BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

CONSUMER ADVOCATE DIVISION	)	
	)	
v.	)	DOCKET NO. 98-00626
	)	
UNITED TELEPHONE SOUTHEAST	)	
	)	

PETITION FOR REHEARING

Comes the Consumer Advocate Division, pursuant to Tenn. Code Ann. § 65-2-114 and respectfully requests the Tennessee Regulatory Authority to reconsider the decisions in its October 13, 1999 Order pursuant to Tenn. Code Ann. § 65-2-116 and insufficient findings as set forth in this Petition and argument. For cause the Petitioner would show:

1. That the Authority made a material error of fact when it decided that the Consumer Advocate Division's emphasis on Tenn. Code Ann. § 65-5-209 (e) was limited to the "annual adjustment" language. October 13, 1999 Order at page 11.

2. That the Consumer Advocate Division believed and cited Tenn. Code Ann. § 65-5-209(e) because it also contained the language "capped at," "the measure", and "of inflation", "from the preceding year" minus two percent and the Authority's findings are insufficient and erroneous on this matter. The Authority fails to compare its result against this standard.

3. That the Authority made a material error of law when it decided that Tenn. Code Ann. § 65-5-

209 (e) provided a "lack of direction."[1]

4. That, alternatively, if the agency intended to assert that the statute is ambiguous, such a decision is also a material error of law because the General Assembly limited the maximum annual adjustment by capping it at "a measure" equivalent to "the percentage change in inflation...from the preceding year minus two percent." Tenn. Code Ann. § 65-5-209 (e) and legislative intent is expressed by the statute.

5. That the Authority made a material error of fact and when it failed to state or consider in its order that no party disagreed that the maximum adjustment language of Tenn. Code Ann. § 65-5-209 (e) is limited to the preceding year or its findings are insufficient on this point. Moreover, no party argued that the language was ambiguous.

6. That the Authority made a material error of fact and law when it did not consider or hold that the "may adjust its rates" language of Tenn. Code Ann. § 65-5-209 (e) did not permit a company to waive or forfeit increases in rates and its findings are insufficient on this point.

7. That the Authority made a material error of fact and law when it did not consider in its order or hold that a company's waiver or forfeiture of rate increases benefitted Tennessee consumers or its findings are insufficient on this matter.

8. That the Authority's omissions and insufficient findings are arbitrary and capricious and that the agency has made a clear error in judgment or otherwise erred pursuant to Tenn. Code Ann. § 4-5-322 (h).

9. That the Authority made a material error of law when it considered extrinsic evidence outside

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[1]October 13, 1999 Order, p. 12. If the statute provides a lack of direction, the delegation of power to the agency would be invalid. (Citation omitted).

of the statute and legislative history to determine the legislative intent of the statute.

10. That the Authority made a material error of fact and law when it did consider or decide the legislative intent of Tenn. Code Ann. § 65-5-209.

11. That the Authority made a material error of law when it used the post hoc "stipulation" as the prompter hoc determinant of legislative intent, after it found that the provisions of Tenn. Code Ann. § 65-5-209 which deem 1995 rates to be just reasonable and affordable on a going forward basis, and the maximum annual adjustment mechanism of the section which perpetuated unlawful subsidies to be preempted by federal law.

12. That the Tennessee Regulatory Authority made a material error of fact and law when it did not consider or decide in its order, and failed to find that the "stipulation" was unenforceable and that the agency could not impose the stipulation because of preemption by the Telecommunications Act of 1996, 47 U.S.C. 276 (b)(1).

13. That the Authority made a material error of fact and law when it failed to consider, in its order, the Consumer Advocate Division's positions about the purpose of the cumulative adjustment as a test when the company could dynamically change rates as opposed to determining the maximum annual adjustment from the prior year or its findings are insufficient on this matter. The Consumer Advocate's position was contained in its Petition for a Declaratory Order and Summary Judgment.

14. That the Authority made a material error of fact and law when it permitted United Telephone to testify to the dollar amount of its payphone subsidy despite due process, other objections and the motion for continuance of the Consumer Advocate Division and refused to permit the Consumer Advocate Division to obtain discovery regarding the dollar amount of United

Telephone's payphone subsidy.

15. That the Authority made a material error of fact and law when it deferred resolution of United Telephone's rate issues when the Consumer Advocate Division did not enter into an agreement with United Telephone to restructure 1995 rates in the Authority's payphone proceeding. Moreover, there is no substantial and material evidence regarding the appropriate amount of the "restated" rates in this proceeding.

16. That the Authority made a material error of fact and law when it failed to discuss the implications of the cumulative adjustment positions of the incumbent LEC's on competition and the effect of delayed lump sum increases on consumers and the authority fails to consider how lump sum adjustments would affect consumers in a less than perfect economy.

ARGUMENT

The Authority made a material error of fact and law when it decided to order United Telephone to unilaterally restate its 1995 base revenues to reflect removal of the payphone subsidy, without permitting the Consumer Advocate Division to have due process discovery and meaningful cross-examination, or permitting the Consumer Advocate Division to contest the "restated" amount. See, e.g., Tennessee Consumer Advocate v. Bissell, Appeal No. 01A01-9606-BC-00286, filed March 5, 1997, pp. 5-6, (Tn. Ct. App., M.S.):

> Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information. ...(E)rror is found in the failure to give timely notice of the communication with opportunity to question, cross-examine and impeach the source and contradict the information.... This Court concludes that the Commission committed a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable access to the materials to be considered and reasonable

> opportunity to cross-examine or otherwise impeach the origin of such materials.

The Consumer Advocate Division had no access to the materials necessary to cross examine Mr. Parrott. Moreover, the Consumer Advocate Division had no access to discovery for cross-examination or challenge UTSE's 1995 "restated" rates and revenues.

