

**AMERICAN BAR ASSOCIATION  
 SPECIAL COMMITTEE ON CITATION ISSUES  
 SECTION OF LITIGATION  
 TORT AND INSURANCE PRACTICE SECTION  
 SECTION OF SCIENCE AND TECHNOLOGY  
 MASSACHUSETTS BAR ASSOCIATION  
 STATE BAR OF SOUTH DAKOTA  
 STATE BAR OF WISCONSIN  
 MILWAUKEE BAR ASSOCIATION  
 COORDINATING COMMITTEE ON LEGAL TECHNOLOGY  
 REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that:	1
	2
1. All jurisdictions adopt a system for official citation to case reports that is equally effective for printed case reports and for case reports electronically published on computer disks or network services, that system consisting of the following key elements:	3
	4
	5
A. The court should include the distinctive sequential decision number described in paragraph C below in each decision at the time it is made available to the public.	6
	7
B. The court should number the paragraphs in the decision.	8
C. The court should require all case authorities to be cited by stating the year, a designator of the court, the sequential number of the decision, and where reference is to specific material within the decision, the paragraph number at which that material appears.	9
	10
	11
	12
D. Until electronic publications of case reports become generally available to and commonly relied upon by courts and lawyers in the jurisdiction, the court should strongly encourage parallel citations, in addition to the primary citation described in paragraph C above, to commonly used printed case reports. When a cited authority is not available in those printed case reports, the court should require counsel to provide printed copies to opposing counsel and to the court. The parallel citation should only be to the first page of the report and parallel pinpoint citations should not be required.	13
	14
	15
	16
	17
	18
	19
	20

# 107

E. The standard form of citation, shown for a decision in a federal court of appeals, should be: 1

Smith v. Jones, 1996 5Cir 15, ¶18, 22 F.3d 955. 2

1996 is the year of the decision; 5Cir refers to the United States Court of Appeals for 3

the 5th Circuit; 15 indicates that this citation is to the 15th decision released by the court 4

in the year; 18 is the paragraph number where the material referred to is located, and 5

the remainder is the parallel citation to the volume and page in the printed case report 6

where the decision may also be found. 7

8

REPORT

¶11 The Special Committee on Citation Issues submits the following report concerning its recommendation to the House of Delegates:

I. Charge to the committee.

¶12 In recent years, growing numbers of court decisions have become available soon after their release, through electronic publication on computer bulletin boards, disks, and the Internet. The traditional method of citing to volume and page numbers in printed reports cannot be used effectively for these decisions because the printed reports typically are not published until considerably later. In an effort to develop citation methods that work effectively both with books and with computer databases, a number of jurisdictions are considering or have recently adopted new citation systems. While there are similarities, these new systems differ significantly among themselves.

¶13 The Board of Governors recognized the importance of avoiding a proliferation of varying citation systems and created this committee at the ABA Annual Meeting in August, 1995. The charge to the committee was:

The Committee shall (a) evaluate citation issues, inviting views from all ABA entities and organizations active in fields related to legal citation; (b) develop recommendations concerning a citation system which will be broadly acceptable to the bar and to the courts; and, (c) recommend action for consideration by the Board of Governors and the House of Delegates at the 1996 Annual Meeting.

II. The committee's study of citation issues.

¶14 The committee posted notices of its work on the ABA Network home page on the Internet and wrote to invite written submissions by interested individuals, ABA sections and divisions, state bar associations, state and federal judiciaries, the editors of the two leading citation manuals, publishers of legal decisions, law libraries, and other entities who had previously worked with citation issues. The first invitation was issued on October 17, 1995, and the period for submissions extended until May 5, 1996.

¶15 Based on the written submissions received by November 20, 1995, the committee selected entities and individuals to provide further information in oral presentations in Chicago on December 8, 1995. Those invited to make presentations represented the entire spectrum of views as to positions the ABA

## 107

should take concerning citation issues. The following entities and individuals made presentations:

ABA Section of Intellectual Property Law  
Sabina Assar  
Gary D. Spivey

American Association of Legal Publishers  
Eleanor J. Lewis  
Alan D. Sugarman

Association of Reporters of Judicial Decisions  
Frederick A. Muller

State Bar of South Dakota  
Thomas C. Barnett, Jr.

Taxpayer Assets Project  
James Love

West Publishing Company  
Donna Bergsgard  
Brady C. Williamson

Wisconsin State Bar  
John H. Lederer

Christopher G. Wren  
Jill Robinson Wren  
(individual Wisconsin lawyers)

- ¶6 The committee drafted an initial outline of its report based on the written submissions received and the oral presentations at its meeting on December 8, 1995. After a number of revisions, a draft report was distributed for public comment on March 18, 1996. Copies were sent to all who had submitted material to the committee and to all who requested a copy, and the report was made generally available through the ABA Network.
- ¶7 The committee took into consideration all of the information and comments it received by May 9, 1996, and prepared this final report with recommendations for consideration by the Board of Governors and House of Delegates at the 1996 ABA Annual meeting.

18 The committee was fortunate to have the benefit of the advice of liaisons from other organizations with particular expertise and interest in citation issues. These liaisons were:

Noel J. Augustyn, Esq.  
Administrative Office of the United States Courts

The Honorable Danny J. Boggs  
Judicial Conference of the United States

Professor Rita T. Reusch  
American Association of Law Libraries.

The liaison members participated fully in the meetings and discussions of the committee, but did not take any part in the decisions of the committee as to its report and recommendations. The members of the committee, who were solely responsible for these decisions, and the entities from which they were drawn were:

Robert W. Barger, Immediate Past Chair, ABA  
Section of Science and Technology (New Jersey).

James E. Carbine, Co-chair, Trial Practice  
Committee, ABA Section of Litigation  
(Maryland).

J. D. Fleming, Jr., Chair (Georgia).

Professor Patricia B. Fry, Council Member, ABA  
Section of Business Law (North Dakota).

Robert E. Hirshon, Chair Elect, ABA Tort and  
Insurance Practice Section (Maine).

The Honorable Thomas S. Williams, Vice Chair,  
Court Management and Administration Committee,  
ABA Judicial Administration Division (Wisconsin).

Carolyn B. Witherspoon, President, Arkansas  
Bar Association (Arkansas).

III. Summary of the Committee's Conclusions.

## 107

- ¶9 As directed by the Board of Governors, the committee evaluated the citation issues which were raised in the written and oral submissions it received. The primary issue of concern was whether or not the committee should recommend a new citation system which is not limited to references to volume and page numbers in printed case reports.
- ¶10 Comments submitted to the committee showed substantial agreement on certain core points. While preferences were expressed for one form of citation or another, there is general recognition that courts should be and are free to prescribe a preferred or mandatory citation method, including new methods which do not rely on the traditional system of citing to volume and page numbers in printed reports. (E.g., West Publishing's Statement of Position to the American Bar Association Citation Issues Committee, p. 12 (Nov. 17, 1995.)) There also is general agreement that substantial uniformity of citation systems should be encouraged for all jurisdictions. The major point of disagreement is whether or not parallel citations to a specific source, such as Lexis, Westlaw, or the West National Reporter System, should be required in addition to a "generic" and medium neutral citation. (Id.)
- ¶11 Based upon the information it received, the committee recommends that courts adopt a universal citation system using sequential decision numbers for each year and internal paragraph numbers within the decision, these numbers being assigned by the issuing court and included in the decision at the time it is made publicly available by the court. The committee also recommends that parallel citations to commonly used print sources be strongly encouraged. This citation system is equally adaptable to printed and electronic case reports and is thus medium neutral.

