discretion it will review the agency's action under section (4)(h)(i) for abuse of discretion.<sup>85</sup> That is, the court will afford the agency decision some deference and assess whether its action is within the bounds of reasonableness.

Second, if the court does not find an explicit grant of discretion, it examines the language of the statute and the statutory framework for an implicit grant of discretion.<sup>86</sup> If the statutory language is broad and expansive or subject to numerous interpretations, the court will assume that the legislature has chosen to defer to the policy making expertise of the agency, and it will find an implicit grant of discretion. The court will

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spent far less time grappling with the standard of review under [pre-UAPA's] relatively simple analysis. The complexities involved in the new analysis seem not, in the end, to make a significant enough difference for the amount of energy we expend." *Id.* at 1286 n.5.

80. *Id.* at 1281.

81. *Id.* at 1291.

82. *Id.*

83. 854 P.2d 570 (Utah Ct. App. 1993).

84. *Id.* at 573 (quoting UTAH CODE ANN. § 35-4-59(b)(1) (Supp. 1992)) (emphasis added).

85. *See, e.g., Tasters, LTD v. Department of Employment Sec.*, 819 P.2d 361, 365 (Utah Ct. App. 1991) (the legislature's use of language such as "unless it is shown to the satisfaction of the commission," and "considered [by the commission] if applicable" in UTAH CODE ANN. § 35-4-22(j)(5) (Supp. 1989) indicates an explicit grant of discretion).

86. *King*, 850 P.2d at 1291.

review the action under subsection (4)(h)(i) for abuse of discretion.<sup>87</sup> If, on the other hand, the language is clear and unambiguous and the court can interpret and apply the statutory language by traditional methods of statutory construction, the court will review the agency action under subsection (4)(d) for correction of error.<sup>88</sup>

Judge Bench on the court of appeals has articulated a slightly different approach to the appropriate analysis mandated by *Morton*. Like the majority's approach, the first question under his reading is whether there is an explicit grant of discretion to the agency to interpret or apply statutory language.<sup>89</sup> If there is an explicit grant of discretion, the court applies a deferential standard of review. Judge Bench, however, takes a more narrow view of what the supreme court meant by an "explicit grant" of discretion to interpret a statutory term. According to Bench, in order to find an explicit grant, "the legislature must direct or authorize the agency to define the statutory term by rule."<sup>90</sup> Judge Bench cites title 7, section 3-19(4) of the Utah Code, which provides that "[t]he commissioner may, by rule or regulation, define the terms 'loans and extensions of credit' and 'person' as used in this section" as an example of an explicit grant of discretion to interpret a statute.<sup>91</sup>

If the court fails to find an explicit grant of discretion, it then determines whether there is an implicit grant. The first question in this process is whether the statute is ambiguous. For, as Judge Bench explains, "[i]f the statute is clear and unambiguous, there is no implicit grant of discretion possible because there is no interpretation required by the agency. The agency simply applies the statute according to its plain language."<sup>92</sup> If the statute is ambiguous, the court should apply traditional rules of statutory construction to ascertain the meaning of the statute. No deference is given to the agency's interpretation if the statute may be interpreted in accordance with traditional rules of construction. If, however, a traditional analysis of the statute does not resolve the

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87. *Id.*

88. *Id.*

89. *Ferro v. Utah Dep't of Commerce, Div. of Occupational & Professional Licensing*, 828 P.2d 507, 510 and n.5 (Utah Ct. App. 1992) (citing *Morton*, 814 P.2d at 589).

90. *Bhatia v. Department of Employment Sec.*, 834 P.2d 574, 581 (Utah Ct. App. 1992) (Bench J., concurring).

91. *Id.* at n.3. See also UTAH CODE ANN. § 26-6-3(2)(b) (1994) ("The department shall, by rule, define persons who shall be considered 'partners' for purposes of this section."); *id.* § 26-21-13.5(3) ("The department may define by rule 'small health care facility' for purposes of licensure under this section. . . ."); *id.* § 31A-20-107(5)(b) ("The commissioner shall define 'insignificant market share' by rule."); *id.* § 59-12-104(15)(b) ("[F]or purposes of this subsection, the commission shall by rule define 'new or expanding operations' and 'establishment.'").