The extent and absence of consideration is evidenced by the omission of discussion and rationale in the agency's order. Tenn. Code Ann. § 4-5-314. The Consumer Advocate Division respectfully submits that the Authority failed to consider the matters raised by the Consumer Advocate Division in its objections and motions. Levy v. Board of Examiners, 553 S.W.2d 909, 911- 912 (Tenn. 1997). In Levy, the Tennessee Supreme Court found that, as the Board made no specific findings, it was impossible for the Court to say whether or not their action was based on substantial evidence or furthermore was an abuse of discretion. Id. at 912.

In Mack v. Civil Service Commission of Memphis, Appeal No. 02A01-9807-CH-00215, filed April 28, 1999 (Tn. Ct. App. W.S.), the Court held that:

> "... the specificity requirement applies to the Commission. The purpose of findings and conclusions is to aid the Court in determining the reasons behind the agency decision, and whether the agency's conclusion is based on sufficient evidence."

In this case, the Consumer Advocate Division alleges that the findings of the Authority are insufficient.

Moreover, the Authority failed to consider the Consumer Advocate Division's objections to the testimony of Mr. Parrott regarding UTSE's alleged payphone subsidy amount and the prejudice to the Consumer Advocate Division from such testimony. Rhode Island Higher Education Assistance Authority v. Secretary of Education, 929 F.2d 844, 854 (First Cir. 1991).

The failure to consider the Consumer Advocate Division's positions are arbitrary and capricious.

The Authority also committed material errors of fact and law because the Consumer Advocate Division's preemption argument showed that Congress's regulatory statutes have completely occupied the field, that it is impossible to comply with the requirements of both the federal and state law, or that the state law somehow obstructs the accomplishment of the objectives of the Telecommunications Act of 1996. BellSouth Telecommunications v. Greer, 972 S.W.2d 663, 672 (Tn. Ct. App. 1998).

At page 8, the October 13, 1999 Order incorrectly states that the Consumer Advocate Division did not challenge the legality of the stipulated methodology accepted by the Tennessee Regulatory Authority. This assertion is not factually correct. In each of the cases mentioned UTSE argued that the stipulated methodology led to certain results. Each time the Consumer Advocate Division argued both that the methodology did not lead to the result and that the results sought by UTSE were inconsistent with or contrary to statute. In addition, the Consumer Advocate Division challenged the stipulated methodology on the grounds that it is inconsistent with federal law in the form of the Telecommunications Act of 1996, 47 U.S.C. 276. The incorrect attribution of the Consumer Advocate Division's challenge is a material error of fact.

The October 13, 1999 decision also commits a material error of law because the agency failed to ascertain the legislative intent of Tenn. Code Ann. § Tenn. Code Ann. § 65-5-209 (e). "The most basic principle of statutory construction is to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." Worley v. Weigel's, Inc., 919 S.W.2d 589, 593 (Tenn. 1996) (quoting Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995); State v. Sliger, 846 S.W.2d 262, 263 (Tenn. 1993)). See also

Parks v. Tennessee Municipal League Risk Management Pool, 974 S.W.2d 677, 679 (Tenn. 1998). Accordingly, courts "must examine the language of a statute and, if unambiguous, apply its ordinary and plain meaning." Parks, 974 S.W.2d at 679 (citing Riggs v. Burson, 941 S.W.2d 44, 54 (Tenn. 1997)). "If the language is ambiguous, the Court must look to the statutory scheme as a whole, as well as legislative history, to discern its meaning." Parks, 974 S.W.2d at 679 (citing Owens, 908 S.W.2d at 926).

The intent may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed. 2d 604 (1977). A statute should not be used by either party as a mere device to reach a result inconsistent with its legislative intent. Harris v. Sabh-Mor Flo Industries, No. 03S01-9712-CH-00142, filed April 22, 1999 (Tenn.). The Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. Carson Creek Vacation Resorts, Inc. v. Department of Revenue, 865 S.W.2d 1, 2 (Tenn. 1993).

The October 13, 1999 decision constitutes a material error of law by failing to apply the above referenced principles of legislative intent. The statute interpreted was Tenn. Code Ann. § 65-5-209 (e) which provides:

> A price regulation plan shall maintain affordable basic and non-basic rates **by permitting a maximum annual adjustment** that is **capped at** the lesser of one half (½) **the** percentage **change in inflation** for the United States using the gross domestic product-price index (GDP-PI) **from the preceding year** *as the measure* of inflation, or the GDP-PI **from the preceding year minus two (2) percentage points**. An incumbent local exchange telephone company may adjust its rates for basic local exchange telephone services or non-basic services only so long as its aggregate revenues for basic local exchange telephone services or non-basic services generated by such changes

do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan.

There is no ambiguity in subsection (e): the **maximum** annual adjustment ***is capped*** by the measure of inflation from the preceding year minus two percent. A finding contrary to the plain meaning of the language is the use of forced or subtle construction or unduly expands the scope of the statute. Using the subsequent sentence as justification to increase rates in excess of the cap is a device which reaches a result inconsistent with legislative intent. The October 13 decision negates the first sentence of Tenn. Code Ann. § 65-5-209 (e) when the statute can be construed without such negation. The agency should rehear the legislative intent issues and find that the maximum annual cap is not ambiguous.

The October 13 order commits a material error of fact and law by equating the need to have "some method for determining 'the aggregate revenues' generated.." to "the maximum annual adjustment" cap mechanism. Under the rule of statutory construction where every word has meaning, the terms, adjustments and revenues, are not the same as a matter of law.

The agency also commits a material error of fact when it states that UTSE's approach better serves the public interest than waiver or forfeiture. The Consumer Advocate Division argued that delaying rate increases undermined competition and would likely cause great harm to Tennessee consumers by creating jumbo rate increases. Indeed, other parts of the order refer to the Consumer Advocate Division's approach as a "use it or use it" approach.