### IV. The Committee's Analysis of the Issues.

#### Issue No. 1: Is there a reason to change the existing citation system?

- ¶12 The existing citation system is based on a volume and page citation to a printed report of decisions. Some jurisdictions have official reports and a number of commercial vendors offer printed reports. These printed reports have earned universal acceptance by courts and lawyers, and a change in this citation system cannot be suggested absent a clear and convincing reason. The committee has no doubt that such a reason exists.
- ¶13 In recent years, computer-based technology has added capabilities which are now commonly recognized as offering significant improvements in the way that

legal authorities are published and disseminated. Few courts still use typewriters. Decisions are largely prepared on computer word processors. As a result, decisions are generated as computer files that can be made available on online computer databases in a few hours instead of the several weeks that are often required to produce printed reports.

- ¶14 In addition to substantial improvement in the speed of publication, electronic publishing offers significant reductions in the bulk of case reports. Reports that would require hundreds of volumes to print can be stored on a CD ROM disk far smaller than a paper back book, allowing a lawyer to carry a library and a computer to read it in a briefcase.
- ¶15 Another important factor is cost. For sole practitioners and small firms as well as for large firms, the current economic pressures on law practice demand that overhead costs be controlled. The cost of making legal research material available is therefore a key issue for most lawyers. The cost of a CD ROM library is often a small fraction of the cost of a printed library and the space it occupies. This makes extensive collections of case reports widely available in smaller towns as well as in the cities, and significantly decreases the cost of those reports.
- ¶16 The committee recognizes that many lawyers prefer to use printed case reports for legal research, and that printed reports likely may remain the preferred source for some time. Just as clearly, a number of examples demonstrate that the publication of case reports is beginning to respond at an accelerating pace to the lower cost and more prompt availability of material that electronic publication makes possible. As of January 1, 1996, the federal judiciary was "in its seventh year offering various electronic public access services to federal court information. . . . The federal courts expect to complete the installation of an electronic public access service into every federal appellate, district, and bankruptcy court within the next several months. . . . All federal circuit courts now offer public users electronic access to appellate court decisions (slip opinions) and other court information . . . ." (Directory of Electronic Public Access Services, U.S. Federal Courts Home Page, Internet, <http://www.uscourts.gov>.) All new Supreme Court and United States Courts of Appeals decisions are available on searchable databases soon after they are released. Some law journals are now published only on the Internet, and not in print. South Dakota is an example in which electronic publication of case reports by a state bar association has made inexpensive libraries available to all lawyers in the state at a modest cost. At least one publisher of CDRom case reports has said "we are in the process of expanding our coverage to all 50 states and adding federal coverage as well." (Brochure, LOIS, Inc., page 3, January 1996.)
- ¶17 Examples such as these have convinced the committee that the continued

## 107

growth of electronic publication of case reports is certain. It is clear that citation methods which are satisfactory for printed reporters are not well suited to electronic databases and reporters. The volume and page numbers which describe very naturally where material can be located in printed reporters are not meaningful or convenient to apply to computer files, which are far more easily indexed sequentially as they are released. In addition, requiring electronic reports to use the page numbers from printed reports is impractical since those page numbers are not available until quite some time after the electronic report is published. The adoption of a new citation method is essential to allow electronic publication of case reports to reach its full potential.

- ¶18 The committee concludes that it will be necessary to adopt a new citation system suited as well to print publication as to electronic publication. This new system should be medium neutral in that it should be as easily used with printed reports as with electronic reports. The principal objective is to enhance the use of all forms of case reports, and not at all to impede the use of printed reports.
- ¶19 The committee recommends that the new citation system be applied to all decisions released to the public after the date of adoption of the system by the court.

### Issue No. 2: What citation convention should be specified for reports of decisions?

- ¶20 As outlined in the following paragraphs, the committee recognizes that any citation system that will be equally useful for printed and electronic case reports must depend on the assignment of specific references by the courts at the time their decisions are released. The courts are in the best position to decide what those references should be, weighing such factors as administrative burdens and costs, convenience for the courts and practicing lawyers, and the advantages of uniformity among the various jurisdictions. The committee's recommendations in the following paragraphs are intended to suggest a beginning point for these decisions.
- ¶21 There are clear advantages to using a consistent locator system for printed reports and for electronic reports. This will allow lawyers and others to use the types of reports that best suit their needs and preferences, and to use the same citations in the works of a variety of publishers of printed and electronic reports.
- ¶22 The use of a universal citation system throughout all jurisdictions also has clear advantages. The free flow of commerce encourages interstate business operations and the result is that lawyers often practice in many different jurisdictions and courts increasingly take advantage of reasoned decisions from other jurisdictions. A



system of universal, permanent, immediately available citations for electronic media will greatly ease the burden of those users.

¶23 In the following paragraphs, the committee has suggested a specific format for the universal citation system. While it is clear that some courts may find it necessary to implement the system with modifications in the recommended format, as noted in ¶20, the benefits from uniformity across the nation will be realized only if the courts adopt consistent formats whenever reasonably possible. The committee would, for example, urge all federal courts of appeals to use consistent court designators.

¶24 Some have suggested that reports be cited by case docket numbers since these numbers could be used for electronic reports as well as for printed reports. This choice would entail several disadvantages, the most significant of which is that multiple decisions in a case would produce multiple reports with the same citation.

¶25 We recommend that each court assign distinctive sequential indexing numbers to decisions it decides should be released for general distribution to the public. These sequential numbers can be used easily both in electronic reporters and in printed reporters.

¶26 The committee recommends a universal system of citing to a decision by stating the year, a unique designator selected by the court, and a sequential number assigned to the decision.<sup>1</sup> This combination of identifiers creates a unique designation of that decision. The committee suggests that all jurisdictions adopt the mandatory use of this universal citation system.

Fn 1. Each jurisdiction will decide which of its decisions will receive a sequential number designation. See ¶31.

¶27 An example of the decision designator in the uniform citation system for a federal district court is:

Smith v. Jones, 1996 SDNY 15

in which 1996 is the year of the decision, SDNY is the United States District Court for the Southern District of New York, and 15 represents the 15th decision of the court during the year.

¶28 Standard forms of other decision designators in the uniform citation system are given in Appendix A.

## 107

- ¶29 The committee recommends the use of this citation form by all state and federal appellate courts and trial courts for which case reports are customarily published.

### Issue No. 3: How should sequential decision numbers be assigned?

- ¶30 The committee concludes that the courts in which the cases are decided should control the assignment of sequential decision numbers.
- ¶31 The committee recommends that each court assign a sequential number to each decision that the court decides should be released for general distribution to the public.<sup>2</sup> The court may also wish to add brief supplemental signals to the universal citation to give additional information such as non-precedential decisions, NP, or "uncitable" decisions, U.<sup>3</sup> An example is:

Smith v. Jones, 1996 9Cir 33 U.

Fn 2. All decisions, whether or not assigned a number by the court indicating release for general public distribution, are of course public records and may be obtained by anyone for any purpose from the clerk.

Fn 3. A decision not to number the decision will not prevent its being cited, to the extent permitted by the forum court, in the same manner as formerly, for example by docket number.

### Issue No. 4: What locator should be used for pinpoint citations within case reports?

- ¶32 The committee concludes that a uniform system of pinpoint citation is highly desirable, for the same reasons that support a uniform system of identifying decisions. With the proliferation of case reporters, it is entirely possible that the lawyers and the court may, in a given case, use different sources for their legal citations. A common reference point through a uniform system of pinpoint citation will be of significant help in avoiding the confusion that will result if different systems are in use among different publishers and different jurisdictions.
- ¶33 Location markers in printed case reports have been dependent on the format of the printed text, such as page, column, or line numbers. A selection of one or two

columns per page, different page sizes, or different type fonts would change the location marker at which particular text appears within the report in various editions or formats.

¶34 For electronic case reports, the location markers used for printed reports are less meaningful. In a word processing file, for example, the page, column, or line location can be changed immediately by selecting different fonts or margins in the software. Fixed locators independent of formatting may be specified in many ways, such as by an arbitrary sequential number inserted after each 100 words of the report, but most readers feel that these arbitrary markers detract from printed reports.