92. *Ferro*, 828 P.2d at 510.

ambiguities and "there is no discernible legislative intent concerning [the] specific issue[,] the Legislature has, in effect, left the issue unresolved. In such a case, it is appropriate to conclude that the Legislature has delegated authority to the agency to decide the issue."<sup>93</sup> Where there is no discernible legislative intent the court assumes that the legislature expected the agency to use its expertise in choosing between the possible permissible interpretations. The choice of interpretations in such cases is therefore viewed as a policy decision by the agency to which the court should give deference.<sup>94</sup>

A comparison of the two approaches reveals that the majority approach is articulated in less constrictive terms. For example, the majority has a broader view of what constitutes an explicit grant of discretion. Under Judge Bench's view, an explicit grant of discretion is limited to circumstances where the legislature has directed an agency to adopt rules interpreting a given term.<sup>95</sup> The majority, on the other hand, is willing to find an explicit grant of discretion not only in an adopted rule, but in any language that directs the agency to interpret or apply specific statutory language.<sup>96</sup> Furthermore, Judge Bench insists that it is important to distinguish between grants of discretion to interpret the law, and grants of discretion to apply the law. He has stated that "[o]ne cannot logically conclude, however, that just because the legislature grants an agency discretion to apply the law as an adjudicative tribunal, it also intended that reviewing courts defer to the agency's interpretation of the law applied."<sup>97</sup> Although the majority recognizes that grants of discretion to interpret statutory language are different than grants of discretion to apply statutory language, they object to Judge Bench's "vigorous effort to build an impenetrable wall between the two . . . ." <sup>98</sup> According to the majority, "[Judge Bench's] analysis is needlessly mechanistic and does not follow the direction of [the Utah]

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93. *Id.* at 511 (quoting *Morton*, 814 P.2d at 589).

94. *Id.* at 511.

95. See *supra* text accompanying note 90.

96. See *supra* text accompanying note 82. In *King*, the majority argued that *Morton* refutes Judge Bench's view that "an explicit grant of discretion can only be found in language directing the agency to define a statutory term by rule." *King v. Industrial Comm'n*, 850 P.2d 1281, 1290 (Utah Ct. App. 1993). The majority pointed out that the example of an explicit grant of discretion in *Morton* "does not show a specific legislative directive to define a statutory term by rule as Judge Bench would require." *Id.*

97. *Employers' Reinsurance Fund v. Industrial Comm'n of Utah*, 856 P.2d 648, 650 n.3 (Utah Ct. App. 1993).

98. *Id.* at 655 (Billings, J., concurring).

supreme court”<sup>99</sup> which did not differentiate between “statutory construction or application” in the *Morton* analysis.<sup>100</sup>

b. *Subsection (4)(h)(ii): Action Contrary to Rule of Agency.* Subsection (4)(h)(ii) allows an appellate court to grant judicial relief from agency action that is “contrary to a rule of the agency.”<sup>101</sup> In *Union Pacific Railroad Co. v. Auditing Division of the Utah State Tax Commission*,<sup>102</sup> the Union Pacific Railroad Company sought relief from a sales and use tax deficiency imposed by the Commission for failure to pay sales and use tax on ballast and fuel purchased in Utah for use outside the state. Union Pacific claimed that the Commission’s rules on interstate sales exempted the purchases from sales and use tax.

In determining whether to grant the Commission’s decision any deference, the court stated that “Section 63-4b-16(4)(h)(ii) refers to rules promulgated by the agency itself. Because courts should uphold agency rules if they are reasonable and rational, courts should also uphold reasonable and rational departures from those rules absent a showing that the departure violated some other right.”<sup>103</sup> The court proceeded to apply the intermediate standard in reviewing Union Pacific’s claim that the Commission erred in applying its rules.