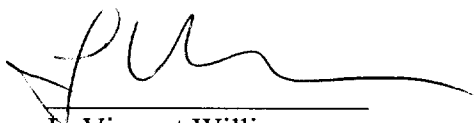
Waiver or forfeiture clearly serves the public interest. Moreover, neither UTSE nor BellSouth cited any authority for a holding that a company could not waive or forfeit rate increases. The decision that waiver or forfeiture is not permitted is contrary to legislative intent.

Tenn. Code Ann. § 65-5-209 (e) simply **permits** a maximum annual adjustment. The statute does not mandate that a company take a maximum annual adjustment. Moreover, no sentence or phrase of the statute can reasonably be taken to permit a company to recover a waived or forfeited annual adjustment. As a result, the October 13, 1999 decision commits a material error of fact and law and should be reheard and reversed.

Finally, the agency suggests in its order at footnote 22 that jumbo or cumulative increases for basic services "would likely be treated differently." The agency fails to note, however, that the statute requires a company to use precisely the same increase mechanism for basic and non-basic service with the only difference being the percentage cap. As a result, the agency's decision serves as precedent for precisely the type of adverse shocks to the public interest the Consumer Advocate Division opposes.

Wherefore the Consumer Advocate Division prays that the Tennessee Regulatory Authority rehear, modify or set aside the associated portions of its October 13, 1999 order regarding the interpretation and effect and policy of Tenn. Code Ann. § 65-5-209 (e) and the "stipulation" for the reasons stated above and grant other relief as is just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition has been mailed postage prepaid to the parties listed below this 27th day of October 1999.

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L. Vincent Williams

1999 Tenn. LEXIS 256 HARRIS V. SABH-MOR FLO INDUS. (S. Ct. 1999)

GERALDINE HARRIS, Plaintiff/Appellant

vs.

SABH-MOR FLO INDUSTRIES, AMERICAN WATER HEATER GROUP, d/b/a AMERICAN WATER HEATERS EAST, INC. and ZURICH AMERICAN INSURANCE, Defendants/Appellees

No. 03S01-9712-CH-00142
SUPREME COURT OF TENNESSEE, SPECIAL WORKERS' COMPENSATION APPEALS PANEL, AT KNOXVILLE
1999 Tenn. LEXIS 256
April 22, 1999, Filed

CHANCERY COURT. WASHINGTON COUNTY. Hon. G. Richard Johnson, Chancellor.

Judgment Order of April 22, 1999, Reported at: 1999 Tenn. LEXIS 255.

COUNSEL

For the Appellant: Greg Holt, Seaton, Holt & Herrin, Johnson City, Tenn.
For the Appellees: J. Eddie Lauderback, Herndon, Coleman, Brading & McKee, Johnson City, Tenn.

JUDGES

Members of Panel: E. Riley Anderson, Chief Justice, John K. Byers, Senior Judge, Roger E. Thayer, Special Judge. CONCUR: E. Riley Anderson, Chief Justice, John K. Byers, Senior Judge.
AUTHOR: THAYER

OPINION

MEMORANDUM OPINION

THAYER, Special Judge

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

The employee, Geraldine Harris, has appealed from the action of the trial court in dismissing her claim against her employer, Sabh-Mor Flo Industries.

Plaintiff sustained a work-related injury during October 1994 to her arm and shoulder. After receiving some treatment, she returned to work at a wage equal to or greater than she had been receiving prior to the accident. In determining her entitlement to permanent disability benefits, the trial court found her return to work was meaningful within the scope of our statute, T.C.A. § 50-6-241(a)(1), and that since her medical impairment rating was 11%, the award of permanent disability was capped at 2 1/2 times the medical impairment, which resulted in a 27.5% disability

award to the body as a whole.

Upon her return to work, she was given another job where she worked for four or five weeks. When this job ended, she was assigned a job classified as a "service agent." This position involved her understanding the basic parts of a water heater in order to handle telephone customer complaints. She was also required to operate a computer. She received several weeks of training and attempted to perform her new duties. The record is quite clear she did not perform satisfactorily. She testified she could not do the work and needed more training and her employer also felt she could not do the work. She testified that after several days attempting to do the work, she was called to the office and was told, "we don't think you are going to make it." She was terminated on April 3, 1997 which was less than two months after the February 13th trial.

The present action seeking a reconsideration of the original award of 27.5% disability under T.C.A. § 50-6-241(a)(2) was instituted on May 2, 1997. At this hearing there was a dispute between the parties as to the exact reason for plaintiff's discharge. Plaintiff contended she was terminated because she could not perform the duties she was asked to do. Defendant-employer contended she fell asleep on the job and was terminated for refusing to obey a direct order.

The Chancellor found she could not do the job because it was beyond her capabilities. On the issue of reason for termination of employment, we find the record makes the following findings:

"I find, according to the plaintiff's own proof, that the reason that she lost this so-called subsequent employment was simply because she was unable to do it mentally."

* * * *

"She doesn't have the education, the background, the experience, the skill, the training, or the mental capacity to do that computer job, ..."

At the conclusion of plaintiff's proof, the trial court dismissed the case for reconsideration of the 27.5% disability award because the proof did not establish a causal connection between her injury and the loss of employment. In support of this conclusion, the court stated that the termination of employment "was not the result of the arm or shoulder injury" and that she could perform her last job without bothering her injury. The court went on to observe that this result (dismissal of the reconsideration claim) did not appear to be right but the court or counsel was not aware of any case dispensing with the requirement of establishing a causal connection between the injury and the subsequent loss of employment.

The case is to be reviewed de novo on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). However, the de novo review does not carry a presumption of correctness to a trial court's conclusion of law but is confined to factual findings. **Union Carbide v. Huddleston,** 854 S.W.2d 87, 91 (Tenn. 1993).

The first issue presents a question of whether the evidence preponderates against the factual findings by the trial court in concluding the employee was discharged from her employment for reasons not connected or associated with her work-related injury. On this issue, we are of the

opinion the greater weight of the evidence supports the trial court's findings.

The main issue presented is whether the trial court was in error in applying T.C.A. § 50-6-241(a)(2) to the employee's claim for a reconsideration of the award of disability.

