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SHAPING JUDICIAL REVIEW OF ADMINISTRATIVE TRIBUNALS*

RALPH M. HOYT

Whether we like it or not as members of the general public, more and more of our business activities are being brought under the control and regulation of boards, commissions and bureaus. And whether we like it or not as lawyers, more and more of our practice is before these same boards, commissions and bureaus. We cannot safely advise a client upon any new business plan without giving careful thought to the regulatory and tax laws that will confront him.

The State of Wisconsin is one of the pioneers in the establishment of administrative agencies for the regulation of business. Thirty years ago this summer there was put into effect in that state one of the first public utility laws in the country, and four years later we entered the then untried fields of workmen's compensation and income taxes. Just six years ago we adopted with some trepidation the innovation of unemployment compensation, wondering how our manufacturers would be able to compete with those in other states who had no such expense to meet. Since then, however, under the impetus of the federal social security program, we have seen the majority of the states, including North Carolina, fall into line with the adoption of substantially similar measures for the relief of the unemployed.

In the meantime the regulation of every conceivable kind of business and profession has proceeded apace in all parts of the country, and as we examine the regulatory acts we are struck with the ingenuity that has been disclosed in uncovering new occupations to regulate. In Wisconsin the latest discovery, by the legislature of 1937, is that the peace and prosperity of the state will be conserved by examining and licensing watchmakers, and so a commission has been created for that purpose. Here in North Carolina you have covered all the usual subjects of regulation, from accountants and architects through electrical contractors and embalmers to realtors and surveyors. You have found some businesses needing regulation that I blush to admit we have not yet thought of in the progressive state of Wisconsin; for instance, dry cleaners, tile layers and photographers.

The serious thing about this avalanche of regulatory activity is not, of course, its effect on the practicing attorney, who must increasingly shift his attention from the common law courts to the boards and commissions, but the tendency to place the rights, privileges and even the

* Address delivered by Mr. Hoyt of the Milwaukee, Wisconsin Bar at the N. C. State Bar meeting in Raleigh, N. C., Oct. 22, 1937.

liberties of the citizen in the hands of non-judicial bodies, politically appointed and often politically controlled.

It is a vital thing to the citizen who wants to engage in a business and finds that he is denied permission, or to a corporation which wants to issue securities and is told that it cannot, to know whether the fiat of the administrative body is final or practically final, or whether there is somewhere a right of re-examination and review. And so it comes about that thoughtful lawyers are giving much attention to the question of the judicial review of administrative decisions.

Where do we go from the commissions? From many of them we go nowhere. We accept what they decide and like it. In an examination of the statutes governing forty-six administrative bodies that are now functioning in North Carolina—which I believe is a fairly complete list—I find only fifteen instances in which any right of review is mentioned in the statute. Of course we all know that if an administrative body acts wholly beyond its jurisdiction, or commits a pure error of law, there is always a way to get into court through the common law writ of certiorari or by injunction or otherwise;¹ but what I am referring to is not the right to keep the board within its jurisdiction, but the right to test the correctness of its decision where it has complied with all the forms of law.

The most thorough provision that I have found in the North Carolina statutes for review of the decisions of an administrative body is in the case of the utilities commissioner.² From his orders, appeals may be taken to the superior court on questions of fact, and to the judge of the superior court on questions of law, with the right of further appeal to the supreme court. The superior court having jurisdiction is the one sitting in the district where the utility company operates or the aggrieved party resides. The trial is *de novo*, in the same manner as any civil action, except that the decision of the commissioner is to be taken as *prima facie* just and reasonable. Your supreme court has held that this means a jury trial, and that any relevant evidence may be introduced, whether previously presented to the commissioner or not.³ Your supreme court also held, in passing upon a former medical examination law not now in force, that where these administrative statutes simply confer a "right of appeal" in general terms, without specifying what method of review, the parties have a right to a jury trial.⁴ This type of

¹ *McCullough v. Scott*, 182 N. C. 865, 109 S. E. 789 (1921) (When quasi-judicial officers exceed their jurisdiction or abuse their discretion they are subject to review by the courts).

² N. C. CODE ANN. (Michie, 1935) §§1097, 1098.

³ *State ex rel. Corp. Comm. v Seaboard A. L. and Southern Ry.*, 161 N. C. 270, 76 S. E. 554 (1912).

⁴ *State ex rel. Board of Medical Examiners v. Carroll*, 194 N. C. 37, 138 S. E. 339 (1927).

review, embodying a complete trial *de novo* and the substitution of an ordinary jury's verdict for the determination of a body supposed to be specially versed in the intricacies of the subject, represents one extreme in the review of administrative determinations.