¶35 One locator as suitable for printed reports as for electronic reports is the beginning of a paragraph. The committee concludes that the use of sequential paragraph numbers, such as those used in this report, within case reports offers a universal locator for case reports independent of the medium. Paragraph numbers can be applied easily, whether manually or through the use of a macro in a word processing program. If errors occur, the result would merely be that the locator is not quite as precise as it might be, so that multiple paragraphs fall within a single paragraph number, or that a single paragraph may be assigned more than one number. In either event the locator is still considerably more precise than a page number in a printed report and therefore is more usable.

¶36 The committee recommends that all jurisdictions adopt the use of paragraph numbers assigned by the court as locator markers within decisions. The paragraph numbers should become part of the official text of the decision.<sup>4</sup>

Fn 4. The use of the paragraph numbers is illustrated in ¶40 below.

Issue No. 5: Should parallel citations be employed in addition to the recommended universal citation?

¶37 Any new citation system must be designed to ease, not impede, the access of courts and lawyers to case reports. The system therefore should maximize the utility and comfort of the citation system for those who prefer printed case reports and for those who prefer electronic case reports. The committee's approach to its recommendation concerning parallel citations reflects this commitment.

¶38 The committee is convinced that over time, primary reliance on printed case reports will shift to primary reliance on electronic case reports. The duration of this

## 107

transition period is likely to be determined by the reaction of the legal market. During the transition period, the committee recommends that in addition to the universal citation, all jurisdictions strongly encourage parallel citation to a print source, if there is one that is commonly used in the jurisdiction. Examples are a parallel citation to U.S.P.Q. (United States Patent Quarterly), the West National Reporter System, an official court reporter, and the BNA Labor Relations Reporter. If the report is not available in commonly used printed reporters, the committee recommends that the court require copies of the decision to be furnished to the court and opposing counsel.

¶39 The parallel citation should be to the beginning of the decision in the format employed by the print source. As noted in ¶47 through ¶49, publishers of printed reports have incorporated paragraph numbers assigned by the court into their reporters. Repeating the pinpoint citation in the parallel citation is thus unnecessary.

¶40 An example of the recommended parallel citation form for a federal court of appeals is:

Smith v. Jones, 1996 5Cir 15, ¶18, 22 F.3d 955.

Other standard forms are set out in Appendix A.

¶41 The paragraph number format used in this report assists in locating a paragraph quickly, but some courts and publishers have expressed a preference for a different format. The Supreme Court of Canada, for example, uses numbers in the margin without the paragraph symbol. West Publishing Company uses paragraph symbols and numbers aligned with the left text margin in printing the South Dakota reports. As long as the paragraph numbers are easily recognized in the report of a decision, any format will suffice. While the paragraph symbol is readily typed using most word processing software, the committee recommends that the use of a recognized alternative, such as par., be permitted in a citation just as sec. is widely accepted as an alternative to the section symbol, §.

Issue No. 6: Primary contentions of proponents of the present citation system.

¶42 Early in the committee's study, those who favored retaining the present citation system without change suggested many reasons for doing so. The committee considered these suggestions at length and took them into account in arriving at the system tentatively recommended by the committee in its preliminary report. Some responses to the preliminary report, which was widely distributed for public

comment, expressed very strong preferences for one system or another without explaining the grounds for those preferences. A number of comments recommended additional features or refinements of the new system, but did not contend that the new system would be seriously flawed. Only three primary arguments remained in any significant number of comments opposing the system recommended in the preliminary report. The committee does not question the sincerity of the exponents of these arguments but concludes that the arguments are not well founded.

- ¶43 The first argument was stated with admirable precision by a judge. With reference to the existing citation system, the judge said "If it ain't broke, don't fix it -- it ain't broke."
- ¶44 The present citation system does function well for conventional printed reports, as the committee recognized in ¶12. It does not, however, afford a citation suited to the electronic publication of a court decision when it is first released to the public. Printed volume and page numbers are not available until weeks or months later. Requiring electronic case reports to use these printed citation references deprives users of the speed of publication, lower cost, and lower space requirements of electronic case reports, as is explained at length in ¶13 through ¶18. The universal citation system recommended by the committee is intended to meet this problem.
- ¶45 The second argument is that the recommended citation system is a "citation to nowhere" because it does not identify the source of the citation. In fact, the recommended citation system is the ultimate citation to somewhere, because it is a citation directly to the court's decision in the form in which it was released by the court. The court assigns the decision number and places the paragraph numbers when it releases the decision to the public and files it in the record of the case. Every citation using those reference numbers is a citation to that original decision.
- ¶46 The last remaining argument is that formidable burdens will be imposed if courts are responsible for assigning sequential numbers to their decisions and numbering the paragraphs. While this argument has been advocated with skill, no factual support for it was offered to the committee. Since several courts have already implemented such systems, and major print publishers, including West Publishing Co., have begun printing reports using those systems, the committee concludes that no insurmountable burdens are involved.
- ¶47 Many Canadian courts have used paragraph numbering in their decisions for a number of years, and the Supreme Court of Canada has numbered the paragraphs in its reports since January 1, 1995. The committee was advised that implementation of this system required only a few hours for the first secretary to be

## 107

trained in using a word processing macro to place the numbers, and less than an hour to train each of the other secretaries. The court reports the cost of implementing this system as being modest. The paragraph numbered reports released by the Supreme Court are used by online services and almost all Canadian publishers of printed case reports. Copies of a few pages from a decision of the Supreme Court of Canada are attached.

- ¶148 The new citation system adopted by Louisiana uses slip opinion page numbers instead of paragraph numbers. These slip opinion page numbers are printed in the West National Reporter System, along with West's own page numbers. Copies of a few pages from the West reporter are attached. Louisiana is pleased with its system and no significant problems with its use have been reported.
- ¶149 South Dakota has adopted a system very similar to that recommended by the committee. Copies of pages from a South Dakota Supreme Court decision, the report of the decision in WestLaw, the report in the CD ROM produced by the State Bar of South Dakota, and the report published by West in N.W.2d are attached. The committee is informed that no substantial burdens were encountered in implementing the system.
- ¶150 The experience of courts that have already implemented citation systems similar to that recommended in this report has convinced the committee that no substantial burdens will be imposed on the courts or publishers by the recommended system.

Special Committee on Citation Issues  
J. D. Fleming, Jr., Chair  
August 1996

APPENDIX A

Standard citations for representative types of decisions are set out in this appendix. They are intended only to be illustrative, not exhaustive.

The committee recommends that at the time of release, each judicial decision should include a distinctive sequential designation unique to that decision by stating the year, the court designator and the sequential number of that decision within the calendar year cycle. For state courts, the committee recommends the use of two-letter postal codes. (Example: 1996 MD 15 or 1996 WI 15). The following is a series of examples of how the new universal form of citation would work in a state court jurisdiction, accompanied by a parallel citation to a print source.

1. Smith v. Jones, 1996 MD 15, 696 A2d 321.
2. Smith v. Jones, 1996 MD App 16, 696 A2d 436.
3. With a pinpoint citation: Smith v. Jones, 1996 MD 15, ¶23, 696 A2d 321.
4. With a citation to material in a footnote: Smith v. Jones, 1996 MD 15, n.4, 696 A2d 321.
5. Under the new system, a decision is "published" when it is first released to the public. If later revised, the modified decision or errata should be assigned a new sequential number. Smith v. Jones, 1996 MD 15, 696 A2d 321, modified, 1996 MD 47, 697 A2d 457; Smith v. Jones, 1996 MD 15, 696 A2d 321, errata 1996 MD 47.