Defendant-employer argues the trial court was correct in dismissing the case and cites the case of **Brown v. State of Tennessee,** 1995 Tenn. LEXIS 712, Special Workers' Compensation Appeals Panel, No. 01S01-9502-BC-00020, filed November 22, 1995 at Nashville. In this case the employee returned to work after sustaining a work-related injury and after some period of time, he voluntarily resigned. On appeal the Panel ruled that in order to activate subsection (a)(2) of T.C.A. § 50-6-241, there must be a causal connection between the injury and the subsequent loss of employment and that the employee could not activate subsection (a)(2) by his voluntary act of resignation which had no connection to his work-related injury.

The employee contends this rule must not have any application to the facts of the present case and if the rule does apply, the employer will be permitted to frustrate the intent of the statute. We are inclined to agree with this argument.

The multiplier statute, T.C.A. § 50-6-241, has been the subject of much litigation since its enactment during 1992. This is not because of any vague or ambiguous language but because of the difficulty of applying the general principles to so many different factual circumstances many of which could not reasonably be anticipated.

Usually in applying the statute, a court must first determine whether the return to work was meaningful in the sense of the statute. Various Panel decisions have held that the action of the employee and/or employer is subject to the "reasonableness test." **See Newton v. Scott Health Care Center,** 914 S.W.2d 884 (Tenn. 1995).

We are of the opinion that the statute should not be used by either the employee or employer as a mere devise to reach a result inconsistent with its legislative intent. Thus, an employee may not avoid the 2 1/2 times cap by voluntarily terminating employment for personal or insubstantial reasons. Conversely, the employer should not be allowed to unfairly limit an award of disability by accepting the employee back to impose a 2 1/2 times cap and then discharge the employee under circumstances where the return to work did not appear to be meaningful.

We do not find the **Brown** case, supra, to control the issue in the present case. In **Brown** the employee was attempting to remove the 2 1/2 times cap by his own action which was not related to his injury. In the present case the employer has terminated the employment. Under these circumstances, we hold that the causal connection rule is not a factor to be considered and that the employer's act of discharging the employee is sufficient to activate the provisions of subsection (a)(2). This part of the statute specifically provides for a new cause of action when (1) the employee is no longer employed by the pre-injury employer, (2) application for reconsideration of the award is made to the appropriate court within one year of the employee's loss of employment, and (3) the loss of employment is within 400 weeks of the day the employee returned to work. All of these requirements have been met.

We believe this part of the statute was enacted to protect an employee under the exact circumstances in present case. The trial judge sensed the injustice which could occur in applying the "causal connection rule" but felt bound by previous Panel decisions which did not appear to create any exceptions to the general rule.

The judgment of the trial court is reversed and the case is remanded for further proceedings. Costs of the appeal are taxed to defendant-employer.

Roger E. Thayer, Special Judge

CONCUR:

E. Riley Anderson, Chief Justice

John K. Byers, Senior Judge

DISPOSITION

REVERSED and REMANDED.

1999 Tenn. LEXIS 255 HARRIS V. SABH-MOR FLO INDUS. (S. Ct. 1999)

GERALDINE HARRIS, Plaintiff-Appellant,

vs.

SABH-MOR FLO INDUSTRIES, AMERICAN WATER HEATER GROUP, dba AMERICAN WATER HEATERS EAST, INC. and ZURICH AMERICAN INSURANCE, Defendants/Appellees

No. 03S01-9712-CH-00142
SUPREME COURT OF TENNESSEE, EASTERN SECTION, AT KNOXVILLE
1999 Tenn. LEXIS 255
April 22, 1999, Decided

CHANCERY COURT. WASHINGTON COUNTY. Hon. G. Richard Johnson, Judge. No. 30935.
Special Workers' Compensation Appeals Panel Opinion of April 22, 1999, Reported at: 1999 Tenn. LEXIS 256.

OPINION

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed, and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the defendant-employer, for which execution may issue if necessary.

04/22/99

1999 Tenn. App. LEXIS 274 MACK V. CIVIL SERV. COMM'N OF MEMPHIS (Ct. App. 1999)

JERRY MACK, Plaintiff/Appellant,
vs.
THE CIVIL SERVICE COMMISSION OF THE CITY OF MEMPHIS, and THE CITY OF MEMPHIS, Defendants/Appellees.

Appeal No. 02A01-9807-CH-00215
COURT OF APPEALS OF TENNESSEE, WESTERN SECTION, AT JACKSON
1999 Tenn. App. LEXIS 274
April 28, 1999, Filed

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY AT MEMPHIS, TENNESSEE. THE HONORABLE FLOYD PEETE, CHANCELLOR. Shelby Chancery No. 108468-2 R.D.

COUNSEL

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ROBERT L. J. SPENCE, JR., City Attorney, ELBERT JEFFERSON, JR., Deputy City Attorney, Memphis, Tennessee, Attorneys for Appellees.

JUDGES

ALAN E. HIGHERS, J., CONCUR: W. FRANK CRAWFORD, P.J., W.S., DAVID R. FARMER, J.
AUTHOR: HIGHERS

OPINION

Jerry Mack ("Mack" or "Appellant") appeals the judgment of the trial court upholding the decision of the City of Memphis Civil Service Commission ("Commission" or "Appellee") which sustained the termination of Mack.

I. Factual and Procedural History

This matter involves an appeal of the discharge of Mack from his position as Events Coordinator for the City of Memphis Park Commission on April 15, 1996 for allegedly disobeying a direct order to stay at a March 23, 1996 expanded event. Mack was employed by the Park Commission for approximately ten (10) years. He held the position of Special Events Coordinator for eight (8) years.