The other extreme is represented by your Workmen's Compensation Act, under which the commission's decision is made absolutely conclusive and binding as to all questions of fact, and a review is given—in the superior court of the county where the accident happened—only upon questions of law.⁵ Your supreme court has tempered the severity of this rule to the extent of holding that where the very jurisdiction of the commission depends on a finding of fact—as, for instance, the finding that the employer had a sufficient number of employees to come under the act—the court may review that finding of fact as well as conclusions of law.⁶

The same very meager review, on questions of law only, is provided in your new Unemployment Insurance Law, enacted in 1937. In this case the review is in the superior court of the county where the employee resides.⁷

Aside from the instances I have mentioned—public utilities, workmen's compensation and unemployment insurance—the provisions for review of administrative determinations in North Carolina are meager. In certain types of cases decided by the board of commissioners of navigation and pilotage an appeal may be taken to the superior court and disposed of as in the case of an appeal from a justice of the peace.⁸ Revocations of licenses by the insurance commissioner are made "subject to review by any judge of the superior court of Wake County on appeal," with nothing provided as to the method or scope of the review.⁹ Presumably the express mention of the judge excludes jury trial in this instance. A barber¹⁰ or cosmetician¹¹ or real estate broker¹² whose license is revoked is given an appeal to the superior court, which "may in its discretion reverse or modify" the order of revocation. From the revocation of the license of a dentist, appeal may be taken to the superior court of the county where the board held its hearing, and the review is upon the record made before the board, in the same manner as in the case of a consent reference.¹³ In the case of plumbers¹⁴ and pho-

⁵ N. C. CODE ANN. (Michie, 1935) §8081 (ppp).

⁶ *Aycock v. Cooper*, 202 N. C. 500, 163 S. E. 569 (1932).

⁷ N. C. Pub. Laws 1937 c. 1.

⁸ N. C. CODE ANN. (Michie, 1935) §6943 (k).

⁹ N. C. CODE ANN. (Michie, 1935) §§6299, 6300.

¹⁰ N. C. CODE ANN. (Michie, 1935) §5003 (t).

¹¹ N. C. CODE ANN. (Michie, 1935) §§5259 (26, 27).

¹² N. C. Pub. Laws 1937, c. 292.

¹³ N. C. CODE ANN. (Michie, 1935) §6649 (20).

¹⁴ N. C. CODE ANN. (Michie, 1935) §5168 (yy).

tographers¹⁵ the statute contains a rather cryptic provision to the effect that if a license is revoked nothing in the act shall prevent an appeal to the superior court, which presumably means that the appellant gets a jury trial. Similarly, in the case of dry cleaners¹⁶ and tile layers¹⁷ any person aggrieved by action of the board is given, in general language, a right of appeal to the superior court. In cases of disbarment of attorneys, as is to be expected in a law thoughtfully drafted by lawyers themselves, there is explicit provision as to the right and method of review. There is an appeal as of right to the superior court of the county where the attorney resides, upon the record made before the state bar counsel or its committee, with right of jury trial and with further appeal to the supreme court, the procedure being the same as in the case of a reference by consent.¹⁸

The foregoing are all the provisions I have found in your administrative statutes with reference to court review. In the case of some of the most important administrative bodies there is, by express provision of the statute, no right of review at all; for example, the revocation of a physician's license by the board of medical examiners is made final and conclusive by the statute itself,¹⁹ and the same is true of the decisions of the advisory commission which passes on orders of the commissioner of banks and banking.²⁰ In the rest of the administrative statutes of your state, the matter of review is passed over in silence, and this is true in such important instances as the administration of the Pure Food Law and the numerous licensing activities of the board of agriculture, the almost innumerable licenses issued by the commissioner of revenue, the work of the various boards which examine architects, nurses, pharmacists, optometrists, and so on *ad infinitum*.

The situation in this regard is little different in North Carolina from the situation in Wisconsin, and probably in most of the states. The question of court review has been considerably neglected in the framing of administrative statutes. Perhaps little harm has been done, so long as the statutes do provide methods of review in the larger fields such as the regulation of public utilities, securities, etc. But the field of regulatory activity is growing so rapidly—having been extended to no less than eight new lines of business in North Carolina in this year of 1937—that it would seem high time for the development of a fairly uniform, just and scientific method of judicial review for all these administrative activities. It is certainly an orderly and lawyer-like

¹⁵ N. C. CODE ANN. (Michie, 1935) §7007 (23).