The recommended citation system is especially suited to single court jurisdictions and can be made equally suitable for multiple court jurisdictions, such as the federal court system, by breaking down each larger jurisdiction into its natural subparts. How the recommended universal form of citation would work for the various federal jurisdictions is shown by the following examples.

6. Supreme Court: Smith v. Jones, 1996 US 15, 124 SCt 432.
7. United States Court of Appeals for the Fourth Circuit: Smith v. Jones, 1996 4Cir 22, 85 F3d 567.
8. United States District Court for the District of Maryland: Smith v. Jones, 1996 DMD 17, 923 F. Supp. 835.
9. United States District Court for the Southern District of New York: Smith v.

## 107

Jones, 1996 SDNY 15, 922 F. Supp. 214.

10. For a federal court patent case the citation might be: Smith v. Jones, 1996 EDVA 34, 23 USPQ2d 456.

Where courts in different locations are part of a single system, they may well wish to draw their sequential numbers from a central source rather than creating a sequence for each location. The committee understands that some court executives have concluded that inexpensive technology is already available to assign numbers from a central computer instantaneously over a phone line. This technology is widely used at present to record credit card purchases and issue approval numbers.

Other federal tribunals could use analogous conventions.

11. The Tax Court: Smith v. Commissioner, 1996 TC 3.

12. The Occupational Safety and Health Review Commission: Secretary of Labor v. Smith, 1996 OSHRC 7.



**r. v. edwards**

**Calhoun Edwards**

*Appellant*

**v.**

**Her Majesty The Queen**

*Respondent*

**Indexed as: R. v. Edwards**

**File No.: 24297.**

**1995: June 1; 1996: February 8.**

**Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.**

**on appeal from the court of appeal for ontario**

*Constitutional law -- Charter of Rights -- Unreasonable search and seizure -- Evidence -- Admissibility -- Search of apartment of third party -- Real evidence seized and admitted -- Whether or not accused can challenge admission of evidence obtained as a result of a search of third party's premises -- Canadian Charter of Rights and Freedoms, ss. 8, 24(2).*

**CORY J.:**

- 1     **What rights does an accused person have to challenge the admission of evidence obtained as a result of a search of a third party's premises? That is the question that must be resolved on this appeal.**

**Factual Background**

- 2     **As a result of receiving information that the appellant was a drug trafficker operating out of his car using a cellular phone and a pager, the police placed him under surveillance. They were told that he had drugs either on his person, at his residence or at the apartment occupied by his girlfriend, Shelly Evers. At the time, Ms. Evers was an 18-year-old student in grade 11 who lived alone.**
- 3     **On the day of his arrest, the police observed the appellant drive Ms. Evers' vehicle from a residence to her apartment. The appellant entered the apartment and stayed there for a brief period of time. Shortly after he left, he was stopped by the police. They knew his driver's licence was under suspension and that a person driving while his or her licence is under suspension may be arrested without a warrant (pursuant to the provisions of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 217(2)).**
- 4     **The police saw the appellant speaking on the cellular phone in the car. When they approached the vehicle, they saw the appellant swallow an object**

wrapped in cellophane about half the size of a golf ball. The car doors were locked, and the appellant did not unlock them until he had swallowed the object. He was arrested for driving while his licence was under suspension and taken into custody. Evers' car was then towed to the vehicle pound.

- 5 It was conceded that the usual practice upon arresting a person for driving while under suspension was to impound the car and give the individual a ticket. It was unusual to take someone into custody and it was acknowledged that this procedure was adopted in order to facilitate the drug investigation.
  
- 6 The police suspected that there might be crack cocaine in Ms. Evers' apartment, but they did not consider that they had sufficient evidence to obtain a search warrant. After taking the appellant into custody, two police officers attended at the apartment. They made a number of statements to Evers, some of which were lies and others half-truths, in order to obtain her cooperation. They advised her: (1) that the appellant had told them there were drugs in the apartment; (2) that if she did not cooperate, a police officer would stay in her apartment until they were able to get a search warrant; (3) that it would be inconvenient for them to get a search warrant because of the paperwork involved; and (4) that one of the officers would be going on vacation the following day and regardless of what they found in her apartment, she along with the appellant would not be charged.
  
- 7 There is conflicting evidence as to whether these statements were made before or after the officers were admitted to the apartment. Nonetheless, once inside, Ms. Evers directed them to a couch in her living room where she

CLEMENT v. FREY  
Cite as 666 So.2d 607 (La. 1996)

La. 607

95-1119, 95-1163 (La. 1/16/96)

Janice G. CLEMENT, as Provisional Curatrix of James C. Clement, and Charlene B. Thibodaux, as Natural Tutrix of the Minor Children, Brittany Renee Clement and Ashley Elizabeth Clement

v.

Melanie FREY, Louisiana Indemnity Company, and Louisiana Department of Transportation and Development (Office of Highways).

Melanie A. FREY

v.

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT (OFFICE OF HIGHWAYS).

Nos. 95-C-1119, 95-C-1163.

Supreme Court of Louisiana.

Jan. 16, 1996.

In consolidated personal injury actions arising out of head-on collision, in which negligence was alleged on part of driver whose vehicle crossed over center line and on part of state for failing to properly maintain roadway, the 82nd Judicial District Court, Terrebonne Parish, Nos. 106027, 106863, 107196, Edward J. Gaidry, J., entered judgment allocating 95% fault to state and 5% fault to driver. Appeal was taken. The Court of Appeal, 653 So.2d 1341, found that allocation of fault was clearly wrong and conducted de novo review in concluding that equal allocation of fault was appropriate. On writ of review, the Supreme Court, Calogero, C.J., held that: (1) after Court of Appeal found clearly wrong apportionment of fault, it could adjust award only to extent of lowering or raising to highest or lowest point respectively that was reasonably within trial court's discretion, and (2) under such standard, allocation of 75% fault to state and 25% fault to driver reflected proper adjustment.

Affirmed in part, remanded.

\* Judge Burrell J. Carter, Court of Appeal, First Circuit, sitting by assignment in the vacancy created by the resignation of Dennis, J., now a judge on the United States Court of Appeals for the

Lemmon, J., concurred and assigned reasons.

1. Appeal and Error  $\Leftrightarrow$ 893(3), 1008.1(13), 1151(2, 3)

After Court of Appeal finds clearly wrong apportionment of fault, it should adjust award, but only to extent of lowering or raising it to highest or lowest point respectively that is reasonably within trial court's discretion; appellate court should give some deference to trial court's allocation of fault; abrogating - *Cornish v. State, Department of Transportation and Development*, 647 So.2d 1170.

2. Negligence  $\Leftrightarrow$ 135(9)

In consolidated personal injury actions arising out of head-on collision, in which negligence was alleged on part of driver whose vehicle crossed over center line and on part of state in failing to properly maintain roadway, allocation of only 5% fault to driver and 95% fault to state was clearly wrong, and 25%-75% allocation was lowest-highest supported by evidence.

Danny J. Lirette, Michael X. St. Martin, for Applicant in No. 95-C-1119.

James Robert Dagate, F. Hugh Larose, Boudreaux & Larose, Philip J. McMahon, Richard P. Ieyoub, Attorney General, Sidney F. Lewis, V, for Respondent.

James Robert Dagate, F. Hugh Larose, Boudreaux & Larose, for Applicant in No. 95-C-1163.

Danny J. Lirette, Michael X. St. Martin, Philip J. McMahon, Richard Phillip Ieyoub, Attorney General, Sidney F. Lewis, V, for Respondent.

1 CALOGERO, Chief Justice.\*

We granted writs in this case<sup>1</sup> to consider how fault should have been allocated by the

Fifth Circuit. Carter, J., recused, was not on panel. Rule IV, Part 2, § 3.