Mack's immediate supervisor was Franklin Shelton. As part of Mack's duties as Special Events Coordinator, Mack was required to plan two jamborees per year. Both events required a great deal of planning and coordination. One week before the March 23, 1996 Jamboree there was a meeting of Park Commission Center Directors in which it was decided that the March 23 Jamboree should be expanded to include high school competition. Mack was not at the meeting, nor was he invited to attend. Shelton testified that he told Mack on or about March 20 that the

event was being expanded. Mack denied any knowledge.

On March 23, Mack conducted the Jamboree pursuant to his plans. At some point during the day he found out there was to be an additional program after his program ended. It is disputed whether Shelton ordered Mack to stay for the additional program. Mack cleaned up his area and left before the additional program began.

A fellow employee, Melvin Carter, testified he knew nothing about the additional program, but was asked to stay over by Shelton. Carter had previous plans to pick up his son. He left against orders, picked up his son, and returned. No disciplinary actions were taken against Carter.

On March 25, 1996, Mack was called into Shelton's office and given a "Fact Finding Hearing" notification advising him that he was being relieved of duty with pay and that the hearing was scheduled for Wednesday, March 27, 1996. Shelton recommended termination. Mack timely appealed to Superintendent Powell who sustained the charges and terminated Mack on April 15, 1996. On May 3, 1996, Terrance Woods, Acting Deputy Director of the Memphis Park Commission, sustained the charges and upheld Mack's termination.

Mack timely appealed his suspension to the Commission and a full hearing was held on September 6, 1996. At the hearing, coupled with arguments of disparate treatment, Mack documented a pattern of hostility practiced toward him by Shelton. On September 8, 1996, the Commission sustained Mack's termination for violations of PM-38-02, # 2 (refusal to accept an assignment from supervisor and failure to obey instruction); Park Commission Work Rule 1.03 (leaving the work site after being instructed to stay); and Park Commission Work Rule 2.03 (verbally abusing your supervisor because of an order given). The Commission did not sustain the other charges.

A timely Petition for Writ of Certiorari was filed in the Chancery Court of Shelby County on November 1, 1996. A hearing was held on November 17, 1997. The Court upheld the Commission's decision sustaining Mack's termination on June 23, 1998. Mack filed a timely Notice of Appeal on July 21, 1998 seeking review by this Court.

II. Standard of Review

A person aggrieved by a final decision of an administrative agency is entitled to judicial review in chancery court. Tenn. Code Ann. § 4-5-322(a)(1). The standard of review of agency decisions on appeal is found in Tenn. Code Ann. § 4-5-322. The statute provides in pertinent part:

§ 4-5-322. Judicial review. -

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(I) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors which affect the merits of such decision.

(j) The reviewing court shall reduce its findings of fact and conclusions of law to writing and make them parts of the record.

Our courts have held that appellate courts shall review agency decisions under the same standard as the chancery court. In **Metro Gov't of Nashville, Etc. v. Shacklett**, 554 S.W.2d 601 (Tenn. 1977), the Tennessee Supreme Court found that it would be impracticable for the Court to afford any broader or more comprehensive review to cases arising under the Act than is afforded to them by the trial court in the first instance. **Id.** at 604. Both the trial court and the appellate court should review factual issues upon a standard of substantial and material evidence. **Humana of Tenn. v. Tennessee Health Care Facilities Comm's.**, 551 S.W.2d 664 (Tenn. 1977). **See also Goldsmith v. Roberts**, 622 S.W.2d 438 (Ten. Ct. App. 1981) (The correct test for reviewing a commissioner's decision, as well as review of chancellor's finding in review of commissioner's decision, is whether or not there was substantial or material evidence to support his decision.)

If the reviewing court finds that the essential rulings of the Board are correct as a matter of law and that any necessary factual findings are based upon substantial and material evidence, then the Board's decision must be affirmed even if other errors may be found. **Bishop v. Tennessee State Bd. of Accountancy**, 905 S.W.2d 939, 942 (Tenn.App. 1995).

III. Lower Court Findings of Fact and Conclusions of Law

Mack contends that the findings of fact and conclusions of law of the trial court are insufficient. Tenn. Code Ann. § 4-5-322(j) provides that the reviewing court shall reduce its findings of fact and conclusions of law to writing and make them part of the record. Mack cites language found in **CF Industries v. Tennessee Public Service Commission**, 599 S.W.2d 536, 540 (Tenn. 1980) which states, "This is a statutory imperative; it is not a mere technicality but is

an absolute necessity without which judicial review would be impossible."

The Court in **CF Industries** found that the sufficiency of an agency's findings of fact must be measured against the nature of the controversy and the intensity of the factual dispute. Where there is no disputed issue of fact before the agency, the facts need only be recited. **Id.** at 541. Where issues of fact are sharply contested and the proof is conflicting, a detailed finding of fact dovetailed to the record is a practical and legal imperative. **Id.** In light of these standards, Mack contends that the Order of Judgment entered by the trial court is legally insufficient and should be remanded for the consideration and entry of further findings.

While the findings of the trial court in this matter are somewhat sparse, the above-quoted language regarding the specificity of findings refers to the findings of the Commission and not to the findings of the trial court. This is further evidenced in the case of **Levy v. State Bd. of Examiners, Etc.**, 553 S.W.2d 909 (Tenn. 1977). In **Levy**, the Tennessee Supreme Court found that, as the Board made no specific findings, it was impossible for the Court to say whether or not their action was based on substantial evidence or furthermore was an abuse of discretion. **Id.** at 912. The Court further held that the detailed findings of the chancellor could not be substituted for those of the Board because they would amount to a usurpation of the Board's judgment which was specifically prohibited by statute. **Id.**

The standard of review at the trial level and appellate level is the same. The court must review the factual issues and the decision of the Commission must stand if it is supported by substantial and material evidence. The findings of fact relevant to this inquiry are the findings of fact of the Commission. While § 4-5-322 requires the reviewing court to reduce its findings of fact and conclusions of law to writing and makes them part of the record, the specificity requirement applies to the Commission. The purpose of findings and conclusions is to aid the court in determining the reasons behind the **agency** decision, and whether the **agency's** conclusion is based on sufficient evidence. **CF Industries** at 541 (emphasis added).