¹⁶ N. C. Pub. Laws 1937 c. 30.

¹⁷ N. C. Pub. Laws 1937 c. 86.

¹⁸ N. C. CODE ANN. (Michie, 1935) §215 (11).

¹⁹ N. C. CODE ANN. (Michie, 1935) §6618.

²⁰ N. C. CODE ANN. (Michie, 1935) §221 (o).

thing to do, and we all know that occasions do, and will in the future, arise when the lack of adequate review results in serious injustice.

I hasten to add that Wisconsin has not solved the problem by any means. We have adopted the habit, in the enactment of regulatory laws, of concentrating practically all the review in the circuit court of the county in which the state capital is located, with appeal from that court to the supreme court of the state. That method has the advantage of requiring only two judges to educate themselves in the intricacies of administrative law instead of scattering the process among two or three dozen judges throughout the state. It has the disadvantage of requiring all aggrieved parties or their attorneys to journey to the state capital and take their place on a crowded calendar. It also has the theoretical disadvantage of violating a time-honored principle of government by subjecting the citizen of one county to the decisions of a judge of another county where he has no right of suffrage. Thus the people of Milwaukee, a city ten times as large as the next largest city in the state and with metropolitan problems not easily appreciated in a more rural setting, must submit all their administrative appeals to a judge whom they have no part in selecting, in a county whose total population would fill up not more than half a dozen wards of the metropolis.

We have not arrived at a solution of the problem of administrative review in Wisconsin, but our state bar association is working toward it. We are proposing the establishment of an administrative court of statewide jurisdiction, composed of three judges who will sit either singly or *en banc* in various cities of the state, with exclusive jurisdiction to review the determinations of all state boards, commissions and departments under a procedure made as nearly uniform as practicable. Due to the iron-clad limitations of our ninety year old state constitution, we cannot get this court without a constitutional amendment, and that takes several years in Wisconsin. We feel, however, that if such a court can be set up, the problem of administrative review will be well taken care of for a long time to come. We also propose that the decisions of this administrative court shall be final on certain subjects, and subject to review by the supreme court only in a limited type of cases; perhaps only on questions of law and of jurisdictional fact. This will serve the double purpose of relieving an excessive load upon our supreme court, and vesting the new court with a dignity and importance that will attract able men to its bench. The ambulatory feature of the court will enable the people to obtain justice near home without traveling to the state capital, and the statewide character of the representation upon the court will avoid the present objections to the concentration of review in the judges of a single county.

There are two very important questions to be faced, however, in connection with setting up such a court. One is the manner of selecting its judges, and the other is the scope of the review to be provided.

As to the selection of judges, we are going to have great difficulty in Wisconsin getting away from the time-honored idea of an elective judiciary, but I think we must do that if the court is to have a proper start. Without disparaging the ability of the people to select, by popular vote, judges of good average qualifications for the common law courts, it would seem that for a court of the specialized character that we are planning it is quite essential that some appointive method be used. In a popular election, the prospect of service on such a bench would excite the ambition of many a lawyer whose only qualification would be an ability to make large promises and garner votes, and it would be most unfortunate if the first three judges of such a court should be men of that type. So it would seem that some safeguarded method of appointment—such, for instance, as nomination by a judicial council containing representatives of the law schools, the bar association, and the supreme and circuit courts—would be the ideal plan, and it is toward this end that we are working in Wisconsin.

Secondly, as to the scope of the review, we find ourselves in a situation of much controversy. In Wisconsin as in North Carolina, decisions of the public service commission are subject to trial *de novo* in court (though we do not have the jury trial that you have), and decisions under the Workmen's Compensation Act are subject to no review whatever upon the facts. Both extremes are undesirable, and a middle ground should be found. In Wisconsin we have just recently had the spectacle of a long trial in the circuit court on the question of statewide telephone rates, upon appeal from a decision of the public service commission which was several years in the making. The presentation of the case before the commission itself ran into 13,000 pages of testimony and 567 exhibits, and I do not know how many more volumes of testimony and exhibits were presented in the circuit court. Such duplication of effort should certainly be avoided. On the other hand, review on questions of law alone leaves the administrative body almost supreme and free from control. It is not often that an astute administrator is unable to find somewhere in the evidence a bit of testimony on which to hang a finding, however greatly the evidence may preponderate against it. In a workmen's compensation case, for instance, if half a dozen physicians of high standing, supported by x-ray and laboratory findings, testify positively that a worker is not afflicted with an occupational disease, and a single physician of shady reputation and no scientific attainment ventures the opinion that the man does have

such disease, the commission's finding of the existence of the disease cannot be disturbed; yet we all know it ought to be reversed. There should be a review of arbitrary or capricious findings, even though supported by some shred of evidence.