1. This case and *Jerry Wayne Hill v. Marshouse Parish Police Jury*, 95-C-1100, 666 So.2d 612

court of appeal, after it determined that the district court's allocation of fault was manifestly erroneous, or clearly wrong. The court of appeal in this case performed a de novo review and thereupon apportioned fault as it perceived was warranted based on the record.<sup>2</sup> Thereafter, plaintiffs filed writ applications with this Court, which were granted.

Under the facts of this case and for the reasons set forth below, we reverse. The court of appeal was correct in finding that the district court's 95-5 allocation of fault was clearly wrong. However, rather than simply fixing the percentages, the court of appeal should have given some deference to the district court and decreased the DOTD's 95% fault to the highest reasonable percentage, while correspondingly increasing the fault of the driver, Frey, to the lowest reasonable percentage within the discretion of the district court. We decide here for the first time that the court of appeal's fixing a fault percentage in its unfettered discretion, with no deference whatever to the district court's finding, was improper.

On November 23, 1992, at approximately 4:00 p.m., on Louisiana Highway 309 in Lafourche Parish, a vehicle driven by Melanie A. Frey crossed the center line and collided head-on with a vehicle driven by James C. Clement ("Clement"). Highway 309 is a two-lane highway traversing the Chacahoula Swamp in Terrebonne Parish. The highway does not have any edge striping and the shell shoulder varies between one and three feet in width and slopes down toward the swamp. On the date of the accident, there were ruts along the edge of the paved surface, ranging from two to five inches deep, and it had been raining intermittently.

At the time of the accident, Frey was returning from her child's haircut appointment. As a result of the collision, Clement's vehicle went into a canal alongside the high-

(La. 1/16/96) were consolidated for oral argument. See the separate opinion rendered this day in that case.

2. The district court assessed 95% of the fault to the DOTD and 5% to the automobile driver, defendant Frey (plaintiff in this consolidated law-

way and both Frey and Clement suffered serious injuries. Because Clement suffered organic brain damage and was interdicted, his mother, Janice G. Clement ("Mrs. Clement") was named his curatrix.

Thereafter, Mrs. Clement filed suit on Clement's behalf against Frey, Frey's liability insurer, Louisiana Indemnity Company ("LIC"), and the Louisiana Department of Transportation and Development ("DOTD"), alleging that the negligence of the DOTD and that of Frey caused the accident. Charlene B. Thibodaux had lived with Clement for six years. They had two children, Brittany Renee Clement and Ashley Elizabeth Clement. Thibodaux, as natural tutrix of Clement's minor children, joined in Mrs. Clement's suit seeking damages on the children's behalf. McDermott Incorporated ("McDermott") intervened to recover hospital, medical, and weekly indemnity benefits which they had paid Clement, and to which they were conventionally subrogated.<sup>3</sup>

Additionally, Frey filed a separate lawsuit against DOTD, alleging as did defendants that the DOTD had notice but did not repair Highway 309 properly and timely. Then, LIC, Frey's liability insurer, filed a concursus proceeding and deposited its \$10,000 policy limit into the registry of the court, impleading Mrs. Clement, Thibodaux, and McDermott. Subsequently, the three suits were consolidated.

After a bench trial, the district court found that the DOTD was 95% at fault and Frey 5%. The court found Frey's total damages were \$142,283.55, Clement's damages were \$4,465,488.84, and the two Clement children's damages were \$150,000.00 each. The award against LIC was limited to the liability insurance policy amount and McDermott was awarded judgment on its intervention claim for hospital, medical, and indemnity expenses paid to and on behalf of Clement.

The court of appeal, however, determined that both the DOTD and Frey were 50% at fault.

3. Prior to trial, the parties stipulated that McDermott's subrogation right was for the full amount of hospital/medical expenses and indemnity benefits, \$401,696.49 and \$8,650.00 respectively.

17  
#19237-a-JKK

1996 SD 34

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

\* \* \* \*

IN THE MATTER OF THE  
GRIEVANCE OF:  
TRUDY SCHROEDER,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES,

Appellee.

\* \* \* \*

APPEAL FROM THE CIRCUIT COURT OF  
THE SIXTH JUDICIAL CIRCUIT  
HUGHES COUNTY, SOUTH DAKOTA

\* \* \* \*

THE HONORABLE JAMES W. ANDERSON  
Judge

\* \* \* \*

THOMAS P. TONNER of  
Tonner, Tobin & King  
Aberdeen, South Dakota

Attorney for appellant.

JAMES E. CARLON  
Pierre, South Dakota

Attorney for appellee.

\* \* \* \*

SUBMITTED ON BRIEFS  
ON JANUARY 10, 1996

OPINION FILED 03/27/96

#19237

KONENKAMP, Justice.

[¶1] We earlier remanded this matter for additional findings of fact and conclusions of law. *Schroeder v. South Dakota Dept. of Social Services*, 529 NW2d 589 (SD 1995)(Schroeder I). Upon entering specific findings, the circuit court again reversed the Career Service Commission's decision to reinstate Trudy Schroeder as an employee with the South Dakota Department of Social Services (DSS). Schroeder appeals and we affirm.

#### Facts

[¶2] The facts are summarized in *Schroeder I*:

Schroeder was employed by DSS for fourteen years; first as a social worker, then a line supervisor and, finally, a district program supervisor. During most of her career with DSS, Schroeder displayed exemplary work performance. However, in 1991, problems arose.

Schroeder assumed a new position as District Program Supervisor (DPS) in 1991. Thereafter, her superiors became concerned about her management style and inability to get along with her co-supervisor. Based on these problems, Schroeder was given an unsatisfactory performance rating in two written evaluations. She was put on a formal work improvement plan on April 20, 1992. This plan contained detailed steps of how Schroeder could improve her performance. On July 16, 1992, DSS contended Schroeder failed to meet plan requirements resulting in her termination.

Schroeder appealed her termination to the Commission. Commission, an administrative board of appeals, is granted authority to adjudicate disputes between state employees and agencies. After hearing two days of testimony from over twenty-five witnesses, Commission entered detailed findings of fact and conclusions of law. Incorporated in its findings, Commission determined that Schroeder had difficulty adapting to the management role required of a DPS and was unable to develop a good working relationship with

#19237

her co-supervisor. Commission noted Schroeder's unsatisfactory work performance rating and noncompliance with a work improvement plan. Furthermore, Schroeder was found to have acted inappropriately by involving co-workers in her employment controversy.

Commission agreed with DSS that Schroeder's work performance was unsatisfactory. However, Commission could not find that Schroeder's misdeeds constituted "just cause" for termination. It held that DSS had not carried its burden of proving that Schroeder had "violated any department, division, bureau or institution regulation, policy, or order or failed to obey any oral or written directions given by a supervisor or other person in authority." Commission further stated that while Schroeder's actions "were not always professional or appropriate, they did not amount to insubordination nor were they disruptive of the morale and efficiency of the department." Consequently, Commission reversed DSS' decision to terminate Schroeder and reinstated her without back pay or benefits.

DSS appealed Commission's reinstatement order to the circuit court which reversed Commission's decision. The circuit court held "just cause" existed for termination under Administrative Rule 55:01:12:05(4)(6) and (7). The court further held Commission clearly erred in finding that Schroeder was not insubordinate.

*Id.* at 590-91 (footnotes omitted).

[¶3] After remand the circuit court ruled: (1) the Commission was not clearly erroneous in finding Schroeder's work was unsatisfactory and that she did not comply with the work improvement plan; (2) the Commission was clearly erroneous in finding Schroeder did not disrupt the efficiency and morale of the Department; (3) the Commission was "arbitrary" in concluding Schroeder did not violate written and oral directions from her supervisor and was not insubordinate;



In the Matter of the Grievance of Trudy  
SCHROEDER, Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES,  
Appellee.

No. 19237.

Supreme Court of South Dakota.

Submitted on Briefs Jan. 10, 1996.

Decided March 27, 1996.

