

A PROPOSED "ADMINISTRATIVE COURT" FOR OHIO*

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The Administrative Law Committee of the Ohio State Bar Association has prepared a bill to amend the Ohio Administrative Procedure Act¹ "for the purpose of creating an Administrative Review Commission." This novel and imaginative proposal for the reform of administrative law deserves wide publicity and approval in principle prior to its introduction in the next legislature.

Under present law, any party affected by an order of an agency adopting, amending or rescinding a rule may appeal to the Court of Common Pleas of Franklin County.² An appeal from an adjudication order denying admission to an examination, denying issuance or renewal of a license or suspending a license may be filed with the court of common pleas of the county in which the place of business or the residence of the licensee is located.³ In adjudication cases, that court shall review the record prepared and certified by the agency and may affirm the agency's order if it finds, "upon consideration of the entire record, and such additional evidence as the court has admitted,⁴ that the order is supported by reliable, probative, and substantial evidence, and is in accordance with law."⁵

The proposed legislation would substitute for the court of common pleas an "administrative review commission," consisting of ten members, one from each of the ten judicial court of appeals districts. The Governor would appoint the members, with the advice and consent of the Senate, for ten year terms. The members of the Commission must be members of the Bar in good standing and have practiced law for at least five years prior to their appointment. The rules of evidence in civil actions tried without a jury would be applied in all hearings before the Commission. Appeals from the decisions of the Commission would go to the Courts of Appeals.

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¹ Ohio Rev. Code Ch. 119.

² Ohio Rev. Code § 119.11.

³ Ohio Rev. Code § 119.12. Appeals from orders of the Board of Liquor Control may go to the Court of Common Pleas of Franklin County.

⁴ Such admission is prescribed for newly discovered evidence which could not with reasonable diligence have been obtained prior to the agency hearing.

⁵ Ohio Rev. Code § 119.12. For the standards of reviewing rules see Ohio Rev. Code § 119.11.

The "administrative review commission" would, obviously, be a judicial body with jurisdiction to review the orders of administrative agencies.⁶ On the state level, this would apparently be a pioneer venture without precedent.⁷ On the other hand, recommendations for establishment of federal administrative courts of original jurisdiction have been much debated in recent years.⁸ The opponents of these recommendations emphasized that a complete separation of judicial from rule-making or executive functions is neither feasible nor desirable.⁹ For instance, the power of the Interstate Commerce Commission to determine what rates are just and reasonable should not be split off from the power to award to shippers reparation when unjust rates have been exacted from them. The exercise of both of these powers is based on the same considerations of fact¹⁰ and requires the same knowledge of intricate economic data. Hence, *initial* determinations by the members of the agency are required if the task entrusted to the agency is to be expertly performed.

These very sound objections are, generally, not applicable to the proposed "administrative review commission," which is primarily¹¹ designed as an *appellate* or reviewing body. Hence, the danger of paralyzing the agencies' programs, which is the principal argument against administrative courts of original jurisdiction, does not exist. The "administrative review commission" would simply take the place now occupied by the courts of common pleas in reviewing the validity of administrative orders. Its job would be comparable to that of the Board of Review in the Bureau of Unemployment Compensation¹²

⁶ The term "agency" is defined in Ohio Rev. Code § 119.01 as including state agencies. Chapter 2506 of the Ohio Revised Code, added in 1957, provides for appeals to the court of common pleas from decisions of political subdivisions of the state.

⁷ For a summary of legislative developments in state administrative law see Davis, *Administrative Law Treatise*, Vol. 1, at 33 (1953).

⁸ For a brilliant analysis and critique of these proposals see R. W. Minor, "The Administrative Court; Variations on a Theme," 19 Ohio St. L. J. 380 (1958). Davis, *op. cit. supra*, note 7, at 31.

⁹ Minor: *op. cit. supra*, note 8, at 395.

¹⁰ Minor, *id.*, at 396.

¹¹ The Committee's bill would grant to the administrative review commission exclusive original jurisdiction in proceedings to suspend or revoke a license, presumably on the ground that these involve discipline for misconduct which should not be imposed by an administrative body. The answer is that the expert administrators should have the first, but not the last, word as to whether the conduct of the licensee constitutes such a serious threat to the public interest as to require such discipline. I would, therefore, suggest deletion of this provision.

¹² Ohio Rev. Code § 4141.06. See Fisher, "Claims Administration in the Ohio Unemployment Compensation Board of Review," 12 Ohio St. L.J. 69 (1951). The Board of Tax Appeals also has appellate jurisdiction [Ohio Rev. Code § 5703.02(E)], but this is not its sole function.

which differs from the "administrative review commission" only in that the Board's jurisdiction is narrower and its members are not protected by as long a tenure as is proposed for the "administrative review commission."