This brings me to a brief discussion of the work that has recently been done in the national field on this subject of administrative review. On this question of the scope of the review the recent convention of the American Bar Association witnessed a contest. I had the pleasure during the past year of serving upon the American Bar Association's special committee on administrative law. We were commissioned to work out and present to the association for approval a proposed bill setting up machinery for the review of administrative determinations in the federal government. When one approaches that subject in the federal field, the vastness of the job is appalling. Departments, bureaus, commissions and individual officers are grinding out an untold number of administrative decisions every day and in all parts of the United States, and the opportunity for review of those decisions at present is exceedingly slight. Our committee, after thorough consideration, prepared and presented to the Kansas City convention of the association last month a bill based on the theory that the administrative process has become a necessary and permanent part of the machinery of government; that the courts cannot be expected to do administrative work; that the findings and determinations of administrative officers are entitled to weight and standing, but should not be beyond control; and that the most feasible method of providing for review in the federal field is to take the testimony and exhibits as produced before the department or board as the final record in the case, and submit that record to the scrutiny of a constitutional court for errors of law and *flagrant* errors of fact. We rejected both the idea of review on questions of law alone, and of a complete retrial of the facts, but instead provided in our bill that the administrative findings of fact should stand unless unsupported by evidence or unless arbitrary or capricious. Those words "arbitrary or capricious" were intended to give the court an opportunity to look into the record if there was something seriously wrong with the findings of fact, without requiring the court to weigh the evidence for a mere preponderance. We were roundly criticized by those of a certain school for giving any review at all upon the facts, and we were equally scolded by those of the opposite school for failing to provide a complete retrial upon questions of fact. Upon presentation of our report to the House of Delegates just three weeks ago, the matter was thoroughly debated and our bill received the approval of the House by the close vote of 55 to 51. Next year's committee, therefore, is under

mandate to proceed with the final drafting of the bill, subject to the approval of the board of governors of the association, and in due course it presumably will reach the halls of Congress for public discussion.

Last year the Boston convention of the American Bar Association turned down a proposal for the creation of a large new court at Washington for the hearing of administrative appeals. The association's committee of 1936 had not put forward such a court as a definitive proposal on its part but had merely discussed such proposal in its report, and a bill for the creation of such a court was then pending in Congress though not sponsored by the committee. After the action taken at Boston, the committee earnestly considered ways and means of providing review, but neither too little review nor too much, neither concentrated at Washington nor too scattered, and the proposal I have already outlined was the result of our deliberations.

The first requisite of a review, as the committee saw it, was the compilation of a record on which such a review could be based. The idea of a right of trial *de novo* in the district courts of the United States, or any other court, of all the myriad cases arising in the conduct of governmental affairs, was obviously out of the question. It was necessary to have a record made somewhere in the course of the administrative process itself, before the case ever reached the courts. In the case of the principal boards and commissions this of course presented no problem; those commissions have their hearings and make up their records in a perfectly natural way. But there are any number of administrative decisions in the federal departments that are made by an individual, or by a group of individuals, with perhaps some re-examination by a higher officer and final approval by the head of the department, but with no method whatever for the citizen affected by such decision to present his case in an orderly way or even to know what reports and confidential memoranda constitute the basis of the decision. To bring these cases out into the open and give the citizen a fair chance to build up a record, we provided in our bill that each head of a department must create a necessary number of intra-departmental boards located in various parts of the United States, and that one of these boards shall hear any person aggrieved by any decision of an officer or employee of the department, and shall make findings of fact and a written decision based upon the testimony and exhibits presented before the board. The members of the board are to be persons already employed in the department, and its chairman must be an attorney. As a matter of fact, we found that such boards are already in existence in most of the departments, operating under executive orders or in some other more or less extra-legal manner, and the provisions of our bill merely serve to legalize these boards

and make their proceedings and the evidence on which they make their decisions a matter of public record.

We further provided in our bill that the decisions of these boards should be subject to the approval, disapproval or modification of the head of the department, for, after all, it would not do to strip the department head of the power to run his own department, and make his decisions subject to the veto of a committee of his subordinates. On this feature of the bill we were criticized by our opponents on the ground that we were creating utterly subservient and rubber-stamp boards which naturally would do nothing to offend the head of the department. Our answer was that the purpose of these boards was, first, to offer an opportunity for compiling a record as thorough and complete as the skill of the complainant's attorney could make it, and second, to permit the department itself to review its acts in the light of the aggrieved person's full presentation of his case, with resultant correction (we thought) of many errors and injustices that otherwise would never be discovered. We operated on the principle that the responsible people in the departments are in the main desirous of doing justice and are neither incompetent nor unduly biased, and that by the method which we propose many errors will be corrected right in the department, without any necessity for resort to the courts. But if that theory fails in any particular case, the intra-departmental boards will still be valuable as constituting a forum in which the aggrieved person may perfect his record for presentation to the courts.