Department of Social Services (DSS) appealed Career Service Commission's order reinstating employee to her former position with DSS. On remand, 529 N.W.2d 589, the Sixth Judicial Circuit Court, Hughes County, James W. Anderson, J., reversed. Employee appealed. The Supreme Court, Konenkamp, J., held that: (1) evidence supported Commission's findings that employee's work performance was unsatisfactory and that employee failed to successfully comply with work improvement plan; (2) Commission's decision to reinstate employee was not supported by its factual findings; and (3) employee was not denied due process.

Affirmed.

[1] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 683

15Ak683

Supreme Court reviews administrative decisions same as circuit court.

[2] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 785

15Ak785

Factual determinations of administrative agency can only be overturned if court finds them to be clearly erroneous in light of entire evidence. SDCL 1-26-36.

[3] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 785

15Ak785

Unless reviewing court is left with definite and firm conviction mistake has been made,

administrative agency's findings of fact must stand.

[4] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 791

15Ak791

In reviewing findings of fact by Career Service Commission, question is not whether there is substantial evidence contrary to Commission's findings but whether there is substantial evidence to support those findings.

[4] OFFICERS AND PUBLIC  
EMPLOYEES ⇌ 72.55(2)

283k72.55(2)

In reviewing findings of fact by Career Service Commission, question is not whether there is substantial evidence contrary to Commission's findings but whether there is substantial evidence to support those findings.

[5] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 781

15Ak781

Administrative agency's conclusions of law are fully reviewable, as are mixed questions of fact and law which require application of legal standard.

[5] ADMINISTRATIVE LAW AND  
PROCEDURE ⇌ 796

15Ak796

Administrative agency's conclusions of law are fully reviewable, as are mixed questions of fact and law which require application of legal standard.

[6] OFFICERS AND PUBLIC  
EMPLOYEES ⇌ 72.63

283k72.63

Evidence supported Career Service Commission's finding that employee's work performance as district program supervisor with Department of Social Services (DSS) was unsatisfactory, where employee was unable to develop good working relations with her cosupervisor, foster parents who had involvement with employee's office expressed concern about problems at such office including employee's lack of positive leadership, employee yelled at her supervisor



James E. Carlon, Pierre, for appellee.

KONENKAMP, Justice.

[¶ 1] We earlier remanded this matter for additional findings of fact and conclusions of law. *Schroeder v. South Dakota Dept. of Social Services*, 529 N.W.2d 589 (S.D.1995) (*Schroeder I*). Upon entering specific findings, the circuit court again reversed the Career Service Commission's decision to reinstate Trudy Schroeder as an employee with the South Dakota Department of Social Services (DSS). Schroeder appeals and we affirm.

#### Facts

[¶ 2] The facts are summarized in *Schroeder I*:

Schroeder was employed by DSS for fourteen years; first as a social worker, then a line supervisor and, finally, a district program supervisor. During most of her career with DSS, Schroeder displayed exemplary work performance. However, in 1991, problems arose.

Schroeder assumed a new position as District Program Supervisor (DPS) in 1991. Thereafter, her superiors became concerned about her management style and inability to get along with her co-supervisor. Based on these problems, Schroeder was given an unsatisfactory performance rating in two written evaluations. She was put on a formal work improvement plan on April 20, 1992. This plan contained detailed steps of how Schroeder could improve her performance. On July 16, 1992, DSS contended Schroeder failed to meet plan requirements resulting in her termination. Schroeder appealed her termination to the Commission.

Commission, an administrative board of appeals, is granted authority to adjudicate disputes between state employees and agencies. After hearing two days of testimony from over twenty-five witnesses, Commission entered detailed findings of fact and conclusions of law. Incorporated in its findings, Commission determined that Schroeder had difficulty adapting to the management role required of

a DPS and was unable to develop a good working relationship with her co-supervisor. Commission noted Schroeder's unsatisfactory work performance rating \*226 and noncompliance with a work improvement plan. Furthermore, Schroeder was found to have acted inappropriately by involving co-workers in her employment controversy.

Commission agreed with DSS that Schroeder's work performance was unsatisfactory. However, Commission could not find that Schroeder's misdeeds constituted "just cause" for termination. It held that DSS had not carried its burden of proving that Schroeder had "violated any department, division, bureau or institution regulation, policy, or order or failed to obey any oral or written directions given by a supervisor or other person in authority." Commission further stated that while Schroeder's actions "were not always professional or appropriate, they did not amount to insubordination nor were they disruptive of the morale and efficiency of the department." Consequently, Commission reversed DSS' decision to terminate Schroeder and reinstated her without back pay or benefits.

DSS appealed Commission's reinstatement order to the circuit court which reversed Commission's decision. The circuit court held "just cause" existed for termination under Administrative Rule 55:01:12:05(4)(6) and (7). The court further held Commission clearly erred in finding that Schroeder was not insubordinate.

*Id.* at 590-91 (footnotes omitted).

[¶ 3] After remand the circuit court ruled: (1) the Commission was not clearly erroneous in finding Schroeder's work was unsatisfactory and that she did not comply with the work improvement plan; (2) the Commission was clearly erroneous in finding Schroeder did not disrupt the efficiency and morale of the Department; (3) the Commission was "arbitrary" in concluding Schroeder did not violate written and oral directions from her supervisor and was not insubordinate; (4) her actions established just cause for discipline; [FN1] and (5) once just cause was established



Dakota Disc Updates

[96 SDO 226]

Schroeder v. Dept of Social Services, 1996 SD 34, 545 NW2d 223

In The Matter of the Grievance of:  
TRUDY SCHROEDER,  
Appellant,  
v.  
DEPARTMENT OF SOCIAL SERVICES,  
Appellee.

South Dakota Supreme Court  
Appeal From The Sixth Judicial Circuit, Hughes County, SD  
Hon. James W. Anderson, Judge  
#19237 — Affirmed

Thomas P. Tonner, Tonner, Tobin & King, Aberdeen, SD  
Attorney for appellant.

James E. Carlon, Pierre, SD  
Attorney for appellee.

Submitted On Briefs Jan 10, 1996; Opinion Filed Mar 27, 1996

---

**KONENKAMP, Justice.**

---

[¶1] We earlier remanded this matter for additional findings of fact and conclusions of law. *Schroeder v. South Dakota Dept. of Social Services*, 529 NW2d 589 (SD 1995) (*Schroeder I*). Upon entering specific findings, the circuit court again reversed the Career Service Commission's decision to reinstate Trudy Schroeder as an employee with the South Dakota Department of Social Services (DSS). Schroeder appeals and we affirm.

**FACTS**

[¶2] The facts are summarized in *Schroeder I*:

Schroeder was employed by DSS for fourteen years; first as a social worker, then a line supervisor and, finally, a district program supervisor. During most of her career with DSS, Schroeder displayed exemplary work performance. However, in 1991, problems arose.

Schroeder assumed a new position as District Program Supervisor (DPS) in 1991. Thereafter, her superiors became concerned about her management style and inability to get along with her co-supervisor. Based on these problems, Schroeder was given an unsatisfactory performance rating in two written evaluations. She was put on a formal work improvement plan on April 20, 1992. This plan contained detailed steps of how Schroeder could improve her performance. On July 16, 1992, DSS contended Schroeder failed to meet plan requirements resulting in her termination.

Schroeder appealed her termination to the Commission. Commission, an administrative

### **Dakota Disc Updates**

board of appeals, is granted authority to adjudicate disputes between state employees and agencies. After hearing two days of testimony from over twenty-five witnesses, Commission entered detailed findings of fact and conclusions of law. Incorporated in its findings, Commission determined that Schroeder had difficulty adapting to the management role required of a DPS and was unable to develop a good working relationship with her co-supervisor. Commission noted [¶ 200 227] Schroeder's unsatisfactory work performance rating and noncompliance with a work improvement plan. Furthermore, Schroeder was found to have acted inappropriately by involving co-workers in her employment controversy.