c. *Subsection (4)(h)(iii): Action is Contrary to Agency’s Prior Practice.* Subsection (4)(h)(iii) provides that an appellate court shall grant relief from agency action that is “contrary to the agency’s prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency.”<sup>104</sup> Subsection (4)(h)(iii) explicitly incorporates the intermediate standard of review, allowing inconsistencies if the agency can “demonstrate a fair and rational basis” for them. Although the supreme court has not yet reviewed a challenge to agency action brought under subsection (4)(h)(iii), Justice Durham has noted that the standard of review incorporated into this subsection shifts the burden of persuasion from the party challenging agency action to the agency. Justice Durham stated that subsection (4)(h)(iii) “requires the agency to demonstrate the reasonableness and rationality of its departure, while in the typical challenge to agency action, the party challenging the action carries the burden of demonstrating its impropriety.”<sup>105</sup>

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99. *Id.*

100. *Id.* (citing *Morton*, 814 P.2d at 589, 592).

101. UTAH CODE ANN. § 63-46b-16(4)(h)(ii) (1994).

102. 842 P.2d 876 (Utah 1992).

103. *Id.* at 879 (citing *Williams v. Public Serv. Comm’n*, 754 P.2d 41 (Utah 1988)).

104. UTAH CODE ANN. § 63-46b-16(4)(h)(iii) (1994).

105. *Semeco Indus. v. Auditing Div. of Utah State Tax Comm’n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J. dissenting).

*d. Subsection (4)(h)(iv): Action is Arbitrary or Capricious.* Subsection (4)(h)(iv) permits relief for agency action that is "otherwise arbitrary and capricious."<sup>106</sup> Courts have used the phrase "arbitrary and capricious" to describe both intermediate and great deference review.<sup>107</sup> In her review of UAPA's standards of review, Justice Durham suggested that subsection (4)(h)(iv) must be read in connection with the other parts of subsection (4)(h).<sup>108</sup> Having concluded that the other parts of subsection (4)(h) require intermediate review, she argues that the court should apply the same standard when reviewing challenges brought under subsection (4)(h)(iv).<sup>109</sup>

Table II on the following pages summarizes the standards of review under UAPA.

#### IV. AFFECT OF UAPA ON THE AMOUNT OF DEFERENCE COURTS WILL ACCORD AGENCY DETERMINATIONS

##### A. Findings of Fact

Under UAPA, an agency's findings of fact are accorded less deference. Before UAPA, agency findings of fact were granted great deference and upheld on review if supported by "evidence of any substance whatever."<sup>110</sup> Under UAPA, however, agency findings of fact receive only intermediate deference.<sup>111</sup> This means that in the context of final administrative agency adjudications, there is no longer any area where the court will grant an agency's findings great deference.

##### B. Issues of General Law

The standard of review for issues of general law remains unchanged under UAPA. The supreme court has determined that subsections (4)(a) through (4)(f) involve questions of general law appropriate for correction-of-error review.<sup>112</sup> Under this standard, the court will not accord agency determinations of general law any deference.

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106. UTAH CODE ANN. § 63-46b-16(4)(h)(iv) (1994).

107. See Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 610 (Utah 1983) (intermediate deference); *id.* at 609 (great deference).

108. *Semeco*, 849 P.2d at 1174.

109. The Utah Supreme Court has not yet had the opportunity to consider a challenge to agency action brought under subsection (4)(h)(iv).

110. See *supra* part II.

111. See *supra* part III.E.

112. See *supra* part III.A.-III.F.

TABLE II: STANDARDS OF REVIEW UNDER UAPA

	STANDARD OF REVIEW	DEGREE OF DEFERENCE
Subsection (4)(a): unconstitutional agency action	Correction of error	No deference
Subsection (4)(b): agency action beyond jurisdiction conferred by statute	Correction of error	No deference
Subsection (4)(c): agency has not decided all the issues requiring resolution	Correction of error	No deference
Subsection (4)(d): agency has erroneously interpreted or applied the law	Correction of error	No deference
Subsection (4)(e): agency has engaged in unlawful procedure	Correction of error	No deference
Subsection (4)(f): illegally constituted decision-making body	Correction of error	No deference