The trial court found that the termination of Mack was the result of Mack's violation and noncompliance with the City of Memphis Personnel Manual Policies and Procedures Section PM 38-02, numbers 1,2 and 4, and of the City of Memphis Park Commission Work Rules 1.03 and 2.02. The trial court also made the following conclusions of law:

1. That this Court has jurisdiction of the parties and the subject matter of this action pursuant to Tenn. Code Ann. § 27-9-114, **et seq.** and § 4-5-322.

2. That in its case before the Civil Service Commission of the City of Memphis, Respondent, City of Memphis, made a **prima facie** case that termination of Petitioner, Jerry Mack, was based on good cause.

3. That Petitioner, Jerry Mack, failed to controvert the **prima facie** case made by the City of Memphis.

4. That the decision of the City of Memphis Civil Service Commission in upholding the termination of Mr. Jerry Mack was not arbitrary, capricious, an abuse of discretion or

unsupported by substantial and material evidence.

5. That the original termination of Mr. Jerry Mack by the City of Memphis be upheld.

We hold that the findings of fact set forth by the trial court comply with Tenn. Code Ann. § 4-5-322(j). The specificity requirement set forth in the above mentioned case law refers to the findings of the agency. Mack has not alleged that the findings of the Commission are in any way insufficient. However, the findings of the Commission are necessary for this Court to determine the reasons behind the Commission's decision and whether the Commission's conclusion is based on sufficient evidence, and we find that the Commission's findings are legally sufficient for this purpose.

IV. Substantial and Material Evidence

Pursuant to Tenn. Code Ann. § 4-5-322(h), the reviewing court may reverse or modify the agency decision if it is unsupported by evidence which is both substantial and material in light of the entire record. Mack contends that the findings of the Commission were arbitrary and the decision of the Commission was not supported by substantial and material evidence.

Mack was terminated for violation of **Personnel Manual Policies and Procedures** PM-38-02, # 2 (refusal to accept an assignment from supervisor and failure to obey instructions); **Park Commission Work Rule** 1.03 (leaving the work site after being instructed to stay); and 2.02 (Verbally abusing your supervisor because of an order given).

For the purpose of review under Tenn. Code Ann. § 4-5-322(h)(5) (Supp. 1997), "substantial and material evidence" is such relevant evidence that a reasonable mind may accept to support a rational conclusion and to furnish a reasonably sound basis for the action under consideration. **See Southern Ry. v. State Bd. of Equalization**, 682 S.W.2d 196, 199 (Tenn. 1984). This amount of evidence is something less than a preponderance of the evidence but more than a scintilla or a glimmer. **Wayne County v. Tennessee Solid Waste Disposal Control Bd.**, 756 S.W.2d 274, 280 (Tenn.App. 1988). "When we are reviewing the evidentiary foundation of an administrative decision under Tenn. Code Ann. § 4-5-322(h)(5), we are not permitted to weigh factual evidence and substitute our own conclusions and judgment for that of the agency, even if the evidence could support a different determination than the agency reached." **Ware v. Greene**, 984 S.W.2d 610, 614 (Tenn.App. 1998). **See also** Tenn. Code Ann. § 4-5-322(h); **Humana of Tenn. v. Tennessee Health Facilities Comm'n**, 551 S.W.2d 664, 667 (Tenn. 1977). An agency's decision may be supported by substantial and material evidence even when the evidence could support another conclusion. **Jones v. Greene**, 946 S.W.2d 817, 828 (Tenn.App. 1996).

Mack argues that he did not know the event was to be expanded until the day of the event. Melvin Carter assisted Mack with the events at the jamboree. Carter testified that he also did not know the event was to be expanded until the day of the event. Mack contends that his supervisor, Franklin Shelton, did not ask him to remain at the event.

However, there was testimony by Shelton that Mack knew the event was to be expanded and that Shelton gave him a direct order to stay at the event. Shelton's supervisor, Charles Powell,

testified that Shelton approached him at the event to tell him he had a conversation with Mack, asked him to stay, and Mack was refusing to stay. Powell testified that he told Shelton to go back and tell Mack that it was a direct order and to disobey it would be insubordination. There is evidence in the record that Mack verbally abused Shelton because of the order he was given.

Mack is correct that these issues were disputed and we would agree that the evidence presented could support a different determination than the Commission reached. However, the possibility of drawing inconsistent conclusions from the proof does not prevent an agency's decision from being supported by substantial and material evidence. **Jones** at 828. The courts need only reject an agency's factual findings when, considering the record as a whole, a reasonable mind would necessarily come to a different conclusion. **Id**.

We cannot find that reasonable minds would necessarily come to a different conclusion. We therefore affirm the factual findings of the Commission and hold that the decision of the Commission is supported by substantial and material evidence.

V. Constitutional Issues

Mack contends that he was denied equal protection of the law in light of the fact that he was treated differently than a similarly situated employee. He alleges that the disciplinary policy and ordinances of the City of Memphis calling for "just cause" for discharge were applied in a disparate fashion to him even though the disciplinary policy itself requires that it be applied in a "uniform method" without "prejudice or favoritism." These allegations are based upon the undisputed fact that Melvin Carter disobeyed a direct order to stay on the premises for the expanded May 23 event. Carter testified that he left the event to pick up his son and then returned to the event. Carter was neither terminated nor disciplined in any fashion for his actions.

Although we have found the Commission's decision to be supported by substantial and material evidence, pursuant to Tenn. Code Ann. § 4-5-322(h)(1), the decision of the Commission may also be reversed or modified if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are in violation of constitutional or statutory authority. The constitutional issues raised by Mack are not addressed in the findings and conclusions of the Commission or the trial court.