Another alternative would be the creation of a single new administrative body to hear appeals from all the departments and boards. It was argued that such an outside body, unconnected with any of the departments, would provide a much more independent and unbiased review of the facts and the law than we could ever expect to get from our intra-departmental boards. We gave that suggestion very serious consideration, but here again we were overwhelmed by the vastness of the field to be covered. A single board large enough and wise enough to sit in review on all the devious activities of the federal departments in their daily operations from Florida to Alaska would have to be one of the most remarkable bodies ever created by man. We did not think it could be done. Aside from the tremendous volume of work, we did not think that such a board, giving its attention today to the inspection of a shipload of salmon and tomorrow to the sufficiency of a contractor's performance of a government dam contract, and the next day to an order for the deportation of an alien, could ever acquire the education necessary to render competent decisions upon the *facts* of all the different situations in which our Government interests itself, to say nothing

of the vast expense of maintaining such a board and the clogging of the administrative process that might result from its activity.

So we adhered to our idea of intra-departmental boards instead of a large outside board of administrative review. We then provided that the final determinations of these intra-departmental boards, as modified perhaps by the head of the department, should be subject to review by the circuit court of appeals of the circuit in which the aggrieved party resides; the review being confined to questions of law and to the limited examination of the facts that I have already mentioned, merely to ascertain whether the decision is unsupported by any evidence or is based on arbitrary or capricious findings. By this type of review we accomplished several things. First, we brought the review "back home" into the part of the country where the aggrieved party resides; secondly, we placed the review in a constitutional court whose judges are protected by life tenure, instead of in a legislative court of the type which Congress can create and abolish at will; and third, we gave the court an opportunity to look into the record sufficiently to see whether the finding was an honest and permissible one, without requiring the court to turn itself into a super-administrator and redetermine intricate matters already passed upon by experts. If our bill becomes a law, the circuit court of appeals will have jurisdiction to correct serious injustices, to remedy flagrant abuses of power even though supported by *some* evidence; but, on the other hand, these courts will not be swamped with compulsory examinations of large records and the weighing of nicely balanced testimony.

I should also mention one other feature of our proposed bill, which met with little opposition at the convention, and which I believe represents a real advance in the interest of good citizens everywhere. That is a provision requiring each department to implement the statutes which it is called upon to administer, by adopting rules and regulations for the purpose of filling in the details of the statute, with a further provision that any person who in good faith orders his conduct in accordance with such rules and regulations shall not be penalized for so doing so long as the regulation remains in effect. If it is repealed or held invalid by a court, notice of such action must be published in the Federal Register, and the immunity period for persons conforming to such regulation will expire thirty days after the publication. We further provided in the bill that the validity of these rules and regulations might be tested by a proceeding in the court of claims. These provisions were intended to answer the longing of the honest business man for some way of knowing whether a proposed course of conduct will accord with or violate the law. It is the accepted practice, in the enactment of regulatory statutes,

to confine the statute to broad requirements, such as that a rate must be "reasonable" or a practice must be "fair" or a structure must be "safe." It is left to the administrative body to determine what is reasonable or fair or safe, or, as it is often put, to fill in the details of the statute. Our bill would require this "filling-in" to be done explicitly and in writing, and would protect the citizen who acts in good faith under the regulation while it is in force. And the citizen who thinks that a regulation does not conform to the authorizing statute is given the right to contest it in a court, not as to any question of policy or wisdom, but as to its conformity with the Constitution and the laws of the United States. We think the enactment of this portion of our bill would be of great benefit to business men and their counsel, who have the somewhat precarious job of making their business conduct conform to broadly and sometimes loosely worded federal statutes.

I have given an outline of the present status of the effort for improvement in the federal field in this matter of administrative review, and in the earlier portion of this paper I suggested also the desirability of an improved system of review in the states. On the federal side, real action is about to be taken, presumably at the next session of Congress. As to the states, perhaps the suggested improvements, or any improvements at all, will not be carried into effect for a long time. I do believe, however, that the subject is one of such rapidly growing importance as to warrant the earnest thought of all of us.