Commission agreed with DSS that Schroeder's work performance was unsatisfactory. However, Commission could not find that Schroeder's misdeeds constituted "just cause" for termination. It held that DSS had not carried its burden of proving that Schroeder had "violated any department, division, bureau or institution regulation, policy, or order or failed to obey any oral or written directions given by a supervisor or other person in authority." Commission further stated that while Schroeder's actions "were not always professional or appropriate, they did not amount to insubordination nor were they disruptive of the morale and efficiency of the department." Consequently, Commission reversed DSS' decision to terminate Schroeder and reinstated her without back pay or benefits.

DSS appealed Commission's reinstatement order to the circuit court which reversed Commission's decision. The circuit court held "just cause" existed for termination under Administrative Rule 55:01:12:05(4)(6) and (7). The court further held Commission clearly erred in finding that Schroeder was not insubordinate.

*Id.* at 590-91 (footnotes omitted).

[13] After remand the circuit court ruled: (1) the Commission was not clearly erroneous in finding Schroeder's work was unsatisfactory and that she did not comply with the work improvement plan; (2) the Commission was clearly erroneous in finding Schroeder did not disrupt the efficiency and morale of the Department; (3) the Commission was "arbitrary" in concluding Schroeder did not violate written and oral directions from her supervisor and was not insubordinate; (4) her actions established just cause for discipline; {1} and (5) once just cause was established the Department had the discretion to choose the proper discipline and the Commission could not interfere with that managerial decision. The circuit court reinstated the Department's decision to terminate. Schroeder appeals, asserting six issues, which we condense into three:

- I. Whether the Commission was clearly erroneous in finding Schroeder's work performance unsatisfactory and in finding she failed to comply with her work improvement plan.
- II. Whether in reinstating her the Commission erred as a matter of law.
- III. Whether Schroeder was afforded due process.

### **STANDARD OF REVIEW**

[14] We review administrative decisions the same as the circuit court. Factual determinations can only be overturned if we find them to be "clearly erroneous" in light of the entire evidence. SDCL 1-26-36. Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not whether there is substantial evidence contrary to the Commission's findings but whether there is substantial evidence to support those findings. Conclusions of law, on the other hand, are fully reviewable, as are mixed questions of fact and law

**SCHROEDER v. DEPARTMENT OF SOCIAL SERVICES S.D. 223**  
Cite as 545 N.W.2d 223 (S.D. 1996)

to judgment as a matter of law. The circuit court's order granting summary judgment for Defendants is affirmed.

[¶ 16] Our determination of Issue 1 makes discussion of Issue 2 unnecessary.

[¶ 17] MILLER, C.J., and SABERS, AMUNDSON and KONENKAMP, JJ., concur.



1996 SD 34

In the Matter of the Grievance of Trudy SCHROEDER, Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES, Appellee.

No. 19237.

Supreme Court of South Dakota.

Submitted on Briefs Jan. 10, 1996.

Decided March 27, 1996.

Department of Social Services (DSS) appealed Career Service Commission's order reinstating employee to her former position with DSS. On remand, 529 N.W.2d 589, the Sixth Judicial Circuit Court, Hughes County, James W. Anderson, J., reversed. Employee appealed. The Supreme Court, Konenkamp, J., held that: (1) evidence supported Commission's findings that employee's work performance was unsatisfactory and that employee failed to successfully comply with work improvement plan; (2) Commission's decision to reinstate employee was not supported by its factual findings; and (3) employee was not denied due process.

Affirmed.

**1. Administrative Law and Procedure**  
⊕-683

Supreme Court reviews administrative decisions same as circuit court.

**2. Administrative Law and Procedure**  
⊕-785

Factual determinations of administrative agency can only be overturned if court finds them to be clearly erroneous in light of entire evidence. SDCL 1-26-36.

**3. Administrative Law and Procedure**  
⊕-785

Unless reviewing court is left with definite and firm conviction mistake has been made, administrative agency's findings of fact must stand.

**4. Administrative Law and Procedure**  
⊕-791

**Officers and Public Employees**  
⊕-72.55(2)

In reviewing findings of fact by Career Service Commission, question is not whether there is substantial evidence contrary to Commission's findings but whether there is substantial evidence to support those findings.

**5. Administrative Law and Procedure**  
⊕-781, 796

Administrative agency's conclusions of law are fully reviewable, as are mixed questions of fact and law which require application of legal standard.

**6. Officers and Public Employees** ⊕-72.63

Evidence supported Career Service Commission's finding that employee's work performance as district program supervisor with Department of Social Services (DSS) was unsatisfactory, where employee was unable to develop good working relations with her cosupervisor, foster parents who had involvement with employee's office expressed concern about problems at such office including employee's lack of positive leadership, employee yelled at her supervisor in response to supervisor's decision to reorganize office, employee angrily yelled at investigator in outer office area, and employee made degrading comments regarding DSS legal counsel.

SCHROEDER v. DEPARTMENT OF SOCIAL SERVICES S. D. 225

Cite as 545 N.W.2d 223 (S.D. 1996)

to superiors and subordinate and that foster parents who had involvement with employee's office expressed concerns about employee's use of intimidation, employee's lack of professionalism and interoffice conflicts. S.D.Admin. R. 55-01:12:05(7).

17. Officers and Public Employees  
§=72.33(2)

Upon determining good cause for discipline, Career Service Commission cannot supplant its judgment on form of discipline chosen. SDCL 8-6A-38.1.

18. Officers and Public Employees  
§=72.20, 72.32

In reviewing disciplinary action, Career Service Commission must apply law before it, including its own administrative rules; Commission's findings of fact must support its conclusions of law.

19. Constitutional Law §=278.4(5)

Officers and Public Employees §=72.20

Fact that Department of Social Services (DSS) employee was directed not to discuss with her subordinates and co-workers disciplinary action taken against her did not deprive employee of due process in proceedings before Career Service Commission to review disciplinary action, despite employee's claim that such directive prevented her from adequately preparing grievance concerning her unsatisfactory work performance evaluation, where many witnesses testified on employee's behalf, employee submitted 30 affidavits contradicting evidence submitted by DSS, and Commission conducted two-day hearing and accorded employee all rights pursuant to statute governing rights of parties at hearings on contested cases. U.S.C.A. Const. Amend. 14; SDCL 1-26-18.

Appeal from the Circuit Court of the Sixth Judicial Circuit Hughes County; The Honorable James W. Anderson, Judge.

Thomas P. Tonner of Tonner, Tobin & King, Aberdeen, for appellant.

James E. Carlon, Pierre, for appellee.

KONENKAMP, Justice.

{11} We earlier remanded this matter for additional findings of fact and conclusions of law. *Schroeder v. South Dakota Dept. of Social Services*, 529 N.W.2d 589 (S.D.1995) (*Schroeder I*). Upon entering specific findings, the Circuit court again reversed the Career Service Commission's decision to reinstate Trudy Schroeder as an employee with the South Dakota Department of Social Services (DSS). Schroeder appeals and we affirm.

Facts

{12} The facts are summarized in *Schroeder I*:

Schroeder was employed by DSS for fourteen years; first as a social worker, then a line supervisor and, finally, a district program supervisor. During most of her career with DSS, Schroeder displayed exemplary work performance. However, in 1991, problems arose.

Schroeder assumed a new position as District Program Supervisor (DPS) in 1991. Thereafter, her superiors became concerned about her management style and inability to get along with her co-supervisor. Based on these problems, Schroeder was given an unsatisfactory performance rating in two written evaluations. She was put on a formal work improvement plan on April 20, 1992. This plan contained detailed steps of how Schroeder could improve her performance. On July 16, 1992, DSS contended Schroeder failed to meet plan requirements resulting in her termination.