The propriety of an administrative agency determining constitutional issues was addressed by the Supreme Court of Tennessee in **Richardson v. Tennessee Bd. of Dentistry**, 913 S.W.2d 446 (Tenn. 1995). The Court in **Richardson** held that administrative agencies are without authority to rule on the facial unconstitutionality of a statute, but agencies may rule on the unconstitutional application of a statute or rule. However, failure to contest the unconstitutional application of a statute or rule at the agency level does not prevent a party from raising those issues upon judicial review. While it is unclear from the record whether the constitutional issues were raised at the agency level, both parties agree that the issues were raised in the trial court below.

Mack's contention is that the policies and ordinances of the City of Memphis, while

constitutional on their face, were applied in a disparate fashion in violation of his equal protection rights under both the United States Constitution and Tennessee Constitution.[1] Mack also contends that the disparate application is in violation of the policy itself which requires that it be applied in a "uniform method" without "prejudice or favoritism."

While it may be difficult for Mack to prove that his equal protection rights have been violated under this theory of disparate application, Mack is entitled to have these grounds of reversal addressed by the trial court pursuant to Tenn. Code Ann. § 4-5-322(h)(1). We must therefore remand this case back to the trial court for findings of fact and conclusions of law on the constitutional issues presented by Mack.

VI. Conclusion

The judgment of the trial court is hereby affirmed in part and remanded for further findings of fact and conclusions of law on the issue of violation of constitutional or statutory provisions. Costs of this appeal are taxed to Appellant, for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.

DISPOSITION

AFFIRMED IN PART AND REMANDED.

OPINION FOOTNOTES

1 Although not framed as a separate issue in his brief to this Court, Mack takes issue with the lack of pre-discharge investigation by the City, and the failures of the post discharge investigation. While Tenn. Code Ann. § 4-5-322(h)(3) allows the reviewing court to reverse or modify the decision if made upon unlawful procedure, this refers to the procedure of the agency itself. Mack does not allege that the problems with the investigation fall under this section of the statute, but neither does he set forth the legal avenue through which this issue can be reached by the reviewing court. To the extent that this issue can be construed as a violation of Mack's constitutional right to procedural due process or as a violation of statutory provisions, it should be addressed by the trial court in its findings of fact and conclusions of law on remand.

1997 Tenn. App. LEXIS 148 TENNESSEE CONSUMER ADVOCATE V. TENNESSEE REGULATOR (Ct. App. 1997)

TENNESSEE CONSUMER ADVOCATE, Plaintiff/Appellant,
vs.
TENNESSEE REGULATORY AUTHORITY AND UNITED CITIES GAS COMPANY, Defendant/Appellee.

Appeal No. 01A01-9606-BC-00286
COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE
1997 Tenn. App. LEXIS 148
March 5, 1997, FILED

APPEAL FROM THE DAVIDSON COUNTY TENNESSEE PUBLIC SERVICE COMMISSION, AT NASHVILLE, TENNESSEE. TN Regulatory Authority Trial No. 95-01134.

COUNSEL

Charles W. Burson, Attorney General & Reporter, L. Vincent Williams, Consumer Advocate Division, Nashville, TN, ATTORNEY FOR PLAINTIFF/APPELLANT.

H. Edward Phillips, III, Tennessee Regulatory Authority, Nashville, TN, ATTORNEY FOR DEFENDANT/APPELLEE.

JUDGES

HENRY F. TODD, PRESIDING JUDGE, MIDDLE SECTION, CONCUR: BEN H. CANTRELL, JUDGE, WILLIAM C. KOCH, JR., JUDGE

AUTHOR: TODD

OPINION

The petitioner, Tennessee Consumer Advocate, has petitioned this Court for review of administrative decisions of the Tennessee Public Services Commission pursuant to T.R.A.P. Rule 12. By order entered by this Court on October 3, 1996, the review is limited to an order entered by the Commission on May 3, 1996. However, the circumstances stated hereafter require reference to an order previously entered by the Tennessee Public Service Commission on May 12, 1995.

The Parties.

Prior to June 30, 1996, the Public Service Commission controlled the charges of public utilities in Tennessee. On June 30, 1996, the Public Service Commission was discontinued by enactment of the Legislature which created the Tennessee Regulatory Commission which has been substituted for the Public Service Commission in proceedings before this Court.

By T.C.A. § 65-4-118, the Consumer Advocate Division of the Office of Attorney General and Reporter may with the approval of the Attorney General and Reporter appear before any administrative body in the interests of Tennessee consumers of public utility services.

United Cities Gas Company is a public utility which purchases and distributes natural gas through its pipelines to patrons in parts of Tennessee.

The Administrative Proceedings.

On January 20, 1995, United filed with the Public Utilities Commission (hereafter P.S.C.), an application for approval of a scheme of variable rates based upon the wholesale price of gas purchased from suppliers.

P.S.C. granted leave to the Consumer Advocate to intervene.

On May 12, 1995, the P.S.C. entered an order approving the proposed scheme on condition that an independent consultant be engaged to review the "mechanism" and report to the commission annually.

On October 31, 1995, United Gas submitted to the Commission for approval, a contract with Consulting & Systems Integration, providing that the work was to be performed by a Mr. Frank Creamer. Subsequently, United Gas requested that Anderson Consulting be substituted for Consulting Systems because Mr. Creamer had severed his connection with Consulting Systems and affiliated with Anderson.

The May 3, 1996, order of the Commission, which is the subject of this appeal, approved the contract with Anderson Consulting and thereby satisfied all of the conditions for activation of the rate plan conditionally approved in the May 12, 1995 order.

On appeal, the Consumer Advocate presents ten issues for review. Only those which relate to the May 3, 1996, order will be considered.