TABLE II: STANDARDS OF REVIEW UNDER UAPA

	STANDARD OF REVIEW	DEGREE OF DEFERENCE
Subsection (4)(g): findings of fact	Substantial evidence	Some deference
Subsection (4)(h)(i): agency action is an abuse of discretion delegated to the agency by statute	Abuse of discretion (Intermediate standard of review) Applied only where the court finds an explicit or implicit grant of discretion to interpret or apply statutory language.	Some deference
Subsection (4)(h)(ii): agency action is con- trary to a rule of the agency	Intermediate standard	Some deference
Subsection (4)(h)(iii): agency action is con- trary to the agency's prior practice	Intermediate standard	Some deference
Subsection (4)(h)(iv): agency action is other- wise arbitrary or capri- cious	Intermediate standard	Some deference

### C. *Issues of Agency Specific Law*

An agency's determination of agency specific law used to receive intermediate deference if the agency's experience and expertise put it in a better position than the court to decide an issue.<sup>113</sup> Under UAPA, agency determinations of agency specific law will be granted deference only if the court finds that the legislature has granted the agency discretion to interpret or apply the statutory language at issue.<sup>114</sup> This seems to be a dramatic change from pre-UAPA law that will limit the scope of agency action entitled to intermediate deference. In *Morton*, however, the court suggested that this change may not have a significant effect on the standard used to review agencies' statutory interpretations and applications of their own statutes because "[i]n many cases where [the court] would summarily grant an agency deference on the basis of its expertise, it is also appropriate to grant the agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute."<sup>115</sup>

The court of appeals has interpreted this passage from *Morton* to mean that "consideration of an agency's expertise and experience is [still] relevant in determining whether the agency should make the necessary policy choice and thus be granted deference by the reviewing court."<sup>116</sup> As support for this conclusion, the court of appeals cited *Sanders Brine Shrimp v. Audit Division of the Utah State Tax Commission*<sup>117</sup> and *Board of Equalization v. Utah State Tax Commission*.<sup>118</sup> In both of these cases, the supreme court cited *Chris & Dick's Lumber & Hardware v. Tax Commission*<sup>119</sup> for the proposition that "we give no deference to an administrative agency's interpretation of a statute absent certain circumstances, none of which exist here."<sup>120</sup> The "certain circumstances" referred to in *Chris & Dick's* are those instances where courts should defer to the agency's experience and expertise.<sup>121</sup>

Thus, whether the change made by UAPA to the standard of review for agency specific law will decrease the amount of deference courts accord agencies remains to be seen. As additional cases involving

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113. *See supra* part II.

114. *See supra* part III.G.1.

115. *Morton Int'l v. Auditing Div. of Utah State Tax Comm'n*, 814 P.2d 581, 588 (Utah 1991).

116. *King v. Industrial Comm'n*, 850 P.2d 1281, 1287 (Utah Ct. App. 1993).

117. 846 P.2d 1304 (Utah 1993).

118. 846 P.2d 1292 (Utah 1993).

119. 791 P.2d 511 (Utah 1990).

120. *Sanders*, 846 P.2d at 1305; *Board of Equalization*, 846 P.2d at 1295.

121. *Chris & Dick's*, 791 P.2d at 513-14.

interpretation and application of agency-specific law emerge, we will see whether there are any cases in which the court would have granted the agency deference because of its expertise and experience under pre-UAPA law, but does not do so under UAPA because it fails to find a grant of discretion. If such cases exist, then UAPA has decreased the amount of deference accorded to agencies. On the other hand, if, as the court of appeals suggests, courts continue to consider agency experience and expertise in deciding whether to grant an agency deference, then UAPA has not significantly affected the amount of deference accorded agency determinations of agency specific law.

#### V. CONCLUSION

Although the Utah Administrative Procedures Act was a necessary step forward in administrative law in Utah, its implementation has altered the standards used to review final agency action in formal adjudicative proceedings. Specifically, UAPA replaced the court's standard for reviewing findings of fact and altered the way in which appellate courts determine the scope of agency action entitled to intermediate deference. The overall effect will be a decrease in the amount of deference courts accord agency action.

*John C. Steele*