Schroeder appealed her termination to the Commission. Commission, an administrative board of appeals, is granted authority to adjudicate disputes between state employees and agencies. After hearing two days of testimony from over twenty-five witnesses, Commission entered detailed findings of fact and conclusions of law. Incorporated in its findings, Commission determined that Schroeder had difficulty adapting to the management role required of a DPS and was unable to develop a good working relationship with her co-supervisor. Commission noted Schroeder's unsatisfactory work performance rat-

ing and noncompliance with a work improvement plan. Furthermore, Schroeder was found to have acted inappropriately by involving co-workers in her employment controversy.

Commission agreed with DSS that Schroeder's work performance was unsatisfactory. However, Commission could not find that Schroeder's misdeeds constituted "just cause" for termination. It held that DSS had not carried its burden of proving that Schroeder had "violated any department, division, bureau or institution regulation, policy, or order or failed to obey any oral or written directions given by a supervisor or other person in authority." Commission further stated that while Schroeder's actions "were not always professional or appropriate, they did not amount to insubordination nor were they disruptive of the morale and efficiency of the department." Consequently, Commission reversed DSS' decision to terminate Schroeder and reinstated her without back pay or benefits.

DSS appealed Commission's reinstatement order to the circuit court which reversed Commission's decision. The circuit court held "just cause" existed for termination under Administrative Rule 55:01:12:05(4)(6) and (7). The court further held Commission clearly erred in finding that Schroeder was not insubordinate. *Id.* at 590-91 (footnotes omitted).

{13} After remand the circuit court ruled: (1) the Commission was not clearly erroneous in finding Schroeder's work was unsatisfactory and that she did not comply with the work improvement plan; (2) the Commission was clearly erroneous in finding Schroeder did not disrupt the efficiency and morale of the Department; (3) the Commission was "arbitrary" in concluding Schroeder did not violate written and oral directions from her supervisor and was not insubordinate; (4) her actions established just cause for disci-

1. The administrative regulations refer to "just cause," whereas the relevant statutory sections refer to "good cause." We deem the terms equivalent.

2. The Commission made the following pertinent findings of fact, supporting its decision that

pline;<sup>1</sup> and (5) once just cause was established the Department had the discretion to choose the proper discipline and the Commission could not interfere with that managerial decision. The circuit court reinstated the Department's decision to terminate. Schroeder appeals, asserting six issues, which we condense into three:

- I. Whether the Commission was clearly erroneous in finding Schroeder's work performance unsatisfactory and in finding she failed to comply with her work improvement plan.
- II. Whether in reinstating her the Commission erred as a matter of law.
- III. Whether Schroeder was afforded due process.

#### Standard of Review

{1-5} {14} We review administrative decisions the same as the circuit court. Factual determinations can only be overturned if we find them to be "clearly erroneous" in light of the entire evidence. SDCL 1-26-36. Unless we are left with a definite and firm conviction a mistake has been made, the findings must stand. The question is not whether there is substantial evidence contrary to the Commission's findings but whether there is substantial evidence to support those findings. Conclusions of law, on the other hand, are fully reviewable, as are mixed questions of fact and law which require the application of a legal standard. *Schuck v. John Morrell & Co.*, 529 N.W.2d 894, 896 (S.D.1995) (citations omitted).

#### Analysis

##### {15} I. Unsatisfactory Performance and Failure to Comply with Work Improvement Plan

{6-8} {16} The record amply supports the Commission's finding that Schroeder's work performance was unsatisfactory.<sup>2</sup>

Schroeder's work performance was unsatisfactory:

- (1) Within the Department, the DPS is a critical management level position, providing an important link between the field and state office. A DPS is responsible for an

GENERAL INFORMATION FORMSubmitting Entity: Special Committee on Citation IssuesSubmitted By: J. D. Fleming, Jr., Chair1. Summary of Recommendation(s).

The committee recommends that the House of Delegates adopt a policy calling upon the courts to adopt a universal citation system using sequential decision numbers for each year and internal paragraph numbers within the decision. These numbers should be assigned by the issuing court and included in the decision at the time it is made publicly available by the court. The committee also recommends that parallel citations to commonly used print sources be strongly encouraged. This citation system is equally adaptable to printed and electronic case reports and is thus medium neutral.

2. Approval by Submitting Entity.

All members of the committee participated in the preparation of the report and each draft was received and reviewed by each member. The report and the recommendation were unanimously approved on May 14, 1996.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No recommendation has previously been submitted by this committee to the Board of Governors or the House of Delegates.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

At the annual meeting in August, 1995, the House of Delegates adopted a policy summarized as follows:

"On-line Access to Court Information. Urge courts to provide computer on-line access to court and docket information to members of the profession and to the general public at no direct cost to the user." 1995-96 ABA Policy and Procedures Handbook, Chapter 10 at p. 184.

The recommendation will assist in the implementation of this policy by encouraging a universal citation system which is designed to permit direct citations to the reports of decisions made available by the courts for on-line public access.



## 107

5. What urgency exists which requires action at this meeting of the House?  
This committee was created by the Board of Governors to assist in bringing consistency to new citation systems being considered and adopted by a number of jurisdictions across the nation. Because of the urgency of this situation, the Board directed the committee to submit its recommendation for consideration by the Board and the House of Delegates at the annual meeting in August, 1996. The committee will cease to exist at the conclusion of that meeting.
6. Status of Legislation. (If applicable.)  
This recommendation is not a legislative resolve.
7. Cost to the Association. (Both direct and indirect costs.)  
This recommendation will not result in expenditures by the Association.
8. Disclosure of Interest. (If applicable.)  
The members of the committee explored all sources of potential conflicts and each voting member executed the following conflicts statement:

"I certify that I do not have any material interest in the subject matter of the issues being studied by the ABA Special Committee on Citation Issues by reason of specific employment or representation of clients, nor any relationship with or financial interest in any entity engaged in or seeking to become engaged in publishing legal opinions or authorities. A 'relationship or financial interest' includes, without limitation, being a shareholder or partner with a 5% or greater ownership interest, officer, director, trustee, employee, consultant or in a relationship as legal counsel personally or through a law firm. If any circumstances arise which affect the accuracy of this statement, I will advise the committee promptly."

The liaison members appointed to the committee by the President did not take any part in the decisions of the committee and were not asked to execute a conflicts statement

9. Referrals.

On January 25 and 26, 1996, the committee notified all sections and divisions, all state bar associations, and all state chief justices of its study and invited the submission of information and comments on the issues. The committee distributed its preliminary report on March 19, 1996, through the ABA Network and by mailing copies to a number of members of the judiciary, to all who had submitted

information to the committee, and to individuals and entities known to be interested in the issue. The Administrative Office of the United States Courts distributed the preliminary report to all federal chief judges and court executives on March 22, 1996. We have been notified that the Tort and Insurance Practice Section has voted to co-sponsor the recommendation and have been informed that co-sponsorship is likely by several other sections and by the state bars of South Dakota and Wisconsin.

10. Contact Person. (Prior to the meeting.)  
J. D. Fleming, Jr., Chair  
23rd Floor  
999 Peachtree Street, N.E.  
Atlanta, Georgia 30309-3996  
404/853-8062  
Telecopy 404/853-8806  
email: jdfleming@sablaw.com  
ABAnet: flemingjd@attmail.com
  
11. Contact Person. (Who will present the report to the House.)  
J. D. Fleming, Jr., Chair  
23rd Floor  
999 Peachtree Street, N.E.  
Atlanta, Georgia 30309-3996  
404/853-8062  
Telecopy 404/853-8806  
email: jdfleming@sablaw.com  
ABAnet: flemingjd@attmail.com
  
12. Contact Person Regarding Amendments to This Recommendation  
We know of no proposed amendments.