The appellant's fourth, fifth, sixth and seventh issues are:

> IV. The commission's action violated statutory provisions, was asked upon unlawful procedure, was arbitrary and capricious, or was clear error when it took judicial notice of a report prepared by a consultant of UCG.
>
> V. The Consumer Advocate was denied an opportunity to be heard as to the propriety of taking judicial notice of the report.
>
> VI. The Consumer Advocate division was not notified of the material noticed and afforded an opportunity to contest and rebut the facts or material so noticed.
>
> VII. A decision of the Tennessee Public Service Commission is void or voidable when agency members receive aid from staff assistants, and such persons received ex parte

communications of a type that the administrative judge hearing officer or agency members would be prohibited from receiving, and which furnish, augment, diminish or modify the evidence in the record in violation of Tenn. Code Ann. § 4-5-304(b).

At a hearing before the Commission on February 3, 1996, the following occurred:

Mr. Irion: We have the independent consultant here. Does the Commission on wish to hear from him?

Chairman: I think what we have agreed to is just summarize his testimony.

Mr. Williams: He has not made any testimony, and --

Mr. Irion: He has only filed a report, and he is not technically our witness or --

Mr. Williams: I think he is their witness. They chose him and paid for him. We did not have any choice. The Consumer Advocate was not given any choice in the matter who was going to be the witness.

Chairman: The Commission can take judicial notice of that, that record. That's our record.

Com. Hewlett: This is our consultant.

Mr. Hal Novak: That's correct, sir. The Commission staff chose this consultant.

Chairman: We can take judicial notice of that and it can referred to in your argument here.

Mr. Williams: I would say that the Commission staff approved the consultant after the company selected the consultant.

Mr. Novak: That's not true, sir.

Chairman: Well, now wait a minute now, fellows. We can take judicial notice, and will take judicial notice of all our records and reports like that to the Commission and you can refer to that in your argument.

Mr. Williams: What I would also like to do, Commissioner, maybe we need to have a longer period of time. I would like to know what the staff's position -- it was indicated that the staff had a position that the rule operated effectively, that the Commissioners had obviously heard and were considering. I would like disclosure under the statute of the staff's position on why they think that it operates correctly.

Com. Hewlett: Well, that would be in my way of thinking not impossible to get into the record, but very difficult it is most appropriate, as I understand the law, for us to discuss with our technical staff. That's the reason that the Consumer Advocate Division was created because of the ex parte concerns of when our staff were parties to the case and when they are not. Our staff, as I understand it, it not a party to this case, and they are a resource for us for analyzing anything that is before this Commission. In this case this situation. So, I think you are trying to make a party to the case somebody that is not.

Mr. Williams: No, sir, what we are trying to do is get all the salient information on the record. The statute explicitly, the UAPA explicitly requires that the Commission disclose when it has any of the position papers that are presented by the staff, and the Public Records Act does not prevent the disclosure of those items either.

Chairman: We will rule on that at the beginning of the meeting at 1:30.

Mr. Williams: Okay.

Chairman: Well, we will evaluate that with our legal counsel, and rule on it before issuing an order or in the order in this manner.

The record of proceedings clearly indicates that the Commission considered a report of an expert despite the objections of the Consumer Advocate and his efforts to impeach the report by cross-examination of the expert. T.C.A. § 65-2-109(1) and (2), authorize the consideration of a broad spectrum of evidence. However, no authority is cited to empower the Commission to deny a protesting party access to all evidence considered by the Commission and opportunity to impeach it by cross-examination of the origin of such evidence.

The issue of consideration of documents and/or communications is not an issue of "judicial notice" or "administrative notice," but an issue of admissibility of evidence and procedural fairness in respect to notice of the matter to be considered and opportunity to cross-examine, or impeach the source or contradict the evidence to be considered.

It is elementary that administrative agencies are permitted to consider evidence which, in a court of law, would be excluded under the liberal practice of administrative agencies. Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information.

No error is found in the consideration of informal forms of communication. However, error is found in the failure to give timely notice of the communication with opportunity to question, cross-examine and impeach the source and contradict the information.

As illustrated by the above quotation from the record, the Commission was unfamiliar with basic rules of fairness in an administrative hearing.

Tenn. Code Ann. § 4-5-312(b)

> **Procedure of hearing.** To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, as restricted by a limited grant of intervention or by the pre-hearing order. (Emphasis added.)

Tenn. Code Ann. § 4-5-313(6)

> Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so

noticed.

Tenn. Code Ann. § 4-5-304(a)(b)

Ex parte communications.

(a) Unless required for the disposition of ex parte matters specifically authorized by statute, an administrative judge, hearing officer or agency member serving in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, **with any person without notice and opportunity for all parties to participate in the communication.**

(b) Notwithstanding subsection (a), an administrative judge, hearing officer or agency member may communicate with agency members regarding a matter pending before the agency or may receive aid from staff assistants, members of the staff of the attorney general and reporter, or a licensed attorney, **if such persons do not receive ex parte communications** of a type that the administrative judge, hearing officer or agency members would be prohibited from receiving, **and do not furnish, augment, diminish or modify the evidence in the record.** (Emphasis added.)

This Court concludes that the Commission committed a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable access to the materials to be considered and reasonable opportunity to cross-examinate or otherwise impeach the origin of such materials.

For the foregoing reasons, the order entered by the Public Service Commission on May 3, 1996, is reversed, vacated, and the cause is remanded to the Tennessee Regulatory Authority for such further proceedings and actions as it may deem appropriate including a reconsideration of the subject of the May 3, 1996, order of the Public Service Commission.

Should the Regulatory Authority reach a conclusion different from that expressed in the May 3, 1996, order of the Commission, the way may be opened for a further consideration of the subject matter of the May 26, 1995, order, in which event the authority will be free to examine the merits of the order and the proposal dealt with therein.

Of particular interest and concern are the propriety of omitting certain income from considering "fair return," of "rewarding" utility for keeping its expenses at the minimum, and of utilizing the services of an expert employed by the utility. These issues have not been discussed

in this opinion because of the limitation of the scope of the appeal granted by this Court.

Costs of this appeal are assessed against the Tennessee Regulatory Authority.

REVERSED AND REMANDED.

HENRY F. TODD

PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE

DISPOSITION

REVERSED AND REMANDED