The purpose of creating that commission is fairly obvious: The issues arising in cases involving the validity of administrative adjudications or rules are "not within the conventional experience of judges,"¹³ in this instance common pleas judges, and, therefore, would be better handled by a tribunal of experts. In other words, "expert" administrators should be supervised by "expert" judges who have acquired—preferably prior to their appointment—specialized knowledge of and experience in the problems of administration and are, therefore, thought to be better qualified than overburdened common pleas judges to provide the fair adjustment between the rights of the individual and the interest of the state which we call justice. Moreover, centralization of such case in one tribunal would promote uniformity of decisions, which would be further enhanced by allowing direct appeals from the commission to the Supreme Court.¹⁴

The idea of a judicial body which reviews exclusively the validity of administrative action has heretofore been accepted in the United States only in a few particular fields of law.¹⁵ The proposed court with appellate jurisdiction covering all administrative state agencies would be an innovation which may disturb traditional notions that specialization is not desirable because it may lead to narrow rather than broad perspectives. However, such an attitude would ignore the expansion of public law in this century; indeed, an "administrative court" reviewing all orders and rules issued by all administrative agencies could hardly be called over-specialized.

The merits of the present proposal for Ohio cannot be fully appreciated without reference to European experience where "administrative courts" have existed for more than a century. In fact, France, West Germany, and many other countries¹⁶ have two separate sets

¹³ Far East Conference, *et al. v. United States, et al.*, 342 U.S. 570, at 574 (1952). Mr. Justice Frankfurter's frequently quoted phrase referred to the intent of Congress in establishing the Federal Maritime Board.

¹⁴ Such appeal is presently allowed from final orders of the Public Utilities Commission, Ohio Rev. Code § 4903.13. The bill in its present form provides for appeals to the Court of Appeals.

¹⁵ The Tax Court and the Court of Customs and Patent Appeals are federal examples. See Frankfurter, "The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: IV. Federal Courts of Specialized Jurisdiction," 39 Harv. L.R. 587 (1926).

¹⁶ Belgium, Italy, Turkey, and Greece.

of courts: the regular law courts which deal with private and penal law, and the administrative courts which provide the forum in which the citizen may challenge the legality of administrative action alleged to violate his individual rights. Since France was the first and probably the most successful country in adopting and implementing such a system,¹⁷ a brief summary of the reasons for its creation and of a few illustrative cases may be in order.

The theory of administrative jurisdiction rests, to a considerable extent, on the proposition that the judges of the law courts do not possess the necessary competence in administrative problems; therefore, the legality of administrative action should be determined by judges who have such competence. Indeed, the leading British commentator concluded:

No Administrator can in France rationally adopt the attitude . . . that the [administrative] judge has reached a decision without appreciating the context in which the decision has to operate: he cannot claim, . . . that he, the civil servant, knows, and the judge does not know, the necessities of administration. This administrative judge has a higher technical competence than any of the administrators whose act he is judging¹⁸

The recruitment of the administrative judges is, thus, of crucial importance.¹⁹ In France, the national administrative court, which reviews the acts of the national government and hears appeals from local administrative tribunals on matters involving local officials, is a part of a larger organization known as the Council of State. The Council is divided into one judicial section and four administrative sections. The latter act as advisers to the Executive, preparing opinions on legal questions and drafting bills and regulations. The func-

¹⁷ See Schwartz, *French Administrative Law and the Common-Law World* (New York, 1954); Von Mehren, *The Civil Law System* 250-336 (1957); Hamson, *Executive Discretion and Judicial Control* (London, 1954); Letourneur, "Control of Governmental Action to Prevent the Violation of Individual Rights," 21 *Ohio St. L.J.* 559 (1960).

¹⁸ Hamson, *op. cit. supra*, note 17, at 66. Schwartz, *op. cit. supra*, note 17, at 321, observes that the French administrative judges "need assume none of the leave-it-to-the-expert attitude that has too often dominated the work of Anglo-American courts in this field."

¹⁹ In Germany, it is considered elementary that only persons with at least several years experience in the executive branch of the state or federal governments will be appointed as administrative judges. Koehler, *Verwaltungsgerichtsordnung* (1960), p. 5. (A commentary on the statute establishing the administrative courts and regulating their practice and procedure.) Many of the French administrative judges held high executive posts before their appointment or came up through the ranks after passing competitive examinations. Schwartz, *op. cit. supra*, note 17, pp. 30, 31; Hamson, *op. cit. supra*, pp. 46-48.

tions of the judicial section are separate and independent from those of the administrative sections. Members of the latter may be transferred to the former, but, thereafter, may not participate in the adjudication of a controversy involving a matter with which the member was officially concerned while serving in the administrative section. The judicial section, whose members are protected by life tenure, has frequently annulled a regulation proposed by one of the administrative sections.²⁰

A few cases picked at random, but dealing with generally significant issues, may illustrate the work of the judicial section of the Council which proceeds entirely on a common-law type case-by-case basis:

The fundamentals of what we call procedural due process are jealously guarded. For instance, in one case refusal to renew a license to operate a news stand was set aside. The Council held that the grant of the privilege to use the public street was revocable at will, but since the police had charged the operator with misconduct, the latter was entitled to an opportunity to defend himself.²¹

Not only the reasonableness of executive acts, but also the motivation of officials are subject to judicial scrutiny. Thus, the Council set aside an order by a mayor limiting the number of taxi stands on the ground that the order "was made . . . not in the interest of traffic regulation but to satisfy the demands of the taxi-drivers' association."²² Administrators must at all times be ready to justify their conduct. In a case which attracted wide attention a Cabinet member had removed the name of an applicant from the list of candidates for the competitive examinations required for admission to the National Academy of Public Administration. The excluded candidate obtained a judgment setting aside the exclusion. The Cabinet member had refused to permit judicial inspection of petitioner's file, and this was held to corroborate the charge of arbitrariness.²³

The standards of judicial review are strict with respect to both law and fact. For instance, a local government had imposed a special emergency property tax on half-occupied buildings in accordance with a statute authorizing such a step in municipalities suffering from a severe housing shortage. The court found there was no such shortage and, therefore, annulled the tax.²⁴

²⁰ For detailed discussion of the organization of the Council of State see Schwartz, *op. cit. supra*, pp. 23-42 and Hamson, *op. cit. supra*, pp. 58-69, 74-76, 78-83.

²¹ Dame Veuve Trompier-Gravier, Von Mehren, *op. cit. supra*, note 17, at 280.

²² Trapy, Von Mehren, *op. cit. supra*, p. 318.

²³ Barel, Von Mehren, p. 319, Hamson, pp. 24-40, 201-204.

²⁴ Commune de Veules-Les-Roses (1948), Von Mehren, p. 329. The decision is

These all-too-brief examples indicate that the protection of the citizen's rights against abuse or excess of administrative power is the aim of the administrative court. In fact, the French seem to go further than we do in at least two important respects: First, the case of the emergency tax indicates that the Council of State will inquire into facts when the statute makes the existence of certain facts the condition for the challenged act. In Ohio, judicial review under the present Administrative Procedure Act "falls short of providing for a trial de novo,"²⁵ and with respect to appeals from local bodies the court may inquire into the facts only if a statute explicitly so provides.²⁶

Second, the case involving the regulation which limited the number of taxi stands, and other similar cases,²⁷ indicates that the French go further than our courts by permitting inquiry into the motivation of administrative action. To be sure, an obvious abuse of power, as occurred in a recent Ohio case where a civil service employee was told his job had been abolished and immediately thereafter another man was hired to perform the same service,²⁸ will not slip by. But where the regulation or adjudication appears reasonable on its face, as in the taxi-stand matter, motives will usually not be considered.²⁹

All this demonstrates the achievements of a tribunal which serves the same purposes as the proposed "administrative review commission."³⁰ The present eminence of the French Council of State, and other similar systems, is the result of a long tradition which we could

comparable to *Crowell v. Benson*, 285 U.S. 22 (1932) which affirmed a judgment granting a trial de novo on the question whether the beneficiary of an award under the Longshoremen and Harbor Workers Compensation Act was an employee within the purview of that act. *Contra*, *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940).

²⁵ *Andrews v. Board of Liquor Control*, 164 Ohio St. 275, at 280 131 N.E.2d 390 (1955).

²⁶ See *Sorge v. Sutton*, 159 Ohio St. 574 113 N.E.2d 10 (1953), holding that Ohio Rev. Code 143.27 authorizing appeals to the court of common pleas from decisions of a municipal civil service commission removing police officers or firemen did not authorize a trial de novo. The section was subsequently amended by providing for an appeal "on questions of law and fact." The proposed bill should be amended by giving to the "administrative review commission" jurisdiction to hear appeals from municipal bodies. No valid constitutional objections could be perceived, since this should be a matter of general law. See Ohio Constitution, Art. XVIII, Sections 3 and 7. The amendment of Ohio Rev. Code 143.27 has not been challenged.

²⁷ *Von Mehren, op. cit. supra*, pp. 316-320.

²⁸ *State ex rel. Click v. Thormyer*, 105 O. App. 479 151 N.E.2d 246 (1958).

²⁹ See *Davis: Administrative Law Treatise*, §§ 12.03 and 12.04 (1958) and *Administrative Law (Hornbook, 1951)* p. 379.

³⁰ An important difference would and should remain: The proposed bill allows an appeal back into the regular appellate courts, while the Europeans maintain the separateness of civil and administrative jurisdictions at all stages.

not match in a hurry. But the basic philosophy of the institution seems sound and deserves the most serious consideration. As noted earlier, the recruitment of qualified persons³¹ to serve on the proposed body would be an indispensable prerequisite for its success. This should not present an insuperable obstacle to adoption of the Committee's proposal which is a stimulating contribution to the endless effort of improvement.

³¹ Ten members would be too many. Three would be sufficient. The ten year tenure would be discriminatory against other judges, but that would be an argument for lengthening tenure generally. The proposal reflects apprehension that anything short of ten years would not guaranty protection against political pressure, which, in view of the commission's jurisdiction, could be expected.